FEDERAL MARITIME COMMISSION

DOCKET NO. 79-68

MILITARY SEALIFT COMMAND,

DEPARTMENT OF THE NAVY

v.

MATSON NAVIGATION COMPANY, INC.

ORDER

January 26, 1982

This proceeding was instituted as a result of a complaint filed by the Military Sealift Command (MSC) against Matson Navigation Company (Matson), alleging that Matson charged and collected rates that were unjust and unreasonable in violation of section 18(a) of the Shipping Act, 1916 (46 U.S.C. § 817(a)) and requesting reparations therefor. The complaint relies on the Commission's findings in Docket No. 76-43—*Matson Navigation Company Proposed Rate Increases in the United States Pacific Coast/Hawaii Domestic Offshore Trade*, 21 F.M.C. 532 (1978) and 21 F.M.C. 987 (1979) (Order on Reconsideration).[1]

The first cause of action alleged in the complaint seeks reparations in the approximate amount of $59,000 resulting from the general increase in rates in effect from August 2, 1976 to July 31, 1977, found to be unjust and unreasonable in Docket No. 76-43. The second cause of action seeks reparations in the approximate amount of $100,000 resulting from a subsequent general rate increase implemented on July 31, 1977, part of which included rates determined to be unlawful in Docket No. 76-43.

Matson filed an answer to the complaint denying that reparations are due MSC under either cause of action and asserting eight affirmative defenses. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) intervened in the proceeding.

[1] Docket No. 76-43 was a Commission-instituted investigation into the justness and reasonableness of a 3.5% general rate increase instituted by Matson in the U.S./Hawaii domestic offshore trade. In its Report and Order issued December 12, 1978, the Commission held that a portion of Matson's rate increase was unjust and unreasonable. In its Order on Reconsideration the Commission further held that: (1) because the rates found unreasonable were superseded by a subsequent general rate increase, the remedy available to shippers who paid the rates determined to be unreasonable was a cause of action for reparations under section 22 of the Shipping Act (46 U.S.C. § 821); and (2) the two year statute of limitations provided in section 22 ran from the date of the Commission's December 12 decision finding the rate increase unjust and unreasonable.

The legal issues raised by Matson's second, third, fourth, fifth, seventh and eighth affirmative defenses and MSC's second cause of action were severed from the proceeding and separately briefed and considered. On an appeal by MSC the Commission here reviews an order of Administrative Law Judge Seymour Glanzer dismissing MSC's second cause of action and sustaining Matson's fourth, seventh and eighth affirmative defenses. The Presiding Officer also dismissed Matson's fifth affirmative defense. Leave to appeal Judge Glanzer's decision was granted pursuant to Rule 153 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.153). In addition to MSC's appeal, the Commission has before it replies of Matson and Hearing Counsel.

DISCUSSION

Upon consideration of the Presiding Officer's Order of May 13, 1981, the appeal of MSC and responses of Matson and Hearing Counsel, the Commission affirms and adopts the Presiding Officer's findings and conclusions as to Matson's eighth affirmative defense and MSC's second cause of action, and reverses his rulings as to Matson's fourth and seventh affirmative defenses. Each of these matters is addressed below in the sequence considered by the Presiding Officer's Order.[2]

I. *Matson's Seventh Affirmative Defense—The Statute of Limitations*

A. *Presiding Officer's Ruling*

The Presiding Officer sustained Matson's seventh affirmative defense. Matson contends that the Commission lacks jurisdiction to entertain MSC's complaint insofar as it relates to freight charges paid on or before June 28, 1977 because of the two-year statute of limitations in section 22 of the Act. The Presiding Officer disagreed with the Commission's determination in Docket No. 76-43 that a cause of action for reparations accrued to shippers upon the date of the Commission's decision finding Matson's rates to be unjust and unreasonable. He held that any cause of action arose when the freight charges for each shipment were paid.

Further, the Presiding Officer ruled that Matson is not collaterally estopped from asserting the two-year limitation period. He described

[2] Matson's first affirmative defense, that MSC is not a real party in interest in this proceeding, and its sixth affirmative defense, that it is entitled to an offset for undercharges due it from MSC, were disposed of at the prehearing conference held in connection with this proceeding. These were, accordingly, not briefed and were not addressed by the Presiding Officer. Also not addressed in the Presiding Officer's Order were Matson's second and third affirmative defenses, which Matson abandoned during the course of the proceeding. Matson's second affirmative defense alleged that MSC's claim is in the nature of one for refund which the Commission lacks jurisdiction to award in this proceeding. Matson's third affirmative defense was that the Commission lacks jurisdiction to award reparations for the past unreasonableness of rates under section 18(a) of the Act. Finally, no party has appealed the Presiding Officer's dismissal of Matson's fifth affirmative defense, which contended that certain revenues included in Matson's rate of return in Docket 76-43 should now be excluded for purposes of awarding reparations.

the Commission's finding that the shippers' cause of action accrued on the date of the decision in Docket No. 76-43 as dicta and not necessarily a final disposition of the issues presented. The Presiding Officer therefore concluded that MSC would be precluded from introducing evidence of overpayments made more than two years prior to the filing of its complaint, that is, prior to June 29, 1977.

B. *Position of the Parties*

MSC

MSC believes that the Presiding Officer erred in his analysis of the Commission's discussion in Docket No. 76-43 as to when MSC's cause of action for reparations accrued. MSC argues that Matson's defense is barred under the doctrines of *res judicata* and collateral estoppel and maintains that the Commission correctly decided that the cause of action accrued at the time Matson's rate increases were determined to be unreasonable.

Matson

Matson argues that section 22 causes of action based on alleged unreasonable rates always accrue at the time freight charges are paid.

Matson also argues that *res judicata* and collateral estoppel do not apply to the findings of the Commission concerning shippers' remedies in its Order On Reconsideration in Docket No. 76-43. These findings were allegedly not an adjudication of the rights of the parties, but rather dicta. Matson submits that a rate making proceeding is legislative in nature and issues concerning reparations could not be entertained in such a proceeding.

C. *Conclusions*

The Commission has carefully reviewed the determinations made in Docket No. 76-43 in light of the Presiding Officer's order and arguments of the parties in this proceeding. We reaffirm our prior decision.

In concluding that the Commission's prior decision was erroneous, the Presiding Officer relies upon authority concerning the accrual of causes of action for reparations for unreasonable commodity rates. He also finds that the Supreme Court case relied upon by the Commission in its Order On Reconsideration in Docket No. 76-43, *Crown Coat Front Co. v. U.S.*, 386 U.S. 503 (1966) is inapposite in this proceeding. The point is made that unlike the facts in *Crown Coat*, shippers charged rates found unlawful in Docket No. 76-43 had the right to file reparation claims on any basis at the time Matson imposed its general rate increase. Accordingly, the Presiding Officer finds that a shipper's unqualified right to file a reparation claim when freight charges are paid precludes the accrual of their cause of action at any later date or the assertion that a new and distinct cause of action arose from the Commission's decision.

In its Order On Reconsideration in Docket No. 76-43, the Commission specifically recognized that claims for reparation on individual commodity rates generally accrue at the time they are paid. However, the Commission noted that claims for reparations due to an unreasonable general rate increase are separate and distinct "causes of action". They are based upon the general revenue levels of the carrier and not on the carrier's rate structure or the specific transportation factors affecting a commodity rate. Applying the rationale of *Crown Coat*, we further held that a shipper's right to reparations based upon an unreasonable general rate increase did not accrue until the Commission issued a final decision in its investigation proceeding.[3]

The rationale underlying the *Crown Coat* decision is that statutes of limitations generally do not specify when a cause of action accrues but only speak to the time available to file an action once it does accrue. The determination of when a cause of action actually accrues should not be restricted by rigid theories but should be made on the facts of a particular case in light of the purposes of the statute of limitations. Thus, in addressing prior decisions regarding the accrual of causes of action in analogous situations, the Court explained:

> The Court has pointed out before, however, the hazards inherent in attempting to define for all purposes when a "cause of action" first "accrues." Such words are to be "interpreted in the light of the general purposes of the statute and of its other provisions, and with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." (Citations omitted) 386 U.S. at 517.

Section 22 was promulgated to enable the Commission to enforce the other provisions of the Act, S. REP. No. 689, 64th Cong., 1st Sess. 13 (1916), including the prohibition of section 18(a) against the imposition of unreasonable rates. Both sections 18(a) and 22 of the Act are remedial in nature and generally should be so construed. *Oakland Motor Car Co. v. Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311-312 (1934).

The objective of statutes of limitations is to prevent stale claims of which the defendant had no prior notice and the facts and merits of which become less susceptible of determination due to the fading of memories and loss of records and evidence. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342 (1944). This objective is

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[3] Although notices of Commission determinations not to suspend or investigate a carrier's general rate increase have uniformly advised that they are without prejudice to persons' right to file complaints with the Commission under section 22 of the Act, the institution of a general rate increase investigation does to some degree affect the right of such persons. Where a general rate increase is investigated the Commission would generally not finally adjudicate a section 22 complaint based on the same activity pending in the general rate investigation. However, the institution of a general rate increase investigation *would not* affect the right of shippers to file section 22 claims concerning individual commodity rates if such claims are based on the specific transportation factors affecting a commodity rate and *not* on the overall revenue needs of the carrier.

not contravened in this case. The claim was not stale [4] and the evidence to support it had already been collected in the Commission's prior proceeding. Matson is well prepared to interpose its subsequent operational results as a defense and was on notice of MSC's challenge to the lawfulness of the rate increase and demand for remedial action from its inception.

In *Crown Coat* the argument was made that the plaintiff could have filed a protective suit which could remain inactive pending the conclusion of the administrative proceedings. This is similar to the argument advanced here that shippers could have filed reparations claims when Matson implemented its general rate increase even though the Commission was investigating those same rates. In disposing of the "protective suit" argument in *Crown Coat*, the Court advised:

> Since it would remain quiescent until the administrative decision is rendered, the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts. Certainly it would be no help to those contractors for whom it is already too late to file such a suit, which is true of the petitioner in this case. 386 U.S. at 503.

Under the Presiding Officer's approach, shippers would have had to file reparation claims within two years of the time each payment of freight under Matson's rate increase was made. As a result, most of these claims would have had to be filed before a final decision in Docket No. 76-43 was issued. Because the Commission has repeatedly held that reparation claims will not be considered in a general rate increase investigation, *General Increase In Rates-Pacific/Atlantic/Guam Trade*, 7 F.M.C. 423, 426 (1962); *Pacific American Fisheries, Inc. American-Hawaiian Steamship Co.*, 2 U.S.M.C. 270 (1940), these many claims could not be consolidated with the rate investigation and would have had to be stayed to preclude the possibility of conflicting decisions. Shippers' rights to reparations in such a situation are effectively dependent upon the outcome of the general rate incrèase investigation. Accordingly, because of the pendency of Docket No. 76-43, shippers did not *in fact* have a cause of action based upon Matson's general rate increase until the Commission issued its decision in that proceeding.

However, even if it is assumed that MSC's cause of action accrued when the freight charges were paid, under the *Crown Coat* rationale, the running of the limitations period would be tolled pending the disposition of the general rate increase investigation.[5] *See Mt. Hood*

[4] The earliest shipment at issue occurred less than three years before this complaint proceeding was initiated.

[5] Equitable tolling of the statute of limitations has long been judicially recognized. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 558 (1973). Whether it is proper in any particular situation to

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Stages v. Greyhound Corp., 616 F.2d 394 (9th Cir. 1980) (the period of limitations for an antitrust action is tolled pending the disposition of an ICC proceeding involving issues essential to the suit), *cert. denied* 49 L.W. 3246 (1980). Moreover, tolling the statute under the circumstances of this case provides for enforcement of the Act without unnecessary procedural complications and congestion of the Commission's dockets.[6] Accordingly, the Commission rejects Matson's seventh affirmative defense and reaffirms its earlier ruling.

II. *Matson's Fourth Affirmative Defense—Actual Operational Results*

A. *Presiding Officer's Ruling*

The Presiding Officer sustained Matson's fourth affirmative defense that reparations under section 22 must be based upon actual results of operations. He held that although those findings in Docket No. 76-43 based on estimates *could* be used as a basis for reparations, Matson had the right to interpose its actual operating results as an equitable defense. The Presiding Officer explained, however, that Matson would have the burden of proof to establish the actual results of its operations.

B. *Position of the Parties*

MSC

MSC challenges the Presiding Officer's action in sustaining Matson's fourth defense. MSC submits that because the Presiding Officer dismissed Matson's fifth affirmative defense on the basis of *res judicata* and collateral estoppel he should have rejected Matson's fourth affirmative defense for the same reason.[7] MSC again asserts its arguments concerning the applicability of the doctrines of *res judicata* and collateral estoppel.

Matson

Matson generally supports the findings of the Presiding Officer as to its fourth affirmative defense and reiterates its arguments as to the inapplicability of the doctrines of *res judicata* and collateral estoppel.

C. *Conclusions*

Matson's fourth affirmative defense is essentially a collateral attack on the findings of fact in Docket No. 76-43. While actual operating results may be considered in determining whether reparations should be

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toll a statute of limitations is not necessarily a function of whether the limitation period is procedural or substantive, but rather whether tolling is consonant with the legislative scheme. *Id.* It should be pointed out, however, that the legislative history of section 22 indicates that at the time of its enactment it was considered to be a procedural proscription for the institution of complaints. S. REP. No. 689, 64th Cong., 1st Sess. 6 (1916).

[6] The ICC specifically provides for situations where the statute of limitations is tolled for reparation claims. See 49 C.F.R. § 1100.23(f); *Thompson Phosphate Co. v. Atlantic Coast Line R. Co.*, 434 F.2d 180 (2nd Cir. 1970).

[7] The Presiding Officer dismissed Matson's fifth affirmative defense on the grounds that the arguments included in that defense could and should have been raised in Docket No. 76-43 but were not.

awarded in section 22 proceedings,[8] the carrier's projections are sufficient evidence to support a finding of unjustness and unreasonableness. *Alaska Steamship Co. v. F.M.C.*, 356 F.2d 59 (9th Cir. 1966). Evidence of actual operating results is not an absolute prerequisite to an award of reparations under section 22 on rates alleged to be unjust and unreasonable. See *Fleetwood Aluminum Products v. Sea-Land Services, Inc.*, 19 S.R.R. 96 (1979).

Accordingly, the essence of Matson's fourth affirmative defense is reduced to an assertion of equitable considerations and as such falls within the scope of its eighth affirmative defense discussed below. However, because Matson's fourth affirmative defense specifically avers that actual operating results are a *jurisdictional prerequisite* to an award of reparations, it is dismissed.

III. *Matson's Eighth Affirmative Defense—Equitable Considerations*

A. *Presiding Officer's Ruling*

Matson's eighth affirmative defense interposed equitable considerations including: (1) the lack of Commission guidelines as to what constitutes a reasonable rate of return; (2) prior Commission decisions as to the permissible level of Matson's rate of return; (3) Matson's historically low rates of return; and (4) the small amount of excess return found in Docket No. 76-43. The Presiding Officer sustained this defense. He noted that the Commission's denial of a Matson Petition to Reopen expressly held that Matson could raise these matters in this proceeding.

B. *Position of the Parties*

MSC and Matson reargue essentially the same contentions advanced by them in support of their positions on Matson's fourth affirmative defense.

C. *Conclusions*

The matters presented by Matson's eighth affirmative defense are properly raised in this proceeding. See Docket No. 76-43, Order, 19 S.R.R. 1691, issued May 2, 1980; Order on Reconsideration, 21 F.M.C. 987. These assertions were not litigated or decided in Docket No. 76-43 and Matson is not collaterally estopped from raising them now. However, while Matson may raise these matters and offer actual operating results in mitigation of the reparations sought, it may not assert matters which simply amount to a reargument of the reasonableness and justness of its rate increase at issue in Docket No. 76-43.[9] For example, it

[8] See also *Consolo v. F.M.C.*, 383 U.S. 607 (1966).

[9] It is generally recognized that collateral estoppel is applicable to *factual* determinations made in administrative proceedings. *United States v. Utah Construction & Mining Co.*, 385 U.S. 394, 422 (1966). Matson had an adequate opportunity to fully litigate all the relevant factual issues concerning the reasonableness of its rates in Docket No. 76-43. It took full advantage of these opportunities. Therefore, Matson will not be allowed to collaterally attack the findings of fact in Docket No. 76-43.

may not show that due to marginal errors in its projections or technical changes in Commission rate investigation methodology, its rate of return is arguably below that which was found in Docket No. 76-43.[10] Therefore, while Matson's eighth affirmative defense will not be dismissed, it has the burden of proof as to the matters raised.

IV. *MSC's Second Cause of Action—Continuing Unreasonableness*

A. *Presiding Officer's Ruling*

The Presiding Officer dismissed in part MSC's second cause of action. MSC alleged that the unreasonable portion of the rate increases investigated in Docket No. 76-43 continued to be charged as an incremental part of subsequent rate increases in violation of section 18(a). The Presiding Officer held that nothing in the Commission's Orders in Docket No. 76-43 can be construed as a finding that Matson's rates continued to be unreasonable after they were subsequently increased. He based this finding on the fact that: (1) the Commission reviewed the subsequent rate increases and on July 31, 1977 found that the suspension or investigation of those rate increases was not warranted; (2) the Commission's Decision in Docket No. 76-43 specified that subsequent increases were not joined in the investigation and that the rates found unjust and unreasonable were only those in effect from August 2, 1976 to July 31, 1977; and, (3) there is no presumption of continuing unreasonableness resulting from a decision that past rates are unjust and unreasonable. Any subsequent rate increases must be examined with regard to the circumstances and conditions extant at the time they are proposed. The Presiding Officer did not, however, preclude MSC from attempting to show the unreasonableness of the subsequent rate increases, but only from relying on the findings in Docket No. 76-43 to prove such unreasonableness.

B. *Position of the Parties*

MSC

MSC submits that the Presiding Officer misunderstood MSC's position in support of its second cause of action. MSC submits that its position is based on the Commission's intent as derived from its Order On Reconsideration in Docket No. 76-43 which indicates that Matson's rates continued to be unreasonable after July 31, 1977. MSC asserts that it can still maintain an action against Matson for assessing unreasonable rates beyond July 31, 1977 and that a presumption of continuing unreasonableness exists, establishing a *prima facie* case in its second cause of action. This presumption allegedly acts to shift the burden of proof to

[10] The substitution of actual operating results for projections was expressly rejected in Docket No. 76-43 on the basis of the facts of that proceeding. The retroactive application of the revisions to Commission General Order 11 in Docket 78-46 was also rejected in the Commission's denial of Matson's Petition to Reopen.

Matson to prove that its rates were in fact reasonable. MSC submits that although the Commission did decline to suspend or investigate Matson's subsequent rate increases, it never found them to be just and reasonable. Finally, MSC advises that it is not seeking reparations for the subsequently imposed rate increases but only that portion of the underlying level of rates which the Commission held unreasonable in Docket No. 76-43.

Matson

Matson argues that there is nothing in the record or decision in Docket No. 76-43 to support MSC's allegation that its rates continued to be unreasonable after July 31, 1977. The findings in that proceeding are allegedly limited to the rates then under investigation. Matson points out that its subsequent rate increases were not investigated by the Commission. It further contends that the Commission's notice that those rate increases did not warrant suspension or investigation rebuts MSC's contention that a presumption of continued unreasonableness results from the decision in Docket No. 76-43. Matson has submitted an offer of proof which it argues proves its subsequent rates to be reasonable.

Hearing Counsel

Hearing Counsel argues that MSC is attempting to improperly extend the findings of Docket No. 76-43. The Commission's Order On Reconsideration allegedly was only intended to create a remedy for those rates actually investigated and found unreasonable. Hearing Counsel contends that there is no presumption of continuing unreasonableness. A new rate increase is a separate act by the carrier under circumstances different than those which existed at the time prior rate increases were imposed. Therefore, Hearing Counsel concludes that while the claim of reasonableness of Matson's subsequent rate increases is an issue in this proceeding, it is one upon which MSC has the burden of proof.

C. *Conclusion*

The Presiding Officer's analysis and conclusions rejecting MSC's second cause of action are correct and will be affirmed. The findings in Docket No. 76-43 were clearly restricted to the rates in effect between August 2, 1976 and July 31, 1977. The subsequent rate increases were not investigated and no evidence of record was obtained regarding those increases in Docket No. 76-43. Moreover, because the subsequent rate increases were allowed to go into effect without suspension or investigation, any subsequent challenge to those rates places the burden of proof on the party alleging their unlawfulness.[11]

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[11] However, Matson bears the burden of placing before the Commission operational results and establishing the reliability of this data. See, *International Harvester Co. v. Ruckelshaus,* 478 F.2d 615, 643 (D.C. Cir. 1973); *Alabama Power Co. v. F.P.C.,* 511 F.2d 383, 391 n. 14 (D.C. Cir. 1974); *Environmental Defense Fund v. E.P.A.,* 548 F.2d 998, 1017 (D.C. Cir. 1976).

THEREFORE, IT IS ORDERED, That the ruling of the Presiding Officer in his Order of May 13, 1981 in the above-captioned proceeding as to the eighth affirmative defense of Matson Navigation Company and the second cause of action of the Military Sealift Command is sustained and the rulings as to the fourth and seventh affirmative defenses of Matson Navigation Company are reversed in accordance with this Order, and,

IT IS FURTHER ORDERED, That the appeal of Military Sealift Command is sustained to the extent indicated in this Order and denied in all other respects.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

* Commissioner James Joseph Carey did not participate. Commissioner Richard J. Daschbach's concurring opinion is attached.

DOCKET NO. 79-68

MILITARY SEALIFT COMMAND, DEPARTMENT OF THE NAVY V. MATSON NAVIGATION COMPANY, INC.

Commissioner Richard J. Daschbach, concurring.

I disagree with the instant Order's treatment of Matson's seventh affirmative defense, which addresses the appropriate accrual date of a cause of action for reparations. Although the Order here does not present a *legal* argument sufficiently compelling to overturn the Administrative Law Judge's May 13, 1981 finding on this matter, a *common sense* approach to this issue will yield the same result which the Commission is trying to achieve through a strained interpretation of legal precedent.

It is simply illogical to expect shippers to file informed claims for refunds of a specific portion of an ocean freight rate until the Commission has determined what portion of that rate, if any, is unjust and unreasonable, and that is all the Commission's order needs to say here. In order to find a "real world" solution to the problem of when a shipper's claim for reparations begins to accrue, it is preferable for the Commission to rely on this simple logic than to undertake a labored effort to make case law produce the result desired in the instant case.

Davis' *Administrative Law Treatise* (Volume 1, Chapter 1) is instructive on the subject of overreliance on legal precedent at the cost of sensible exercise of agency discretion. In criticizing the so-called "extravagant approach" to the rule of law, Davis argues that regulatory agencies should not be hamstrung by precedent in exercising a common sense approach to the law, citing *Merchandise Transport Ltd. v. British Transport Commission*, [1962] Q.B. 173. Danckwerts, L.J.: "If the tribunal makes a practice of relying on previous decisions in respect of other applications . . . there is, in my opinion danger that the discretion of the tribunal may not be applied in an unfettered and proper manner having regard to the merits of the particular case."

This admonition is applicable in this proceeding, where there is no case law cited in the instant Order which is directly on point, but logic squarely addresses the issue. Rather than attempting to bolster its decision through a strained application of inapposite case law, the Commission should demonstrate enough faith in its own discretion to rely on the common sense approach to Matson's seventh affirmative defense which yields the same result.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-80

PAULSSEN & GUICE LTD. -

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1166

PAULSSEN & GUICE MIDWEST, INC.

APPLICANT FOR A LICENSE AS AN INDEPENDENT OCEAN FREIGHT FORWARDER

Settlement agreements entered into between the Commission's Bureau of Hearings and Field Operations and Paulssen & Guice Ltd. (PG) and Paulssen & Guice Midwest, Inc. (PGM) for violations of the Shipping Act, 1916 approved. PG is permitted to retain its freight forwarding license and PGM's application for a freight forwarding license is granted. Penalties of $10,000 and $5,000 are assessed against PG and PGM respectively.

Gerald H. Ullman for Paulssen & Guice Ltd. and Paulssen & Guice Midwest, Inc.

Joseph B. Slunt, Stuart James and *John Robert Ewers* for the Bureau of Hearings and Field Operations.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISION

January 27, 1982

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

This proceeding was initiated by the Commission on November 25, 1980, to determine whether Paulssen & Guice, Ltd. (PG), an independent ocean freight forwarder, has violated section 44(e) of the Shipping Act, 1916 (the Act),[1] and sections 510.24(e), 510.23(a) and 510.5(c) of the Commission's General Order 4,[2] and, if such violations occurred, whether civil penalties should be assessed against PG and its license revoked or suspended. The Commission also sought to determine whether Paulssen & Guice Midwest, Inc. (PGM), a corporation partially owned by PG, violated section 44(a) of the Act,[3] and if such

[1] 46 U.S.C.A. §841(b).
[2] 46 C.F.R. §510.
[3] 46 U.S.C.A. §841(b).

violations occurred, whether they warrant the imposition of a civil penalty against PGM and the denial of its application for a freight forwarder license. During the course of the proceeding, PG, PGM and the Commission's Bureau of Hearings and Field Operations (Hearing Counsel) submitted a joint stipulation of fact and a proposed settlement agreement. Under the terms of the agreement, PG agreed to pay the Commission $10,000 and PGM agreed to pay the Commission $5,000, but neither admitted that any violation it may have committed was willful.

On September 3, 1981, Administrative Law Judge William Beasley Harris issued an Initial Decision in which he concluded that PG should be permitted to retain its independent ocean freight forwarder license. He also approved the civil penalty settlements in the amounts of $10,000 and $5,000 entered into between Hearing Counsel and PG and PGM respectively, but refused to "consent" to certain sections of the stipulated record and denied PGM's application for an independent ocean freight forwarder license.

This proceeding is now before the Commission on Exceptions of PGM and Hearing Counsel. The Commission agrees with the Presiding Officer's decision to approve the settlement agreements and permit PG to retain its freight forwarding license but, for the reasons set forth below, believes that the Presiding Officer erred when he refused to accept certain parts of the stipulated record and denied PGM's application for a freight forwarding license.

BACKGROUND

The following summary of the essential facts is based upon a joint stipulation submitted, pursuant to Rule 162 of the Commission's Rules of Practice and Procedure,[4] by Hearing Counsel and counsel for PG and PGM.

PG, a New York Corporation, was granted an independent ocean freight forwarder license by the Commission on August 1, 1967. On December 27, 1976, PG established a branch office in Kansas City under the name Paulssen & Guice, Ltd. This arrangement was approved by the Commission. The Kansas City branch was managed by Leo Moore.

On January 31, 1977, PGM was incorporated under the laws of Missouri. Leo Moore, who became President of PGM, owns 55% of the stock. The remaining stock is owned by PG (35%) and another individual (10%). Siegfried Paulssen, President of PG, is also Vice-President of PGM.

[4] 46 C.F.R. §502.162.

After its incorporation, PGM continued to use PG's forwarding license. Between January 31, 1977 and May 31, 1979, 922 shipments were handled by PGM under PG's license. It mistakenly believed that the Commission's approval of the Kansas City branch sanctioned the continued use of PG's license. Because PGM was operating under PG's license, steamship companies frequently sent commissions earned by PGM to PG in New York. To correct this problem, and to gain complete autonomy over its operations, PGM applied for its own license on May 23, 1978.

The Commission's Office of Freight Forwarders (OFF) learned of PGM's use of PG's license in December of 1978 and in March of 1979 informed PGM that until it received its own license, it would have to operate as a branch of PG. PGM promptly complied with OFF's directive, sending all commission checks to PG and returning all PGM employees to PG's payroll.

In 1976, 1977, 1978 and 1979, several changes were made in the operations of PG's Houston, Cleveland, Miami, Baltimore and Los Angeles offices. These included changes of personnel and the opening and closing of certain offices. The Commission was not informed of these changes in a timely fashion because PG was in the midst of an effort to recover its financial health, which had been in a precarious state since at least early 1976.

INITIAL DECISION AND POSITION OF THE PARTIES

In his Initial Decision, the Presiding Officer approved the civil penalty settlement agreements entered into between Hearing Counsel and PG and PGM and permitted PG to retain its license. Citing Rule 162 of the Commission's Rules of Practice and Procedure,[5] the Presiding Officer refused, however, to "consent" to Paragraphs 5, 6 and 8 of the stipulated record agreed upon by the parties because he felt that these matters could best be shown from official records.[6]

He also denied PGM's application for a license on the grounds that: (1) it was not clear that PGM was independent; and (2) PGM had not proved itself fit. The Presiding Officer observed that but for the addition of "Midwest," PG and PGM would have the same name, and he believed that granting a license to PGM would be akin to granting a second license to the parties that forwarded 922 shipments without a license. He also stated that PG needed to devote its full attention to its

[5] 46 C.F.R. §502.162.

[6] Paragraphs 5, 6 and 8 indicate that: (1) PGM was formed as a separate profit center and incorporated to simplify record keeping; (2) PGM continued to use PG's license after incorporation because it mistakenly believed such conduct was lawful; and (3) PGM applied for its own license so it could be completely autonomous and because commission checks earned by it were being sent to PG in New York.

own affairs, not to the establishment of a new corporation in one of its branch offices with a name almost identical to its own. The Presiding Officer noted that shippers who might deal with PGM would really be dealing with the same individuals who violated the Shipping Act, 1916, 922 times.

In its Exceptions to the Initial Decision, PGM states that a license should not be denied unless there has been a willful failure to comply with the Act or the relevant regulations. PGM stresses that its unauthorized forwarding was not the result of intentional or wanton disregard of the Shipping Act, 1916, but of the mistaken belief that its forwarding activities could be performed under PG's license.

PGM is particularly disturbed by the Presiding Officer's decision not to "consent" to paragraphs 5, 6 and 8 of the stipulation for, without these, the record is stripped of any evidence proving that the unauthorized forwarding was not willful. It is PGM's belief that the Presiding Officer's decision to delete from the record certain facts stipulated by the parties is completely without legal basis. PGM argues that a stipulation may be set aside only when it is a mistake or misunderstanding.

PGM further argues that the Presiding Officer misconstrued Rule 162 of the Commission's Rules, which he read as giving him the authority to admit to the record certain portions of a stipulation while excluding others. PGM believes that Rule 162 only gives the Presiding Officer the authority to decide whether or not to permit the parties to develop a record through stipulation, instead of through other means. By refusing to accept facts which PGM feels are critical to its case, PGM believes the Presiding Officer erred and denied it the opportunity to present its case and establish its right to a license.[7]

PGM also believes that the Presiding Officer placed disproportionate importance upon the number of shipments which it forwarded unlawfully. Allegedly, all 922 shipments in question were the result of the single misunderstanding by PGM that it could operate under PG's license, and neither Moore nor PGM enjoyed any financial advantage as a result of the unauthorized forwarding.[8]

PGM points out, that in the past, the Commission has issued licenses to applicants who have performed unauthorized forwarding when mitigating circumstances exist and that the Interstate Commerce Commission and the courts have taken a similar approach. PGM believes it is entitled to the same treatment. To deny Moore a license, according to

[7] PGM argues that the Presiding Officer, in finding that the deleted portions of the stipulation "are best shown from official records," not only failed to indicate what records he had in mind, but also neglected to give PGM an opportunity to use these records to present its case.

[8] PGM notes that Moore was already paid as a branch manager and that steamship lines paid the same brokerage to PGM which they would have paid to PG.

PGM, would be punitive and inconsistent with the remedial purpose which underlies section 44.

PGM disagrees with the Presiding Officer's finding that granting a license to PGM would be akin to granting a second license to the parties charged with violating section 44. First, it is noted that most of PGM's stock is owned by Moore and that PG is only a minority stockholder. Second, Moore is allegedly not part of PG's operation. Finally, PGM points out that, if granted, the license would go to a separate corporation, not to PG.

PGM also feels that the Presiding Officer did not provide a reasoned basis for his conclusion that PGM may not be independent and erred in deciding that it had not met its burden of proving that it was fit. Except for the unauthorized forwarding, Moore allegedly has an unblemished record. Because of the mitigating circumstances surrounding this conduct, PGM believes that it is fit to obtain a license.

Finally, PGM takes issue with the Presiding Officer's assertion that it should be denied a license because PG needs to direct its attention to its own operation. PGM again notes that PG is only a minority stockholder in PGM, and PGM believes that the Presiding Officer's conclusion that PG's operation in New York would suffer if PGM were to receive a license was speculation.

In challenging the Presiding Officer's denial of a license to PGM, Hearing Counsel points out that: (1) although PGM serves as PG's Kansas City branch office, it is separately incorporated; (2) if it is granted its own license, PGM will become a separate and distinct freight forwarder; and (3) PGM seeks its own license so that it can be completely independent of PG. These facts convince Hearing Counsel that the Presiding Officer's concerns about granting a second license to the same parties involved in 922 unauthorized shipments are unfounded. Hearing Counsel adds that although PG's President owns 35% of PGM's stock and is its vice-president, his interests in PGM stem from his role as a stockholder and officer, not as president of PG.

Responding to the Presiding Officer's concern that PG needed to direct all of its attention to its own affairs, not operate a new corporation in the same branch office, Hearing Counsel argues that if PGM receives a license, PG will have one less office with which to concern itself. This will allegedly allow it to devote more time to the remaining branch offices.

Hearing Counsel also contends that PGM has met its burden of proving it is fit to receive a license. Allegedly, the only question concerning PGM's fitness stems from the forwarding performed under PG's license and this, Hearing Counsel notes, was the result of a mistake which was promptly corrected when brought to PG's attention. This is viewed as mitigating the gravity of the 922 violations of the Act.

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Hearing Counsel also notes that the Commission has stated that the freight forwarding laws are remedial in nature, not punitive, and contends that it would be consistent with this philosophy for the Commission to fine PGM but not deny its application for a license.

Hearing Counsel agrees with PGM that paragraphs 5, 6 and 8 of the stipulation were improperly excluded. Hearing Counsel notes that courts generally look favorably upon reasonable stipulations of fact which simplify and shorten litigation. If the Presiding Officer felt that the stipulation was inadequate, Hearing Counsel believes that he should have either requested the parties to amend it or excluded the entire stipulation, providing the parties with an opportunity for a hearing. By excising certain portions of the stipulation, the Presiding Officer allegedly precluded the parties from completing the record. Hearing Counsel submits that the stipulation does not, in its truncated form, reflect the intent of the parties.

DISCUSSION

Because the arguments of both PGM and Hearing Counsel in favor of granting PGM a license depend in part upon the paragraphs in the stipulation which the Presiding Officer has chosen to discard, the Commission must first determine whether the Presiding Officer incorrectly excluded certain portions of the stipulated record.

Any matter which involves the individual rights or obligations of the parties to a judicial proceeding may properly be made the subject of a stipulation between them, provided that the stipulation is not illegal, unreasonable, or against good morals or sound public policy, and does not interfere with the general powers, duties and prerogatives of the courts.[9] Once created, stipulations are the equivalent of proof and prevent an independent examination by a judicial officer or body of the matters which have been stipulated.[10] Stipulations are used to dispense with the need to prove facts through the normal judicial process.[11]

It is well settled that in civil cases stipulations of fact fairly entered into are controlling and conclusive and that courts are bound to enforce them.[12] Once a set of facts has been stipulated, a court loses its freedom to alter it. Courts may not pick and choose at will [13] or adopt findings of fact which contradict those which have been stipulated,[14]

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[9] 83 C.J.S., Stipulations, §10, p. 12.

[10] *Id.* at §12, p. 30.

[11] *Burstein v. United States,* 232 F.2d 19, 23 (8th Cir. 1956).

[12] *Id.* at 22, 23; *Fenix v. Finch,* 436 F.2d 831, 836 (8th Cir. 1971); *United States v. 3,788.16 Acres of Land, Emmons Co., N.D.,* 439 F.2d 291, 294 (8th Cir. 1971); *Furniture Forwarders of St. Louis v. Chicago, Rock Island and Pacific Ky. Co.,* 393 F.2d 537, 358 (8th Cir. 1968); *Osborne v. United States,* 351 F.2d 111, 120 (8th Cir. 1965).

[13] *Stanley Works v. Federal Trade Commission,* 469 F.2d 498, 506 (2d. Cir. 1972).

[14] *Verkouterren v. District of Columbia,* 346 F.2d 842, 844 (D.C. Cir. 1965).

but have a duty to treat stipulated facts as having been established by the clearest proof.[15]

The Commission has prescribed its own rule concerning stipulations. The parties in a Commission proceeding may, by stipulation, agree upon any facts involved in the proceeding and include them in the record with the consent of the presiding officer.[16]

The Presiding Officer here chose to read this rule as permitting him to consent to the stipulation of certain facts while denying the stipulation of others. PGM and Hearing Counsel feel that the rule should be interpreted as permitting the Presiding Officer to decide whether or not to permit the use of the stipulation process, but not to consent to the stipulation of certain facts while denying others once the decision to permit the use of stipulation has been made. In light of the judicial treatment of stipulations discussed above, the Commission adopts the interpretation favored by PGM and Hearing Counsel.[17]

There is nothing in the record which contradicts the facts which the parties stipulated in paragraphs 5, 6 and 8 of the stipulation. PGM was formed as a separate profit center and incorporated to simplify record keeping.[18] After incorporation, it continued to use PG's license because it mistakenly believed that the Commission's approval of the Kansas City branch office sanctioned such use.[19] PGM applied for its own license on May 23, 1978, because it wanted to be completely autonomous and because the use of PG's license was causing steamship companies to send commission checks to PG's New York office.[20] With the inclusion of these three paragraphs in the record, the Commission must now weigh the exceptions to the Presiding Officer's decision to deny PGM's application for a freight forwarder's license.

Access to the ocean freight forwarding profession is restricted to those who are fit, willing and able.[21] An applicant or licensee must demonstrate to the Commission that it maintains the highest degree of business responsibility and integrity with clients, carriers and the public.[22] In determining an applicant's fitness, there can be no doubt

[15] *Schlemmer v. Provident Life & Ass. Ins. Co.*, 349 F.2d 682, 684 (9th Cir. 1965).

[16] 46 C.F.R. §502.162.

[17] Even if the Presiding Officer had been correct in his interpretation of the stipulation rule, he should not have waited until the Initial Decision to announce his refusal to accept the facts stipulated in paragraphs 5, 6 and 8 of the stipulation. Had the parties been advised of the Presiding Officer's concerns before he rendered his Initial Decision, they might have chosen other means to prove the facts they stipulated. By failing to so inform the parties, the Presiding Officer led them to believe that their entire stipulation would be accepted and deprived them of the opportunity to present important elements of their case. Such conduct appears to infringe upon Respondents' due process rights.

[18] Paragraph 5.

[19] Paragraph 6.

[20] Paragraph 8.

[21] *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino,* 15 F.M.C. 127, 128 (1972).

[22] *Id.* at 134.

that it intends to comply with the Commission's rules and policies.[23] Other factors taken into consideration by the Commission in evaluating the fitness of an applicant or licensee include experience,[24] character, integrity, veracity[25] and technical ability.[26] An applicant must not only be honest, but must affirmatively strive to meet the regulatory requirements prescribed by the Commission.[27]

Occasionally an applicant for a forwarding license has engaged in conduct which is violative of the Shipping Act, 1916, or other statutes. Past violations of law are a major factor in deciding whether a license will be granted.[28] In such cases the Commission has tried to determine whether the applicant acted in good faith and whether there are circumstances surrounding the misconduct which tend to mitigate culpability.[29] If the violation was not accompanied by fraud or moral turpitude, the Commission has sometimes found that it will not bar the granting of a license.[30]

Even after receiving a license, a forwarder remains subject to the Commission's scrutiny and may have its license revoked for unlawful conduct. In applying section 44 to forwarders that have behaved unlawfully, the Commission is aware that section 44 is remedial, not punitive in nature.[31] Remedies fashioned by the Commission are tailored to the facts of the particular case after taking into account evidence of mitigation.[32]

The Presiding Officer found that PGM had not proved itself fit but, except for the stipulated violations of the Shipping Act, 1916, there is no evidence in the record which indicates that PGM is unfit. Between January 31, 1977 and May 31, 1979, PGM forwarded 922 shipments

[23] *Harry Kaufman D/B/A International Shippers Co. of N.Y.—Independent Ocean Freight Forwarder License No. 35*, 16 F.M.C. 256, 271 (1973).

[24] *Anthony G. O'Neil—Freight Forwarder License*, 12 F.M.C. 68, 71 (1968).

[25] *Independent Ocean Freight Forwarder License Application L.T.C. Air Cargo, Inc.*, 13 F.M.C. 267, 276-277 (1970).

[26] *Independent Ocean Freight Forwarder License Application—Guy G. Sorrentino*, 15 F.M.C. 127, 139 (1972).

[27] *Independent Ocean Freight Forwarder License Application—Lesco Packing Co., Inc.*, 19 F.M.C. 132, 137 (1976).

[28] *Cargo Systems International—Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 22 F.M.C. 57 (1979).

[29] *Continental Forwarding, Inc.—Independent Ocean Freight Forwarder Application and Possible Statutory Violations*, 23 F.M.C. 623 (1981); *Concordia International Forwarding Corp. Independent Ocean Freight Forwarder Application and Possible Violations of Section 44, Shipping Act, 1916*, 21 F.M.C. 587 (1978); *Avion Forwarding, Inc. Independent Ocean Freight Forwarder License Application*, 23 F.M.C. 232 (1980).

[30] *Independent Ocean Freight Forwarder Application Fabio A. Ruiz d/b/a/ Far Express Co.*, 22 F.M.C. 583 (1972); *Independent Ocean Freight Forwarder Application—Air-Mar Shipping, Inc.*, 14 S.R.R. 97 (1973); *All-Freight Packers & Forwarders, Inc.—Independent Ocean Freight Forwarder License Application*, 23 F.M.C. 131 (1980).

[31] *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, 22 F.M.C. 585, 596 (1980); *Independent Ocean Freight Forwarder License E.L. Mobley, Inc.*, 21 F.M.C. 849 (1978).

[32] *E. Allen Brown—Independent Ocean Freight Forwarder License No. 1246*, 22 F.M.C. 585, 596 (1980); *Independent Ocean Freight Forwarder License E.L. Mobley, Inc.*, 21 F.M.C. 845, 846 (1979).

without a freight forwarder license. While this conduct clearly amounts to 922 separate violations of section 44(a), mitigating circumstances are present. First, all 922 violations resulted from a single misunderstanding by PGM that it was permitted to operate as a forwarder under PG's license. Although clearly unlawful, this conduct is distinguishable from that of a person who acts as a freight forwarder without even attempting to operate under the authority of a license. Second, once PGM learned that its activities were unlawful, they were curtailed promptly. Third, there is no indication that prior to this set of violations PGM ever violated the Shipping Act, 1916, or otherwise ignored the legal requirements incident to ocean freight forwarding.

It also appears that PGM's violations were not the product of fraud or moral turpitude, but only of a misunderstanding. There is no evidence that any shipper suffered as a result of PGM's unlawful activities, or that PGM received improper financial gain from its violation. Finally, PGM appears technically well qualified to perform forwarding duties, as its president has operated a branch office for PG since 1976, and committed to adhering to the requirements of section 44 in the future, as it has retained counsel, familiar with the legal requirements of freight forwarding, to prevent the recurrence of regulatory problems.

The Presiding Officer found that PGM was not "independent." There is nothing in section 44 which requires a forwarder to be independent. The only restriction is that a forwarder may not receive compensation with respect to: (1) any shipment in which it has a beneficial interest; or (2) any shipment in which any holding company, subsidiary, affiliate, officer, director, agent, or executive of the forwarder has a beneficial interest. There is no evidence in the record which indicates that PGM will operate in a manner which is not consistent with this restriction.

The Presiding Officer also stated that PGM should not be granted a license because PG needs to devote its full attention to its own affairs. PGM is a separate corporation from PG and, if granted a license, would presumably operate independently of PG. There is nothing in the record which indicates that the Presiding Officer had any knowledge of how much attention PG did or should have devoted to its operation but, to the extent that granting PGM a license would relieve PG of its responsibility for PGM, it could actually increase the amount of attention which PG devotes to its own affairs.

In light of the above discussion, the Commission believes that, pursuant to section 44 of the Shipping Act, 1916, it is appropriate to grant PGM a freight forwarding license.

THEREFORE, IT IS ORDERED, That the Initial Decision in Docket No. 80-80 is adopted by the Commission to the extent indicated above; and

IT IS FURTHER ORDERED, That the Exceptions of PGM and Hearing Counsel are granted to the extent indicated above and denied in all other respects; and

IT IS FURTHER ORDERED, That Paulssen & Guice Midwest, Inc. is granted an independent ocean freight forwarder license pursuant to section 44 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That Hearing Counsel and counsel for PG and PGM shall arrange for the payment of the fines agreed upon in the settlement agreements; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-80

PAULSSEN & GUICE LTD. - INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 1166

PAULSSEN & GUICE MIDWEST, INC. -

APPLICANT FOR A LICENSE AS AN INDEPENDENT OCEAN FREIGHT FORWARDER

Proposed civil penalty settlements in the amount of $10,000 as to Paulssen & Guice, Ltd., and $5,000 as to Paulssen & Guice Midwest, Inc., each payable within 30 days, are approved.

Paulssen & Guice, Ltd., are permitted to retain independent ocean freight forwarder license.

Paulssen & Guice Midwest, Inc.'s application for license as independent ocean freight forwarder is denied. Granting such a license to applicant would be akin to granting a second license to the same parties, at the same stand where 922 shipments concerning them and PG in violation of rules and regulations were made and civil penalty settlements therefor received. It is not clear that PGM is independent or that it has met its burden of proving to be fit under the circumstances and record herein.

Joseph B. Slunt, Stuart James and *John Robert Ewers*, Director of the Commission's Bureau of Investigation and Enforcement,[1] for the Commission.

Gerald H. Ullman, P.C., and *Gerald H. Ullman, individually*, for Respondents; *W. Edward Coen, Jr.*, of Meise, Cope, Coen and Jester (Kansas City, Missouri), as co-counsel on behalf of Respondent Paulssen and Guice Midwest, Inc.

REVIEW OF SETTLEMENT AGREEMENT INITIAL DECISION [2] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Partially Adopted January 27, 1982

The Commission's Order of Investigation and Hearing in this proceeding served November 28, 1980, pursuant to sections 22, 32 and 44 (U.S.C. 821, 831 and 841(b)) of the Shipping Act, 1916, and section 510.9 of General Order 4 (46 CFR 510.9) was published in the *Federal*

[1] Title changed (July 1981) to "Bureau of Hearings and Field Operations" with two distinctly identified offices—The Office of Hearing Counsel and the Office of Investigation. The title of Hearing Counsel was restored.

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

Register, Vol. 45, No. 247, Monday, December 22, 1980, pp. 84145, 84146. This proceeding was instituted to determine:

1. Whether PG has violated section 44(e) of the Shipping Act, 1916 and section 510.24(e) of the Commission's General Order 4 by accepting compensation on ocean freight forwarding shipments for which it did not perform ocean freight forwarding duties from January 31, 1977 through May 31, 1979.
2. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding services from January 31, 1977 through May 31, 1979, in the Kansas City area.
3. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding services in the Houston area from July 16, 1978 through August 28, 1978.
4. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding activities in the Los Angeles area from June 22, 1976 through July 2, 1976.
5. Whether PG has violated section 510.23(a) of General Order 4 by permitting its license to be used by a person not in its employ to perform ocean freight forwarding work in the Los Angeles area during late 1979 and early 1980.
6. Whether PG has violated section 510.5(c) of General Order 4 by failing to inform the Commission of changes in its operations at branch offices.
7. Whether PG violated sections 510.23(a) and 510.24(e) by failing to act in accordance with its duties and obligations as set forth in those sections of General Order 4 in regard to any of its offices during the past five years and the effect of any such violations on the fitness of PG.
8. Whether civil penalties should be assessed against PG pursuant to section 32(e), Shipping Act, 1916 for violations of section 44(e) of the Shipping Act, 1916 and/or sections 510.23(a), 510.24(e) and 510.5(c) of the Commission's rules and regulations and, if so, the amount of any such penalty which should be assessed, taking into consideration factors of possible mitigation of such a penalty.
9. Whether PG's independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Shipping Act, 1916, for:

   (a) willful violations of section 44(e) the Shipping Act, 1916, or sections 510.23(a), 510.24(e), and 510.5(c) of the Commission's regulations or both, or, if such are not shown to have occurred,

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

IT IS FURTHER ORDERED, That pursuant to the above cited sections of the Shipping Act, 1916, a proceeding also be instituted to determine:

1. Whether PGM has violated section 44(a) of the Shipping Act, 1916, by performing ocean freight forwarding work without having a license issued it by the Commission on at least 922 occasions from January 31, 1977 through May 31, 1979.

2. Whether civil penalties should be assessed against PGM pursuant to section 32(e), Shipping Act, 1916, for violation of section 44(a) 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 of possible mitigation of such a penalty.

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

4. Whether PGM's independent ocean freight forwarder license application should be denied for:

(a) willful violation of section 44(a) of the Shipping Act, 1916 pursuant to section 44(d) of that Act, or, if such violation is not shown to have occurred,

(b) such conduct as the Commission finds nevertheless renders PGM unqualified to carry on the business of forwarding in accordance with section 510.8(a) of General Order 4.

BACKGROUND

A prehearing conference was held in this proceeding on Monday, December 15, 1980, at which the parties agreed to file a joint or each a separate status report on or before February 13, 1981 (Tr. 32).

On December 16, 1980, the Commission's Office of Energy and Environmental Impact in a memorandum to the Secretary of the Commission advised "The OEEI has examined Docket No. 80-80 and has determined that section 547.4(a)(1) of the Commission's Procedures for Environmental Policy Analysis applies. No environmental analysis needs to be undertaken nor environmental documents prepared in connection with this docket."

On February 13, 1981, the Commission's Bureau of Investigation and Enforcement (BIE) served and filed a letter status report. As a follow-up, the parties by notice served February 17, 1981, were directed to file a prehearing statement within 15 days and by March 13, 1981, to advise whether settlement can be reached in this proceeding.

In a joint prehearing statement served March 4, 1981, the parties stated, *inter alia,* that since they have agreed in principle upon a settlement and there are no facts in dispute, an oral hearing for receipt of evidence will not be necessary. The parties will provide a stipulated record along with the proposed settlement for review by the Administrative Law Judge. The Judge by Order served March 11, 1981, directed the parties to file the stipulated record and proposed settlement by April 9, 1981.

On April 9, 1981, BIE served and filed (1) a six (6) page joint stipulation to which was appended a six (6) page affidavit of Siegfried Paulssen sworn to January 28, 1981, and (2) proposed Settlement of Civil Penalties. These are set forth in full as follows:

STIPULATION

Pursuant to Rule 162 of the Commission's Rules of Practice and Procedure (46 CFR 502.162) the Bureau of Investigation and Enforcement and Counsel for the Respondents hereby submit this joint stipulation.

1. Paulssen & Guice, Ltd. (PG) is a New York corporation operating as an Independent Ocean Freight Forwarder, License No. 1166, and as a Custom House Broker. The home office of PG is located at 15 Park Row, New York, New York 10038.

2. Siegfried Paulssen (Paulssen) is President of PG and owns 54% of the stock. Ketra Uebersee Transport GMBH & Co. KG Hamburg (Ketra) owns 25%, Philip D. Jones owns 6% and Eduardo Gonzales owns 3%. The remaining 12% is Treasury Stock.

3. On December 27, 1976, PG established a branch office, approved by the Commission, in Kansas City, Missouri under the name Paulssen & Guice, Ltd. The branch manager was Leo A. Moore (Moore).

4. On January 31, 1977, Paulssen & Guice Midwest (PGM) was formed as a Missouri corporation with its office located at 2124 Atlantic Area, North Kansas City, Missouri. Moore became President of PGM and owns 55% of the stock, PG owns 35% and Richard Held owns 10% of the stock. Paulssen, President of PG, is also Vice President of PGM. PGM performed the services previously done by PG's Kansas City branch office.

5. PGM was formed because it was felt that it would be better to have a separate profit center and that the incorporation would simplify the record keeping.

6. After PGM was incorporated, it continued to use PG's IOFF license mistakenly, believing that since the Commission had approved the Kansas City branch office, it could continue using PG's license.

7. Subsequent to January 31, 1977, when PGM was incorporated, ocean freight commissions were retained by PGM. During the balance of 1977 approximately 210 ocean freight shipments were handled by PGM, on which commissions were earned. During 1978, approximately 461 shipments were handled on which ocean freight commissions were earned.

8. Since PGM was operating under PG's license number, PGM began experiencing problems because the steamship companies were sending the commission checks to PG in New York instead of PGM. This occurred because of the ocean carrier's computer system. In order to solve this problem and to become competely [sic] autonomous, PGM applied for an IOFF license on May 23, 1978.

9. In a letter dated December 7, 1978, the Office of Freight Forwarders (OFF) requested additional information from PGM regarding an item in its financial statement attributing $2,225.18 to ocean freight commissions. PGM responded by admitting that these commissions were collected using PG's license but stated that they did not realize that this was a violation of the Commissions' Rules and Regulations.

10. OFF, in a letter dated March 2, 1979 with a copy to Paulssen, pointed out that until PGM received its own license, PGM would have to operate as a branch office of PG. Since that time, PGM has sent all ocean freight commission checks to PG in New York and beginning with the pay period ending January 18, 1980, PGM's personnel were put back on PG's payroll. From January 1, 1979 through May 3, 1979, PGM has logged 251 ocean export shipments. This brings the total number of ocean export shipments performed by PGM during the period between January 31, 1977 to May 31, 1979 to 922.

11. PG operates a branch office in Houston, Texas located at 1314 Texas Avenue, approved by the Commission on April 19, 1976. The Branch Manager at that time was Linda Roberson. Ms. Roberson resigned as Branch Manager on July 18, 1978 without prior notice to PG.

12. Barbara Middleton was employed by PG to manage the Houston Branch Office on August 28, 1978. She resigned on June 29, 1979. She was replaced by Carolyn Chambers who managed the branch from June 29, 1979 to September 10, 1979. On September 10, 1979, PG hired Karen Kowalke to manage its Houston branch.

13. OFF was not notified that Ms. Roberson was no longer the branch manager until a letter dated July 5, 1979. In that letter OFF was advised of the employment of Ms. Middleton and Ms. Chambers. By a letter dated October 9, 1979, OFF was advised of the employment of Ms. Kowalke. Neither Ms. Middleton or Ms. Chambers were ever approved by the Commission. Ms. Kowalke's qualifications were submitted but, there's no record of OFF approving her as a branch manager.

In a letter received by the Commission on April 8, 1981, dated November 21, 1980, which inadvertently was not mailed until April 7, 1981, PG advised OFF that Ms. Kowalke was no longer the Houston Branch manager. She was replaced by Rudy Barraza whose qualifications were submitted on April 7, 1981.

14. During the period of July 18, 1978 to August 28, 1978, the time period between the resignation of Ms. Roberson and the hiring of Ms. Middleton, PG's Houston branch office was managed by Harold Hess, General Manager of Ketra and his wife Katherine. Neither Harold or Katherine Hess were employees of PG. Hess performed this function to help PG whose branch manager had left suddenly.

15. PG operates an approved branch office in Cleveland, Ohio. Raymond Gillie was the qualifying officer and branch manager since the branch opening in 1973. Mr. Gillie left this position in 1976. He was replaced by Peggy Rhinebold who managed the branch from approximately March, 1976 to August, 1976 when she was replaced by Janet Acklin. OFF was not notified that Mr. Gillie had left or of the appointment of Ms. Rhinebold. In a letter received by the Commission on April 8, 1981, dated January 16, 1981, which inadvertently was not mailed until April 7, 1981, PG advised OFF of the appointment of Ms. Acklin as branch manager. By another letter received on April 8, 1981, dated February 9, 1981, which also inadvertently was not mailed until April 7, 1981, OFF was informed that as of January 19, 1981, John White would be managing this office. His qualifications were also submitted at that time.

16. PG operates an approved branch office in Miami, Florida. Francisco Gonzales was the qualifying officer and managed the branch from its opening in 1973 until approximately April, 1977 when he left this position. He was replaced by Hans Bunte who is the current manager of this branch. In a letter received by the Commission on April 8, 1981, dated January 19, 1981, which inadvertently was not mailed until April 7, 1981, OFF was advised that Mr. Bunte was managing this branch. His qualifications were also submitted.

17. PG operated an approved branch office in Baltimore, Maryland from January 24, 1972 until May 25, 1977 when it was closed due to the death of its branch manager Hugh Curry. The Commission was not notified of this branch closing. PG was not aware that it was required to inform the Commission of this branch closing.

18. On June 22, 1976, OFF approved a branch office for PG in Los Angeles based upon the qualifications of Alfred Kuehlewind. By letter dated July 21, 1976, however, PG was advised to cease operations at this location because it appeared that Mr. Kuehlewind was not an employee of PG. In a tele-

*phone conversation with the attorney who at that time repre-*sented PG, OFF was advised that the arrangement with Mr. Kuehlewind had stopped.

19. PG reopened this branch in September 1979. By letter dated March 24, 1980, PG requested that Alfred Vetter be allowed to replace Mr. Kuehlewind as branch manager of the Los Angeles branch. By a letter dated July 10, 1980, PG was advised that they did not have a currently approved Los Angeles branch and that they would have to apply again for a Los Angeles branch office. On August 7, 1980, PG made this application. Subsequently, however, in January, 1981, the Commission denied the request by PG to operate a Los Angeles branch.

20. The Commission was not apprised of these various changes in PG's branch operations because at that time PG was experiencing a number of internal problems. In early 1976, it was discovered that PG was in poor financial condition. Subsequently, PG changed banks, accounting firms, a portion of a major stockholder's stock was purchased by Ketra, and PG reduced its staff by 40%. In addition PG was assisted by Ketra who arranged for long term loans. For these reasons, most of PG's focus was on rebuilding the company and this was the period during which most of the branch office problems arose. (See Paulssen affidavit attached hereto).

(S) JOHN ROBERT EWERS
Director
Bureau of Investigation
and Enforcement

Gerald H. Ullman
Counsel for Respondent

STUART JAMES
Attorney

AFFIDAVIT

Siegfried Paulssen, being duly sworn, deposes and says:

I am the President of Paulssen & Guice, Ltd., respondent in the above-enumerated proceeding and am making this affidavit in order to explain the problems that led to the commencement of this proceeding.

Since the formation of our corporation Charles Guice and I were equal shareholders. It was Guice's function as Treasurer to handle the financial affairs, keep a close liaison with our accountant and banks, watch our cash flow closely and ob-

serve regulatory requirements. My function as President was to develop new business requiring me to spend a great part of my time on the road and develop and maintain close working relationships with the customers. I was quite successful in this regard, obtaining many major accounts, and building up a strong agency network in Europe, the Middle East, South America and the Far East.

In reviewing the financial condition of our company in early 1976 I learned to my great shock that the company was in poor financial shape. The accountant for the firm, one Harold Greenberg, had apparently developed with Guice an incorrect method of accounting for payables and in addition our records were kept so poorly that our financial situation became serious indeed. It was necessary for me to dismiss Greenberg, obtain a new firm, Biller & Snyder, to conduct a thorough audit of our books. Because our financial and accounting activities had been so mismanaged, after lengthy and difficult negotiations at the end of December, 1976 I worked out an agreement with Guice whereby he terminated his employment, he resigned as an officer and director and he sold all of his stock interest.

At that time I assumed the position of Treasurer as well as President and devoted a great deal of time and effort to restoring the corporation to a sound financial position. In this area I was able to do the following:

1. Four of our key employees were made shareholders by the sale to them of part of the stock owned by Guice and myself, creating additional capital of $190,000.

2. Stock was sold to Ketra Uebersee Transport, a highly reputable German forwarder, which brought into the company another $160,000 in September, 1976.

3. In February, 1977 Ketra agreed that it would make long term loans to our firm in German marks and repayable in like currency.

4. From mid-1976 to mid-1977 I reduced our staff from 100 employees to 60.

5. In late 1977 we changed banks, using Barclays Bank with whom we currently enjoy an excellent relationship. In addition, Ketra arranged a line of credit for us with a Hamburg bank which substantially relieved the financial pressure upon us.

During this period we found a competent comptroller, Harold Riggs, and improved our accounting system. After unsuccessfully using two computer service bureaus we have installed a house computer, IBM System 34, with a proven freight program which went on line on January 1, 1981. We have also bought a software program from Cyber Data Systems which provides us with the type of control and information we badly needed.

It was during the period described above that most of the problems with our branch offices arose. For the most part, we sought to comply with General Order 4 in applying for branch office approval and keeping the Commission apprised of changes. I have gone through our files exhaustively, but am not certain that our firm has all of the correspondence. What we do have indicates that we were aware of the necessity of branch office approval, sought same, and attempted to inform the Commission of changes. However, the Commission records are probably more complete than ours and may show some deficiencies, inadvertent though they were.

In some cases involving our branch offices we were simply unable to comply with Commission requirements through no fault of our own. For example, in our Houston branch office two of our branch managers, Lynda Robertson and Barbara Middleton, terminated their employment without giving us any notice. Since this action took place at a time when I was concentrating my efforts to ward off a collapse of our firm, I was simply unable to drop everything and fill promptly the vacancy in the branch office manager. It could also be that in other areas appropriate action was not taken expeditiously, but again, my focus was necessarily on saving the company. I can state unequivocally, and as earnestly as I can, that any noncompliance with the branch office approval or reporting requirements of General Order 4 was totally unintentional.

Our counsel, Gerald H. Ullman, advises that we bear responsibility for any "willful failure" to comply with a Commission rule. As may be seen from the foregoing, I do not feel that any violation that may have occurred was willful. Nevertheless, our firm is willing to make amends by the payment of civil penalties provided that counsel for both sides agree that fitness should no longer be an issue to be submitted to the Administrative Law Judge for a decision.

In addition, our firm can assure the Commission that we shall diligently seek to avoid any future problems. As noted above, we have a new computer system and an able controller in Riggs who will be in charge of regulatory matters. Mr. Ullman has recently become our retainer counsel and by reason of his competence in our field we feel certain that we will obtain the proper advice and guidance on legal matters.

In summary, our firm has had serious problems, but we are well on the road to recovery. Our revenue in 1980 has increased 50% over our 1979 gross income and we have acquired new major accounts and long term contracts with government entities overseas. With a new accountant, a proven computer system, an experienced controller, adequate credit lines and expert counsel, we are confident that the difficult period is behind us, but we continue to be handicapped by the pendency of this proceeding. While we are willing to make

amends by paying a reasonable civil penalty, we ask that the fitness issue be disposed of by agreement so that we can concentrate on building our business, preserving our stockholders' equity, and keeping our 80 employees gainfully employed.

(S) SIEGFRIED PAULSSEN

On April 9, 1981, BIE served a memorandum in support of proposed settlement and recommendation in regard to the fitness issue. The respondents served on April 17, 1981 (received April 20, 1981) a memorandum in support of the proposed settlement.

The Presiding Administrative Law Judge served on April 29, 1981, an order directing the parties to supply further information and documents in relation to the proposed settlement and recommendation as to the fitness issue. The BIE on May 14, 1981, served and filed a supplemental memorandum in support of recommendation as to the fitness issue with attached documentation. The respondent served on May 11, 1981 (received May 14, 1981) a supplemental memorandum.

REVIEW OF SETTLEMENT AGREEMENT

The above stipulation and proposed settlement of civil penalties are submitted to the Presiding Administrative Law Judge for approval pursuant to Rule 162 of the Commission's Rules of Practice and Procedure, 46 CFR 502.162. Rule 162 provides, *inter alia*, "the parties may, by stipulation, agree upon any facts involved in the proceeding and include them in the record with the *consent* of the presiding officer. . . ." (Emphasis supplied.)

As to the Stipulation, the Presiding Administrative Law Judge does not consent to Paragraphs 5, 6 and 8, page 2, as these are best shown from official records. Otherwise he consents to the remainder's inclusion in the record.

As to the Proposed Settlement of Civil Penalties, the Judge does not consent that PG's use of a controller and legal counsel (page 2) lessens PG's responsibilities to conform to Rules and Regulations. The amounts of the civil penalties as to PG in the amount of $10,000 and PGM in the amount of $5,000 are consented to.

On May 14, 1981, BIE served and filed a supplemental memorandum supporting its prior recommendation that the respondents, Paulssen & Guice, Ltd. (PG) and Paulssen & Guice Midwest, Inc. (PGM) be found "fit" to be licensed as independent ocean freight forwarders.

The respondents served their supplemental memorandum May 11, 1981 (received in the Office of the Secretary of the Commission May 14, 1981) and in it stated, *inter alia*, there is no question that the authority to adjudicate the issue of civil penalties and fitness rests in the first instance with the Presiding Judge.

Under date of June 4, 1981, the Presiding Administrative Law Judge served an Order for the Parties to Supply Additional Information for consideration on which the issue of fitness is to be judged. BIE on June 15, 1981, served and filed additional information regarding proposed settlement. On July 6, 1981, the additional information was received from the respondents, which is simply a nine (9) page affirmation under penalty of perjury by Siegfried Paulssen, to which was appended a copy of the following letter:

JUN 02 1981

Siegfried Paulssen, President
Paulssen & Guice, Ltd. (FMC-1166)
15 Park Row
New York, NY 10038

Dear Mr. Paulssen:

This is in response to your firm's attorney's letter of April 7, 1981, and the telephone conversation with staff of this office on May 29, 1981 requesting the Federal Maritime Commission's continued permission for branch offices at:

1314 Texas Avenue
Houston, TX 77002

2124 Atlantic Avenue
North Kansas City, MO 64116

Miami Int'l Airport
Building 2141, Door-12
Miami, FL 33148

5100 West 164th Street
Cleveland, OH 44181

and describing the qualifying experience of the respective proposed managers:

Rudy Barrazo
Leo Moore
Hans Bunte
John Dennis White

From the information contained in the letter, it appears that the branch offices will be staffed by qualified persons knowledgeable in the field of ocean freight forwarding.

In accordance with section 510.23(a) of the Commission's General Order 4 (copy enclosed), you are hereby authorized to continue to operate the Houston, North Kansas City, Miami and Cleveland branch offices.

Approval is based upon the experience of the individuals as set forth in that letter. Should any leave his position, you must notify us immediately and submit:
1) the name of the proposed replacement,
2) that person's resume,
3) a statement on the person's connection with any other firm, and particularly with any shipper, consignee, seller or purchaser of shipments to foreign countries from the United States, as well as a statement whether that person has read and understands the Commission's General Order 4 and section 1 & 44 of the Shipping Act, 1916.
Our continuing permission is based upon this premise.

VERY TRULY YOURS,

(S) JEREMIAH D. HOSPITAL
Chief
Office of Freight Forwarders

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The introducing of evidence on the question of fitness of a holder or applicant for an independent ocean freight forwarder license is the burden of BIE. See *Independent Ocean Freight Forwarder Application, Lesco Packing Co., Inc.*, Docket No. 74-31, 19 FMC 132, 136 (1976). An applicant for such a license also has a burden of showing fitness. Despite the burdens, BIE continues to recommend the respondents be found fit, and of course, the respondents agree with BIE.

BIE states its opinion is that the record in this proceeding justifies the imposition of a civil penalty but does not warrant the revocation of PG's license nor the denial of PGM's application (p. 2—May 14, 1981 Supplemental Memo); that while it has made a recommendation in regard to the respondents' fitness after considering the facts as they have evolved in this proceeding, BIE says it is well established that the ultimate determination can be made only by the Presiding Administrative Law Judge and the Commission, citing *Independent Ocean Freight Forwarder License—E. L. Mobley, Inc.*, Docket No. 77-26, 21 F.M.C. 845 (1978), and *Trimodal, Inc.*, Docket No. 78-26, 18 SRR 1172 (1978).

Recognizing that fitness is to be determined by the Presiding Judge and the Commission, and presumably aware of its burden to introduce evidence in question of fitness, that presented herein by the BIE asserting that while PGM did perform 922 ocean shipments using PG's license number, the shipments were performed under the mistaken belief that PGM was authorized by the Commission to perform these services; that after PG and PGM were informed by the Office of

Freight Forwarders that the arrangement was violative of the Shipping Act, 1916, corrective action was taken to return PGM to the status of a branch of PG; that it was during a time when PG's focus was on regaining their financial stability that these violations occurred.

BIE contends the respondents have cooperated with the Commission and have evidenced a willingness to conform to the conduct required by the Commission's Rules and Regulations in the future, thus BIE continues to recommend that the Presiding Administrative Law Judge find that the respondents are fit to be licensed independent ocean freight forwarders.

The instant proceeding has two civil penalty settlement agreements proposed, one as to the Respondent Paulssen & Guice, Ltd. (PG) in the amount of $10,000, and the other as to Paulssen & Guice Mid-west, Inc. (PGM) in the amount of $5,000. The two total $15,000. PG is the holder of Independent Ocean Freight Forwarder License No. 1166, issued August 1, 1967. PGM is an applicant for an independent ocean freight forwarder license. PGM applied May 23, 1978, and was assigned Application No. B-207.

PGM was formed January 31, 1977. Leo A. Moore, who was manager of PG's North Kansas City, Mo. branch office, which branch office was established December 27, 1976, became President of PGM; he owns 55% of the stock. PGM, even though it has never been licensed as an independent ocean freight forwarder, performed the services previously done by PG's North Kansas City, Mo. office using PG's license No. 1166. Ocean freight commissions were retained by PGM for 210 ocean freight shipments in 1977, 461 ocean freight shipments in 1978, and 251 ocean freight shipments in 1979, for a total of 922 occasions from January 31, 1977, through May 31, 1979.

The Commission, by letter of April 23, 1980, notified PGM of its intent to deny the application unless the applicant requested a hearing on the grounds that such a denial is unwarranted. In a letter dated May 7, 1980, legal counsel for the applicant requested that PGM be given an opportunity to show at a hearing that such a denial is unwarranted.

As indicated hereinabove, under date of June 4, 1981, the Presiding Administrative Law Judge served an Order for the parties to supply additional information for consideration on which the issue of fitness is to be judged; that BIE on June 15, 1981, in response thereto filed additional information regarding proposed settlement. BIE said, page 4, *inter alia*:

> Finally, the ALJ has requested that certain references to the stipulated record, made by BIE in the proposed settlement of civil penalties agreement and in its supporting memorandum, be specifically identified. The Order of Investigation and Hearing alleged that Respondents engaged in unlicensed forwarding activities and PG was alleged to have had a number

> of defects in its branch office operations. In its supplemental memorandum filed May 14, 1981, as well as in its original supporting memorandum, BIE stated that "PG and PGM have admitted to the conduct in question". Namely that PGM did perform 922 ocean freight shipments using PG's license while they were not in the employ of PG and that a number of PG's branch offices contained defects. The Respondents have admitted, in paragraph 7 of the stipulation that in 1977, 210 ocean freight shipments were handled by PGM and that 461 shipments were handled in 1978 using PG's license number. In paragraph 10 of the stipulation, the Respondents admit that in 1979, PGM handled 251 ocean freight shipments using PG's license number bringing the total number of shipments performed by PGM to 922.

Counsel for PG in its April 17, 1981, Memorandum in support of proposed settlement, stated, page 9, ". . . PG joins with BIE in its recommendation that the proceeding against PG be terminated with the imposition of a civil penalty of $10,000 and a finding by the Presiding Judge that PG's license be retained." And counsel argues that the sole issue for determination herein with respect to PGM is whether its unauthorized forwarding justifies a denial of its application for a license. In all other respects, PGM has the necessary requisites for licensing. BIE in its April 9, 1981, Memorandum in support of proposed settlement and recommendation, in regard to fitness issues (p. 12), urged the Presiding Judge to approve the proposed settlement submitted by the parties, to find PG fit to continue to be licensed as an independent ocean freight forwarder, to approve PGM's IOFF application, and to discontinue the present proceeding. So, here there is a request for termination of the proceeding as to PG and a request to discontinue the proceeding.

The President of PG, Siegfried Paulssen, in his January 28, 1981, affidavit, stated among other things that he learned in 1976 that PG was in poor financial shape. He dismissed the company's accountant and got another one; Guice & Paulssen worked out an agreement whereby Guice terminated his employment, resigned as an officer and director, and sold all of his stock interest. President Paulssen assumed the position of Treasurer, as well as President. Mr. Paulssen stated that in other areas appropriate action was not taken expeditiously because his focus was on saving the company; that any more compliance with the branch office's approval or reporting requirements was totally unintentional.

In his July 1, 1981, affirmation, Mr. Paulssen says (pp. 8, 9), PGM's qualifications for a license are not questioned except for the unauthorized forwarding.

The Presiding Administrative Law Judge, based upon the above, and under the terms of the settlement, the record as a whole and the

implication therefore finds that there was unauthorized forwarding; that PGM did perform 922 ocean shipments using PG's license number. The Kansas City office was under the management of Leo A. Moore during the period of the 922 shipments. Now the same Leo A. Moore is the President of Paulssen & Guice Midwest, Inc., to whom the Leo Moore Company leases space for the Kansas City office. Leo A. Moore, according to the application of PGM, owns or holds fifty-five percent (55%) of the stock in PGM. Thirty-five percent (35%) of the stock in PGM is owned or held by PG. Mr. Paulssen, as noted above, stated his effort was focused on saving the PG company. Mr. Moore, as manager of the PG North Kansas City, Mo. branch was present all the time the 922 shipments were made. The respondents contend that any violations, if they occurred, were not willful. However, as the Commission said in *Independent Ocean Freight Forwarder License No. 1778, Crescent Navigation, Inc.*, Docket No. 80-21, Order Adopting Initial Decision, served August 13, 1981 (24 F.M.C. at 77 (1981)): "The Commission's regulations impose duties and obligations . . . and . . . passive failure to conform with the requirements of law is as serious a matter as affirmative actions in violation of the law."

PG is still doing business at its branch office at 2124 Atlantic Avenue, North Kansas City, Mo., and as indicated above, under date of June 2, 1981, was authorized by the Chief, Office of Freight Forwarders of the Commission, to continue to operate the North Kansas City and other branch offices named. PG is now promising to obey the Commission's Rules and Regulations and thus serve the public.

PGM is applicant for an independent ocean freight forwarder license at the same spot PG's branch office is doing business at, 2124 Atlantic Avenue, North Kansas City, Mo. Mr. Leo A. Moore is manager of the PG branch office at North Kansas City, Mo., and is President of the applicant PGM, holding or owning 55% of PGM stock. Mr. Paulssen, President of PG, is Vice President of the applicant PGM and holding or owning 35% of the PGM stock. Save for the addition of Midwest, Inc., the name of the applicant PGM is the same as that of the licensee PG.

Granting an independent ocean freight forwarder license to the applicant PGM would be akin to granting a second license to the same parties at the same stand where 922 shipments concerning them and PG in violation of rules and regulations were made and civil penalty settlements therefor received. A grant of a new, or second license under such conditions might be construed as condonation by the Commission of the actions involved, rather than enforcement of the law with compassion, which it is sought to be.

The respondents have been given every consideration in regards to the settlement of civil penalty. Enforcement of the law with compassion shall be followed in regard to the license of PG and the application

for a license by PGM. Under the circumstances of this case and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that PG shall be permitted to retain its independent ocean freight forwarder license, and the civil penalty settlement in the agreed amount of $10,000 payable in 30 days is approved. PGM, under the circumstances herein, at this point, shall not be granted an independent ocean freight forwarder license, as its application shall be denied because it is not clear that PGM is independent, or that PGM has met its burden of proving to be fit and under such circumstances and record, to find PGM fit would be to make a travesty of justice. PG needs to direct all of its attention to the proper operation of PG without any dilution of the attention by efforts to operate a new corporation in the same branch office, trying to do the same business in almost the same name, which the record shows previously was confusing to the customers, and to operate with the same persons responsible and in charge the time PG found itself in financial difficulty.

Shippers who conceivably believe they are dealing with a new corporation, operating under a new independent ocean freight forwarder license as sought herein, would in reality be conducting business with those found to have engaged in activities amounting to 922 violations of the Shipping Act. The record is simply void as to the reasons necessitating the approval of a new license for PGM and the purposes are not apparent nor have the parties submitted a scintilla of evidence which mandates a second license.

For these reasons, the application of PGM is denied. However, PGM's settlement of civil penalty is accepted and approved.

For the reasons given, the results of the investigation and the record herein, PG is permitted to retain its freight forwarder license.

Wherefore, it is ordered:

(A) Paulssen and Guice Ltd.'s proposed settlement of civil penalty in the amount of $10,000 payable within 30 days is approved.

(B) Paulssen and Guice Ltd.'s independent ocean freight forwarder license is not suspended or revoked; they are allowed to retain the license.

(C) Paulssen and Guice Midwest, Inc.'s proposed settlement of civil penalty in the amount of $5,000 payable within 30 days is approved.

(D) Paulssen and Guice Midwest, Inc.'s application for a license as an independent ocean freight forwarder is denied.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-61

CHUMET SHIPPING CO., INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 619

NOTICE

February 4, 1982

Notice is given that no exceptions have been filed to the December 31, 1981 initial decision in this proceeding and the time within 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. 80-61

CHUMET SHIPPING CO., INC. - INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 619

Held:

(1) Where the Respondent ocean freight forwarder improperly invoiced clients for insurance premiums by inflating the amount of the premiums it paid to insurance companies and where it failed to timely notify the Federal Maritime Commission of changes in its ownership and management and in its "qualifying officer," a settlement providing a penalty of $20,000, with safeguards as to the company's future operation, 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 will secure compliance with the law and the Commission's rules and policies.

(2) Where the Respondent improperly invoiced customers for insurance premiums and engaged in certain other questionable practices, all of which activity was initiated and carried out by persons no longer associated with the Respondent, and where the Respondent is now owned and operated by other persons who were unaware of the improper conduct and who have corrected the prior wrongdoing and have agreed to future independent audits designed to prevent its recurrence and compliance with the law and regulations, it is held that the Respondent is "fit," willing and able to carry on business as an ocean freight forwarder and its license need not be suspended or revoked.

Gerald H. Ullman for Respondent.

Charles C. Hunter and *Stuart James* for Office of Hearing Counsel, Bureau of Hearings and Field Operations.

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

Finalized February 4, 1982

PRELIMINARY MATTERS

This case began when the Federal Maritime Commission (Commission) served an Order of Investigation and Hearing on the Respondent on September 12, 1980. In the Order the Commission directed that the following issues be addressed and resolved during the course of the investigation:

[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).

1) Whether Chumet violated section 510.5(a)(4) of General Order 4 by failing to notify the Commission of a change of the firm's qualifying officer within 30 days after the occurrence of the change.

2) Whether Chumet violated section 510.5(c) of General Order 4 by failing to notify the Commission of a change of the firm's officers and owners within 30 days after the occurrence of the change.

3) Whether Chumet violated section 510.23(c) of General Order 4 by participating in an export transaction whereby the licensee prepared a commercial invoice dated May 23, 1978, misrepresenting, by lowering, the selling price of the merchandise to the purchaser on a shipment which moved under ocean bill of lading dated May 26, 1978.

4) Whether Chumet violated section 510.23(d) of General Order 4 by not exercising due diligence in imparting information to its principal and/or by knowingly imparting false information to its principal in regard to a manufacturer's discount received on merchandise purchased by check dated June 5, 1978, relative to an ocean freight forwarding transaction handled under bill of lading dated May 26, 1978.

5) Whether Chumet violated sections 510.23(e) and 510.23(f) of General Order 4 by: (1) withholding information from its principal in regard to a manufacturer's discount received on merchandise purchased by check dated June 5, 1978, and (2) not promptly accounting to its principal for an over payment of charges relative to an ocean freight forwarding transaction handled under bill of lading dated May 26, 1978.

6) Whether Chumet violated section 510.23(f) by failing to account to its shipper principal, Cardinal Export Corp., the insurance money paid to Chumet relative to an insurance claim filed on behalf of the shipper principal which was in excess of the amount sought by the shipper principal.

7) Whether Chumet violated section 510.23(j) of General Order 4 by failing to state separately on its invoices or other forms of billing to its shipper principals the actual amount of the insurance value, insurance rate, and premium cost of insurance arranged for shipments handled during the billing period June 1, 1977 through February 28, 1979.

8) Whether Chumet violated section 510.23(j) by failing to state separately on its invoices or other forms of billing to its shipper principals the actual amount of the insurance value, insurance rate, and premium cost of insurance arranged in regard to ocean shipments forwarded by the licensee during the past five years.

9) Whether civil penalties should be assessed against Chumet 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 imposed taking into consideration factors in possible mitigation of such a penalty.

10) Whether Chumet's independent ocean freight forwarder license should be suspended or revoked for:

(a) willful violations of the Shipping Act, 1916, and the Commission's rules and regulations pursuant to section 44(d) of the Shipping Act, 1916.

(b) failure to comply with the requirements of section 510.5(a)(4) of General Order 4 pursuant to section 510.5(a)(5) of General Order 4.

(c) failure to respond to a lawful inquiry or to comply with the rules and regulations of the Commission in accordance with section 510.9(b) of General Order 4.

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

Subsequent to the issuance of the Order of Investigation and Hearing, the Bureau of Hearings and Field Operations [2] (Hearing Counsel) and Chumet exchanged discovery requests in the form of written interrogatories and requests for admissions and production of documents. Pursuant to these requests, the parties exchanged a quantity of information and material relating to the allegations set forth in the Commission's Order of Investigation and Hearing. However, Chumet also raised objections to a number of Hearing Counsel's inquiries. In response, Hearing Counsel, on December 2, 1980, filed a motion for an order compelling responses to its outstanding discovery requests. Although Chumet furnished Hearing Counsel with additional information on December 17, 1980, the parties were unable to resolve all of the discovery issues in dispute.

By letter dated February 20, 1981, Hearing Counsel requested that its motion to compel be held in abeyance pending the outcome of further discussions by the parties. Hearing Counsel advised the presiding Administrative Law Judge that Chumet would furnish additional documentary material to Hearing Counsel and that Hearing Counsel would be deposing Chumet's Vice President and Secretary, Michael Metrick, in mid-March, 1981. Hearing Counsel further advised that the parties thereafter would jointly explore the possibility of resolving the instant proceeding without resorting to protracted litigation.

By letter dated March 24, 1981, Hearing Counsel notified the presiding Judge that a negotiated settlement appeared to be a realistic possi-

[2] At the time the present investigation was instituted, the Bureau of Hearings and Field Operations was designated the Bureau of Investigation and Enforcement.

bility and that negotiations between the parties were continuing. During the subsequent months, Chumet made available additional material requested by Hearing Counsel. The parties eventually informed the presiding Judge of specific dates on which an evidentiary record, a settlement agreement and memoranda of law would be submitted.

However, negotiations broke down in midsummer and Hearing Counsel, by letter dated August 7, 1981, notified the presiding Judge that although the parties had made significant progress in narrowing the gap between their respective positions, their efforts to reach a settlement had ultimately been unsuccessful. The presiding Judge then scheduled a hearing for October 19, 1981.

At that hearing, the parties advised the presiding Judge that a settlement had been reached. Pursuant to the Order of the presiding Judge served October 22, 1981, the parties have submitted on November 27, 1981, a settlement agreement reflecting the settlement so negotiated. In conjunction with that submission, the parties have also filed an evidentiary record upon which the propriety of the settlement can be determined.[3]

Also in accordance with the Order of October 22, 1981, the parties have each submitted memoranda in support of the proposed settlement of civil penalties. The memoranda also discuss the issue relating to "fitness," which cannot be settled. The parties both take the position that the Respondent should be allowed to continue to be licensed as an ocean freight forwarder. They assert that the evidentiary record submitted by the parties supports both the proposed settlement and a holding that the Respondent's license should not be revoked.

FINDINGS OF FACT

The parties to this proceeding executed a stipulation of facts which was submitted on November 27, 1981, together with certain Appendices and Exhibits which are hereby made a part of the evidentiary record of this proceeding. The facts contained in the stipulation are hereby adopted and so found, with one minor addition, as set forth below. We would have used a different sequence, but we have closely followed the stipulation submitted by the parties to avoid confusion when referring to the attached documents.

1. Chumet, located at 401 Broadway, New York, New York, 10013, is an independent ocean freight forwarder operating under FMC License No. 619, issued on February 12, 1964.

2. Effective August 25, 1971, License No. 619, Revised, was issued to Chumet following its incorporation. At that time, Chumet was owned

[3] The evidentiary record consists of a stipulation between the parties with ten appendices and nine additional exhibits.

solely by Philip Chudnoff and Philip Metrick who were the only officers of Chumet and its sole qualifying officers.

3. By letter dated May 3, 1978, the Commission was advised of the death of Philip Chudnoff. (Appendix A.)

4. By letter dated May 8, 1978, the Commission's Office of Freight Forwarders (OFF) provided Chumet with a copy of form FMC-18 requesting that it update this form to reflect, *inter alia*, changes in the owners and officers of the firm. By letters dated April 2, 1979 and October 16, 1979, OFF advised Chumet that it had not received a response to its initial request. (Appendix B.) As of September 12, 1980, the date on which the present investigation was instituted, OFF had not received a revised form FMC-18 from Chumet.

5. On January 1, 1979, Philip Metrick died.

6. Chumet failed to notify the Commission in writing on Form FMC-18 of the changes in ownership or the changes in officers which occurred at Chumet as a result of either the death of Philip Chudnoff or the death of Philip Metrick until after the commencement of the present investigation.

7. Chumet failed to notify the Commission in writing of either the identity or the detailed ocean freight forwarding experience of the officer of Chumet who qualified Chumet as an independent ocean freight forwarder until after the commencement of the present investigation.

8. With a cover letter dated October 7, 1980, Chumet submitted an amended form FMC-18 that reflected the current ownership and officers of Chumet and detailed the work experience of Michael Metrick (Philip Metrick's son), the current qualifying officer of Chumet. (Appendix C.)

9. The current officers of Chumet are Roslyn Metrick, President, Michael Metrick, Vice President, and Sharon Metrick, Treasurer. Chumet's ownership is shared equally between Michael Metrick, Sharon Metrick and Debrah Metrick.

10. Michael Metrick has been employed by Chumet since July 1976. From July 1976 until December 1977, Mr. Metrick was employed by Chumet as a typing clerk. From December 1977 until March 1979, Mr. Metrick was employed as the Secretary and Assistant Manager of Chumet. From March 1979 to the present, Mr. Metrick has been employed as the Vice President and General Manager of Chumet.

11. Following the death of Philip Metrick in January 1979, Michael Metrick assumed the position of Chumet's qualifying officer.

12. Prior to January 1979, Michael Metrick had not been exposed to Chumet's methods of billing its clients for services performed.

13. Subsequent to January 1979, Michael Metrick investigated Chumet's existing procedures for billing its clients for the services it performed.

14. Michael Metrick initially worked with the Chumet employee who had been involved in the billing of Chumet's clients prior to January 1979. Mr. Metrick gradually assumed the responsibility for supervising the task of billing Chumet's clients for services performed.

15. Today, if a shipper requests insurance *from Chumet's own open policy,* Chumet issues an insurance certificate under that policy, forwards the original to the shipper and sends copies to the insurance company.

16. The insurance certificate that the shipper receives does not specify the premium that is paid by Chumet for the insurance so arranged.

17. Prior to January 1979, Chumet showed on its invoices to its clients the insured value of the cargo, an amount that allegedly represented the insurance premium and the amount of the placement service charge. The placement charge was for the service involved in arranging for the insurance. Appendix D contains a sampling of Chumet invoices reflecting insurance charges.

18. The premiums shown on Chumet's invoices, however, were not the actual insurance premiums paid by Chumet to its insurance broker. Prior to January 1979, it was a general practice for Chumet to show a larger figure on its invoices to its clients than the actual premium that had been paid by Chumet. The percentage of the "mark-up" of the premium costs varied from shipment to shipment.

19. Chumet inflated the actual insurance premium on its invoices to its clients by amounts ranging from 10 percent to in excess of 100 percent. Appendix E contains examples of insurance statements issued by Chumet's insurance broker that reflect the actual insurance premiums on the shipments represented by the invoices contained in Appendix D. The handwritten figures in the "Remarks" column on these statements represent the alleged premium and the placement fee billed to the client. The premium actually paid by Chumet is reflected in the "Premium" column. Also included in Appendix E are compilations of the differences between the actual and inflated premiums on a sampling of shipments handled by Chumet.

20. Chumet's clients were not aware that prior to January 1979, they were paying more in insurance premiums than Chumet was actually paying to its insurance broker.

21. Chumet forwarded approximately 2,000 to 2,500 ocean freight shipments annually during the years 1975 through 1980. Insurance was arranged by Chumet on a varying percentage of these export shipments.

22. Chumet's annual statements of income and earnings contain a category entitled "Profit on Insurance" (POI) which reflects the gross profit generated from insurance billings to clients minus the premiums paid by Chumet to its insurance broker. Included in the POI category are the placement fees assessed by Chumet and the difference between

the premiums actually paid by Chumet to its insurance broker and the premiums Chumet billed its clients (the differential).

23. For the years ending April 30, 1976, through April 30, 1979, the POI category amounted to $25,219, $44,560, $154,494 and $152,836 respectively. For these same years, Chumet's income from ocean freight forwarding fees was $61,095, $60,661, $100,828 and $126,972 respectively. Its net profit for these years was $2,082, $4,180, $12,104 and $21,778 respectively. (Appendix F.)

24. The POI category for the years ending April 30, 1978, and April 30, 1979, were disproportionately large as compared to the same category for the years ending April 30, 1976, and April 30, 1977, because of the increased volume and value of the shipments forwarded by Chumet during the later years.

25. The average percentages (taken from a random sample of Chumet's shipping files) of the POI category that were attributable to the differential during the calendar years 1976 through 1979 were respectively 44.87 percent, 38.63 percent, 44.09 percent and 95.51 percent. (Appendix G.)

26. Chumet generated approximately $150,000 during the period September 1975 through June 1979 by inflating insurance premiums in billing its clients.

27. Prior to January 1979, Chumet identified on its invoices to its clients both the alleged premium cost of the insurance applied to the shipment and a placement fee. After January 1979, Chumet no longer specified a separate placement fee. Chumet thereafter assessed a lump sum for insurance coverage.

28. Chumet began billing its clients in this manner because Michael Metrick, having analyzed Chumet's previous system for billing insurance charges and having been unable to determine why Chumet had so billed its clients, decided to discontinue the previous method. Chumet operated in this latter manner until June 1979.

29. In June 1979, Chumet began billing its clients separately for the exact premium rate that Chumet paid to the insurance broker and a placement service charge.

30. Chumet altered its billings procedures because Michael Metrick was advised by Peter Breslaw, an investigator with the Commission's Atlantic District Office, of the Commission's regulations requiring that Chumet's insurance charges be reflected in such a manner.

31. Chumet, on its invoices to its clients, has used the letter P to designate the insurance premium and the letters P & S to designate the insurance placement fee. (Appendix H.)

32. Chumet's clients were not originally advised as to the meaning of the symbols so utilized and a number of shippers were confused as to the charges that the symbols represented.

33. For the year ending April 30, 1981, Chumet possessed working capital in the amount of $87,010 and a net worth of $56,557. During that year, Chumet had a net loss of $1,237. (Appendix I.)

34. For the six-month period May 1, 1981, through October 30, 1981, Chumet possessed working capital in the amount of $78,216 and a net worth of $50,115. During that period, Chumet had a net loss of $6,442. (Appendix J.)

ULTIMATE FINDINGS OF FACT

35. The record in this proceeding justifies a settlement whereby the Respondent pays $20,000 to the Federal Maritime Commission. Such a settlement takes into consideration relevant mitigating circumstances and is within the boundaries 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 practices.

36. 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 the 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,[4]

[4] 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., lst Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

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

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

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 [5] and has often favorably looked upon them as a matter of policy.[6]

While settlement of cases is encouraged generally, they must be predicated on the specific facts and circumstances present in each case. Here, the facts are quite clear. For the fiscal years ending April 30, 1976, through April 30, 1979, Chumet invoiced its clients by including in the invoice information allegedly showing the insured value of the cargo, the amount of the insurance premium and the amount of a "placement service charge." In doing so, at least up until January of 1979, it "marked-up" the premium payments from 10 percent to over 100 percent, without informing its clients of the true premium costs. During the period April 30, 1976, through April 30, 1979, Chumet's profit on insurance income from ocean forwarding fees and net profit was as follows:

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[5] 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 con sideration of facts, argument, 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.

[6] See *Perry Crane Service v. Port of Houston Authority, of Port of Houston, Texas (Approval of Settlement)*, FMC Docket No. 75-51, served June 21, 1979 (22 F.M.C. 30 (1979)), 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. 364 (1979)), Administratively Finalized, December 27, 1979; *Merck, Sharp & Dohme v. Atlantic Lines*, 17 FMC 244 (1973). See also the long list of cases cited in section IIA of the Memorandum filed by the Bureau of Hearings and Field Operations.

Year	Insurance Profit	Fees	Net Profit
1976	25,219	61,095	2,082
1977	44,560	60,661	4,180
1978	154,494	100,828	12,140
1979	152,836	126,972	21,778

During the four-year period, officer's salaries rose from $86,000 to $138,100, and in 1978 a pension plan was apparently adopted to which $69,611 was contributed in 1978 and $72,275 was contributed in 1979.[7]

Prior to January of 1979, Chumet was owned by Philip Chudnoff and Philip Metrick, who were its only officers and its sole "qualifying" [8] officers. When Mr. Chudnoff died, Michael and Roslyn Metrick also became officers.[9] On January 1, 1979, Philip Metrick died, and ultimately Roslyn Metrick became President, Michael Metrick became Vice-President and Secretary, and Sharon Metrick became Treasurer. It was not until October 7, 1980, after the present investigation began, that Chumet filed a form FMC-18 which detailed the work experience of Michael Metrick, Chumet's present qualifying officer.

Michael Metrick, who is Philip Metrick's son, began working for Chumet in July of 1976 as an office boy. On Mr. Chudnoff's death, he took on additional duties as a typing clerk and from December 1977 to March 1979 Michael was Secretary and Assistant General Manager of Chumet. After his father's death in January 1979, Michael became Chumet's qualifying officer and since March 1979 has been employed as the Vice-President and General Manager of Chumet.

Prior to January 1979, Michael Metrick was neither part of nor familiar with Chumet's methods of billing clients for services performed. After January 1979, he investigated Chumet's existing procedures for billing its clients for the services it performed and gradually assumed responsibility for those billings. Initially, he discarded the separate description of premium payment and placement fee, assessing a lump sum for insurance coverage. In June 1979, Chumet began billing its clients for the exact premium rate Chumet paid to the insurance broker and the placement service charge. This was done because the Commission advised Mr. Metrick that its regulations required such a breakdown of the insurance costs.

In addition to failing to properly account for the insurance premiums on the invoices, which goes to whether or not Chumet violated section

[7] While the record is devoid of any indication of who benefited from the pension program, Chumet only had two principal officers until 1978. In 1979 there were three officers, all members of the Metrick family.

[8] "Qualifying" under the Commission's rules as licensed ocean freight forwarders.

[9] They so notified the Commission by letter dated May 3, 1978.

510.23(j) of General Order 4, and its failure to timely notify the Commission about a change in its qualifying officer and its owners and officers, which involves violations of sections 510.5(a)(4) and 510.5(c) of General Order 4, Chumet is also charged with certain other possible violations. They are set forth in subparagraphs 2 and 3 of the Order of Investigation and Hearing (at page 2). They involve a shipment which moved on an ocean bill of lading dated May 26, 1978, and allege that Chumet misrepresented the selling price of merchandise shipped to Authentic Agencies, Inc. (Authentic) by failing to disclose a 5 percent discount ($210.44) received from a supplier on its invoice dated May 23, 1978. The evidence of record [10] indicates that Authentic requested certain services of Chumet, was aware of the 5 percent discount, and does not object to Chumet's retaining the discount "since valuable services have been rendered by Chumet to us."

Subparagraph 4 of the Order (page 2) charges Chumet with possible violation of General Order 4, by failing to account to its principal, Cardinal Export Corporation (Cardinal), for certain insurance money ($426.92) paid to Chumet as a result of a claim filed on behalf of Cardinal. Chumet received $1,387.40 and paid Cardinal $960.48. The evidence of record [11] indicates that Cardinal was aware of the amount received by Chumet, but allowed Chumet to retain the $426.92 "as reasonable compensation for the services rendered in the preparation, filing and processing of the claim."

Given the above factual background, it is our task to approve or disapprove the proposed settlement submitted by the parties. In it Chumet admits that it has engaged in specified conduct that may be violative of pertinent regulatory authority, and states that it has terminated all such practices. It agrees to pay a civil penalty of $20,000 over a period of four years. To safeguard against any recurrence of any possible conduct violative of the maritime laws or Commission rules and regulations, Chumet not only has agreed to advise its owners, directors, officers and employees of the provisions of the proposed settlement, but has agreed to take further steps, the most important of which is to allow an independent auditor to inspect its books to insure compliance with General Order 4. The audits are to be conducted annually with or without notice to Chumet, and copies of the auditor's report will be furnished to the Commission as well as Chumet.

In accepting or rejecting the proposed settlement, it is necessary to consider the Commission's rules and regulations regarding settlements generally, 46 C.F.R. 505.1 *et seq.* They provide in pertinent part that "the criteria for compromise, settlement, or assessment may include, but need not be limited to, those which are set forth in 4 C.F.R. Parts 101-

[10] Stipulation, Exhibit 2.
[11] Stipulation, Exhibit 5.

105." The referenced criteria are the government-wide "Standards For The Compromise of Claims," developed by the Comptroller General and the Attorney General of the United States under the Federal Claims Collection Act of 1966, 31 U.S.C. 952, and the Commission has held that these criteria do provide an accepted perspective from which to review and analyze a proposed settlement.[12] The criteria include consideration of the Commission's enforcement policy, the cost of collecting the claim, litigative probabilities and inability to pay. With respect to enforcement policy, it is our belief that given the provisions of the settlement, that policy is adequately served by the approval of the settlement agreement. It is clear that Chumet violated General Order 4 when it failed to properly invoice customers for the insurance premiums and when it did not timely notify the Commission of changes in ownership and management. Further, its billing methods in particular instances were loose and inaccurate to say the least. Yet, there are several important factors in mitigation which must be weighed. The lack of culpability of the current owners and managers is clearly a consideration in Chumet's favor. The termination of the violative practices is important, and Chumet's acquiescence in having outside auditors monitor its activities is a clear expression of its determination and willingness to right whatever wrongs that may have occurred. Indeed, in terms of enforcement policy, the proposed settlement of $20,000 coupled with the corrective measures contemplated in the agreement is precisely the kind of example one would like to see followed in the settlement of similar Shipping Act violations.

As to the cost of collecting any penalties which might be due and the litigative probabilities involved, it is true that if the maximum penalty for each possible violation were assessed, it would far exceed the $20,000 figure set forth in the settlement agreement. However, the likelihood that every violation could be proven, or even if proven would give rise to the maximum penalty being imposed, is remote. The cost of investigation and trial in terms of actual costs as well as man-hours would be substantial, and given the mitigating circumstances already noted, one would be hard-pressed to predict a money judgment that would exceed $20,000 after costs and trial hazards were taken into account.

Finally, as to inability to pay, it does appear that Chumet had a net loss of $1,237 in the year ended April 30, 1981, and a net loss for the next five-month period of $6,442. Its current working capital is only

[12] *Behring International, Inc., Independent Ocean Freight Forwarder License No. 910,* (Approval of Settlement and Initial Decision), Docket No. 80-43, served March 17, 1981, 23 F.M.C. 974; *Eastern Forwarding International, Inc.—Independent Ocean Freight Forwarder Application—Possible Violations, Section 44, Shipping Act, 1916* (Initial Decision), Docket No. 79-27, served July 31, 1980, 23 F.M.C. 207.

$78,216, and its net worth is $50,115. Chumet's current expenses, including officer's salaries, are reasonable. While one might readily argue in support the proposed settlement on the basis of the above facts and an inability to pay, we note that it is not necessary to do so here. Even without consideration of Chumet's inability to pay, we would approve the settlement because of the other facts and circumstances we have already discussed. Our hesitancy in citing inability to pay as a decisive settlement consideration in this case stems from the belief that if inability to pay is considered to be a decisive factor, the financial settlements submitted should be certified with a sworn statement given within the ambit of 18 U.S.C. 1001.[13] Further, where a corporate ocean freight forwarder license is involved, settlements on the basis of inability to pay should be approached with caution. It is all too easy for the corporate entity, especially when it is closely-held, to place assets beyond the reach of the Commission or its customers, so that when violations do occur and are uncovered, it might conveniently be able to plead inability to pay for settlement purposes. In our view, given the nature of maritime law and regulations, settlements on the basis of inability to pay ought to be approached with caution and avoided where other factors warrant settlement. We have done so here.

In view of all of the above, we believe the proposed settlement is an acceptable resolution of the issues involved. Without 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. 10, page 5, of the Order of Investigation and Hearing). In *Independent Freight Forwarder's License or—E.L. Mobley Inc.*, 21 F.M.C. 845 (1979), Initial Decision served November 6, 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

[13] Section 1001 provides a criminal sanction for willful false statements.

agency's 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. 583, and partially adopted March 24, 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 the Respondent admits, that it made mistakes in billing clients for insurance. It also agrees that it failed to timely notify the Commission of changes in its ownership and management. However, the evidence also establishes that Chumet's violations were not the result of any incompetence in carrying out its duties as a freight forwarder. Rather, they resulted from questionable practices apparently initiated and carried out by persons who are no longer employed by Chumet. The evidence is clear that the practices have stopped, the present ownership is operating the company properly and that it intends to so operate it in the future. Indeed, it must do so because the audit required by the settlement agreement leaves no other alternative. Finally, we are convinced that Michael Metrick, the present qualifying officer, is sincere when he testified that he intends to operate Chumet in accordance with the law and regulations. We are also convinced that he has the expertise to render ocean freight forwarder services to customers in the future. Certainly, he and Chumet deserve the opportunity to do so, especially since the business is a small one and his livelihood depends on future compliance with the law and regulations. To suspend Chumet's ocean freight forwarder license would be too harsh a remedy and one we believe is unnecessary. Therefore, it is held that the Respondent is fit to carry on the business of an independent ocean freight forwarder.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

ATTACHMENT

DOCKET NO. 80-61

BEFORE THE FEDERAL MARITIME COMMISSION

CHUMET SHIPPING CO., INC. INDEPENDENT OCEAN FREIGHT FORWARDER LICENSE NO. 619

PROPOSED SETTLEMENT OF CIVIL PENALTIES

This Proposed Settlement has been entered into between the Bureau of Hearings and Field Operations (Hearing Counsel) and Respondent Chumet Shipping Co., Inc. (Chumet). 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 the instant proceeding if so approved.

WHEREAS, by Order of Investigation and Hearing served September 12, 1980, the Commission instituted the present investigation to determine whether Chumet had violated sections 510.5(a)(4), 510.5(c), 510.23(c), 510.23(d), 510.23(e), 510.23(f) and 5;.0.23(j) of the Commission's General Order 4 (46 C.F.R. 510.5(a), 510.5(c), 510.23(c), 510.23(d), 510.23(e), 510.23(f) & 510.23(j)), and whereas, that Order includes the issue of whether civil penalties should be assessed for any violations of the above sections of the Commission's General Order 4 so found;

WHEREAS, the Order of Investigation and Hearing alleges that Chumet may have violated the above sections of the Commission's General Order 4;

WHEREAS, Chumet has admitted that it has engaged in specified conduct which may be violative of section 510.5(a)(4), 510.5(c) and 510.23(j) of the Commission's General Order 4;

WHEREAS, Chumet has terminated the conduct that may be violative of section 510.23(j) of the Commission's General Order 4 and has instituted and has indicated its willingness and commitment to maintain measures designed to eliminate, discourage, and prevent such conduct in the future;

WHEREAS, the parties, in order to avoid the delays and expense that 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 Chumet 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 penalty 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, Chumet agrees, as a condition of this Agreement, to comply with all requirements set forth hereinafter, subject to the stipulations, conditions and terms of settlement contained herein:

1. Chumet hereby agrees, as a condition of this Agreement, to pay a monetary amount of Twenty Thousand Dollars ($20,000) of which Two Thousand Dollars ($2,000) shall be payable thirty (30) days following approval by the Commission of this Proposed Settlement and Eighteen Thousand Dollars ($18,000) shall be payable according to the terms of the Promissory Note attached hereto as Appendix 1.

2. Except as provided in paragraph six (6) below, this Agreement shall forever bar the commencement or institution by the Commission of any civil action or other claim for recovery of civil penalties from Chumet arising from the conduct set forth and described in the factual record submitted in the present proceeding It is understood by Chumet 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 based upon the specific conduct engaged in by Chumet, other than these actions and claims for recovery referred to above.

3. Chumet agrees to take all reasonable steps to preserve and maintain at a location agreeable to the Commission through January 1, 1986 all records and documents now in its possession or under Its control that in any way or manner either indicate or verify the conduct set forth in the factual record submitted in the present proceeding and, upon reasonable notice, to allow Commission investigators or attorneys unimpeded access to such records and documents and to allow the removal of documents specifically requested by Commission investigators or attorneys for the purpose of duplication.

4. Chumet agrees to take all reasonable measures designed to discourage, prevent, and eliminate the conduct that may be violative of section 510.23(j) of the Commission's General Order 4. These measures shall include, but need not be limited to, the measures set forth in Appendices II and III attached hereto.

5. Chumet agrees that within thirty (30) days following the approval of this Proposed Settlement, it will either furnish copies of this Agreement, or will give affirmative notice of the terms and provisions thereof, to all of its owners, directors, officers, and employees.

6. Chumet hereby agrees, as a condition of this Agreement, that, if it breaches this Agreement, it will not interpose the Statute of Limitations as a bar or a defense in any action or proceeding instituted prior to January 1, 1986, by or on behalf of the Commission, to recover civil penalties for violations of the Commission's General Order 4, arising

out of the conduct set forth in the factual record submitted in the instant proceeding. In the event of such a breach by Chumet, if such noncompliance shall not have been cured or explained to the Commission's satisfaction within thirty (30) days after written notice to Chumet by the Commission, the Commission shall have the option to seek enforcement of all terms and conditions of this Agreement, or to declare this Agreement null and void; provided, however, that Chumet's waiver of the Statute of Limitations under this paragraph shall remain in full force and effect. In the event the Commission declares this Agreement null and void and such determination is not reversed by a court of competent jurisdiction, any monies paid to the Commission shall remain the property of the United States, and Chumet will not interpose any defense based on the Statute of Limitations in any action which the Commission may institute to recover civil penalties arising out of the conduct set forth in the factual record submitted in the present proceeding.

7. In the event of changes of law or other circumstances at any time during the term of this Agreement that Chumet believes warrant modification or mitigation of any of the requirements imposed on Chumet by this Agreement, the Commission agrees, as an inherent part of this Agreement, to Chumet's right to petition the Commission to this end.

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

9. Chumet acknowledges that it has voluntarily signed this Agreement and states that no promises or representations have been made to it, other than the agreements and consideration herein expressed.

10. The undersigned represents that he/she is properly authorized and empowered to execute this Agreement on behalf of Chumet and to fully bind Chumet to all of the terms and conditions set forth herein.

CHUMET SHIPPING CO., INC.

BY____________________

JOHN ROBERT EWERS, DIRECTOR
Bureau of Hearings and Field Operations

TITLE ____________________

JOSEPH B. SLUNT, CHIEF
Office of Hearing Counsel

CHARLES C. HUNTER
Hearing Counsel

STUART JAMES
Hearing Counsel

APPENDIX I

PROMISSORY NOTE

APPENDIX 1 TO PROPOSED SETTLEMENT IN DOCKET NO. 80-61

For value received, Chumet Shipping Co., Inc (Chumet) promises to pay to the Federal Maritime Commission (Commission) the principal sum of Twenty Thousand Dollars ($20,000) to be paid at the offices of the Commission in Washington, D.C., by bank cashier's or certified check in the following installments:

Two Thousand Dollars ($2,000) on or before thirty (30) days following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before six (6) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before twelve (12) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before eighteen (18) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before twenty-four (24) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before thirty (30) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before thirty-six (36) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,250) on or before forty-two (42) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

Two Thousand, Two Hundred and Fifty Dollars ($2,500) on or before forty-eight (48) months following the approval by the Commission of the Proposed Settlement in FMC Docket No. 80-61;

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. 80-61 and be computed at the rate of twelve percent (12%) per annum on the unpaid balance.

If any payment of principal or interest shall remain unpaid for a period of thirty (30) days after becoming due and payable, the entire unpaid principal amount of the Promissory Note, together with interest thereon, shall become immediately due and payable at the option of the Commission without demand or notice, said demand and notice being hereby expressly waived.

If a default shall occur in the payment of principal or interest under the Promissory Note, Chumet does hereby authorize and empower any U.S. attorney, any of his/her assistants or any attorney of any court of record, Federal or State, to appear for them, and to enter and confess judgment against Chumet 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 Chumet 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. Chumet 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 Chumet 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.

CHUMET SHIPPING CO., INC.
BY: ____________________
TITLE: ____________________
DATE: ____________________

APPENDIX II

APPENDIX II TO PROPOSED SETTLEMENT IN DOCKET NO. 80-61

For a period of three years following final Commission approval of the Proposed Settlement in Docket No. 80-61, Chumet Shipping Co., Inc. will permit an independent audit of its books and records, as described below.

(1) The audit will be conducted by Bernstein & Friedman, P.C., certified public accountants, or such other independent auditor as may be named, subject to Commission approval, who will have complete authority to examine pertinent books and records of Chumet (see Attachment A hereto); and upon the issuance of a written statement by the independent auditor that he/she has been denied access or reasonable cooperation in an audit of Chumet's books and records, he/she will so certify to the Commission, and said action by Chumet will be conclusively considered to be a breach of the Settlement Agreement.

(2) The independent auditor will review a five percent (5%) sample of Chumet's shipping files reflecting ocean export shipments as to which Chumet arranged for insurance coverage and such other documents, including, but not limited to, statements issued by Chumet's insurance broker, that may serve to verify that Chumet has invoiced its clients the amounts of the insurance premiums actually paid by Chumet on the shipments represented by those files.

(3) The audits will take place once a year with or without notice to Chumet.

(4) The independent auditor will furnish Chumet and the Commission with a report of each audit, identifying in his/her report the materials inspected, including in such identification the reference number of the shipping files reviewed, the method of review and the findings of the audit.

CHUMET SHIPPING CO., INC.

BY:__________________

TITLE:__________________

DATE:__________________

ATTACHMENT A TO
APPENDIX II TO
PROPOSED SETTLEMENT
AGREEMENT IN DOCKET
No. 80-61

[CHUMET SHIPPING CO., INC.
LETTERHEAD]

Bernstein & Friedman, P.C.
60 Cutter Mill Road
Great Neck, New York 11021

Re: Audit of Chumet Shipping Co., Inc.

Gentlemen:

This is to set forth the terms of our agreement that you provide the necessary services to audit the insurance billing practices of Chumet Shipping Co., Inc.

Pursuant to the Settlement Agreement in Federal Maritime Commission Docket No. 80-61, Chumet Shipping Co., Inc. has undertaken to adopt measures to eliminate and prevent practices by Chumet Shipping, Co., Inc. which violate the Federal Maritime Commission's freight forwarder regulations.

To accomplish this, Chumet Shipping Co., Inc. has authorized you to conduct an independent audit of the books and records of Chumet Shipping Co., Inc. This auditing is to continue for a period of three years following from Federal Maritime Commission approval of the Settlement Agreement. The audits will take place every twelve months.

The complete terms of the audit procedures and of Chumet Shipping Co., Inc.'s obligations thereunder are contained in Appendix II to the Settlement Agreement, which is attached hereto.

It is agreed that you will be compensated for your audit services at $____________________.

It is also agreed that all information and documents that you obtain by virtue of this audit will be maintained by you in strict confidence, except to the extent the Settlement Agreement requires you to make reports to the Federal Maritime Commission.

If the foregoing comports with your understanding of our agreement, please sign the enclosed copy of this letter, and return it.

CHUMET SHIPPING CO., INC.
BY:____________________
TITLE:____________________
DATE:____________________

Attachment

BERNSTEIN & FRIEDMAN, P.C.
BY:____________________
TITLE:____________________
DATE:____________________

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-70

PUERTO RICO MARITIME SHIPPING AUTHORITY PROPOSED 2.9% RATE INCREASE AFFECTING MAJOR COMMODITIES IN THE U.S. ATLANTIC AND GULF/ PUERTO RICO AND VIRGIN ISLANDS TRADES

NOTICE

February 4, 1982

Notice is given that no appeal has been taken to the December 31, 1981 discontinuance of proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-70

PUERTO RICO MARITIME SHIPPING AUTHORITY
PROPOSED 2.9% RATE INCREASE AFFECTING MAJOR
COMMODITIES IN THE U.S. ATLANTIC AND GULF/
PUERTO RICO AND VIRGIN ISLANDS TRADES

DISCONTINUANCE OF PROCEEDING

Finalized February 4, 1982

By motion dated December 2, 1981, the respondent Puerto Rico Maritime Shipping Authority moved to dismiss (discontinue) this proceeding. In reply, Hearing Counsel agreed that the subject proceeding be terminated upon cancellation of the proposed rate increases.

The Director, Bureau of Tariffs, has advised that on or before December 29, 1981, PRMSA had completed filing the cancellations of the rate increases.

Good cause appearing, the subject proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-11

"50 MILE CONTAINER RULES"

IMPLEMENTATION BY OCEAN COMMON CARRIERS SERVING U.S. ATLANTIC AND GULF COAST PORTS - POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

INTERIM REPORT AND ORDER

February 5, 1982

The Commission commenced this proceeding by Order of Investigation on February 3, 1981. 46 *Fed. Reg.* 11357 (1981). Its purpose is to ascertain whether 142 ocean carriers have violated sections 14 Fourth, 16 First, 17 and 18 of the Shipping Act, 1916 (46 U.S.C. 812 Fourth, 815 First, 816 and 817) [1] by engaging in the practices described in the "Management-ILA Rules on Containers" (hereafter "Container Rules"). These rules are embodied in labor contracts collectively bargained for and agreed upon between ocean carriers and direct employer members of management port associations and appropriate organizational units of the International Longshoremen's Association, AFL-CIO (ILA) at U.S. Atlantic and Gulf Coast ports. No ocean shippers are parties to these collective bargaining units. In their simplest form, the Container Rules prohibit ocean carriers from providing shipping containers or trailers to persons located within 50 miles of the carrier's pier, unless the containers or trailers are loaded: (1) by ILA labor; or (2) by the shipper's own employees at the shipper's own facilities.[2]

The Commission has previously held that carrier conduct derived from an application of an earlier version of the Container Rules (1974 Rules) in the Puerto Rico trade during 1973 and 1975 violated the

[1] The Order of Investigation alleged violations of Shipping Act sections 18(a) and 18(b) and both paragraphs of section 17. Violations of section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) were also alleged. Section 2 contains the same tariff filing requirements as section 18(b) of the Shipping Act, 1916, insofar as the present inquiry is concerned. Unless otherwise indicated, references to section 18(b) are intended to apply equally to section 2.

[2] The Container Rules as amended through May 27, 1980 are included in Exhibit B to the May 20, 1981 Affidavit of James J. Dickman and involve seven practices expressly identified in the Order of Investigation as possibly violative of the Shipping Act, 1916. These practices are: (1) refusing to load containers or trailers onto vessels; (2) refusing to deliver containers or trailers; (3) refusing to book cargo or to honor existing bookings; (4) refusing to supply or make available containers, trailers or other equipment owned, leased or used by the carriers at certain off-pier facilities; (5) requiring certain containerizable cargoes to be shipped to the port in a "loose" condition; (6) charging certain shippers for fines assessed against the carrier for violation of the Container Rules; (7) imposing additional charges for stuffing and restuffing containers or trailers at the pier. Future references to "containers" will include "trailers" unless otherwise indicated.

Shipping Act. *Sea-Land Service,. Inc.—Proposed Rules on Containers*, 21 F.M.C. 1, 21 F.M.C. 7 (1978), *appeal pending Council of North Atlantic Shipping Associations v. Federal Maritime Commission*, D.C. Cir. Docket No. 78-1776 (hereafter "*Sea-Land*"). In addition, the National Labor Relations Board (NLRB) issued a decision in 1975 which condemned the Container Rules as an unfair labor practice. *Consolidated Express, Inc. v. ILA*, 221 N.L.R.B. 956.[3] The NLRB's decision was later vacated, however, following the Supreme Court's remand of a companion order in *National Labor Relations Board v. International Longshoremen's Association*, 447 U.S. 490 (1980), thereby opening the door to renewed implementation of the Rules by the ILA and affected ocean carriers not bound by the Commission's *Sea-Land* order.

The ILA announced that it would begin enforcing the Container Rules commencing January 1, 1981 on both foreign and domestic commerce shipments. The Commission began this proceeding after receiving complaints from shippers and other information indicating that at least some ocean carriers were adhering to the Container Rules.[4] These practices continued until halted on February 29, 1981 by an injunction issued to preserve the *status quo* pending the remanded NLRB investigation into the Container Rules. *Pascarell v. New York Shipping Ass'n.*, Docket No. 81-13 (D.N.J.), *aff'd*, 650 F.2d 19 (3d Cir.), *cert. denied*, 454 U.S. 832 (1981).[5] Accordingly, the Container Rules were in effect for only two months—January and February, 1981.

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[3] The unfair labor practice involved was a secondary boycott against third or "neutral" party employers prohibited by sections 8(b)(4)(B) and 8(e) of the National Labor Relations Act (29 U.S.C. 158(b)(4)(B) and 158(e)). The present form of these statutes was enacted as part of the 1959 Landrum-Griffith Act (73 Stat. 542) and was intended to eliminate the type of collusive boycott known as "hot cargo clauses." *See* 105 *Cong. Rec.* 15532 (1959); *Woodwork Manufacturers Ass'n v. National Labor Relations Board*, 386 U.S. 612 (1967).

29 U.S.C. 158(e) provides, in pertinent part, that:

> [No] labor organization or any employer [shall] enter into any contract or agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforceable and void.

Despite this language, a secondary boycott may lawfully, as far as the labor laws are concerned, occur when the parties to a collective bargaining unit are implementing a *bona fide* work preservation practice. The presence or absence of a work preservation rule is a matter within the primary jurisdiction of the NLRB and not the FMC.

[4] On January 22, 1981, the International Association of Nonvessel Operating Common Carriers and other persons filed a complaint against a number of ocean carriers based upon implementation of the Container Rules which is pending before an administrative law judge as FMC Docket No. 81-5. A nonvessel operating common carrier (NVO) issues an ocean bill of lading in its own name, but actually moves the goods by using the facilities of a vessel operating carrier in the same manner as any other shipper. NVO's typically load or consolidate container load shipments on behalf of their shipper clients in addition to undertaking the basic ocean transportation.

[5] The *Pascarell* injunction was issued under section 10 of the Norris-LaGuardia Act (29 U.S.C. 160(e), (h) and (j)), which allows "appropriate temporary relief" pending NLRB investigations in

Continued

PARTIES TO THE PROCEEDING

The New York Shipping Association, Inc., the Council of North Atlantic Shipping Associations and the International Longshoremen's Association, AFL-CIO (jointly), and the Pacific Maritime Association have intervened in support of the individual ocean carriers named as respondents.[6] The International Association of Nonvessel Operating Carriers and the Custom Brokers and Forwarders Association of America intervened in opposition to the Container Rules. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) is also a party.[7]

Twenty-five ocean carrier respondents requested that they be dismissed from this proceeding on various grounds. On June 12, 1981, Karlander Kangaroo Line, Seapac Container Service and Hanjin Container Lines, Ltd., were dismissed when they presented affidavits demonstrating they did not serve U.S. Atlantic or Gulf ports. An additional 13 Respondents subsequently submitted affidavits indicating that they are either not common carriers by water,[8] do not serve ILA ports,[9] or carry no containers.[10] These Respondents will also be dismissed. In addition, the Commission takes official notice that four other respondent carriers did not offer container service at Atlantic and Gulf ports during January or February, 1981.[11]

Those carriers which sought dismissal without supporting affidavits or which merely alleged that they did not "implement" or "enforce" the Container Rules because they took no action against specific nonconforming containers or offered no rates for consolidated shipments will not be dismissed. The Container Rules seemingly apply to full container load shipments as well as FAK or "consolidated" shipments and the adoption of the container use policy reflected in the Container Rules, without appropriate tariff amendments, is alone sufficient to violate section 18(b). An announced policy of discrimination may also be sufficient to violate the other Shipping Act sections cited in the Order of Investigation.

There remain 122 ocean carrier Respondents, many of which were members of the New York Shipping Association (NYSA) during Janu-

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order to preserve the Board's primary jurisdiction over labor disputes. On September 29, 1981, an initial decision was issued upholding the Container Rules. *International Longshoremen's Association et al.*, Case Nos. 2-CC-1364 *et al.*, JD-515-81.

[6] The ocean carriers and all persons siding with them are hereafter referred to as "Respondents" unless otherwise indicated.

[7] The nonvessel operating carrier and customs broker interests (NVO's) and Hearing Counsel are hereafter referred to as "Proponents" unless otherwise indicated.

[8] Gulf Atlantic Transportation, MTO Liner Services and West India Shipping Company, Inc.

[9] American President Lines; Showa Line Ltd.; Korea Maritime Transport Co., Ltd.; Uruguayan Line; Seaspeed Services; Tropical Shipping and Transportation Co., Ltd.

[10] Jinyang Shipping Co., Ltd.; R.T. Djakarta Lloyd; American Industrial Carriers; and D.B. Turkish Cargo Lines.

[11] CAST Shipping, Ltd.; Black Star Line; Caribe Cargo Express; and Trans World Systems.

ary or February, 1981, but most of which have not directly participated in this proceeding.[12]

POSITION OF THE PARTIES

Five basic issues have emerged from the proceeding to date: (1) must practices determining the availability of carrier-controlled containers be published in FMC tariffs; (2) does the 1980 Maritime Labor Agreements Act (MLAA) alter the Commission's jurisdiction over tariff rates and practices; [13] (3) is Commission regulation of the Container Rules precluded or limited by the policies of the National Labor Relations Act; [14] (4) does the refusal to furnish containers to non-ILA consolidators located within 50 miles of the carrier's pier, or the other Container Rules practices described in note 2, *supra*, violate sections 14 Fourth, 16 First, 17, or 18(a) of the Shipping Act, 1916; and (5) which of the Respondents have implemented or would necessarily implement all or part of the Container Rules. The position of the parties on each of these issues is described below.

I. Must practices determining the availability of carrier-controlled containers be published in FMC tariffs?

A. *Proponents*

Proponents argue that the Shipping Act requires tariffs to describe the rates applicable to all transportation services provided by the publishing carrier and to state separately "any privileges or facilities granted or allowed which affect these rates in any manner whatsoever." 46 U.S.C. 817(b)(1) and 844. *See also* 46 C.F.R. 5(c)(5). Proponents claim that this language requires that any restrictions in a common carrier's basic undertaking to serve all shippers indiscriminately be fully disclosed in its tariff. *Japan Korea-Atlantic & Gulf Freight Conference—Chassis Availability Rules*, 22 F.M.C. 466 (1980); *South Atlantic and Caribbean Lines, Inc. (SACL)*, 12 F.M.C. 237 (1969), *aff'd* 424 F.2d 941 (D.C. Cir. 1970); *A. H. Bull S.S. Co.*, 7 F.M.C. 133 (1962); *Intercoastal Investigation*, 1 U.S.S.B.B., 400, 447-450 (1935); *See Puerto Rican Rates*, 2 U.S.M.C. 117, 129 (1930). Proponents further state that the Container Rules involve service restrictions which were specifically adjudged to be mandatory tariff material in *United States v. Sea-Land Service, Inc.*, 424 F. Supp. 1008, 1011-1012; (D.N.J. 1977), *appeal dismissed*, 577 F.2d

[12] Twelve respondent carriers either expressly joined in or endorsed the position taken by NYSA/CONASA/ILA: Atlantic Container Line, Ltd.; Dart Containerline, Ltd.; Puerto Rico Maritime Shipping Authority; Sea-Land Service, Inc.; Trans Freight Lines, Inc.; United States Lines, Inc.; Compagnie Maritime d'Affretement; Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd.; Nippon Yusen Kaisha; and Yamashita Shinnihon Steamship Co., Ltd. NYSA purports to speak for all of its ocean carrier members.

[13] P.L. 96-325, 94 Stat. 1021 (August 8, 1980), amending sections 15 and 45 of the Shipping Act, 1916 (46 U.S.C. 814, 841c).

[14] 29 U.S.C. 151 *et seq.*

730 (3d Cir. 1978), cert. den. 439 U.S. 1072 (1979); *SACL, supra,* 12 F.M.C. at 241-242 (1969). *See also Sea-Land, supra,* 21 F.M.C. at 29.

B. *Respondents*

Respondents note that their charges for packing and unpacking containers are already listed in their tariffs and the Commission has not stated exactly what additional material should be published as a result of the Container Rules. The Respondents then argue that section 18(b) is intended to require only the publication of a carrier's "rates and charges", and that the use of carrier-controlled containers is not a matter intended to "change, affect or determine" rates or charges.[15] In fact, Respondents allege that the Commission has never taken any publicly reported action suggesting that rules relating to the use of carrier-owned or leased containers must be published in tariff and that such rules are customarily omitted from FMC tariffs in most trades. Respondents also argue that the *A.H. Bull, SACL,* and *United States v. Sea-Land* cases, *supra,* dealt with a carrier's refusal to perform a service already stated in its tariff and did not actually hold that container use practices must be published.

II. Does the Maritime Labor Agreement Act alter the Commission's jurisdiction over matters which must be filed in FMC tariffs?

A. *Proponents*

Proponents allege that the MLAA is directed exclusively at section 15's prior filing and approval requirements and expressly retains Commission jurisdiction over tariff practices of all types.[16] The statute's plain language is, according to Proponents, further reinforced by the Senate Committee's statement that the MLAA preserves Commission jurisdiction to "ensure equal treatment of shippers, cargo, localities, and to prevent abuses made possible by concerted activity of ocean carriers and others." Sen. Report No. 96-854, 96th Cong., 2d Sess. at 2, 10, 13 (1980). Proponents claim it can make no difference whether the "tariff practices" in question are incorporated verbatim into a maritime labor agreement—as are some of the alleged practices in the instant case—or

[15] Proponents note that tariff filing has been described as "a system of rates and charges." *See, e.g., Pacific Steamship Co. v. Cackette,* 8 F.2d 259, 261 (9th Cir. 1925), *cert. den.* 269 U.S. 586 (1925). *Accord, Intercoastal Investigation,* 1 U.S.B.B. 400, 433 (1935); *Certain Tariff Practices of Sea-Land Service,* 7 F.M.C. 504, 507-508 (1963).

[16] 46 U.S.C. 841(c) provides that:

> The provisions of this Act and of the Intercoastal Shipping Act, 1933, shall not apply to maritime labor agreements and all provisions of such agreements except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized. Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act or of the Intercoastal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water or other person subject to this Act which are required to be set forth in a tariff, whether or not such rates, charges, regulations, or practices arise out of, or are otherwise related to a maritime labor agreement.

whether they represent a carrier's unilateral interpretation of its obligations under such an agreement. To limit FMC jurisdiction to the latter situation would allegedly allow ocean carriers to avoid regulation of their tariff practices at will by incorporating appropriate language into collective bargaining agreements. Proponents find further support for FMC jurisdiction over tariff practices included in a collective bargaining agreement in the fact that the discriminatory effects of the Container Rules were specifically mentioned to Congress during its consideration of the MLAA, Senate Report, supra, at 8-9; Sen. Doc. 96-107, *Hearings before the Subcommittee on Merchant Marine and Tourism of the Committee of Commerce, Science and Technology*, 96th Cong., 2d Sess. at 16 (June 4, 1980).

B. *Respondents*

Respondents argue that the MLAA was remedial legislation designed to reduce the impact of the *PMA* decision upon labor activities and should be interpreted as totally exempting maritime labor agreements from Shipping Act jurisdiction even when they contain terms which would otherwise be published in a tariff.[17] Respondents believe that only "unilateral" carrier practices—such as the rates charged for stuffing and stripping containers—are subject to continued FMC regulation under section 5 of the MLAA. It is alleged that all aspects of an actual collective bargaining agreement must be exempt; otherwise, MLAA would merely remove Shipping Act jurisdiction with one hand and replace it with the other. Respondents submit that the legislative history quoted by the Proponents concerning preservation of FMC jurisdiction to "ensure equal treatment of shippers, cargo and localities" relates only to complaints concerning nonuniform assessment agreements under section 4 of the MLAA.

III. Is Commission regulation of the Container Rules precluded or limited by the National Labor Relations Act?

A. *Proponents*

Proponents allege that section 5 of the MLAA preserves and clarifies the Commission's jurisdiction over tariff practices and that the so-called "nonstatutory" labor law exemption from Shipping Act regulation is inapplicable to the type of shipper discrimination involved in the Container Rules. This claim is based upon the Commission's decision in *Sea-Land, supra*, and the Supreme Court's opinions holding that the pres-

[17] Respondents focus upon the broad language used in the first sentence of MLAA section 5 which states, in pertinent part, that the Shipping and Intercoastal Acts "shall not apply to maritime labor agreements and all provisions of such agreements . . . ." Respondents claim that the second sentence of section 5 merely prevents common carriers from using labor agreements as an excuse to avoid regulation of their own unilateral practices. According to the Respondents, if Congress had intended for the *actual terms* of labor agreements to be regulated as tariff practices, it would have written section 5 to expressly say so. Instead, it wrote a statute which states that only tariff practices "arising out of or related to" labor agreements may be regulated.

ence of some conflict between the Shipping Act and the policy of freely negotiated settlements of labor/management disputes represented by the Labor Relations Act, does not necessarily remove the Commission's authority to regulate. *See Federal Maritime Commission v. Pacific Maritime Association (PMA)*, 425 U.S. 40, 53-60 (1978), and *Volkswagenwerk, A.G. v. Federal Maritime Commission (VW)*, 390 U.S. 261 (1968).

Proponents claim that the nonstatutory labor law exemption from Shipping Act regulation is limited to section 15 agreements.[18] Conflict with the labor laws is allegedly a matter to be considered only in determining whether tariff practices are unfair, unjustly discriminatory or unreasonable under the Shipping Act; it does not create a total exemption from Shipping Act regulation. *Burlington Truck Lines v. United States*, 371 U.S. 156, 170 (1962); *Carpenter's Union v. Labor Board*, 357 U.S. 93, 110 (1958). Proponents conclude that general labor policies cannot override an express legislative prohibition against specific ocean carrier practices, and that nothing about the Container Rules or their relationship to a collective bargaining agreement requires exemption from Commission regulation.[19]

B. *Respondents*

Respondents concentrate on the proposition that FMC regulation of the Container Rules impermissibly conflicts with legitimate labor law objectives within the meaning of the Supreme Court's decision in *Burlington Truck Lines, Inc. v. United States, supra. See also PMA, supra.* Respondents claim that the nonstatutory labor agreement exemption from the Shipping Act is co-extensive with the nonstatutory labor agreement exemption from the antitrust laws. Senate Report, *supra*, at 7. *See United Stevedorinq Corp. v. Boston Shipping Ass'n (BSA)*, 16 F.M.C. 7 (report on remand, 1972); *PMA, supra*, at 58. Consequently, if the Container Rules meet the test for antitrust law exemption described in *BSA, supra*, at 12-13, they would not be subject to Shipping Act regulation.[20] Respondents contend that the Container Rules meet the

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[18] If the Container Rules were subject to the criteria for labor law exemptions articulated by the Commission in *BSA, infra*, Proponents alternatively allege that the Container Rules fail to meet the third standard (see note 20, *infra*) because they impose discriminatory conditions on parties outside the collective bargaining unit.

[19] Proponents contend that a breach of a common carrier's duty to treat shippers in a reasonably equal fashion cannot be nullified by entering into a collective bargaining agreement. *Carpenter's Union v. Labor Board*, 357 U.S. 93, 109-111 (1958); *Merchandise Warehouse Co. v. A.B.C. Freight Forwarder Corp.*, 165 F. Supp. 67, 75 (S.D. Ind. 1958); *Galveston Truck Line Corp.*, 73 M.C.C. 617, 625-630 (1957); *See also Montgomery Ward & Co. v. Northern Pacific Terminal Co.*, 128 F. Supp. 475, 518 (D.C. Ore. 1953); *Pickup & Delivery Restrictions, California Rail*, 303 I.C.C. 579, 594 (1958).

[20] The four *BSA* guidelines patterned after the "nonstatutory labor exemption" from the antitrust laws are:

(1) the agreement was bargained for in good faith;
(2) the matter is a mandatory subject of bargaining;
(3) the agreement does not impose terms on entities outside the collective bargaining group;

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BSA test and, in so doing, argue that the third *BSA* guideline—the imposition of terms on entities outside the bargaining group—has been construed too broadly by the Proponents. According to Respondents, the Container Rules are a work preservation measure valid under section 8(e) of the National Labor Relations Act which necessarily have an adverse economic effect upon third parties. Respondents argue that an *effect* upon third parties does not constitute an impermissible "imposition of terms" upon third parties, *National Woodwork Manufacturers Association v. National Labor Relations Board*, 386 U.S. 612, 627, 635, 644 (1967), and that the Container Rules do not involve an agreement by bargaining unit employers to impose working conditions upon other employers with whom they compete. Respondents contrast *PMA, supra*, where ports outside the bargaining unit were to be bound by the terms agreed upon by PMA and the union.[21]

Respondents also allege that the NLRB is the exclusive forum for judging the lawfulness of secondary boycott schemes and that the Commission is powerless to halt the Container Rules because the Norris-LaGuardia Act prohibits injunctions in cases "involving or growing out of a labor dispute" (29 U.S.C. 101, 104, 114).[22] Respondents cite a recent House of Representatives bill (H.R. 2042, 97th Cong., lst Sess.) banning the Container Rules as further evidence that the Commission is not presently authorized to regulate in this area. Respondents believe it would be arbitrary and highly unfair if Shipping Act considerations prevented the ILA from exercising work preservation rights available to unions in other industries.

IV. Does the refusal to furnish containers to non-ILA consolidators located within 50 miles of the carrier's pier, or the other Container Rules practices described in note 2, *supra*, violate sections 14 Fourth, 16 First, 17 or 18(a) of the Shipping Act, 1916?

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(4) the union is acting purely in its own self-interest and not in conspiracy with management.

Failure to meet any one of these guidelines can defeat exemption.

[21] Respondents cite *Intercontinental Container Transport Corp. v. New York Shipping Ass'n*, 426 F.2d 884 (2d Cir. 1970), as further support for their claim that the Container Rules are exempt from the antitrust laws. There, the court held that the Container Rules were not sufficiently likely to violate the antitrust laws to warrant the issuance of a preliminary injunction against them pending litigation under the Sherman Act.

[22] Respondents allege that a federal court could not enforce an FMC cease and desist order against the Container Rules because this would constitute injunctive relief against a person "participating or interested in a labor dispute" in violation of the Norris-LaGuardia Act. *See Railroad Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330, 339 n. 15 (1960); *Utilities Services Engineering, Inc. v. Colorado Building and Construction Trades Council*, 549 F.2d 173, 177-178 (10th Cir. 1977); *Brotherhood of R. Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649, 655 (5th Cir. 1966); *East Texas Motor Freight Lines, Inc. v. Teamsters Local 568*, 163 F.2d 10 (5th Cir. 1947); *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, 126 F.2d 931 (10th Cir.), *cert. den.* 317 U.S. 645 (1942).

A. *Proponents*

Both parties intermingled their arguments concerning the different practices involved in the Container Rules and the different Shipping Act provisions involved. Proponents concentrated their efforts on the claim that the Container Rules constitute unjust discrimination under sections 14 Fourth, 16 First, and 17 first paragraph.

Proponents argue that common carriers have a fundamental duty to serve all comers on a reasonable and indiscriminate basis. *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297, 303 (1937); *Grace Line, Inc. v. Federal Maritime Board*, 280 F.2d 790, 792-793 (2d Cir. 1960), *cert. den.*, 364 U.S. 933 (1961). Proponents state that the Supreme Court expressly ruled that this duty applies to nonequipment operating carriers in *Interstate Commerce Commission v. Delaware, L. & W. R.R.*, 220 U.S. 235, 252 (1911).

According to Proponents, the record clearly supports a finding that the Container Rules require similarly situated shippers to receive unjustifiably different treatment, and the Commission invalidated virtually identical practices in its *Sea-Land* decision, *supra*, because they deprived NVO's and shippers using non-ILA consolidation services access to facilities and privileges routinely available to other shippers. Allocating the entire burden of ILA work reductions caused by containerization to shippers that are consolidators or use consolidators is allegedly unfair and unreasonable within the meaning of *VW*, because such shippers are not the only persons that enjoy the benefits of containerization. *See* 390 U.S. at 282.

Proponents contend that the Container Rules violate section 16 First as well as section 14 Fourth and section 17, first paragraph, because the provision of containers is a matter ancillary to basic ocean transportation which cannot reasonably be affected by the nature of the cargo being transported. In such circumstances, the carrier has been said to have an absolute duty to treat shippers equally, making it unnecessary to demonstrate the presence of a competitive relationship between affected shippers. *New York Foreign Freight Forwarders & Brokers Ass'n v. Federal Maritime Commission*, 337 F.2d 289 (2d Cir. 1964); *Free Time Practices—Port of San Diego*, 9 F.M.C. 525, 547 (1966); *Valley Evaporating Company v. Grace Line, Inc.*, 14 F.M.C. 16, 21 (1970). Proponents also argue that although an ocean carrier generally enjoys the right to control the use of its equipment, this right is at all times subject to the requirements of the Shipping Act and Respondents have failed to show that their discrimination against shippers who are consolidators or who use consolidators located within 50 miles of a port is reasonable from a *transportation* perspective.

Proponents also argue that the Container Rules require unreasonably different treatment with regard to the handling of substantially identical

classes of cargo in violation of sections 17, second paragraph, and 18(a) because the Commission so held in *Sea-Land, supra*.

B. *Respondents*

Respondents treat the various antidiscrimination provisions of the Shipping Act as though they impose the same statutory duties (Reply Memorandum, note 57). Respondents argue that the discriminatory aspects of the Container Rules are just and reasonable because they implement a valid work preservation scheme and deprive no person of any benefit to which such person is entitled. Respondents claim that the Commission's sole responsibility is to determine whether the burdens which the Container Rules place upon the affected parties are fairly allocated. *VW, supra*, 390 U.S. at 292-295 (Harlan, J., concurring).

According to Respondents, however, fair allocation does not mean *equal* allocation, and the approach to unjust discrimination taken by the Commission in *Sea-Land, supra*, is incorrect and inconsistent with *VW* because it merely examines the alleged harm to shippers in transportation terms and does not meaningfully consider the underlying labor concerns.[23]

Finally, Respondents contend that (1) only carrier-controlled containers are subject to the Rules; and (2) there is no evidence showing that the Container Rules produce unjust results.[24] Respondents claim that the Proponents have not proven that consolidators located within 50 miles of ports are similarly situated to any other class of shippers, or even that all such persons are shippers; Proponents have simply declared any difference in treatment is unlawful *per se*. Respondents also claim that relevant transportation factors are present which justify discrimination between full containerload and less-than-containerload traffic, including: the efficient and uninterrupted movement of containers over the piers; facilitation of trained dockside labor for handling less-than-containerload cargo; the relative efficiency and cost of full containerload shipments as compared to less-than-containerload shipments; [25] the relatively small volume of freight generated by consolida-

[23] The *VW* decision featured a finding that the separate "Mech Fund" agreement raised problems logically and factually distinct from the basic labor problems resolved by the collective bargaining agreement. 390 U.S. at 287. In the instant case, the collective bargaining objectives are allegedly inseparable from the Shipping Act conduct, and the Respondents therefore allege that the Commission cannot measure the fairness of the Container Rules without also assessing their validity as a work preservation measure—a task reserved for the NLRB.

[24] Proponents encourage the Commission to take a broad view of the circumstances which may justify the discriminatory aspects of the Container Rules, and note that the Supreme Court has stated that discrimination may be judged in light of:

> . . . all circumstances and conditions which reasonable men would regard as affecting the welfare of the carrying companies and of the producers, shippers and consumers . . . *Texas & Pacific R. Co. v. Interstate Commerce Commission*, 162 U.S. 947 (1896).

[25] By accepting consolidated containers, ocean carriers allegedly permit transportation efficiencies to occur which benefit less-than-containerload shippers more than full-containerload shippers which

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tors; the NVO's lack of a beneficial interest in the goods shipped; and the interests of the shipping public as a whole.

V. Which of the Respondents have implemented, or would necessarily implement, any or all of the practices covered by the Container Rules?

A. *Proponents*

Proponents submitted 20 affidavits describing some 19 ocean carriers which refused to carry loaded containers or cancelled containerized cargo bookings, refused to provide empty containers to prospective shippers, or required loaded containers to be repacked at the pier during January or February, 1981.[26]

B. *Respondents*

NYSA provided evidence indicating that its members and the ILA intended for the Container Rules to be implemented effective January 1, 1981, but decline to admit that its members actually performed any of the specific practices described in the Order of Investigation. Delta Steamship Company, Compagnie Maritime d'Affretement, Venezuelan Line and Hafskip Ltd., state that they did not implement the Container Rules, but furnish no corroborating evidence despite the fact that one or more of these ocean carriers appear to be NYSA members.

Respondents' evidence also indicates that the Container Rules are intended to apply only to containers owned or leased by the carrier; carriers possess the right to control the loading and unloading of their containers; consolidators provide only a small percentage of the total container traffic handled by Respondents; the Container Rules have a long, *bona fide* history as an ILA bargaining objective; and the ILA considers the Container Rules critical to its survival as an organized labor union.

DISCUSSION AND CONCLUSION

Four of the above-described issues can be decided on the present record. The fifth—whether individual Respondents have or would violate specific Shipping Act provisions—will be referred to an administrative law judge to develop additional evidence and more focused legal argument.

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makes it fitting for LTL shippers to pay the cost of using ILA Labor or obtaining their own containers. The Container Rules are also said to allow ocean carriers to accept shipments consolidated by non-ILA labor if the containers are owned or leased by the shipper.

[26] The carriers identified as implementing all or part of the Container Rules during 1981 are: Atlantic Container Lines; Barber Blue Sea Line; Dart Containerline Co., Inc.; Farrell Lines; Hapag-Lloyd, A.G.; Korea Shipping Corporation; Maersk Line; Moore-McCormack Line, Ltd.; Naviera Central, C.A.; Nedlloyd Lines; Polish Ocean Line; Prudential Lines, Inc.; Puerto Rico Maritime Shipping Authority; Royal Netherlands Steamship Co.; Sea-Land Service, Inc.; Trans Freight Line; United Arab Lines; United States Lines; and Zim Lines Company.

In order to expedite this proceeding and to focus more clearly on the discriminatory aspects of the Container Rules, the Commission has decided against pursuing civil penalty claims against any ocean carriers which may ultimately be found to have violated the Shipping Act during January or February, 1981. For this reason, the question of whether the respondent carriers violated section 18(b) by implementing specific Container Rule practices not published in their FMC tariffs will also be abandoned.[27]

The basic features of the Container Rules must be published in an ocean carrier's tariff. A tariff notifies the shipping public of the "privileges and facilities" offered by ocean carriers, the conditions applicable to the use of these privileges and facilities, and all rates and charges assessed.[28] A carrier-controlled container is a facility within the meaning of section 18(b), and the privilege of using such containers unquestionably "changes, affects or determines" the rates and charges paid by the shipper. Restrictions on the type of loaded containers which will be transported by the carrier or requirements that certain loaded containers be warehoused or repacked as a condition of transport represent a denial of privileges otherwise available and must also be fully disclosed in a tariff. To transport certain types of containers only on the condition that the shipper pay an additional amount (i.e., the penalty assessed by the ILA) is to impose a "rate or charge" for transportation which may be lawfully collected only when published in the carrier's tariff.

There has been no suggestion that labor law considerations prohibit publication of these aspects of the Container Rules in ocean carrier tariffs. Indeed, it seemingly advances the Respondents' collective bargaining objectives to publicize the treatment to be afforded loaded containers and requests to use empty containers by providing shippers with the legal notice attributed to tariff publication and filing.

Although the Commission's tariff filing regulations (46 C.F.R. Parts 531 and 536) do not contain provisions specifically prescribing the publication of tariff rules governing the availability of carrier-controlled containers,[29] the Commission has consistently held that section 18(b)

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[27] A random check of the Commission's tariff files indicates that appropriate tariff provisions were not filed, however.

[28] Section 18(b)(1) provides, in pertinent part, that:

> [E]very common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established. Such tariffs shall plainly show the places between which freight will be carried, and shall contain the classification of freight in force, and shall also state separately such terminal or other charge, privilege, or facility under the control of the carrier or conference of carriers which is granted or allowed, and any rules or regulations which in anywise change, affect, or determine any part or the aggregate of such aforesaid rates, or charges, and shall include specimens of any bill of lading, contract of affreightment, or other document evidencing the transportation agreement.

[29] *But see* 46 C.F.R. 531.3(a), 531.5(b)(8)(i), 536.5(b)(8)(xv), 536.9, 536.5(d)(2) and 536.5(c)(5).

imposes a duty to publish analogous information. *Japan/Korea Atlantic and Gulf Conference—Chassis Availability and Demurrage Charges*, 22 F.M.C. 466 (1980); *F. Powers Co., Inc. v. Orient Overseas Container Lines*, 19 F.M.C. 219 (1976); *A. H. Bull S.S. Co.*, 7 F.M.C. 133 (1962); *Intercoastal Investigation*, 1 U.S.S.B.B. 400, 447 (1935). *See also Borden World Trade, Inc.—Declaratory Order*, 23 F.M.C. 248 (1980) (wherein the Commission stressed the need for clear and complete tariff provisions applicable to shipper use of carrier-owned containers). Moreover, in previous Container Rules litigation, the Commission stated that Container Rules practices could not be performed "unless and until [the carrier's] tariffs are amended in the manner prescribed by section [18(b)]," *SACL, supra*, at 242. *Accord United States v. Sea-Land, supra*, where civil penalties were collected from a carrier which continued to implement the Container Rules after the Commission had suspended the tariff provisions governing such practices.[30]

Section 5 of the MLAA did not diminish the Commission's authority to regulate practices which must be described in ocean carrier tariffs. Although various phrases associated with section 5 are susceptible to more than one interpretation, the language of the entire statute and its legislative history taken as a whole firmly support the conclusion that the MLAA preserves the *status quo* concerning Shipping Act regulation of labor-related activities under Shipping Act sections other than section 15. A tariff practice "arising out of or otherwise related to a maritime labor agreement" therefore includes practices described by language taken verbatim from a labor agreement and practices mandated by the terms of the agreement. Any other interpretation would render the second sentence of MLAA section 5 meaningless.

As originally passed by the House of Representatives, H.R. 6613 (which ultimately became the MLAA) simply exempted all "collective bargaining agreements and agreements preparatory thereto" from all Shipping Act regulation. Senate Hearings, *supra*, at 5. It was only during Senate deliberations that a narrower exemption was considered necessary, and the Senate explained that its intention in adding section 5 to H.R. 6613 was to:

> . . . *retain the existing protections* of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements. (Emphasis supplied). Senate Report, *supra*, at 13.

The import of this language cannot be fully appreciated without reviewing the adverse reaction to the House version of the bill reflect-

[30] In *United States v. Sea-Land, supra*, the carrier's tariff did not provide for the refusal of containers to consolidators and the court held that such a refusal, even though done in reliance on the carrier's labor agreement, was an unlawful failure to observe the provisions of its FMC tariff.

ed in the Senate hearings. Shippers, port interests and the Commission opposed H.R. 6613's total exemption of actions taken pursuant to collective bargaining agreements. Senate Hearings, *supra*, at 11 (FMC Vice Chairman Moakley), at 59 (the Boston Shipping Association, Inc.), at 83 and 107 (the International Association of NVOCC's), and at 95-96 (Maryland Port Administration). The Senate Committee described its hearings as follows:

> The witnesses who appeared . . . were nearly unanimous in support of exempting collective bargaining agreements from . . . section 15 of the Shipping Act. The majority of those opposing H.R. 6613 as it passed the House, however, felt the bill went beyond what was necessary to assure free and unfettered collective bargaining, and that it stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by one [sic] concerted activity of carriers and others. Senate Report, *supra*, at 10.

Vice Chairman Moakley's testimony explained that tariff practices stand on their own and must be defended outside the context of section 15, even if they involve the subject of collective bargaining agreements. Senate Hearings, *supra*, at 12 and 16.[31] The Committee was also advised that the Container Rules were the subject of *both* collective bargaining agreements and FMC tariffs when the Commission decided the *Sea-Land* case in 1978. Senate Hearings, *supra*, at 15 and 16. The bill finally enacted was basically the "second alternative" offered to the Senate Committee by Vice Chairman Moakley. This approach was designed to preserve Shipping Act regulation over conduct prescribed by collective bargaining agreements to the extent it was subject to the tariff filing requirements of section 18(b), thereby avoiding a situation where "two carriers [would be] treated differently under the law simply by virtue of their collective bargaining obligations." Senate Report, *supra*, at 17-18. It was also designed to preserve whatever authority the Commission previously possessed to regulate the Container Rules. Too many witnesses expressed concern over the possible loss of Shipping Act jurisdiction over these specific practices, *e.g.*, Senate Hearings, *supra*, at 42, 83-85 and 90-91, for the Senate Committee to

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[31] The Vice Chairman noted that the language of the House Bill was unclear as to whether the agreement alone was to be exempt or whether conduct arising out of the agreement was also to be exempt. He then stated:

> The Commission did not exercise jurisdiction over the [collective bargaining] agreement between management and labor in [the *Sea-Land*] case, but jurisdiction over tariff rules of individual carriers. As the Administrative Law Judge said in his initial decision, "A tariff provision is not an agreement; rather it is a unilateral statement of the author of the tariff . . . ." If the Committee does intend to exempt all activities in implementation of collective bargaining activities from Shipping Act scrutiny, that intent must be made clear in the bill. Senate Hearings, *supra*, at 16.

foreclose all Commission regulatory authority over them without plainly stating it had reached such a conclusion.

As discussed above, the MLAA creates no statutory limitation on the FMC's jurisdiction over the tariff practices of ocean carriers. The further argument remains, however, that the Container Rules fall within the "nonstatutory labor exemption" from the Shipping Act recognized in *VW* and *BSA*, both *supra*. This possibility was addressed and rejected in the Commission's 1978 *Sea-Land* decision, *supra*, and the instant record provides no basis for reaching a different result.

The Container Rules impose conditions on persons outside the bargaining unit, namely the shippers and consolidators which use the carriers' services, and therefore do not meet the third of the Commission's *BSA* guidelines for exemption from Shipping Act regulation. Although it can be argued that the Respondents' collective bargaining agreement standing alone does not impose terms on outside parties, the Respondents necessarily accomplish such a result when they insist upon adherence to practices which must be published in carrier tariffs. Tariffs establish the exclusive basis upon which the publishing carriers may deal with shippers and therefore provide the vehicle by which the collective bargaining agreement imposes the terms and conditions of the Container Rules upon persons not party to the agreement. The Supreme Court has held that the failure to meet the third *BSA* guideline is sufficient to defeat a claim to a "nonstatutory labor exemption." *PMA*, *supra*, at 61-62.

Commission jurisdiction over the Container Rules is supported by more than their nonconformance with the third *BSA* guideline, however. The Shipping Act's purposes differ from those of the antitrust laws and the *BSA* criteria are not identical to the "nonstatutory" exemption from the antitrust laws articulated in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676 (1965). In *BSA*, the Commission announced that it would apply an analytic approach for evaluating practices arising out of collective bargaining agreements which reflects the weighing of shipping and labor interests prescribed by VW.[32] Although one aspect of this broadly conceived analysis is the application of four specific guidelines derived from the antitrust law exemption, a transportation practice arising out of a collective bargaining can meet the four specific guide-

[32] The Commission stated:

In the final analysis, the nature of the activity must be scrutinized to determine whether it is the type of activity which attempts to affect competition under the . . . Shipping Act. The impact upon business which this activity has must then be examined to determine the extent of its possible effect upon competition, and whether any such effect is a direct and probable result of the activity or only remote. Ultimately, the relief requested or the sanction imposed by law must then be weighed against its effect upon the collective bargaining agreement. 16 F.M.C. at 13.

lines and still be subject to Shipping Act regulation under the "final analysis" portion of the *BSA* test. 16 F.M.C. at 12-13.

The Container Rules have a direct and practical impact upon both labor and shipping interests.[33] Nonetheless, a Commission order prohibiting this particular method of resolving labor/management conflict as an unjust ocean carrier practice would not undermine the basic collective bargaining process created by the National Labor Relations Act, whereas the absence of Shipping Act regulation would eliminate the fundamental premise of the Shipping Act and other common carrier statutes—that similarly situated shippers be treated equally.[34] Moreover, the courts have recognized that common carrier obligations take precedence over carriers' implementation of analogous "hot cargo" practices created by collective bargaining agreements. *See Burlinqton Truck, supra*;[35] *Carpenters' Union v. Labor Board*, 357 U.S. 93, 108-111

[33] The Container Rules seemingly concern a mandatory subject of collective bargaining and the Commission must treat them as lawful under the labor laws pending the NLRB's evaluation of their status under 28 U.S.C. 158(e). The Affidavit of James J. Dickman describes the history of the Container Rules and establishes that the ILA agreed to handle containers loaded by non-ILA labor in return for major income and other compensation concessions (*e.g.*, the GAI or guaranteed annual income plan) and the right to stuff and strip certain consolidated containerload shipments. *See Sea-Land, supra*, 21 F.M.C. at 16-22, 34, for an exposition of these uncontested facts. Respondents further claim the Container Rules are critical to the ILA's survival. No evidence was presented to substantiate or disprove this relatively extreme assertion. Although the ILA has experienced a major membership reduction during the past twenty years, an inability to implement the Container Rules is unlikely to shift all ILA cargo handling functions to other labor organizations.

[34] It is the integrity of the collective bargaining *process* and not the value of each bargained for benefit which must be balanced against the Shipping Act's guarantees of fair, essentially equal treatment. The effect of regulating ocean carrier practices under Shipping Act sections 14, 16, 17 and 18 is significantly different from the effect of subjecting collective bargaining agreements to the advance filing and approval requirements of section 15. Even if remedying a discriminatory tariff practice presented a plain choice between the protection of a particular union and protection of a particular class of ocean shippers, the more specific legislative purpose of the Shipping Act requires that the Commission choose the latter—provided the final action taken is no broader than necessary to remedy the unjust discrimination in question.

[35] In *Burlington Truck* the Supreme Court held that the ICC abused its discretion in awarding new route certifications when the record did not show that additional carriers were necessary to provide adequate service in the market. The case was remanded to the ICC to take *direct action* against the boycotting carriers, thereby affirming the presence of Interstate Commerce Act jurisdiction over the bargained for conduct which created the controversy. The presently relevant portion of the opinion reads as follows:

> The union was free to make [appeals directly to the trunk-line carriers to refuse to serve local carriers], absent inducement of employees, and, as far as the labor laws and the collective agreement were concerned, the employer was free to reject or accede to such requests. But it was precisely at this point that the *Sand Door* case [*Carpenters Union v. Labor Board, supra,*] recognized the power of the Commission to enter cease-and-desist orders against the carriers violating the transportation law and their tariffs. Thus, . . . there was no reason to have assumed that the ordinary processes of the law were incapable of remedying the situation. 371 U.S. at 170.

The *Sand Door* (or *Carpenter's Union*) case cited above noted the ICC's 1957 decision in *Galveston Truck Line Corp. v. Ada Motor Lines, Inc., supra*, with approval and described it as a self-restrained action which did not invalidate hot cargo clauses *per se*, but only enforced Interstate Commerce Act requirements on certain carriers after concluding that a "hot cargo" provision *was not a defense to the charge that the carriers had violated specific statutory duties*. 357 U.S. at 109. Accordingly, the teaching

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(1958); *Merchandise Warehouse Co. v. A.B.C. Freight For. Corp.*, 165 F. Supp. 67, 75-76 (S.D. Ind. 1958); *Montgomery Ward & Co. v. Northern Pacific Term. Co.*, 128 F. Supp. 475, 516-519 (D. Ore. 1953). *Cf. Railway Employees v. Florida E. C. Ry. Co.*, 384 U.S. 238, 244-245 (1966) (interpreting the Railway Labor Act in a manner consistent with the defendant's common carrier responsibilities); *Quaker City Motor P. Co. v. Interstate Motor Fr. Sys.*, 148 F. Supp. 226 (E.D. Pa. 1957) (enjoining a motor carrier from refusing to deliver cargo when its employees unilaterally chose to honor the picket line of another union). Application of these cases does not depend on the legality of the collective bargaining contract under the labor laws and the Commission makes no assumptions regarding the Container Rules' status as a legitimate work preservation measure. Shipping Act jurisdiction exists because the Container Rules present distinct Shipping Act questions with important Shipping Act consequences.

The national policy favoring facilitation of privately negotiated settlements to labor/management disputes does not authorize otherwise unlawful conduct simply because it is incorporated into a collective bargaining agreement,[36] and the Norris-LaGuardia Act's limitations on

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of *Burlington Truck* is this: transportation considerations may not "unduly trench upon" the labor laws, but the labor law interest in the implementation of a collective bargaining agreement is not sufficiently acute to preclude administration of the otherwise applicable antidiscrimination provisions of the Interstate Commerce Act.

Intervenor Pacific Maritime Association cites the *Burlington Truck* decision for the opposing proposition that "work preservation rules . . . are exempt from . . . regulation under transportation statutes," (PMA Brief at 18) and attempts to demonstrate that the opinion's component parts somehow exceed the whole. PMA's meticulous disassembly of *Burlington Truck* fails to uncover support for the broad exemption the Respondents seek, however. Only the dissenting Justice (Black) believed the ICC lacked regulatory authority over conduct arising out of collective bargaining agreements. His position cannot be attributed to the four concurring Justices (Goldberg, Warren, Douglas and Brennen) simply because they stated that the ICC on remand should order the carriers:

> . . . to provide service in a manner and to the extent compatible with their labor agreements and with both the carriers' and the union's rights and duties under the federal labor laws. 371 U.S. at 177.

When read together, the Opinion of the Court and the concurring opinions indicate that the ICC was expected to prevent further implementation of the "hot cargo" clause in the carriers' collective bargaining agreement in a manner which would not unduly conflict with the National Labor Relations Act. The four concurring Justices differ from the Opinion of the Court only in their use of the qualifying phrase "appropriately limited cease- and-desist order"—a reference to the specific facts of the case which apparently permitted mutual accommodation of both collective bargaining agreement and Interstate Commerce Act obligations. Moreover, the concurring Justices voiced no disagreement with footnote 20 of the Opinion of the Court which states that the grant of permanent operating authority to additional carriers might be a justifiable ICC remedy in a different factual situation. 371 U.S. at 171, note 20.

[36] Agreements lawful under the labor laws may be unlawful under other statutes, and are not exempt from these other statutes merely because of their validity under the labor laws. *See United Mine Workers v. Pennington*, 381 U.S. 657, 664-666 (1965); *Amalgamated Meat Cutters v. Jewel Tea Co.*, 381 U.S. 676, 684-687 (1965) (opinion of Justice White); *VW, supra*, at 312 (dissent of Justice Douglas). When the Supreme Court has considered the lawfulness of work preservation or work extension agreements under the labor laws, its holdings were confined to the validity of such agreements on labor grounds alone. *E.g.*, in *National Woodwork Mfrs. Ass'n v. NLRB*, 386 U.S. 612 (1967), a collective

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injunctive relief in cases "involving labor disputes" do not apply where the requested relief represents a *bona fide* effort to enforce another federal statute.[37] The Commission may therefore investigate the Container Rules despite the fact that an adverse Shipping Act decision could ultimately prevent implementation of collective bargaining provisions which may be lawful under the labor laws.

The present record indicates that some of the Respondents have implemented the Container Rules so as to create the type of discrimination prohibited in *Sea-Land, supra*. There are, however, several matters which should be further developed before the Commission finally decides which Shipping Act sections have been violated by which of the remaining Respondents. This proceeding will therefore be referred to

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bargaining agreement between a carpenters' union and a general contractors' association providing that union members would not handle premachined doors was found to be an unfair labor practice and the Court further stated:

> We likewise do not have before us in these cases, and express no view upon, the antitrust limitations, if any, upon union-employer work-preservation or work-extension agreements. 386 U.S. at 631, note 19.

In *Connell Construction Co. v. Plumbers and Steamfitter*, 421 U.S. 616 (1975) the Supreme Court held that a non collective bargaining agreement *unlawful* under the Labor Relations Act was *also* subject to federal antitrust liability and stated:

> There is no legislative history . . . suggesting that labor-law remedies for section 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA. 421 U.S. at 634

See also United Construction Workers v. Laburnum Corp., 347 U.S. 656, 665 (1954); *Southern S.S. Co. v. Labor Board*, 316 U.S. 31, 47 (1942); *Montgomery Ward & Co., supra*, at 498-499.

[37] The Norris-LaGuardia cases cited by Respondents are distinguishable. *Railroad Telegraphers v. Chicago & N.W. R. Co.*, 362 U.S. 330 (1960), did not involve any unlawful union conduct, and the footnote quoted out of context by NYSA is basically irrelevant to the Court's decision not to invoke the Norris-LaGuardia Act. *Brotherhood of Railroad Trainmen v. Chicago River & I. R. Co.*, 353 U.S. 30 (1957), upheld an injunction issued against unlawful union activity, although the law violated was a labor statute. *Milk Wagon Drivers v. Lake Valley Farm Products, Inc.*, 311 U.S. 91 (1940), involving attempts to halt alleged Sherman Act violations, must be compared with *Allen Bradley Co. v. Electrical Workers*, 325 U.S. 797 (1945), wherein injunctive relief was invoked to halt fully adjudicated Sherman Act violations arising from a labor dispute.

In *Brotherhood of R. Trainmen v. Atlantic Coast Line R. Co.*, 362 F.2d 649 (5th Cir. 1966), the court stated:

> . . . it should be emphasized we deal only with the enjoinability of appellants' activity and not with its legality for any other purpose.
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> * * *
>
> Congress did not . . . make the conduct listed lawful for all purposes. The most logical inference from this fact is that . . . Congress intended only to remedy abuses of judicial equity power relating to injunctions, allowing the law relating to the "legality" of the described activity for other purposes to develop in the court. 362 F.2d at 653 and note 3.

The decisions dealing with refusals to enjoin motor carriers for alleged violations of their common carrier responsibilities, *East Texas Motor Freight Lines, Inc. v. Teamsters Local 568* and *Lee Way Motor Freight, Inc. v. Keystone Freight Lines, Inc.*, both *supra*, were private party complaints, alleging violations of the Interstate Commerce Act. They involved neither the ICC itself nor an attempt to enforce an order of that agency. *Texas and New Orleans R. Co. v. Brotherhood of R. Trainmen, supra*, denied an injunction to a railroad attempting to implement a permissive authorization granted by the ICC. These cases present no obstacle to the enforcement of an ICC cease and desist order. *See Burlington Truck, supra*.

an Administrative Law Judge for expeditious resolution of the following questions:

1. Whether, and, if so, exactly how, the present Container Rules differ from the 1974 Rules at issue in *Sea-Land, supra*. Copies of the 1974 and December 6, 1980 versions should be made part of the record and the December 6, 1980 amendments plainly identified. Specific attention should be given to:

(a) the phrase "containers owned, leased or used by the carriers . . ." which appears in Container Rule 1(a)(1). A finding should be made as to whether the word "used" includes shipper owned or leased containers, and, if it does not, what its intended meaning is;

(b) the phrase "containers . . . from a single shipper . . . into which the cargo has been loaded (consolidated) by other than its own employees . . ." which appears in Container Rule 1(a)(2). A finding should be made as to whether full containers loaded *by the employees* of a nonvessel operating common carrier, or other person dealing with the ocean carrier as the shipper of said containers, are included in the Container Rules; and;

(c) whether the Container Rules require that the $1,000 per container liquidated damages provided by Rule 7(c) be passed on to the shipper and, if not, whether such a result is likely or possible under the Container Rules; [38]

2. The membership of NYSA during January and February, 1981;

3. The ports at which outstanding injunctions or other circumstances unrelated to the free choice of the ILA precluded carriers from implementing the Container Rules during January and February, 1981;

4. A detailed description of the actions, if any, taken to implement the Container Rules during January and February, 1981, by a representative sample of the remaining respondents to be selected by Hearing Counsel. This sample shall consist of 36 different carriers, no more than 20 of which shall be NYSA members, and shall examine the activities of at least three such carriers at each of 12 representative U.S. Atlantic and Gulf ports where implementation of the Container Rules was not barred by court order or other circumstances. The relevant conduct to be described includes any notices or other information communicated to shippers, orally or in writing, indicating that the Container Rules would be applied, as well as actual refusals to supply containers, load cargo, or deliver cargo except upon compliance with conditions prescribed by the Container Rules. Each imposition of Container Rules conditions by each of the selected Respondents should be documented,

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[38] *See, e.g.*, the March 18, 1981 Affidavit of Joseph M. Henderson, which states that Boston Consolidation Services, Inc., was told by respondent Korea Shipping Corporation that Boston Consolidation would be responsible for any ILA penalties on shipments booked on KSC vessels at New York.

as well as any attempts to impose responsibility for ILA fines on shippers.

5. A finding as to whether any of the seven enumerated aspects of the Container Rules (*see* note 2, above)—as they were implemented or necessarily would be implemented in the absence of labor law restraints—are unfair, unduly prejudicial or unjustly discriminatory between shippers within the meaning of Shipping Act sections 14 Fourth, 16 First and 17, first paragraph;

6. A finding as to whether any of the seven enumerated aspects of the Container Rules—as they were implemented or necessarily would be implemented in the absence of labor law restraints—are unjust or unreasonable within the meaning of section 17, second paragraph (foreign commerce) and section 18(a) (domestic offshore commerce);

7. A conclusion as to whether unjust discrimination against shippers is prohibited in domestic offshore commerce by virtue of Shipping Act section 14 Fourth, section 16 First, section 18(a), or any combination of the above, or any other provisions of the Shipping Act, 1916;

8. A conclusion as to whether each of the remaining Respondents would violate any of the above-referenced Shipping Act sections if the Container Rules were implemented in their present form and a recommendation as to whether any such Respondent should be ordered to cease and desist from taking such action in the future.

In resolving these remaining issues, Proponents and *any* of the Respondents may introduce such additional evidence as the Presiding Officer deems relevant to whether the Container Rules, as presently formulated, create discriminations or commercial burdens so unreasonable as to violate the above-referenced Shipping Act sections. Because the Commission has today ruled that the Container Rules are not exempt from Shipping Act regulation, despite their inclusion in ILA collective bargaining agreements, no further evidence regarding labor conditions shall be accepted by the Presiding Officer. If the Respondents have a defense to the Shipping Act violations alleged in the Order of Investigation, it must be a defense relating to transportation conditions, not national labor relations policy.

THEREFORE, IT IS ORDERED, That Gulf Atlantic Transportation; MTO Liner Services; West India Shipping Company, Inc.; American President Lines; Showa Line Ltd.; Korea Maritime Transport Co., Ltd.; Uruguayan Line; Seaspeed Services; Tropical Shipping Transportation Co., Ltd.; Jinyang Shipping Co., Ltd.; R.T. Djakarta Lloyd; American Industrial Carriers; D.B. Turkish Cargo Lines; CAST Shipping, Ltd.; Black Star Line; Caribe Cargo Express; and Trans World Systems are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That this proceeding is assigned for hearing and decision to the Commission's Office of Administrative Law Judges, with a public hearing to be held at a date and place hereafter

determined by the Presiding Administrative Law Judge. This hearing shall include oral testimony and cross-examination in the discretion of the Presiding Officer only upon a showing that there are genuine issues of material fact that cannot be resolved on the basis of sworn statements, affidavits, depositions or other documents or that the nature of the matters in issue is such that oral hearing and cross-examination are necessary to develop an adequate record; and

IT IS FURTHER ORDERED, That, pursuant to sections 21 and 27 of the Shipping Act, 1916 (46 U.S.C. 820 and 826), the Respondents shall file with the Presiding Officer within ten business days from the service date of this Order:

1. a verified list of all ocean carriers which were members of the New York Shipping Association during January and February, 1981;
2. a complete and verified copy of the 1974-1977 "Management-ILA Rules on Containers," a complete and verified copy of the December 6, 1980 version of these Rules which identifies the December 6, 1980 changes, if any, and an analysis of each such change describing its intended effect;
3. a verified list of any ports at which injunctions or other factors beyond the ILA's control prevented implementation of the Container Rules during January or February, 1981, and an explanation of what the factor was in each instance.

Copies of these submissions shall be simultaneously furnished to all other parties of record; [39] and

IT IS FURTHER ORDERED, That this order be published in the *Federal Register* and a copy served upon all parties of record; and

IT IS FURTHER ORDERED, That all future notices, orders, or decisions issued in this proceeding, including notice of the time and place of hearing or prehearing conference, be mailed directly to all parties of record.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[39] It is not required that each of the 122 Respondents file the same material. It would be sufficient for the New York Shipping Association members and the ILA to respond on behalf of all.

* Commissioner Thomas F. Moakley concurs in the result and will issue a separate opinion. Commissioner Richard J. Daschbach dissents and issues a separate opinion.

DOCKET NO. 81-11

"50 MILE CONTAINER RULES"

IMPLEMENTATION BY OCEAN COMMON CARRIERS SERVING U.S. ATLANTIC AND GULF COAST PORTS - POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

Commissioner Richard J. Daschbach, dissenting.

The Commission's instant Order is a sincere effort to make good law but, by ignoring the intent of the Maritime Labor Agreements Act of 1980 (MLAA), as well as the practical and economic consequences of the investigation it proposes, it continues a wasteful and unnecessarily burdensome proceeding.

The Commission has already spent nearly a year investigating the 50-mile container rules, and it has compiled a record sufficient to make two important findings.

First, the 50-mile rules are a practice subject to the tariff filing requirements of section 18(a) of the Shipping Act, 1916.

Second, a plain reading of the MLAA and its legislative history shows that it was not intended to alter the Commission's authority to enforce Shipping Act violations.

However, the instant Order buries these conclusions amidst 40 pages of legal justification for preserving Shipping Act jurisdiction where it has not been seriously challenged, and it continues an investigation which, after the two findings described above have been made, is no longer necessary or defensible.

Any further conclusions which the Commission can reach regarding alleged violations by specific parties and their disposition is inherently remedial and can be more efficiently adjudicated in the currently stayed complaint proceeding (Docket No. 81-5, *International Association of NVOCC's et al. v. Atlantic Container Line et al.*).

In view of the broad jurisdictional issues already resolved and the specific factual matters still requiring adjudication, the complaint proceeding is far more practical, economical, and consistent with the regulatory reform principles of the MLAA than a costly and protracted Commission investigation and hearing.

Docket No. 81-5 addresses the same legal issues as Docket No. 81-11 and is the only vehicle for the parties alleging harm from imposition of the 50-mile rules to seek financial redress of their alleged injuries. The complaint proceeding also reflects the purposes of the MLAA, which specifically *removed* the Commission from active regulation of maritime labor activities while preserving its authority to adjudicate the complaint of any party affected by specific violations of the Shipping Act.

Finally, the complaint proceeding places the financial as well as legal burden of going forward on the aggrieved parties, where it belongs. In

view of the Commission's limited budget and personnel resources, cost is a valid issue to be considered in weighing the propriety of initiating or extending any investigation. It is a particularly relevant concern with respect to the instant Order, in which the Commission is embarking on an investigation of sweeping magnitude despite the availability of a more economically feasible alternative.

In addition to its cost, the Commission investigation envisioned by the instant Order has as many drawbacks as the complaint proceeding has advantages.

The Order is skewed in two mutually exclusive directions. On the one hand, it is a scholarly legal treatise on the respective philosophies underlying Shipping Act regulation and national labor law. On the other hand, it tries to re-focus an extant investigation in order to obtain more specific factual information. It simply cannot do both. The more scholarly the treatise, the less suitable a vehicle it becomes for the factual investigation which is allegedly needed here. The treatment of legal issues may be exemplary, but it does not help the Commission determine what Carrier X did to Shipper Y.

The instant Order presents an elaborate defense of Commission jurisdiction where none is needed, thus inviting controversy which might not otherwise arise. The MLAA clearly delineated the Commission's authority regarding maritime labor issues, and a simple re-affirmation of the principles of that statute would be sufficient. In belaboring the issue through 40 pages, the Order may create needless doubts about the Commission's statutory jurisdiction and complicate the premise on which that authority is based. This is the same error which the Commission committed in its overly aggressive assertion of jurisdiction in *Federal Maritime Commission v. Pacific Maritime Association (PMA)*, 425 U.S. 40 (1978), creating regulatory overkill which required statutory modification. The Commission's Order here threatens to rekindle the controversy which the MLAA resolved.

Finally, the cumbersome investigation proposed by the instant Order shows that the Commission continues to swim against the tide of current thinking on the proper role of the Federal government in enforcing the law. An investigation of the scope and magnitude envisioned by the Order here is over-reaching and interventionist regulation at its worst. It thrusts the heavy hand of Federal bureaucracy into a matter which could be more expeditiously and economically resolved through a private complaint proceeding. In so doing, the Commission imposes a major burden upon U.S. industry and labor as well as an unnecessary drain on its own financial and manpower resources.

Vice Chairman Moakley, concurring.

I agree with the majority's conclusion that the Commission has jurisdiction over the Practices described in the order of investigation but only to the extent that those practices affect the relationship between respondent carriers and shippers who utilize their services. To the extent that those practices (e.g. refusal to supply containers to off-pier facilities) affect the relationship between a carrier and a contractor who is not a shipper and is merely performing consolidation services on behalf of the carrier, the practices may be beyond our jurisdiction.

The jurisdictional borders between shipping and labor laws may have been in dispute prior to enactment of the Maritime Labor Agreements Act of 1980 (P.L. 96-325). However, since enactment of that statute on August 8, 1980, it is clear that this Commission has no jurisdiction over collective bargaining agreements *per se* (except with respect to certain assessment agreements, which exception is irrelevant to this proceeding). Shipping Act jurisdiction was clearly preserved over all practices of common carriers which are required to be set forth in tariffs, whether or not those practices reflect a collective bargaining obligation.

Therefore, it is critical for the Commission to distinguish between those practices which must be set forth in carriers' tariffs and all other practices.

The starting point for such a distinction would seem to be the obligation of a carrier, codified in section 18 (b) of the Shipping Act, 1915, and in section 2 of the Intercoastal Shipping Act, 1933, to notify the shipping public of the terms under which its service is offered. If the practice pertains to the terms of its service to the shipping public, then the practice would seem to be one which is required to be set forth in a carrier's tariff.

Since NVO's are members of the shipping public,[1] the terms under which containers are made available to NVO's (and to other shippers) must be set forth in a carrier's tariff. However, consolidators that perform stuffing or stripping operations as subcontractors to the ocean carriers are not shippers and their arrangement with carriers would not, at first blush, seem to be required to be set forth in the carriers' tariffs.

To my considerable frustration, we have not yet developed a record which reflects exactly what practices we are investigating, although there is some evidence to the effect that certain NVO's are being denied containers and are being subjected to other practices described in the Order of Investigation. It would seem beneficial to solicit the parties help in refining this issue once the record adequately divulges the practices involved. While I believe that the majority intends to make this distinction that I believe is critical to our ultimate disposition

[1] *Sea-Land Service, Inc.—Proposed Rules on Containers*, 21 F.M.C. 1.

of this case, the order may not be sufficiently clear to alert the parties and the presiding Administrative Law Judge of this intent.

On a second, related issue, I would clearly take a different path from the majority in reaching our common conclusion. That issue relates to the treatment of the non-statutory exemption arising out of the BSA [2] litigation. I simply do not believe that the existence of such an exemption is consistent with the intent of Congress in enacting the Maritime Labor Agreement Act of 1980, *supra*.

As described above, the central theme of the Maritime Labor Agreements Act was to draw a clear line between labor and shipping jurisdictions. Collective bargaining agreements were relegated solely to labor law. Tariffs were seen as purely Shipping Act matters.[3]

Thus, having concluded that this case deals with tariff matters, the jurisdictional inquiry must end.

The application of the BSA exemption test once again blurs this clear jurisdictional division. It not only suggests that the Commission may not, under some circumstances, exercise jurisdiction over tariff matters, despite the language of section 5 of the Maritime Labor Agreements Act, but also requires the Commission to analyze the collective bargaining agreement itself, a result which Congress was intently attempting to avoid.

I would agree with the majority that, if on the basis of the record ultimately developed in this case, certain practices of respondent carriers are found in violation of the Shipping Act, the remedy for those violations should take labor policy matters into consideration. This result is, in fact, required by virtue of the Supreme Court's decision in *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962). However, to consider labor policy matters in determining whether to exercise jurisdiction over a tariff matter is a throw back to a very difficult era for this agency prior to enactment of the Maritime Labor Agreements Act.

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[2] *United Stevedoring Corp. v. Boston Shipping Association*, 16 FMC 7 (1972).

[3] See e.g. *Hearing before the Subcommittee on Merchant Marine and Tourism of the Committee on Commerce, Science and Transportation on HR 6613*, U.S. Senate, 96th Congress, 2nd Sess. (June 4, 1980) at pp 12-37:

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-45

AGREEMENT NOS. 10386, AS AMENDED, AND 10382, AS AMENDED—CARGO REVENUE POOLING/EQUAL ACCESS AGREEMENTS IN THE UNITED STATES/ARGENTINA TRADES

ORDER PARTIALLY ADOPTING INITIAL DECISION

February 16, 1982

This proceeding was initiated by Order of Investigation and Hearing served June 30, 1980 to determine whether certain cargo revenue pooling and sailing agreements in the northbound and southbound United States/Argentina trades should be approved, disapproved or modified pursuant to section 15, Shipping Act, 1916 (46 U.S.C. 814).[1]

On July 31, 1981, Presiding Administrative Law Judge Paul J. Fitzpatrick served his Initial Decision approving the northbound agreements, *i.e.*, Agreement Nos. 10386 and 10382. The proceeding is now before the Commission upon Exceptions to that decision.

INITIAL DECISION

The Presiding Officer concluded that Agreement Nos. 10386 and 10382 (Agreements) are not inconsistent with any of the standards of section 15 and accordingly granted them approval. In so doing, the Presiding Officer found that the Agreements: (1) implement a government-to-government arrangement and therefore carry a presumption of being in the public interest and are presumptively approvable; (2) meet a serious transportation need and provide important public benefits and further valid regulatory purposes; (3) do not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the Shipping Act; and (4) are a result of commercial negotiations subject to the Commission's Jurisdiction under section 15 of the Act. The Presiding Officer specifically addressed the issues delineated by the Commission in its January 29, 1981 Order and found no evidence which would warrant the disapproval or modification of the Agreements or which would support a finding that they are not the result of commercial negotiations among the parties.

The Presiding Officer reviewed the history which led to the negotiation and execution of these Agreements. He discussed the evidence in

[1] The Agreements were granted approval *pendente lite*. On January 29, 1981, the Commission denied *Moore-McCormack Lines'* motion to terminate the proceeding but finally approved the southbound agreements, *i.e.*, Agreement Nos. 10388 and 10389.

this proceeding, as well as designated portions of the record in Docket Nos. 78-51 and 78-52,[2] and found the impetus for the Agreements to be the March 31, 1978 Argentine/ United States Memorandum of Agreement—the so-called Blackwell/Guevara Memorandum of Understanding. The Presiding Officer found that the fixed share provisions of these Agreements are "consistent" with that Memorandum.

Having found that the Blackwell/Guevara Memorandum represents a favorable United States policy towards pooling agreements in these trades, the Presiding Officer therefore concluded that the Agreements are presumptively in the public interest and therefore presumptively approvable.[3] The Presiding Officer also found that the Proponents had met their *Svenska* [4] burden and that the Agreements warranted approval under the standards of section 15.

The Presiding Officer concluded that Argentine law and policy require fixed shares in the United States/Argentine traces. In so doing, he relied on a number of Aide Memoires, which were transmitted through the United States State Department, and the testimony of Mr. Samuel B. Nemirow, then Assistant Secretary of Commerce for Maritime Affairs, that fixed shares were consistent with the Blackwell/Guevara Memorandum and that the Argentine government, through its State Secretary of Maritime Interest (SEIM), had indicated that open competition was inconsistent with that Memorandum and Argentine law and policy.

The Presiding Officer held that the approval of these agreements will fulfill serious transportation needs and provide important public benefits by preventing the disruption of both the north and the southbound trades through the imposition of restrictive Argentine laws, and by avoiding the international conflict which could result from United States' retaliatory use of section 19 of the Merchant Marine Act, 1920, and other statutes. He found that the Argentine government would, if the Agreements are not approved, reimpose its waiver procedures in the southbound trades, as well as impose similar restrictions in the northbound trades with devastating impact on the U.S.-flag carriers, Delta and Mooremac, to the detriment of the foreign commerce of the United States. The Presiding Officer concluded that Argentina would

[2] The Atlantic and Gulf Agreements are successor agreements to Agreement Nos. 10349 and 10346, respectively, which were the subject of Docket Nos. 78-51 and 78-52, *Agreement No. 10349—A Cargo Revenue Pooling and Sailing Agreement Argentina/United States Atlantic Trade,* and *Agreement No. 10346—A Cargo Revenue Pooling and Sailing Agreement Argentina/United States Gulf Coast Trade* (Report and Order issued June 22, 1979, 21 F.M.C. 1100.

[3] In support of this finding, the Presiding Officer cited a letter from President Carter to the House Committee on Merchant Marine and Fisheries relating to certain pending legislation. The President stated in pertinent part that:

> . . . agreements and implementing government-to-government negotiations should receive prompt presumptive approval by the FMC. (I.D. page 92).

[4] *Federal Maritime Commission v. Svenska Amerika Linien,* 390 U.S. 238 (1968).

take this action because it views the north and southbound trades and the respective pooling agreements as being "interlinked."

The Presiding Officer found that the third-flag allocations were not unjustly discriminatory or unfair,[5] and were the product of true commercial negotiations without influence from the Argentine government or its state-owned carrier, ELMA. He determined that although Ivarans' share—the largest third-flag share—resulted, at least in part, from its negotiating tactics,[6] consideration was given to its past performance. While past carryings were found not to be the only factors applied in negotiating the shares, the Presiding Officer explained that it was impossible to conclude from the record what weight was given to zonalism and reciprocity, and the intangibles that are always present in commercial negotiations. No one factor was found, however, to have been given undue weight.

As to the level of share ultimately allocated Ivarans, the Presiding Officer also pointed out that Ivarans' recent past carriage (13.3% in 1980) is not much greater than its initial pool share and noted that Ivarans had stipulated that economic injury was not in issue and that Agreement No. 10386 would not force it out of the trade.

The Presiding Officer also held that actual pool calculations in the last quarter of 1980 show that the pool provisions are not unfair to Ivarans.[7] During this quarter, Ivarans was found to have had total pool earnings of $629,194, excluding surcharges, and to have retained $228,059 of this amount as its 45% carrying compensation, in addition to the surcharges. The Presiding Officer noted that although Ivarans

[5] The Presiding Officer noted that the 20% share allocated to third-flag lines in the Gulf trade was in excess of their historical carryings.

[6] With regard to the disputed Atlantic Agreement negotiations, the Presiding Officer explained that the third-flag allocations resulted in part from the negotiating positions of the principal antagonists, Lloyd and Ivarans. In the negotiations Lloyd argued that it is entitled to its share because: (1) it has the capacity and capability to perform its pool obligations; (2) it has demonstrated a commitment to the trade; (3) it views its minimum sailing requirements as commitments and will serve the trade even if there is no cargo; (4) its vessels do not exclusively serve their national trades but also rely on cargo from other ports of call, such as Argentina, as do Argentine-flag carriers which load cargo in Brazilian ports; (5) consideration should be given the economic community of interest between Brazil and Argentina.

Ivarans, on the other hand, believed that past carryings should be the *only* criterion used to determine the third-flag shares in these trades. It also argued that a new entrant or carrier without substantial past participation should only be initially assigned a 1% share until it has established its capability to serve the trade. Finally, Ivarans believed that the Commission would not approve an agreement where Ivarans' share was lower than the percentage set forth in the predecessor agreement, Agreement No. 10349, (12.5% down to 11.1% over a three-year period). Ivarans allegedly did not reduce its share demand because it believed that the Commission would dismiss any protest if its pool demands were only a few percentage points over what the other lines were prepared to give Ivarans. Ivarans position is that it signed Agreement No. 10386 because it believed that failure to do so would result in the imposition of sanctions against it pursuant to Argentine law in both the north and the southbound trades.

[7] Agreement No. 10386, the Atlantic Agreement in issue, was not in effect for the first three quarters of 1980.

paid an overcarriage penalty of $21,835, this penalty only costs Ivarans $.03 on the dollar on its *gross* revenues.

The Presiding Officer further concluded from the report on this pool period that the evidence indicated that Ivarans was only interested in very high-rated cargoes since its average revenue ton earnings were $138.47 compared to $111.53 for all the other carriers. He found that even after Ivarans paid the overcarriage penalty, it still earned an average of $133.66 per revenue ton. Accordingly, it was concluded that the third-flag allocations were not unfair to Ivarans and that Agreement No. 10386 could be approved without the modifications proposed by Ivarans and Hearing Counsel.[8]

With regard to the impact of these Agreements on shipper interests, the Presiding Officer noted that no shipper testified in opposition to these Agreements and that the 24 shippers who responded to Hearing Counsel's survey perceived no difference in service under open or fixed shares.

POSITION OF THE PARTIES

A. Hearing Counsel

While supporting the Agreements as approved by the Presiding Officer, Hearing Counsel requests that the Commission clarify certain of the Presiding Officer's conclusions.

Hearing Counsel believes that the record does not support the Presiding Officer's finding that Argentine law requires fixed shares for the third-flag carriers. It points out that, although there was testimony concerning Argentine law and policy, no specific Argentine law was ever entered into the record. Hearing Counsel submits that because there is no Argentine law which *requires* fixed shares, open competition within the third-flag share would be consistent with the Blackwell/Guevara Memorandum of Understanding. Hearing Counsel cites the testimony of Mr. Blackwell in support of this position.

Hearing Counsel also takes exception to the Presiding Officer's finding that the Agreements are *prima facie* in the public interest because they are consistent with the Memorandum of Understanding and are therefore presumptively approvable under section 15 of the Act. Hearing Counsel believes, however, that the Memorandum is entitled to "considerable weight" in determining the approvability of these Agreements under the "public interest" standard of section 15, but that the Agreements must nevertheless be examined under the existing standards of section 15.

[8] Ivarans favored open competition or renegotiation of the third-flag share. Hearing Counsel urged that the third-flag shares be renegotiated in the Atlantic trades and that both Agreements be modified to provide for verbatim transcripts of the third-flag caucuses. On Exception, Hearing Counsel abandoned its request for renegotiated third-flag shares in the Atlantic trade.

B. Ivarans

Ivarans excepts to nearly every finding and conclusion of the Initial Decision. Ivarans lists 35 specific factual/legal matters with which it takes issue. In general, Ivarans argues that: (1) neither the Blackwell/Guevara Memorandum of Understanding nor Argentine law requires fixed third-flag shares in these trades; (2) the Shipping Act, 1916 does not permit the presumptive approval of section 15 agreements which allegedly implement intergovernment agreements; (3) Agreement No. 10386, the Atlantic Agreement, is unjustly discriminatory and unfair to Ivarans.

Ivarans contends that the Presiding Officer has in effect overruled the Commission's findings in Docket Nos. 78-51 and 78-52 that the Argentine government does not have an interest in the actual division of the third-flag shares. Ivarans argues that the Presiding Officer made this finding without moving before him any specific Argentine law or resolution requiring fixed third-flag shares. In fact, Ivarans points out that the Argentine laws which the Presiding Officer did consider were the ones which were before the Commission in Docket Nos. 78-51 and 78-52 and upon which the Commission there based its finding that the Argentine government has no interest in how the third-flag shares are allocated.

Ivarans also argues that the Blackwell-Guevara Memorandum does not require fixed third-flag shares. Ivarans points to the testimony of Mr. Blackwell, where he indicated that the issue of fixed or open shares for the third-flag carriers was not part of the negotiations which led to the Memorandum, and that he personally was not concerned with the third-flag issue beyond the *general* concern for the participation of third-flag lines in the trade.

Ivarans also maintains that the Presiding Officer erroneously relied on President Carter's endorsement of "presumptive approvability" in determining that the Agreements should be approved. Ivarans points out that President Carter's statement was not "law," nor was the legislative proposal to which it was addressed enacted into law. Ivarans excepts to the Presiding Officer's "presumptive" analysis and further argues that this allegedly erroneous analysis led him to find the Agreements approvable.[9]

Finally, Ivarans argues that the Presiding Officer erred in failing to find that "zonalism and reciprocity" were significant factors in deter-

[9] Ivarans also objects to the Presiding Officer's findings that the Agreements meet the *Svenska* standards. Ivarans argues that the Presiding Officer's conclusions are based on speculative findings that: (1) the Argentine government will disrupt the north and southbound trades in the event of Commission disapproval of these Agreements; (2) that the American-flag carriers will suffer immediate and irreversible financial hardship; and (3) that Mooremac will request, and the United States will extend countervailing relief under section 19, Merchant Marine Act, 1920 (46 U.S.C. 876) or section 301 of the Trade Act. (19 U.S.C. 2411).

mining the third-flag shares, particularly the Atlantic Agreement's shares. The record in this proceeding allegedly indicates that the Argentine-flag lines, ELMA and Bottacchi, and the Brazilian-flag lines, particularly Lloyd, consider zonalism and reciprocity as the primary factors in allocating third-flag shares.

The record also is said to establish that both the Argentine government and the Argentine carriers improperly influenced the negotiation of the third-flag shares.[10] In support or this argument, Ivarans explains that it was required to attend a meeting with SEIM prior to the March, 1980 principals' meeting and that at this meeting, SEIM discussed the Argentina/Brazil Agreements, as well as the implementation of Resolution 619 against Ivarans if it did not sign the Agreement. Ivarans contends that both SEIM and Bottacchi [11] commented favorably on the shares that are presently set forth in the Atlantic Agreement. Ivarans is of the opinion that it could have developed more evidence on this issue if its discovery requests had been complied with and if ELMA had not refused to testify concerning instructions it had received from SEIM.

With respect to the weight afforded the factors used in determining the level of the third-flag shares, Ivarans submits that Agreement No. 10386 itself is the best evidence that past performance and service capabilities were not given significant consideration. Ivarans notes that Lloyd received a substantial share in Agreement No. 10386, although Lloyd has provided very little service in the Atlantic trade.

Finally, Ivarans contends that the Presiding Officer misconstrued its stipulation regarding lack of economic injury.[12] As a result, Ivarans argues that the Presiding Officer improperly placed the burden of going forward and the burden of proof regarding financial injury on Ivarans. Ivarans argues that it does not have the burden to establish that it would be economically harmed by the Agreements. Ivarans submits that it entered into the stipulation only with respect to certain discovery requests that Mooremac made of it regarding its financial records. Ivarans maintains that the Presiding Officer has erroneously interpreted the shipper responses to a Hearing Counsel survey and argues that the shipper responses in fact indicate preference for open rather than fixed third-flag shares.

[10] Ivarans urges the Commission to draw negative inferences against the Proponents because of the refusal of the Argentine government to comply with certain discovery requests and ELMA's refusal to testify concerning the instructions that ELMA received from SEIM.

[11] Bottacchi, unlike ELMA, is not a government-owned carrier, but rather is privately owned.

[12] Ivarans stipulated that it would not contend that it would be economically harmed by the Atlantic Agreement.

C. Proponents

Proponents support the Presiding Officer's findings and conclusions and urge the Commission to adopt the Initial Decision.

DISCUSSION

The Exceptions to the Initial Decision present essentially four issues for resolution: [13]

(A) Whether the Presiding Officer properly applied a "presumptive" standard in finding that these Agreements should be approved;

(B) Whether the Presiding Officer properly found that Argentine law and policy require fixed third-flag shares in these trades;

(C) Whether the Commission should draw adverse inferences from the failure of ELMA and the Argentine government to comply with certain discovery requests; and

(D) Whether the Atlantic Agreement is unjustly discriminatory or unfair to Ivarans.

A. *Presumptive Standard*

The Presiding Officer found that the Agreements "carry a presumption of approvability" under the public interest standard of section 15 because they result from the United States/Argentina Memorandum of Understanding. The Presiding Officer qualified his finding, however, by explaining that this presumption does not necessarily render the Agreements "conclusively approvable." Thereafter he independently analyzed the Agreements under the *Svenska* standard and found the Agreements to be approvable.

The Commission concurs with the Presiding Officer that commercial agreements which flow from certain government-to-government arrangements should be presumed to be in the public interest for the purpose of section 15 consideration. Such an arrangement would not, however, necessarily render the agreement presumptively approvable, but rather acts to offset the adverse public interest presumption created by *Svenska* and shift the burden of going forward with respect to this issue back to the opponents of the Agreement.[14] It is imperative, however, that the section 15 agreement be a *direct* result of the executive arrangement, as it clearly is in this case.

[13] In reaching its decision to adopt the Presiding Officer's Initial Decision in this proceeding, as modified herein, the Commission has considered the complete record and the briefs and arguments of the parties. Arguments and exceptions not specifically discussed in this Order were nevertheless considered and determined to be either without merit or properly disposed by the Presiding Officer.

[14] As the Presiding Officer observed, there would not be any point in the United States negotiating a diplomatic agreement which indicates that pooling agreements are in the public interest, if the commercially negotiated pooling arrangement is presumed to be contrary to the public interest under the Commission's rationale in *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27 (1966), *affirmed sub nom. FMC v. Svenska Amerika Linien, supra.*

B. *Argentine Law and Third-Flag Shares*

Ivarans and Hearing Counsel urge the Commission to reverse the Presiding Officer's finding that Argentine law and policy *require* fixed third-flag shares in its trade. Although the Presiding Officer did not have a specific Argentine law in evidence, the Commission finds that it is unnecessary to reverse this finding. There is adequate uncontradicted evidence of record that Argentine law and policy require fixed third-flag shares in its trade. Exhibit SX-40 on page 9, an Aide Memoire from the Argentine government, indicates that "open competition is contrary to the maritime laws and policies of Argentina." Moreover, Mr. Nemirow, a former Maritime Administrator, testified that he had been advised by Argentine officials that fixed third-flag shares were required by Argentine law,[15] and that the Argentine government assumed that the Blackwell/Guevara Memorandum would, consistent with its laws, result in a pool with fixed third-flag shares in the trade. Accordingly, Hearing Counsel's and Ivarans' Exception will be denied.

C. *Adverse Inferences*

Ivarans and Hearing Counsel urge the Commission to impose sanctions against the Proponents for the failure of ELMA and the Argentine government to comply with discovery and for the refusal of ELMA's witnesses to testify concerning SEIM instructions to ELMA. Ivarans states that the Presiding Officer failed to rule on the adverse inferences it requested as a result of these refusals. The Commission is now requested to infer that the Argentine government had an interest in and in fact influenced the specific individual third-flag shares in the Atlantic Agreement. The Commission finds upon review of the Initial Decision as well as the evidence in this proceeding that the Presiding Officer properly disposed of Ivarans' request.

Although the Presiding Officer did not specifically rule on Ivarans' request for adverse inferences, the Presiding Officer nevertheless addressed the matters raised by the requested inferences. Indeed, as Ivarans points out, and the Presiding Officer found, reciprocity and zonalism were factors in the negotiations of the third-flag shares in the Atlantic trade. Despite these findings, Ivarans argues that the Presiding Officer failed to infer that the Argentine government influenced the negotiations through its support of zonalism and reciprocity. Given Argentina's recognized support of these concepts, the Presiding Officer's finding is tantamount to granting Ivarans' requested inference—

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[15] The Federal Rules of Civil Procedure provide that foreign law may be determined by any relevant source including testimony. This determination may be made without the benefit of expert opinion. *Curtis v. Beatrice Food Co.*, 481 F. Supp. 1275, aff'd 633 F.2d 203 (1980) (*See* 46 U.S.C. 826; 46 C.F.R. 502.156).

i.e., the Argentine government had an interest in the third-flag negotiations.[16]

This conclusion, however, does not require a reversal of the Presiding Officer's ultimate disposition of the Agreements since he further found, and the record will so support, that these factors were not given undue weight in determining the Agreements' third-flag shares (see Discussion, *infra*). Because the Commission has recognized zonalism and reciprocity as appropriate negotiating factors in this trade, their consideration by the third-flag carriers does not render them inappropriate.[17]

D. *Atlantic Agreement Approvability*

As the Presiding Officer noted, a record of this magnitude usually provides, by the process of selective record references, a basis of support for many and varied arguments. In balance, it appears that the Initial Decision presents a proper and well-supported disposition of the varied issues presented in this proceeding. There is sufficient evidence of record to support this finding that the Agreements satisfy the standards for approval and that the Atlantic Agreement is not unduly discriminatory or unfair to Ivarans.

The Agreements do fulfill serious transportation needs and provide important public benefits in the United States/Argentine trades. They serve to obviate potential conflict between the laws and policies of the United States and Argentina. *Docket Nos. 78-51 and 78-52, supra.* In the absence or these Agreements, and the related southbound agreements, it appears likely that certain restrictive Argentine laws and policies would be invoked. Such an action would inevitably lead to international conflict and result in the disruption of the U.S. foreign commerce with injury to shipper and carrier interests alike. Agreement Nos. 10386 and 10382 reflect a commercial alternative which should avoid these consequences and thereby provide important public benefits warranting their approval.

Nor does the existence of fixed third-flag share provisions require, as Ivarans contends, disapproval of the Agreements. (fixed third-flag shares in the United States/Argentine trades are not inconsistent with the Blackwell/Guevara Memorandum nor in and of themselves con-

[16] This should not be taken to mean that the Argentine government had an interest in the level of the specific individual third-flag shares. In fact, the evidence in this proceeding indicates the contrary.

[17] Neither Ivarans nor any other party is arguing that the role of the Argentine government presents a question of Commission *jurisdiction* under section 15.

trary to any United States law administered by this Commission.[18] The record in this proceeding supports the Presiding Officer's finding that the negotiated shares are the result of commercial negotiations and that Ivarans' share is not unjustly discriminatory or unfair.[19]

The executed Atlantic Agreement, to which Ivarans is signatory, provides that its signatories voluntarily accepted the Agreements' terms and conditions. Thus, the Agreement itself is the best evidence that the shares allocated in Agreement No. 10386 are not unjustly discriminatory or unfair to Ivarans. Moreover, Ivarans does not contend nor is there any evidence that Ivarans will economically be harmed by Agreement No. 10386.[20]

Finally, the record does not establish that undue weight was given to zonalism and reciprocity. Nor is there any indication that zonalism will result in the "abrupt curtailment of services" provided by carriers who have historically served the trade, as was the case in Docket Nos. 78-51 and 78-52.

THEREFORE, IT IS ORDERED, That the Presiding Officer's July 31, 1981 Initial Decision is adopted by the Commission as modified by the discussion above; and

IT IS FURTHER ORDERED, That Hearing Counsel's and Ivarans' Exceptions are granted to the extent indicated above and denied in all other respects; and

FINALLY, IT IS ORDERED, That these proceedings are discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[18] The Commission's decision in Docket Nos. 78-51 and 78-52 to require open competition in the third-flag share was solely in response to the inadequacies of that record in an effort to avoid a lapse of Agreement Nos. 10346 and 10349 and the consequential disruption of the United States foreign commerce. It was not intended to establish a Commission policy of "open competition" in the Argentine trades. Fixed third-flag shares are neither required by nor contrary to any United States law administered by this Commission. Argentine law and policy on the other hand require fixed shares.

[19] There does not appear to be widespread shipper opposition to fixed third-flag shares and the Proponents, with the exception of Ivarans, favor such provisions.

[20] Indeed, Ivarans stipulated that it would not raise these issues.

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-45

AGREEMENT NOS. 10386, AS AMENDED, AND 10382, AS AMENDED CARGO REVENUE POOLING/EQUAL ACCESS AGREEMENTS IN THE UNITED STATES/ARGENTINE TRADES

Cargo revenue pooling and equal access agreements in the Northbound Argentine/United States Trades to United States Gulf of Mexico ports and United States Atlantic Coast ports found not to be unjustly discriminatory or unfair as between carriers; detrimental to the commerce of the United States; or contrary to the public interest or otherwise in violation of the Shipping Act, 1916.

Proposed modification to Agreement No. 10386-2 requiring that the Agreement be approved only pending renegotiation of third-flag shares found to be impractical, unnecessary and not warranted on this record.

Proposed modification to Agreement No. 10386-2 providing for "open competition" within the third-flag sector rejected as unwarranted on this record.

Proposed modification to Agreement Nos. 10386 and 10382 requiring transcripts be made of the non-national flag lines' future negotiations also rejected.

Agreement Nos. 10386, as amended, and 10382, as amended, found: to carry a presumption of approvability, to meet serious transportation needs, provide significant public benefits, further valid regulatory purposes, not to invade the prohibition of the antitrust laws any more than necessary to serve the purposes of the Shipping Act, 1916, and subject to the jurisdiction of this Commission.

Agreement No. 10386, as amended, (No. 10386-2) (U.S. Atlantic) approved without modification.

Agreement No. 10382, as amended, (No. 10382-2) (U.S. Gulf) approved without modification.

Odell Kominers, William H. Fort, Jonathan Blank, John W. Angus, III, for Moore McCormack Lines, Incorporated.

Roy G. Bowman, Hopewell H. Darneille, III, John B. Yellott, Jr., for Delta Steamship Lines, Inc.

Neal M. Mayer, Peter J. King, Paul D. Coleman, for Companhia de Navegacao Lloyd Brasileiro and Companhia Maritima Nacional.

Seymour H. Kligler, David A. Brauner, Asher H. Miller, Nathan J. Bayer, for Empresa Lineas Maritimas Argentinas, S.A. and A. Bottacchi S.A. de Navegacion C.F.I.I.

Elmer C. Maddy, George E. Dalton, John E. Bradley for A/S Ivarans Rederi.

Stanley O. Sher, John R. Attanasio, Anthony J. Clccone for Transportacion Maritima Mexicana, S.A.

Edward M. Shea for Sea-Land Service, Inc.

Robert L. McGeorge for Holland Pan American Lines.

James P. O'Sullivan, John A. Gaughan, Office of General Counsel, Federal Maritime Commission, appearing on behalf of Dr. Robert A. Ellsworth of the Commission.

John Robert Ewers, C. D. Miller, Polly Haight Frawley, William D. Weiswasser for the Bureau of Investigation and Enforcement.

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

Partially Adopted February 16, 1982

PROCEDURAL BACKGROUND

This proceeding was instituted by "Order of Investigation and Hearing and Conditional *Pendente Lite* Approval," served June 30, 1980 (20 S.R.R. 83), to determine the approvability under section 15, Shipping Act, 1916 (46 U.S.C. § 814), of four cargo revenue pooling/equal access agreements in the United States/Argentina trades: Agreement Nos. 10382, as amended (northbound), and 10389 (southbound) in the Argentina/U.S. Gulf trades; and Agreement Nos. 10386, as amended (northbound), and 10389 (southbound) in the Argentina/U.S. Atlantic trades.

The Order recognized that similar predecessor northbound agreements previously approved in Docket Nos. 78-51 and 78-52 (*Agreement No. 10349—A Cargo Revenue Pooling and Sailing Agreement—Argentina/ U.S. Atlantic Trade,* No. 78-51 (F.M.C., June 22, 1979), and *Agreement No. 10346—A Cargo Revenue Pooling and Sailing Agreement—Argentina/ U.S. Gulf Trade,* No. 78-52 (F.M.C., June 22, 1979, 21 F.M.C. 1100, (hereinafter "*Docket Nos. 78-51 and 78-52*") were found to serve an important public benefit by maintaining international harmony through the avoidance of disruptive retaliatory action and resultant international conflict. The Order also stated that the justification for approval and the protest submitted raise factual and legal issues requiring further examination. The Agreements were granted *pendente lite* approval in view of "a considered emergency situation existing in the trade." [2]

Transportacion Maritima Mexicana, S.A. (TMM), the sole protestant of any of the four Agreements, was designated a protestant and the

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

[2] The language of the Order is as follows:

> Because the Argentine Government has declared that all pool agreements will be declared null and void absent Commission approval by June 30, 1980, the Commission considers an emergency situation to exist in this trade. The threatened disruption of ocean trade between the United States and Argentina is an emergency of sufficient magnitude to lead the Commission to believe that approval of these Agreements pending our investigation of them and their approvability under the Shipping Act standards is not only justified, but is the only responsible course of action available to the Commission. Such approval should avoid disruption of United States/Argentina trade, assure shipper service, while preserving carrier interests pending the conclusion of our investigation. (Footnote omitted.)

Bureau of Hearing Counsel (renamed Bureau of Investigation and Enforcement, now Bureau of Field Operations, Office of Hearing Counsel) (Bureau or BIE) was made a party to this proceeding, and the Commission, at that time, directed the issuance of an Initial Decision on or before March 31, 1981.

On July 11, 1980, TMM filed a Petition for Review of the Commission's June 30, 1980 Order in the United States Court of Appeals for the District of Columbia Circuit, *Transportacion Maritima Mexicana, S.A. v. F.M.C.*, D.C. Cir. No. 80-1781, relating to Agreement No. 10382, as amended. TMM also filed simultaneously with this Commission a Motion to Stay the Commission's Order pending a decision by the Court. The motion was referred to the Commission and denied in its Order served October 10, 1980. However, on September 23, 1980, TMM and the other parties to Agreement No. 10382 executed an Amendment No. 2 with TMM apparently being provided a satisfactory pooling share. TMM has indicated it would withdraw its protest in this proceeding as well as its Petition in Court and become a proponent of Agreement No. 10382 if the Amendment was approved. The Amendment was filed and approved *pendente lite* and placed under investigation by Commission Order served December 16, 1980. TMM's Court action subsequently was dismissed.

Pursuant to the Commission's Order of June 30, 1980, a prehearing conference was held in Washington, D.C., on August 26, 1980. Extensive discovery was undertaken by the parties, including the taking of the deposition of the Honorable Samuel B. Nemirow, the Assistant Secretary of Commerce for Maritime Affairs.

On October 20, 1980, Moore McCormack Lines, Incorporated (Moore McCormack), filed a "Motion to Terminate the Proceeding, Or in the Alternative Suspend Proceedings Pending Receipt of Certain Evidence." Moore McCormack's request to terminate the proceeding was based in large measure on the deposition of the Assistant Secretary which would, it was claimed, resolve important issues concerning the positions of the Argentine and U.S. Governments and obviate the need for further evidentiary proceedings. A second prehearing conference was held on October 28 and, among other things, the Moore McCormack motion was discussed and the positions of the parties were noted. Parties filed replies and the motion was referred to the Commission. On November 6, 1980, the Commission granted a stay of this proceeding pending resolution of the motion.

On January 29, 1981, the Commission served an "Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389," 23 F.M.C. 611. The Commission's January 29th Order denied the request to terminate the proceeding, added four issues, and posed a number of factual questions by which the parties were to develop responsive information. In addition,

the Commission stated, "[b]ecause the principal focus of this proceeding relates primarily to third-flag issues," it determined to discontinue the investigation of southbound Agreement Nos. 10388 and 10389. The Commission decided that those Agreements meet the standards for approval under section 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814), and concluded that "the extent of the anticompetitive impact of these Agreements is not sufficient to outweigh the benefits found." The Order also set a new deadline of July 31, 1981, for the completion of hearing and issuance of an Initial Decision.

A further prehearing conference was held on February 19, 1981. Discovery requests were considered, a procedural schedule was set for the resolution of outstanding discovery matters, exchange of testimony, and dates were set for the commencement of hearing and the filing of briefs.

Hearing was held in Washington, D.C., on May 11-14, 1981. Witnesses appearing on behalf of proponents were Messrs. Fred A. Wendt of Delta Steamship Lines, Inc. (Delta); James T. Crowley of Moore McCormack; Marcelo N. Dandois of Empresa Lineas Maritimas Argentinas, S.A. (ELMA); Hernan Schliemann of Bottacchi S.A. de Navegacion C.F.I.I. (Bottacchi); and Geraldo Ornellas de Souza of Companhia de Navegacao Lloyd Brasileiro (Lloyd Brasileiro or Lloyd), testifying on behalf of the Brazilian-flag lines, Lloyd Brasileiro and Companhia Maritima Nacional (Nacional). Dr. Robert Ellsworth of the Commission staff also testified, pursuant to subpoena, with respect to portions of the Commission's South American Trade Study. The Bureau, A/S Ivarans Rederi (Ivaran), Sea-Land Service, Inc. (Sea-Land), TMM, Holland Pan American Lines (Hopal), Reefer Express Lines (REL or Reefer Express), and Montemar S.A. Comercial y Maritima (Montemar) did not submit written direct testimony or present any witnesses, although counsel for Sea-Land, TMM and Hopal made brief statements setting forth the positions of their respective clients in support of approval of the agreements. The evidentiary record consists of 609 pages of hearing transcript and 23 exhibits, which include the parties' direct written testimony, exhibits introduced in the hearing, several volumes of stipulated exhibits, and transcript and exhibit designations from *Docket Nos. 78-51 and 78-52*. Simultaneous opening and reply briefs were filed on June 8 and 19, respectively, by the participants.

FINDINGS OF FACT [3]

A. AGREEMENTS AND PARTIES.

1. *Agreement No. 10386 (U.S. Atlantic).* Agreement No. 10386 is a cargo revenue pooling agreement covering the northbound trade from

[3] Briefs were filed on behalf of Moore McCormack, Delta, ELMA, Bottacchi, jointly by Lloyd and Nacional, Ivaran and the Bureau. Moore McCormack, Delta, ELMA, Bottacchi, Lloyd and Nacional also filed Joint Proposed Findings of Fact (88 in number) which provide a thorough and persuadable treatment of an extensive record developed in this proceeding. Two other parties also submitted proposed findings as well. The Bureau submitted a total of 197 findings and Ivaran 69.

Rule 221 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.221) provides, in part:

> . . . opening or initial briefs shall contain the following matters *in separately captioned sections*: . . . proposed findings of fact in serially numbered paragraphs *with reference to exhibit numbers and pages of the transcript, argument* based upon principles of law with appropriate citations of the authorities relied upon, and conclusions. (Emphasis supplied.)

A careful review of the proposed finding submitted by Ivaran reveals that (1) some of the findings have been treated in the proponents' joint proposed findings and, in many instances, in a more thorough manner, (2) many contain statements that are clearly argumentative in nature and not properly a part of proposed findings, (3) many simply lack any reference to exhibit numbers and pages of transcript, (4) some reveal that the citations provided do not support the finding proposed, (5) others are either a misstatement of the record or an inaccurate portrayal of the testimony or exhibits, (6) some represent a broad conclusion clearly taken out of context or which requires additional record support to establish the matter as fact, and (7) some are of questionable relevance. Indeed, the reply briefs of Delta, Moore McCormack, and the Bureau pointedly accentuate the innumerable frailties noted above. Admittedly some of Ivaran's proposed findings are without any objection and have record support. On the other hand, of Ivaran's findings, the majority would require extensive recasting to remove the many objectionable features. A task of that nature involving an admittedly "massive record" would require, at the least, an inordinate amount of time considering that the Commission has set the time for completion of this proceeding on an expedited basis.

The Bureau's proposed findings present a somewhat different picture. Although the proposed findings are impressive in number (197), the overall approach taken in the presentation of these findings provides a less comprehensive treatment of the record. A careful review of the proposed findings reveals numerous proposals that, taken as a whole, cast the record in a limited scope which, while marked by a degree of meticulousness, fails to offer the fullest treatment to the many and varied issues presented here. For example, many of the proposed findings are merely selected excerpts from the transcript or exhibits. While this type of finding would be supported and generally not objectionable, the problem presented is that, in many instances, the finding, in order to be substantive, requires more. Proposed findings of that nature require a recognition of additional testimony relating to the subject. Furthermore, a number of important areas contained in the joint proposals are not present in those submitted by the Bureau. But most important, the joint proposed findings fundamentally treat those same factual presentations offered by the Bureau in a form more comprehensive and appropriate to this record.

In view of these observations, it has been determined to adopt the findings of fact as submitted jointly on behalf of Moore McCormack, Delta, ELMA, Bottacchi, Lloyd and Nacional (hereinafter referred to in the subsequent text as FF). Certain limited modifications have been made in view of the objections raised by Ivaran and the Bureau. In that respect, it should be observed that the opposition registered by the Bureau to the joint proposed findings (twelve in number—one of which represents a request to modify its own proposed findings) reflects, in many instances, a request to include selected transcript references which buttress the Bureau's position in this proceeding. Ivaran has provided objections which are by and large argument. A fair reading of both the Bureau's and Ivaran's responses show minimal objection to the citation of sources supporting the factual presentations contained in the joint proposed findings.

This Judge is aware of the admonition that a trier of facts should not routinely adopt findings submitted by the prevailing party. In this proceeding, those findings have been carefully and fully reviewed and found to be satisfactory and fully supportable in the record. To make changes other than those reflected here would be to do so for the sake of change alone. This Judge deems it unnecessary

Continued

Argentine ports in the La Plata/Rosario port range to discharge ports in U.S. Atlantic Coast from Key West, Florida, to Portland, Maine, inclusive (*ASX-1(a)*, p. 2).[4] The principal terms of the agreement are described in detail in Findings Nos. 61(a) and 61(b), 62, 65, *infra*. The parties to Agreement No. 10386 are Moore McCormack, Sea-Land, ELMA, Bottacchi, Ivaran, Lloyd Brasileiro, Hopal, Montemar, and Reefer Express Line (see Section B, *infra*).

2. *Agreement No. 10382 (U.S. Gulf)*. Agreement No. 10382 is a cargo revenue pooling agreement covering the northbound trade from Argentine ports within the La Plata/Rosario port range to discharge ports on the U.S. Gulf Coast from Brownsville, Texas, to Key West, Florida, inclusive (*GSX-1(A)*, p. 2). The principal terms of the agreement are described in Findings Nos. 61(a) and 61(c), 62, 65, *infra*. The parties to Agreement No. 10382 are Delta, ELMA, Bottacchi, Lloyd Brasileiro, Nacional, TMM, Montemar, and Reefer Express (see Section B, *infra*). Navimex was a party to the agreement as initially filed, but subsequently went bankrupt and withdrew from the agreement and the Argentine/U.S. Gulf trade (see Finding No. 16, *infra*).

3. *Southbound national-flag pooling agreements (Nos. 10388 and 10389)*. In addition to the two northbound agreements identified above, two southbound equal access and pooling agreements among the national-flag carriers were initially made subject of the investigation, but were subsequently approved and dismissed from the proceeding by Commission Order of January 29, 1981. Agreement No. 10388 covering the U.S. Atlantic/Argentina trade is among Moore McCormack, Sea-Land, ELMA, and Bottacchi. Agreement No. 10389 covering the U.S. Gulf/Argentina trade is among Delta, ELMA, and Bottacchi. These agreements are further described in Finding No. 75, *infra*.

B. PARTIES TO THE PROCEEDING.

4. *Moore McCormack Lines, Incorporated.* (a) Moore McCormack operates United States-flag vessels in the U.S. East Coast/Argentine, Brazil, and Uruguay[5] trade under a long-term operating-differential subsidy agreement with the United States, Contract No. MA/MSB-338, made under authority of Title VI of the Merchant Marine Act, 1936.

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to do so. Furthermore, issues raised by Ivaran and the Bureau, which are necessary for the ultimate determinations in this proceeding, will be afforded the consideration required in this decision.

[4] The record references herein are as follows: *SX*—Stipulated Exhibits (in the two bound volumes); *ASX*—Atlantic Stipulated Exhibits (in the three bound volumes); *GSX*—Gulf Stipulated Exhibits (in the two bound volumes); *GS*—Gulf Stipulations (in Vol. 1 of GSX); *Stip.*—Stipulations (in Vol. 1 of SX); *Ex.*—Individual exhibits admitted into evidence during the hearing. Some of the exhibits also contain exhibits or attachments within them, and these are cited after the exhibit within which they are found, *e.g.* (*SX-3A*, Ex. 5) or (*Ex. 7*, DGX-11).

The original numbering of each factual submission has been retained for ease of identification. The explanatory footnotes have been renumbered to conform to the prior text.

[5] It also serves South and East Africa (*Ex. 4*, MM-2, p. 2).

Its current contract runs until December 31, 1994. Moore McCormack's participation in Agreement No. 10386, as amended, and No. 10388 was approved by the Maritime Administration as required by Moore McCormack's subsidy contract on August 12, 1980 (*SX-24(A)*). Moore McCormack is at present the only company operating United States-flag vessels in liner service between the U.S. Atlantic Coast and Argentina, a trade it has served continually for over 40 years. It operates a fortnightly service to and from Argentina as part of its Trade Route No. 1 service, which covers the entire East Coast of South America,[6] utilizing two C-6 vessels each equipped to carry 521 TEU's and four C-4 vessels, each of which can carry 197 TEU's, in addition to break-bulk cargo (*Ex. 4*, MM-2 (Crowley), pp. 2-3). Moore McCormack is in the process of reconstructing four C-4's to increase container capacity to 628 TEU's each and modifying the C-6's to carry 610 TEU's. Moore McCormack's anticipated additional investment will be approximately $42,000,000 (*Ex. 19* (Crowley), p. 1). Complete vessel particulars are listed in *Ex. 19*, Attachment A. These vessels provide shippers a full range of service by offering both containerized and break-bulk space, bulk liquid capacity, and reefer space.

(b) In Moore McCormack's Argentine service, vessels arriving in the United States usually call first at New York, Boston, or Jacksonville, where cargo from South America is discharged. They then proceed to call at the ports of Philadelphia, Baltimore, Norfolk, and Savannah to discharge and load cargo and return to New York for loading. Vessels then proceed southbound directly to one or two Brazilian discharge ports and to the port of Buenos Aires, Argentina (Moore McCormack's only port of call in Argentina) where cargo is discharged and loaded. After loading in Buenos Aires, vessels proceed northbound to Montevideo, Uruguay, to Brazilian loading ports, and thence to U.S. ports of discharge. Total transit time from Buenos Aires to the United States is approximately 22 days (*Ex. 4*, MM-2, pp. 2-3). Moore McCormack's service to Brazil is part of its South American service, however, not every voyage serving Brazil also serves Argentina (*Tr.* 490).[7]

(c) Pursuant to the terms of Agreement No. 10386, Moore McCormack is required to make 24 voyages annually in the northbound Argentine trade. Between 1977 and 1980, Moore McCormack served over 2,000 active shippers in the Argentina northbound trade. Ninety percent of its staff is employed in solicitation or customer services supporting solicitation. Moore McCormack has offices in Chicago, De-

[6] See, *United States Oceanborne Foreign Trade Routes*, U.S. Department of Commerce, Maritime Administration, Oct., 1979 (p. 22).

[7] Its contract with the United States requires a minimum of 40 voyages per year in the U.S./South American trade (*Ex. 4*, MM-2, p. 2). A number of these voyages turn at Brazil and do not serve Argentina, but could serve Argentina if the traffic justified additional service.

troit, Cleveland, Rochester, Boston, New York City, Philadelphia, Baltimore, and Washington, D.C. engaged in cargo solicitation, as well as agents employed in other parts of the country. It has its own office in Buenos Aires serving shippers in Argentina (*Ex. 4*, MM-2, pp. 4-5).

5. *Delta Steamship Lines, Inc.* (a) Delta is the U.S. national-flag line member to Agreement No. 10382 as amended (*GSX-1A*, p. 3) and also southbound Agreement No. 10389 (*GS-40*). Delta has been serving the Argentina-U.S. Gulf trade since shortly after the Company was founded in 1919, under the name Mississippi Shipping Company, Inc., and is presently the only U.S.-flag carrier serving the Gulf trade (*Ex. 7*, ¶12, p. 6). Delta's service in this trade is part of Delta's regular Line E service on essential Trade Route 20 (U.S. Gulf/East Coast of South America) (*id.*), and Delta's participation in the trade under Agreement No. 10382 as amended has been approved by the Maritime Administration under Delta's Operating Differential Subsidy Agreements, MA/MSB Nos. 353 and 425 (*SX-24B*). In large part due to the new stability in the trade and the assured equal access to Argentine and Brazilian government controlled cargoes resulting from cargo revenue pooling/equal access agreements entered into in the early 1970's, Delta made a substantial capital investment to improve its service in the trade and ordered three modern efficient LASH/Container vessels, each having a capacity of 1,450,400 cubic feet (based on 74 barges at 19,600 cu. ft. each) plus 288 TEU's, which Delta introduced into service in the trade in 1973 (*Ex. 7*, ¶13, p. 7; *Tr.* 246).

(b) Delta's present service in this trade consists of approximately biweekly sailings by these three LASH vessels (*Ex. 7*, ¶14, p. 7; *DGX-1B*), and includes regular service to the ports of Maracaibo, Puerto Cabello and Guanta in Venezuela, Salvador, Rio de Janeiro, Santos, and Paranagua in Brazil, Montevideo, Uruguay, Buenos Aires, Argentina, and New Orleans and Houston on the U.S. Gulf Coast (*Ex. 7*; *DGX-1B*). Other U.S. Gulf ports are served by LASH barge, and other foreign ports are served on inducement (*id.*). During the 2½ years ending December 31, 1978, Delta accounted for approximately 66% of total Gulf cargo tonnage and 61% of cargo revenues (*Ex. 7A*, DGX-12, p. 1). And during the 25 months through December 31, 1980, Delta accounted for approximately 50% of total Gulf pool revenue (*GSX-18H*, p. 2), and also was a substantial carrier of non-pool cargo (*Tr.* 266, 502-03).

(c) The Argentina/U.S. Gulf trade constitutes an important part of Delta's Gulf service, and in 1979 accounted for approximately 22% of Delta's total northbound annual revenue and 27% of its total southbound annual revenue (*Ex. 7*, ¶15, at p. 7). Were Delta to be foreclosed from competing freely for any of the cargoes moving in these trades, and particularly Argentine Government-controlled cargoes which comprise some 85-90% of the southbound Gulf traffic (*Ex. 7*, ¶17, p. 9; *Tr.*

75-76), which in turn is about four to five times the size of northbound traffic (*Tr.* 267-68), Delta's profitability and service on this essential trade route would be substantially impacted, with resulting detriment both to the shipping public and the commerce of the United States (*Ex.* 7, ¶15, at p. 7-8; *Ex. 5A*).

6. *Sea-Land Service, Inc.* (a) Sea-Land is a U.S.-flag signatory to Agreement No. 10386, but does not presently operate vessels in the U.S./Argentina trade. The agreement provides that Sea-Land will not commence its service or participate in the agreement until it reaches an agreement with Moore McCormack defining their respective shares, rights, and obligations within the overall U.S.-flag share and obligations (*ASX-1(a),* p. 3).

(b) Sea-Land's position in support of Agreement No. 10386 was stated orally at the commencement of the hearing:

> MR. SHEA: Thank you, Your Honor. As you know, Your Honor, Sea-Land is a party to one of the pools at issue here. However, it is not an active operator in the trade.
>
> While we are not presenting any evidence, Sea-Land does support and adhere to this pool and we urge its acceptance. [*Tr.* 6-7].

7. *Empresa Lineas Maritimas Argentinas, S.A.* (a) ELMA is an incorporated society of the Republic of Argentina. Argentine Decree Law No. 20055 establishes that the Government of the Argentine Republic must own at least 75% of the stock of ELMA and the remaining 25% of the stock may be owned by provincial states, municipalities or municipal corporations. The Board of Directors is appointed by the State Secretary for Maritime Interests (SEIM) (*SX-36,* p. 1; *Tr.* 305); however, SEIM does not control ELMA's commercial operations (*Tr.* 306), and ELMA acts as a profit-making venture (*SX-36,* p. 1).

(b) As part of the Argentine-flag merchant marine, ELMA is an instrument of Argentine national economic policy (*SX-1,* Att. C, p. 1).

(c) ELMA has served the U.S. East Coast/Argentine trade for at least 30 years with calls also in Brazil (see *Tr.* 302). Between 1978 and 1980 thirty-two vessels have served the Argentine/Atlantic trade, 13 Argentine flag, 1 Portuguese, 8 Greek, 4 German, 2 Liberian, 2 Panamanian, 1 Mexican, 1 unspecified (*ASX-9*). In the Atlantic trade, ELMA's vessel calls include Buenos Aires, Montevideo, Brazilian ports, Jacksonville, Norfolk, Philadelphia, Baltimore, New York and St. John. It made 28 northbound and 28 southbound sailings during 1978, 32 northbound and 41 southbound sailings during 1979, and 19 northbound and 22 southbound sailings during the first half of 1980.

(d) ELMA has been active in the Argentine/Gulf trade for many years. Nineteen vessels served the Gulf trade between 1978 and 1980, 18 of which were Argentine flag and one German flag (*ASX-9*). In the Argentine/Gulf trade, ELMA serves Buenos Aires, Campana, Brazilian

ports, *Tampa, Mobile, New Orleans, Houston, Veracruz, Tampico,* La Guayra, Curacao, San Juan and Santo Domingo. It made 17 northbound and 25 southbound sailings during 1978, 17 northbound and 18 south-bound sailings during 1979, and 9 northbound and 12 southbound sailings during the first half of 1980.

8. *A. Bottacchi S.A. de Navegacion C.F.I.I.* (a) Bottacchi is an Argentine Corporation whose stock is owned totally by private persons (*SX-36*, p. 1; *Tr.* 405). Bottacchi began to serve the Argentine/U.S. Gulf trade in 1978, and the Argentine/Atlantic trade in 1980 (*SX-37A*, p. 1; *ASX-11(c)*, MM-1, pp. 25, 52). Two multi-purpose Argentine-flag vessels serve the Argentine/Atlantic trade, and one multi-purpose Argentine-flag vessel serves the Argentine/U.S. Gulf trade. Other vessels are time chartered as required.

(b) In the Argentine/Atlantic trade Bottacchi calls at Buenos Aires, Montevideo, Brazilian ports, New York, Baltimore, Philadelphia, Norfolk, Charleston, Savannah, Jacksonville, and Miami. During the last six months of 1980, Bottacchi made nine southbound and six northbound sailings in the Atlantic trade.

(c) In the Gulf trade, Bottacchi calls at Buenos Aires, Montevideo, Brazilian ports, Veracruz, Tampico, New Orleans and Houston. During the last six months of 1980, Bottacchi made seven southbound sailings and six northbound sailings in the Gulf trade.

9. *Companhia de Navegacao Lloyd Brasileiro.* (a) Lloyd is a Brazilian-flag carrier (*Tr.* 171) whose stock is substantially owned by the Brazilian Government (*Tr.* 161, 163; *SX-36*, p. 3). Lloyd and its subsidiaries participate in numerous trades throughout the world (*Tr.* 217-218; *Ex. 11*, pp. 1, 7), and have a substantial history of service in the trade from Brazil to the United States (*Tr.* 232).

(b) Prior to 1979, Lloyd provided service in the Argentina/U.S. trade on a limited basis (*SX-37(A)*, p. 2; *Ex. 4*, Tr. pp. 708, 728-729, 770). Since 1979, Lloyd has provided service from ports in Argentina to the U.S. Atlantic in conjunction with its regular Brazil/U.S. East Coast service, operating three vessels (*ASX-9*, pp. 23-28) which call both at ports in Argentina and at ports in Brazil (*Ex. 11* (Ornellas), pp. 7-8; *Tr.* 215-216). In the period 1979-1980, Lloyd completed 12 sailings from Argentine ports to the U.S. East Coast (*ASX-9*, p. 41; *Ex. 11*, p. 6). According to its witness, Lloyd has demonstrated its commitment and its capability of providing service to shippers in the Argentina/U.S. trades (*Ex. 11* (Ornellas), p. 7; *Tr.* 181, 189, 192-193).

(c) Since 1979, Lloyd has provided service to the U.S. Gulf from ports in Argentina in conjunction with its regular Brazil/U.S. Gulf Coast service, operating two vessels (*GSX-18(E)*; *GSX-7(A)*, p. 2) which call both at ports in Argentina and at ports in Brazil (*Ex. 11*, p. 2; *GSX-7(A)*, p. 2).

(d) Lloyd and Nacional participated jointly in the negotiation of a Brazilian-flag share within the Gulf pool (*Tr.* 171-172, 188-189), and their cargo carryings are considered jointly for pool purposes (*Tr.* 188; *GSX-18(A)-(D)*). The Brazilian lines carried just under two-thirds of the third-flag cargo during the first half of 1980 (*Ex. 11*, p. 6) and over 13% of the pool cargo, by revenue tons, for the period December 1, 1978 through December 31, 1980 (*GSX-18(H)*, p. 2).

10. *Companhia Maritima Nacional.* Nacional is a privately-held carrier operating under the Brazilian-flag (*SX-36*, p. 3; *Tr.* 162). Nacional operates solely in the trade from ports in Argentina and Brazil to ports in the U.S. Gulf and Mexico (*Tr.* 170, 176). Since 1979, Nacional has provided service from ports in Argentina in conjunction with its regular Brazil/U.S. Gulf service, operating three vessels which call both at Argentina ports and at ports in Brazil (*GSX-1(A)*, p. 3).[8]

11. *Hopal.* Hopal (Holland Pan American Line) is the trade name for Van Nievelt Goudriann & Co. B.V. Its position in support of Agreement No. 10386 was stated orally at the commencement of the hearing:

> MR. MCGEORGE: Your Honor, perhaps I can give a little bit of background information that may be helpful. First of all, I should point out that Holland Pan American Line serves primarily the Paraguayan US Atlantic trade.
>
> It stops off in Argentina and Brazil. It is important to it that it remain a member of this pool. It supports the pool agreement, and would urge that it be approved by the Commission. [*Tr.* 7.]

12. *A/S Ivarans Rederi.* (a) Ivaran is owned by A/S Ivarans Rederi, a Norwegian company. Its Chief Executive Officer (Managing Owner) is Mr. Erik Holter-Sorensen (*ASX-11(c)*, p. 3). Ivaran has been engaged in the U.S./Argentina trade for 50 years operating vessels, *inter alia*, of Norwegian, Danish, German, Greek, Singapore, and Spanish registry (*Ex. 19*, Att. F). It has operated from five to seven vessels in its service. Ivaran does not call regularly at all ports between New York and Miami—it does not serve Jacksonville from Argentina which most of the other lines do serve. In the United States, Ivaran does not directly serve any ports north of New York, *e.g.*, Boston, Gloucester, or New Bedford, and has not served them regularly for several years (*Ex. 19* (Crowley), p. 15). Although Ivaran has recently reduced its direct service to certain ports, it has continued to carry cargo regularly to those ports by moving it overland[9] (*Ex. 19* (Crowley), pp. 15-16). In

[8] A third Brazilian-flag carrier, Netumar, has suspended its participation in the Argentina/U.S. East Coast trade. Should it resume operations in the trade, its participation in any pooling agreements then in force will be derived from the Brazilian-flag quota (*Stip-2*).

[9] For example, in 1980 Ivaran made only 16 direct calls at Philadelphia. Argentine conference statistics show that it loaded Philadelphia cargo on 26 of its 1980 voyages (*Ex. 19* (Crowley), p. 16).

the view of Moore McCormack's witness, Ivaran has curtailed direct service to some ports as an essential part of its policy of carrying mostly high-rated cargo and speeding its turnaround time to increase its capacity in the trade (*id.*). For example, while not putting its ships into the Port of Boston, Ivaran has nevertheless served that port by trucking or railing the cargo from other discharge ports, particularly the port of New York (*ASX-11(c)*, MM-1, p. 50). In 1980, Ivaran made no direct calls at Boston, but carried over 10% by weight of the total cargo shipped from Argentina to Boston (*Ex. 19* (Crowley), pp. 15-16). However, there is also testimony that Ivaran's service has been curtailed by reason of the restrictions imposed by the pooling agreement (*ASX-11(b)* at 12-13).

(b) Ivaran has also recently bypassed some Brazilian ports, where the cargo consist is low-rated. For example, in the first two months of 1981, Ivaran made five northbound voyages from Brazil, but of the six leading Brazilian pool container cargo ports Ivaran made no calls at Salvador (the number three port) or at Ilheus where the average rate per weight ton is $96.00 and $107.00, respectively, whereas it made five calls at Santos and three calls at Rio Grande where the average rate per weight ton is $203.00 and $300.00, respectively (*Ex. 19* (Crowley), pp. 16-17).

(c) By comparing, the vessels used by Ivaran in the trade in 1977 with those used in 1981, it can be seen that Ivaran has significantly increased its capacity. In 1977 Ivaran utilized approximately 6 vessels, all of which were built before 1968. Ivaran offered insignificant container capacity (approximately 50 TEU's per ship), and 5 of its ships were under 7,200 dwts (*Ex. 19*, Att. F). In April of 1978, Ivaran began phasing in its semi-container ships, and by 1980 had revamped its fleet. At present Ivaran utilizes the *Holstensailor* and *Holstentrader*, each of approximately 12,400 dwts and each on short-term charter to Ivaran, and the *Santa Fe* and *Salvador*, each owned by Ivaran and each of 14,700 dwts. The *Santos* (and other vessels) are also occasionally used in the trade (*Ex. 19*, Att. F).

13. *Reefer Express Lines.* (a) REL is a specialized carrier which operates primarily chartered fully refrigerated vessels of various flags. REL solicits and carries only refrigerated cargo in the northbound trade. It neither solicits cargo nor offers a service in the southbound trade (*Ex. 4*, Tr. 985-987). Its ships can carry containers but it does not offer container service (*Ex. 4*, Tr. 998). REL does not advertise a regular sailing schedule (*Ex. 4*, Tr. 989). Its agent in Argentina solicits large parcels of cargo and if he finds a shipper he "reports them back to New York" (*Ex. 4*, Tr. 985), and if "the quantity is of interest to us" (*Ex. 4*, Tr. 992), and if REL has or can obtain a ship for the required position, REL charters or assigns a ship to meet that opportunity (*Ex. 4*, Tr. 985, 992). Once the vessel is placed its agent goes back into the

market to seek completion cargoes (*Ex. 4*, Tr. 974, 985). It offers a service only where sufficient cargoes may take it (*Ex. 4*, Tr. 992).

(b) Because of the specialized nature of its service, and the limited scope of the pool range which excludes the ports situated in the south of Argentina where the reefer carryings of fish are prevailing (*GSX-5B*, p. 11), the parties negotiated a mutually acceptable participation for REL of 1,000 freight tons, which would be treated as being outside the pool in the U.S. Gulf agreement, and a maximum two annual sailings (*GSX-5B*, pp. 11, 14; *GSX-1A*, p. 3). In the Atlantic agreement REL's 1,000 ton maximum is considered inside the pool (*ASX-1(a)*, p. 3).

14. *Transportacion Maritima Mexicana, S.A.* (a) TMM is a Mexican-flag carrier (*Tr.* 7) with limited historical participation in the Argentina/U.S. Gulf trade. TMM is the exclusive Mexican-flag carrier serving the Mexico/Brazil trade (*Ex. 4*, Tr. 1079-80), which is governed by a bilateral agreement between Brazil and Mexico (*id.*, Tr. 1089), and also serves the Mexico/Puerto Rico trade (*Id.*, Tr. 1081), among others. TMM attempted to enter the trade in 1976 and made nine northbound sailings between April 1976 and January 1977, only one of which carried a single cargo of 5,261 tons of bulk sugar, before suspending its service (*Ex. 4*, Tr. 1094-95, 1181-82; *Ex. 7*, ¶18, p. 9; *SX-37A*). TMM reinstituted service in the trade during the period of "open competition" under predecessor Agreement No. 10346, as amended, and made six sailings (only five of which carried poolable cargo) during the period from July 23, 1979 - June 30, 1980 (*GSX-18H*, p. 1), carrying a total of 1,438 revenue tons for poolable revenue of $97,747, which constituted 2.12% of the total poolable revenue of all lines during that period (*Ex. 7A*, DGX-12, p. 3).

(b) TMM was offered and refused a 4.3% share under Agreement No. 10382 (*GSX-1A*, p. 4; *GSX-5B*, pp. 33, 35, 37, 39). TMM thereafter protested approval of Agreement Nos. 10382 and 10382-1 (*GS-33*), and originally was a protestant in this proceeding. After commencement of the proceeding, however, TMM reached a mutually satisfactory commercial agreement with the other lines (*Ex. 7*, ¶42, p. 19; *GSX-15*; *Tr.* 7-8), whereby TMM became a member of Agreement No. 10382 as amended by Amendment No. 2, FMC No. 10382-2, with a 6.0% third-flag share and required three minimum annual sailings (*GSX-1D*). TMM thereafter urged approval, at least *pendente lite*, of Agreement No. 10382 as amended (*GSX-16*), and after *pendente lite* approval thereof became a proponent of the agreement as amended (See Procedural Background, *supra*). TMM presented no witnesses at the oral hearing, but stated its support for approval of Agreement No. 10382, as amended, as follows:

> MR. ATTANASIO: Your Honor, TMM, which is a Mexican-flag carrier which has participated in this trade for several years was originally a protestant to Agreement Number 10382.

However, following further negotiations with the other parties to the agreement, TMM was able to negotiate and was satisfied with the share of six percent which resulted from those negotiations.

As a result, TMM now urges approval of this pool agreement, is no longer protesting the agreement, and has withdrawn the related litigation in the Court of Appeals. As a proponent, we urge approval of the agreement as filed.

The agreement is a commercial settlement of the matters previously raised by TMM. However, because our position in the pool will be adequately represented by the other proponents, the original proponents of the agreement, we do not anticipate the need for any active participation, and would respectfully request to be excused. (*Tr.* 7-8.)

15. *Montemar S.A. Commercial y Maritima.* Montemar is a Uruguayan-flag line which has had some small, occasional participation in the Argentine/U.S. Gulf trade in the past (*GSX-5B*, p. 34; *SX-37A*, p. 1; *Ex. 7A*, DGX-12, p. 1), but has made no sailings or carryings under either Agreement Nos. 10345, 10382, 10349, or 10386 through the end of 1980 (*GSX-18H*, pp. 1-2). Under Agreement No. 10382 as amended Montemar has a 1.9% share with two minimum annual sailings (*GSX-1D*), which Montemar originally negotiated and accepted at the February 12-13, 1980 Gulf Principals' Meeting (*GSX-5B*, p. 38; *GSX-1A*, pp. 3, 8). Montemar has indicated it intends to reinstitute its service in the trade at some future date (*GSX-5B*, p. 28; *GSX-7D*, pp. 2-3).

16. *Navimex*. Navimex was a Mexican-flag carrier formed in 1971 with 51% Mexican ownership and 49% Japanese and American interest (*Ex. 4*, Tr. 1080). Navimex was admitted into the IAFC in August 1974 (*Tr.* 252-63), but excluded from the Brazil/Mexico trade by the Mexican Government because of a lack of 100% Mexican ownership (*Ex. 4*, Tr. 1080). Navimex provided some service in the Argentina/ U.S. Gulf trade during the two years concluding June 30, 1978, two days after the negotiation and execution of Agreement No. 10346 (*GS-8*), but carried only 1,400 freight tons, or 0.73% of the tonnage carried by all lines, for $132,129 in freight revenues, or 1.09% of the total freight revenues of all lines for the period (*Ex. 13*). Navimex participated in Agreement No. 10346 with a 1% pool share (*GSX-2A*, p. 3), 1979 (*Ex. 7*, ¶30, p. 15; *GSX-18E*, p. 3 (Ref. No. 84) *et seq.*). Navimex's lack of participation in the trade during the period of "open competition" under Agreement No. 10346 apparently was due to difficulties within the company (*GSX-5B*, pp. 28-29). Navimex sold two of its four ships (*Tr.* 260; *GSX-17A*, p. 11), and at the time of the February 12-13, 1980, Gulf Principals' Meeting stated it had restructured the company, intended to reinitiate its service from the Gulf to Brazil and Argentina, and was studying the possibility of buying or chartering vessels to be used in the trade (*GSX-5B*, pp. 9, 29). Navimex was offered a 1.9% share under Agreement

No. 10382 (*id.*, p. 33; *GSX-1A*, p. 4), which it initially rejected (*GSX-5B*, pp. 35-39) and then accepted on March 31, 1980 (*GS-32*; *GSX-6*, pp. 2, 4). Navimex executed Amendment No. 1 to Agreement No. 10382 on April 18, 1980 (*GS-36*; *GSX-1B*), and became a proponent of the Agreement as amended. However, it did not reinstitute its service in the trade, and on June 30, 1980, informed the IAFC that it was withdrawing from both the conference and the pool (*GS-51*; *GSX-10*, p. 2). Navimex filed a declaration of bankruptcy in Case No. 2821/80 before the Eleventh Civil Court in Mexico City (*GSX-12*, p. 1), and took no part in the present proceedings.

C. THE ARGENTINE/U.S. EAST COAST TRADE.

17. *Cargo carryings—Argentine to U.S. East Coast, 1977-1980.* The table below shows the cargo carryings of the parties, in revenue tons, during the years 1977, 1978, 1979 (including December 1978), and 1980 (derived from *SX-37A*, p. 2 (1977-1978) and *ASX-9*, pp. 20, 29, 35 and 37 (1979 and 1980)):

REVENUE TONS OF POOL CARGO CARRIED

U.S. ATLANTIC TRADE (1977 to 1980)

	1977 (%)	1978 (%)	1979 (%) [10]	1980 (%)
Mormac	67,706(43.8)	81,815(41.2)	81,833(46.0)	60,363(48.7)
Arg.-flag [11]	54,177(35.0)	69,976(35.2)	58,494(32.9)	45,833(37.0)
Ivaran	32,174(20.8)	44,394(22.4)	33,471(18.8)	16,433(13.3)
Lloyd	360(.2)	-- (--)	3,380(1.9)	654(.5)
Hopal	226(.2)	704(.4)	619(.3)	674(.5)
REL	-- (--)	1,691(.9)	26(--)	-- (--)
Montemar	-- (--)	-- (--)	-- (--)	-- (--)
TOTAL	154,643	198,611	177,823	123,957

18. *Sailings—Argentina to U.S. East Coast, 1979 and 1980.* The table below shows the number of voyages made from Argentina by the parties during the calendar years 1979 (including December 1978) and 1980 in the northbound trade to the U.S. East Coast (from *ASX-9*, p. 41):

[10] Including December 1978.

[11] ELMA and Bottacchi combined. Bottacchi did not begin service until 1980 (FF No. 8(a)).

SAILINGS IN U.S.
ATLANTIC TRADE

(1979 AND 1980)

	12/1/78-12/31/79	1980
Mormac	29	28
Argentine-flag	36	45
Ivaran	27	30
Lloyd	6	6
Hopal	4	3
REL	1	0
Montemar	0	0

19. *Southbound trade.* The southbound trade from the United States Atlantic Coast to Argentina grew substantially in 1979 and 1980 and at the time of the hearing was larger than the northbound movement (*ASX-11(c)*, pp. 8-9). In 1979 and 1980 the percentage of the southbound traffic controlled by the Argentine cargo preference laws declined from about 80% (*Ex. 19* (Crowley), p. 8) to between 50% and 60% (*Tr.* p. 441). Mr. Holter-Sorensen testified in *Docket Nos. 78-51 and 78-52* that he would take less than his historical participation in the northbound Argentine pool if he had "compensation" by way of an increased participation in the southbound trade to Argentina or Brazil (*Ex. 4* (Vol. 1), ¶17, p. 174,[12] and *Tr.* 343). However, as to a more recent view, he testified as to the probability of a decrease in southbound carriage (*ASX-11(c)*, pp. 8-9). Ivaran's vessels are presently carrying substantially greater amounts of southbound Argentine cargo then they carried in 1977 and 1978 (*ASX-11(c)*, MM-1, pp. 26 and 80). Mr. Holter-Sorensen estimated that in 1979 Ivaran carried between 6% and 10% of the southbound Argentine trade and between 7% and 9% of the Brazil trade and 21% of the Uruguay trade (*ASX-11(c)*, MM-1, p. 52). In 1979 Ivaran's total northbound carryings were approximately 100,000 revenue tons while its total southbound carryings were approximately 127,000 revenue tons (*ASX-11(c)*, MM-1, p. 51).

20. *Relationship of the northbound Argentine trade to entire northbound traffic to the U.S. East Coast.* Vessels employed in the Argentina/U.S. trades also call at ports in Brazil. Concepts such as stability, overtonnaging, energy savings, capacity, capability and sailings are interrelated with services to ports and places on the entire route (*Ex. 11* (Ornellas), p. 2; see also *Ex. 7* (Wendt) pp. 28-29). The northbound Argentine traffic is only about one-fifth of the northbound Brazil traffic (*id.*, p. 4). Other statistical evidence indicates that of the entire northbound liner

[12] The number 174 appears at the top of the page cited in Ex. 4 (Vol. 1). It is page 7 of Mr. Holter-Sorensen's direct testimony in *Docket Nos. 78-51 and 78-52.*

cargo movement (in 1980) to the U.S. East Coast from Argentina, Uruguay, Paraguay, and Brazil, nearly 85% originated in Brazilian ports (*Ex. 19* (Crowley), p. 14).

D. ARGENTINA/UNITED STATES GULF TRADE.

21. *In General.* (a) The northbound Argentina/U.S. Gulf trade covered by Agreement No. 10382, as amended, is a relatively small trade, amounting during the last two years to only about one-half the tonnage and less than 40% the revenue of the northbound Atlantic agreement trade (compare *GSX-18A*, p. 3 and *GSX-18C, D and E* with *ASX-9*, pp. 20, 29, 35 and 37). Thus, in the 13 months ending December 31, 1979, the Gulf pool consisted of only 91,290 revenue tons (84,268 annualized) for $7,040,047 in freight revenues ($6,498,505 annualized). These figures dropped for the twelve months ending December 31, 1980, to only 64,808 revenue tons and $5,216,568 (see *GSX-18H* p. 2 and *Ex. 7A*, p. 3). Moreover, the northbound Argentina/U.S. Gulf poolable trade is substantially smaller than the northbound Brazil/U.S. Gulf poolable trade which in the last nine months of 1980 (the only period for which statistics including third-flag carriage are in the record) alone amounted to 195,201 revenue tons and $17,981,193 in pool revenue (*GSX-19C*, pp. 5, 7 and 8), more than four times as much on an annualized basis. Indeed, the non-poolable general cargo carried only by the pool members just from the pool ports in Brazil to the U.S. Gulf during this same nine months amounted to 182,133 revenue tons and $7,305,237 in revenues (*GSX-19C*, p. 5), approximately four times the total tonnage in the Argentine pool on an annualized basis (*Tr.* 267).

(b) In addition to poolable cargo, there appears to be substantial non-poolable cargo moving from Argentina to the United States Gulf (*Tr.* 266). The pool range itself is quite limited, covering only those ports within the La Plata to Rosario range, both inclusive (*GSX-1A*, p. 2; *Ex. 7*, DGX-1A).

(c) The southbound U.S. Gulf/Argentina trade is much larger than the northbound trade (*Tr.* 267-68). Mr. Wendt testified that the southbound traffic was probably four to five times larger, and that in 1979 the southbound poolable cargo revenue alone had jumped to in excess of $32 million (*Tr.* 268), in contrast to the annualized 1979 northbound pool revenue of approximately $6.5 million discussed above.

(d) The northbound Argentina/U.S. Gulf trade thus is but a relatively small, although still significant, part of a considerably larger trade route pattern between the East Coast of South America and the U.S. Gulf, which also includes Uruguay, Paraguay, Brazil, Venezuela (at least in the case of Delta) and sometimes Caribbean ports. Vessels employed in the Argentina/U.S. Gulf trade call at some or all of these ports (see *GSX-7A*, pp. 2, 3; *GSX-7C*, p. 5; *GSX-7D*, p. 3; *Ex. 7*, DGX-

1B), and concepts such as capacity, capability and sailings are interrelated with services to ports and places on the entire route (*Ex. 11*, p. 2).

22. *Cargo Carryings—Argentina to U.S. Gulf Coast, 1977-1980.* The table below shows the cargo carryings of the parties, in freight or revenue tons, during the years 1977, 1978, 1979 (including December 1978) and 1980 based upon the IAFC Conference Statistics for 1977 and 1978 (including non-poolable cargoes) (*SX-37A*, p. 1) and the pool accountant reports under Agreements Nos. 10346 and 10382 for 1979 and 1980 (*GSX-18H*, pp. 2-3):

FREIGHT/REVENUE TONS OF POOL CARGO CARRIED

ARGENTINA-U.S. GULF TRADE, 1977-1980

	1977 (%)	1978 (%)	1979 (%) [13]	1980 (%)
Arg. Flag [14]	7,972(24.0)	38,233(26.3)	31,678(34.7)	23,321(36.0)
Delta	49,674(66.4)	94,574(64.9)	48,815(53.5)	28.625(44.2)
Lloyd	-- (--)	-- (--)	351(0.4)	1,895(2.9)
Nacional	-- (--)	-- (--)	8,579(9.4)	9,552(14.7)
Navimex	308(0.4)	2,491(1.7)	783(0.9)	-- (--)
Nopal	1,702(2.3)	7,405(5.1)	1,061(1.2)	-- (--)
Monte-marse	-- (--)	2,836(1.9)	-- (--)	-- (--)
TMM	5,261(7.0)	-- (--)	-- (--)	1,415(2.2)
REL	-- (--)	33(0.02)	-- (--)	-- (--)
TOTALS	74,917	145,632	91,266	64,818

23. *Sailings—Argentina to U.S. Gulf Coast, 1979-1980.* The table below shows the number of sailings made from Argentine ports within the pool range to the U.S. Gulf coast by the pool parties for the pool years 1979 (including December 1978) and 1980 (*GSX-18H*, p. 1):

SAILINGS FROM ARGENTINA TO U.S. GULF, 1979–1980

	12/1/78-12/31/79	1980
ELMA	19	20
Bottacchi	4	11
Delta	27	24
Lloyd	2	4
Nacional	2	3
Navimex	2	0

[13] Includes December 1978.

[14] ELMA and Bottacchi. Bottacchi only entered the trade in 1978, and carryings are not broken out by line for the two under the pools.

SAILINGS FROM ARGENTINA TO U.S. GULF, 1979-1980—Continued

	12/1/78-12/31/79	1980
TMM	1	4
Montemar	0	0
REL	0	0
TOTALS	59	66

E. ARGENTINE CARGO PREFERENCE LAWS AND MARITIME POLICIES.

24. *Law No. 18.250, as amended.* (a) Argentina has instituted programs, through a series of laws, decrees and resolutions designed to develop, maintain and promote an Argentine-flag merchant marine that is capable of carrying a substantial portion of its commerce and to strictly regulate common carrier service to and from Argentina (*GS-1*). (The relevant Argentine Merchant Marine promotional and cargo preference laws are set forth in *SX-1* and are discussed in the Commission's decision in *Docket Nos. 78-51 and 78-52, supra*, 1103-1104.) The principal Argentine cargo reservation law is Law No. 18.250 of June 10, 1969, as amended in 1972 by Law No. 19.877 (*SX-1*, Att. A). This law and its implementing decrees reserved for Argentine-flag carriage all goods imported by or for the account of or destined to the national government, the provincial governments, or the local governments (and all departments of any of these entities), state-owned corporations, and corporations in which the state (or provinces or local governments) have a controlling interest. In addition, the reservation in favor of the Argentine-flag applies to any goods whose importation is financed or guaranteed by any credit company of the state-owned banking system, and any import enjoying exchange, tax, or custom duty franchises, or any other type of fiscal benefit (*Docket Nos. 78-51 and 78-52, supra*, 1103). This law has effectively controlled upwards of 80% of the southbound exports to Argentina from the U.S. (*Ex. 19*, p. 8), but at the time of the hearing was estimated to control 50 to 60% of the southbound U.S. East Coast trade (*Tr.* 441) and 85 to 90% of the southbound U.S. Gulf Coast trade (*Tr.* 75-76).

(b) Law No. 18.250 as amended by 19.877 allows for participation by vessels of the exporting nation, such as Moore McCormack and Delta in the case of the United States, but only where there are intergovernmental or private agreements approved by the Argentine Government which establish a participation in favor of the Argentine-flag of no less than 50% of the freight revenues earned (*SX-1(A)*, p. 10).

Several decrees implementing the provisions of Law 18.250 have been issued, including Decree 6942 of October 1972 and Decree 264 of January 1974 (*SX-1*, Att. B).

(c) With respect to exports from Argentina moving in the northbound trade to the United States, Law 18.250 provides that the Argentine Government shall take action to obtain the largest possible share by Argentine-flag vessels in those types of cargoes controlled in the southbound trade (*SX-1*, Att. B, Article 1, p. 1). In addition, a "drawback" system, instituted in 1971 gives the Argentine exporter a tax rebate for exporting his commodity, and when he utilizes Argentine-flag vessels the rebate is also extended to a percentage of the freight charges (*Docket Nos. 78-51 and 78-52, supra*, 1103, note 15).

25. *Law No. 20.447.* In 1973 the Argentine Government promulgated Law No. 20.447. That law specifically declares that the Argentine Merchant Marine is an instrument of national economic policy, and asserts Argentina's right to carry 50% of its foreign ocean borne trade in its national-flag vessels (*SX-1*, Att. C). The law further directs the Argentine maritime regulatory agency, the State Secretariat of Maritime Interests ("SEIM"), to negotiate bilateral and multi-lateral agreements with other countries in order to distribute the traffic, and in the absence of such agreements the law directs that the distribution of traffic shall be in accordance with conference agreements in which the Argentine-flag shall be established by the government (*Ex. 4*, MM-2 (Crowley), p. 7).

26. *Resolution No. 507.* On December 22, 1976, SEIM promulgated Resolution No. 507 (*SX-1(D)*). This resolution, implemented on January 19, 1977, provides in essence that Argentine-flag vessels are to be given first right of refusal for all Argentine import cargoes controlled under Law 18.250 and such cargo may be shipped on other lines only after a waiver of Resolution No. 507 is obtained in Argentina 30 days in advance of the non-Argentine vessel's departure. Violation of the decree subjects the consignee to severe monetary penalties (*GS-3*; *Ex. 19* (Crowley), p. 3). Resolution 507 was administered by the Argentine authorities and banks and changed "the prior mechanisms for obtaining waiver and requiring almost all the cargo in the United States that was moving to Argentina to be first offered to the Argentine flag lines in the United States, basically the ELMA line, not only in New York but in the Gulf as well" (*SX-2*, p. 11).

F. IMPLEMENTATION OF RESOLUTION NO. 507 IN THE UNITED STATES TRADE.

27. *Disruption of U.S./Argentina trade.* Implementation of Resolution 507 resulted in chaotic conditions on the loading docks, cargo terminals and in the traffic departments of major United States shippers, as

former Assistant Secretary of Commerce for Maritime Affairs Blackwell testified (*SX-2*, pp. 10-13). Shippers could not book with Moore McCormack or Delta prior to obtaining required Argentine clearance. As a consequence shippers were forced to cancel bookings already made (and in some cases were forced to dray cargo to ELMA's pier at their expense), and other bookings were lost, causing substantial delay, confusion, and inconvenience to shippers and threatening serious financial injury to Moore McCormack and Delta (*Ex. 19* (Crowley), p. 3; *Ex. 7* (Wendt), pp. 9-10). Assistant Secretary Blackwell testified, as a result of Resolution No. 507:

> The shipper didn't know what vessel his cargo was going on. He did not know when it was going to arrive. He did not know what condition it was going to arrive in. . . . [*SX-2*, p. 13.]

As the Commission found in *Docket Nos. 78-51 and 78-52*:

> Generally, [the shippers and carriers] complained of the "stifling" effects of the Resolution on the movement of goods from the United States to Argentina and the chaotic conditions created by that Resolution at loading docks, cargo terminals, and in the traffic departments of major United States shippers. [*supra*, 1103.]

28. *Shipper and carrier protests over Resolution 507.* The implementation of Resolution 507 caused an "avalanche of concern" by shipper and carrier interests in the United States (*SX-2*, p. 70). "The basic complaint was almost a total discombobulation of the shipping services in the southbound trade" (*SX-2*, p. 13), as U.S. shippers were totally stifled in moving their exports to Argentina (*id.*, p. 70). This resulted in an outpouring of protest to the carriers (*Ex. 19* (Crowley), p. 3; *Ex. 7* (Wendt), p. 10) and to the Maritime Administration "urgently" asking that something be done to remedy the situation (*SX-2*, p. 12). The Maritime Administration received protests from, among others, the Commerce and Industry Association of New York, the National Industrial Traffic League (a major shipper association), International General Electric, Ford Motor Company, and DuPont Company (*SX-2*, pp. 12, 70). Meanwhile there was "chaos . . . on the loading docks and in the [cargo] terminals and in the traffic departments of some of our major shippers" (*SX-2*, p. 12; *GS-4*).

29. *Response of the United States Government.* In response to these protests, Assistant Secretary Blackwell and representatives of the State Department traveled to Argentina in February 1977 and met with Admiral Carlos N. A. Guevara, then Argentine Secretary of State for Maritime Interests. It was agreed that in furtherance of harmonious relations between the United States and Argentina, and in view of the existing revenue pooling agreements between Moore McCormack and Delta, on one hand, and ELMA, on the other hand, and Article 4 of

Resolution 507 which permits pre-waivers of the Argentine-flag loading requirement where such agreements are in effect, pre-waivers would be issued for all shipments of U.S. exports on United States-flag vessels (*GS-5*; *Ex. 7* (Wendt), p. 10; *Ex. 19* (Crowley), p. 3). This prompt action by the United States benefited shippers by lifting the harsh restrictions on their selection of vessels, avoided severe financial injury to Moore McCormack and Delta, and eliminated the possibility of a more serious intergovernmental confrontation (*SX-2*, pp. 16-19; *Ex. 19*, pp. 3-4; *GS-5*; *Ex. 7*, p. 10).

30. *Moore McCormack and Delta slow in recovering.* Despite the pre-waiver procedure, Moore McCormack's and Delta's southbound carryings were slow in recovering from the adverse impact of Resolution 507, notwithstanding the fact that it was implemented in full force for only about 2 months (*Ex. 19* (Crowley), p. 4; *Ex. 7* (Wendt), p. 10). Moore McCormack's participation in the southbound pool trade under Agreement No. 10038 was over 55% and ELMA's was below 45% for the full year 1976. Moore McCormack's participation dropped sharply during 1977 to about 43%, while ELMA's rose correspondingly. Moore McCormack's participation did not improve significantly until after the first eight months of 1978, despite the fact that its service was unchanged (*Ex. 19* (Crowley), p. 4). Delta's southbound cargo carriage under Agreement No. 10039 for the entire first six months of 1977 declined by more than 42% from the last half of 1976 (*Ex. 7* (Wendt), p. 10).

G. THE MEMORANDUM OF UNDERSTANDING BETWEEN THE UNITED STATES AND ARGENTINA.

31. *Meetings between Argentine and United States Government officials.* On March 31, 1978, Assistant Secretary of Commerce Blackwell (accompanied by a representative of the State Department) and Admiral Guevara signed a Memorandum of Understanding concerning the maritime trades between the United States and Argentina (*SX-2*, Ex. 4; and *SX-16*, Att. 3) (hereafter sometimes referred to as the "Memorandum of Understanding" or the "Intergovernmental Agreement"). A draft of the Memorandum of Understanding had been prepared by Marad, in conjunction with the United States Department of State, to be presented to and negotiated with the Argentine maritime authorities (*SX-2*, pp. 28-30; *GS-6*); the document had been "blessed by the State Department" (*SX-2*, p. 29). The Memorandum of Understanding was a product of the confrontation in February 1977 over issuance of Resolution 507, and established a set of principles to govern the trade to avoid future such international disputes (*SX-5*; *Ex. 19*, p. 4).

32. *Principal terms of The Memorandum.* The Memorandum was intended to establish a set of principles to govern the trade and to protect

both the U.S. and Argentine commercial and maritime interests. It was the intention of both governments that the vehicle for accomplishing the Intergovernmental Agreement would be commercially negotiated carrier pooling agreements (*SX-2,* pp. 35, 37, 82-83; *Ex. 4,* ELMA-3, Att. D; *SX-16*; *SX-22B*). The Intergovernmental Agreement provides in pertinent part:

> 1. Each party recognizes the intention of the other Party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. For purposes of this paragraph, vessels of Argentina shall include vessels under Argentine registry or charter.
>
> This provision, established in the light of the reciprocal interests of the two countries, does not affect the rights of flag vessels of third parties to carry goods between the ports of the two Parties, as implemented in the terms of Paragraph 2 below, and in accord with the appropriate legislation in each country.
>
> 2. The establishment of mechanisms and procedures necessary to the implementation of the carriage of cargo envisioned in Paragraph 1 of this Memorandum of Understanding, such as revenue shares for the lines in the trade, number of sailings, over-carriage and under-carriage provisions, and similar matters, will be determined by commercial agreement between their respective national flag carriers, subject to approval by the appropriate governmental agencies of each of the Parties.

Regarding the participation of third-flag carriers, Assistant Secretary Nemirow testified that:

> The memorandum says that third flags participate in accord with appropriate legislation in each country. If appropriate legislation in one of the countries party to this agreement provided for fixed shares for third flags, it would be consistent with this agreement that that be the requirement for third flag competition or participation. [*SX-3A*, p. 32.]

33. *The Memorandum of Understanding is a binding Executive Agreement of the United States.* When the Assistant Secretary of Commerce negotiates bilateral agreements on behalf of the United States, he acts as the "chief negotiator on behalf of the Executive" (*SX-3A*, p. 6). A draft of the Memorandum of Understanding was prepared by the Maritime Administration in the United States, and in conjunction with the United States Department of State (*SX-2*, pp. 28-30). Before Mr. Blackwell traveled to Argentina with the intention of entering into the Memorandum of Understanding, he was authorized by the Department of State specifically to sign on behalf of the United States Government (*SX-2*, pp. 28-29, 79-80, and Ex. 3, p. 1). When the Memorandum was executed it became a binding Executive Agreement of the United States (*SX-*

2; pp. 50, 93-94). The Assistant Secretary of Commerce has been designated the chief spokesman for U.S. maritime policy (*SX-3A*, p. 6 and Ex. 2, pp. 6-7).

H. PREVIOUS CARRIER AGREEMENTS AND F.M.C. PROCEEDING—DOCKET NOS. 78-51 AND 78-52.

34. *Negotiation of Agreement Nos. 10346 and 10349.* (a) Subsequent to the execution of the Memorandum of Understanding, ELMA was directed by SEIM to draft pooling agreements with the other national-flag carriers then serving the United States/Argentina trades. The pools in the northbound trades were to be formed on the basis of no less than 80% for the national-flag lines and no more than 20% for the third-flag lines (*Ex. 4*, ELMA-3, Barni Testimony, p. 2 and Att. D). Thereafter, a principals' meeting of all lines serving the Argentine/U.S. Gulf Coast trade was held in Buenos Aires on June 27 and 28, 1978, and an agreement was executed on June 28, 1978, covering the northbound Gulf trade from Argentine ports within the La Plata-Rosario range. This agreement was filed with the Commission and assigned No. 10346 (*GS-8*).

(b) On June 29-30, 1978, a principals' meeting was held for the East Coast trade, but no agreement could be reached on the division of the third-flag 20% share. Following failure of the third-flag carriers to agree upon pool shares, SEIM issued Resolution No. 619 in July 1978 (*Ex. 4*, ELMA-3, p. 4). That Resolution provides that all Argentine export cargoes which are covered by a conference or pool shall be carried only by conference members, or, by members of the pool where pooling agreements approved by SEIM exist.[15] A second Atlantic principals' meeting was held in late July 1978 at which the third-flag carriers reached an agreement. Ivaran was dissatisfied with its share, but signed the agreement and signified its intention to oppose it by pursuing its legal rights (*ASX-11(c)*, MM-1, p. 2). The Atlantic agreement was filed with the FMC and assigned No. 10349.[16]

35. *F.M.C. Proceedings on Agreement Nos. 10346 and 10349—Docket Nos. 78-51 and 78-52.* The Commission held an investigation and evidentiary hearing on Agreement Nos. 10346 and 10349. In its final report and Order served June 22, 1979, the Commission unanimously

[15] Resolution 619 allows for a waiver of the carrier requirement when no conference or pool member, as the case may be, is in a position to lift the cargo. For perishable cargo such as refrigerated commodities, a waiver may be obtained if there is no pool member in position to lift the cargo within 48 hours of the desired date of shipment (*SX-1E*, p. 2).

[16] Contemporaneously, Delta, ELMA and Bottacchi, and Moore McCormack, Sea-Land and ELMA also executed new southbound equal access, sailing and cargo and revenue pooling agreements, which provided for a 50-50 division of cargo pool revenue by the national-flag lines. The Agreements were filed with the FMC and approved effective November 28, 1978 (*GS-9*; *Ex. 4*, MM-2 (Crowley), p. 11).

approved the Agreements subject to the condition that they be amended to provide for "open competition" within the maximum twenty percent third-flag shares, 21 F.M.C. 1100. Thereafter, the parties met in Buenos Aires in July 1979 and amended the Agreements in accordance with the Commission's Order (*GS-16*; see Order, 19 S.R.R. 700).

I. RESPONSE OF THE GOVERNMENT OF ARGENTINA TO F.M.C. IMPOSITION OF OPEN COMPETITION.

36. *Initial response.* Shortly after the Commission imposed "open competition" Assistant Secretary Samuel B. Nemirow, who had succeeded Mr. Blackwell, contacted the Argentine authorities to explain that the Commission's decision was not a disapproval of the pools and to request that Argentina not take any precipitous action cancelling or disapproving the pools (*SX-3A*, pp. 30-31, 56, 79-80). Mr. Nemirow took this action because he believed that it was important that the Agreements not be terminated by the Argentine authorities since continuance of the pools was important to the free flow of commerce between the United States and Argentina (*id.*, p. 56).[17]

37. *Position of the Argentine Government on fixed shares.* Despite the Commission's belief to the contrary as reflected in its decision in *Docket Nos. 78-51 and 78-52*, the record shows that the Government of Argentina has stated that its maritime laws and policy require fixed shares, although the Argentine law has not been offered in evidence here, (*SX-40*, p. 9), and had always assumed and understood that the Memorandum of Understanding would result in a pool with fixed shares for all the lines (*id.*, p. 8). However, SEIM has no interest in the specific division of the third-flag shares, and has always left it to those lines to agree (*SX-3A*, pp. 75-76 and Ex. 4; *SX-40*, p. 10; see 21 F.M.C. 1100). In the discussions with Mr. Blackwell preceding the signing of the Memorandum of Understanding, the Argentina maritime authorities reportedly were "fearful that that type of competition [*i.e.*, open competition within shares] . . . would in itself create conditions unstable to trade" (*SX-2*, p. 86). This position was also expressed in the Argentine Government Aide Memoire commenting on the predecessor agreements wherein Argentina stated that those agreements (which had fixed shares for all lines) ". . . constitute *precisely* the manner of implementation contemplated by our respective governments in entering into the above mentioned memorandum" (*SX-6*, p. 4; emphasis supplied). Mr. Ne-

[17] Assistant Secretary Nemirow held various legal and policy positions in the Department of Transportation and the Federal Maritime Commission prior to joining the Department of Commerce (*SX-3A*, Ex. 1, p. 4). He was the chief negotiator on behalf of the United States during the negotiation of the U.S./China bilateral maritime agreement, has been personally involved in the negotiations which led to bilateral shipping agreements between the U.S. and the Soviet Union, Brazil, and Argentina (*SX-3A*, p. 6), and has headed delegations to negotiate with all of these countries.

mirow testified in this proceeding that from the very beginning, upon learning of the Commission's imposition of open competition, the Argentine authorities have opposed that concept:

> Q. [BIE] What was their position with regard to the open competition?
>
> A. Their position with regard to open competition is perfectly clear, I think, to everyone at this table and everyone who has participated in any of these discussions. They believe that in order to participate in their trade all carriers should have a fixed share.
>
> And the fixed share for the third flags is, they believe, a requirement. They've indicated that to me. They've indicated that to the Commission. They've indicated that to various of the parties in this case. They're very clear on it. [*SX-3A*, p. 31.]
>
> * * *
>
> Mr. Kominers: My question is is that a requirement of some law of theirs or is it a requirement of some policy?
>
> The Witness: It has been indicated to me and I have not researched their law—it has been indicated to me by certain people in Argentina that in order to comply with their law that fixed shares would have to be established for third flag participants. [*SX-3A*, p. 33.]

(See also *Ex. 15*, p. 2; *Tr.* 358.) The position of the Argentine Government was reaffirmed recently in a further Aide Memoire related to this proceeding:

> The clear understanding of the Argentina side is that both countries expected the lines would negotiate 40/40/20 pools with fixed shares for each carrier as was the case in all of the pooling agreements entered into in other trades in which Argentine flag carriers participated. This understanding has been repeated in each succeeding meeting between the two governments with regard to this matter . . . [*SX-40*, p. 8] Because such "open competition" is contrary to the maritime laws and policies of Argentina, SEIM, after consultation with and the support of the U.S. Maritime Administration and State Department, instructed ELMA to call another meeting to arrive at fixed shares. [*SX-40*, pp. 9-10.]

38. *Purpose and policy in requiring fixed shares.* (a) In a letter to Mr. Nemirow dated December 7, 1979, Admiral Guevara took occasion to address specifically the Commission Order requiring open competition for the third-flag share:

> This State Secretariat believes that the modifications imposed by the Federal Maritime Commission, determining a system of "free competition" in 20% of the Northbound trade, for the

intervention of the so-called third flags, infringe upon the contents of Paragraph 2 of the Memorandum of Understanding signed by the Maritime Administration and this State Secretariat for Maritime Affairs, and duly ratified by the corresponding governments. . . .

* * *

We share, in this respect, the views adopted by SUNAMAM[18] in opposition also to the system of "free-competition" because, in our opinion, non-existence of fixed shares for each of the participating third-flag lines—nor, in consequence, a minimum number of sailings for each of them—would entail a lack of rationalization in the service and a probable uncontrolled competition in providing it, that could consequently be the cause for over-tonnaging and for all kinds of malpractices, together with an uneconomical utilization of fuel. [*SX-3A*, Exhibit 5A, p. 1.]

This position was again expressed to Assistant Secretary Nemirow in meetings held in March 1980 between U.S. and Argentine delegations (see FF 45, *infra*). Mr. Nemirow testified that during those meetings Admiral Guevara reiterated the importance to Argentina of fixed shares for all carriers.

Q. How do they characterize the problem? How did the Argentine authorities characterize the problem?

A. In their view, and it's set out here, they believe they must have fixed shares in the third flag participation. And they believe that carriage other than a fixed share basis will destabilize the trade and will generate over-tonnaging in the trade.

That it will generate the kinds of competition that will have a negative impact on their trade and that they intend to take whatever measures are available to them to see that that doesn't happen. [*SX-3A*, p. 40.]

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[18] SUNAMAM, the Brazilian maritime regulatory agency, voiced the following objections to open competition:

1 - the practice encourages individual Lines to constantly endeavor to increase their percentage participations;

2 - discourages rationalization of sailings and service and, consequently, adversely affects the interchange of trade between the particular countries involved;

3 - open competition could lead to an unmanageable free-for-all between the Lines involved, in which situation both the traffic flow and the Lines would suffer and control by the Maritime authorities of respective Lines' performances would be made the more difficult;

4 - open competition gives rise to rebating and other malpractices which flourish in an area of unrestrained competition and which damage the maritime industry;

5 - could result in cost increases to the Lines in addition to increased fuel consumption, any such increases being contrary to Brazilian Government policies;

6 - could encourage undesirable "under carrier" practice when active and rational participation is the proper conduct for all Lines engaged in the Trade. [*SX-7*, pp. 5-6.]

> *Q. You had indicated earlier, I believe, that members of SEIM* felt that open competition would—well, to characterize—create havoc in their trade. Do they give you any specific examples of the sort of problems that they were experiencing?
>
> A. I don't know about the word "experiencing." They contemplate—they believe in a regularized, rationalized, stabilized trade as an efficient way to conduct commerce. They have agreements of that nature with European countries, with developing countries, with developed countries.
>
> They believe it's a waste of resource to have, for example, excess capacity out there trying to compete with someone else who has excess capacity in order to generate cargo. They think that will increase rate levels because you're competing with more tonnage than the trade requires.
>
> They are also concerned about, and they've indicated this to us, that it will be in the nature of the competition that if the third flag share were open for competition, the third flags will have a tendency to always over carry. And they're afraid that the third flags will then, because of the level of tonnage that they would put in the trade and the kinds of competition within that share, that that will by nature generate a situation where the third flags are carrying more of the share than "they're entitled to." [*SX-3A*, pp. 42-43.]

(b) The purpose and policy underlying Argentina's requirement was confirmed and elaborated upon in the Aide Memoire (*SX-40*) submitted to the United States concerning this proceeding:

> Argentina is opposed to open competition in the non-national portion of the pool because:
>
> 1. it encourages the various lines to seek ever-increasing percentages of participation;
>
> 2. it discourages rational employment of resources and impairs the ability of maritime authorities to regulate destructive competition;
>
> 3. it encourages malpractices and instability to the detriment of shippers and consignees, and
>
> 4. it leads to increased fuel consumption.
>
> No country in the world that has pools has "open competition" pools—a pool without fixed shares is not a pool and cannot serve to stabilize the trade or contribute to the most efficient allocation of scarce capital and fuel, a matter of great importance to the Argentine Republic. [*SX-40*, pp. 10-11.]

39. *Considerations expressed as to open competition in one segment of the pool.* Fixed shares give the necessary predictability to enable each carrier to plan an efficient service, to make investment decisions (*Ex. 11* (Ornellas), p. 3) and, also allow the pool members to maximize their utilization in a manner which conserves energy. Open competition in only one segment of the pool will have a tendency to cause the third-

flag carriers to overcarry their maximum allotted share which in turn will lead to destabilization of the trade and contribute to the employment of unnecessary and unutilized tonnage in the trade (*Ex. 19* (Crowley), pp. 5-6). Mr. Blackwell testified that the Argentine authorities ". . . were fearful that that type of competition, even amongst the divided portions of the trade, would in itself create conditions unstable to trade and very likely lead to a dominant carrier within the pool shares which in turn would lead to more unfavorable conditions later on" (*SX-2*, p. 86). If the third-flags are left to open competition, the Argentine Government is obviously concerned that this will encourage the third-flags as a group to exceed 20% and the Argentine share possibly to fall below 40% (*Ex. 19* (Crowley), p. 6). Since Ivaran has been increasing its carrying capacity over the past two years to the point that it alone can now carry more than 25% of the Atlantic trade and is willing to be an overcarrier even with fixed shares demonstrates that Argentina's concern may be valid (*ASX-11(c)*, p. 94; *id.*, MM-1, pp. 2, 43).

On cross-examination, Mr. Crowley testified that the problems engendered by "open competition" within the third-flag share are not limited in their effect to the non-national lines:

> . . . because of the relatively light penalties paid, the distinct potential is there for a line not subject to a specific share to just pump in tonnage and take anybody's share, including Moore McCormack's.
>
> That of course, would disrupt the . . . certainness, [sic] to the extent that you can be certain, as to how we should employ our assets in the trade. It puts another question in, in a business where there are enough questions anyway. [*Tr.* 455.]

Prior to the signing of the Memorandum of Understanding, Assistant Secretary Blackwell identified the concern of Argentina to be:

> the Argentineans believed, that third flag lines had made very significant incursions into the non-pool traffic, and the pool [predecessor Agreement Nos. 10038 and 10039] which we thought was the stabilizing element in the northbound trade from the Argentine point of view was losing its effectiveness in terms of the amount of cargo moving pursuant to it. [*ASX-2*, p. 20.]

40. *The Agreements, including fixed shares for the third-flag lines, are consistent with the Memorandum of Understanding.* (a) The position of the Government of Argentina with respect to the carrier agreements contemplated by the Memorandum of Understanding is stated in its April 13, 1981, Aide Memoire:

> That Memorandum called for pooling agreements among all carriers in the northbound trade. *The clear understanding of the Argentine side was that both countries expected the lines would*

> *negotiate 40/40/20 pools with fixed shares for each carrier as was the case in all of the pooling agreements entered into in other trades in which Argentine flag carriers participated.* This understanding has been repeated in each succeeding meeting between the two governments with regard to this matter and has been the subject of written communications between them including an Aide Memoire dated April 17, 1979 which was submitted to the Federal Maritime Commission in the predecessor to these proceedings, Docket 78-51 and 78-52, and a letter to the Maritime Administration dated December 7, 1979. [Emphasis added.] [19] [*SX-40*, pp. 8-9.]

(b) Former Assistant Secretary of Commerce Blackwell, who negotiated the Memorandum, understood from his discussions with the Argentine authorities at the time of signing that it was their desire that the commercial pooling agreements include more than just the national flag carriers (*SX-2*, p. 81), and while Mr. Blackwell did not recall that specific percentages were then discussed (*id.*, p. 60), he knew from his experience that Argentina was sensitive about receiving the same treatment in maritime matters as Brazil (*id.*, pp. 68-69) where there have been 40/40/20 pools in the northbound trades to the U.S. for many years (*Ex. 4*, MM-2, p. 22). He testified that a 40/40/20 division was "a reflection of the practicalities that exist in the shipping business today" (*SX-2*, p. 71) and seemed to be "a reasonable allocation of traffic to meet the needs of the direct traders as well as the cross traders" (*id.* at p. 72).

(c) In a letter to the Federal Maritime Commission on June 16, 1980, Reginald A. Bourdon, Director of Marad's Office of International Affairs, stated on behalf of Mr. Nemirow:

> Read together, paragraphs 1 and 2 of the Memorandum also contemplate that there will be commercially agreed shares for such third flag carriers as participate in the trade. [*SX-22(B)*.]

Likewise, Mr. Nemirow, who was involved in drafting the Memorandum of Understanding (*SX-3A*, p. 22), testified that the pooling agreements reached, including fixed shares for all carriers, were not inconsistent with the Memorandum of Understanding or any U.S. policy (*SX3A*, pp. 31, 32).

(d) Marad has approved these agreements after finding that they "do not create relationships which will eliminate or tend to eliminate the substantial foreign-flag competition encountered by" Moore McCormack and Delta and that they "do not contravene and may not reason-

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[19] In the Aide Memoire dated April 17, 1979, the Argentine Government advised that the prior agreements which then had fixed shares ". . . constitute precisely the manner of implementation contemplated by our respective Governments in entering into the above-mentioned Memorandum" (*SX-6*, p. 4).

ably be expected to contravene the purposes, policy or provisions of the Merchant Marine Act, 1936, as amended" (*SX-24A and B*, p. 1).

41. *The Argentine Government's request for negotiation of fixed third-flag shares.* On December 22, 1979, SEIM temporarily approved Agreement Nos. 10346 and 10349 as modified by the parties to include "open competition" in accordance with the Commission's June 22, 1980, Order, as well as the corresponding southbound Agreement Nos. 10345 and 10350, until March 31, 1980 (*GS-22*; *SX-9*). However, SEIM advised both the IAFC and the Commission that:

> 3. Before March 31, 1980 this State Secretariat will definitely decide on the manner in which third flag lines will participate in the trade from Argentina to the U.S. East and Gulf coast ports. [*SX-8*.]

Thereafter, SEIM instructed ELMA to call principals' meetings of the Atlantic and Gulf lines to attempt to reach new agreements in which the third-flag lines would participate with fixed shares (*SX-40*, pp. 9-10). ELMA was instructed by SEIM to inform the lines that the existing pools would terminate as of March 31, 1980, and that any new pools would have to be based upon fixed shares for third-flag participants (*Tr.* 329-30; *GSX-5B*, pp. 2-3; *ASX-4*, pp. 1-2). SEIM, however, did not specify what the third-flag shares should be (*SX-40*, p. 10), and ELMA did not receive any instructions as to any specific third-flag shares (*Tr.* 331). Admiral Guevara told Mr. Nemirow in March 1980 that SEIM preferred a "commercially arrived at arrangement" and agreed "to allow the commercial mechanisms to try to work out arrangements that would avoid government involvement and government, unilateral government action. . . ." (*SX-3A*, pp. 59, 76-76 and Ex. 4). This was consistent with the Commission's finding in *Docket Nos. 78-51 and 78-52* that the Argentine Government had no interest in how the third-flag shares were divided (*supra*, 512).

J. NEGOTIATION OF AGREEMENT NOS. 10386 AND 10382.

42. *Delta's request for a Gulf Principals' Meeting.* In response to SEIM's December 22, 1979, telex, which was circulated to the member lines by the IAFC (*GS-22*; *SX-9*), Delta also requested ELMA to call a meeting of the Gulf pool principals at the earliest possible date to discuss SEIM's announcement and possible alternative pool conditions to be adopted so as to avoid a lapse of the pools on March 31, 1980 (*GS-25*; *Ex. 7*, ¶¶25, 27-28, pp. 12, 13 and DGX-4A).

43. *ELMA's calls to Principals' meetings.* On February 1, 1980, Captain Dandois of ELMA contacted the Gulf lines' Buenos Aires representatives by telephone to see if February 12-13, 1980, would be acceptable for a meeting in Buenos Aires (*GS-25*; *GSX-5B*, p. 4). Upon receiving no objection (*id.*), ELMA sent a letter to the IAFC-B dated February 4, 1980, requesting the convocation of a Gulf Pool Principals' Meeting

in Buenos Aires on February 12-13, 1980, to discuss "third flag participation in Argentina/U.S. Gulf pool (NB)" (*GS-26*; *GSX-4*, p. 2). The IAFC-B immediately notified the member lines of the communication by telex on February 4, 1980, and by Gulf Pool Circular C080, dated February 5, 1980 (*GS-26*; *GSX-4*). Similarly, on February 19, 1980, ELMA wrote the IAFC to request a Principals' Meeting for March 18-19, 1980, in Buenos Aires to discuss "participation of the third-flags in the Argentina/U.S. East Coast pool -establishment of a new pool" (*ASX-3*).

44. *The Gulf Pool Principals' Meeting—February 12-13, 1980.* (a) Pursuant to ELMA's request, a meeting of the Gulf Pool Principals' was held in Buenos Aires on February 12-13, 1980. A tape recording was made of this meeting and the transcript thereof is *GSX-5A* (Spanish original) and *GSX-5B* (English translation). No recording was made of the separate third-flag caucus and no transcript exists of that meeting. However, the results of the caucus were reported in the Principals' Meeting and are reflected in the transcript thereof (see *GSX-5B*, pp. 10-12, 17). (*GS-27*; *Ex. 7*, ¶30, p. 14).

(b) The Gulf Pool Principals' Meeting commenced on February 12th. TMM and Navimex were represented only by their Buenos Aires agents, and not their principals. After a preliminary statement by ELMA regarding the calling of the meeting and SEIM's opposition to the concept of open competition (*GSX-5B*, pp. 2-6), the lines' pool cargo carriage and sailing statistics for the prior year were reviewed (*id.*, pp. 6-10). The third-flag lines then held a caucus to negotiate shares, the results of which were reported at the resumption of the Principals' Meeting (*id.*, pp. 1-12). REL had proposed that it be permitted two or three sailings with a minimum of 500 tons per vessel. The other third-flag lines agreed to this request, conditioned upon REL's participation being "limited to two annual sailings with a minimum of 500 tons per vessel" (*id.*, p. 11). REL agreed to accept a maximum of 1,000 tons of reefer cargo which would be considered out of the pool cargo (*id.*, pp. 12, 14). The Brazilian lines initially had requested a combined 14.3% share, which was based on their share under original Agreement No. 10346 adjusted for the withdrawal of Nopal (*id.*, p. 10; *Tr.* 175). However, they had receded first to 13.0% and then finally to 11.9% (*GSX-5B*, p. 11). Navimex, which as of October 1979 had sold two of its four ships (*GSX-17A*, p. 11) and had not made any sailings in the trade in almost eight months, was demanding 4% on the basis of an equal division of the 20% share among the five individual third-flag lines (*GSX-5B*, pp. 11, 19). TMM, with carryings of only 23 tons during the prior year and including the period of open competition (*id.*, pp. 29-30; *GSX-18E and F*), rejected the concept of basing shares on past performance (*GSX-5B*, pp. 12, 32) and proposed that the lines first determine the number of sailings for each line and then calculate the

shares proportionately according to those numbers (*id.*, pp. 11, 20, 30). This proposal was rejected by the other lines (*id.*, pp. 11, 15, 19; *Tr.* 92-94). TMM finally stated that its objective was 10%, and refused to negotiate its share further (*GSX-5B*, pp. 20, 22, 30). Montemar initially requested a 3.0% share (*id.*, p. 11), but evidenced a willingness to recede to 2.7% (*id.*, p. 18). No consensus was reached.

(c) Additional negotiations were conducted the next day, during which the future intentions of the various third-flag lines in the trade in terms of vessel commitments and capacities were reviewed, as well as the comparative carryings of the Brazilian lines and TMM during the preceding pool year (*id.*, pp. 27-30). None of the thirdflag lines evidenced any willingness to change its previous position (*id.*, pp. 30-31). The national-flag lines felt that the 11.9% requested by the Brazilian lines was fair and reasonable in view of the capacity of their fleet and their past performance during the preceding year (*id.*, p. 33; *Ex.* 7, ¶31, p. 15; *Tr.* 101, 104). However, the national-flag lines felt that the positions of TMM, Navimex and Montemar were unreasonable in view of their general lack of service in the trade (*GSX-5B*, pp. 23, 31, 35 (Schliemann); *Ex.* 7*A*, ¶31, p. 15; *Tr.* 101). After discussions among the lines continuing into the afternoon of the second day, the Brazilian lines were again polled to determine if they would accept the reduced share of 11.9% proposed in the third-flag caucus (*GSX-5(B)*, pp. 32-33). In an effort to encourage a possible division of the 8.1% third-flag balance which would be mutually acceptable to the three remaining lines, and in view of the third-flag lines' inability to reach any agreement among themselves, the national-flag lines suggested 1.9% each for Navimex and Montemar, and 4.3% for TMM (*GSX-5B*, p. 33; *Tr.* 357). Captain Dandois of ELMA stated that this proposal was based upon Navimex's past performance and stated intention to put two vessels into the trade, Montemar's stated intent also to put two vessels into the trade, and TMM's showing of actual present vessels and sailings in the trade, notwithstanding TMM's past lack of carryings even where they were physically present and making sailings (*GSX-5B*, pp. 33, 37; *Tr.* 351). This suggestion was rejected, and the three lines failed to suggest any alternative division (*id.*, pp. 35-36). Montemar finally agreed to accept a 1.9% share, conditioned upon its having only two minimum sailings (*GSX-5B*, p. 38); however, Navimex and TMM refused to agree to any shares.

(d) A new agreement therefore was executed on February 13, 1980, with the Brazilian-flag lines and Montemar having 11.9% and 1.9% respectively, and REL being able to carry up to 1,000 tons of reefer cargo outside the pool (*GSX-1A*, Art. 2, p. 3). The 6.2% balance of the third-flag 20% share was retained for TMM and Navimex, on a "suggested" basis of 4.3% for TMM and 1.9% for Navimex, in the event they elected to join the agreement (*id.*, p. 4; *GSX-5B*, p. 40). The

executed agreement was based upon the original Agreement No. 10346 (*GSX-2A*), inasmuch as the lines already had agreed to the terms thereof and that agreement had been approved by the appropriate authorities except as to the particular third-flag shares (*GSX-5B*, pp. 6, 27; *Tr.* 286-87, 337). Provisions of the prior agreement were negotiable, however, and could have been changed had the lines so agreed (*Tr.* 338). The new agreement was promptly filed with the Commission for approval under section 15 and assigned Agreement No. 10382 (*GS-29*).

45. *March 12-14, 1980 meetings between the U.S. and Argentine Governments.* Meetings were held March 12 through 14, 1980, between delegations of the United States Maritime Administration and State Department, headed by Assistant Secretary Nemirow (*SX-3A*, pp. 37-38), and of Argentina, headed by Admiral Guevara. At these meetings the Argentine side stressed its view that the failure of the third-flag lines to reach fixed pool shares was inconsistent with both the Intergovernmental Agreement and Argentine maritime policy, and both governments indicated their intention "to urge participants in the northbound Argentina/U.S. pools to arrive at fixed shares through the commercial mechanisms contemplated by . . . the Memorandum of Understanding" (*SX-3A*, Ex. 4, p. 1; *SX-3A*, p. 71). Failure of all third-flag lines to agree upon fixed shares "would result in the implementation of regulatory measures by SEIM to insure non-interference with the efficient and stable operation of northbound pools" (*SX-3A*, Ex. 4, p. 1). The press release issued at the conclusion of the meetings indicated that ". . . whatever measures which might be available to maintain stability in the trade would be pursued by both sides" (*SX3A*, Ex. 4, p. 6). During his deposition, Mr. Nemirow was asked whether Admiral Guevara's reaction to the FMC's decision opening the third-flag share to competition was reasonable in light of Admiral Guevara's assumptions about what the Intergovernmental Agreement meant:

> A. Well, I can't get into his mind, Mr. Kominers. It seems to me that in his view, that is what the agreement meant. Therefore, you can understand that also in the view of his government, fixed shares are an appropriate way to establish third-flag participation, and his response to that is clearly understandable under those circumstances. They have these agreements, as I indicated earlier, with many countries. I believe that almost every trade where a pool does exist, the pool provides for fixed shares. I don't know of a situation such as the one he is confronted with here. And I think his response is understandable.
>
> Q. What I am really trying to ascertain is whether you think that he has a reasonable basis for feeling that Argentina, rather than anyone else is the aggrieved party in this entire flap.
>
> A. In the discussions I have had with him, it is clear to me that he believes he has a reasonable basis for that. He believes

> that he has an agreement with the United States government that the proviso will be implemented in a certain way; he believes that that agreement is based upon fixed shares for third flags; he can't understand why we have come to a point where the governments have agreed to something, the lines have agreed to something, and it isn't happening.
>
> I can understand his concern, and I think his response is not unreasonable. [*SX-3A*, pp. 60-61.]

46. *East Coast Principals' Meetings—March 18-19, 1980.* (a) At the principals' meeting ELMA announced that it had called the meeting at SEIM's request for the purpose of forming a new pool in which the third-flag carriers would participate with fixed shares (*ASX-4*, pp. 1-2; *Tr.* 374). The third-flag carriers promptly met in a caucus to discuss division of the third-flag share (*ASX-4*, p. 5).[20] They thereafter advised the other lines that they were far apart. Lloyd Brasileiro asserted that it was entitled to 9.5% "taking into consideration our capability of transport in the area and of our overall participation in this trading area" (*ASX-4*, p. 5). Ivaran's representative, Mr. John Schmeltzer of U.S. Navigation (Ivaran's U.S. agent), stated that: ". . . we believe that performance and service should be the criteria" and considered itself entitled to a 19% share, effectively leaving 1% to be divided among Lloyd, Hopal, Montemar and REL. Apparently recognizing that such a claim was unrealistic, Ivaran proffered that "we are willing to go down to the 17%" (*ASX-4*, p. 6; see also, *ASX-11(c)*, MM-1, p. 55). Hopal "consider[ed] . . . 1% [would] be an absolute and bare minimum" (*ASX-4*, p. 6), and Montemar's representative advised that: ". . . it is our intention for the next pool to normalize our service on this trade. For that reason, our aspiration now is to have a quota of about 1.4% in the next Pool" (*id.*, p. 7). In *lieu* of a percentage share, REL requested authorization for several sailings to carry a fixed volume of refrigerated cargo only, which would not be included in the pool (*id.*). This was similar to the arrangement reached in the Gulf negotiations. At the request of the national-flag lines a second caucus was held (*id.*, p. 10) with the result that Lloyd came down to 9%, Ivaran to 16.2%, and Hopal and Montemar held at 1% and 1.4% respectively (*id.*, p. 11). The third-flag carriers held a third caucus on March 19 in which Hopal proposed 9% for Ivaran, 9% for Lloyd, 1% for Hopal, and 1% for Montemar. This was acceptable to all third-flags but REL and Ivaran (*id.*, p. 15). Ivaran continued to adhere to a minimum requirement of 16.2% (*id.*, p. 16). Ivaran insisted that performance and service should be the sole criteria for pool shares (*id.*, pp. 15-18) and would not consider a suggestion that it reduce its tonnage to accommodate the

[20] No transcripts of the third-flag caucuses were made, though transcripts were made of the principals' meetings, and the results of the third flag caucus were reported therein (*SX-Stip. No. 1*).

other lines (*id.*). Thereafter ELMA proposed that "we are prepared to discuss the new wording of the new Pool with all those lines which are prepared to sign it with a quota as proposed by Hopal, or something like that" (*id.*, p. 26). Lloyd, Montemar, and Hopal indicated their assent (*id.*), and REL refused to sign (*id.*), saying that it was "going to Washington to protest" (*id.*, p. 29).[21] Ivaran indicated that it would have to sign under protest (*ASX-4*, p. 27). The national-flag lines objected because they were "not ready to accept any signatory party which [did not] sign in full agreement with all terms and conditions" (*id.*, p. 28).

(b) As Captain Dandois explained, by seeking the commitment that all parties agree to their shares, he was attempting to avoid "having hearings like this" (*Tr.* 380), "because it is useless having an agreement, then protesting it, and then going on with all those things. But it is not so imperative, it is not a fact of taking it or leaving it" (*Tr.* 381; see generally, *Tr.* 379-381). Ivaran thereafter advised that it was prepared to sign the agreement and state that it would not protest (*id.*, p. 32), but made the statement only after conferring with its attorneys who advised that such a statement was "completely meaningless" (*ASX-11(c)*, MM-1, p. 56). After further discussion of a technical nature concerning the terms of the Agreement, it was decided that the final document would be signed the next day (*ASX-4*, p. 42).

47. *Ivaran refused to sign Agreement 10386 on March 20th.* (a) The following day Ivaran appeared at the conference's offices at the appointed time for signing the Agreement, but refused to sign. It told the other lines it was "unable [to] sign due instructions received from Norwegian government via Norwegian Shipowners Association" (*ASX-11(c)*, MM-1, p. 34; *Ex. 19*, p. 6; *ASX-11(b)*, p. 6; *ASX-11(c)*, MM1, p. 41). Mr. Holter-Sorensen subsequently advised the Norwegian Embassy in Washington that he was in fact prepared to sign and protest, but did not because of instructions from Norway:

> THE AGREEMENT WAS TO BE SIGNED MARCH 20 AT 10.00 HOURS, BUT THE SAME MORNING I RECEIVED A TELEX FROM THE OSLO OFFICE QUOTING A LETTER FROM HANDELSDEPARTEMENTET [i.e., the Norwegian Shipping Department] REQUESTING ME NOT TO SIGN WHEREFORE I ADVISED THE OTHER SIGNING LINES THAT IVARAN WOULD NOT SIGN THE AGREEMENT. [*ASX-11(c)*, MM-1, p. 56.]

(b) As a result of Ivaran's refusal to sign the Agreement on March 20, the remaining parties amended the fixed share provisions to distrib-

[21] The other third-flag lines including Ivaran had rejected Reefer's request for a tonnage ceiling within the third-flag share of 3,200 tons (*ASX-4*, p. 21), equivalent to about 9.3% share. The lines did in fact accommodate REL, but on a reduced basis (*ASX-4*, p. 36).

ute the share agreed upon by Ivaran among the other lines, with opportunity for Ivaran to sign the Agreement at any time in the future at its previously agreed upon share. In addition, provision was made for REL's participation by setting aside a specific number of sailings and a tonnage limit to be counted against the third-flag 20% share (*Ex. 19*, pp. 6-7; *ASX-1(b)*). Unlike the Gulf trade, Ivaran was given no fixed date by which it must sign the Agreement (*Tr.* 345-46).

(c) Subsequent to the principals' meeting, the parties to the Agreement advised Ivaran:

> Finally, no Pool member has any intention of depriving Ivaran of its legal rights to protest the agreement or continue to prosecute its appeal. Ivaran may sign the March 20th, agreement reserving its legal rights as it has previously done with 10.349, so long as it agrees that if and when the agreement is approved, Ivaran will be bound by the agreement as signed [*ASX-11(c)*, BIE-Ex. 4; also *Ex. 19*, Att. C, p. 1.] [22]

The Agreement and amendment were filed with the F.M.C. for approval on April 1, 1980, and assigned numbers 10386 and 10386-1 respectively. On March 31, 1980, SEIM informed the IAFC that SEIM was extending its approval of all the prior northbound and southbound pools to April 30, 1980 (*GS-31*; *SX-12A*).

48. *Ivaran's legal advice that Resolution 619 was unconstitutional.* During and after the March 18-19, 1980, principals' meeting Ivaran obtained the advice of several lawyers in Argentina with respect to legal action should the Argentine Government use Resolution 619 to ban Ivaran from the trade. The advice it received, quoted in detail below, was that Resolution 619 was unconstitutional under Argentine law and would be set aside by the Argentine courts:

> While I was in Buenos Aires 4 weeks ago, I met with 3 different lawyers, who all stated that once used, Resolution 619 was a clear breach of the Argentine constitution. This constitution gives all Argentine citizens and foreigners trading in Argentina complete freedom to navigate and trade. None of the lawyers were afraid to take the matter to court, and if Resolution 619 is used, we will immediately and latest on May 1st, ask for a temporary injunction against Resolution 619. Our lawyers state that we have good hopes to have the resolution set aside, until the courts have made a final decision, which could take about 4-6 months. [*ASX-11(c)*, MM-1, p. 54.]

[22] In response to a request by Ivaran for confirmation that this was the position of all parties (*Ex. 19*, Att. C, p. 3). Ivaran was advised by the Conference Administrator:

> In response to your telex of April 28, my telex of April 25 reflects view of all of the lines.
> Lines do not consider quoted statement to imply any limitation on Ivarans prosecuting such full legal rights as it believes it has.
> However, if and when agreement is approved, Ivarans will be bound by the agreement as signed. [*Ex. 19*, Att. C, p. 4.]

* * *

> Both during and after the meeting I had contact with Argentinean lawyers, all of whom were of the opinion that if loading up were denied we would have a very good case against the Argentinean authorities. Altogether we discussed the case with three lawyers, one of whom gave us a short opinion but unfortunately did not have time to take our case. Both of the other two were of the opinion that Resolution 619 was constitutionally unwarrantable under the constitution at present in force. According to the Argentine constitution which to my amazement is evidently respected by the military Junta, we all have privileges in Argentina and if we are denied loading, both counselors believe we can take the matter up before a judge and get 619 set aside while the matter is investigated more deeply. I inquired also precisely whether counselors and judges would be afraid of pronouncing a verdict against the military Junta but this was rebuffed. As mentioned above, the military Junta has hitherto followed the Argentinean laws, but there are only a few cases where Argentinean citizens have endeavored to stand on their rights. Where they have done so, they have, however, won through.
>
> * * *
>
> When we take the case to the court, we can, according to Argentine law, select our own judge and our counselors had two whom they believed would set 619 aside. If this were set aside, we shall have a few months in front of us to get a final decision regarding Resolution 619. [*Id.*, p. 42.]

Ivaran has not pursued legal action in Argentina to have Resolution 619 set aside.

49. *Resolution 619 not implemented.* (a) On March 28, 1980, Ivaran's agent in Argentina met with officials of SEIM (*ASX-11(c)*, MM-1, p. 35). At that time Ivaran was concerned that Resolution 619 would be enforced against it if it did not sign the pool agreement and was prepared to take legal action. It telexed its agent in Argentina:

> Also, of course, try find what SEIM will do if do not sign pool on 31-3.
>
> Also start preparing immy all papers necessary to get cargo ban lifted as disc with Dabinovic and other Lawyer. [*ASX11(c)*, MM-1, p. 35.]

(b) On April 8, 1980, the IAFC received SEIM note No. 76 dated March 28, 1980, signed by Captain Babino, the National Director of Politics of Maritime Interests (DNPIM Note 76) (*SX-13*). This note

stated that as of May 1, 1980, Ivaran, TMM and Navimex [23] could not accept northbound cargo bookings from ports within the pool range to U.S./Atlantic and Gulf ports, and instructed the IAFC to circulate this information among shippers and other interested parties. Ivaran protested that Section B of the conference (U.S./Atlantic) had no authority to inform the trade and that Ivaran would sue if they did (*ASX-11(c)*, MM-1, pp. 48-49; *ASX-11(c)*, pp. 232-233). The other carriers in the U.S. Atlantic trade concluded that they should obey the instructions of SEIM (*Tr.* 496) and let the Conference Administrator decide what action to take. No notice was published (*Tr.* 496), and Ivaran was in fact never banned (*ASX-11(c)*, pp. 224-225; *Tr.* 507).

50. *Ivaran's communications with the Norwegian Government.* (a) Prior to and during the course of the East Coast principals' meeting of March 18-19, 1980, Ivaran kept the Norwegian Government well informed of Ivaran's views on the new agreement. On March 17, Mr. Holter-Sorensen communicated his impressions of a meeting that day with SEIM officials to Mr. Dahl at the Norwegian Embassy in Washington, D.C. (*ASX-11(c)*, MM-1, pp. 30-31). Mr. Holter-Sorensen was concerned that the U.S. Government might agree to fixed shares and therefore sought further information from the Norwegian Embassy on this issue (*id.*, p. 33). Based on his discussions with Mr. Dahl, Mr. Holter-Sorensen entered the meeting in the mistaken belief that "MarAd [didn't] want fixed shares at all" (*ASX-11(c)*, Tr. 56). Ivaran also believed that the F.M.C. would not approve an agreement containing a share for Ivaran below that negotiated in the prior agreement (*id., Tr.* 27). Throughout the course of the Pool meetings Ivaran remained in constant communication with the Norwegian Shipowners Association and the Norwegian government (*ASX-11(b)*, p. 6; *ASX-11(c)*, Tr. 39, 86). By the time of signing on March 20, Ivaran knew that a Norwegian trade delegation would be traveling to Argentina to discuss Ivaran's problems (*ASX-11(c)*, Confidential #1, p. 3).

(b) On April 8, 1980, Mr. Holter-Sorensen prepared a memorandum for the Norwegian Shipowners Association, a private voluntary organization of shipowners, (*ASX-11(c)*, Tr. 16, 57), through which he communicated with the Norwegian Government (*id.*, pp. 16-17). With respect to the instructions of the Norwegian Government this memo discloses:

> . . . After having discussed the matter with our American legal adviser by telephone to New York we found we could

[23] On March 31, 1980, Navimex, through its Buenos Aires agents, notified IAFC-B that Navimex accepted the 1.9% pool share made available to it under Agreement No. 10392 (*GSX-6*). In view of Navimex's acceptance of the 1.9% share the IAFC on April 10, 1980, requested SEIM to permit Navimex's inclusion in Agreement 10382. SEIM responded that Navimex could join the pool and would be excluded from the effect of DNPIM Note 76 (*GS-35*).

> give such a declaration [not to protest] since it was meaningless because of the coercion introduced by Resolution 619. We gave the said declaration, but before we got to the point of signing we received a very serious telex from the (Norwegian) Royal Department of Trade and Shipping, which strongly admonished us not to sign, since the agreement was in direct conflict with Norwegian shipping policy and consequently a trade delegation would soon be sent to Argentina. We thought this would be useful in solving our problems. [*ASX-11(c)*, MM-1, p. 41.]

At his deposition, Mr. Holter-Sorensen was unsure of the basis for the Norwegian Government's instructions. He did not know whether the Norwegian Government opposed fixed shares generally or just the level of the Ivaran share. He also indicated that had he been offered the 18 percent he sought he would have signed despite not knowing the Norwegian Government's position (*ASX-11(c)*, Tr. 112-114).

(c) In the April 8 memorandum Ivaran considered its strategy for the future:

> If we cannot therefore solve these baffling situations by some means or other, we shall be compelled to change our tactics gradually and then probably reach a position of accepting the percentage shares after a number of discussions but continue to load the cargoes. In Argentina it is gradually becoming more sensible to be overcarriers since this will cost only 22% of the gross freight. [*ASX11(c)*, MM-1, p. 43.]

(d) In preparation for the upcoming meetings of the Norwegian delegation with authorities in the U.S. and in Argentina, Mr. Dahl requested information from Ivaran in order for the Norwegian Embassy in Washington, D.C., to brief Mr. Oelberg, head of the delegation, upon his arrival (*ASX-11(c)*, Tr. 62). Further memos were provided to Mr. Dahl by telex on April 15, 1980, (*ASX-11(c)*, MM-1, p. 50) and on April 18, 1980 (*id.*, p. 54).

51. *Meetings between Argentine and Norwegian Governments.* (a) By as early as April 15, 1980, Ivaran was confident that there would be new pool meeting in May:

> meanwhile norw dlgtn coming to ba 24/4 will meet with ut authrts 24/25. then 28 norw undersecretary of state p m oelberg will be coming down. plstlx u later what matter to be discussed. meanwhile sr ehs wrking around the clock to prepare memos etc.
>
> * * *
>
> hwr feel that norw dlgts will remove treat of cargo ban and that will be new mtnings in ba month of may. [*ASX-11(c)*, MM-1, p. 49.]

(b) After Assistant Secretary Nemirow met with Admiral Guevara in March, he met with representatives of the Norwegian Government. They had a general discussion concerning the position of the Argentine Government on fixed shares and the regulation of the trade (*SX-3A*, p. 50), and discussed a possible meeting between Norwegian and Argentine authorities (*id.*, p. 62). Assistant Secretary Nemirow briefed the Norwegians on his view of Admiral Guevara's position:

> A. Well, I told them that I believed he was sincere, he was committed to pursue this course, and that I believed that he had the support of his government with a capital "G" behind him and that they would have to make some serious decisions as to what impact that would have on their carriers and on the [their] policies; and we even discussed the possibility of them meeting with Guevara so they could be as convinced as I was that he was resolved to pursue a resolution of the third-flag participation in that trade either on a bilateral basis or any commercial other basis he could find.
>
> Q. In other words, if it were not commercially done, he would do it on a bilateral basis; was your advice to the Norwegians. Is that true?
>
> A. Or he might do it on a unilateral basis.
>
> Q. But one way or another, your advice was that he was going to accomplish it in your judgment.
>
> A. That is what he told me, and I know that is what he told them. I was convinced that he was sincere, and I assume they were also. [*SX-3A*, pp. 61-62.]

(c) Meetings were held in Buenos Aires between Norwegian and Argentine officials, including Admiral Guevara, on April 25, 1980 (*ASX-11(c)*, MM-1, p. 57) and April 28, 1980, (*id.*, p. 59). Minutes of these meetings were transmitted to Mr. Holter-Sorensen by Mr. Wegener of the Norwegian Shipowners Association who attended the meetings (*ASX-11(c)*, Tr. 28, 60). At these meetings Admiral Guevara stated he would extend SEIM's approval of the prior agreement (No. 10349) through June 30, 1980; that the new pool should be disregarded for the time being; that new conference meetings would be called for May to allow Ivaran to renegotiate its share; and that the shares should be reached strictly on a commercial basis—SEIM had "no views" as to percentages for each third-flag (*ASX-11(c)*, MM-1, p. 58). Mr. Holter-Sorensen assumed that since SEIM was willing to give Ivaran another opportunity to negotiate that SEIM believed Ivaran's share was unfair (*ASX-11(c)*, Tr. 27-28, 187).

(d) Ivaran has been in contact with its Government subsequent to the May 19-20 Atlantic Principals' Meeting (*ASX-11(c)*, Tr. 35-37). Ivaran has not received any further communication from its government concerning pool negotiations or the size of its share since the May meeting at which Ivaran agreed to join the pool (*ASX-11(c)*, Tr. 39). So far as

the record shows, the Norwegian Government has taken no action in Ivaran's behalf since Ivaran signed Agreement No. 10386-3 in May.

52. *SEIM call for further negotiations.* (a) On April 30, 1980, SEIM telexed the F.M.C. that, in response to the requests of F.M.C. and Marad, SEIM was extending its approval of the existing northbound and southbound pools through June 30, 1980 (*GS-41*; *SX-18*). SEIM then directed ELMA to call further principals' meetings of both the Atlantic and the Gulf carriers "in order to allow third-flag lines to renegotiate their pool shares and to materialize their entry into the corresponding pool agreement" (*SX-21A*).

(b) Pursuant to SEIM's direction, ELMA requested the IAFC to call principals' meetings for May 19-23 in Buenos Aires (*GSX-8*, pp. 2, 4; *ASX-5*).

53. *May 19-20 Atlantic principals' meeting.* At the outset of the meeting ELMA announced that it had called the meeting "to allow the non-national lines who may wish it, particularly Ivaran, to renegotiate their respective quotas" (*ASX-6*, p. 1). Mr. Schmeltzer again acted as spokesman for Ivaran and promptly agreed to a third-flag caucus to discuss division of the third-flag 20% share (*ASX-6*, p. 2). After the first caucus, in which the prior shares were discussed, no agreement was reached. Ivaran argued that the Norwegian Government had advised Ivaran that both SEIM and the F.M.C. had indicated that Ivaran's share under the prior agreement (9% for Ivaran) was "unfair" (*ASX-6*, pp. 2, 4-5). Ivaran's position was that they did not "think a Pool is necessary, but if that is the will of the group here [we] will and we want to participate in the Pool but we have to have a viable share" (*ASX-6*, p. 3). A second third-flag caucus was held and Ivaran stated it was willing to reduce its demands to 15.5% for 1980-1981, 15% for 1982, and 14.5% for 1983; however, the other third-flag lines did not agree (*ASX-6*, pp. 9-10) as this would permit only 4.5% to 5.5% among the three of them. The next day at the third-flag caucus Lloyd proposed for the year 1980: Lloyd Brasileiro 8%, Hopal .75%, Montemar .75%, Ivaran 10.5%; for the year 1981: Lloyd 8.5%, Hopal .85%, Montemar .85%, Ivaran 9.8%; for the year 1982: Lloyd 9%, Hopal 1%, Montemar 1%, and Ivaran 9%. This proposal was acceptable to all third-flag lines in the caucus; however, Ivaran did not express a position until the plenary meeting (*ASX-6*, p. 13). At the plenary meeting, Ivaran indicated that its "request is much larger than as indicated by Lloyd" (*id.*) and suggested one of the national-flag lines act as a mediator (*id.*, pp. 13-14). Mr. Schliemann, "in order to solve the gap," offered the following "suggestion" to the third-flag lines:

> . . . I think it would be a possible solution to give in 1980-81, 8% to the Brazilian line, 10.5% to Ivaran, .75% to Hopal, and .75% to Montemar. In the beginning of 1982, or January 1st, 1982, 8.5% to Brazilian lines; Ivaran 9.8%; Hopal .85%; Mon-

> temar .85%. In the beginning of 1983, January 1st, 1983, 9% to Brazilian lines; Ivaran 9%; Hopal 1% and Montemar 1%. . . . I will ask to the third flag lines to have the necessary flexibility to try to reach an agreement and to find a solution. I think this is fair to all the third flag lines and the most important thing is to reach an agreement and to find the necessary stability in this trade. [*ASX-6*, p. 15.]

All the third-flag lines agreed to those shares and an amendment to the agreement reflecting these shares was signed the next day (*ASX1(c)*).

54. *Negotiation and position—Lloyd Brasileiro*. Lloyd believes that the shares it negotiated are the minimum needed to provide an economically sound and competitive service (*Ex. 11* (Ornellas), p. 4). One percent of the Argentine pool is about equal to 1,800 tons of cargo and no common carrier could possibly hope to make its commercial presence felt with such a minuscule share (*Ex. 11* (Ornellas), pp. 45). It rejected Ivaran's position of giving a new carrier only 1 or 2 percent [24] and forcing it to overcarry and negotiate a higher share, because such a concept would have the effect of substantial overtonnaging in the trade, creating an incentive to malpractice and the resultant instability that follows (*id.*, p. 5). Lloyd's position is that it is entitled to its share because of the following factors: (1) it has the capacity available and the capability to perform its pool obligations; (2) it believes it has demonstrated a commitment to Argentine shippers with its sailings and carryings under Agreements 10346 and 10349 (*id.*, p. 6); (3) it looks on pool minimum sailing requirements as commitments and will serve the trade even if there is no cargo available; (4) Argentine and Brazilian vessels do not operate exclusively in just their national trades; they rely on and need cargo from ports of call in other countries, and Brazil provides cargo to Argentine carriers, and Brazilian carriers should accordingly have access to Argentine cargo (*id.*, pp. 7-8); (5) as a "zonal" flag, consideration should be given to the economic community of interest between Brazil and Argentina, and the related economic and maritime strength of each; and (6) its belief that it is entitled to reciprocity, *i.e.*, if Argentine-flag carriers are to share in the Brazil trade, Brazilian-flag carriers should share in the Argentine trade (*id.*, p. 8). Lloyd testified, without contradiction, that no carrier had any specific share imposed on it and no carrier was denied the opportunity to negotiate (*Ex. 11*, (Ornellas) p. 4).

55. *Negotiation and position—Ivaran*. Ivaran emphasized in negotiations its past carryings in the trade (see FF's 46 and 56, *infra*) and its belief that the F.M.C. and SEIM thought it did not obtain a fair share of the pool negotiated in March (see FF's 50(a), 51, 53, *supra*). Among

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[24] Holter-Sorensen at his deposition agreed that a one or two percent share would involve several years of losses (*ASX-11(c)*, Tr. 117, 120).

the considerations it weighed in the negotiations was how the F.M.C. would view its "bottom line." It did not believe the F.M.C. would approve an agreement giving it a share lower than that received in the prior agreement (*ASX-11(c)*, Tr. 26-27; *ASX-6*, p. 5), and in negotiations it did not "reduce [its] requirements down to 12 or 13%" because it felt the F.M.C. would dismiss any protest by Ivaran where "the margin between what the other lines were prepared to agree to and what our requirements were, were . . . insignificant" (*ASX-11(c)*, MM-1, p. 77). The factors Ivaran weighed in reaching its ultimate position in the May negotiations are perhaps best summarized in Mr. Schmeltzer's report on those negotiations to his superiors. That contemporaneous report reflects Ivaran's attitude at that time, uncolored by an expectation that there would be future litigation:

> Our opening offer was the same as we had proposed at the last meeting on March 19th, that is, starting off with the 16% requirement. Lloyd Brasileiro insisted on a 9% minimum, Montemar insisted their share be 1% and Hopal, their share be 1%. Most of the discussions centered around Lloyd Brasileiro and ourselves and neither line seemed disposed to reduce their requirements.
>
> * * *
>
> At the caucus meeting the following morning Lloyd Brasileiro was not going to alter their position at all and Ivaran, in order to show some good faith and intention of trying to negotiate, agreed to make a final proposal as follows. The first year 15.5%, the second year 15%, third year 14.5%. This proposal fell upon deaf ears. We felt that if we reduced our requirements down to 12 or 13% and still did not sign the pooling agreement and continued our protest in the FMC that the margin between what the other lines were prepared to agree to and what our requirements were, were so small the FMC would say the difference was so insignificant that they would dismiss our protest.
>
> * * *
>
> Bottachi's representative indicated that now that we were all in the same group he hoped that we would work together and no individual line, and particularly directed the remarks at Ivaran, would protest this newly signed agreement. We indicated that although we reserved our legal rights at this time we had no intention of protesting and would sign the agreement as indicated above.

* * *

> In conclusion I believe that the signing of this Pooling Agreement was not only proper but also a practical decision for Ivaran. . . . Also, during our meetings it was indicated that if we could not reach some satisfactory arrangement in the Argentina Northbound pool that certain measures might be taken to restrict Ivaran southbound carryings which of course could be very serious for us. The line is virtually living on the Southbound carryings to Argentina. I think we had reached a point where if we did not conclude some sort of an agreement with Argentina that both the governments of Argentina and Brazil would institute retaliatory measures against Ivaran and although we could go to court, this could be an expensive process. Ivaran has spent over $200,000 in legal fees so far. There is also the possibility that after operating under this pooling agreement for a year that Lloyd Brazileiro, Montemar and Hopal will not lift their respective shares and it is entirely possible that we can then file a complaint with the FMC and request revisions in our pool shares. Also one of the most important factors in concluding this pooling agreement is that Ivaran will be able to continue in this trade and if the trade continues as strong, it will put Ivaran in a sound financial position. [*ASX-11(c)*, MM-1, pp. 76-78.]

56. *Ivaran's negotiating position—Holter-Sorensen deposition.* (a) At the deposition of Mr. Holter-Sorensen, taken in New York on April 8-9, 1981, he provided the following insights on Ivaran's view of what "commercial" negotiations under the pool would entail:

(b) As an initial matter, Ivaran believes that commercial negotiations should be based solely on historic participation (*ASX-11(c)*, Tr. 30). Based on previous carryings, Ivaran feels it is entitled to the full non-national-flag 20% portion (*id.*, Tr. 95) and believes there should be no restrictions on its ability to carry cargo in the trade (*id.*, Tr. 95-96).

(c) New entrants, or carriers without substantial prior participation in the trade would be assigned a one percent share (*id.*, Tr. 101) without commercial negotiation or consideration of other factors. Mr. Holter-Sorensen conceded that such a carrier would be limited to a token percentage (*id.*, Tr. 117). A share of 1% in the East Coast pool would be equal to approximately 1800 tons, based on 1979 figures of 180,000 tons for the trade (*id.*, Tr. 101). It would not be economical to call at an Argentine port for 1800 tons (*id.*). Mr. Holter-Sorensen agrees that a 1% share is essentially an illusory pool share (*id.*, Tr. 102). Unless a carrier could negotiate a "big" share in the Brazil trade [25] (*id.*) or

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[25] Ivaran is also a participant in the Brazil/U.S. pools under a 5050 bilateral agreement (*id.*, Tr. 102, 104, 106).

carries significant cargo southbound (*id.*, Tr. 96), it could not expect to survive with such a share (*id.*, Tr. 102).

(d) In order to increase its pool share above that initially allocated to a line, Ivaran believes the carrier must first load in excess of its share during the pool period and then seek to renegotiate (*id.*, Tr. 115). In negotiations, however, a carrier cannot ask for any share larger than that portion of the pool cargo which it has already transported during the previous pool period (*id.*, Tr. 118), even though competition in the Argentine trade is only on a service basis (*id.*, Tr. 97).[26]

(e) Mr. Holter-Sorensen recognizes that this procedure would require that a line become an overcarrier in the pool, and pay continuing overcarriage penalties in order to be permitted to renegotiate its pool share (*id.*, Tr. 115, 117). He further acknowledged that if all third-flag lines sought to overcarry in order to improve their respective pool positions, the carryings of the third-flags would quickly exceed the entire 20% share set aside for them (*id.*), entailing both significant costs in providing service (*id.*) and substantial overcarriage penalties (*id.*, Tr. 115, 117). However, in Ivaran's view "That's the only way to do it" (*id.*, Tr. 115, 116).

(f) For a carrier seeking to establish itself, the upshot is that the line can expect several years of significant costs of service and penalties to break into the trade (*id.*, Tr. 117); Mr. HolterSorensen admits that even the most efficient line will suffer losses during the first few years (*id.*, Tr. 120). Further, Mr. HolterSorensen concedes that the negotiation of a fixed share in the pool provides only the *opportunity* to carry cargo (*id.*, Tr. 98). Thus, despite the fact that a carrier commits itself to provide a minimum number of sailings under the pool (*id.*), the cargo will go to the carrier that has a ship on berth (*id.*, Tr. 97), but the commitment must be met whether cargo is available or not (*id.*, Tr. 98).

57. *Gulf Principals' Meeting, May 22-23, 1980.* (a) The further Gulf Pool Principals' Meeting was held in Buenos Aires on May 22-23, 1980. As with the prior Gulf meeting, the Principals' Meeting was recorded, and a transcription thereof is *GSX-9A* (Spanish original) and *9B* (English translation). No recordings or transcripts exist of the separate third-flag caucuses, although the results thereof were reported at the Principals' Meeting (*GSX-9B*, pp. 9, 51). (*GS-46.*)

(b) Unlike the February meeting, TMM was represented by its principals this time and evidenced a more flexible position. TMM initially requested 7%, and later proposed a sliding scale whereby it would receive 4.3% in 1980, 5.2% in 1981 and 6.2% in 1982 (*GSX-9B*, pp. 9, 51). Montemar stated that it did not seek a higher share than the 1.9% agreed to in February (*id.*, p. 9); however, Navimex stated that it

[26] Under the IAFC conference rate system, there is no rate competition (*id.*).

wanted 50% of the entire share allocated to the two Mexican-flag lines, and in any event not less than 4% (*id.*). No agreement was reached (*id.*, p. 51).

(c) Considerable discussion also took place regarding TMM's statement in its protest to the Commission that TMM would accept the 4.3% share on the conditions that (1) TMM's and Navimex's minimum sailing requirements be proportional to their shares, and that there be an adjustment of shares between those lines at the end of the pool period in proportion to any sailing deficiency by either, and (2) that all third-flag shares be renegotiated annually, subject to F.M.C. approval (*GSX-9B*, p. 13 *et seq.*; *GS-33*). The lines expressed a willingness to agree to TMM's first condition, but rejected the concept of annual renegotiation of shares (*Ex. 7*, ¶37, p. 18 and DGX-8) because the lines feared such would just result in more disagreements and litigation (*Tr.* 114).

(d) The Gulf meeting ended without any new agreement being reached.

58. *Navimex withdrawal.* On June 30, 1980, Navimex submitted its resignation from the Gulf Agreement and from the IAFC (*GS-51*; *GSX-10*, p. 2). Pursuant to the terms of both Agreement No. 10382 as amended (*GSX-1A*, Art. 1Ob, p. 20) and the Conference Agreement, this resignation was effective July 30, 1980 (*GS-51*). The F.M.C. was informed of this resignation by IAFC telex dated July 17, 1980 (*GSX-11A*).

59. *TMM request for further Gulf principals' meeting.* In early September 1980, TMM requested the IAFC to include the Gulf pool on the agenda for the September 21-24, 1980, annual Conference Principals' Meeting being held in New York to discuss the question of "Amendment of the Agreement due withdrawal of Navimex, [and] Allocation of Navimex quota to TMM" (*GS-54*; *GSX-13A and B*, pp. 2, 4).

60. *Gulf Principals' Meeting, September 22, 23, 1980.* (a) A further Gulf Pool Principals' Meeting, including TMM, was held in New York on September 22, 1980 (*GS-58*). As with the prior Principals' Meeting, this meeting was taped and a transcript thereof is *GSX-14A* (Spanish original) and *14B* (English translation). There were no separate third-flag caucuses during this meeting (*GS-58*).

(b) This meeting resulted in a commercial division of the thirdflag shares among the third-flag lines (*Ex. 7*, ¶42, pp. 19-20; *Tr.* 78; *Ex. 11*, pp. 3, 5). Immediately prior to the meeting Commandante Reis Vianna of Nacional informed Captain Dandois of ELMA that the third-flag lines had reached a mutually acceptable agreement whereby Montemar and REL maintained the same shares previously accepted by them and Lloyd, Nacional and TMM would divide the 18.1% balance on the basis of 12.1% for the two Brazilian lines and 6.0% for TMM (*Tr.* 301; *GSX-14B*, p. 3). Reis Vianna of Nacional requested ELMA to present

this proposal at the Principals' Meeting (*Tr.* 307). After a brief preliminary caucus with Bottacchi and Delta (*Tr.* 301, 121-22, 205), ELMA proposed the agreed upon division (*GSX-14B*, p. 3), which was accepted by all the third-flag lines (*id.*, p. 5). TMM stated that it would withdraw its Petition for Review in the court of Appeals and support approval of the amended Agreement (*id.*, p. 6; *GSX-15*).

(c) Amendment No. 2 to Agreement No. 10382 (*GSX-1B*) was executed in New York the next day with the agreed upon shares and a minimum sailing requirement for TMM equal to one-half that previously assigned to the two Brazilian lines together. This Amendment was filed with the Commission on September 26, 1980, and approved *pendente lite* by Order December 16, 1980 (*GS-43*).

K. AGREEMENT NOS. 10382, AS AMENDED, AND 10386, AS AMENDED.

61. *General provisions—pool shares, etc.* (a) Agreement No. 10382, as amended, (Gulf) (*GSX-1A*, *GSX-1C* and *GSX-1D*) covers revenue earned from all cargo (except that specified in Article 3(a)) carried by the signatories from the La Plata/Rosario port range in Argentina to discharge ports on the Gulf coast of the United States, Brownsville, Texas, to Key West, Florida, inclusive (*GSX-1A*, p. 2). Agreement No. 10386, as amended, (*ASX-1(a)* and *ASX-1(c)*) covers revenue earned from all cargo (except that specified in Article 3(a)) carried by the signatories from the La Plata/Rosario port range in Argentina to discharge at ports on the Atlantic Coast of the United States, Key West, Florida, to Portland, Maine, inclusive (Article 1(a); *ASX-1(a)*, p. 2). Both agreements are open to membership for new liner operators, both national-flag and third-flag, upon negotiation of pool shares within the general framework of at least 40 percent for vessels of each reciprocal national-flag and no more than 20 percent for all third-flag carriers (Article 2(b), (c) and (d)) (*Ex.* 7, p. 33) (see also PF's 37 and 40). Each carrier except for REL has a minimum sailing obligation (Article 5(a)) (*GSX-1D*, p. 2; *ASX-1(c)*, p. 2) and a specific percentage share of the pool revenue (Article 2(b)) (*GSX-1D*, p. 1; *ASX-1(c)*, p. 1); however, each party "exercises its sole discretion in the manning, navigation and operation of its vessels" (Article 12(a); *GSX-1A*, p. 22; *ASX-1(a)*, p. 22). The agreements have administrative provisions common to similar such agreements (see, *e.g.*, Articles 9, 13, 16, etc.), and provide on the signature page that the lines "executed [it] voluntarily, of their own free will" (*GSX-1A*, p. 31 and *GSX-1D*, p. 2; *ASX-1(a)*, p. 31 and *ASX-1(c)*, p. 1). The shares and minimum sailings of the lines are set forth below:

(b) *U.S. Atlantic*, (*ASX-1(c)*, p. 1; *ASX-1(a)*, p. 8).

National Flag	No less than 80%
Argentine	40%
U.S.A.	40%
Non-National Flag	No more than 20%

	1980/1981	1982	1983
Brazilian (Lloyd Bras.)	8.0	8.5	9.0
Ivaran	10.5	9.8	9.0
Holland Pan Am	0.75	0.85	1.0
Montemar	0.75	0.85	1.0

The minimum number of sailings for each party are:

National Flag		48
Argentine	24	
U.S.A.	24	
Non-National Flag		20
Lloyd Brasileiro	8	
Ivaran	8	
Montemar	2	
Holland Pan Am	2	

(c) *U.S. Gulf*, (*GSX-1D*, pp. 1-2).

National Flag	No less than 80%
Argentina	40%
U.S.A.	40%
Non-National Flag	No more than 20%
Lloyd Bras./Nacional	12.10
Montemar	1.9
TMM	6.0

The minimum number of sailings for each party are:

National Flag:		32
Argentina	16	
U.S.A.	16	
Non-National Flag:		11
Lloyd Bras./Nacional	6	
Montemar	2	
TMM	3	

62. *Pooling provisions—cargo and revenue exclusions.*[27] Specifically excluded from revenue pooling are the following: openrated liquid bulk

[27] The summary discussion of the revenue pooling provisions which follows is taken from the detailed explanations of those provisions in the written testimony of Mr. Crowley (*Ex. 19*, pp. 1012) and Mr. Wendt (*Ex.* 7, pp. 29-32).

cargo and dry bulk cargo (with certain exceptions), explosives, livestock, mail, corpses, and exhibition cargoes (*GSX-1A*, p. 6; *ASX-1(a)*, p. 6). Before any carrier revenue is pooled, there is also excluded from each carrier's earnings all "surcharges, container rental, taxes levied against cargo and port differential" charges (Article 4(c)). These exclusions particularly the bunker surcharge, which in the Atlantic trade presently equals 20.5% of the ocean freight rate (*Ex. 19*, p. 11), represent a substantial part of the total charges paid to the carrier. In addition, each carrier retains a "carrying compensation" which is not contributed to the pool and which is intended to cover cargo handling and other expenses. The carrying compensation is equal to 45% of the average revenue per revenue ton of all parties during the pool period (Article 7(b)(3) and (5)).[28] (*Ex. 19* (Crowley), p. 11; *Ex. 7* (Wendt), p. 32).

63. *Pooling provisions—sailing deficiency forfeiture.* The pooling provisions are designed to encourage the carriers to adequately accommodate their shares and, in providing for flexibility in serving the needs of the trade, to not unduly penalize a line which overcarries its share. On the other hand, the pooling provisions severely penalize a line which does not meet its assumed service obligations to the trade (*Ex. 19*, p. 10). To insure that no carrier gets a "free ride" by not competing for its share, the pool has forfeiture provisions. If a party fails to make its minimum sailings during the "pool period" (*i.e.*, the calendar year, except for the first pool period which runs from October 1, 1980, to December 31, 1981), that party's share is reduced in the proportion that the number of unmade sailings bears to its minimum sailing obligation, and the part of its share thus reduced is redistributed to those carriers within its flag group meeting or exceeding their sailing obligations. It is important to note that the share of a line failing to meet its sailing obligation is redistributed only to the other carriers in its flag group, *i.e.*, to the other national or non-national flags, as the case may be (Article 6(a)). For example, in the Atlantic agreement if Montemar fails to make any sailings, its 1 percent share will be distributed among Hopal, Ivaran and Lloyd Brasileiro (*Ex. 19* (Crowley), pp. 11-12; *Ex. 7* (Wendt), p. 30).

64. *Pooling provisions—undercarriage forfeiture.* In addition to the minimum sailings obligation, a carrier which fails to earn revenues to the extent of 85% of its pool share forfeits all overcarriage due it corresponding to the difference between its actual revenue performance and 85% of its pool share (Article 7(c) VIII). The undercarriage forfeiture is distributed among the carriers whose pool contribution equals or exceeds 85% of their share, in proportion to their respective shares

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[28] The carrying compensation is 10% for F.I.O., F.I.O.S. and F.I.O.S.T. cargo rated at less than $45 per revenue ton (Atlantic) and $35 per revenue ton (Gulf) (*ASX-1(a)*, p. 12; *GSX-1A*, p. 13).

(Article 7(c) IX). This provision promotes competition in that it encourages each line to strive to carry at least 85% of its pool share (*Ex. 7* (Wendt), p. 31) (see also *Ex. 19* (Crowley), p. 12). Both forfeiture provisions strongly encourage carriers to meet their service obligations to the trade, to offer a competitive service, to penalize them when they do not, and to protect those carriers who meet their service obligations (*Ex. 19* (Crowley). p. 12).

65. *Pooling provisions—penalty payment only 50%.* If a penalty is assessed because a party's contribution (net revenue less carrying compensation) has exceeded its pool share, the penalty is only 50% of that part of the party's pool contribution in excess of its share; the overcarrier retains the other 50% (Article 7(c) VII) (*Ex. 19*, (Crowley), p. 11). The 50% penalty paid is credited to the other parties proportionately to their negative contributions (subject to the minimum sailing and undercarriage provisions (*Ex. 7* (Wendt), p. 32).

L. IMPACT OF AGREEMENT NO. 10386 ON IVARAN.

66. *Ivaran Offered No Case in Opposition.* (a) Ivaran did not present any witnesses in opposition to Agreement No. 10386 and never intended to do so.[29] It offered no affirmative evidence in the proceeding, and has consistently taken the position in papers it has filed that "Ivaran is not a protestant nor has Ivaran claimed it will be forced out of the trade" (*e.g.*, Reply of A/S Ivarans Rederi to Motions to Compel, served October 3, 1980, p. 8). When Moore McCormack and ELMA sought to take the oral deposition of Mr. Holter-Sorensen, Ivaran considered the deposition upon written interrogatories as submitted by the Bureau to be sufficient and opposed the oral deposition thereby requiring Moore McCormack and ELMA to agree in advance to bear the cost.

(b) When Moore McCormack sought information in discovery to test any allegations of economic harm to Ivaran, Ivaran stipulated that economic injury was not in issue (Transcript of Prehearing Conference, February 19, 1981, pp. 50-51):[30]

> MR. FORT: * * * And then we've asked for some other financial information.
>
> We have conditioned our request for this information on page 15, and I think the condition explains why we've asked for it.
>
> We've conditioned our request upon the condition that if Ivaran contends or intends to contend or present evidence that

[29] Its discovery responses indicated that it would present no witnesses (see, *e.g.*, Moore McCormack's Motion to Terminate Proceeding, etc., dated October 20, 1980, p. 7).

[30] See Moore McCormack letter dated 2/27/81, p. 2, requesting corrections of the transcript, and the ruling served March 18, 1981, granting the request.

> approval of agreement number 10386 will or may cause any curtailment of its service to the trade or jeopardize its ability to continue serving the trade, or would adversely affect its profitability, or economic position in the trade, then we would like the information.
>
> The purpose for the financial information is to meet such a contention. Ivaran had not made that contention yet, and if they're not going to make it, then they don't have to produce it. . . . And I think it's essential to our case if Ivaran intends to make such a contention that we have it.
>
> MR. MADDY: Your Honor, we don't intend to make that contention in that case.[31]

Finally, the Commission's April 3, 1981, discovery order stated: "Moreover, Ivarans points out that it has not claimed that the present Agreement will force it out of the trade or have an adverse impact upon its profitability." (Order on Discovery served by the Commission on April 3, 1981, p. 5.)

67. *The Pooling provisions will prevent any actual unfairness to Ivaran.* (a) As noted (PF 63, 64, and 65), the pooling provisions of Agreement No. 10386 are designed to penalize a line which does not meet its assumed service obligations to the trade, and to cushion the impact on an overcarrier. These provisions, as the actual pool calculation for October December 1980 shows, will prevent unfairness to Ivaran (*Ex. 19* (Crowley), Att. D). First, because Lloyd and Montemar failed to make their minimum sailings during this period, their shares were reduced and redistributed to Ivaran and Hopal, giving Ivaran a 14.933% share rather than 10.5%. Second, of its total pool earnings of $629,194 Ivaran deducted and retained $228,059 in carrying compensation. Third, because Lloyd and Hopal did not carry 85% of their share, most of their undercarriage was forfeited to Ivaran, Moore McCormack, and ELMA/Bottacchi (see, *Ex. 19,* Att. D, part D Forfeiture Calculation). The net effect of these adjustments was an overcarriage penalty payment by Ivaran of $21,835 and by the Argentine lines of $486 (*Ex. 19,* Att. D, (Column 33)). Comparing Ivaran's penalty with its gross revenue (including surcharges, etc., which are not pooled), the pool penalty cost Ivaran less than three cents on the dollar of gross revenue (*Ex. 19* (Crowley), p. 13).

(b) Another way of looking at the impact of the pool on Ivaran is to compare its average revenue per revenue ton before pooling with its average revenue per revenue ton after pooling. Ivaran carried 4,544 revenue tons and earned $629,194, for an average of $138.47 per revenue ton (*not* including surcharges, etc.). It should be noted that this far

[31] See also, Moore McCormack's Motion to Compel A/S Ivarans Rederi to Answer Discovery, served September 22, 1980, pp. 14-15.

exceeded the average revenue per revenue ton of all carriers which was $111.53 (*Ex. 19*, Attachment D (Column 9)), indicating that Ivaran has been carrying mostly very high-rated cargo. After deducting Ivaran's pool payment of $21,835 from its pool revenue, Ivaran earned $607,359 for carrying 4,544 revenue tons, or $133.66 per revenue ton (*Ex. 19*, p. 13). The pool penalty reduced its average revenue per ton by $4.80. However, it still earns in excess of $20 per ton more than the average of all lines. The actual experience for the first three months of the pool shows it has neither been unfair to Ivaran nor unduly penalized it (*Ex. 19* (Crowley), pp. 12-13).

M. IMPACT OF GULF AGREEMENT NO. 10382 ON THIRD-FLAG CARRIERS.

68. *The maximum 20% third-flag share exceeds past participation.* The Commission determined in *Docket Nos. 78-51 and 78-52* that the maximum 20% share allocated to the third-flag lines under the prior Gulf Agreement No. 10346 was reasonable in view of the past carryings of the national-flag carriers in the Gulf trade, and in fact represented a concession of a portion of the past national-flag share to the third-flag lines (*supra*, 511). This finding is supported by the IAFC Conference statistics for the two and a half years from July 1, 1976, through December 31, 1979, which show that the national flag lines accounted for approximately 89% of total cargo tonnage and freight revenues during that period (*SX-37A*, p. 1; *Ex. 7A*, DGX-12, p. 1). Moreover, during the 19 months under Agreement No. 10346 from December 1, 1978, to June 30, 1980, including almost one year of "open competition" thereunder, the national-flag lines accounted for 87.1% of cargo tonnage and 91.0% of cargo revenues (*GSX-18H*, p. 2; *Ex. 7A*, DGX-12, p. 3). In the six months after Commission approval of Agreement No. 10382. as originally amended, national-flag carriage decreased to 77.3% of cargo tonnage and 88.4% of cargo revenues (*id.*), notwithstanding TMM's refusal to join the pool during that period. The maximum 20% third-flag share under Agreement No. 10382 as amended therefore continues to exceed the historical aggregate third-flag share in the Gulf trade.

69. *The individual third-flag shares exceed past participation.* Moreover, the individual third-flag shares allocation under Agreement No. 10382, as amended, exceed the historical participation of the respective lines. Lloyd and Nacional did not even participate in the trade during the two and a half years from July 1, 1976, to December 31, 1978 (*SX-37A*, p. 1), while TMM suspended its brief participation in the trade in January 1977 (*Ex. 4*, Tr. 1086). Montemar and REL had only minor participation during this period with 2,836 and 33 freight tons respectively (*SX-37A*, p. 1). The Brazilian lines, Lloyd and Nacional, have established a capability to compete and serve the trade during the

subsequent period in which they have participated, however. Thus, in the seven months from December 1, 1978, to June 30, 1979, Lloyd and Nacional made a total of four sailings carrying 8,936 revenue tons or 14.7% of total pool tonnage during that period (*GSX18H*, p. 1; *GSX-18A*, p. 1), and in the last six months of 1980, Lloyd and Nacional made three sailings and carried 8,150 revenue tons or 23% of total pool cargo tonnage (*id.*). Similarly, TMM has shown an ability to compete and attract cargo, although to a somewhat lesser degree. Thus, in the six months from January 1, 1980, to June 30, 1980, TMM made four sailings and carried 1,415 revenue tons, constituting 4.8% of total cargo tonnage during the period (*GSX-18H*, pp. 1, 2).

70. *The third-flag shares negotiated under Agreement No. 10382 are not unjustly discriminatory or unfair.* Although the allocated third-flag shares under Agreement No. 10382 as amended exceed historical participations, they are not unjustly discriminatory or unfair as between the carriers, given the willingness of the national-flag lines to cede a portion of their past share and the reasonableness of the maximum 20% third-flag share. REL's share is fair in view of the position it took at the February 1980 Gulf Principals' meeting (*GSX5B*, pp. 11, 14). Similarly, the 1.9% allocated Montemar is reasonable and is what Montemar agreed to accept. The 18.1% balance of the third-flag share is divided among the three remaining lines on essentially an equal basis, with Lloyd and Nacional having a combined 12.1% or 6.05% each under their separately filed Association Agreement (*GSX5B*, p. 40), and TMM having 6.0% (*GSX-1D*, p. 1). Each of these three lines also has similar minimum sailing requirements (*id.*, p. 2).

71. *Basis for third-flag shares.* The basis for the third-flag shares was commercial negotiation among the third-flag lines. There is no evidence of any governmental influence upon the specific size of the shares. Indeed, Captain Dandois testified that his instructions were to let the third-flag carriers reach agreement, if possible, and to accept any distribution the third-flags independently reached (*Tr.* 331). Similarly, the evidence indicates that the other national-flag lines had no interest in the actual division of shares (*Ex. 7*, ¶31, at p. 15; *Tr.* 331, 408). While the third-flag lines did not reach agreement at either the February or May 1980 Gulf Principals' Meetings, they did reach a mutually acceptable agreement at the September 1980 Meeting in New York, embodied in Agreement No. 10382-2. Both the Brazilian lines and TMM have stated that these negotiations were commercial in nature (*Ex. 11*, pp. 3, 9; *Tr.* 8).

72. *Competitive impact of approval of the fixed shares under Agreement No. 10382.* Approval of the fixed third-flag shares negotiated under Agreement No. 10382, as amended, should promote third-flag participation and competition to the national-flag lines. At least in the Gulf trade, "open competition" did not result in increased third-flag partici-

pation as hoped by the Commission in *Docket No. 78-52.* Indeed, during the almost eight months from the date of the Commission's Order in *Docket Nos. 78-51 and 78-52* and the February 12-13, 1980, Gulf Principals' Meeting in Buenos Aires, only one third-flag carrier—TMM—made any sailings in the Gulf trade, and TMM carried a total of only 23 tons of pool cargo (*Ex. 7,* ¶49, pp. 24-25). There is no evidence that this lack of participation was the result of any action by either the Government of Argentina or any of the national-flag lines (cf. *Ex. 7,* ¶50. p. 25). Mr. Ornellas, however, testified that the Brazilian lines consider their minimum sailing requirements as commitments (*Ex. 11,* p. 7), and that Lloyd has a goal of fulfilling its shares in all pools in which it participates (*Tr.* 167-68). The Brazilian lines, with a combined six minimum annual sailings under Agreement No. 10382 as amended, in fact did make a combined three sailings in the last months of 1980 (*GSX-18H,* p. 1).

N. AGREEMENT NOS. 10386 AND 10382 ENTRY AND WITHDRAWAL.

73. *Agreements—open entry.* Agreement No. 10382, as amended, includes all IAFC members who have expressed a present interest and intent in serving the Argentina/U.S. Gulf trade (*Ex. 7,* ¶65, p. 33; *Tr.* 134). Both northbound agreements provide for the prompt entry of any additional national and third-flag line participating in the scope of and requesting entry into the Agreements (*GSX-1A*; Art. 2(c), (d), (f), and (g), at pp. 4-5; *ASX-(1)(a),* pp. 3-4). There is no established procedure for a new line seeking entry (*Tr.* 333-334), but such new line could contact either the national-flag lines (*Tr.* 133-134) or the IAFC-B Executive Administrator (*Tr.* 335). In either case, the line would be referred to the third-flag lines and would have to negotiate a mutually acceptable share with those lines (*Ex. 77,* ¶65, p. 33; *Tr.* 134, 333). There is no third-flag carrier who desired to enter the trade during the period January 1, 1978, through December 30, 1980, who was unable to do so (*Ex. 7,* ¶66, p. 33; *Tr.* 134).

74. *Carrier withdrawals.* (a) There were two carriers who withdrew from the Argentina/U.S. Gulf trade during the period January 1, 1978, to December 31, 1980—Oivind Lorentzen Ltd. or Nopal Line ("Nopal") which resigned from the IAFC and northbound Argentina/U.S. Gulf and Brazil/U.S. Gulf pools on September 25, 1979 (*GS-19*; *GSX-20,* p. 2), and Navimex which resigned from the IAFC and the Argentina/U.S. Gulf pool on June 30, 1980 (*GS-51*; *GSX-10,* p. 2). In neither instance is there any evidence that the Argentina/U.S. Gulf pools or the share of the two lines thereunder was a significant factor in such withdrawals, and indeed the evidence suggests that other fac-

tors not fully apparent on the record were responsible for such withdrawals.

(b) *Nopal.* Under Agreement No. 10346, Nopal, which had carried only 4.8% of cargo tonnage and 7.8% of freight revenues in the trade during the period July 1, 1976–December 31, 1978 (*SX-37A*, p. 1; *Ex. 7A*, DGX-12, p. 1), was allocated a considerably larger pool revenue share of 11.1% in 1978 declining to 10.05% in 1980 (*GSX-2A*, Art. 2, p. 3). Nopal accepted that share, but during the period under Agreement No. 10346 from December 1, 1978–July 22, 1979, carried only 1.6% of total cargo tonnage for 2.3% of total pool revenue (*GSX18H*, p. 2; *Ex. 7A*, DGX-12, p. 3). Moreover, at the time Nopal withdrew, the Commission had decreed "open competition" within the third-flag share under Agreement No. 10346, and was considering imposing "open competition" in the northbound Brazil/U.S. Gulf pool F.M.C. No. 10320 as well (*GS-17*). There was therefore sufficient cargo available to Nopal under Agreement No. 10346 at the time of its withdrawal had it wished or been able to stay in the trade. However, Nopal apparently had other difficulties. In late 1978 it had entered into a management agreement with Ivaran, F.M.C. No. 10352 (*Ex. 9A*), whereby Ivaran had full management authority of Nopal's East Coast of South America/U.S. Gulf trade for a limited trial period. This agreement was not renewed or extended. However, in May 1979, during the evidentiary hearings in *Docket Nos. 78-51 and 78-52*, Nopal entered into a proposed management agreement with TMM, F.M.C. No. 10370 (*Ex. 10*), whereby TMM essentially would operate in the trade under Nopal's name and using Oivind Lorentzen, Inc., as its general agent in the U.S. Under this proposed agreement, TMM would have been responsible for all expenses, including claims, and would have received 97.5% of gross pool revenue and 98.75% of nonpool revenue. The Commission's imposition of "open competition" in its June 30, 1980, Order destroyed the premises upon which this agreement was reached (*Ex. 12*), and the agreement subsequently was withdrawn (*GSX-3*, ¶2, pp. 2, 4). Nopal thereafter withdrew from the trade without making any further sailings (*GS-19*; *GSX-18H*, p. 1).

(c) *Navimex.* Under Agreement No. 10346 Navimex accepted a 1% revenue share (*GSX-2A*, Art. 2, p. 3) which was closely in line with its carryings of 0.73% of total freight tons and 1.09% of freight revenues during the preceding two years from July 1, 1976, to June 30, 1978, (*Ex. 13*, note 4). Navimex was a slight overcarrier during the initial pool period under Agreement No. 10346 from December 1, 1978, to July 22, 1979, with 1.19% of total cargo tonnage and a 1.45% pool revenue contribution (*GSX-18H*, p. 2; *Ex. 7A*, GSX-12, p. 3), but failed to participate during the "open competition" period from July 23, 1979, to December 31, 1979 (*id.*), apparently due to internal problems having nothing to do with the pool (*GSX-5B*, p. 28-29). Notwithstanding Navi-

mex's lack of participation during the previous seven months, but giving recognition to Navimex's past participation in the trade and its stated intent to put two vessels into the trade, the lines at the February 1980 Gulf Principals' meeting offered Navimex a 1.9% share (*GSX-5B*, p. 33), which was virtually identical to the 1.96% revenue share which Navimex had carried during the period of its greatest participation in the trade from July 1, 1977, to July 22, 1979 (see *Ex. 13*). In addition, of course, Navimex was free to compete for the substantial non-pool cargoes available from Brazil (see FF 21, *supra*). Under these circumstances, it cannot be concluded that Navimex's share under Agreement No. 10382 was a factor in its withdrawal from the trade and subsequent bankruptcy. Rather it appears that such were the results of the internal difficulties referenced by Navimex's agent at the February and May 1980 Gulf Principals' Meetings (*GSX-5B*, pp. 9, 28-29; *GSX-9B*, p. 12).

(d) *Netumar.* Netumar, a Brazilian carrier, has suspended its participation in the Argentine/U.S. East Coast trade during the period January 1, 1978, through 1980. Should it resume operations in the trade, its participation in any pooling agreements then in force will be derived from the Brazilian-flag quota (*Stip. 2*).

O. SOUTHBOUND NATIONAL-FLAG EQUAL ACCESS POOLS—AGREEMENT NOS. 10388 (ATLANTIC) AND 10389 (GULF).

75. *Agreement Nos. 10388 and 10389—purpose and effect.* Moore McCormack and Delta have been parties to equal access and pooling agreements covering the southbound trades since 1973. The first pooling agreements, Agreement Nos. 10038 (Atlantic) and 10039 (Gulf), were entered into in 1973 after the intervention of the Maritime Administration and State Department with Argentine Authorities to resolve problems occasioned by Argentine preference laws (*Ex. 19*, p. 2; *GS-2*). Those agreements were superceded by Agreement Nos. 10345 (Gulf) and 10350 (Atlantic) (*GS-9*; *Ex. 4* (Crowley), MM-2, p. 11). Current Agreement Nos. 10388 (Atlantic) and 10389 (Gulf) were negotiated contemporaneously with the respective northbound agreements (*Ex. 19*, p. 7; *Ex. 7*, p. 9), and were filed with the F.M.C. in late April 1980 (*Ex. 19*, pp. 7-8; *GS-40*). These agreements between Moore McCormack (and Sea-Land), Delta, ELMA and Bottacchi form the basis for the U.S.flag carriers' equal access to Argentine government-controlled cargo moving in the southbound trades (*Ex. 19*, p. 7). On January 29, 1981, the Commission found:

> The Southbound Agreements provide the means for increased shipper service with respect to government controlled cargoes in these trades by permitting United States and Argentine-flag carriers equal access to the otherwise restricted cargoes. Moreover, these agreements facilitate the free-flow of the United States foreign commerce with Argentina. In the ab-

> sence of these agreements, Argentine import cargoes would be subject to the 30-day prewaiver requirements of Argentine Resolution 507 (footnote omitted). [*Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389*, p. 6.]

The Commission concluded that these agreements "meet the standards for section 15 approval" (*id.*, p. 6).

76. *The southbound and northbound trades and agreements are interlinked.* (a) The Argentine Government has repeatedly made known its position that the "southbound trade, and the availability of Argentine imports for carriage by non-Argentine-flag carriers, was tied to the Northbound trade . . ." (19 S.R.R. 510). This was made clear to former Assistant Secretary Blackwell when he negotiated the Memorandum of Understanding. (*SX-2*, pp. 27, 32, 33).

(b) The Government of Argentina has advised the national-flag carriers that in order to achieve a complete regulation of the Argentina/U.S. traffic it considers all four agreements as an "indivisible whole" (*SX-14A*, p. 2; *SX-14B*, p. 2). The Government's position was expressed in meetings with Mr. Nemirow, (*SX-3A*, p. 69) and is also evident from SEIM's communication of December 26, 1979, to Section B of the IAFC (*SX-8*). Its advice to the F.M.C. of the short-term extensions of the predecessor agreements pending Commission action on the new agreements (*SX-12A* and *SX-18*) and its recent temporary suspension of approval of all agreements pending a Commission decision in the proceeding (*Ex. 19*, p. 8; *SX-31*) further confirm this fact. As Reginald A. Bourdon, Director of the Office of International Activities of the Maritime Administration, stated:

> SEIM has stated it wants to consider the four northbound and southbound Argentine/U.S. Atlantic and Gulf Port's pooling agreements at the same time. This latter is consistent with Argentina's previous position that the northbound and southbound trades are inextricably interlinked. [*SX-16*, p. 3.]

77. *Dislocation of the southbound trade.* It was Secretary Blackwell's opinion that if the northbound pools were disapproved "there is a strong likelihood" that the Argentine government would take action to dislocate the southbound trade, thereby depriving U.S. carriers of Argentine government-controlled cargo (*SX-2*, pp. 62-63). The U.S. State Department confirmed his testimony:

> On December 22, 1976, the Government of Argentina enacted Resolution No. 507 . . . [which] provided that Argentine authorities would then determine the vessel upon which the cargo would move, giving first refusal to the Argentine national line, ELMA, thereby implementing 100 percent southbound Argentine cargo preference.

* * *

> Argentine officials have informed their U.S. counterparts and U.S. shipping executives that, absent a commercial pooling agreement in the northbound trade that has been approved by the appropriate authorities of each government, the Argentine government will reinstitute the provisions of Resolution 507. [*SX-5*, pp. 1-2 (Bank Affidavit).]

Assistant Secretary Nemirow testified:

> Q. Mr. Nemirow, if the Federal Maritime Commission were to disapprove the northbound pools or to approve the northbound pool without fixed shares, do you have any opinion as to what the Argentine response to that situation might be?
>
> A. Do I have an opinion?
>
> Q. Or do you have any knowledge as to what the Argentine response might be?
>
> A. I think that Argentina at that point would disapprove the pools. There would be no pools. The conditions in the trade would revert to the kinds of situations which existed prior to the negotiation of the pools, of the government-to-government agreement.
>
> And I think that they would use whatever powers were available to them, and I think it requires a review of their legislation, to assure that third-flag carriers would have a lesser participation in their trade than they have today. [*SX-3A*, p. 69.]

When the carriers in the Argentina/European trades could not reach pooling agreements acceptable to SEIM, the Argentine Government reserved substantially all inbound cargo in the Argentina/European trades to Argentine-flag vessels, and those trades were apparently thrown into chaos (*Ex. 19*, p. 8).

78. *Disapproval of the agreements will cause serious financial injury to Moore McCormack and Delta.* If the northbound agreements are not approved, Moore McCormack and Delta stand to suffer serious financial injury through termination of the southbound equal access agreements and resulting loss of competitive access to Argentine Government-controlled cargo (*Ex. 7*, ¶15, pp. 7-8; *Ex. 19*, p. 8). Argentina has controlled upwards of 80% of the southbound East Coast trade and 85 to 90% of the southbound Gulf Coast trade in recent years (*Ex. 19*, p. 8; *Ex. 7*, ¶17, p. 9). At present the percentage of controlled cargo on the East Coast has temporarily declined (*Ex. 19*, p. 8). However, Moore McCormack could not continue to operate a viable service at present levels if it were shut out of the Argentine controlled traffic (*Ex.*

19, p. *8*).[32] Likewise, the Argentina/U.S. Gulf trade constitutes an important part of Delta's overall service and loss of access to Argentine Government-controlled cargo would cause serious financial injury to Delta. (See FF 5(c).)

79. *Serious adverse impact on commerce from disapproval.* The Department of State has reported:

> MORE IMPORTANT, A BREAKDOWN OF THE POOLING AGREEMENTS WOULD CAUSE A SEVERE DISRUPTION IN A BILATERAL TRADE IN WHICH THE U.S. ENJOYED ABOUT A $1.3 BILLION SURPLUS IN 1979. [*SX-35*, p. 9.]

Mr. Crowley testified "if there is a stalemate between the U.S. and Argentina over these pooling agreements, then in my opinion Argentina will act to reserve substantially all the southbound cargo to the Argentine-flag, as it did in the European trades. That action will tie up all U.S. liner exports to Argentina, last year amounting to over one billion dollars worth of cargo from the East Coast of the United States" (*Ex. 19* (Crowley), p. 9).

80. *Strong potential for unilateral northbound controls.* There is also a strong possibility that the Argentine Government may unilaterally take action affecting the northbound trade. A similar problem arose in the Brazil-to-U.S. Atlantic trade in the later 1960's and early 1970's with precisely that result, and it was this sort of problem that Mr. Blackwell sought to avoid in entering into the Intergovernmental Agreement (*SX-2*, pp. 33-34). There, the Government of Brazil, to implement its national cargo policies, instructed Lloyd to call a meeting of all conference lines to form a pooling agreement for the carriage of coffee and cocoa. When no agreement was reached, the Brazilian carriers, and thereafter the U.S. carriers and other Latin American lines, withdrew from the existing conference. A new conference was then formed and the Brazilian Government decreed that only members of that conference could carry Brazilian export cargo. The other third-flag lines ignored the new conference and the government imposed a northbound loading ban on the third-flag carriers which remained in the old conferences, the ban being effective until they joined the new one. Continuing efforts by the conference carriers to negotiate pools in the northbound trade were unsuccessful, and finally on April 24, 1970, the Brazilian Government issued a resolution requiring that all coffee and cocoa be shipped on Brazilian-flag vessels with a provision for a waiver of up to 50% to U.S.-flag vessels. To implement this resolution, the Brazilian Government thereafter unilaterally allocated the carriage of coffee (*Ex. 4*, MM-

[32] The Department of State has estimated that: "IN THE U.S.-ARGENTINE TRAFFIC, ABOUT SEVENTY-FIVE PERCENT OF THE FREIGHT REVENUE IS GENERATED BY SOUTHBOUND CARGO." [*SX-35*, p. 9.]

2, p. 16) (see also *SX-2*, p. 33). And, as Secretary Nemirow testified, SEIM might very well take unilateral action to control the participation of third-flag carriers in the northbound U.S./Argentine trade (*SX-3A*, pp. 61-62).

81. *Potential for intergovernmental confrontation.* Should Moore McCormack be denied equal access in the southbound trade, or should the Argentine Government take unilateral action to Moore McCormack's detriment in the northbound trade, then Moore McCormack will consider requesting appropriate countervailing relief by the United States Government through invocation of section 19, Merchant Marine Act, 1920, or section 301 of the Trade Act (*Ex. 4*, MM-2, p. 16). As Mr. Blackwell testified, "[T]he fact is that to call those types of very severe remedies into effect is in itself not an indication but a manifestation that there are already conditions very unfavorable to shipping and to commerce existing in the trade" (*SX-2*, p. 70). There is also substantial question whether an appropriate remedy could be devised to deal with the problem, or that these remedies ultimately could or would be invoked to satisfactorily resolve the problem. Should either be pursued to the point of countervailing action, there would be a diplomatic confrontation between the United States and Argentina (*Ex. 4*, MM-2, p. 16). As Mr. Blackwell testified, the Argentine Government has a firm policy with respect to enforced cargo sharing arrangements (*SX-2*, p. 62), and it is extremely difficult to change its views with respect to the U.S./Argentina trade (*id.*, p. 68). It is evident that retaliatory action by the United States against Argentina or its government-owned line would seriously disrupt diplomatic relations, commercial dealings, and trade between the two countries, where matters of national pride and prestige would be at stake (*Ex. 4*, MM-2, p. 16). The real losers from such a contest would be the carriers and the importers and exporters who would be in the middle of, and subject to, the conflicting requirements and obligations imposed by both nations (*Ex. 4*, MM-2, pp. 16-17). In the past there have been instances where, as a result of retaliation, commerce has been seriously disrupted and the American line injured (SX-2, pp. 70-71). From Moore McCormack's point of view, there would be no assurance that it would not suffer irreparable damage while these retaliatory remedies were employed. Past experience in such confrontations indicates that the ultimate outcome would likely take the form of a carrier agreement such as the one now before the Commission (*Ex. 4*, MM-2, p. 17).

P. IMPACT OF AGREEMENTS ON SHIPPING PUBLIC.

82. *No long- or short-term adverse impact on the shipping public if agreements are approved.* Affidavits were received into evidence from 24 U.S. importers (19 in the East Coast trade and 5 in the Gulf Coast trade). The shippers were specifically asked by BIE to describe the

short-term and long-term effect of approval of the subject agreements on their business. All 19 of the East Coast importers responded that approval of the agreements with fixed shares would have no impact whatsoever upon their businesses (*Ex. 5*).

In the Gulf trade, importer "A" responded that "it would appear reasonable that a limitation of third-flag carriage to a fixed share by line would be preferable to open competition, which could affect that stability of the trade." Importers "B" and "C" did not believe approval would have any short-term or long-term effect. Importer "D" responded that since "one-hundred percent of our northbound Argentine trade is carried by U.S. or Argentine lines . . ." it could not determine at this time whether open competition or approval of the agreement as submitted would affect its business. Finally, shipper "E" was concerned that if Argentina were to disapprove all pools in the trade as a result of a requirement that there be open competition, that "would have an immediate and permanent negative effect because Argentina would undoubtedly limit cargo movement to their vessels alone. . . . We emphatically do not wish a change in the status quo. 'E' therefore supports approval of the agreements" (see *Ex. 5(a)*).

Mr. Holter-Sorensen's statements confirm that the pools do not adversely affect shippers: "The shippers don't think about the pool. They see what is the first ship to come into the port and what is the first ship to go to the States, and they give the cargo" (*ASX-11(c)*, p. 97; see also *ASX-11(c)*, p. 98).

83. *Shippers noticed no difference in service between the period of open competition and fixed shares.* (a) The same 24 importers were advised:

> The difference between these agreements and the agreements the parties were operating under before June 30, 1980, is that previously, the non-national-flag lines were not assigned shares, but competed among themselves for a maximum of 20% of the pool revenues. . . . [*Ex. 5*, Questionnaire, p. 2.]

Of the 19 East Coast shippers, 17 noticed no difference in service provided by carriers in the northbound Argentine trades between the time before June 30, 1980, and the time after that date. One shipper did not respond to that question, and one responded: "A few days slow" (*Ex. 5*).

(b) All 5 of the Gulf Coast importers noticed no difference in service (*Ex. 5(a)*). Thus, from a shipper's perspective, open competition did not result in better or worse service (*Ex. 5, 5(a)*).

84. *Shipper reliance on Moore McCormack and Delta.* (a) The importers were asked what the effect would be on their operations if carriage in the northbound Argentine trades were available to non-Argentine lines only by previously authorized waiver. Every shipper but two stated that this condition would be unacceptable.

(b) In response to different questions, almost every shipper stated that any action which would affect its ability to utilize the service of Moore McCormack and Delta, would be very unsatisfactory, or an unworkable situation: "If this will restrict U.S. lines in any way, it will work to our disadvantage" (North American Crop Services, Ltd.); "Whenever possible we use American-flag lines" (Kayan International Corporation); "We see little effect because American-flag lines are first choice due to better service" (Irwin-Harrison-Whitney Importers); "No effect at all, we currently only use American Flag Vessels due to the service and attention we receive" (William H. Hall & Co., Inc.); would "cause extreme delays, paperwork and again effect the service—we need steamers of Moore McCormack and/or Argentine lines" (C.A. Andres & Co., Inc.).

(c) The results of BIE's "shipper-survey" comport with the findings of a study prepared by an independent consultant for Marad based on a comparison of the rationalized Brazil trades with two trades that do not have pooling arrangements, the Australian and South Africa trades (*Ex.* 7, DGX-11, p. 4). That report concludes that there has been no adverse impact upon shippers in rationalized trades.

85. *No basis for implying adverse impact on freight rates.* (a) In the Argentine and Brazilian trades, rate increases have been imposed at levels lower than experienced in many other trades (*Ex.* 7, DGX-10, p. 2a). In a comparison of freight rates on the top 10 commodities moving in three trades—Brazil/United States, Argentina/ United States, and the U.S. North Atlantic/Continental Europe trade—utilizing the most recent data available in the year 1979, an F.M.C. study indicated that, over a five year period on a percentage basis, the North Atlantic trades witnessed an 11.66% higher increase in rates than did the Argentine or Brazil/U.S. trades (*id.*, p. 4). Specifically, in a comparison of the northbound U.S. Atlantic and Gulf/ Brazil and U.S. Atlantic and Gulf/ Argentina trades with the North Atlantic/Continental Europe inbound trades, on a percentage basis, rates increased 9.14% more in the North Atlantic as compared to Argentina and 23.82% more than rates in the Brazilian trade (*id.*, p. 10). These findings "offer evidence that it cannot be dogmatically concluded that pools must result in higher freight rates" (*id.*, p. 10). The Commission's chief economist (*Tr.* 514), who has appeared as an expert witness in seven or eight proceedings before the Federal Maritime Commission (*Tr.* 527, 528), testified that the results of this study indicate:

> that it cannot be dogmatically concluded that pools must result in higher freight rates. So in other words, the burden of proof is now on the other side if you will. . . . You cannot say with certainty that pools must lead to higher freight rates, given the result of this study. Because the evidence of the study would leave you in the opposite direction. [*Tr.* 527.]

That same witness testified that the results of the study were statistically valid (*Tr.* 526), and that two techniques were utilized in performing the study "in order to arrive at the fairest figures" possible (*Tr.* 521). He concluded:

> that you could not empirically prove that pools must lead to higher freight rates. [Tr. 522-523.]

(b) The findings of this F.M.C. report were similar to those contained in a report performed for the Office of Commercial Development of the United States Maritime Administration in May of 1979 (*Ex. 7*, DGX-11, p. 4).

86. *No shipper or other trade interest appeared in opposition to the agreements.* No shipper, importer, exporter, port, or other trade interest appeared in opposition to the agreements. Ivaran produced no shipper evidence, and none of the shipper affidavits in evidence identified Ivaran's service as being important to its business (see generally *Ex. 5*).

Q. MISCELLANEOUS RELEVANT PROPOSED FINDINGS.

87. *Brazil/Argentina Agreement of August 10, 1979, was not a factor in negotiations of third-flag share.* (a) On August 10, 1979, SEIM and SUNAMAM signed a Memorandum of Understanding agreeing to cooperate in a broad range of Maritime matters (*SX-33*). A copy of the agreement was provided to the Federal Maritime Commission (*SX-33(B)*, p. 2). Mr. Ornellas, on behalf of Lloyd Brasileiro, testified that his company had received no instructions from SUNAMAM to implement the memorandum in negotiating Agreement Nos. 10386 or 10382 (*Ex. 11* (Ornellas) pp. 8-9,[33] whereas Lloyd had received such instructions when pools in the Europe/Brazil trade were negotiated (*Tr.* 202-203). Likewise, Captain Dandois, who was in charge of ELMA's negotiating team for the Atlantic trade, testified he had no instructions regarding specific third-flag shares and was instructed to allow the third-flag carriers to reach whatever agreement was acceptable among them (*Tr.* 330-331). SEIM's Aide Memoire in evidence as Exhibit *SX-40* states that "The instructions of SEIM to ELMA were that all carriers should have fixed shares but SEIM *did not specify* what the non-national-flag shares should be, *and left it up to those lines to agree*" (*SX-40*, p. 10; emphasis in original). Mr. Schliemann testified that he was of the personal opinion that the guidelines of the memorandum should have been followed in negotiation of the agreements, but his company had not received any instruction from SEIM to apply them (Tr. 428).

(b) One of the memoranda prepared by Mr. Holter-Sorensen suggested that Lloyd was indirectly pressuring ELMA to establish pools in the

[33] This was confirmed by the U.S. State Department which raised the matter with SUNAMAM in March 1981 (*SX-34(D)*, p. 2).

trade through the influence of SUNAMAM, the Brazilian regulatory authority (*ASX-11(c)*, BIE-6, p. 3); however, Mr. Holter-Sorensen subsequently testified that he had no proof of any such pressure (*ASX11(c)*, Tr. 179) and had based his view on recollection from a period prior to 1978 (*id.*, *Tr.* 179-182), and his understanding of the agreement was that the pools would have common termination dates (*ASX11(c)*, Tr. 166), and that the only statement made by Lloyd at a thirdflag caucus regarding the agreement concerned the termination dates (*ASX-11(c)*, Tr. 166-167). Mr. Holter-Sorensen also testified that he had never been told that the Argentine Government had provided reciprocal treatment to Lloyd, and his understanding of the Brazil/Argentina agreement was that it did not promise such treatment either (*ASX11(c)*, Tr. 193).

88. *Argentine-flag shares in northbound Brazil/U.S. pools.* There is no evidence that the shares of the Argentine-flag lines in the Brazil/U.S. trades are the result of any agreements or understanding between the Governments of Brazil and Argentina. Neither Lloyd nor Nacional received any instructions from SUNAMAM with respect to implementation of the Brazil/Argentina August 10, 1979, Memorandum in the Brazilian/U.S. trades (*SX-39*, p. 3). The transcript of the Brazil pools which are in evidence (*GSX-17A, B, C, and D*; *ASX-8 and 10*) demonstrates that the Argentine-flag shares are the result of commercial negotiations, as testified by Mr. Wendt with respect to the Brazil/U.S. Gulf pool (*Ex.* 7, ¶48, pp. 48-49). Further, the very substantial difference in the values of the respective Gulf trades—million revenue tons for the Brazil/U.S. trade compared to 150,000 revenue tons for the Argentina/U.S. trade renders completely meaningless any concept of an equal share in the trade of these adjoining nations (*SX-39*, p. 3).

POSITIONS AND CONTENTIONS OF THE PARTIES

In order to place this proceeding in perspective, it is almost obligatory to note initially the varying positions and contentions raised by the parties.

Basically, the positions of the parties are represented in the views of Moore McCormack, Delta, ELMA, Lloyd and Nacional, as proponents of the agreements (sometimes referred to as proponents collectively), Ivaran and the Bureau.

The Bureau's position is that: (1) Agreements Nos. 10386-2 and 10382-2 are both approvable, with modifications, under the standards provided in section 15; (2) approval of the agreements is in the public interest for several compelling reasons, including that they are consistent with United States laws and policy, and although they restrict competition, they do not do so beyond the point necessary to achieve valid regulatory purposes; and, (3) a failure to approve the agreements will undoubtedly result in the strict implementation of the Government of Argentina's cargo preference laws and disrupt the trade.

The Bureau also submits that certain modifications in the Agreements should be required. In that respect, it concludes that the particular shares assigned to the non-national flag lines in Agreement No. 10386-2 are discriminatory between carriers in that they do not reflect the past service of the carriers in the trade. The Bureau urges that the Commission should require the non-national flag lines to renegotiate their shares. Finally, the Bureau submits that both Agreements should be modified to require all discussion between non-national flag lines concerning renegotiation of shares be recorded.

The Bureau generally supports the proponents' position regarding the approvability of the Agreements. It argues that the provision of both Agreements which provide for fixed shares for non-national flag lines carriers meet the standards of section 15 and should be approved. Specifically, it argues that "[f]ixed shares, rather than open competition, is in the public interest and meets a serious transportation need." In reaching that conclusion, the Bureau realistically evaluates the record as reflecting that the policy of the Argentine government is clear by stating that "if the fixed share provisions of the agreements are not approved, the Argentine cargo preference laws will operate so as to virtually exclude U.S. national-flag carriers from operating in the trade without first obtaining waivers from the cargo preference laws." The Bureau considers that such an eventuality "would so severely disrupt the trade for shippers, importers and the U.S. national-flag lines that the 'public interest' consideration of section 15 mandates the approval of these agreements. Furthermore, there are no substantial reasons why the 'fixed share' provisions should not be approved in light of the consequences of disapproval: the concept is not inconsistent with the policies of the United States as set forth in the Argentine-U.S. Memorandum of Understanding or any U.S. treaty obligations, open competition versus closed competition has not had a measurable impact on the trade, and fixed shares will still provide for a significant degree of competition among the members of the agreements."

In supporting these conclusions, the Bureau has turned to a number of considerations. It argues that: (1) Argentine law and policy are intended to restrict competition; (2) in negotiations with Argentina, the United States has not sought to guarantee open competition among non-national flag lines; (3) tangible benefit of open competition versus fixed shares is indeterminable from the facts of record; (4) fixed share provisions of the Agreements neither eliminate competition among participants to the Agreements nor prevent the inclusion of new third-flag members; (5) approval of the Agreements with fixed shares is in the public interest because they permit a degree of competition that would not exist if Argentine cargo preference laws were fully applied; and (6) fixed shares are consistent with the Memorandum of Understanding and

whether that memorandum is consistent with U.S. treaty obligations is not a matter for the Commission.

The Bureau also considers that the individual non-national flag shares set forth in Agreement No. 10386-2 are unjustly discriminatory and unfair as between carriers and the Agreement, therefore, does not meet the standards of section 15, and should not be approved by the Commission as submitted. It argues that the share assigned to Ivaran is unduly small in light of its past service in the trade and the share assigned to the Brazilian-flag line, Lloyd, greater than its past service merits. It urges approval of the Agreement "but with the caveat that the third-flag shares must be renegotiated."

Insofar as Agreement No. 10382, as amended, is concerned, the Bureau concludes that the shares assigned the non-national flag carriers are consistent with the standards of section 15. In that respect, it considers the "shares of each of the non-national flag lines that sought more than a nominal share of the trade (1-2%) are approximately equal, and are larger than their respective past carriage in the trade."

In approaching its analysis of the issue of the fairness of the non-national flag shares contained in the agreements, the Bureau details the negotiating factors influencing the non-national flag lines as well as the negotiating process itself. It concludes that "[a]lthough many of the negotiating factors discussed by the parties during the Principals' Meetings are elements the Commission should consider when determining if the agreement is approvable under section 15, they do not justify the agreement as submitted under the standards of that section. . . ." In addition, it also details those other factors which influenced the allocation of shares, particularly the role of the governments of the lines participating in the negotiations. It concludes that although commercial considerations played a large role in the negotiation of these Agreements, the governments of Argentina, Brazil, Norway, and the United States also influenced the negotiations. It points out that "the role of Norway and the United States can be fairly well ascertained, however, the influence of the Brazilian and Argentine governments cannot be clearly defined due to a refusal of Argentina and the Argentine-flag line to provide all pertinent information. However, even assuming the 'worst possible case' of government influence, the Commission is not deprived of jurisdiction over these agreements."

Ivaran contends that Agreement No. 10386-2 [34] is unjustly discriminatory and unfair and that the Agreement should be modified to provide for "open competition" within the third-flag sector. In the alternative, "Ivaran believes that the third-flag shares should be renegotiated

[34] While Ivaran's position is directed only to Agreement No. 10386, Delta considers its argument as "not limited to the Agreement in its substantive impact." Accordingly, Delta has submitted a reply brief directed to arguments presented by both the Bureau and Ivaran.

according to directed guidelines which permit Ivaran to obtain a share commensurate with its past history and demonstrated capability of service to the trade."

Ivaran points to a "continuing pattern of domination" of the trade by the Argentine government through SEIM. It considers that this domination, in favor of the neighboring Brazilian government line, is based upon the concept of reciprocity.

It has summarized its major concern and position as follows:

> Ivaran has been consistently of the view that a pooling agreement of any sort is not necessary. However, if it is decided to, once again, accede to the demands of the government of Argentina and establish a pool then the third flag share of such a pool should be open and *not* assigned. This will foster competition in the third flag sector and is significantly more pro-competitive than fixed third flag shares. In the alternative, if it is determined that fixed third flag shares should be implemented then Ivaran asserts that they should be arrived at by true commercial negotiations and rely on valid and traditional commercial factors and not on governmental trade-offs.
>
> Furthermore, Ivaran's dilemma must be considered in light of its more than 50 years of service to the Argentina United States East Coast trade and it must be considered with the view that this trade is Ivaran's business. If Ivaran is out of this trade its business is lost and service to shippers will suffer.

Basically, Ivaran contends that the Agreement fails to meet the standards for approval since it is a "commercial agreement" arising in the context of a bilateral understanding between the governments of Argentina and the United States. It states, however, that the "bilateral agreement memorialized in the Memorandum of Understanding Between the Government of the United States of America and the Government of Argentine Republic . . . does not address and specifically does not 'affect' the issue which is central to this case: whether the third-flag allocation should be on an assigned share basis." It considers that the Commission's authority under section 15 has not been "usurped" by the Maritime Administration "at least insofar as the third flag allocation is concerned" and, therefore, the reviewing authority is free of "overriding foreign policy constraints."

Ivaran contends that the Agreement also is contrary to the public interest of the United States by pointing to: (1) the antitrust implications and the necessity that the Commission weigh the benefits of competitive service within the third-flag share; and (2) the "lack of the issue of intergovernmental harmony" in this proceeding, and that even if the issue existed, other public interest considerations outweigh those of intergovernmental harmony. It also contends that the Agreement is unfair and unjustly discriminatory because (1) the requirement by the

Argentine government for fixed third-flag shares is unequal in its application to Ivaran by favoring another third-flag line, Lloyd; (2) the Agreement goes beyond the actual terms of the Blackwell-Guevara Memorandum; and (3) the method by which the third-flag shares were "negotiated" was devoid of "true commercial considerations" and, therefore, contrary to guidelines previously enunciated by this Commission.

Proponents collectively provide a multitude of arguments demonstrating that the record supports that both Agreements, as amended, are justified and should be approved as submitted.

Moore McCormack contends that Agreement No. 10386, as amended, meets every test for approval under the Act. It argues that the Agreement, which implements a government-to-government agreement, carries a presumption of approvability since it: (1) is a binding Executive Agreement of the United States; (2) successfully accommodates United States and Argentine maritime policies; and (3) is the policy of the United States in maritime relations with Argentina. It also contends that the regulatory policy of the Shipping Act favors approval since the Commission's grant of antitrust immunity arises expressly out of section 15; that there have been no allegations of carrier conduct outside the scope of section 5; and the considerations of competition support approval. It is argued that the Agreement meets serious transportation needs, provides significant public benefits and furthers valid regulatory purposes by the maintenance of U.S.-flag carriers' access to cargo, the avoiding of potential intergovernmental confrontations, and points out that: such issues were previously decided by the Commission, approval will prevent disruption in the trade, and the maintenance of intergovernmental harmony requires fixed pool shares which are otherwise justified under the Act.

In viewing the issue of the division of the third-flag shares, Moore McCormack contends that (1) the shares resulted from commercial negotiations in which each competing interest bargained to achieve the most favorable result; (2) the shares were the product of the best bargain each line could make under the circumstances; (3) the Agreement is not unjustly discriminatory or unfair to Ivaran since Ivaran has the burden of proving these considerations and has failed to produce any case and stipulated that approval would not economically harm it; and (4) the evidence shows the Agreement will not in fact be unfair since the pooling provisions will operate to prevent any unfairness to Ivaran.

Delta contends that the record conclusively establishes: (1) that Agreement No. 10382, as amended, is the result of commercial negotiations and not some direct or indirect coercion by either the Government of Argentina or any other person; and (2) the legitimate and unequivocal interest of the Argentine government is in requiring fixed

shares with minimum sailing requirements for all lines. It argues that the Agreement (1) is a commercial agreement subject to the Commission's jurisdiction under section 15; (2) serves a serious transportation need; (3) is in the public interest since is not unjustly discriminatory or unfair, does not transgress the antitrust laws more than is necessary to serve the regulatory purposes of the Act and contains substantial pro-competitive features, and does not exclude carriers wishing to participate in this trade.

The joint position of Lloyd and Nacional is that Agreement Nos. 10382, as amended, and 10386, as amended, should be approved without change or modification. Lloyd and Nacional contend the Agreements are not discriminatory or unfair, are not detrimental to commerce or otherwise violative of the provisions of the Shipping Act, 1916, and are wholly consistent with the public interest. They argue that the Agreements, as filed by the parties, fully comply with the standards necessary for consideration in that they meet a serious transportation need, serve a valid regulatory purpose and their implementation will provide important public benefits.

Lloyd specifically argues that approval of Agreement No. 10386, as amended, will provide the Argentine/U.S. East Coast trade with better and more competitive service than either of the alternatives proposed by the Bureau (renegotiation) or by Ivaran (open competition). In considering the specific circumstances of the trade here involved, it claims that: the share negotiated by Lloyd is the smallest share capable of permitting an economically viable and credible service for shippers in the Argentina/U.S. East Coast trade; any lesser share or "open competition" will effectively result in Ivaran's monopolization of the third-flag shares; Ivaran's allegations concerning the negotiations of the pool are without basis in fact; and, Ivaran is essentially opposed to any negotiation which would result in its having less than virtually all of the 20 percent pool share set aside for all third-flag lines serving or desiring to serve the trade.

Lloyd and Nacional submit that on the basis of the evidence and the applicable case law, the pooling agreements, as filed, represent the best, most viable, and most competitive approach to providing service in the trades from Argentina to the United States.

ELMA considers that the crucial issue is whether the Agreements should be approved as filed, with the third-flag shares therein contained, since none of the parties to this proceeding have requested outright disapproval of the pools. It contends that the Commission therefore faces four alternatives, *i.e.*, to open the third-flag shares of 20% to free competition as was done in the prior proceeding; to require the third-flag lines to renegotiate their shares; to assign a share of the 20% to each third-flag carrier different from the shares which the parties negotiated; or to approve the pools as filed. It submits that the

only alternative which will satisfy the requirements of both United States and Argentina law and will bring "an end to this long and protracted litigation is the last alternative." It claims that the first means a direct confrontation between the two governments involved; the second is doomed to failure since there is no evidence to indicate that new negotiations will produce any different shares from those reached during the long negotiations in 1980; and the third is impractical since there is no evidence to enable the Commission to devise a formula to fix each third-flag carrier's percentage precisely.

In addition to the above, a few observations should be noted concerning the reply briefs.

Briefly, the Bureau's position remains unchanged. It disagrees with the proponents' claim that the Agreements are vested with presumptive approvability; believe that the proponents "have carried the burden of going forward in regard to section 15's public interest criterion"; concludes that "Ivaran's argument really goes to the *size* of its share and little further" in addressing the public interest aspects of allocation by fixed shares rather than by open competition. The Bureau submits that "the avoidance of certain trade disruption is sufficient public benefit to justify fixed shares"; that both open competition and fixed shares are consistent with the Argentine/United States Memorandum "but that neither is mandated by it"; that the Commission decision in favor of fixed shares "must be grounded in the Shipping Act, 1916, rather than any mandate of the Memorandum of Understanding."

In discussing "the non-commercial pressures" exerted on the third-flag lines in the negotiations, such as Resolution 619, the Bureau states "Unlike the other parties to this proceeding, except Ivaran, who refuse to admit that these influences existed, the Bureau submits that they did exist but they do not render the agreements unapprovable under section 15." Finally it contends that the "special interest" of Argentine government in the share of the Brazilian flag lines does not deprive the Commission of jurisdiction over the Agreements or make them inconsistent with section 15.

Ivaran argues that the third-flag shares are not mandated by the Blackwell-Guevara Memorandum, or Argentine Law, and that Agreement No. 10386, as amended, is not entitled to a "presumption of approvability"; that the Agreement is more anticompetitive than necessary and is not otherwise in the public interest; and that the Agreement was not the product of true commercial negotiations. In conclusion, Ivaran states:

> Proponents argue that Ivaran wishes to maintain its monopoly on third flag shares; shares which Ivaran obtained through efficient service to the trade. Proponents' preference is to substitute an unproven carrier (Lloyd) into a significant portion of Ivaran's rightful slot. The proponents propose a mo-

nopolistic agreement which, coupled with Resolution 619 has severe anti-competitive impact. This agreement provides for fixed third flag shares grounded almost entirely on zonalism and arrived at in so-called "commercial negotiations" which were completely dominated by SEIM and SUNAMAM (and their respective national lines).

Moore McCormack observes that it disagrees with the Bureau "only upon one of the ultimate issues" where the Bureau "contends that notwithstanding the host of factors considered in negotiation, Ivaran's share is unjustly discriminatory and unfair because Ivaran was not given sufficient 'credit' for past carryings." Moore McCormack's position, on the other hand, is that "the third-flag shares are the product of a true commercial negotiation in which the shares represent the best bargain each line could make under the circumstances, and the difference between Ivaran's share and its past carryings, in-and-ofitself does not render Agreement No. 10386 unjustly discriminatory." Turning to the position of Ivaran, Moore McCormack observes that they "are in disagreement upon virtually the entire case." Accordingly, its reply brief centers only upon the Bureau's position that the third-flag share be renegotiated and directs a major portion to the arguments raised by Ivaran.

Delta supports the Bureau's position, except as to the scope of the proposed modification, and contends that the arguments raised by the Bureau, and the record in this case, fully justify approval of Agreement No. 10382, as amended. Delta also responded to certain "factual errors and subsidiary arguments" posed by the Bureau which it "does not believe are supported by the record" but do "not adversely impact the validity of [the Bureau's] position on approvability, and in fact strengthen[s] the arguments in favor of approvability."

On the other hand, while first observing that Ivaran is not a party to Agreement No. 10382, as amended, Delta states that the "substance of several of Ivaran's arguments have applicability beyond that Agreement and warrant reply here. Specifically, Ivaran argues (1) that pooling agreements in these trades, and particularly the inclusion of fixed third flag shares, are contrary to the antitrust laws and therefore contrary to the public interest, and (2) that disapproval of fixed shares will not result in intergovernmental confrontation." It submits that these arguments are without substance and offers detailed and supportive argument as to why they should be rejected.

Lloyd and Nacional direct most of their attention to urging that fixed shares are in the public interest and are not unjustly discriminatory or unfair to Ivaran. In addition, the brief contains arguments in opposition to the Bureau's proposal to require transcripts of the third-flag caucuses.

ELMA, like the other proponents, responds to the positions of both Ivaran and the Bureau. As to the latter, it argues that the Bureau's "solution" would result in further "destabilization" of the trade. Like Lloyd it opposes the Bureau's requirement of transcripts of the third-flag line caucuses.

PRELIMINARY OBSERVATIONS CONCERNING THE BASIS FOR THE DECISION TO APPROVE THE AGREEMENTS

As noted earlier, the Commission has determined that this proceeding be treated on an expedited basis. The Bureau, in particular, has sought extensive discovery requests geared to the many issues posed by the Commission's Orders. The hearing and exhibits have resulted in what has aptly been described as a "massive record." A record of that magnitude usually provides, by the process of selective record references, a basis of support for many and varied arguments. And as shown in the preceding section, this record has produced a veritable arsenal of ammunition for the advancement of divergent arguments and positions. As a monument to the parties' endeavors, collectively they submitted briefs and findings of fact in excess of 750 pages. On the other hand, what also emerges are those discussions relating to the matters central for the determination of the ultimate issues herein. The inclusion of a detailed discussion of each disagreement among the parties in this decision would not only be counterproductive, but also unnecessarily extend an already lengthy decision. Moreover, the time allotted by the Commission for the submission of an initial decision (July 31), coupled with an expedited schedule agreed to by all of the participants (reply briefs were filed on June 19), by necessity, reduces a compulsion to treating each and every collateral factual point or varying interpretations placed upon selective excerpts of a record of this nature. What can be said is that these matters have been carefully considered and reviewed by this Judge. For example, the Bureau's position in favor of the approvability of these Agreements, in many instances, is based upon a view of the evidence that differs from those of the proponents. On the other hand, Ivaran's arguments are directed toward its position and are clearly distinguishable from those of the proponents. Consequently, in treating the issues in this proceeding, it will not be my intent, nor do I consider it necessary, to provide a point-by-point recitation or refutation of those matters not considered primarily directed to the resolution of the ultimate issues. The refinements to these arguments can be found fully explored in the briefs. Indeed, Moore McCormack itself has determined it unnecessary to refute each of the arguments of the Bureau except as to the one "ultimate issue." Also Delta has responded to the Bureau's position in a limited fashion as do the other proponents.

The Judge also considers it unnecessary to quote the many lengthy excerpts from this record and cases which are relied upon by the

parties. Suffice to say that these excerpts have been considered and require, in most instances, only a brief reference either to the case or to the particular part of the record.

Finally, a review of the record and arguments presented by the proponents seeking approval of the Agreements has provided the ingredients necessary for a determination of the decision herein. In that regard, proponents have offered a persuasive treatment of the issues and provided abundant record support for the conclusions to be drawn. Inasmuch as the arguments of the proponents are virtually identical in all major respects, in many instances, a single summary of their position will be sufficient to indicate their views. As a consequence, this decision will not contain references to all of the citations and support appearing in the briefs submitted by the proponents. Again, it is unnecessary to do so since they are contained in their briefs and are part of this record. Accordingly, references will be made, at times, to the specific briefs of certain proponents which should be understood to convey that the Judge agrees with the position stated and with the support provided for that position as contained in that brief.

DISCUSSION AND CONCLUSIONS

STANDARDS FOR REVIEW OF THE AGREEMENTS

The Agreements under consideration in this proceeding, involving cargo revenue pooling and minimum annual sailing provisions, must be filed for approval with this Commission under the provisions of section 15 of the Shipping Act, 1916, as amended (46 U.S.C. § 814). Such agreements are to be approved unless found:

> . . . to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act. . . . 46 U.S.C. § 814.

See *Federal Maritime Commission v. Seatrain Lines, Inc. ("Seatrain")*, 411 U.S. 726, 727-28 (1973) ("The Commission is directed to approve all other agreements . . .").

Also under section 15, the Commission is required to consider the antitrust aspects of all agreements submitted for its approval and to make sure that the agreement does not invade the prohibitions of the antitrust laws more than is necessary to serve the regulatory purposes of the Shipping Act. And the Commission has long held that proponents of anticompetitive restraints must demonstrate that the restraint is required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose. *Investigation of Passenger S.S. Conferences Regarding Travel Agents*, 10 F.M.C.

27, 33 (1966), *rev'd sub. nom., Aktiebolaget Svenska Amerika Linien v. F.M.C.*, 372 F.2d 932 (D.C. Cir. 1967), *rev'd*, 390 U.S. 238 (1968) ("Svenska"). And it has been recognized that exemptions from antitrust laws are to be strictly construed since they represent a fundamental national economic policy. *Seatrain, supra*, at 733; *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305, 316 (1956); *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966); and *Gulf States Utilities Co. v. Federal Power Commission*, 411 U.S. 747, 759 (1973).

Courts are reluctant to imply an exemption from the antitrust laws merely because business activities are subject to either state or federal regulatory control, see, *e.g., Cantor dba Selden Drugs Co. v. Detroit Edison Co.*, 428 U.S. 579, 596-97 & n. 36 (1976) (state regulation of electric utility does not imply antitrust immunity), *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687, 691-92 (9th Cir. 1977) (conduct not immunized merely because it falls within the jurisdiction of Interstate Commerce Commission), and statutory provisions granting exemptions from the antitrust laws are strictly construed. *Seatrain, supra*, 411 U.S. at 733; and *Mt. Hood Stages, Inc., supra*, 555 F.2d at 691. In such cases, courts analyze the statutory scheme and purposes of the regulatory legislation, and when they conclude that Congress rejected a pervasive regulatory scheme in favor of voluntary relationships, they "must be hesitant to conclude that Congress intended to override the fundamental national policies embodied in the antitrust laws." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 374 (1973). Moreover, the courts have considered that competition may be a healthy and desirable feature even in the regulated industries. *Bowman Transportation, Inc. v. ArkansasBest Freight System, Inc.*, 419 U.S. 281, 298 (1974); *Trans-American Van Service, Inc. v. United States*, 421 F. Supp. 308, 321 (N.D. Tex. 1976).

THE AGREEMENTS, AS AMENDED, IMPLEMENT AN INTERGOVERNMENTAL AGREEMENT AND ARE ENTITLED TO PRESUMPTIVE APPROVABILITY IN THE PUBLIC INTEREST

The Agreements are in the public interest and should be approved since they implement and are entirely consistent with the intergovernmental Memorandum of Understanding between the Governments of the United States and Argentina.

The Memorandum of Understanding was signed on March 31, 1978, and arose out of negotiations following the disruptions in the trade in 1977 caused by Argentina's implementation of its cargo preference laws (FF 31). Assistant Secretary Blackwell was formally authorized by the Department of State to negotiate for the United States and to sign that document (FF 33). Mr. Blackwell was the chief negotiator on behalf of

*the Executive in negotiating bilateral agreements and the chief spokes*man for maritime policy matters in that context and acted in conjunction with the Department of State and other interested agencies (FF 33, *SX-3A*, p. 6). The Memorandum of Understanding had been "blessed by the State Department," (*SX-2*, p. 29) and it is a binding agreement, executed by responsible officials of both governments, and is an Executive Agreement between the two countries (FF 33).

As testified by Assistant Secretary Nemirow, the purpose of the Memorandum was to reconcile the potentially conflicting policies of the United States and Argentina, and avoid the disruption of the free flow of commerce between the two countries (*SX-3A*, pp. 34-35). Mr. Nemirow further testified that, in his opinion, the negotiations were successful and in the national interests of the United States (*id.*, p. 78).

The Memorandum of Understanding on its face contemplates that the lines will enter into implementing commercial agreements, including, *inter alia*, "revenue shares for the lines in the trade, number of sailings, over-carriage and under-carriage provisions, and similar matters . . ." and that the resulting agreements would be "subject to approval by the appropriate governmental agencies of each of the parties." (*SX-3A*, Ex. 3, ¶2.) And the Agreements, as amended, are on their face consistent with the terms of this Agreement.

Furthermore, Assistant Secretary Nemirow testified that agreements, such as those under consideration here, which implement an intergovernmental agreement should be treated in a special way by this Commission and are presumptively approvable (*SX-3A*, p. 64). In a letter to the then Chairman of the House Committee on Merchant Marine and Fisheries, former President Carter stated:

> . . . agreements implementing government-to-government negotiations should receive prompt presumptive approval by the FMC. (*SX-3A*, Ex. 2, p. 4.)

The intergovernmental agreements, once negotiated, presumably represent the policy of the United States in the trades in question. It could rightfully be observed that there would not be any point in negotiating an executive level diplomatic agreement calling for a commercially negotiated agreement, and then stating it was United States policy that such a commercial agreement was contrary to the public interest.

Of course, these observations are not intended to categorically find that the intergovernmental agreements have rendered the Agreements here as "conclusively approvable." The Memorandum itself recognizes that the implementing agreements would be "in accord with the appropriate legislation in each country" and, as such, would be subject to review under the Shipping Act, 1916. As will be shown, *infra*, the Agreements have not produced any "irreconcilable conflict" between the Shipping Act or the Memorandum of Understanding despite the

arguments arising over the inclusion of fixed third-flag shares as contained in the Agreement Nos. 10382-2 and 10386-2.

THE AGREEMENTS, AS AMENDED, DO NOT INVADE THE PROHIBITIONS OF THE ANTITRUST LAWS ANY MORE THAN IS NECESSARY TO SERVE THE PURPOSES OF THE SHIPPING ACT, 1916

All parties to this proceeding concur that the Agreements are subject to the Commission's jurisdiction under section 15 of the Shipping Act, 1916 (46 USC § 814). Only Ivaran, however, urges that Agreement No. 10386-2 should not be approved with fixed shares for all carriers. Ivaran suggests that Agreement No. 10386 is not the "least anticompetitive alternative" available to the parties or the Commission. Ivaran urges the Commission, in exercising its responsibilities "in the public interest" under the *Svenska, supra*, standard to disapprove Agreement No. 10386 or order open competition in the third-flag share.

The *Svenska* decision requires that in granting antitrust immunity to an arrangement which would be otherwise violative of the antitrust laws, the Commission give consideration to the competitive philosophy of the antitrust laws. The responsibility of the Commission is to consider carefully the antitrust aspects of all agreements submitted for its approval. *United States Lines, Inc. v. Federal Maritime Commission*, 584 F.2d 519, 530-531 (D.C. Cir. 1978). Once the Commission considers the antitrust issues, however, its grant of antitrust immunity arises expressly out of the statutory grant contained within section 15. The Supreme Court recognized that Congress had found significant advantages in allowing agreements among carriers so as to, *inter alia*, preserve more competition than if the agreements were not approved (*Svenska*, p. 242).

Under the rules of statutory construction, antitrust exemption provisions must be read as narrowly as possible in favor of competition. *Seatrain, supra*, 733; *United States v. McKesson & Robbins, Inc , supra*; *United States v. Masonite Corp.*, 316 U.S. 265, 280 (1942); and *Mt. Hood Stages, Inc. v. Greyhound Corp., supra*. This principle is a corollary of the rule that business conduct is not immune from the antitrust laws merely because it falls within the jurisdiction of a regulatory agency or within the scope of a regulatory statute. *Cantor v. Detroit Edison Co., supra; and United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-351 (1963). These rules have their origin in a view taken by the courts that in the scheme of national policy, the position of the antitrust laws is fundamental. *Gulf States Utilities Co. v. Federal Power Comm'n, supra*; and *Otter Tail Power Co. v. United States, supra*.

Thus, antitrust exemption statutes must be construed narrowly so as not to derogate the antitrust laws unnecessarily.

The promotion of competition among carriers is a component of the national transportation policy as well as a basic concern of the antitrust laws. The courts have generally construed this policy to require that, absent factors indicating the contrary, competition should be considered a healthy and desirable feature even in regulated industries: See *Trans-American Van Service, Inc. v. United States, supra.* The Supreme Court, in *Bowman Transportation, Inc. v. ArkansasBest Freight, Inc., supra,* has strongly endorsed competition within the same mode of transportation as an aid in the attainment of the objectives of the national transportation policy as contemplated under the Interstate Commerce Act.

This Commission's obligation is to scrutinize the Agreements and "make sure that the conduct thus legalized does not invade the prohibitions of the anti-trust laws *any more than is necessary to serve the purposes of the regulatory statute.*" *Isbrandtsen Co. v. United States,* 211 F.2d 51, 57 (D.C. Cir. 1954).

Considerations of competition support approval of Agreement No. 10386. It can be, in fact, considered pro-competitive. As the record clearly shows if Agreement No. 10386 is not approved, the result will be not an unfettered, open market, but, rather, the imposition by Argentina of a highly restrictive regime of cargo preservation with a resultant loss of competition (FF's 77-80). And while Ivaran claims that "the trade is a complete monopoly," there are at least seven carriers serving the trade, competing on the basis of service, and any carrier under the terms of the Agreement can enter the conference or pooling agreement at any time. Another consideration is that the provisions of Agreement No. 10386, other than pool shares, contain light penalties *(ASX-11(c),* MM-1, pp. 2, 43), are pro-competitive in nature (FF's 61-65), and the record reflects that under open competition the other third-flag lines were unfairly penalized. The advancement of the theory that "open competition means more competition" becomes suspect under considerations shown in this record. Even if Ivaran were correct in its theory, the record reflects that if the Commission orders open competition, Ivaran will not, at least initially, suffer any detriment, since it cannot now carry government controlled cargo. But the effect of open competition on other carriers could be considerable.

Moore McCormack presently transports all cargo, without any discrimination distinction between either controlled or non-controlled cargo. Thus, at least initially, potentially all of its southbound cargo marketing ability could be disrupted and, moreover, it conceivably could lose outright its ability to carry the substantial percentage of the market controlled by Argentine preference laws during the duration of any trade disruption. The effect upon its operations would be clear-cut, it would require alteration in its current service pattern and would have severe adverse impact on shippers in the trade (FF 78).

Likewise, Delta's Argentine/U.S. Gulf southbound trade constitutes an important part of its overall service. And the potential loss of equal access to government controlled cargo would cause Delta also to suffer serious financial injury (*id.*).

The Commission's consideration of such adverse consequences would hardly be either original or novel to this proceeding. This Commission has approved commercial agreements which preserve U.S.-flag carriers access to the trade, thus resolving the problem of potential U.S. carrier loss of access to controlled cargoes. *West Coast Line, Inc. v. Grace Line Inc.*, 3 F.M.B. 586 (1951); *Alcoa S.S. Co., Inc. v. Cia. Anonima Venezolana*, 7 F.M.C. 345 (1962), aff'd *sub. nom Alcoa Steamship Company v. Federal Maritime Commission*, 321 F.2d 756 (D.C. Cir. 1963); *Agreement Nos. 9847 and 9848—Revenue Pools, U.S./Brazil Trade*, 14 F.M.C. 149 (1970); *Agreement Nos. 9932 and 9939 Equal Access to Government-Controlled Cargo and Interim Cooperative Workings Arrangement*, 16 F.M.C. 293 (1973); *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. 462, (1978); and *Approval of Agreement No. 10330-1*, 20 S.R.R. 725 (1980).

Docket Nos. 78-51 and 78-52, supra, which approved the Northbound Argentina/U.S. pooling agreements in 1979 reaffirmed the policy of preferring commercial resolution of problems which threaten U.S.flag carriers with loss of access to South American trades over that of confrontation and retaliation. And this Commission, in this proceeding, has granted final approval to Agreements 10388 and 10389, revenue pooling agreements in the southbound United States/Argentine trade in this proceeding. It found that those agreements met the standards for section 15 approval, because, *inter alia*, they "provide the means for increased shipper service" and "facilitate the free flow of the United States foreign commerce with Argentina." (*Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreements Nos. 10388 and 10389, supra*, slip op. 6.) On the other hand, the imposition of a modification to the Agreements, as urged by Ivaran, would seriously endanger those same public benefits which the Commission found would flow from approval of Agreement Nos. 10388 and 10389 (FF's 75-77).

Furthermore, the Commission's role, as delineated in *Svenska, supra*, 242-46, is to balance the public interest, which includes the general public interest in encouraging competition, with the regulatory purposes of the Shipping Act—one major purpose of which was to avoid the hazards of unfettered competition. As stated by the Supreme Court, the Shipping Act "is not an historical anachronism that we are entitled to ignore." *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40 (1978).

> *Congress anticipated that various anticompetitive restraints,* forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry. (53.)

The Commission thus is charged with consideration of "economic relations, of facts peculiar to the business of its history, of competitive conditions in respect of the shipping of foreign countries, and of other relevant circumstances. . . ." *Far East Conference v. United States,* 342 U.S. 570, 573 (1952); *accord, United States Navigation Co. v. Cunard Steamship Co.,* 284 U.S. 474, 485 (1931). Like other agencies empowered to approve cooperative, as opposed to competitive, arrangements, "the Commission is not so bound by the antitrust laws that it must permit them to overbear what it finds to be in 'the public interest'." *Minneapolis & St. Louis Railway Co. v. United States,* 361 U.S. 173, 187 (1959) (Interstate Commerce Commission may approve joint control of railroad service, even though the arrangement may contravene the considerations of the antitrust policy).

Ivaran has devoted much of its attention of the consideration of the antitrust laws beyond those especially applicable to this proceeding. For instance, it argues that the Agreements pose an anticompetitive restraint on prices. The short answer is that the Agreements here do not deal with rates, which are set by the Conference and separately approved by this Commission. Moreover, as this record shows, studies of the pools in the East Coast of South America trades have shown that rates increased at lower percentage rates than in other non-pooled trades (*Ex. 7,* DGX-11 & 12) (FF 85).

Ivaran, more appropriately, also argues that the terms and conditions of Agreement No. 10386 constrain the parties from competing aggressively for all available cargo. On the other hand, the record shows that the Agreements not only do not prevent competition, they in fact encourage it by means of their various minimum sailing, undercarriage and overcarriage provisions.

Also the contention that "open competition" within third-flag shares would be less anticompetitive than fixed shares is without substantial support in this record. It also argues that the "imposition of fixed third-flag shares will only worsen the competitive imbalance within the market." At the least, Ivaran has an incentive to improve its service or maintain its position, in view of the "extremely moderate" overcarriage penalty provisions (*ASX-11(c),* MM-1, p. 2). As the Bureau correctly concluded, "open competition benefited Ivaran but penalized smaller non-national flag carriers." And the Bureau has pointed out that the trial period of "open competition" failed to bear out the hypothetical benefits claimed.

Realistically, if the Commission were to require "open competition," it would result in disapproval by the Government of Argentina and trade disruption would surely follow. On the other hand, the record

also establishes that the present Agreements promote competition and do not infringe upon the considerations expressed in the antitrust laws any more than is necessary. As Ivaran recognizes, the policies of the Shipping Act and of the antitrust laws are not irreconcilable. *Latin America/Pacific Coast Steamship Conference v. Federal Maritime Commission*, 465 F.2d 542, 545 (D.C. Cir. 1972) (purposes of ocean carrier regulation and antitrust law service to the public are complementary); and *Northern Natural Gas Go. v. Federal Power Commission*, 399 F.2d 953, 959 (D.C. Cir. 1968). Here the record supports a finding that approval of the Agreements reaches an appropriate reconciliation of those considerations. And disapproval or modification of the Agreements based upon this record and a theory that competition simply "is good" would be unwarranted and unsupportable under any circumstances involving these trades.

THE INTERGOVERNMENTAL AGREEMENT IS AN IMPORTANT FACT FOR CONSIDERATION BY THE COMMISSION

Ivaran contends that the Intergovernmental Agreement "does not address" or specifically affect the central issues in this proceeding, *i.e.*, "whether the third flag allocation should be on an assigned share basis?" It states that the issue of fixed third-flag shares was not a part of the negotiations leading to the Memorandum and that according to Assistant Secretary Nemirow, the Memorandum is not inconsistent with open competition within the third-flag share. It considers MARAD's policy as "simply irrelevant since the Memorandum specifically requires that the rights be determined in accordance with governmental legislation, and not policy." It contends that, "Nothing has changed with respect to Argentinean law since the Commission handed down its decision in *Docket No. 78-51* on June 22, 1979." It further argues, "After the dust settles on the question of Argentinean policy, the fact remains that Argentinean *law* simply does not require fixed third flag shares."

The government of Argentina has consistently made it clear that it intended for the implementing carrier agreements to contain fixed shares for all lines (FF's 36-41). Assistant Secretary Blackwell testified that he understood the Memorandum of Understanding would be implemented by "the traditional cooperative arrangements that we have understood to have been involved in the shipping business for years" (*SX-2A*, p. 36). Assistant Secretary Nemirow (through the Maritime Administration's Director of International Activities) confirmed that Argentina's interpretation is valid:

> Read together, paragraphs 1 and 2 of the Memorandum also contemplate that there will be commercially agreed shares for such third-flag carriers as participate in the trade. [*SX-22(B).*]

Neither the United States nor Argentina nor any of the carriers contemplated a pooling agreement without fixed shares prior to the Commission's decision in *Docket Nos. 78-51 and 78-52, supra.* It clearly was the expectation of both the United States and Argentina in 1978 that the commercial agreements would contain fixed shares for all parties. The Intergovernmental Agreement does not specify "fixed shares" for revenue pools because it was a basic assumption by both countries' negotiators that any "pool" would contain fixed shares since established shares for each carrier would be the essence of a cargo and revenue pool.

Moreover, both Argentine law and policy require fixed shares. Mr. Nemirow testified that he was told by Argentine officials that fixed shares were required "in order to comply with their law" (*SX-3A*, p. 33). The Argentine Aide Memoire states that "such 'open competition' is contrary to the maritime laws and policies of Argentina" (*SX40*, p. 9). Captain Dandois testified that "SEIM's instructions were that, in accordance with Argentine law and policy, the new pools were to have fixed shares" (*Ex. 15*, p. 2). Admiral Guevara, in a meeting with the F.M.C. staff in October 1980, advised that "according to Argentine law a party must determine and agree to its shares in a pool on a commercial basis" (*SX-27*, p. 4). Law No. 18.250 provides in Article 7 (*SX-1A*, p. 6) that "When third-flag lines operate regularly in the same service [to and from Argentine ports], a certain share of the traffic may be reserved to them." The record abundantly establishes Argentina's insistence upon fixed shares and that SEIM views such as a requirement both of Argentine law and policy.

In short, while Ivaran relies upon a limited reading of the Intergovernmental Agreement, it also fails to provide an adequate recognition to the evidence or testimony in this proceeding. That evidence demonstrates that fixed-flag shares are a requirement of Argentine law and policy and that United States law does not prohibit fixed-flag shares in agreements such as under consideration in this proceeding. Ivaran points out that in *Docket Nos. 78-51 and 78-52, supra,* the Commission concluded that "open competition within the third flag share appears to be consistent with the Blackwell-Guevara Memorandum," p. 1114. However, that portion of the Commission's Order based upon the conclusion that the Argentine Government failed to insist upon fixed shares simply is not conformable now to the ample testimony and evidence developed in this proceeding (FF's 36-41).

THE PUBLIC INTEREST REQUIRES THE ATTAINMENT OF INTERGOVERNMENTAL HARMONY

Ivaran indicates that the Commission's responsibility under the Act "is free of overriding foreign policy constraints" and that the "public interest" favors disapproval of Agreement No. 10386. However, in *Agreement No. 9932 Agreement No. 9939, Equal Access to Government Controlled Cargo and Interim Cooperative Working Arrangement, supra,* 306 (1973), the Commission held that "the public interest in intergovernmental harmony is clear." And in *Agreement No. 10056 Pooling, Sailing and Equal Access to Cargo in the Argentina/U.S. Pacific Coast Trade,* 20 F.M.C. 255, (1977), it was held that a clear likelihood of intergovernmental conflict must be shown before "intergovernmental harmony" would justify an agreement under section 15. Furthermore, the Commission in *Agreement No. 10066 Cooperative Working Arrangement, supra,* rejected the heavy burden placed on proponents that they "first establish a clear likelihood that a specific type of confrontation would be avoided . . ." (*id.*, p. 1241) and instead held that "a commercial arrangement which avoids *potential* intergovernmental conflict is clearly preferable to disruptive retaliatory action. The avoidance of such potential 'intergovernment conflict' and the maintenance of intergovernmental harmony is a legitimate public interest objective . . ." (*id.* p. 1242).

Here proponents have abundantly demonstrated that intergovernmental harmony is clearly within the "public interest" considerations warranting approval under that standard. And the evidence here also substantiates the Commission's earlier judgment in *Docket Nos. 78-51 and 78-52, supra,* that:

> These Agreements serve an important public benefit by maintaining international harmony through the avoidance of disruptive statutory action and resultant international conflict. Additionally . . . the agreements serve a serious transportation need by avoiding a disruption of United States foreign commerce and the consequential injury to shipper and carrier interest in the United States/Argentina trades, particularly southbound. p. 1111.

Indeed, governmental harmony is also a significant issue in this proceeding, and the consideration of that issue has a meaningful influence in favor of the approval of both Agreements.

Ivaran also suggests that even if approval of Agreement No. 10386 results in "international harmony," the Commission should not be concerned with the results of disapproval because the achievement of intergovernmental harmony "is outweighed by the other public interest factors." It appears that Ivaran's attention here is directed principally toward "other" public interest factors, such as, that (1) fixed shares will

be less competitive than open competition, and (2) the views of the shippers in the trade. The latter point will be treated now.

The Bureau has concluded that there is "no evidence that open competition had any effect one way or the other on importers." Twenty-four shippers were surveyed by the Bureau during the course of this proceeding. Of the twenty-four, only eight, or one-third of the shippers surveyed had something positive to say about open competition (*e.g.*, should stimulate service). Twelve of the twenty-four said that open competition would have no effect or would be disadvantageous to them. The four remaining responses were equivocal on the question and could be fairly interpreted either way. In sum, a clear 50% of the shippers surveyed did not see any particular benefit to them from open competition, whereas only 33% viewed open competition positively (*Ex. 5*; *Ex. 5A*). It should be noted that the question was put to these shippers in the abstract—they were asked to express an opinion on open competition or fixed share competition. They were not told that the alternative to fixed shares would be imposition of the Argentine cargo preference laws and disruption of commerce. And while Ivaran points out that all of the affidavits were provided by Moore McCormack shippers, nonetheless, Ivaran itself determined not to supply any affidavits or other shipper evidence in this proceeding. (See FF's 82-86 for a discussion of the impact of the Agreement upon the shipping public.)

By way of summary, the record clearly shows that intergovernmental harmony would be in the public interest and a factor for consideration of approval of the Agreements. That is not to say that other public interest considerations are to be neglected. As will be shown, *infra,* serious transportation needs and other factors also warrant approval of these Agreements.

THE BUREAU'S POSITION AND ARGUMENT

As discussed above, the Bureau's position generally supports the approval of the Agreements. As to Agreement No. 10386, as amended, it agrees with the proponents' conclusions that: fixed shares rather than open competition is in the public interest and meets a serious transportation need.—The fixed share provisions neither unduly eliminate competition nor exclude new third-flag members.—The record discloses no tangible benefits which resulted from open competition.—Agreement No. 10386 permits third-flag competition which would not exist if the agreement were disapproved and Argentina's cargo preferences laws were applied.—Argentine law and policy are intended to restrict competition.—Fixed shares are consistent with the Intergovernmental Agreement, and the fact that Agreement No. 10386 implements the Intergovernmental Agreement does not render it beyond the scope of section 15 of the Shipping Act or the Commission's jurisdiction.—Governmental influence, if any, does not require disapproval of Agree-

ment No. 10386. The Bureau's position is also that the fixed third-flag shares negotiated under Agreement No. 10382, as amended, are not unjustly discriminatory or unfair, and that Agreement No. 10382 should be approved. However, the Bureau urges that the Agreements be modified (1) to provide for transcripts of the negotiations of the non-national flag lines, and (2) that Agreement No. 10386-2 should be approved only pending renegotiation of third-flag shares. The former will be treated later.

The Bureau submits a number of considerations contained in the record which, in its view, point to the need for the renegotiation of the pool shares. By way of summary, the Bureau states as to Agreement No. 10386-2:

> The shares in the agreement are clearly discriminatory and cannot be permitted to go into effect. However, the Commission cannot inject itself into the process by using its own judgment to assign pool shares. In addition to depriving the parties of notice and an opportunity to comment on the assigned shares, the Commission would be entirely removing any commercial aspects of these agreements that presently exist. If the Memorandum of Understanding requires commercial negotiations free from all governmental influence then it applies to the governmental influence of both the United States and Argentina. The Commission is no more free to impose a specific non-national flag share than is SEIM.
>
> Nor is it a feasible alternative for the Commission to order that the parties renegotiate their pool shares each year. The contentious nature of these negotiations is evident from the past proceeding and negotiations. Each negotiation is a very expensive proposition considering trips to South America for the Principals' Meetings and the inevitable hearing process. Mr. Wendt testified that during one of the Principals' Meetings when TMM suggested annual renegotiation the parties did not agree simply because annual renegotiation would be too expensive. [Tr. 114.] The Bureau submits that the only alternative is for the Commission to order renegotiation of the shares under the modification set forth above requiring transcripts of the caucuses and to permit these shares to remain in effect until the agreement expires in 1983.

Initially, it is considered by this Judge to be counter-productive to treat separately the myriad of contentions raised by the Bureau in its briefs. It should be observed also that the Bureau undertook the difficult task of securing by discovery measures the information geared to many of the varied issues and questions posed for resolution here by the Commission's Orders. And, on the basis of the enormous record developed by the parties, the Bureau has provided an in-depth analysis of the controlling issues from its standpoint. What has emerged is that the

Bureau essentially reaches the same conclusions, as proponents, on most issues but, in many instances, from a differing emphasis to the material contained in the record. As noted earlier, fn. 3, *supra*, the proposed findings of facts posed by the Bureau, which formed the nucleus of their argument and position, posed some specific factual problems and represented selective excerpts to fortify their position. (See Moore McCormack and Delta's Reply Briefs.) On the other hand, it is readily admitted that the position of the Bureau on many of those issues finds support in a record of this magnitude. But in viewing these differences, the proponents have clearly demonstrated that their treatment of the areas of disagreement is persuasive in reaching the same conclusions as the Bureau. Delta has provided a concise view of these differences by first observing:

> In the course of its argument, however, [the Bureau] raises several collateral factual points or comments which require clarification and reply. [The Bureau's] position in favor of approvability of these Agreements does not rest on these points, and indeed in several instances was reached in spite of the points noted. The following reply therefore does not adversely impact the validity of [the Bureau's] position on approvability, and in fact strengthens the arguments in favor of approvability.

Delta then persuasively disputes, with appropriate citations to the record, the Bureau's suggestion that Argentina's policy favoring fixed third-flag shares is based upon general economic philosophy and not the actual conditions in the trade. As Delta points out, the record establishes that while Argentina's policy favoring fixed shares may be based in part upon Argentina's general economic philosophy, it also is directly based upon the realities of conditions in this trade. (Delta Reply Brief, pp. 11-14.) Next, the Bureau argues that the third-flag shares under Agreement No. 10382, as amended, are not unjustly discriminatory or unfair and should be approved. The Bureau suggests, however, apparently in an attempt to bolster its argument against the Atlantic Agreement, that the record of the Gulf negotiations indicates that ELMA improperly influenced the negotiations in favor of the Brazilian flag lines. The underlying proposed findings of fact in support of the Bureau's position have been thoroughly treated by the proponents. Moreover, the record reveals that the national flag lines, and not just ELMA, attempted to reach a reasonable accommodation to assist the third-flag lines. (Delta Reply Brief, pp. 14-15, Appendix A.) The Bureau also suggests "SEIM may have exerted an indirect influence on the negotiations by using ELMA as a conduit." In support of this suggestion, the Bureau relies on the acknowledged existence of certain confidential instructions from SEIM to ELMA, and the Argentine Government's alleged refusal to disclose these instructions or to permit

ELMA to testify with respect thereto. Delta, on the other hand, points out that there is nothing which can be drawn from this record to establish that SEIM actually influenced the conduct of the negotiations, either directly or indirectly. As Delta concludes:

> The negotiations ultimately turned on the various commercial arguments raised by the lines and the lines' respective perceptions of their own best interests, including whether they felt that they possibly could get a better result from this Commission. (Delta Reply Brief, pp. 15-17.)

In its discussion of the factors considered by the parties in negotiating their shares, the Bureau argues that little weight should be given to actual capability and future trade intentions and observes that "the parties themselves do not even correlate the pool share to their future services." Delta, on the other hand, responds by showing that the record of the Gulf negotiations establishes that the lines considered not only past carryings (see *GSB-5B*, pp. 7-10), but also the present capabilities and specific vessel commitment and service intentions in their negotiations (*GSX-5B*, pp. 27-29). All of these factors were discussed by the lines, and considered in the proposals made by the national flag lines (*id.*, pp. 33, 37). (Delta Reply Brief, pp. 17-18.)

Finally, the Bureau argues that the withdrawals of Nopal and Navimex from the trade were not related to Agreement Nos. 10386 and 10382, as amended, or the shares of those lines thereunder. While this position is fully supported by the record (see FF's 16 & 74), the Bureau relies in part on the Nopal and Navimex affidavits (*Ex's. 6 & 6A*). These affidavits were admitted, over the objection of the proponents, "as strictly an indication of these individuals [present] state of mind," and not for the truth of the matters asserted therein. (Tr. 32, lines 12-14; 61, lines 12-19). Delta maintains its previously stated position that these affidavits are inadmissible and moves that they be stricken from the record and claims that the Bureau's purported use of these affidavits goes beyond the purposes for which they were admitted. And while Delta's motion will be denied, the facts here, in any event, regarding the withdrawals of Nopal and Navimex establish that the pools and shares therein were not the reasons for the withdrawals (see FF 74). (Delta Reply Brief, pp. 18-20.)

The one major issue of disagreement is that the Bureau considers that the Commission should approve Agreement No. 10386, as amended, "pending a renegotiation of the third-flag shares." It contends that the "[s]hares assigned in the agreement do not accurately reflect the past service of Ivaran or Lloyd." The Bureau observes:

> While the other factors the Commission should consider may account for some of the difference between the pool contributions in the past and the shares assigned in Agreement No. 10386-2, these factors are not so great that they should out-

> weigh the credit which should be given to Ivaran's past service. The shares assigned Hopal and Montemar however, are consistent with section 15 in that prior to the negotiation of the agreement, Hopal provided very little service to the trade, and Montemar provided none.

The Bureau also agrees:

> . . . that Ivaran should not be permitted to carry all of the third-flag share or even such a large portion that the other lines are not able to develop a stable service. In this respect, Ivaran was unreasonable in requesting 16 to 17% of the third-flag share.

Proponents have addressed a number of arguments which ultimately resolve this issue. Lloyd and Nacional argue that the Bureau's position "simply stands without support in the record." (Lloyd and Nacional Opening Brief, pp. 9-14, Reply Brief, pp. 22-23.) [35] Lloyd points to the testimony of Mr. Ornellas, who described the nature of the negotiations as showing that: (1) each party always wants more than it gets, (2) that there are intangibles to be considered, and (3) that each party operates from its own evaluation of the real, the perceived and the intangible factors (*Ex. 11*, p. 4). Most important, he stated specifically that "no carrier . . . in any way denied any carrier the opportunity to negotiate" (*id.*). Lloyd also argues:

> Moreover, what results can be expected to obtain from renegotiation? Given the [Bureau's] well-founded reluctance to define how much "room" it believes Ivarans needs, or how much weight should be accorded the issue of past participation, we submit that the parties should not be subjected to yet another lengthy and expensive round of negotiations, only to find themselves engaged in another lengthy and expensive round of second-guessing by [the Bureau].

ELMA contends that the Bureau offers no guidelines as to what might be an acceptable outcome of such further negotiations. It also argues that the Bureau has failed to consider "what will happen in the trade while these endless purported negotiations are going on with the Agreement 'approved' subject to such renegotiation." In ELMA's view, the trade would revert to "chaos, and severe prejudice to shippers, consignees and carriers." (ELMA Reply Brief, pp. 10-12.)

Moore McCormack also provides the ingredients which necessitate the rejection of the Bureau's suggestion. As it persuasively points out, the Bureau has not provided the specific shares that would be fair to both Ivaran and Lloyd and would, in effect, require the Commission to

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[35] As part of their argument, Lloyd and Nacional rely upon "a telex supplied by Ivarans in discovery but not part of the record here" (Opening Brief, p. 11). Both Ivaran and the Bureau properly object to the consideration of the telex "as a late-filed counsel's exhibit." No consideration will be given to the telex, and it is hereby rejected as an exhibit.

order renegotiation based upon the concept that Ivaran's share under the pool is too low. The result of such an Order may well lead again to protracted litigation. On the other hand, if the Commission determines to set a specific share for Ivaran, the shares of others would be altered with the probable result that SEIM would, in regulating Argentina's foreign commerce, set shares that differ from this Commission.

Furthermore, Moore McCormack realistically evaluates another of the consequences of the Bureau's requirement as follows:

> If the Commission orders renegotiation it will be injecting another factor into the negotiating process by placing a "veto" in the hand of one line, Ivaran. If one line knows that the Commission will order renegotiation of "commercial" arrangements because of a dispute over 3 or 4 percent, that line can frustrate the wishes of the other parties by failing to negotiate in good faith, and waiting for the F.M.C. to act. Moreover, the Commission would be placed in a position of continuously second guessing the actions of the lines. (Moore McCormack Reply Brief, pp. 21-24.)

Under the circumstances presented by this record, the Bureau's proposed modification of Agreement No. 10386-2, to the effect that the Commission should require the non-national flag lines to renegotiate their shares, is found to be impractical, unnecessary, and not warranted. The Bureau's proposed modification seeking the transcripts of the negotiations of the non-national flag lines will be treated later.

AGREEMENT NO. 10386, AS AMENDED, IS FOUND NOT TO BE UNJUSTLY DISCRIMINATORY OR UNFAIR TO IVARAN

The Bureau, in considering the arguments raised by Ivaran and the record, observes:

> The only party to argue against the allocation by fixed share of the third flags' carriage has been Ivaran.
>
> In so arguing, Ivaran has emphasized certain factors and totally ignored others. Its antitrust discussion concludes that its share is too small and thus contrary to the public interest. Although the Bureau agrees that Ivaran's share is too small within the fixed shares, we believe fixed shares are in the public interest. Instead of addressing the public interest aspects of allocation by fixed share rather than by open competition, Ivaran's argument really goes to the *size* of its share, and little further.

The Bureau also has argued that the allocation of fixed shares for the non-national flag lines is in the public interest. (Reply Brief, pp. 12-16.) The Bureau also concluded that the factors influencing the negotiations of the Agreements do not render them unapprovable by the Commission. In that regard, the Bureau states:

> . . . an analysis of the negotiating process demonstrates that certain pressures influenced the third-flag lines to accept, if not specific shares, relative share sizes, but that the existence of these influences does not a) deprive the Commission of jurisdiction to approve the agreements, or b) render the agreements contrary to the public interest and therefore unapprovable under section 15. (Reply Brief, p. 16.)

As the Bureau has noted, Ivaran has emphasized certain factors and totally ignored others in its argument. Indeed, as Moore McCormack also pointed out, Ivaran's argument here "is premised upon a host of erroneous factual contentions." Moore McCormack has supplied a detailed treatment to almost all of the record "support" relied upon by Ivaran. (Moore McCormack Reply Brief, Appendix A, pp. 37-77.) A few examples will point to the problem in relying upon Ivaran's factual contentions. Ivaran claims that SEIM and SUNAMAM refused to allow ELMA's representative to testify to any instructions that SEIM gave to ELMA. (Ivaran Reply Brief, pp. 23, 30.) However, the witnesses' testimony does not support such a conclusion. (Moore McCormack Reply Brief, Appendix A, pp. 71-73.) Ivaran also states, "As previously demonstrated (Iv. PFF 12-24), Ivaran has provided a much more efficient, innovative and loyal service over a period of years to the shipping public in this trade than Lloyd. These factors must weigh heavily in share negotiation." (Ivaran Reply Brief, p. 33.) But the sweep of Ivaran's reliance upon its proposed findings is diminished considerably when viewing the considerations of the record omitted from Ivaran's proposed findings. (Moore McCormack's Reply Brief, Appendix A, pp. 46-56.) Ivaran also makes the claim that it "is the only carrier introducing new tonnage to the trade (Iv. PFF 2)." (Ivaran Reply Brief, p. 33.) A review of Ivaran's proposed finding reveals that of the four vessels listed, two are on short-term charter and that Ivaran's "commitment" to the trade may be more limited than its argument suggests. (Moore McCormack Reply Brief, Appendix A, p. 38.) Ivaran also states, "As Mr. Holter-Sorensen explained when lines are granted a share far beyond its ability to carry, the only way to meet its share is by rebating which, coupled with decreased service to shippers, benefits no one. (*ASX-11(c)*, p. 80 and pp. 211-215 and Iv. PFF 39)." (Ivaran Reply Brief, p. 34.) However, Mr. Holter-Sorensen also testified that with respect to his allegation of rebating that "This is second-degree hearsay . . . I don't have any evidence" (*ASX11(c)*, p. 81). Later he testified that he was "quite sure" Lloyd Brasileiro was not rebating (*id.*, p. 212). Ivaran also states that Moore McCormack "conveniently ignores Mr. Holter-Sorensen's testimony that Ivaran began cutting back its service because of these fixed shares. (Iv. PFF 17 & 18)." (Ivaran Reply Brief, p. 36.) However, a review of Ivaran's PFF 17 and 18 reveals misstatements of the record and argument without

supporting citations. (Moore McCormack's Reply Brief, Appendix A, pp. 50-53.) And even assuming that a pool share restricted an ability to lift cargo, an assumption not justified on this record, the question here is whether Ivaran in the next year will carry slightly more than 3,000 tons of cargo. And the suggestion that Ivaran "may be forced to withdraw from the trade" is considerably weakened considering its stipulation that approval of Agreement No. 10386, as amended, will not cause any curtailment of its service, jeopardize its ability to continue serving the trade, or adversely affect its profitability (FF 66). And while Ivaran takes issue that "it stipulated that the Agreement would not economically harm" itself, nonetheless it "agreed it would not raise any contentions of its economic position." (Ivaran Reply Brief, pp. 35-36.) A stipulation of that nature has, of course, at least two results: (1) based upon the stipulation, the proponents failed to pursue discovery requests in this area, and (2) the record is devoid of supportable conclusions concerning Ivaran's view of its economic position.

These examples are but a few illustrations which illuminate the frequent use by Ivaran of its proposed findings which are either based upon a selective and narrow view of the record or are argumentative in nature. Certainly, it should be unnecessary here to resort to constant refutation of its many arguments and the supposed record support for each. Again, after a review of this record and because of the expedited nature of this proceeding, this Judge should not be required to provide attentive consideration to arguments based upon such proposed findings. This is especially appropriate where the briefs of the proponents, as well as the Bureau, provide ample and persuasive response to the arguments of Ivaran. Notwithstanding these observations, the treatment of the substantive arguments raised by Ivaran, as provided by the other parties to this proceeding, substantially respond to the contentions raised and will be presented next.

(1) RECIPROCITY BETWEEN BRAZIL AND ARGENTINA WAS NOT THE SOLE BASIS FOR DETERMINING THE POOL SHARES.

Ivaran argues that the only basis for the third-flag shares was "total reliance on the reciprocity factor in favor of Lloyd" and that "reciprocity" in favor of Lloyd was achieved through an agreement between the governments of Argentina and Brazil. Admittedly, the argument that reciprocity should be considered in fixing shares was one of many negotiating points used by Lloyd, however, the record fails to provide what weight, if any, that factor played in reaching the final pool shares. Moreover, the record fails to demonstrate that there was an agreement in fact between the governments of Argentina and Brazil providing for reciprocity in their trades with the United States (FF 87),

and even if there were, an agreement of that nature would have little impact upon the negotiation of the third-flag shares since SEIM played no role in the third-flag negotiations of the Argentine pool and SUNAMAM played no role in negotiations of the Brazil pool. If there were in fact an agreement for reciprocity, the Argentine carriers necessarily would have received comparable treatment in the Brazil trade. The record shows that in that trade the Argentine lines received no "reciprocity," because of an agreement between the government of Norway and Brazil in favor of Ivaran which precluded any increase in the share of the Argentine lines (Moore McCormack Reply Brief, Appendix A, pp. 42-43, 62-64). Finally, the Commission held in *Docket Nos. 78-51 and 78-52, supra,* that Lloyd's negotiating position urging reciprocity was not in and of itself determinative of the existence of an agreement between the carriers to that effect (pp. 1114-1115). (See also FF 46, 53-55 and the treatment of Ivaran's factual contentions concerning reciprocity, Moore McCormack Reply Brief, Appendix A, esp. pp. 56-66, 68-69, and Lloyd's Opening Brief, pp. 10-14, 18-20.)

(2) FIXED SHARES WERE NOT UNEQUALLY APPLIED.

In its opening brief, Ivaran claims that "there was *no* commercial basis for the allocation. Ivaran submits that reciprocity was the determinative factor and that total reliance on the reciprocity factor in favor of Lloyd was manifestly unfair to Ivaran and the shippers of the trade." (Brief, p. 58.) It also argues that:

> [T]he situation at hand has not appreciably changed from June 22, 1979, [the date of the service of the Commission's Order in *Docket Nos. 78-51 and 78-52, supra*]. The only change has been SEIM's statements that fixed third flag shares are desirable based upon reciprocity with Brazil. It has not been shown that SEIM's position is not supported by any Argentine statutes legislation or resolutions. Therefore, the Commission's decision in Agreement 10349, that the allocation of fixed third flag share was unjustly discriminatory and unfair, is equally applicable here. (Brief, p. 60.)

Again, the claim that the requirement for fixed shares represents any kind of "arrangement" with Brazil finds little support of record. Actually, the requirement for fixed shares applies to all carriers (in both the Atlantic and Gulf trades). And it is justifiable to argue, as Moore McCormack has, that if Ivaran had been able to persuade other third-flag carriers that it was entitled to virtually the entire 20 percent third-flag share, then perhaps it would not be complaining about the application of the fixed share requirement.

(3) THE CLAIM OF CONFLICT BETWEEN THE TERMS OF AGREEMENT NO. 10386, AS AMENDED, AND THE INTERGOVERNMENTAL AGREEMENT IS IRRELEVANT IN CONSIDERING WHETHER THE AGREEMENT IS UNJUSTLY DISCRIMINATORY OR UNFAIR.

The claim that Agreement No. 10386, as amended, "goes far beyond the actual terms" of the Intergovernmental Agreement, even if true, would be irrelevant to whether the agreement was unjustly discriminatory or unfair, unless the Intergovernmental Agreement provided that there would *not* be fixed third-flag shares. The evidence indicates that fixed shares for all lines participating in the commercial carrier agreements was what the two countries anticipated (FF 40). And the record shows that the Argentine Government understood (and insists) that the Intergovernmental Agreement would be implemented by fixed shares (*SX-40*, p. 8). The Maritime Administration has advised the Commission that paragraphs 1 and 2 of the Agreement [36] "also contemplate that there will be commercially agreed shares for such third-flag carriers as participate in the trade" (*SX-22B*). And Mr. Nemirow testified at his deposition that the agreement contemplated that third-flags would participate in accordance with the appropriate legislation in each country, and if Argentine law required fixed shares then that is the way in which the third-flags should participate (*SX-3A*, p. 32). And, as noted above, the testimony and evidence show fixed shares to be a requirement of Argentine law. (FF 37 and 38, Moore McCormack Reply Brief, Appendix B, pp. 78-79.)

[36] As the Bureau points out:

Ivaran mischaracterizes the Argentine/United States Memorandum as not addressing fixed third-flag shares. In citing the Memorandum's intent not to affect third-flag rights, it fails to quote all of the relevant language:

1. Each party recognizes the intention of the other Party in carrying a substantial portion of its liner trade in vessels of its own flag in accord with appropriate legislation in each country. For purposes of this paragraph, vessels of Argentina shall include vessels under Argentine registry or charter.

This provision, established in the light of the reciprocal interests of the two countries, *does not affect the rights of flag vessels of third parties to carry goods between the ports of the two Parties, as implemented in the terms of Paragraph 2 below*, and in accord with the appropriate legislation in each country.

2. The establishment of *mechanisms and procedures necessary to the implementation of the carriage of cargo envisioned in Paragraph 1* of this Memorandum of Understanding, *such as revenue shares for the lines in the trade*, number of sailings, over-carriage and undercarriage provisions, and similar matters, will be determined by commercial agreement between their respective national flag carriers, subject to approval by the appropriate governmental agencies of each of the Parties. (Emphasis added.) (Bureau's Reply Brief, pp. 14-15.) (See also FF 31-33.)

(4) THE RECORD ESTABLISHES THAT IVARAN'S SHARE IS BOTH JUSTIFIED AND FAIR.

In the Commission's *Order Denying Motion to Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389,* served January 29, 1981, *supra,* two issues were raised with respect to the division of third-flag shares: (1) whether the specific shares "are based on valid commercial considerations" (Appendix first unnumbered paragraph), and (2) if any of the third-flag carriers "accepted a significantly larger or smaller share . . . than its historical share . . . what is the basis for the new share?" (*id.*, p. 6).

What emerges from an evaluation of these issues is that this record cannot possibly provide answers to the precise weight that should be afforded to *all* factors utilized in arriving at any given share. Although Ivaran's share is several percentage points below its actual participation in 1979 and 1980 (FF 17), and Lloyd's is significantly larger (id.), the "basis" for these shares appears to be the "best bargain" each could reach under all of the considered circumstances.

In Ivaran's limited view of the record, "its past history and demonstrated capability went for naught in the Atlantic because it was totally overshadowed by Lloyd's high card zonalism and reciprocity with the attendant supporting hands of SEIM and SUNAMAM." (Reply Brief, p. 25.) Ivaran's principal argument is that past participation should operate to the virtual exclusion of all other factors, and that a carrier offering new service had to be content with an unprofitable one or two percent and then fight its way in (FF's 53, 55, 56). But it also argued that both the F.M.C. and SEIM were of the opinion that the share it negotiated in March (9%) was unfair (FF 55). It considered both the financial and political impact of continuing to fight the other lines (*id.*; *ASX-11(c)*, MM-1, p. 78). And Ivaran's decision as to the point at which it would yield to arguments of the third-flag lines was demonstrated to be on numerous factors (FF 55). One factor was how this Commission would view its "bottom line." In mid-1979 when operating under "open competition," Ivaran had "hoped" to "carry a position between 12 and 15%" (*ASX-11(c)*, MM-1, pp. 3 and 16), and during the May negotiations it "felt that if we reduced our requirements down to 12 or 13% and still did not sign . . . the margin between what the other lines were prepared to agree to and what our requirements were, were so small that the F.M.C. would say the difference was so insignificant that they would dismiss our protest" (*ASX-11(c)*, MM-1, p. 77). See also *ASX-11(c)*, Tr. 21-23. Ultimately, "one of the most important factors . . . [was] that Ivaran will be able to continue in this trade and if the trade continues as strong, it will put Ivaran in a sound financial position." (*ASX-11(c)*, MM-1, p. 78.) These are but a few examples of factors other than its "past participation" in arrival as to the shares. Moreover,

the Bureau concluded that it does not "dispute that Ivaran's tactics contributed to the size of the pool share it accepted." Its area of disagreement, on the other hand, "goes to the point that Ivaran was not dictated a particular pool share, a position with which the Bureau agrees." (Reply Brief, p. 18.)

Lloyd argued first that its share must be sufficient to enable it to offer an economically sound and competitive service (FF 54; *Ex. 11* (Ornellas), p. 4). It also argued, *inter alia* that its share should reflect its capability [37] and commitment to the trade and its position as a "zonal" flag and entitlement to reciprocity because of the substantial contribution that the Brazil trade makes to the entire cargo movement on the trade route (FF 54).

The record clearly has demonstrated that many factors contributed to the final results reached after negotiations. It is equally clear that each factor cannot be assigned with any mathematical precision in the eventual outcome. But most important is that "past participation" was considered to the extent that Ivaran received the largest third-flag share. Also what clearly amounts to commercial negotiations involving many factors defies any realistic attempt to determine the exact role of each in reaching shares. Indeed, the unknown and unstated rationalization behind any possible "bluffing" or otherwise in the negotiations certainly cannot be fixed with a percentage point one way or the other.

Other observations are necessary concerning Ivaran's past carryings. First, Ivaran's recent past carriage, as reflected in FF 17, is not so much greater than its initial pool share. Second, Ivaran's claim of 16 or 17 percent of the pool had to give way to a lesser share since it had sought virtually the entire third-flag share, and in order to make room for the other third-flag lines to operate economic services, Ivaran had to reduce its share demands below its past participation. In *Docket Nos. 78-51 and 78-52, supra*, the Commission acknowledged that if past carryings were the principal factor in reaching shares, "Ivaran . . . would be entitled to the entire third-flag allocation . . . [and that] . . . would be inequitable and would unreasonably deny the other third-flag carriers access to the United States/Argentine trades" (p. 1113). The Commission qualified its endorsement of the importance to be attached to past carryings in considering pool shares (emphasis added):

> [P]ast carryings of other carriers cannot be disregarded. *To do so could well result in the abrupt curtailment of the services provided by a carrier* who had been carrying significant amounts of cargo. (*Id.*)

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[37] Ivaran recognized that "Lloyd has, of course, the financial backbone to install a larger number of vessels if they feel so compelled." (*ASX-11(c)*, MM-1, p. 3.)

And as noted above, Ivaran has failed to persuasively show that approval would force it to curtail its service; it has stipulated that approval will not "cause any curtailment of its service to the trade" (FF 66(a) and (b)), and has stated that approval will not force it out of the trade (*id.*). And the record also shows that the 1981 cargo theoretically "lost" to Ivaran because of its reduced share is approximately 3,300 tons. (Moore McCormack Reply Brief, Appendix A, pp. 5153.)

Moreover, the so-called "national interest" factor commented unfavorably upon by the Commission in *Northern Pan-American Lines (Nopal) v. Moore McCormack Lines, Inc., et al.*, 8 F.M.C. 213 (1964), a proceeding relied upon by Ivaran here, was included by the Commission in *Docket Nos. 78-51 and 78-52, supra*:

> Since its decision in Nopal, the Commission has, at least to some extent, determined that national-flag interests *are an appropriate factor that should be considered* when evaluating Section 15 agreements that derive their impetus from foreign cargo preference laws. [p. 1113, note 40; citations omitted; emphasis added.]

Certainly there are additional factors that operated in a fashion to determine the shares in addition to the reliance upon past carryings as argued by Ivaran and to an extent by the Bureau. (Moore McCormack Reply Brief, pp. 31-34.) But the Bureau, unlike Ivaran, has recognized that "past carriage is not the only factor which the Commission should consider under section 15" and agrees that "Ivaran does not have a 'property right' to a certain share by virtue of its past carriage. . . ." (Bureau Reply Brief, p. 23.)

Finally, as Moore McCormack also points out, the pools have revenue exclusions and forfeiture provisions which will protect Ivaran from any actual unfairness. The minimum sailing forfeiture provision, the undercarriage forfeiture provision, the carrying compensation provision, and the 50 percent penalty payment provision (FF 62-65) all operate to severely penalize a line which does not meet its service obligations or does not carry its share, and to cushion the impact that the agreement has upon an overcarrier. (Moore McCormack Reply Brief, p. 34, Opening Brief, pp. 53-56.) Ivaran points to the testimony of Mr. Crowley concerning the undesirable features of utilizing penalty provisions (*Tr.* 487-488) and claims that it would be losing the support of shippers not being served during this "forced" period of acceptance of penalty payments which it may receive from lines that cannot meet their share. (Ivaran Reply Brief, p. 34.) But, as Moore McCormack has shown, in the pool calculation for the first three months of the pool (October through December 1980) (*Ex. 19* (Crowley) Attachment D), Ivaran had a pool share of 10.5%. It carried 14.95% of the pool revenue during this period, but paid a "penalty" of only $21,835. The pooling provisions had the following effect: First, because Lloyd Brasi-

leiro and Montemar failed to make their minimum sailings, their shares were reduced and redistributed to Ivaran and Hopal, giving Ivaran a 14.933% share rather than 10.5%. Second, of its total pool earnings of $629,194 (the 20.5% bunker surcharge was *not* pooled), Ivaran deducted and retained $228,059 in carrying compensation. Third, because Lloyd and Hopal did not carry 85% of their share most of their undercarriage credit was forfeited to Ivaran, Moore McCormack, and ELMA/Bottacchi (see *Ex. 19*, Attachment D, part D, Forfeiture Calculation). The net effect of these adjustments was an overcarriage penalty payment by Ivaran of $21,835 and by the Argentine lines of $486 (Column 33). Comparing Ivaran's penalty with its gross revenue (including surcharges, etc.), the pool penalty cost Ivaran less than three cents on the dollar of gross revenue (FF 67(a)). The actual experience for the first three months of the pool shows it has neither been unfair to Ivaran nor unduly penalized by it. Furthermore, the carriers must earn their respective percentages by serving the trade and carrying the cargo. (FF 67(b); *Ex. 19*, pp. 12-13; Moore McCormack Opening Brief, pp. 54-56).

In balancing *all* of the factors necessary, especially the impact upon Ivaran as opposed to the many benefits derived from approval of the agreement, it is found that Agreement No. 10386, as amended, is not unjustly discriminatory or unfair or contrary to the public interest considerations imposed under section 15.

THE RESPONSE TO THE INCLUSION BY THE COMMISSION OF SPECIFIC ISSUES AND QUESTIONS TO BE ADDRESSED IN THIS PROCEEDING

The Commission's Order Denying Motion To Terminate, Vacating the Stay of Proceedings, and Approval of Agreement Nos. 10388 and 10389, served January 29, 1980, *supra*, amended the earlier Order of June 30, 1980, "to include the issues set forth in the Appendix to this Order," slip. op. 77. The Appendix (pp. 1-4) listed four issues and added, "In addressing these issues, the parties to this proceeding should develop information in response to the following specific questions. They should not, however, consider the proceeding limited to these questions if circumstances indicate other areas of inquiry." The Appendix listed 14 specific questions.

A few preliminary observations are necessary before the treatment of these issues and specific questions. The resolution of many of these issues and questions can be found in the extensive findings of fact utilized in this decision. Furthermore, the position of the parties has been detailed earlier in this decision. Both the Bureau and Ivaran,[38] in

[38] Ivaran provided its responses in its Reply Brief thereby precluding a treatment of its views by the other parties. (Reply Brief, Appendix 1.)

addressing the four issues,[39] have essentially responded by references to portions of their briefs which also have been considered and treated to the extent necessary in this decision.

The discussion of the fourteen questions by proponents are contained in Lloyd and Nacional's Opening Brief (Appendix pp. 1-13), and both Moore McCormack and Delta concur in the presentation of the summary of those views.

The following will set forth the Commission's specific questions, a summary of the responses, and the conclusions of this Judge which adopt, in large measure, those submitted by the proponents. The Bureau has provided references to its Opening Brief in support of its responses, while Ivaran, for the most part, provided none.

1. Does Argentine law require fixed third-flag shares and, if so, does it specify the size of any such shares?

Both the Bureau and Ivaran agree that the "record does not reveal a requirement of Argentine law but Argentine policy clearly favors it."

This issue has been treated above and, although the record does not contain a specific Argentine law to that effect, the testimony reflects that the Argentine Government has stated that its laws require fixed shares (*SX-40*, pp. 8-10) and this was confirmed by the Assistant Secretary of Commerce (*SX-3A*, p. 33). See also, *SX-10*, p. 6, Ex. 15, p. 2.

In addition, the record supports the contention that neither Argentine law nor policy specified the size of any share of the third-flag lines. Argentina's position, as set forth by SEIM, has been that there should be fixed shares with no less than 80% reserved for the national lines, and no more than 20% reserved for the third-flag lines (*Ex. 15*, p. 4), and that it has no views as to specific percentages to be determined among the lines (*SX-40*, p. 10; *Tr.* 331; *ASX-11(c)*, MM-1, pp. 30-31, 58).

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[39] The four issues set forth by the Commission are as follows:

Whether fixed, individual shares for third-flag carriers in these trades are necessary to meet serious transportation needs, to achieve important public benefits, or to fulfill valid regulatory purposes of the Shipping Act and, if so, whether the specific third-flag shares fixed by these Agreements are unduly discriminatory or unfair between carriers, whether they are based on valid commercial considerations, and whether they are the result of direct or indirect coercion by the Government of Argentina or any other person.

Whether the facts surrounding the negotiations and execution of these agreements indicate conduct inconsistent with the provisions of the United States/ Argentina Memorandum of Understanding of March 31, 1978, requiring that the "mechanisms and procedures necessary to the implementation" of the Memorandum be determined by "commercial agreement", either by showing imposition of the will of the Government of Argentina, directly or indirectly, or coercion by any other party.

Whether the provisions of the Agreements providing for penalties for overcarriage and undercarriage unnecessarily restrict competition among third-flag lines within the 20 percent share to these lines and, if so, whether those provisions should be amended.

Whether the provisions of the Agreements giving third-flag carriers who are parties to the Agreements control over the cargo shares assigned to any new third-flag parties are unnecessarily restrictive or unduly discriminatory among carriers, and, if so, whether those provisions should be amended.

2. Is there any evidence that the decision to renegotiate Agreement Nos. 10346 and 10349, to provide for fixed third-flag shares, resulted from requests to do so by non-Argentine carriers?

The Bureau states that the record reveals that Delta requested a Gulf Principals' Meeting, but that ELMA had been planning to call one. Ivaran's response is simply "that the decision to renegotiate fixed third-flag shares had its origin in the position of SEIM and possibly SUNAMAM."

The record reflects that the decision to renegotiate those Agreements was indicative of a policy determination of the Argentine Government. On December 26, 1979, SEIM advised the Inter-American Freight Conference Section B that its approval of these Agreements (and the corresponding southbound pools) would expire on March 31, 1980, and before that date SEIM "will definitely decide on the manner in which third-flag lines will participate in the trade from Argentina to the U.S. East and Gulf Coast ports" (*SX-9*). SEIM has stated that "Because such 'open competition' is contrary to the maritime laws and policies of Argentina, SEIM, after consultation with and the support of the U.S. Maritime Administration and the State Department, instructed ELMA to call another meeting to arrive at fixed shares." (*SX-40*, pp. 9-10.) Delta also requested ELMA to call a meeting of the Gulf pool principals at the earliest possible date to discuss SEIM's announcement and possible alternative pool conditions to be adopted (*GS-25*; *Ex. 7*, pp. 12-13).

3. Are executives of the involved Argentine carriers Government officials? If not, were they appointed to their positions by the Argentine Government, or can they be disciplined or discharged by the Argentine Government?

The Bureau concludes that "the record reveals that the Board of Directors of ELMA is appointed by an agency of the Argentine government but is incomplete beyond that." Ivaran agrees and adds that "Bottacchi was described as a privately held company in testimony given."

The record indicates that the Board of Directors of ELMA is appointed by the State Secretary of Maritime Interests, which in turn designates the executive officers of ELMA (*SX-36*, p. 1). SEIM does not control ELMA's commercial operations (*Tr.* 306), and the available evidence is that ELMA's executives are not government officials (*Tr.* 302). Bottacchi is a privately-held company which appoints its directors and officers without the involvement or approval of the Argentine government (*SX-36*, pp. 1, 6). Moreover, the record fails to establish that these executives are even subject to discipline or discharge by the Argentine Republic.

4. Are there transcripts available of the negotiations for third-flag participation in the northbound trades?

Although there were no transcripts made of any of the caucuses of the Principals' Meetings in which Agreement Nos. 10382 and 10386 were negotiated, the pool transcripts contain reports by the third-flag lines of the results of the caucus (Stipulation of Fact No. 1). And while no recordings were made of the separate third-flag caucuses which occurred in the Atlantic Coast (March 18-19, 1980, and May 19–20, 1980) or Gulf Coast (February 12-13, 1980, and May 22-23, 1980) pool meetings, statements regarding the caucuses were made at the Principals' Meetings and are reflected in the transcripts thereof (*ASX-4* and -*6*, and *GSX-5* and -*9*).

The Bureau has urged that both Agreements should be modified to provide for transcripts of the negotiations of the non-national flag lines. That contention will be treated in the next section of this decision.

5. What are the carryings (by shares of total revenue tons) of all third-flag carriers in the northbound trades for the period from January 1, 1975, through the most recent date for which such information is available?

The Bureau's response to this question is: "See *ASX-9* and *GSX-18* for carrying statistics since the second semester of 1976. The Bureau has been informed that earlier statistics were not kept. The Bureau believes that the available record on this point is sufficient to support decisions regarding approvability." Ivaran contends "that the available record on this point clearly demonstrates the inequality of granting Ivaran and Lloyd comparable pool shares."

A brief summary of the cargo carryings and sailings of the lines for the period 1977 through 1980 is provided in FF 17 and 18 regarding the Argentine/East Coast trade and in FF 22 and 23 covering the Gulf trade.

Prior to July 1976, reliable statistics on the carryings of the individual lines in the Argentina-U.S. trades are not available. A summary of carrying statistics for the period beginning July 1976 through December 1978 is provided in *SX-37(A)*, based on carrying statistics of conference members moving cargo from Argentina to U.S. East Coast and Gulf Coast ports.

Carrying statistics for Gulf pool members under Agreement Nos. 10346 and 10382 are summarized in *GSX-18(H)*, and the specific pool reports for the period December 1978 through December 31, 1980, are set forth in *GSX-18(A)-(G)*. For the Atlantic agreements, northbound cargo statistics are provided in *ASX-9*. These statistics include conference reports for the period July 1976 through December 1978 (*ASX-9*, pp. 1-15); carryings under former Agreement No. 10349 for the period through June 30, 1980 (*ASX-9*, pp. 16-34); and pool accountant's reports pursuant to Agreement No. 10386 through the period ending December 31, 1980 (*ASX-9*, pp. 34-40).

6. Have any of the third-flag parties to these Agreements accepted a significantly larger or smaller share of the pooled cargo than its historical share? If so, what is the basis for the new share? The Bureau summarizes its position developed on brief as follows: "The Brazilian flag and Ivaran have accepted larger and smaller shares, respectively, in Agreement No. 10386-2." Ivaran agrees by relying upon the citations to the Bureau's brief and adds thereto *SX37*.

As to the Argentina-U.S. East Coast pool, the evidence indicates that in the Argentina-East Coast pool, Agreement No. 10386, as amended, Lloyd negotiated a larger share than it has historically carried. Ivaran, on the other hand, negotiated a share smaller than its historical carriage in this trade. Also, the shares ultimately accepted by the parties to Agreement No. 10386 were established on the basis of commercial negotiations among the lines participating in the third-flag portion of the pool. Although the parties have argued both sides of the question of whether the third-flag shares resulted from the "commercial negotiations," this Judge is persuaded that the predominance of the evidence supports a finding that the Agreements are true commercial agreements where (1) the competing interests bargained to achieve the most favorable result; (2) there was no showing of actual "dictation" or "coercion" by the governments or carriers involved; and (3) the pooling agreements are a result of the type of arrangement contemplated by the Intergovernmental Agreement. All witnesses presenting direct testimony or appearing at the hearing expressly indicated that the shares agreed upon were the result of open, commercial discussions (*Ex. 11* (Ornellas), pp. 3-4, 5; *Ex. 15* (Dandois), pp. 4, 6; *Ex. 18* (Schliemann) pp. 2-3; *Ex. 19* (Crowley) pp. 6-7). The substance of the third-flag negotiations are described in FF's 46, 53, 54 and 55. Moreover, while the commercial considerations underlying each share are not capable of precise formulation and assignment of weighted value, the substance of these discussions are described in FF 44, 54, 57, 58, 59 and 60.

Turning to the Gulf pooling agreement, No. 10382, all third-flag carriers negotiated shares in excess of their historical carrying prior to the pools. Lloyd and Nacional jointly negotiated a Brazilian-flag share which was less than their carriage participation under the "open competition" requirements of Agreement 10346, as amended (*Ex. 11*, p. 6; *Ex. 7*, pp. 27-28).

7. Did the divisions of third-flag shares in the northbound Argentine trades under these Agreements arise from any agreement or understandings, formal or informal, between the Argentine Government and any other third-flag government?

The Bureau summarizes its position, taken on brief, that "the record is not clear on this point." Ivaran agrees with the Bureau by stating that the record is not clear because of the "failure of ELMA and Bottacchi to respond to discovery requests or cross-examination on this

issue. Under the circumstances the Commission should draw the inference that fixed shares were the result of an agreement between Brazil and Argentina." In support of this contention, it points to its brief which treats the so-called "SEIM and SUNAMAM Involvement." (Reply Brief, pp. 21-25.) Although this issue is treated above, the record fails to reflect evidence of any agreements or understandings between the Argentine Government or any other third-flag government concerning the divisions of third-flag shares in the Northbound Argentine trades. The witness for Lloyd testified that, to his knowledge, the August 1979 Memorandum of Understanding between SEIM and SUNAMAM did not apply to the Northbound U.S. trades and that if it did, he would have received instructions from SUNAMAM. (*Ex. 11*, p. 9.) SUNAMAM also confirmed to the United States representatives in Brazil that it did not issue instructions to Lloyd concerning the pools from Argentina to the United States (*SX-34(c), (d)*). Similarly, Mr. Schliemann of Bottacchi testified that the Memorandum of Understanding of August 10, 1979, was not applied to these pooling agreements (*Tr.* 427-428). And meetings were held in April 1980 between Norwegian and Argentine officials concerning shipping matters where Admiral Guevara of SEIM announced that new pool meetings would be convened in May 1980 to permit Ivaran to renegotiate its share (*ASX11(c)*, MM-1, p. 58).

8. Is the current fixed share of northbound pool cargo held by the Argentine flag lines in the Brazil/U.S. trades the result of an agreement or understanding, formal or informal, between the Governments of Brazil and Argentina?

The Bureau concludes that the record is not clear on this point. Ivaran agrees and attributes that again to the "failure of ELMA and Bottacchi to respond to discovery requests or cross-examination on the issue."

The record fails to reflect that the Argentine line's share of the Brazilian pools is the result of any agreements or understandings between those two countries. Mr. Wendt, head of Delta's negotiating team at the Principals' Meetings for the Brazil-U.S. Gulf pools, testified that all pool shares were established on the basis of commercial negotiation (*Ex. 7*, pp. 23-24). The commercial nature of these discussions can be found in the record (*GSX-17*; *ASX-7*; *ASX-8*).

9. Did open competition among third-flag lines under Agreements Nos. 10346 and 10349 result in overtonnaging, unstable rates, rebating or any other malpractices in the northbound trades?

The Bureau concludes that the record reveals that it did not and Ivaran agrees.

The record fails to reflect that open competition resulted in unstable rates, rebating, or other malpractices in the northbound trades (*SX-38*). There is some evidence of overtonnaging during the period of open

competition (*Ex. 11*, pp. 6-7; *SX-38*, p. 3). It was discussed during the March pool meeting (*ASX-4*, p. 11) and commented upon during the hearing (*Ex. 19*, p. 17; *Tr.* 489-490).

10. Were any third-flag lines discouraged from participating in the 20 percent open competition share, required by the Commission under Agreements Nos. 10346 and 10349, by any actions of the national flag lines or the Government of Argentina?

The Bureau concludes "Such reluctance to participate was not evidently caused by national flag or Argentine governmental action." And Ivaran "does not take issue with [the Bureau's] answer."

The record fails to reflect that the actions of the national-flag lines or the Government of Argentina discouraged any third-flag line from participating in the pools under "open competition."

11. Is the United States a signatory to any treaties on maritime matters with any of the countries under whose flags the third-flag carriers participate in the northbound trades? If so, would approval by the Federal Maritime Commission of fixed third-flag shares conflict with the United States' obligations under those treaties?

The Bureau contends that:

> . . . the 1928 Treaty of Friendship, Commerce and Navigation between the United States of America and Norway, 47 Stat. 2135, requires that Norwegian flag vessels be given a pool share equal to shares given to any of the United States' trading partners, then both the Argentine share and the Ivarans share must be condemned. Only pooling agreements with equal shares for all would be consistent with an obligation to treat all trading partners equally.
>
> * * *
>
> In acknowledging the right of Argentine flag vessels to carry more cargo in the trade from Argentina to the United States than non-national flag lines, did the Memorandum of Understanding violate a treaty obligation? The question is not one properly before the Federal Maritime Commission. The Memorandum of Understanding was cleared by the Department of State as being consistent with overall foreign policy. (*SX-2*, pp. 28, 29.) Whether the Department of State erred in this regard is not for the Commission to decide.

The Bureau points to *Agreement No. 9939 Pooling, Sailing and Equal Access to Government-Controlled Cargo Agreement*, 16 F.M.C. 293 (1973), where the Commission concluded, in the absence of a Memorandum of Understanding or other agreement, that 50-50 agreement between a United States carrier and a Peruvian carrier, which excluded Westfal-Larsen, a Norwegian carrier, was not contrary to the 1928 Treaty of

Friendship, Commerce and Navigation with Norway. (Bureau Opening Brief, pp. 57-58.)

Ivaran's response is simply that it "does not take issue with [the Bureau's] answer."

The proponents also point out that, by agreement of counsel, it was concluded that the foregoing treaty questions are legal, not factual, issues for determination. (See Transcript of Prehearing Conference, February 19, 1981, at 11-12.) And, it has been settled in at least two additional proceedings that agreements of this type do not infringe on the treaty obligations of the United States: *Agreement No. 10066 Cooperative Working Arrangement, supra*, pp. 1243-44, and *Alcoa Steamship Company, Inc. v. Federal Maritime Commission, supra*, p. 761, n. 12.

12. Have any carriers withdrawn from the northbound trades or been unable to enter them during the period January 1, 1978, through September 30, 1980? If so, what were the circumstances surrounding such occurrences?

The Bureau responded to this question by referring to its brief wherein it concluded:

> In summary, fixed non-national flag shares can hardly be blamed for either the demise of Navimex or Nopal's decision to leave the trade. There was a substantial amount of nonpool cargo moving which either line could have carried. . . . Open competition benefited Ivaran and penalized other smaller non-national flag carriers in the Argentina/U.S. East Coast trade. It may have caused the Brazilians to stop service in the Argentina/Gulf trade, although it did not have that effect in the Atlantic. It did nothing to prevent carriers from leaving the Argentine/U.S. Gulf trade. (Bureau's Opening Brief, p. 49.)

Ivaran states "Ivaran does not take issue with [the Bureau's] answer."

The record reflects that Navimex and Nopal are the only carriers which withdrew from the trades during the period January 1, 1978, through September 30, 1980. (Stipulation of Fact No. 2.) In neither instance is there any evidence that the respective shares of the two lines in the Argentina-U.S. Gulf pools was a factor in their withdrawal. (FF 16 and 74.) Netumar has suspended its participation in the Argentine/U.S. East Coast Trade during this period as well. Should it resume operations in the trade, its participation in any pooling agreements then in force will be derived from the Brazilian-flag quota (*id.*). And there is no evidence of any carrier having been unable to enter the trade during this period.

13. What will be the short-term and long-term effect of these Agreements (if they are approved) on U.S. importers in these trades?

The Bureau treated this question in its Opening Brief and a number of its proposed findings of fact. As part of its conclusion, it stated that "There is no evidence that open competition had any effect one way or

the other on importers." (Opening Brief, p. 46.) Ivaran's response is rather brief. "See Iv. PFF No. 23."

The effect upon U.S. importers has been discussed above. Suffice to say here that no shipper affidavits were supplied by Ivaran or by any other source indicating that Agreement No. 10386 would adversely affect their business or their ability to use Ivaran, or that approval would have any adverse impact upon them. There is record support to conclude that in the short term, approval of the Agreements will provide for a continued stability of the trades, and in the long term, will permit continued development and alternative third-flag services to U.S. importers. (For an in-depth discussion of the evidence of record concerning the impact upon shippers, see FF's 82-86.)

14. May a carrier (national or third-flag), who is not a party to these Agreements, obtain cargo in the northbound trades? If not, what is the mechanism which excludes such a carrier from obtaining cargo?

The Bureau in its brief observed that "[w]hatever factors were openly expressed and considered by the parties in agreeing upon shares, all decisions were made against the backdrop of Argentine law and policy. Argentine Resolution 619 excludes carriers that fail to sign pooling agreements approved by SEIM from participating in the northbound Argentina United States trades." (Opening Brief, p. 79.) Ivaran agrees that Resolution 619 would prohibit such carriage.

The record reflects that under Resolution 619, any carrier not a party to the pooling agreements would be restricted to carriage of non-pool cargo northbound.

THE BUREAU'S SUGGESTION THAT BOTH AGREEMENT NOS. 10386-2 AND 10382-2 SHOULD BE MODIFIED TO REQUIRE TRANSCRIPTS OF NEGOTIATIONS OF THE NON-NATIONAL FLAG LINES.

At the close of the hearing, this Judge provided an opportunity for the parties to state their position regarding the major issues presented for resolution in this proceeding. One of the Bureau's positions was that the Commission should require transcripts be made of future third-flag caucuses (*Tr.* 569). Simultaneous opening briefs were filed by the parties reflecting the following observations as to the Bureau's proposal: (1) Moore McCormack "does not believe keeping transcripts of the third-flag caucuses will be particularly helpful" (Opening Brief, p. 41) but took the position that it would not oppose this limited requirement; (2) Delta also had no objection to such a modification "provided it is limited to that requirement"; (3) Lloyd and Nacional opposed the suggestion because, among other reasons, the very nature of negotiations involve both tangible and intangible factors incapable of accurate portrayal on a record, that the essence of private business negotiations

is that it be private and non-public, and that there would be no benefit derived; and (4) ELMA opposed the Bureau's requirement since the "give and take" for successful negotiations would be impaired. However, after reviewing the Bureau's specific recommendation including the language to be inserted in both agreements as appearing in the Bureau's Opening Brief, the parties now stand united in their opposition. What might have appeared as a "modest proposal" at the hearing is now considered "excessive, and no regulatory purpose would be served by it" (Moore McCormack Reply Brief, p. 35); Delta "would prefer that the proposed modification be rejected in its entirety on the basis that the hypothetical gains are not worth the potential serious impact on the commercial nature of the negotiations" (Delta Reply Brief, p. 22). Lloyd and Nacional argue that the proposal "be rejected in its entirety" (Lloyd and Nacional Reply Brief, pp. 24-27); and ELMA considers that the suggestion, if adopted, would stifle commercial negotiations and is of no importance to this Commission's regulatory purposes. (ELMA Reply Brief, pp. 1922.)

Apparently, the Bureau has considered it necessary and perhaps meaningful for their purposes to expand upon their initial observations made at the close of the hearing. It would be appropriate now to provide the text—in full—of the Bureau's position and proposed language it determined necessary for inclusion in these Agreements.

> Transcripts of the non-national flag lines' negotiations would be very helpful to the Commission in fulfilling its responsibility under section 15 to determine whether the factors used to establish individual shares in the pooling agreements are consonant with the policies and purposes of the Shipping Act. *The Northern Pan-American Line, A/S (Nopal) v. Moore-McCormack Lines, Inc., supra*, p. 228. This inquiry is particularly important here because Resolution 619 permits the majority of the lines to impose a share on a non-national flag carrier on a "take it or leave it" basis. With this obvious potential for abuse, it is essential for the Commission to know which criteria were used to establish the shares.
>
> Knowledge of what went on in the non-national flag caucuses is essential to this inquiry. If the hearing has shown anything, it has shown that the Commission cannot rely on the memories of participants in order to determine what went on in the non-national flag caucuses. Therefore, the Bureau suggests that the following language be inserted in both agreements:
>
> > It is agreed by the parties that the Federal Maritime Commission will be furnished with transcripts of meetings, including meetings of Non-National lines, committees, subcommittees or working groups in which any of the following subjects are discussed.
> >
> > 1. Entry of a Non-National Flag line into the Agreement.

2. Participation of a Non-National Flag line in the Non-National Flag proportion established in Article 2(b).
3. Renegotiation of the Non-National Flag proportion established in Article 2(b).
4. Renegotiation of the Non-National Flag minimum sailing requirements.

Transcripts shall include:

1. All discussions relating to any of the subjects identified above, whether or not final action was taken thereon;
2. A full and accurate showing of any action taken on any of the subjects identified above and the reasons therefor;
3. Each of the views expressed during any such discussions;
4. An identification of all documents considered in connection with the discussions of or action taken on any of the subjects identified above.

> We do not suggest that this measure is a cure-all to the problems regarding non-national flag negotiations. It is a first step. If parties attempt to circumvent the requirement, other measures will be required. SEIM already sends observers to the pool negotiations. Perhaps the Commission might consider a similar approach if the transcripts are inadequate. Regardless of what other steps may be necessary in the future, we submit that the transcript requirement is a reasonable approach to the problem. (Opening Brief, pp. 89-90.)

While Moore McCormack and Delta apparently do not oppose the requirement that third-flag negotiations of shares, including separate third-flag caucuses, be recorded and transcribed, with such transcripts being provided to the participants, the far reach of what the Bureau considers necessary in order to obtain its objectives is considered objectional by these parties for a variety of reasons. First, the Bureau itself concedes "that the record [here] is relatively clear as to what transpired at the third-flag caucuses" but wants to examine the source of the information and shows a concern over the memory of potential witnesses. Second, in order to obtain what the Bureau seeks, it will require a modification that, as the parties describe, "is excessive," "the cost alone would outweigh any theoretical benefit," "no reason to require that all transcripts automatically be provided to the F.M.C.," "the definition of meeting is far too broad," "the suggestions as to what the transcripts should include are far too broad," "the proposed language provides a good example of 'regulatory over-reach,'" "the F.M.C. has not, in over 10,400 agreements filed, ever required the parties to file detailed transcripts of their negotiations leading to agreement," and, would "only result in many documents being filed with the Commission

which its staff would have to read and which, for the most part, would be of no importance to the Commission's regulatory purposes."

In my view, the requested modification of both Agreements and the insertion of the language proposed by the Bureau is both unwarranted and unnecessary. It is evident that the purpose in seeking the transcripts is motivated by an eagerness to obtain the most complete record of the parties' negotiations. But the impositions imposed by the proposed language employed in the modification, act in a fashion that would, at the very least, be costly and, in some respects, inhibit the negotiation purposes underlying the functions of a caucus. Furthermore, what is submitted here should be considered as the form the Bureau considers necessary to accomplish its objectives. Since the Bureau's specific language represents its judgment as to best accomplish its purposes, it will be rejected for the many reasons advanced by the parties and because this Judge considers that the requirement would unduly infringe upon the commerciality of the negotiations.

THE AGREEMENTS MEET THE STANDARDS FOR APPROVAL

The record in this proceeding, as reflected in the findings of fact, provides the supportability in favor of the approval of each Agreement without the modifications urged by either Ivaran or the Bureau. Basically, the agreements serve a serious transportation need in that, *inter alia*, they provide for continued stability in the involved trades, encourage additional third-flag participation and service competition to the national flag lines, and encourage regular and comprehensive service through the minimum sailing requirements and pool revenue adjustment mechanisms. The agreements also serve an important public benefit by providing a reasonable commercial resolution, pursuant to the intergovernmental Memorandum of Understanding, of the potentially conflicting policies of the United States and Argentina. The agreements contribute to the maintenance of international harmony and avoidance of disruptive retaliatory action and international conflict, benefiting the lines, the shipping public, and the foreign commerce of the United States. Moreover, the agreements do not invade the antitrust law more than is necessary to promote the regulatory purposes of the Shipping Act and, in fact, contain substantial pro-competitive features. On the other hand, disapproval of these agreements would have a destructive impact upon the shipping public and the commerce between the United States and Argentina. In balancing the interests, the numerous public interest considerations, including the potential for trade disruption and governmental confrontation which would adversely affect the shipping public and the individual carrier interests, these far outweigh any contrary interest as claimed by Ivaran in this proceeding. In a proceeding of this nature, it is the obligation of the Commission to weigh the

conflicting interests. The Commission stated in *Agreement No. 9932—Agreement No. 9939, supra*:

> The weighing of the case presented by the proponents of approval against the case made by those protesting approval, of course, resolves the question of whether the ultimate burden of proof has been sustained.
>
> * * *
>
> It is impossible to completely satisfy all of those interests. All that this Commission can do is balance the interests and reach our best judgment under the laws we administer. pp. 302, 305.

The Supreme Court recently observed that the burden of proof standard to be employed in an administrative proceeding is by a preponderance of the evidence.[40] The proponents have met this burden and the findings of fact attest to the necessary support for the approval of each Agreement.

The Agreements also meet serious transportation needs by providing significant public benefits in the furtherance of valid regulatory purposes.

First, approval here would avoid a potential intergovernmental confrontation wherein both Moore McCormack and Delta may be forced to seek protection through retaliation under section 19, Merchant Marine Act, 1920, or section 301 of the Trade Act if these Agreements are disapproved. Second, the Commission, just two years ago, found that the predecessor agreements in the northbound Argentina/United States Atlantic trade had been justified under the *Svenska* standards. All the underlying questions as to serious transportation need, important public benefits and furtherance of valid regulatory purposes applicable to this proceeding have been previously decided in *Docket Nos. 78-51 and 78-52, supra.* Third, the evidence clearly demonstrates that approval of the agreements will continue to assure all carriers participation in the trade in an orderly manner and to the benefit of the importers. No shipper, carrier, port or other body has protested approval of the agreements. Fourth, the Commission has held in numerous cases that the maintenance of intergovernmental harmony is an important public benefit, *Agreement No. 10066, supra*; *Agreement No. 10320-4*, 20 S.R.R. 734 (1980). In 1979, discussing the Northbound Argentine/U.S. pooling agreements, the Commission stated: "These Agreements serve an important public benefit by maintaining international harmony through the avoidance of disruptive retaliatory action and resulting international

[40] The Court stated: "Where there is evidence pro and con, the agency must weigh it and decide in accordance with the preponderance." *Steadman v. SEC*, No. 79-1266, 450 U.S. 91, Slip Opinion p. 10 (February 25, 1981.)

conflict." *Docket Nos. 78-51 and 78-52, supra,* 1111. Likewise, the prevention of disruption of commerce was considered a serious transportation need. And since it is the policy of Argentina that there be fixed shares in the third-flag share, and since their laws and policies are not so incompatible with ours that we cannot reach an agreement (*SX-3A,* pp. 34-35), it is clear that the maintenance of intergovernmental harmony and the free flow of commerce requires the approval of an agreement with fixed shares. Fifth, by approving an agreement with fixed shares, the Commission assures the continuation of third-flag carriage in the trade which cannot otherwise be assured. And sixth, approval of the agreements will have the least adverse impact on any of the regulatory policies which the Commission enforces.

Both agreements have been justified by the proponents. And both are presumptively in the public interest. The preponderance of the evidence developed in this proceeding conclusively permit the finding that the agreements are in the public interest, are required by serious transportation needs, and in furtherance of the valid regulatory purpose of the Shipping Act.[41]

As discussed above, the Commission has questioned whether the agreements are truly commercial agreements subject to the Commission's jurisdiction under section 15, or whether they are the product of unilateral government action and thus outside the scope of the Commission's jurisdiction. The record persuasively demonstrates that both are commercial agreements. First, the fixed shares allocated are the result of commercial negotiations among the lines premised upon the considerations of the requirements of the laws and policies of the United States and Argentina and the two regulatory bodies (this Commission and SEIM), which have to approve the resulting agreements. Second, the actual shares assigned were the result of commercial negotiations. Third, the agreements are commercial agreements compatible with the terms of the Memorandum of Understanding. And finally, as discussed above, in the negotiations leading to the third-flag shares, each side advanced the strongest arguments available resulting in the best arrangement that could be reached under the many circumstances involved.[42]

ULTIMATE FINDINGS

Upon consideration of the evidence, the Administrative Law Judge finds that as to Agreement No. 10386, as amended, and Agreement No. 10382, as amended:

[41] For a detailed discussion of these considerations, see Moore McCormack Opening Brief, pp. 17-33, and Delta Opening Brief, pp. 21-39.

[42] For a detailed discussion of these considerations, see Moore McCormack Opening Brief, pp. 33-45, and Delta Opening Brief, pp. 6-12, 19-21.

(1) The Agreements are found not to be unjustly discriminatory or unfair as between carriers; detrimental to the commerce of the United States; or contrary to the public interest or otherwise in violation of the Shipping Act, 1916;

(2) The Agreements, which implement a government-to-government agreement, carry a presumption of approvability;

(3) The Agreements meet serious transportation needs, provide significant public benefits, and further valid regulatory purposes;

(4) The Agreements do not invade the prohibition of the antitrust laws any more than is necessary to serve the regulatory purposes of the Shipping Act, 1916; and

(5) The Agreements are the result of commercial negotiations and subject to this Commission's jurisdiction under section 15 of the Shipping Act, 1916.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-39

AGREEMENT NOS. 10333, 10333-1 AND 10333-2

CALCUTTA/BANGLADESH/U.S.A. POOL AGREEMENT

ORDER ON MOTION TO TERMINATE AND STAY

February 25, 1982

This proceeding was initiated by Order of Investigation and Hearing, served June 17, 1981, to determine the approvability of Agreement Nos. 10333-2 and the continued approvability of Agreement Nos. 10333 and 10333-1 pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814).[1]

Proponents have filed a Motion for Termination, Stay, or Modification of the Commission's Order of Investigation, to which the Bureau of Hearings and Field Operations (Hearing Counsel) filed a Reply. Administrative Law Judge Paul J. Fitzpatrick has certified these pleadings to the Commission for decision.

POSITIONS OF THE PARTIES

Proponents' request to terminate this proceeding is based primarily on Farrell Lines' resignation from Agreement No. 10333 and the conference agreement in the trade, Agreement No. 8650, the Calcutta, East Coast of India and Bangladesh/USA Conference. This "fundamental change in circumstance" and the subsequent withdrawal of Amendment No. 2 allegedly require the termination of this proceeding under the rationale expressed in *Inter-American Freight Conference—Cargo Pooling Agreement Nos. 9682, 9683, and 9684*, 14 F.M.C. 58 (1970). Proponents submit that termination is necessary because a "major portion" of the issues raised in the Commission's June 17 Order are directed to "the problems occasioned by Agreement No. 10333-2 and Waterman's status as an overcarrier in the pool."

[1] Agreement Nos. 10333 (Agreement) and 10333-1 (Amendment No. 1) establish a framework for a cargo revenue pool in the inbound trade from Calcutta, India, and ports in Bangladesh to the Atlantic and Gulf Coasts of the United States. The Agreement, as amended by Agreement No. 1, was approved on January 20, 1981. Agreement No. 10333-2 (Amendment No. 2) would amend the Agreement by, among other things, establishing specific individual revenue shares for the active carrier members. Amendment No. 2 also reserves a revenue share for Cunard-Brocklebank, limited and Hellenic Lines, Limited, who are signatories to the Agreement but not to Amendment Nos. 1 or 2. The signatories to Amendment No. 2 are: Farrell Lines, Inc.; Scindia Steam Navigation Co., Ltd.; Bangladesh Shipping Corp.; Shipping Corporation of India, Ltd.; and Waterman Isthmian Line, Division of Waterman Steamship Corp.

In the alternative, the Commission is requested to stay the proceedings until Proponents can renegotiate and file another amendment to Agreement No. 10333. This amendment would allegedly establish new individual pool shares and remedy the problems which gave rise to this proceeding. Should the Commission decline to terminate this proceeding, Proponents request that the June 17 Order be modified to delete those issues that relate solely to Amendment No. 2.[2]

Hearing Counsel urges the Commission to deny Proponents' requests to terminate or stay this proceeding. It argues that the Order initiating this proceeding focuses on the continued approvability of Agreement No. 10333 and Amendment No. 1 and not just the approvability of Amendment No. 2. In this regard, Hearing Counsel argues that Proponents' reliance on *InterAmerican, supra,* is misplaced. Hearing Counsel distinguishes *Inter-American* from the instant case on the basis that the proceeding there was discontinued after two signatories repudiated the agreements under consideration but before the Commission acted on those agreements. Accordingly, only those issues relating to Amendment No. 2, which was repudiated by Farrell prior to approval, should allegedly be abandoned here.[3]

Although Farrell has now resigned from the pool agreements, Hearing Counsel opposes Farrell's dismissal from the proceeding.[4] It maintains that Farrell is a necessary party since it may have been involved in the pre-approval implementation of Amendment No. 2 which was designated by the Commission as an issue in this proceeding.[5]

DISCUSSION

For the reasons stated below, the Commission will deny Proponents' request to terminate this proceeding but will grant a limited stay.

The Order initiating this proceeding clearly raises issues other than the approvability of Amendment No. 2. One of these is whether Agreement No. 10333, as it stands approved, warrants continued section 15 approval.[6] The pre-approval implementation of Amendment No. 2 is also presented as an issue in this proceeding.[7] Farrell's resignation from

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[2] Proponents also request that Farrell, Hellenic, and Brocklebank be dismissed from this proceeding since they have withdrawn from the pool arrangement.

[3] The June 17 Order sets forth eleven specific issues to be resolved in this proceeding. Issues 1 and 3 relate to the individual shares in Amendment No. 2. Hearing Counsel would also delete Issue 2 which relates to the participation of Hellenic and Brocklebank.

[4] Hearing Counsel does not oppose the dismissal of Hellenic Lines and Brocklebank based on their representations that they have not and do not intend to participate in the pool.

[5] Hellenic and Brocklenbank were not signatories to Amendment No. 2 and apparently resigned prior to its filing.

[6] The first ordering paragraph of the *June 17th* Order provides:

> . . . a proceeding is hereby instituted to determine whether or not Agreement Nos. 10333, 10333-1 and 10333-2 shall be approved, disapproved or modified under the provisions of section 15.

[7] Issue 11 in the second ordering paragraph asks: Have the terms of Agreement No. 10333-2 been implemented in any way prior to approval of that Agreement by the Commission?

and the Proponents' subsequent withdrawal of Amendment No. 2 only serves to moot the issues concerning that Amendment's approval. These actions do not affect the other issues presented. Accordingly, Proponents' request to terminate will be denied.

However, the Commission will grant, at least in part, the Proponents' request to stay this proceeding. The Proponents have represented that they are negotiating a new agreement which would supersede, at least in part, Agreement No. 10333, as amended.[8] If such an agreement is filed, it may require this proceeding to be restructured. The Commission believes, therefore, that some form of stay is warranted in the interest of avoiding unnecessary litigation. However, as the Proponents have advised, the proposed new agreement has been under "active consideration" since September 1981, yet to date no such proposal has been filed. Because one of the objectives of this investigation is to determine whether the current agreement continues to meet the standards of section 15, a grant of indefinite stay would be clearly inappropriate. The Commission will therefore limit the stay granted to 30 days, which should allow the parties adequate time to file any modified agreement.[9]

THEREFORE, IT IS ORDERED, That this proceeding is stayed for 30 days from the date of this Order; and

IT IS FURTHER ORDERED, That the first ordering paragraph of the June 17, 1981 Order initiating this proceeding be amended to read: . . . whether or not Agreement No. 10333, as amended, shall continue to be approved or should be disapproved or modified; and

IT IS FURTHER ORDERED, That the second ordering paragraph of the June 17, 1981 Order be amended by deleting Issues 1, 2 and 3; and

FINALLY, IT IS ORDERED, That Hellenic lines and Brocklebank Lines are dismissed from this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[8] Because a major revision to Agreement No. 10333, as amended, appears to be contemplated and because that Agreement is not effectively operable without individual pool shares, Proponents may wish to consider cancelling the existing Agreement at this time without prejudice to the filing of a modified agreement.

[9] Any new agreement filed will be noticed in the *Federal Register*, after which time an appropriate procedural order will be issued in this proceeding.

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-56

DOCKET NO. 81-67

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES

NOTICE

February 25, 1982

Notice is given that no appeal has been taken to the January 19, 1982 dismissal of the complaints in these proceedings and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) JOSEPH C. POLKING
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-56

DOCKET NO. 81-67

BELCO PETROLEUM CORPORATION

v.

COMPANIA PERUANA DE VAPORES

John Martin of Arsham & Keenan for Complainant.

Bert I. Weinstein of Haight, Gardner, Poor & Havens for Respondent.

JOINT MOTION GRANTED FOR APPROVAL OF SETTLEMENT AND FOR DISMISSAL OF PROCEEDINGS

Finalized February 25, 1982

BACKGROUND

In Docket No. 81-56 a complaint filed by Belco Petroleum Corporation against Compania Peruana de Vapores (Peruvian State Line) was served September 18, 1981. Complainant alleged that respondent had subjected it to payment of rates for ocean transportation in violation of section 18(b)(3) of the Shipping Act, 1916. The complainant sought $27,993.19 from the respondent. Notice of filing of the complaint and assignment of Judge served September 23, 1981, was published in the *Federal Register*, Vol. 46, No. 188, Tuesday, September 29, 1981, page 47661.

In Docket No. 81-67, complaint filed by Belco Petroleum Corporation against Compania Peruana de Vapores (Peruvian State Line) was served October 28, 1981. Complainant alleged that respondent had subjected it to payment of rates for ocean transportation in violation of section 18(b)(3) of the Shipping Act, 1916. The complainant sought $9,054.97 from the respondent. Notice of filing of complaint and assignment of Judge served October 29, 1981, was published in the *Federal Register*, Vol. 46, No. 212, Tuesday, November 3, 1981, page 54641.

Docket No. 81-56 and Docket No. 81-67 are not consolidated. Consolidation was not requested. Both dockets are acted upon.

Appearance of counsel for respondent in Docket No. 81-56 was entered in response to counsel's request contained in a letter dated October 5, 1981. Counsel for respondent in Docket No. 81-56, in a letter dated October 26, 1981 (received October 28, 1981), requested an extension of time to November 25, 1981, to answer the complaint or otherwise move. Denial of the request for extension of time was served

November 5, 1981. On November 20, 1981, notice was served for hearing to commence in this proceeding on Tuesday, December 1, 1981.

On November 23, 1981, the respondent served its answer to the complaint and a Counterclaim (received November 25, 1981) in Docket No. 81-56 and in Docket No. 81-67 (however, in Docket No. 81-67, instead of a counterclaim, the respondent asserted an Affirmative Defense).

On Wednesday, November 25, 1981, the Presiding Administrative Law Judge received a telephone call from Attorney Weinstein for the respondent and Attorney Martin for the complainant, who advised they can possibly settle the proceedings in Docket No. 81-56 and Docket No. 81-67 within two weeks. This was confirmed by them in writing in a letter dated November 25, 1981, sent by Express Mail No. B-04311619, postmarked New York, November 27, 1981 (received November 30, 1981). The official stenographer was telephoned to cancel the December 1, 1981, hearing date. By notice served November 30, 1981, the hearing date of December 1, 1981, was postponed to December 15, 1981. Both Docket Nos. 81-56 and 81-67 to be heard that date, December 15, 1981.

Under a covering letter dated December 10, 1981 (received December 14, 1981), the parties enclosed a Joint Motion for Approval of Settlement and for Dismissal of Proceeding, a Joint Affidavit, and a copy of Agreement of Settlement and Mutual Release as to Docket Nos. 81-56 and 81-67.

Set forth in full is the Joint Motion for Approval of Settlement and for Dismissal of Proceeding:

JOINT MOTION FOR APPROVAL OF SETTLEMENT AND FOR DISMISSAL OF PROCEEDING

Complainant, Belco Petroleum Corporation, by its attorneys Arsham & Keenan, and Respondent, Compania Peruana de Vapores, by its attorneys Haight, Gardner, Poor & Havens, hereby request that the Administrative Law Judge, and the Commission, approve a settlement entered into by the parties in these two complaint cases. In connection with this request we refer to the attached Agreement of Settlement and Mutual Release, and to the Joint Affidavit of the parties. For convenient reference, the principal agreed upon facts involved in these disputes are set forth below.

I. THE FACTS

1. Belco Petroleum Corporation ("Belco"), Complainant in these proceedings, is a corporation in the business of exploration and production of crude petroleum and natural gas.

2. Compania Peruana de Vapores ("CPV"), is a common carrier by water in the commerce of the United States, and participated in the trade in question as a member of the Atlantic & Gulf/West Coast of South America Conference ("the Conference").

3. At all times in question Belco was an industrial contract shipper with the Conference, under Contract No. 10361, in effect since September 9, 1965.

4. For the shipments subject of the disputes in these complaint cases (eight in Docket No. 81-56, six in Docket No. 81-67), Belco's freight forwarder prepared the documents for ocean carriage and, in particular, providing for shipment to Talara, Peru under Conference tariff item 1050 which provides an industrial contract rate schedule.

5. Belco's complaints allege that it was entitled to ship the cargoes subject of these proceedings at lower rates than those charged under tariff item 1050, pursuant to Conference tariff item 1036A, which states:

> "*Talara Oilwell and Production Project*
>
> Shipments of proprietary material and equipment to Talara or Paita will be assessed base rate of $132.00 W/M plus all additional charges. Heavy lift charges as per tariff scale will be applicable on the weight basis (2,000 lbs.). Extra length charges will be applicable as per tariff scale W/M as cargo is freighted. Bills of lading shall be claused as set forth in Rule 50."*

6. For the shipments subject of Docket No. 81-56, Belco paid ocean freight of $140,960.91. Balco alleges it should have paid only $112,967.72 for these shipments, under item 1036A. (It is agreed by the parties that Bill of Lading No. 16 omitted rating of 49 cubic feet of cargo, so if item 1036A in fact applied, the freight would have been $113,161.95 for these shipments).

7. For the shipments subject of Docket No. 81-67, Belco actually paid ocean freight of $59,003.19. Belco alleges it should have paid only $49,948.22 for these shipments, under item 1036A.

8. For further reference, the bills of lading subject of these Dockets are attached to the complaints.

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* Rule 50 states:

"In order to identify the cargo which is covered by this tariff rule, it is understood and agreed shipper will arrange to have the following notation placed on each Bill of Lading: 'The Shipper shown in this Bill of Lading certifies that the cargo described hereon is forwarded pursuant to the terms and conditions of tariff item No. __ and that he is aware that the Shipping Act of 1916 declared it to be a violation of law, punishable by a penalty, for a shipper to utilize an unfair device or means to obtain transportation at less than the applicable rates.'

Further, it is understood and agreed that the shipper shall submit a freight copy of all such Bills of Lading or Bill of Lading and due bill to the Conference Chairman on a timely and confidential basis."

9. In consequence of the aforesaid, were Belco to satisfy its burden of proof as to the qualification of the cargo for the item 1036A rate, it would be entitled to reparation of $27,798.96 in Docket No. 81-56, and $9,054.97 in Docket No. 81-67, for a total of $36,853.93.

10. But the point of genuine dispute between the parties, and the principal basis for CPV's denial of Belco's claim for reparations, concerns whether these shipments, nearly all of which were shipped over two years ago, in fact might have qualified for the lower rate at the date of shipment.

II. AUTHORITIES

In reparation cases, where the shipper or its freight forwarder misdescribes cargo, resulting in inadvertent overcharges, the shipper has the burden of proof to show that the cargo in fact qualified at the time of shipment for the lower rate. *See e.g., Abbott Laboratories v. Moore-McCormack*, 17 F.M.C. 191 (1973). The shipments subject of these proceedings are now all nearly over two years old. Under tariff item 1036A, Belco would have the heavy burden of proving that these old shipments consisted of "proprietary material and equipment" for use at Talara oilwell and production projects. Those are the facts critical to the resolution of these disputes.

The reasons for the parties entering into a settlement of these cases are fully stated in the parties' Joint Affidavit, but to summarize: saving of legal expense; avoidance of impairing good commercial relations; saving the expense of finding proof, and furnishing witnesses, on the merits of the dispute; and saving the expense and avoiding the difficulty of ascertaining the evidence as to these shipments.

In *Organic Chemicals v. Atlanttraffic Express*, 18 S.R.R. 1536a, 1539-40 (FMC, 1979), the Commission laid down the rule for permitting settlements of these kinds of cases:

> "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."

As a general matter the law favors settlements, and under the Commission's guidelines the settlement of the parties is fully justified and should be approved, especially so because of the fact that the evidence and witnesses necessary to resolve the dispute as to the qualifications of

these shipments for the item 1036A rate are not reasonably ascertainable.

The settlement of the $36,853.93 claimed by Belco for $30,404.49, or for 82-1/2% of the amount claimed, is justified by comparison to other settlements approved by the Commission, and is most reasonable, especially so when the likely legal costs, man-power costs and executive time, and risks of litigation are considered. See *e.g.*, *Forte International v. Seatrain*, 23 F.M.C. 27 (1980), 60% settlement; *Ellenville v. FESCO*, 23 F.M.C. 707 (1981), 80% settlement; *Terfloth v. APL*, 22 F.M.C. 81 (1979), 64% settlement; *Del Monte v. Matson*, 23 F.M.C. 364 (1979), 62% settlement.

CONCLUSION

Belco and CPV request approval of the proposed settlement, and that Docket Nos. 81-56 and 81-67 be dismissed with prejudice.

RESPECTFULLY SUBMITTED,
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Attorneys for Complainant
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Attorneys for Respondent
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Set forth in full is the Joint Affidavit:

JOINT AFFIDAVIT

We, the undersigned Alejandro Moreno, New York Representative of Compania Peruana de Vapores, and Vincent A. Merola, Controller of Belco Petroleum Corporation, each first severally sworn, depose and say for and on behalf of our respective corporations:

(1) The parties have entered into a settlement of the claims subject of FMC Docket Nos. 81-56 and 81-67 to terminate these disputes. The amicable settlement of these cases will avoid the substantial costs of further litigation which, based upon the estimates of our attorneys, could total about $20-25,000, and perhaps even more; the parties desire to continue to maintain the good commercial relations which exist between them, and to avoid the disruptions inevitably caused by litigation; further litigation, including searches for documents and information, and the attendance of witnesses for both sides would be disruptive to the normal commercial affairs of the parties, and would be a nonproductive use of expensive manpower and the valuable time of our

executive and managerial personnel; and, in view of the uncertainties of litigating and the difficulties of obtaining evidence as to the shipments subject of these disputes, the settlement of these genuine disputes between the parties is most desirable.

(2) This settlement is a bona fide attempt by the parties to terminate this controversy and is not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act, 1916.

Sworn to before me this
10th day of December, 1981

(S) ALEJANDRO MORENO
ALEJANDRO MORENO, NEW YORK
REPRESENTATIVE

(S) Joseph S. Labell
Notary Public
Sworn to before me this
9th day of December, 1981

(S) VINCENT A. MEROLA
VINCENT A. MEROLA,
CONTROLLER

(S) Mary Haig
Notary Public

The parties submitted the following Agreement of Settlement and Mutual Release:

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned, Belco Petroleum Corporation ("Belco"), Complainant in Federal Maritime Commission Dockets Nos. 81-56 and 81-67, and Compania Peruana de Vapores ("CPV"), Respondent in said Dockets, that said Dockets shall be terminated by mutual accord on the terms and conditions set forth herein and for the reasons set forth in the accompanying Joint Affidavit of the parties:

1. CPV shall pay to Belco the sum of Thirty Thousand, Four Hundred and Four Dollars and 49/100 cents ($30,404.49).

2. Belco shall, in consideration of CPV's payment as provided in paragraph 1 above, withdraw its complaints in Federal Maritime Commission Dockets Nos. 81-56 and 81-67, with prejudice to further pursuing the claims subject of said Dockets.

3. Neither Belco nor CPV, nor any successor in interest of either such party, shall initiate any new claims against the other party arising in connection with the shipments subject of the complaints in these proceedings except for enforcement of any provision of this Agreement.

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

5. This Agreement shall be submitted for approval to the Federal Maritime Commission and shall become effective and binding upon the parties when final approval is obtained, at which time CPV shall pay to Belco the sum provided in paragraph 1.

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

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

Dated: New York, New York
December, 1981

BELCO PETROLEUM CORPORATION
By s/s Vincent A. Merola
Controller

COMPANIA PERUANA DE VAPORES
By s/s Alejandro Moreno
New York Representative

DISCUSSION

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge *finds* and *concludes* that the parties have made out a proper case for settlement in each of these Dockets Nos. 81-56 and 81-67 and that the settlements should be approved;

Wherefore, it is ordered, subject to approval by the Commission, as provided in its Rules of Practice and Procedure:

(A) The settlements are approved.

(B) Respondent Compania Peruana de Vapores (Peruvian State Line) shall pay to the complainant Belco Petroleum Corporation a total of Thirty Thousand, Four Hundred and Four Dollars and 49/100 cents, ($30,404.49) according to the Agreement of Settlement and Mutual Release signed by the parties and set forth above.

(C) Upon respondent's payment as provided in the settlement agreement, the complainant shall notify the Commission and the complainant will also withdraw complaints in Docket Nos. 81-56 and 81-67 herein, with prejudice, whereupon the proceedings in said dockets shall be discontinued.

(S) William Beasley Harris
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-47

LEASE AGREEMENT NO. T-3753 BETWEEN MARYLAND PORT ADMINISTRATION AND ATLANTIC & GULF STEVEDORES, INC.

ORDER ON RECONSIDERATION

February 26, 1982

This proceeding is before the Commission upon receipt of Maryland Port Administration's (*MPA*) Petition for Reconsideration of the Commission's December 2, 1981 Order [1] denying *MPA*'s Petition for Declaratory Order regarding a dispute over a lease agreement with Atlantic & Gulf Stevedores, Inc. (A&G). The Commission declined to issue an interpretation of the term "cargo" as used in the lease, and instead deferred to the Circuit Court of Baltimore City, where litigation had also been initiated. A&G has filed a Reply to *MPA*'s Petition.

POSITIONS OF THE PARTIES

MPA alleges that the Commission granted a similar petition for declaratory order in *Virginia Port Authority v. Portsmouth Terminals, Inc.*, 24 F.M.C. 415 (1981). *MPA* argues that the Commission's failure to afford *MPA*'s petition the "same treatment" as the Virginia Port Authority's (VPA) petition violated MPA's "basic due process rights." MPA also questions the propriety of the Commission's having considered MPA's petition at an open Sunshine meeting, while it considered VPA's petition in closed session.[2] The material changes of fact in this proceeding which require reconsideration are alleged to be that the lease controversy has still not been resolved by the Maryland state court or settled out of court, and that the Commission's December 2, 1981 Order "seems to indicate a change of philosophy by the Commission." [3]

In its Reply, A&G contends that MPA has failed to meet the criteria for petitions for reconsideration set forth in Rule 261 of the Commis-

[1] 24 F.M.C. 500 (1981).

[2] MPA states:

A cloud hangs over one of the most important leases in the Port of Baltimore and over the Commission when it handles one lease controversy at a Sunshine meeting and another behind closed doors. Petition, at 8.

[3] The "change of philosophy" apparently refers again to the fact that a petition for a declaratory order was granted in the *VPA* case but denied in the instant proceeding.

sion's Rules of Practice and Procedure.[4] A&G also distinguishes the *VPA* and *MPA* cases, pointing out that, unlike the instant proceeding, there was no state court suit pending in the *VPA* case to which the Commission could have deferred, and no relief was sought in *VPA* which would ultimately have to be enforced by a court of law. Moreover, A&G submits that the dispute in *VPA* required the Commission's expertise in interpreting a provision of the Shipping Act (*i.e.*, section 15's prohibition of retroactive Commission approval of agreements)[5] and also involved the Commission's intent in approving the *VPA* lease.

DISCUSSION

The Commission agrees with A&G's argument that MPA's petition fails to meet the strict requirements of Rule 261. However, in order to clarify the matters raised in MPA's petition and to dispel that party's apparent confusion on several issues, the Commission will waive Rule 261 and address the merits of MPA's argument.

The Commission's disposition of *Virginia Port Authority* was premised on the particular issues raised by *VPA*'s petition. It did not reflect what MPA apparently perceives to have been a Commission policy of issuing rulings on every dispute that arises out of a Commission-approved lease agreement, regardless of the particulars of the dispute.

In *VPA*, the Commission decided whether a Commission approved rental formula in a lease agreement could be retroactively applied. At issue was the Commission's understanding, when it approved the agreement, regarding whether the formula used in determining rental payments should be applied to cargo handled prior to the date of the Commission's order. Only the Commission itself could make this determination of its previous intent. Moreover, a technical problem arose in that proceeding involving section 15's prohibition against retroactive approval of agreements. It would have been inappropriate for the Commission to defer resolution of that Shipping Act issue to a court of general jurisdiction. And as pointed out by A&G, no state court suit was pending in the *VPA* case to which the Commission could have deferred.

In the instant proceeding, the dispute involves the definition of the term "cargo" as used in the lease. Although the lease agreement was approved by the Commission, whether "cargo" includes the weight of a container was not a factor or issue in that approval, nor do any Shipping Act issues or considerations appear to be involved. Definition

[4] Rule 261 states that a petition for reconsideration will be summarily rejected unless it: (1) specifies a subsequent change in material fact or law; (2) identifies a substantive error in material fact; or (3) addresses a matter upon which the party had not previously had the opportunity to comment. 46 C.F.R. 502.261. A&G argues that MPA's Petition failed to meet any of these requirements.

[5] 46 U.S.C. §814.

of the word "cargo" is not an issue requiring maritime expertise or exercise of Shipping Act jurisdiction, but rather a semantic matter requiring an equitable interpretation of the language of this particular lease and the mutual accord of its parties. An appropriate forum for ascertaining its meaning is, therefore, a court of general jurisdiction, particularly when the matter is already pending before that court. In this context, the Commission's expertise does not appear to be required, does not appear to produce any particular benefit, and, as noted in the Commission's December 2, 1981 Order, would be a potential source of administrative delay, as the Circuit Court of Baltimore City would remain the only entity capable of awarding damages to an aggrieved party.

Furthermore, it is not clear whether MPA is arguing that the Commission's consideration of the *VPA* proceeding should have been handled in open session, or whether *MPA*'s petition should have been considered in closed session. At any rate, whether to close an agency meeting when it is statutorily permissible to do so is a matter of agency discretion involving consideration of the public interest.[6] The Commission does not believe that exercise of its discretion in making this determination somehow gives rise to "due process" arguments, particularly where no specific allegation has been made whether and how any harm or prejudice attached to the litigants in either the *MPA* or *VPA* proceeding.

THEREFORE, IT IS ORDERED, That the Maryland Port Administration's Petition for Reconsideration is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[6] It is clear that discussion of both the *VPA* and *MPA* cases could have been closed, for they involved disposition of particular cases of formal agency adjudication. 5 U.S.C. §552b(c)(10); 46 C.F.R. 503.73(j).

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 524]

[GENERAL ORDER 23, REVISED: DOCKET 81-18]

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

March 3, 1982

ACTION: Final Rule

SUMMARY: This exempts agreements which provide for the collection, compilation and exchange of credit experience information from the filing and approval requirements of section 15 of the Shipping Act, 1916 (16 U.S.C. 811). The Commission has determined that this exemption will not substantially impair effective regulation of common carrier practices, result in unjust discrimination or be detrimental to commerce.

DATE: Effective April 9, 1982.

SUPPLEMENTARY INFORMATION:

Section 35 of the Shipping Act, 1916 (the Act) (46 U.S.C. 833a) allows the Commission to exempt any class of agreements between persons subject to the Act 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. Under this authority the Commission previously announced (46 *Fed. Reg.* 13243) that it proposed to amend 46 C.F.R. 524 (Commission General Order 23) to exempt from the filing and approval requirements of section 15 of the Act, agreements which provide for the collection, compilation, and exchange of credit information.

Comments on the proposed rule were due by April 21, 1981 and were received from the (1) Baltimore Marine Terminal Association, (2) New York Credit and Financial Management Association, (3) Puerto Rico Maritime Shipping Authority (PRMSA), (4) North European Conferences (NEC), (5) Atlantic and Gulf American-Flag Berth Operators (AGAFBO) and (6) ten conference and rate agreements (Group of Ten).

On June 18, 1981, the Department of Justice (DOJ) filed a motion seeking leave to file reply comments to NEC's arguments concerning

antitrust immunity for the exempted agreements.[1] This motion was granted by the Commission on July 8, 1981. On August 5, 1981 the Commission, in response to a motion from NEC, denied NEC's request for oral argument but permitted NEC to file a reply to DOJ's comments. On August 24, 1981, the Associated Latin American Freight Conferences (ALAFC) filed a Petition for Intervention in response to the Commission's Order dated August 5, 1981, on the question "whether agreements exempted by Commission rule from section 15 requirements are excepted from the provisions of the antitrust laws." The ALAFC Petition is hereby accepted.

The Baltimore Marine Terminal Association and the New York Credit and Financial Management Association support the rule as proposed. The New York Association of 3200 members note that the exchange of credit information among competitors has long been recognized in law and by the courts as proper business activity.

PRMSA supports the proposed rulemaking and asks that the Commission address specific questions so as to allow for a better understanding of how the exemption can and cannot be utilized by carriers. The Commission offers the following in response to the four specific questions raised by PRMSA:

(a) The final rule does not allow carriers to discuss or agree to credit policies and practices such as concern the period of time for which credit is to be extended or the procedures to be utilized if payment is not received within a certain period. These activities fall within the scope of credit rule enabling authority found in conference or ratemaking agreements which is excluded by the rule. By way of clarification, the final rule limits approved activity under the exemption to that which pertains to the collection, compilation and exchange of credit experience information only. Agreement on any credit matter which is required to be published in a tariff on file with the Commission is prohibited.

(b) The rule would allow carriers to exchange credit experience information such as providing each other with the names of shippers who have not paid freight charges within the period called for by a carrier's tariff rules.

(c) The rule would allow agreement parties to form or employ an entity to collect, compile and distribute credit experience information.

(d) The rule provides only for collecting, compiling and exchanging credit experience information and does not allow carriers to discuss or agree upon a common "credit history report" form which is to be completed by shippers prior to their being granted credit privileges.

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[1] The supplementary information in the Notice of Proposed Rulemaking 46 *Fed. Reg.* 13243 provided that: "The proposed exemption would not confer antitrust immunity." NEC's comments took exception to this statement.

However, if such a credit history report form is already required by individual members of an agreement, the information in that report could be distributed to the other members.

The Group of Ten comments that the agreements proposed to be exempted are purely administrative agreements serving no competitive purpose and that such agreements allow each carrier to exercise individual judgment in determining whether to extend credit or require cash from any given shipper. Consequently, although the conferences do not believe this type of agreement is subject to the filing and approval requirements of section 15, they support the proposal noting that those who wish to obtain antitrust immunity may file for section 15 approval.[2] This commentator also asks that credit rule enabling authority, which is specifically excluded in the proposal, be clarified and that the Commission affirm its past holding that separate section 15 approval is not required for credit rule enabling authority in ratemaking agreements. The Commission notes that credit rule enabling authority has been clarified in the final rule and that such activity is specifically prohibited activity only as to the types of credit information agreements exempted under this rule.

NEC and AGAFBO generally support the proposed Rule. However, they and the ALAFC take exception to the statement appearing in the supplementary information that the proposed exemption will not confer antitrust immunity. In general, these parties argue that exempted agreements are lawful for Shipping Act purposes and are, therefore, entitled to the antitrust immunity which section 15 affords "lawful agreements." They submit that section 35 does not preclude the grant of antitrust immunity and that the Commission may, in considering a proposed exemption, properly determine that a class of agreements satisfies the standards for antitrust immunity set forth in section 15. Regarding the class of agreements subject to this proceeding, these parties submit that there are no competitive considerations that would preclude approval and antitrust immunity. The Department of Justice opposes the contention that an exemption under section 35 can have the effect of granting immunity from the antitrust laws.

As NEC indicated in its comments, the Commission has previously determined that antitrust immunity does not attach to agreements exempted pursuant to section 35. *Exemption of Non-Exclusive Transshipment Agreements*, 10 S.R.R. 148 (1968). In fact, both the Commission and the Supreme Court have indicated that the limited antitrust immunity afforded by section 15 is only conferred by an affirmative act of approval pursuant to section 15. *FMC v. Svenska Amerika Linien*, 390 U.S. 234, 242 (1968); *Volkswagenwerk v. FMC*, 390 U.S. 261, 273 (1968).

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[2] Optional section 15 approval is available under 46 C.F.R. 524.7.

In our view, agreements awarded a section 35 exemption from the filing and approval requirements of section 15 enable parties to elect not to file such agreements without fear that they will violate those requirements. Relief from the filing and approval requirements cannot be construed or equated with approval and the concomitant finding that the agreement merits antitrust immunity. Should exempted agreements authorize concerted conduct which has antitrust implications, the parties operate under that agreement at their risk. Moreover, in the usual course, the Commission would not authorize section 35 exemptions to agreements which have significant antitrust implications. The Commission, as the public arbiter of competition in the shipping industry, has an affirmative duty to examine the potential anticompetitive consequences of each agreement, as well as the circumstances surrounding it, before granting approval and the limited antitrust immunity afforded by such approval. Accordingly, the Commission rejects the NEC, AGAFBO, and the ALAFC positions regarding antitrust immunity in the Final Rule.

Section 35 also provides that the Commission may attach conditions to any exemption and may, by order, revoke any such exemption. The Commission has provided that these agreements, although exempted, must be kept by the parties and available for inspection by the Commission during the term of the agreement and two years thereafter.

Pursuant to the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), the Commission certifies that the rulemaking will not have a significant economic impact on a substantial number of small entities. The 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).

Accordingly, under sections 15, 35 and 43 of the Shipping Act, 1916 (46 U.S.C. 814, 833a and 841a) and 5 U.S.C. 553, the Federal Maritime Commission amends 46 C.F.R. Part 524 as follows:

1. A new paragraph (e) is added to section 524.2, *Definitions,* which reads:

    524.2(e) A credit information agreement is an agreement between common carriers by water or their duly appointed representatives which provides only for the collection, compilation and exchange of credit experience information. Under such an agreement, the parties cannot discuss or agree on any matter which is required to be published in a tariff pursuant to the Shipping Act, 1916 or any rule published pursuant thereto.

2. A sentence is added to section 524.3, *Exemption of agreements* which reads:

 524.3 Agreements as defined in paragraph 524.2(e) shall be kept by the parties and shall be available for inspection by the Commission during the term of the agreement and two years thereafter.

By the Commission

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-2

AGREEMENT NO. 10416 - TRAILER MARINE TRANSPORT CORPORATION AND PUERTO RICO MARITIME SHIPPING AUTHORITY

JOINT MOTION TO DISCONTINUE PROCEEDING IS SUBMITTED TO THE COMMISSION FOR DETERMINATION OF IF AND HOW COMMISSION WISHES TO PROCEED

Finalized March 4, 1982

This proceeding was initiated by Order of Investigation and Hearing served January 7, 1982 (published in the *Federal Register*, Vol. 47, No. 8, Wednesday January 13, 1982, pp. 1418-1420), to determine whether Agreement No 10416 should be approved, disapproved or modified in accordance with the provisions of section 15 of the Shipping Act, 1916.

Notice of the Assignment of the Presiding Administrative Law Judge was served January 11, 1982.

On Friday, January 15, 1982, the Secretary of the Commission, by telephone, informed the Presiding Administrative Law Judge that the parties in this proceeding are in the process of withdrawing the Agreement. A copy of the Notice of Withdrawal of Agreement and Joint Motion to Discontinue filed in the Office of the Secretary, January 15, 1982, was received in the Office of Administrative Law Judges on January 18, 1982. Following is the full text of the:

NOTICE OF WITHDRAWAL OF AGREEMENT AND JOINT MOTION TO DISCONTINUE

Proponents Trailer Marine Transport Corporation and Puerto Rico Maritime Shipping Authority, the only parties to Agreement No. 10416, hereby withdraw Agreement No. 10416, and move that the Commission discontinue this proceeding.

Proponents no longer desire Commission approval of Agreement No. 10416. Since the only issue before the Commission is whether the agreement should be approved, disapproved, or modified, withdrawal of the agreement renders the proceeding moot, and it is appropriate that the proceeding be discontinued. See, *Agreement No. 10294*, (Docket No. 77-23) Order of Discontinuance, mimeo decision served September 17, 1980.

Combined Protestants Government of the Virgin Islands and Puerto Rico Manufacturers Association have authorized us to state they have no objection to granting the motion.

RESPECTFULLY SUBMITTED,
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KOMINERS, FORT, SCHLEFER & BOYER
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(S) MORRIS R. GARFINKLE
MORRIS R. GARFINKLE
GALLAND, KHARASCH, CALKINS & SHORT, P.C.
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Attorney for Puerto Rico Maritime. Shipping Authority

January 15, 1982

Hearing Counsel in its January 19, 1982, reply to proponents' joint motion to discontinue, states, among other things: "In that the subject matter of the Commission's investigation has been eliminated, it is Hearing Counsel's position that no valid regulatory purpose would be served by continuing this investigation. Therefore, Hearing Counsel support Proponent's motion and urge the presiding Administrative Law Judge to discontinue the present proceeding."

DISCUSSION

In the Order of Investigation and Hearing in this proceeding, the Commission pointed out at p. 3 thereof (next to bottom line), ". . . Proponents argue that their affidavits submitted in support of Agreement No. 10416 constitute substantial evidence of widespread malpractices in the Trades. Proponents further emphasize the Commission's discussion of such malpractices in *Agreements Nos. DC-38 And DC-38-1 Association, Puerto Rico Trades—1968, supra*, and suggest that the problems discussed therein still plague the Trades." And the Order of Investigation and Hearing continues p. 5 (last paragraph): "It is possible that malpractices in the Trades and the instability such malpractices can occasion might require some form of remedial action."

Because this is a Commission-instituted investigation rather than a complaint proceeding and because of the above-noted observations contained in the Order of Investigation and Hearing, and the withdrawal of

the *Agreement*, the Presiding Administrative Law Judge, under such circumstances, deems it is the responsibility of the Federal Maritime Commission to determine if and how it wishes to proceed.

Thus, the matter is submitted.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-57

COSMOS SHIPPING CO., INC.

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 722

NOTICE

March 5, 1982

Notice is given that no exceptions have been filed to the January 29, 1982 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. 80-57

COSMOS SHIPPING CO., INC.

INDEPENDENT OCEAN FREIGHT FORWARDER

LICENSE NO. 722

Settlement jointly proposed by the Bureau of Hearings and Field Operations and by the respondent Cosmos Shipping Co., Inc., approved; conditions of settlement include, among others, payment of $117,103 by Cosmos to compromise all civil penalty claims pursuant to section 32(e) of the Shipping Act, 1916, 46 U.S.C. section 831(e).

Compensation paid Cosmos in excess of that specified in ocean carriers' tariffs was not passed through to Cosmos' shipper principals and did not affect Cosmos' performance of its duties as an independent ocean freight forwarder; revocation of freight forwarder license not warranted.

Gerald H. Ullman for respondent.

John Robert Ewers, Joseph B. Slunt, Aaron W. Reese and *Stuart James* as Hearing Counsel.

REVIEW OF PROPOSED SETTLEMENT AND OF RECOMMENDATION FOR A FINDING OF FITNESS AND INITIAL DECISION [1] OF CHARLES E. MORGAN, ADMINISTRATIVE LAW JUDGE

Finalized March 5, 1982

This proceeding is an investigation, pursuant to sections 15, 16, 22, 32 and 44 of the Shipping Act, 1916 (the Act), and pursuant to section 510.9 of General Order 4 (46 C.F.R. 510.9), to determine:

(1) Whether Cosmos Shipping Co., Inc. (Cosmos), a licensed independent ocean freight forwarder, violated section 15 of the Act by entering into and carrying out without Commission approval any agreement subject to the terms of section 15 providing for the receipt of payments from ocean carriers in excess of the amount of ocean freight forwarder compensation specified in the ocean carrier's applicable tariff;

(2) Whether Cosmos violated section 16, Initial Paragraph, by directly or indirectly passing on any portion of monies received by it or its officers from ocean carriers in excess of authorized freight forwarder compensation to its shipper principals, thus obtaining ocean

[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).

transportation on behalf of its principals at less than the applicable rates or charges;

(3) Whether Cosmos violated section 16, Initial Paragraph, even if it did not pass any or all monies received by it or its officers from ocean carriers in excess of authorized ocean freight forwarder compensation to its shipper principals, by obtaining transportation by water at less than the applicable rates and charges.

(4) Whether civil penalties should be assessed against Cosmos pursuant to section 32(e) of the Act for violations of the Act; and/or the Commission's Rules and Regulations, and if so the amount of such penalty which should be imposed taking into consideration possible mitigation of such a penalty; and

(5) Whether Cosmos' independent ocean freight forwarder license should be suspended or revoked pursuant to section 44(d) of the Act, for: (a) willful violations of the Act, and (b) such conduct as may be found to render Cosmos unfit to carry on the business of forwarding in accordance with section 510.9(e) of General Order 4.

Before hearing was noticed, Cosmos filed a motion requesting dismissal for lack of jurisdiction of that portion of this proceeding which alleged violation of section 15. Cosmos argued that the Commission had no jurisdiction to determine the level of freight forwarder brokerage commission. It was determined that the Commission does have jurisdiction over agreements between ocean carriers and forwarders without regulating the exact measure of brokerage.

Cosmos also moved for summary judgment regarding the alleged violation of section 16, Initial Paragraph, as to the passing of monies received by it or its officers on to its shipper principals in excess of authorized freight forwarder compensation, as per ordering paragraph 2 above. Ruling in this contention was withheld pending development of evidence.

Cosmos argued regarding ordering paragraph 3 above in effect that only the shipper can obtain transportation at less than the applicable rates and charges. The ruling denying the motion to dismiss pointed out that section 16 makes it unlawful for any shipper, consignee, *forwarder*, broker, or other person, etc., to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable. The ocean carrier who pays excess brokerage is offering transportation at a net charge less than the rate or charge which would be applicable otherwise. The freight forwarder accepting excess brokerage is obtaining transportation at rates or charges less than would be applicable otherwise.

In lieu of a scheduled oral hearing, in order to avoid protracted litigation, the parties in this proceeding agreed upon a settlement.

The formal record herein includes the following documents, submitted by Hearing Counsel on September 15, 1981:

1. Stipulation (that the affidavit of Morton Bycoffe, President of Cosmos, shall constitute the record in this proceeding).
2. Affidavit of Morton Bycoffe.
3. Proposed Settlement of Civil Penalties, and a Promissory Note executed by Morton Bycoffe.

Also, Hearing Counsel and Cosmos filed memoranda in support of the proposed settlement.

The order of investigation alleged that in the period from August 25, 1975, through November 5, 1976, Cosmos received about $17,030 in payments from steamship lines in excess of the ocean freight forwarder compensation specified in the carriers' tariffs.

In fact, Cosmos admits that it received excess compensation from five named ocean carriers, totaling $335,513.

Cosmos did not pass on any portion of the non-tariff compensation received by it, either directly or indirectly to its principals, either the exporters or consignees of the shipments. At the time it negotiated a forwarding fee with a principal, Cosmos did not know whether any excess compensation would be received from an ocean carrier.

The principals of Cosmos suffered no loss or dimunition of services in any manner by reason of Cosmos' receipt of non-tariffed compensation from ocean carriers. At no time was the dispatch of a shipment delayed in order to move it aboard a vessel of a carrier paying excess compensation.

Except for a small amount of excess compensation received from one ocean carrier, all revenue of this type was received by check from the ocean carriers or their agents, and was entered on the books of Cosmos as income, on which taxes were paid.

A substantial bonus was paid by check to one of the employees of Cosmos who had performed considerable services in this area, leaving the remaining revenue as net income to Cosmos, for use for regular corporate purposes.

On March 10, 1980, the Managing Director of the Commission sent a circular letter to all ocean carriers, in part, advising that payment of compensation to forwarders in excess of rates specified in tariffs is unlawful. Forwarders were also advised on April 2, 1980, not to accept such excess compensation. These documents were distributed long after the events involved in the present proceeding.

At no time during the period in which Cosmos was receiving nontariffed compensation was it ever called to the attention of Cosmos or of other forwarders, so far as Bycoffe recalls, that the practice of receiving excess compensation from ocean carriers was unlawful.

Cosmos and its predecessor have been in business since 1919, and Cosmos always has made a conscientious effort to comply with pertinent laws and regulations.

For the year 1980, the net worth of Cosmos is about $194,300. Cosmos has agreed to pay a civil penalty of $117,103, or about 60 percent of its net worth.

When this penalty is paid, plus interest at 12 percent, and considering other factors such as taxes, legal fees and other costs, it is apparent that Cosmos will not benefit financially from the excess compensation which it received.

Cosmos has not profited in recent years, having lost $13,000 in fiscal 1978, $11,000 in 1979, and $20,000 in 1980.

Cosmos fully cooperated with the staff of the Commission. It voluntarily disclosed that it received untariffed compensation from five named ocean carriers. Also there is considerable doubt of any *willful* failure by Cosmos to comply with provisions of the Act.

No good reason has been shown to revoke the independent ocean freight forwarder license of Cosmos.

The settlement proposed herein requires Cosmos to pay a total of $117,103, plus interest at 12 percent. The penalty is to be paid in nine installments, the first $13,011.48 payable 30 days following Commission approval of the proposed settlement, and the other eight installments of $13,011.44 each every six months following approval of settlement, with the last installment payable four years following approval.

Cosmos agrees to preserve certain records, to take measures to prevent the receipt by it of non-tariff compensation, to give certain notice of the settlement agreement to its directors, officers and field office managers, and if Cosmos were to breach the agreement, Cosmos will not interpose the statute of limitations as a bar or a defense in certain proceedings.

The agreement also provides that it is not to be construed as an admission by Cosmos of the violations alleged in the order of investigation and hearing.

It is concluded and found that the proposed settlement agreement both serves the public interest and is fair to Cosmos. Said settlement agreement hereby is approved.

It further is concluded and found that the compensation paid Cosmos in excess of that specified in ocean carriers' tariffs was not passed through to Cosmos' shipper principals, and did not affect Cosmos' performance of its duties as an independent ocean freight forwarder.

And it further is concluded and found that revocation of Cosmos' ocean freight forwarder license is not warranted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-60

EASTERN CEMENT CORPORATION

v.

PORT OF PALM BEACH DISTRICT

NOTICE

March 5, 1982

Notice is given that no appeal has been taken to the January 28, 1982 dismissal of the complaint in this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-60

EASTERN CEMENT CORPORATION

v.

PORT OF PALM BEACH DISTRICT

MOTION TO DISMISS COMPLAINT GRANTED

Finalized March 5, 1982

A complaint was filed by Eastern Cement Corporation against Port of Palm Beach District (Port) which was served on September 30, 1980. The Complainant alleges, among other things, that respondent has subjected it to payment of rates for storage facilities in violation of 46 U.S.C. 814, 815 and 816. Basically, the complainant seeks damages on the basis or "overcharges" and "unjustly discriminatory and unfair rental charges" and claims damages in excess of $25,000.00.

Respondent Port filed a motion to dismiss the complaint to which complainant filed its reply. Pursuant to notice served December 10, 1981, a prehearing conference was held before this Judge on January 5, 1982. After extensive discussion concerning the matters relating to the motion, this Judge denied the motion and Ordered a procedural schedule for the future conduct of this proceeding with the concurrence of both parties. (See: Prehearing Conference Report and Order served January 6, 1982.) During the prehearing conference a discussion was held concerning an existing civil suit currently pending in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida.[1] On the basis of representations made by counsel for complainant, the Judge did not stay this proceeding because of the stated differences between that case and this proceeding. (See: Prehearing Conference Transcript, pp. 4-8.)

Complainant has now filed a Motion to Dismiss served January 19, 1982, indicating that the parties have entered into a stipulation of settlement in the Circuit Court case, "which necessarily encompasses and resolves a dispute between Eastern Cement Corporation and the Port of Palm Beach District which is currently before the Federal Maritime Commission." The motion attached the Stipulation[2] and re-

[1] *Port of Palm Beach District, Etc. v. Eastern Cement Co., Etc.*, Case No. 80-2910 CA (L) OIE.

[2] Paragraphs 4 and 5 of the Stipulation provide that:

Continued

quests dismissal of this docket "with prejudice with both parties to bear their respective costs and attorney's fee."

This Commission has approved a wide variety of settlements and discontinued numerous complaint proceedings arising under the various provisions of the Shipping Act, 1916. *Del Monte Corp. v. Matson Navigation Co.*, 22 F.M.C. 364, 368-369 (1979). Furthermore, it is well settled that legislative, judicial and Commission policy foster the settlement of administrative proceedings. *Del Monte Corp.*, p. 367. The terms of the Stipulation submitted to the Court reveal that the parties have resolved their differences and embrace obligations which apparently are satisfactory to Complainant to seek a dismissal of this proceeding. Counsel for the Port has indicated that he joins in the motion.

Accordingly, the Motion to Dismiss is granted.

It is Ordered, That the complaint is hereby dismissed with prejudice;

It is Further Ordered, That the proceeding is discontinued.

(S) PAUL J. FITZPATRICK
Administrative Law Judge

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4. EASTERN shall, simultaneously with the execution of this Stipulation, execute its Voluntary Dismissal with Prejudice, of all claims and issues raised and pending in that certain action before the Federal Maritime Commission entitled *Eastern Cement Corporation v. Port of Palm Beach District*, Docket No. 81-60. Such voluntary dismissal shall be immediately filed by EASTERN with the Federal Maritime Commission and EASTERN shall take such steps as are necessary to obtain that Commission's approval of the dismissal.

5. The parties shall, simultaneously with the execution of this Stipulation, execute their Joint Stipulation for Dismissal, with prejudice, of all claims, counterclaims, and defenses pending in this litigation. Said Joint Stipulation for Dismissal shall be submitted by the parties to the above-referenced court for its approval and filing immediately following the approval of EASTERN's dismissal of its FMC Complaint by the Federal Maritime Commission.

The Court by Order Approving Stipulation, signed by Circuit Court Judge Jack H. Cook on January 18, 1982, in effect, approved the Stipulation as to all of its terms and conditions and the parties were directed to comply with those terms.

FEDERAL MARITIME COMMISSION

TITLE 46 - SHIPPING

CHAPTER IV - FEDERAL MARITIME COMMISSION

SUBCHAPTER B - REGULATIONS AFFECTING MARITIME CARRIERS AND RELATED ACTIVITIES

PART 530 - INTERPRETATIONS AND STATEMENTS OF POLICY

(DOCKET NO. 80-70)

STATUS OF BULK COMMODITIES WITH RESPECT TO THE TARIFF FILING REQUIREMENTS OF SECTION 18(b)(1) OF THE SHIPPING ACT, 1916

March 8, 1982

AGENCY: Federal Maritime Commission

ACTION: Final Interpretative Rule

SUMMARY: This makes the transportation of bulk commodities loaded and carried in containers, trailers, rail cars, or similar intermodal equipment (with the exception of LASH or Seabee barges) moving in the foreign commerce of the United States subject to the tariff filing requirements of the Shipping Act, 1916.

DATE: Effective date of this interpretation is stayed until further order.*

SUPPLEMENTARY INFORMATION:

On October 14, 1980, the Commission issued a proposed interpretative rule (45 F.R. 67711), making bulk type cargo loaded in containers, trailers, rail cars, LASH or Seabee barges or similar types of intermodal equipment subject to the tariff filing requirements of section 18(b) of the Shipping Act, 1916, (46 U.S.C. § 817), because, once so loaded, such cargo is carried with mark or count.

Several persons commented on the proposed rule. While most agreed with the rule to the extent that it is applied to bulk commodities loaded and carried in containers, trailers, rail cars or similar intermodal equipment, some objected to its application to LASH or Seabee barges. The objections were based upon the contention that such barges are "vessels" as provided by section 1 of the Shipping Act (46 U.S.C. § 801)

*Effective June 27, 1983, pursuant to notice appearing in the *Federal Register* on April 28, 1983 (47 FR 10851).

and not some form of intermodal equipment. Consequently, it was suggested that bulk type cargo transported in such vessels is "cargo loaded and carried in bulk without mark or count" and is therefore exempt from the tariff filing requirements of section 18(b)(1). The Commission agrees with this contention and thus finds that the exclusion of LASH/Seabee barges from its proposed interpretative rule is warranted.

The Commission therefore concludes that bulk type cargo loaded in containers, trailers, rail cars, or similar types of intermodal equipment (with the exception of LASH or Seabee barges) is subject to being loaded and carried with mark or count, and is, therefore, subject to the tariff filing requirements of section 18(b) of the Shipping Act, 1916.

Other commenting parties opposed the proposed rule on the ground that carriers of bulk commodities need complete flexibility in the quotation of freight rates and that bringing such cargo under the Commission's tariff filing regulations could result in higher costs to shippers. They therefore argued that all bulk cargo carried in intermodal equipment should be exempt from the tariff filing requirements regardless of the type of equipment employed.

The Commission agrees that there may be some merit to exempting certain types of bulk commodities from the tariff filing requirements of section 18(b)(1). However, such an exemption is beyond the scope of this proceeding. Therefore, by separate Notice issued this date, the Commission is instituting a rulemaking proceeding to consider the exemption of certain bulk commodities under section 35 of the Shipping Act, 1916 (46 U.S.C. § 833a). Pending completion of this new rulemaking and to avoid potentially unnecessary tariff filings, the Commission is staying the effective date of the Interpretative Rule issued in this proceeding.

Therefore, Part 530 of the Code of Federal Regulations is amended by the addition of the following:

530.15 Further interpretation of the Shipping Act.

Section 18(b)(1) of the Shipping Act, 1916, provides, in part, that:

> ". . . every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports between all points on its own route and on any through route which has been established . . . . The requirements of this section shall not be applicable to cargo loaded and carried in bulk without mark or count . . . ."

The Federal Maritime Commission interprets this provision to mean that bulk cargo which is loaded in containers, trailers, rail cars, or similar types of intermodal equipment is subject to being loaded and

carried with mark or count and is therefore subject to the tariff filing requirements of section 18(b)(1) of the Shipping Act, 1916. This interpretation does not apply to bulk cargo loaded and carried in LASH or Seabee barges. For the purposes of this section "bulk cargo" means those commodities which are in a loose, unpackaged form and have homogeneous characteristics.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81-27
AGREEMENT NOS. 10355 AND 10402

NOTICE

March 8, 1982

Notice is given that no exceptions have been filed to the February 1, 1982 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. 81-27
AGREEMENT NOS. 10355 AND 10402

Held:

1. Where two Agreements (Agreement Nos. 10355 and 10402, as modified), respectively, provide for a joint service that has the effect of improving the existing irregular service in a Trade, (a) by establishing a regular service permitting more frequent sailings, (b) by combining cargoes and rationalizing service so as to eliminate costly cargoless "ballast" legs, (c) by insuring the availability of ship capacity for the Trade; and there are no protesting intervenors and disapproval of the Agreements would cause each of the parties to the Agreements to operate separately so that the Trade would be overtonnaged and less efficient; such Agreements are in the public interest and satisfy the requirements of the holding in *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968), in that the Agreements are required by a serious transportation need, necessary in order to secure important public benefits, and are in furtherance of a valid regulatory purpose.
2. Where a joint service agreement is entered into by a private commercial carrier and a carrier owned by a government, and the agreement provides that the parties are acting as a single common carrier, the joint service has one vote when participating in any conference or similar organization. The fact that the governmental carrier may have "major functions and responsibilities beyond those which are purely commercial" and "has important defence, political and political/economic responsibilities" does not overcome the effect of the Commission's holding in *In Re Agreement No. 9973-3—Johnston Scanstar Service Voting Provision*, Report and Order, served 8/15/78, 21 F.M.C. 218 (1978).

Elmer C. Maddy and *Walter H. Lion* for The Bank & Savill Line Ltd., The Bank Line Limited and The Shaw Savill & Albion Co. Ltd.

Sanford C. Miller and *Bert I. Weinstein* for The Shipping Corporation of New Zealand, Ltd.

John Robert Ewers, Joseph B. Slunt, Polly Haight Frawley and *Stuart James* as Hearing Counsel.

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

Finalized March 8, 1982

This proceeding was instituted pursuant to Commission Order [2] which was issued to determine whether or not, under section 15 of the Shipping Act of 1916, Agreements No. 10402 and No. 10355, respectively, should be approved, disapproved, or modified. There are no

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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] See Order of Investigation and Hearing and *Pendente Lite* Approval served April 14, 1981.

intervenors in this proceeding, the only parties being the Proponents, Bank & Savill Line Ltd. (BSL); the Shipping Corporation of New Zealand Ltd. (SCNZ); the Bank Line Ltd. (Bank Line), the Shaw Savill & Albion Co. Ltd. (Shaw Savill), and the Commission's Bureau of Investigation and Enforcement (BIE).

FINDINGS OF FACT

The parties to this proceeding have submitted a proposed stipulation of facts which is both precise and complete. The facts contained in it are supported by the attached exhibits X-1 through X-16. The proposed stipulation and the accompanying exhibits are hereby adopted and the facts involved therein are so found as set forth below:

I. *Background*

Agreement 10355 is a cooperative working arrangement between the Bank & Savill Line Ltd., and the Shipping Corporation of New Zealand Limited, providing for a joint service in the trade "between ports of Australasia and the Pacific Islands and Gulf ports of the United States and between ports in Australasia, the Pacific Islands and ports in the Caribbean" (hereinafter "the Trade"). X-1 at 1. The Caribbean trading area includes ports in the Caribbean Islands, and along the coasts of Central and South America. Among the ports served by Bank & Savill are Sydney and Melbourne in Australia; Auckland, New Plymouth and Lyttelton in New Zealand; Houston and New Orleans in the United States Gulf Coast. and Callao, Guayaquil, Panama City, Curacao, La Guaira, Kingston, Veracruz, Acajutla, Port of Spain, Bridgetown, Fort de France, and Santo Domingo in the Caribbean. X-8 at 5.

2. Agreement 10355 was initially filed with the FMC for approval on October 17, 1978. The Agreement was subsequently amended on February 28, 1979 and July 25, 1979 to take into account the objections of Sealand Service Inc. and Farrell Lines, Inc. The limitations on the number and size of vessels as stated in Article 4 of Agreement 10355 were instituted in the Agreement, as amended on July 25, 1979, in response to Farrell Lines' objections. As a result of such amendments, all objections to the Agreement were dropped and there are no complainants or intervenors in this proceeding. No carrier or shipper has presented testimony concerning or opposed to Agreements 10355 and 10402 as amended. X-1; X-8 at 2; X-14 at 4.

3. Agreement 10402 is an agreement between the Bank Line Ltd., and Shaw Savill & Albion Co. Ltd., providing authority for the Bank & Savill Line, Ltd., to operate as a common carrier in the Trade. Bank & Savill is a corporation, formed under British law in October 1977, which began operations in the Trade in January of 1978. Agreement 10402 was given Pendente Lite approval by an Order of the Federal Maritime Commission, served April 14, 1981. The service has been

operating under terms in the Agreement which expressly limit service capacity to up to three container vessels of up to 800 TEU's and up to 4 composite breakbulk vessels or the equivalent in single voyage charter tonnage, each vessel having an average overall capacity of up to 750,000 cubic feet bale space included in which up to 400 TEU's can be accommodated. X-8 at 2-4, 10-15.

4. The Bank Line Ltd., and the Shaw Savill & Albion Co. Ltd., are corporations formed under British law, both of whom had a long history of service in portions of the Trade prior to the formation of Bank & Savill. X-8 at 2, 6-10.

5. The Governments of the United Kingdom and of New Zealand have expressed a governmental interest in approval of the subject agreements by Aides Memoire issued by the New Zealand Government on June 10, 1980 and September 3, 1981, and by the British Government on September 10, 1981. X-4; X-5; X-6.

6. An initial dispute concerning whether a section 15 agreement was required to authorize the formation of Bank & Savill has been resolved by the filing of Agreement 10402 and by the settlement of a Claim for Civil Penalty which had been initiated by the Federal Maritime Commission General Counsel against Bank & Savill. The settlement agreement conclusively resolves any issue of prior section 15 violations, without admission of fault by Bank & Savill, and any such violations are no longer an issue in this proceeding. X-7; X-8 at 35.

II. *Interest of SCNZ*

7. During the period of interim approval of Agreement 10402, Bank & Savill has operated a three-vessel container service. Although SCNZ has chartered a vessel to the service, SCNZ has not been able to participate in the service as a carrier. X-8 at 12-15.

8. Raymond Peter Shea, Deputy General Manager of the SCNZ, testified that New Zealand is probably more dependent upon shipping than any other developed country and this is compounded by its geographic location such that the freight content of all import and export transactions is particularly significant in the commerce of the country. X-9 at 1.

9. The capital intensity and current low financial return from shipping makes it unattractive, if not impossible, for New Zealand private sector interests to invest substantially in this area and thus the national strategic requirements to obtain some presence in the shipping sector is, of necessity, at this time forced into the public sector. SCNZ is wholly owned by the Government of New Zealand. SCNZ participation in Agreement 10355 represents SCNZ's first entry as a common carrier in the trades between New Zealand and the United States. The Corporation was incorporated in 1974 under the provisions of the Companies

Act 1955 and in accordance with the Shipping Corporation of New Zealand Act 1973. X-9 at 1-2.

10. New Zealand's economy is heavily dependent on its overseas trade. For most of its history, New Zealand's major trade routes have been dominated by overseas shipping operators. The acceptability of allowing overseas interests to set freight rates and levels of service which in turn determine the competitiveness (or lack thereof) of the country's overseas trade is a matter of concern to New Zealand. Establishment of a New Zealand National Line provides an alternative to, and a means of influence in, the various shipping bodies and organizations serving the New Zealand trade. In addition, a New Zealand National Line also provides a means of improving shipping/trade knowledge through participation in shipping markets which can be used for the benefit of all New Zealand traders. x-9 at 3.

11. Mr. Shea testified that SCNZ concluded that, given that the United States is one of New Zealand's major trades, it follows from the basic objectives of SCNZ as New Zealand's National Line, that as a matter of basic policy, SCNZ must have a presence as a common carrier in New Zealand/United States liner trades. The decision to accomplish this objective through participation in Agreement 10355 resulted from a number of reasons viz;

(a) SCNZ, both from its own knowledge and from consultation with others knowledgeable in the trade, concluded that a one-vessel service is economically impossible. With only one vessel on this long trade route, a carrier cannot offer the frequency of service required by shippers Its provision of valuable container equipment would have to be more than doubled at very high cost. Many of its facilities, including its marketing and operational needs, would have to be maintained at a fixed level, regardless whether for one vessel or for three vessels. These fixed costs would be so disproportionately high as to make the operation of a one vessel service uneconomic even if contrary to a reasonable expectation, any support would be attracted to a one-vessel service.

(b) Based on the experience of existing operations in the trade it was established that the minimum acceptable service frequency to induce a level of cargo support consistent with economic operation was a monthly service. This required that SCNZ would need to operate within a service framework of three vessels. A further requirement of the trade was that the service should incorporate the most modern and efficient equipment suitable to the needs of this particular trade. To meet these criteria requires a container service with refrigerated container capacity, as well as having a breakbulk and heavy lift capacity together with supplemental breakbulk vessels. Having regard to SCNZ's limited capital re-

sources, it was deemed most appropriate that a one-vessel SCNZ participation in a three-vessel joint service would permit SCNZ to have an important presence but a presence in keeping with its capital strength and other commitments, as well as the overall needs of the trade.

(c) A service operated in conjunction with the Bank and Savill Line providing two other similar modern vessels enables the marketing, terminaling and other facilities, and operational functions, to be supported on an economic basis, which, of course, yields cost efficiencies.

(d) The economic considerations for a three-vessel service, as well as SCNZ's appraisal of the needs of this trade, the shippers and receivers in New Zealand as well as in the United States, compels SCNZ to conclude that the framework of Agreement 10355 is the only reasonable mechanism for operation in this trade. SCNZ did not in the planning stage actively investigate, nor has it since investigated, other alternatives. However, the delay in obtaining approval of this agreement, as well as the need to appraise the future, has forced SCNZ to review its original analysis of the situation. As a matter of policy, SCNZ must have a presence as a common carrier in the New Zealand/U.S. trades. If it should develop, however, that Agreement 10355 is not permitted to go forward, SCNZ would then have to consider as the only remaining alternative, establishing a three-ship service.

(e) A service at a level lower than three-vessels is not one which can be economically considered under any standard. A three-vessel service would present an unnecessary and unwarranted strain on the resources of SCNZ. In addition, taking the larger viewpoint, a three-vessel service by SCNZ added to a service maintained by Bank & Savill, presumably also with three vessels or even more than three vessels if Bank & Savill, are not permitted to operate as a single service by the Commission, would impose on the trade excessive and unneeded capacity, with consequent upward pressure on freight rates. X-9 at 10-12.

III. *History and Nature of the Trade*

12. New Zealand exports to the United States and to the Caribbean consist largely of primary agricultural products, especially meat (beef, veal and lamb) and dairy products (mainly cheese and casein), which by value represented approximately 77% of its exports to the United States in the year ending June 1980. X-8 at 6-7; X-9 at 8.

13. Traditional [New Zealand] imports from the U.S. include petroleum products, rice, tobacco, fruit and nuts, synthetic rubber, lumber, chemicals (including fertilizers and insecticides), pharmaceutical compounds, cotton, metal, edible and vegetable oils, internal combustion

engines, motors, power generating machinery, agricultural machinery, automatic data processors, food processing machinery and plastics. X-9 at 9.

14. Cargoes from Australia and New Zealand are generally similar, but in the meat trade Australia tends to be a more important beef exporter. In addition, Australia is exporting increasing quantities of manufactured goods such as automobiles and agricultural machinery to the Caribbean and the surrounding region. X-8 at 7.

15. The northbound liner trade from Australia and New Zealand to the United States is highly concentrated in refrigerated commodities. The southbound trade primarily requires dry containerizable cargo and bulk cargo capacity. In 1979, the U.S. Gulf Coast imported 45,000 long tons of dry cargo from Australasia, but exported 184,000 long tons. In that same year the Gulf Coast imported 31,000 long tons of refrigerated cargo but did not export any refrigerated cargo. Since not all dry cargoes can be carried in refrigerated containers, capacity utilization tends to be less than if all containers could be used on both ends of the Trade. X-8 at 6-7; X-10 at 7, 20.

16. The northbound trade is directed primarily to the United States North Atlantic and Pacific coasts. As the U.S. Gulf Coast is in close proximity to major United States meat and dairy product producing regions, northbound trade from Australia/New Zealand to the Gulf region is relatively minimal. X-8 at 7-9; X-10 at 14-22; X-11 at 9-10, Graphs 1-2.

17. Gulf Coast liner exports to Australia/New Zealand have been consistently greater than liner imports in both value and volume terms. Since 1969, on a value basis, Gulf Coast liner exports have increased at a compound annual rate of 10.8%, but on a volume basis have decreased at a rate of 1.6%. Gulf Coast liner imports have increased at a compound annual rate of 21% in value terms and 9.1% in volume terms. X-11 at 9. Economists have testified that the U.S./Australasia Trade is likely to grow. X-10 at 4; X-11 at 11. In long tons, U.S. exports have increased by 31% over the 1970-1980 decade or at a compound annual rate of 2.7%. Imports grew by 55% over the same ten year interval, or 4.5% per year. X-10 at 12.

18. The inbound and outbound Trades from the United States Gulf to Australia and New Zealand are, therefore, imbalanced, in both direction (more so than trade from any other U.S. coast to Australia and New Zealand) and type of capacity required. As a result, service difficulties arise for any line serving only the United States Gulf Coast from Australia and New Zealand. X-8 at 7-10.

19. For approximately 60 years prior to the formation of Bank & Savill, the Bank Line had operated a service from the United States Gulf coast to Australia and New Zealand, with its vessels returning to

the Gulf via either the charter market or Europe, when possible. X-8 at 9.

20. Shaw Savill, on the other hand, had operated a service from New Zealand to the Caribbean and Central and South America. The Shaw Savill vessels generally returned to New Zealand without cargo, prior to joining the United States Atlantic and Gulf/Australia—New Zealand Conference in 1975. After 1975, Shaw Savill vessels attempted to carry cargoes from the U.S. Gulf to Australia and New Zealand, but the service was commercially unsuccessful because extended trips and loading delays in Australia compromised the quality of the New Zealand Caribbean service. X-8 at 7-9.

21. Without the intrusion of Australian cargoes, however, the Shaw Savill service was unable to obtain sufficient southbound New Zealand cargo to balance its northbound carryings. X-8 at 8-9.

22. During the 1970's, the economics of the shipping industry was altered by the increase in world oil prices. As a result, the inclusion of an unladen "ballast leg" in the Australia—New Zealand/U.S. Gulf Trade became increasingly uneconomical for Bank Line as well as Shaw Savill. X-8 at 10; X-10 at 41-42.

23. At the same time, the emergence of new container technology made possible increasing efficiency in cargo handling, but required enormous capital investment in order to replace existing vessels and equipment. The expense is even greater in a trade where substantial refrigerated container capacity is required. By 1974, however, 70% of the liner cargo from the Atlantic and Gulf coasts to Australasia and the Pacific Islands was containerized. X-8 at 16; X-10 at 42.

24. Bank & Savill Line Ltd. began operation as a joint service on January 1, 1978. Initially, various conventional vessels were chartered from Shaw Savill and Bank Line for use in the Bank and Savill service. At about the time of the formation of Bank and Savill, it was decided by both Bank Line and Shaw Savill to separately finance the construction of two new, modern containerships to be chartered to Bank & Savill for use in the U.S. Gulf, Australasia, Caribbean trade. A third container vessel was commissioned at this time by the Shipping Corporation of New Zealand in connection with Agreement 10355. These three container vessels, the WILLOWBANK, DUNEDIN, and NEW ZEALAND CARIBBEAN, were delivered in 1980, and are currently in service in the Trade. All three vessels are chartered to Bank & Savill by their owners. They range in capacity from 766 to 852 TEU's when non-cellular spaces are used for containers and have bale space for 3,681 to 4,227 CBM's if the non-cellular spaces are not filled by containers. X-3 at 11-13.

25. Since 1975, average southbound breakbulk utilization (for Bank Line prior to 1978 and Bank and Savill after 1978) has not been greater than 55% in any year. Bank & Savill's southbound utilization rate for

TEU's averaged 55% in 1978, 71% in 1979, and 73% for the first half of 1981. X-8 at 20. During the second half of 1980, Bank and Savill's average southbound TEU utilization, including breakbulk tonnage which was converted to TEU's, was 67%. X-11 Table 8. The average southbound vessel utilization of breakbulk space during the same period of time was 33%. During the first half of 1981, the utilization of the breakbulk space southbound was 39%. X-12 at 13. The only breakbulk cargo carried on the containership is large overgauge single lift cargo which the container terminals are willing to accommodate.

26. The Trade is also served by carriers trading with the United States North Atlantic and South Atlantic coasts. Currently, Columbus Lines and Farrell Lines stop at U.S. Gulf ports while en route from Australia and New Zealand to the United States Atlantic Coast, but only Bank & Savill offers a service exclusively from the United States Gulf coast to Australia and New Zealand. The combined annual TEU capacity for Farrell and Columbus for both coasts in 1980 was approximately 69,000 TEU's. At present, all of the carriers serving the Trade on a regular liner basis are operating with containerized services. X-8 at 5-6; X-10 at 30-41.

27. All of the operating Atlantic and Gulf services operate with at least three ships and on at least a monthly basis. A service with less than three vessels could not provide a monthly service because of the great distance between the U.S. Gulf and Australasia, as most carriers average from 70-90 days per round trip voyage. Carriers have found that a less than monthly service is insufficient to attract regular shippers. X-9 at 11-12; X-10 at 67-68.

28. As a result of the oil price increases of recent years, most services are operating their vessels at a lower speed than the design speed of the vessels. Of the services to the United States Gulf coast, Bank & Savill operates at the highest ratio of actual to design speed, a ratio of approximately 100%. Thus, the service is efficient in terms of resource usage. The Bank & Savill service also differs from the other carriers serving the U.S. Gulf/Australasia trade in that it alone has a breakbulk/heavy-lift capability in its container vessels. X-8 at 13-14; X-10 at 51, 59-61.

29. An alternative to the liner carriers directly serving the United States Gulf/Australasia trade are minibridge carriers, via the Pacific coast, including Karlander—Kangaroo Lines and until recently, Seapac and Farrell Lines. There is, however, no advantage in resource use by minibridge over all-water routes in trade with Australasia. In economic terms, the minibridge route requires a greater allocation of resources. Thus, the all-water route from the Gulf to Australia and New Zealand is superior so long as the service is efficient, regular and sufficiently frequent. X-8 at 6; X-10 at 45-59; X-14 at 2-3.

30. United States Gulf ports benefit from continuing availability of a high quality all-water liner service to Australia and New Zealand, since the availability of such a service reduces the loss of cargoes due to diversion via minibridge. Moreover, the Bank & Savill service presently offers shippers a transit time equivalent to or faster than the speediest minibridge alternatives. X-10 at 45-49.

IV. *Operations and Anticipated Effects of Agreements*

31. The number of ships employed in the Bank & Savill service has been reduced as the three modern containerships came into service in 1980. Although bulk cargoes, bulk liquids and project cargoes to Australian outports were dropped, shipper complaints resulting from the change in service characteristics have been few and Bank & Savill continues to carry some breakbulk cargo. X-8 at 14-15; X-12 at 7. The three modern containerships operated by Bank & Savill also offer a regular and frequent service, having a frequency of approximately one voyage per month.

32. The Bank & Savill service includes the northbound traffic from Australasia to the Caribbean, thereby balancing its southbound carryings from the United States Gulf coast to Australasia and resulting in more efficient vessel usage. For the Caribbean countries, the efficiency of liner service is a major benefit since these less developed countries are highly sensitive to price increases in primary products. X-8 at 18.

33. The current Bank & Savill service does not result in a general increase of overall capacity in the Trade, although it does reflect a shift from breakbulk to container carriage. Annually, assuming monthly sailings, the current service offers 10,331 TEU's or 9,464 TEU's and 50,000 CBM's if bale space is not used for containers. In 1978, Bank & Savill offered 6,570 TEU's and 350,000 CBM's; in 1979 7,100 TEU's and 240,000 CBM's; and in 1980 8,600 TEU's and 60,000 CBM's. In the northbound leg of the Trade 100% of the cargo is potentially containerizable, while in the southbound leg it would be possible to containerize 85 to 90% of the cargoes. There is no evidence that operation of the Bank & Savill joint service has resulted in an increased market share for the members. X-8 at 14, 29-32; X-11 at 33.

34. There are recent developments, however, which show an increase in shipper demand for the introduction of a breakbulk service into the Trade. The developments concern certain cargoes originating in the U.S. Gulf/southbound Australasia Trade which are not economically containerizable. For instance, substantial quantities of milk carton stock and wood pulp (neo-bulk cargoes) are exported from the United States Gulf area to Australasia. This cargo is generally not containerized because its poor containerized stowage characteristics would result in an effectively higher freight rate for the shipper. Prior to the introduc-

tion of the Bank & Savill containership service, portions of these cargoes were carried on Bank & Savill conventional vessels. X14 at 2.

35. Since the introduction of the Bank & Savill containerships, wood pulp and milk carton stock cargo has largely moved on tramp vessels or been shipped via the United States West Coast on LASH vessels operated by Farrell Lines, Inc. Although the Bank & Savill containerships do have breakbulk capacity, Bank & Savill has been unable to cover this cargo because the container vessels use container facilities in Australasia where normal breakbulk cargo cannot be handled. The only breakbulk cargo carried on the containerships is large over-gauge single life cargo which the container terminals are willing to accommodate. Moreover, the demand has been insufficient to justify the use of breakbulk liner ships out of U.S. Gulf ports so long as this cargo was covered by Farrell Lines. X-14 at 2-3.

36. In recent weeks, however, it has been announced that Farrell Lines, Inc. is withdrawing its LASH vessels from the West Coast service, leaving these cargoes uncovered. The shippers involved, which include International Paper and Georgia-Pacific, have made temporary arrangements by chartering vessels out of the U.S. Gulf in their own right. This was made possible by the currently weak charter market, but represents no long-term solution to the problem. X-14 at 3.

37. Accordingly, a Bank & Savill breakbulk liner service could benefit shippers by covering these cargoes, as well as other residual bulk cargoes which are available at Gulf Ports. The best estimate of the amounts of milk carton stock and wood-pulp cargo available is 35,000 cubic bale meters per year. Mr. Greenwood on behalf of Bank & Savill stated that in order to provide an adequate service to cover this cargo and the various parcels of bulk cargoes which are readily available in the U.S. Gulf, it would be necessary to provide at least six conventional sailings per year. A voyage for a breakbulk ship takes approximately 120 days. X-12 at 5; X-14 at 3.

38. Not a single liner competitor in the Trade operates breakbulk tonnage or has objected to Bank & Savill's possible introduction of such tonnage. Farrell Lines withdrew its objections to Agreement 10355 when that Agreement was amended in July of 1979 to restrict the service to three container and four conventional vessels of the sizes specified in the Agreements. X-14 at 4.

39. If Agreements 10355 and 10402 are not approved, then the parties to the Agreements have stated that neither Bank Line nor Shaw Savill would be likely to withdraw from the Trade, but each would be required to add additional tonnage so as to provide a regular service. X-8 at 17.

40. Although during past years there has been no evidence, report or complaint of malpractices in the Trade, and rates have remained relatively stable, there is a reasonable possibility that the expansion of

capacity which would result from disapproval of Agreements 10355 and 10402 would result in an atmosphere where malpractices are more likely to occur. Overtonnaging is recognized as a cause of malpractices among ocean liner operators. X-8 at 6; X-11 at 36-37.

41. Upon approval of Agreement 10355 it is the intent of the parties to the Agreements to operate only under the Bank & Savill/Shipping Corporation of New Zealand joint service, and that Bank & Savill will not operate a separate service in this Trade. Although Agreement 10402 will be inactive so long as Agreement 10355 is in operation, Agreement 10402 provides a necessary basis for the structure of Agreement 10355. Presently, neither Shaw Savill, Bank Line, Bank & Savill nor SCNZ operate or participate in a common carrier service in the Trade other than in the capacity specified in the proposed Agreements. X-8 at 15, 34; X-12 at 12; X-9 at 5.

42. Although the Agreements include the Pacific Islands within their scope, these Islands are not part of the planned itinerary. The parties are prepared to make inducement stops, however, and have done so in the past. None of the Pacific Islands included in the Agreements, however, are U.S. trust territories. X-12 at 14.

43. The parties to Agreement 10355 propose to initially share revenues and expenses on a basis of ⅔ to Bank & Savill and ⅓ to the SCNZ. Although the parties are responsible for the financing and operation of the vessels on an ownership basis, the parties will operate on a daily standard allowance for each party for each day its vessel is operated. The financial arrangement could be amended accordingly among the parties if the make-up of the vessels in the service should change. X-8 at 15.

44. Operating expenses which will be shared include terminal expenses, marketing expenses, agency expenses and stevedoring expenses, but not lost/damaged cargo claims. X-12 at 3.

45. Normally, for commercial purposes, the service will be advertised jointly with the programs of all vessels being shown. However, each party may wish to undertake corporate advertising in which case either party may wish to show its interest in this service together with its other service interests. X-12 at 4.

46. Neither Agreement can be terminated at will prior to the completion of the initial approval period of five years, and termination thereafter requires twelve months prior notice by all parties. The five year initial approval period is required because of the magnitude of initial investment required from each of the parties in the new containerships and in purchases of container equipment. X-8 at 16; X-12 at 8.

47. SCNZ does function in large part on a commercial basis. In many ways, the legal framework under which the Corporation operates is no different from an incorporated company. The main objectives and internal regulations are set out in the Memorandum and Articles of Associa-

tion and policy and operations are controlled by a Board of Directors within this framework. This enables the Corporation to meet changing commercial circumstances on the same footing as its competitors and has allowed an operational control to be established without the development of undue bureaucratic procedures. X-9 at 2. The Corporation is constituted in such a way that it trades as a commercial entity with a requirement that it pay tax and dividends to its shareholder, the New Zealand Government. X-9 at 4. The Corporation does not receive any subsidies from the New Zealand Government other than a special arrangement in respect of a service to the Cook Islands and Niue. It does not receive financial advantage by virtue of the fact it is owned by the New Zealand government in that it does not receive loans at lower interest rates nor is it taxed at a lower rate than a privately owned company. X-13 at 7.

48. Mr. Shea testified, however, that as the National Line of New Zealand, SCNZ has major functions and responsibilities beyond those which are purely commercial. SCNZ is charged with additional economic responsibilities including, most importantly, the requirement of ensuring that cost effective trade development opportunities are provided and that New Zealand's proper interests as a trading national are protected within the conference framework. Moreover, SCNZ has important defence, political and political/economic responsibilities. In SCNZ's view, these are functions and responsibilities which are unique to SCNZ, as distinguished from the interests of Bank & Savill, the other parties to Agreement 10355, whose interests are solely commercial. In order to enable SCNZ to carry out these unique responsibilities, it is SCNZ's position that a separate vote is essential. X-13 at 12.

49. The New Zealand Government's Aide Memoire states:

> The New Zealand Government notes that the Corporation is seeking a separate vote within the United States Atlantic and Gulf/Australia—New Zealand Conference. It regards the provision of such a separate vote to the Corporation as being consistent with the Corporation's position as a Government-owned national flag carrier. X-5.

50. The Proponents have no objection to the modification to Agreements 10355 and 10402 proposed by Hearing Counsel in Stipulated Exhibits 15 and 16. X-15 and X-16.

ULTIMATE FINDINGS OF FACT

51. The effect of the operation of either of the joint services contemplated by Agreement Nos. 10355 and 10402, respectively, as modified by the parties, is to improve the existing service by establishing a regular service permitting more frequent sailings, by eliminating costly cargoless "ballast" legs, and by insuring the availability of ship capacity

for the Trade. The Agreements are, therefore, in the public interest and satisfy the *Svenska* test.

52. If Agreement Nos. 10355 and 10402, respectively were disapproved, each of the parties to the Agreements would operate separately rather than jointly with the result that the Trade would be overtonnaged and less efficient.

53. The evidence of record asserting that a separate vote is needed by SCNZ is inconclusive and insufficient to overcome the rule followed by the Commission in *Johnson Scanstar, supra.*

DISCUSSION AND CONCLUSIONS

Section 15 of the Shipping Act, 1916, provides, in pertinent part:

> The Commission, shall by order after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof. whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations.

In its Order of Investigation, the Commission gave more explicit direction regarding possible violation of section 15. It stated:

> Both agreements are subject to the *Svenska* doctrine and must be justified to receive approval . . . . This investigation will include an examination of the present operating conditions in the trade, the nature and extent of the breakbulk and container cargo markets, the exact activities covered by the Agreements, and any transportation needs, public benefits, or regulatory purposes which Proponents believe would result from Agreements Nos. 10355 and 10402.[3]

In *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 328 (1968), the Court established that the question of whether or not an agreement was in the public interest turns on if they are "required by a serious transportation need, necessary in order to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act." *United States Lines v. Federal Maritime Commission,* 584 F.2d 519 (D.C. Cir. 1978). In the final analysis, the determining factors are the circumstances and conditions existing in the

[3] While Agreement 10402 now provides it will be inactive so long as Agreement 10355 is in operation, and paragraph 41 of the findings of fact is to the same effect, it is nevertheless appropriate to consider Agreement 10402 under section 15 and *Svenska* since it does provide for a division of profits between Bank & Savill, and since it may become fully operative in the future.

particular trade involved. *Agreements Nos. DC 38 and DC 38-1*, 17 FMC 251 (1974).

The facts as found in this case amply support approval of the Agreements involved. They are well documented and will not be repeated in this portion of the decision except where necessary to emphasize the legal conclusions being made. First of all, it should be noted that Agreement Nos. 10355 and 10402 offer the same service except that SCNZ is to operate as a common carrier in 10355, thereby creating a new joint service. As to the service itself and the Trade it serves, perhaps it is best to look at what has transpired to date. The Bank & Savill joint service has been operating ln the Trade with conventional vessels since 1978, and with the three containerships since 1980. This means the parties have the benefit of being able to analyze exactly how the joint service has affected the Trade rather than estimating or anticipating what the effect will be.

Prior to the formation of Bank & Savill, Bank Line operated a service from the U.S. Gulf Coast to Australia and New Zealand, but did not offer a northbound service out of Australia/New Zealand to the U.S. Gulf or the Caribbean. Bank Line vessels returned to the Gulf via either the charter market or Europe. (FF 19.) The reason no northbound service existed is because exports from Australasia consist largely of primary agricultural products which are directed to the U.S. Atlantic and Pacific Coasts; the Gulf Coast is close to the United States' own meat and dairy producing region and thus does not have as great a need to import these products. (FF 12, 14 and 16.) Similarly, Shaw Savill operated a service from New Zealand to the Caribbean and Central and South America, but had difficulty incorporating a southbound service from the Gulf to Australia because the additional time required to include the Gulf and Australia compromised the quality of the New Zealand-Caribbean service. (FF 20.) In the three years prior to the formation of Bank & Savill, the carryings of each line, in revenue tons, was as follows:

	1975	1976	1977
Northbound			
Bank Line	0	0	0
Shaw Savill	45,537	61,217	82,034
Southbound			
Bank Line	167,902	186,505	179,570
Shaw Savill	6,424	13,806	16,000

(X-8 at 9.)

By combining into one service, Bank & Savill are now able to offer a round-trip service from the U.S. Gulf southbound to Australia and New Zealand returning via South and Central America and the Caribbean area to the U.S. Gulf. (FF 32; X-8 at 12.) Carriage in revenue tons during the first three years of the joint service was as follows:

	1978	1979	1980
Northbound	79,584	89,056	98,650
Southbound	158,452	157,389	96,900

(X-8 at 11.)

By carrying cargo on both the northbound and southbound voyages. ships in the Trade are being used more efficiently.

The three containerships which Bank & Savill introduced into the Trade in 1980 appear to be ideally suited to the Trade's needs. These containerships have the average capacity of 800 TEU's each, of which, on the average, 364 can be refrigerated containers. (FF 24; X-10 at Table 9a.) These statistics assume that non-cellular spaces are used to hold containers, but if the non-cellular spaces are not used for containers, the ships have bale space for between 3,681 to 4,227 cubic bale meters (CBM) of breakbulk cargo. (FF 24.) The ships specifically meet the Trade's needs because while the northbound trade consists mostly of agricultural products requiring refrigeration, the southbound trade primarily requires dry containers and breakbulk space. (FF 15.) Because the voyage is so long (70-90 days), each ship is able to make approximately four sailings a year for a total of 12 sailings, or a monthly service, for the three containership service. (FF 27.)

In combining their operations and initiating a basically containerized service, Bank & Savill has not had a significant anticompetitive impact on the Trade. The service does reflect a shift to containerized cargo from breakbulk cargo, but there is no evidence that its market share has changed substantially. In 1978 Bank & Savill offered capacity for 6,750 TEU's and 350,000 CBM's; in 1979, 7,100 TEU's and 245,000 CBM's; and in 1980, 8,600 TEU's and 60,000 CBM's.[4] Its current three containership service, with sailings scheduled approximately once a month, has an annual capacity of 10,331 TEU's or 9,464 TEU's and 60,000 CBM's if bale space is not used for containers. (FF 33.) Therefore, although container capacity has gone up, breakbulk capacity has decreased.

[4] Data for 1980 is not necessarily representative because that year Bank & Savill used both conventional vessels and containerships. The second half of the year, however, was a totally containerized service.. (X-8 at 28.)

In terms of overall market share, Bank & Savill is the only service in the Trade which exclusively serves the Gulf, and the only service from the Gulf which offers breakbulk capacity. Columbus and Farrell Lines independently serve both the Atlantic and Gulf Coast-Australasia Trade with a combined capacity of approximately 69,000 TEU's.[5] (FF 26.) By strengthening the service to the Gulf, Bank & Savill is offering a competitive alternative to Columbus and Farrell Lines' Atlantic and Gulf Coast services, as well as to carriers who serve Australasia from the Atlantic Coast. In addition to Farrell and Columbus Lines, Pacific America Container Express (a joint service) and Atlanttrafik Express Service serve the Atlantic Coast-Australasia Trade. Zim Container Service also offers a feeder service but the amount of cargo carried is minimal. In 1980, Bank & Savill provided between 7% and 11% of the total annual TEU capacity in the Atlantic and Gulf Coast-Australasia Trade. (X-10 at 30; X-11 at Table 6.) [6]

Although the containership service of Bank & Savill increases the containership capacity which is offered in the Trade, there is no evidence of overtonnaging. During the second half of 1980, Bank & Savill's average TEU utilization, southbound, including breakbulk tonnage which was converted to TEU's averaged 67% or 3,460 TEU's.[7] Southbound utilization of TEU space, not including breakbulk space, prior to the introduction of the containership vessels averaged 55% in 1978 (3,713 TEU's), 71% in 1979 (5,041 TEU's), and 73% in the first half of 1980. (FF 25.) the southbound breakbulk utilization rate averaged 50% in 1978 (175,000 CBM's), 55% in 1979 (134,750 CBM's,) and 42% in the first half of 1980.[8] (FF 25; X-8 at 27 and 28.) Although these utilization figures appear to be a little low, it should be noted that because the Trade requires dry containers southbound and refrigerated containers northbound, and because not all dry commodities can be carried in refrigerated containers, the Trade requires the carriage of some empty containers. (FF 15.)

Although the Trade is not overtonnaged now, if the Commission disapproves the Agreement. involved here, there is a possibility that overtonnaging would occur. Bank Line and Shaw Savill have both been in the Trade for a substantial period of time and have established

[5] The amount of this capacity which is allocated to the Gulf Coast cannot be determined because both coasts are part of a single service.

[6] A range of numbers is provided here as Dr. Nadel found Bank & Savill's share to be 10.33% (X-10 at 30) and the Commission's economists found it to be 7% (X-11 at Table 6).

[7] This figure is derived by taking 67% of half the annual combined TEU and breakbulk capacity of the three containerships (10,331/2).

[8] The TEU's and CBM's carried for the first half of 1980 are not provided because the capacity for this portion of the year is not known. The northbound utilization data was not provided by Bank & Savill who stated that northbound cargo is mostly directed to the Caribbean and Central and South America and that carriage to the U.S. Gulf is minimal. (X-8 at 26.)

their businesses with shippers.[9] *Therefore, if the Commission* disapproved the joint service, each carrier would give serious consideration to entering the Trade independently. In order to establish a regular service, Bank Line and Shaw Savill would each have to offer approximately monthly sailings which would substantially increase the capacity offered in the Trade.

As filed, Agreement No. 10402 and 10355 sought authority to add four breakbulk vessels, each vessel having an average overall capacity of up to 750,000 cubic feet in which up to 400 TEU's can be accommodated. (X-2 and 3.). The Commission's staff economists testified that there was not a sufficient need in the Trade for the additional breakbulk vessels. (X-11 at 37-41.) Since the submission of that testimony, Bank & Savill submitted additional testimony introducing new and additional facts to justify a breakbulk service. (X-14.) Based on the additional information, Hearing Counsel agreed that two additional breakbulk vessels are justified. Proponents have no objection to this modification.

A voyage for a breakbulk vessel takes approximately 120 days and therefore each ship could make 3 sailings a year. (FF 37.) Thus, the authority for two breakbulk ships of the size specified would permit approximately 6 sailings or increase Bank & Savill's annual capacity by approximately 2,400 TEU's and 127,428 CBM's to 12,731 TEU's and 177,428 CBM's.[10]

The conclusion of the Commission's economists that additional breakbulk capacity was not required was based upon the low utilization rates for the breakbulk space on the three containerships (33% southbound for the second half of 1980 and 39% southbound for the first half of 1981) (FF 25); the fact that 85% to 90% of all southbound cargo was containerizable (FF 33); and that although exports to Australasia from the United States have increased overall, exports from the U.S. Gulf have decreased. (FF 17, 35; X-11 at 38.)[11] The economists concluded that authorizing four breakbulk vessels for Bank & Savill when there was insufficient demand for such a service and the possibility of a growth in such a demand was speculative, could result in overtonnaging and create a barrier to entry to a new firm which wished to enter the Trade. (X-11 at 39.)

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[9] Although the record does not state how long Shaw Savill has been in the Trade, it does state that it has served portions of the Trade since 1975. (X-8 at 9.) Bank Line has operated in the U.S. Gulf/Australia Trade for at least sixty years. (FF 19.)

[10] These figures represent maximum capacities. The TEU capacity would be lower if the breakbulk space was filled with breakbulk cargo and the breakbulk capacity would be lower if breakbulk space was filled with containers. The additional annual capacity was derived by multiplying 400 TEU's and 21,238 cubic bale meters (750,000 cubic bale feet) by 6. (See X-11 at 19.)

[11] Only southbound data is examined here because the greatest amount of breakbulk cargo which moves in the Trade moves in the south- bound direction. (F. 15.)

In its supplemental affidavit, Bank & Savill produced new information which shows that a demand for a breakbulk service is not speculative, but currently exists. (X-14.) The affidavit states that Farrell Lines has withdrawn its LASH vessels from its Pacific Coast-Australasia service. (X-14 at 5.) *The Journal of Commerce*, November 4, 1981, at 1, confirms that Farrell has leased two of its three vessels in the LASH service which it operated in the West Coast-Australia/New Zealand trade to the Military Sealift Command and on November 5, 1981, at 1, it was reported that its entire service in the trade has been temporarily suspended. The reason Farrell's reduction in service is significant is that Farrell carried bulk cargoes which originated out of the Gulf and which Bank & Savill carried on its conventional ships prior to the introduction of its containerships. These commodities are milk carton stock and wood pulp which are not economically containerizable. (FF 34.) Bank & Savill estimates that the amount of annual cargo provided by these two commodities is 35,000 CBM's. (FF 37.)

The amount of annual breakbulk space available if Bank & Savill or Savill/SCNZ are limited to the three containerships is 50,000 CBM's. While this space would be sufficient to carry the milk carton stock and wood pulp, it would not enable Bank & Savill or Savill/SCNZ to carry these commodities in addition to the breakbulk cargo it is currently handling. Bank & Savill stated that in the first half of 1981, its southbound breakbulk utilization rate was 39%. (FF-25.) However, the additional 31,000 CBM's constitutes 70% of the annual breakbulk capacity on the containerships.

In addition, the supplemental affidavit states that Bank & Savill is not currently carrying normal breakbulk cargo in the breakbulk space on its containerships because the container vessels use container facilities in Australasia where normal breakbulk cargo cannot be handled. It states that the only breakbulk cargo Bank & Savill carries on its containerships is large over-gauge single lift cargo. (FF 35.) Prior to the introduction of the containership service, the Bank & Savill conventional service carried significant amounts of breakbulk cargo. In 1979, when its total breakbulk capacity was 240,000 CBM's its southbound utilization rate was 55%. (FF 25.) Therefore, it can be assumed that Bank & Savill carried approximately 132,000 CBM's in the southbound trade that year. The Commission's economists had assumed that most of this cargo could be carried by Bank & Savill's containerships because 85%-90% of the southbound trade is containerizable. (FF 33.) Although the cargo may be containerizable, if it is not economically carried in containers, there is a need for a breakbulk service. Bank & Savill or Savill/SCNZ would be the only carrier offering breakbulk service from the Gulf. (FF 37.)

As we have noted, the service to be offered under Agreement No. 10355 is identical to that offered under Agreement No. 10402, except

that SCNZ is to operate as a common carrier in the joint service under 10355. The testimony of Raymond Peter Shea, Deputy General Manager of SCNZ, states that the New Zealand Government has determined that it must have a presence as a common carrier in this Trade (FF 11.) The interest of the government is also expressed in its two Aide Memoires. (FF 5.) If SCNZ does not enter the Trade as a participant in the joint service, it is possible that it will come into the Trade on its own, and thereby create a risk of an overtonnaged trade as was discussed if Bank Line and Shaw Savill operated in the Trade independently. The length of the voyage would require the introduction of several vessels in order to be able to offer a regular service. Considering the outlay of capital which would be required for such an undertaking, it would be a waste of resources given the amount of cargo in the Trade. Furthermore, if SCNZ entered the Trade independently, it would obviously withdraw the NEW ZEALAND CARIBBEAN from the Bank & Savill service thereby destroying that service's ability to offer a frequent, regular service without the addition of more ships. If all three Proponents operate together, they are able to offer a better service than each, or even two, could offer separately. As for the anticompetitive impact, as noted above, Columbus and Farrell Lines serve the Atlantic and Gulf Coast-Australasia Trade and therefore do provide competition to the joint service.

Finally, with respect to the specific provisions of the Agreements themselves, it should be noted that certain modifications have been made in the original Agreements, which modifications have been agreed to by both parties.[12] The modifications do not change the substance of the Agreements but serve to clarify their terms. Actually, the only issue remaining on which the parties disagree is whether or not each party to Agreement No. 10355 should have a separate vote. Hearing Counsel argue that since the Agreement provides for a single competitive entity,[13] that entity should be entitled to only one conference vote. On the other hand, the Proponents argue that independent voting rights are necessary for SCNZ. In support of their position they cite the Aide Memoire [14] submitted by the Government of New Zealand and the testimony of Mr. Shea who stated:

> Agreement 10355 provides for a separate voting right for SCNZ. In SCNZ's view, this is regarded as essential. SCNZ does function in large part on a commercial basis. However, as the National Line of New Zealand, SCNZ has major functions and responsibilities beyond those which are purely commer-

[12] Compare the original agreements (X-1, X-2 and X-3) with those which have been amended (X-15 and X-16).

[13] The Agreement states, "[T]he Parties agree either to belong to or operate independently from any conference as a group so as to ensure uniformity of rates for the service." (X-3, Art. 1.)

[14] FF, par. 49 (X-5).

> cial. SCNZ is charged with additional economic responsibilities including, most importantly, the requirement of ensuring that cost effective trade development opportunities are provided and that New Zealand's proper interests as a trading nation are protected within the conference framework. Moreover, SCNZ has important defence, political and political/economic responsibilities. It is not intended to suggest in any way that these additional functions and responsibilities are in any way inconsistent with the proper functioning of the Shipping Act, 1916, as administered by the Federal Maritime Commission. Rather, SCNZ wishes to emphasize that these are functions and responsibilities which are unique to SCNZ, as distinguished from the interests of Bank & Savill, the other parties to Agreement 10355, whose interests are solely commercial. In order to enable SCNZ to carry out these unique responsibilities, a separate vote is essential. X-9 at 12.

In Re Agreement No. 9973-3—Johnson Scanstar Service Voting Provision, Docket No. 77-5, Report and Order, 21 F.M.C. 218 (1978), the Commission held that a joint service which acts as a single carrier is only entitled to a single conference vote. It also held that whether joint service members have formed a single carrier in trades covered by conferences so that the joint service would be restricted to one vote upon joining the conferences depends on many factors and then proceeds to enumerate fifteen (15) separate factors. The Commission recently followed *Johnson Scanstar, supra*, in its Order of Conditional Approval of the Pacific America Container Express Service, dated October 29, 1981, where it conditioned approval of an extension of an agreement on deletion of a separate voting provision. The Proponents of the Agreements here argue that *Johnson Scanstar* is distinguishable from the instant case because the decision "did not consider the effect of the important Government and National interests which affect SCNZ, as the Government-owned carrier of a Nation with which the United States has close and friendly relations." They cite the testimony of Mr. Shea and the Aide Memoire submitted by New Zealand in support of their argument and point out that none of the other carriers in the Trade, upon whom the adverse effects of a single vote for SCNZ would fall have complained.

We believe that given the facts and argument on the question of the conference voting right of the joint service in Agreement No. 10355, the joint service is entitled to one vote under the ambit of the decision in *Johnson Scanstar, supra*. When considered in light of the modifications agreed to by the parties, Agreement No. 10355 satisfies twelve (12) of the fifteen criteria set forth in *Johnson Scanstar* regarding whether or not the parties are acting as a single carrier. The parties to the Agreement have agreed as follows:

1. *Coordination of sailings*: Article 6 of the Agreement provides that the parties shall schedule containership sailings at regular intervals, supplemented by conventional sailings as from time to time considered necessary by the parties.

2. *Pooling or other mutual allocation of costs, revenues or profits*: Articles 5 and 9 provide that each party is to be paid a daily standard allowance for its vessel(s) for each day it is operated in the trade and that the service will pay the parties their respective expenses attributable to the operation and provision of their vessel or vessels. However, Articles 9 and 10 of the Agreement, as modified, reflect that initially, the parties will share terminal, marketing, agency and stevedoring expenses as well as net revenues and deficiencies on a basis of two-thirds for Bank & Savill and one-third for SCNZ. Claims for lost and/or damaged cargo will be borne by each party separately. Although the parties have contributed vessels to the trade on a ⅔-⅓ basis, they have not keyed the division of the joint expenses and revenues to this factor, but have created a pooling arrangement.

3. *Covenants not to compete with the joint venture*: Proponents have stipulated that "upon approval of Agreement 10355 it is the intent of the parties to operate only under the Bank and Savill/Shipping Corporation of New Zealand joint service, and that Bank and Savill will not operate a separate service in this Trade." (FF 41.) The parties have agreed to modify Agreement No. 10402 to reflect that Bank and Savill will not independently operate under it as long as Agreement No. 10355 is in existence. (X-15 at Art. 13.) Therefore, although Agreement No. 10355 does not contain an express covenant not to compete, such an understanding does in fact exist. In its order conditionally extending Agreement No. 9925-3, the Commission stated that "although Agreement No. 9925-3 contains no express covenant not to compete, the actions of the Proponents since 1971 may indicate that such an understanding exists on a *de facto* basis." (Order at 5, nt. 6.)

4. *Limitations of tonnage used in the joint venture*: Article 4 of Agreement No. 10355 limits the parties in the size and number of vessels that can be employed in the service. Because the voyages are so long (approximately 70-90 days), with three container vessels, the parties are somewhat limited to a monthly container service which in turn limits the amount of tonnage they can carry. (FF 27 and 31.) The length of the voyage of the breakbulk vessels (approximately 120 days) would similarly limit the breakbulk service. (FF 37.)

5. *Common offices or direction by a jointly owned corporation*: The Agreement does not provide for common offices or a jointly owned corporation.

6. *Common agents*: Article 8 provides that the Proponents will have a common agent.

7. *Common tariff*: Article 2(a) provides for a common tariff in the event the service does not join a conference and utilize the conference tariff.

8. *Common bill of lading*: The Agreement contemplates a common bill of lading. Article 14 states "copies of bills of lading *of the service* shall be furnished promptly to the Commission" (emphasis supplied).

9. *Common name for combined service*: The preamble of the modified agreement provides that the service will be known under the common name "The Bank and Savill Line/Shipping Corporation of New Zealand Joint Service." Although both names of the Proponents are reflected in the name of the joint service, the name indicates that the parties are operating jointly.

10. *Common vessel identification*: Each of the three container vessels is separately owned: Bank Line owns the WILLOWBANK; Shaw Savill owns the DUNEDIN; and SCNZ owns the NEW ZEALAND CARIBBEAN. (X-8 at 12 and FF 24.) Article 3 of Agreement No. 10355 provides that each party shall have sole responsibility for the procurement, management and financing of its own ships and equipment.

11. *Common arrangements with terminals, stevedores and other parties*: Article 2(b) states that the Agreement extends to arrangements between the parties with other modes of transportation. Article 9 provides for the sharing of terminal, marketing, agency and stevedoring expenses and therefore envisions common arrangements with these entities.

12. *Joint advertising and/or solicitation*: Article 15 states that the service will be advertised jointly although the full corporate and/or trade name of each party shall be shown in a manner which reflects their separate interests. The parties have stipulated that normally, for commercial purposes, the service will be advertised jointly with the programs of all vessels being shown. (FF 45.)

13. *Lack of significant individual interests in the trade outside the joint venture*: Presently, neither Shaw Savill, Bank Line, Bank and Savill nor SCNZ operate or participate in a common carrier service in the Trade other than in the capacity specified in the proposed Agreements. (FF 41.) Arguably, SCNZ has an interest in the Trade outside the joint venture by virtue of the fact that it is owned by the government of New Zealand and has governmental responsibilities. However, as a common carrier, on a commercial basis, it does not have an interest in the Trade outside of the joint venture.

14. *Duration of the joint venture*: As originally filed, the parties sought to have the Commission approve the Agreement for an indefinite term, indicating that the parties intended to fully commit themselves to establishing a joint service in the Trade. (X-2 and 3.) As amended, the Agreement seeks Commission approval for a term of five (5) years. (X-15 and 16.)

15. *Limitation, if any, on the type of cargo carried by the service*: The Agreement does not limit the service to the carriage of particular cargo types.

From the above, we hold that the parties to Agreement No. 10355 are holding themselves out as a single carrier through joint advertising, common agents, tariffs and bills of lading, and common arrangements with other entities. Further, they are operating as a single carrier by pooling revenues and deficiencies and coordinating sailings. The argument advanced by the Proponents that this proceeding is materially distinguishable from the holding in *Johnson Scanstar* must be rejected. While the testimony of Mr. Shea and the Aide Memoire of New Zealand asserts generally that "SCNZ has major functions and responsibilities beyond those which are purely commercial," and "has important defence, political and political/economic responsibilities," nowhere is it explained how these "responsibilities" are manifested in commercial terms. What specifically are those responsibilities? Indeed, is it possible that they may outweigh commercial considerations, which are the Commission's concern, so that a separate vote may are cast on a basis that contravenes the provisions of the Shipping Act? The answer to these questions and more are not contained in the record and, in effect, we are asked to approve a separate vote for SCNZ simply because it believes it needs it. While we believe some weight must be given to the views of foreign governments, their views, standing alone, should not be allowed to outweigh the basic unfairness of allowing a single joint service to cast two votes on most conference questions. Put another way, when a foreign government seeks to obviate the Commission's holding in *Johnson Scanstar*, it is not enough to generally allude to "other governmental responsibilities," without describing how the exercise of those responsibilities might require a separate vote and without some assurance in the agreement that a vote so cast could or would not violate shipping laws and regulations.

In view of the above facts and discussion, it is held that Agreement Nos. 10355 and 10402, respectively, are in the public interest and are required by a serious transportation need, necessary in order to secure important public benefits and are in furtherance of a valid regulatory purpose, subject to the following modifications and conditions:

(1) That both Agreement Nos. 10355 and 10402, respectively, be modified in accordance with the agreement of the parties as set forth in exhibits X-15 and X-16.

(2) That in addition in Agreement No. 10355, Article 1 be deleted and the following language be substituted:

> The joint service may become a member of, and may resign or withdraw from, any lawful conference, rate agreement, pooling arrangement or other agreement subject to the Shipping Act, 1916, that may operate in the whole or any portion of the

trades covered by this Agreement. The parties agree either to belong to or operate independently from any such conference as a group. When participating in any conference or similar organization, the joint service shall act as a single member and shall be entitled to no more votes than any other single member.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80-77

FAILURE OF VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES TO COMPLY WITH THE CERTIFICATION FILING REQUIREMENTS OF SECTION 21(b) OF THE SHIPPING ACT, 1916

ORDER

March 10, 1982

By Order served October 24, 1980, the Commission directed the carriers listed in Appendix A (Respondents) to show cause why they should not be found in violation of section 21(b) of the Shipping Act, 1916 (46 U.S.C. § 820(b)) and Commission General Order No. 43 (46 C.F.R. § 552, *et seq.*) for failure to file a proper antirebating certificate. In addition, the Order directed those Respondents not currently offering an active common carrier service to show cause why their tariffs should not be cancelled. The majority of Respondents filed responses to the Order. The Commission's Bureau of Hearings and Field Operations (Hearing Counsel) filed a Memorandum in Reply and a Supplemental Memorandum. This latter memorandum divides the respondent carriers into 16 categories and recommends a variety of actions depending upon the category. Twelve Respondents filed replies to Hearing Counsel's Supplemental Memorandum, generally alleging errors of classification.[1]

DISCUSSION

Section 21(b) directs the Commission to require the chief executive officer of every vessel operating common carrier by water in the U.S. foreign commerce to file a periodic, written certification, under oath, attesting to: (1) a policy prohibiting the payment, solicitation or receipt of any rebate which is unlawful under the Shipping Act; (2) the fact that such policy has been promulgated recently to each owner, officer, employee, and agent of the company; (3) the details of efforts made within the company or otherwise to prevent or correct illegal rebating; and (4) full cooperation with the Commission in any action concerning illegal rebating. 46 U.S.C. § 820(b).[2] Pursuant to this mandate, the

[1] Neither Hearing Counsel's Supplemental Memorandum nor the replies thereto were contemplated by the procedural schedule set forth in the Order to Show Cause. However, both serve to clarify the record and they will therefore be considered by the Commission.

[2] Failure to file any such certification could result in a civil penalty of not more than $5,000 for each day such violation continues.

Commission promulgated regulations requiring the filing of anti-rebating certificates and prescribing their form and content. General Order No. 43, 46 C.F.R. § 552, *et seq.* The initial certifications of vessel operating common carriers were due May 15, 1980, with subsequent certifications due on or before May 15 of each succeeding year. This proceeding arose because many carriers failed to respond to this directive, while the responses of others were inadequate.

After having thoroughly reviewed the responses submitted to the Commission's October 24 Order to Show Cause, the Commission has decided to resolve this proceeding in the manner recommended in Hearing Counsel's Supplemental Memorandum, subject to a few minor modifications. The Commission will therefore take the following action against the carriers included in each of the categories enumerated below, as set forth in Appendices B through P.[3]

The Commission will dismiss proceedings against those Respondents listed in Appendices B, C, D, E, F, 0, and P. Because Appendix B carriers are not actively participating as common carriers in the foreign commerce of the United States, they are not subject to G.0. 43. However, carriers not actively carrying cargo or clearly committed to commence carrying cargo between ports named in a tariff at the rates stated therein are not common carriers by water within the meaning of section 18(b) and their tariffs in such unserved trades are subject to cancellation. *See Publication of Inactive Tariffs*, 20 F.M.C. 433 (1978). The Commission will, therefore, cancel the tariffs of the Appendix B carriers as contrary to section 18(b) and the Commission's tariff filing regulations (46 C.F.R. Part 536), but will take no further action against them. The carriers in Appendices C, D, and E cancelled their own tariffs at some time prior to the initial brief of Hearing Counsel. No further action regarding these Respondents is necessary or warranted. Appendix F carriers filed timely and acceptable certificates and should not have been included in this proceeding in the first instance. Appendix P carriers were inadvertently included in the October 24 Order. They are either exempt from the Commission's tariff filing requirements or beyond the Commission's jurisdiction. Appendix 0 carriers initially filed unacceptable certificates, but after their deficiencies were pointed out in Hearing Counsel's initial brief, they rectified the errors and now fully comply with G.0. 43. Because they originally made good faith efforts to achieve compliance and subsequently did so, they will be dismissed from this proceeding.

Several Respondents are in technical violation of section 21(b) as implemented by G.0. 43, but, because of the nature of their conduct, no further action will be taken against them. The carriers in Appendices G

[3] By separate Order served February 4, 1982, the Commission denied the request of China Ocean Shipping Company for oral argument in this proceeding.

and M filed acceptable certifications, but did so only after the issuance of the October 24 Order. Those in Appendix L cancelled their tariffs, but only after Hearing Counsel's initial brief. In either case, there appears no reason to pursue civil penalties for these technical violations, especially because there appears to have been some initial confusion concerning this relatively new reporting requirement.

The carriers listed in Appendices I and J failed to respond to the October 24 Order and have never filed an acceptable anti-rebating certificate.[4] The Commission must assume, therefore, that these Respondents are also not offering an active common carrier service in any United States trade. Their published tariffs will likewise be cancelled on the same basis as those of the carriers in Appendix B, above. Again, civil penalties will not be pursued.

Carriers listed in Appendix H responded to the October 24 Order but never filed an anti-rebating certificate. They are also in violation of section 21(b) as implemented by G.0. 43. Because their responses indicate that they are actively involved in the U.S. foreign commerce, the Commission will allow these Respondents an additional 30 days from the date of this Order to file an acceptable certificate. If they fail to do so, the Commission will consider the institution of civil assessment proceedings pursuant to section 32 of the Shipping Act (46 U.S.C. § 831) and the cancellation of their tariffs.

Carriers listed in Appendices K and N filed certifications which are in some way formally defective. They are also in technical violation of section 21 as implemented by G.0. 43. However, the Commission will give these Respondents 30 days to cure their defects.

The primary defect concerns what has been termed "clause 3" - the requirement that the certification set forth "the details of measures instituted within the filing company or otherwise to eliminate or prevent the payment of illegal rebates . . . . " 46 C.F.R. § 552.2(b). This requires a *detailed* description of the *actual* measures taken within a specific company. Many of the responses were vaguely worded and general in nature.[5] These clearly do not comply with the third paragraph of the model certification appended to G.0. 43.

The Commission has noted the specific defects in each submission in parentheses after the carrier's name. If these defects are not rectified within the time provided, further proceedings may be instituted under section 32.

[4] Though the carriers in Appendix J were not served through the U.S. Postal Service, they received valid constructive notice by *Federal Register* publication of the October 24 Order.

[5] The Commission is particularly concerned about the number of responses which contained almost identically worded sections. This would appear to reflect the fact that some carrier agent is preparing certifications for several carriers without regard to the particular operations of the individual carriers.

THEREFORE, IT IS ORDERED, That Respondents listed in Appendices B, C, D, E, F, 0, and P are dismissed from this proceeding; and

IT IS FURTHER ORDERED, That Respondents listed in Appendices G, H, I, K, L, M, and N are found in violation of section 21(b) of the Shipping Act, 1916 as implemented by General Order 43 (46 C.F.R. $ 522.2); and

IT IS FURTHER ORDERED, That those Respondents listed in Appendices H, K, and N have 30 days from the date of this Order to file corrected anti-rebating certificates with the Secretary of the Commission which fully comply with the requirements of G.0. 43; and

IT IS FURTHER ORDERED, That the tariffs of those Respondents listed in Appendices I and J are cancelled effective immediately; Provided, however, that this cancellation is without prejudice to said carriers filing new tariffs covering the subject trades at such time as they file appropriate anti-rebating certificates and actually commence common carrier service in those trades.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

APPENDIX A

ACADIAN OCEAN FREIGHT LTD.
ACHILLE LAURO
AGROMAR LINE
ALFA LINE LTD.
ALIANCA LINE
AMERICAN INDUSTRIAL CARRIERS, INC.
AMERICAN SHIPPING COMPANY INC. S.A.
AMERICAS SHIPPING LINES, INC., THE
ANGLO EUROPEAN CONTAINER LINE
ARMADA LINES
ARMASAL LINE
ARROW LINE
ASIA AMERICA LINE
ATLANTIC CARIBE LTD.
ATLANTIC TRANSPORT CO. LTD.
B.F.I. WEST AFRICA LINES, LTD.
BAHAMA ADVENTURE SHIPPING LTD.
BARBARA LINE
BELFRANLINE
BIFROST, LTD.
BOOTH-LAMPORT (J/S)
BRIDGE LINE (BLL), LTD.
C R LINE
CACENA LINE LTD.
CALIFORNIA INTERNATIONAL FREIGHT CORP.
CARGO DISPATCH, INC.
CARIB TRANSPORT, INC.
CARIBBEAN EXPRESS LINE
CARIBBEAN LINE
CARIBBEAN LINES CORPORATION
CARIBBEAN STEAMSHIP CORP.
CARIBE LINE, LTD.
CARIGULF LINES
CONTAINER LINE
CHAR CHING MARINE COMPANY LTD.
CHINA OCEAN SHIPPING COMPANY
CHRISTENSEN CANADIAN AFRICAN LINES
CLEMWOOD SHIPPING COMPANY
COATES, PETERSON STEAMSHIP CO.
COBELFRET LINES
COMMONWEALTH MARITIME COMPANY
COMPAGNIE TAHITIENNE MARITIME
COMPAGNIE MARITIME BELGE
CONSORCIO PANAMENO DE NAVEGACION
CRUSADER SWIRE CONTAINER SERVICE, LTD.
CUNARD-BROCKLEBANK, LTD.
CYLANCO, S.A.
DAFRA LINES
DEVONIA LINES
DIVI-DIVI LINE, LTD.
DONACA LINE
EDWARD SHIPPING & MERCANTILE, S.A.
EMPACADORA DEL NORTE, S.A.
EMPRESA MARITIMA DEL ESTADO
EURO-FREIGHT LINES, LTD.
EUROBRIDGE LINES
EUROHOLD LINE
EUROPE CANADA LAKES LINE

FAIRPLAY CARIBE LIMITED
FLONAC LINE
FREIGHT & CHARTERING CO., LTD.
FRENCH AMERICAN SERVICE TRANSPORT LINE
FROTA AMAZONICA S.A.
FURNESS WITHY (CHARTERING) LTD.
GALLEON SHIPPING CORPORATION
GEORGIA-AZTEC LINES (J/S)
GULF WEST AFRICA LINE
HAIGA BRIDGE SHIPPING S.A.
HONG KONG GUAM CARRIER S.A.
HYUNDAI INTERNATIONAL, INC.
ICELAND STEAMSHIP CO.
INCA LINES
INCAN SUPERIOR, LTD.
INTERCOASTAL SHIPPING AGENCY
INTERCONTINENTAL MARITIMA, S.A.
IRAQI STATE ENTERPRISE FOR MARITIME TRANSPORT
ISLANDER FREIGHT & SUPPLY, LTD.
JAPAN SHIPPING CO., LTD.
JOHNSON LINE
KINGSTON SHIPPING S.A.
KOCTUG LINE
L & W LINE
LAGO LINE S.A.
LIBRA SHIPPING AND TRADING CORPORATION, LTD.
LINEA ISLENA LTD.
LINEAS MARITIMAS DE GUATEMALA, S.A.
LTL INTERNATIONAL LIMITED
MAJESTIC LINES INC.
MAMMOTH BULK CARRIERS, LTD.
MAPLE LEAF SHIPPING CO., LTD.
MAR AZUL MOTORSHIPS, INC.
MAR SHIPPING LINE, INC.
MARCA LINE
MARCELLA SHIPPING COMPANY, LTD.
MARINE AGENCY, INC.
MARINE AUTOCRUISIERS OF PANAMA, INC.
MARINE BULK CARRIERS
MARINE EXPRESS LINE, S.A.
MARITIMAS DEL CARIBE, CO. S. DE R.L.
MARITIMA SAN ANDRES LTD.
MARITIME AMERICAS LTD.
MARSH HARBOUR SHIPPING CO. LTD.
MAZOA LINE CORP. S.A.
MERCANDIA REDERIENNE
MEXICO EXPRESS LINE
MIAMI-CAICOS SHIPPING LIMITED
MID-OCEAN LINES, INC.
NAURU PACIFIC SHIPPING LINES
NAUTILIUS CHARTERING INC. S.A.
NAVIERA BUQUES CENTRO AMERILANO, S.A.
NAVIERA CENTRAL, C.A.
NAVIERA MARFRIGO, S.A.
NAVIERAS CARIBE, LTD.
NAVIMERCA LINE
NERVION LINES
NIGERIAN STAR LINE
NOSAC LINE
OCEAN TRANSPORT AGENCY INC.
OCEANIA LINE, INC.
OLYMPIC STEAMSHIP, INC.

OMEGA DE NAVEGACION, S.A.
PACIFIC FORUM LINE
PACIFIC NAVIGATION OF TONGA, LTD.
PACIFIC RIM CONTAINER SERVICE INC.
PHOENIX SHIPPING COMPANY, INC.
PORTUGUESE LINE
R.C.D. SHIPPING SERVICES (J/S)
RAINBOW LINE
REGENT LINE
RETLA STEAMSHIP CO.
RUTLAND MARITIME MANAGEMENT CORP.
SAGUENAY SHIPPING CO.
SAIMAA PACIFIC LINE
SAIPAN SHIPPING CO.
SALSOLA SHIPPING LINES S.A.
SAN ANDRES SHIPPING LINE LTD.
SAUSE BROS OCEAN TOWING CO., INC.
SCANDINAVIAN CONTINENTAL LINE AB
SEALARK SHIPPING COMPANY S.A.
SEASPAN INTERNATIONAL LTD.
SEASPEED SERVICES
SEASTAR SHIPPING CO., LTD.
SEATRADERS, LTD.
SERVICIOS MARITIMOS DEL ECUADOR, S.A.
SIBONEY SHIPPING CO. S.A.
SIDRUSS SHIPPING CO., LTD.
SOCIETE IVOIRIENNE DE TRANSPORT MARITIME
SOCIETE NATIONALE MARITIME
SPRINGBOK LINE
SPRINGBOK SHIPPING CO., LTD.
STRAUM STEAMSHIP CO. LTD.
SUN COAST LINES INC.
T. TAINERS SYSTEMS
TARGET NAVIGATION AND TRANSPORTATION
TAYLOR CORPORATION, LTD.
TEC LINES LTD.
TIMBER LINE LTD.
TMT LINE
TOKYO SHIPPING CO.
TRAGHETTI MEDITERRANEO S.P.A.
TRANATI LINES
TRANS AIR MARINE S.A.
TRANS-CARIBBEAN LINES
TRANSOCEANIC NAVIGATION CORP.
TRANSYTUR LINE
UITERWYK LINES (FAR EAST)
UITERWYK LINES (MEXICO)
UNI-PACIFIC CONTAINER LINES, LTD.
UNION STEAMSHIP CO. OF N.Z. LTD.
UNITED REEFER LINES, INC.
UNIVERSAL ALCO LTD.
VAASA LINE, O/Y
VALMAR DE NAVEGACION, S.A.
VENEBUQUES, S.A.
VICTORIA LINE
WARNER PACIFIC LINE
WEST INDIES SHIPPING CORP.
WESTFAL-LARSEN LINE
WHITE PASS TRANS LTD.
YULSAN SHIPPING CO., LTD.

APPENDIX B

Achille Lauro
Bridgeline Ltd.
Caribbean Line
Compagnie Tahitienne Maritime, S.A.
Islamic Republic of Iran Shipping Lines (I.R.I.S.L.) (member of R.C.D. Shipping Services J/S)
Rainbow Line
VAASA Line 0.Y.
Warner Pacific Line

APPENDIX C

B.F.I. West Africa Lines, Ltd.
Belfranline
Cobelfret Lines S.P.R.L.
Compagnie Maritime Des Chargeurs Reunis, S.A. (CR Line)
Flora Naviera Nacional Interoceanica S.A. (d/b/a Flonac Line)
Gulf West Africa Line
Saimaa Pacific Line
TMT Line
Tokyo Shipping Co.
Traghetti Mediterraneo S.P.A.
Westfal-Larsen & Co., A/S (Westfal-Larsen Line)

APPENDIX D

Sealark Shipping Company, S.A.
Siboney Shipping C.S.A.

APPENDIX E

Booth Lamport Joint Service
Caribe Line Ltd.
Cartainer Line N.V.
Christensen Canadian African Line
Cunard Brocklebank Ltd.
Dafra Lines
Haiga Bridge Shipping S.A.
Hyundai International Inc.
Iraqi State Enterprise for Maritime Transport
Johnson Line
Kingston Shipping S.A.
Maple Leaf Shipping Co. Ltd.
Marca Line
Mid-Ocean Lines, Inc.
Nautilius Chartering, Inc., S.A.
Naviera Buques Centro Americano, SA
Pacific Navigation of Tonga, Ltd.
Retla Steamship Co.
Rutland Maritime Management Corp.
T. Tainers System
Uiterwyk Lines (Far East) Ltd.
Uiterwyk Lines (Mexico)

APPENDIX F

R.C.D. Shipping Services J/S (except Islamic Republic of Iran Shipping Lines (I.R.I.S.L.)) (see App. B)
Seaspeed Services, Inc.

APPENDIX G

American Industrial Carriers
Caribbean Lines Corporation
Crusader Swire Container Service, Ltd.
Galleon Shipping Corp.
Georgia Aztec Line (J/S)
Koctug Line
Mar Azul Motorships, Inc.
Marine Bulk Carriers, Inc.
Naviera Central, C.A.
Pacific Rim Container Service, Inc.
Sause Bros., Ocean Towing
Scandinavian Continental Line AB
Seaspan International Ltd.
Tec Lines Ltd.
Timber Line, Ltd.
Universal Alco Ltd.
Victoria Line
White Pass Transportation Ltd.

APPENDIX H

Maritimas Del Caribe Co. S. De R.L.
Navimerca Line

APPENDIX I

Anglo European Container Line Corporation
Armadora Maritime Salvadorena, S.A. (Armasal Line)
Asia America Line
Barbara Line
Bifrost, Ltd.
Caribbean Express Line
Clemwood Shipping Co.
Coates, Peterson Steamship Co., Inc.
Commonwealth Maritime Company
Compania Maritime Del Nervion (Nervion Line)
Consorcio Panameno De Navegacion S.A.
Edward Shipping and Mercantile, S.A.
Empresa Maritima Del Estado-Chile
Euro-Freight Lines
Eurobridge Lines
Europe Canada Lakes Line
Fairplay Caribe Ltd.
Freight & Chartering Co., Ltd.
Furness Withy (Chartering) Ltd.
Inca Lines
Intercoastal Shipping Agency
Intercontinental Maritima S.A.
Japan Shipping Co., Ltd.
L & W Line
Marine Express Line SA
Maritime Americas Ltd.
Mercandia Rederienne
Navieras Caribe, Ltd.
Oceania Line, Inc.
Phoenix Shipping Co., Inc.
Regent Lines
San Andres Shipping Line, Ltd.
Sidruss Shipping Co., Ltd.
Societe Nationale Maritime
Sun Coast Lines
Target Navigation & Transportation Inc.
Transportes Navieros Muaco C.A. (d/b/a Tranati Lines)
Trans Air Marine S.A.
Uni-Pacific Container Lines Ltd.
United Reefer Lines, Inc.
Venebuques, S.A.
Yulsan Shipping Co., Ltd.

APPENDIX J

The Americas Shipping Lines, Inc.
Arrow Line
Atlantic Caribe Ltd.
Cacena Line, Ltd.
Caribbean Steamship Corp.
Cargo Dispatch, Inc.
Devonia Lines
Eurohold Line
French American Service Transport Lines
Hong Kong Guam Carrier
Islander Freight and Supply, Ltd.
Libra Shipping and Trading Corp., Ltd.
Linea Islena Ltd.
Mar Shipping Line, Inc.
Marine Autocruisers of Panama, Inc.
Mazoa Line Corp. S.A.
Ocean Transport Agency, Inc.
Omega de Navegacion S.A., Inc.
Salsola Shipping Lines S.A.
Seatraders, Ltd.
Straum Steamship Co., Ltd.
Transoceanic Navigation Co.

APPENDIX K

Acadian Ocean Freight Ltd. (clause 3)
Empresa De Navegacao Alianca S.A. (Alianca) (clause 3; not notarized)
Cylanco, S.A. (clause 3)
Lago Line S.A. (clause 3)
Maritima San Andres Ltd. (clause 3)
Nauru Pacific Line (clause 3)
Naviera Marfrigo, S.A. (clause 3)
Portuguese Line C.T.M. (clause 3)
Taylor Corporation Ltd. (clause 3)

APPENDIX L

Compagnie Maritime Belge, S.A.
Union Steamship Company of New Zealand Ltd.

APPENDIX M

Alfa Line Ltd.
American Shipping Co., S.A.
Armada Lines
California International Freight Corp.
Carib Transport Ltd.
Carigulf Lines
Char Ching Marine Company Limited (C.C. Line)
Divi-Divi Line, Ltd.
Donaca Line
Iceland Steamship Co., Ltd.
Majestic Line, Inc.
Marcella Shipping Co., Ltd.
Marine Agency, Inc.
Mexico Express Line
Nosac Line (Nopal Specialized Auto Carriers A/S)
Pacific Forum Line
Saguenay Shipping Co.
Seastar Shipping Co., Ltd.
Springbok Line
Springbok Shipping Co., Ltd.
Transytur Line

APPENDIX N

Cia. Agropecuaria Y Maritima Santa Rose Ltd. (Agromar Line) (clause 3)
Lineas Maritimas De Guatemala, S.A. (clause 3)
Olympic Steamship, Inc.
Societe Ivorienne De Transport Maritime (SITRAM) (preamble, clauses 2 and 4)

APPENDIX O

Atlantic Transport Co., Ltd.
Bahama Adventure Shipping Ltd.
China Ocean Shipping Company
Empacadora De Norte, S.A.
Frota Amazonica S.A.
Marsh Harbour Shipping Co., Ltd.
Miami-Caicos Shipping Ltd.
Nigerian Star Line
Saipan Shipping Co.
Servicios Maritimos Del Ecuador, S.A.
Trans-Caribbean Lines, Inc.
Valmar De Navegacion, S.A.
West Indies Shipping Corp.

APPENDIX P

Incan Superior Limited
LTL International Ltd.
Mammoth Bulk Carriers, Ltd.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 835

APPLICATION OF SOUTH ATLANTIC AND GULF - PANAMA AND COSTA RICA RATE AGREEMENT 10045 SEA-LAND SERVICE, INC. FOR THE BENEFIT OF H.E. SCHURIG & CO., INC. AGENT FOR POLYMER UNITED

A newly filed commodity rate may become immediately effective under 46 C.F.R. 536.10(a)(4), where a preexisting higher-rated "Cargo, N.O.S." rate would be otherwise applicable.

Applicant for a refund of freight charges has met the requirements of section 18(b)(3) of the Shipping Act, 1916. The Initial Decision is reversed and the refund application is granted.

F. J. O'Donnell and *Frank A. Fleischer* for Applicant.

REPORT AND ORDER

March 12, 1978

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

This proceeding is before the Commission upon Exceptions from Sea-Land Service, Inc. to Administrative Law Judge William Beasley Harris' Initial Decision, served November 5, 1981. That Decision denied Sea-Land's application for refund of freight charges for failure to meet the requirements of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. 817(b)(3)) [1], and Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92).[2]

BACKGROUND

On March 21, 1981, a shipment of "Gummed Paper" was transported by Sea-Land from Houston, Texas to Puerto Limon, Costa Rica, and rated at $243.00 W/M as "Cargo N.O.S.: Not dangerous." Sea-Land now seeks to apply the rate for "Paper, Viz: Gummed," at $140.50 W/M, which was filed by telex on April 14, 1981, effective that date, and

[1] Section 18(b)(3) provides that the Commission may permit a waiver or refund of freight charges when there has been a clerical or administrative error in the tariff or an inadvertent error in failing to file a new tariff, provided, *inter alia*, that the carrier or conference has, prior to filing its application, filed a new tariff with the Commission setting forth the rate on which the refund or waiver would be based.

[2] Rule 92 generally parallels section 18(b)(3), but specifies that the Commission must have received an "effective tariff" setting forth the corrected rate.

published in its tariff on April 24, 1981. The commodity rate had been inadvertently omitted from the initial publication of the applicable tariff (which became effective March 9, 1981), because of the failure of the Sea-Land Agreement representative to bring forward the Gummed Paper provision from the previously existing tariff.

In denying the application, the Presiding Officer determined that Sea-Land had failed to file the required effective tariff setting forth the rate on which the refund would be based. He found that the rate on which Sea-Land based its refund application required 30 days' advance notice to become effective pursuant to section 536.10(a)(2) of the Commission's tariff filing regulations,[3] but that the tariff filed by Sea-Land provided only 10 days. Thus, he apparently concluded that the tariff was never effective, and denied the application.

In its Exceptions, Sea-Land contends that a "Cargo N.0.S." rate was in effect at the time of the shipment and that it was a higher rate than the alleged intended rate. Sea-Land points out that section 536.10(a)(4) provides that where a "Cargo N.0.S." rate is in effect and a new lower commodity rate is filed, this new rate may become effective immediately. Sea-Land argues that section 536.10(a)(4) is controlling here, that it therefore had filed an effective tariff, and that the Presiding Officer's conclusion to the contrary was incorrect.

DISCUSSION

This proceeding involves the same general factual situation and misinterpretation of law as that found in Special Docket No. 844, *Application of Sea-Land Service, Inc. for the Benefit of Aquatech Marketing Inc.*, 24 F.M.C. 855 (1982), decided this date.[4] Section 536.10(a)(4) allows a new commodity item to become effective immediately if a higher-rated "Cargo N.0.S." rate is otherwise applicable. The record indicates that this is the case here, and Sea-Land's Exceptions are therefore well-founded.[5]

Upon review of the record, the Commission is satisfied that an inadvertent error as contemplated in section 18(b)(3) had occurred, and

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[3] That section provides in part:

> Amendments which provide for new or initial rates . . . shall be published and filed to become effective not earlier than 30 days after the date of publication and filing, unless special permission to become effective on less than said 30 days' notice has been granted by the Commission . . . .

46 C.F.R. 536.10(a)(2).

[4] Unlike the situation that existed in Special Docket No. 844, however, there was no intervening general rate increase in this proceeding.

[5] The Presiding Officer's reliance on the Commission's decision in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit or Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), is misplaced. In the instant proceeding, section 536.10(a)(4) applies because, in addition to the corrective tariff, there is a higher-rated cargo N.0.S. rate which is otherwise applicable. In *Texas Turbo Jet*, there was no otherwise applicable rate, and the 30-day requirement of section 18(b)(2) of the Act and section 536.10(a)(2) therefore applied.

that an appropriate corrective tariff has been timely filed. The requirements for a refund of freight charges have therefore been met.

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

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. is granted permission to refund to H. E. Schurig & Co., Inc. as agent for Polymer United, freight charges in the amount of $2,234.04; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. cause to have published the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 835, that effective March 21, 1981, and continuing through April 14, 1981, inclusive, the rate on Paper, viz: Gummed, is $140.50 W/M subject to Note as published in Tariff FMC-6, page 251-A, and subject to all applicable rules, regulations, terms and conditions of this tariff. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the goods described which may have been shipped during the specified time.

and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary