DECISIONS OF THE

FEDERAL MARITIME COMMISSION

VOLUME 24

JULY 1981 TO JUNE 1982

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON, D.C., 1993

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C. 20402

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1982

Alan Green, Jr., Chairman
James J. Carey, Member
Richard J. Daschbach, Member
James V. Day, Member
Thomas F. Moakley, Member

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FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1049(I)

INGERSOLL RAND COMPANY

v.

HAPAG-LLOYD

ORDER OF PARTIAL ADOPTION

July 10, 1981

The Commission determined to review the decision of Settlement Officer Joseph T. Farrell in which he denied the claim of Ingersoll Rand Company (I-R) for alleged freight overcharges collected by Hapag-Lloyd on three shipments from New York to Le Havre, France, and ordered I-R to pay Hapag-Lloyd $81.48 with 11.4 percent interest from June 1979, and $198.83 with 11.5 percent from July 1979.

The shipments were described in the bills of lading as "Spiral Rods," "Road Building Machinery Pts.," "Pneumatic Hand Tools," and "Pneumatic Wrenches."

The shipment was assessed the rate of $89.50 applicable to "Roadbuilding, Road Maintenance and Earthmoving Equipment." I-R contends that it should have been rated as "Components Parts For - Roadbuilding Equipment, Road Maintenance Equipment, Earthmoving Equipment" at $78.00 per 2,240 pounds.*

The Settlement Officer denied the claim on the ground that I-R had not sustained its burden of proving that freight was overcharged. On the contrary, he found that two of the items shipped were undercharged and therefore ordered I-R to pay to Hapag-Lloyd the amount of $198.83 plus interest.

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 shipper or consignee. As a result, the Settlement Officer had no authority to direct I-R, a shipper, to pay to Hapag-Lloyd any amount. Accordingly, this portion of the Settlement Officer's decision must be vacated.

* North Atlantic French Atlantic Freight Conference Tariff No. (3), FMC-4.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusion are correct. Hapag-Lloyd should therefore take the steps necessary to collect from Ingersoll Rand Company freight undercharges in the amount of $280.31.

THEREFORE, IT IS ORDERED, That that portion of the Settlement Officer's decision directing Ingersoll Rand Company to pay to Hapag-Lloyd the amount of $280.31 plus interest is reversed and vacated;

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

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.

** Commissioner Richard J. Daschbach's separate opinion is attached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1049(I)

INGERSOLL RAND COMPANY

v.

HAPAG-LLOYD

DECISION OF JOSEPH T. FARRELL, SETTLEMENT OFFICER [1]

Partially Adopted July 10, 1981

Reparation Denied

By its complaint filed with the Commission on February 17, 1981, Ingersoll Rand Company (I-R) claims $1,939.89 plus interest of Hapag-Lloyd, this amount representing an alleged overcharge arising out of three I-R shipments transported by Hapag-Lloyd from New York, New York to Le Havre, France, pursuant to bills of lading dated June 1, 1979, July 6, 1979, and July 27, 1979, respectively. I-R prepaid freight charges in all instances,[2] and each shipment was transported by container under terms of "house-to-house movement." The bill of lading descriptions are as noted in Appendix A to this decision.

I-R's complaint centers on the contention that all or part of each shipment was erroneously freighted in accordance with item 718.4001.001 of the controlling tariff: [3] "Roadbuilding, Road Maintenance and Earth Moving Equipment, viz. . . ." at a rate of $89.50 per 40 cubic feet. Complainant cites item 931.0078.0000, "Shipments of Straight or Mixed Loads of . . . Component Parts For - Roadbuilding Equipment, Road Maintenance Equipment, Earthmoving Equipment . . . ," $78.00 per 2,240 pounds. This special rate is limited to "house-to-house" service.

I-R further contends that, in the case of one item, it was in fact undercharged, although the logic of this contention was not delineated in the original claim.

Hapag-Lloyd notes that I-R's claim was denied on the basis of the Conference 6-Month Rule, but also disputes the complaint on its merits:

[1] 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.

[2] The original submissions left it unclear whether I-R had actually prepaid these charges. In response to the Settlement Officer's query, I-R provided copies of invoices from its forwarder which demonstrate that I-R, in fact, has standing to pursue this complaint.

[3] North Atlantic French Atlantic Freight Conference Tariff No. (3) FMC-4.

> . . . As to the merits of the claim itself we find ourselves in a difficult position in that since the containers are no longer available for inspection we cannot verify the contents. The Merchant claims that the cargo shipped was components for road building, road maintenance and road moving equipment. However, the documents furnished particularly invoices from Ingersoll Rand do not state anywhere that these parts are for road building, road maintenance and road moving equipment. Furthermore, the bills of lading have been annoted (sic.) in some cased (sic.) in "pen and ink" with the word roadbuilding. It is impossible to determine whether this was done before or after the fact in order to justify complying with the Tariff item description.
>
> Finally we want to point out to you that the entry claim of the Merchant i.e. item number 931.0078.000 has a reference "Rule 25E2 not applicable." This of course is the weight/measure part of the minimum utilization rule and in effect gears the entry to minimum revenue portion i.e. Rule 25E3.
>
> Should you find in favor of the Merchant please be sure you apply the minimum revenues.[4]

Although not specified in the complaint, I-R's contentions constitute an alleged violation of section 18(b)(3) of the Shipping Act.[5] In support of its claim, I-R attached to the complaint lengthy invoices addressed to its French consignee, Ingersoll Rand OSC (I-R OSC). As noted by Hapag-Lloyd, these invoices fail to specify that the parts shipped were intended for any particular type of equipment.[6] It was clear to the Settlement Officer that more data was required to clarify the invoices.

An exchange of several letters between the Settlement Officer and complainant has helped to clarify the description of at least some of the disputed items. A discussion of each partial shipment cited in I-R's complaint follows:

1. June 1, 1979: "11 bdls. Spiral Rods; 8415 pounds, 51 cubic feet."

This item includes (on the Bill of Lading) the hand-written notation: "Road Building." The Settlement Officer concurs with Hapag-Lloyd's comments on such notations, and has discounted these added words in the ensuing discussion.

This item can be found on one of the attached invoices as Package 17210/02-12; i.e., 11 packages of 765 pounds each (8,415 pounds). I-R has supplied a "Rock Drill Division Product Code Listing" which demonstrates that the parts included with order 074-17210 are intended

[4] Letter from respondent dated March 16, 1981.

[5] 46 C.F.R. 502.304(a) Appendix A. No specific violation of the Shipping Act need be cited by the complainant in overcharge cases.

[6] Each part is identified with such terminology as: "Drill Rod"; "Chuck"; "Hub/Tire Asy."; "Sleeve DHD 24"; "Feed Mtr. Cpt."; etc.

as components of rockdrills; underground mining equipment; surface drills; etc. Included in this code listing is "Code 129: I-R Manufactured Steel: Spiral Steel System Rods, Couplings, Shanks, Other I-R Manufactured Steel & Accessories." This code and the entry "spiral rod" can be found in the itemized invoice for order 074-17210.[7]

Sales literature submitted by complainant at the request of the Settlement Officer clearly demonstrates that spiral rods are intended for use in "Surface Drilling, Mining, and Tunneling" operations. The "I-R Spi-Ral Steel System" is described as useful for "Construction jobs, pioneer roadbuilding, quarry drilling, pipeline drilling, underground mining, tunneling . . . Spi-Ral Steel transmits drill energy to the rock as efficiently as possible in both underground and surface applications . . . ."

It is clear that complainant relies upon use as the major determinant of proper rating in this case. The Settlement Officer concurs that "road building machinery" is a potential use for spiral rods, but, when use is a factor, our concern must be with the "controlling use." [8] Unfortunately, no evidence exists that "road building machinery" best describes the intended use of these particular spiral rods. However, no such reliance upon use is necessary. The Settlement Officer is forced to conclude that the best description of this commodity can be found in yet another tariff item: (No. 718.4) "Construction and Mining Machinery (N.E.S.) . . . Equipment, Earth Boring, Viz: - Rock Driller." Spi-Ral rods are essentially parts [9] of rock drillers, and this is clearly the most specific description (especially barring knowledge of the ultimate use of the product).[10]

The rate sought by complainant pertains to ". . . Component Parts For - Road Building Equipment, Road Maintenance Equipment, Earthmoving Equipment . . . ."

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[7] "129 A 275 50249226 Spiral Rod." Page 3 of invoice no. 074-17210.

[8] "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 (2d Cir., 1959)." *C.S.C. International, Inc. v. Lykes Bros. Steamship Co., Inc.*, 20 F.M.C. 552, 560 (1978).

[9] Tariff Rule 2(J)(3): "Where in this tariff rates are provided for articles, the same rate will also be applicable on parts of such articles where so described on the Bill of Lading, except where specific rates are provided for such parts."

[10] It occurred to the Settlement Officer that a knowledge of consignee's business might help establish the intended use of the questioned shipment. I-R, however, advises that I-R OSC is engaged in "distribution." Without information concerning the ultimate destination of I-R's products, shipper's advice on this point is of little use.

This item cannot be matched with any of the data on any of the attached invoices, and none of the other submissions introduced by complainant in any way assist. The proof advanced therefore rests on two factors. The first of these is the bill of lading description. In this case, the designation "road building machinery parts" is *not* a handwritten addition, but, rather, a part of the bill of lading description as originally completed. Nevertheless, the Settlement Officer is persuaded that this description alone is not adequate to establish complainant's case.[11]

The second factor which might help establish the precise nature of this segment of the shipment in question is the previously cited "Rock Drill Division Product Listing." This submission clearly demonstrates that nearly all of the items listed on the unidentifiable invoices accompanying the listing pertains to earthmoving, drilling, etc. Unfortunately, neither the commodity descriptions, the weight (993 pounds), nor the measurement (250 cubic feet) can be related to any items (or group of items) reflected on the invoice upon which this particular facet of the claim is predicated. Without such linkage, no corroboration exists for the bill of lading description; it cannot be verified that 993 pounds of road building machinery parts were included in the shipment. The burden of proof is clearly on the complainant to establish that its shipment was misrated.[12] In this instance, it has failed to do so to the satisfaction of the Settlement Officer. Accordingly, reparation is denied.

3. June 1, 1979: "1 pcs. Air Compressor Parts; 386 pounds, 19 cubic feet."

This is the item on which complainant contends that it was undercharged. Although the original complaint failed to explain the rationale for this contention, subsequent correspondence resulted in the following remarks from I-R:

> These parts are for stationary air compressors and tariff item # 718.4005.001 should apply. The steamship company rated the item as Road Building Equipment which covers only Ingersoll Rand Portable Air Compressors used mostly for road building and earth moving purposes.[13]

The material was rated in accordance with item 718.4001.001: "Roadbuilding, Road Maintenance and Earth Moving Equipment, viz.: . . . (b.) Air Compressors, over 15 HP . . . and (c.) Parts for above. Not otherwise specified elsewhere in this tariff." Item 718.4005.001, which

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[11] For example, consider the following remarks: "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." *Western Publishing Company v. Hapag-Lloyd A.G.*, Docket No. 283(I), May 4, 1972, 13 S.R.R. 16.

[12] *Sanrio Company, Ltd. v. Maersk Line*, Informal Docket No. 681(F), 23 F.M.C. 150 (1980).

[13] Complainant's letter of April 1, 1981.

complainant believes to contain the proper rate, applies to: "Air Compressors (Not Applicable to Engines, for which see Tariff Items 711.4001 - 711.5004 - 711.5012 - 711.5016."

The Settlement Officer is inclined to agree with I-R that item 718.4005.001 should apply to the product as described. First, the bill of lading description in no way indicates the use for which the "air compressor parts" were intended, nor is there any indication that the air compressors of which they are alleged to be components are "over 15 HP" as required by item 718.4001.001 - More importantly, complainant has provided us with straight-forward testimony which is decidedly not self-serving. The Commission has consistently held that even self-serving testimony is not automatically to be discredited.[14] Such testimony when it weighs against the witness would seem to be of even greater probative value. Finally, the tariff provides an unambiguous rate for "air compressors." The tariff also contains Rule 2(J)(3), footnote 9, *supra*, whereby parts of compressors are entitled to the same rate. In this light, given the bill of lading description, it is difficult to comprehend the reason for the application of item 718.4001.001. A preponderance of the evidence indicates that item 718.4005.001 is applicable, and this portion of the shipment should have been rated at $147.25 per 40 cubic feet.[15]

4. June 1, 1979: "8 pcs. Portable Compressor Parts; 23 pounds, 188 cubic feet."

The problem with this portion of the complaint is the same as that posed for the "11 pieces Road Building Machinery Parts." That is, this description can in no way be identified with anything in the invoice notations. It is therefore impossible to determine the actual nature of what was shipped.[16] In light of the lack of supporting data, reparation is denied.

5. July 6, 1979: "28 bdls. Road Building Machinery Parts (Spiral Rods); 34624 pounds, 210 cubic feet."

This appears to be the same commodity discussed in the first section. The weight can be related to 28 packages noted on the accompanying invoice, and, once again, portions of the shipment are introduced with

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[14] For example, confer *Unapproved Sect. 15 Agt. - Coal to Japan, Korea*, 7 F.M.C. 295, 302 (1962).

[15] This portion of the shipment cannot be correlated with any particular items or groups of items on the invoice, and, without complainant's additional comments, I-R's claims concerning proper rating would have to be dismissed for lack of evidence. However, in light of I-R's admission of an undercharge, it appears justified to conclude that parts so described were in fact shipped on June 1, 1979.

[16] I-R has supplied some fascinating sales literature which provides the following information: "Although most portable compressors provide air to power rock drilling equipment, they're also used for . . . ." In light of this principal (i.e., controlling) use, and supporting photographs, the best description of the commodity appears to be that found in item 718.4260.001: "Construction and Mining Machinery (N.E.S.) Equipment, Earth Boring, Viz.: - Portable Compressor on wheels or skids mounted on a truck." If it could be demonstrated that the parts shipped are related to the commodity described in the sales literature, the proper rate would be $100.50 per 40 cubic feet.

code number "129." The bulk of the entries including that number are identified with the word "rod." Accordingly, reparation is denied for the same reasons originally outlined above. Complainant was undercharged; the proper rate is $100.50 per 2,240 pounds.

6. July 6, 1979: "15 pcs. Road Building Machinery Parts; 7355 pounds, 248 cubic feet."

The remaining 7355 pounds encompasses all of the remaining invoice items pertaining to the shipment of July 6, 1979. The numerous items involved include "A few prefixed with the codes 115 ('I-R Manufactured Bits') and 129 ('I-R Manufactured Steel'); the bulk of the items bear no such designation, but are described with such terms as 'elbow rubber,' 'oil ring,' 'hose,' etc." Nothing contained in the invoices or anywhere else outside of the bill of lading descriptions demonstrates or even indicates that the commodities involved were component parts for road building machinery. Accordingly, reparation is denied.

7. July 27, 1979: "11 ctns. Road Building Machinery; 1969 pounds, 144.5 cubic feet."

The invoices provided in support of this part of the complaint do correlate with the data on the bill of lading. Some items are identified with the usual Rock Drill Division codes, while some are not; all items are identified on a summary invoice as being subject to "Rock Drill Division Payment Plan #354." However, no evidence has been provided that the shipment consisted of parts for "road building machinery" - other than the words appearing on the bill of lading.[17] The Settlement Officer concludes that the evidence presented by claimant is insufficient, and reparation is denied. However, a slight adjustment should be made in the freight charges for another reason. The bill of lading measurement of 144.5 cubic feet (calculated as 145 cubic feet) is clearly indicated on the invoices as only 143.7 cubic feet. The Settlement Officer calculates the total of individual measurements to be 143.9 cubic feet; in either case, there is no rationale for the calculation based on 145 cubic feet.

The effects on overall freight charges resulting from this slight overcharge, as well as from the undercharges previously discussed, are calculated in Appendix B to this decision. I-R is ordered to pay Hapag-Lloyd $280.31; in addition, it is the opinion of the Settlement Officer that interest should be awarded. The Commission has determined that interest is not to be considered a penalty, but, rather, as compensation for the use of the money involved during the period covered by the interest. Accordingly, Hapag-Lloyd is awarded 11.4 percent interest per annum on undercharges of $81.48 from June 1979, and 11.5 percent interest per annum on undercharges of $198.83 from July 1979. The

[17] Part of the original description rather than pen and ink additions.

interest figures of 11.4 percent and 11.5 percent are based on the average monthly rates on U.S. Treasury bills in the secondary market from the months freight charges were paid to March 1981, the most recent quote available to the Settlement Officer. So ordered.

(S) JOSEPH T. FARRELL
Settlement Officer

Appendix A

The bills of lading identified the shipments thusly:
Bill of Lading No. 17106578 dated June 1, 1979:

		Gross Weight	Measurement
[1] 11	bdls. Spiral Rods	8,415#	51 cft.
[1] 11	pcs. Road Building Machinery Pts.	993#	250 cft.
[1] 1	pc. Air Compressor Parts	386#	19 cft.
24	pcs. Pneumatic Tool Parts	14,931#	797 cft.
[1] 8	pcs. Portable Compressor Pts.	2,360#	188 cft.

Bill of Lading No. 17128547 dated July 6, 1979:

		Gross Weight	Measurement
[1] 28	bdls. Road Building Machinery Parts (Spiral Rods)	34,624#	210 cft.
[1] 15	pcs. Road Building Machinery Parts Page No. 218 Item #718.4001.001	7,355#	248 cft.

Bill of Lading No. 17139889 dated July 27, 1979:

[1] 11	ctns. Road Building Machinery Parts Item 718.4001.001	1,969#	144.5 cft.
29	boxes Air Compressor Parts Item 718.4005.001	10,366#	506.1 cft.
50	boxes Pneumatic Hand Tools Item 695.0001.001	20,753#	1036.6 cft.
	(Separate Container)		
15	ctns. Pneumatic Wrenches Item 695.0001.001	18,676#	519.8 cft.

[1] Only items so indicated are in dispute.

Note: Several other notations (e.g., Road Building) can be found on the bill of lading. They have, however, been omitted, inasmuch as the Settlement Officer cannot determine when these notations were added.

Note: The bill of lading of June 1, 1979, is actually a revised bill of lading. Ingersoll Rand originally paid freight charges of $4,860.99, but this figure was reduced to $4,247.53 as a result of an earlier overcharge claim adjusted directly by the carrier.

Appendix B

Bill of Lading Dated June 1, 1979:

11 bdls. Spiral Rods	8,415 pounds at 89.50/2240	=	$ 336.22
11 pcs. Road Building Machinery Pts.	250 cts. at 89.50/40	=	559.38
1 pcs. Air Compressor Parts	19 cft. at 89.50/40	=	42.51
24 pcs. Pneumatic Tool Parts	797 cft. at 103.75/40	=	2,067.22
8 pcs. Portable Compressor Parts	188 cft. at 89.50/40	=	420.65
			$3,425.98

18.5% Currency Adjustment Factor:	633.81
$5.00 per 40 cft. (as freighted) Fuel Adjustment Factor:	156.75
$8.25 per 2240 pounds (as freighted) Fuel Adjustment Factor:	30.99
	$4,247.53

Correct Rating of Shipment of June 1, 1979:

11 bdls. Spiral Rods	8,415 pounds at 100.50/2240	=	$ 377.55
11 pcs. Road Building Machinery Pts.	250 cft. at 89.50/40	=	559.38
1 pcs. Air Compressor Parts	19 cft. at 147.25/40	=	69.94
24 pcs. Pneumatic Tool Parts	797 cft. at 103.75/40	=	2,067.22
8 pcs. Portable Compressor Parts	188 cft. at 89.50/40	=	420.65
			$3,494.74

18.5% Currency Adjustment Factor:	646.53
$5.00 per 40 cft. (as freighted) Fuel Adjustment Factor:	156.75
$8.25 per 2240 pounds (as freighted) Fuel Adjustment Factor:	30.99
	$4,329.01

Amount of Undercharge:

$4,329.01
– 4,24753
$ 81.48

Bill of Lading Dated July 6, 1979:

28 bdls. Road Building Machinery Parts (Spiral Rods)	34,624 pounds at 89.50/2240	=	$1,383.41
15 pcs. Road Building Machinery Parts Page No. 218 Item #718.4001.001	248 cft. at 89.50/40	=	554.90
			$1,938.31
18.5% Currency Adjustment Factor:			358.59
$5.00 per 40 cft. (as freighted) Fuel Adjustment Factor:			31.00
$8.25 per 2240 pounds (as freighted) Fuel Adjustment Factor:			127.52
			$2,455.42

Correct Rating of Shipment of July 6, 1979:

28 bdls. Road Building Machinery Parts (Spiral Rods)	34,624 pounds at 100.50/2240	=	$1,553.44
15 pcs. Road Building Machinery Parts Page No. 217 Item #718.4001.001	248 cft. at 89.50/40	=	554.90
			$2,108.34
18.5% Currency Adjustment Factor:			390.04
$5.00 per 40 cft. (as freighted) Fuel Adjustment Factor:			31.00
$8.25 per 2240 pounds (as freighted) Fuel Adjustment Factor:			127.52
			$2,656.90

Amount of Undercharge:

$2,656.90
– 2,45542
$ 201.48

Bill of Lading Dated July 27, 1979:

11 ctns. Road Building Machinery Parts Item 718.4001.001	145 cft. at 89.50/40	—	$ 324.44
29 boxes Air Compressor Parts Item 718.4005.001	506 cft. at 147.25/40	=	1,862.71
50 boxes Pneumatic Hand Tools Item 695.0001.001 (Separate Container)	1037 cft. at 103.75/40	=	2,689.72
15 ctns. Pneumatic Wrenches Item 695.0001.001	520 cft. at 103.75/40	=	1,348.75
			$6,225.62
18.5% Currency Adjustment Factor:			1,151.74
$5.00 per 40 cft. (as freighted) Fuel Adjustment Factor:			276.00
			$7,653.36

Correct Rating of Shipment of July 27, 1979:

11 ctns. Road Building Machinery Parts Item 718.4001.001	144 cft. at 89.50/40	=	$ 322.20
29 boxes Air Compressor Parts Item 718.4005.001	506 cft. at 147.25/40	=	1,862.71
50 boxes Pneumatic Hand Tools Item 695.0001.001 (Separate Container)	1037 cft. at 103.75/40	=	2,689.72
15 ctns. Pneumatic Wrenches Item 695.0001.001	520 cft. at 103.75/40	=	1,348.75
			$6,223.38
18.5% Currency Adjustment Factor:			1,151.33
$5.00 per 40 cft. (as freighted) Fuel Adjustment Factor:			276.00
			$7,650.71

Amount of Overcharge:

	$7,653.36
−	7,650.71
$	2.65

Total Undercharge:

$	81.48
+	201.48
$	282.96
−	2.65
$	280.31

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-55

DOW CORNING CORPORATION

v.

ATLANTIC CONTAINER LINE, ET AL.

NOTICE

July 28, 1981

Notice is given that no exceptions have been filed to the June 22, 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

DOCKET NO. 80-55
DOW CORNING CORPORATION

v.

ATLANTIC CONTAINER LINE, ET AL.

Complainant found to have been overcharged based upon an uncertainty resulting from a tariff provision susceptible of two interpretations. Complainant entitled to reparations.

Complainant failed to sustain its evidentiary burden that certain commodity descriptions in the shipping papers were of the character within the description on which the rate claimed was applicable.

David L. Weiser, Traffic Service Bureau, Inc., for complainant, Dow Corning Corporation.

John M. Ridlon for respondent Sea-Land Service, Inc.

Frederick L. Shreves, II, for respondent Dart Containerline Company Limited.

Leo S. Fisher and *Anthony J. Ciccone, Jr.*, for respondent Hapag-Lloyd Aktiengesellschaft.

William Karas for respondent Atlantic Container Line.

Peter J. King for respondent Seatrain International, S.A.

INITIAL DECISION [1] OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE

Finalized July 28, 1981

Dow Corning Corporation of Midland, Michigan,[2] seeks in its complaint, as amended,[3] reparations totalling $96,569.48 against five carriers because of a claimed assessment of an incorrect rate involving sixty-eight shipments of silicone emulsion, silicone elastomer [4] and silicone rubber compound from ports in Baltimore, New York, Norfolk, and Portsmouth during the period from August 2, 1978, to July 5, 1979.

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

[2] By letter to Traffic Service Bureau, Inc., Dow provided permission "to file a formal complaint with the Federal Maritime Commission on Claims you have processed."

[3] The complaint states that the rates charged ". . . are unjust and unreasonable in violation of Section 18(b)(3) of the Shipping Act." During the prehearing conference, permission was granted to amend the complaint to the seeking of reparations on the basis of claimed assessment of incorrect rates. Complainant also abandoned its request for a "cease and desist" order.

[4] Elastomers appears in the pertinent tariff provisions as "Elestomers." In those instances where the tariff provision is cited, the decision will use the spelling as it appears in the tariff.

Atlantic Container Line (Atlantic), Dart Orient Service, Inc. (Dart), Hapag-Lloyd Aktiengesellschaft (Hapag-Lloyd), Sea-Land Service, Inc. (Sea-Land), and Seatrain International, S.A. (Seatrain) were named as respondents. According to the complaint, reparation is sought against Atlantic in the amount of $78,898.83, Dart - $7,058.80, Hapag-Lloyd - $2,877.02, Sea-Land - $7,260.72, and Seatrain - $474.11, and all subject to a requested imposition of interest in the amount of 12 percent. Complainant also requested that the proceeding be conducted under the Shortened Procedure provided by the Commission's Rules of Practice and Procedure (46 C.F.R. 502.181-187).

A review of the responses to the complaint coupled with complainant's failure to file either an answering memorandum or response to a pending motion to dismiss necessitated the convening of a prehearing conference. Moreover, Atlantic, in a letter addressed to the Secretary of the Commission, stated: "We have examined the claimant's memorandum of facts and arguments and found his tariff authority to be in good order. The governing conference, North Atlantic Continental Freight Conference, has confirmed that the claimant's interpretation of tariff item 931.0118 is correct. In view of this fact we acknowledge the overcharge."

At the prehearing conference, Atlantic submitted an "agreement" which provided that it "will pay $78,898.83 to complainant, without interest, upon dismissal, with prejudice, of the complaint." Atlantic also agreed to make a like adjustment for any other shippers "similarly situated." This agreement, signed by the complainant, requested dismissal of the complaint as to Atlantic. Prior to the conference, Hapag-Lloyd submitted a motion to dismiss and proposed a settlement wherein it would pay complainant the sum of $2,877.02 without interest. Also prior to the conference, Seatrain filed a motion to dismiss, claiming complainant failed to meet "its heavy burden of proof" and also adding that it "does not expect to participate further in this proceeding, and agrees to be bound by the final determination of the Commission herein." After a discussion of the issues and submissions of the parties, it was agreed that: (1) complainant was to supply supplemental evidentiary material; (2) Sea-Land and Dart would reply to the complainant's submission coupled with a proposed procedural course for the future conduct of the proceeding; (3) a legal memorandum of position (regarding the terms and effect of the proposed settlement agreements of other respondents) was to be filed by Sea-Land and Dart; and (4) a reply memorandum was to be filed by Hapag-Lloyd, Atlantic and complainant.[5] Thus, as it stands now, as to the merits of the complaint, Sea-Land and Dart oppose the claim for reparations, Hapag-Lloyd has

[5] Prehearing Conference Report served October 23, 1980.

submitted a supplement agreement and supporting affidavit on March 3, 1981, Seatrain has not participated beyond the filing of its motion to dismiss, and Atlantic has not participated beyond submission of its "agreement" of October 22, 1980. The arguments posed by Sea-Land and Dart focus upon the major areas of disagreement, i.e., a dispute as to an interpretation of a tariff provision and a question of whether the complaint carried its evidentiary burden in establishing the character of certain commodities warranting the imposition of the rate sought herein.

Sea-Land, pursuant to the provisions of the North Atlantic Continental Freight Conference Tariff Nos. (29) FMC-4 and (30) FMC-5, serves the eastbound trade between North Atlantic ports in the range from Eastport, ME, to Hampton Roads, VA, and Antwerp, Rotterdam, Amsterdam, Hamburg, Bremen, and Bremerhaven on the other. Between August 5, 1978, and May 2, 1979, it transported on behalf of complainant six (6) shipments of various commodities.

Under its Bill of Lading No. 901-026202 dated August 5, 1978, Sea-Land carried a mixed load of cargo composed of "silicone rubber compound" and "chemicals" as described by the complainant. Each of the commodities was rated separately under its specific commodity description. "Silicone rubber compound" was rated under Tariff Item 581.1020.001 at $138.50 W/M applicable to "Silicon(e) Rubber Compounds Packed" pursuant to the terms of 31st Rev. Pg. 175, North Atlantic Continental Freight Conference Tariff No. (29) FMC-4, effective May 24, 1978. As to this bill, the issue is whether the cargo should have been assessed a rate of $88.50 applicable on a weight basis to a minimum load of 29,120 pounds per container pursuant to Item No. 931.0118.576 of the Conference's tariff, 9th Rev. Pg. 270-M, effective May 24, 1978, which provides for the application of the following rates:

				(Item No.)
Straight or Mixed Shipments of:				
Silicone Antifoam Emulsion	W	—	119.50	931.0118.000
Silicone Elestomer	W	150.25	171.75	931.0118.000
Silicone Monomer	W	179.75	198.25	931.0118.000
Minimum 29,120 lbs. per Container	W	88.50	—	931.0118.576

According to Sea-Land, the minimum rate, provided under Item No. 931.0118.576, by virtue of its location in the tariff provision applies only to straight or mixed shipments of "Silicone Monomer" and not to containers of straight or mixed shipments of any other commodity named in that particular section of the tariff. It observes that even if the minimum rate was to apply to each of the three items under No. 931.0118, then under no circumstances could that minimum apply to "silicone rubber compound" specifically covered under Item 581.1020.001.

Freight Bill 901-031564 dated October 14, 1978, presents identical issues except that the cargo consisted of "silicone rubber compound" in a mixed shipment with "synthetic resins" rather than simply "chemicals." Complainant, on the other hand, again claims that the shipment should have been rated pursuant to the minimum weight rate provided under Item 931.0118.576.

Bill of Lading No. 901-042317, dated December 16, 1978, involved a mixed shipment of cargo consisting of: (1) "silicone emulsion"; (2) "flammable liquid NOS (Acetoxysilane)," a "synthetic resin"; and (3) a third portion of the cargo described only as "synthetic resin." Again this cargo was rated as a mixed cargo of "silicone emulsion" and "synthetic resin." Complainant claims that the rate applied to the "silicone emulsion" was improper. Respondent assessed the rate applicable to mixed container loads of "Silicone Antifoam Emulsions," pursuant to Item No. 931.0120.587 of the tariff, 9th Rev. Pg. 270-M, effective May 24, 1978.[6] Here the complainant seeks the application of the minimum per container weight rate under Item No. 931.0118.576.

The cargo carried by respondent under Bill of Lading No. 901-049366 dated January 27, 1979, consisted of a mixed cargo of "silicone emulsion" and "synthetic resin," and Sea-Land applied the specific commodity rate applicable to "Silicone Antifoam Emulsions, Packed," i.e., a minimum 38,080 pounds per container rate of $99.75 under Tariff Item 581.1042.769, 35th Rev. Pg. 175, effective November 30, 1978. Sea-Land individually rated the synthetic resin, which complainant did not dispute; but complainant urges that it should have been assessed the rate applicable to a minimum of 29,120 pounds per container of straight or mixed shipments of specific items under Tariff Item No. 931.0118.013.[7]

Under Bill of Lading No. 984-748354, dated May 2, 1979, Sea-Land transported cargo consisting of another mixed shipment of "silicone elastomers" and "chemicals no label." Again, it was rated under

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[6] The tariff provision utilized by Sea-Land provides:

Mixed Containerloads of the Following:				
Silicone Fluids, Silicone Resin,				
Solutions, Silicone Rubber Compounds,				
Silicone Base Adhesive and Sealers,				
Silicone Antifoam Emulsions,				
Silicone Base Lubricating Greases-				
Minimum 40,320 lbs. per Container	W	(R)139.00	-	931.0120.587

[7] Conference Tariff, Orig. Pg. 323, effective January 1, 1979, provides:

Straight or Mixed Shipments of:				
Silicone Antifoam Emulsion	W	-	125.50	931.0118.003
Silicone Elestomer	W	158.00	180.50	931.0118.003
Silicone Monomer	W	188.75	208.25	931.0118.003
Minimum 29,120 lbs. per Container	W	93.00	-	931.0118.013

specific commodities separately. The rate application with respect to "chemicals" is not disputed. According to Sea-Land, the specific commodity rate applicable to straight or mixed shipments of "Silicone Elastomer" is $158.00 on a weight basis under the provisions of Tariff Item No. 931.0118.102.[8] Again, complainant alleges that it should have been billed a minimum rate applicable to 29,120 pounds per container of $93.00 on a weight basis pursuant to Item 931.0118.310. The last claim under Bill of Lading No. 984-748598 dated May 2, 1979, consisted of a mixed shipment of "silicone elastomers" and "silicone rubber compound." This cargo was rated under Item No. 931.0120.018 at a rate of $146.00 on a weight basis applicable to a minimum container load of 40,320 pounds per container, the rate applicable to "mixed container loads" containing silicone rubber compound.[9] Again, complainant seeks the application of the minimum 29,120 pound per container rate of $93.00 provided in Item No. 931.0118.013. Sea-Land, on the other hand, considers the minimum is applicable only to minimum weight per container of mixed shipments of "Silicone Monomer."

As noted above, complainant was provided an opportunity to submit a more complete description of certain commodities involved herein. In its Supplemental Evidentiary Statement, it submitted advertising literature addressing the nature of the commodities. In particular, advertising bulletins addressing: (1) silastic 731 RTV adhesive/sealant; (2) HV 490 emulsion; (3) Dow Corning 1111 emulsion; (4) Dow Corning 3145 RTV adhesive/sealant; (5) sylgard 170 A & B silicone elastomer; and (6) Dow Corning 3140 RTV coating were submitted. In each case, the commodities such as coatings, sealant and other compounds are referred to and shown to be silicone elastomer compounds. Sea-Land points out that there is no dispute that the commodities shipped were "silicone emulsion" or "silicone elastomers" with the exception of the claims Freight Bill Nos. 901-026202 and 901-031564. Of the six claims, four involve either "silicone emulsion" or "silicone elastomer" shipments where the commodity description is not disputed. Sea-Land, in effect, does not question the complainant's submissions showing that

[8] *Ibid.*, 2nd Rev. Pg. 323, effective April 12, 1979, provides:

Straight or Mixed Shipments of:				
Silicone Antifoam Emulsion	W	-	125.50	931.0118.003
Silicone Elestomer	W	158.00	180.50	931.0118.102
Silicone Monomer	W	188.75	208.25	931.0118.202
Minimum 29,120 lbs. per Container	W	93.00	-	931.0118.310

[9] *Ibid.*, the tariff provides:

Mixed Containerloads of the Following: Silicone Fluids, Silicone Resins Solutions, Silicone Rubber Compounds, Silicone Base Adhesive and Sealers, Silicone Antifoam Emulsions, Silicone Base Lubricating Greases- Minimum 40,320 lbs. per Container	W	146.00	-	931.0120.018

silicone emulsions and silicone elastomers are as represented. However, as to those commodities, the only claim outstanding is that there should have been applied to those shipments the minimum billing per container. As to the remaining two shipments, the dispute involves the description of "silicone rubber compounds" which Sea-Land rated under tariff Item No. 581.1020.001 (Silicon(e) Rubber, Compounds, Packed, WM $138.50). Complainant submitted packing lists in which the commodities are described only as "SGM-35" and "Rubber COMPD UNVUL." However, the documentation submitted by complainant does not clarify the precise nature of "SGM-35." This commodity is shown in the packing list as rubber compound unvulcanized paralleling the description on the disputed bills of lading of silicone rubber compounds. According to Sea-Land, there has been no showing that its rating of commodities described as silicone rubber compounds is inconsistent with the commodity known as "SGM-35" and described as rubber compound unvulcanized on the packing lists.

Dart transported three shipments for the complainant from Baltimore to Antwerp, Belgium, one in July and two in November 1978. The shipping documents prepared by the complainant described the commodities as silicone rubber compound in each instance. Dart rated the commodity under Item No. 581.1020.001 (Silicon(e) Rubber, Compounds, Packed).[10] Complainant originally contended that the commodity shipped was a "silicone elastomer." However, in a monument to brevity, complainant has filed a pleading entitled "Response to Legal Memorandum of Position Filed by Dart Containerline Company Limited & Sea-Land Service Corporation." This one-page document, supposedly addressing the arguments of Sea-Land and Dart, fails to reflect any response to Sea-Land but does manage to reveal the following observation:

> Mr. Shreves, attorney for Dart Containerline, stated a number of times at our pre-hearing conference that their situation was not the same as the other respondents.
>
> Since SGM-35, which we still contend to be an elastomer, constitutes only a small portion of the shipments involved in Atlantic Container Line's and Hapag Lloyd's portion of the formal, Mr. Shreves is correct.

DISCUSSION AND CONCLUSION

Basically the primary issue here is the uncertainty resulting from an ambiguous tariff provision which is susceptible of two interpretations, one technical and the other fair and reasonable in light of the circum-

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[10] *Ibid.*, 31st Rev. Pg. 175, effective May 24, 1978, at $138.50 W/M.

stances and the undisputed intent of the framers. In this proceeding, the latter interpretation should prevail.

The tariff provision claimed by the complainant to be the properly applicable provision for the shipments involved may be found in the following form:

Straight or Mixed Shipments of:	
Silicone Antifoam Emulsion	W
Silicone Elestomer	W
Silicone Monomer	W
Minimum 29,120 lbs. per Container	W

In the view of Sea-Land and Dart, the indentation of the minimum rate under the item applicable to "Silicone Monomer" would, under any standard of tariff interpretation, make clear that the minimum is applicable to straight or mixed shipments of silicone monomer alone. They contend that were the minimum provision to have been carried out to the same margin as the items listed as "Silicone Antifoam Emulsion," "Silicone Elastomer" and "Silicone Monomer," then it would be clear that the minimum could be applied to a straight or mixed shipment of any of those three items.

Complainant, of course, contends that the minimum rate should apply to all three items. As noted above, Atlantic has stated: "The governing conference, North Atlantic Continental Freight Conference, has confirmed that the claimant's interpretation of tariff Item 931.0118 is correct. In view of this fact, we acknowledge the overcharge." And the Conference took the necessary steps to clarify the provision in the following form: [11]

Straight or Mixed Shipments of:	
Silicone Antifoam Emulsion	W
Silicone Elestomer	W
Silicone Monomer	W
(C) Minimum 29,120 lbs. per Container	W [11]

Sea-Land argues that it "will readily admit that tariff classification determination should not be dependent upon typesetting (*U.S. v. Hellenic Lines, Ltd.*, 14 F.M.C. 254, 258 (1977), (but) it is also a fundamental principle that the provisions of the tariff published and in effect at the time of shipment are the only applicable terms which may be applied, and those terms have the force and effect of law. *Atchison T. & S.F. Railway Co. v. Bouziden*, 307 F.2d 230, (10th Cir. 1962); *Silent Sioux Corp. v. Chicago & N.W. Railway Co.*, 262 F.2d 474, (8th Cir. 1959);

[11] *Ibid.*, 8th Rev. Pg. 323, effective June 12, 1980.

Louisville & Nashville Railway v. Maxwell, 237 U.S. 94, 59 L.Ed. 853 (1914) and cases cited therein. Clearly, modification of that tariff by implication or interpretation as sought here simply is not consistent with the stringent and admittedly harsh, principles governing the applications of tariff rates." In short, Sea-Land contends that the tariff terms as published control irrespective of intent.

And while the representative of the complainant provided no legal support whatever for the position of Dow in this proceeding; nonetheless, the principles governing the application of tariff rates are such that relief is not precluded. Furthermore, this is not a situation where the conference has outright denied that the tariff provision is not susceptible of the interpretation urged by the complainant. In my opinion, the tariff change by the conference merely clarified the existing tariff provisions. Admittedly, there is no need to inquire to the intent of the tariff framer when the language of the provision is clear and unambiguous. However, this is not the situation presented here.

In *National Van Lines, Inc. v. United States*, 355 F.2d 326, 332 (1966), the Court concluded that where an uncertainty or ambiguity created in a tariff gives rise to feasible alternative interpretations, the traditional rules of construction of written instruments control. The court determined that, under such circumstances, the intent of the framers and other considerations become relevant in the proper application of the tariff. Furthermore, in construing tariffs, as any other contract, all pertinent provisions must be considered together. "The construction should be that meaning which the words used might reasonably carry to the shippers to whom they are addressed, and any ambiguity or reasonable doubt as to their meaning must be resolved against the carriers." *United States v. Missouri-Kansas-Texas R. Co.*, 194 F.2d 777, 778 (5th Cir. 1952).

The conference has a duty to express its intent in a tariff in clear and plain terms so that those referring to them may readily understand their meaning and act accordingly. As the Court said in *Atlantic Coastline R. Co. v. Atlantic Bridge Co.*, 57 F.2d 654, at page 655 (5th Cir. 1932), the tariffs "may not be contrived in catchpenny terms to catch the ignorant and unwary. If they are ambiguous, or permit of two meanings, the shipper may construe them in the most favorable way to himself which the terms permit."

Just as in *National Van Lines, supra*, this proceeding involves an uncertainty resulting from an ambiguous tariff provision susceptible of two feasible interpretations. Here, there is an uncertainty about whether the minimum rate applies to the three items of straight or mixed shipments or just one item. In *National Van Lines*, the crucial fact, and the one emphasized by the Court, was the existence of an ambiguity or an uncertainty, not the manner in which it was created. Here, since this Commission is faced with contradictory interpretations, such a tariff provision is inherently ambiguous. As the Interstate Commerce Commission stated in *August Plantz, Inc. v. Atlantic & E.C. Ry. Co.*, 291 I.C.C. 771, 773 (1954), "Where there is ambiguity, the shipper will be given the benefit of the doubt, in conformity with the principle often enunciated by the Commission that vague or indefinite tariffs will be construed strictly and in favor of the shipper rather than the maker of the tariff." See also, *I.M. Dach Underwear Co. v. Central of Georgia Ry. Co.*, 287 I.C.C. 797, 799 (1953). The principles of these cases apply here and it is concluded that the minimum rate should apply to straight or mixed shipments of "Silicone Antifoam Emulsion," "Silicone Elastomer" and "Silicone Monomer" for all of the involved shipments.

The next area of dispute involves those commodities described as "silicone rubber compounds." As noted above, the commodity known as "SGM-35" and "Rubber Compd Unvul" are claimed to be a "silicone elastomer" subject to the application of minimum rate discussed above. On the other hand, both Dart and Sea-Land applied the separate commodity description and tariff provision applicable to "silicone rubber compounds."

It is well settled that there is a duty upon the shipper to pay and the carrier to collect charges on the articles actually shipped, regardless of their description in shipping papers. *Janice, Inc., v. Acme Fast Freight, Inc.*, 302 I.C.C. 596, 597 (1958). And, the burden is upon the complainant to show by convincing evidence that the commodity descriptions in the shipping papers were erroneous and that the commodity was of a character embraced within the description on which the rate claimed was applicable. *Brewster Co., Inc. v. National Carloading Corp.*, 273 I.C.C. 419, 421.

A review of the submissions by the complainant fails to establish that the actual commodity was that of an elastomer. Indeed, complainant makes the concession that, at least as to Dart, the contention that the commodity was actually "silicone rubber compounds" "is correct." Presumably, that concession should extend to all respondents as well and it is so concluded.

One final matter requires some discussion. As earlier noted, both Atlantic and Hapag-Lloyd submitted an "agreement" or settlement joined by the complainant. Both Sea-Land and Dart oppose the acceptance of these settlements for a variety of reasons. However, in view of the decision here, it will be unnecessary to discuss this issue since the dollar amounts contained in the proposals must be adjusted in view of the treatment of those shipments involving commodities described only as "SGM-35" and "Rubber Compd Unvul" on the packing list. And the complainant concedes that those shipments involving "SGM-35" applicable to Atlantic and Hapag-Lloyd are affected by the Dart argument which complainant concedes as "correct." The argument posed by Sea-Land has been found to have merit here as well. The precise amount of traffic subject to the applicable rates is capable of determination by the parties pursuant to the findings in this proceeding. In any event, the amount of reparations as originally sought and as permitted herein will not be the same as contained in the proposals as submitted. In addition, both proposals agreed to by the complainant are "without interest." Under these circumstances, it would appear that complainant may have abandoned its original request for the imposition of interest at "12 percent" at least as to two respondents. It has made no showing or argument that interest should be imposed upon the other respondents. Indeed, the fact that Sea-Land and Dart have chosen to dispute the award of reparations should not operate as the sole reason why interest should be awarded against them when apparently abandoned as a condition in settlement with other respondents for claims arising under similar circumstances.

ULTIMATE FINDINGS

Upon consideration of all the evidence of record, this Administrative Law Judge ultimately finds and concludes:

(1) That respondents' Sea-Land and Dart interpretation of tariff provisions governing the application of a minimum rate applicable to only one item of a tariff provision involving straight and mixed shipments of silicone antifoam emulsion, silicone elastomer and silicone monomer is improper when applied to complainant's shipments herein and in violation of section 18(b)(3) of the Shipping Act, as amended;

(2) That the assessment of charges by respondents is in violation of section 18(b)(3) to the extent that it exceeds the proper application of the tariff provision as interpreted herein;

(3) That complainant is entitled to reparations, without interest, on charges for the movement of shipments involved to the extent that charges were assessed in excess of the appropriate charges under the disputed tariff provision; and

(4) That the commodities described as "SGM-35" and "Rubber Compd Unvul" are properly rated as "silicone rubber compounds packed" within the meaning of applicable tariffs.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-38

THE STACKPOLE CORPORATION

v.

SEA-LAND SERVICE, INCORPORATED

NOTICE

July 29, 1981

Notice is given that no exceptions have been filed to the June 23, 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

DOCKET NO. 80-38

THE STACKPOLE CORPORATION

v.

SEA-LAND SERVICE, INCORPORATED

Held:

(1) Where a shipper identified cargo as "carbon composition resistors" and failed to establish that they were television parts, the carrier properly classified the cargo under the tariff heading, "Not Otherwise Specified," in the absence in the tariff of a specific commodity description for carbon composition resistors.

(2) Where cargo was shipped as "carbon composition resistors," the fact that from 40.1 percent to 50 percent of such resistors may be sold to television manufacturers does not establish that the resistors were properly described or ratable as "television parts."

(3) Where it is argued that a tariff is ambiguous because it is unclear as to whether or not the commodity description, "Video and Television Equipment," includes parts of television equipment, the complainant cannot have any alleged ambiguity resolved in its favor, where it fails to establish that the cargo shipped was television parts.

Eugene L. Stewart and *Paul W. Jameson* for complainant, The Stackpole Corporation.

John M. Ridlon for respondent, Sea-Land Service, Inc.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized July 29, 1981

This case began with the filing of a complaint by the Stackpole Corporation (Stackpole; formerly known as Stackpole Carbon Company) against Sea-Land Service, Inc. (Sea-Land). In its complaint Stackpole alleged that Sea-Land incorrectly classified merchandise shipped to it which resulted in freight charges higher than those "properly applicable in accordance with issued tariff filed with the Federal Maritime Commission and in effect at the time of this shipment," all in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817). Actually there were several shipments involved and the merchandise shipped was described by the complainant as, "carbon composition resistors, used principally in radios, televisions, and other audio and visual equipment."

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

After the original complaint was filed, the complainant filed an amended complaint, which contained substantially the same allegations as the first. It sought reparations in the amount of $6,081.30. Also, counsel for both parties agreed that the proceeding should be conducted under the rules applicable to Shortened Procedure (46 C.F.R., Part 502, Subpart K, Sections 502.181 et seq.). Such procedure has been followed. Before proceeding with the findings of fact section of this decision it should be noted that during the pendency of these proceedings the parties reached agreement as to the proper treatment of certain shipments. This decision will address itself to those issues which remain.[2]

FINDINGS OF FACT

1. Respondent, Sea-Land, is a common carrier by water in the foreign commerce of the United States, subject to the Shipping Act, 1916, and serving the eastbound trade between Japan/Korea and ports in the United States Gulf and Atlantic Coast pursuant to the terms of the Trans-Pacific Freight Conference of Japan/Korea Eastbound Intermodal Tariff No. 1 and No. 2, ICC No. 1, FMC No. 4, and ICC TPC 111, FMC No. 5, respectively (hereafter referred to as "Tariff No. 1 and Tariff No. 2"), at all times relevant to the carriage of the cargoes involved in this proceeding. (Complaint, page 1; Complainant's Memorandum, page 3 and Exhibit 3.)

2. The complainant is a corporation whose principal place of business is in St. Mary's, Pennsylvania. It is engaged in the business of manufacturing and selling electrical components and electrical parts, involving the use of carbon in their manufacture. (Amended Complaint, page 1.)

3. Between June 2, 1978, and March 30, 1979, the complainant moved, via Sea-Land, 17 shipments of cargo as follows:

Bill of Lading (Freight Bill) Date	Vessel	Voyage	Freight Bill Number	Container Number	Commodity Code	Tariff Item	Number of Cartons	Cubic Measure	Weight (Kilogms)
06/02/78	Exchange	65E	937114102	311681	7299700	R-51	465	24.42	9,612
06/16/78	McLean	100E	937115445	312018	7299700	4160-00	56	2.73	1,013
06/30/78	Finance	54E	937116833	NC009	7299700	4160-00	373	20.42	7,566
07/13/78	Commerce	63E	937117840	29191	7299700	4160-00	232	12.29	4,759
08/04/78	Finance	55E	937121685	107036	7299700	4160-00	59	3.05	1,190
08/30/78	Philadelphia	296W	937127337	302547	7299700	4160-00	473	24.11	9,504
09/07/78	Finance	56E	937129026	106947	7299700	4161-00	74	4.02	1,519
09/29/78	McLean	103E	937133813	302370	7299700	4160-00	644	33.69	12,380
10/27/78	Commerce	66E	937159734	70162	7299700	4161-00	657	34.78	12,296
10/27/78	Commerce	66E	937159735	70162	7299700	4160-00	199	14.63	5,101
11/23/78	Exchange	70E	937165289	302148	7299700	4160-00	596	31.69	11,445
01/26/79	Finance	60E	937176843	61463	7299700	R-70	27	.99	406
01/26/79	Finance	60E	937176844	61463	7299700	R-70	1	.04	17

[2] The areas of agreement will be identified in the Findings of Fact.

—Continued

Bill of Lading (Freight Bill) Date	Vessel	Voyage	Freight Bill Number	Container Number	Commodity Code	Tariff Item	Number of Cartons	Cubic Measure	Weight (Kilogms)
01/26/79	Finance	60E	937176859	61463	7299700	3610-10	522	20.21	9,131
01/26/79	Finance	60E	937176860	61463	7299700	3610-10	97	3.91	1,732
03/02/79	Finance	61E	937184676	301829	7299700	4160-00	728	28.63	12,641
03/30/79	Trade	71E	937190684	262442	7299700	4160-00	652	25.37	11,313

See freight bills attached to complaint.
(Amended Complaint, page 3.)

4. Each shipment herein involved moved from Yokohama, Japan, to Baltimore, Maryland, and was consigned to Mellon Bank, N.A. The real party in interest was the complainant. (Amended Complaint, page 2; Answering Memorandum, page 3.)

5. The complainant originally averred that it was overcharged by the respondent as follows:

	Was							Should Be						
Freight Bill Number	Rated As	Rate	Charges	Currency Surcharge	Currency Surcharge	Handling	Total	Rated As	Rate	Charges	Currency Surcharge	Handling	Total	Overcharge
937114102	100.00	25.50	$2,550.00				$2,550.00	24.42	66.50	$1,623.93			1,623.93	$ 926.07
937115445	2.72	82.50	224.90	15%	$ 33.74	$ 9.54	268.18	2.72	66.50	180.88	$ 27.13	$ 9.54	217.55	50.63
937116833	20.42	82.50	1,684.73	15%	252.71	71.47	2,008.91	20.42	66.50	1,357.93	203.69	71.47	1,633.09	375.82
937117840	12.28	82.50	1,013.76	20%	202.75	43.01	1,259.52	12.28	66.50	816.62	163.32	43.01	1,022.95	236.57
937121685	3.05	83.50	255.01	20%	51.00	13.74	319.75	3.05	67.50	205.88	41.18	13.74	260.80	58.95
937127337	24.11	83.50	2,103.27	20%	402.65		2,415.92	24.11	67.50	1,627.43	325.49		1,952.22	463.00
937129026	4.01	83.50	335.50	20%	67.10	18.08	420.68	4.01	67.50	270.68	54.14	18.08	342.90	77.78
937133813	33.68	83.50	2,812.86	20%	562.57		3,375.43	33.68	67.50	2,273.40	454.68		2,728.08	647.35
937159734	34.78	83.50	2,904.30	30%	871.29		3,775.59	49.40	67.50	3,334.50	1,000.35		4,334.85	1,028.72
937159735	14.62	83.50	1,221.52	30%	366.46		1,587.98							
937165289	31.68	83.50	2,646.03	30%	793.81		3,439.84	31.68	67.50	2,138.40	641.52		2,779.92	659.92
937176843	1.00	85.50	85.50	30%	25.65		111.15							
937176844	1.00	85.50	85.50	30%	25.65		111.15	25.15	67.50	1,697.63	509.29		2,206.92	433.08
937176859	1.00	16.65	1,665.53	30%	409.15		2,074.68							
937176860	3.90	67.50	263.86	30%	79.16		343.02							
937184676	28.63	83.50	2,390.77	30%	717.23		3,108.00	28.63	67.50	1,932.53	579.76		2,512.29	595.71
937190684	25.37	83.50	2,118.40	30%	635.52	114.17	2,868.09	25.37	67.50	1,712.48	513.74	114.17	2,340.39	527.70
														$6,081.30

See Freight Bill No. 937196182, attached to complaint, for example of a bill with the proper item number description and charges. (Amended Complaint, page 5,)

6. Subsequently, the complainant submitted a "Recalculation of Amount of Overcharge Claim," as follows:

Recalculation of Claimed Amounts of Overcharge [3]

(See page 5 of Amended Complaint)

Freight Bill Number	Was							Should Be						
	Rated As	Rate	Charges	Currency Sur-charge	Currency Sur-charge	Handling	Total	Rated As	Rate	Charges	Currency Surcharge	Handling	Total	Overcharge
937114102	100.00	25.50	$2,550.00				$2,550.00				Correct			$0
937115445	2.72	82.50	224.90	15%	$ 33.74	$ 9.54	268.18	2.72	77.50	210.80	$ 31.62	$ 9.54	251.96	$ 16.22
937116833	20.42	82.50	1,684.73	15%	252.71	71.47	2,008.91	20.42	77.50	1,582.55	237.38	71.47	1,891.40	117.51
937117840	12.28	82.50	1,013.76	20%	202.75	43.01	1,259.52	12.28	77.50	951.70	190.34	43.01	1,185.05	74.47
937121685	3.05	83.50	255.01	20%	51.00	13.74	319.75	3.05	77.50	236.38	47.28	13.74	297.40	22.35
937127337	24.11	83.50	2,103.27	20%	402.65		2,415.92	24.11	77.50	1,868.53	373.71		2,242.42	173.68
937129026	4.01	83.50	335.50	20%	67.10	18.08	420.68	4.01	77.50	310.78	62.16	18.08	391.02	29.66
937133813	33.68	83.50	2,812.86	20%	562.57		3,375.43	33.68	77.50	2,610.20	522.04		3,132.24	243.19
937159734	34.78	83.50	2,904.30	30%	871.29		3,775.59	34.78	78.50	2,730.23	819.07		3,549.30	226.29
937159735	14.62	83.50	1,221.52	30%	366.46		1,587.98	14.62	78.50	1,147.67	344.30		1,491.97	96.01
937165289	31.68	83.50	2,646.03	30%	793.81		3,439.84	31.68	78.50	2,486.88	746.06		3,232.94	206.90
937176843	1.00	85.50	85.50	30%	25.65		111.15				Correct			0
937176844	1.00	85.50	85.50	30%	25.65		111.15				Correct			0
937176859	1.00	16.65	1,665.53	30%	409.15		2,074.68	20.21	67.50	1,363.84	409.15		1,772.99	301.69
937176860	3.90	67.50	263.86	30%	79.16		343.02				Correct			0
937184676	28.63	83.50	2,390.77	30%	717.23		3,108.00	28.63	67.50	1,932.53	579.76		2,512.29	595.71
937190684	25.37	83.50	2,118.40	30%	635.52	114.17	2,868.09	25.37	67.50	1,712.48	513.74	114.17	2,340.39	527.70
														$2,631.38

[3] Those items marked, "0," overcharge have been conceded by the complainant. The item marked, "$301.69," overcharge has been conceded by the respondent.

7. Pursuant to ten (10) bills of lading during the period June 17, 1978, through November 25, 1978, Sea-Land carried ten (10) shipments described on the bill of lading as carbon composition resistors. (Bill of Lading/Freight Bill/Invoice Nos. 937-115445; 937-116833; 937-117840; 937-121685; 937-127337; 937-129026; 937-133813; 937-159734; 937-159735; 937-165289, Answering Memorandum, Exhibit C; also Reply Memorandum, page 1.)

8. Section 4 of Tariff No. 1, includes the heading, "Electrical Equipment." It contains no specific commodity listed and rated separately described as, "carbon composition resistors." (Complainant's Memorandum, page 4; Respondent's Answer, page 5; Complainant's Reply, page 1.)

9. Respondent rated all the shipments described in paragraph 7, above, under the rate applicable to "Electrical Goods, Supplies and Parts, not otherwise covered in Section 4," at $82.50 or $83.50 (Answering Memorandum, Exhibit D, 21st Rev. Page 188 of Tariff No. 1, through 25 Rev. Page 188, Item No. 4160-00.)

10. Pursuant to Bill of Lading No. 937-184676, dated March 2, 1979, the respondent moved a shipment for the complainant described by the shipper on the bill of lading as, "Carbon Composition Resistors." The cargo consisting of 28.632 cubic meters, weighing 12,641 kilograms, was rated under Item No. 4160-00 of Tariff No. 2. That tariff (original page 300), under the heading, "Electrical Equipment," contains a specific commodity description as follows:

	Base Rate	Item No.
Video and Television Equipment, viz:		
Television Receiving Sets, with or without clocks Television Receiving Sets, Closed-circuit Video Monitors	78.00	4110-00
Special Rate	67.50	4110-05
Accessories and Parts of the commodities named herein		
Special Rate	67.50	4110-10
Note: The protective materials to be considered as a part of the pallet in palletized shipments subject to Rule 26.		

Tariff No. 2, also includes the heading, "Electrical Goods, Supplies and Parts, not elsewhere covered in Section 6," which applies to Item No.

4160-00 and a rate of $83.50. (Answering Memorandum, Exhibits K, M and N; Complainant's Reply, page 3.)

11. Pursuant to Bill of Lading No. 937-190685, dated March 30, 1979, the respondent moved a shipment for the complainant described by the shipper as, "Carbon Composition Resistors & Etc." The cargo consisted of 25.37 cubic meters of cargo weighing 11,313 kilograms and moved under the same facts and circumstances set forth in paragraph 10, above. (Answering Memorandum, Exhibits L, M and N; Complainant's Reply, page 3.)

12. The American Heritage Dictionary of the English Language, New College Edition, Copyright 1979, defines, "resistor," as "an electric circuit element used to provide resistance." (The American Heritage Dictionary of the English Language, New College Edition, Houghton Miffin Company, p. 1107; Answering Memorandum, Exhibit P.)

ULTIMATE FINDINGS OF FACT

13. The cargo transported in the shipments involved here was carbon composition resistors and not television parts.

14. The tariffs here involved did not contain a specific commodity description and rate for carbon composition resistors and such resistors were properly rated under the heading, "Not Otherwise Specified."

15. The record in this proceeding fails to establish that the complainant has carried its burden of proof in factually establishing that the cargo shipped was anything other than what it was originally designated by the complainant, namely, carbon composition resistors.

16. The fact that resistors may *commonly* be used in television sets does not establish that the resistors here involved are parts of television sets.

17. The tariffs involved here were not ambiguous and even if they were complainant's failure to establish that the commodity involved was television parts would preclude a holding in its favor.

18. The respondent did not improperly classify merchandise shipped to the complainant and did not charge ocean freight rates which were higher than those set forth in the applicable tariffs, and no reparations are due or owing.

DISCUSSION AND CONCLUSIONS

The issues in this case are whether or not ten (10) shipments of "carbon composition resistors," moved by Sea-Land on behalf of Stackpole were properly rated under Tariff No. 1, and whether or not two subsequent similar shipments were properly rated under Tariff No. 2.

Tariff No. 1 provides in section 4, which has to do with commodity rates, as follows:

ELECTRICAL EQUIPMENT

This heading includes:

(1) All apparatus that functions by the use of electrical energy

(2) Electrical components and parts of such apparatus for conducting, connecting, insulating and switching electrical current

(3) Non-electrical components and parts of such apparatus

(4) Insulated wire and cable and insulated metal conduit pipe and tubing

(5) Electrical components and parts of other commodities not elsewhere covered in section 4

Included within Section 4 were specific commodity descriptions as follows:

(1) Item No. 3610.00, "Audio (Sound) Equipment, viz:

amplifiers
headphones
phonographs, etc."

(2) Item No. 4110-00, "Video and Television Equipment, viz:

Television Receiving Sets, with or without Clocks
Television Receiving Sets, Closed Circuit."

(3) Item No. 4160-00, "Electrical Goods, Supplies and Parts, not elsewhere covered in Section 4."

Tariff No. 1 remained unchanged from June 5, 1978, until January 1, 1979, so that it applied to ten (10) shipments made by Sea-Land for Stackpole.[4] In its original complaint, Stackpole argues that the shipment "should have been classified under Tariff Item 3610-00, Television and Audio Equipment 'Accessories and Parts of the commodities named herein.'" However, in its original Memorandum of Facts and Arguments (page 6), Stackpole argues that Sea-Land was wrong to rate the shipments under Item No. 4160-00 and should have rated them under Item No. 4110-00. It bases its argument on the premise that carbon composition resistors are *commonly* used as parts of television equipment and should carry the same rate. Then, in its Reply, Stackpole builds on this argument averring that, "in the absence of a specific commodity item, cargo may in [sic] included in the classification applicable to a final product in which the commodity may be used." It also argues that if parts of a commodity may be included within the tariff item for that commodity, then the tariff item is more specific than the, "Not Elsewhere Covered" (N.O.S.) tariff item. It concludes that in this

[4] See "Recalculation of Claimed Amounts of Overcharge," and Finding of Fact No. 7.

case, parts of television equipment (the carbon composition resistors) should, therefore, be rated under the tariff item for Video and Television Equipment, and not the NOS tariff item. Finally, Stackpole contends that the tariff is ambiguous in that Item No. 4110-00, Video and Television Equipment, "does not specify whether only complete television receiving sets may be rated under this Item." It then concludes that "Given, then that it is not clear that Parts of Television Receiving Equipment were not formerly subsumed within the classification for Video and Television Equipment, this ambiguity should be resolved against the writer of the tariff—Sea-Land."

As to the shipments made under Tariff No. 2,[5] the tariff specifically assigns a rate to Television Receiving Sets, with or without Clocks (Item 4110-00 at $78.50); to Television Receiving Sets, Closed-Circuit (Item 4110-05 at $76.50); and to Accessories and Parts of the commodities named herein, Special Rate (Item 4110-10 at 67.50). The complainant argues that for the latter two shipments Sea-Land was wrong in rating carbon composition resistors at 83.50 as Electrical Goods, Supplies and Parts, not elsewhere covered in section 6 (Item 4160-00). Instead, it avers that carbon composition resistors are television parts and should have been rated under Item 4110-10 at 67.50.

When the arguments put forth by the complainant are considered separately, each in turn, fails—and for the same reason. For example, the complainant contends that:

> Similarly, if parts of an [sic] commodity may be included within the Tariff Item for that commodity, then that Tariff Item is more specific than the "Not Elsewhere Covered" Tariff Item. Therefore, parts of television equipment should be rated under the Tariff Item for Video and Television Equipment before they are rated under the Tariff Item for "Not Elsewhere Covered."

Even assuming that the major premise is correct, the above argument seems to ignore the fact that the record fails to establish that the "carbon composition resistors," shipped here and so described by the complainant itself, were parts of television sets. Standing alone they were inherently resistors which by definition are "electric circuit elements used to provide resistance." They obviously were manufactured for that general purpose. They can and are used in a variety of electrical products, including but not limited to television sets. Indeed, the complainant itself provides schedules (Exhibits 1 and 2 to its Memorandum of Facts and Argument) which indicate that in 1978 and 1979 the percentage of carbon resistors sold by it to television manufacturers was 44.1 percent and 49.9 percent, respectively, and that for the period

[5] See Findings of Fact Nos. 10 and 11.

June 1978 through March 1979 (the period during which the shipments here involved occurred), the "Weighted Average % for Video" was 40.1 percent. Stated differently, at least 50 percent of the carbon resistors the complainant sold were not destined for television manufacturers. By way of corroboration, the complainant's own witness, its product sales manager for carbon composition resistors, states:

> . . . that each of the grades and tolerances of resistors included in the subject shipments are used by Stackpole's customers as parts of television equipment *as well as* as [sic] parts of other equipment. (Emphasis supplied), and
>
> I can affirm that the grades and ratings included in the subject shipment are commonly used as parts of television equipment, and there is no other single end use for which they are more commonly used.

Given this record, one cannot justify a holding that the transistors shipped here were parts of television sets. Consequently, the complainant's argument must fail. What was shipped was, "carbon composition resistors," a commodity for which, the complainant admits, there is no specific provision in the tariff. Therefore, the "Not Elsewhere Covered" classification applied to these shipments.

Likewise, the complainant argues that, "in the absence of a specific commodity item, cargo may in [sic] included in the classification applicable to a final product in which the commodity may be used." It cites *Continental, Shellmar, Inc. v. Sea-Land Service, Inc.*, 20 F.M.C. 305 (F.M.C. No. 408(I), served November 15, 1977), in support of its contention. *Continental, supra*, is cited erroneously. It holds that where two commodity descriptions may apply to one commodity that is shipped, the rate quoted in the more specific description will be used. The case does not hold directly, nor does it infer that in the absence of a specific commodity item, cargo may be included in the classification applicable to a final product in which the commodity may be used. We think the law is clear that the final application of a product with several possible end uses is immaterial to the proper classification of commodities for tariff purposes. The 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, as it would be virtually impossible for ocean carriers to ascertain whether each item transported is subsequently put to the use for which it was rated for ocean transportation. *Crestline Supply Corporation v. The Concordia Line & Boise-Griffin S.S. Co., Inc.*, 19 F.M.C. 207, 211 (1976), citing 6 F.M.B. 155, 159. See also *CSC International Inc. v. Waterman S.S. Corp.*, 19 F.M.C. 523, 528 (1977), holding that the nature and character of each shipment at the time tendered determines its status for rate purposes, and the use which may be subsequently made of the material does not control.[6] So here, where carbon composition resistors were shipped, the complainant cannot change the nature of the commodity for rate purposes, by showing an end use for which the resistors *might* be used. Even if the complainant had actually established the end use of the resistors shipped here (it established only that 40.1 percent of all resistors it sold were sold to television manufacturers), the resistors would be rated as resistors, not in accordance with the end use.

Another argument used by the complainant is that:

> . . . there is an ambiguity in Tariff Item No. 4110-00, Video and Television Equipment. The commodity description does not specify whether only complete television receiving sets may be rated under this Item.

The complainant after further argument then proceeds to conclude that "Given, then, that it is not clear that *Parts* of Television Receiving Equipment were not formerly subsumed within the classification for Video and Television Equipment, this ambiguity should be resolved against the writer of the tariff—Sea-Land." It is well settled that where a tariff is ambiguous or doubtful it is to be construed against the carrier who prepared it. *United Nations Children's Fund v. Blue Sea Line*, Docket No. 71-25, 15 F.M.C. 206 (1972), which cites several other cases. However, neither the shipper nor the carrier may rely on a strained or unnatural construction of an ambiguous tariff, *Bratti v. Prudential et al.*, 8 F.M.C. 375, 379 (1965); and if a tariff is subject to different constructions, an interpretation which is reasonable and consistent with the purpose of the tariff should be preferred to a construction which is impractical or which leads to absurd consequences, *Trans Ocean Van Service v. U.S.*, 426 F.2d 329, 336-337 (1970). Here, again assuming that the tariff is ambiguous in that it is unclear as to whether or not parts of television sets should be included as Video and Television equipment, this record does not establish that the carbon composition resistors shipped here were television parts. How could one so hold when the complainant itself states that less than 50 percent are sold to television manufacturers and where it describes them as resistors. If there is an ambiguity here regarding the cargo shipped it arises not from the tariff provisions, but from the inability of the complainant to properly identify and classify the cargo. When it designated the cargo here as carbon composition resistors, how could the carrier be expected to classify them in any other manner? Was he to guess as to whether the resistors were to be used in televisions or radios or phonographs, or stereos, or in any one of hundreds of electrical products where resistors are used? Even now, given the complainant's failure to

[6] *CSC, supra*, also held that one use of a product does not necessarily determine the tariff rate, and that different rates on the same commodity dependent upon the use made of it would lead to unjust discrimination.

properly classify the resistors, if indeed they were misclassified, we could still hold that they were television parts if the record justified such a holding, because a shipper is not forever bound by the description of the shipment contained on the bill of lading. *Rohm & Haas Co. v. Moore McCormick Lines Inc.*, 17 F.M.C. 56, 59-60 (1973). Here, however, as we have stated, the record does not establish that the shipments involved were television parts.

The last material argument made by the complainant is that, "Sea-Land misconceives the nature of the burden of proof. Stackpole has the burden of proving facts not law." We do not disagree with the complainant, but for reasons set forth above we must hold that the complainant has failed to establish the fact most necessary to all of its arguments, namely, that what was shipped were television parts and not carbon composition resistors. Perhaps, the best example of the inherent weakness in complainant's attempt to establish that the resistors were television parts is its statement that, "it is not necessary that the commodity be used entirely, or even chiefly, as parts of television equipment, only that such resistors are *commonly* used as parts of television equipment." It cites no cases supporting such a view or even defining what is meant by "commonly." Were one to apply the complainant's view of tariff construction, the results would be chaotic. If the resistors here were television parts because of *common* usage, would all resistors be television parts? If not, in what commodity classification would the other resistors fall? And if the commonality of use determines the classification are we to believe that in the future resistors might be *commonly* used in some other product?

One could continue with examples of why the complainant's arguments lack validity but in essence this case presents two questions; what commodity was shipped and what was the rate provided for that commodity in the pertinent tariffs. The respective answers are, "carbon composition resistors" and "Not Otherwise Specified."

For the reasons set forth above and in light of the entire record it is held that Sea-Land did not improperly classify merchandise shipped to the complainant and did not charge ocean freight rates which were higher than those properly applicable under the tariffs filed with the Federal Maritime Commission and in effect at the time the shipments here involved were made. Consequently, the relief sought by the complainant, including the payment of reparations,[7] is hereby denied and the proceeding is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

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[7] Sea-Land agreed that as to Freight Bill 93176859, and the shipment made relating to such freight bill, it owed Stackpole $301.69. If such payment has not already been made it is due and owing.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1062(I)
THE GOODYEAR TIRE & RUBBER COMPANY

v.

MAERSK LINE

ORDER OF PARTIAL ADOPTION

July 29, 1981

The Commission determined to review the decision * of Settlement Officer Joseph T. Farrell in which he denied the claim of The Goodyear Tire & Rubber Company (Goodyear) for an alleged freight overcharge by Maersk Line, (Maersk) on a shipment of spare parts for tire manufacturing machinery from New York to Port Kelang, Malaysia, and ordered Goodyear to pay Maersk the amount of $634.96 with interest from March 1979.

As stated in *Ideal Toy Corp. v. Evergreen Line*, Informal Docket No. 998(I) 23 F.M.C. 1008 (1981), section 22 of the Shipping Act, 1916 (46 U.S.C. 821) confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a shipper or consignee. The Settlement Officer, therefore, had no authority to order Goodyear, a shipper, to pay Maersk any amount. Accordingly this portion of the Settlement Officer's decision must be vacated.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusions are correct. Maersk Line is therefore directed to take the steps necessary to collect from Goodyear freight undercharges in the amount of $634.96.

THEREFORE, IT IS ORDERED, That the portion of the Settlement Officer's decision ordering the Goodyear Tire & Rubber Company to pay to Maersk Line the amount of $634.96 plus interest is reversed and vacated;

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

* The complaint in this proceeding was filed on March 16, 1981.

** Commissioner Daschbach's separate opinion 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

INFORMAL DOCKET NO. 1062(I)
THE GOODYEAR TIRE & RUBBER COMPANY

v.

MAERSK LINE

DECISION OF JOSEPH T. FARRELL, SETTLEMENT OFFICER [1]

Partially Adopted July 29, 1981

Reparation Denied

By its complaint filed with the Commission on March 16, 1979, The Goodyear Tire & Rubber Company (Goodyear), through its agent, seeks reparation of $1,541.41 plus interest of Maersk Line (Maersk), this amount representing an alleged overcharge arising out of a Goodyear shipment transported by Maersk from New York, New York, to Port Kelang, Malaysia, pursuant to a bill of lading dated March 23, 1979. The bill of lading described the shipment as "4 Boxes: Misc. Spare Parts for Tire Mfg. Machinery. All Materials Included in This Bill of Lading are of Wholly Proprietary Nature Not for Resale and are for Use in the Construction and/or Installation in the Tire Plant Project." Goodyear prepaid freight charges of $5,512.71.

There is no dispute concerning the nature of the commodity shipped. Goodyear's shipment was assessed freight charges of $128 per cubic meter in accordance with the Project Rate for a tire manufacturing plant expansion project. The bill of lading was duly claused as required by the controlling tariff,[2] and the materials were shipped to the proper consignee, Goodyear Malaysia Berhad, Shah Alam, Selangor, Malaysia.

Goodyear contends, however, that heavy lift charges assessed by Maersk were improperly applied. According to Goodyear, Maersk calculated such charges based on the total weight of shipment. Complainant believes that heavy lift charges should have been applied to each of the four boxes separately. Maersk, in reply, opines that Goodyear's claim should be rejected, at least insofar as the amount claimed is concerned, because Goodyear's agent has ". . . used the wrong heavy lift scale. In addition, it appears they applied the rating on the wrong

[1] 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.

[2] Atlantic and Gulf-Singapore, Malaya and Thailand Conference FreightTariff No. 16 FMC-6.

basis, however, considering the illegibility of the Bill of Lading we are unable to comment any further."

Although not specified, Goodyear's complaint constitutes an alleged violation of section 18(b)(3) of the Shipping Act.[3] In support of its claim, Goodyear has submitted, in addition to the bill of lading previously referenced, copies of the invoice addressed to its consignee, and of the tariff page used to calculate what it considers to be the proper heavy lift charges. The Settlement Officer concurs with Maersk on the usefulness of this tariff page: Goodyear has based its calculations on a heavy lift scale intended for use only with regard to "outports." Port Kelang is a "base port" as defined by the tariff, and, consequently, a different heavy lift scale must apply.

The bill of lading, as indicated by Maersk, was, in fact, partially illegible. That is, that part of the bill of lading which detailed the charges assessed could not be interpreted. However, this detailing of charges was available from the attached invoice addressed to Goodyear by its freight forwarder. These charges are recounted in the Appendix to this decision.

The Settlement Officer nevertheless requested Goodyear's agent to submit a legible bill of lading. This has been done, although the figures supplied appear to have been added at some point subsequent to the completion of the bill of lading. Nevertheless, these figures are the same as those indicated on the forwarder's invoice, and are confirmed by the total of freight charges noted on Goodyear's invoice to consignee. It appears reasonable to conclude that the charges indicated were those actually paid.

Concurrent with the submission of the rated bill of lading, complainant advised the Settlement Officer of its intention to amend its claim.[4] Goodyear now argues that it was incorrectly assessed a container stuffing charge of $2.50 per cubic meter, arguing that, ". . . (since) the shipment did not move in a container, this charge should be deleted and the amount of $68.45 added to our claimed amount." Maersk, however, challenges this contention, pointing out that ". . . Maersk Line is a fully containerized ocean vessel operator. This shipment was loaded at our container freight station at Port Newark into containers MAEU 2065374 and MAEU 4000813 which you will note in the official Intermodal Equipment Register are a 40 foot dry container and a 40 foot opentop container respectively." Insofar as this amendment to the com-

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[3] 46 C.F.R. 502.304(a) Appendix A. No specific violation of the Shipping Act need be cited by the complainant in overcharge cases.

[4] Amendments of this nature are liberally permitted under the Commission's procedures. Confer *Trane Co. v. South African Marine Corp. (NY)*, 18 F.M.C. 375 (1976).

plaint is concerned, the Settlement Officer finds Goodyear's contention to be without merit.[5]

Goodyear's original claim, on the other hand, would appear to be valid. Tariff rules 1(B) and 4 indicate clearly that heavy lift charges must be applied to each piece individually. The proper heavy lift charges as derived from the "base port" scale have been calculated in the Appendix to this decision.

Maersk's failure to properly apply heavy lift charges resulted from complainant's failure to indicate on the bill of lading the weight of each individual package, as required by Tariff rule 4. However, shipper's lack of care does not constitute an adequate defense in cases of this nature, and Goodyear is entitled to reparation.[6] In the same manner, shipper's lack of care also contributed to what is, in fact, an erroneous calculation of the basic freight charges on this shipment.

Tariff rule 1(B) requires: "Rates to be assessed per ton of 1000 Kg. (2204.62 lbs.) or 1 cubic meter (35.314 cft.) whichever creates the greater revenue." The Port Kelang Project Rate at the time of shipment was $128.00 per cubic meter or $159.00 per kilo ton. Inasmuch as Goodyear's cargo weighed 28.105 kilo tons,[7] and measured only 27.383 cubic meters,[8] the use of measurement as the rating basis is a clear violation of rule 1(B).[9]

Furthermore, the error was compounded by this incorrect application of the basic freight rate to Goodyear's shipment taken as a whole. There is no question that each of the four boxes should have been rated independently.[10] Although the shipment was transported by container, it was handled as a "pier-to-pier" (CFS/CFS) movement, packed by the carrier for its convenience,[11] and properly rated as breakbulk cargo. This being the case, each of the four boxes should have been rated separately.[12]

As it happens, three of the four boxes concerned should have been rated on a weight basis, while the fourth is measurement cargo. This

[5] In point of fact, the charge in dispute is not a "container stuffing charge," but, rather, a CFS delivery charge, applicable at the "base port" of Port Kelang. See rule 28(B)(2)(b)(ii)(2). Container stuffing charges are applicable only when such service is requested by the shipper. See rule 28(B)(2)(b)(i).

[6] For example, confer *United States of America v. Farrell Lines, Inc.*, 16 F.M.C. 42, 48 (1972).

[7] 61,961 pounds ÷ 2,204.62 = 28.105 kilo tons.

[8] 967 cubic feet ÷ 35.314 = 27.383 cubic meters.

[9] 28.105 x $159.00W = $4,468.70
27.383 x $128.00M = $3,505.02

[10] The project rates (original page 233) are provided for "packages or pieces."

[11] If the container had been utilized at the shipper's request, a CFS receiving charge of $4.50 per revenue ton would apply. See rule 28(B)(2)(b)(i).

[12] The same point applies to the heavy lift charges. If the shipment had been transported by a "house-to-house" (CY/CY) movement, heavy lift charges would not apply. See rule 28(B)(3). Cargo containerized for the convenience of the vessel is covered by rule 28(B)(14), which provides that such cargo is to be treated as breakbulk cargo, and that CFS delivery charges must apply.

has been determined by an analysis of the weights and measurements provided on a invoice submitted by Goodyear. The results of this rerating are included in the calculations found in the Appendix.

One final error was made in the rating of this shipment. On March 23, 1979, a currency adjustment surcharge of 10 percent, applicable to base ports only (including Port Kelang), should have been assessed on Goodyear's shipment.[13] The failure to apply this charge has been corrected in the Appendix calculations.

Reference to those calculations will indicate that the overcharge resulting from misapplication of heavy lift charges is more than offset by the total of the undercharges deriving from the other errors discussed above. The net undercharge amounts to $634.96, and Goodyear is ordered to submit that sum to Maersk. In addition, it is the opinion of the Settlement Officer that interest should be awarded. The Commission has determined that interest is not to be viewed as a penalty, but, rather, as compensation for the use of the money involved during the period covered by the interest. In accordance with the present practice of the Commission, Maersk is awarded 11.4 percent interest per annum from March 1979. The interest figure of 11.4 percent is based on the average of the monthly rates on U.S. Treasury bills as quoted in the secondary market from March 1979, to May 1981. So ordered.

(S) JOSEPH T. FARRELL
Settlement Officer

[13] Rule 10.

APPENDIX

Freight Charges as Assessed by Maersk Lines:

967 [1] cubic feet at $128.00 per cubic meter:	$3,505.06
Heavy Lift Charges, 61,961 lbs. at $69.00 per 2,204.62 lbs.:	1,939.25
CFS Delivery Charge, 967 cft. at $2.50 per cubic meter:	68.45
Total Charges:	$5,512.71

Correct Assessment - four boxes rated separately:

Box #1: 10.433 kilo tons at $159.00 per kilo ton:	$1,658.85
Heavy Lift Charges at $38.25 per kilo ton:	399.06
Box #2: 9.741 cubic meters at $128.00 per cubic meter:	1,246.85
Heavy Lift Charges (6.350 kilos) at $25.25 per kilo ton:	160.34
Box #3: 5.579 kilo tons at $159.00 per kilo ton:	887.06
Heavy Lift Charges at $22.25 per kilo ton:	124.13
Box #4: 5.743 kilo tons at $159.00 per kilo ton:	913.14
Heavy Lift Charges at $22.25 per kilo ton:	127.78
Total:	$5,517.21
Plus 10 percent Currency Adjustment:	551.72
	$6,068.93
Plus CFS Delivery Charge [2] $2.50 per revenue ton as freighted. 31.496 rev. tons:	78.74
Total:	$6,147.67
Less Charges Actually Paid:	−5,512.71
Amount of Undercharge:	$ 634.96

[1] Rounding of cubic feet is accomplished in accordance with rule 23(ii), which permits dropping fractions under one-half, but requires raising fractions of one-half or larger to the next whole cubic foot.

[2] CFS Delivery Charge is not subject to the currency adjustment factor. See rule 10.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1092(I)

WHITE CROSS INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

ORDER OF PARTIAL ADOPTION

July 29, 1981

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he denied the claim of White Cross Industries, Inc. (White Cross) for an alleged freight overcharge by Sea-Land Service, Inc. (Sea-Land) on a shipment of resin from New Orleans to Puerto Limon, Costa Rica, and ordered White Cross, in the event it had not yet done so, to pay with interest Sea-Land's supplemental bill in the amount of $1008.65 covering an increase in bunker surcharge, which had come into effect on the date of sailing of the vessel.

As recently stated in *Ideal Toy Corp. v. Evergreen Line,* Informal Docket No. 998(I) 23 F.M.C. 1008 (1981), section 22 of the Shipping Act, 1916, (46 U.S.C. 821), confers no jurisdiction on the Commission to order the payment of reparation, in any form, by a shipper or consignee. As a result, the Settlement Officer had no authority to direct White Cross, a shipper, to pay to Sea-Land any amount. Accordingly, this portion of the Settlement Officer's decision must be vacated.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusion are correct. Sea-Land is therefore directed to take the steps necessary to collect from White Cross unpaid freight charges in the amount of $1008.65.*

THEREFORE, IT IS ORDERED, That the portion of the Settlement Officer's decision directing White Cross Industries, Inc. to pay to Sea-Land Service, Inc. the amount of $1008.65 plus interest is reversed and vacated;

* The doubt raised by the Settlement Officer on whether White Cross has already paid the supplemental bill is dispelled by the reference in Sea-Land's letter of July 10, 1980 to "Unpaid Ocean Freight - $1008.65."

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.**

(S) FRANCIS C. HURNEY
Secretary

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.

** Commissioner Daschbach's separate opinion is attached.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1092(I)

WHITE CROSS INDUSTRIES, INC.

v.

SEA-LAND SERVICE, INC.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER [1]

Partially Adopted July 29, 1981

Reparation Denied

By its complaint filed with the Commission during May 15, 1981, the White Cross Industries, Inc. (White Cross) appears to claim $1,008.65 of Sea-Land Service, Inc. (Sea-Land), this amount representing an alleged overcharge [2] arising from a White Cross shipment of resin transported by Sea-Land from New Orleans to Puerto Limon, Costa Rica pursuant to the latter's received for shipment bill of lading dated August 4, 1979.

The facts of the matter here are not in dispute. White Cross delivered the resin to Sea-Land during August 2, 1979. Subsequently, the cargo was booked for a vessel scheduled to sail from New Orleans during August 4th, upon which date the bill was issued. On August 5th, a scheduled increase in Sea-Land's bunkers surcharge became effective, i.e., the surcharge was increased from $3.50 to $6.00 per revenue ton. The cargo is said not to have "sailed" until August 9th, that date representing the day when the Sea-Land vessel which lifted the resin departed New Orleans on its outward passage. White Cross was billed twice by Sea-Land. The first required payment of ocean freight and a bunkers' surcharge at the $3.50 rate. A second, supplemental, billing called for the payment of an additional $2.50 per ton of surcharge, or the differential between the two. It is the latter which White Cross protests on the ground, essentially, that the cargo was in Sea-Land's possession prior to the effective date of increase.

In its reply to service, Sea-Land contends correctly that it had no alternative to assess other than it did. Sea-Land's Tariff No. 264, FMC

[1] 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.

[2] No specific violation of section 18(b)(3) of the Shipping Act, 1916,was alleged by White Cross as none is required with respect to overcharge claims. See 46 C.F.R. 502.304, Appendix A.

No. 144, which controls here, states specifically that "TARIFF CHANGES - EFFECTIVE DATE. The effective date of rate changes at each loading port will be governed by the date the vessel sails from the port and not by dates of bookings, dock receipts or bills of lading." [3] Hence, Sea-Land's vessel would have to have sailed by August 4th for White Cross to prevail here.

It is not clear from the materials before the Settlement Officer whether White Cross has, in fact, paid the supplemental billing. If it has, reparation is denied. If it has not then it is directed to pay Sea-Land \$1,008.65 plus interest at the rate of 11.5 percent per annum, pro rata, from September 1979. So ordered.

Had White Cross prevailed here, Sea-Land would have been ordered to pay White Cross interest at the same rate, not as a penalty in any way but on the theory that Sea-Land would have enjoyed the use of money to which it was not entitled. That would have been consistent with the Commission's present practice. If Sea-Land has not been paid the supplemental billing then it has been denied the use of money to which it was entitled. Fairness, then, dictates that the same principle apply. The 11.5 percent rate reflects the average of the monthly rates quoted in the secondary market for U.S. Treasury notes for its 6 months bills for the period September 1979, through May 1981, the latest month for which such quotations are available. It is considered reasonable in the circumstances.

(S) DONALD F. NORRIS
Settlement Officer

[3] 6th Revised page 83, effective February 9, 1979.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING

MARITIME CARRIERS AND RELATED ACTIVITIES

[GENERAL ORDER 23, REVISED; DOCKET NO. 81-3]

PART 524 - EXEMPTION OF CERTAIN AGREEMENTS FROM THE REQUIREMENTS OF SECTION 15, SHIPPING ACT, 1916

August 6, 1981

ACTION: Final Rule

SUMMARY: This exempts agreements which provide for joint cargo inspection or self-policing services, or both, from the filing and approval requirements of section 15 of the Shipping Act, 1916 (46 U.S.C. 814). This exemption will not substantially impair effective regulation, result in unjust discrimination, or be detrimental to commerce. It should encourage the use of cargo inspection services which complement self-policing and also strengthen compliance with the provisions of carrier tariffs.

DATE: Effective September 10, 1981

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (46 U.S.C. 833a) allows the Commission to exempt any class of agreements between persons subject to the Act, where it finds that such exemption will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce. Pursuant to this authority, the Commission has proposed (46 F.R. 5008) to amend 46 C.F.R. 524 (Commission General Order 23) by exempting agreements which provide for joint cargo inspection or self-policing services, or both, from the filing and approval requirements of section 15 of the Act.

Comments on this proposal have been received from: (1) the U.S.-Flag Far East Discussion Agreement, (2) several North European Conferences (NEC), (3) the Inter-American Freight Conference (IAFC), (4) Sea-Land Service, Inc., (5) three Pacific conferences - the Pacific Westbound Conference, the Pacific-Straits Conference, and the Pacific/Indonesian Conference, and (6) a group of 12 other conferences and rate agreements (Group of 12).

The Pacific Conferences and the Group of 12 support the proposed rule without reservation.* NEC and the IAFC support the proposed rule in principle but suggest certain revisions to clarify the application of the exemption. Both would expand the proposed definition of joint cargo inspection or self-policing agreement to include a broader range of activities associated with self-policing and cargo inspection services. In addition, IAFC recommends that agreements of this type which are filed for approval be handled under delegated authority and a timetable for prompt approval be established.

While Sea-Land believes that joint self-policing/cargo inspection agreements have minimal impact, it does not support their exemption. Sea-Land urges that they continue to be filed, but that they be approved upon filing as presumptively approvable. Sea-Land also suggests that the rule be amended to specifically include within its scope agreements between independent carriers or between an independent carrier or carriers on the one hand and the members of conferences or rate agreements, on the other hand.

The U.S.-Flag Far East Discussion Agreement does not support the proposed rule. It believes that the rule would subject it to unreasonable risks of antitrust exposure because the filing option provided would rarely be exercised under the agreements to which the U.S.-flag carriers are party. This result is anticipated because the U.S.-flag carriers in the several U.S./Far East conferences are minority members, and the majority, foreign-flag members may not be that concerned about the potential application of U.S. antitrust laws and thus would not vote to file the agreements for the optional approval provided. The Commission is, therefore, urged to continue to require the filing of such agreements and adopt a simplified processing procedure so that they can be handled under delegated authority or approved by notation.

After having thoroughly reviewed the comments received, the Commission continues to believe that full section 15 regulation of these agreements serves no substantive purpose and that the proposed exemption will not significantly affect the overall design of regulation contemplated by the Shipping Act, 1916.

The comments submitted by Sea-Land and the U.S.-Flag Far East Discussion Agreement do not convince us that there is a regulatory need for continued Commission approval for all such arrangements. As mentioned before, filing of such agreements for approval will remain optional under the current rule to which this exemption will be added (46 C.F.R. 524.7). Moreover, it is unlikely that coordinated activity under such agreements will result in violations of the antitrust laws.

* The group of 12 does suggest that the rule be amended to clearly state that optional approval is available. This is unnecessary, because the rule to which this exemption would be added already provides for optional section 15 approval for exempted agreements (46 C.F.R. 524.7).

However, if problems arise because of the filing option, then this matter should be brought to the Commission's attention for such further action as may be necessary or warranted.

Some changes in the proposed rule are warranted, however. The exemption has been expanded to include carrier associations operating under section 15 agreements which are neither conferences nor other ratemaking bodies, and arrangements between individual carriers or an individual carrier and a carrier association. The anticompetitive effect of such agreements is equally minimal whether the signatory is an independent carrier or a member of an association of carriers approved under section 15. The final rule also clarifies the type of cargo inspection and self-policing activities which will warrant an exemption.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the proposed rule will not, if adopted, have a significant economic impact on a substantial number of small entities. The proposed exemption will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom undoubtedly are small entities may enjoy a secondary benefit from this exemption but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

THEREFORE, pursuant to 5 U.S.C. 553 and sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a), 46 C.F.R. 524 is amended by adding a new paragraph (c) to section 524.2, as follows:

(c) A joint policing agreement is an agreement between or among:

- (1) two or more individual common carriers by water,
- (2) two or more associations of common carriers by water each operating pursuant to an approved section 15 agreement, or
- (3) one or more individual common carriers by water and one or more such associations;

which provides that its parties may discuss and agree upon any of the following activities concerning cargo inspection and/or self-policing services: (a) negotiations for and employment of such services, (b) establishment of rules and procedures relating thereto (including the collection of delinquent freight and other tariff charges), (c) allocation of the costs of such services, and (d) the administration and management of such arrangements.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

ORDER ADOPTING DISMISSAL OF COMPLAINT

August 12, 1981

This proceeding was initiated as a result of a Complaint filed by Archie Peltzman against the American Maritime Association (AMA), the Pacific Maritime Association (PMA), and the individual members of these Associations who are common carriers by water or "other persons subject to the Act" within the meaning of section 1, Shipping Act, 1916 (46 U.S.C. 801) (the Act).[1] Also named in the Complaint are several unions as well as a number of independent shipping companies. In all, the Complaint names some 185 entities alleged to have violated sections 15, 16 and 17 of the Act (46 U.S.C. 814, 815, 816), as well as the antitrust laws and numerous labor statutes. These violations are said to have resulted from the "union security clauses" of certain unspecified collective bargaining agreements which were allegedly neither filed with, nor approved by, the Commission and which allegedly deprived Complainant of employment as a radio operator on Respondents' vessels (Complaint, paragraphs 13, 14, 16, 17 and 21). Complainant requests that the Commission declare the agreements unlawful and seeks reparation under the Act or treble damages under the antitrust laws. Complainant also urges the Commission to investigate the hiring hall and maritime training facilities that are subsidized by the United States Maritime Administration.

This proceeding is now before the Commission upon Petition for Reconsideration filed by Complainant to the ruling of Chief Administrative Law Judge John E. Cograve dismissing the Complaint.[2] Replies to the Petition have been filed by or on behalf of most of the Respondents in the proceeding.

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[1] This proceeding was initiated prior to the effective date of the Maritime Labor Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021, which modified the Commission's jurisdiction over activities flowing from collective bargaining agreements.

[2] Mr. Peltzman is appearing *pro se*. His Petition, though captioned as one for "reconsideration," is being treated as an appeal pursuant to Rule 227(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(b)). This Rule permits a party to seek Commission review of an administrative law judge's grant of a motion to dismiss a proceeding in whole or in part.

DISCUSSION

In his Order dismissing the Complaint, the Presiding Officer concluded that Complainant had failed to state a cause of action upon which relief could be granted and that, in any event, the Complaint is barred by the two-year statute of limitations in section 22 of the Act (46 U.S.C. 821). The Presiding Officer first found that the agreements complained of, at least as they extend "to provisions which establish union membership as a condition precedent to employment as a radio operator in the U.S. Merchant Marine," are labor-exempt under the criteria established in *United Stevedoring Corporation v. Boston Shipping Association*, 16 F.M.C. 7 (1972) (*BSA*), and "thus are immune from challenge under the Shipping Act" (Order at 11 & 14).[3]

Further, the Presiding Officer determined that section 16 of the Act is not intended to address the Complainant's allegation regarding "unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and 'union' membership requirement in the agreements which is placed on seamen who wish to enter the service of shipping companies" (Order at 4 and 16; Complaint paragraph 17). The Presiding Officer explained that although section 16 is broadly worded, it is "clearly directed to the obligations of common carriers and other persons subject to the Act to users of their services, *i.e.* the shipping public" rather than to an employee's grievance against an employer and the union. He also noted that it would be "absurd" to recognize a "labor exemption" under *BSA* to reconcile conflicting labor and shipping policies on the one hand and to undermine that exemption by taking jurisdiction under section 16 - "a section which was not intended to deal with offenses alleged" (Order at 16) on the other.

Section 17 of the Act was likewise found to be inapplicable to the charges advanced in the Complaint. The Presiding Officer ruled that the regulations and practices which section 17 requires to be reasonable relate to receiving and handling property and not to the terms and conditions of a radio officer's employment by a common carrier by water (Order at 17).

In concluding that the Complaint is, in any event, barred by the two-year statute of limitations, the Presiding Officer relied on the affidavit of C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal Courts. The Presiding Officer found that Mr. Peltzman's cause of action, if any, arose from his "discharge from employment" in May of 1971 when Central Gulf

[3] It was unnecessary for the Presiding Officer to have considered other provisions of the collective bargaining agreements because they were not put in issue. Accordingly, the Commission will not adopt that portion of the Order which implies that the Agreements are exempt in their entirety (see Discussion, *infra*).

terminated his employment because of a refusal to pay union initiation fees (Order at 17).

Complainant appeals from the Presiding Officer's dismissal on essentially five grounds:

(1) the Presiding Officer applied an erroneous standard in considering the alleged violations of the Shipping Act;

(2) the Presiding Officer committed procedural errors;

(3) the Presiding Officer committed factual errors;

(4) the Presiding Officer failed to consider all of the Respondents' pleadings and arguments; and

(5) the Presiding Officer erred in finding that the Complaint is time-barred.

The Complainant argues that the "union security" provisions of the agreements complained of are illegal restraints of trade and are therefore contrary to the public interest and must be investigated by the Commission. Complainant maintains that the purpose of the Shipping Act, 1916, and related statutes is not only to assure a strong merchant marine but also to protect merchant seamen. He further submits that the Commission may not approve an agreement under the public interest standard of section 15 if it violates either labor statutes or the antitrust laws.

Complainant also argues that the Presiding Officer erred in failing to convene a prehearing conference or any hearings in this proceeding, in dismissing the Complaint prior to the receipt of all the Respondents' answers thereto, and in not specifically considering and addressing all of his pleadings and arguments.

Mr. Peltzman further contends that the Presiding Officer's finding that the Larsen affidavit went unchallenged is erroneous. This affidavit was allegedly rebutted in Complainant's December 5, 1980 Reply to the Motions to Dismiss. The Presiding Officer also allegedly erred in stating that Complainant had cited *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968), as an indication that Complainant was cognizant of the Commission's jurisdiction over matters arising out of collective bargaining agreements. Finally, Mr. Peltzman contends that his Complaint is not time-barred because, although he was discharged in 1971, the "illegal closed shop and restrictive hiring hall practices are still continuing." [4] (Petition at 9).

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[4] The provisions or agreements at issue here have been variously referred to by the parties as "closed shop" or "union security" provisions. The various tribunals where Mr. Peltzman has sought relief have characterized the provisions complained of as "union security" provisions (see for example *Peltzman v. Central Gulf Lines, Inc.*, 86 L.R.R.M. 2127 (1974) and footnote 7, *infra*). They are so referred to in this Order.

The several Respondents replying to Complainant's appeal all urge the Commission to deny the appeal and to affirm the Presiding Officer's dismissal.

Complainant's appeal presents the Commission with no reason for setting aside the Presiding Officer's ruling. The Presiding Officer's ultimate conclusions are well-reasoned and are supportable procedurally and in law and fact. The Order of Dismissal is therefore adopted by the Commission, subject to the modifications and clarifications discussed below. The Commission shall, however, first dispose of certain procedural challenges.

Rule 64 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.64, provides that answers to complaints shall be filed within 20 days of the service of the complaint, *unless a motion to dismiss the complaint is filed.* This Rule further states that the answer to the complaint need not be filed until such motion has been denied. Complainant did not request relief as provided for in Rule 64, has not demonstrated how he was harmed by the failure of any Respondent to timely answer his Complaint, nor has the Commission been able to perceive any harm accruing from failure by any Respondent to timely answer Mr. Peltzman's Complaint.[5] The Commission therefore finds that if any such failure existed, it constituted harmless error, particularly in light of the Commission's ultimate disposition of the Complaint.

Similarly, Complainant has failed to establish how he was prejudiced by the absence of a pre-hearing conference or evidentiary hearings. The Commission Rules provide the Presiding Officer broad discretion in structuring the proceeding (See Rule 94, 46 C.F.R. 502.94). The Commission cannot find that the Presiding Officer abused that discretion. The disposition of this proceeding, on the basis of the Motions filed, turned on questions of law, thus obviating any need for evidentiary hearing procedures.

Finally, it is a well-settled principle that administrative decisions need not recite or respond to each and every argument or finding propounded by a party to a proceeding.[6] The Presiding Officer's ruling in this proceeding addresses all the material matters raised by the pleadings.[7]

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[5] The one Respondent alleged not to have filed an answer, the Seafarers International Union, filed its answer on November 24, 1980.

[6] *See Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966), citing *NLRB v. State Center Warehouse and Cold Storage Company*, 193 F.2d 156 (9th Cir. 1951); and *NLRB v. Sharpless Chemicals, Inc.*, 209 F.2d 645 (6th Cir. 1954).

[7] The facts relied upon by the Presiding Officer are contained in the various decisions and orders of the National Labor Relations Board, and the Federal and New York State courts, as well as Mr. Larsen's affidavit. Commission Rule 226, 46 C.F.R. 502.226, permits the taking of official notice of these decisions, thus mooting any challenges to the Presiding Officer's consideration of Mr. Larsen's affidavit. In any event, the matters allegedly rebutted by Mr. Peltzman's December 5, 1980 Reply were not relied upon nor pertinent to the Presiding Officer's basis for dismissal. Similarly, the Commission per-

Continued

The arguments that Complainant submits were not considered by the Presiding Officer relate primarily to the merits of his Complaint rather than the gravamen of the Motions to Dismiss, *i.e.*, the lack of Commission subject matter jurisdiction and the failure to state a claim upon which relief can be granted.

It is the absence of subject matter jurisdiction and the failure to state a claim upon which relief can be granted which mandates the dismissal of the Complaint. The essence of the Complaint is that certain collective bargaining agreements or their provisions require membership in the union as a condition to employment on Respondent's vessels. (Order at 11). These "union security" agreements or provisions are at the heart of the Complaint. Despite sweeping statements concerning the unlawfulness of the collective bargaining agreements in their entirety, the focus of the Complaint is:

> . . . directed *solely* to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements . . . placed on seamen who wish to enter the service of shipping companies . . . [Emphasis supplied] (Complaint, paragraph 17).

Complainant's grievance therefore addresses pure employer-employee/union matters which are not cognizable under the Shipping Act.[8] *See New York Shipping Association, Inc. v. Federal Maritime Commission*, 495 F.2d 1215, 1220 (2d Cir.), *cert. den.* 419 U.S. 964 (1974). *Cf. Federal Maritime Commission v. Pacific Maritime Association (PMA)*, 435 U.S. 40 (1978).[9]

This agency's jurisdiction attaches to the provision of common carrier services in the domestic offshore and foreign ocean trades of the United States.[10] Within the context of this proceeding, it is concerned with the regulation of *common carriers* subject to its jurisdiction, and not the individual seamen employed by those carriers.[11] The transpor-

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ceives no harm in the Presiding Officer's misreference to *Volkswagenwerk, supra*, because he properly noted the proposition relied on in a footnote (Order at 11). Moreover, it is irrelevant to the matter at issue whether Complainant was in fact previously aware of the Commission's jurisdiction over collective bargaining agreements (*Id.*).

[8] Such matters appear to fall within the province of the National Labor Relations Act.

[9] In *PMA*, the Supreme Court recognized that collective bargaining agreements could be subject to section 15 of the Shipping Act and found such an agreement so subject when it imposed terms relating to *employer* competition in providing transportation related services upon *employers* not members of a multi-employer bargaining unit.

[10] "The F.M.C. has no concern with so much of [a collective bargaining agreement] as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters." *New York Shipping Association, supra*, at 1220.

[11] This proceeding presents a factual situation far removed from the type of transportation practice growing out of collective bargaining agreements whereby carriers refuse to tender containers to certain classes of shippers or tender them only subject to additional charges, or from situations involving the imposition of charges by common carriers against the users of their transportation services to fund longshoremen's benefits, the usual situations in which our jurisdiction has come into play. *See e.g. Volkswagenwerk v. F.M.C.*, 390 U.S. 261 (1968); *New York Shipping Association, Inc. v. Federal Maritime*

Continued

tation activities of such carriers present Shipping Act considerations; their employment relationships, standing alone, do not.[12] It follows, therefore, that the Complaint does not allege matters which, if true, would establish a violation of the Shipping Act, 1916. The Complaint must accordingly be dismissed as a matter of law.

The language of sections 16 and 17, even if broadly construed, could not be interpreted to apply to Complainant's grievance. The Commission will therefore adopt the Presiding Officer's disposition of these allegations with the following clarification. After concluding that the Complaint does not state a cause of action under section 16, the Presiding Officer noted that:

> It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First - a section which was not intended to deal with the offenses alleged. (Order at 16).

Notwithstanding the last modifying phrase, this statement could suggest that once a particular agreement is determined to be "labor exempt" from the filing and approval requirements of section 15, the activities contemplated by the agreement are also immune from other sections of the Shipping Act, 1916. This result is inconsistent not only with the *BSA* decision relied on by the Presiding Officer, but with court decisions indicating that action which is "labor exempt" from the reach of section 15 may nevertheless be subject to section 16 of the Act. *See, e.g., Pacific Maritime Ass'n v. F.M.C.*, 543 F.2d 395, 410, 411, fn. 39

Commission, 495 F.2d 1215 (2nd Cir. 1974), *cert. den.*, 419 U.S. 964 (1974); *Transamerican Trailer Transport, Inc. v. F.M.C.*, 492 F.2d 617 (D.C. Cir. 1974); *New York Shipping Ass'n v. F.M.C.*, 571 F.2d 1231 (D.C. Cir. 1978); *New York Shipping Ass'n v. F.M.C.*, 628 F.2d 253 (D.C. Cir. 1980); *United States v. Sea-Land Service, Inc.*, 424 F.Supp. 1008 (D.N.J. 1977), *appeal dismissed*, 577 F.2d 730 (3rd Cir. 1978) (table), *cert. denied*, 439 U.S. 1972 (1979); *South Atlantic and Caribbean Line, Inc.*, 12 F.M.C. 237 (1969); Docket Nos. 73-17, *Sea-Land Service, Inc. and Gulf Puerto Rico Line, Inc. - Proposed Rules on Containers* and 74-40, *Puerto Rico Maritime Shipping Authority Proposed ILA Rules on Containers* 20 F.M.C. 788 (1978), pending appeal *sub nom. CONASA and NYSA v. F.M.C. and USA*, D.C. Cir. No. 78-1776.

[12] In *NAACP v. Federal Power Commission*, 425 U.S. 662 (1976), the Supreme Court ruled on the applicability of the public interest standard of the Federal Power Act, 41 Stat. 1063, and the Natural Gas Act, 52 Stat. 821, to employment practices of the regulated industry. In rejecting the contention that the public interest criterion authorized the Federal Power Commission to "concern itself with discriminatory employment practices on the part of the companies it regulates," the Court explained:

> This Court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation.
>
> For example, in the case of the Interstate Commerce Commission . . . the term "public interest" . . . is not a concept without ascertainable criteria but has a direct relation to the adequacy of transportation service. . . . (at 669, citations omitted).

The Court further stated:

> [I]t could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest" Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees. (at 671).

(D.C. Cir. 1976), *reversed on other grounds sub nom. F.M.C. v. Pacific Maritime Ass'n*, 435 U.S. 40 (1978); *F.M.C. v. Pacific Maritime Ass'n*, 435 U.S., *supra*, at 68, 74-75, 77 (dissent of Justice Powell). Accordingly, the Commission will not adopt the sentence quoted above from page 16 of the Order.

There is one final matter that warrants clarification. The Presiding Officer concluded that the Complaint is barred by the two-year statute of limitations in section 22 of the Act. The limitation in section 22, however, applies only to claims for reparation and does not act as a bar to requests for other relief. This fact is not significant here, however, because Complainant has not otherwise stated a claim upon which relief can be granted.

THEREFORE, IT IS ORDERED, That Complainant's Petition for Reconsideration is denied.

IT IS FURTHER ORDERED, That the March 13, 1981 Order of Dismissal in this proceeding is adopted by the Commission as modified and clarified above.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Chairman Green did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

DISMISSAL OF COMPLAINT

Adopted August 12, 1981

Complainant, Archie Peltzman, a "Marine Radio Officer," charges some 185 entities with depriving him of employment on certain vessels through "monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Association." Some of the respondents are named in the body of the complaint while the remainder are designated in four appendices to the complaint. Those named in the complaint appear to be the principal respondents and they are:

The American Maritime Association (AMA) and the Pacific Maritime Association (PMA) which are "the employers collective bargaining representatives, negotiating on behalf of the employers with the American Radio Association, and the Radio Officers Union and with other seamen's unions in the maritime industry for wages, pensions, and other benefits to be paid seamen employed on the vessels listed in Annex A, B, C" to the complaint.

The American Radio Association (ARA) and the Radio Officers Union (ROU) are both unions, which together represent "over ninety percent of the Marine Radio Officers in the maritime industry thereby controlling the entrance and continuity of employment in the trade by the restrictive hiring hall agreements negotiated with AMA and PMA." According to Mr. Peltzman, all "Radio Officers are hired through union hiring halls and continuity of employment is controlled by the restrictive 'closed shop' agreements with AMA and PMA."

The "American Federation of Labor-CIO (AFL-CIO) which is an association which has unions in the maritime field. . . ."

The remaining respondents are according to Mr. Peltzman "common carriers by water" subject to the Shipping Act "which have bargaining agreements with the unions and associations already named or with others named in appendix D to the complaint."

Mr. Peltzman states that the case "arises under section 15 of the Shipping Act, 1916, as amended" and recites the events leading up to the filing of the complaint as follows: [1]

> From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU, and did not file the agreements negotiated with the other maritime unions affiliated with the American Federation of Labor-C.I.O.
>
> In 1978 PMA filed an agreement with ARA which the Commission on August 18, 1978, granted a temporary exemption, which the complainant by telegram on November 30, 1978, and later by a letter giving reasons for such protest. PMA sought either approval pursuant to section 15 of the Act or exemption therefrom.
>
> AMA and PMA control and determine the amount to be assessed to each shipping company for the various funds of the unions, for the benefit of the individual shipping company employees as provided for under the collective bargaining agreement with the unions in the maritime industry.
>
> Pursuant to the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices, and tenure of employment for "union members" only, the complainant and other seamen similarly situated have been subjected to prejudice and disadvantage in violation of Section 16 of the Act, (B) constituted unjust and unreasonable regulations and practices in violation of section 17 of the Act, and (C) cause the agreement to be unjustly discriminatory and unfair as between "members" of the unions and "permit card members," all to the detriment of the commerce of the United States, and to be contrary to the public interest in violation of section 15 of the Act, and to the public policy of the Government as expressed in Taft-Hartley Act, Landrum-Griffin Act, and the Norris-Laguardia Act. Similarly the statutes enacted for the protection of seamen in Title 46 have been nullified by the bargaining agreement.
>
> This complaint is not directed to the amounts of wages or benefits which are agreed to be paid to seamen under the agreement. This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall agreements, and "union" membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to "join" a union or be discharged from employment if they do not "join" a union which has an exclusive preferential hiring hall agreement, commonly called a pre-hire, or closed

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[1] The numbers preceding the paragraphs in the complaint have been omitted. No other editorial changes have been made.

shop agreement, requiring membership as a condition of employment, or referral by a union as a condition of employment.

AMA and PMA are controlled by the shipping companies listed in Annex A, B, C. When raises and other benefits are negotiated the Maritime Administration pays the shipping companies a subsidy to cover these raises in pay and other benefits. This is done by the Government in order to strengthen and keep the Merchant Marine ready for any emergency, and to provide this country with commercial carriers to compete in world trade with foreign vessels, and to have a sufficient supply of seamen to man those vessels.

AMA and PMA and some independent shipping companies have caused the seamen who are not "union" members to be deprived of the benefits negotiated on their behalf, and thereby treated those seamen discriminatorily by discharging "non-union" employees, and offering only temporary employment to "non-union" employees.

Seamen employed by the bargaining agreement are employed on an industry wide basis, and the benefits of the agreement in respect to entry in the trade, continuity of employment, health, welfare, vacation, and pension benefits are restricted to "union members" to the detriment of the complainant and those similarly situated who are not "union members."

By way of illustration complainant was discharged from his employment as a Radio Officer on a Central Gulf Lines vessel, because of a lack of "clearance" from the American Radio Association, thereby violating not only his "permanent" assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he had accumulated in three and one half years of employment in the trade.

Many Captains, Mates, and Radio Officers of the American Export Lines were discharged because non-membership in the unions that Farrell Lines had a bargaining agreement with when Farrell Lines bought the American Export Line vessels.

Radio Officers of the Prudential Steamship Company lost their jobs when Farrell Lines bought those ships and required those American Radio Association members to join the Radio Officers Union or be discharged.

Unlicensed seamen on National Maritime Union and Seafarer's Union contract ships have been discharged and refused referral from the exclusive preferential hiring halls of these unions. Likewise seamen have been prevented from entering the trade because of the closed shop, pre-hire agreements in the maritime industry.

Respondents and the ARA and ROU unions have received subsidy payments from the Maritime Administration and have been unjustly enriched to the detriment of complainant and other seamen similarly situated in violation of the Shipping Act and seamen's statutes protecting seamen in their employment and entrance into the trade.

On the basis of the foregoing, Mr. Peltzman prays that the Commission (1) "declare that the bargaining agreements which were not filed until 1978 were illegal and could not be enforced against complainant and other seamen similarly situated before the agreement was filed and approved," (2) award reparations "retroactive from the date of discharge of complainant from the Central Gulf Lines vessel to the present, and continuing until rehired by Central Gulf Lines or triple damages because of the violation of the antitrust laws relating to monopoly in employment, . . ." and (3) determine "that insofar as the agreements call for an exclusive pre-hire preferential hiring hall referral system," and "union membership" as a condition of employment, the agreements, unless modified are unlawful and may not be approved. Finally Mr. Peltzman prays "that the Commission investigate the illegal hiring hall and training facilities in the maritime industry which are subsidized by the Maritime Administration, and order that the agreements be modified so as to conform to the requirements of sections 15, 16 and 17 of the Act."

Before dealing with the merits of the various motions now before me, a summary of what one respondent has called Mr. Peltzman's "legal odyssey" is necessary to any understanding of the complaint in this case. The facts set forth below are taken from an unchallenged affidavit of Mr. C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal courts. Official notice is taken of those decisions and orders pursuant to Rule 226 of the Commission's Rules of Practice and Procedure. The affidavit, orders and decisions can be found in the Appendix to Central Gulf's Motion to Dismiss Complaint.

Mr. Peltzman was first employed by Central Gulf in May 1970 as a radio operator on the *SS Green Ridge* and completed three voyages aboard the vessel. Then and since, Central Gulf employed radio operators on its vessels under agreements with the American Radio Association, a union of radio operators.[2] All of these agreements contained a "union security clause" which provides:

> (b) The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring.

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[2] The current agreement between Central Gulf and the Association became effective June 16, 1978, and expires June 15, 1981. There have been and there are now no other agreements between Central Gulf and anyone else concerning the employment of radio operators.

In May 1971, the Association advised Central Gulf that Mr. Peltzman had not paid his union initiation fees and on May 28, 1971, Central Gulf told Mr. Peltzman that because of its agreement with the Association, he would "not be able to rejoin the vessel without prior clearance from the union." In September of 1971, Mr. Peltzman filed charges with the National Labor Relations Board (NLRB) alleging that the union's refusal to clear him for employment on a central Gulf vessel and Central Gulf's subsequent refusal to employ him were unfair labor practices in violation of the National Labor Relations Act. He also charged the union with violating the National Labor Relations Act because of the Union's refusal to enroll him in "the industry school," which refusal was allegedly based solely on the fact that Mr. Peltzman was not a union member.

On October 26, 1971, the NLRB's Region 2 found Mr. Peltzman's charges to be without merit saying:

> The evidence does not tend to establish that the . . . Union violated the National Labor Relations Act. The evidence establishes that pursuant to a valid Union security agreement you were obligated to pay an initiation fee to the Union which you refused to do after notification by the Union that such fees were due. Under such circumstances the refusal by the Union to refer you to your former permanent position aboard the *S.S. Green Ridge* was permissible.
>
> Insofar as the charge alleges that you were not enrolled in the industry school because of your lack of membership in the Union, the evidence does not support such claims, inasmuch as you failed to qualify for admission to the course for which you sought enrollment and admission to the school is not limited to Union members. (Central Gulf Appendix, page 8.)

The findings of Region 2 were confirmed by the NLRB's General Counsel and Mr. Peltzman's appeals from those decisions were unsuccessful. (*Peltzman v. NLRB*, 2d Cir., Dkt. No. 70-1091, unreported orders of dismissal and rehearing contained in Central Gulf Appendix pages 15 and 16; *certiorari denied*, 409 U.S. 887; *rehearing denied*, 409 U.S. 1050.)

It appears that at the same time Mr. Peltzman was seeking relief from the NLRB, he was pursuing other remedies in the courts of New York State where he sought to enjoin the union and collect damages for the termination of his employment on Central Gulf vessels. These actions were dismissed because the subject matter was within the exclusive jurisdiction of the NLRB. *Peltzman v. American Radio Association*, 69 Misc. 2nd 17, 327 N.Y. Supp. 2d 505 (1971); *affirmed*, 40 A.D. 2d 631 (N.Y. Supp. Ct. App. Division 1971), 335 N.Y. Supp. 2d 998 (1971); *certiorari denied*, 411 U.S. 916; *rehearing denied*, 411 U.S. 977 (1973).

Having been turned down by the NLRB and the New York courts, Mr. Peltzman then filed suit against Central Gulf in the United States

District Court for the Southern District of New York but again the result was the same with the Supreme Court denying rehearing in 1976.[3] The gravamen of Mr. Peltzman's action in the District Court was described by the Court of Appeals as consisting of ". . . a myriad of claims . . . based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement. . . ." The Court disposed of the claims saying:

> Most of Peltzman's arguments can be dealt with summarily. Nothing in maritime law renders illegal a discharge that is authorized under a legitimate union security clause. There is no colorable basis for an antitrust claim. The security clause here is not subject to attack under the federal or New York constitutions . . . And any claim that the company committed an unfair labor practice in discharging him would plainly be subject to the exclusive jurisdiction of the NLRB.

The record does not disclose what other actions, if any, Mr. Peltzman might have taken during the period from 1976 when the Supreme Court last denied rehearing to October of last year when he filed this complaint with the Commission. Motions to dismiss Mr. Peltzman's complaint have been filed by or on behalf of virtually every respondent in the case. The arguments for dismissal run from the complaint being barred through lack of jurisdiction over some of the respondents to failure to state a cause of action.

Before getting to the merits of the various substantive grounds for dismissal a word or two should be said about a procedural ground which has been argued by a number of respondents, i.e. that the complaint fails to meet the requirements of Rule 62 of the Commission's Rules of Practice and Procedure. That rule requires that complaints contain, (1) a concise statement of the cause of action, (2) a request for relief or other affirmative action sought, and (3) identification of ports of origin and destination and other particulars of shipments when reparations are sought. The main thrust of the procedural argument is that the complaint utterly fails to concisely state the cause of action—the complaint is so confusingly drafted that respondents are virtually reduced to divination to find what violations they are charged with.

Mr. Peltzman, who is appearing without counsel, has, it must be admitted, been somewhat less than lucid in stating his grievance. However, the various motions to dismiss demonstrate that the respondents have little doubt as to the precise nature of Mr Peltzman's charges.

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[3] *Peltzman v. Central Gulf Lines, Inc.*, 86 L.R.R.M. 2127, not officially reported; *affirmed in part and remanded for a single fact determination*, 497 F.2d 332 (2d Cir. 1974) *decision on remand*, 88 L.R.R.M. 2924, not officially reported; *affirmed*, 523 F.2d 96 (2nd Cir. 1975), *certiorari denied*, 423 U.S. 1974 (1976); *rehearing denied*, 424 U.S. 979 (1976). These decisions can be found in the Central Gulf Appendix pages 17-26.

Moreover, were the complaint defective for its lack of clarity, the appropriate remedy would not be dismissal but leave to amend.

Two statements in the complaint provide the key to the nature of Mr. Peltzman's grievance. First Mr. Peltzman describes himself as a "Marine Radio Officer . . . who has been deprived of employment on [certain] vessels . . . due to the monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Assn. with the American Radio Association, and the Radio Officers Union." And later in the complaint Mr. Peltzman states, "This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and union membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to join a union or be discharged from employment if they do not join a union which has an exclusive preferential hiring hall agreement, commonly called a prehire or closed shop agreement. . . ."

From this it is clear that the real grievance of Mr. Peltzman is the requirement that he join a union before he can be employed as a radio officer on the vessels of those shipping companies which have union contracts containing closed shop or union security clauses. It is equally clear that Mr. Peltzman feels that the Commission's jurisdiction over this grievance is to be found in section 15 of the Shipping Act.[4] Mr. Peltzman is also aware that since 1968, the Commission has exercised jurisdiction, albeit expressly limited, over some provisions of collective bargaining agreements for in a reply to the motions to dismiss he cites *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).[5] Thus the question becomes does or can whatever jurisdiction the Commission has or had over labor-management agreements extend to provisions which establish union membership as a condition precedent to employment as a radio officer in the U. S. Merchant Marine. While it is unnecessary to review the complete history of the Commission's involvement in labor agreements, some consideration of the leading cases is necessary to show just why Mr. Peltzman's complaint is without the Commission's jurisdiction.

In 1965 the Commission issued its decision in *Volkswagenwerk Aktiengesellschaft v. Marine Terminals*, 9 F.M.C. 77. Volkswagen's complaint in that case charged that the agreement between members of the Pacific Maritime Association (PMA) establishing the method of assessing cargoes for contributions to pay their obligations under an agreement with

[4] In paragraph 9 of his complaint Mr. Peltzman states, "This proceeding arises under Section 15 of the Shipping Act, 1916, as amended, 46 USC Sec. 814."

[5] Mr. Peltzman cites *Volkswagen, supra*, solely for the proposition "that the public interest is violated by this type of agreement," i.e. closed shop.

the International Longshoremen's and Warehousemen's Union (ILWU) violated section 15 of the Shipping Act.[6]

In 1960 the ILWU agreed to the introduction of labor saving devices and the elimination of certain restrictive work practices. In return the PMA agreed to create a $29,000,000 "Mechanization and Modernization Fund" to be used to mitigate the impact upon employees of technological unemployment. The agreement specifically reserved to the PMA alone the right to determine how to raise the Fund from its members. PMA decided to raise the money for the fund by an assessment on each revenue ton of cargo handled.

Volkswagen in its action before the Commission charged that the method of allocating the assessment was discriminatory as applied to its automobiles and that the agreement itself was unenforceable because it had not been filed with or approved by the Commission under section 15 of the Shipping Act. The Commission dismissed the complaint concluding it was not the kind that required filing under section 15. The Court of Appeals affirmed the Commission and the case then went to the Supreme Court. The Supreme Court reversed the Commission finding that the agreement did fall within the ambit of section 15 and after reaching their conclusion the Court went on to say:

> It is to be emphasized that the only agreement involved in this case is the one among members of the Association [PMA] allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of section 15. Those agreements reflecting the national labor policy of free collective bargaining by representatives of the parties own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiation with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement affecting only relationships among Association members and their customers, is all that there is before us in this case.

Several points are clear from the Court's decision: (1) the agreement in question was between persons subject to the Act, (2) the agreement has

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[6] PMA is an employer organization of some 120 principal common carriers by water, stevedoring contractors and marine terminal operators representing the Pacific Coast shipping industry. The primary function of PMA is to negotiate and administer collective bargaining agreements with unions representing its member's employees of which the ILWU is one.

a direct impact upon persons protected by the Act, i.e. shippers, and (3) the agreement was not a collective bargaining agreement reflecting the national labor policy which is the exclusive concern of the NLRB. The Supreme Court's decision in Volkswagen faced the Commission with the problem of "reconciling or accommodating Shipping Act policies with labor act policies." The Commission dealt with the problem in *United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7 (1972). In that case, the Commission decided to apply the so-called "labor exemption" to certain agreements which might otherwise fall under section 15.

The labor exemption was created as a means of accommodating the national policies embodied in the antitrust laws and the labor laws. The labor exemption rendered "pure" collective bargaining agreements immune from attack under the antitrust laws. The Commission found the analogy to a labor exemption from the shipping laws "obvious," and after a review of the leading cases on the labor exemption from the antitrust laws, the Commission developed the following criteria to be used in granting "labor related" agreements a labor exemption from the "shipping laws":

> 1. The collective bargaining agreement which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball."
>
> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
>
> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management. (16 F.M.C. 13).

Application of these criteria to the agreements Mr. Peltzman says violate the Shipping Act clearly demonstrates that the agreements come under the labor exemption and thus are immune from challenge under the Shipping Act.[7]

First, there is no allegation that the agreements were not the product of "arms length" or "eyeball to eyeball" bargaining.

Second, the challenged provisions are mandatory bargaining subjects. *NLRB v. General Motors*, 373 U.S. 734 (1963); *Onieta Knitting Mills v.*

[7] Mr. Peltzman refers to only two agreements with anything approaching specificity—"From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU. . . ." There are a number of unclear references to other "agreements."

NLRB, 375 F.2d 385 (4th Cir. 1967). "Closed shop" or union security clauses are proper union concerns and are primarily and commonly associated with a bona fide labor purpose.

Third, the result of the challenged clause in the collective bargaining agreements does not impose terms on entities outside the bargaining group which are protected by or subject to the provisions of the Shipping Act.

Fourth, there is no allegation that the unions were or are acting at the behest or in combination with nonlabor groups, i.e. there is no conspiracy with management. Even if a conspiracy were alleged it would of necessity deal with matters which are the exclusive concern of the NLRB and beyond the jurisdiction of the Federal Maritime Commission.

Thus, since at least 1972, the allegedly unlawful agreements have or would if challenged, been exempt from and therefore immune to any attack under section 15 of the Shipping Act, 1916. In other words, since at least 1972, the labor exemption has applied to agreements of the kind challenged by Mr. Peltzman and the Commission since then has lacked jurisdiction over the subject matter of those agreements.

Mr. Peltzman also alleges that the agreements violate section 16 and 17 of the Act.[8] Section 16 First provides:

> 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:
>
> 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. (46 U.S.C. 815).

Though broadly worded, section 16 is clearly directed to the obligations of common carriers and other persons subject to the act to users of their services, i.e., the shipping public. See e.g. *Armstrong Cork Co. v. American Hawaiian SS Co.*, 1 U.S.M.C. 719 (1938); *Huber Mfg. Co. v. N.V. Stoomvart "Nederland,"* 4 F.M.B. 343, 347 (1953); *Afghan-American Trading Co. v. Isbrandtsen Co.*, 3 F.M.B. 622, 623 (1951); *Port of New York Authority v. AB Svenska*, 4 F.M.B. 202, 205 (1953); and *Pittston Stevedoring Corp. v. New Haven Terminal Inc.*, 13 F.M.C. 33, 35 (1969). Mr. Peltzman's charge is that he has been subjected to "prejudice and disadvantage in violation of section 16" because of "the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices, and tenure of employment for 'union members'

[8] It must be assumed that Mr. Peltzman is relying on section 16 First since no other section is even remotely applicable to the complaint.

only. . . ." It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First—a section which was not intended to deal with offenses alleged.

Mr. Peltzman alleges that closed shop or union security clauses in bargaining agreements "constitute unjust and unreasonable regulations and practices in violation of Section 17 of the Act, and cause the agreement to be unjustly discriminatory as between 'members' of the union and 'permit card members'. . . ." A simple reading of the language of section 17 shows that it has no applicability to the grievances of Mr. Peltzman.

The regulations and practices which section 17 requires to be just and reasonable are those "relating to or connected with the receiving, handling, storing or delivery of property." They clearly do not apply to the terms and conditions under which a common carrier will employ a "radio officer." The unjust discrimination forbidden by section 17 is discrimination in rates between shippers and ports. Again a condition not even remotely concerned with the employment of radio officers.

Finally, the complaint is time-barred by the two-year period of limitation in section 22 of the Act. The single allegation of harm is contained in paragraph 21 of the complaint where Mr. Peltzman says:

> . . . complainant was discharged from his employment as a Radio Officer on a Central Gulf Line vessel, because of lack of "clearance" from the American Radio Association, thereby violating not only his "permanent" assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he accumulated in his three and one half years of employment in the trade.

The record demonstrates that the discharge Mr. Peltzman is referring to took place in 1971.[9] Mr. Peltzman's cause of action, if he had one, arose with his "discharge from employment" in May of 1971 when Central Gulf terminated his employment because of Peltzman's refusal to pay his union initiation fees. Additionally in a letter reply to some of the motions to dismiss Mr. Peltzman argued that the motions "do not reach the thrust or substantive allegations in the complaint" which allege in essence:

> 1. Illegal bargaining agreements not filed by the defendants in violation of the Shipping Act from 1948 to 1977.

Again this alleged violation is time-barred by section 22 of the Act.

[9] See affidavit of C. S. Larsen and the decisions in *Peltzman v. Central Gulf Lines Inc.*, 497 F.2d 332 (CA2, 1974); *Peltzman v. NLRB*, 409 U.S. 877, *reh. denied*, 409 U.S. 1050; *Peltzman v. American Radio Assoc.*, 327 N.Y. Supp. 2d 505 (1971), *affirmed*, 40 A.D. 2d 631 (N.Y. Sup. Ct. App. Div. 1971); 335 N.Y. Supp. 2d 998 (1971) (App 35); *cert. denied*, 441 U.S. 916 (1973), *reh. den.*, 411 U.S. 977 (1973).

The complaint of Mr. Archie Peltzman fails to state a cause of action upon which relief can be granted and is time barred. The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-21
INDEPENDENT OCEAN FREIGHT FORWARDER
LICENSE NO. 1778;
CRESCENT NAVIGATION, INC.

ORDER ADOPTING INITIAL DECISION

August 13, 1981

This proceeding was instituted by Order of Investigation and Hearing served April 11, 1980 to determine whether Crescent Navigation, Inc. (Crescent) violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. 815), and sections 510.23(c), 510.23(d), 510.23(h) and 510.24(a) of the Commission's General Order 4 [1] on certain shipments

[1] Section 16, Initial Paragraph provides:

> That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable.

On May 1, 1981 the Commission's General Order 4 was substantially revised and reissued. (46 FR 24565). All references to General Order 4 herein reflect the numbering and wording of the regulations prior to revision.

Section 510.23(c), General Order 4 (46 C.F.R. 510.23(c)) provided:

> A licensee who has reason to believe that a principal has not, with respect to a shipment to be handled by such licensee, complied with the law 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 his principal promptly of the suspected noncompliance, error, misrepresentation or omission, and shall decline to participate in such transaction involving such document until the matter is clarified.

Section 510.23(d) of General Order 4 (46 C.F.R. 510.23(d)) provided:

> Every licensee shall exercise due diligence to ascertain the correctness of any information which he imparts to a principal with reference to any forwarding transaction; and no licensee shall knowingly impart to a principal or oceangoing common carrier false information relative to any such transaction.

Section 510.23(h) of General Order 4 (46 C.F.R. 510.23(h)) provided:

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

Section 510.24(a) of General Order 4 (46 C.F.R. 510.24(a)) provided:

> No oceangoing common carrier shall pay to a licensee, and no licensee shall charge or receive from any such carrier, either directly or indirectly, any compensation or payment of any kind whatsoever, whether called "brokerage", "commission", "fee", or by any other name, in connection with any cargo or shipment unless the name of the actual shipper is disclosed on the shipper identification line appearing above the cargo description data of the ocean bill of lading, and, if the forwarder's name also appears on said shipper identification line, it appears after the name of the actual shipper.

for which Crescent prepared bills of lading and which: (1) were misrated due to a misstatement of measurement; or (2) did not state the name of the actual shipper. The Commission's Order also put at issue whether, as a result of such activity, Crescent's freight forwarder license should be revoked or suspended pursuant to section 44(d) of the Shipping Act, 1916 (46 U.S.C. 841b(d)) and section 510.9(e) of General Order 4.[2] Administrative Law Judge Paul J. Fitzpatrick issued an Initial Decision finding no violations of section 16, Initial Paragraph or section 510.23(c) of General Order 4 but assessing a $10,000 penalty on the basis of violations of sections 510.23(a), 510.23(h) and 510.24(d). The Presiding Officer held, however, that the nature of the violations found did not warrant suspension or revocation of Crescent's freight forwarder license. Crescent has filed Exceptions to the Initial Decision and the Commission's Bureau of Investigation and Enforcement (BIE) has filed a Reply to those Exceptions.

THE INITIAL DECISION

The Presiding Officer concluded that Crescent's handling of eight shipments, which were misrated based on a misstatement of measurement, did not violate the Shipping Act or General Order No. 4. He found that the misstatement of measurement on the shipments of identical excavators exported by FMC Corporation to Turkey, between May of 1977 and August of 1977, was the result of the shipper's failure to provide Crescent with packing lists reflecting the equipment's proper measurements, including the measurements of a gantry assembly attached to each excavator. The Presiding Officer determined that Crescent prepared the bills of lading for the shipments from information appearing on the packing lists and had no knowledge of the misstatements until so advised by one of the carriers transporting the shipments. It was also noted that Crescent took immediate corrective action after learning of the error.

The Presiding Officer, therefore, concluded that the evidence failed to establish that Crescent "knowingly and wilfully" caused the cargo to be misrated. Although certain deficiencies in Crescent's handling of the shipments were noted, these failures were found to fall short of a

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[2] Section 44(d) provides:

> Licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided. Any such license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended or revoked for willful failure to comply with any provision of this Act, or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Section 510.9(e) of General Order 4 (46 C.F.R. 510.9(e)) provided:

> A license may be revoked, suspended, or modified after notice and hearing for any of the following reasons: . . . (e) Such conduct as the Commission shall find renders the licensee unfit or unable to carry on the business of forwarding.

violation of section 16. Similarly, it was found that none of the provisions of General Order 4 were violated by Crescent's handling of these eight shipments, again because of a failure to prove *scienter*.

The Presiding Officer did find that Crescent violated section 510.23(d) of General Order No. 4 on 27 occasions in its handling of 33 shipments between July 9, 1976 and June 16, 1978 by receiving compensation for bills of lading it prepared which did not name the actual shipper.[3] He found that when these bills of lading were prepared, naming Far Eastern Forwarding Company (Far Eastern) as the shipper, Crescent knew or should have known that the actual shipper was New World Research Corporation (New World). The Presiding Officer held that this enabled New World to avoid its obligations under a dual rate contract with the Far East Conference on shipments to Taiwan. As a result, the Presiding Officer found that Crescent had violated section 510.23(h) on 29 of the 33 occasions by assisting in filing documents which it knew or should have known were false or fraudulent and had violated section 510.23(d) on all 33 occasions by knowingly imparting to a carrier false information regarding shipments it had handled.

In finding that Crescent knew or should have known that Far Eastern was an instrumentality of New World and that New World and not Far Eastern was the actual shipper in these transactions the Presiding Officer relied upon the following evidence: (a) New World paid the freight charges for Far Eastern; (b) correspondence and shipping documents received by Crescent from third parties concerning Far Eastern shipments referred to New World as the shipper; (c) Far Eastern and New World had the same office address and telephone number; (d) shipping instructions for Far Eastern were received on New World letterhead, (e) freight charges for Far Eastern shipments were invoiced to New World; (f) Crescent's files for New World contained Far Eastern bills of lading; (g) some of New World's bills of lading had Far Eastern written in the margin and (h) the president of Far Eastern, Mr. Peter Pai, testified that he had told the president of Crescent, Mr. Robert Arciero, that Far Eastern was established to ship New World shipments on nonconference vessels. The Presiding Officer found that the use of this device saved New World approximately $8,000 in freight charges.

For the violations found, the Presiding Officer assessed a civil penalty of $10,000, noting that a total of 89 violations had been proven for which a maximum potential civil penalty of $89,000 could be assessed. The violations were not found to be of such a nature, however, to warrant suspension or revocation of Crescent's license.

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[3] The Presiding Officer found that Crescent did not receive compensation for six of the 33 shipments, and therefore could not have violated section 510.23(d) on those occasions.

POSITION OF THE PARTIES

In Exceptions to the Initial Decision, Crescent submits that the $10,000 civil penalty assessed by the Presiding Officer is excessive and is based upon an erroneous finding that Crescent knew or should have known that the shipments of Far Eastern were actually those of New World.

Crescent alleges that there is no evidence of record supporting a conspiracy between it and New World and that this case is the first time that a forwarder has been held to be responsible for the actions of the shippers it serves. Crescent contends that its president came into contact with the two shippers through two different individuals and that the interaction between the two firms evolved gradually over an extended period of time. This is allegedly supported by the fact that two different rates of compensation were negotiated for the two entities.

Crescent also argues that there is insufficient evidence upon which the Presiding Officer could find that it knew or should have known of the identity of interests between Far Eastern and New World. Moreover, it is pointed out that the consignees of Far Eastern were government agencies of Taiwan and required the use of its national-flag vessels.

Alternatively, Crescent argues that, even assuming a violation of the Commission's regulations has been shown, such violation is one of "omission" and not of "commission", and that there are significant facts in mitigation presented on the record, to wit: (a) the alleged violations only indicate negligence on the part of Crescent; (b) no harm to shippers or the public has been shown; (c) the allegedly violative practice was discontinued by 1978; (d) the president of Crescent has a history of 15 years of forwarding without any violations and (e) Crescent fully cooperated in the Commission's investigation. Crescent alleges that the instant situation is less serious than one involving forwarding without a license and accordingly, the penalty of $10,000 is unjustified and punitive.

In its Reply to Exceptions, BIE alleges that the preponderance of evidence shows that Crescent knew or should have known that Far Eastern was in fact an instrumentality of New World and, accordingly, violated General Order No. 4 by preparing documents which did not reflect the actual shipper. BIE cites basically the same evidence relied upon by the Presiding Officer in support of his finding and requests the Commission to uphold the Initial Decision.

BIE does not believe that the Presiding Officer's findings are undermined by Crescent's allegation that its contact with Far Eastern and New World was made with two different individuals because New World is a large entity and would logically have separate personnel on different shipments. Similarly, it is argued that the record does not support the allegation that the consignee directed which carriers were to be used.

BIE supports the $10,000 penalty assessed against Crescent. First, it states that Crescent committed 89 separate violations of General Order 4 and could have been assessed an $89,000 penalty. Furthermore, BIE submits that the Commission's regulations are intended to require the utmost integrity by forwarders and mandate careful scrutiny of a forwarder's business relations due to the intermediary rôle that forwarders perform in transferring large sums of money between shippers and carriers. BIE concludes that Crescent has failed to meet the responsibilities of a forwarder.

DISCUSSION

Having reviewed the Initial Decision, Exceptions and Replies to Exceptions in light of the evidence of record in this proceeding, the Commission has determined that the Presiding Officer's decision is correct both in law and in fact. That decision is therefore adopted by the Commission with the clarification discussed below.

Much of the disagreement between the parties to the proceeding concentrated on whether Far Eastern and New World were separate corporations. There is conflicting evidence of record on this issue. The Presiding Officer did not resolve whether Far Eastern has a separate corporate existence from New World, nor does the Commission believe it was necessary for him to do so. The critical determination that must be made here is whether Crescent knew or should have known that New World and not Far Eastern was the actual shipper. The Presiding Officer found that it did and the Commission agrees.

Although a separate fee for shipments under the name of Far Eastern was negotiated, New World was viewed by all parties to the forwarding transactions as the entity which ultimately bore the responsibility for the essential elements of those transactions. Of particular significance is the fact that shipper instructions were received on New World's letterhead and that New World was invoiced for the shipments in question and paid the freight charges on those shipments. Moreover, correspondence and shipping documents received by Crescent from third parties refer to New World as the shipper. The only involvement of Far Eastern appears to be the use of its name on the bills of lading for shipments moving to Taiwan. Accordingly, there is sufficient evidence to conclude that the actual shipper was New World and that Crescent knew or should have known this fact.

Once it has been determined that Crescent knew or should have known that New World was the actual shipper in these transactions, the violations of 46 C.F.R. 510.23(h) and 510.23(d) have been established. The misrepresentation of the shipper on the bills of lading was false information which Crescent imparted to the carriers which ultimately transported the shipments. This constituted a clear violation of section 510.23(d). Similarly, the false information appeared on export declarations signed and certified by Crescent as true and accurate and filed with the United States Customs Service in violation of section 510.23(h).

The amount of the civil penalty assessed by the Presiding Officer is not unreasonable. The number of violations found to have been committed by Crescent exposes it to a potential penalty of $89,000. The "omission" rather than "commission" argument of Crescent is without merit. The Commission's regulations impose duties and obligations on Crescent, and its passive failure to conform with the requirements of law is as serious a matter as affirmative actions in violation of the law. Crescent has not argued financial hardship and the volume of their business would indicate that a $10,000 penalty would not impose an undue burden on the firm.

THEREFORE, IT IS ORDERED, That the Exceptions of Crescent Navigation, Inc., are denied; and,

IT IS FURTHER ORDERED, That the Initial Decision served in this proceeding on April 14, 1981, is adopted and made a part hereof;

IT IS FURTHER ORDERED, That the Respondent, Crescent Navigation Inc., shall contact the Office of Hearing Counsel within 20 days of service of this Order to discuss the form and manner of payment of the civil penalty imposed by this decision; and

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

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-21
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1778;
CRESCENT NAVIGATION, INC.

Respondent found to have violated provisions of the Commission's General Order 4 (46 C.F.R. Part 510), which regulates the conduct of independent ocean freight forwarders. Civil penalty assessed.

Carlos Rodriguez for respondent.

Polly Haight Frawley, Aaron W. Reese, Paul J. Kaller, and *John Robert Ewers* for the Commission's Bureau of Investigation and Enforcement.

INITIAL DECISION [1] OF PAUL J. FITZPATRICK, ADMINISTRATIVE LAW JUDGE

Adopted August 13, 1981

This investigation was instituted by the Commission's Order of Investigation and Hearing (Order) served April 11, 1980. Basically, two dissimilar forwarding activities by Crescent Navigation, Inc. (respondent or Crescent), of 30 Vesey Street, New York, N.Y., are placed under investigation. The Order states that Crescent, an independent ocean freight forwarder operating pursuant to FMC License No. 1778 (effective April 20, 1976), may have violated section 16, Initial Paragraph, of the Shipping Act, 1916 (46 U.S.C. 815) (the Act), and provisions of the Commission's General Order 4. The seven issues posed in the Order embrace the claimed violations and seek determination as to (1) whether civil penalties should be assessed, and (2) whether Crescent's license should be revoked or suspended.[2] The Bureau of Hearing Counsel,

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

[2] The Order lists the following as the issues to be determined:

1. Whether Crescent has violated section 16, Initial Paragraph of the Shipping Act, 1916, by knowingly and wilfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means obtained or attempted to obtain transportation by water for property at less than the rate or charges which would otherwise be applicable;
2. Whether Crescent has violated section 510.23(c) of General Order 4, by participating in a forwarding transaction involving an export declaration, bill of lading, affidavit or other paper executed by its principal in connection with a shipment handled by Crescent, in which Crescent had reason to believe the principal made an error or misrepresentation or omission;

Continued

now the Bureau of Investigation and Enforcement (Bureau), presented six witnesses and Crescent one at the hearing held in New York City on October 1-2, 1980. Briefs were filed by the parties.

In evaluating Crescent's conduct relating to discrepancies between cargo measurements on bills of lading and measurements appearing on packing lists (Issues 1-4), the Bureau concludes that "The evidence developed in the record of this proceeding shows that Crescent's involvement in these eight shipments did not violate the Shipping Act, 1916, or General Order 4." The other type of conduct under investigation, involving instances where the actual shipper's name did not appear on the bills of lading, the Bureau submits that: (1) the record demonstrates a violation of certain provisions of General Order 4; (2) Crescent should be assessed civil penalties in the amount of $10,000; and (3) the facts do not warrant suspension or revocation of its license. Respondent concludes that the Bureau "fairly evaluated the record and the law on the issues related to the [discrepancies in the cargo measurement] shipments" but disagrees that the record reflects any other violations or supports an assessment of civil penalties. The two types of possible violations will be treated separately.

(1) ALLEGATIONS OF MISMEASUREMENT

As noted above, the Bureau concludes that Crescent's involvement in the allegations of mismeasurement in eight shipments did not violate the Shipping Act, 1916, or General Order 4. A review of the proposed findings of fact submitted by the parties reveals that the findings proposed by the Bureau, by and large, are uncontested and set forth a

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3. Whether Crescent has violated section 510.23(d) of General Order 4, by not exercising due diligence to ascertain the correctness of any information which it imparts to a principal and by knowingly imparting to an oceangoing common carrier false information relative to a forwarding transaction;
4. Whether Crescent has violated section 510.23(h) of General Order 4, by filing or assisting in the filing of any paper or document with respect to a shipment handled by Crescent which it had reason to believe was false or fraudulent;
5. Whether Crescent has violated section 510.24(a) of General Order 4, by charging or receiving from an oceangoing common carrier any compensation or payment of any kind whatsoever in connection with any cargo or shipment for which the name of the actual shipper was not disclosed on the shipper identification line of the ocean bill of lading;
6. Whether Crescent should be assessed civil penalties pursuant to section 32 of the Shipping Act, 1916, if it is found to have violated section 16, Initial Paragraph, of the Shipping Act, 1916, and/or provisions of General Order 4, and, if so, the amount of such penalties which should be imposed taking into consideration factors in possible mitigation of such a penalty;
7. Whether Crescent's independent ocean freight forwarder license should be revoked or suspended pursuant to:
   a. section 44(d), Shipping Act, 1916, for willful violations of the Shipping Act, 1916, the Commission's Orders, Rules or Regulations, or both;
   b. section 510.9(e) of General Order 4 for conduct which renders the licensee unfit to carry on the business of forwarding.

convincing basis for the conclusions to be drawn. Accordingly, they will be adopted here with some slight modifications.

(A) FINDINGS OF FACT

1. Mr. Robert Arciero, the President of Crescent, formed his company in April 1976. As to activities under consideration here, Crescent performed freight forwarding services on eight shipments between May 1977 and August 1977. The exporter, FMC Corporation, was the same in each instance as was the consignee in Turkey. Shipments one, two and seven were transported by Turkish Cargo Lines and the remainder by Prudential Lines, Inc. (Prudential). (Ex. 1, Attachments 1-8.)

2. The cargo was the identical type of excavator, Model HC78B, although a variance existed in the number of excavators in the shipments. The excavators were subject to standardized packing. (Ex. 1, Attachments 1-8, and Tr. 110.)

3. The freight rate for the eight shipments was $95.00 for weight (2240 pounds) or measurement (40 cubic feet). (Tr. 84.) [3]

4. The dimensions of piece #1 of the excavator exported were 108 inches wide, 314 inches long and 149 inches high, or 2924 cubic feet. (Ex. 7, Tr. 124, 129-30.)

5. The bills of lading were rated on the basis of machines for which the dimensions of piece #1 were 108 inches wide, 314 inches long and 139 inches high or 2728 cubic feet. (Ex. 1, Attachments 1-8, Tr. 49-50.)

6. Mr. Yilmaz Cetin, Vice-President of Crescent during this period, was responsible for performing freight forwarding services for the shipments.

7. Mr. Cetin testified that he always sent a copy of the packing list which had been supplied by FMC Corporation to the steamship company. Because the packing lists were similar, he sent only one copy to the carrier and that copy was the first packing list in the "export reference" box on the bill of lading. (Tr. 119, 131, 142.)

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[3] Respondent disagrees that there is an acceptable basis for Nos. 3 and 5. The claim is made that such data should be obtained only from the appropriate tariff. The objections raised fall into two areas: (1) that respondent withdrew its earlier discovery request (seeking the tariff pages) on the basis of the Bureau's representation; and (2) that respondent had a right to verify the accuracy of the oral testimony relating to tariff rates under the best evidence rule and the Commission's Rules of Practice and Procedure. A fair reading of the Bureau's representations made at the time of the prehearing conference (May 20, 1980, Tr. 1823) reflects that the tariff pages for each shipment would not be produced as evidence by the Bureau because of an understandable inability to determine the rate at that time. The discussion related to tariff pages only. Furthermore, neither the applicable tariff rate nor the application of the proper tariff rate should be considered essential to the overall determination here since the issues relate to the alleged misdescription of cargo measurements. The witness who addressed the topic of rates was particularly qualified to testify concerning the applicable tariff rate and certainly more so than Commission personnel who would lack the information concerning the movement of cargo under a project rate. Certainly, respondent had the opportunity to request permission to file a late-filed exhibit reflecting the applicable tariff rate in the event the testimony of this witness was inaccurate. It did not pursue that avenue of evidentiary relief.

8. The packing lists for the first four shipments listed the height of piece #1 as 139 inches and those for the last three shipments as 149 inches. The list for the fifth shipment provided both heights. (Ex. 1.)

9. The first packing list listed in the "export reference" box on the fifth bill of lading and reflected the height of piece #1 as 149 inches. (Ex. 1, Attachment 5.)

10. Shipments one, two and seven were rated on the basis of a letter from FMC Corporation to Thule Ship Agency, Inc. (Thule), general agent for Turkish Cargo Lines, which indicated the height of piece #1 to be 139 inches. (Ex. 12, Tr. 88-89.)

11. Thule did not receive packing lists from Crescent for shipments which moved under certain bills of lading. (Ex. 1, Attachments 1, 2 and 7, Tr. 90, 101.) If it had received packing lists, it would have used the weights and measurements supplied to rate the bills of lading. (Tr. 90.)

12. Prudential contacted Crescent when it discovered that the measurements of the cargo being transported under Bill of Lading No. 3 of June 25, 1977 (Ex. 1, Attachment 3), did not conform to the dimensions specified on the packing list. The discovery resulted when the hatch on its lash barge would not close. Crescent informed Prudential not to process the bill of lading until it confirmed the measurements with the shipper. Crescent then confirmed that the packing list contained an error and the actual measurement of piece #1 was 149 and not 139 inches high. Crescent then authorized Prudential to process the bill of lading based upon the correct measurements rather than those specified on the packing list. (Tr. 122-124, 127-28.)

13. According to Mr. Cetin, after the third shipment FMC Corporation authorized Crescent to correct, by hand, packing lists incorrectly reflecting the height of piece #1. He also made the correction on the packing list corresponding to the fourth bill of lading before he sent it to Prudential. (Tr. 129, 131, 161-162.)

14. Thule received a packing list for the shipment moved pursuant to its Bill of Lading No. 1 of September 2, 1977 (Ex. 4) and used a rating on the basis of piece #1 as 149 inches. (Tr. 90.)

15. The reason for the error covering the first five shipments is that the shipper failed to remove a gantry assembly while disassembling the excavator for shipping at its factory. (Ex. 7.)

16. Crescent has not performed any freight forwarding services for the shipper other than these shipments. (Tr. 110.)

17. Crescent, in the usual course of business, would receive from the steamship company a rated copy of a bill of lading which it had prepared within two working days of the vessel's departure. (Tr. 116.)

18. Crescent did not examine the rated copies of the bills of lading received from the steamship companies for shipments three through eight to determine if they were rated in accordance with the actual dimensions of piece #1. (Tr. 116, 135, 137-138.)

19. Crescent did not discuss with Turkish Cargo Lines or Prudential the necessity for these companies to issue freight correctors for the bills of lading. (Tr. 128, 135-6, 139.)

20. Prudential, after being approached by this Commission, issued freight correctors for its bills of lading. (Ex. 1, Attachments 3-6 and 8, Tr. 37-38, 45-48, Ex. 5, 8 and 10.)

21. Thule, also after being approached by the Commission, issued freight correctors for its bills of lading. (Ex. 1, Attachments 1, 2 and 7. Tr. 45-48, Ex. 9 and 11.)

22. FMC Corporation chose Crescent to be the freight forwarder for the shipments. (Ex. 1, Attachments 1-8, Tr. 109, Ex. 13.)

23. Crescent authorized Turkish Cargo Lines to process Bill of Lading No. 7 of May 23, 1977 (Ex. 1, Attachment 1), on the basis of eight units rather than ten units which were listed on the initial bill of lading. (Tr. 114.)

24. Part of the freight forwarding services performed by Crescent for these shipments included preparation of the bills of lading and export declarations and to make a firm booking of the shipments with the steamship companies. (Ex. 1, Tr. 109-110, 115, 118.)

(B) DISCUSSION AND CONCLUSIONS

Since the Bureau concludes, in this instance, that respondent did not violate section 16 of the Act or the applicable provisions of General Order 4, both parties, on brief, arrive at the same conclusion and both essentially utilize the same legal principles as support. The differences lie somewhat in the approach afforded to the facts, the stress placed upon certain areas and the emphasis provided in discussing the legal precedents involved. As a practical matter, it is considered unnecessary to burden this report by articulating the differences since the resulting conclusion reached here is the same as urged by both sides. The important aspect to be borne in mind is that the Bureau, in evaluating the evidence, correctly acknowledges that the evidence fails to reflect that respondent "knowingly and willfully attempted to obtain lower freight rates than would otherwise be applicable."

Briefly, the evidence shows that the eight shipments which moved between May and August 1977 involve the same exporter and consignee. The identical cargo transported (except for the number of pieces involved) was subject to standardized packing and moved under the same freight rate. Shipments identified in the record as one, two and seven were transported by Turkish Cargo Lines and the remainder by Prudential.

Respondent's Vice-President at the time testified that for each shipment the shipper sent Crescent a packing list which he then forwarded to the steamship company. Since the packing lists were similar, only one copy was provided the carrier. The copy sent was the first packing list listed in the "export reference" box on the bill of lading. For the first two shipments, the packing list listed the height of piece #1 of the excavator as 139 inches. Thule, agent for Turkish Cargo Lines, did not receive copies of the packing lists but rated the bills of lading on the basis of measurements supplied in a letter from the shipper. The letter listed the height of piece #1, an excavator, as 139 inches, and the bills of lading for the first two shipments were rated accordingly. Prudential carried the third shipment and during the course of loading the excavator, because its hatch would not close, discovered that piece #1 was actually 149 inches in height. Prudential notified the respondent of the problem, who in turn contacted the shipper, who stated that piece #1 was actually 149 inches high. Crescent then authorized Prudential to rate the bill of lading on the corrected basis. For some reason, which is not entirely apparent from the record, this was not done.

The packing lists forwarded by the shipper for the fourth shipment still listed piece #1 as 139 inches high. Respondent, pursuant to an authorization from the shipper, sent, by hand, a corrected packing list for this shipment to Prudential indicating that the height of piece #1 was actually 149 inches high. However, the bill of lading for this shipment was rated as 139 inches. The packing lists for the fifth shipment varied, some listing 149 and others 139 inches. The first packing list listed in the "export reference" box on the bill of lading, B77-306, sent to Prudential reflects the height as 149 inches. But, again, the bill of lading was rated on the basis of 139 inches. The packing lists for the remaining three shipments sent by the shipper listed 149 inches, but all three bills of lading were rated on the basis of 139 inches. Turkish Cargo Lines, the carrier for the seventh shipment, rated the bill of lading on the measurements contained in the letter its agent received from the shipper and on the same basis used for the first two bills of lading.

By way of summary, all eight of the bills of lading were rated using the dimensions of piece #1 as 139 inches, although the actual height was 149 inches. Respondent sent a packing list to the steamship company for each shipment and a correct packing list for each of the five shipments after learning of the error on the packing list in connection with the third shipment. The evidence is uncontroverted concerning shipments transported by Prudential. On the other hand, Thule did not have packing lists for the first, second or seventh shipments and rated the cargo on the basis of measurements contained in a letter from the shipper. Thule also received a packing list for a ninth shipment, not at issue, where the bill of lading was correctly rated.

The evidence clearly fails to establish that respondent "knowingly and wilfully" caused the cargo to be rated on the basis of an inaccurate measurement.[4] Certainly, none of the usual elements establishing a violation are present. Respondent did not intentionally disregard the statute or act in a fashion that mirrors activities plainly indifferent to its stated requirements. What the evidence does provide is an acceptable explanation of events arising from a shipper's mismeasurement. Once the error was recognized, activity was undertaken to correct the mismeasurement. Very simply, respondent's fee for its services could have increased if the error continued; instead, it took some steps to seek a correction. And while the submission of a packing list for each shipment should have been the appropriate action originally taken by the respondent, that deficiency alone does not equate with a willful practice contemplated by the statute.

The record also establishes that respondent's actions were deficient in other respects. Respondent should have inspected each of the bills of lading to insure that the correct rate was applied. It also should have contacted the two steamship companies with respect to the requirement to issue freight correctors. But again these failures to take appropriate action fall short of the type of conduct necessary to establish a violation within the contemplation of the statute. *Viking Importrade Inc.*, 18 F.M.C. 3, 11 (1973). And the additional considerations beyond the "knowingly and wilfully" language employed in the statute likewise are not established on the record. A review of the activity of respondent fails to show any falsification of documents and clearly no deception, fraud or intentional concealment. Accordingly, it is found that respondent did not violate section 16, Initial Paragraph, of the Act.

Both the Bureau and respondent also agree that the record fails to establish a basis for finding a violation of any provision of the Commission's General Order 4, sections 510.23(c), (d) and (h), (46 C.F.R. 510.23(c), (d) and (h)). Essentially, section 510.23(c) provides that a freight forwarder may not participate in a transaction in which it has reason to believe that its principal made an error, misrepresentation or omission from any export declaration, bill of lading, affidavit or other paper executed by the principal. The only document submitted by the shipper was the packing list containing an error for the first five shipments. Moreover, for the first three shipments, respondent was not aware that the lists contained the error and sent a correct list for the fourth and fifth shipments.

[4] Section 16, Initial Paragraph, of the Shipping Act, 1916, provides:

That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person or any officer, agent, or employee thereof, *knowingly and wilfully*, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. (Emphasis supplied.)

Section 510.23(d) provides that a freight forwarder "shall exercise due diligence to ascertain the correctness of any information which he imparts to a principal with reference to any forwarding transaction" and that no licensee shall "knowingly impart to a principal or oceangoing common carrier false information" relative to a forwarding transaction. And while respondent provided false information to the carriers for the first three shipments, the record fails to establish that it knowingly did so on any of the shipments.

Finally, section 510.23(h) provides that "No licensee shall file or assist in the filing of any claim, affidavit, letter of indemnity, or other paper or document, with respect to a shipment handled, or to be handled by such licensee, which he has reason to believe is false or fraudulent." Again, there is no evidence that respondent had reason to believe that any of the documents involved in the shipments were false or fraudulent. Accordingly, it is found the respondent did not violate any of the provisions of General Order 4 with respect to the allegations of mismeasurement of the eight shipments under investigation.

(2) ALLEGATIONS INVOLVING FAILURE TO NAME THE ACTUAL SHIPPER ON BILLS OF LADING

(A) FINDINGS OF FACT

25. Crescent performed freight forwarding services for thirty-three shipments between July 9, 1976, and June 16, 1978, where Far Eastern Forwarding Company (Far Eastern) appeared as the shipper on the bills of lading. As part of the services, it prepared the bills of lading and export declarations for these shipments. (Ex. 1.)

26. For eighteen of these shipments, New World Research Corporation (New World Research) or China Trade and Industrial Service also appeared on the shipper line of the bills of lading immediately below "Far Eastern Forwarding Company, c/o." (Ex. 1, Attachments J, L, M, N, O, P, Q, R, S, T, U, V, W, X, EE, FF, GG, HH.)

27. Mr. Robert Arciero, the President of Crescent, first became aware of New World Research as a shipper in the late 1960's while employed by Crescent Transport Co., Inc. (not related to Crescent Navigation, Inc.), an ocean freight forwarder. At this time Far Eastern was unknown to him. On matters concerning New World Research, he dealt with Mr. Sung. (Tr. 251-252.)

28. In the early 1970's Mr. Arciero, while employed by Brag International, an ocean freight forwarder, became familiar with Far Eastern as a shipper. Upon leaving Crescent Transport, Inc., he discontinued forwarding services for New World Research. There was a lapse of a year or two between forwarding shipments for New World Research with Crescent Transport, Inc., and commencing forwarding for Far Eastern at Brag International. On matters concerning Far Eastern, he dealt with Mr. Peter Pai. (Tr. 252, 253.)

29. Before April 1976, Mr. Arciero was employed for two and a half to three years by Aquino Shipping, also an ocean freight forwarder. During this period, both New World Research and Far Eastern utilized his services. Mr. Pai continued to represent Far Eastern and a Mr. Light now dealt with matters concerning New World Research. Both firms followed Mr. Arciero as forwarder when he commenced his own company in April 1976. (Tr. 255.)

30. Forwarding fees of $35.00 per shipment were negotiated by Mr. Arciero for Far Eastern shipments and fees of $50.00 per shipment were negotiated by him for New World Research shipments. (Tr. 259.)

31. New World Research shipped primarily to South America, the Philippines and Korea, and these shipments were made on carriers of the Far East Conference using conference rates. (Tr. 215-216, 260.)

32. China Trade and Industrial Service, Inc., and New World Research, its subsidiary, are bound by a Merchant's Freight Agreement with the Far East Conference, effective September 4, 1964. Far Eastern is not a signator of a dual rate contract with that Conference. (Tr. 209, Ex. 19.)

33. Shipments listing Far Eastern as shipper all moved aboard non-conference Chinese flag vessels to China. (Tr. 270-272.) Crescent received compensation for its freight forwarding services for twenty-seven of the thirty-three shipments. (Ex. 1.) Crescent also performed freight forwarding services for New World Research. These shipments moved with carriers of the Far East Conference using Conference rates. (Tr. 215-216, 260.)

34. The only business in which Far Eastern is engaged is in shipping cargo to China, specifically Taiwan. Between July 1976 and June 1978, New World Research only exported cargo to countries other than China. (Tr. 213-14.) The destination of the shipment determined whether the name New World Research or Far Eastern would appear on the bill of lading. (Tr. 216.)

35. New World Research and Far Eastern engaged in the same type of shipping business, but while Far Eastern shipped to China and New World Research shipped to countries other than China, Far Eastern obtained freight rates lower than the applicable conference rates by shipping cargo with non-conference carriers. (Tr. 214.)

36. Mr. Pai stated to Mr. Kane, an investigator with this Commission, on July 30, 1980, that Far Eastern was incorporated in the state of New York in 1958. (Tr. 190.)

37. A letter dated August 22, 1980, from the state of New York to this Commission indicates that its records do not show the following names as New York Corporations: Far Eastern Forwarding Corp., Far Eastern Forwarding Co., Far Eastern Forwarding Company, Inc., Far Eastern Forwarding Corporation. A letter to Far Eastern from the state of New York (Department of Taxation and Finance) dated August 26,

1959, refers to it as a corporation taxable under New York law. Mr. Pai testified that Far Eastern was a separate corporation with a corporate identification number from the Internal Revenue Service. (Ex. 20, 23, Tr. 223-224.)

38. The New York Telephone Company phone book for 1980 lists New World Research and Far Eastern as having the same address and the same phone number. (Ex. 21 and 22.) The two companies operate out of the same office. (Tr. 282.)

39. The records of the rental officer of the World Trade Center, in New York City, do not indicate that Far Eastern occupies a suite occupied by New World Research, the company registered with the building management. (Tr. 190.)

40. Far Eastern does not make a profit. (Tr. 221.) New World Research used its own funds to pay Crescent for the freight forwarding services it performed for Far Eastern. (Tr. 217.)

41. Crescent received instructions for shipments to be shipped by Far Eastern on stationery typed with the letterhead of New World Research and signed with the typed name of New World Research. (Tr. 220-222, Ex. 1, Attachments, A, C, G, K, L, N, S, T, U, V, W, BB, DD, EE, FF, and GG.)

42. Crescent received instructions for shipments to be shipped by Far Eastern on stationary printed with the letterhead of Far Eastern stamped with the letterhead of New World Research and signed with the typed name of New World Research. (Ex. 1, Attachments A, Y, Z and AA.)

43. Most shipping instructions contained the reference "Chinese Vessel" or an Order number prefixed "CTC," which, from experience, Crescent knew was a Far Eastern shipment; "CTC" was a reference to China Trust of China, a consignee for most of the Far Eastern shipments. (Ex. 1, Tr. 271, 212-213.)

44. Crescent invoiced New World Research for the freight forwarding services it performed for Far Eastern. (Tr. 219.)

45. The files of Crescent contained ten letters of credit made out to New World Research for shipments in which Far Eastern appeared as the shipper on the bills of lading. (Ex. 1, Attachments B, C, L, N, O, U, W, AA, BB, and FF.)

46. For fourteen of the shipments for which Far Eastern was listed as the shipper on the bills of lading, the files of Crescent contained documents from suppliers and inland transportation companies which referred to the shipments as those of New World Research. These documents included letters, invoices, inland bills of lading and arrival notices. (Ex. 1, Attachments B, C, D, I, J, L, N, Q, R, U, W, X, AA and FF.)

47. During a compliance check interview in June 1978, Mr. Kane asked Crescent to examine the files for certain shipments which were

denoted in Crescent's reference log as New World Research files. Among the files supplied pursuant to this request were bills of lading which listed Far Eastern as the shipper. (Tr. 180.) For four of these shipments, the files of Crescent included a piece of paper on which New World Research was handwritten along the side. (Ex. 1, Attachments A, C, Y and Z.)

48. The files of Crescent contained five dock receipts, prepared by Crescent, which listed the exporter as New World Research. These receipts corresponded to bills of lading where the shipper was listed as Far Eastern. (Ex. 1, Attachments A, U, BB, CC and HH.)

49. For eight of the shipments where Far Eastern was listed as the shipper on the bills of lading, the files of Crescent contained correspondence from Crescent which referred to the shipments as those of New World Research. (Ex. 1, Attachments B, I, M, U, W, DD, EE and FF.)

50. Mr. Paí told Mr. Arciero throughout the years that Far Eastern was a separate company from New World Research; that it was the actual shipper for the subject shipments; that the firm was used to ship to Taiwan on Chinese vessels; that Taiwan consignees, generally government agencies, requested that shipments be shipped on Chinese vessels; and that Far Eastern was set up strictly to ship cargo to China via non-conference vessels. (Tr. 224-225, 271.)

51. Between July 1976 and June 1978, Crescent was aware that the Far East Conference was a conference which offers dual rate contracts (Tr. 265), and that a dual rate contract usually covers affiliates of the shipper company. (Tr. 264.)

52. Far Eastern has been shipping to Taiwan at least since 1963, a time before New World Research was a signator of a merchant contract with the Far East Conference. (Ex. 19, 25.)

53. Mr. Arciero testified that he was under the impression that Far Eastern was a separate corporation. (Tr. 259.) He testified that Crescent cooperated completely with the FMC investigators on the investigation of both matters subject of this proceeding. (Tr. 257.)

54. During the period in question, July 1976 through August 1978, Crescent handled approximately 500 shipments for New World Research as compared to approximately 34 shipments for Far Eastern. For these shipments, New World Research spent approximately $647,000 for ocean freight and over $60,000 for Far Eastern shipments. (Ex. 1, Tr. 261.)

55. Crescent prepared twenty-nine export declarations which listed Far Eastern as the exporter. (Ex. 1, Attachments B, C, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, X, Y, AA, BB, CC, DD, EE, GG and HH.)

56. Export declarations are filed with the United States Customs Service, Department of the Treasury. (Tr. 115.) The preparer is re-

quired to sign the export declaration, certifying that the information contained therein is true and correct. (Ex. 1, Attachments B, C, E, F, G, H, I, J, K, L, M, N, O, P, Q, R, S, T, U, V, X, Y, AA, BB, CC, DD, EE, GG and HH.)

57. The following are various documents wherein Far Eastern is referred to as a separate entity by various sources:

a. Letter from Crescent to Yangming Maine Transport Corporation dated October 27, 1977, refers to "our shipper Far Eastern Forwarding Co., Inc." (Ex. 1, Attachment J.)

b. Lyons Transport, Inc. arrival notice dated March 30, 1978, refers to the "A/C Far Eastern Fwdg. Co., Inc." (Ex. 1, Attachment T.)

c. Shipping Order from Soiltest, Inc., dated March 29, 1978, consigns a shipment to Far Eastern Forwarding Company, Inc. (Ex. 1, Attachment T.)

d. June 2, 1978, letter from Soiltest International, Inc., to Eckert Overseas Agency, Inc., which says: "Please be advised that the above mentioned material is being exported by Far Eastern Forwarding Company, Inc. c/o China Trade & Industrial Service, Inc., not by our firm; we are the supplier." (Ex. 1, Attachment X.)

58. Crescent Navigation, Inc., has not previously been approached by the Commission for questionable practices as a freight forwarder. (Tr. 255.)

(B) DISCUSSION AND CONCLUSIONS

The Bureau argues that respondent here violated provisions of General Order 4; i.e., section 510.24(a) on twenty-seven occasions, section 510.23(d) on thirty-three occasions, and section 510.23(h) on twenty-nine occasions. It recommends the imposition of an assessment of a civil penalty in the amount of $10,000. On the other hand, it considers that any revocation or suspension of respondent's freight forwarding license based upon these violations would be an unduly harsh penalty. Respondent argues that: (1) there is no substantial evidence to find that Far Eastern was not the actual shipper of shipments to Taiwan, or that it knew or should have known that Far Eastern was not the actual shipper; and (2) the facts neither warrant revocation or suspension of respondent's license nor an assessment of civil penalties. The evidence supports a showing of violations of the General Order and the assessment of a penalty in the amount recommended by the Bureau.

In this instance, respondent provided freight forwarding services for thirty-three shipments moving aboard non-conference vessels where the name of the shipper on the bill of lading was Far Eastern. In all but six of these shipments, it received compensation. The Bureau argues that respondent knew or should have known that Far Eastern was a name used by New World Research when it shipped on non-conference vessels. Both China Trade & Industrial Service, Inc., and New World Research, a subsidiary, are bound by a Merchant's Freight Agreement to ship with the Far East Conference while Far Eastern is not similarly bound. The Bureau contends that the evidence establishes that Far Eastern is essentially a shell of New World Research, the actual shipper for these thirty-three shipments.

Far Eastern was engaged in the business of shipping cargo to China, specifically Taiwan, and New World Research, in exporting cargo to countries other than China. The destination would determine the name under which the cargo would be shipped. Cargo shipped to China under Far Eastern moved on non-conference vessels, while cargo to countries other than China under New World Research used conference vessels at conference rates. This procedure enabled the obtaining of lower than the conference freight rates on shipments to China and lower rates on shipments moving with the conference because of the dual rate contract.

The practices of New World Research and Far Eastern inexorably demonstrate that, as to these shipments, they operated, in fact, as the same entity. New World Research paid the freight charges and used its own funds in payment of forwarding fees for Far Eastern shipments. Documents of third parties refer to such shipments as those of New World Research. For example, letters of credit, letters from suppliers, and invoices were completed by parties directly involved with the firms at the time of shipment. While some documents specifically referred to Far Eastern, companies also referred to the shipper as New World Research. Specifically, letters of credit for ten of the shipments where Far Eastern appears as the shipper were issued to New World Research. Fourteen of the shipments, suppliers and inland transportation companies referred to New World Research as the shipper of the cargo.

Both companies work out of the same office and have the same telephone number. Far Eastern does not make a profit from its operations. The rental office records indicate New World Research occupies the office space, but those records also fail to reflect that Far Eastern shares the same space. Despite testimony that Far Eastern was incorporated in the State of New York, its Department of State, Corporate Division, has no record reflecting that articles of incorporation were ever filed.

Respondent, on the other hand, raises numerous points in its attempt to offset the apparent commingling of the operations of these "separate entities." From a historical view, it points out that Mr. Arciero formed Crescent in April 1976 and first became aware of New World Research as a shipper in the late 1960's while he was employed by Crescent Transport Co., Inc. (not related to Crescent Navigation, Inc.); that at that time Far Eastern was unknown to him; that during that period he dealt with a Mr. Sung on matters concerning New World Research; that in the early 1970's he was employed by Brag International, an ocean freight forwarder, and at this time became familiar with Far Eastern as a shipper; that upon leaving Crescent Transport, Inc., he stopped forwarding for New World Research; that there was a lapse of a year or two between forwarding of shipments for New World Research with Crescent Transport, Inc., and his commencing forwarding for Far Eastern at Brag; that as to matters concerning Far Eastern, he dealt with a Mr. Peter Pai; that he was employed for two and a half years to three years before April 1976 by Aquino Shipping, an ocean freight forwarder; that during this time both New World Research and Far Eastern utilized Aquino as forwarder; that Mr. Pai continued to represent Far Eastern and a Mr. Light dealt with matters concerning New World Research; and that both firms followed Mr. Arciero as forwarder when he started his own company (Crescent). From these facts, respondent claims that Mr. Arciero had a historical reason to think of Far Eastern and New World Research as separate and distinct entities, and that he had associated different individuals with each one and had performed services for them independently of one another. To strengthen the point, it is added that forwarding fees of $35.00 per shipment were negotiated with Mr. Pai, while a $50.00 fee per shipment applied to New World Research shipments, a fee negotiated with Mr. Light. But in viewing these conditions, one must put in perspective the respondent's conduct as to these particular shipments.

The record establishes that respondent should have known of the relationship between the two companies and that its conduct demonstrates a participation in an operation whose purpose was to improperly take advantage of the dual rate contract system through the use of the two names. Those shipments moving under the name of Far Eastern received instruction on paper bearing the letterhead of New World Research and signed with that name typed on the document. Respondent also received instructions on paper with the printed letterhead of Far Eastern with the name and address of New World Research also stamped across the top and signed with the typed name of New World Research.

Respondent invoiced New World Research for shipments it forwarded for Far Eastern. As already noted, the files of respondent in ten instances contained letters of credit made out to New World Research and in fourteen instances contained documents (letters, invoices, bills of lading) from suppliers or inland transportation companies referring to the shipment as being shipped by New World Research. During the initial compliance check that district investigators of the Commission made of respondent's files, files shown as New World Research files contained bills of lading which named Far Eastern as shipper. Four of its shipment files where Far Eastern appeared on the bill of lading included a piece of paper on which New World Research had been handwritten along the side. Five dock receipts prepared by respondent listed the exporter as New World Research where the corresponding bill of lading listed Far Eastern as the shipper. Respondent's files for eight of the bills of lading which listed Far Eastern as the shipper also contained its own correspondence referring to the particular shipment as a shipment of New World Research. Even a letter refers to "(o)ur principals, New World Research Corporation." In addition, Mr. Arciero testified that Mr. Pai had told him that Far Eastern was set up strictly to ship cargo to China via non-conference vessels. Since respondent had performed freight forwarding services for New World Research on shipments transported by the Far East Conference, it also was aware that the conference was a dual rate conference, and that New World Research was a contract signator.

The Bureau also points out that the last shipment of Far Eastern forwarded by respondent was dated June 16, 1978. Mr. Kane conducted his compliance check interview with Crescent during which this matter was raised in June 1978. It submits that the time of these two events was not coincidental. Mr. Pai testified that Far Eastern stopped exporting cargo to Taiwan because the United States recognized the Peoples Republic of China and that the Republic of China trade had become very slow. The United States' recognition of the Peoples Republic of China was not effective until January 1, 1979. 44 *Fed. Reg.* 1075 (1979).

Respondent also contends that Far Eastern was shipping to the Far East in 1963, before New World Research signed a merchant contract with the Conference, and existed as a genuine shipper to the Far East and was not as a firm whose sole purpose was to circumvent the conference rates. Furthermore, there would have been no reason for Far Eastern and New World Research to coexist during a period when New World Research was not a signator to a merchant agreement. However, the Bureau does not contend that the sole purpose for the forming of Far Eastern was to circumvent the conference rate, rather its position here specifically relates to the period of time involved in the shipments under consideration.

Respondent argues that the savings on freight rates, if any, would be minimal ($8,000) as contrasted to a volume of freight expended by these companies ($677,000). On the other hand, the record shows that savings on freight charges did exist and lower freight rates were obtained through the operation. And while respondent points out that consignees requested Chinese carriers and could exempt the signatory of a merchant freight contract, the record provides no basis for a finding that the companies did not have a right to select the carrier.

The separate arrangements for forwarding fees or the administering of arrangements with different individuals for Far Eastern and New

World Research shipments does not alter the conclusions reached here. Certainly, in a company the size of New World Research (based upon its total freight charges during this period), different individuals assume responsibilities for the operation of the business. And lower freight forwarding fees were paid for Far Eastern shipment simply because lower freight charges were assessed.

This record goes far beyond the limited concession of the respondent that "(t)here is undoubtedly a relationship between Far Eastern Forwarding and the other firms," and that the relationship "exceeded just sharing office space." What this record demonstrates is that for the shipments involved in this proceeding, both Far Eastern and New World Research were not operating as separate shippers but essentially as one and that the use of one name or the other resulted in the obtaining of lower freight rates.

The Bureau correctly views this record as showing that as a result of respondent's participation in the operation of Far Eastern and New World Research to evade the dual rate contract system, respondent has violated sections 510.24(a) and 510.23(d) and (h) of General Order 4.[5] Section 510.24(a) prohibits a forwarder from receiving compensation in connection with any shipment for which the name of the actual shipper was not disclosed on the shipper identification line on the bill of lading. Respondent received compensation for twenty-seven of the thirty-three shipments for which Far Eastern appeared on the bills of lading. The evidence shows that the actual shipper in these instances was New World Research and that respondent knew or should have known this fact. Respondent also violated section 510.23(d) on all thirty-three occasions by knowingly imparting to the oceangoing common carrier false information relative to a forwarding transaction. Respondent knowingly disguised the true identity of the shipper. A violation which requires knowledge on the part of the alleged violator is established if the facts demonstrate that the alleged violator should have known of the illegal nature of his activity. *Hohenberg Brothers Co. v. Federal Maritime Commission and United States,* 316 F.2d 381, 385 (D.C. Cir. 1963).

Section 510.23(h) states that a forwarder may not file or assist in the filing of any paper or document with respect to a shipment handled by the forwarder which the forwarder had reason to believe was false or fraudulent. Respondent prepared the export declarations for at least twenty-nine of the thirty-three shipments in question. Export declarations are filed with the United States Customs Service, Department of the Treasury. These declarations require the preparer to sign them certifying that all the information contained therein is true and correct. By preparing and signing these declarations, which respondent knew

[5] The Bureau does not argue that Crescent has violated section 510.23(c) since there is no evidence that its principal executed any of the documents in connection with the shipments in question.

would be filed with the Department of the Treasury, it also violated section 510.23(h) on twenty-nine occasions.

Although respondent views the evidence as failing to sustain a finding of violations of General Order 4 and considers that no sanctions are proper, it argues that civil penalties of $10,000, as urged by the Bureau, would be excessive. It points to other Commission proceedings and compares number of violations with the amount of penalty imposed. The Bureau submits that the potential liability of respondent is $89,000 based upon 89 violations.[6] Obviously, the imposition of any sanction and the amount to be assessed are governed by the particular factual considerations presented in a proceeding. The weakness of arguing numbers and prior assessment cases is borne out by the differing types of violations involved, the circumstances surrounding the violations, and the mitigating factors, if any. Here the circumstances justify the imposition of a penalty in the amount of $10,000.

One final matter requires some attention. Respondent suggests that "there is no substantial evidence" to find certain violations in this proceeding. In support of that view, as contrasted to traditional "preponderance of the evidence" standard, it relies upon section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706, the explicit "scope of review" provision that declares that agency action shall be held unlawful if "unsupported by substantial evidence." However, in *Sea Island Broadcasting Corp. v. Federal Communications Commission*, U.S. App. D.C., 627 F.2d 240, 243 (1980), the Court stated: "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)." cert. denied, 449 U.S. 834 (1980). Indeed, the Supreme Court recently stated: "Where there is evidence pro and con, the agency must weigh it and decide *in accordance with the preponderance.*" *Steadman v. Securities and Exchange Commission*, 450 U.S. 91, 101, (1981). The standard of proof in this proceeding has been met by the Bureau and the preponderance of the evidence established the violations found here.

FINDINGS

Upon consideration of all evidence in this proceeding, the Judge finds that the respondent, Crescent Navigation, Inc., violated section 510.24(a) of General Order 4 on twenty-seven occasions, section 510.23(d) on thirty-three occasions, and section 510.23(h) on twenty-nine occasions, and that civil penalties in the amount of $10,000 are

[6] Section 32(c) of the Shipping Act, 1916 (46 U.S.C. 831(c)) provides:

Whoever violates any order, rule, or regulation of the Federal Maritime Commission made or issued in the exercise of its powers, duties, or functions, shall be subject to a civil penalty of not more than $1,000 for each day such violation continues.

hereby assessed against Crescent Navigation, Inc., pursuant to section 32(c) (46 U.S.C. 831(c)) of the Shipping Act, 1916.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 1046(I)

COTEY CHEMICAL CORP.

v.

SEA-LAND SERVICE, INC.

ORDER OF PARTIAL ADOPTION

August 17, 1981

The Commission determined to review the decision of Settlement Officer Donald F. Norris in which he reviewed the claim of Cotey Chemical Corp. (Cotey) and directed Cotey to pay Sea-Land Service, Inc. the unpaid balance of the freight charges assessed by that carrier on a shipment of "Dry Acid Cleaning Compound" from Houston, Texas to Riyadh, Saudi Arabia. Cotey was further directed to pay interest on that balance.

Section 22 of the Shipping Act, 1916, under which this claim was filed, confers no jurisdiction on the Commission to order shippers or consignees to pay reparation in any form. *Ideal Toy Corp. v. Evergreen Line,* 23 F.M.C. 1008 (1981). The Settlement Officer had no authority to direct Cotey Chemical Corp., a shipper, to pay to Sea-Land any amount. Accordingly, this portion of the Settlement Officer's decision must be vacated.

Except as stated above, the Commission finds that the Settlement Officer's findings and conclusion are correct. Sea-Land is therefore directed to take the steps necessary to collect from Cotey Chemical Corp. unpaid freight charges in the amount of $3,170.00.

THEREFORE, IT IS ORDERED, That the portion of the Settlement Officer's decision directing Cotey Chemical Corp. to pay to Sea-Land Service, Inc. the amount of $3,170.00 plus interest is reversed and vacated;

IT IS FURTHER ORDERED, That in all other respects, the decision of the Settlement Officer is adopted and made a part hereof.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner Daschbach's separate opinion 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

INFORMAL DOCKET NO. 1046(I)

COTEY CHEMICAL CORP.

v.

SEA-LAND SERVICE, INC.

DECISION OF DONALD F. NORRIS, SETTLEMENT OFFICER [1]

Partially Adopted August 17, 1981

Respondent's Rate Assessment Affirmed. Respondent Awarded Freight Due, Plus Interest.

By its complaint filed with the Commission during February 17, 1981, the Cotey Chemical Corporation (Cotey), through its attorney, protests the ocean freight assessed a Cotey shipment of 60 drums of "Dry Acid Cleaning Compound" transported by Sea-Land Service, Inc. (Sea-Land) from Houston to Riyadh, Saudi Arabia, pursuant to a Sea-Land bill of lading dated February 17, 1979. Sea-Land billed Cotey for a total of $7,366.29 representing ocean freight and ancillary charges. During March 26, 1979, Cotey paid Sea-Land a total of $4,196.29, or what it thought proper. Cotey contends that it is entitled ". . . to a reduction of $3,170 plus such other reparation to which Claimant is entitled and including Attorney's fees reasonably incurred to institute this claim in the amount of $500." Conversely, and, in fact, Sea-Land maintains that it rated the shipment correctly and that it is owed $3,170.

No violation of section 18(b)(3) of the Shipping Act, 1916, is alleged by Cotey as none is required with respect to "overcharge" claims. See 46 C.F.R. 502.304. Technically, no overcharge has occurred here inasmuch as Cotey has steadfastly refused to pay the amount in dispute. However, the filing of the complaint and Sea-Land's acquiescence to an informal proceeding here manifest a mutual desire to have the matter arbitrated by the Settlement Officer (S.O.). The S.O. cannot perceive of any logical reason why he cannot do so.

There is no dispute as to the commodity shipped, nor are any of the ancillary charges amounting to $746.29 contested in any way. At issue is how the shipment should have been rated. Cotey claims that the acid should be considered an "drilling mud additive" entitled to the special,

[1] 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.

lump sum rate of $3,450 per 35-foot container in effect at the time of shipment. Sea-Land's view is that the acid was properly accorded a lump sum rate of $6,620 applicable to "Compounds: . . . Cleaning, including Dry Washing Compound (Non-Hazardous)" in accordance with the rate and terms appearing in the tariff controlling here, that of The "8900" Rate Agreement Freight Tariff No. 7, FMC No. 7 (the Tariff), 6th revised page 83, and 1st revised page 43 specifically.

In support of its contention, Cotey has submitted a copy of a Sea-Land letter to Cotey dated February 13, 1979; an Exhibit "C" appended to its complaint which describes the "use" and "application" of dry acid; what appears to be sales literature; and copies of the Sea-Land bill of lading and freight invoice both of which are identical in describing the commodity shipped as "Dry Acid Cleaning Compound."

The Sea-Land letter informs Cotey that ". . . we have filed the following rate in the . . . Tariff: 'Mud, drilling, including additives: In carriers 35 foot container - $3,450 per container; this rate is effective from 2/15/79 to 3/15/79." [2] Cotey contends that this was intended to encompass dry acid.

Cotey's Exhibit C and sales sheet reveal that "dry acid" is, actually, a registered trade name of Cotey's. However, both counsel's contribution and the sheet demonstrate clearly that that dry acid ". . . is used to remove clays, drill cuttings, and mud from water wells, thus should be used in drilling new wells to prevent build-up of mud on the face of the water zone and to keep the drilling muds from settling to the bottom of the hole. In older wells Dry Acid should be used to dissolve any mud cake in and on the gravel pack - a common occurance which reduces yield. Dry Acid can also be used to loosen drill pipe which may become stuck in the mud." [3]

Cotey's sales sheet is somewhat more detailed. Dry acid is used to remove "clays, shales, drilled 'cuttings' and commercial drilling muds from water wells. Excellent for 'gravel slipping' and freeing stuck drill pipe." Further, it will develop "[n]ew wells to their maximum specific capacity by breaking down 'mud cake' produced during drilling." Additionally, dry acid will serve to "[r]edevelope: Old Wells producing in sand or gravel formations to their original flow or greater." Parts of Cotey's submissions deal with dry acids' application or "How to Use Dry Acid." These are quite explicit in that it be mixed with water.

The Tariff is silent as to what constitutes "drilling muds," and its "additives." However, extrinsic sources provide definitions and clues.[4]

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[2] Here, Sea-Land was exercising its right of independent action as it is authorized to do by the terms of the 8900 Rate Agreement.

[3] See, Exhibit C, Complaint.

[4] As to the resort to, and application of, "extrinsic evidence," the S.O. relies upon ALJ John Cograve's exposition upon the point in *C.S.C. International v. Lykes Bros.*, 20 F.M.C. 552, 555-6 (1978).

Firstly, at page 691, *Webster's Third New International Dictionary (Unabridged)*, 1961, defines drilling mud as ". . . a preparation of water, clays, and chemicals circulated in oil-well drilling for lubricating and cooling the bit, flushing the rock cuttings to the surface, and plastering the side of the well to prevent cave-ins."

The Condensed Chemical Dictionary, 8th Edition, 1971, is more specific. Drilling mud is:

> "Mud used in drilling oil wells. It is sent down through the drilling pipe under high pressure and returns through the annular space between the walls of the hole and the pipe. The mud helps control gas, oil and water pressures and to maintain the walls of the hole. Its basic components are clay and water, but other materials are added, e.g., barytes to increase weight, an alkali to increase pH, gelatinized starches to prevent loss of water, and cellophane flakes to add bulk. Special clays such as bentonite are also used."

Despite this, Cotey's sales sheet indicates that drilling mud has a wider applicability than that appearing in the definitions. The S.O. believes that this is reasonable.[5] A drilling bit, for example, probably can get just as hot drilling for oil as for water, thus necessitating cooling and lubrication although different grades and compositions of mud may well be more suitable for one type of operation than the other. The question remains, however, what of the mud's "additives," and dry acid in particular?

Both definitions of drilling mud have common denominators. Both describe it as used in drilling operations. Both indicate the general nature of its additives which, logically, contribute to the mud's basic drilling function. In contrast, all of Cotey's explanatory submissions reveal that dry acid is mixed with water, not mud, for water well cleansing and rehabilitative purposes.

We turn now to Sea-Land's letter to Cotey of February 13th, quoted above. It concerns "Mud, drilling, including additives . . . ." No mention is made of dry acid as included in the additive category. In fact, no mention is made of dry acid at all, and there is no way that that letter and resultant tariff filing can be associated with the shipment in question. Conceivably, it could relate to another Cotey transaction. Accordingly, the S.O. is compelled to conclude that the bill of lading, prepared by Cotey's forwarder, accurately described the shipment as a ". . . Cleaning Compound" and that Sea-Land rated the shipment correctly.

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[5] The S.O. interviewed the secretarys of three conferences whose member lines are known to transport drilling muds. One said its tariff references referred to "all" muds; another said "oil well drilling" mud is referenced specifically as such; the third said that its "muds, drilling" category "usually" referred to oil well muds.

Sea-Land did not request interest. However, it is the Commission's present practice to award shippers interest with respect to sums awarded them arising from carriers' "overcharges," not as a penalty in any way but on the theory that the carrier's have enjoyed the use of sums to which they were not entitled. Here, Sea-Land has been denied the use of money to which it was entitled. Fairness would dictate that the same principle apply here. Accordingly, interest in the amount of 11.1 percent per annum will be awarded Sea-Land. This rate reflects the average of the monthly rates quoted in the secondary market for U.S. Treasury notes for its 6 months' bills for the period April 1979 through May 1981, the latest month for which such quotations are available.

In conclusion, Cotey is directed to pay Sea-Land the sum of $3,170 plus interest at the rate of 11.1 percent per annum, pro rata, from April 1979.

So ordered.

(S) DONALD F. NORRIS
Settlement Officer

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-12

DART CONTAINERLINE COMPANY, LTD.

POSSIBLE VIOLATIONS OF SECTION 16 SECOND PARAGRAPH AND 18(b)(3), SHIPPING ACT, 1916

ORDER OF REMAND

August 18, 1981

This proceeding was instituted on February 29, 1980 to investigate certain alleged rebating activities by Dart Containerline Company, Ltd. (Dart) in the trade between the United States and the Iberian Peninsula and to determine whether civil penalties should be assessed for any violations of section 16 Second and 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 815 Second and 817(b)(3)) found to have occurred. Shortly thereafter, the parties engaged in negotiations which led to a proposed settlement agreement, accompanied by a stipulation of facts and separate memoranda in support of the proposed settlement agreement.

On September 18, 1980, Chief Administrative Law Judge John E. Cograve rejected the settlement agreement and directed the parties to submit a new settlement proposal or to proceed to litigate the case. The latter alternative was chosen and discovery was commenced by the Commission's Bureau of Investigation and Enforcement (BIE) on November 14, 1980.

Respondent's submission in answer to BIE's initial discovery requests were followed on January 9, 1981 by a status report from BIE indicating that its discovery efforts had been unproductive. BIE's status report concluded with a determination that, given the circumstances, it was unable to contribute anything further to the record in this proceeding.

On March 24, 1981, Dart filed a motion to dismiss the proceeding. This motion was unopposed by BIE and was granted by the Presiding Officer. The Commission, on its own motion, determined to review that order of dismissal. Upon review and for reasons stated below, the Commission has decided to remand the proceeding for further development of the record.

DISCUSSION

This proceeding is being conducted under Shipping Act provisions which were significantly strengthened in 1979 to deter unlawful rebating in the foreign commerce of the United States (P.L. 96-25, 93 Stat. 71). Three aspects of this Congressional action are relevant here. First, the maximum penalty for violating section 16 Second or section

18(b)(3) was increased from $5,000 to $25,000. Second, Congress vested in the Commission the power to assess these increased civil penalties, a power formerly reserved for U.S. District Courts. Third, in response to numerous complaints from U.S.-flag carriers that anti-rebating laws were being unevenly enforced because of the difficulty of obtaining evidence from companies located overseas, the Commission was given the power to suspend any or all tariffs of a carrier which fails to comply with subpoenas or discovery orders in a rebating investigation.

Since the Commission now has greater investigative and enforcement powers than it had in the past, particularly with respect to foreign-flag carriers, it is now possible to effectively and economically continue a proceeding such as this, despite the difficulties in obtaining documents located outside the United States.

Prior to the institution of this proceeding, the Commission's Bureau of Enforcement had conducted a field investigation into possible rebating activities in the inbound Iberian/United States trade. As a result of this investigation, a claim was made against Monsieur Henri Wines, Ltd. (Henri Wines) in which it was charged that Monsieur Henri's subsidiary, Bodegas Riojas Santiago, S.A. (BRS) received rebates in violation of section 16 from various common carriers in this trade in connection with certain shipments of Yago Sangria wine. As indicated by the instant Order of Investigation and Hearing, that claim was settled with Henri Wines on July 9, 1979 for $12,500.

Respondent is one of the carriers alleged to have paid rebates to Henri Wines, BRS, or both. As indicated by BIE's Memorandum in Support of Proposed Settlement, there is some evidence that Dart may have paid rebates amounting to $41,959.18 to this shipper/consignee on twenty-six shipments between November 18, 1973 and December 15, 1973. This evidence is said to consist of bank drafts and invoices indicating that freight charges paid on Henri Wines' account by BRS for these twenty-six shipments amounted to $58,286.90 while the applicable tariff charges should have been $100,245.75. However, these bank drafts and invoices have not been entered into the record of this proceeding despite the Presiding Officer's observations on their importance in his September 16, 1980 order rejecting the proposed settlement.

In that same order, the Presiding Officer also expressed concern that no demand had been made of Dart for evidence which might clearly establish whether it had billed or collected less than the applicable tariff rates from the shipper. Particularly troublesome to the Presiding Officer was the reliance on a statement made by Dart's counsel to Commission field investigators that "he personally" could find nothing in Dart's Antwerp office dealing with the 26 shipments described in the June 23, 1980 Stipulations of Hearing Counsel and Dart Containerline Company, Ltd.[1]

In the discovery which ensued after the rejection of the proposed settlement, BIE served the following interrogatory upon Dart:

> 3. For each shipment of Yago Sangria wines transported by Dart and listed in the Stipulation please provide:
>
> a. The total amount of monies received by Dart from Bodegas Riojas Santiago, S.A. (BRS) as payment for freight, including any ancillary charges (bunker or currency adjustment factors).
>
> b. All documents recording or reflecting in any manner the monies received by Dart from BRS as payment for freight.
>
> c. All documents recording or reflecting in any manner any deposits into any bank account maintained directly or indirectly by or for the account of Dart either within the United States or overseas where such deposits reflect such monies received by Dart from BRS as payment for freight.

The response to this interrogatory was:

> "Dart has no documents responsive to Request No. 3."

Contrary to the Commission's Rules of Practice and Procedure (46 C.F.R. 502.206) this response was not made under oath and was not signed by an officer or agent of Respondent, but rather by Dart's attorney.[2] Moreover, the response raises more questions than it answers, in view of the fact that Dart has stipulated that it carried the shipments in question and in view of Dart's unequivocal negative answer to BIE's Interrogatory No. 5 which asks whether Dart transported any other shipments of wine for these parties during the same period of time. However, no follow-up discovery was conducted.

In addition to the absence on this record of any direct input from responsible officers or agents of Dart, there is nothing to indicate that any cooperation was solicited from Henri Wines, in order to determine the nature and extent of Dart's alleged violations within the context of this proceeding. In its July 18, 1979 Settlement Agreement with the Commission, Henri Wines, agreed to the following:

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[1] The Presiding Officer correctly noted in his September 16, 1980 order (p. 10, note 9) that the Order of Investigation and Hearing in this proceeding is broader in scope than the twenty-six shipments set forth in the parties' stipulations. In fact, there was no mention of the twenty-six shipments in that Order, but rather, only a reference to the settlement agreement with Henri Wines. However, the Commission believes that the proceeding on remand should focus upon the 26 shipments for which there appears to be substantial available information, although this emphasis should not preclude the development of other relevant data pertaining to alleged rebating violations by Dart as contemplated by the Commission's February 29, 1980 Order of Investigation and Hearing.

[2] The Commission is by no means challenging the integrity of Dart's attorneys, but rather wishes to emphasize that the purpose of this rule (and similar federal rules of discovery) is to ensure that a person charged with responsibility for the records in question responds to such an inquiry.

> 2. Respondent shall preserve and maintain at Respondent's main office at White Plains, New York, or at such other location as may be agreeable to the Commission for five (5) years from the date of execution of this Agreement the originals of all records and documents provided to the Commission during its investigation of the alleged violations described above. Upon reasonable notice, Respondent will allow Commission investigators or attorneys unimpeded access to such records and documents, and will allow the removal of any documents as specifically requested by Commission investigators or attorneys for the purpose of duplication.*

In short, the Commission is unwilling to discontinue this investigation on the basis of the present record and is not persuaded that the only untapped source of evidence is the Spanish shipper, BRS.

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the presiding Administrative Law Judge for further development of the record consistent with this order.

IT IS FURTHER ORDERED, That the proceeding on remand shall focus on but not be limited to investigation of the twenty-six shipments described in the Stipulations of Hearing Counsel and Dart Containerline Company, Ltd., dated June 23, 1980.

By the Commission **

(S) FRANCIS C. HURNEY
Secretary

* Paragraph 3 of the Settlement Agreement also raises the possibility that the cooperation and information from the Spanish shipper may be obtained through Henri Wines.

** Chairman Green did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-78

ANTONIO LOPEZ QUINTANA D/B/A

TONY QUINTANA FREIGHT FORWARDERS

INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1324

NOTICE

August 18, 1981

Notice is given that no exceptions have been filed to the July 13, 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

DOCKET NO. 80-78
ANTONIO LOPEZ QUINTANA D/B/A
TONY QUINTANA FREIGHT FORWARDERS
INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 1324

Held:

(1) Where the respondent freight forwarder allowed his ocean freight forwarder's license to be used by a friend and where the respondent was not materially unjustly enriched, cooperated in the Commission's investigation and the illegal forwarding did not result in damage to others, a settlement setting a penalty of $5,000 is just and proper. Such a penalty gives due consideration to mitigating circumstances and is within that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and policies.

(2) Where the respondent freight forwarder "loaned" his ocean freight forwarder's license to a friend not believing it a "serious violation," and where he now recognizes its seriousness, and where the respondent has demonstrated that he is able to carry on the business of freight forwarding in accordance with the pertinent law and regulations and has sworn to do so in the future, it is held that he is "fit," willing and able to carry on such business and his license need not he suspended or revoked.

Carlos Rodriguez for respondent.

Stuart James for the Bureau of Investigation and Enforcement.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized August 18, 1981

PRELIMINARY MATTERS

By Order of Investigation dated November 3, 1980, the Commission ordered that pursuant to sections 22, 32 and 44 of the Shipping Act, 1916, and section 510.9 of the Commission's General Order 4 a proceeding be instituted to determine:

1. Whether Quintana violated section 510.23(a) of General Order 4 by permitting a person not in its employ to use its license for the performance of ocean freight forwarding services.
2. Whether Quintana violated section 44(e) of the Shipping Act, 1916 and section 510.24(e) of the Commission's General Order

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

4 by collecting compensation from oceangoing common carriers on shipments for which it did not perform ocean freight forwarding services.

3. Whether civil penalties should be assessed against Ouintana pursuant to section 32(e), Shipping Act, 1916 for violations of the Shipping Act, 1916, and/or the Commission's rules and regulations and, if so, the amount of any such penalty which should be assessed, taking into consideration factors in possible mitigation of such a penalty.

4. Whether Quintana's ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916, for:

   (a) willful violations of the Shipping Act, 1916, or the Commission's rules or regulations or both;

   (b) such conduct as the Commission finds renders Quintana unfit properly to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

As a result of the above order the parties submitted a stipulation of facts and a proposed settlement of civil penalties. In addition, testimony was taken regarding the question of whether or not the respondent was "fit" to continue as a licensed ocean freight forwarder.

STIPULATION OF FACTS

1. Antonio Lopez Quintana d/b/a Tony Quintana Freight Forwarders (Quintana) located at 941 West Flagler Street, Miami, Florida, is an independent ocean freight forwarder operating under FMC license number 1324 issued May 4, 1971.

2. During the course of a compliance check of licensee, and of a record review conducted pursuant to discovery procedures in this proceeding, it was determined that Quintana permitted a then-unlicensed firm, Trans-World International, Inc. (T.W.I.) to use its license for the performance of ocean freight forwarding services during the period May 17, 1977 to September 13, 1977.

3. During the aforementioned period Quintana allowed T.W.I. to use its license for sixty-six (66) ocean shipments.

4. Quintana collected $600 in compensation for thirty (30) of the shipments described above, and no forwarding fees.

5. During discovery procedures conducted of Quintana forwarding files and books of account by FMC personnel on January 12, 13, 1981, it was determined that there were no other apparent violations of the Shipping Act, 1916, from January 1, 1977 to the present.

6. Quintana was motivated by his friendship of T.W.I.'s principal, Mr. Frank Reyes, in allowing him to use his license during the interim that T.W.I. was processing its own application for a freight forwarder's license.

7. Quintana's activities with T.W.I. were initially discovered by FMC investigators during a compliance check of T.W.I. in November, 1978. Mr. Quintana was cooperative in supplying documents and information during the course of that compliance check as well as during the current discovery proceedings.

8. Mr. Quintana submitted a notarized financial statement including a profit and loss statement for 1980 which indicates that Mr. Quintana's total net income (from all sources) for that year was $23,851.00, after taxes.

9. The above noted financial statement includes all of Mr. Quintana's personal assets and liabilities since he operates as sole proprietorship.

10. Mr. Ouintana has never been the subject of any other FMC investigation, even though he has been working in ocean freight forwarding since 1950.

11. Mr. Quintana had known Mr. Frank Reyes, President of T.W.I., since approximately 1966 as a co-worker for a freight forwarder, and had met with him and his family socially also since that time.

12. The respondent did not consider the loan of his freight forwarder's license to a friend as a "serious violation" at the time he undertook to do so.

13. The respondent now better understands the law relating to fitness and qualifications for a freight forwarder's license.

14. In the future the respondent will not allow his license to be used by anyone other than himself.

15. The respondent agrees that if he misuses his freight forwarder's license in the future it will be revoked.

ULTIMATE FINDINGS OF FACT

16. The record in this proceeding justifies a settlement whereby the respondent pays $5,000.00 to the Federal Maritime Commission. Such a settlement takes into consideration relevant mitigating circumstances and is within the parameters of that reasonable area of settlement and compromise which lends itself to the deterrence of future similar conduct by the respondent and others so inclined, and which will secure compliance with the law and the Commission's rules and policies.

17. The respondent is fit to continue as a licensed ocean freight forwarder.

DISCUSSION AND CONCLUSIONS

1. *Settlement of Civil Penalties*

It is well settled that the law generally, as well as the Federal Maritime Commission, encourages settlements and that there is a presumption that settlements are fair, correct and valid. 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 adjustments 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,[2] 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.

Further, the Commission has by rule encouraged settlement [3] and has often favorably looked upon them as a matter of policy.[4]

Here, in arriving at a settlement of the civil penalties counsel considered various factors including:

1. The nature of the violations alleged;

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[2] 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 untertake 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 procedure is left to development by the agencies themselves.

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

[3] 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, arguments, offers of settlement, or proposal of adjustment.

See also Rule 505, 46 C.F.R. 505, where in General Order 30 the Commission provides for: "compromise, assessment, settlement and collection of civil penalties under the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933"; and the criterion contained in the government-wide "Standards for the Compromise of Claims" where in section 103.5 under the heading "Enforcement Policy" (4 C.F.R. 103.5) it is stated that:

> Statutory penalties, forfeitures, or debts established as an aid to enforcement and to compel compliance may be compromised pursuant to this part if the agency's enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon.

[4] See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement)*, FMC Docket No. 79-51, served June 21, 1979 (22 F.M.C. 31). Administratively Finalized, July 27, 1979, *Del Monte Corp. v. Matson Navigation Co. (Approval of Settlement)*, FMC Docket No 79-11, served November 20, 1979 (22 F.M.C. 365), Administratively Finalized, December 27, 1979; *Merck, Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244 (1973).

2. The period of time during which the alleged violations occurred and the frequency of those alleged violations;
3. The extent of the conduct in question;
4. The cessation of the allegedly violative conduct;
5. The amount of money generated through the allegedly violative conduct;
6. The distribution of the monies generated through the violative conduct;
7. The impact of the conduct in question upon Quintana's performance of its duties and responsibilities as an independent ocean freight forwarder; and
8. The level of cooperation provided.

As can be seen from the findings of fact, once one moves past the initial wrongdoing all of the other factors weigh in favor of the respondent. While he allowed his freight forwarder's license to be used by another unlicensed party, he was not materially unjustly enriched; once on notice he did not continue in the prohibited activity; he has cooperated throughout the investigation, and his wrongdoing was not so extensive and prolonged so as to be harmful to others.

Without unduly belaboring the point, the settlement of the civil penalties proposed by the parties here is a fair and equitable one in the light of the facts and circumstances involved, is in the public interest, and is approved. A copy of the settlement agreement is attached.

2. *Fitness*

After settlement of the penalty provisions the only issue left for decision is whether or not the respondent's ocean freight forwarder's license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916 (Issue No. 4 of the Order of Investigation and Hearing). In *Independent Freight Forwarder's License—E.L. Mobley Inc.*, 18 S.R.R. 451 (1979), Initial Decision 21 F.M.C. 849 (1978), where the Commission issued an Order of Investigation regarding both civil penalties and the question of fitness, the Commission held that:

> Freight forwarder licensee will not be permitted to use the settlement procedures in lieu of proceeding with a hearing ordered by the Commission to investigate alleged violations of the freight forwarders rules and the fitness of the forwarder to continue as a licensee . . . it would be an abrogation of the agencies Shipping Act responsibilities to permit the licensee to negotiate the issue of fitness. . . .

So here, it is necessary to make a determination on this issue.

Section 44 of the Shipping Act, 1916, provides in pertinent part:

> SEC. 44.(a) 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 . . . .
>
> (b) 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. . . .

Part 510 of the Commission's rules (46 C.F.R. 510.1 et seq.) deals with the Licensing of Independent Ocean Freight Forwarders. The case law that has evolved from the application of the pertinent legislation and regulations is understandably subjective in nature. On the one hand it has been held that where violations of the Shipping Act have occurred and it is believed the licensee will continue in the violative conduct, that licensee cannot be deemed to be fit to be so licensed. *Independent Ocean Freight Forwarder Application—Alvarez Shipping Co., Inc.* 16 F.M.C. 78 (1973); *G. R. Minon—Freight Forwarder License,* 12 F.M.C. 75 (1968). *See also, Harry Kaufman D/B/A International Shippers Co. of N.Y.—Independent Ocean Freight Forwarder License No. 35 and Forwarding Activities of Irving Betheil and Stephen M. Betheil,* 16 F.M.C. 256 (1973). On the other hand, it has been held in *Mobley, supra,* that:

> Administrative sanctions should not, however, be blindly or automatically imposed and even in cases where the violation is clear, evidence of mitigation will be considered in tailoring the sanctions to the facts of the specific case (footnote omitted). Section 44 and its regulations are based on an underlying remedial public interest purpose and the sanctions imposed must serve such a purpose and not be punitive in character (footnotes omitted);

and in *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246,* FMC Docket No. 79-16, Initial Decision served October 19, 1979 (22 F.M.C. 585), and partially adopted 22 F.M.C. 583 (1980), that:

> . . . Thus, the courts 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 (citations omitted). Furthermore, in previous cases the Commission has expressed its belief that the Freight Forwarder Law, P.L. 87-254, was enacted as remedial statute in order to correct abuses in the forwarding industry (citations omitted).

> 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 (footnote omitted).

Applying the above law and principles to the facts involved in this case, we must determine whether or not the respondent is fit to continue to be licensed as an ocean freight forwarder. The evidence establishes, and he admits, that he made a mistake in allowing a friend to use his freight forwarder's license. It also established that he is now aware of the seriousness of his offense, that it will not happen again, and that if it does the license will be suspended or revoked. Given Mr. Quintana's expertise in the area of freight forwarding, his demonstrated ability and intent to operate in a proper manner for the last three years, his obvious sincerity in testifying that he was determined to operate in accordance with the Commission's rules in the future and the fact that his business is a small one and his livelihood depends on future compliance with the law and regulations—suspension or revocation of his freight forwarder license is too brash a sanction. In essence, he deserves another chance and therefore, it is held that the respondent is fit to carry on the business of an independent ocean freight forwarder.

The proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

DOCKET NO. 80-78

ANTONIO LOPEZ QUINTANA D/B/A
TONY QUINTANA FREIGHT
FORWARDERS - INDEPENDENT
OCEAN FREIGHT FORWARDERS
LICENSE NO. 1324

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Investigation and Enforcement (Bureau) and Respondent Tony Quintana Freight Forwarders (Quintana). 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 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 November 3, 1980, the Commission instituted the present proceeding to determine whether Quintana had violated sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916, 46 U.S.C. 841(b), and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of sections 510.23(a) and 510.23(e) of the Commission's General Order 4, and/or violations of section 44(e) of the Shipping Act, 1916, if so found;

WHEREAS, the Order of Investigation alleges that Quintana may have violated sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916;

WHEREAS, Quintana has admitted that it has engaged in activities which may be violative of sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916;

WHEREAS, Quintana has terminated its participation in conduct which may be violative of sections 510.23(a) and 510.24(e) of the Commission's General Order 4, and section 44(e) of the Shipping Act, 1916, and has indicated its willingness and commitment to maintain measures designed to prevent future violations of the Shipping Act, 1916 and the Commission's Rules and Regulations;

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 Quintana in accordance with the terms and conditions of this Agreement; and

WHEREAS, section 32(e) of the Shipping Act, 1916, 46 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, Quintana 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. Quintana hereby agrees, as a condition of the settlement agreement, to pay a monetary amount of Five Thousand Dollars ($5,000) of which One Thousand Dollars ($1,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Four Thousand Dollars ($4,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix I in the following installments:

> One Thousand Dollars ($1,000), plus 12% interest, shall be paid on or before six (6) months following approval by the Commission of this Proposed Settlement;
>
> One Thousand Dollars ($1,000), plus 12% interest, shall be paid on or before twelve (12) months following approval by the Commission of this Proposed Settlement;
>
> One Thousand Dollars ($1,000), plus 12% interest, shall be paid on or before eighteen (18) months following approval by the Commission of this Proposed Settlement;
>
> One Thousand Dollars ($1,000), plus 12% interest, shall be paid on or before twenty four (24) months following approval by the Commission of this Proposed Settlement;

2. It is understood by Quintana that this Agreement shall not serve as a bar or defense to any criminal prosecution or civil litigation by the Commission or any other department or agency of the United States Government for conduct engaged in by Quintana, other than that reflected in the factual record submitted in the present proceeding.

3. In the event changes in law or other circumstances occur during the term of this Agreement which Quintana believes warrant modification or mitigation of the Agreement, Quintana may petition for this purpose.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Quintana of the violations alleged in the Order of Investigation and Hearing by which this proceeding was instituted.

5. The undersigned counsel for Quintana represents that he is properly authorized and empowered to execute this Agreement on behalf of Quintana and to fully bind Quintana to all of the terms and conditions herein.

CARLOS RODRIGUEZ
Counsel for Respondent

ROBERT EWERS, DIRECTOR
Bureau of Investigation & Enforcement

STUART JAMES
Attorney

April 3, 1981

APPENDIX I

PROMISSORY NOTE CONTAINING AGREEMENT FOR JUDGMENT

For value received, Tony Quintana Freight Forwarders (Quintana), promises to pay to the Federal Maritime Commission (the Commission) the principal sum of Five Thousand Dollars ($5,000) to be paid at the offices of the Commission in Washington, D. C., by bank cashier's or certified check in the following installments:

One Thousand Dollars ($1,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars ($1,000) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars ($1,000) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars ($1,000) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

One Thousand Dollars ($1,000) on or before twenty-four months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-78;

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. 80-78 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 this 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, Quintana does hereby authorize and empower any U.S. attorney, any of his assistants or any attorney of any court of record, Federal or State, to appear for them, and to enter and confess judgment against Quintana 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 Quintana 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 immediate execution on said judgment. Quintana 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 Quintana by bank cashier's or certified check at any time, provided that accrued interest on the principal amount prepaid shall be paid at the time of the prepayment.

TONY QUINTANA FREIGHT FORWARDERS

By: ____________________

Date: ____________________

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 502
GENERAL ORDER 16; AMENDMENT 39
DOCKET NO. 81-38
RULES OF PRACTICE AND PROCEDURE

August 19, 1981

ACTION: Final Rule

SUMMARY: Present Rules of Practice suggest that a former FMC employee wishing to practice before the agency, with respect to a matter that was pending during the employee's tenure, is absolutely precluded from such activity if "associated" with a barred former FMC employee, by reason of current common employer. This amendment makes clear that a former employee may practice before the FMC under such circumstances subject to certain conditions and restrictions.

DATE: Effective August 26, 1981.

SUPPLEMENTAL INFORMATION:

46 C.F.R. 502.32(b)(2) currently requires a former employee wishing to appear or practice before the agency within one year of the termination of FMC employment on a particular matter, which was pending during the employee's tenure, to file an affidavit attesting, among other things, that the affiant "is not associated with" nor will be associated with any other former member, employee, or officer who is precluded from practicing, appearing or representing anyone before the FMC in connection with that matter.

The term "not associated with" is neither defined nor explained in section 502.32(b)(2). The term could be read, however, as absolutely precluding an otherwise qualified former FMC employee from appearing before the agency solely because that employee now happens to be associated, by reason of a common employer, to another former FMC employee who is precluded by law or regulation from so appearing. The Commission did not intend such a result.

Section 502.32(b)(2) is intended to forbid a former employee intending to practice before the agency on a particular matter, that was pending during the employee's tenure, from obtaining an unfair or unethical advantage by conferring with or soliciting the assistance of another former FMC employee who is precluded from appearing before the Commission in connection with such matter. Interpreted in this manner, section 502.32(b)(2) is consistent with section 502.32(c), which permits a former employee's partners or associates to appear before the Commission, even if the former employee is precluded from so doing, provided that such partners or associates do not discuss the matter with, utilize the services of, or share any fees with the former FMC employee. This is the standard the Commission intended to apply to associations among former employees rather than the absolute bar that could be implied from the existing language of section 502.32(b)(2).

In recognition of the foregoing the Commission on June 10, 1981 (46 F.R. 30666) published a proposed rule designed to clarify this matter. No comments were filed in response to the proposed rule. The Commission is of the belief that the rule as proposed should be adopted with one minor modification. As proposed, § 502.32(b)(2)(ii) would have prohibited discussion by a former employee of "any" matter with an associated former employee. Our intention is to preclude only discussion of the particular matter for which permission to appear is sought. Accordingly, the words "any matter" have been changed in this final rule to read "the particular matter."

THEREFORE, pursuant to E.O. 11222 of May 11, 1965 (30 F.R. 6469), 18 U.S.C. 207, section 43 of the Shipping Act, 1916 (46 U.S.C. 841a), and 5 U.S.C. 553, section 502.32(b)(2) of Title 46 of the Code of Federal Regulations is revised to read as follows:

§ 502.32 Former Employees

* * * * *

(b) * * *

(2) Such applicant shall be required to file an affidavit to the effect that the particular Commission matter was not under the applicant's official responsibility as a member, officer or employee of the Federal Maritime Commission at any time within a period of one year prior to the termination of his or her service with the Commission; that the applicant will not: (i) utilize the service of, (ii) discuss the particular matter with, or (iii) share directly or indirectly any fees or revenues received for services provided in the particular matter with a partner, fellow employee, or legal or business associate who is a former member, officer or employee of the Commission and who is either permanently or temporarily precluded from practicing, appearing or representing anyone before the Commission in connection with the particular matter; and that the applicant's employment is not prohibited by any law of the United States or by the regulations of the Commission. The statements contained in such affidavit shall not be sufficient if disproved by an examination of the files and records of the case.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-63

WEST COAST OF ITALY, SICILIAN AND ADRIATIC PORTS, NORTH ATLANTIC RANGE PORTS CONFERENCE (WINAC) - TARIFF RULE 26

Conference tariff rule prescribing penalties against persons responsible for misdescribing cargo, but enforcing those penalties by means of a lien against the cargo is found to violate sections 17 and 18(b)(1) of the Shipping Act, 1916. The conference is ordered to cancel the rule and to cease and desist from collecting or publishing unspecified cargo verification charges, enforcing cargo liens at private sales, and enforcing penalties by means of a cargo lien which effectively penalizes persons other than those responsible for misdescribing cargo.

Stanley O. Sher and *John R. Attanasio* for West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference.

Paul J. Kaller and *Deana E. Rose* for the Bureau of Investigation and Enforcement.

REPORT AND ORDER

August 21, 1981

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

This proceeding was commenced on September 19, 1980 by an Order to Show Cause directed to the member lines of the West Coast of Italy, Sicilian & Adriatic Ports, North Atlantic Ports Conference (WINAC). The Conference was ordered to demonstrate why Rule 26 of its Tariff FMC No. 3 should not be cancelled for permitting the assessment of certain unclear, variable and discriminatory charges; for unreasonably restricting the delivery of cargo to U.S. consignees; and for unfairly penalizing innocent parties for errors in shipping documents, in violation of sections 18(b)(1), 17 and 15 of the Shipping Act, 1916 (46 U.S.C. 817(b)(1), 816 and 814), respectively.[1]

* Chairman Alan Green, Jr. did not participate.

[1] The following practices were authorized by Tariff Rule 26 as it read on September 19, 1980:

(a) Collection of freight undercharges from the "interested party" with underlying liability in the "freight payor."

(b) Collection from the "interested party" of a penalty equal to double the amount of any freight undercharge caused by any error of the shipper or consignee, with underlying liability in the "party at fault."

(c) Collection from the "interested party" of unspecified "verification expenses" incurred by the carrier in ascertaining any freight undercharge, with underlying liability in the "party at fault."

Continued

On November 14, 1980, WINAC submitted a Memorandum of Law, an affidavit from Conference Secretary Giovanni Ravera, and an amendment to Rule 26. The amendment, as further modified on December 30, 1980, became effective February 12, 1981, and is attached as Appendix "A" hereto. The amended version of Rule 26 cures two of the deficiencies perceived in the earlier version by quoting the exact amount to be charged for verification expenses and permitting foreclosure of a cargo lien only at a public sale.[2] In addition, the term "interested party" was replaced by the term "cargo interests" and the term "party at fault" was defined as the "party responsible for the misdescription or error," thereby clarifying the Rule's intended operation to some degree.

Both WINAC and the Commission's Bureau of Investigation and Enforcement contend that amended Tariff Rule 26 is lawful in all respects. The arguments raised in favor of assessing a "double the unpaid freight" penalty plus a verification charge, and making both collectable by means of a lien against the cargo can be summarized as follows: (1) penalty charges imposed by ocean carrier tariffs have been judicially enforced; (2) special circumstances in the WINAC trade require carrier-imposed penalties to deter otherwise unmanageable cargo misdescription practices; (3) private penalties are consistent with Shipping Act section 18(b)(3) because ocean carriers have no duty to verify cargo descriptions and need only apply the correct rate to the shipper's description; and (4) Shipping Act section 18(b)(1) does not require an advance statement of tariff charges in every situation.[3] For

(d) Securing each of the above amounts by means of a lien against the cargo.
(e) Enforcement of cargo liens securing the above amounts by either public or private sale.
(f) Application of penalty and verification amounts collected under the above procedures to the Conference's "Verification Service" rather than the general revenues of the carrier involved.

[2] Verification expenses are now stated as $100 plus $25 per ton if container stripping is necessary.

[3] WINAC also claims that the September 19, 1980 Show Cause Order represented an improper attempt to "shift the burden of going forward to the Respondents," but WINAC is clearly mistaken in this regard. The validity of show cause procedures such as those set forth in 46 C.F.R. 502.66 are well established in situations where the agency possesses sufficient facts to establish a *prima facie* case against the respondent. *See American Export & Isbrandtsen Lines v. Federal Maritime Commission*, 334 F.2d 185 (9th Cir. 1964). WINAC does not contend that the Commission's Show Cause Order failed to state a *prima facie* case against Rule 26, but claims only that the Order does not demonstrate the unlawfulness of the *amended* Rule, in light of the facts contained in Mr. Ravera's affidavit. This simply rephrases the ultimate question before the Commission—does the record establish the invalidity of all or part of Rule 26?

Intertwined in WINAC's apparent procedural argument is the statement that "[a] tariff rule which has continued in effect without challenge for a number of years carries with it a presumption of lawfulness." If this statement is intended to advise the Commission that it, as the moving party, bears the ultimate burden of proof under 5 U.S.C. 556(d), WINAC belabors the obvious. If, however, WINAC believes that common carrier practices authorized by properly filed tariffs achieve some measure of protection from subsequent challenge under Shipping Act sections 14 through 18 because the tariff has been accepted for filing, this belief is erroneous. Tariff filings are neither adjudicatory proceedings nor finally determinative of individual rights and privileges. It does not follow that because a carrier must

Continued

the reasons given below, the first three of these arguments fail to justify the particular penalty/lien arrangement published in Tariff Rule 26.

DISCUSSION

Factual Background

Rule 26 has been in WINAC's tariff since March, 1959.[4] Until March 13, 1964, it imposed "treble damage" penalties in the case of cargo misdescription. On May 15, 1968, the Rule was again amended to indicate that only the "party at fault" would be subject to penalty and verification charges.[5] Nonetheless, the simultaneous presence of other language stating that the "interested party" is liable created an ambiguity in this regard, and it appears that the Conference commonly invokes the leverage of a cargo lien to collect both freight undercharges and penalty/verification amounts from the consignee, regardless of whether the consignee is the party at fault.[6] The consignee is then left to adjust its account with the shipper as best it can. Application of this procedure to a shipment of chestnuts in October, 1979 led to the reparation action against a WINAC member line adjudicated in *William Kopke, Jr. v. Sea-Land Service, Inc.*, 23 F.M.C. 39 (1980).

The WINAC trade is heavily containerized and over 94% of the Conference's cargo is loaded into containers by shipper-controlled personnel at shipper-controlled premises. Under Tariff Rule 20-2(f), shippers of such cargo must provide the carrier with a certified packing list for each container which describes the goods therein and gives their gross weight, measurement and F.O.B. value, as may be necessary for accurate rating.[7] Containers loaded by the shipper are accepted subject to "Shipper's Load and Count," a term which may affect the carrier's

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adhere to its tariff that the contents of that tariff are in any other respect lawful. *See Chicago M. St. P. & P.R. Co. v. Aloutte Peat Products*, 253 F.2d 449, 454-456, n.5 (9th Cir. 1957). *Cf. States Steamship Co. Far East/U.S.A. Household Goods Tariff*, 19 F.M.C. 793, 794-798 (1977). The two decisions interpreting the scope of conference ratemaking practices under specifically-approved section 15 agreements which WINAC cites at pages 28 and 29 of its Memorandum are inapposite to the present controversy. The section 15 authority of the WINAC member lines concertedly to impose "double the unpaid freight" penalties enforced by cargo liens is not at issue here.

[4] Tariffs giving advance notice of ocean carrier rates and practices for foreign commerce transportation were not required to be filed until Congress added section 18(b) to the Shipping Act, 1916, on October 3, 1961 (P.L. 87-347, 75 Stat. 762).

[5] WINAC FMC Tariff No. 1, first revised page 61. Rule 26 was designated as Rule 17 in previous editions of WINAC's FMC tariff.

[6] WINAC consignees cannot take possession of their cargo unless all charges, including penalty/verification amounts, are paid or a bond is posted to cover amounts in dispute. Ravera affidavit at 8-9; WINAC Memorandum at 25-26.

[7] If the shipper is unaware or mistaken as to the necessity for stating weight and measure or F.O.B. value on a given shipment, adequate certification would not be present and the cargo is presumably not transported by the carrier. To deliberately transport goods without ascertaining the freight rate until their arrival is a highly questionable practice, likely to result in violations of section 18(b)(3).

liability under the Carriage of Goods by Sea Act (46 U.S.C. 1300 *et seq.*, hereafter "COGSA").[8]

THE VALIDITY OF CARRIER-IMPOSED PENALTIES

WINAC argues that Rule 26 is reasonable and lawful because similar carrier-imposed misdescription penalties were allowed by courts reviewing cargo forfeiture proceedings. In *North-German Lloyd v. Elting*, 96 F.2d 48 (2d Cir. 1938), where a penalty of double the total correct freight was assessed, and *North-German Lloyd v. Heule*, 44 F.100 (S.D.N.Y. 1890), involving a 5% penalty surcharge, cargo had been seized and forfeited for violations of United States customs laws (*i.e.*, smuggling), and the validity of the ocean carrier's lien for such penalty amounts was at issue. In both instances, the court ruled in favor of the carrier, but these decisions are not based on the Shipping Act, 1916 or any of its regulatory precepts.[9] *Elting* simply reflected the court's view that the charge in question was not unconscionably high under contract law principles which permit the collection of liquidated damages, but not "forfeitures" or "penalties." The court did not pass upon the reasonableness of this charge as a transportation practice, but evaluated it only in light of the carrier's "additional trouble, expense and long delay in payment" occasioned by the seizure and sale of a particular shipment of Swiss watches by the U.S. Treasury Department.[10]

WINAC alleges that Italian origin shipments present special difficulties for ocean carriers when containers are loaded away from the carrier's pier because Italian Customs clearance is obtained at the point of loading and the cleared containers cannot be reopened by the carrier.[11] When WINAC has requested waivers of Italian Customs regulations, the Guardia di Finanza (Ministry of Finance) has denied the requests. Thus, WINAC cannot verify the accuracy of containerized cargo descriptions prior to vessel loading except in the case of cargo rated on the basis of weight.[12]

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[8] *See* Ravera affidavit at 7. COGSA does not define or discuss the term "Shipper's Load and Count." *Cf.* section 21 of the Federal Bills of Lading Act (49 U.S.C. 101), a statute inapplicable to U.S. import trades. However, 46 U.S.C. 1303(5) does provide for the shipper to indemnify the carrier against all loss, damages and expenses arising from inaccuracies in the shipper's description of the cargo's "marks, number, quantity and weight." WINAC's reliance upon COGSA as excusing affirmative cargo verification responsibilities by its members is discussed below.

[9] These cases did not involve tariff interpretation. *Heule* was decided before enactment of the Shipping Act, 1916. *Elting* was decided before enactment of Shipping Act section 18(b). *See* note 4, *supra*.

[10] The court held that the "double the total freight" charge was not so high it could not be considered as payment for additional transportation related expenses. 96 F.2d at 49.

[11] WINAC does not indicate what percentage of its shipper-loaded container cargo originates in Italy. It is presumed to be substantial.

[12] WINAC states that it has had a policy of verifying all weight-rated containers at the port of loading since 1977. Ravera affidavit at 6 and 9. WINAC further states that in weight discrepancy cases, the shipper is "immediately notified to request an amendment to the declaration and a recalculation of charges based on the adjusted rate." *Id.* at 9. The 1979 *Kopke* shipment was rated on a weight basis, however, and when the carrier erroneously calculated its weight, the consignee and not the shipper was required to pay the penalty and verification charges before the cargo was released.

In addition, freight forwarders in Italy effectively control much of the cargo moving in the U.S. trade and can insulate underlying shippers from direct contact with ocean carriers.[13] Because 80% of WINAC's total shipments are made on a freight collect basis, WINAC believes that U.S. consignees commonly instruct Italian forwarders to prepare false shipping documents in apparent violation of Section 16 Initial Paragraph of the Shipping Act, 1916 (46 U.S.C. 815).[14] The Commission declines to make such a finding on the present record.

WINAC's inspection program uncovered misdescriptions affecting significantly less than one percent of WINAC's 1978 and 1979 containerized shipments.[15] There is no evidence that Italian forwarders regularly retain portions of the freight monies advanced by their clients, encourage clients to obtain reduced rates through deceitful practices, or even that they ordinarily represent U.S. consignees. WINAC itself states that the shipper and not the consignee is presumed to be the party at fault in misdescription cases.[16] Moreover, when a WINAC carrier has reason to believe a U.S. consignee has conspired with an Italian intermediary, that U.S. consignee is subject to the full jurisdiction of the United States and its courts for purposes of redressing the carrier's injuries.[17]

The difficulty WINAC encounters in inspecting cargo in Italy should not cloud the fact that it can make inspections before the cargo is delivered in the United States. When a misdescription is verified prior to delivery, the carrier must collect the full amount of freight undercharges and any verification expenses provided for in its tariff. Under these circumstances, the consignee responsible for payment of the legal tariff rate cannot be said to "benefit" from the shipper's misdescriptions in any respect.

WINAC claims that certain provisions of the Carriage of Goods by Sea Act obligate shippers to describe accurately the cargo they tender to a carrier and that this obligation signifies a Congressional intention to absolve ocean carriers of section 18(b)(3) liability for tariff errors

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[13] The Commission has observed this situation in earlier proceedings focusing on carrier malpractices. *E.g.*, *WINAC Trade Investigation*, 10 F.M.C. 95 (1966). It apparently contributes to the WINAC trade's reputation for having a high incidence of deliberate cargo misdescription designed to evade carrier scrutiny as well as untariffed carrier inducements to shippers.

[14] Ravera affidavit at 5 and 13.

[15] Ravera affidavit at 11-12. The total penalty and verification charges collected on these shipments averaged $147,500 per year and is minuscule in comparison to the conference's annual revenues of $110,000,000. *Id.* WINAC does not indicate what percentage of its annual container inspections uncover cargo misdescriptions.

[16] Ravera affidavit at 9 and 13.

[17] WINAC, however, states that its members cannot risk their customers' good will by subjecting them to ordinary commercial collection practices or possible Shipping Act penalties. Memorandum at 18-19. Assuming that the U.S. consignee is in fact the carrier's "customer," the customer's good will is also unlikely to be enhanced by a lien enforced demand for double damages and verification charges. *See* Ravera affidavit at 12-13.

made in reliance on the shippers' cargo descriptions.[18] The Commission disagrees and concludes that WINAC's exceedingly broad interpretation of COGSA contravenes the plain meaning of COGSA and the Shipping Act and finds no support in legislative history or prior judicial decisions.

The decisions in *Nitram, Inc. v. Cretan Life*, 599 F.2d 1359 (5th Cir. 1979) and *Atlantic Overseas Corp. v. Feder*, 452 F.Supp. 347 (S.D.N.Y.), *aff'd*, 594 F.2d 851 (2d Cir. 1978), both deal with the limited question of a carrier's COGSA rights against a shipper which furnishes the carrier with false information. The existence of such rights is not inconsistent with the strict liability imposed upon carriers by section 18(b)(3) for "charging, demanding, collecting or receiving" an amount different than that specified in their FMC tariffs.[19] Moreover, COGSA itself clearly states that it "shall not affect rights or obligations under the provisions of the Shipping Act, 1916." 46 U.S.C. 1308.

WINAC finally contends that its penalty charges are valid because they are logically related to the additional costs of detecting cargo misdescription and the revenue losses resulting from those misdescriptions which remain undetected. WINAC maintains a separate verification charge for the purpose of recovering the costs of ascertaining any particular misdescription and has not attempted to demonstrate that Rule 26's revenues are reasonably related to the overall cost of its cargo inspection program.[20] The number of containers WINAC inspects annually and the type, number and cost of the personnel employed to conduct inspections have not been revealed.

Despite the invalidity of WINAC's arguments, the Commission is not now prepared to rule that all penalty charges designed to deter shipper misdescriptions are unlawful. Although reliance upon shipper descriptions does not excuse a carrier from accurately rating each piece of cargo it transports, the Commission recognizes that it is not commercially reasonable for ocean carriers to personally inspect all cargo and

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[18] WINAC cites 46 U.S.C. 1303(5) and 46 U.S.C. 1303(3)(b) for the proposition that an ocean carrier may conclusively rely upon shippers' descriptions in performing cargo rating obligations. The former provision is described at note 9, *supra*. The latter merely requires the carrier to *issue* a *bill of lading* which shows, among other things, the "number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper." Thus, COGSA does not relieve the carrier of its obligation to accurately ascertain the nature of the cargo for tariff application purposes, but only of the need to place the omitted number, weight or measure on its bill of lading.

[19] Section 18(b)(3) imposes liability without regard to fault or intent. This liability is for damages caused to private parties and for civil penalties of up to $5,000 per occurrence. *E.g.*, *Sanrio Co., Ltd. v. Maersk Line*, 23 F.M.C. 154, 163 (1980); *United States v. Seatrain Lines, Inc.*, 370 F.Supp. 483 (S.D.N.Y. 1973); *United States v. Pan American Mail, Inc.*, 359 F.Supp. 728 (S.D.N.Y. 1972).

[20] A penalty rule intended to deter misdescriptions could reasonably recover revenues which exceed the carrier's costs of inspecting those shipments actually found to have been misdescribed, thereby partially subsidizing the cost of a conference's container inspection program. It does not follow, however, that a penalty system is justifiable merely because it helps finance a conference's mandatory self-policing operations or that the full recovery of self-policing costs is in itself a permissible objective of such a system.

that shipper honesty and thoroughness in preparing shipping documents are critical elements in an efficient ocean transportation system. Ocean common carriers may therefore take reasonable steps to encourage accuracy in shipper descriptions. It is the ambiguity of Rule 26 and its unreasonable impact upon innocent consignees, discussed more fully below, which render the penalty charge unlawful in this instance. The Commission does not rule that carrier-imposed penalties are unlawful *per se*, but only that in order for such a penalty system to be valid under the Shipping Act, it must be fairly and evenly applied against the party at fault.

INDEFINITENESS OF TARIFF RULE 26

Section 18(b)(1), in conjunction with Part 536 of the Commission's regulations, requires all practices which affect a carrier's rates or charges in any fashion whatsoever to be clearly stated in its tariff.[21] The Commission's Show Cause Order noted that Rule 26 did not state the amount of verification expenses which would be charged, expressed the penalty amount in terms of "twice the unpaid freight," and could, but would not necessarily, collect the penalty charges from an innocent U.S. consignee. The first matter has been temporarily resolved by the February 12, 1981 amendment to Rule 26.[22]

Although the freight payor may not know in advance whether a cargo misdescription has occurred or what twice the unpaid freight would total, WINAC argues that this variable penalty assessment formula is necessary to produce the desired deterrent effect upon shipper misrepresentations.[23] Upon reflection, the Commission concludes that as long as reasonable carrier-imposed penalties are permitted for the purpose of deterring cargo misdescriptions, a penalty charge described only as a percentage of the unpaid freight represents an acceptable balance between the legitimate objectives of the penalty system and the shipper's right to advance notice of the amounts for which it will be liable.

The third source of ambiguity concerns the application of WINAC's cargo lien to the collection, of misdescription penalties and, as discussed more fully below, continues to be a significant factor contributing to the invalidity of Rule 26.

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[21] 46 C.F.R. 536.6(a) states that:

> The application of all rates shall be clear and definite and explicitly stated per 100 pounds . . . or some other expressly defined unit.

> 46 C.F.R. 536.6(k) states that:
>
> > Publication of rates which duplicate or conflict with the rates published in the same or any other tariff is forbidden . . . .

[22] An option to dispose of unclaimed cargo at public or private sale was also eliminated by the February 12, 1981 amendment. The Rule now restricts the carrier to the use of public sale arrangements.

[23] *See* Ravera affidavit at 11 and 14.

WINAC's Cargo Lien Procedures

Rule 26's principal infirmity is that it permits the entire economic impact of its shipper penalty system to be placed upon U.S. consignees. Consignees do not ordinarily prepare shipping documents and must therefore be presumed "innocent" of misdescribing cargo unless the carrier has express evidence to the contrary. Nonetheless, WINAC directs its penalty collection efforts against the consignee even in cases such as the *Kopke* matter, *supra,* where the misdescription should be known before the cargo leaves Europe. This practice is not described with reasonable clarity, if at all, by Rule 26's present language, which creates the impression that only the "party at fault" will be required to pay the penalty.

The collection of penalties from consignees rather than shippers is encouraged by the economic leverage available through the use of Rule 26's cargo lien.[24] Although WINAC believes this method of penalty collection is the only "practical" remedy available to its member lines, the Conference simultaneously believes U.S. consignees should have no difficulty obtaining reimbursement from their European shippers.[25] The latter supposition is disproven by WINAC's own conduct as well as the Commission's experience in adjudicating cargo rating controversies involving foreign freight payors. Shippers without a legal presence in the United States can be difficult to locate and even more difficult to persuade. The Conference lines maintain offices and regularly transact business in Europe. They are clearly more capable of obtaining payments from European shippers than are U.S.-domiciled consignees.

WINAC also claims to have a policy of identifying and then contacting the "guilty" party before penalties are assessed.[26] The record in the *Kopke* decision, however, reveals that the carrier neither identified nor attempted to collect from the European shipper at fault before collecting an erroneously assessed penalty from the consignee.[27] Moreover, none of WINAC's alleged procedural protections for innocent parties is described in Rule 26. This omission not only violates section 18(b)(1)'s directive to disclose all practices which affect the rates to be charged, but raises the prospect that member lines possess and exercise the discretion to apply cargo liens in an uneven and discriminatory fashion depending upon their business relationships with the parties involved.

[24] *See* notes 6 and 12, *supra.*

[25] *Compare* Ravera affidavit at 3 and at 9 and 6.

[26] Ravera affidavit at 13. In the Italian trade, this practice apparently involves contacting the Italian forwarder rather than the shipper. WINAC states that in recent years, the forwarder has always paid "when confronted with evidence of a misdescription, except where it is claimed that the forwarder had instructions from the [consignee]." *Id.* Elsewhere, WINAC states that the responsible parties ordinarily agree to settle the matter without protest. *Id.* at 6.

[27] The *Kopke* shipment was perishable and required prompt delivery to the consignee against whom the cargo lien was enforced.

One provision not disclosed in Rule 26 is the shipper's purported option to secure the release of disputed cargo through the submission of a bond.[28]

It is also an unreasonable practice within the meaning of section 17 for a carrier to condition cargo delivery upon the consignee's payment of penalties imposed because of the shipper's fault or omission. Basic fairness requires that carrier-imposed penalties be accompanied by protective measures which assure that only the parties at fault are penalized—either ultimately or in the first instance through the use of a cargo lien device—and that these measures be described in the governing tariff.[29]

It has not been proven that collecting penalties from "innocent" parties is necessary to deter misdescriptions in the WINAC trade and the Commission finds no basis for accepting the contention that Rule 26 strikes the perfect balance between wholesale shipper misdescriptions and the loss of shipper good will. The relatively small number of misdescriptions which have been discovered by WINAC and the relatively small amount of the penalties assessed during 1978 and 1979 do not support the conclusion that collection of penalties by means of a lien against the cargo is critical to WINAC's commercial vitality.[30] A strong conference inspection program, coupled with a compensatory verification charge and the additional freight revenues collected when undercharges are discovered by cargo inspections, is just as likely to achieve the results WINAC attributes to Rule 26's present penalty/lien system.[31]

The fact that penalties are typically small does not justify the unfairness of Rule 26 when it is applied to a particular U.S. consignee which is in no way responsible for the misdescription or the general vagueness and potential for unjust discrimination reflected in the present language of the Rule.[32] Accordingly, the Conference will be directed to cancel the February 12, 1981 version of Rule 26 from its tariff and hereafter to cease and desist from publishing imprecise and unfair penalty/cargo lien provisions and from imposing inexact or unspecified cargo verification

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[28] Ravera affidavit at 8-9; Memorandum, at 25-26.

[29] Although the use of a cargo lien system to collect *penalties* from a person not accurately determined to be the party at fault is an unreasonable practice, cargo liens may be used to collect *verification charges* of the type contained in amended Rule 26 without unreasonably restricting the consignee's right to receive delivery of its cargo.

[30] WINAC states that its penalties are judiciously applied, provide few complaints and ordinarily do not exceed several hundred dollars. Ravera affidavit at 6 and 3.

[31] *See Report on Reconsideration of Docket No. 73-64*, 21 F.M.C. 380, 385 (1980), *affirmed, Trans-Pacific Freight Conference of Japan/Korea v. Federal Maritime Commission*, 15 S.R.R. 775 (D.C. Cir. 1980), *cert. den.* 451 U.S. 984 (1981), regarding the need for self-policing system to include unintentional as well as intentional tariff deviations by conference member lines.

[32] William Kopke was required to pay a penalty of $562.74.

charges of the type described in the Commission's September 19, 1980 Order to Show Cause.

THEREFORE, IT IS ORDERED, That Rule 26 of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference Tariff FMC No. 3 is cancelled, such cancellation to take place 60 days from the service date of this Order; and

IT IS FURTHER ORDERED, That the member lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference listed in Appendix "B" hereto shall—effective 60 days from the service date of this Order—cease and desist from publishing tariff matter purporting to authorize or otherwise engaging in activities which have the following results:

(1) the imposition of a cargo lien enforceable by means of a private sale of the cargo;

(2) assessing a cargo verification charge which is not stated in exact terms in the applicable FMC tariff;

(3) enforcing cargo misdescription penalties by means of a lien against the cargo which allows such penalties to be collected from persons other than the party at fault; and

(4) refusing to deliver cargo on the basis of any reason or condition not fully and clearly set forth in the applicable FMC tariff.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX "A"

The carrier . . . [is to] verify the weight, volume, contents, value and nature of cargo, whenever reasonable doubts exist as to their correctness.

Should it result from this verification that there was a misdescription or misdeclaration or error of any kind in connection with said cargo, whether innocent or intentional, and whether known or unknown to the consignee, the [cargo interests] shall be liable to pay:

(a) The difference of freight due on such cargo if the . . . error concern[s] the volume of the cargo, provided cargo is not containerized. Such difference to be paid, in any case, by the freight payer.

(b) The difference of freight due on such cargo and the verification expenses [*] plus an amount equal to double such difference of freight if the said misdescription or misdeclaration or error concern the weight, contents, value and nature of cargo, or dimension of containerized cargo. The difference of freight to be paid, in any case, by the freight payer whilst the amount equal to double such difference plus the verification expenses is to be paid by the party [responsible for the misdescription or misdeclaration or error ("Party at Fault").]

The Carrier shall have a lien for any or all of said sums which he may enforce by public sale on notification given to the Consignee of the proposed sale even if said Consignee is not the party at fault. In the event of Consignee not being yet identified, steps will be taken by the Carrier or by the Conference Verification Service to notify the Shippers of the action to be taken.

* The verification expenses shall be $100.00 per container plus, if the container is stripped for verification, an additional $25.00 per ton.]

APPENDIX "B"

Member Lines of the West Coast of Italy, Sicilian and Adriatic Ports, North Atlantic Range Ports Conference.

1) Black Sea Canada/U.S.A. Line
2) Concordia Lines
3) Constellation Line
4) D.B. Turkish Cargo Lines
5) Egyptian National Line
6) Farrell Lines, Inc.
7) Hansa Line
8) Hellenic Lines, Ltd.
9) Ibero Lines, S.A.
10) Italian Line
11) Jugolinija
12) Nedlloyd
13) Ro-Ro Charters Corporation
14) Sea-Land Service, Inc.
15) Seatrain International, S.A.
16) Zim Israel Navigation Co., Ltd.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-20

PROCTOR & SCHWARTZ, INC.

v.

MITSUI O.S.K. LINES, INC.

ORDER ADOPTING INITIAL DECISION

August 26, 1981

This proceeding was instituted by the filing of a complaint by Proctor & Schwartz, Inc. (Complainant) against Mitsui O.S.K. Lines, Inc. alleging an overcharge on two shipments, one from Baltimore, Md. to Kobe, Japan and the other from Portsmouth, Va., to Kobe. The complaint sought reparations of $10,115.02.* On July 13, 1981, Administrative Law Judge Charles E. Morgan issued an Initial Decision finding for the Complainant and awarding reparation in the amount requested. 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 money due to the 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 and Chem. Corporation v. Pacific Coast European Conference*, 11 F.M.C. 451, 470 (1968). The Commission will therefore modify the Presiding Officer's award to include interest at the rate of 12% per annum from the dates the Complainant paid the excess freight charges on the two shipments. *Allied Stores Int., Inc. v. United States Lines, Inc.* 20 S.R.R., 97 (1980). These dates are January 24, 1980 and March 4, 1980.

THEREFORE, IT IS ORDERED, That the Initial Decision served on July 13, 1981 in this proceeding is adopted and made a part hereof.

* The Complainant alleged an overcharge of $6,020.10 on the first shipment and $4,094.92 on the second shipment.

IT IS FURTHER ORDERED, That the Respondent Mitsui O.S.K. Lines, Inc. pay to the Complainant reparation in the amount of $6,020.10 plus interest at the rate of 12% per annum from January 24, 1980 on the first shipment and $4,094.92 plus interest at the rate of 12% per annum from March 4, 1980 on the second shipment.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-20
PROCTOR & SCHWARTZ, INC.

v.

MITSUI O.S.K. LINES, INC.

Complainant found to have been overcharged $10,115.02 on two shipments of film tenter or stenter from Baltimore, Md., and Portsmouth, Va., to Kobe, Japan.

Joseph F. Queenan for the complainant.

Elmer C. Maddy and *Walter H. Lion* for the respondent.

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

Adopted August 26, 1981

The shortened procedure was followed. The Commission's Office of Energy and Environmental Impact has determined that section 547.4(a)(22) of the Commission's "Procedures for Environmental Policy Analysis" applies to this proceeding, and that "No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket."

By complaint served February 23, 1981, the complainant, Proctor & Schwartz, Inc., a manufacturer of various types of machinery, alleges that it was overcharged in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act), on two shipments, one shipment from Baltimore, Maryland, to Kobe, Japan, bill of lading No. BAKB-2001, dated January 11, 1980, and the other shipment from Portsmouth, Virginia, to Kobe, bill of lading No. NKFB-2006, dated February 18, 1980.

The charges billed and paid on the first shipment were based on a rate of $174 per cubic meter for 223.962 cubic meters. Basic charges were $38,969.39, plus currency adjustment factor (C.A.F.) of 12 percent or $4,676.33, plus bunker fuel surcharge (B.S.C.) of $17 per cubic meter or $3,807.35, making total charges billed and paid of $47,453.07.

The complainant seeks a rate on the first shipment of $150 per cubic meter. Sought basic charges are $33,594.30, plus 12 percent C.A.F. of $4,031.32, plus the same B.S.C. of $3,807.35, making total sought charges on the first shipment of $41,432.97.

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

The complainant actually paid the amount of the total freight charges plus $50, for forwarding fees and other charges, to its forwarder, Southern Overseas Corporation, on both of the two shipments, after the forwarder apparently prepaid the freight on the two shipments.

For the second shipment, the freight charges billed and paid were based on a rate of $184 per cubic meter. Basic charges on 157.983 cubic meters were $29,068.87, Plus 8 percent C.A.F. of $2,325.51, plus B.S.C. of $19 per cubic meter or $3,001.68, making total charges billed and paid of $34,396.06.

The complainant seeks a rate on the second shipment of $160 per cubic meter. Sought basic charges are $25,277.28, plus 8 percent C.A.F. of $2,022.18, plus the same B.S.C of $3,001.68, making total sought charges on the second shipment of $30,301.14.

The differences in rates between the 1st and 2nd shipments were caused by advances in rates effective February 1, 1980.

The grand total for the two shipments of charges billed and paid was $81,849.13. The total for the two shipments of sought charges is $71,734.11. The difference of $10,115.02 is the total of claimed overcharges on the two shipments.

The first shipment was described on the bill of lading as 5 containers said by the shipper to contain: 7 boxes and 312 loose pieces plastic working machinery "Part of one (1) set of film stenter (No. 8)."

The second shipment was described on the bill of lading as 4 containers said by shipper to contain: 34 boxes and 72 nozzles plastic working machinery "Part of one (1) set of film stenter (No. 8)."

Southern Overseas Corporation, the foreign freight forwarder, acting on behalf of the complainant, issued shipping advices dated January 7, 1980, and February 18, 1980, in connection with the two shipments herein, giving certifications of the origins of the shipments as products of the United States of America, and also describing the shipments in the exact same fashion as they were described in the bills of lading.

The complainant has plants in Philadelphia, Pennsylvania, Lexington, North Carolina, and Glasgow, Scotland. The term "stenter," according to the complainant, is used in Great Britain, while the same article is referred to as a "tenter" in the United States of America. The complainant's principal place of business is in Philadelphia.

The two bills of lading both list the shipper/exporter as Proctor and Swartz on behalf of Seknoy Co., Limited, 280 Earl's Court Road, London SW5. The consignee on both bills of lading is listed as "To Order." The "Notify Party" on each bill of lading is Nikko Trading Co., Inc., Tokyo, Japan.

The commodities shipped were licensed by the U.S. for ultimate destination Japan, and diversion contrary to U.S. law was prohibited, according to notations on the bills of lading.

On bill of lading BAKB-2001, dated January 11, 1980, "Seknoy Co. Limited L/C No. 04 2827/011/001" is listed below "Import Declaration No. I.D. (9) L (30)-00188." The letter of credit No. correctly should have been listed as 042327/011/001 as shown on the invoice dated December 26, 1979, to Nikko Trading Co., Inc., from Proctor & Schwarz, Inc.

On bill of lading NFKB-2006, dated February 18, 1980, under the same "Import Declaration No. I.D. (9) L (30)-00188," is the certification, "We certify that goods are of United States of America origin and manufacture," following which is "(blacked out name) L/C No. 042327/011/001."

Inasmuch as the same letter of credit apparently covered both shipments herein, it is reasonable to conclude that these two shipments were part of the same order. This is confirmed by the descriptions on both of the bills of lading, "Part of One (1) Set of Film Stenter (No. 8)."

This conclusion also appears to be confirmed by the fact that both shipments had the same Import Declaration No. I.D. (9) L (30)-00188.

The record does not otherwise disclose who or what Seknoy Co., Limited is, nor why the shipper/exporter was listed as Proctor and Swartz on behalf of Seknoy Co., Limited, nor why Seknoy Co., Limited is listed under the Import Declaration No. on one bill of lading, and apparently was blacked out in the same place on the second bill of lading. Seknoy Co. Limited is not blacked out on the Shipper's Export Declaration (Exhibit C. page 1 of 3 attached to the answering memorandum of the respondent) which covers bill of lading No. NFKB-2006, the second shipment.

In the shipper's export declaration prepared by its forwarder for the first shipment Schedule B Commodity No. 670.3100 was listed, which covers, "Weaving Machines, knitting machines, and textile machines—Other (including fabric trimmings or embroidery producing machines)."

In the shipper's export declaration for the second shipment Schedule B Commodity No. 670.3400 was listed, which covers,"Machine for making felt and non-woven fabrics included bonded fabrics, in the piece or in shapes, including felt-hat making machines and hat-making blocks; and parts thereof, n.s.p.f."

Because of the shipper's declarations of "Schedule B" numbers, the shipments were rated by the respondent according to the Far East Conference Commodity Code 006-0405-00, which provides rates on textile machines, laundry and dry cleaning machines; sewing machines; and parts—N.O.S.

Respondent states that even assuming the truth of complainant's statement that its forwarder erred in the description of Schedule B numbers in the shipper's export declarations, nevertheless that the complainant has not shown the Commodity Code which properly should apply. Respondent states that the proper commodity code would have been 678-5000-00 covering "Machines not specially provided for, and parts, N.O.S.," as per Far Eastern Conference Tariff No. 28-FMC No. 12, page 704, as shown on Exhibit A to respondent's answering memorandum. The rate for this item as shown on the 10th revised page 704, effective January 1, 1980, was $174, as was charged on the 1st shipment and the rate effective February 1, 1980, was $184, as was charged on the second shipment.

The complainant contends that the shipment consisted of "one set of film stenter consisting of panels and nozzles and guidance system," and that the shipments were knocked down into separate component forms to save shipping space.

The complainant contends that the commodity shipped should have been rated under commodity code No. 678-3545-40 on "Plastic foamed sheet making and film making machines," taking the special rates of $150 and $160, respectively, for the first and second shipments.

The respondent points out that the complainant's sales literature shows that a "tenter" is only one of many components of a "Proctor Film Tenter and Oven" unit, and accordingly argues that a tenter is not qualified to be rated as a full "plastic sheet making or film making machine."

The complainant answers the respondent's contention above, by stating that Tariff No. 28, FMC 12, Far Eastern Conference, Item 3, paragraph (k), 1st Revised Page #16 reads:

> Unless otherwise specifically provided by an individual commodity item for parts, the *rates provided therein also apply on the named parts of the articles described in the tariff Item when so declared on Ocean Bills of Lading.* (Emphasis supplied.)

The above provision makes it clear that a commodity item will also apply on parts of the commodity item when so declared on ocean bills of lading.

To obtain the rate on commodity code item No. 678-3545-40, this could have been accomplished by declaring on the bill of lading that the article shipped was "plastic foamed sheet making and film making machines," or by declaring that the article shipped was a part of such a machine or machines.

As seen, the bills of lading described the articles shipped as boxes and loose pieces plastic working machinery (first shipment), and as boxes and nozzles plastic working machinery (second shipment), both "Part of one (1) set for film stenter (No. 8)."

The bills of lading descriptions establish that plastic working machinery was shipped, and that such machinery was part of a set of film stenter.

The complainant states that while the incorrect commodity code Nos. 670-3400 and 670-3100 were used in the shipper's export declarations, this was nothing more than a clerical error.

It easily is understandable why the respondent charged the rate it did based on the commodity codes in the export declarations, Particulary when the commodities were shipped in containers. Had these articles not been in containers and if they had been subject to visual inspection by respondent, perhaps it would have been evident that these articles were not textile machines nor hat making machines.

Nevertheless, the record as a whole, including the sales literature furnished by the complainant, together with the bills of lading descriptions, of parts of one set of film stenter, appears sufficient to support the conclusion that the complainant has met its heavy burden of proof as to the nature of the commodity shipped.

It is concluded and found that the commodity shipped in each shipment was part of one set of film stenter, and that these articles are entitled to the special rates of $150 (first shipment) and $160 (second shipment) on "plastic foamed sheet making and film making machines."

The complainant was overcharged the total sum of $10,115.02 on the two shipments, and reparation of that amount hereby is awarded.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-79
TUPPERWARE COMPANY

v.

COMPANIA SUD-AMERICANA DE VAPORES
(CHILEAN LINE)

ORDER REVERSING DISMISSAL OF COMPLAINT

August 26, 1981

This proceeding is before the Commission upon its determination to review the May 19, 1981 Order of Administrative Law Judge William Beasley Harris. That Order acknowledged the parties' settlement of a $72,072.37 overcharge claim for $40,000.00, granted the parties' motion to dismiss the complaint, and discontinued the proceeding.

At issue in this proceeding are eleven [1] shipments which Complainant shipper alleged were incorrectly rated by the Respondent carrier in violation of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817). Complainant argued that the commodities should have been assessed the rates for "Utensils, Cooking, Kitchen or Toilet, N.O.S., non-electric, Plastic or Rubber," but were instead rated as "Plastic Articles." Respondent argued that the commodities were correctly rated, and that Complainant failed to meet the heavy burden of proof that attaches when the cargo has left the custody of the carrier.[2]

The Commission has determined that approval of the settlement as presented was improper and that the dismissal of the proceeding was therefore both premature and inappropriate. Although the Commission generally favors the settlement of controversies, it is at the same time concerned that settlements of section 18(b)(3) matters not provide a means for rebating or discriminatory rating practices. Carriers are required under section 18(b)(3) to charge or receive compensation only at the rates published in their tariff filed with the Commission. Failure to charge or receive the appropriate compensation is a violation of that section. In *Organic Chemicals (Glidden-Durkee) Division of SCM Corp. v. Atlanttrafik Express Service,* 18 S.R.R. 1536a (1979), the Commission

[1] The complaint originally referred to twelve shipments. However, one shipment and the payment therefor took place more than two years before the November 12, 1980 filing of the instant complaint, and Complainant's claim based on this shipment was dismissed at a hearing held on April 14, 1981.

[2] Respondent initially rejected Complainant's attempt at a voluntary, informal settlement because of its "six-month rule."

imposed the following requirements for settlements under section 18(b)(3):

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.

18 S.R.R. 1539.

Upon review of the record, it is evident that the instant settlement is not approvable under the aforementioned standards. The second condition imposed by *Organic* has not been satisfied in that no such affidavit has been filed. More importantly, the third condition has not been met in this instance, nor does it seem likely that it could be. The facts critical to the resolution of this dispute—*i.e.*, what constituted the shipments in issue—would appear to be reasonably ascertainable. First, Complainant's submissions include invoices listing the commodities in issue, all of which appear to be Tupperware products. Moreover, the parties' settlement agreement includes an exhibit in which the parties list, shipment by shipment, the rates "As Charged," the charges that "Should Be," and the amounts of "Reparation/Overcharge," which total $72,072.37.

A $40,000.00 settlement of a proceeding in which the parties agree that there have been $72,072.37 in freight overcharges would permit a continued violation of section 18(b)(3) of the Act and is not approvable under the *Organic* standards. The Presiding Officer's Order discontinuing the proceeding will therefore be reversed, and the proceeding will be remanded to the Presiding Officer with instructions to make a specific finding whether the third criterion of the Organic decision can be met. If it cannot, the Presiding Officer shall disapprove the settlement agreement and proceed with the adjudication.

THEREFORE, IT IS ORDERED, That the May 19, 1981 Order granting the motion to dismiss and discontinuing the proceeding is vacated; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 536

GENERAL ORDER 13, AMDT. NO. 10,

DOCKET NO. 80-56

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; PROHIBITION OF FILING TEMPORARY AMENDMENTS

August 31, 1981

ACTION: Stay of Final Rule

SUMMARY: The Commission's decision in the proceeding removed the provisions of 46 C.F.R. 536.10(c), which would prohibit the practice of accepting the filing of temporary amendments to tariffs published by carriers and conferences of carriers in the foreign commerce of the United States, effective September 8, 1981. Various conferences have filed petitions requesting a stay of the effective date to allow opportunity to comment on the rationale explained by the Commission in arriving at its decision. The Commission now has decided to stay the effective date of its order so that it may have the benefit of a full staff analysis and recommendation on the issues raised by petitioners.

DATE: Effective September 3, 1981.

SUPPLEMENTARY INFORMATION:

The Commission published its final rule in this proceeding July 7, 1981, (46 FR 35092). The rule contains a provision which prohibits the filing of any type of temporary tariff amendment. The Commission has received petitions from various conferences requesting a stay of the effective date of its decision to allow interested parties the opportunity to comment on the rationale explained by the Commission in arriving at its decision to prohibit the acceptance of temporary tariff amendments. So that the Commission may have the benefit of a full staff analysis and recommendation on the issues raised by the petitioners, the effective date must necessarily be stayed.

Therefore, *it is ordered*, that the effective date of the removal of 46 C.F.R. 536.10(c) is stayed pending further order of the Commission.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 502

[GENERAL ORDER NO. 16, AMDT. 40; DOCKET NO. 81-22]

RULES OF PRACTICE AND PROCEDURE

September 3, 1981

ACTION: Final Rule

SUMMARY: Fluctuations in interest rates have required the FMC to modify its past practice regarding awards of interest in reparation proceedings. This rule prescribes the rate of interest to be granted as part of reparation awards in cargo misrating cases. Interest will be based on the rates on 6-month U.S. Treasury bills. The intended effect of the rule is to compute interest awards that more accurately reflect prevailing interest rates during the reparation period involved in each case.

DATE: Effective September 10, 1981.

SUPPLEMENTAL INFORMATION:

On March 17, 1981, the Commission issued a notice of proposed rulemaking providing for the grant of interest on awards of reparation in cases involving the misrating of cargo arising under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817 (b)(3)) and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844). The interest awarded would be based on the rate paid on six-month U.S. Treasury bills averaged over the reparation period.

Eight responses to the proposed rule were submitted, on behalf of numerous conferences of carriers.[1] Comments received are summarized and discussed below.

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[1] Comments were submitted by:

(a) Pacific Westbound Conference, Pacific-Straits Conference, Pacific Indonesian Conference, and Far East Conference;

(b) Australia-Eastern U.S.A. Shipping Conference, Greece/U.S. Atlantic Agreement, Iberian/U.S. North Atlantic Westbound Freight Conference, Italy, South France, South Spain, Portugal/U.S. Gulf and The Island of Puerto Rico (Med-Gulf) Conference, Marseilles North Atlantic U.S.A. Freight Conference, Mediterranean-North Pacific Coast Freight Conference, North Atlantic Mediterranean Freight Conference, U.S. Atlantic & Gulf/Australia-New Zealand Conference, U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement, The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC);

Continued

Some commenting parties argue that the proposed rule is inconsistent with the holdings in *Consolo v. FMC,* 383 U.S. 607 (1966) and *Flota Mercante Grancolombiana, S.A. v. FMC,* 373 F.2d 674 (D.C. Cir. 1967), that awards of reparation under section 22 of the Shipping Act, 1916 (46 U.S.C. 821) are discretionary. They contend that because the rule does not allow for exceptions it constitutes an abdication of statutory discretion. The rule is also alleged to be contrary to prior Commission decisions indicating that interest on reparation awards will be denied if the misrating is the result of the negligence or misrepresentations of the shipper. Accordingly, the Commission is urged to modify the rule to allow a case-by-case determination of interest awards.

While the proposed rule does alter the existing Commission practice of making a strict case-by-case determination of all elements of interest awards in reparation proceedings, it is neither improper nor inconsistent with case law. Generally, the choice made between proceeding by general rule or on an *ad hoc* basis is one that rests with the discretion of the administrative agency. *SEC v. Chenery Corp.,* 332 U.S. 194, 203 (1947); *British Caledonia Airways, Ltd. v. CAB,* 584 F.2d 982, 993 (D.C. Cir. 1978). While *Consolo* and *Flota, supra,* did construe section 22 of the Act as allowing the Commission some discretion in reparation proceedings to consider the equities of each case before it, those cases did not address the issue of whether it would be permissible to eliminate such discretion by rule. In any event, it is not the intent of the rule to remove all discretion from the Commission. The rule does contemplate exceptions. These exceptions, however, would be narrow and generally limited to situations involving shipper fraud or misconduct. *See Girton Manufacturing, Co. v. Prudential Lines, Inc.,* 23 F.M.C. 74, 75

(c) The Associated Latin American Freight Conferences, consisting of United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, United States Atlantic & Gulf-Santo Domingo Conference, Southeastern Caribbean Conference, Atlantic & Gulf/West Coast of South America Conference, United States Atlantic & Gulf/Venezuela Conference, West Coast of South America Northbound Conference, East Coast Colombia Conference, and Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference;

(d) The North European Conferences, consisting of 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, United Kingdom & U.S.A. Gulf Westbound Rate Agreement, Continental-U.S. Gulf Freight Association, Gulf-United Kingdom Conference, and Gulf-European Freight Association;

(e) Agreement No. 10107, Agreement No. 10108, Japan/KoreaAtlantic & Gulf Freight Conference, Japan-Puerto Rico & Virgin Islands Freight Conference, New York Freight Bureau, Trans-Pacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan/Korea, Thailand/Pacific Freight Conference, and Thailand/U.S. Atlantic & Gulf Conference;

(f) Inter-American Freight Conference;

(g) Atlantic and Gulf-Indonesia Conference;

(h) Atlantic and Gulf-Singapore, Malaya and Thailand Conference.

(1980). Because the rule intends exceptions under certain circumstances, it has been modified to make this clear.

The comments urge that the Commission consider other factors in determining whether and in what amount interest will be awarded in proceedings involving the misrating of cargo. It is argued that in cases where delay in presenting a claim is attributable to the shipper, the period upon which interest is based should be proportionately reduced. The commenting parties also suggest that some time limit on interest awards be imposed to protect carriers from interest charges caused by delays beyond their control. Because the award of interest is intended to compensate the shipper for the loss of use of funds, the Commission is further urged to take into consideration the *actual* financial losses of the claimant. As an example, it is argued that freight auditors, who have no actual losses, should not be allowed to benefit from the rule.

These comments in effect urge the Commission to inject fault considerations into the proposed rule. Fault of the shipper is irrelevant to the award of reparation in cases involving the misrating of cargo and the only consideration is proof of what was actually shipped. *Kraft Foods v. Moore McCormack Lines,* 19 F.M.C. 407, 410 (1976). Because interest in reparation proceedings is intended to make the shipper "whole," *U.S. Borax & Chem. Corp. v. Pacific Coast European Conference,* 11 F.M.C. 451, 470 (1968), the same rule, holding that fault is irrelevant, will generally apply. Moreover, if fault were to become a factor in interest awards, proceedings involving routine misrating claims could evolve into legally and factually more complex negligence actions, frustrating efforts to dispose of these claims efficiently.

Other "equitable" considerations suggested in the comments which tend to undermine the overall purpose of the general rule are similarly rejected. Because the party who actually paid the freight charge has been held to have suffered the "injury" within the meaning of section 22, and not the party who "ultimately bore the cost of the overcharge," *Sanrio, Inc. v. Maersk Line,* 19 S.R.R. 907 (1979), the carrier may not avoid the payment of interest on the basis of third party relationships for which there is no privity. Similarly, assignees, *i.e.,* "freight auditors," obtain for a consideration legal title to the claim of an "injured" party for reparations, and such assignments do not extinguish any part of the recognized section 22 damages, including interest. *See Ocean Freight Consultants, Inc. v. Bank Line, Ltd.,* 9 F.M.C. 211 (1966).

Commenting parties further point out that carriers cannot bring a claim for undercharges against the shipper before the Commission but rather must proceed in court, thereby limiting them to that forum's statutory rate of interest. Because these parties believe this interest rate is likely to be lower than the Treasury bill rate, and is therefore seen as giving an unfair advantage to shippers, the Commission is requested to seek an amendment to the Shipping Act to allow carrier claims against shippers. The commenting parties believe that until this is done the Commission should limit interest awards to the statutory rate of the forum in which such claims would otherwise have to be brought.

This suggestion not only ignores the realities of the situation but also overlooks the basis of the rule. First, the Commission's statutory inability to entertain undercharge claims by carriers against shippers cannot act as a basis for denying relief to shippers for overcharges.[2] The Commission cannot amend the Shipping Act by rulemaking nor refuse to fulfill its statutory obligations pending any such amendment.

Second, the Commission has determined that a "statutory" rate of interest or any fixed level of interest does not reflect contemporary conditions. The rule as proposed establishes a method of computing interest that accurately and fairly reflects the loss incurred by shippers. Because the Shipping Act does not prescribe the manner in which compensation for injuries under section 22 is to be computed, the Commission is necessarily entitled to exercise discretion in determining which rate of interest is appropriate in reparation awards.

Two perspectives can be taken in evaluating the choice of an interest rate. One perspective is that the shipper has effectively "loaned" money to the carrier during the period of the overpayment and that the carrier should pay a rate of interest as if it were a borrower. This would suggest a rate such as the prime which is typically higher than the rates on commercial paper in investment portfolios. The other perspective is that, were it not for the overpayment, the shipper would have had the additional funds to use or to invest, and thus the shipper should be compensated according to investment rates in the money and capital markets. These rates are lower than those charged by lenders and should put no undue burden on the carrier because the overpayment is money that the carrier could have invested anyway. Thus, the carrier is paying interest at a rate which is approximately that which the shipper could have earned if the shipper had been able to invest the amount of the overpayment. In order to borrow that same amount of money, the carrier would have had to pay a much higher rate of interest.[3]

Once having concluded that it is more appropriate to focus on an investment rather than a loan rate, a further question arises as to whether the rate selected should reflect short term or long term investment opportunities. The rule suggests six-month Treasury bills because the Commission is of the opinion that the combination of uncertainty

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[2] However, carriers are entitled to a set-off for undercharges against a claim for overcharges when both arise under a single bill of lading. *Colgate Palmolive Co. v. The Grace Line*, 17 F.M.C. 279 (1974).

[3] It is interesting to note in this context that the Internal Revenue Service, by statute, focuses on the *higher* rate at which money could be *borrowed* when it establishes a rate for the overpayment or underpayment of taxes (Section 5521(b) of the Internal Revenue Code, 26 U.S.C. 6621(b)).

and generally short duration of overpayment circumstances makes it unlikely that these funds could be used for longer term investments.

One commenting party suggests that the Treasury bill interest level is too high because the small amounts of money generally involved in reparation cases are not eligible for investment at the Treasury bill rate. The Commission cannot agree with this suggestion. While most reparation amounts, by themselves, would probably not be large enough to invest in Treasury bills, there are a myriad of investment opportunities at rates approximating the Treasury bill rate which are available to the smaller investor.[4] Thus, the Commission continues to believe that the use of an average Treasury bill rate as opposed to a fixed "statutory" rate or "passbook" rate is a valid exercise of agency discretion. *Global Van Lines v. ICC*, 627 F.2d 546, 553 (D.C. Cir. 1980).

Several specific amendments to the proposed rule have been advanced. One commenting party requests that the term "misrating" be redefined to exclude shipper misrepresentation. As stated above, the rule will be modified to exclude cases where shipper deception or misconduct is shown. No further redefinition is deemed necessary.

It also has been suggested that the rule specify whether interest will be simple, compounded or prorated. The Commission agrees that clarification of this point is appropriate and the rule has accordingly been revised to specify that simple interest is contemplated. The final rule also specifies that interest will accrue from the date of payment of freight charges to the date reparations are paid.

Finally, it is proposed that interest not be made mandatory where the claim is settled between the parties. This suggestion is also found to have merit. Except in situations where facts critical to the resolution of a dispute are not reasonably ascertainable, settlements of section 22 reparations claims based on misrating of cargo must reflect the applicable freight rate to comply with the requirements of section 18(b). *Organic Chemicals v. Atlanttrafik Express Service*, 18 S.R.R. 1536a (1979). However, because interest is not part of the freight rate, it is appropriate that its treatment in settlement agreements be left up to the parties. The Commission has modified the rule to except settled claims from its scope.

This proposed rule would appear to be exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. 601 et seq.). Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates. . . ." This rule would seem to be one "relating to rates." However, since an initial

[4] See, *e.g.*, Statement of the Honorable John R. Evans, Commissioner of the Securities and Exchange Commission, before the House of Representatives Subcommittee on Domestic Monetary Policy of the House Committee on Banking, Finance and Urban Affairs, concerning the Regulation of Money Market Funds, April 8, 1981.

regulatory flexibility analysis was issued in this proceeding, providing a final flexibility analysis will not delay or protract this rulemaking proceeding, although this analysis may not be required. Accordingly, and without prejudice to any future determination as to the applicability of the Act to this or any related rule, the following final regulatory flexibility analysis is being provided.

The need for, and the objectives of, the rule are stated in the "Summary" above. No comments in response to the initial regulatory flexibility analysis published in this rulemaking proceeding have been received by the Commission.

This rule is intended to result in a favorable economic impact on small entities. Accordingly, consideration of alternatives which minimize the economic impact of the rule would appear to be unnecessary. However, the Commission has considered alternatives to the proposed rule and has determined that they are impractical. A discussion of one of these alternatives was provided in the Notice of Proposed Rulemaking issued in this proceeding on March 17, 1981 (46 F.R. 17064).

Therefore, pursuant to 5 U.S.C. 553 and sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 821 and 841(a)), Part 502 of the Code of Federal Regulations is amended by the addition of a new section 502.253 as follows:

> Section 502.253. Interest in Reparation Proceedings.
>
> Except as to applications for refund or waiver of freight charges under section 502.92 of this part and claims which are settled by agreement of the parties, and absent shipper fraud or misconduct, interest will be granted on awards of reparation in cases involving the misrating of cargo and arising under section 18(b)(3) of the Shipping Act, 1916 and section 2 of the Intercoastal Shipping Act, 1933. Interest (simple) will accrue from the date of payment of freight charges to the date reparations are paid. The rate of interest will be calculated by averaging the monthly rates on six-month U.S. Treasury bills commencing with the rate for the month that freight charges were paid and concluding with the latest available monthly Treasury bill rate at the time reparations are awarded.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 537

[GENERAL ORDER 18, AMDT. 5; DOCKET NO. 81-4]

FILING OF MINUTES

September 11, 1981

ACTION: Final Rule

SUMMARY: This excludes from existing reporting requirements discussions and decisions dealing with certain routine rate actions. Experience has shown that such reporting is redundant and of little use as a surveillance tool. This exemption will lessen regulatory requirements.

DATE: Effective October 19, 1981.

SUPPLEMENTARY INFORMATION:

The Commission previously gave notice (46 F.R. 8599-8600) that it proposed to amend 46 C.F.R. § 537.3 to exclude from the reporting requirements minutes of conference or rate agreement meetings dealing with certain routine rate actions. Section 537.3 presently requires that:

> (a) Within 60 days of the effective date of this part, the parties to each approved conference agreement, agreement between or among conferences, or agreements whereby the parties are authorized to fix rates (except two-party rate-fixing agreements and except leases, licenses, assignments or other agreements of similar character for the use of marine terminal property or facilities) shall, through a designated official, file with the Federal Maritime Commission a report of all meetings describing all matters within the scope of the agreement which are discussed or taken up at any such meeting, and shall specify the action taken with respect to each such matter. For the purpose of this part, the term 'meeting' shall include any meeting of parties to the agreement, including meetings of their agents, principals, owners, committees or subcommittees of the parties authorized to take final action in behalf of the parties. If the agreement authorizes final action by telephonic or personal polls of the membership, a report describing each matter so considered and the action taken with respect thereto shall be filed with the Commission. These reports need not disclose the identity of parties that propose actions, or the identity of parties that participated in the discussions of any particular matter.

Since these rules became effective in 1966, experience has shown that the majority of minutes filed with the Commission involve decisions by the conference or rate agreement membership to adopt new or initial rates or to alter the level of or delete existing rates, with little or no substantive discussion being presented as to the basis for the proposals or the decisions reached. The minutes reporting those rate actions are essentially redundant because such rates must also be filed in an appropriate FMC conference tariff. Also, many conference actions involving rates are taken pursuant to requests received from shippers. All such requests are ultimately included in reports filed with the Commission annually under General Order 14 (46 C.F.R. § 527) which include more detail than is usually incorporated in conference minutes. These rate related minute filings, standing alone, generate a considerable paper flow through the Commission at substantial expense to all concerned without providing significant useful information.

Therefore, it was proposed that 46 C.F.R. § 537.3 be amended to exclude from its scope reports of decisions by ratemaking groups to adopt a new or initial commodity rate or alter the level of or delete an existing commodity rate, to the extent said rate actions are filed in tariffs pursuant to the notice requirements of section 14(b) and 18(b) of the Shipping Act, 1916 (46 U.S.C. 813a and 817b). At the same time, and in order to preserve the essential elements of those reports required under 46 C.F.R. § 537.3, it was proposed that those discussions and decisions relating to general rate policy, *i.e.*, rule changes, general rate increases, surcharges, the opening of a rate or rates, etc., must continue to be reported. Periodic reports related to these matters are useful to the Commission in carrying out its responsibility to assure, on a continuing basis, that rate activities under approved agreements are consistent with Shipping Act objectives.

Commentators were requested to respond with specific examples, if any, as to how, in their view, the proposed exclusion would substantially impair effective regulation by the Federal Maritime Commission or significantly affect the overall design of regulation contemplated by the Act.

Twelve responses were received representing the views of 35 conferences and ocean carriers, including the members of one discussion agreement. The commentators either supported the proposed rule as written or with modifications. The main area of concern related to the distinction between "routine rate actions," which do not have to be reported, and "general rate policies," which do. The commentators maintain that the proposed rule puts conferences and rate agreements in the position of making decisions with respect to minute filing requirements without clear and precise guidelines. One conference noted that such uncertainty and confusion could subject the group to penalties due to their not reporting certain actions which the Commission may have intended them to report. Accordingly, it was suggested that the rule be revised to more clearly define those actions that are either included in, or exempted from the Commission's minute filing requirements.

Several commentators expressed concern that the rule might actually increase the industry's paperwork burdens. These commentators argue that because minutes of conference meetings will be kept regardless of any Commission requirement and because such meetings virtually never involve decisions on only "exempt" commodity rates, the proposed rule would require the conference to (1) either keep two sets of minutes for the same meeting, one for commodity rate adjustment items and the other for the rest of the tariff items being considered, or (2) continue to submit a full set of minutes to the Commission. The Commission has considered these comments, but since minutes of routine rate actions may still be filed at the conference's option, it is unlikely that the rule would result in increased paperwork.

To eliminate the confusion which apparently exists as to which discussion or action items are to be considered "routine rate actions," and therefore exempt, and which items relate to "general rate policy," and therefore must be reported, the Commission is including appropriate criteria for such determinations into the final rule. Under these criteria, which relate to tariff format requirements presently outlined in 46 C.F.R. § 536.4(f),* rate actions or discussions of rate actions that, if adopted, would be required to be filed in the Commodity Rate Section, Class Rate Section or Open Rate Section of the applicable tariff need not be reported. Actions on, and discussion of, matters of general rate policy, general rate changes, the act of opening or closing rates, or the removal of an item from inclusion in a dual rate system must be reported as are all other "general rate policy" items that would, if adopted, be published in other tariff sections specified in 46 C.F.R. § 536.4(f), *e.g.*, the Surcharge Section, the Rules and Regulations Section.

The rule promulgated herein is intended to reduce the volume of minutes required to be filed without jeopardizing the Commission's ability to carry out its statutory responsibilities. As such, it is in furtherance of the Commission's continuing effort to more clearly define those matters considered necessary for effective regulation. The Commission therefore intends to periodically evaluate the quality and quantity of minutes filed to determine whether they enable it to effectively and

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* 46 C.F.R. § 536.4(f) provides as follows:

(f) To the extent applicable, all tariffs filed pursuant to this part shall be arranged in the following order:

Title Page. Check Sheet. Table of Contents. Participating Carrier Page. Surcharge and/or Arbitrary/Differential/Outport Differential (or other identifying term) Section. Rules and Regulations Section. Index of Commodities and Classifications. Commodity Rate Section. Classifications and Class Rate Section. Routing Section. Open Rate Section.

efficiently monitor the concerted activities of carriers operating under FMC approved agreements or, alternatively, whether they impose unnecessary regulatory burdens. In the event the existing minute reporting requirements prove inadequate or without valid regulatory purpose, further revisions will be considered.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) the Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities. The rule will not impose any reporting or record keeping requirements which might result in a compliance or reporting burden on small entities. It will primarily benefit carriers by lessening reporting requirements imposed on conferences and rate agreements.

THEREFORE, IT IS ORDERED, That pursuant to sections 15, 21 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 820 and 841a), and 5 U.S.C. 553, 46 C.F.R. Part 537 is amended by adding paragraph (d) to section 537.3 to read as follows:

> (d) No report need be filed under paragraph (a) of this section with respect to any discussion of or action taken with regard to rates that, if adopted, would be required to be published in the Commodity Rate Section, Class Rate Section or Open Rate Section of the pertinent tariff on file with the Commission. This reporting exemption does not apply to 1) discussions involving general rate policy, general rate changes, the opening or closing of rates or the removal of items from a dual rate system, or 2) discussions involving items, that, if adopted, would be required to be published in other tariff sections as specified in 46 C.F.R. § 536.4(f).

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 524]
[GENERAL ORDER 23, REVISED: DOCKET 81-6]
EXEMPTION OF CERTAIN AGREEMENTS
FROM THE REQUIREMENTS OF SECTION 15
SHIPPING ACT, 1916

September 23, 1981

AGENCY: Federal Maritime Commission

ACTION: Final Rule

SUMMARY: This exempts agreements which relate to routine administrative or housekeeping matters from the filing and approval requirements of section 15 of the Shipping Act, 1916. These agreements have previously been routinely approved and appear to have little or no anticompetitive potential. Exemption should lessen the regulatory burden on ocean carriers and encourage the formation of agreements involving routine housekeeping or administrative matters which should promote efficiencies and economies in operation for such carriers.

DATE: Effective November 2, 1981.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (the Act) (46 U.S.C. 833a) provides that the Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to the Act, or any specified activity of such persons from any requirement of the Act, where it finds that such exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, or be detrimental to commerce.

The Commission previously gave notice (16 FR 10178) that it proposed to amend 16 C.F.R. Part 524 to exempt certain agreements from the filing and approval requirements of section 15 of the Act (46 U.S.C. 814). The agreements proposed to be exempted involve non-substantive routine housekeeping or administrative matters. Specifically, this type of agreement: 1) reflects changes in the name of a port or country currently served; 2) substitutes officers and/or committee assignments; or 3) relates to the procurement, maintenance and sharing of office facilities, furnishings, equipment, supplies and personnel.

Eight responses to the proposed rulemaking were filed on behalf of 31 conferences/rate agreements, one discussion agreement and one independent carrier. All but one commentator support the rule as proposed or with modifications.

Two commentators suggest that the rule's reference to "committee assignments" is unclear and that it should refer to "establishment of committees." The Commission believes the reference to "committee assignments" can be modified to remove any confusion, and this has been accomplished in the final rule. Furthermore, the establishment of a committee by the members of an agreement should be allowed under the rule. Accordingly, the rule has been revised to so allow.

Uncertainty has also been expressed as to whether exempted nonsubstantive provisions must be included in the basic agreement of a conference and filed with the Commission before such provisions may be carried out, and, if so, whether they must be designated in some manner to indicate they have been filed for informational purposes only. The Commission does not believe that such provisions need a special designation to indicate they have been filed for informational purposes. Section 524.3 provides that an informational filing must be made within 30 days of the effective date of the provisions.

The U.S.-Flag Far East Discussion Agreement participants contend that potential adverse effects in the form of undue risks of antitrust exposure outweigh any benefits of the proposed exemption. For example, they believe it conceivable that even the exchange of information relating to the sharing of office facilities may give rise to a claim by certain parties of a restraint of trade. They view the filing option as unrealistic and one that would rarely be exercised. This result is anticipated because the U.S.-flag carriers in the several U.S./Far East conferences are minority members, and the majority foreign-flag members may be less concerned about the potential application of U.S. antitrust laws and thus would not vote to file the agreements for the optional approval provided. The Commission is, therefore, urged to continue to require the filing and approval of such agreements and adopt a simplified processing procedure so that they can be handled under delegated authority or approved by notation.

The concern expressed by the U.S.-Flag Far East Discussion Agreement parties does not, in the Commission's opinion, establish a justifiable basis or regulatory need for continued Commission approval of arrangements with *de minimus* anticompetitive impact *. Moreover, it is unlikely that coordinated activity under such agreements will result in violations of the antitrust laws. However, if problems arise because of

* The filing of such agreements will remain optional under the current rule (46 C.F.R. 524.7).

the filing option, this should be brought to the Commission's attention for such further action as may be warranted.

Pursuant to a commentator's suggestion, the Commission will amend Item 3 of the final rule to include provisions for the allocation and assessment of costs and the administration and management activities incidental to agreements providing for the procurement, maintenance or sharing of office facilities, furnishings, equipment and personnel, including employees and contractors.

Certain other suggestions regarding amendments which should also be defined as non-substantive agreements (for example, those involving a change in the name of an agreement or in the names of parties to an agreement, corrections to typographical and grammatical errors, renumbering and relettering of articles and subarticles of agreements, changes in the tables of contents of agreements or changes in the names and/or numbers of any other section 15 agreements or designated provisions thereof referred to in an agreement and changes in the date or amendment number contained in agreements) have been added to the rule.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the proposed rulemaking will not have a significant economic impact on a substantial number of small entities. The proposed exemption will not impose any reporting or recordkeeping requirements which might result in a compliance or reporting burden on small entities. The exemption will primarily benefit carriers. The shipping public, some of whom fall within the definition of small entities, may enjoy a secondary benefit from this exemption, but it is not foreseen that this benefit will amount to a "significant economic impact," within the meaning of 5 U.S.C. 605(b).

THEREFORE, pursuant to sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a) and 5 U.S.C. 553, 46 C.F.R. Part 524 is amended by adding a new paragraph (d) to section 524.2 *Definitions,* as follows:

(d) A non-substantive agreement is an agreement between common carriers by water acting individually or through approved agreements which:

(1) reflects changes in the name of any geographic locality stated therein, the name of the agreement or the name of a party to the agreement, the names and/or numbers of any other section 15 agreement, or designated provisions thereof referred to in an agreement, the table of contents of an agreement, the date or amendment number through which agreements state they have been reprinted to incorporate prior revisions thereto or which corrects typographical and grammatical errors in the text of the agreement, renumbers or reletters articles or subarticles of agreements and references thereto in the text,

(2) reflects changes in the titles of persons or committees designated therein or transfers the functions of such persons or committees to other designated persons or committees or which merely establishes a committee, or

(3) concerns the procurement, maintenance, or sharing of office facilities, furnishings, equipment, supplies and personnel, including employees and contractors, the allocation and assessment of the costs thereof, or the provisions for the administration and management of such agreements by duly appointed individuals.

Section 524.3 would be amended by adding a final sentence which reads:

> 524.3 . . . and provided further, that a non-substantive agreement which modifies an agreement which is subject to the requirements of section 15 shall be filed with the Commission for informational purposes only within 30 days of its effective date.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-25

UNION CARBIDE CORPORATION

v.

NIPPON YUSEN KAISHA (N.Y.K. LINES)

NOTICE

September 23, 1981

Notice is given that no exceptions have been filed to the August 18, 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 initial decision has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-25

UNION CARBIDE CORPORATION

v.

NIPPON YUSEN KAISHA (N.Y.K. LINES)

Held:

(1) Where a shipper transported "cooling towers" but did not specifically so describe the cargo on the pertinent bill of lading, the appropriate freight rate is that rate applicable to "cooling towers," rather than an N.O.S. (Not Otherwise Specified) rate, since what is actually shipped determines the applicable rate.

(2) Where a bill of lading inadequately described the cargo to be shipped, neither is the carrier bound by the description on the bill of lading nor is it valid to argue that inadequately described cargo should be assessed at the highest possible tariff rates.

Warren Wytzka for complainant.

Henry Bieg for respondent.

INITIAL DECISION [1] OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Finalized September 23, 1981

This proceeding began with the filing of a Complaint by Union Carbide Corporation (UCC) against Nippon Yusen Kaisha Lines (NYK).[2] The facts and law regarding the issues raised in the Complaint are set forth in the following portions of this decision. Both parties have requested the "Informal Procedure." [3]

FINDINGS OF FACT

1. The Complainant, Union Carbide Corporation (UCC), is a corporation incorporated in the State of New York. It is located at 11 W. 42nd Street in New York City.

2. UCC operates many businesses, one of which is the marketing of cryogenic equipment.

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

[2] The Complaint refers to "violation of Section 18(b)(3) of the Shipping Act of 1936, as amended." Obviously, the Complainant is seeking relief under the Shipping Act of 1916, and we have considered the issue presented on the basis of the 1916 Act.

[3] Subpart K of the Commission's Rules of Practice and Procedure, Section 502.181 *et seq.*, 46 C.F.R. 502.181, refers to "Shortened Procedure." We have treated the parties' requests as requests to decide the issue presented on the basis of the record as it now stands, which is in accord with oral communications had with both of them and which provides a decision in the most expeditious manner.

3. The Respondent, Nippon Yusen Kaisha (NYK), is a common carrier engaged in transportation by water from U.S. Atlantic Ports to Japan and other Far East destinations and is subject to the Shipping Act, 1916.

4. Effective April 1, 1979, and through September 30, 1979, the Far East Conference Tariff No. 28-FMC No. 12, relating to shipments from United States Atlantic and Gulf Ports to Yokohama, Kobe, Osaka, Nagoya and Tokyo, Manila, Hong Kong, Kaohsiung/Keelung and Busan was on file with the Federal Maritime Commission (Commission). The tariff included various commodities and rates, including "Cooling towers, and parts" (Item No. 661 7075 40) at a special rate of $126.00 W/M to Busan, and "Industrial Machinery, plant, and similar laboratory equipment (except furnaces and ovens) whether or not electrically heated, for the treatment of materials by a process involving a change in temperature, and parts - N.O.S." at a rate of $166.00 to Busan. (See 5th Revised Page 675 attached to Complaint.)

5. On July 27, 1979, UCC shipped certain cargo from New York to Inchon via Kobe, Japan, aboard a vessel owned by NYK. The cargo was described in the pertinent bill of lading as "Industrial Machinery For The Treatment Of Materials Involving A Change In Temperature." The Shipper's Export Declaration contains the same language, but also lists the cargo with a Schedule B Commodity No. 661.7075, which refers to the special rate on cooling towers. (See Bill of Lading attached to the Answer and the Shipper's Export Declaration attached to the Complaint.)

6. The freight on the above-described shipment was prepaid as follows:

at 170	=	$ 98,960.40	582.120 cm HEAVY LIFT
at 50.01	=	1,497.15	29.937 MT
at 43.75	=	930.74	21.274 MT EXTRA LENGTH
at 19.80	=	5,062.98	255.706 cm
at 23.85	=	7,784.97	326.414 cm
SUBTOTAL		$114,236.24	
5%	=	5,711.81	Currency Adjustment 5% BUNKER
at 11.00 cm		6,403.32	582.120 cm
TOTAL		$126,351.37	

The rate used by NYK was $170.00 (the $166.00 N.O.S. rate to Busan, plus a $4.00 Arbitrary). (See Bill of Lading attached to Answer.)

7. On January 25, 1981, UCC filed a claim with NYK whereby it asserted that the N.O.S. classification was incorrect and that the cargo should have been classified as "Cooling Towers" and rated at $130 (the $126.00 rate to Busan with a $4.00 Arbitrary). According to UCC, the freight bill would then have been:

at 126.00 + 4.00	=	$ 75,675.60	582.120 cm
			HEAVY LIFT
		1,497.15	29.937 MT
		930.74	21.274 MT
			EXTRA LENGTH
		5,062.98	255.706 cm
		7,784.97	326.414 cm
SUBTOTAL		$ 90,951.44	
5%	=	4,547.57	Currency Adjustment 5%
			BUNKER
		6,403.32	582.120 cm
TOTAL		$106,449.90	

8. The claim filed by UCC was denied by NYK under Rule 19.1 of the tariff which reads:

> Claims for adjustments of freight charges, if based on alleged errors in description, weight and/or measurement, will not be considered unless presented to the carriers in writing before the shipment leaves the custody of the carrier.

And further:

> Claims seeking the refund of freight overcharges may be filled [sic] in the form of a complaint with the Federal Maritime Commission, Washington, D.C. 20573, persuant [sic] to Section 22, Shipping Act, 1916 (46 U.S.C. 821). Such claims must be filed within two years of the date the vessel sails or the date the disputed charges are paid, whichever is later.

(See pertinent tariff pages filed with the Answer.)

9. On March 26, 1981, UCC filed the Complaint in this proceeding. On April 16, 1981, NYK filed its answer. In it the Respondent notes that it denied UCC's claim because of Rule 19.1 of the tariff and that "with the new information supplied on January 25, 1981, i.e., packing list and corrected export declaration it appears that this shipment did consist of 'cooling towers.'"

ULTIMATE FINDINGS OF FACT

11. The cargo shipped by UCC on July 27, 1979, was "cooling towers."

12. The failure to specifically designate the cargo on the bill of lading as "cooling towers" is not controlling as to its classification.

DISCUSSION AND CONCLUSIONS

The findings of fact in this case are patently clear and will not be belabored or repeated in this section of the decision. Suffice it to say that the Complainant shipped "cooling towers"; that perhaps because of some initial ambiguity in the bill of lading the Respondent mistakenly gave the cargo a N.O.S. rating; that the shipper made claim of the carrier based on the proper rating; and that but for a restrictive conference rule in the tariff relating to the claim, the matter would have been concluded without recourse to the Commission.

Having found as a fact that the Complainant shipped "cooling towers," the legal question remains as to how the cargo should have been rated and what freight charges were applicable. It is well settled that what is actually shipped determines the applicable rate rather than what is declared on the bill of lading. *Union Carbide Inter-America v. Norton Line,* 14 F.M.C. 262 (1971); *Union Carbide Corp. v. American & Australian S.S. Line,* 17 F.M.C. 177 (1973); *Johnson & Johnson International v. Venezuelan Lines,* 16 F.M.C. 84 (1973). Also, a carrier is not bound by a shipper's misdescription appearing on the bill of lading. *CSC International Inc. v. Orient Overseas Container Line, Inc.,* 19 F.M.C. 465 (1977); and any contention that a tariff requires that cargo inadequately described on the bill of lading be assessed at the highest tariff rates is erroneous. *Abbott Laboratories v. Alcoa SS Co.,* 18 F.M.C. 376 (1975). So here, even assuming *arguendo* that the bill of lading was ambiguous or even incorrect,[4] the evidence in this case clearly shows that the Complainant has established that "cooling towers" were actually shipped. This being so, the proper rate was $126.00 (plus $4.00 Arbitrary), which was applicable to that specific item, and not $166.00, which was the N.O.S. rate, and it is so held. Consequently, rather than the amount of $126,351.37, the Complainant should have paid the Respondent $106,449.90. The difference of $19,901.47, with interest at the rate of 12 percent,[5] is hereby awarded as reparation to the complainant.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

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[4] Such an assumption could be open to argument because while the original bill of lading did not include the words "cooling towers" in the description of the cargo, the export declaration referred to the tariff item number which was applicable to cooling towers.

[5] *Belco Petroleum Corp., Inc. v. Lykes Bros. Steamship Co., Inc. & Peruvian State Line,* 23 F.M.C. 1001 (1981); *Interpur, A Div. of Dart Industries, Inc. v. Barber Blue Sea Line, et al.,* 22 F.M.C. 679 (1980).

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, GULF CARIBBEAN MARINE LINES, INC., AND PUERTO RICO MARITIME SHIPPING AUTHORITY, PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLANDS TRADES

ORDER PARTIALLY ADOPTING INITIAL DECISION

September 25, 1981

This proceeding was instituted by Order of Investigation, served January 29, 1981, to determine the lawfulness of general rate increases filed by Sea-Land Service, Inc. (Sea-Land), Trailer Marine Transport Corporation (TMT), Gulf Caribbean Marine Lines, Inc. (GCML) and Puerto Rico Maritime Shipping Authority (PRMSA) in the Puerto Rico and Virgin Islands domestic offshore trades.[1]

The Government of the Virgin Islands, the Puerto Rico Manufacturers Association (GVI/PRMA), the Chamber of Commerce of Puerto Rico[2] and the Drug and Toilet Preparation Traffic Conference, Inc. (DTPTC) were named Protestants in the proceeding. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) was made a party to the proceeding pursuant to Rule 42 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.42).

On July 20, 1981, Administrative Law Judge Norman D. Kline issued an Initial Decision holding that all the carriers, with the exception of TMT, had adequately established the reasonableness of the proposed rate increases. A final determination of the reasonableness of TMT's rate increases was withheld to allow TMT a further opportunity to justify those rates on exception to the Initial Decision and allow the Commission to determine their reasonableness. Exceptions to the Initial Decision have been filed by GVI/PRMA, DTPTC, PRMSA, Sea-Land and TMT. Replies to Exceptions have been filed by GVI/PRMA, PRMSA, Sea-Land, TMT and Hearing Counsel.

[1] On February 27, 1981 the Commission issued an Order Amending Order of Investigation to include a PRMSA tariff in the proceeding.

[2] The Chamber of Commerce of Puerto Rico, although technically a party did not actively participate at any stage of the proceeding.

DISCUSSION

Pursuant to the requirements of P.L. 95-475,[3] the Order of Investigation issued by the Commission limited the issues to be determined in this proceeding to the following:

1. What is an appropriate rate of return for the carriers named as Respondents? In addressing this question consideration should be given to the average rate of return earned by other U.S. corporations and the inherent risks, if any, in operating in the affected trades.
2. Is the methodology used by Respondents in making revenue and cargo volume projections appropriate?
3. Are Respondents' revenue and cargo volume projections sufficiently accurate, and if not, what are the appropriate projections?
4. Have Respondents properly calculated their cost projections covering labor, fuel, vessel maintenance and administrative and general expenses, and, if not, what are the proper calculations?
5. Do the proposed rate increases impose an economic hardship on the affected interests represented by Protestants and Intervenors, and, if so, to what extent should this factor be considered in determining a reasonable rate of return for the carriers?

The February 27, 1981 Order Amending Order of Investigation stated that because of PRMSA's peculiar capital structure,[4] consideration should be given to the fixed charges coverage ratio standard of reasonableness stated in 46 C.F.R. 512.6(d)(3) in determining the reasonableness of its proposed rate increases.

Due to the number of issues and subissues presented, and their complexity, the findings of the Presiding Officer, Exceptions and Replies of the parties and discussion of the issues will be presented according to subject matter. These issues will be treated under three major topics, i.e. Rate of Return, Revenues and Expenses, and Economic Hardship.[5]

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[3] P.L. 95-475, which became effective January 16, 1979, enacted the most recent amendments to the Intercoastal Shipping Act, 1933 (the Act) (46 U.S.C. 843 *et seq.*). These amendments included, *inter alia:* (a) a definition of "general rate increase" and "general rate decrease" for purposes of the Act; (b) an increase in the advance notice provisions for such rate changes to sixty days; (c) an increase in the Commission's suspension authority of such rate increases to six months; (d) a 180-day limit and 60-day maximum extension on proceedings initiated pursuant to the Act; (e) a requirement that specific reasons for investigation under the Act be included in Orders of Investigation; and (f) refund authority for rate increases investigated but not suspended and subsequently found to be unreasonable.

[4] PRMSA is an instrumentality of the Government of Puerto Rico and as such is 100% debt financed and tax-exempt.

[5] The Presiding Officer devoted a substantial portion of his Initial Decision to a discussion of the overall problems faced by the Commission in general rate investigations under P.L. 95-475 and how the Commission should generally modify its approach to this area of law to make these proceedings

Continued

RATE OF RETURN

The Initial Decision

The Presiding Officer explained that an appropriate rate of return for a carrier in the domestic offshore trades requires a determination of: (1) what average rate of return is earned by other U.S. corporations, the so-called "benchmark" rate of return; and (2) whether, in light of the inherent risks facing a carrier in its particular trade, the carrier should be allowed a greater or lesser rate of return than this average in order to put it on a generally equal footing with other industries in its ability to attract investment capital. This is the so-called "comparable earnings test" of reasonableness adopted by the Commission as the standard to be applied to carriers' rates under P.L. 95-475.

In this proceeding each party used a different analysis to arrive at the benchmark rate of return and the particular adjustments that must be made to reflect the peculiar risks faced by each carrier under investigation. After carefully analyzing each proposal the Presiding Officer found that none of them was entirely satisfactory, either because they failed to adhere to the basic requirements of the Commission's regulations in General Order 11 (46 C.F.R. Part 512) (G.O. 11) or because the statistical data bases used were not reliable indices of average rates of return.

It was determined, however, that although somewhat flawed in one aspect, Hearing Counsel's analysis was the one that could best be utilized in this proceeding, because of its objectivity, adherence to the Commission's regulations and statistical reliability. The reference group of corporations chosen by Hearing Counsel, that of all manufacturing firms, was found to be the one most comparable to the shipping industry and was therefore found to avoid distortions resulting from selecting either a more restricted or wide-ranging group. Also found appropriate was Hearing Counsel's use of the average returns of these corporations from 1974 through 1980 with adjustments for current trends in the cost of money and rates of return. This method was held to yield a more reliable average return because it accounted for the general average of returns over time, thereby eliminating distortions from particular good or bad business years, while at the same time accounting for the cumulative effects of inflation on corporate earnings in the near projected future. In applying this methodology Hearing Counsel arrived at an average rate of return for 1974 through 1980 of 12.5% with an upward adjustment of 2% for current trends [6] and a reference group rate of

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more manageable and meaningful. Because this portion of the Initial Decision addresses matters not ordered to be considered and is not necessary for a final disposition of this proceeding it will not be discussed here.

[6] The 2% upward adjustment for current trends was based upon overall rate of return trends from 1968-1979.

return of 14.5% for the projected year at issue. Hearing Counsel then analyzed the business and financial risks of each carrier as it compared to the reference group and concluded that: PRMSA should be awarded a risk premium of 2.5% for a total reasonable rate of return of 17%; Sea-Land should be awarded a risk premium of 1.5% for a total reasonable rate of return of 16%; TMT should be awarded a risk premium of 1.5% for a total reasonable rate of return of 16%; and GCML should be awarded a risk premium of 2.5% for a total reasonable rate of return of 17%.

The Presiding Officer construed the conclusions reached by Hearing Counsel as suggesting that on a trade-wide basis a risk premium of 1.5%-2.5% should be awarded and a rate of return "zone of reasonableness" of 16-17% should be established. However, based upon a perceived technical fault in the computations of Hearing Counsel, the Presiding Officer expanded this zone to 16-18%. In computing the reference group's returns, Hearing Counsel had used Federal Trade Commission Quarterly Financial Reports as a data base. In order to utilize the data in computing rates of return according to the formula required by Commission regulation, a long-term debt cost figure had to be computed. This figure does not appear in the FTC-QFR data published and had to be estimated by Hearing Counsel's economic witness, Mr. Jay Copan. Mr. Copan estimated this figure to be 7%. The Presiding Officer found that the record did not indicate how this figure was computed and advised that he felt it was "too low." He accordingly adjusted the range of allowable returns upward by 1%. This, he explained, results in a more reliable range of returns, particularly in view of the testimony of the carriers who proposed much higher ranges and the testimony of GVI/PRMA which proposed a uniform 15% ceiling with no adjustment for risk.

The Presiding Officer also discussed PRMSA's proposals to apply alternatives to the G.O. 11 rate of return formula due to its peculiar capital structure and tax-exempt status. He rejected the use of before-tax figures and the exclusion of non-operating assets to compare PRMSA's rate of return with that of comparable U.S. industries. It was found that true comparability was impossible on this basis and was, in any event, contrary to the requirements of G.O. 11. Moreover, the results using the standard G.O. 11 formula were found not unreasonable and justified the carriers' rates. The Presiding Officer noted that the alternative to the G.O. 11 rate of return formula is the fixed charges coverage ratio referred to in the Order Amending Order of Investigation. Although Hearing Counsel recommended this as the primary test to be applied to PRMSA, the Presiding Officer found it useful only as a secondary "check" on the results of the rate of return formula which should be "considered." He adopted Hearing Counsel's proposed 1.8-2.0 ratio range of reasonableness although he characterized it as being "too low." PRMSA was found not to have exceeded this range of reasonableness.

Position of the Parties

Exceptions

GVI/PRMA argue that because none of the proposed analyses were accepted by the Presiding Officer, the carriers have not met their burden of proof on the reasonableness of their rate increases. Because all of the analyses were found flawed, none can allegedly support the findings of reasonableness made by the Presiding Officer. Alternatively, they argue that their own rate of return analysis, which excluded the use of risk premiums after arriving at a benchmark rate of return, is most reliable and reveals the unreasonableness of the rate increases. It is further argued that because no combination of subjective/statistical measures of risk can support the risk premiums awarded the carriers, the Presiding Officer erred in relying upon a presumption of risk to find the rates of return of the carriers reasonable. GVI/PRMA submit that the carriers are entitled only to cover their costs of service, including a reasonable cost of capital. On this basis, it is concluded that the carriers are entitled to no more than a 15% rate of return on total capital.

DTPTC argues that the burden of proof in the proceeding was erroneously assigned to the Protestants. Further, it is argued that the Presiding Officer allowed unprecedented rates of return to be enjoyed by the carriers based primarily on the poor historical earnings and his reluctance to order refunds. DTPTC submits that the carriers will be realizing profits akin to a highly profitable enterprise or a speculative venture, a result that is completely contrary to regulatory principles.

PRMSA takes exception to the Presiding Officer's rejection of its proposed range of reasonableness of 19-20% for its rate of return. It is argued that in arriving at a benchmark rate of return of the comparable industries reference group, the reported total capital of these firms should not be used. PRMSA maintains that the proper computation of the reference group total capital should be net fixed assets plus working capital (computed as current assets minus current liabilities). Moreover, it is pointed out that the use of manufacturing firms as a reference group excludes mining and trading companies, which are high-profit enterprises, and their exclusion depresses the benchmark return. Finally, it is argued that before-tax rate of return figures should have been used to test the reasonableness of PRMSA's rate of return because this is the only method by which its tax-exempt status can be adequately considered.

Sea-Land excepts to the refusal of the Presiding Officer to allow it a risk premium above the otherwise reasonable limit on its rate of return to account for historical shortfalls in its rate of return.

Replies

GVI/PRMA argue that Sea-Land cannot be awarded risk premiums to compensate for past shortfalls in earnings, because this would violate the legal prohibition against allowing a carrier excess profits in the future to compensate for past losses. They also argue that PRMSA's Exceptions should be rejected on the grounds that PRMSA has already been allowed a rate of return that is greater than any previously allowed by the Commission and that it is attempting to reap excessive profits.

TMT's Reply finds the rate of return determinations of the Initial Decision acceptable. GVI/PRMA's refusal to consider risk premiums is allegedly based upon a cost of capital approach which is contrary to G.O. 11.

PRMSA's Reply also supports the Presiding Officer's zone of reasonableness and his risk premiums findings. PRMSA points out that both statistical and subjective studies were utilized to support the Presiding Officer's determinations and it was proper for him to reject a cost of capital approach as contrary to G.O. 11. PRMSA denies that its 100% debt financing reduces its business risk.

Sea-Land's Reply challenges the allegation that none of the rate of return testimony was accepted by the Presiding Officer, pointing out that its testimony was accepted with the exception of the premiums for past shortfalls.

Hearing Counsel contends that the Presiding Officer was correct in rejecting the alternative rate of return analyses proffered. Hearing Counsel submit that the comparable earnings test of reasonableness based upon an examination of rates of return on total capital is not only appropriate but required by Commission regulations and the award of risk premiums is warranted to the extent the carrier's risk exceeds that of the reference group. However, it is alleged that the interest expense estimated by Mr. Copan is reasonable in light of the time frame of earnings examined. Hearing Counsel submit that the computation of a rate of return on total capital advanced by PRMSA was properly rejected. The Commission is urged to assert that no rate of return premium can be awarded carriers because of past shortfalls in profit projections as past losses cannot be used to justify future excess earnings.

Conclusion

In light of the evidence of record, the Presiding Officer was correct in relying chiefly upon the presentation of Hearing Counsel in determining what is an appropriate rate of return for the carriers included in this proceeding. The two reasons advanced for this decision by the Presiding Officer are sound and support the result reached.

First, Hearing Counsel's analysis is most objective. Ordinarily, the fact that a party in interest has tendered an analysis does not automatically disqualify that analysis on the grounds of bias. However, bias is properly a factor to be considered in determining the weight to be accorded any testimony. In this proceeding an evaluation of the disparities in methodology utilized by the various parties resulted, in each instance, in rates of return markedly favorable to the ultimate position of the party advancing such methodology. Satisfactory justification for these novel methodology approaches was not supplied. As examples, Dr. Ileo, DTPTC's witness, used an extremely narrow data base and very selective risk factors to achieve a maximum rate of return below that which all of the other witnesses agree is the average current return for U.S. businesses.[7] Dr. Nadel, testifying for TMT, GCML and Sea-Land, although possibly accurate as to his computation of past average returns for U.S. corporations, uses these findings to predict what appears to be unreasonable levels of returns in the test year.[8]

Second, Hearing Counsel's witness, Mr. Copan, adhered closely to the requirements of G.O. 11. P.L. 95-475, pursuant to which this proceeding was undertaken, requires the Commission by regulation to prescribe the method by which a carrier's rate of return will be evaluated for reasonableness (46 U.S.C. 845(a)). G.O. 11, as recently revised, represents the Commission's compliance with this legislative mandate.[9] Adherence to G.O. 11 therefore is essential. Departures from its requirements cannot generally be permitted in rate proceedings if the regulation is to fulfill its statutory purpose. The alternative "middle ground" analyses in this proceeding, to some degree depart from the requirements of G.O. 11. Dr. Germaine, for TMT and GCML, utilizes a cost-of-capital analysis in crucial portions of his presentation, a

[7] Although Dr. Ileo surveyed rates of return from 1976-1980, he ultimately based his rate of return findings only on the results of 1980. (Ileo Testimony at 7). His risks differential was based solely upon the difference in the imbedded debt cost of PRMSA and that of the average U.S. manufacturing firm. (Ileo Testimony at 10).

[8] In addition to projecting a comparatively high 18.5% average rate of return for 1981, Dr. Nadel proposed a 2% premium as a "desirable target" for TMT, GCML and Sea-Land and an additional 3% premium in light of past shortfalls in achieving the maximum permissible rates of return for these carriers. (Nadel Testimony at 38). Dr. Nadel bases his benchmark rate of return on specific companies selected under restrictive and subjective criteria (Nadel Testimony at 18), and projects a 1981 average by attempting to establish a correlation with Aaa bond yield trends using regression analysis (Nadel Testimony at 23). His 2% premium is based upon an assumption that the actual average rates of return in the 1970's did not achieve "desirable" levels. This conclusion is again based upon an assumed correlation with Aaa bond yields. (Nadel Testimony at 26). Dr. Nadel's 3% premium to account for past shortfalls in the carriers' rates of return is an overadjustment above any reasonable maximum level of return. (Nadel Testimony at 29-30). Allowing a carrier to achieve an unreasonably high rate of return to compensate it for past shortfalls in earnings is impermissible in rate regulation. *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 395 (1922). This rule of law is not unfair to the carrier in light of the fact that confiscatory rates cannot be established on the basis of the carriers' past actual profits. *Board of Public Utility Commissioners v. N.Y. Telephone Company*, 271 U.S. 23 (1926).

[9] *See, Financial Reports of Common Carriers in the Domestic Offshore Trades*, FMC Docket No. 78-46, 22 F.M.C. 403 (1980).

method specifically rejected by the Commission in its promulgation of G.O. 11.[10]

The same infirmity applies to the testimony of Dr. Brennan, testifying for GVI/PRMA.[11] Dr. Silberman, sponsored by PRMSA, substituted the G.O. 11 formula for computing a rate of return based upon total capital with one which computes a rate of return on selected assets.[12] While these analyses are subject to other deficiencies, the failure to follow the requirements of G.O. 11 precludes any reliance upon them.

The Presiding Officer, however, did not accept Mr. Copan's estimated imbedded debt cost figure utilized to compute the benchmark rate of return for U.S. manufacturing firms. Mr. Copan used a 7% estimated interest figure which he derived from his primary data base, FTC Quarterly Reports. While certain adjustments to Mr. Copan's conclusions are warranted based on certain policy considerations discussed below, the Commission does not share the Presiding Officer's skepticism regarding the imbedded debt cost.

The bases cited for the Presiding Officer's belief that the 7% interest figure was "too low" were the current cost of money, the estimate of Dr. Ileo and the arguments of PRMSA in its brief.[13] The figure used by Mr. Copan was not intended to reflect the current cost of money but the average interest costs of U.S. manufacturing firms from 1968-1979.[14] It is certainly beyond dispute that average interest rates were lower during that period of time than they are today. Mr. Copan adjusted his rate of return results for current trends in the cost of money by 2%, thereby compensating for any potential distortion. Dr. Ileo's 9.5% interest estimate was applicable *only* to 1980[15] and this supports rather than undermines Mr. Copan's estimate of a significantly lower rate for an earlier period. Finally, assertions of PRMSA's counsel on brief do not alone impeach the otherwise reliable expert opinion of Mr. Copan.[16] Therefore, the benchmark rate of return computed by Mr. Copan, 14.5%, is the most, and possibly the only, reliable testimony on the rate of return issue in the record.

The determination of a reasonable rate of return, however, does not stop with a determination of what U.S. corporations earn generally. Consideration must be given to the peculiar risks faced by the carriers in this trade. While it is true that there is no presumption of risk,

[10] See, Germaine Testimony at 18.

[11] See, Brennan Testimony at 5.

[12] See, Silberman Testimony at 6, Silberman Rebuttal Testimony at 13-14.

[13] See, I.D. at 38.

[14] See, Copan Testimony at 8.

[15] See, Ileo Testimony at 7, Table IV.

[16] Even as an "unexplained" expert opinion, it is entitled to more weight than the *argument* of a party in interest on brief. See 7 Wigmore on Evidence § 1922, 1933 (Chadbourn rev. 1978); *Franklin Supply Co. v. Tolman*, 454 F.2d 1059, 1071 (9th Cir. 1972).

consideration of this factor must be given if the comparable earnings test is to fulfill the requirement that the carriers are to be allowed sufficient earnings to attract necessary capital and compensate investors for the risks they have assumed.[17]

The question remains, however, as to how risk is to be considered in this proceeding. The threshold issue, and one not answered by the Presiding Officer, is whether consideration is to be given to the risks faced by each *individual* carrier or the risks faced *generally* by carriers operating in the trade. Stated another way, should the Commission establish a maximum rate of return for each individual carrier or a trade-wide maximum rate of return? Hearing Counsel and the carriers would take into account the individual financial and business risk of each carrier. GVI/PRMA advance a trade-wide rate of return and the Presiding Officer constructs a "zone of reasonableness" within which all the carriers' rates of return must fall.[18]

The factors militating in favor of an individualized approach are: (a) it ensures that full consideration is given to the question of the risks assumed by the investors in each carrier, and (b) it is susceptible to a greater degree of precision in measurement due to the narrower focus of the inquiry. The factors militating against an individualized approach are: (a) it discourages efficiency of operation and in effect rewards past faulty management decisions;[19] and (b) it necessarily requires an analysis of each carrier's debt-equity ratio, a difficult and unreliable procedure which the Commission sought to avoid by adopting the rate of return on rate base test and rejecting the rate of return on equity test of reasonableness.[20] Each of these considerations operates in an opposing manner when used in evaluating the desirability of establishing a trade-wide maximum rate of return.[21]

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[17] See *Permian Basin Area Rate Cases,* 390 U.S. 747, 791-792 (1968). The use of an average U.S. corporate rate of return as a "benchmark" necessarily requires a determination of whether the carriers display different risk characteristics than the average firm. The alternative approach, that of eliminating risk premiums or discounts by carefully selecting highly comparable firms (including comparable risk) to arrive at a benchmark return, is not consistent with the approach prescribed by the Commission in G.O. 11. See, 46 C.F.R. 512.6(d)(2)(ii).

[18] The "zone of reasonableness" as that term has been defined by the Supreme Court is that area between minimum nonconfiscatory rates and the maximum reasonable level of rates. *FPC v. Natural Gas Pipeline Co.,* 315 U.S. 575, 585 (1942). As used by the Presiding Officer, however, the "zone of reasonableness" is simply a range of the maximum rates of return applicable for the particular carriers surveyed. To allow a zone of 16-18% is just another way of establishing an 18% maximum rate of return for the carriers.

[19] Establishing rates of return on the basis of individualized financial structures and earnings variations takes these factors as a "given" and allows carriers who have high risk financial structures, high comparative costs and erratic earnings histories to be allowed a higher overall return than a carrier who has a conservative financial structure, low comparative costs and a stable earnings history.

[20] See Docket No. 78-46, *supra.*

[21] Trade-wide maximum rates of return would establish an average rate of return in light of the individual carrier rates of return. This admittedly does not take into account individual investor's risks but only an average investor's risks and is essentially an estimate of what the average carrier in the

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A third "compromise," approach would give carriers individualized treatment in terms of the business risks they face in the trade but give no consideration to the individualized financial risks assumed by each carrier's financial structure. Business risk is an objective factor based upon earnings variations resulting from, to the most part, external market forces over which the carrier has little, if any, control.[22] Financial risk is a more subjective factor. It is based upon the potential of variations on earnings to *equity holders* due to the *internal financing structure* of the carrier which, to a very large degree is the result of the carrier's *own business judgments.*[23] The advantages of this approach are that: (a) it avoids the problem of attempting to establish each carrier's debt-equity ratio;[24] (b) it eliminates the apparent inconsistency with G.O. 11; (c) it considers the risks assumed by investors;[25] and (d) it encourages efficiency of operation.[26]

Because this third approach eliminates the inconsistencies inherent in awarding financial risk premiums and permits individual consideration of the business risks faced by each carrier in the trade, it is the one which appears most appropriate under the circumstances of this case.[27] Accordingly, it will be adopted here. Applying this approach and giving individualized treatment for each carrier's business risk but eliminating consideration of financial risk, the maximum reasonable rates of

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trade "should" earn, in light of the condition of *all* the carriers. While it does assume the theoretical existence of an "average" carrier, the trade-wide approach does allow for more competition by permitting a carrier to reap rewards for its efficiency and preventing a carrier a higher return because of its inefficiency.

[22] See Copan Testimony at 13.

[23] See Copan Testimony at 11.

[24] The reason rate of return on equity was rejected by the Commission in its recent revision of G.O. 11 was primarily due to the difficulty of establishing debt/equity ratios of carriers which are subsidiaries of a large corporate entity. This problem is revealed in this proceeding where the difference in rates of return allowed the carriers results in large part from differences in financial risk. Two of the four carriers were not awarded financial risks premiums because their debt/equity ratios could not be determined. See Copan's Testimony at 18-20.

[25] Under this approach, consideration is given to the individual market risks faced by each carrier. Also, because the Commission only determines the reasonableness of the return on *rate base* the carrier is free to increase its return on *equity* by means of financial leverage. Accordingly, the carrier who assumes the additional risk of financial leverage will necessarily be compensated for this factor without an upward adjustment of its return on rate base.

[26] Large variances in maximum permissible returns based on financing structures will be moderated, encouraging carriers to achieve higher earnings through a reduction of costs rather than increasing leverage.

The Commission is not unmindful of disadvantages of this approach. First, it imputes to each carrier a debt-equity ratio comparable to that of the average U.S. corporation. This is because financial risk premiums are based upon a determination of a higher degree of leverage than the average U.S. firm. Second, it does to some degree allow premiums to be awarded on the basis of potential past faulty management decisions. Carriers would still be allowed business risk premiums due to variations in earnings which may have in part resulted from poor marketing decisions. However, these disadvantages are clearly outweighed by the advantages stated above.

[27] Vice Chairman Moakley agrees with the majority decision to exclude financial risk premiums in this proceeding but solely on the basis of the economic hardship shown by Protestants. *See* Concurring Opinion of Vice Chairman Moakley.

return for each carrier are: (a) 16.5% for GCML;[28] (b) 15.5% for TMT;[29] (c) 16% for Sea-Land; and (d) 17% for PRMSA.[30]

The Commission will now consider the fixed charges coverage ratio as an alternative standard for measuring the reasonableness of PRMSA's rates. Hearing Counsel's suggestion that the fixed charges coverage ratio be used as the primary test of reasonableness of PRMSA's rates is contrary to the requirements of G.O 11 which clearly contemplates the use of this standard only when the rate of return on rate base test produces unreasonable results.[31] Under any of the above rate of return analyses PRMSA is entitled to the highest rate of return in the trade and will obtain a significant margin of net profit over and above all operating costs and debt maintenance. Accordingly, it does not appear that in this case the results of the rate of return analysis are unreasonable regardless of the theoretical problems presented by its application to PRMSA. The fixed charges coverage ratio utilized by Hearing Counsel of 1.8-2.0,[32] is a useful check on the results of the rate of return analysis and should be utilized whenever PRMSA rates are examined. However, this case does not present any compelling reason for replacing the rate of return standard as the primary test for all cases involving PRMSA.

REVENUES AND EXPENSES

The Initial Decision

The major issues addressed in the Initial Decision, concerning revenues and expenses of the carriers, centered around the proper methodology to be applied in estimating the cargo tonnage to be carried in the test year, the adjustment for inflation in the carrier's cost projections (excluding labor [33] and fuel), and the projected cost of fuel for the test year. Also, there were disputes over particular administrative and general expenses of the carriers.

The basic methodology utilized by PRMSA in projecting tonnage for the test year was accepted by the Presiding Officer with some exceptions. PRMSA utilized a marketing survey approach with adjustments for major plant openings and closings in its targeted markets. The

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[28] This would eliminate the .5% financial risk premium for this carrier included in the rate of return found appropriate by Mr. Copan.

[29] See footnote 28.

[30] Because neither Sea-Land nor PRMSA were awarded any financial risk premium, no change in their rates of return would result.

[31] 46 C.F.R. 512.6(d)(1); Docket No. 78-46, *supra.*

[32] The fixed charges coverage ratio is designed to evaluate the carriers' ability to cover all fixed charges and ability to take on additional debt. Copan Testimony at 27, 32. The times interest earned ratio also presented by Hearing Counsel is a simpler form of the fixed charges coverage ratio, see Copan Testimony at 33, but is not recognized as a test of reasonableness in G.O 11.

[33] Although noted as an issue in the Order of Investigation there was virtually no disagreement with the carriers' projected labor costs, these being determined by negotiated contracts. I.D. at 71.

Presiding Officer rejected as too speculative the proposed modifications to these figures which the carrier had estimated would result from the effects of the Federal budget cuts on the economy of Puerto Rico.

PRMSA also requested that its original projections be modified to reflect the effects of the late delivery of one of its vessels, the PONCE. The Presiding Officer held that although modifications to the carrier's original projections based upon actual operating results obtained during the course of a rate proceeding are not normally allowed, where subsequent events render those projections unreasonable and the modifications are not subject to reasonable dispute, they would be allowed. Accordingly, he accepted the reduction in projected tonnage resulting from the delay in the delivery of the PONCE.

A major dispute arose between PRMSA and GVI/PRMA as to the inflation factor to be applied to cost projections, other than for labor and fuel, which is the subject of a separate dispute. All parties submitted their own inflation factor calculations and the Presiding Officer found that the one proposed by Hearing Counsel was the most reliable. Hearing Counsel proposed a 10.4% annual inflation factor, utilizing the Producer Price Index For Industrial Commodities Less Fuels and Related Products and Power, as forecasted by Data Resources, Inc., a major independent forecasting service. Although no other party used this index it was held to be the most reliable because it was the one that came the closest to the "ideal" index that should be used for ocean carriers, *i.e.* the Producer Price Index for Finished Goods Less Food and Fuels, which is not published. Although PRMSA used a different index, its results closely approximated Hearing Counsel's and its inflation adjustment was accepted. GVI/PRMA's analysis which resulted in an inflation factor of 7.2% was rejected because it relied primarily on a subjective trend line analysis held to be overly simplistic.

PRMSA's fuel cost projections were based upon a forecast of Average Refiners Acquisition Domestic (ARAD) prices by Data Resources, Inc., the same independent forecasting service relied upon by Hearing Counsel in computing the inflation factor. GVI/PRMA challenge this projection on the basis that current events indicate that data used by PRMSA in its projections are no longer valid and that revised forecasts published since the proceeding was instituted should be utilized. The Presiding Officer found that GVI/PRMA's calculations were unreliable because they resulted from a combination of faulty techniques and an overreliance on the long-term effects of the recent "oil glut" and OPEC policies. The Presiding Officer held that although recent events indicate the risks inherent in making any attempt to accurately predict the cost of fuel for carriers, those proposed by PRMSA appeared reasonable and had not been successfully challenged by Protestants.

The Presiding Officer found that the results of PRMSA's revenue and expense projections indicated that if the late delivery of the

PONCE were to be considered it would realize a 16.95% rate of return with adjustments and a 17.41% rate of return without adjustments for the late delivery of that vessel. Either of these rate of return figures were held to be within the zone of reasonableness established by the upward adjustment of Hearing Counsel's figures.

Sea-Land's cargo projections were based upon an internal marketing staff report which in turn was adjusted by management to account for specific company marketing goals. The Presiding Officer accepted this methodology as reasonably reliable but rejected a projection of a loss of 2,723 containers in the North Atlantic segment of the trade. This tonnage reduction was attacked by both Hearing Counsel and GVI/PRMA on the ground that it presumed that an increase in available carrying capacity of its competitors would result in a loss of tonnage for Sea-Land. This presumption was held by the Presiding Officer to be unsupportable on the record and accordingly the 2,723 containers were included in Sea-Land's projections. With this adjustment, Sea-Land's rate of return was determined to be 16.28%.

The Presiding Officer also found, however, that Sea-Land had underestimated its inflation factor, utilizing a 9.3% annualized rate. Upon the suggestion of Hearing Counsel, this was raised to 9.9%. Utilizing this inflation factor in computing Sea-Land's expenses, the Presiding Officer concluded that Sea-Land's rate of return would be 16.04%, again within the zone of reasonableness.

TMT and GCML utilized the same basic methodology in predicting cargo for the test year, a straight trend line analysis adjusted for anticipated unusual changes in its targeted markets. No party took issue with GCML's prediction of a drastic reduction in tonnage due to an overall reduction in its services. Although no formal findings were made as to GCML's rate of return, the Presiding Officer apparently adopted its projected 16.1% rate of return and found this to be within the zone of reasonableness.

With regard to the projections of TMT, the Presiding Officer found that in the absence of further explanations, it had not satisfied its burden of proof as to the reasonableness of those projections and its rate increases. The essential issue concerned the amount of GCML cargo that TMT would capture in the trade. The Presiding Officer found that although it appeared that GCML would lose 120,000 tons of cargo in the test year, it was not clear whether TMT would pick up 80,000 or 100,000 tons of this amount. Because this would make a difference of $1.2 million in TMT's revenue, it was determined to be significant enough to require further elucidation. The Presiding Officer advised that TMT would have an opportunity to clarify this matter on exceptions to the Commission.

TMT applied a straight 10% annualized inflation factor in projecting its expenses which was found to be reasonable and there was no challenge to its fuel cost estimates. However, the Presiding Officer found that TMT had not adequately explained what appeared to be a double counting for management commissions and supervision fees to Crowley Maritime Corporation (CMC), TMT's parent company. Also, it was noted that GVI/PRMAs' contentions concerning the application of inflation factor to unidentified expense items and a $7.4 million overestimate of rate base were not adequately explained. No findings of TMT's rate of return were made in light of these deficiencies.

Position of the Parties

Exceptions

GVI/PRMA excepted to the refusal of the Presiding Officer to allow revisions to the submissions of PRMSA based upon actual operating results obtained since the institution of the proceeding. It argues that it is inconsistent to allow the carriers to amend their submissions when it is in their interests, citing the late delivery of the PONCE, but refuse to allow consideration of current events when it undermines some of the carriers' projections. Also, it is argued that PRMSA's methodology in using a market survey which indicates a general market decline and then reducing this forecast even further with specific plant closings results in a double counting of the market decline.

GVI/PRMA also challenge the use of the various inflation factor indexes selected by the Presiding Officer and the carriers because they all to some degree include the increases in the price of food and fuel which were recognized to result in upward distortions of the indexes. Moreover, the index for fuel costs used in the Initial Decision allegedly does not account for the recent drastic and unforeseen developments in the world oil market. It is noted that even the independent service relied upon in the Initial Decision has recently amended its forecast data and these data indicate that fuel costs could not possibly increase to the level predicted by the carriers.

GVI/PRMA maintain that TMT should not only have been found to have failed to carry its burden of proof but that it should not have been given the opportunity to supplement its case on exception to the Commission. It is argued that this procedure is contrary to the intent of P.L. 95-475, inconsistent with the Administrative Procedure Act and Commission regulations, and most important, violates Protestants' due process rights. Finally, GVI/PRMA submit that it was error for the Presiding Officer to fail to reduce Sea-Land's expenses by the amount of brokerage payments which are not provided for in its tariffs, such payments allegedly being illegal.

DTPTC excepts to PRMSA's amendment of its submissions to account for the late delivery of the PONCE. It also argues that it is unfair and inconsistent to refuse to amend the carrier's fuel cost projections in light of the indisputable change in circumstances in the world oil market and forecasted prices for the test year.

TMT excepts to the Presiding Officer's finding that it failed to fulfil its burden of proof. It is argued that simply because it did not rebut each and every assertion of Protestants does not mean that it has failed to submit sufficient evidence to prove the reasonableness of its rates. TMT maintains that the Presiding Officer erred in not examining the record to find this evidence. TMT argues that the record of the proceeding includes adequate explanations rebutting every allegation of the Protestants and that excerpts of its workpapers which it appended to its Exceptions reveal that it has sustained its burden of proof in this proceeding. TMT argues that the amount of cargo it obtained from the reduction of GCML's service is shown to be 80,000 tons and that the 100,000 ton figure originally stated was erroneous and was adequately explained by both its witnesses and Hearing Counsel's witness. Even with the additional 20,000 tons, TMT explains that its rate of return would only be 14.43%, which is reasonable. TMT also takes issue with the finding of double counting of payments to its parent corporation. It explains that the figures do not reflect payments but merely an allocation of expenses, one being an allocation of CMC's Caribbean Division office expenses and the other being an allocation of CMC's home office expenses. As to the impact of the double counting error on its rate base, TMT states that its only mistake was detected early in the proceeding and corrected, and, that in any event, because its rate base figures were not expressly made an issue in the proceeding, its rates may not now be found to be unreasonable on this basis.

Sea-Land excepts to the rejection of its projected decline in tonnage in the North Atlantic segment of the trade, arguing that it is entirely reasonable for it to project a loss of tonnage when new and competitive vessels of its chief competitor, PRMSA, will be coming on line during the test year.

Replies

GVI/PRMA do not believe that the information provided in TMT's Exceptions rehabilitate its case and therefore maintains that TMT has still failed to sustain its burden of proof in the proceeding. The "error" in its cargo forecast has allegedly not been sufficiently explained and what explanation was provided is seen as self-serving. GVI/PRMA submit that TMT's supervision fees/management commission allocation argument does not refute the apparent double counting of expenses. GVI/PRMA argue that even if TMT's rate base was not expressly put at issue in this proceeding, the significant discrepancy in its submissions reveals the inherent unreliability of all of the carrier's projections and justification of its rates. The inflation factor application explanations of TMT are alleged to be insufficient and inconsistent. Finally, GVI/

PRMA maintain that TMT's workpapers do not contain all of the information cited in TMT's Exceptions and that the additional information cannot now be considered by the Commission.

TMT argues that contrary to the assertions of the Protestants, it has met its burden of proof on the basis of the existing record. It submits that its tonnage figures were adequately explained in its Exceptions, using the record developed, and that in any event the error is inconsequential. TMT also repeats its argument that the supervision fees and management commissions are separate expenses and are not payments to its parent corporation. Protestants' attempts to require reductions of fuel costs and general inflation factors on the basis of events subsequent to the institution of the proceeding are argued to be impermissible hindsight contentions which were properly rejected by the Presiding Officer.

PRMSA argues that the evidentiary ruling of the Presiding Officer preventing the consideration of events subsequent to the institution of the proceeding was proper and did not violate the due process rights of the Protestants. PRMSA also insists that there was no double count of plant closings in its cargo forecasts because its market survey took this into account. PRMSA views Protestants' trend line analysis, to arrive at an inflation factor, as unreliable and subjective. The independent service used in the Initial Decision is supported as being both objective and historically reliable. PRMSA opposes the Protestants' attempt to submit evidence as to fuel cost projections after the institution of the proceeding on the basis that P.L. 95-475 requires that there be some limitation on the submission of testimony and evidence in order to expeditiously dispose of rate proceedings.

Finally, PRMSA supports TMT on the burden of proof issue. It argues that TMT has in fact adequately clarified the record. PRMSA would also have the Commission keep in mind the impact that a rollback of TMT's rates would have on PRMSA, who is said to have clearly justified its rate increase.

Sea-Land submits that its brokerage expense was a sales commission to its Puerto Rican subsidiary and is a lawful and proper expense. The problem with the payment allegedly was not as to its accuracy or propriety, but rather its classification.

Hearing Counsel's Replies to Exceptions are intended to clarify its position on the issues now before the Commission. The "rule of reason" standard, for the use of actual operational data advanced in the Initial Decision, does not go as far as Hearing Counsel originally desired, but is deemed acceptable for the purpose of expediting rate proceedings. Hearing Counsel admit that in applying this standard the Presiding Officer was correct in allowing PRMSA to adjust its projections due to the late delivery of the PONCE and refusing to allow the Protestants to reduce the carriers' fuel cost projections on the basis of the recent

OPEC oil price freeze. Hearing Counsel believe that the Presiding Officer was correct in rejecting Sea-Land's projected decline in tonnage in the North Atlantic segment of its service because this reduction is inconsistent with gains projected in other segments of the trade.

Conclusion

Before contentions concerning the individual revenue and expense projections of the carriers can be addressed, certain general matters affecting all of the carriers projections must first be discussed. These are: (a) the acceptance or rejection of actual operating results obtained after the commencement of the proceeding; (b) the appropriate methodology to be applied to arrive at an inflation factor for all non-labor and non-fuel expenses; and (c) the appropriate methodology to be applied to arrive at a predicted average cost of fuel for the test year.

The Commission finds that actual operating results should not be accepted unless they are based upon changes in circumstances so significant and certain as to render the original projections substantially unreliable.[34] This standard approximates the Presiding Officer's "rule of reason."

It is particularly important that parties not be permitted to supplement their cases after the close of the record and after an Initial Decision is issued, as both Hearing Counsel and TMT were urged to do by the Presiding Officer. The procedure suggested by the Presiding Officer is of questionable validity under the Administrative Procedure Act, the Commission's regulations, and the strict procedural requirements of P.L. 95-475. And, as was noted in the Commission's Order Denying Petition to Reopen the Record, issued August 14, 1981, aside from all other questions of the legality of such a procedure, it is practically inappropriate under the time limitations of P.L. 95-475.

The methodology proposed by Hearing Counsel to determine an appropriate inflation factor to be applied to non-labor and non-fuel expenses, and adopted by the Presiding Officer, appears to be the most reliable method presently available. A close relationship was established between the index selected, Producer Price Index for Industrial Commodities Less Fuel and Related Products, and the types of costs incurred by the carriers. The index is published by a recognized independent forecasting service and provides a sufficiently reliable as a check on the propriety of the carrier's projections.

As for fuel cost projections under current economic conditions, the Presiding Officer may be correct in noting that no one, not even

[34] *See, TMT Corp. - General Increase in Rates,* 18 S.R.R. 1374, 1375, n. 4 (1978); Docket No. 75-57, *Matson Navigation Company - Rate Increases,* 21 F.M.C. 538, 539 (1978). This standard has also been applied in cases arising after the enactment of P.L. 95-475. *See Matson Navigation Company - Bunker Surcharge,* 22 F.M.C. 276, 278 (1979). *See also Villages of Chatham and Riverton, Illinois v. F.E.R.C.,* No. 80-1826, Slip Op. at 11 (D.C. Cir. August 11, 1981).

respected independent forecasting services, can predict the cost of fuel over the next year with any precision or certainty. However, in comparison with PRMSA, which forecasted very substantial increases in its average fuel cost for the test year, all the other carrier parties to the proceeding entered relatively conservative estimates of fuel cost increases.[35] Although the ARAD forecasts used by PRMSA may have been based upon the most reliable information available at the time they were published, dramatic changes in world oil markets have caused these forecasts to change substantially since the initiation of the proceeding. Also, valid criticisms as to the appropriateness of the method by which PRMSA has applied these forecasts have been offered by Protestants.

The point is made that if subsequent events justify allowing PRMSA to alter its data on the basis of the late delivery of the PONCE, the same treatment should be given fuel costs which have a much more significant impact on the carrier's projections. Theoretically, therefore, updated projections based upon the ARAD forecasts should be included in the carrier's cost projections. However, there are no reliable applications of the data to be found in the record. The methodology of GVI/PRMA was successfully shown to be unacceptable.[36] PRMSA's methodology is also very tenuous.

If PRMSA had established a direct relationship between its costs and ARAD forecasts, its data might be acceptable. However, only a theoretical statistical correlation has been shown. As explained by PRMSA's witness, Dr. Vasquez, the relationship is based upon a correlation coefficient which in turn is not based upon actual PRMSA prices but an extrapolation (linear least square fit) of only 1980 PRMSA fuel costs. The reason given for the use of extrapolated figures as opposed to actual figures before 1980 is that "there was a change in the pattern of bunker fuel versus ARAD." Essentially what this means is that the pre-1980 actual data was not used because it did not fit PRMSA's model. This undermines the efficacy of PRMSA's forecast technique. These deficiencies (a questionable correlation, the marked changes in circumstances, and the inconsistency with the other carriers' projections) would ordinarily warrant disapproval of PRMSA's forecast. However, in this case there is simply no alternative forecast data which

[35] Sea-Land predicts an average cost of fuel for the test year of $29.69 per barrel. Zito Testimony at 7. TMT and GCML predict its prices to range from $.85/gallon to $1.02/gallon for an average cost of fuel for the test year of $.935/gallon or $29.45 per barrel. Farmer Testimony at 7, Andic Testimony at 26, n. 5. PRMSA predicts an average cost of fuel for the test year of $35.98 per barrel. Vasques Testimony at 5.

[36] GVI/PRMA's witness on this issue, Dr. Andic, essentially used a straight trend line analysis in her calculations based upon the updated ARAD forecast data then available. Andic Rebuttal Testimony at 20, 23-24. However, PRMSA's rebuttal testimony indicates that neither its fuel costs nor the ARAD data follow any clear trend line. Vasquez Rebuttal Testimony at Exhibit C. This exhibit, however, also points out PRMSA's extenuated forecast technique.

can be applied to PRMSA. Therefore, the Commission basically has three options: (1) adopt the Presiding Officer's findings due to a lack of an alternative forecast; (2) find that PRMSA has not sustained its burden of proof and deny its proposed rate increase; or (3) utilize the last known price level actually paid by PRMSA throughout the test year. It is clear that the particular circumstances of this proceeding require a pragmatic adjustment of the carrier's projections. *Permian Basin Area Rate Cases, supra,* at 800. The last alternative is the most acceptable for two reasons: (1) PRMSA's last known fuel cost approximates the test year projections of the other carriers, and (2) all of the petroleum "trade intelligence" entered into the record in this proceeding support the conclusion that petroleum prices are likely to level off the remainder of 1981. If this figure proves to be too low, PRMSA can utilize the Commission's present policy of allowing cost-pass-through rate increases as the need arises.[37] On the other hand, if PRMSA is permitted to recover excess revenues based upon what is clearly an excessive fuel cost figure, shippers are left with no adequate remedy.

This leads us to the overall evaluation of PRMSA's revenue and expense projections. The findings of the Presiding Officer as to PRMSA's cargo and revenue projections will be adopted applying his evidentiary "rule of reason." The basic methodology used by PRMSA in making its cargo projections, a market survey adjusted for known plant closings, appears reasonable. These plant closings have been properly adjusted in the market survey.[38] However, the additional adjustments proposed by PRMSA due to the expected effects of Federal budget cuts on the economy of Puerto Rico were properly rejected by the Presiding Officer, such effects being clearly speculative. The adjustments made for the late delivery of the PONCE, however, appear to be reliable.[39]

PRMSA's cost projections in all areas except fuel costs appear to be reliable and the Presiding Officer's findings in these respects will be adopted. The inflation factor applied to these costs closely approximates that resulting from Hearing Counsel's independent forecast technique.

Accordingly, the Commission will allow the adjustment for the PONCE but require that the fuel cost projections for the test year be held to the latest available data. Based upon these determinations,

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[37] Although the Presiding Officer correctly recognized that the Commission's bunker fuel cost increase pass-through policy had been terminated as it applies to bunker surcharges, he failed to note that fuel cost increases may be accommodated by permitting carriers to file overall rate increases with alternative abbreviated data. *Bunker Surcharges in the Domestic Offshore Trades,* 20 S.R.R. 401, 402 (1980).

[38] Huresky Rebuttal Testimony at 3.

[39] Vasquez Rebuttal Testimony at 18-19, Exhibits F-J.

PRMSA's rate of return will be 20.69%.[40] This figure exceeds PRMSA's maximum reasonable rate of return of 17% and PRMSA's rate increases are therefore found to be unjust and unreasonable to the extent that they exceed an average of 14.5%.[41]

The Presiding Officer's basic findings concerning Sea-Land's cargo and revenue projections should be adopted. The method by which its projections were made, a marketing study adjusted for company goals, appears to be reasonable with the exception of the projected decline in tonnage in the North Atlantic segment of the trade. As was correctly pointed out by the Presiding Officer, the fact that a competitor is increasing its deployment in a particular area does not automatically mean that the carrier will lose cargo to that competitor. If Sea-Land had supported its projection with a consistent competitive impact analysis it may have been acceptable. However, this was not done. Sea-Land's competitors have the highest concentration of lift capabilities in other segments in the trade where Sea-Land does not project a loss of cargo.[42] Absent some distinguishing competitive factors, this inconsistency effectively undermines the reliability of Sea-Land's projected decline in tonnage.

The inflation factor applied by Sea-Land was alleged to be too low by Hearing Counsel and was revised upward to more accurately reflect the factor obtained from the index used by Hearing Counsel and found appropriate by the Presiding Officer. Because this adjustment is solely one of methodology and does not go to the reliability of the underlying data, the Commission believes that it is not inappropriate in this proceeding.

Although the Presiding Officer indicated that "brokerage" payments made by Sea-Land to its Puerto Rico subsidiary raise a question as to

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[40] The last available fuel cost data for PRMSA in the record is the average price of $31.14 for the 20 days of March, 1981. Vasquez Surrebuttal Testimony at 12. PRMSA estimates fuel consumption for the test year at 1,521,442 barrels. Vasquez Surrebuttal Testimony at 13, n. 9. This computes to a total fuel expense of $47,377,704, approximately $7,383,000 less than PRMSA's estimate of $54,761,000. PRMSA Schedule B-II(1) - Transclass Case. Applying this reduction in costs to PRMSA's figures allowing for the PONCE adjustment but not the Federal Budget cuts results in a Total Net Income and Interest Expense of $40,858,000 over a rate base of $197,494,000 for a rate of return of 20.69%. See PRMSA Reply Brief, Appendix A. It should be noted that a decrease in expenses would ordinarily require a reduction in the working capital portion of the carrier's rate base. However, because rate base was not noted as an issue in this proceeding, this adjustment was not made for any of the carriers. If made, this adjustment would have further increased the rate of return.

[41] See PRMSA Reply Brief, Appendix A. Utilizing a rate base of $197,494,000, a 17% rate of return would yield net income plus interest of $33,574,000. Interest expense is constant at $23,651,000 and net income must be limited to $9,923,000. With a reduced Vessel Expense of $220,657,000, revenues must therefore be reduced $7,284,000 to $305,675,000. PRMSA's 17.2% average rate increase would have produced $45,929,000 and therefore must be reduced to $38,645,000 or an average rate increase of 14.5%. Because the carrier's rate structure was not made an issue in this proceeding, PRMSA will be allowed to apportion this average rate increase among the tariff items in its Tariff FMC-F No. 7 to achieve the same rate relationships it originally proposed.

[42] See, I.D. at 53; Rozynski Testimony at 9-10.

their lawfulness, he found that because this was not expressly included as an issue in this proceeding and because Sea-Land was not put on notice of any allegation of such unlawful activity, it cannot be addressed in this proceeding. While there is some question as to the correct label to be placed on these payments,[43] there is no dispute that the payments do reflect expenses incurred in the trade. Nor has it been demonstrated that these payments were in fact unlawful under the Shipping Act, 1916. These payments will therefore be considered as expenses in this proceeding.

When Sea-Land's cargo volume projections are modified pursuant to the foregoing discussion, and Hearing Counsel's inflation factor is applied, Sea-Land's rate of return computes to 16.04%[44] This result closely approximates the 16.0% rate of return Sea-Land should be allowed, and, accordingly, its rate increases are found to be just and reasonable.[45]

As was noted by the Presiding Officer, GCML's proposed increases went virtually unchallenged in this proceeding. Although no specific findings were made as to its revenues and expenses, a review of the record reveals that it engaged in basically the same type of methodologies as its related corporation, TMT. It projected a substantial cutback in service with a resulting reduction in its cargo projections. While there was disagreement as to whom this cargo would go, there was no dispute that GCML would lose it.[46] GCML's projected operating costs were proportionately reduced to reflect its reduced service and its estimates were not contested by any other party. It applied a 10% annualized inflation factor to its projected costs which was held to be consistent with the test index established in the proceeding. As a result of these calculations GCML's rate of return computes to 16.10%.[47] This is below the 16.5% maximum reasonable rate of return it is allowed, and accordingly its rate increases are found to be just and reasonable.

Questions were raised as to whether TMT met its burden of proof in this proceeding. Its methodology in forecasting cargo projections and revenues, a trend analysis adjusted for extraordinaries, was found to be reasonable. However, one of the extraordinaries it claimed, *i.e.* cargo gained due to GCML's reduction of service was disputed, due to

[43] Sea-Land paid a total of $607,547 to Sea-Land Puerto Rico, Inc. and itemized this payment as Freight Brokerage, although it later alleged it to be a sales expense. Zito Rebuttal Testimony at 2.

[44] Hearing Counsel Opening Brief, Appendix A.

[45] It should also be noted that Sea-Land cancelled the increases proposed to Tariff FMC-F No. 53 but did not make a corresponding decrease in its revenue forecast. If this had been done, Sea-Land would have arrived at a rate of return below the 16.04% found here.

[46] GCML projected a decline of 100,000 tons of cargo in the trade. Baci Testimony at 5.

[47] This data is reflected in GCML's original submissions filed with the Commission pursuant to Rule 67(a)(2) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.67(a)(2)).

ambiguities in TMT's original projections and its failure to adequately clarify these ambiguities and its subsequent adjustment of projections. The Presiding Officer held that TMT had not justified its final projections. While the Presiding Officer suggested that TMT might, by way of Exceptions to the Initial Decision, correct these deficiencies, it chose not to supplement the record but rather to simply highlight evidence of record which it alleged supports its final figures. As noted above, TMT has shown that GCML will lose 100,000 tons of cargo and not 120,000 tons. Accordingly, the corrected figure of 80,000 tons of additional cargo for TMT which is based upon a loss of 100,000 tons by GCML will be accepted.

The initial methodology used by TMT in arriving at its operating cost projections appears acceptable. Like GCML, it used the annualized 10% inflation factor approved by the Presiding Officer. However, questions arose as to whether this factor was properly applied to costs, and as to the legitimacy of its claimed expenses as it applied to "commissions" and "fees" assigned to its parent corporation. While TMT has adequately explained the application of its annualized 10% inflation factor,[48] it has not totally rebutted the allegation of double counting of supervision fees and management commissions. Its explanation is that CMC, its parent, supervised and managed both TMT and GCML through its Caribbean Division and that the $7 million "supervision" expense is TMT's allocable portion of the Caribbean Division's administrative and general expenses.[49] While this appears to be a satisfactory explanation of the "supervision" expenses, it completely fails to address "management commissions."

TMT's explanation of its claimed "management commissions" is that CMC incurs expenses in managing all its operating units, including the Caribbean Division, of which $3.013 million were allocated to TMT operations in this trade. This does not explain, however, whether part of CMC's home office expenses include an allocable portion of the Caribbean Division expenses. CMC's overall operating expenses are not itemized in the record.[50] TMT has therefore failed to sustain its burden of proof on this issue, and accordingly the $3.013 million in "management commissions" will be disallowed as a expense.[51]

TMT adjusted its rate base downward due to a double counting of vessel improvements in response to protests to its original projections. During the proceeding, it was alleged that an additional $7 million of rate base was overstated.[52] TMT's response to this allegation has been

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[48] See Farmer Testimony 4-7; TMT Exceptions at 18-19.

[49] See Farmer Testimony, Exhibit F, p. 1; TMT Exceptions at 10-11.

[50] See Farmer Testimony, Exhibit G.

[51] Administrative and general expenses were specifically included as an issue in this proceeding in the Order of Investigation and TMT bears the burden of proof on these issues.

[52] I.D. at 70.

that its projections are accurate and that, in any event, it is not an issue set forth in the Order of Investigation. TMT is correct in this latter contention, based on the Commission's interpretation of P.L. 95-475 which excludes any consideration of issues not noted in the Order of Investigation.[53] TMT's original calculations adjusted for its prior admission of rate base overestimate will therefore be accepted.

Based upon the above determinations, TMT's rate of return will be 15.33%, below the 15.5% maximum reasonable rate of return permitted. Accordingly TMT's rate increases are found to be just and reasonable.

ECONOMIC HARDSHIP

The Initial Decision

The Presiding Officer essentially found that Protestants had failed to establish that a particular economic hardship would result from the general rate increases proposed by the carriers. He reviewed the testimony of witnesses on this issue and found that it addressed only individual commodity rates and that these are irrelevant in a general rate proceeding. The Presiding Officer was also apparently of the opinion that even if economic hardship had been shown on the record, there is no relief available in a general rate increase investigation. It is his belief that the Commission may only grant specific relief on individual commodity rates based on specific transportation factors.

It is the Presiding Officer's opinion that the consideration of economic hardship in a general rate increase investigation would result in the imposition of confiscatory rates. The testimony of witnesses is seen as sincere and in some cases compelling but as simply not addressing the issues relevant to the proceeding. The Presiding Officer noted that while this testimony does indicate that the economic interests of Puerto Rico and the Virgin Islands are suffering from a number of inflationary factors, it does not isolate the impact of ocean freight rates.

Position of the Parties

Exceptions

GVI/PRMA take exception to the findings of the Presiding Officer as to the lack of a showing of economic hardship resulting from the rate increases of the carriers. They submit that the record in this proceeding is replete with compelling testimony of both specific and general economic harm flowing from these specific rate increases. Allegedly, this economic impact is relevant to the public interest and must be considered in determining a reasonable rate of return for the carriers in this trade. GVI/PRMA further submit that the facts and circumstances surrounding these rate increases indicate price collusion on the

[53] See Docket No. 79-48 - *TMT - Proposed General Increases in Rates* 22 F.M.C. 175, 178 (1979).

part of the carriers in violation of the antitrust laws, and that this should be considered by the Commission in deciding the existence and extent of the economic impact.

PRMSA believes that the Presiding Officer erred in giving any consideration at all to the economic impact testimony advanced by GVI/PRMA. It argues that this is unfair to the carriers because GVI/PRMA refused to comply with discovery requests concerning its contemplated testimony and thereby precluded the carriers from adequately preparing for cross-examination of its witnesses.

Replies

GVI/PRMA contend that the economic impact testimony and evidence was properly admitted into the record of this proceeding and cannot now be excluded.

TMT, PRMSA and Sea-Land argue that no adverse economic impact resulting from the rate increases has been shown on the record of this proceeding. A general revenue investigation allegedly does not focus on the adverse impacts on individual shippers and their objections are said to be best left to complaint cases where the transportation factors can be more carefully analyzed. TMT also submits that it is improper for GVI/PRMA to attempt to argue price collusion by the carriers at this stage of the proceeding.

Hearing Counsel disagree with the Presiding Officer's opinion that economic hardship cannot be considered in a general rate investigation. It submits that economic impact is a valid rate of return consideration. Shipper testimony is argued to be relevant to this determination if sufficient shippers come forward to enable the Commission to deduce the general economic impact of the rate increases. Hearing Counsel maintains, however, that the evidence in this case does not indicate sufficient economic dislocation to justify an adjustment to what is otherwise a reasonable rate of return for each carrier.

Conclusion

The economic impact of rate increases is relevant to a determination of their reasonableness [54] and must be considered as a relevant public interest factor in making these determinations.[55] The economic condition of the domestic offshore economies and the particular economic interests represented by Protestants are certainly relevant public interests whose welfare should be balanced against the revenue needs of the carriers. The manner in which the economic impact of rate increases may best be factored into rate of return decisions is by considering it in connection with the award of risk premiums. The Commission cannot

[54] *Alaska Rate Investigation*, 1 U.S.S.B. 1, 7 (1919).
[55] *Permian Basin Area Rate Cases, supra*, at 791.

impose a confiscatory rate of return upon a carrier because of economic hardship considerations.[56] However, in determining the amount of additional revenues that will be necessary for a carrier to attract capital and compensate its investors for the risks they have assumed, it is appropriate that the Commission consider, in balancing carrier interests against shipper and other affected interests, the economic impact that a rate increase can be expected to have on a trade.[57]

Whenever a business entity is in a positive rate of return situation (in excess of imbedded debt costs) there is some degree of ability to attract capital and compensate investors for risk. The question becomes what is a "fair" rate of return. The comparative earnings test uses the average earnings of U.S. businesses as a benchmark by which such "fairness" can be measured.[58] Imposing a rate of return below the U.S. average would require a finding that the particular entity has less risk than average. While economic hardship could be factored into in such considerations, if risks are shown to be above average it is highly unlikely that even a showing of extreme hardship would justify a rate of return below average. The relevant inquiry is when business risks above the national average are shown, to what extent can economic hardship act as a moderating factor. In this regard attention should be focused upon the criteria used to award "risk premiums." To reduce business "risk premiums" on the basis of economic hardship would require a showing of extreme economic dislocation resulting directly from a carrier's rate increases.[59]

In terms of a common carrier serving an insular domestic offshore jurisdiction, the best evidence of possible economic hardship is a showing that the costs of goods and services in the general offshore economy have increased as a direct result of increased ocean transportation costs at a greater rate than those on the U.S. mainland. By such a showing some inferences can be drawn as to the comparative burden on consumers and the comparative competitive disadvantages imposed on business interests in the offshore economy. Also relevant here would be an analysis of the general state of the offshore economy. This would enable the Commission to ascertain the economic impact imposed by the rate increases.

Evidence relating to specific impacts of a general rate increase on single commodity shippers and their ultimate consumers could also be relevant in an economic impact inquiry. While not as comprehensive as general comparative analysis, a fair sampling of the impact upon major

[56] *Baltimore & Ohio Railroad Co. v. United States*, 345 U.S. 146, 150 (1953).

[57] See *Permian Basin Area Rate Cases, supra*, at 812.

[58] *F.P.C. v. Hope Natural Gas Co., supra*, at 603.

[59] This would require a finding that risks assumed by carrier investors due to the overall volatility of the trade are outweighed by considerations such as business failures, resulting unemployment and the inability of the average consumer to obtain the basic necessities.

commodities moving in the trade is a sufficient basis upon which inferences may be drawn as to the overall impact of a general rate increase.[60] At what point such inferences can be drawn is a question which must be answered on an *ad hoc* basis. A trade-wide rate investigation probably presents the best vehicle for considering both general and specific impacts.

The question then becomes what, if any, economic hardship has been established in this case and how does it impact upon the reasonable limit of the carriers' rates of return. Protestants should not be estopped from alleging economic hardship due to a failure to comply with discovery requests of PRMSA. It is questionable whether Protestants in fact *failed* to comply with discovery requests [61] and whether the carrier has suffered any significant prejudice as a result of any such failure.[62] Therefore, the imposition of sanctions has not been shown to be warranted under the circumstances, particularly given the expedited nature of the proceeding.[63] Accordingly, the Commission will consider the evidence of economic hardship entered into the record of this proceeding.

The Protestants did submit substantial evidence of general and specific economic adverse impacts resulting from ocean freight rates on the interests they represent. They satisfactorily established that ocean freight rate increases have a clear adverse impact upon the costs of basic commodities,[64] the competitive position of business interests in relation to the mainland U.S.,[65] and the basic economic welfare of the

[60] Clearly, if 100% of the commodities moved by carriers in the trade to and from an insular economy are examined, a general comparative analysis can be directly derived from such evidence. Also, if only a few minor commodities are surveyed, it is doubtful that any general inferences can be established. The major commodities, if sufficiently analyzed, can form the basis of general inferences as they comprise the majority of the carriers' cargo as well as the vital trade of the insular economy

[61] Protestants allegedly did not comply with discovery requests asking the witnesses in the hearings in St. Thomas and San Juan to bring with them financial data as to their individual businesses. At least one witness complied with this request. I.D. at 88. Also, other discovery requests may have been complied with. See GVI/PRMA Reply Brief at 108-110.

[62] Certainly, any such failure did not significantly prejudice PRMSA's ability to cross-examine these witnesses. PRMSA Reply to Exceptions at 103-105. I.D. at 88, n. 34. Further, no formal discovery orders were issued in this proceeding and only a general discussion of discovery requirements was given by the Presiding Officer. See Summary of Ruling Made at Second Formal Prehearing Conference and Notice of Schedule Established, issued March 26, 1981.

[63] Rule 210 of the Commission's Rules (46 C.F.R. 502.210) contemplates that such sanctions are to be imposed by the presiding officer. The Presiding Officer here refused to impose such sanctions and the Commission is not prepared to question that determination.

[64] Due to the low profit margins of food retailers, the major impact of the rate increases will be passed on to consumers. Caparros Testimony at 2-3. This was corroborated by other testimony. Transcript of May 4, 1981 Hearing at 95, 1933. Housing costs will also be substantially impacted. Testimony of Murray at 3. Motor vehicle costs will also be increased and fewer vehicles will be available. Transcript of May 4, 1981 Hearing at 50-54.

[65] The apparel industry will be put at a distinct competitive disadvantage compared to U.S. mainland firms. Transcript of May 6, 1981 Hearing at 332, 344. At least one commodity whose shipping costs are a significant determinate of its ability to move, rags, has stopped moving due to the costs of

Continued

offshore economy in relation to the U.S. mainland.[66] However, all of this evidence relates to the general trend in ocean freight rates in recent years and was not specifically tied to these particular rate increases. Accordingly, a specific extreme dislocation resulting from these specific rate increases was not established. Therefore, no adjustment of the carriers' rates of return based solely on this consideration is warranted.

Finally, whatever its merits, the question of price collusion cannot now be considered in this proceeding. It was not included as an issue in the Order of Investigation. The tactic here of having it considered under the economic hardship issue on the basis of a presumption of economic injury due to a *per se* violation of the antitrust laws is tenuous. First, it would require a finding of a violation of antitrust law, which, in the context of this proceeding is beyond the Commission's statutory authority. Second, this allegation is subject to the same if not more serious notice and due process impediments as is the issue of Sea-Land's brokerage payments.[67] Third, it would be contrary to the Commission's prior holdings on the exclusionary effects of an Order of Investigation under P.L. 95-475 [68] and it is now too late for the Commission to amend the investigative scope of this proceeding in light of the statutory requirement that the Commission issue its final decision by September 26, 1981.[69] For all the above reasons, the Commission will not consider Protestants' allegations of price collusion in this proceeding.

THEREFORE, IT IS ORDERED, That the proposed rate increases to Tariffs FMC-F No. 34 and 53 of Sea-Land Service, Inc. are found to be just and reasonable; and

IT IS FURTHER ORDERED, That the proposed rate increases to Tariff FMC-F No. 5 of Trailer Marine Transport Corporation are found to be just and reasonable; and

IT IS FURTHER ORDERED, That the proposed rate increases to Tariff FMC-F No. 2 of Gulf Caribbean Marine Lines, Inc. are found to be just and reasonable; and

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transportation. Transcript of May 6, 1981 Hearing at 282-283, 291-295. The tourism industry will indirectly suffer. Transcript of May 4, 1981 Hearing at 192-193. The liquor industry will lose business to mainland suppliers. Paiewonsky Testimony at 2-3.

[66] The economies of the Virgin Islands and Puerto Rico are dependant upon ocean transportation. Francis Testimony at 5-6; Castillo Testimony at 7. Increases in the costs of transportation, therefore, will have a clear impact on major segments of these economies in the manufacturing sector, Castillo Testimony at 7, agricultural products, and textiles, *Id* at 8-11. While these interests recognize that rate increases cannot be avoided, they are of the opinion that the impacts of the rate increases should be considered in establishing a reasonable profit for the carriers. Castillo Testimony at 16; Transcript of May 6, 1981 Hearing at 352-353.

[67] See I.D. at 62, n. 27.

[68] *See footnote 69.*

[69] On June 5, 1981, in response to the request of the Presiding Officer, the Commission issued an order extending the time period for this proceeding by 60 days pursuant to section 3(b) of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 845(b)) to September 26, 1981.

IT IS FURTHER ORDERED, That the proposed rate increases to Tariff FMC-F No. 7 of Puerto Rico Maritime Shipping Authority are found to be unjust and unreasonable to the extent they exceed an average of 14.5%; and

IT IS FURTHER ORDERED, That the Puerto Rico Maritime Shipping Authority refund to any person who was charged on the basis of its unsuspended proposed rate increases an amount equal to that portion thereof found to be not just and reasonable plus interest in accordance with section 3(c)(2) of the Intercoastal Shipping Act, 1933, as amended (46 U.S.C. 845(c)(2)); and

IT IS FURTHER ORDERED, That the Puerto Rico Maritime Shipping Authority file with the Commission within thirty (30) days from the service date of this Order amendments to its Tariff FMC-F No. 7 cancelling its rate increases of February 27, 1981 and implementing a 14.5% average general rate increase which will become effective immediately upon filing; and

IT IS FURTHER ORDERED, That the Puerto Rico Maritime Shipping Authority file with the Commission's Secretary within sixty (60) days from the service date of this Order a full accounting of all refund payments made pursuant to this Order; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Assistant Secretary

* Vice Chairman Moakley's concurring opinion and Commissioner Daschbach's separate opinion are attached.

Vice Chairman Moakley, concurring:

I concur with the ultimate conclusions reached by the majority in this proceeding but differ in the manner in which two related issues were resolved.

First, I disagree that a logical discussion of the pros and cons of financial risk premiums, such as that set forth in the majority opinion, is a sufficient basis on which to disregard the testimony of expert witnesses and to overturn the Administrative Law Judge's conclusions on this subject. It is particularly troublesome that the majority would adopt this approach, not upon any particular exceptions to the initial decision on the financial risk issue, but, rather, upon its own motion. General Order 11 speaks only in general terms on risk premiums. It states in pertinent part, that

> ". . . the average rate of return earned by U.S. corporations is computed and, where appropriate, adjusted for current trends in rates of return, the cost of money and *relative risk.*" (Emphasis supplied). 46 C.F.R. 512.6(d)(2)(ii).

The staff economic witness on this issue, Mr. Jay Copan, was one of the authors of that provision in General Order 11. The majority would rely on his expert testimony in this proceeding because, among other reasons, his methodology comports with G.O. 11, but would disregard his opinion on whether financial risk premiums fall within the meaning of "relative risks" as set forth in that rule.

While the logic used by the majority is appealing, the issue of whether financial risk premiums should, as a general matter, be considered, is one which should be addressed in a rulemaking proceeding. The mandate of P.L. 95-475 to resolve methodology questions by rule and not in general rate proceedings is certainly clear.

The second area in which I depart from the majority opinion is its evaluation of the testimony relating to economic hardship. The majority concluded that protestants satisfactorily established that ocean rate increases have a clear adverse impact upon:

(1) the costs of basic commodities;

(2) the competitive position of business interests in relation to the mainland U.S.; and

(3) the basic economic welfare of the offshore economy in relation to the U.S. mainland.

However, this evidence is not found persuasive in this proceeding because it "was not specifically tied to these particular rate increases."

It certainly challenges the imagination to understand how the protestants could have more specifically tied the economic hardship evidence to these particular rate increases. The increases were just beginning to take effect at the time that the shipper witnesses were testifying. In all proceedings under P.L. 95-475, hearings must be completed within 60 days of the Order of Investigation which, in turn, must be issued before the increases take effect. This criticism of the protestants' evidence becomes even more severe in connection with other rate increases that the Commission may choose to suspend. Evidence of the impact would never be available during proceedings involving suspended increases because the rates would not be in effect and adherence to the majority's position would thus render all shipper input irrelevant.

I would find that the economic impact demonstrated on this record by protestants is relevant to these particular increases and that the award of financial risk premiums to TMT and GCML should be deleted because of this impact, and *not* because, as a general rule, it is inappropriate to consider financial risk.

In this respect, I would agree with the distinctions made by the majority opinion between the nature of business risk and that of financial risk. Financial "leveraging" is essentially speculative and any benefits to the public interest obtained by allowing carriers to obtain the rewards of such leveraging are here outweighed by the hardship which will be imposed upon these insular economies by the instant rate increases. In short, I believe that it is necessary to balance the equities here in favor of the consumer.

SEPARATE OPINION OF COMMISSIONER RICHARD J. DASCHBACH

Judge Kline's July 20, 1981 Initial Decision is fully dispositive of the five issues delineated in the Commission's January 29, 1981 Order of Investigation and Hearing (see headnotes at pp. 1-2 of Initial Decision) and I adopt its findings that the rate increases of Sea-Land, the Puerto Rico Maritime Shipping Authority, and Gulf Caribbean Maritime Shipping Lines are just and reasonable. I further find that TMT's rate increase is just and reasonable.

In view of the Initial Decision's thorough treatment of the salient issues in this proceeding, the Commission's extensive re-examination of them is, in my judgement, unnecessary and duplicative.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-10

SEA-LAND SERVICE, INC., TRAILER MARINE TRANSPORT CORPORATION, AND GULF CARIBBEAN MARINE LINES, INC. PROPOSED GENERAL RATE INCREASES IN THE PUERTO RICO AND VIRGIN ISLAND TRADES

This is the first trade-wide general-revenue investigation under Public Law 95-475, which imposes strict time limits. It investigates general-rate increases of 16 to 18 percent filed by four carriers, PRMSA, Sea-Land, TMT and GCML. The huge scope of the proceeding compressed within strict time limits presented severe problems which were met by adopting modern procedures which largely abandon the old-fashioned, trial-type oral hearing. Additional problems arose because the pertinent regulation, G.O. 11, does not clarify certain critical matters and because it was not always clear from reading the Commission's Orders what were its intentions regarding the scope of the issues being litigated. Protestants were given ample opportunity to show whether the carriers had carried their burdens of proof by a preponderance of the evidence, recognizing that in rate cases only reasonable approximations are required. The record shows that with one possible exception (TMT) the carriers have adequately explained their methodologies and justified their rate increases. More specifically I find:

(1) An exact rate of return cannot be fixed with assurance on this record because of deficiencies in all of the expert witnesses' testimony. However, the closest approximation is provided by BIE witness Copan and confirmed by others to show that 16 to 17 percent up to about 18 percent for PRMSA, primarily, represents a zone of reasonableness. Witness Copan's recommendations would have been followed more closely but for a significant omission, which he and BIE should cure on exceptions. This omission refers to an estimate of 7 percent for interest which he made when deriving a benchmark rate of return from a group of industries. For PRMSA, consideration of the fixed charges coverage ratio is necessary as a check but, as Mr. Copan shows, the ratio justifies PRMSA's rate increases.

(2) All respondents except possibly for TMT have generally provided adequate explanations showing that their revenue and cargo volume methodologies are reasonable. Protestants' alternative methodologies are not found to be persuasive or more reliable but seem to have been improvised and based on questionable techniques.

(3) The carriers' calculations of fuel and increases in other costs are reasonable under the circumstances. Protestants' alternative calculations are found to be deficient, largely improvised, and based upon doubtful methodologies and expedient adjustments.

(4) Economic hardship cannot be measured with assurance in a general-revenue case and the evidence in this case is inconclusive. Essentially individual shipper testimony is relevant in an individual commodity rate case, not a general-revenue proceeding. Individual shippers with particular rate problems who testified in this proceeding should be steered to proper negotiations or relevant proceedings to seek relief.

(5) Protestants' criticisms of certain aspects of the carriers' cases are found to be valid. These refer to certain projections of Sea-Land, add-ons to rate of return because of bad past years, the effects of budget cuts, PRMSA's use of a "surrogate" G.O. 11

formula, and to some extent, its attempt to compensate for its tax-exempt status. These criticisms, however, after corrections, do not alter the finding that the rate increases are justified. However, protestants' criticism of TMT's curious change in its prediction from that originally presented to the Commission, and certain other matters not adequately explained, warrant a finding that TMT has not proven its projections to be reasonable, absent satisfactory explanation on exceptions to the Commission.

(6) Certain critical recommendations are made for the sake of efficiency in future rate cases. These concern the need to clarify G.O. 11 regarding the formula and data to be used, the need for Commission Orders to specify the scope of the issues; the need to formulate a rule governing admissibility of later evidence; and the need to encourage shippers and carriers to seek solutions to individual rate problems in other than general revenue proceedings.

Amy Loeserman Klein and T. Scott Gilligan, for respondent PRMSA.

Donald J. Brunner, for respondent Sea-Land Service,.Inc.

Michael Joseph, for respondents TMT/GCML.

Edward J. Sheppard, George J. Weiner, and April C. Lucas, for protestants GVI/PRMA.

Daniel J. Sweeney and Steven J. Kalish, for protestant DTPTC.

Walter R. Fournier, for protestant Chamber of Commerce of Puerto Rico.

John Robert Ewers, Alan J. Jacobson and Charles C. Hunter, for Bureau of Investigation and Enforcement.

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

Partially Adopted September 25, 1981

This proceeding is the first general trade-wide investigation of general rate increases filed in the United States Atlantic and Gulf-Puerto Rico and U.S. Virgin Islands trades in approximately seven years, the last such investigation (Docket Nos. 71-30, 71-42, 71-43) having concluded in 1974.[2] It began after general rate increases were filed by the Puerto Rico Maritime Shipping Authority, Sea-Land Service, Inc., Trailer Marine Transport Corporation, and Gulf Caribbean Marine Lines (PRMSA, Sea-Land, TMT, and GCML). The proceeding was instituted by the Commission's Order of Investigation, served January 29, 1981, originally confined to the three carriers other than PRMSA, but on February 27, 1981, the Commission added PRMSA to the case.

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

[2] The last such trade-wide investigation was Docket Nos. 71-30, 71-42, 71-43, *Transamerican Trailer Transport, Inc., Sea-Land Service, Inc., Seatrain Lines, Inc. - General Increases in Rates, etc.,* 14 S.R.R. 645 (1974). These were the three main carriers operating in the trade at that time. Of course, there have been numerous investigations of general rate increases filed by individual carriers since that time involving PRMSA, Sea-Land, and TMT, but until the present proceeding, the Commission had not decided to conduct a simultaneous investigation of all four major carriers now operating in the trade.

The rate increases were all filed between November 26, 1980, and December 5, 1980, and were designed to become effective for Sea-Land on January 25, 1981, for TMT/GCML on January 29, 1981, and for PRMSA, on February 3, 1981. However, for various reasons, only GCML's rates went into effect as scheduled, the others being deferred so that ultimately PRMSA's and Sea-Land's rates became effective on February 27, 1981, and TMT's on March 3, 1981.[3] The rate increases subject to investigation were 18 percent for Sea-Land, 16 percent for TMT/GCML, and a weighted composite increase of 17.2 percent for PRMSA consisting of an 18 percent increase in the North Atlantic ports and 16 percent in the South Atlantic and Gulf ports. The rates were not suspended but were made the subject of investigation under section 18(a) of the Shipping Act, 1916, and sections 3 and 4 of the Intercoastal Shipping Act, 1933. These rate increases were published in supplements to two of Sea-Land's tariffs (FMC-F No. 34 and No. 53); one of TMT's (FMC-F No. 5), one of GCML's (FMC-F No. 2) and PRMSA's tariff FMC-F No. 7. Interestingly, Sea-Land's Tariff No. 53 is an intermodal tariff applying between Canadian ports and San Juan, Puerto Rico, a tariff which the Commission has decided is a domestic rather than foreign tariff. *See* Special Docket No. 556, *Pan American Industries, Inc. v. Sea-Land Service, Inc.*, 18 S.R.R. 1697 (1979); *but cf.* Special Docket No. 695, *Application of Sea-Land for the Benefit of the Otto Gerdau Co.*, 19 S.R.R. 1424 (I.D. 1980, F.M.C., April 7, 1980). In any event the rate increases in the Canadian tariff were ultimately canceled by Sea-Land and never went into effect.

Protests to the proposed rate increases were filed by the Government of the Virgin Islands (GVI), the Puerto Rico Manufacturers Association (PRMA), the Chamber of Commerce of Puerto Rico, and The Drug and Toilet Preparation Traffic Conference, Inc. (DTPTC). The combined protestants contended that the rate increases would have a serious adverse economic impact on Puerto Rico and the Virgin Islands[4] and challenged the carriers' supporting materials filed with the rate increases as being speculative, inaccurate, and unreliable especially as regards proper allocation of rate base and expenses, reasonableness of projections of cargo volume and revenue and the reasonableness of the rate of return.

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[3] There appears to be some confusion about the effective date of Sea-Land's increases probably caused by so many postponements and special-permission applications which affected the various dates of the rate increases. BIE states that Sea-Land's changes became effective on March 3, 1981 (BIE opening brief, p. 1), together with TMT's. However, the Commission's tariff records indicate that Sea-Land's increases in its tariff FMC-F No. 34 went into effect on February 27, 1981. (See Supplement No. 26 to cited tariff.)

[4] Protestant DTPTC has not contended the issue of economic impact in litigating this case but has joined other protestants in the other issues.

The three carriers originally named as respondents replied to the protests in defense of their rate increases, citing Commission case law and regulations in support of their financial exhibits and asserting the need for increased revenue so that the islands could enjoy the benefits of reliable service by financially healthy carriers. PRMSA also defended its supporting materials filed with its financial case but encountered a problem with its submissions relating to projections based upon the assumption that it would acquire the *ATLANTIC BEAR*, an acquisition which did not occur. After PRMSA had filed replies to the protests on January 15, 1981, in which it attempted to show that deployment of the two Transclass vessels in the Gulf would not significantly alter PRMSA's pro forma year results, the Commission found that these submissions contained new factual assertions which should have been presented back in December with the original case. The Commission therefore rejected PRMSA's tariff filings for failure to comply with Rule 67. *See* Order, 23 F.M.C. 681 (1981). However, the Commission later permitted PRMSA's rate increase to become effective on February 27, 1981, on special permission.

THE REASONS FOR THE HEARING

In ordering a hearing the Commission recited a number of facts which apparently convinced them of the need for such a proceeding. The Commission cited the protestants' contentions generally regarding the carriers' speculative and unreliable financial submissions and specified that protestants had challenged the carriers' projected labor costs, fuel costs, vessel maintenance costs and administrative and general expenses. The Commission stated that "these matters will be made an issue in this proceeding to provide Protestants opportunity to sustain their objections." (Order, p. 6.) Furthermore, the Commission noted that "in some extreme situations" concentration on a strict comparative analysis of a carrier's rate of return with other U.S. corporations may fail to take into account other important public interests such as economic hardships that rate increases "may impose on the affected domestic offshore economies and commercial interests." Therefore, when consideration is given to allowing a higher than average rate of return because of particular risks which carriers face in serving a trade, the Commission stated that "such considerations must be balanced" against the possible economic hardships. (Order, p. 6.)

> Having recited the above facts, the Commission then stated: Accordingly, a hearing is necessary to resolve the issues specified below in order to determine whether the general rate increases here are unjust, unreasonable, or otherwise unlawful under section 18(a) of the Shipping Act, 1916 and sections 3 and 4 of the Intercoastal Shipping Act, 1933. Order, p. 6.

The Commission thereafter set forth the issues to be determined in addition to the ultimate issue of the justness and reasonableness of the rate increases. The Commission specified five issues, the first relating to an appropriate rate of return; the second and third relating to the sufficiency of the carriers' revenue and cargo volume projections as to methodology employed and accuracy; the fourth relating to the propriety of the carriers' calculations of projected labor, fuel, vessel maintenance and administrative and general expenses; and the fifth relating to the question of possible economic hardship on the affected interests represented by protestants and, if such were shown, how it should be treated when determining a reasonable rate of return. (Order, pp. 8-9.)

The exact language employed by the Commission in framing the above five issues is as follows (Order, pp. 8-9):

(1) What is an appropriate rate of return for the carriers named as Respondents? In addressing this question consideration should be given to the average rate of return earned by other U.S. corporations and the inherent risks, if any, in operating in the affected trades.

(2) Is the methodology used by Respondents in making revenue and cargo volume projections appropriate?

(3) Are Respondents' revenue and cargo volume projections sufficiently accurate, and, if not, what are the appropriate projections?

(4) Have Respondents properly calculated their cost projections covering labor, fuel, vessel maintenance and administrative and general expenses, and, if not, what are the proper calculations?

(5) Do the proposed rate increases impose an economic hardship on the affected interests represented by Protestants and Intervenors, and, if so, to what extent should this factor be considered in determining a reasonable rate of return for the carriers? Order of Investigation, pp. 8-9.

In addition to the above explanations, the Commission provided comments on the nature of the inquiry into the question of the carriers' reasonable rate of return. The Commission stated:

> In any investigation into the reasonableness of a general rate increase, consideration must be given to what constitutes a just and reasonable rate of return for the carrier. In addressing this issue, the Commission generally takes into account: (a) the average rate of return earned by U.S. corporations, and (b) the risks faced by the individual carrier that may warrant a different rate of return. This analysis must also necessarily consider the group of U.S. corporations that should be used to derive an average, the time span examined in this regard and the criteria to be applied in determining whether a risk factor

> adjustment should be made, and, if so, the degree of such an adjustment. Such an inquiry will be made in this case. (Order, p. 5.)

As mentioned above, the Commission added PRMSA as a respondent to this case by Order of February 27, 1981. PRMSA has by far the largest share of the trade. The Commission incorporated the issues previously set forth in its first Order, discussed above, for application to PRMSA. The Commission also noted:

> Accordingly, because of this similarity of issues, particularly the rate parity considerations prevailing in this trade, PRMSA's proposed rate increases will be permitted to go into effect as scheduled but will be included in this investigation, and PRMSA will be made a respondent in the proceeding. (Order, February 27, 1981, p. 2.)

However, the Commission added another matter applicable only to PRMSA, namely, consideration of the "fixed charge coverage ratio standard." Thus, the Commission stated (Order, February 27, 1981, p. 3):

> In addition, because of the peculiar capital structure of PRMSA, the fixed charge coverage ratio standard of reasonableness stated in 46 C.F.R. 512.6 (d)(3) will also be considered in determining the reasonableness of PRMSA's proposed rate increases.
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> * * *
>
> IT IS FURTHER ORDERED, That all issues stated in the said Order of Investigation be considered in determining the reasonableness of PRMSA's proposed rate increases and that in addition consideration be given to the fixed charge coverage ratio standard of reasonableness as set forth in 46 C.F.R. 512.6 (d)(3) in making such determination; . . .

PROBLEMS ENCOUNTERED IN LITIGATING THIS CASE UNDER THE GOVERNING STATUTE, P.L. 95-475

Having issued its two Orders of Investigation, discussed above, the Commission launched this massive investigation. At the outset it was clear that the parties were facing enormous difficulties caused by the huge scope of the proceeding, the number of parties, and the pressures imposed by the time prescriptions erected in the governing statute, P.L. 95-475, which amended the Intercoastal Shipping Act, 1933, to ensure that rate cases would be decided by the Commission within 180 days, or, if necessary, 240 days after effective date of the rate increases. Because this appears to be the first trade-wide general rate investigation under the new statute, the Commission has not had the experience of conducting such a proceeding under the new law. I deem it my duty to point out to the Commission possible means to alleviate the huge burdens and expenses which every party has undergone in this proceeding in future proceedings, consistent with the reforms contemplated by P.L. 95-475.

There are two major areas the Commission should consider when initiating future rate cases. First, the Commission should, whenever possible, provide specific guidance to the parties as to the problems which the Commission believes require a hearing, as P.L. 95-475 requires. Second, again as P.L. 95-475 envisions, the Commission should amplify and clarify its General Order 11 so that parties need not continually litigate the same type of issues concerning rate of return methodology, cost escalation factors, or means of projecting carriers' cargo and revenue in pro forma years.

P.L. 95-475, 92 Stat. 1494, became effective on January 16, 1979. It had two main purposes.[5] The first, not relevant to the particular discussion here, concerns the Commission's power to suspend rates and to grant refunds to shippers if general rate increases are found to have been excessive. The second, highly relevant here, concerns reforms enacted to expedite the Commission's decisionmaking process. (See Senate Report, cited above, p. 1.) In reaction to the fact that Commission general rate cases had consumed years of litigation time, Congress enacted strict time periods, requiring end of hearings within 60 days, Initial Decisions, if any, within another 60 days, and Commission's final decision within 60 days thereafter (unless extended for compelling reasons another 60 days).

Enactment of such short time periods to determine a multitude of critical matters in general revenue cases was recognized as requiring corresponding procedural reforms. Procedural techniques which would assist in moving cases forward expeditiously were specifically contemplated and written into the statute or the Commission's implementing regulation, Rule 67. For example, the carriers are required to file their direct written case with the tariff filing 60 days before the effective date of the rate change, the case is to be developed by written rather than oral evidence and without cross-examination to the extent possible consistent with due process, the Commission is required to explain in detail its reasons for instituting a hearing, and the Commission is supposed to promulgate guidelines periodically for determining reasonable rates of return or profit. (See Senate Report, p. 2.) To a considerable extent the massive record in this case was developed by written rather than oral testimony and cross-examination was held to a minimum. However, it is apparent that this case consumed much more time and required expenditure of much more money in litigation expense because the parties were required to litigate numerous issues which had not

[5] For a good discussion of this law and its purposes, see Senate Report No. 95-1240, 95th Cong., 2d Sess., September 26, 1978.

been laid to rest in General Order 11 and furthermore were not advised by the Commission in greater detail concerning the specific problems which the Commission had found with the materials which had been submitted by the carriers before the case was formally instituted. For example, because General Order 11 does not describe the "comparable earnings" test for rate of return in any detail, yet requires that rate cases be determined by that test as do the Commission's Orders in this case, we have a half dozen or so expert witnesses each selecting his or her own group of companies for comparison and adding extra points for risk or other reasons. Obviously it will save litigants a great deal of time and money in future submissions if G.O. 11 is revised to specify how the comparable earnings test should be employed by the carrier, for example, what reference group should be selected over what time span, and what further adjustments should be made for what types of risk or current trends and by what measuring techniques. It would also be helpful if G.O. 11 would select other uniform formulae such as which inflation escalation factor should be employed in projecting future costs so that we would not have a medley of inflation factors submitted, *e.g.*, GNP Implicit Price Deflator, Producer Price Index for Finished Goods, PPI for finished goods less food and fuel, Consumer Price Index, etc., all of which have been put forth by various expert witnesses in this case. Other problems, such as whether one can use current data rather than data submitted originally with the rate filing, should be considered as well, whether in G.O. 11 or in Rule 67. This problem has been a serious one in this case and has occurred in previous cases as well. As mentioned, P.L. 95-475 specifically contemplated revisions to G.O. 11 which would help narrow issues in future rate cases. As the statute states in regard to the Commission's issuance of regulations providing guidelines:

> After the regulations referred to in the preceding sentence are initially prescribed, the Commission shall from time to time thereafter review such regulations and make such amendments thereto as may be appropriate. Section 3 (a), Intercoastal Shipping Act, 1933, last sentence.

The legislative history to P.L. 95-475 makes clear that Congress believed that continual issuance of guidelines by the Commission was critically important. The Senate Report, for example, cited one witness's testimony as follows:

> It is tragic that after 40 years of being subject to the Intercoastal Shipping Act in the noncontiguous trades, the carriers are completely unaware of what would constitute a guideline for just and reasonable rates of return and consequently that issue must be litigated in each case. (Senate Report, cited above, p. 13.)

The Senate Report explained the purpose of the requirement that the Commission issue guidelines, stating (*Id.*, p. 13):

> This should help assure that the same complicated and lengthy arguments will not have to be made every time a hearing is held.

I call the Commission's attention to the "same complicated and lengthy arguments" in this case regarding what is an acceptable rate of return, what reference group of companies should be compared, what adjustments should be made, etc.

Finally, I call the Commission's attention to Commissioner Moakley's testimony to Congress emphasizing the need for the Commission to issue substantive guidelines regarding methodology so as to curtail repetitive hearings, a problem of the past and one that has continued into the present case. Commissioner Moakley stated:

> Second, the methodology prescribed by the Commission for the determination of what constitutes a just and reasonable profit would have to be given substantive effect and be followed rigidly throughout each rate proceeding, unless otherwise ordered by the Commission. *Much of the time now consumed by rate proceedings is spent on arguments relating to methodology and the introduction of evidence in support of those arguments.* . . . The Chairman has already directed the staff to prepare recommended rule changes which will resolve many of the questions of methodology which have plagued our rate proceedings in the past. Hearing Before the Senate Subcommittee on Merchant Marine and Tourism, 95th Cong., 2d Sess., August 29, 1978, p. 17. (Emphasis added.)

The Commission has also stated that the procedural rules under which rate cases proceed would also be revised from time to time as follows:

> We anticipate that the procedural rules will evolve, based on our experience in processing general rate changes under these procedures. Docket No. 78-47, promulgating original Rule 67, February 14, 1979, p. 10.

I strongly recommend, therefore, that the Commission reopen proceedings to amend and clarify both General Order 11 and Rule 67 in keeping with the statutory mandate to provide guidance so that continual relitigation of essentially similar issues can be prevented.

As to the guidance that the parties would welcome in a particular case, it also became apparent that much time and expense could have been saved in this case had the Commission explained in greater detail why a hearing was necessary on so many issues and, if so, what particular areas the parties should scrutinize. Although the Commission had had the carriers' materials for analysis at least 60 days before this case was docketed, the Commission specified numerous issues without indicating anything other than that protestants had alleged the carriers' materials to be "speculative" or "unreliable" or something similar. Had the Commission indicated with further specificity exactly what portions of the carriers' materials were to be scrutinized and why they might be unreliable, much time might have been saved in the ensuing litigation. In this regard, the legislative history to P.L. 95-475 indicates that Congress believed that the Commission should show the need for a hearing in detail after having analyzed the carriers' evidence during the 60 days before instituting a formal proceeding. The Commission, having the benefit of advance analysis of data and evidence, was supposed to explain in detail why a hearing was necessary. (See Senate Report, cited above, pp. 12-13.) In this case one can infer from the Commission's Order that a hearing is necessary to test the various contentions of protestants regarding the quality of the carriers' evidence. (Order, p. 6.) However, this is the same sort of practice which caused so many delays in the past. For many years the Commission's orders instituting rate cases merely recited the claims of protestants and the replies of the carriers and then set everything down for hearing without narrowing issues. The results were that every litigating party felt free to dump into the case evidence on every contention and every issue that the party wished to litigate having any connection with the ultimate question of the carrier's need for more revenue. That explains to some extent why so much time was consumed in rate cases and why there were so many continued hearings to which the legislative history of P.L. 95-475 makes reference. (*See, e.g.*, Hearing, cited above, pp. 43-45, documenting delays and continued hearings.) In the present case the Commission's Order somewhat resembles the old orders which caused so much delay in that the present Order recites numerous issues encompassing most of the issues that used to be litigated in the old cases, states protestants' contentions and that a hearing is necessary. If protestants raise specific questions about the carriers' submissions, I am not saying that the Commission need not investigate such matters. I am suggesting, however, that the Commission could assist the parties in fashioning their cases for formal litigation efficiently by telling the parties exactly what the Commission's analysis during the 60-day period had indicated and exactly what was wrong or suspect as regards the materials submitted so that the litigating parties could focus on the areas so identified. Otherwise, with so many issues specified for determination in a multi-carrier general rate case, the Commission may be inadvertently continuing the old practices which P.L. 95-475 was supposed to eliminate.[6]

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[6] By case law the Commission has emphasized that it will not only narrow issues but will read its Orders narrowly to make sure that unintended, extraneous issues are not litigated, however important

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In order to assist all parties in holding down costs of litigation and meeting the strict statutory time limits in future rate cases, experience in this case demonstrates that the Commission ought to clarify G.O. 11 and its Rule 67 and ought to provide more guidance to put to rest continually reappearing issues of methodology and arguments about whether current data can be used rather than data originally submitted by the carriers with the rate filings. Moreover, the Commission, after having analyzed the carriers' data for 60 days, can help the parties immeasurably by advising them what was wrong with the original evidence so that all litigating parties can focus on specific evidentiary problem areas rather than having to mount full-blown cases in the dark under issues which merely allege that the carrier's materials were "unreliable" or "speculative."

Whatever the outcome of this particular case, I deem it to be of critical importance to call the Commission's attention to these problems both because such problems have been reappearing in Commission rate cases even since enactment of P.L. 95-475 which was supposed to eliminate such problems and because I have observed in this case that, because of its huge size, the problems have become onerous causing great expense and probable exhaustion on all litigating parties. I now turn to the specific means employed to deal with the problems in this case.

MODERN PROCEDURAL TECHNIQUES EMPLOYED TO MEET THE PROBLEMS POSED BY THE SIZE OF THIS CASE AND THE GOVERNING STATUTE

At the outset it was apparent that because of the many issues and parties in this trade-wide investigation every modern administrative technique conducive to rapid development of an evidentiary record would have to be employed. The basic problem, of course, is that P.L. 95-475 requires completion of the "hearing" within 60 days. Considering that there were four carriers and three protestants and the Commission's Bureau of Investigation and Enforcement (BIE) who wished to present their cases within such a short time period and that allowance had to be made for rebuttal evidence and for some discovery so that each party could obtain facts to develop rebuttal testimony on so many issues, I early decided that the old-fashioned trial-type hearing well suited for non-technical accident or murder cases in jury trials could not be followed. As I noted in a number of procedural rulings, modern administrative law encourages development of the record by written rather than oral means and strongly encourages abandonment of cross-

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the issues may appear to be. *See Trailer Marine Transport Corp.—Proposed General Increase in Rates*, 22 F.M.C. 175, 177-178 (1979), affirmed without opinion by the D.C. Circuit Court of Appeals *sub. nom. Government of the Virgin Islands v. F.M.C.*, January 30, 1981 (unreported).

examination when expert witnesses are involved and credibility or sense perception are not really relevant. I cited numerous authorities in two rulings, served February 9, 1981 (p. 5 n. 4) and March 3, 1981 (p. 3 n. 2).[7] Moreover, I noted that the legislative history to P.L. 95-475 emphasized the need to utilize written testimony and eliminate cross-examination to the fullest extent possible.

One advantage of such a technique is that the record was developed almost entirely in written form and in gradual states. This enabled myself and the parties to grasp the technical issues on an ongoing basis and to understand the evidentiary record while it was being compiled. The advantage to such a procedure is that the presiding judge can utilize the post-hearing briefs much more rapidly than is possible in the traditional oral, trial-type system of hearings when all too often a baffled judge must await the post-hearing briefs to begin to understand what he had been listening to from a medley of experts spewing forth a barrage of technical mumbo jumbo. In a highly complex and technical rate case in which time is of the essence, as in this case, I found such a technique to be absolutely essential especially considering the fact that my Initial Decision was originally scheduled to be issued only 15 days after the filing of the last post-hearing brief (since extended 19 days by the Commission in response to my memorandum of May 18) and the fact that I have no law clerks or technical staff advisors assigned to me, in other words, the fact that I must read the record and briefs, digest them, and write my decision entirely on my own. These various benefits derived from the use of written evidence in lieu of trial-type, oral testimony and cross-examination in technical cases has been summarized in McCormick, *Evidence* (2d Ed. 1972) pp. 856, 857. He concludes by stating:

> Properly handled, written procedures should result in a more adequate record being produced in a shorter space of time. McCormick, cited above, p. 857.

Accordingly, the record in this proceeding was developed essentially by having each party present its direct written case on March 10, rebuttal written case on April 10, and written surrebuttal on April 23. Interspersed were four formal prehearing conferences and one informal conference at which time discovery or other pressing matters had to be

[7] There are too many cases and authorities establishing that trial-type hearings are not always necessary in administrative proceedings and need not be employed in technical cases or unless there are specific issues of adjudicative fact which can only be resolved by means of oral testimony and cross-examination. Many of them are set forth in the footnote references cited in the text of this decision. For a quick reference however, the reader may wish to consult *American Public Gas Ass'n v. Federal Power Commission*, 498 F. 2d 718, 722-723 (D.C. Cir. 1974); 3 Davis, *Administrative Law Treatise* (2d Ed. 1980) §§ 14.1-14.5; Senate Report to P.L. 95-475, pp. 2, 9, 14-15; *United States v. Florida East Coast Railway Co.*, 410 U.S. 224 (1973); Prettyman, *Trial by Agency*, The Va. Law Review Assoc. (1959) pp. 30-35.

resolved. At the final conference, it was decided that some limited cross-examination of one expert witness (Mr. Copan, BIE's first expert) would be warranted. Such limited cross-examination conducted by counsel for PRMSA was held on April 29. Thereafter, to accommodate small business persons who could not present written statements or who wished to be heard orally on the islands, oral hearings were held in St. Thomas, U.S. Virgin Islands, on May 4, and in San Juan, Puerto Rico, on May 6, 1981. Nine witnesses appeared in St. Thomas while three testified in San Juan.[8] The formal hearing phase was thence concluded.

THE EVIDENTIARY RECORD AND POST-HEARING BRIEFS

The evidentiary record that was developed by the techniques described above is massive. It consists of the direct, rebuttal, and surrebuttal written testimony of more than 30 witnesses, mostly experts in their respective fields and amounts to several hundreds of pages in the aggregate. In addition there are three volumes of transcript covering cross-examination of witness Copan and the examination of the witnesses testifying in St. Thomas and San Juan. Incidental exhibits and documents of one type or another were also admitted into evidence. For ready reference, an outline showing these various exhibits and testimony has been compiled and printed as an appendix entitled "Exhibit A" to PRMSA's opening brief, June 1, 1981. The outline comprises seven pages. Following the close of the evidentiary record, six opening and reply briefs were filed many of which were huge. In the aggregate these twelve briefs total many hundreds of pages.

FUNDAMENTAL PRINCIPLES OF LAW GOVERNING ADMINISTRATIVE RATE CASES

Because this case involves controversy among so many expert witnesses which I must attempt to resolve although I am without personal technical or legal assistance as I have mentioned and because P.L. 95-475 imposes strict time constraints which disable me from explaining my findings in detail or recalculating financial exhibits consistent with my findings on methodology, I must resort to fundamental principles of law as an aid in determining the many technical issues. These principles establish that rate cases are technically akin to rulemaking proceedings, that it is impossible to make precise findings in rate cases, that the burden of proof is merely a preponderance of the evidence rather than

[8] There was a certain amount of difficulty in scheduling these oral hearings on the islands because of pressing time constraints imposed by the statute and because of the attempts, not completely successful, to submit questions to witnesses in advance of the hearings for their preparation for cross-examination. Moreover, the fact that the first two witnesses who testified in St. Thomas were the Governor and a Senator rather than small business persons generated some degree of controversy as did the introduction of evidence by PRMSA on the last day of hearing. Appropriate rulings dealing with these problems have been issued. (See PRMSA's Motion to Strike Certain Portions of Testimony of Governor Luis and Senator Williams Denied in Part, and other rulings, June 10, 1981.)

a clear and convincing showing, and that expert witnesses, like all other witnesses, must base their testimony upon reliable source data and reasonable, logical thinking if their testimony is to be followed.

Technically, under the Administrative Procedure Act, a rate case is rulemaking rather than adjudication. See APA, 5 U.S.C. 551 (4); *Alaska S. Co. v. F.M.C.*, 356 F.2d 59 (9th Cir. 1966); 2 Davis, *Administrative Law* (2d Ed. 1979) pp. 5, 322-323. Although modern case law seems to recognize that cases such as the present one may not be pure rulemaking since there is a possibility of retroactive refund on a finding of unjustness and unreasonableness and the old rule permitting ex parte discussions in such cases is not quite free of doubt, nevertheless there are many elements of rulemaking in the present case. I mention this fact because it is obvious that the methodology issues in the case could have been resolved by means of rulemaking, specifically by a proceeding amending G.O. 11 when the Commission would have the benefit of adequate time to consider the many comments on the matters in question rather than having to hurry through to decision in the midst of vigorous adversariness under P.L. 95-475. I have, however, previously recommended that G.O. 11 be revised and clarified.

Of greater immediate significance to any judge trying to decide the many technical issues are other principles of law that recognize that it is impossible to make precise findings in rate cases and that all that is expected of any party attempting to justify its position is to show the validity of that position by a preponderance of the evidence. As many parties have continually shown by citation of many cases, "ratemaking is not an exact science," and only a reasonable approximation is required. Among the many cases in which this basic principle has been recognized are the following: *Increased Rates on Sugar*, 7 F.M.C. 404, 411 (1962); *Alcoa Steamship Company - General Increase in Rates in the Atlantic Gulf Puerto Rico Trade*, 9 F.M.C. 220, 231 (1966); *Investigation of Increased Sugar Rates*, 9 F.M.C. 326, 330 (1966); *Sea-Land Services, Inc. - Increase in Rates in the U.S. Pacific Coast/Puerto Rico Trade*, 15 F.M.C. 4, 9-10 (1971); *TMT Corp. - Rates*, 21 F.M.C. 998, 1008–1009, 187-188 (I.D. 1979; FMC May 16, 1979); *Matson Navigation Co. - Bunker Surcharge*, 22 F.M.C. 276 (1979). The Supreme Court has also recognized that pinpointing is not feasible in ratemaking and therefore a "zone of reasonableness" should be employed, stating:

> Statutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low and what is unreasonable because too high. *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976), cited in *Communications Satellite Corp. v. F.C.C.*, 611 F.2d 883, 892 (D.C. Cir. 1977).

In a similar vein the Supreme Court has stated:

> What will constitute a fair return in a given case is not capable of exact mathematical demonstration . . . *United Railways & Elec. Co. v. West,* 280 U.S. 234, 249, 251 (1930).

Moreover, the courts have been tolerant when agencies have employed methodologies that admittedly contain infirmities, stating that "it is the result reached not the method employed which is controlling" and "[i]t is not theory but the impact of the rate order which counts" and "[t]he fact that the method employed to reach that result may contain infirmities is not then important." *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 602 (1944).[9]

A further indication that precision cannot be attained in rate cases is shown by the comments of protestant DTPTC in its opening brief. This protestant has made an earnest appeal to me and to the Commission to amend its regulation in various ways by developing formulae to determine cost escalations, by defining reference groups and time periods for use in the comparable earnings test, and by abandoning the continual *ad hoc* guesstimates of revenue and cargo projections that haunt every Commission rate case, etc. (See DTPTC Opening Brief, pp. 2-6.) Protestant does not agree with respondent PRMSA's evidence on rate of return or revenue projections in this case. However, protestant realistically acknowledged when urging procedural reforms for future cases: [10]

> First, it is clearly impossible for any carrier regulated by the Commission, or any other business for that matter, to predict its future revenues and volumes precisely. There are simply too many unknowns and none of us has a crystal ball. (DTPTC opening brief, p. 2.)

The next principle of law that I find relevant to my decision concerns the fact that a party having the burden of proof in an administrative proceeding need only prove its case by a preponderance of the evidence and is not required to prove its case by making a clear and convincing showing. The lesser standard of proof has been the normal standard employed in administrative proceedings for years. Recently, however, the Supreme Court has confirmed its use even in fraud-type cases involving regulated licensed brokers. See *Steadman v. S.E.C.,* 450 U.S. 91 (February 25, 1981); *Sea Island Broadcasting Corp. v. F.C.C.,*

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[9] The *Hope* case is a leading case constantly cited on rate of return questions. The quotations, of course, refer to a court's review standards as to what satisfies a reviewing court when reading an agency's decision. The quotation, however, seems to me to involve circular reasoning. How can one judge the reasonableness of a method by its "total effect" or "results" if those results or effects are determined reasonable by the very method employed? By what independent means can we know if the results or the method is reasonable?

[10] This quotation is not used to demean protestant's case or to prejudice its position in which it has very emphatically disagreed with PRMSA's projections and presented its own evidence and arguments most forcefully. The quotation shows concern for future cases and conforms with my own views in that regard.

627 F.2d 240, 243 (D.C. Cir. 1980); McCormick, *Evidence,* cited above (2d Ed. 1972), p. 853. This principle is important since the respondent carriers have the statutory burden of proof on most of the issues set forth in the Commission's Orders and I must determine whether their estimates and projections are reasonable and valid under such standard. This does not mean, however, that carriers can sustain their burden by a preponderance of speculative and unreliable evidence. As the Commission has stated in another type of crystal ball-gazing case involving predictions of the future effects of an anticompetitive agreement under section 15 of the Shipping Act, the Commission is "only able to decide cases on the evidence of existing facts and the reasonable deductions to be drawn therefrom and not on 'speculative possibilities.'" *Alcoa S.S. Co. Inc. v. Cia. Anonima Venezolana,* 7 F.M.C. 345, 361 (1962), citing *West Coast Line, Inc. et al. v. Grace Line, Inc. et al.,* 3. F.M.B. 586, 595 (1961). (In the cited case, the Commission refused to find the contentions of protestants to be valid notwithstanding protestants' arguments that there was a "reasonable possibility" of harmful effects if the agreements in question were approved. *Id.*)

Finally, since the present case involves the conflicting testimony of many expert witnesses, all well qualified in their respective fields, it is well to consider the principle that their testimony, like that of lay witnesses, is subject to scrutiny and must show that it is based on reliable data, is reasonable and logical in its reasoning, and is not riddled with errors or inconsistencies. See the enlightening discussion of Judge Biunno in *United States v. R. J. Reynolds Tobacco Company, et al.,* 416 F. Supp. 316, 323-325 (D.N.J. 1976). In that case the court rejected the Government's major expert witness's testimony, finding it based on unproven assumptions and unreliable methodology, factual ignorance of the subject matter, use of wrong figures, and other errors. The Court concluded that "[t]his sort of evidence from an expert witness carries such a large risk of misleading the finder of fact as to require that it be rejected as unreliable and hence not credible. See, for example, 'How to Lie with Statistics,' by Darrel Huff (W.W. Norton & Co., Inc., 1954). . . ." *Id.* The Court further opined that "[o]pinions are valueless as evidence without exploration of the underlying facts and rationale showing the path from the facts to the opinion." *Id.* (Interestingly, however, the Court makes mention of the fact that it utilized Federal Rule 706 to name an independent expert witness on whom the Court relied, a device which I wish had been available to me.) [11]

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[11] McCormick, *Evidence,* cited above, pp. 37-41, has an interesting discussion on ways in which the courts can deal with the "battle of experts," for example, by having the experts meet in conferences to seek agreement, use of impartial experts to assist the court, etc. Compare Federal Rule 706 authorizing the court to appoint its own expert. In this case, lacking such authority and lacking a personal techni-

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In *United States et al. v. F.C.C.*, D.C. Cir. Nos. 77-1249, 77-1252, 77-1253, decided *en banc*, March 7, 1980, 652 F.2d 72, the Court expressed opinions on the use of expert witnesses in speculative areas and also recognized that agencies must be free to utilize some degree of expertise when making predictions in industries they regulate even when hard facts are difficult to obtain. The Court refused to require the F.C.C. to hold evidentiary hearings to hear the testimony of experts which would involve speculation in a constantly changing industry. The Court stated:

> But the FCC's decision cannot be based on competitive conditions "at any given time;" it must be based on a reasonable prediction of future conditions. The FCC has concluded that the attempt to resolve these speculative matters through adversary proceedings would be futile. We believe that conclusion is reasonable. Slip opinion, p. 45.

The opinion in the cited case is well worth studying since it provides much guidance for a case such as the present one, especially concerning the practical difficulties of making predictions in a volatile industrial environment (e.g., the cost of fuel during the carriers' pro forma projected years), the need for the agency to rely on its own experience if hard facts are unobtainable, and the unsuitability of adversary proceedings in what is essentially crystal ball-gazing.

THE SPECIFIC ISSUES ORDERED TO BE DETERMINED

Armed with all of the above ammunition, I am now prepared to embark upon the hazardous course of trying to resolve the many technical issues. Having read the hundreds of pages of briefs which demonstrate zealous advocacy by capable counsel, I believe that anyone entering into this maelstrom runs the risk of enduring not only attack but even perhaps name-calling. Since it is impossible, furthermore, to find hard facts and to make precise predictions or findings in rate cases, as I have explained above, anyone's findings or predictions are open to second guessing, including this judge's. I have no technical staff assisting me, as I have explained, nor even a law clerk. However, I have studied the record and the massive briefs and am guided by the basic legal principles recited above. Furthermore, to the extent possible, I rely upon what little Commission precedent is available from an unclear G.O. 11 and previous decisions and, if the BIE staff experts' testimony passes scrutiny, I tend to turn to it first since these witnesses, in theory at least, should be free from any tendency to favor one side

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cal assistant or law clerk, the discussion by McCormick regarding practical difficulties affecting judges in technical cases is especially meaningful to me. To some extent, as I discuss below, I have turned to the staff experts who have testified in this proceeding on the theory that they should be relatively free from bias although, of course, staff expert testimony must also be carefully scrutinized for errors, faulty reasoning, etc., as Judge Biunno stated.

or the other, i.e., free from bias. (This reliance on staff experts, however, is limited because, as protestants have noted, the BIE essentially limited its contribution to certain issues, e.g., rate of return, inflation factor to be employed, and use of current or more recent data.) [12]

Because of the massive size of the record and the briefs and the strict time constraints imposed on me by P.L. 95-475, which, thanks to the Commission's response to my memorandum of May 18, 1981, gives me 35 calendar days to read, analyze, write, and have typed and printed, my decision without assistance except for the briefs, I have allocated much time to study of the briefs and record to enable me to understand the complex technical issues. Accordingly, I have not had the luxury of ample time to write such explanations as I would normally have done in a case of this size absent time restrictions and have had to rely on adopting portions of briefs which I have found persuasive where such is possible as a time-saving device. There is nothing in the Administrative Procedure Act, of which I am aware, however, which requires me to rewrite every proposed finding or argument or even to make findings on every argument presented. *See, e.g., Adel International Development Inc. v. PRMSA,* 23 F.M.C. 477, 480–481 (1980).[13] Moreover, even summary findings of fact and conclusions may suffice if the path being followed can be discerned and the findings are not vague or obscure. *See, e.g., Colorado Interstate Gas Co. v. Federal Power Commission,* 324 U.S. 581 (1945); *Minneapolis & St. Louis Ry. Co. v. United States,* 361 U.S. 173 (1959) (I.C.C. had not made express findings but its opinion showed that it had considered and discussed the issues intelligibly); *Borak Motor Sales, Inc. v. NLRB,* 425 F.2d 677 (7th Cir. 1970) (similar); *Gilbertville Trucking Co. v. United States,* 196 F. Supp. 351, 359 (D. Mass. 1961) modified on other grounds, 371 U.S. 115 (1962) (need to furnish the parties with a sufficiently clear basis for understanding the premises used by the tribunal in preparing its conclusion of law, adjudications, and orders).

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[12] As I will mention, I find that the staff experts' testimony to be of high quality and generally reliable when the staff had the witnesses to testify. However, the staff gave limited evidence on operational issues and confined themselves in several instances to verifying whether the carrier complied with G.O. 11. (See GVI/PRMA Opening Brief, p. 17 n. 8.) I sorely missed staff testimony on the other issues and hope that the Commission will provide the staff with the facilities to offer substantive testimony on all issues, not merely those relating to accounting and statistics. This would be consistent with the Commission's direction in Docket No. 75-38, *PRMSA - General Increase in Rates,* 18 S.R.R. 469, 476 (1978), where the Commission defined Hearing Counsel's (BIE's predecessor) role as one in which they would furnish evidence on all the issues. Since I have no technical staff, the furnishing of more complete evidence on all issues by staff expert witnesses would have been of great value to me.

[13] As the Commission stated in the case cited:

> 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 pp. 480–481.

THE RATE OF RETURN ISSUE

The first issue framed by the Commission's Order of January 29, 1981, is:

> (1) What is an appropriate rate of return for the carriers named as Respondents? In addressing this question consideration should be given to the average rate of return earned by other U.S. corporations and the inherent risks, if any, in operating in the affected trades.

This type of issue would have been a perfect subject for rulemaking, specifically, a rulemaking proceeding to amend G.O. 11. Because G.O. 11 is itself not fully informative and because the comparable earnings standard itself has deficiencies and uncertainties, the record contains different opinions by a half dozen expert witnesses on this question.

Effective March 28, 1980, the Commission promulgated its revised G.O. 11. See Docket No. 78-46, General Order 11, Revised, slip opinion, January 14, 1980, 19 S.R.R. 1283. Among other things, the Commission adopted the so-called "comparable earnings" test to determine reasonableness of carriers' rates of return. The Commission stated:

> [t]he Commission intends to continue to test the reasonableness of a carrier's rates based on a "comparable earnings analysis" which will utilize as its benchmark the rate of return on total capital earned by comparable U.S. corporations. The Commission will not limit the comparable earnings analysis to firms in the same geographic region. There will be some cases in which the Commission will consider a predetermined hypothetical capital structure to determine financial risk. Slip opinion, p. 65.

After rejecting alternative tests such as "opportunity cost," the Commission stated:

> Therefore, the Commission has determined to retain the comparable earnings test in its final rules so as to account for, *inter alia,* various sources of financing and differences in risk in judging the reasonableness of a carrier's rates. *Id.*, p. 67.

This is, of course, not the place to challenge the Commission's choice of the comparable earnings test. As some authorities have pointed out, however, this test is considered secondary while a cost of capital or capital attraction test has been preferred. See James C. Bonbright, *Principles of Public Utility Rates* (Columbia University Press, 1981), p. 257, Phillips, *The Economics of Regulation* (Richard D. Irwin, Inc. 1965), p. 298.

I do not have the time to write a treatise on the two tests, how they developed, or how the courts deal with them. I can only define them briefly and refer the reader to the authorities cited for a complete discussion.

Briefly, for ready reference, one authority defines the two tests as follows:

> First, the "cost of capital" standard, under which the rate of return should enable a company to attract capital on terms that will (a) maintain its credit standing, (b) protect its financial soundness, and (c) maintain the integrity of its existing investment. Second, the "comparability of earnings" standard, under which the rate of return to equity owners "should be commensurate with returns on investments in other enterprises having corresponding risks." Phillips, cited above, p. 268.

Another authority defines the two tests as follows:

> Two tests of a fair rate of return have been mentioned in court decisions. These are the "comparable earnings" test and the "attraction of capital" or "maintenance of credit" test. Both of these were stated by the Supreme Court of the United States in the Bluefields case. The "comparable earnings" test was indicated in the following language: "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." The "attraction of capital" test found expression as follows: "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." Both of these tests require further comment.[14]

Protestants GVI/PRMA have concisely shown how the test has been formulated and how it is one of the two basic tests and how the courts have employed both, although the cost of capital test is perhaps considered the primary test. To quote from their Reply Brief, pp. 31-32:

> The formulation as set out in the universally-cited genesis of the comparable earnings test is the following passage from the *Bluefield Waterworks* decision, 262 U.S. 679, 692-693 (192):
>
> A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of

[14] Locklin, *Economics of Transportation* (Richard D. Irwin, Inc. 1972, 7th Ed.) p. 394. (Footnote citations in the quoted passage omitted.)

> the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunities for investment, the money market and business conditions generally.

As Bonbright notes in his discussion of the Court's formulation of the comparable earnings standard in *Bluefield* and, later *Hope Natural Gas* [J. Bonbright, *Principles of Public Utility Rates*, 257-58 (1961) (emphasis added)]:

> Here as in the Hope case, are suggested not just one standard of a fair rate of return but two. In the first place, the rate must be equal to that currently earned on 'investments' in other equally risky business enterprises. But, in the second place, it must also suffice to maintain the credit and the capital-attracting ability of the very company whose case is at bar. And the question arises what should be done in the likely event that the rate indicated by the one test is higher or lower than the rate indicated by the other. A severely literal construction of the *Bluefield* opinion would seem to require the acceptance of whichever rate of return happens to be higher in any given case. But this interpretation would run so contrary to common sense that it has not won acceptance.
>
> Faced with this problem of judicial interpretation, my own preferred interpretation has been that the courts have not intended to set up two conflicting standards of reasonable utility rates. *Instead, the credit-maintenance or capital-attraction standard is primary, while the comparable-risk standard is secondary and ancillary. That is to say, the fair rate of return is a rate, the allowance of which will permit the company in question to support its credit and to raise required supplies of new equity capital on terms fair to the old investors; but this rate is necessarily related to the rates of return that investors, while still free to commit their capital on the competitive market, could expect to secure on investments in enterprises of comparable reputed risk.*

As I have discussed above, Congress intended that the Commission issue substantive guidelines for determining rate of return questions and intended, furthermore, that the Commission revise these guidelines from *time to time. It is extremely important, however, to understand that* these guidelines (present in G.O. 11 revised) are intended to have substantive, i.e., precedential effect, and are not merely suggestions. Otherwise the same issues keep getting litigated in case after case. G.O. 11, of course, has not selected the first test, i.e., "cost of capital," "capital attraction" or sometimes called the "maintenance of credit" test.

It is important to bear in mind that the Commission has chosen "comparable earnings" rather than the other test and that the choice must be followed unless or until G.O. 11 is revised by the Commission. This is important because, in my opinion, a good deal of certain experts' evidence seems irrelevant to the "comparable earnings" test or interprets that test to mean that no upward adjustment may be made in consideration of peculiar risks of respondent carriers.

Having made the choice of the "comparable earnings" test, we must now live with it in this case and deal as best we can with its deficiencies. (I might add that the other test, i.e., cost of capital, has also been criticized for several reasons, e.g., use of earnings-price ratios, circular reasoning, reliance on investors' anticipation. See Locklin, cited above, pp. 397-398.) The authorities recognize problems with the "comparable earnings" test, problems which have become terribly obvious in this case. The main problems concern the selection of the reference group of "comparable" industries, the time period utilized in the selection, and how one is to determine whether there is an adjustment necessary for risk, current trends, or other such factors. *See* , e.g., Locklin, *Economics of Transportation,* cited above, p. 394; Phillips, *The Economics of Regulation,* cited above, pp. 297-303; Welch, *Cases and Text on Public Utility Regulation* (Public Utilities Reports, Inc. 1968, rev. ed.), pp. 488-489. In previous Commission decisions which I have had time to read, it appears that different source materials have been used showing different companies or industries, that adjustments were made for risks and other factors, and that a period of time over one year was selected for the comparison. As a guide to the problems in this case, the following table will show at a glance how the various expert witnesses differed in their final recommendations, how they selected different groups of industries for comparison purposes, how they used different time periods, how they made adjustments, and for what factors such adjustments were made. It will be seen that, not surprisingly, the range of recommended or allowable rates of return runs from a low of 13.5 percent from witness Ileo testifying on behalf of protestant DTPTC to a high of 23.5 percent as an allowable target proposed by witness Nadel on behalf of respondent carriers Sea-Land and TMT/GCML. It will also be seen that at least four different reference groups of companies or industries were used, namely Federal Trade Commission Quarterly Financial Reports (FTC-QFR) used by three expert witnesses, Standard & Poor's

400 Industrials, Value Line, and a special selected group of utilities and motor carriers used by one witness. Time periods for comparison vary from less than one year to six or more years in the past. Upward adjustments to benchmark figures derived from the reference group vary also, some experts making adjustments for current trends, business and financial risks, while others limited adjustments to embedded costs differentials or other factors.

The table illustrates a few basic points which I have previously mentioned. First, that the uncertainty of G.O. 11 and the "comparable earnings" test permit wide disagreement among well qualified experts. Second, that a precise mathematical determination of a single reasonable rate of return is not feasible. As Dr. Germane, one of TMT/GCML's experts, stated (Surrebuttal-Germane, p. 9):

> None of the methodologies used by any of the parties to this proceeding are likely to provide the single "appropriate" rate of return. They are all based on assumptions and judgments with respect to risk, capital costs and other critical determinants of an appropriate return.

I also agree with Dr. Nadel, another expert sponsored by Sea-Land and TMT/GCML, who stated:

> In summary, I agree with Dr. Germane, as apparently does Mr. Copan, that the "question of comparability can never be resolved clearly." (Surrebuttal-Nadel, p. 7).

Because of these views and those I have discussed earlier in this decision regarding impossibility of precision in cases of this type, the imperfect nature of measuring techniques, and unclear Commission precedent, I believe that the most reasonable approximation of a fair rate of return would be a zone of reasonableness rather than a single fixed number, provided that the record would furnish sufficiently reliable and probative evidence so that a zone could be determined. However, after studying the recommendations of the six expert witnesses who all reach different conclusions, as summarized in the table below, it is apparent that there is neither a single number that I can rely upon nor is there anything but a vague range that I can presently ascertain. Unfortunately once again time constraints do not permit me to discuss the many problems that the record presents in the detail that such problems deserve and I can only touch upon the highlights. As will become apparent, however, the incomplete guidance provided by General Order 11, the extremely difficult problem of dealing with PRMSA, a tax-exempt company, and the fact that the various expert witnesses were compelled to turn to a variety of published financial sources which do not tabulate their information to suit the terminology of General Order 11, all play significant roles in disabling the experts or myself from singling out any one number with assurance as the one-and-only reasonable rate of return. As will become further apparent, all of the expert witnesses' testimony contained flaws of one type or another, some so serious that I have to reject their recommendations almost summarily. Furthermore, even in the case of the more moderate recommendations which fall in the center of the table below (such as Mr. Copan's 16-17 percent, Dr. Nadel's 18.5 percent before markups, and Dr. Silberman's 19-20 percent for PRMSA) each of them have infirmities which I will briefly describe. However, unless the Commission seeks a degree of precision that the law does not expect in rate cases, somewhere among these witnesses a reasonable range or approximation must be deduced. Otherwise all of the testimony would have to be rejected and the Commission would have no answer to its first question, i.e., "what is an appropriate rate of return. . . ." As I indicate below, the best approximation that I believe the present record can offer is somewhere above the 16-17 percent recommended by Mr. Copan to somewhere around 18 percent, the latter figure more relevant to PRMSA than to the other three respondent carriers. (Since various calculations and corrections to pro forma exhibits performed by the carriers and BIE show that they fall under or within the range per carrier, respondent carriers except, in certain respects, TMT, as I later discuss, have shown that the general rate increases under investigation are not excessive.) If, however, the Commission believes that a single-number rate of return must be picked despite the imprecision of the rate-of-return measuring techniques, I would have recommended those numbers put forth by BIE's witness, Copan, but for a significant omission in one of the critical elements in his formula, which should be explained on exceptions. Before discussing the various recommendations, I present the following table summarizing the expert witnesses' methodologies:

TABLE OF RECOMMENDED ALLOWABLE RATES OF RETURN

PRMSA	13.5 OR 13.2% (Ileo)	15% (Brennan)	17% (Copan)	19-20% (Silberman)	21.29% (Germane)	23.5% (Nadel)
SL			16%		20.26	23.5%
TMT			16%		17.14%	23.5%
GCML			17%		17.14%	23.5%

Methodology-Reference Groups Plus Add-ons for Risk, etc.

Ilio	Brennan	Copan	Silberman	Germane	Nadel
FTC-QFR (mfg.) 1980 - 3 qtrs. 1980-est. 4th qtr.	S & P 400 diversified industrials 1975-9	FTC-QFR (mfg.) 1974-9	FTC-QFR (mining, mfg., retailing) 1978-80	Selected group (elec. utilities & motor carriers)	Value Line (36 industries; 717 companies) 13.9% median in 1979)

A very good objective description of the methods used by each of these expert witnesses is provided by protestants GVI/PRMA in their opening brief, pp. 140-182. For the primary source, of course, the reader should consult the briefs of the party that sponsored the witness. However, protestants' counsel has done a commendable job in summarizing the various experts' testimony, saving me much time.[15]

At the outset I find that the extremes represented by Dr. Ileo (13.5 or 13.2 percent, as revised in his rebuttal testimony), the 23.5 percent by Dr. Nadel and 21.2 percent (for PRMSA) by Dr. Germane to be just that, extremes, which I do not find persuasive in comparison with the other more central and moderate studies. Dr. Ileo, testifying on behalf of protestant DTPTC would understandably be recommending a lower rate of return but his low points seem off the scale of reasonableness. However, I do not find them unpersuasive merely because they are so low. As other parties have cogently shown (see PRMSA's opening brief, pp. 57-62) Dr. Ileo's methodology is faulty. Essentially he relies on a relatively brief period of time for comparison (less than one year), uses a bad business year for a basis of comparison (1980), makes an adjustment for PRMSA's risk based on embedded cost differentials from unlocatable sources and fails to consider tax consequences, thereby understating PRMSA's risk differential. His results allow PRMSA only a very thin margin over PRMSA's huge debt ($24 million in interest annually).

On the other end, I find Dr. Nadel's target rate of return of 23.5 percent to be based on faulty and unprecedented methodology because he wants to award premiums to offset past bad years and past inabilities of carriers to reach allowable rates of return. A good summary of Dr. Nadel's faults is contained in protestant GVI/PRMA's opening brief, pp. 219-227. While I do not agree with much of protestants' criticisms of Dr. Nadel in other respects, I do agree that Dr. Nadel's adjustment upward in the amount of 2 percent and another 3 percent to offset bad business years since the 1960s and past shortfalls in revenue are unprecedented and contrary to case law.[16] I find his net rate of return (18.5

[15] Although I obviously am disagreeing with counsel on many issues, I must take this opportunity to commend counsel for the high quality of briefwriting generally and the tremendous efforts put into the opening and reply briefs. Counsel for GVI/PRMA wrote 262 pages on opening brief and 122 pages on reply brief in a very short space of time. Counsel for PRMSA wrote 177 pages on opening brief and 111 on reply. Other counsel generally contributed sizeable briefs, also well crafted and argued, and some almost as long, e.g., BIE's opening brief was 88 pages. I do not mean to encourage mammoth briefs since they are obviously burdensome but I understand, in an expedited proceeding, how they arose and I commend counsel for their diligence even though I fully realize that I may be blasted on exceptions. Length, however, does not necessarily connote quality.

[16] See *Galveston Elec. Co. v. Galveston*, 258 U.S. 388, 395 (1922); *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145, 153 (1962); *Government of Guam v. F.M.C.*, 365 F.2d 515, 519 (D.C. Cir. 1966), cited in protestants GVI/PRMA opening brief, p. 226 n. 70. See also *Communications Satellite Corp. v. F.C.C.*, 611 F2d 883, 894 (D.C. Cir. 1977).

percent) to be a reasonable alternative to the BIE's witness Copan if one considers that he attempted to derive a true comparable group of companies and eliminate the need for upward adjustments to benchmark figures for risks. I will return to Dr. Nadel later. (He also makes note of the fact that carriers in the Puerto Rican trade just do not make much profit, showing that during the period 1975-1979 their aggregate returns were, as weighted, an average of 3.52 percent, and, most recently, only 7.1 percent (D-Nadel, p. 29).) It is tempting to stop right here and stop pretending that a rate of return of 16 to 18.5 percent is realistically possible and drop what appears to be an academic exercise not related to the real world. Not only do the carriers in the trade not seem to be doing very well, and even protestants do not generally resist some rate increase as being reasonable for them, but they almost never seem to have. Cf. the last general trade-wide investigation in Docket No. 71-30, etc., cited above, 14 S.R.R. 645 (1974), when it was shown by the G.O. 11 filings that the carriers lost an aggregate of $14 million. For similar evaluation, see Dr. Germane's testimony (D-Germane, p. 13).

Getting closer to the center of the table, I find Dr. Germane's recommendations of 21.2 percent for PRMSA and 20.26 percent for Sea-Land to be too high and even though his other two recommendations (17.14 percent for TMT/GCML) are within a zone of reasonableness, I find Dr. Germane's methodology to be less persuasive and reliable than that of BIE's witness Copan or Dr. Nadel once the latter's two premium factors are disregarded. Although impressive in certain areas, my main problem with Dr. Germane is his use of the cost-of-capital test to determine benchmark rates of return before applying his various risk factors. Although stressing more risk factors than may be necessary, Dr. Germane's quantitative tests for risk do not appear to be invalid in theory. The real problem, however, is that he utilized a test that the Commission has not selected when ascertaining a benchmark rate of return, namely, cost-of-capital. Secondly, he relied upon a narrow, selective reference group (regulated motor carriers and utilities). See GVI/PRMA opening brief, pp. 153-156; 216-219. BIE also argues correctly that Dr. Germane (and another witness not shown on the table, Mr. Haesemeyer, sponsored by TMT/GGML) utilized the cost-of-capital test rather than comparable earnings to determine the benchmark rate of return before adding risk factors. BIE reply brief, pp. 2-5. BIE correctly points out that the Commission deliberately avoided the cost-of-capital approach as seen by the Commission's discussion of the problems in determining debt-equity ratios, a typical problem with the cost-of-capital approach. See Docket No. 78-46, 19 S.R.R. at 1308-1309.

Interestingly, as BIE notes in their reply brief (p. 2) TMT/GCML seem to have acknowledged that BIE witness Copan correctly followed

G.O. 11 methodology most closely although they suggested that their approach was a useful alternative. Of course, the Commission has already decided against such an alternative in the cited rulemaking proceeding.

The major battle in this hectic case has been that between PRMSA, the leading carrier and its witness, Dr. Silberman, and GVI/PRMA and its leading witness, Mr. Joseph F. Brennan. I have serious problems with Mr. Brennan's approach, namely, his heavy orientation toward utilities, money market, and cost-of-capital tests rather than ocean common carriers and comparable earnings, the idea that his reference group may have already included "premiums" so that no separate risk adjustment is necessary, and the idea espoused by GVI/PRMA that the "comparable earnings" test is supposed to be a maximum without upward adjustment for any risk. I have equally difficult problems with Dr. Silberman's work.

Previous Commission decisions, Docket No. 78-46, and the Order in this case seem clearly to contemplate that once a benchmark rate of return is determined from a reference group, an upward adjustment for peculiar risks to the carriers should be made. True, G.O. 11 states that an adjustment for risk shall be made "where appropriate." See 46 C.F.R. 512.6(d), Docket No. 78-46, slip opinion, p. 26, rules section. However, the authorities cited above associate comparable earnings with determination of risk factors. As Phillips states (Phillips, *The Economics of Regulation),* cited above, p. 297: "The crucial element in the 'comparable earnings' standard is the measurement of risk." See also Welch, *Cases and Text on Public Utility Regulation,* cited above, pp. 488-489. The definition of the "comparable earnings" test as seen in the *Bluefield* case, cited above, contemplated a comparison with "other business undertakings which are attended by corresponding risks." 262 U.S. at 692-693. One could infer that ideally a group of comparable industries was supposed to be selected that was so comparable to the regulated company that no adjustment for risk would be necessary. However, the Commission has continually adjusted for risk as have other agencies because the reference group that is so comparable is very difficult to find. Thus, in Docket No. 78-46, the Commission specifically stated that in retaining the "comparable earnings" test, the Commission would account for, among other things, "differences in risk in judging the reasonableness of a carrier's rates." Docket No. 78-46, slip opinion, p. 67. Compare also the fact that regulatory commissions normally utilize wide varieties of reference groups for comparison purposes, e.g., broad groups of industrials, utilities, railroads. See Phillips, cited above, p. 299 n. 128.[17] In previous Commission rate cases, comparisons with broad groups has been sanctioned. In *TMT Corp. - General Increase in Rates,* cited above, 22 F.M.C. at 189, a large group of non-financial companies reported by Citibank was used. In Docket No. 79-47, *Sea-Land Service, Inc. - Proposed Five Percent GRI in Six P.R. and V.I. Trades,* 22 F.M.C. 114 (1979) (I.D.; F.M.C. Sept. 19, 1979), comparison with industries analyzed by Standard and Poors, including airlines, common carrier trucking, and total transportation, was used. See also *PRMSA - General Increase in Rates,* 21 F.M.C. 439, 444–445 (I.D. 1978); *Matson Navigation Co. - Rate Increases,* 21 F.M.C. 532, 534 (1978); 21 F.M.C. 538, 540–541 (1978). In the Order instituting this case, the Commission stated:

> In addressing this issue [i.e. rate of return] the Commission generally takes into account: (a) the average rate of return earned by U.S. corporations, and (b) the risks faced by the individual carrier that may warrant a different rate of return. This analysis must also necessarily consider the group of U.S. corporations that should be used to derive an average, the time span examined in this regard and the criteria to be applied in determining whether a risk factor adjustment should be made, and, if so, the degree of such an adjustment. Such an inquiry will be made in this case. Order, p. 5.

Elsewhere, the Commission specifically recognized that there may be risk adjustments necessary under the "comparable earnings" test, stating:

> While carriers are as a general matter entitled to the average rate of return earned by U.S. corporations, when, as in this case, consideration is given to allowing rates of return exceeding a national average because of the particular risks facing the carriers in serving a trade. . . . Order, p. 6.

In short, the practice of making adjustments for risk and in this Commission, upward adjustments after reference group bench-marks have been ascertained, seems firmly embedded. Mr. Brennan, however, would make no such adjustments. He would not do so because he or his counsel apparently believes that his group of Standard and Poors 400 industrials have already been given a premium for risk and because, as his counsel argues on brief, in a new rationale not previously discussed by Mr. Brennan, the "comparable earnings" test was originated in 1923 when the utilities were a less risky group than the reference group. Therefore, the test is a maximum, i.e., when the reference group's average return is determined, there can be no upward adjust-

[17] As this reference shows, in the leading case, *FPC v. Hope,* broad groups were used for comparison purposes. Also, even though the reference group is supposed to be "truly comparable," adjustment for individual risk is apparently still allowed.

ment for risk for the regulated company since the reference group is already more risky by definition. Even if reference groups are or were at one time more risky than a regulated company in 1923, according to GVI/PRMA's contentions, the evidence in this case strongly suggests that the four carriers are riskier than reference groups today. Witnesses Copan, Silberman, and Germane have made various risk findings and adjustments upward to account for greater risk which these carriers are running. Indeed, even when Mr. Brennan attempted to point out several factors which convinced him that the carriers were less risky compared with utilities, Mr. Copan showed that the factors pointed to the opposite conclusion. (See Brennan's rebuttal testimony, pp. 20-21 compared with Copan's surrebuttal testimony, pp. 22-25.) [18] In previous rate cases before this Commission risk adjustments have customarily been made. See, e.g., *TMT Corp. - General Increase in Rates,* 22 F.M.C. at 190. Nevertheless witness Brennan makes no risk adjustments at all. (Sea-Land's and TMT/GCCL's witness, Dr. Nadel, also made no risk adjustment but did so because he selected a reference group that, in his opinion, would be truly comparable based on several enumerated criteria.)

The reason why Mr. Brennan will make no upward adjustment to his benchmark rate of return of 15 percent relates apparently to his fundamental grounding in utility, money market and cost-of-capital principles. Mr. Brennan is presenting ideas to this Commission which were not presented in the proceeding leading to the formulation of General Order 11 (Docket No. 78-46) as far as I can determine, nor does that regulation or any Commission rate case of which I am aware find his theories relevant. Even if I did not agree that, as PRMSA pointed out, Mr. Brennan has taken what appears to be an inconsistent position in certain respects in a Pennsylvania utility rate case, I find that there are good and sufficient reasons to find that Mr. Brennan's approach is unacceptable in this proceeding. These reasons are well presented in BIE's reply brief, pp. 28-31, in Mr. Copan's rebuttal testimony, pp. 72-75, in Dr. Germane's surrebuttal testimony, pp. 25-33, and in PRMSA's reply brief, pp. 18-24. I have no time to discuss the many points made by these parties and witnesses. Very briefly, however, they show that Mr. Brennan's concern over how the marketplace has already given reference group companies some type of premium to maintain the market value of the companies' assets above book values is irrelevant in Commission rate cases conducted under the comparable-earnings test. Mr. Copan cites several authorities which demonstrate that a market-to-

[18] GVI/PRMA's attempts to persuade me that utilities such as AT&T are more risky than PRMSA seem very strained and the argument is very hard to swallow. As the court stated in *Communications Satellite Corp. v. F.C.C.,* 611 F.2d at 910: "As for the Present [1977] it is a truism that AT&T generally is not a risky investment. . . ."

book value analysis is not only irrelevant to this Commission's rate regulation principles but it is dangerous anyway for any regulatory agency to attempt to consider such factors. (See Copan's rebuttal testimony, p. 74, citing Bonbright.) On brief, GVI/PRMA strive valiantly to persuade that there is a fundamental principle in ratemaking that supports Mr. Brennan's irrelevant market-to-book value analysis and that is that a regulatory agency starts from the basic proposition that a regulated company is only entitled to earn a sufficient return to maintain the integrity of its assets, i.e., "to maintain the integrity of its original-cost rate base." (GVI/PRMA reply brief, p. 18.) This sounds appealing as do so many skillful arguments raised by GVI/PRMA in their post-hearing briefs (after all, shouldn't any carrier be able to maintain the integrity of its assets?), but again they do not withstand the particular rebuttal evidence and arguments. As PRMSA, for one, shows (PRMSA's reply brief, pp. 18-24) this whole market-to-book idea is a technique that belongs in a cost-of-equity-capital study, Mr. Brennan continually uses cost-of-capital theories and methods, ultimately shows that he is really disagreeing with the Commission's comparable-earnings test, and the theory appears on brief for a new purpose, namely, to show that no risk adjustments should be made above Mr. Brennan's reference group benchmark rate of return. As noted in the reference cited above, BIE and Mr. Copan generally agree that Mr. Brennan's theories are irrelevant to the Commission's comparable-earnings test. Furthermore, as PRMSA points out on brief, the theory was advanced to justify Mr. Brennan's refusal to award any factors for risk to PRMSA above that of Mr. Brennan's reference group but that there is no showing of a logical connection between the market-to-book value theory and the determination of risk for a particular carrier. Despite the ingenuity and skill with which GVI/PRMA argue the relevancy of Mr. Brennan's approach and his refusal to award any factors for risk peculiar to PRMSA, I find that Mr. Brennan, for all his novel analyses, seems basically unwilling to live with the Commission's comparable-earnings test nor with the evidence that shows that PRMSA and the other carriers are operating at higher risks than companies in reference groups. I find myself rather in agreement with Dr. Silberman, Mr. Copan, and Dr. Germane that PRMSA's and other carriers' risks are measurably higher than those of the reference groups and that the Commission has indeed recognized the techniques employed in this case to measure risk, especially business risk. See cases cited in PRMSA's reply brief, pp. 10-11, and the discussion refuting Mr. Brennan on the risk issue in PRMSA's reply brief, pp. 3-11. Nor do I agree with GVI/PRMA's arguments on brief criticizing expert witnesses other than their own Mr. Brennan for subjectivity in evaluating risk factors. I think it is clear that every witness is guilty of some degree of subjectivity, including Mr. Brennan. See PRMSA's reply brief, pp. 25-26. Accordingly. I find Mr. Brennan's recommendation of a 15 percent rate of return to be unacceptable.

Having found that the more extreme witnesses on the edge of the table have not been persuasive, I now turn to the more moderate witnesses nearer to the center of the table to determine if one of them has made a reasonable approximation of a reasonable rate of return. I find again, however, that there is no single perfect exercise performed by any of these witnesses and must recall that the courts permit one to accept a methodology even with infirmities in rate cases since precision is not possible. There are three candidates in the center of the table, Mr. Copan (16 to 17 percent varying with the carrier), Dr. Nadel (as to his 18.5 percent recommendation before his unprecedented markups) and Dr. Silberman (19-20 percent for PRMSA). Of the three I would by far prefer to rely upon Mr. Copan's recommendations (16 percent for Sea-Land and TMT, 17 percent for PRMSA and GCML). If the omission that I mentioned above and will explain can be corrected on exceptions with reliable evidence and if the Commission believes that a single number only should be found to be "appropriate," I would recommend that it adopt Mr. Copan's figures. However, if not adequately explained or if the explanation still leaves some room for flexibility, I would adopt Mr. Copan's recommendations as a minimum with allowance for a range to approximately 18 percent. The reason for this conclusion is briefly as follows:

Mr. Copan, as the Chief of the Commission's Office of Economic Analysis, is free of any suggestion of bias, considering the position he holds. One would also expect that he would know and understand what kind of comparable earnings study the Commission's General Order 11 envisions. It appears to me that he followed that regulation as closely as one can, given its ambiguities and silence on so many critical points. He made certain subjective adjustments for certain kinds of risk and for the selection of his reference group and time period, but so did everyone else. The main flaw, however, which PRMSA has also noted in connection with Dr. Ileo's testimony, is that Mr. Copan had to estimate a critical figure in the formula which he applied to the FTC-QFR reference group, namely the amount of interest which these FTC companies had to pay, since FTC-QFR reports do not show any such figure. The record does not show how Mr. Copan derived his figure of 7 percent, which appears to be low. (See PRMSA's opening brief, pp. 38-39.) (Dr. Ileo had estimated 9.5 percent. using the FTC-QFR data, and PRMSA's interest cost is estimated at 11.7 percent for its pro forma year.) Mr. Copan apparently estimated that interest would amount to 7 percent of long-term liabilities, the latter figure published in the FTC-QFR reports. (See surrebuttal testimony of Dr. Silberman, p. 23, and Copan's rebuttal testimony, Schedule 3.) Moreover. Mr. Copan apparently estimated 7 percent of long-term debt as interest and apparently used the period 1968-1979. This number is exceedingly important because Mr. Copan's formula (which is also the General Order 11 formula) applied to the FTC reference group is: net income after taxes plus interest divided by long-term debt and stockholders' equity. Obviously, the rate of return derived from the FTC reference group will be too high or too low if the estimate for interest is also too high or too low. If the Commission believes that it should select one rate of return figure per carrier, then I would recommend consideration of Mr. Copan's 16 and 17 percent figures for the various carriers, provided, however, that on exceptions BIE can furnish a satisfactory explanation and evidence which will support the estimated 7 percent figure. Such evidence should indicate the source of the figure, the time period it covers, the comparability of the borrowing institution, company or companies in terms of risk and other relevant factors, and whether the interest figure is depressed or representative of the time period, which should be a relevant period. In other words BIE and Mr. Copan should explain how a secondary figure not published in the FTC-QFR data can reasonably be plugged into the FTC data he used and matched with such data to produce a reliable rate-of-return benchmark figure before making adjustments for risks peculiar to the four respondent carriers. Even if so explained and justified, that 7 percent figure must remain a "plug-in," therefore introducing an additional element of imprecision into Mr. Copan's work and undermining any contention that any single rate-of-return number is the be-all and end-all above which refunds at 20 percent or so of interest must be ordered to be paid by the carriers. This further illustrates my point that selection of a single-number rate of return is probably unwarranted given the imprecise state of the art of ratemaking. (See *TMT Corp. - Proposed General Increase in Rates,* cited above, 22 F.M.C. 175 (1979) (F.M.C.; 22 F.M.C. 180 (I.D.), where the Commission allowed TMT a rate of return of 16.15 percent although finding that the record showed a reasonable rate of return to be only 15.8 percent, i.e., .35 percent below what was actually allowed, considering the fact that some allowance has to be made for imprecise rate-of-return measurement techniques. See also *Matson Navigation Co.,* 20 F.M.C. 822, 826 n. 6 (1978), regarding a "zone of reasonableness" approach.) [19]

[19] Furthermore, it seems rather drastic to fix on a single number such as 17 percent as the one and only maximum allowable rate of return so that if PRMSA were to exceed that figure by less than one percent (i.e., if PRMSA were to reach 17.44 percent as BIE believe could happen under BIE's unadjusted calculations (not allowing for delayed redelivery of the *PONCE,* etc.) PRMSA would be ordered to make refunds at something like 20 percent interest as required by P.L. 95-475. This would be quite a blow to a carrier which apparently has not made reasonable earnings in its history, has lost $1,800,000 in its most recent fiscal year ending June 29, 1980, and admittedly needs some rate increase even if only the 11.2 percent increase that GVI/PRMA advocate. We are not dealing here with carriers which have enjoyed fat profits and could absorb such a refund order out of such profits. Rather, as

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Considering what has happened to the cost of borrowing money in the past five or more years, Mr. Copan's estimate of 7 percent for interest seems too low. Therefore, unless adequately explained, I would find that his 16 to 17 percent rate of return to be a minimum and allow some slight flexibility upward to account for his apparently low or imprecise estimate of interest. As I will discuss later in connection with Dr. Silberman, this range of 16 to 17 percent can perhaps be raised to 17 or 18 percent for PRMSA, after adjustments are made to Dr. Silberman's recommendations (19-20 percent) which reflect Mr. Copan's criticisms. I believe these adjustments will justify a range up to 17 or 18 percent for PRMSA and that no more reliable range can be determined on this record, even though the adjustment of Dr. Silberman's recommendations itself is not free of problems. However, before I get into the extremely complicated problems raised by Dr. Silberman, I will mention at this juncture that there is an alternative approach that indicates that a range of 16 to 18 percent or thereabouts might be reasonable, and that approach is given by Dr. Nadel, whose alternative methodology provides a yardstick of sorts to those expert witnesses who made adjustments for risk factors to their reference groups.

Dr. Nadel, like all the other experts, is not free of error. I have mentioned earlier his erroneous awards of premiums for bad business years and past shortfalls in revenues which would elevate his net rate-of-return of 18.5 percent to 23.5 percent. But if we put aside this five percent award and concentrate on Dr. Nadel's net recommendation of 18.5 percent, we can explore whether that is a reasonable yardstick. Of course, as BIE and GVI/PRMA have noted, Dr. Nadel focused on one year, 1979, a high year compared to the previous years that he studied, and he also adjusted his median rate of return (13.93 percent) upward on the basis of his belief that a correlation existed between rates of return and increasing rates of interest or, more accurately, yields. (See Sea-Land's opening brief, pp. 4-23 for a good explanation.) He has been criticized for his adjustment and his time period as well as his selection of 717 companies from 36 industry groups as a reference group drawn from Value Line, although one would think that a comparable group could be selected from such a large number. However, the important consideration is that unlike the other experts except for Mr. Brennan, Dr. Nadel made no adjustment for risks. He did this because he believed that he had selected a truly comparable group of companies based upon his several enumerated criteria. It is interesting that he is attacked for doing this when the classic comparable earnings test, as stated in the case, is supposed to rely upon a comparable group, i.e.,

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Dr. Nadel testified, the carriers' last G.O. 11 reports showed only an aggregate of 7.1 percent rate of return and historically these carriers have earned returns that were actually 6 percent below FMC-approved rates of return.

companies having corresponding risks.[20] In any event, under his approach Dr. Nadel made no adjustments for risk and arrived at the figure of 18.5 percent. This figure, slightly above the range of 16 to 18 percent, might be somewhat high because it begins from a median of 13.93 percent for the year 1979, a high year, as I have noted although the median figure is lower than the weighted average of 14.87, which he found for his reference group. Nevertheless it provides an interesting alternative, if one accepts Dr. Nadel's selection of truly comparable companies based on the several criteria which he enumerated. (See Sea-Land's opening brief, pp. 10-11, for a list of these criteria.)

An even more fascinating exercise which might illustrate that the range of 16 to 18 percent is roughly reasonable can be performed by adjusting Mr. Brennan's recommendation of 15 percent upward to account for the risk factors that he refused to recognize. Of course, as I have discussed, Mr. Brennan believes that his reference group drawn from Standard & Poor's 400 Industrials requires no upward adjustment for any risk since the marketplace has already determined what return was necessary and has awarded a factor to keep market value of assets above book value, etc. However, a preponderance of expert testimony shows that the respondent carriers suffer from higher than average risk and merit adjustments to benchmark rates of return drawn from reference groups. See the testimony of Dr. Silberman who utilized three different tests to show that PRMSA stood at the high level for business risk and of Mr. Copan who showed that the factors which Mr. Brennan cited to show low risk for PRMSA actually demonstrated the reverse for the four carriers. Dr. Germane also found high risk. (See PRMSA's reply brief, p. 25, citing Brennan's rebuttal testimony, pp. 20-21, and

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[20] Dr Nadel's attempt to select truly comparable companies was opposed by BIE who believed that his group of 717 companies drawn from 36 industries was too narrow. This presents a curious situation. Theoretically, the classic comparable earnings test was supposed to select comparable companies with similar risk and the *Bluefield* and *Hope* decisions define the comparable group in those terms. If so, then Dr. Nadel was on the right track since he selected comparable companies under specifically enumerated criteria and then made no adjustment for risks. Almost all other expert witnesses, however, including Mr. Copan, selected companies for comparison but then added factors for peculiar risk affecting the four respondent carriers. BIE seems to be arguing that it is not possible or feasible to find a comparable group having similar risk and that one must always adjust for peculiar risk, although G.O. 11 does not expressly forbid selection of a truly comparable group of companies and does not state that an adjustment for risk is always required. One wonders why 717 companies represents too narrow a group for comparison, as BIE contends. Moreover, to illustrate further the lack of clarity in G.O. 11 concerning the proper reference group, BIE also contends that PRMSA's reference group, which includes mining and retailing companies as well as manufacturing companies, is too broad. BIE's exclusion of these companies is well argued. However, it is difficult and perhaps unfair to find against any particular party who has made a particular selection of companies for comparison for the reason that the party's reference group is not comparable or is too broad or too narrow when the Commission's own regulation is so unclear on this point as are previous Commission decisions. Cf. *Mediterranean Pools Investigation*, 9 F.M.C. 264, 304 (1966). It would obviously be helpful if the Commission would clarify G.O. 11, and it would be my recommendation, based upon the factors explained by Mr. Copan, to select the manufacturing sector of U.S. industries, as did Mr. Copan, for use in the future.

Copan's surrebuttal testimony, pp. 22-25.) Thus, if one adds a minimal factor to Mr. Brennan's 15 percent, we would once again end up somewhere in the zone of reasonableness described. For example, if we add Dr. Silberman's factors for business risk only, as regards PRMSA, namely 2.32-3.32 points, this brings the 15 percent up to 17.32-18.32. Or, if we add Mr. Copan's 2.5 percent figure for business risk only for PRMSA. we would arrive at 17.5 percent. For Sea-Land and TMT, it would rise to 16.5% after adding Mr. Copan's 1.5% risk factor.

It becomes increasingly clear that a range of 16 or so to around 18 might be the most reasonable zone that can be determined on the present state of the record. This conclusion, however, must reckon with the work of Dr. Silberman and leads to the most complicated and brainbreaking controversy in the entire case. I would need much more time than I now have to unravel the complexities surrounding the work of Dr. Silberman, especially with regard to the effort to compensate for PRMSA's tax-exempt status. I can only deal with the matter briefly and conclude that Dr Silberman's work, as highly skilled and impressive as it is, must be adjusted for the reasons put forth by BIE and GVI/PRMA because of its departure from the literal requirements of General Order 11 and because of the practical impossibility of resolving the matter of adjusting for PRMSA's tax-exempt status satisfactorily in this hasty, time-impelled proceeding. Furthermore, because of the practical difficulties of trying to perform a rate-of-return study for application to a unique, tax-exempt, totally debt capitalized carrier such as PRMSA, I agree with BIE that one should consider measuring PRMSA's needs by using the fixed charges coverage ratio, although I would consider it as a necessary check and not eliminate a rate of return study totally from consideration.

This brings me to what will have to be a brief discussion of the massive work performed by Dr. Silberman for PRMSA and a brief description of the problems which I have found with it. As seen from the table above, Dr. Silberman recommended a range of rates of return for PRMSA of 19-20 percent. He also used FTC-QFR data but selected manufacturing, mining, and trading sectors, not merely manufacturing as had Mr. Copan (and Dr. Ileo). He used a narrower time period (1978-1980) than Mr. Copan's period of 1974-1979. He found a benchmark rate of return before taxes (because of PRMSA's tax-exempt status) for the reference group to be 16.68 percent and then added 2.32-3.32 percentage points for business risk factors, based upon three different statistical measures. (Dr. Silberman did not add on a factor for financial risk, nor did Mr. Copan who also awarded PRMSA a risk factor of 2.5%. However, GVI/PRMA attack PRMSA and Dr. Silberman because of PRMSA's lopsided financial structure, i.e., total debt capitalization, under a misapplication of the "prudent investment" theory, although neither PRMSA nor Dr. Silberman seek any factor for financial risk, which such a capitalization structure might otherwise warrant in theory.) A good general defense of Dr. Silberman's work is provided in PRMSA's reply brief, pp. 2-39, although I do not agree with all of it as will be seen.

There are two main problem areas that appear from Dr. Silberman's work, the first relatively easy to handle, the second, more complex. They both relate, however, to the fact that General Order 11 has established certain accounting procedures which do not always follow non-regulatory accounting practices, do not have a provision for tax-exempt companies with huge interest costs such as PRMSA, and make no provision for the fact that the reference group mixes all of its capital and assets without regard to operating or nonoperating functions.

Just as I had problems with Mr. Brennan who seemed unable to accept the Commission's comparable-earnings test or, if he did, injected novel theories into it which General Order 11 never considered nor mentions, I have problems because Dr. Silberman chose not to employ the General Order 11 formula (net income plus interest divided by total capital) to the reference group. Instead, Dr. Silberman used a "surrogate" formula (operating income divided by net fixed assets plus working capital). Both Dr. Silberman and PRMSA on brief try to give reasons for this "surrogate" formula. (See PRMSA's opening brief, pp. 30-45.)[21] But as BIE and GVI/PRMA have correctly demonstrated, this formula simply does not follow the requirements of General Order 11. Rather than discuss the details of this departure from General Order 11 which would serve little purpose since I cannot alter General Order 11 in this proceeding, I will mention only that BIE's witness Copan has revised Dr. Silberman's table to accommodate it to General Order 11

[21] PRMSA struggles mightily to persuade that the Commission intended to allow something like Dr. Silberman's "surrogate" rate base formula as applied to reference groups when it issued General Order 11. (PRMSA's opening brief, pp. 30-35.) The portion of its brief cited is not convincing, however. True, the Commission abandoned return-on-equity in favor of return-on-rate base, as the quoted portions of Docket No. 78-46 cited in PRMSA's brief, show. But I do not read the Commission's decision adopting the return-on-rate base method to authorize a formula for application to a reference group that is something other than total invested capital, or "total capital" as the regulation liberally reads. Furthermore, in the particular regulation in question (46 C.F.R. 512.6(d)(2)(ii)), the Commission distinguishes between "return on rate base" (for the carrier) with "return on total capital" (for the reference group of "comparable U.S. corporations"). Mr. Copan and BIE have cited authorities including even Dr. Silberman who recognize that return on invested capital is a proper formula. Dr. Silberman's comments in Docket No. 78-46 do indeed seem to show that he was using total invested capital interchangeably with rate base but that does not mean that the Commission also did so. Furthermore, these comments did not call the Commission's attention to the distortion problems caused by use of total capital applied to the reference group, which PRMSA does in this proceeding. Therefore there was no reason for the Commission in Docket No. 78-46 to worry about application of a "total-capital" formula to reference groups. All that the Commission really did was abandon the return-on-equity formula which was complicated by debt/equity ratio problems. But the Commission did not say that the "total capital" formula as applied to the reference group of "comparable U.S. corporations" could be a "surrogate" collection of assets and working capital. If PRMSA wants to use Dr. Silberman's "surrogate" formula, it should petition the Commission to revise G.O. 11 in a separate rulemaking proceeding.

and to Mr. Copan's views as to a more appropriate reference group (limited to manufacturing companies) and time period (fiscal years 1975-1980 rather than 1978-1980). The results are shown in Mr. Copan's Schedule 6, attached to his rebuttal testimony, as discussed in that testimony on pp. 13-14. They show that with the adjustments, the benchmark before interest before tax figure, which Dr. Silberman calculated as 16.68 percent for the reference group, is reduced to 14.70 percent. Thus, if the business risk factor is added to this figure, we arrive at an adjusted rate of return recommendation of 17.02 to 18.02 percent if Dr. Silberman's range of business risk factors are added on and to 17.20 percent if Mr. Copan's business risk factor (2.5 percent) is added on. This exercise would tend to confirm that a reasonable rate of return for PRMSA is in the 17 to 18 percent range. However, life is not so simple as this case illustrates for a number of reasons. First, as PRMSA has shown, the use of General Order 11 without regard to separation of operating and nonoperating assets and income when deriving a benchmark rate of return from the FTC-QFR reference group can lead to overstating or understating depending on the mix of assets and the returns on each income produced by each. PRMSA explains the distortions well in its opening brief, pp. 39-47. In some instances the General Order 11 formula applied without such separation could lead to a recommendation for a higher return for a carrier than would be justified when nonoperating assets of both carrier and reference group were producing higher rates than the operating assets. At other times the recommended rate of return would be lower for the carrier than that earned by the reference group. (See PRMSA's opening brief, pp. 41-43, and hearing exhibit 7.) PRMSA argues that because of this failure of General Order 11, "there can be no true comparability between a carrier and the reference group in a comparable earnings study unless the reference group's data is [sic] adjusted to reflect a return comparable to the return on rate base. If it is not, either the carrier or the public is penalized by the exclusion from G.O. 11, of nonoperating assets and nonoperating income." PRMSA's opening brief, p. 46. Mr. Copan and BIE have answered this criticism of General Order 11 on the grounds that companies are competing for capital on a total capital basis and that investors are not seeking to separate one type of asset or income from another. (See BIE's opening brief, pp. 34-35.) Whatever the merits of PRMSA's argument, however, the fact remains that this is not the proceeding to amend General Order 11. Moreover, as far as I can determine, the record does not show what kind of distortion was produced by application of the General Order 11 formula to the reference group. Therefore, I must find that General Order 11 simply does not authorize a formula for application to a reference group in which the denominator consists not of total capital but of "net fixed assets and working capital." [22] Both BIE and GVI/PRMA have convincingly demonstrated this and have also shown how Dr. Silberman's own selection of assets and working capital are not reliable (e.g., his definition of working capital is not that of General Order 11 and Dr. Silberman's selection of assets is somewhat unclear). (See GVI/PRMA's reply brief, pp. 9-15, and BIE's reply brief, pp. 20-24.)

THE TAX-EXEMPTION ISSUE

The final, brainbreaking problem, which also stems from General Order 11 rate-of-return methodology as applied to reference groups, concerns the problem of PRMSA's tax-exempt status and its huge interest costs. This is a problem which offers no easy solution if rate of return is used as the sole test and because it offers no easy answer under that test, suggests strongly that BIE is correct in recommending that consideration be given to measuring PRMSA's rate increases by the fixed charges coverage ratio. This topic which deserves a treatise by itself and a separate rulemaking proceeding for full contemplation does not lead itself to a solution in this hectic, time-constricted, multi-issue proceeding. The battle here is waged primarily between GVI/PRMA and PRMSA with BIE, although apparently agreeing somewhat with GVI/PRMA, suggesting a solution, namely, to junk the rate-of-return approach as far as PRMSA is concerned and turn to the fixed charges coverage ratio. For a discussion of the battle by the parties, see GVI/PRMA's reply brief, pp. 25-30; GVI/PRMA's opening brief, pp. 249-252; PRMSA's reply brief, pp. 31-38; PRMSA's opening brief, pp. 19-20; BIE's reply brief, pp. 26-27.

The battle stems from Dr. Silberman's attempts to adjust the General Order 11 methodology (as he viewed it using his "surrogate" rate-base formula) for the fact that PRMSA is a tax-exempt company with a huge interest expense, i.e., unlike any company in the FTC-QFR reference group. Dr. Silberman made such an adjustment, arriving at a benchmark figure of 16.68 percent as an equivalent rate of return for a reference group company before interest and, of course, before taxes. All other witnesses using the comparable-earnings method, however, made no such adjustment, instead deriving after-tax benchmark figures.

[22] I have only a brief moment to comment further on this dispute between BIE and PRMSA as to the meaning of "total capital." BIE argues (reply brief, pp. 21-23) that "total capital" is a very simple term and simply means "total." Therefore, Dr. Silberman's formula is incorrect. Although I agree with BIE that Dr. Silberman's formula does not comply with G.O. 11, BIE's argument *in this particular* regard is too quick. The G.O. 11 formula uses "total capital" as the denominator without further definition but, as Mr. Copan's testimony and BIE elsewhere demonstrates, this really means "total invested capital," or long-term liabilities plus equity. But such a definition omits current liabilities from the balance sheet. So "total" is *not* really "total." See an explanation in Anthony and Reece, *Management Accounting Principles* (Richard D. Irwin. Inc. 3d ed. 1975). pp. 239-241. See also at least five different types of "total capital" reported by Value Line, as shown in Sea-Land's reply brief, Attachment A, p. 2.

Thus, at the outset, Dr. Silberman's benchmark rate of return is higher, as GVI/PRMA note. (As I discussed above, Mr. Copan reworked Dr. Silberman's table to conform it to the General Order 11 formula and made other corrections, reducing the before-tax benchmark from 16.68 percent to 14.70 percent. This exercise did not eliminate the tax-exemption and high interest problems affecting PRMSA, however.)

PRMSA and Dr. Silberman believe that the before-tax, before-interest benchmark of 16.68 percent is proper and shows what a tax-exempt company like PRMSA would have to earn on its rate base to earn the same amount that would be earned by a taxable company achieving a before-tax return of 20.67 percent, which is the weighted average return which Dr. Silberman found to have been experienced by his reference group (under his methodology) (PRMSA's opening brief, p. 19). PRMSA furthermore believes that by allowing PRMSA a benchmark (i.e., before markups for risk factors) return of 16.68 percent, before interest, before taxes. PRMSA passes on to the public the entire tax savings generated by its tax-exempt status. Both BIE's witness Copan and GVI/PRMA see another side to this claim, however, because they see a distortion produced by PRMSA's huge interest costs (projected as $24 million in the pro forma year, or approximately 12 percent of PRMSA's total capitalization). Mr. Copan explains that this huge interest expense borne by PRMSA makes Dr. Silberman's adjustments for tax exemptions "hazardous." (Copan-rebuttal testimony, pp. 6-7.) As Mr. Copan explains, Dr. Silberman's adjustments are subject to overstatement of the rate of return and are heavily dependent on the amount of interest. For example, reducing PRMSA's interest expense from $24 million to $20 million would reduce PRMSA's benchmark rate of return, derived from the reference group, from 16.68 percent to 15.77 percent. Mr. Copan states that "through usage of a $24 million interest expense figure for a hypothetical tax paying firm, one is basically understating taxable income for the tax paying entity, which translates into a lower amount of taxes that need not be paid by PRMSA, and thus a higher equivalent rate of return for PRMSA." (Copan-rebuttal testimony, p. 7.) Mr. Copan states the dilemma that if one calculates a comparable before-tax rate of return for PRMSA, this would entail allowance of a greater than necessary rate of return but if reliance is placed on a comparable after-tax rate of return, one must compare PRMSA with firms that, unlike PRMSA, do incur a tax liability. (Copan-surrebuttal testimony, p. 6.) Mr. Copan suggests a refinement of Dr. Silberman's calculations adjusted to consider PRMSA's capital structure as well as its massive interest payments. (Id.) PRMSA, however, disagrees with Mr. Copan because by adjusting PRMSA's rate of return by reducing its interest obligations, PRMSA would be forced to pass along to rate payers more in tax savings than PRMSA actually experienced. (PRMSA's opening brief, p.

47 n. 22.) Mr. Copan recommends that we escape this tax dilemma by considering the fixed charges coverage ratio.

This, unfortunately for the reader, is only the beginning of the controversy. GVI/PRMA are much more vehement in their opposition to Dr. Silberman's claim that he has passed on to the consumer the entire tax savings generated by PRMSA's tax-exempt status. GVI/PRMA see this calculation of Dr. Silberman to be an illusion. According to them, Dr. Silberman is imputing to the reference group PRMSA's massive interest costs, thereby overstating the rate of return, and Dr. Silberman is not deriving an actual rate of return from the reference group of companies but rather hypothetical returns based on the assumption that the reference group had the same massive interest costs as PRMSA. (GVI/PRMA's reply brief, p. 26.) GVI/PRMA show in a table (reply brief, p. 27) that if one compares PRMSA to a true reference group company, i.e., one with a much lower interest (estimated through Mr. Copan's work to be about 2 percent of the reference group companies' total capital as opposed to PRMSA's nearly 12 percent), the before-interest, before-tax benchmark rate of return derived from the reference group would drop to 12.16 percent from Dr. Silberman's 16.68 percent. But once again, as they did to Mr. Copan, PRMSA argues that one cannot simply "wish away" PRMSA's high interest costs. GVI/PRMA reply to that argument by stating that General Order 11 methodology simply mandates that the reference group be a true reference group, not one to which is imputed PRMSA's peculiar high interest costs. As GVI/PRMA state: "This, however, is not the 'wish' of GVI/PRMA but the *mandate* of G.O. 11 in recognition of the proper regulatory treatment of interest expense." (GVI/PRMA reply brief, p. 28.)

In its reply brief, PRMSA does a fantastic job of trying to justify acceptance of what it calls a "package deal," i.e., that PRMSA's highly leveraged (total debt capitalization) structure "has certain consequences to the ratepayers and its tax exempt status has other consequences to the ratepayers." (PRMSA's reply brief, p. 34.) PRMSA produces a set of hypothetical tables with various companies having certain debt/equity structures compared to a non-taxable company with a 100-percent debt structure like PRMSA. These tables do show that PRMSA wants me to conclude, namely, that the GVI/PRMA and Brennan approach require PRMSA to pass on to the ratepayers tax savings never experienced by the non-taxable company, in effect "penalizing" PRMSA for its tax-exempt status. (Furthermore, using the tables and another adjustment, PRMSA shows that a non-taxable company like PRMSA needs to earn a return of 18.08 percent to be equivalent to a 22.8 percent before-tax return of the reference group, derived from PRMSA's hypothetical tables. (PRMSA's reply brief, p. 37.)

All of this justification is fascinating and I commend it to lovers of dilemmas. It does show what PRMSA argues. However, as GVI/PRMA have pointed out by way of a warning in their reply brief, no matter how many tables PRMSA may present in its final brief, PRMSA cannot escape certain facts. First, PRMSA is obviously struggling because of the General Order 11 dilemma which does not account for totally debt-financed, tax-exempt companies like PRMSA and does not expressly allow such a company to adjust actual reference companies' data to attribute to those companies PRMSA's peculiar financial structure. This means, as PRMSA has shown, that PRMSA will have to pass along tax savings which it does not realize if PRMSA is forced to start from a benchmark rate of return figure drawn from the reference group which is after interest, after taxes. The alternative, as Mr. Copan pointed out, however, is to allow PRMSA a higher rate of return than is necessary based upon a benchmark figure that is before taxes, before interest only because of PRMSA's peculiarly high interest costs. Second, the tables do prove what PRMSA wishes me to conclude about the apparent inadequacies of General Order 11 to deal with its peculiar problems even though the tables themselves are hypotheticals, i.e., they assume several sets of facts, for example, a taxable company with a 30-60 percent debt-equity ratio and another taxable company with 60-40 percent debt-equity ratio. Furthermore, the interest for these hypothetical companies nowhere approaches the proportion of interest to operating income of PRMSA (PRMSA's interest at $24 million being more than three times its projected income).

PRMSA's exercises are ingenious and appear to justify its adjustments to the application of General Order 11 to the reference group. Nevertheless the price for this adjustment is not only to start from a higher rate-of-return benchmark but to make an adjustment to the normal after-tax benchmark figure drawn from the reference group because PRMSA is a tax-exempt, high-interest company which is not comparable to the companies in the reference group. Furthermore, even if PRMSA were held to the benchmark rate of return drawn from the reference group *after* taxes, as Mr. Copan, Mr. Brennan, and others did (before making upward adjustments) and even if this means that PRMSA is passing on more tax savings than it experiences, the result, according to Mr. Copan, Dr. Nadel, and Mr Brennan, as adjusted by adding risk factors, is to allow PRMSA a rate of return of 17 to 18 percent, above PRMSA's pro forma projections of expected returns. Moreover, PRMSA is given a rate of return that, as GVI/PRMA's table shows, is far above a benchmark return (12.16 percent) that would be derived if the tables were turned and the reference group's actual low interest expenses were attributed to PRMSA. Therefore, the rate payers are arguably picking up some of the costs of the tax savings which PRMSA never experienced.[23]

I conclude that PRMSA has pointed out a serious inadequacy in General Order 11 and one caused possibly by the fact that this problem in its full ramifications was not brought to the Commission's attention in Docket No. 78-46. Or perhaps the problem was realized and that is why that regulation permits usage of the fixed charges coverage ratio when the rate-of-return approach would produce "unreasonable results." (Docket No. 78-46, slip opinion, p. 68.) Much as I appreciate PRMSA's dilemma, the allowable rate of return that I find most reasonable as calculated by Mr. Copan and by Dr. Silberman after adjustments, and as compared to Dr. Nadel's 18.5 percent recommendation, are sufficiently high to permit PRMSA to *maintain* its 16 to 18 percent general rate increase. Mr. Copan's recommendation, it will be remembered, was for 17 percent, and is probably on the low side due to his estimate of interest at only 7 percent. It was not affected by the above tax problems since he derived a benchmark return from the reference group which was after taxes, not before. Moreover, the fixed charges coverage ratio, which Mr. Copan recommends as the primary test because of such problems as discussed immediately above, confirms the reasonableness of PRMSA's rate increases. Therefore, in the last analysis, resolution of this tax problem is not necessary in this case. However, it should be resolved in a rulemaking proceeding amending General Order 11 instead of being buried in the midst of so many other issues so that sufficient time can be devoted to it.

USE OF THE FIXED CHARGE COVERAGE RATIO

In its Order of February 27, 1981, the Commission stated that "because of the peculiar capital structure of PRMSA, the fixed charge coverage ratio standard of reasonableness stated in 46 C.F.R. 512.6(d)(3) will also be considered in determining the reasonableness of PRMSA's proposed rate increases." Order, pp. 2, 3. In the ordering paragraph, the Commission stated that "in addition consideration be given to the fixed charge coverage ratio standard of reasonableness . . . in making such determination." Order, p. 3.

[23] While one can understand PRMSA's reluctance to pass on to consumers tax savings it never experienced, merely because of its high interest and total debt financial structure, this financial structure is PRMSA's own making. PRMSA has made much of the fact that it is seeking no factor for financial risk (as opposed to business risk) otherwise due to it because of its total debt structure. True enough. But if PRMSA is allowed to start from a before-tax, before-interest benchmark of 16.68 percent drawn from a noncomparable reference group rather than 12 or so percent which Mr. Copan derives after taxes, it more than makes up its willingness to forego points for financial risk. Finally, PRMSA is government-owned. One may wonder what is so terrible if a government-owned carrier passes on to its citizens more tax savings than the carrier experiences and why its citizens should pay a higher rate of return to a publically-owned carrier so that the carrier can show that it is not being "penalized" for its tax-exempt status, although admittedly this would undermine the purposes of conferring tax exemption on PRMSA to some extent.

Various parties' experts have estimated reasonable ratios under this standard (1.2 by GVI/PRMA; 1.6 by DTPTC; 1.8-2.0 by BIE; and 2.02-2.08, at least, by PRMSA). Only BIE urges that this ratio be used as the primary standard instead of rate of return on rate base.

I have no time to discuss this issue at any length. Under any reasonable projection PRMSA will not exceed BIE's estimate of 1.8 - 2.0, which appears to be too low anyway. I do not find, however, that this ratio should be the primary standard. The Commission's Order merely states that "consideration" should be given to it and G.O. 11 establishes that the ratio is a "legitimate secondary evaluation . . . which may be employed when rate of return on rate base produces unreasonable results." Docket No. 78-46, slip opinion, p. 68. Again the Commission stated that "[t]his methodology, it must be remembered, is to be employed only as a secondary tool and any comparison evaluation made on the basis of that ratio will include a variety of entities, not solely public utilities." Docket No. 78-46, slip opinion, p. 69. The ratio has deficiencies, one of them being that it is a bare minimum, not measuring risk, another that it is totally dependent upon the relationship of a debt payment schedule to the useful life of an asset, becoming highly distorted when that schedule is not matched to useful life of the asset. Moreover, use of the TIER ratio, a reduced derivative of the fixed charge coverage ratio may not be fully reliable without a study of comparable TIER ratios. The I.C.C. has specifically rejected the ratio for determining reasonable revenues for railroads. In Ex Parte No. 393, *Standards for Railroad Revenue Adequacy,* March 30, 1981, the I.C.C. had considered establishing a ratio as high as 3.5 but, in rejecting the use of the ratio, stated:

> After considering these comments we now believe that using these financial ratios as conditions to a finding of revenue adequacy would be misleading. Financial ratios are intended to provide summary information that, if not interpreted within the proper context, could suggest incorrect conclusions. For example, a firm's fixed charge ratio might be low because of its ability to raise long term debt. That ability could, in turn, be a reflection of its strong financial outlook. Yet the low fixed charge ratio would lead us to conclude the carrier was revenue inadequate. Because of the possible ambiguity, we have decided that these financial ratios should not be used in revenue adequacy determinations. We believe firmly that the rate of return standard is correct, and will base our determinations on it. Ex Parte No. 393, slip opinion, pp. 22-23.

Although I do not find that the fixed charges coverage ratio should be considered to be the primary test, as I have found above, as can be seen from my previous discussion concerning PRMSA's tax exempt status and the practical difficulties of applying the traditional General Order 11 comparable-earnings formula test in PRMSA's case, BIE's witness Copan recommends consideration of the ratio for good reason. I agree and believe that it serves as a useful check. As General Order 11 states in the portion cited above, the ratio may be employed when "rate of return on rate base produces unreasonable results." One may wonder how one is to determine that the results are unreasonable unless there is some independent yardstick. For instance in this case Mr. Copan's rate of return "results" are 17 percent. That result does not appear to be unreasonable. To avoid the circular reasoning here, a reasonable interpretation is that, as Mr. Copan testified, the ratio should be considered because of the practical difficulties of applying the rate of return method to PRMSA which I so painfully described in the preceding section. This difficulty should be enough to trigger consideration of the ratio and, indeed, the Commission's Order specifically invokes such consideration. It is reasonable to presume that both the regulation and the Commission's Order wanted the ratio used as a check specifically because the Commission recognized the problems associated with PRMSA's peculiar capital structure, as stated in the Commission's Order cited above.

Although there are deficiencies in the ratio in theory and in Mr. Copan's particular testimony, as PRMSA has pointed out (PRMSA's reply brief, pp. 106-110), the deficiencies, if anything, may tend to show that his recommendations (1.8 - 2.0) might be too low. BIE describes why the ratio, even with its admitted weaknesses, is useful in this proceeding for application to PRMSA. (BIE's reply brief, pp. 41-50.) I agree but, as indicated, would apply the ratio as a check on the rate-of-return method. As BIE states, the usage of the ratio helps alleviate a problem that has been continually dogging the Commission, namely, how to apply rate-of-return methodology to a unique carrier like PRMSA, tax-exempt, debt-financed, government-owned. Even an expert witness previously appearing for PRMSA in at least one previous rate case (Docket No. 75-38) has recognized that the rate-of-return method has definite limitations when applied to a carrier like PRMSA. (BIE's reply brief, p. 42.)

As noted, the ratio has recognized deficiencies. However, Mr. Copan's work, in my opinion, is sufficient to act as a check on the rate-of-return methodology and, as such, it survives the various attacks made on it by PRMSA, GVI/PRMA, and DTPTC, none of whom conducted a study of their own. Mr. Copan did his study, as noted, because of the tremendous problems one has in applying the rate of return method to PRMSA. He selected municipally-owned utilities because they are comparable to PRMSA for purposes of this test and made adjustments upward above the minimum levels derived from rate covenants in bond offerings to allow for risk and provide PRMSA with a cushion. (See BIE's opening brief, pp. 24-27.) General Order 11 specifically authorizes use of comparable public utilities such as those selected by Mr. Copan. (See Docket No. 78-46, slip opinion, p. 27, rules section, 46 C.F.R. 512.6(d)(3)(ii).) The attacks made on the ratio, while possessing some merit, have been satisfactorily answered by BIE and, in any event, seem to me to be efforts to discredit the alternative method because of PRMSA's and GVI/PRMA's belief that their rate-of-return calculations justify their respective positions. I agree, however, with PRMSA that PRMSA would not exceed any reasonable estimate of the ratio under any projection that I have seen and that Mr. Copan's estimate of 1.98 - 2.00 might be too low, if anything.

ISSUES (2) AND (3): CARRIERS' REVENUE AND CARGO VOLUME PROJECTIONS

The Commission's Order frames two issues concerning respondents' revenue and cargo volume projections. These are, as noted earlier:

(2) Is the methodology used by Respondents in making revenue and cargo volume projections appropriate?

(3) Are Respondents' revenue and cargo volume projections sufficiently accurate and, if not, what are the appropriate projections?

Although the first of the above two issues questions whether the "methodology" employed by the carriers in forecasting was appropriate, the main contentions of protestants concern not the fact that the carriers used various forecasting techniques such as market surveys, contacts with shippers, projections of categories of traffic, etc., but rather specific errors which protestants claim have rendered the projections unreliable.

It is generally recognized that in the field of forecasting there is no way to make a precise prediction. As protestant DTPTC recognized in its opening brief:

> First, it is clearly impossible for any carrier regulated by the Commission, or any other business for that matter, to predict its future revenues and volumes precisely. There are simply too many unknowns and none of us has a crystal ball. DTPTC opening brief, p. 2.

I believe this statement is a truism in the business world so that a variety of different forecasting techniques may be employed. As one book states in regard to financial projections by businesses:

> This means that there will be a great deal of difference in the approaches taken by various companies, even within the same industry, and differences will have to be recognized even within the same industry, also within a given company. A growing body of literature on the concept of responsibility accounting has recognized these aspects. Helfert, Erich A., *Techniques of Financial Analysis* (Richard D. Irwin, Inc. fourth ed. 1977) p. 91.

DTPTC suggests that the Commission abandon the system of relying upon "*ad hoc* guestimates" which lead to continual "wrangling" and do not lead to accuracy. (DTPTC opening brief, p. 2.) Instead DTPTC would have the carriers simply assume that their traffic volume would remain constant in the forecasted year so that revenue would change merely because of the rate increases. DTPTC also suggests an easier approach for determination of various expenses other than labor costs (which are easily determined from the labor contracts), namely, by adopting a formula upon which everyone can agree, as has the I.C.C. which utilizes a formula for non-labor expenses for motor carriers.

These suggestions would certainly simplify Commission rate cases. However, until and unless they are considered and adopted by the Commission, we must continue to abide by the current system, however clumsy and difficult it may be. Because we must abide by the present system, furthermore, it is necessary to recognize the basic principle of the system, which is that it is based upon forecasting and upon the principle that that a carrier is expected to use reasonable, responsible techniques at the time it makes its projections. If so, to penalize the carrier by ordering refunds at 20 percent interest because of later events which the carrier could not have reasonably anticipated smacks of an *ex post facto* type decisionmaking. On the other hand, to permit carriers to take advantage of later events to justify their earlier predictions sounds like *post hoc* rationalization. In other words, current Commission rate cases impose a responsibility on carriers to make reasonable projections and try to avoid either *ex post facto* decisionmaking or *post hoc* excuses by the carrier. Furthermore, under this principle of responsible forecasting compounded with the need for expedition, it is not appropriate to introduce later actual data unless there are extraordinary reasons, for example, when something has happened to make the carrier's projections not reasonably possible even as an approximation. The point is to encourage responsible forecast accounting and not to penalize carriers who have employed the best and most reasonable techniques available unless an event occurs which obviously makes the forecast a pretense. I have no time to develop this discussion further and will return to it briefly later in connection with the issue over fuel projections. Suffice it to say that Commission rate cases are based upon forecasting, not after-the-fact accounting.

Having said that, I must briefly discuss the various attacks which protestants have made upon the four carriers' forecasts. PRMSA, as the leading carrier by far, undergoes the most intensive attacks. PRMSA explained its methodology in some detail in its opening brief (pp. 65-72). PRMSA explains that the "basic methodology that PRMSA has utilized here, that is, the marketing survey and the adjustment for plant closings and openings, has been utilized by PRMSA in the past three general rate increases filed with this Commission." PRMSA opening brief, p. 72. PRMSA also starts that its predictions have been shown to have been extremely accurate when comparing the forecast with actual history. In two of the last rate cases PRMSA actually carried 99 percent and 98.5 percent of what it had forecast. *Id.* Although, as I have said, the basic principle in Commission rate cases is not after-the-fact use of actual data, history bears out that PRMSA's forecasting has been very good and has not been pessimistic. BIE acknowledges this fact.

The argument on PRMSA's projections centers on which figure to use. PRMSA's projection, submitted on March 10, 1981, was for 166,763 trailerloads (Transclass case) [24] as adjusted to account for purported effects of President Reagan's budget cuts and late redelivery of the laid-up ship *PONCE.* BIE would hold PRMSA to PRMSA's original forecast submitted to the Commission before the case was docketed in response to the Commission's insistence on a Transclass case projection. If so held, the figure is 171,441 units. Protestants GVI/PRMA insist that these figures are too pessimistic and are unreliable and project their own figure of 174,401 units.

The questions are whether to accept PRMSA's guesses as to the effects of the Reagan budget cuts and calculations as to the increased costs due to late redelivery of the *PONCE* and whether to adopt protestants GVI/PRMA's alternate projection instead of PRMSA's, BIE's, or any derivative of those two. As to the first question, I must quickly decide, having no time to explain further, that protestants' and BIE's arguments on brief are convincing that the effects of President Reagan's budget cuts on decreases in the Puerto Rican trade are extremely speculative and that PRMSA's witness Lopez-Mangual, in effect, realized this when he tried to estimate how many units would be lost (265,000 tons he estimated) as a result of budget cuts. I refer the reader to the very effective arguments in BIE's and GVI/PRMA's briefs. As to the effects of late redelivery of the *PONCE,* I find that they can be considered in adjusting PRMSA's forecasts downward. Unlike the amorphous, preliminary estimates of effects of budget cuts, the late redelivery of the *PONCE* is a verifiable and quantifiable fact. Furthermore, protestants GVI/PRMA themselves specifically asked PRMSA to determine the effects of late redelivery of the *PONCE* although, being a less costly ship to operate than the *BAYAMON* which had operated in its place and for other reasons, adjusting for late redelivery of the *PONCE* would lead to a gloomier forecasted year. Moreover. PRMSA submitted its adjustments for the *PONCE* in time for other parties to challenge them before the record closed. This was not done. BIE objected merely on legal grounds, contending that

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[24] PRMSA has abandoned its *ATLANTIC BEAR* case since it appears that PRMSA will not acquire that ship, having failed to lure the *BEAR* out of its cave.

PRMSA should be frozen to its original case submitted before this investigation was docketed. Protestants GVI/PRMA, after having asked for the evidence, object to it on various grounds on brief apparently because of inability to verify the accuracy. PRMSA, however, has explained and answered protestants in detail. See PRMSA reply brief, pp. 56-57.

The really significant attack on PRMSA's projections, aside from BIE's contentions that almost no revisions should be allowed once the case is docketed, is based upon GVI/PRMA's alternative projection based upon their witness, Dr. Suphan Andic, a qualified economist, who performed her own projection based upon a historic year ending on February 28, 1981, with certain adjustments. I regret that I have no time to discuss her projection in any detail and that, because of the inexorable pressure of time and the number of other issues remaining, I can only announce that I find Dr. Andic's alternative projections to be belated creations done in the midst of litigation which show no greater reliability than PRMSA's and indeed even less, especially in view of her changes from previous positions, misunderstandings, or other errors.

GVI/PRMA's explanations for its alternative projections and reasons for their rejection of PRMSA's forecast are beautifully explained in their opening brief, pp. 71-99. As well crafted as the brief is, however, I find that I cannot agree that GVI/PRMA's Dr. Andic has come up with a more reliable projection than PRMSA. Although very impressive at first reading, when one re-reads it and considers PRMSA's cogent replies, one sees less and less substance to the contentions. I regret that this discussion must be so brief in such an important area but I have no choice in view of the time pressures imposed upon me.

PRMSA's analysis of Dr. Andic and GVI/PRMA's attacks on its forecasts and of the substitution of a new methodology on surrebuttal by Dr. Andic is set forth very tellingly on pp. 62-70 of PRMSA's reply brief. Very briefly Dr. Andic abandoned her first methodology which had projected 174,401 units based upon PRMSA's historic year (July 1, 1979 - June 28, 1980). On surrebuttal Dr. Andic projects the same figure, this time by taking the most recent actual year ending on February 28, 1981, and making an upward adjustment, again arriving at the same figure, 174,401 units. (As PRMSA points out, moreover, even her counsel on brief abandons her claim that she had earlier made adjustments to PRMSA's market survey rather than to PRMSA's historic year.) In any event, on surrebuttal, Dr. Andic changed her methodology but still arrived at the same number.

Certain key points should be kept in mind in evaluating Dr. Andic's later methodology. As PRMSA shows, she worked from a particular year rather than from PRMSA's market survey. Thus, if PRMSA's forecast is to be rejected in favor of Dr. Andic's, it would be rejected not because PRMSA's market-survey technique is necessarily wrong but because we should take more recent actual results and use them as the basis for projection. But, as I have noted, the basic principle of Commission rate cases is to require reliable forecasting techniques and not to employ after-the-fact actual data. If the latter principle were to prevail, then any carrier could constantly file new rate increases if later data showed that the carrier's actual earnings were much worse than had been predicted, on the grounds that such actual data forecasted terrible pro forma years.

In any event, Dr. Andic in her last projection, took 171,075 actual units carried in the year ending on February 28, 1981, and adjusted this figure upward to the same 174,101 units that she derived from her earlier methodology, now abandoned. The upward adjustment is derived by Dr. Andic's estimate of some economic growth and use of a 1.8 percent factor which she derived from her evaluation of such growth. However, as PRMSA notes, not only does Dr. Andic's new methodology result in the exact same number as the old but Dr. Andic now makes an upward adjustment whereas in the old methodology she made a downward adjustment from the base year then used. (PRMSA reply brief, pp. 69-70.) Moreover, in so doing, she somehow disregarded her earlier acknowledgement that adjustments for plant closings should be made downward because the effects would fall into the pro forma year [25] and that PRMSA would suffer some ill effects from continued use of the old Transclass ships.

I must leave the fascinating discussion of the Andic predictions with the acknowledgment that under different circumstances I would have provided a more detailed explanation of her work and why I find it to

[25] I regret that I have so little time to discuss many other contentions by GVI/PRMA, for example, that PRMSA is guilty of double counting the effects of plant closings. First GVI/PRMA contended that PRMSA double counted the effects of plant closings, first by considering the general effects and then by specific accounting plant by plant. PRMSA's witness Huresky rebutted that contention. (See rebuttal testimony of Huresky, p. 9, quoted by GVI/PRMA in their opening brief, p. 87.) After this explanation, GVI/PRMA then contended that most of the plant closings had taken place prior to the start of PRMSA's pro forma year (March 1, 1981 - February 28, 1982). (GVI/PRMA opening brief, pp. 88-89.) I suppose this argument means that PRMSA should have made no allowance for the effects of plant closings on the pro forma year. But even Dr. Andic in her original methodology had recognized that the effects of closings would, to some extent, be felt during the pro forma year. Moreover, under a market survey technique rather than merely comparing historic years with pro forma years I would think that PRMSA would have to account for specific effects of plant closings even if they had mainly occurred before the start of the pro forma year, as indeed PRMSA did so account. In the last analysis, GVI/PRMA attempt to substitute a second forecast made by Dr. Andic based upon the most recent actual carryings of PRMSA in lieu of PRMSA's market survey techniques and criticize PRMSA's forecast by later events or estimates as to the future of the economy in an effort to discredit the PRMSA forecast. Of course, if enough time elapses, anyone's early forecast can be shown not to be exactly right. But as seen, PRMSA's market surveys have been shown to have a good track record. Even if not, GVI/PRMA's massive attempts to substitute Dr. Andic's work for PRMSA's does not ultimately persuade, notwithstanding amazing efforts by counsel on brief. I also find BIE's arguments on brief, supporting PRMSA's forecast in most regards because it accords with trends showing past declines and otherwise appears reliable, to be persuasive. BIE opening brief, pp. 57-59.

be less reliable than PRMSA's, although both have defects. I do note, however, that because of her changes in methodology, the incredible coincidence that both her old and new methodologies end up with exactly the same figure, 174,101 units, the manner in which she decided to make changes, and the generally unsupportable claims made by GVI/PRMA and Dr. Andic regarding supposed concessions by PRMSA which never departed from its view that its market survey technique is basically correct, I cannot find that Dr. Andic is more reliable than PRMSA in determining a fair and reasonable forecast.[26] Finally, I see that under a variety of projections ranging from PRMSA's original projection to projections accounting for Reagan budget cuts and delay of the *PONCE's* return (but not for GVI/PRMA's alternative method), the highest return to PRMSA would be 17.41 percent. This latter figure results if BIE's position of freezing PRMSA to its original pre-docketed unrevised figures is adopted. (See PRMSA's reply brief, table in Appendix A.) As I have noted above, I would accept adjustments for late redelivery of the *PONCE* but not for the speculative effects of the Reagan budget cuts. According to the table, such an adjustment (for the *PONCE*) would result in a return to PRMSA of 16.95 percent. Either result is under what I have earlier found to be a reasonable rate of return for PRMSA (17-18 percent). BIE's figure was 17 percent, but, as noted, it is probably too low and needs further explanation.

SEA-LAND'S REVENUE AND CARGO PROJECTIONS

Very briefly, Sea-Land has projected for the pro forma year a decline from 20,374 containers carried in the historical year to 19,252, a decline of 5 and one-half percent. Both GVI/PRMA and BIE contend that this projection is erroneous and is too pessimistic. GVI/PRMA,

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[26] I regret that it is impossible for me to discuss other contentions, especially some made by protestant DTPTC, which argues that PRMSA's projections are much too low and are unduly pessimistic. Even if DTPTC's specific points are valid regarding the fact that shippers contacted disagreed with PRMSA's forecast as to them and to Sea-Land's belief that PRMSA would benefit from I.C.C. deregulation of rail/water traffic, however, DTPTC adopts Dr. Andic's first study based on her earlier methodology. In other words, even if DTPTC is correct in certain specifics, I am asked to junk the entire market survey forecast of PRMSA in favor of Dr. Andic who herself dropped the methodology which DTPTC is willing to adopt. However, as to the merits of DTPTC's specific comments, I believe PRMSA has provided satisfactory answers. Specifically, I.C.C. rail/water deregulation will not necessarily benefit PRMSA which has very little intermodal traffic and does not plan to increase intermodal business since it calls at so many ports directly. Second, while it is true that the different views of two shippers out of three contacted throws some doubt on the accuracy of PRMSA's market survey, PRMA, with many members, did not challenge the survey by contacting its own shipper members. Also, an adjustment for the two contacted would lead to a minuscule upward revision of only 89 units out of 3,582. (See PRMSA's reply brief, pp. 67-68.) It would be interesting to contact all shippers whom PRMSA contacted to know whether they all were more optimistic than PRMSA or whether some were more pessimistic. In any event, I cannot reject an entire market survey because two shippers disagree. I can only wonder what would happen had a more complete double-check survey of shippers been performed. This would have been a good area for the Commission's staff investigators to check if the Commission had the available personnel.

however, briefly attack Sea-Land's methodology of forecasting as being "unilluminating" since it is based on Sea-Land's "unspecified goals." (In addition GVI/PRMA attack one of Sea-Land's expense items, "freight brokerage" expense, as being unlawful since no provision for "freight brokerage" appears in Sea-Land's tariff. This issue was not specified in the Commission's Order and I could probably ignore it. However, I believe that the record is inconclusive on the matter anyway.) [27]

Sea-Land's forecasting technique is described by its witness O'Donnell and is based upon information gathered by its sales force located in the field, which information is given to the marketing staff. The marketing staff reviews the data, broken down by cargo movements under different categories and by port movements. The data is modified in accordance with company goals, so that the forecast becomes in fact the goal. Revenue projections are calculated by adjusting actual revenues generated during the historical year to reflect rate increases and the forecasted cargo volume. (See GVI/PRMA opening brief, pp. 99-100, quoting Sea-Land's witness O'Donnell and BIE's opening brief, p. 60, citing O'Donnell and BIE witness Coleman.) Notwithstanding GVI/PRMA's swipe at this technique, it appears to be another means for a carrier to estimate its future and to make its forecasts, in effect, its goals. Companies may formulate their estimates as goals just as they prepare operating budgets for the forthcoming year which become, in effect, their goals. The real problem is with Sea-Land's pessimistic outlook for the North Atlantic where it projects a loss of 2,723 containers. The main reason why Sea-Land estimated such a loss in the North Atlantic is the fact that PRMSA will re-establish its full service with the return of the *PONCE and SAN JUAN* which will operate during the pro forma year (although, as seen, the *PONCE's* return was delayed by several months). Sea-Land believed that these two ships would divert some traffic from Sea-Land. However reasonable that may have seemed to Sea-Land, GVI/PRMA, as well as BIE, have persuasively

[27] Sea-Land's explanation for this expense item amounting to $607,547 for "freight brokerage" is contained at pp. 12-15 of its reply brief. GVI/PRMA argue most vigorously that this item is unlawful and should be deleted from Sea-Land's pro forma projections. See GVI/PRMA opening brief, pp. 105-106. This matter apparently was raised in the protests before the case was docketed by the Commission. If the Commission wished to determine the issue, it would have so specified as it did fuel, labor costs, etc. Under P.L. 95-475 and Commission case law, I am supposed to narrow issues and strictly rule out litigation of issues not specified in the Commission's Order of Investigation. *See TMT Corp. - General Increase in Rates*, cited above, 22 F.M.C. 175. In any event, Sea-Land claims that the item is a legitimate sales expense paid to its own agent, Sea-Land of Puerto Rico, Inc., and that the problem is only where to place the item in the G.O. 11 accounts, which heretofore have never been criticized by the Commission in this respect. BIE totally ignores the issue. I believe that the item in question may indeed look suspiciously like brokerage but without full litigation on the issue I cannot make a finding which, after all, may mean that Sea-Land had violated law. For such a serious matter, Sea-Land should have been placed on notice by the Commission in its Order. Finally, as Sea-Land notes, even if the questionable item is deleted from Sea-Land's allowable expenses, the results seem to show that its return would only be 16.3 percent, still within an allowable rate of return. See Sea-Land's reply brief, p. 15.

pointed out serious shortcomings. GVI/PRMA argue convincingly that PRMSA's increase in capacity in the North Atlantic does not necessarily mean a decline by Sea-Land there, that even if so, Sea-Land itself is putting a somewhat larger vessel into service there, that its competitors have not been operating at capacity, therefore merely putting new ships into the North Atlantic does not mean that Sea-Land will lose cargo to them, and finally, in the South Atlantic where Sea-Land's competitors TMT and PRMSA deploy the largest increments to vessel capacity, Sea-Land projects a substantial increase of 29.2 percent rather than a decrease, which under its theory, it should have done in the South Atlantic. GVI/PRMA opening brief, pp. 99-105. BIE also effectively shows that Sea-Land's pessimistic forecast for the North Atlantic is unsupportable on the record and generally agrees with GVI/PRMA's criticisms. BIE's opening brief, pp. 60-64. I agree with the criticisms. However, as Sea-Land notes, since the dispute centers on the pessimistic estimate of a loss of 2,723 containers, Sea-Land, with the assistance of BIE's witness Coleman has added back the lost containers. The results are shown in a table on pp. 38-39 of Sea-Land's opening brief and as Appendix A to BIE's opening brief. This table shows that under the highest projection and lowest expense estimates, Sea-Land's return would be only 16.28 percent, well under Dr. Nadel's recommendation of 18.5 percent and slightly over BIE's incompletely explained recommendation of 16 percent. However, since BIE believes that Sea-Land has underestimated its fuel and administrative and general expenses, the table also shows that Sea-Land's return would only be 16.04 percent after adding back the 2,723 containers in the North Atlantic and adjusting Sea-Land's understated fuel and other expenses, using BIE's inflation factor of 14.9 percent. If the fact that Sea-Land has permanently canceled the rate increases in the Canadian tariff which had been under investigation is considered, these returns would be lowered further.

I must leave this discussion again because of time pressures to conclude that I find Sea-Land's North Atlantic forecast to have been unduly pessimistic and not sufficiently supportable. However, after appropriate adjustments are made to add back the forecasted loss of 2,723 containers and to adjust for understated expenses, I agree with BIE that Sea-Land's return will not be excessive.

TMT/GCML'S REVENUE AND CARGO PROJECTIONS

No one disputes GCML's projections and indeed no one focuses on GCML at all in this case. BIE supports GCML's methodology and has no dispute with GCML. BIE's opening brief, p. 65. Accordingly, I will pass on to TMT. Only GVI/PRMA attack TMT's projections and do so for limited reasons relating, among other things, to TMT's estimated capture of traffic from GCML, which has reduced its services, and for an alleged overstatement in TMT's rate base.

As for TMT's methodology, i.e., basic techniques employed to make its forecasts, they appear to be as reasonable conceptually as any other carrier's. The technique is explained in detail in TMT/GCML's opening brief, pp. 19-22, and also by BIE (BIE's opening brief, pp. 64-65). Very briefly, since I have no time to discuss it further, TMT based its pro forma year on a forecast of calendar year 1981. TMT reviewed data drawn from the twelve-month period ended September 1980 categorized by types of unit, compared to prior forecasts and adjusted to eliminate the effects of extraordinary occurrences. TMT made further adjustments to reflect assumptions regarding the competitive environment, service considerations, and economic trends through consultation with TMT's marketing and operational staffs. Specific factors considered were drastic service reductions by GCML, redeployment of equipment, and increased availability of specialized equipment. TMT adjusted historical revenue data to reflect a projected increase in cargo volume and the rate increases. TMT projected an increase of 17.39 percent from the cargo volume it transported in the historical year. (See BIE's opening brief, pp. 64-65.) As TMT explains, this methodology is based upon management's budgets prepared in the regular course of business. TMT/GCML's opening brief, p. 19.

BIE has no quarrel with TMT's methodology or results. BIE states that the methodology "appears to be appropriate" and that the projections "appear to be reasonable." BIE, therefore, "does not dispute TMT's or GCML's forecasts. . . ." BIE's opening brief, p. 65. GVI/PRMA, however, have serious problems with TMT's forecast results mainly relating to TMT's estimates of the volume of cargo that it will attract from GCML as a result of GCML's diminished service. I also have serious problems because of inscrutable changes in testimony by TMT's witness Baci and by equally inscrutable and cavalier responses by TMT to serious contentions by GVI/PRMA's witness Rozynski and by GVI/PRMA's opening brief, pp. 107-109. Accordingly I do not find that TMT has adequately explained that it will only attract 80,000 tons from GCML rather than the 100,000 tons, which it originally told the Commission it would attract. Moreover, since I have been given no assistant who can recalculate the effect of another 20,000 tons of cargo for TMT in its pro forma year, an effect which GVI/PRMA claims would add $1.2 million additional revenue, I cannot find that TMT's increases will fall under an allowable rate of return of 16 or more percent or indeed what its return would be or that its forecast is reliable. Accordingly, what I have done with regard to BIE witness Copan, I will do for TMT. TMT will have to provide detailed explanations to the Commission as to why its later estimate of 80,000 tons should be accepted instead of its original estimate of 100,000 tons which it submitted to the Commission by verified statement of the same Peter Baci who later testified that only 80,000 tons of GCML's former carryings would be attracted to TMT. I now explain briefly why I believe that the present state of the record does not persuade me that TMT's later estimate is reliable and why I find that TMT's response to the contentions of GVI/PRMA has not impressed me as being persuasive or as careful as the seriousness of the GVI/PRMA charges warrant.

GVI/PRMA's problems regarding Mr. Baci's changes of testimony and their inability to understand why the Commission should accept Mr. Baci's later statement that TMT would garner only 80,000 tons from GCML rather than 100,000 tons are clearly and concisely set forth in GVI/PRMA's opening brief, pp. 107-109. I have the same difficulty as do GVI/PRMA.

Although the matter of the change in Mr. Baci's testimony concerns me more than the other matters raised by GVI/PRMA (unexplained application of its cost-escalation factor to certain expense items, payment of management commissions to its parent company followed by management supervision fees), I am also troubled by these other problem areas. Generally, it appears, as GVI/PRMA have noted, that TMT has taken a somewhat relaxed attitude and has not bothered to present rebuttal testimony or to provide adequate explanations in its post-hearing briefs. This does not mean that TMT is required to write a 262-page brief, as did GVI/PRMA, but the abbreviated and rather cursory treatment of the GVI/PRMA charges which are based upon substantial criticisms raised by GVI/PRMA's witness's testimony, in my opinion, is not satisfactory when dealing with proposals by TMT to ask the Commission to allow TMT to assess ratepayers additional millions of dollars. Another basic problem I have with TMT's rather offhanded replies to GVI/PRMA in its briefs is that, unlike other carriers like PRMSA and Sea-Land, TMT's briefs do not even provide me with a table showing its pro forma income statement and rate base. Instead I am supposed to go burrowing through workpapers and exhibits to resolve critical areas of dispute. In a pressure cooker such as I am under, I need more enlightenment than TMT has chosen to provide. Instead of doing this, however, TMT answers two of GVI/PRMA's most important contentions (the 80,000 ton reduction and the double counting of management commissions) in brief footnotes in its opening and reply briefs.

I cannot, therefore, give my imprimatur to TMT and find that on the record as I now see it, TMT has fully survived the criticisms of its case. Very briefly, I call the Commission's attention to pages 103-106 of GVI/PRMA's reply brief and to pp. 56-57 and pp. 107-109 of GVI/PRMA's opening brief. As seen, TMT has not provided full and complete explanations in several important areas, most especially why TMT changed its testimony to reduce its projected tonnage by 20,000 tons and why its management commissions to its parent Crowley Corporation are not excessive because of double counting.

As shown in GVI/PRMA's briefs, TMT, through Mr. Baci, submitted a verified statement to the Commission apparently dated November 26, 1980, which told the Commission that TMT would gather approximately 100,000 tons of cargo from GCML which was reducing its services substantially. In his direct testimony submitted after this case was docketed, however, this figure is reduced to 80,000, a substantial change. The explanations for this important change become confusing and mystifying. In Mr. Baci's direct testimony, he explains that the 80,000 figure derives from an estimated reduction of GMCL's Puerto Rican cargo in the amount of 100,000, of which 80 percent was estimated to go to TMT. See direct, Baci, pp. 4-5, quoted in GVI/PRMA's opening brief, p. 108. No further testimony was offered by Mr. Baci on rebuttal to explain the discrepancy. The answer to this serious question as to why a change was provided by TMT in its opening brief in a footnote, which TMT states later in its reply brief, "fully answered" the GVI/PRMA's charges. See TMT, opening brief, p. 23 n. 7, and reply brief, pp. 4-5. TMT's footnote explanation states that Mr. Baci's first submission to the Commission was in error and gives an explanation as to why the correct figure is 80,000 tons rather than 100,000 tons which even appears to be different from that which Mr. Baci provided in his direct testimony. In the footnote TMT states that the 100,000 tons, of which TMT would attract 80,000, is shown by the difference between 190,573 tons carried by GCML in the year ending September 30, 1980, and the 90,903 tons which GCML projected to carry in 1981. In the post-docketed testimony of Mr. Baci, however, he stated that the 100,000 ton figure was derived by an estimate of the effects of the reduction of GCML's services. See quoted testimony on page 108 of GVI/PRMA's opening brief. As GVI/PRMA point out in their reply brief, however (p. 104), in his pre-docketed statements made to the Commission Mr. Baci made no reference to these GCML tonnage figures mentioned in the footnote in TMT's opening brief. Rather Mr. Baci had referred to specific commodities carried by GCML in its historic year which he considered to be of the type suitable for carriage by TMT. This reference led GVI/PRMA's witness Rozynski to rebut the analysis on the basis of the latter's study of the particular commodities, leading to Mr. Rozynski's conclusion that TMT had understated its revenue by $1.2 million. (GVI/PRMA's reply brief, pp. 104-105.)

The shift from specific-commodity analysis to general tonnage figures to explain a substantial change in Mr. Baci's testimony is not adequately explained by a brief footnote reference which cavalierly tosses off GVI/PRMA's criticism. Moreover, I am puzzled as to why BIE, which has taken a strict position that a carrier's case should be frozen to its pre-docketed submission, should now have no problem with this very substantial change in TMT's case, which apparently emerged only after the case was docketed. Why does not BIE now insist that TMT should be held to its pre-docketed case of 100,000 tons? I would welcome BIE's explanations in BIE's exceptions. Perhaps there is an adequate explanation which TMT can provide on some type of obvious-error theory. However, there has been a significant change in numbers and in explanation between the pre-docketed and post-docketed statements of Mr. Baci and the matter is simply too serious to toss off in cavalier footnotes. I, for one, am not prepared to make findings under such circumstances that TMT has adequately carried its burden of proof and leave the matter for the Commission to resolve if TMT can provide an adequate explanation other than in footnotes.

In order to determine whether there was some explanation for BIE's acceptance of the decline from 100,000 to 80,000 tons between the original verified statement of Mr. Baci submitted to the Commission and the direct testimony of Mr. Baci submitted after the case was docketed by the Commission, I consulted the direct testimony of BIE's witness New, a staff accountant with the Commission's Office of Financial Analysis. Rather than clarify the matter, however, the testimony makes it even more confusing. Mr. New, who, like all other staff witnesses, is well qualified and furnished helpful evidence, first stated that he reviewed TMT's workpapers and exhibits submitted before the case was docketed as well as the protests and found that "the aforementioned items included in TMT's financial projection appear to have been appropriately calculated." (New—direct testimony, p. 2.) He also listed five errors found in the TMT papers which had to be corrected. However, he also stated that TMT's data which be renewed were "unverified." (Id.) Of greater significance, however, for this particular problem, is the explanation or lack of it for the 20,000-ton discrepancy. Mr. New testified on this point as follows:

> TMT anticipates gaining approximately 80,000 tons of cargo formerly handled by GCML, which is reducing the size of its operations and will discontinue calling at Lake Charles, Louisiana, a port served by TMT. (It should be noted that the statement of Peter Baci (page 2, 3) indicates that TMT expects to gain approximately 100,000 tons of cargo from GCML: However, TMT's financial projection assumes a gain of 80,000 tons from GCML. *TMT has acknowledged that the 80,000 tons figure is correct. Therefore, since this error appeared only in Mr. Baci's statement, the projected revenue calculation has not been adjusted.)* New—direct testimony, p. 3. (Emphasis added.)

Therefore, the only explanation for the discrepancy is that "TMT has acknowledged that the 80,000 figure is correct" and no adjustment to TMT's projections was deemed necessary "since this error appeared only in Mr. Baci's statement. . . ." Perhaps such an explanation might have sufficed if the Commission had not specifically ordered me to determine whether TMT's projections are "sufficiently accurate" and whether TMT used "appropriate methodology." (Issues Nos. two and three.) I cannot determine that the new 80,000 figure given by Mr. Baci is "sufficiently accurate" merely because "TMT has acknowledged that the 80,000 figure is correct" and that the figure 100,000 is not accurate simply because it appeared only in Mr. Baci's original, verified statement. Which Baci statement is accurate and, if the second statement is the correct one, what evidence proves it correct other than TMT's acknowledgment that the 80,000 figure is correct. What does such acknowledgment mean?

I do not mean to impugn the quality of Mr. New's work. On the contrary, he showed that he made five important corrections to TMT's original submissions, all of which served to reduce overstated items of expense and items in TMT's rate base, so as to ensure that TMT would not be overcompensated by the rate payers. However, since the Commission wants to know whether the TMT projection is "sufficiently accurate," I need more evidence and explanation than the record now contains before I can make findings about the accuracy of TMT's projections. Since the burden was, and is on TMT to prove this point about the accuracy of its later 80,000-ton projection and TMT provided such little evidence and argument despite the specific criticism on this point made by GVI/PRMA, TMT will now have to satisfy the Commission on this point. It has not satisfied me.[28]

Since the matter of the 100,000 and 80,000 tons appears to me to be the most significant problem area regarding TMT, I have spent what little time I had discussing it. However, TMT has also used the footnote technique to answer another of GVI/PRMA's criticisms, namely, the possible double counting by TMT for management commission and supervision fees to TMT's parent, Crowley Maritime Corporation. See GVI/PRMA's reply brief, p. 105. Again, TMT's answer is contained in a footnote. (TMT/GCML's reply brief, p. 6 n. 2.) TMT's short answer is that TMT was only following prescribed G.O. 11 terminology. I think that GVI/PRMA and the ratepayers deserve a more thorough answer than that and that TMT should provide it to the Commission or be found not to have carried its burden of proof.[29]

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[28] It may be argued on exceptions that even if one adds back the 20,000 tons, TMT will still fall under an allowable rate of return. That may or may not be. However, that does not justify the failure to prove the point because the Commission wants to know the answers to the issues it has framed. As the case of *TMT Corp. - Proposed General Increase in Rates*, 22 F.M.C. 175, cited above, illustrates, the Commission has the right to obtain answers to questions it frames in its Orders of Investigation, even if it appears that the answers will have no effect on the ultimate question of the reasonableness of the carrier's rates.

[29] TMT states in its reply brief (p. 6) that "the obligation of the carriers in this proceeding is to establish that their projections in the specified categories are reasonably reliable, not to respond to every question asked by protestants' experts." But TMT has the statutory burden of persuasion. Moreover, the Commission docketed this proceeding to permit GVI/PRMA an opportunity to show the validity of their contentions, as the Order mentions. I do not believe that TMT's rather offhand attitude is appropriate in rate cases affecting so many people in Puerto Rico and the Virgin Islands.

I have no further time to linger on the inadequacies of TMT's explanations. I would, however, if I had more time, explore more fully GVI/PRMA's additional contention that TMT/GCML applied its cost-escalation factor to unidentified expense items and the contention that there is an improper $7.4 million overstatement of TMT's rate base. TMT has ignored these criticisms in its briefs, unlike PRMSA and Sea-Land, who attempted to answer all of the attacks made upon their cases. Without explanation by TMT and with no time to dig out what its explanations might have been, I would suggest that TMT provide answers in an adequate fashion to the Commission on its exceptions.

RESPONDENTS' COST ESCALATION FACTORS - NON-LABOR, NON-FUEL

The fourth issue framed by the Commission's Order is as follows:

> (4) Have Respondents properly calculated their cost projections covering labor, fuel, vessel maintenance and administrative and general expenses, and, if not, what are the proper calculations?

This issue has broken down into two main categories, first, the general inflation factor to be used for non-labor, non-fuel expenses and second, the fuel expense calculation. As to the question of labor, vessel maintenance, and administrative and general expense, there appears to be no specific problem. Labor expenses are derived from labor contracts which were made available to protestants and to the Commission's staff. Vessel maintenance, as such, was not litigated, nor was administrative and general expense except regarding certain TMT and Sea-Land expenses, discussed above. These two items fall under the controversy as to what general index of inflation should have been used. Since the Commission's Order does not explain what problems the Commission had with these particular items and the parties did not litigate the issues, I will pass directly to the real issue, namely, whether the carriers used appropriate inflation factors to project their non-labor, non-fuel expenses. Here again, as in the case of the different rate-of-return recommendations, there is a variety of recommendations.

The different indices and percentages which each party employed are summarized in PRMSA's reply brief, p. 76 and by GVI/PRMA in their opening brief, pp. 45-50. Again, protestants' calculations and recommendations, like their recommendations for rate of return, are at the low end while the carriers are somewhat higher. BIE, which accepted the carriers' various calculations, falls in the range of the carriers' annualized rate of inflation. (See PRMSA's reply brief, p. 76.) As annualized, GVI/PRMA would hold the carriers to an inflation factor of 7.2 and later 6 percent, the carriers suggest 9.9 to 10.4 percent, while BIE would accept 10.4 percent. The following table prepared by PRMSA and *found in its opening brief (p. 118)* is very helpful as a visual aid and is set forth below:

INDEX AND FORCAST	U.S.G.N.P Implicit Price Deflator (Price Deflator) as forcasted by Data Resources Inc.	Producer Price Index for Industrial Commodities Less Fuels and Related Products and Power (PPI-ICLF) as Forcasted by Data Resources Inc.	Producer Price Index for Industrial Commodities Less Fuels and Related Products and Power (PPI-ICLF) as Forcasted by Sea-Land	Consumer Price Index (CPI) as Forecasted by Citibank	Producer Price Index for Finished Goods (PPI-FG) as Forecasted by V.I./Mfrs.	Producer Price Index for Finished Goods Less Energy (PPI-FGLE) as Forecasted by V.I./Mfrs.
Party	PRMSA	BIE	Sea-Land	TMT	V.I./Mfrm.	V.I./Mfrm.
Escalation Factor	17.27% [1] 20 months	17.3% [2] 20 months	14.9% [3] 18 months	[4]	12% [5] 20 months	10% [6] 20 months
Annual Rate	10.4%	10.4%	9.9% [7]	14.2% [8]	7.2%	6%

[1] D - Vasqeuz, p.5

[2] S - Fratter, p. 14

[3] Sea-Land actually forecasted a 13.90% escalation factor, D - Ziio, p. 8. However, Ms. Fratter noted that Sea-Land had erred in making its forecast and that the actual forecast should have been 14.9%. D - Fratter, p. 12 Sea-Land accepts this correction.

[4] T.M.T. did not make an 18 or 20 month forecast.

[5] D - Andic, p. 21.

[6] H - Andic, p. 28.

[7] Sea-Land's original erroneous projection worked out to a 9.3% annual rate.

[8] T.M.T. used a 10 % escalation factor/12 months instead of 14.9% as forcasted by Citibank. Ms. Fratter notes that it was proper for T.M.T to reduce theCitibank forecast. D - Fratter, p. 10, n.10.

As seen from the table, the differences in the various escalation factors stem from the choice of index and the adjustments made by the individual party. Included in the table are the U.S. Gross National Product (GNP) Implicit Price Deflator utilized as a forecast basis by Data Resources, Inc. (DRI), an independent, widely-used service, as adopted by PRMSA; forecasts derived from one type of the Producer Price Index as made by DRI and adjusted by BIE; forecasts derived from types of the Producer Price Index as made by Sea-Land and GVI/PRMA; and forecasts derived from the Consumer Price Index by Citibank, used by TMT with adjustments.

Time does not permit me to describe these various factors. Good explanations are provided in the briefs of the parties. Briefly, however, BIE explains in its brief why the staff does not generally challenge the carriers' calculations. As explained in its brief (BIE opening brief, p. 67), the most appropriate measure for a carrier's non-fuel, non-labor expenses would be an inflation factor designed specifically for the maritime industry. Such an index is not published, however. Therefore, it is necessary to use a proxy or surrogate index that is most closely aligned to the ideal maritime index of inflation. BIE's expert witness Fratter testified that a Producer Price Index for Finished Goods Less Food and Fuels would be the closest proxy for the ideal but that no independent service publishes such an index. However, an independent service, DRI, does make a forecast based upon a PPI for Industrial Commodities Less Fuel and Related Products, which Ms. Fratter recommends as a suitable proxy. Such a forecast has the advantage, furthermore, of being free from bias since it is prepared by a recognized, independent service, DRI. BIE explains in more detail why such a forecast prepared by an independent service is reliable for application to the carriers and why fuel and food are properly eliminated from such an index. (See BIE opening brief, pp. 68-70.)

BIE and the Commission's staff accept the carriers' calculations with slight modifications. Thus, BIE finds Sea-Land to have understated its inflationary factor by use of a simplistic trend-line type of analysis and makes a correction so as to raise the Sea-Land factor from an annualized rate of 9.3 percent, as originally calculated by Sea-Land, to 9.9 percent. (BIE opening brief, pp. 70-71.) BIE accepts PRMSA's calculations (10.4 percent annualized) although BIE believes that PRMSA used a conservative, i.e., understated index, the GNP Implicit Price Deflator, which, although prepared by the independent service, DRI, is an index derived from numerous other price indices and suffers from other problems. (BIE opening brief, p. 73.) However, since the GNP Price Deflator is historically a conservative index, it would tend to understate PRMSA's cost increases. Therefore, BIE accepts PRMSA's escalation factor of 10.4 percent (stated as 10 percent in BIE's opening brief, p. 74).

BIE accepts TMT/GCML's use of an inflation factor in the amount of 10 percent annualized. Although the index employed by TMT was the Consumer Price Index, which BIE shows to be unsuitable for carriers' use for a number of reasons (BIE opening brief, p. 77), the end result, as adjusted, was within the range of reasonableness and approximated that of PRMSA which was probably conservative. I agree that the CPI is not suitable for the reasons BIE explains (it is a "market basket" compendium of consumer items including clothing, shelter and medical services which are not relevant to a carrier's business). However, the result, as adjusted by TMT, conforms to results produced by more reliable indices.

I have only a very limited time to discuss GVI/PRMA's contentions and recommendations. As PRMSA states in its reply brief (p. 79): "No one agrees to the V.I./Mfrs. - sponsored indices except the V.I./Mfrs." That, of course, is not sufficient reason to reject it. There are, however, such reasons, and they are succinctly mentioned by PRMSA, among others (PRMSA reply brief, pp. 79-80). Essentially, GVI/PRMA's escalation factor, originally annualized to only 7.2 percent, later revised to drop to 6 percent, is not based upon an independent service such as DRI but is based upon the work of Dr. Andic who employed indices which are weighted by food and fuel factors. (BIE, it should be noted, strongly supports the use of an index prepared by an independent service such as DRI in place of an *ad hoc* study done by a particular carrier with its tendency to build in biases.) PRMSA explains in greater detail why Dr. Andic's incredibly low figure of 7.2 percent (later, 6 percent), well below every other estimate, is unreliable. (PRMSA opening brief, pp. 122-124.) Briefly, Dr. Andic, although purportedly starting from the PPI for finished goods in her first version, managed to lower the figure although the PPI index, according to BIE's witness Fratter, should have produced a higher result. What Dr. Andic did is similar to what she also did in regard to her alternative projection of PRMSA's cargo volume and revenue forecast, discussed earlier, namely, take the most recent months and assume that the same trend would continue into the future. In other words, according to BIE witness Fratter, Dr. Andic assumed that an inflation rate can be forecasted based on the rate that has occurred in the most recent past. (See rebuttal testimony—Fratter, p. 8, quoted in PRMSA's reply brief, p. 123.) Ms. Fratter calls the Andic methodology "naive." Moreover, Dr. Andic's result was much lower than the 10.5 percent annual rate of inflation predicted for both 1981 and 1982 by DRI, the source from which Dr. Andic purportedly drew her data. Finally, in Dr. Andic's second study, in which she reduced her earlier prediction from 7.2 percent to 6 percent, she used the PPI index for finished goods less energy. But this index is heavily weighted with food so that it is not really relevant to carriers and, as BIE witness Fratter showed, the

Andic methodology of projecting a 20-month period from a five-month period, if used one year earlier, would have predicted an inflation factor way out of line with reality. (PRMSA, reply brief, p. 124.)

I conclude that the record supports the inflation factors employed by the carriers with modifications discussed above and that, as in the case of the cargo volume and revenue projections, GVI/PRMA's unique and alternative methodology utilized by Dr. Andic does not withstand analysis. Furthermore, because of her continual revisions and unique results, I find Dr. Andic's work to be quick and resourceful but increasingly suspect. BIE has been even more severe with GVI/PRMA's expert witnesses.[30]

THE FUEL COST INCREASE ISSUE

Another difficult question to solve in this already difficult case is what to do with the carriers' fuel cost predictions. A special problem with this particular estimate is, of course, the volatile, erratic price changes in oil and the corresponding need to employ a reasonably accurate methodology in Commission rate cases which rely upon the one-year forecast method. Again, I regret that the tremendous pressures of time and my lack of technical assistance make it impossible for me to discuss this complicated issue in more detail. Perhaps the Commission, which has given itself 43 days after the last pleadings (replies to exceptions to my Initial Decision) are filed, can devise a better solution but the problem taxes the wisdom of my ancestor, King Solomon.

The problem is that the carriers had to make their forecasts of increases in the price of oil back in November 1980 or before, approximately when they first submitted their cases to the Commission. Now that we are, at the time of writing, in July, the crazy oil market continues to amaze and dumbfound. Every day one can read different predictions. First one authority says that the Saudis will call off their game with OPEC and curtail production so as to raise prices. Then another authority claims that the Saudis have to maintain current production to finance domestic projects. Both PRMSA and GVI/PRMA attach conflicting cartoons and newspaper articles. The point is that no one really knows how long the current oil glut will last. Consequently, if we try to apply the most current daily prices of oil to any carrier's original forecast to make a new forecast, there is no way of knowing that such a forecast is more reliable than that which was originally

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[30] Thus, in commenting upon the shortcomings of GVI/PRMA's witnesses in their calculations of inflation factors, BIE states:

> The Bureau submits that not only does the blatant methodological error detailed above effect (sic) the inflation factor developed by GVI/PRMA's witnesses, but it draws into serious question the alleged expertise of these witnesses in this crucial area. Perhaps more telling, however, is GVI/PRMA's witnesses' inability to comprehend the mistake that they had made when confronted with criticisms of their methodology. (BIE reply brief, p. 69 n. 35, citations to the record omitted.)

submitted, even if it were conceptually sound to assume that later data would always supply a more reliable base merely because such data were more recent.

There are a few other basic problems here as well. First. there is the fact that the Commission has discontinued its bunker fuel surcharge program by which it had required special accounting on a forecasting as well as after-the-fact-reckoning basis. The Commission discontinued this program on the grounds that oil prices had supposedly stabilized. See *Bunker Surcharges in the Domestic Offshore Trades,* 20 S.R.R. 401 (1980), revoking 19 S.R.R. 406. But having announced that oil prices have stabilized, that meant that carriers could seek compensation for increases in fuel costs as part of their general-rate-increase cases. That is exactly what has happened in this case. This leads to the second problem, which I mentioned briefly earlier in connection with the carriers' revenue and cargo volume projections, namely, that Commission rate cases, based on testing carriers' forecasting methodologies, are prospective, not retroactive. In other words, to the largest extent possible, in order to assure responsible forecasting by carriers, they are not allowed to produce *ad hoc,* i.e., after-the-fact justifications. Similarly, if protestants are allowed to rely upon later, current events, this is a form of retroactive, *ex post facto* type of decisionmaking so that even if the carrier utilized the best techniques available at the time it filed its rate increases, it would be forced to make refunds and pay interest at something like 20 percent because of later events which the carrier could not have reasonably anticipated.

The particular solution in this case emerges after one has considered the relative merits of GVI/PRMA's alternative methodology to ascertain whether it will withstand analysis, even assuming that later events should be allowed to supplant a carrier's original case and the facts which the carrier had to rely upon at the time of submitting that case. A close analysis of GVI/PRMA's alternative calculations for PRMSA's fuel cost forecasts shows, as do the analyses of protestants' previous alternative projections and calculation of inflation factors, that they once again do not hold up. The various deficiencies in what otherwise might appear to have been a plausible alternative using a more current base, are well stated in PRMSA's reply brief, pp. 80-104. Time will not permit me to explain in detail how PRMSA shows the weaknesses in protestants' alternative methodology. I can only briefly touch upon the highlights and refer the reader to the complete explanation in the cited portions of the reply brief and to PRMSA's opening brief.

As explained in PRMSA's opening brief (pp. 125-127), PRMSA used a forecast based upon the forecast of Average Refiners Acquisition Domestic (A.R.A.D.) prices by Data Resources, Inc. (DRI), the same widely-used service discussed above in connection with the inflation factor issue. PRMSA then compared A.R.A.D. forecasts with its own experience with oil prices using recognized statistical measuring techniques. BIE witness Straube examined PRMSA's forecasting technique and found it to be reasonable. GVI/PRMA's witness, Dr. Andic, however, attacked the PRMSA methodology and substituted her own, as she did previously in connection with cargo volume and revenue projections and inflation factors. Here again her attacks on PRMSA seem to pass through a variety of unsupportable allegations and changing rationales. Dr. Andic contends that a better base for prediction would be the March 1981 DRI forecasts rather than the November 1980 base used but her contentions fall apart under scrutiny. I cannot take the time to describe the manner in which PRMSA, in my opinion, has undermined Dr. Andic's work and credibility in PRMSA's opening and reply briefs. Among many other things, PRMSA has shown that Dr. Andic incorrectly accused PRMSA of applying a simplistic trend-line analysis to the DRI data. This is especially interesting since Dr. Andic herself appears to have used a trend-line analysis elsewhere. Moreover, even using the March 1981 DRI forecast, PRMSA has shown that the results would be more pessimistic than PRMSA had originally forecast and that the only reason why Dr. Andic is able to reduce PRMSA's forecasted cost increases is by use of techniques that are full of mistakes. As PRMSA shows, although supposedly using the March 1981 forecast, Dr. Andic actually ignored it by employing a percentage factor of 22.2 percent which was supposed to cover steady monthly increases in costs from first quarter 1981 to first quarter 1982 under another simplistic trend-line analysis. Also Dr. Andic's starting point of two weeks in March 1981, although sounding appealing because it is more current, leads to woefully distorted results, a danger that results whenever a single starting point is selected for projection purposes.

Essentially PRMSA has relied upon a recognized forecasting service, DRI, a technique which, as I have noted, BIE agrees to be reasonable while GVI/PRMA and its witness, Dr. Andic, once again substitute different data and make their own *sui generis* calculations, make unsupported allegations about PRMSA's evidence, change grounds, and end up looking worse for the effort. The statement made by PRMSA that Dr. Andic simply is not qualified to make predictions as to fuel costs because of her lack of experience in the field seems to be supportable. Moreover, the statement that she cannot compete with a service such as DRI coupled with the fact that the trend-line analysis method which she did employ has been shown in fact and in theory to be faulty, lead me to conclude that GVI/PRMSA's attacks on PRMSA's forecasts of fuel cost increases cannot be sustained and moreover, to conclude that the credibility of Dr. Andic has again been significantly undermined.

As to the fuel cost projections of Sea-Land and TMT/GCML, protestants seem to say nothing in their briefs, having concentrated on PRMSA. BIE, however, finds nothing wrong with these other carriers' projections. Indeed, BIE states in its opening brief that both Sea-Land's and TMT/ GCML's projected average costs for the pro forma year of $29.69 and $29.45 per barrel which were below PRMSA's predictions, were probably too low. (See BIE's opening brief, pp. 71, 76.)

THE ISSUE OF ECONOMIC HARDSHIP

The final issue framed by the Commission's Order is as follows:

> (5) Do the proposed rate increases impose an economic hardship on the affected interests represented by Protestants and Intervenors, and, if so, to what extent should this factor be considered in determining a reasonable rate of return for the carriers?

The parties claiming that the rate increases will cause economic hardship are protestants GVI/PRMA and the Chamber of Commerce of Puerto Rico, which did not take an active role in the case and did not file post-hearing briefs. Protestant DTPTC based its case on contentions similar to those of GVI/PRMA regarding rate of return, cargo volume projections, cost escalation factors, etc., not on economic hardship. Although the parties commented on this issue, however, only GVI/PRMA seem to present specific recommendations, because of alleged economic hardship, which are, of course, that the rate increases be rolled back to something like 11.2 percent from the 16 to 18 percent level.

The main factual issues falling under this general question stem from the testimony of individual shippers and business persons who testified in St. Thomas and San Juan that the rate increases affected them adversely. The legal issue concerns the question whether the Commission can change a carrier's return which is otherwise shown to be reasonable for reasons relating to economic hardship and, more particularly, to hardship affecting individual shippers in a general-revenue case.

There is considerable dispute as to whether the subject rate increases will cause economic harm on individual shippers and consumers, PRMSA and other carriers arguing that the shippers' problems are caused by many other factors and that many shippers are doing better financially than the carriers are. Moreover, PRMSA and Sea-Land ask me to apply sanctions against shippers who testified on behalf of GVI/PRMA because they did not furnish answers to questions which both PRMSA and Sea-Land had, by previous arrangement approved by myself, asked counsel for GVI/PRMA to have brought to their individual attention. The overall conclusion I draw from this area of the record is that the rate increases are an aggravation to the shippers, as are any price increases, but that I cannot find that these rate increases are the main cause of business problems which individual shippers are facing. Moreover, because of the failure of most of them to prepare themselves to answer the specific questions which might have indicated how well their businesses were doing and how the specific rate increases resulted in cost increases to them, I find that they have, without intending to, weakened their individual cases because I have no idea whether some are able to absorb cost increases that may have directly or indirectly resulted from the rate increases out of healthy profits or whether they are being victimized by other factors.

I again regret that I have so little time to devote to this subject which concerns individual human beings whom I observed at the hearings in St. Thomas and San Juan and that I cannot find that this proceeding will be the vehicle through which they can enjoy some relief from the inexorable march of inflation. My problem is that their testimony, while entitled to careful consideration and sympathy, seems directed at the issues not in this type of case, even if I were persuaded that the rate increases were causing them substantial problems. Thus, before I mention the factual testimony, I will discuss basic principles of law and assume that the individual shippers have shown substantial economic harm because of the general rate increases.

A very basic problem here is the principle that the particular problems affecting individual commodity rates are generally not relevant to cases involving the issue of a carrier's need for additional revenue in a so-called general-rate-increase or general-revenue case. In general-revenue case after general-revenue case, individual shippers customarily march in to testify and customarily march out with no success. Basically they are in the wrong case because their evidence concerns factors peculiar to their own commodity rate and not factors affecting a carrier's rate of return in its rate base. Despite many years of general-revenue cases before this Commission, it never seems to fail that shippers consume their time trying to litigate irrelevant issues in the wrong type of case. The Commission has recognized the difference between a general-revenue case and an individual commodity case. In Docket No. 77-12, G.O. 16, Amdt. 20, 20 F.M.C. 202 (1977), the Commission amended its Rule 41, 46 C.F.R. 502.41, to clarify the fact that a "complainant" in an individual-commodity rate case was not the same thing as a protestant in a general-revenue case. The Commission tried to advise shippers that they should concentrate their efforts in fighting individual rates based upon transportation factors peculiar to the carrying of those commodities and other relevant factors involved in single-commodity cases rather than waste their time in general-revenue cases which, like the present one, are heavily involved in rate-of-return and general-revenue and cargo-volume predictions. The Commission stated:

> However, the question of reasonableness of a particular rate is still an essentially different issue which should be litigated in consideration of transportation factors such as cost of service,

> value of service, etc., which focus upon the particular commodity in question. (Footnote citations omitted.) All too frequently, however, shippers interested in obtaining a determination that a particular commodity rate or rates are unjust or unreasonable engage in the futile endeavor of contesting evidence pertaining to the carrier's need for increased overall revenue armed with little more than evidence concerning anticipated effects on movements of their particular commodities. As the Commission remarked in our previous notice, these efforts usually consume time needlessly and are essentially irrelevant in a general-revenue case. The answer to this problem is to avoid the wasteful practice of litigating issues in wrong proceedings. The proposed rule would require protestants to file their own complaints or, under the proper circumstances, petition the Commission to institute investigations concerning a particular rate or rates. In either event, the resulting proceeding would proceed to develop truly relevant evidence pertaining to revenue, transportation, and ratemaking factors relating to the specific rate in question. Docket No. 77-12, 20 F.M.C. 202, 205-206 (1977).

In the footnote citation omitted from the above quotation the Commission cited numerous authorities which held that general-revenue cases are essentially different from those involving specific commodities. Among the many cases are: *Chicago Board of Trade v. United States,* 223 F.2d 348, 351 (D.C. Cir. 1955); *Alcoa Steamship Co., Inc. - General Increase in Rates in the Atlantic/Gulf Puerto Rico Trade,* 9 F.M.C. 220, 222 (1966); *Matson Navigation Company - Rate Structure,* 3 U.S.M.C. 82, 87-88 (1948); *Wool Rates From Boston to Philadelphia,* 1 U.S.S.B. 20, 21 (1921); Locklin, *Economics of Transportation* (Irwin, Inc. 7th ed. 1972), pp. 421-422.

Even if this case were an individual-commodity investigation rather than general-revenue, the law is not clear that the Commission could depart from recognized principles of ratemaking and order rate reductions because particular businesses or industries claimed hardship. PRMSA cites a number of these cases holding against such orders in its opening brief (p. 156).[31] This entire area of law concerning how far a transportation regulatory agency can determine reasonableness of rates (usually individual rates) is not free from confusion, however. See discussion in Locklin, *Economics of Transportation,* cited above, pp. 445-447. That author, after observing that the I.C.C. had, in some specific commodity cases, ordered reductions to relieve the problems of a

[31] These are: *Eastbound Intercoastal Lumber,* 1 U.S.S.B. 608, 623 (1936); *Puerto Rican Rates,* 2 U.S.M.C. 117, 119 (1939); *Increased Rates on Sugar,* 7 F.M.C. 404, 413 (1962); *Pacific Coast/Puerto Rico Rate Increase,* 7 F.M.C. 525, 534 (1963); *Matson Navigation Co. - Rates on Pallets,* 7 F.M.C. 771, 772, 775 (1964).

particular business or industry, also observed that many other cases were opposed and concluded:

> The general conclusion to be drawn from these cases is that although the Commission sometimes recognizes the economic and social effects of certain rates, it is on insecure ground if it modifies rates otherwise reasonable out of deference to these consequences. To give weight to considerations of welfare, economic policy, and the like would hardly be consistent with the statement of the Supreme Court that the standards set up by the Interstate Commerce Act are "transportation standards, not criteria of general welfare." Locklin, p. 447 (footnote citation omitted.)

BIE takes strong issue with respondent TMT/GCML which has argued that specific-commodity issues are not relevant in general-revenue cases. BIE develops a well-researched discussion of relevant law which elaborates upon the necessity to consider the interests of the public and allows agencies to utilize a zone of reasonableness so that agencies can select a rate within that zone which will reflect the proper balance between investor and consumer. (BIE opening brief, pp. 77-82.) (This position is interesting coming from BIE since BIE earlier advocated a single, fixed rate of return rather than a range like Dr. Silberman's range of 19-20 percent.) BIE also quite properly recognized a line of cases which establish that a carrier or utility must be allowed to earn a decent return comparable to other industries in order to maintain the quality of its service, otherwise the public suffers later from higher rates, reduced services, or even lack of service. (This, again, is interesting as applied to the carriers in the Puerto Rican/V.I. trades since over half of their fleets consist of ancient World War II ships.) (See Sea-Land's opening brief, p. 8, citing Dr. Nadel's direct testimony, p. 33, table 7.)

Having expressed the above principles well, however, BIE concludes that carriers are entitled to make earnings comparable to those earned by other U.S. corporations having similar risk and that no reductions should be ordered unless they would prevent "severe and harmful economic dislocation." (BIE opening brief, p. 82.) Such dislocation, however, has not been shown on this record, according to BIE.

Even if BIE's contention that "severe and harmful economic dislocation" must be shown to justify lowering a carrier's otherwise reasonable rate of return, I note that the bulk of the cases cited by BIE are either individual-commodity cases or utility cases. I know of no purely general-revenue case before the Commission in which the Commission has ordered a reduction of a tariff across-the-board because a number of individual shippers have contended that individual rates were harmful. However, as Locklin observes, in a case BIE cites, this Commission has in at least one individual commodity rate case followed a doctrine of permitting high rates on luxury items to subsidize low rates on food and subsistence items and in the Puerto Rican trade. See *Reduced Rates on Autos - North Atlantic Ports to Puerto Rico,* 8 F.M.C. 404 (1965). Moreover, the Supreme Court has permitted an agency to reduce a carrier's rates below compensatory levels in the public interest provided, however, that the carrier was permitted an adequate return from its traffic as a whole. This is the famous case of *Baltimore & Ohio Railroad Co. v. United States,* 345 U.S. 146 (1953) (reduced rates on fresh fruits and vegetables prescribed by the I.C.C.).

What the above discussion shows is that there might be some relief available to the individual shippers if they would concentrate on seeking individual commodity rate relief or if their problems fell in the limited area of the Commission's and Supreme Court's decisions in *Reduced Rates on Autos* and the *Baltimore & Ohio* cases, cited above. Even without litigation, however, as the many current tariff pages filed with me by respondents show, and as Sea-Land contends, general rate increases do not hold up uniformly because individual shippers often negotiate roll-backs on the commodity rates which concern these shippers.

GVI/PRMA develops a similar discussion on applicable law to that presented by BIE. (See GVI/PRMA opening brief, pp. 128-135.) As did BIE, GVI/PRMA argue cogently that analogous case law holds that this Commission should consider factors other than cost of service, such as the impact on the economy, and should strive to fix the lowest reasonable rate of return. Again, most of the cases cited are utility cases but there are some I.C.C. cases and GVI/PRMA also cites another F.M.C. decision in which this Commission recognized that it would permit higher rates on certain items in a tariff to support lower rates on subsistence items. See *Reduced Rates on Machinery From U.S. to Puerto Rico,* 10 F.M.C. 248, 250-251 (1967). I think it is interesting, however, that after discussing all of this precedent and contending that the record shows specific economic hardship on individual shippers as well as general adverse effects on the economies of Puerto Rico and the Virgin Islands, in the final analyais, GVI/PRMA's case rests upon its evidence, discussed earlier, that PRMSA should be limited to no more than a 15 percent rate of return, that its cargo volume and revenue projections are too pessimistic, and that its forecasted expenses, especially for fuel, are overstated. If all that is so, what does one do with the evidence of economic hardship, assuming it is probative? Is one supposed to find that all GVI/PRMA's rate of return and related technical evidence passes over the line between non-persuasive and persuasive not on its own merits but because of the additional consideration of economic hardship? I do not mean to downplay GVI/PRMA's concerns over increased costs in ocean transportation. No one welcomes cost increases and the continual inflationary spiral under which our economy has been groaning for so long. However, GVI/PRMA, besides arguing that the Commission should set the lowest fair rate of return within a zone of reasonableness,[32] presumably 15 percent put forth by their witness Brennan, do not specify why Mr. Brennan's study nor Dr. Andic's alternative forecasting methodologies should be considered to be more reliable than any of the carriers' or BIE's corresponding technical evidence merely because of evidence of adverse economic impact, again assuming that such evidence is persuasive. (I note that the other active protestant in this case, DTPTC, did not bother to argue the issue of economic impact but confined itself to the technical rate of return and projection issues.)

I think that what I have just said corroborates my earlier observation that evidence of specific economic harm is far more relevant to an individual commodity rate case or perhaps to a case involving an investigation of a carrier's tariff structure, i.e., relationship among different rates in the tariff, to determine if there is some way in which value-of-service factors would warrant individual rate adjustments. However, this is not that type of case nor, for that matter, was this case docketed to determine whether there was any way in which carriers could increase their productivity, i.e., improve their efficiencies, so as to absorb some of the increases in costs which they are experiencing owing to the inexorable march of inflation.[33] Even GVI/PRMA do not deny that PRMSA and the other carriers need some rate increase (although on brief GVI/PRMA now argue that TMT's and perhaps even GCML's increases should be disapproved for failing to sustain their burden of proof (GVI/PRMA reply brief, p. 106; opening brief, p. 128).) Their position is that the rate increases should be reduced to

[32] This principle, namely, selecting the lowest possible rate of return in a zone of reasonableness, while sounding appealing, appears, however, to conflict with another idea that various authors espouse, namely, the desirability of adjusting allowable rates of return to motivate carriers or utilities to improve their efficiencies. In other words, if a carrier is being operated inefficiently, a regulatory agency may hold its allowable return to a lower point whereas an efficiently-run carrier may be permitted a higher return within the zone of reasonableness. This proceeding is not designed to question the carriers' efficiencies but, considering the extreme age of the carriers' combined fleet in the Puerto Rican trade, a holddown to the lowest possible rate of return might not take into account the carriers' inability to offset inflation with increased productivity, not to mention the carriers' ability to replace their aging ships. For a brief discussion of the idea of adjusting allowable rates of return to motivate improvements in efficiencies, see Bonbright, *Principles of Public Rates*, pp. 262-265.

[33] Before everyone jumps all over this decision in exceptions, calling this observation "dicta," I will note that there is no evidence or suggestion that any carrier is inefficiently run. Indeed, it would be astonishing if PRMSA, owned by the Government of Puerto Rico, had a policy of oppressing the welfare of its own citizens. There is no suggestion of any such idea by anyone. What seems to be more likely is the probable fact that PRMSA, like the other carriers, is employing ancient ships, and is experiencing the impact of inflation which it cannot absorb without further endangering its ability to remain financially visible and that PRMSA believes that unless it can seek to maintain a certain revenue and income position, the people of the Commonwealth may be faced with the prospect, as BIE observed, of reduced service or decline in quality of service.

something like 11.2 percent so as to give the carriers a rate of return not to exceed the 15 percent which their witness Brennan espoused.

Although my above discussion indicates that there may be little that this particular proceeding can do to relieve the economies of Puerto Rico and the Virgin Islands when the record shows that GVI/PRMA's alternative evidence does not withstand careful analysis and is less persuasive generally than the evidence presented by the carriers (with the possible exception of the TMT problem discussed above), the Commission may, of course, feel otherwise and may wish to do something in this proceeding that would specifically address itself to the people who testified in this case in St. Thomas and in San Juan. Therefore, I commend to the Commission's attention the summary of testimony set forth in the briefs of the parties (GVI/PRMA opening brief, pp. 118-128; BIE opening brief, pp. 83-87; PRMSA opening brief, pp. 143-156).

I cannot, in the brief time allotted to me, describe in much detail the testimony of the witnesses who appeared in St. Thomas and in San Juan. The briefs of all the parties, cited above, give a good overall description, however. Generally the testimony demonstrated a great concern over increases in prices, especially increases in the cost of ocean transportation on which the two islands so vitally depend. The witnesses all appeared to be most sincere in their beliefs and in certain instances the particular rates with which they were concerned (e.g., Ms. Creque's comparison of rates from Japan compared to rates from the U.S.A. mainland on certain types of automobiles) were somewhat amazing. GVI/PRMA, in their brief, summarize all of this economic testimony and argue that it shows persuasively how harmful the increases in ocean freight rates are to the individual businesses and the economy of the islands generally. However, other observers reach different conclusions. BIE, for example, although conceding that the economic testimony indicating that adverse impact is "generally valid," (BIE opening brief, p. 87), believes the testimony to show that ocean-rate increases are not the entire story, by any means, as far as adverse impact is concerned in an inflationary environment. BIE states:

> Ocean freight rates, like most other costs, have increased dramatically over the preceding years. Inflation is a fact of life. However, as noted above, the Bureau believes that something more than a suggestion that increased freight rates, like increased costs of all varieties, will contribute to the overall rise in costs and prices is necessary to compel a reduction in what would otherwise be considered a fair rate of return for the respondent carriers. (BIE opening brief, p. 85.)

Although BIE pointed out some technical deficiencies in the general economic impact testimony given by Mr. Castillo, President of PRMA, and by Dr. Francis, a well qualified economist testifying on behalf of GVI, PRMSA points out greater deficiencies in the testimony of these and other witnesses (PRMSA *reply brief, p. 105, with references contained therein*). Sea-Land points out similar deficiencies. Generally PRMSA points to evidence showing that many of these businesses are in better financial shape than the carriers (and thus presumably better able to absorb inflationary cost increases than are the carriers). PRMSA describes in detail how the Virgin Islands suffer from a variety of economic problems of which cost of ocean transportation is only one (e.g., failure to diversify, heavy reliance on the tourist industry, failure to generate backhaul cargo). PRMSA argues that these deficiencies in the Virgin Islands' economies have led to the demise of carriers serving the Virgin Islands. (I note that the Virgin Islands can be served by foreign carriers, as an exception to the cabotage laws, yet this fact does not seem to ameliorate their problems.) PRMSA also cites evidence it introduced showing negligible increases on certain food items attributable to ocean freight rate increases, problems in the distribution system in the Virgin Islands, and evidence showing that the economy is too complex and is affected by too many factors to single out ocean rates as a cause of economic hardship. (PRMSA's opening brief, pp. 150-151.) PRMSA shows another side to the oral testimony given in St. Thomas and in San Juan. (PRMSA's opening brief, pp. 151-156.) First, PRMSA argues that only one witness in St. Thomas (Ms. Creque) brought relevant documents with her to the hearing, documents which had been requested through counsel for GVI/PRMA, earlier.[34] But aside from that omission, PRMSA shows that the testimony also indicates that the various businesses represented by the witnesses were doing better financially than any of the carriers whose rates are under investigation. Even as to Ms. Creque, who runs an automobile dealership in the Virgin Islands (and, incidentally, I found Ms. Creque to be an exceedingly impressive witness), the problems from which she suffers cannot be reduced simply to increases in ocean freight rates (e.g., heavy local taxes, GM's increases in prices, high financing rates). Other witnesses were shown to suffer from a variety of problems, again not related to ocean freight rates.

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[34] Both PRMSA and Sea-Land ask me to apply sanctions against some of these witnesses because of their failure to bring relevant documents to the hearing so as to permit thorough cross-examination. I specifically advised the parties that I would consider sanctions upon request, to ensure that the witnesses would be prepared to answer questions. The sanctions now requested, namely, specific adverse findings and preclusionary rules, seem excessive and unnecessary. I note the great pressures under which all parties operated and have little desire to punish the well-intentioned residents of the Virgin Islands when it is not clear that they were at fault. I do note their failure as well as the effective cross-examination which was conducted notwithstanding the lack of documents but I cannot see how such sanctions are really necessary in view of the effectiveness of the examination. The failure to bring the documents or otherwise be prepared does, however, leave me with the impression that the documents would confirm the carriers' contentions, after consideration of evidence which PRMSA and Sea-Land did elicit during cross-examination.

None of the above discussion is intended to show lack of concern for these witnesses. I believe, however, that it confirms what I have said above, i.e., that even if high ocean freight rates were the main problem affecting them (and this was by no means clearly shown), their testimony would be much more relevant in an individual-commodity rate investigation, not a general-revenue case. No matter how impressed I was by Ms. Creque, for example, I do not see how I can convert GVI/PRMA's rate-of-return and cargo volume and cost projections, which have so many inherent defects described above, into reliable studies merely because Ms. Creque or Mr. Jacobson, another exceedingly impressive witness who manufactures garments in Puerto Rico, would welcome rate reductions. Moreover, especially in the case of Mr. Jacobson, an important manufacturer, I do not see why PRMSA cannot negotiate with him to assist him competitively rather than face him as an opposing witness in a general-revenue case. It was obvious at the hearing in San Juan that PRMSA, a government-owned carrier, treats citizens of Puerto Rico (who are also American citizens) with great respect and deference. It would make no sense for PRMSA to price one of its best customers out of the market.

I must conclude my limited discussion with an expression of sympathy for residents of the Virgin Islands and Puerto Rico who, like all of us, are suffering from the aggressive inroads of inflation but who have a greater dependence on ocean transportation. However, I cannot see how this proceeding is the appropriate vehicle to afford them relief and must conclude with the observation that I have made before, namely, that individual shippers generally should devote their efforts to relief in other than general-revenue cases, as a myriad of Commission general-revenue cases in the past have repeatedly shown. I hope, as with all Americans, that our country can defeat inflation, which is their real problem as it is with the carriers, and that in the meantime consideration can be given to an appropriate type of proceeding or negotiation for them. Perhaps the best way to emphasize my point regarding the difference between a general-revenue and single commodity rate case is to refer to the lengthy quotation from the Supreme Court's decision in *Aberdeen & Rockfish R. Co. v. SCRAP,* 422 U.S. 289, 311-314 (1975), contained in TMT/GCML's opening brief, pp. 27-28. After drawing the distinction between the two types of cases, the Court approved an I.C.C. order which invited parties complaining about individual rates or groups of rates to utilize different administrative remedies than general-revenue investigations. The Court then stated:

> [U]nder the Louisiana case, the general rule has been that the ICC may confine its attention in general revenue proceedings almost entirely to the need for revenue and to any other factors that relate to the legality of the general increase as a

whole; and it follows a fortiori that if attention is given to other issues, that attention may be of a limited nature.

THE MATTER OF USE OF CURRENT OR REVISED DATA IN LIEU OF CARRIERS' PRE-DOCKETED DATA

I have alluded to a problem which has occurred in previous rate cases both under P.L. 95-475 and before, which problem has proven to be troublesome and for which a definitive answer seems elusive. This concerns BIE's contention that it is essential in rate cases, which must be expedited under P.L. 95-475 time schedules, that carriers and all parties confine themselves to the carriers' pre-docketed cases submitted to the Commission and that other parties essentially do likewise. In other words, BIE objects to the admission of any evidence such as current data which is dated after the original submissions except perhaps for corrections of obvious arithmetic errors. BIE believes that this problem is so critical for all Commission rate cases that "it is essential that a definitive statement resolving this question be issued in this proceeding." BIE reply brief, p. 56.

I do not doubt that this problem has been a recurrent thorn in the sides of litigants in Commission rate cases and that a "definitive" statement would be very helpful. However, I am not sure that a statement engraved in cement can be fashioned in this case or in any case. Unfortunately, time and other reasons do not permit me to give the matter the attention it deserves but, as I have said, the Commission, which enjoys a 43-day period (from August 14 to September 26, 1981) between the last pleading and final decision may be able to improve upon my suggestions.

All active parties have commented on BIE's suggestion but there is no unanimity of opinion. Even protestants do not agree with themselves. Respondents TMT/GCML support the idea of restricting the case to consideration of facts presented by carriers and to resist the temptation of looking at later events to use hindsight as a means to criticize or overturn carriers' cases. (TMT/GCML reply brief, p. 7.) Protestant DTPTC supports the idea of holding carriers to the submissions they made with their general rate increases. (DTPTC reply brief, p. 6.) But respondents PRMSA and Sea-Land, for once joined by protestants GVI/PRMA, reject such a rigid position. (PRMSA's reply brief, pp. 44-53; Sea-Land's reply brief, pp. 19-20; GVI/PRMA's reply brief, pp. 91-94.) These parties, in varying degrees, argue in favor of some degree of flexibility instead of what has been called the BIE's "freeze" or "frozen case" theory.

BIE mounts a very well crafted and sincerely argued appeal that for the sake of making P.L. 95-475 work the way it was supposedly intended, the Commission definitively establish that all cases will be, in effect, frozen to the pre-docketed submissions and that later current data not be allowed to enter the record. Its arguments are set forth in detail in its opening brief, pp. 38-48. It relies upon statements made by Commissioners to the congressional committee before enactment of P.L. 95-475 as well as Commission precedent and practical considerations.

All parties, even those opposing BIE's "freeze" theory, seem to agree that the basic principle of Commission rate cases is to hold the carrier to its original submissions on the apparent theory that the Commission is testing the reasonableness of the carrier's decision to file a general rate increase and should not allow the carrier to engage in *post hoc* rationalizations by introducing later operational data. However, an with any extreme position, adherence to it could lead to absurd results which PRMSA and GVI/PRMA show. For example, unless some allowance is made for major factual changes, for example, a lost ship or a discontinuance of an entire area of service, or a cancellation of a rate increase, all parties would be required to continue to litigate phantom issues. In other words, parties would continue to pretend that carriers should or should not be allowed a return on a sunken ship or compensation for expenses relating thereto or whether a general rate increase should continue to be litigated even when it has been canceled (as for example, Sea-Land's cancellation of the rate increases in its Canadian tariff under investigation). It is hard to believe that even BIE would argue that the Commission could not consider such major events but would prefer to waste its time determining whether rate payers should pay phantom increases or phantom expenses.

The problem is not with such obvious examples of major catastrophes or cancellation of tariff increases (although BIE still seems to refuse to consider the fact that Sea-Land did cancel its Canadian tariff increases which had been under investigation).[35] The problem, as usual, is with the gray areas. In this case, for example, PRMSA wants the Commission to consider events which occurred after it had filed its predocketed case, such as the delay in redelivery of the *PONCE* and the effect of Reagan budget cuts. (I have already decided earlier that I would consider the effects of the late delivery of the *PONCE* but that the evidence of the effects of the Reagan budget cuts was too speculative. Therefore, I cannot find that my comments in this troublesome matter should be considered as pure dicta.)

If BIE's rigid position were to be adopted, then I would have rejected considerable evidence as a matter of law because it was based

[35] But even BIE does not wish to litigate issues concerning PRMSA's projections under its *ATLANTIC BEAR* case since the *BEAR* apparently will not be acquired by PRMSA, as I have noted earlier. But this fact was not known until after PRMSA made its original filing on December 5, 1980. Even BIE does not expect everyone to litigate complicated issues about the poor *BEAR* while she was still in her cave and would probably never come out.

upon current data or data which developed after the case was docketed. For example, I would have had to reject Dr. Andic's alternative cargo volume and revenue projections as a matter of law because they were ultimately based upon a more recent actual year ending in March 1981 and the same holds true for her fuel cost projections which utilized March 1981 fuel prices as a base. I would even have to reject some of BIE's own witnesses' evidence, for example, perhaps even BIE witness's Fratter's recalculation of Sea-Land's cost inflation factor because she utilized data running through December 1980 or later, after Sea-Land had submitted its case. Indeed so extreme is BIE's position (or perhaps so principled is BIE) that it urges me not to consider evidence given by its own witnesses! (See BIE reply brief, pp. 55 n. 29, asking me not to consider testimony of three of the Bureau's witnesses, Straube, New, and Coleman relating to updated fuel prices.)

I find that BIE's position, no matter how tempting and easy, is simply too extreme. At the least, as has happened in previous rate cases (see, e.g., Docket No. 79-55, *Matson Navigation Co. - Bunker Surcharge*, 22 F.M.C. 276) allowance should be made for obvious mathematical or methodological errors (which BIE concedes) and for obviously better evidence which is not reasonably subject to dispute, as both the case cited shows and Sea-Land argues. I agree, as I believe do all parties, that it is essential to hold carriers to the fullest extent possible to their original cases submitted in justification of their rate increases. Otherwise we are not testing the reasonableness of the carrier's decision to file rate increases but rather are applying retroactive, *ex post facto* type decisionmaking. If we do that, why not simply wait until the end of the actual year and require an accounting based upon actual results? But this is not the basic theory of Commission rate cases and when such an idea has been applied, it was done only in connection with bunker surcharges under the Commission's discontinued program (but even then not fully abandoning the prospective nature of the case). In the legislative history portions to P.L. 95-475 and case law cited by BIE, no one said that there can never be any change to the carriers' original submission. For example, the House Report (cited in BIE opening brief, p. 40) stated that the carrier's financial data must "essentially be the data relied on by the carrier throughout the expedited hearing." Commissioner Morse told the congressional committee considering what became P.L. 95-475 that the carrier's financial data would have to be "essentially the date (sic) relied upon by the carrier throughout the expedited hearing." (BIE opening brief, p. 40.) Commissioner Moakley did state that "we limit the carrier to the financial information that he started with and he has to stay with it." (*Id.*, p. 41.) But then Chairman Daschbach stated that the carrier "cannot make major changes or additions to that evidence which would require further analyses, cross-examination and possibly, rebuttal." (*Id.*) Even before enactment of

P.L. 95-475, the Commission attempted to put restrictions on carriers' changing their original cases but still allowed some flexibility. In Docket No. 75-57, *Matson Navigation Co. - Proposed Rate Increases, etc.,* 21 F.M.C. 538 at 540, cited by BIE (BIE opening brief, pp. 44-45), the Commission stated that the test year projections submitted by the carrier with its initial tariff filing must be the "starting point" and "should be amended only in unusual circumstances." The Commission went on to say that the original figures "were the basis for the carrier's decision to increase its rates" and allowance of revisions "contravenes the Commission's policy of expediting general revenue inquiries and hinders effective participation by persons opposed to rate increases." (*Id.*) I conclude that although the legislative history emphasizes the need to hold carriers to their original cases to the fullest extent, it does not mandate an unbending rule of extremism in this regard and does not require the Commission to bury its head in the sand when major events occur later which are not reasonably subject to dispute and which make a carrier's original projections impossible of being a reasonable approximation of the future. Both GVI/PRMA and PRMSA, in near agreement for once, formulate a rule of reason. GVI/PRMA would allow carriers to revise their original justifications to the extent of offering probative, relevant evidence which could not previously have been proffered, of new facts that materially "impact upon" the issues under investigation, subject to the rights of opposing parties to test the new evidence in whatever manner would be appropriate. (GVI/PRMA reply brief, pp. 93-94.) PRMSA, elaborating upon the test which the Commission adopted in Docket No. 79-55 (from my Initial Decision in that case), would establish a "flexible rule of reason" by which the presiding judge could "balance the equities and decide the admissibility of the proffered data." (PRMA reply brief, p. 49.) Essentially PRMSA's rule would permit admission of largely uncontested data which was not subject to constant change if it were introduced early enough in the proceeding to allow all parties to test its reliability.

I do not know if it is possible to create a fixed rule in this case which will not have to undergo revision in some future case. Furthermore, such a rule change might better be promulgated in a rulemaking proceeding which would revise Rule 67 so that the entire public can offer its comments, not merely the parties to this proceeding. In this case, however, at the least I would admit and have admitted evidence if it makes obvious corrections to earlier errors and if the new facts are so major and not subject to reasonable dispute that they will make the carriers' projections no longer capable of being a reasonable approximation of the future and if, furthermore, other parties have had opportunity to offer their rebuttal evidence or arguments. Such was the case with the delayed return of the *PONCE,* a fact which is not subject to dispute and to the recalculations which PRMSA offered in time for them to be challenged. I also have considered the fact that Sea-Land has canceled its rate increases in its Canadian tariff, a fact beyond dispute, and has offered recalculations early enough before my decision for other parties to challenge. I have not, however, considered proffered evidence concerning Reagan budget cuts or pending court cases because they are too speculative, i.e., they are not sufficiently reliable and probative and do not permit me to make anything other than general, conjectural findings.

I agree that it would be extremely helpful and would relieve future litigants of much uncertainty, burden and expense if the Commission would announce a "definitive" cutoff rule for new evidence. Since, however, this particular matter has not been set down for determination in the Commission's Order and since the Commission has, in past cases, instructed me that my additional comments which were made in the spirit of helpfulness have been "dicta" and were not necessary to my decision (See Docket No. 77-19, *Consolidated Forwarders Intermodal Corporation,* 23 F.M.C. 905 (1981), I will confine myself to the rulings which I have made which I believe were necessary. As for a rule for the future, I commend to the Commission the formulations of GVI/PRMA, PRMSA, and Sea-Land, if the Commission chooses to adopt any of them or to institute a rulemaking proceeding to revise Rule 67.

ULTIMATE CONCLUSIONS AND CRITICAL RECOMMENDATIONS

Because of the enormous pressures imposed by the time restrictions described above, the massive size and scope of this case, and the mammoth briefs. I have been compelled to limit my discussion of the issues and to refer frequently to the briefs of the parties and to the portions of the parties' briefs with which I have agreed.[36] Since there are many hundreds of pages of briefs (GVI/PRMA's briefs alone totalling over 380 pages), it is impossible to discuss or even mention every matter raised by every party. Under different circumstances, I would have addressed many of the minor contentions in order to assist the Commission in resolving the issues that they raised if they reappear on exceptions. However, I have had to make a decision as to priorities in order to meet the tight time schedule and have therefore omitted discussion of contentions that I have found not to be material, i.e., whose resolution would not have affected my ultimate decision, no matter how interesting the particular contentions may have appeared to be in the briefs. In many other instances, furthermore, I have not found

[36] Moreover, because of the unprecedented time pressures in such a massive case, minor errors and inconsistencies might appear in this decision from time to time which I have not had full opportunity to screen out. The relevant portions of the briefs cited, however, should provide a ready resolution of any resulting confusion.

the proponents of these many minor arguments to have been persuasive after considering the particular rebuttals. Having travelled so far through such an enormous record in so short a time, however. I believe it is imperative that I summarize my ultimate conclusions and call the Commission's attention to matters which are critical to future rate cases conducted under the requirements of P.L. 95-475.

There are five critical matters that I must emphasize. The first refers to my basic evaluation of protestants' cases presented in this proceeding. The remaining four relate essentially to the great need for future reform if the Commission is to conduct rate regulation efficiently so that minimal cost will be imposed on all litigating parties. In short, these ultimate conclusions and critical recommendations are as follows:

(1) Protestants' cases have been tested and found wanting in most respects as compared to the more persuasive cases and rebuttal arguments and evidence presented by respondent carriers and by BIE.

(2) The Commission must amend and clarify General Order 11 in numerous critical respects in order to eliminate repetitive and unnecessarily expensive rate proceedings.

(3) The Commission should, in its Orders of Investigation, strive to specify issues and advise parties carefully as to the specific reasons why the Commission believes that a formal proceeding is necessary to explore any particular matter.

(4) The Commission should formulate an evidentiary rule as to if and when later evidence, current data, and the like can be entered into the record and considered after the case is docketed.

(5) The Commission should encourage shippers and carriers to negotiate individual rate problems on humanitarian or value-of-service principles under the *Baltimore & Ohio* and *Reduction in Freight Rates on Automobiles* doctrines to the extent they can be applied. In this way the Commission can call a halt to the unfortunate practice of encouraging individual shippers to spend their time needlessly in general-revenue proceedings where their evidence is almost invariably unrelated to the broad financial issues which are characteristic of those proceedings. I now briefly explain.

(A) Protestants (mainly GVI/PRMA) have been given a fair opportunity to present a reliable, effective case. However, in almost every major respect their evidence and arguments were shown to be significantly defective and ultimately incapable of offsetting the persuasiveness of respondent carriers' and BIE's cases.[37] In many instances

[37] This statement holds true for the major portions of GVI/PRMA's case as I have mentioned. However, despite the fundamental fact that they simply have not presented reliable and probative evi-

Continued

protestants GVI/PRMA utilize inherently deficient, *ad hoc* methodologies or attempt to rehabilitate their questionable evidence by employing innumerable ingenious arguments in huge post-hearing briefs, sometimes even abandoning or ignoring the rationale underlying the evidence itself in such efforts. This massive effort in their briefs, however, simply cannot elevate their evidence above its level of non-persuasiveness nor eliminate its many inherent deficiencies and its aura of *ad hoc* expediency. The major examples which illustrate the above statements are GVI/PRMA's evidence on the issues concerning PRMSA's cargo volume projections, fuel cost projections, the non-fuel, non-labor inflation factor, and GVI/PRMA's alternate calculation of an allowable rate of return. The first three areas were covered by GVI/PRMA's witness, Dr. Andic, a qualified economist whose productivity and resourcefulness are remarkable. However, Dr. Andic's alternative projection for PRMSA's cargo volume substitutes her *ad hoc* methodology, namely, use of a later period of time adjusted by questionable elevations, in place of PRMSA's market-survey methodology which has been shown in the past to be very reliable and which has been found to be sound by the Commission's staff. Moreover, she makes upward adjustments to her selected base period of time which are contrary to certain calculations made in her earlier testimony which was based upon a different methodology. Indeed, her second methodology, which appears to represent a second attempt to fashion an acceptable alternative projection to PRMSA's cargo volume forecast, incredibly arrives at exactly the same number of trailerloads (174,101) that her different methodology had produced in her earlier testimony, now apparently abandoned (but adopted by protestant DTPTC before its abandonment by Dr. Andic).[38] Dr. Andic's fuel-cost projections are inherently less sound than PRMSA's, bring based upon a limited time period in March 1981 as a base and an adjustment by trend-line analysis that has been persuasively shown by BIE's staff expert witnesses and by others to be naive and simplistic, and there is other evidence showing that PRMSA's reliance on an independent forecasting service was reasonable. (For a good summary, see PRMSA's reply brief, pp. 80-88.) In this area of fuel price forecasting, furthermore, I find the most typical of GVI/PRMA's approaches, namely, to seize upon current events and create an *ad hoc*

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dence sufficient to offset the justifications of the carriers and the persuasiveness of BIE's evidence, as my decision has shown, I believe that GVI/PRMA have made telling points in connection with such things as Sea-Land's gloomy cargo volume forecast in the North Atlantic, TMT's failure to explain the decline from 100,000 to 80,000 tons in its projection, PRMSA's attempt to quantify the effects of the Reagan budget cuts, Sea-land's Dr. Nadel's award of unprecedented premiums totalling 5 percent to reach a rate of return of 23.5 percent, and BIE's rigid, impractical position on freezing all evidence to time periods before the rate increases were filed.

[38] The serious flaws in Dr. Andic's revised forecast are cogently exposed in PRMSA's reply brief, pp. 68-70; 73-75.

methodology during the heat of litigation and try to persuade that such method is superior through lengthy but well crafted arguments on brief which ring with indignation and outrage. However, after the rebuttal arguments and evidence are thoroughly considered, it appears that GVI/PRMA's case is reduced to relying upon current uncertainty and methodologically unsound statistical adjustments in place of a far more thorough independent forecasting service. It comes down to the questions whether Dr. Andic should be relied upon more than DRI, Inc., are current data always a better base for forecasting than earlier data in such a complicated area, and can the superficially appealing arguments that PRMSA's actual oil prices have declined as of March 1981 because of a current oil glut be allowed to cloud sound and dispassionate forecasting. GVI/PRMA's invigorating emotional arguments in their reply brief (pp. 67-72) are emotionally stimulating but ultimately do not persuade me that PRMSA was wrong in relying upon DRI, Inc. Nor do they persuade me that the oil glut will continue forever or that PRMSA's forecasts cannot possibly be attained even as an approximation. Even as I write this, conflicting reports continue to come in. For example, the Washington Post of July 12, 1981, carried a front-page story which acknowledges that the Saudis are still trying to bring down OPEC prices (to their $32 per barrel as opposed to OPEC prices of $36 to $41 per barrel) but also states that production has declined this year, that spot prices "have recently been rising slightly, a sign the glut may be finally starting to dry up." This article, of course, is not evidence, but neither are the many emotional contentions made by GVI/PRMA that urge me to find that PRMSA's original forecast has become totally overtaken by events. As I said earlier, the oil situation is simply too volatile and erratic for anyone to seize upon any particular day or month for projection purposes (a situation possibly justifying restoration of something like the Commission's bunker surcharge approach for the future). GVI/PRMA, however, argue vigorously and forcefully to the contrary.

Finally, Dr. Andic's cost-inflation factor for PRMSA's non-fuel, nonlabor expenses was shown to be amazingly low (7.2 or 6 percent annualized), far below any other indicator, and to be based upon an index which is heavily weighed by food or fuels, giving unsound and distorted results, again after Dr. Andic had made her own adjustments.[39] GVI/PRMA's witness on rate of return, Mr. Brennan, while well qualified like all the expert witnesses more or less, is heavily influenced by ideas associated with the cost-of-capital rather than the comparable-earnings test, which latter test the Commission has adopted in General Order 11 and seems to have given testimony in another rate

[39] PRMSA reply brief, pp. 76-80, and its references, provides another good summary of the shortcomings affecting Dr. Andic's analysis.

case involving a utility which is inconsistent with portions of his present testimony. More importantly, perhaps, based on his testimony, GVI/PRMA struggle unsuccessfully to persuade that the four water carriers are less risky than utilities (such as even AT&T) and that, accordingly, no factors for risk should be allowed for such carriers above his reference group of comparable industrial companies. On brief, GVI/PRMA strive to save this shaky evidence with a new rationale based on the idea of preservation of the integrity of assets which their witness himself did not even articulate. Moreover, to support their arguments against allowing any adjustments to PRMSA's rate of return on account of risk, GVI/PRMA consumed time not in attempting to make their own measurements of risk by recognized objective techniques, three of which were employed by PRMSA's witness, Dr. Silberman, to show high business risk for PRMSA, but instead in continually quibbling about the measuring techniques. Furthermore, even though PRMSA's witness and PRMSA, as well as BIE's witness Copan and Sea-Land's expert witness Nadel, all seek no allowance for PRMSA on account of financial risk caused by PRMSA's total debt capitalization, GVI/PRMA make arguments about supposed harm to the public from this type of capitalization which are not only irrelevant under the circumstances but are based upon a misapplication of the so-called "prudent investment standard." Finally, even when GVI/PRMA have made telling points with which I have agreed to one extent or another, the necessary changes to the carriers' cases do not affect the outcome of the case. For example, Sea-Land has adjusted for its unduly gloomy decline in volume in the North Atlantic and still shows its increases to be reasonable, PRMSA's speculations as to the Reagan budget cuts has been rejected but PRMSA still shows the justification for its rate increases, I have rejected BIE's "frozen case" theory to allow consideration of Dr. Andic's use of current data but she fails to persuade, I have rejected consideration of Sea-Land's Dr. Nadel's total of five percent premiums added onto his 18.5 percent recommended rate of return, yet other evidence supports Sea-Land's contention that its increases are within a zone of reasonableness, I have rejected Dr. Silberman's "surrogate" G.O. 11 formula, as GVI/PRMA urge, and have found little support for his method of elevating benchmark rate of return to compensate for PRMSA's tax-exempt status, yet other evidence supports a rate of return for PRMSA of 17 to 18 percent or so. However, as to the remainder of their case concerning their alternative calculations for rate of return, cargo volume and revenue projections, fuel cost projections, and general inflationary factors, as I have indicated, the overall conclusion to which I am inescapably drawn is that GVI/PRMA are struggling to eradicate the effects of a well-prepared and well-presented case by PRMSA by improvising new methodologies and arguments as the proceeding goes on, hoping to find one methodology or argument that will ultimately appear to be persuasive. I find their efforts to have been diligent, massive, and resourceful but increasingly expedient in appearance and ultimately unsuccessful. In short, GVI/PRMA were unable to show that PRMSA had utilized defective methodology and had prepared a defective, irresponsible case when it decided to file its general rate increases. I think that GVI/PRMA and DTPTC have had a fair opportunity to demonstrate the superiority of their cases or at least the failure of PRMSA and the other respondents to mount a persuasive case but they have not succeeded notwithstanding the amazing zeal and ingenuity poured into 380 pages of post-hearing briefs by GVI/PRMA's counsel nor even the fact that GVI/PRMA have had the benefit of several months of actual data and hindsight (the use of which, however, is subject to serious attack, especially by BIE, as a matter of law).[40]

(B) It is imperative that the Commission, once and for all, clarify and revise General Order 11 in certain critical areas. Otherwise there will be no end to the continual, repetitive litigation of rate-of-return issues which unfairly burdens the Commission's staff, carriers, protestants, and ultimately the public. There simply is no reason why there should have been six different calculations of an allowable rate of return after so many years of Commission rate regulation and especially after the enactment of P.L. 95-475, which specifically instructed the Commission to end such wasteful litigation by issuing and revising appropriate regulations. However, despite the new law and despite the issuance of a revised General Order 11, litigating parties are still arguing about such basic things as which group of companies should be used for comparison, what time periods should be studied, what adjustments should be made for risk, etc. The Commission could perform a great service and confer tremendous savings in litigation costs if it could revise and clarify General Order 11 to select one standard group of comparable industries or companies, one standard recognized source (such as FTC-QFR, Value Line, Standard and Poor's, etc.) and a standard time period for comparison (e.g.. last 5 years, 4 years, 3 years). Also, the Commission should clarify how its rate-of-return formula derived from

[40] In all fairness, I should mention that PRMSA has itself sometimes struggled to elevate shaky evidence from the speculative to the probative. This occurred when PRMSA's witness, Mr. Lopez-Mangual, tried strenuously to quantify the effects of the Reagan budget cuts on PRMSA's cargo volume forecasts. Among other things, Mr. Lopez-Mangual tried to use Census data which he apparently did not realize contained inexplicable inaccuracies and then also attempted to employ another study which varied from his own. Other serious errors affected his efforts as both BIE and GVI/PRMA have cogently shown. (See BIE's opening brief, pp. 48-54; GVI/PRMA's reply brief, pp. 58-64.) This shows that if anyone struggles to find specific evidence which simply is not there, one resorts to questionable methodologies and fails to persuade whether one testifies for PRMSA or for GVI/PRMA. I have accordingly found that I cannot rely on PRMSA's speculative evidence concerning the Reagan budget cuts no matter how gloomy the people of Puerto Rico find them to be any more than I can rely upon GVI/PRMA's speculations about what will be the price of oil as of February 28, 1982, the end of PRMSA's forecast year, or the average price of oil during PRMSA's total forecast year.

General Order 11 is to be applied to data published by independent reporting services which do not follow General Order 11 accounting methods or terminology. Much needless argument has ensued between BIE and PRMSA, both of whom presented impressive evidence, over this point and both of whom believed they were following the present General Order 11. Attention needs to be given, furthermore, to the special status of a tax-exempt carrier like PRMSA when applying the formula and to the problem of distortions in a comparable-earnings study caused by artificial elevation or reduction of a rate of return because of the failure to separate nonoperating income and assets from operating income and assets when using independent reporting services. The Commission should decide whether the distortions introduced as a result of comparing only total invested capital and income without separating nonoperating assets and incomes is a permissible degree of imprecision on the theory espoused by BIE that companies compete in the marketplace on a total-capital basis. This record shows that distortions will most likely be present in a comparable-earnings study performed without such a separation but does not show the degree of the distortion as far as I can tell.

(C) It is imperative to follow the requirements of P.L. 95-475 when the Commission frames its Orders of Investigation, not only by specifying particular issues but by explaining why the Commission needs more evidence on these particular issues and, as seen in this case, why a particular rate case must be the vehicle, rather than general rulemaking, to obtain such evidence and resolve such issues if the problems relate more generally to defects in Commission regulations like General Order 11. Otherwise, by merely identifying issues and reciting general allegations made by protestants in their protests, as was done in the present Orders, the Commission is not really narrowing the issues but is rather perpetuating the old practice of inviting litigants to make all manner of argument and develop all types of evidence under broad rubrics such as the issue as to "what is an appropriate rate of return" or whether cargo volume revenue and cargo volume projections are "sufficiently accurate." In this proceeding, because no one could be sure what was troubling the Commission after its staff had analyzed the carriers' cases for 60 days or more and had studied the protests, the parties covered themselves with innumerable lines of evidence and arguments. All this was undoubtedly very expensive as well as exhausting in view of the very tight 60-day hearing schedule. But this type of litigation, which had plagued previous Commission rate cases, was supposed to have ended with the enactment of P.L. 95-475. Clearly it has not ended. It is, moreover, particularly important to determine whether an adversary-type, *ad hoc* proceeding like the present massive investigation is a better procedure to resolve complicated General Order 11 or Rule 67 issues rather than a general rulemaking proceeding or a proceeding not conducted under the strict time restrictions imposed by P.L. 95-475. By choosing the P.L. 95-475 approach to resolve complicated industry-wide issues, the Commission is forcing itself and the litigating parties to fashion solutions to complex accounting and methodological problems which affect all rate cases in a frenzied pressure cooker rather than in a more carefully planned rulemaking or other type of proceeding where the parties and the Commission would have time to breathe.

(D) It is imperative that the Commission formulate a rule concerning the admissibility of evidence or data that post-dates the carrier's pre-docketed evidentiary submissions. In other words, can a party utilize current data or post-docketed evidence and, if so, under what circumstances,. BIE argues that it is critical for parties to obtain a "definitive" rule of procedure from the Commission. In this proceeding, BIE apparently chose to disregard all data or evidence relating to time periods occurring after the carrier's original pre-docketed evidentiary submissions even to the extent of disregarding the indisputable fact that respondent Sea-Land has permanently cancelled one of the rate increases set down for investigation, namely that in Sea-Land's Canadian tariff, and even to the extent of urging me to disregard certain testimony given by BIE's own staff witnesses. However, other parties, notably PRMSA, GVI/PRMA, and Sea-Land, utilized later evidence. I employed a rule of reason to allow corrections of obvious errors or consideration of major factual changes which were not reasonably subject to dispute, would make carriers' projections not reasonably attainable even as approximations, and which could be challenged before the record closed. Whatever the rule, however, the Commission cannot let its proceedings be tied up with needless, time-consuming arguments over such evidence and cannot allow one party to proceed under one set of rules such as those BIE advocates and actually employed [41] while others proceed under another set. This problem continues to appear in successive rate cases under P.L. 95-475. If rate cases are to proceed efficiently under the new law, the Commission must provide guidance so as to prevent recurrence of the present situation in which, among other problems, BIE felt that the statute did not require it or its staff witnesses to consider later evidence. Since I have no law clerk or staff personnel assigned to assist me, this means that I have been deprived of the benefit of the staff's evaluation of such things as

[41] As I have mentioned earlier, however, even BIE did not follow its own strict position completely. Thus, BIE urged me to consider PRMSA's case on the basis of its Trans-class vessel projections rather than those made under the *ATLANTIC BEAR* situation although PRMSA apparently did not know that the *BEAR* would never become available until some time after it had submitted its original evidentiary case. I do not see how the fact that the *BEAR* became unavailable is any different from the fact that Sea-Land cancelled the rate increases in its Canadian tariff or that the *PONCE* was delayed in redelivery to PRMSA except that the effects of the latter two factual changes had to be evaluated at a later time in the proceeding.

the effects of Sea-Land's cancellation of the rate increases in its Canadian tariff or the delayed redelivery of PRMSA's vessel, the *PONCE*, and moreover, so might be the Commission, since both the Commission and its administrative Law judges are on the decisionmaking side of the Administrative Procedure Act. If the Commission agrees with BIE's position that no evidence should be considered if it covers time periods occurring after the carriers' original evidentiary submissions 60 days or more before the rate changes or before the docketing of the proceeding, then staff evaluation of such evidence was unnecessary. However, if the Commission does not agree with BIE, then the staff in future cases will be obliged to reckon with later factual changes and give testimony where appropriate.

(E) It is imperative that the Commission, once and for all, save individual shippers with particular problems about individual rates from wasting their time and money in the wrong type of case where they beat their heads against a wall of general-revenue issues with tools which are designed to bring specific commodity rate relief. For over 20 years now I have seen individual shippers march into purely general-revenue cases and leave empty handed and the practice goes on, although the Commission tried to advise them in the past that general-revenue cases were ill suited to alleviate their particular individualized problems. It is once again frustrating and deeply disturbing to hear individual shippers and consumers, especially the elderly and retired living on fixed incomes, and realize that they are in the wrong type of case. As a service to these citizens who demonstrated sincere concerns, the Commission ought to encourage individual negotiations between shippers and carriers seeking to adjust rate relationships in the tariffs and work with the carriers, if necessary, to see if any individualized relief can be devised under the doctrines enunciated in the *Baltimore & Ohio* and *Reduction in Freight Rates on Automobiles* decisions to the extent those doctrines can be applied. This idea is worth pursuing especially if the Reagan budget cuts will adversely affect the food stamp program and presumably the ability to import food into Puerto Rico, as PRMSA contends. In any event, since the record shows that the respondent carriers (with the possible exception of TMT which has not adequately explained certain areas of its case, as I mentioned above) have shown that their projections are based on reasonable methodologies and are as reliable as can be expected when forecasting more than a year into the future, they have shown justification for their 16-18 percent general rate increases. Moreover, the various calculations performed by the carriers, as adjusted to satisfy BIE's objections or to factor in indisputable facts such as the cancellation of the increases in Sea-Land's Canadian tariff or the delayed redelivery of the *PONCE* to PRMSA, have corroborated the basic finding that these increases will not exceed a reasonable rate of return level. Therefore, as a consideration to the shippers, businesspersons, and consumers who testified in this proceeding, I recommend that the Commission announce that it will encourage individualized attention to particular rate problems and will lend its good offices to any reasonable attempts to adjust any particular individual rate that appears to be causing problems. In any event, however, the Commission owes it to individual persons who are concerned over particular rates to save their time and money by steering them to negotiations or to proceedings in which their individualized rate evidence is relevant, i.e., individual commodity rate negotiations or proceedings, not general-revenue investigations.

This final recommendation which focuses on individual rate problems and rate relationships in the tariffs is not meant to disparage the economic impact testimony proffered by GVI/PRMA. It is rather designed to direct attention to areas where relief might be available and away from intangible abstract propositions which do not offer easy solutions. I do not necessarily disagree with GVI/PRMA's statement that "the Commission should consider the economic impact as one element of its equation, and set the lowest feasible rate of return in view of the economic impact of rates upon Puerto Rico and the Virgin Islands." (GVI/PRMA's reply brief, p. 118.) The problem arises, however, when one tries to fix the "lowest feasible rate of return" given the imprecise measuring tools available to any rate-of-return expert. The "lowest-feasible-rate-of-return" approach, while it sounds appealing, is not easy to apply. Moreover, it is not necessarily a panacea since it sidesteps real problems. For example, such an approach provides no incentive to a carrier to improve efficiencies. More importantly, perhaps, it does nothing to deal with what appears to be the real problem in these trades, namely, how to offset the effects of creeping inflation by improving productivity given so many old ships in the various fleets and how to attract the necessary money to replace these ships given the tendency of the dominant, government-owned carrier PRMSA to keep a lid on rate levels. It would be strange to discover that this latter carrier which was established by the Government of the Commonwealth of Puerto Rico to ensure continued water transportation services to the people of the Commonwealth, did not already pursue a policy of maintaining rates at the lowest feasible overall levels consistent with the ability of the economy of the Commonwealth to absorb rate increases. As history shows and as certain testimony in this proceeding has indicated, carriers serving the Puerto Rican trade have not been able to maintain rate levels that provide them with reasonable earnings, the trade simply not being lucrative. For example, PRMSA lost $671,000 in its fiscal year ending June 29, 1980, and from June 29, 1980 through January 25, 1981, it lost $1,260,000 before interest, $10,777,000 after interest. To some extent, therefore, whatever the Commission can do by way of regulation to keep profits down to reasonable levels has already been more than accomplished by the realities of the marketplace.

(S) NORMAN D. KLINE
Administrative Law Judge