DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1984

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FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 522]

GENERAL ORDER 24, AMENDMENT NO. 3

DOCKET NO. 76–63

FILING OF AGREEMENTS BY COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT, 1916

July 11, 1983

ACTION: Amendment of Final Rules.

SUMMARY: This grants, in part, Petitions for Reconsideration of the final rules issued in this proceeding. These amendments are for the purpose of further clarifying the status and treatment of supporting statements, and for allowing communications between Commission staff and agreement proponents in the case of uncontested agreements.

DATE: Effective July 15, 1983.

SUPPLEMENTARY INFORMATION:

On October 18, 1982, the Commission issued final rules [1] in this proceeding which revised regulations governing the filing and processing of agreements pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. §814). A supplement to the final rules was issued on November 2, 1982,[2] and the rules became effective on January 1, 1983. Petitions seeking relief from certain provisions of the final rules have been filed by a group of fifteen steamship conferences and rate agreements (Conference Group),[3] by the Pacific Coast European Conference (PCEC),[4] by Sea-Land Service,

[1] *General Order* 24, Amdt. 2, 25 F.M.C. 423.

[2] 25 F.M.C. 445. Notice of the Office of Management and Budget clearance of the reporting requirements of the rules appeared in the *Federal Register* on January 7, 1983 (48 F.R. 797).

[3] The Conference Group filed a "Petition For Reconsideration Or Modification Of, And Relief From, The Commission's Final Rules" pursuant to Rules 261, 51 and 69 of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.261, 502.51 & 502.69). The fifteen conferences and rate agreements joining in this Petition are: Australia/Eastern U.S.A. Shipping Conference; The "8900" Lines; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Israel/North Atlantic Ports Westbound Freight Conference; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico (Med-Gulf) Conference; Marseilles North Atlantic U.S.A. Freight Conference; Mediterranean-North Pacific Coast Freight Conference; Mediterranean U.S.A. Great Lakes Westbound Freight Conference; North Atlantic/Israel Freight Conference; North Atlantic Mediterranean Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; U.S. North Atlantic Spain Rate Agreement; U.S. South Atlantic/Spanish, Portuguese, Moroccan and Mediterranean Rate Agreement; The West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference.

[4] PCEC filed a "Petition For Reconsideration" on behalf of the Conference and its member lines.

Inc. (Sea-Land),[5] by six of the member conferences of the Associated Latin American Freight Conferences (ALAFC),[6] and by the Council of European & Japanese National Shipowners' Associations (CENSA).[7]

BACKGROUND

The final rules revise Commission procedures for: (a) filing agreement approval requests pursuant to section 15, including statements in support thereof; (b) filing comments and protests to such agreements, and responsive pleadings thereto; and (c) the disposition of agreement approval requests. The purpose of the final rules is to ensure fair, orderly and expeditious processing of agreement approval requests.

The original Notice of Proposed Rulemaking appeared in the *Federal Register* on November 23, 1976 (41 F.R. 51622-51623). Numerous comments to the proposed rulemaking were filed by carriers, conferences of carriers, and other interested parties. On June 20, 1979, the Commission issued revised proposed rules and invited further comment (44 F.R. 36077-36080). Additional comments were submitted on the revised rules.[8]

These comments were carefully considered and, where appropriate, were incorporated in the final rules issued by the Commission. The Petitioners seeking relief from the final rules have, for the most part, been participants during the course of this rulemaking proceeding.[9]

DISCUSSION

The particular sections of the final rules objected to by the Petitioners are: (1) sections 522.5 and 522.6 as they concern the status of supporting statements and affidavits as public records and the confidential treatment of such documents; (2) section 522.7 as it concerns communications between Commission staff and agreement proponents and the good cause requirement for supplementation of a filing; and (3) section 522.8 as it relates to the "notice and hearing" requirement of section 15 of the Shipping Act. In addition, Petitioners object to the absence from the final rules of a provision which would establish internal Commission deadlines for processing agreements, and the absence of a provision which would indicate that internal staff memoranda and recommendations are part of the administrative

[5] Sea-Land filed a "Petition For Clarification Or Amendment" pursuant to Rules 51 and 69 of the Commission's Rules of Practice and Procedure.

[6] Six of the member conferences of the ALAFC filed "Comments In Support Of A Petition For Reconsideration Or Modification Of, And Relief From, The Commission's Final Rules." The comments support the Conference Group Petition and urge that it be granted. The six ALAFC members subscribing to the comments are: United States Atlantic & Gulf/Ecuador Freight Conference; Atlantic & Gulf/Panama Canal Zone, Colon and Panama City Conference; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; West Coast of South America Northbound Conference; and United States Atlantic & Gulf-Venezuela Conference.

[7] CENSA filed a "Petition For Reconsideration And Modification Of Final Rules."

[8] A list of commentators is set forth in Appendix A of the final rules. 47 F.R. 46286-46287.

[9] One member conference joining in the ALAFC Petition and four conferences subscribing to the Conference Group Petition appear not to have previously submitted comments.

record in the agreement review process. Each of these objections are discussed below.[10]

1. Section 522.5 Supporting Statements and Section 522.6 Federal Register Notice

Section 522.5 provides that supporting statements are public records and that no claims of confidentiality with regard to such statements will be allowed. Section 522.5 also provides that affidavits or other evidence may be attached to supporting statements. Section 522.6(e) provides that supporting statements shall be available for inspection at the Commission's offices. The earlier revised rule provided that copies of the agreement and the supporting statement would be available for inspection at the Commission offices. It did not explicitly state that requests for confidentiality would not be allowed.

Several Petitioners object to these sections as they relate to affidavits and supporting statements filed in connection with requests for approval of an agreement. Sea-Land claims that it is unclear whether the affidavits submitted with supporting statements may be given confidential treatment. Sea-Land believes that this section should be clarified to permit confidential treatment of proprietary information contained in an affidavit or other document submitted with a supporting statement CENSA also argues that some measure of confidentiality should be provided for in order to avoid the alleged harm that may result from disclosure of sensitive business information. Sea-Land states further that, if confidential treatment is not permitted, these sections should then be modified to affirm Commission practice of providing notice to agreement proponents of any request for proprietary data so that such information may be withdrawn prior to disclosure.

Affidavits and other documents submitted with a supporting statement are part of the supporting statement and, therefore, are public documents for which confidentiality claims are not permitted. This is the clear intent of sections 522.5 and 522.6. However, in order to avoid any possible ambiguity, these sections shall be amended to expressly state that affidavits and other evidence attached to supporting statements are part of the public record.

No amendment to these sections to allow for confidential treatment of supporting statements is necessary or appropriate. Making such information public is the consequence that proponents must accept when they seek section 15 authority. Such agreements are impressed with a public interest and are not merely contracts governing the private business relationships of the parties. Full disclosure is required to enable protestants, commentators

[10] Petitioners also complain that the record in this proceeding is stale and that the final rules were issued without additional notice and comment. Petitioners do not explain how the length of this proceeding would affect the record or the final rules themselves. Moreover, Petitioners and other interested persons have had ample opportunity to comment on the rules throughout this proceeding. Many of the objections raised by Petitioners have previously been considered. Finally, these very Petitions have provided an opportunity to comment on the final rules.

and other interested persons to know the basis for an agreement and be able to fashion informed responses. Therefore, Petitioners' request that this section be amended to allow for confidential treatment of supporting statements is denied.

Nor is it practical to notify agreement proponents of any request for proprietary data prior to disclosure. Such a provision would be contrary to the purpose of the final rules since it would be likely to delay the processing of agreements. Therefore, Petitioners' request for such an amendment is denied.

2. Section 522.7 Comments and Protests

Section 522.7 defines and sets forth procedures for the filing of comments and protests. This section also provides for the service of comments and protests and for the filing and service of any response by proponents of an agreement. Section 522.7(e) limits communications between parties to section 15 agreements and Commission staff and prohibits further supplementation of the proponent's filing unless good cause is shown. The provision of 522.7(e) which sets forth the good cause requirement did not appear in the earlier revised proposed rules. Other changes in section 522.7 from the revised proposed rules are non-substantive in nature.

Petitioners object to the prohibition against communications between Commission staff and agreement proponents in the case of unprotested agreements. Petitioners argue that such contacts facilitate the agreement review process, that the prohibition against such contacts will delay consideration of agreements, and that such a prohibition should apply only where protests or comments have been filed.

Petitioners also object to the good cause requirement of section 522.7(e). They argue that the good cause requirement unduly restricts a proponent's ability to supplement its support of an agreement in unprotested cases and is not in keeping with the Commission's responsibility to base its decisions on the fullest possible record.

The final rule's preclusion of communication with staff in the case of unprotested agreements was intended to expedite the agreement review process by encouraging proponents to make the proper showing required for approval with their initial submission and to avoid piecemeal additions of supporting information which could delay the agreement review process. There are, however, instances where such communications may resolve staff questions and aid the review process. The Commission has determined that, with respect to unprotested agreements, such contacts may on balance be of more benefit than detriment to the agreement review process. Therefore, section 522.7 shall be amended to permit members of the staff of the Bureau of Agreements and Trade Monitoring (Bureau) to contact the parties to unprotested agreements, at the discretion of the Bureau Director. Such contacts would not be undertaken prior to the close of the comment period. The preclusion of such contacts by the Bureau staff in the case

of protested or commented agreements remains in effect. Contacts initiated by parties to an agreement are not permitted.

The "good cause" requirement of section 522.7 is also intended to expedite agreement review by limiting supplementary submissions to those instances wherein good cause is shown. This provision ensures a definite termination of the agreement review process and at the same time establishes a procedure for dealing with those instances in which special circumstances call for allowing supplementary submissions. This mechanism appears to be reasonable and fair and no amendments to the good cause requirement appear to be warranted. Therefore, Petitioners' requests to amend the "good cause" requirement shall be denied.

3. Section 522.8 Disposition of Agreement Approval Requests

Section 522.8 sets forth procedures for the disposition of agreement approval requests. This section provides for further proceedings regarding an agreement when the Commission considers further inquiry advisable, when a protest alleges material facts which would preclude approval, and when the proponents of an agreement properly exercise their right to request a further hearing. This section also establishes procedures for conditional approval of agreements and describes the factual showing that must be made when proponents request further hearing. Although this section of the final rules reflects certain clarifying, technical and editorial changes, it is substantially the same as published in the revised proposed rules.

The Conference Group contends that section 522.8 fails to ensure a hearing prior to conditional or unconditional disapproval of an agreement by treating the statutory right to a hearing prior to disapproval as discretionary. It also argues that this section places an unfair triple burden on the proponent which the Commission has not explained or justified.[11] The Conference Group believes that this section will delay rather than expedite the processing of agreements.

ALAFC goes further and argues that section 15 guarantees proponents an evidentiary hearing prior to conditional disapproval. ALAFC also notes that section 522.8 contains no definition of "conditional order of disapproval," and that such orders are not final orders of the Commission and may not be appealed to the United States Courts of Appeals.

PCEC contends that the proponent of a section 15 agreement has a statutory right to a hearing upon "simple request" and attacks those provisions in sections 522.8(b)(3) and (d)(2) which require that a proponent prove entitlement to a hearing.

CENSA argues that section 522.8 improperly limits proponents' right to a hearing and imposes new, unnecessary, burdensome, and costly requirements. CENSA contends that the conditional disapproval procedure is not consistent with the statutory right to a hearing before disapproval.

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[11] The alleged triple burden is: (1) in the initial supporting statement; (2) in the requirement to prove entitlement to a hearing; and (3) in the hearing itself.

The basic issue raised by these rules and the contentions of the parties is not so much the right of parties to a hearing, but the right of the Commission to control the structure and procedures of hearings conducted under the Shipping Act. It is clear that the statute requires "notice and hearing" before the Commission may disapprove an agreement.[12] It is also clear that the Commission has substantial latitude in constructing the type of procedures best suited to fulfilling this hearing obligation.[13] The procedures set forth in the final rules afford filing parties a basic hearing procedure from the date an agreement is filed. Neither the language of the statute nor the decisions of the courts require the Commission to hold a formal evidentiary hearing prior to action on a request for approval. The kind of hearing required will depend upon the nature of the agreement and the issues which must be resolved.[14]

In determining what kind of hearing is appropriate in a particular case, the Commission must, of course, be guided by principles of due process and fairness to the parties.[15] Where an application for approval raises disputed issues of material fact, a trial-type evidentiary hearing may well be required.[16] However, where the disposition of the case does not involve such issues, the Commission must be able to reach intelligent decisions about other types of proceedings which will most economically provide fair procedures to the parties and an adequate record for Commission decision and judicial review.[17] The Commission must also ensure that it obtains

[12] Section 15 of the Shipping Act, 1916 provides in relevant part that:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

[13] *Sea-Land Service, Inc.* v. *United States*, 683 F.2d 491, 495 (D.C. Cir. 1982); *United States Lines, Inc.* v. *Federal Maritime Commission*, 584 F.2d 519, 537 (D.C. Cir. 1978). In *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F.2d 577, 589 (D.C. Cir. 1969) the court stated that: "The requirement of a hearing in a proceeding before an administrative agency may be satisfied by something less time-consuming than courtroom drama."

[14] "The statute does not require that a hearing be held where no one requests one, rather, it requires only that interested persons be given the opportunity for a hearing. This applies equally to approval or disapproval of agreements. Further, a trial-type evidentiary hearing is not always required. Where there are no disputes as to the material facts, an appropriate hearing could consist of the filing of briefs or memoranda of law. In the usual case, the Commission affords interested parties an opportunity for hearing by the publication in the Federal Register of an invitation to submit comments, protests, and requests for hearing. If no one takes advantage of that opportunity, or if the comments, protests, or requests for hearing are frivolous, the Commission is not required to hold a hearing before approving an agreement." *Canadian-American Working Arrangement*, 16 S.R.R. 733, 738.

[15] *Seatrain International, S.A.* v. *Federal Maritime Commission*, 584 F.2d 546, 550 (D.C. Cir. 1978).

[16] In *Marine Space Enclosures* the court held that where agreements which are anticompetitive in nature involve disputed issues of material fact a further hearing was necessary. As the court noted, antitrust issues ". . . do not lend themselves to disposition solely on briefs and argument." In remanding the case to the Commission, however, the *Marine Space Enclosures* court deliberately and explicitly refrained from requiring the Commission to hold formal evidentiary hearings. *Marine Space Enclosures, supra*, 420 F.2d at 590.

[17] *Outward Continental North Pacific Freight Conference* v. *Federal Maritime Commission*, 385 F.2d 981, 984 n.9 (D.C. Cir. 1967); *Persian Gulf Outward Freight Conference* v. *Federal Maritime Commission*, 375 F.2d 335, 340–41 (D.C. Cir. 1967).

sufficient information so that its decision is based on substantial evidence,[18] and reflects a consideration of all relevant factors.[19]

An appropriate hearing within the meaning of section 15 is one in which the proponents of an agreement are afforded an effective opportunity to develop a factual record and legal argument in support of the request for approval. Typically, the hearing requirement of section 15 is satisfied by affording all interested parties the opportunity to submit comments or argument and present evidence in the form of affidavits or other documents. The procedures set forth in section 522.8 provide this opportunity and are in harmony with the statute and relevant court decisions. Proponents may file whatever supporting information they believe is necessary in their initial filing. Should the Commission determine that this initial showing is not adequate and issue an order of conditional disapproval, section 522.8 provides that proponents may exercise their right to request a further hearing. This further hearing will be granted provided a proper showing is made that additional proceedings will serve some legitimate purpose which cannot be fulfilled by less formal tools. The conditional disapproval order is in essence a notice to parties of the Commission's view that the state of the record is such that approval cannot be granted, and that absent a request for additional procedures to demonstrate material evidence, the subject agreement will be finally disapproved at a subsequent date.

Petitioners complain that section 522.8 places an undue burden on proponents.[20] The final rules, however, do not impose any mandatory filing requirements. The only burden imposed on proponents of an agreement is the burden to satisfy the standards of section 15. In the particular case of an agreement which would otherwise be violative of the antitrust laws or which would be likely to have serious anticompetitive consequences, a proponent has a burden to justify the agreement under the *Svenska* doctrine.[21] The final rules merely set forth a procedure for meeting the burden imposed by section 15 and, where applicable, the *Svenska* doctrine. Petitioners' arguments that the final rules impose additional, extra-statutory, substantive burdens on filing parties are without merit. The Commission has

[18] *Consolo* v. *Federal Maritime Commission,* 383 U.S. 607 (1966).

[19] *Seatrain International S.A.* v. *Federal Maritime Commission, supra,* 584 F.2d at 550.

[20] Petitioners' objections to this section contain certain internal inconsistencies. On the one hand, they claim that proponents are deprived of an adequate hearing, and on the other, that the provisions in section 522.8 which provide an additional opportunity to justify an agreement place an undue burden upon proponents. The so-called "triple burden" is in fact but one requirement: the requirement that parties seeking Commission action on agreements explain the reasons for the requested action and provide the agency with sufficient information about their presentation to enable the agency to structure an appropriate proceeding.

[21] The *Svenska* doctrine is the proposition affirmed in *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968), whereby section 15 agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence.

simply established uniform procedures for making determinations as to the type of hearing required.

Petitioners claim that section 522.8 will delay the processing of agreements. The procedures set forth in section 522.8, however, should promote more efficient management of Commission resources and hence expedite the agency's processes. A rule which would require formal hearings upon mere request without any supporting information would be likely to lead to unnecessary hearings. The Conference Group's suggestion that parties would not frivolously undertake an expensive hearing is beside the point. It is the Commission's responsibility to control its administrative processes. The burden is properly on proponents of an agreement to make a sufficient showing of approvability to warrant further hearing. Such a requirement is not unreasonable.

It is not clear what point ALAFC intends to make when it states that conditional orders of disapproval are not final orders of the Commission and may not be appealed. Such orders become final when the conditions stated therein are not met, and thereafter may be appealed.[22] No right of appeal is denied by the procedures of this section.

ALAFC also complains that section 522.8 does not define the term "conditional order of disapproval." While the term is not defined in the rules, the language of section 522.8 makes the meaning of the term readily apparent and inclusion of an actual definition would appear to be unnecessary.

Accordingly, no further revision of section 522.8 appears to be warranted and Petitioners' various requests for modification of or relief from this section shall be denied.

4. Internal Deadlines for Processing Agreements

The Preamble to the final rules states that: "Internal deadlines and procedures have been established and are now in the process of being further updated. However, these matters are inappropriate for inclusion in a Commission General Order and are more properly the subject of an internal Commission directive." 25 F.M.C. 423–424. On October 18, 1982, simultaneously with the issuance of the final rules, the Commission published Commission Order No. 104 which sets forth internal procedures governing the processing of agreements (47 F.R. 46376–46379). This Order also became effective on January 1, 1983.

The Conference Group objects to the absence in the final rules issued in Docket No. 76–63 of any provision establishing binding internal deadlines for the processing of agreements. The Conference Group is aware of the procedures set forth in Commission Order No. 104,[23] but contends that

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[22] Proponents are also free at that time to refile the agreement with appropriate justification, the conditional disapproval order having indicated the deficiencies.

[23] In its Petition filed on November 12, 1982, PCEC stated that the Commission's internal processing guidelines should be made public. PCEC's comment completely overlooks the publication of the Commis-

those procedures are inadequate because they are not mandatory and because there are no sanctions for non-compliance. The Conference Group contends that agreements should be processed in the order in which they are filed.

The Commission has established adequate internal procedures to ensure the expeditious processing of agreements. The procedures set forth in Commission Order No. 104 should ensure that agreements generally will be processed in the order in which they are filed. The final rules do not, nor would it be feasible, given the varying complexity of agreements, guarantee that agreements will be processed strictly in the order in which they are filed. Such a rule would unduly restrict the flexibility of the Commission.

Although the internal rules do not have the force of law, they do establish a clear regime for processing agreements which the Commission is now implementing. Petitioners suggest that the rules should contain sanctions for non-compliance but do not state what sanctions would be appropriate. Commission Order No. 104 sets forth the requirements which the staff of the Commission must meet. Adherence to these requirements is a matter which concerns the performance of Commission personnel and any failure to meet those requirements may be addressed through established Commission personnel policy. This is not a matter which involves the approvability of an agreement pursuant to section 15 and hence should not be included in General Order 24. Accordingly, Petitioners' request for an amendment to the final rules providing for inclusion of internal processing rules and sanctions related thereto shall be denied.

5. Availability of Internal Reports or Information

CENSA objects that both the final rules in Docket No. 76–63 and the procedures set forth in Commission Order No. 104[24] permit the Commission to make determinations on the approvability of agreements on the basis of information which CENSA contends is not in the record. CENSA argues that staff recommendations and memoranda are part of the administrative record upon which the Commission relies in its decision making process and should be available to the parties. CENSA argues that the full administrative record must be disclosed in order to determine whether the Commission acted arbitrarily.

As authority for this contention, CENSA cites *United States Lines, Inc.* v. *Federal Maritime Commisson,* 584 F.2d 519 (D.C. Cir. 1978) and *Home Box Office, Inc.* v. *Federal Communications Commission,* 567 F.2d 9 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). These cases deal with the issue of *ex parte* communications and hold that if a communication from outside

sion's internal rules on October 18, 1982, in the same issue of the *Federal Register* as appeared the final rules in Docket No. 76–63.

[24] CENSA objects to the procedures in section 5 of Commission Order No. 104 which provides for the development of "additional facts" and the preparation of a "data package" by the Office of Regulatory Policy and Planning upon request of the Director, Bureau of Agreements and Trade Monitoring.

the agency contains information which forms the basis for agency action, then that information must be disclosed to the public.

These decisions do not require the routine disclosure of internal memoranda or recommendations, prepared to assist the Commission in its deliberations, either during the agreement review process or even prior to a decision by the Commission. It is sufficient for the Commission to articulate the facts relied upon to support its decision in the order itself even where those facts are derived from internal Commission sources. We are aware of no legal precedent which would require the routine disclosure of internal memoranda in all cases. Accordingly, Petitioners' request to amend the rules to require that such internal documents be made available to the public shall be denied.

List of subjects in 46 C.F.R.: Administrative Practice and Procedure.

THEREFORE, IT IS ORDERED, That pursuant to 5 U.S.C. §553 and sections 15, 21, 22 and 43 of the Shipping Act, 1916 (46 U.S.C. §§814, 820, 821 and 841a), Part 522 of Title 46, Code of Federal Regulations, is amended as follows.

1. Section 522.5 is amended by revising the third sentence to read as follows:

> Supporting statements, including all documents, affidavits, or other evidence attached thereto, are public records.

2. Section 522.6 is amended by revising paragraph (e) to read as follows:

> (e) A statement that the agreement and any supporting statement, including all documents, affidavits, or other evidence attached thereto, are available for inspection at the Commission's offices;

3. Section 522.7 is amended by revising the first sentence of paragraph (e) to read as follows:

> (e) Except as provided in this section and §522.5, or except, in the case of an unprotested agreement, as the Director, Bureau of Agreements and Trade Monitoring may in his/her discretion initiate, or unless specifically requested in writing by the Commission, with copies to the proponents and persons which have filed protests or comments, no other written or oral communication concerning a pending agreement shall be permitted.

and

IT IS FURTHER ORDERED, That Petitioners' requests for reconsideration, clarification, modification or withdrawal of, relief from, or amendment

to the final rules issued in Docket No. 76-63 are granted to the extent indicated above and denied in all other respects.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 536]

GENERAL ORDER 13, AMDT. 11; DOCKET NO. 83–18

FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

July 26, 1983

ACTION: Final Rule

SUMMARY: This amends FMC tariff filing rules to permit conferences and rate agreements to file, on behalf of member line controlled carriers, lower rates on less than 30 days' notice to meet the independent action rates of member line non-controlled carriers and to meet the actions taken by member line non-controlled carriers on open rated commodities. It also permits member line controlled carriers to initiate action and lower their rates on open-rated commodities to a level at or above the conference minimum.

DATE: Effective September 2, 1983.

SUPPLEMENTARY INFORMATION:

The Commission previously gave notice (48 FR 12576-77) that it proposed to amend 46 C.F.R. Part 536 to permit conferences and rate agreements to file reduced rates with less than 30 days' notice, on behalf of member line controlled carriers on open-rated commodities and independent action rates, where the basic agreement provides for independent action. Such filings, however, would not be permitted where controlled carrier member line rates would be lower than rates of non-controlled carrier member lines.

Comments were received from a controlled carrier,[1] a manufacturers association,[2] 7 conferences or rate agreements,[3] and a non-controlled carrier.[4]

All commentators support the Commission's proposed rule though some have expressed reservations about certain aspects. The Inter-American Freight Conference, is concerned that the rule will make Conferences responsible for identifying a given carrier as a "controlled carrier" without their having all the facts necessary to make that determination. This concern has merit, and the rule has been amended so that conferences may rely upon the Commission's prior and continuing determinations as to which carriers are controlled and subject to the regulatory provisions of the Shipping Act, 1916, as amended (the Act).

The Trans-Pacific conferences suggest that the rule be changed to specifically permit controlled carrier members to initiate rate reductions on open-rated commodities where the conference or ratemaking agreement has established open rates subject to minimum rate levels. The Commission concurs. Establishing rates "open, subject to a minimum" requires collective conference action. Therefore, controlled carrier members should be allowed to initiate rates and lower their rates on open-rated commodities to a level at or above the conference minimum. This would violate neither the intent nor the letter of the Act. That portion of the rule has been amended to permit controlled carriers to initiate actions on open-rated commodities subject to a conference imposed minimum.

The Commission finds that these amendments to its rules are exempt from the requirements of the Regulatory Flexibility Act (5 U.S.C. §601). Section 601(2) of that Act excepts from its coverage any "rule of particular applicablity relating to rates . . . or practices relating to such rates. . . ." As the proposed amendments clearly relate to rates and rate practices the Regulatory Flexibility Act requirements are inapplicable.

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[1] Shipping Corporation of India.

[2] Motor Vehicle Manufacturers Association of the United States, Inc., whose members are:
American Motors Corporation
Chrysler Corporation
Ford Motor Company
General Motors Corporation
International Harvester Company
M.A.N. Truck & Bus Corporation
PACCAR Inc.
Volkswagen of America, Inc.
Volvo North America Corporation

[3] Malaysia Pacific Rate Agreement
Trans-Pacific Freight Conference of Japan/Korea
Japan/Korea-Atlantic and Gulf Freight Conference
Philippine North America Conference
Agreement No. 10107
Agreement No. 10108
Inter-American Freight Conference

[4] Sea-Land Service, Inc.

List of Subjects in 46 C.F.R. Part 536:
Rates, Maritime Carriers

Therefore, pursuant to 5 U.S.C. §553 and sections 18(c) and 43 of the Shipping Act, 1916 (46 U.S.C. §§817(c) and 841a), 46 C.F.R. Part 536 is amended by:

1. The addition of a new sentence at the end of §536.6(n), as follows:

   "*Provided however*, that conferences or rate agreements may, on less than 30 days' notice, file reduced rates on behalf of controlled carrier members for open-rated commodities: 1) at or above the minimum level set by the conference or rate agreement, or 2) at or above the level set by a member of the conference or rate agreement that has not been determined by the Commission to be a controlled carrier subject to section 18(c) of the Shipping Act, 1916, in the trade involved."

2. The addition of a new sentence at the end of §536.10(a)(3) as follows:

   "*Provided further*, that conferences or rate agreements whose basic agreements provide for independent action, may file on behalf of their controlled carrier members, lower independent action rates on less than 30 days' notice, subject to the requirements of their basic agreements and subject to such rates being filed at or above the level set by a member of the conference or rate agreement that has not been determined by the Commission to be a controlled carrier, subject to section 18(c) of the Shipping Act, 1916, in the trade involved."

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–22

EQUAL ACCESS AGREEMENT IN THE UNITED STATES/REPUBLIC OF THE PHILIPPINES OCEAN LINER TRADE

(AGREEMENT NO. 10461)

NOTICE

August 3, 1983

Notice is given that no appeal has been taken to the June 28, 1983, dismissal of this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and, accordingly, the dismissal has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–22

EQUAL ACCESS AGREEMENT IN THE UNITED STATES/REPUBLIC OF THE PHILIPPINES OCEAN LINER TRADE (AGREEMENT NO. 10461)

PROCEEDING DISMISSED

Finalized August 3, 1983

This proceeding was instituted by Order of Investigation and Hearing, served April 14, 1983, to determine whether Agreement No. 10461, an equal access agreement between certain United States-flag carriers and Philippine-flag carriers (Proponent) should be approved, disapproved or modified under the provisions of section 15 of the Shipping Act, 1916, 46 U.S.C. 814.

Following some interim motions and events, including a prehearing conference and the issuance of some procedural orders, the Proponents determined to withdraw the Agreement. By letters dated June 15, 1983, Proponents withdrew the Agreement without prejudice to later refiling and asked that the proceeding be discontinued. By Order, served June 15, 1983, I advised that the request was deemed a motion to dismiss and that replies, if any, would be due not later than June 22, 1983. No reply was received.

Accordingly, there being no opposition to the motion and there being no useful regulatory purpose to be served by continuing this proceeding, it is ordered dismissed.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–15

AMERICAN COASTAL LINE JOINT VENTURE, INC.

v.

UNITED STATES LINES, INC. AND SEA-LAND SERVICE, INC.

NOTICE

August 8, 1983

Notice is given that the time within which the Commission could determine to review the June 21, 1983 discontinuance of the complaint in this proceeding 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. 83–15

AMERICAN COASTAL LINE JOINT VENTURE, INC.

v.

UNITED STATES LINES, INC. AND SEA-LAND SERVICE, INC.

MOTION TO WITHDRAW COMPLAINT GRANTED; PROCEEDING DISCONTINUED

Finalized August 8, 1983

Complainant American Coastal Line Joint Venture, Inc. (AMCO) has filed a Motion to Withdraw Complaint. AMCO states that it "hereby requests leave to withdraw its complaint in this proceeding without prejudice" and furthermore states that counsel for respondents United States Lines, Inc. and Sea-Land Service, Inc. have advised that respondents do not oppose the motion.

In its complaint AMCO had alleged that respondents had concertedly submitted rates for the carriage of military cargo under the military bidding system, which rates were non-compensatory and so unreasonably low as to be detrimental to the commerce of the United States, causing damage to AMCO in an unspecified amount, such conduct allegedly being in violation of sections 15 and 18(b)(5) of the Shipping Act, 1916. Respondents had denied any concerted action or violation of law or the filing of non-compensatory rates. The Military Sealift Command (MSC) was granted leave to intervene.[1]

The proceeding moved into its prehearing inspection and discovery phase, the parties serving various discovery requests on each other. Several prehearing conferences were held, as a result of which protective orders were fashioned and established, information was exchanged, and other rulings issued designed to narrow issues and expedite progress toward a reasonably prompt decision.

DISCUSSION AND CONCLUSIONS

AMCO's motion in this proceeding resembles a similar motion filed in a similar proceeding involving allegations of non-compensatory military rates, which proceeding was discontinued on complainant's motion. (See Docket No. 83–19, *Farrell Lines Incorporated* v. *Sea-Land Service, Inc.*, Motion to Withdraw Complaint Granted; Proceeding Discontinued, 25

[1] Counsel for MSC has orally advised that MSC does not intend to oppose the motion.

F.M.C. 729 (1983)). As I discussed in the ruling cited, a complainant's motion to withdraw its complaint can be handled under Rule 73, 46 CFR 502.73, the rule governing motions generally, and Rule 147, 46 CFR 502.147, the rule setting forth the powers of presiding officers, including the power to "hear and rule upon motions." Furthermore, under the federal rules, specifically Rule 41(a), 28 U.S.C.A., complainants are permitted to withdraw their complaints even after answers have been filed and other action taken in the case subject to possible terms and conditions which courts may impose which are not relevant here. In practice, moreover, complainants' rights to withdraw their complaints have been respected by this Commission since the Commission has the power to institute its own investigations if it chooses and it is generally recognized that complainants should not be compelled to litigate cases if they do not choose to do so. See, e.g., *Smoot* v. *Fox,* 340 F. 2d 301 (6th Cir. 1964); *Tyco Laboratories, Inc.* v. *Koppers Co.,* 627 F. 2d 54 (7th Cir. 1980); 9 Wright and Miller, *Federal Practice and Procedure,* section 2364, p. 169 (voluntary dismissals permitted in early stages of a proceeding).

The instant proceeding is still in a relatively early stage and AMCO simply wishes to withdraw its complaint without prejudice. Respondents do not object to the motion. Accordingly, the motion is granted and the proceeding is discontinued. The parties are reminded of the need to comply with paragraph 10 of the Protective Order regarding the return of confidential materials to the parties furnishing them at the conclusion of the proceeding.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–24

BOB AKIN MOTOR RACING, INC.

v.

COSMOS SHIPPING COMPANY, INC.

NOTICE

August 19, 1983

Notice is given that the time within which the Commission could determine to review the July 8, 1993 discontinuance of the complaint in this proceeding 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. 83–24

BOB AKIN MOTOR RACING, INC.

v.

COSMOS SHIPPING COMPANY, INC.

Sam R. Watkins, Jr., of Rockwood, Edelstein & Duffy, P.C., for complainant.

Gerald H. Ullman, P.C., for respondent.

PROCEEDING DISCONTINUED WITH PREJUDICE TO RENEW AS REQUESTED BY PARTIES

Finalized August 19, 1983

A complaint filed by Bob Akin Motor Racing, Inc., against Cosmos Shipping Company was served April 27, 1983. Complainant alleged that respondent had breached its duties and responsibilities as a freight forwarder in violation of section 44 of the Shipping Act, 1916, in connection with the shipment of a truck, racing car and related parts. Complainant sought reparation in the amount of $21,569.49.

The complainant also brought action in the Supreme Court of the State of New York County of Westchester charging defendant with (1) breach of contract, (2) negligence, and (3) negligent and/or fraudulent misrepresentations, seeking damages in the amount of $21,534.49 for each.

The defendant answered denying all allegations, made five affirmative defenses as well as a counterclaim for $3,769.94 plus interest, together with the costs and disbursements of the action.

As was noted in the memorandum anent cancellation of Thursday, June 16, 1983, Prehearing Conference due to parties having settled, that was served June 20, 1983, settlement in this proceeding was worked out by Mr. Ullman who represents the respondent and Mr. Watkins who represents the complainant.

In a letter dated June 28, 1983 (received June 30, 1983), Mr. Watkins submitted the following:

1. General Release from Cosmos Shipping Company, Inc. to Bob Akin Motor Racing, Inc. (filed in this docket)
2. General Release from Bob Akin Motor Racing, Inc. to Cosmos Shipping Company, Inc. (filed in this docket)
3. Letter dated June 16, 1983 describing the terms of the settlement and contersigned by counsel for Cosmos Shipping Company, Inc. The letter reads as follows:

Gerald H. Ullman, Esq.
Gerald H. Ullman, P.C.
120 Broadway
New York, New York 10271

Re: Bob Akin Motor Racing, Inc. v. Cosmos Shipping Company, Inc.
Our Reference Number 1337–A

Dear Gerry:

Pursuant to our agreement, please find enclosed herewith three signed copies of a Stipulation Discontinuing the captioned Action with Prejudice. You should keep one copy for your records and return the others to me. I will file one with the Westchester Supreme Court and forward the other one to the Federal Maritime Commission.

I also enclose an original General Release to be executed by your Client, Cosmos Shipping Company, Inc., and returned to me after it has been executed and notarized. I also enclose a copy of a Release which has been forwarded to our client for execution.

The net result of the agreed upon settlement between our clients is that Cosmos Shipping Company, Inc. will tender a check to Bob Akin Motor Racing, Inc. in the amount of $5,581.81. This check should be certified or bank funds. General Releases as enclosed herewith will be exchanged between our clients. The action commenced by Bob Akin Motor Racing, Inc. in the Westchester Supreme Court will be discontinued with prejudice and Bob Akin Motor Racing, Inc. will withdraw its Complaint which it filed with the Federal Maritime Commission.

You will hold in escrow all settlement documents received from us in connection with this matter until we have received your client's check, General Release, your signed copy of this letter and the Stipulation Discontinuing the Action.

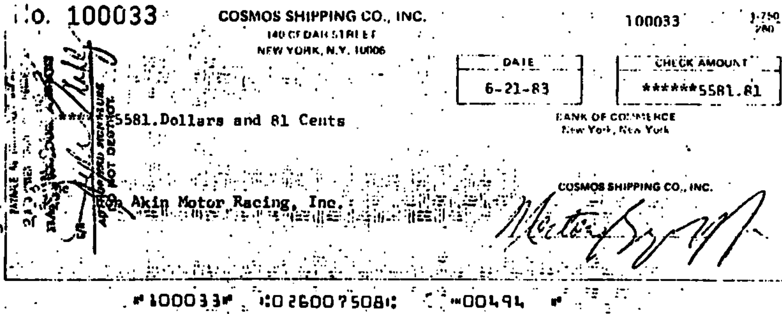
Please be kind enough to indicate your client's agreement to the settlement arrangements as set forth herein by signing and returning the enclosed copy of this letter. Thereafter I will submit a copy of this letter along with all other settlement documents to Judge Harris of the Federal Maritime Commission for his approval.

I thank you for your professional courtesy and cooperation in reaching this settlement and throughout the course of this matter.

Very sincerely,
ROCKWOOD, EDELSTEIN & DUFFY, P.C.

BY ______________________________
Sam R. Watkins, Jr.

4. Copy of certified check from Cosmos Shipping Company, Inc. in the amount of $5,581.81:



No. 100033

COSMOS SHIPPING CO., INC.
140 CEDAR STREET
NEW YORK, N.Y. 10006

100033

DATE	CHECK AMOUNT
6-21-83	******5581.81

*****5581.Dollars and 81 Cents

BANK OF COMMERCE
New York, New York

Bob Akin Motor Racing, Inc.

COSMOS SHIPPING CO., INC.

AUTHORIZED SIGNATURE
DO NOT DESTROY

100033 026007508 00494

5. Copy of Stipulation Discontinuing Action with Prejudice which was filed with the Westchester County Clerk. The stipulation follows:

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF WESTCHESTER

Index No. 24429/82

BOB AKIN MOTOR RACING, INC.,
Plaintiff
against
COSMOS SHIPPING COMPANY, INC.,
Defendant

Calendar No.

STIPULATION DISCONTINUING ACTION WITH PREJUDICE

IT IS HEREBY STIPULATED AND AGREED, by and between the undersigned, the attorneys of record for all the parties to the above entitled action, that whereas no party hereto is an infant or incompetent person for whom a committee has been appointed and no person not a party has an interest in the subject matter of the action, the above entitled action be, and the same hereby is discontinued with prejudice without costs to either party as against the other. This stipulation may be filed without further notice with the clerk of the court.

Dated: June 16, 1983

GERALD H. ULLMAN, P.C.
Attorney(s) for Defendant

120 Broadway
New York, New York 10271
(212)732–2570

ROCKWOOD, EDELSTEIN & DUFFY, P.C.
Attorney(s) for Plaintiff

One Water Street
White Plains, New York 10601
(914)328–1500

DISCUSSION

This proceeding had all the prospects of a very interesting and important case involving the duties and responsibilities of a freight forwarder. For-

warders are subject to the Shipping Act, 1916, and the requirements, rules and regulations of the Commission issued thereunder. As to whether in this proceeding the facts bring it within the necessary purview is not known, the parties having settled. Although the parties in the above settlement material do not mention the financial saving in time, research and possible hearings, official notice is taken that trial of the issues herein could be very costly and that there is financial saving in settlement.

In short, as seen from the material herein, approval of the settlement in this forum is unnecessary, as the complainant has withdrawn his complaint here and stipulated discontinuing the action with prejudice in the New York Court.

The law favors compromise and settlement. The parties in three months by settling have had this matter discontinued in two forums. Counsel for the parties deserve congratulations as well as the forums for such speedy action.

Upon consideration of the above, the requests for discontinuing this proceeding with prejudice to renew are granted, subject to approval by the Commission as provided in the Commission's Rules of Practice and Procedure, wherefore, it is ordered:

Proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 80–22

INTERNATIONAL PAPER CO.

v.

SEATRAIN PACIFIC SERVICES S.A., ET AL.

ORDER ADOPTING INITIAL DECISION

August 23, 1983

This proceeding was initiated as a result of a complaint filed by the International Paper Co. (IP) against eight named carriers (Respondents)[1] alleging violations of section 16 and 17 of the Shipping Act, 1916 (46 U.S.C. §§815 and 816). The complaint states that certain currency adjustment factors (CAFs) imposed by Respondents are discriminatory and unlawful, requests that the Commission issue a cease and desist order against the collection of the CAFs, and claims reparations on all of IP's shipments of woodpulp and milk carton stock to Japan from New Orleans.

The Presiding Officer, Administrative Law Judge William Beasley Harris, issued an Initial Decision (I.D.) finding that IP had failed to prove violations of the Shipping Act. Exceptions to the I.D. have been filed by IP and Respondent, OOCL-Seapac. Replies to Exceptions have been filed by IP and Respondents. The Commission heard oral argument on June 21, 1983.

DISCUSSION

As a threshold matter, IP and OOCL-Seapac argue that the I.D. is seriously deficient in necessary findings of fact and law. While not completely unfounded, these arguments are substantially overstated. An administrative law judge need only address issues which are critical to the disposition of the proceeding and need not address every factual or legal issue raised

[1] The carriers named in the original complaint were: Seatrain Pacific Services, S.A., Kawasaki Kisen Kaisha, Ltd., Sea-Land Service, Inc., Nippon Yusen Kaisha, Showa Line, Ltd., Japan Line, Ltd., and Yamashita-Shinnihon Steamship Co., Ltd. Subsequently, Seapac Pacific Services, S.A. succeeded to Seatrain Pacific Services, S.A. and, thereafter, merged with Orient Overseas Container Line now operating as OOCL-Seapac. I.P.'s motion to amend its complaint to name OOCL-Seapac as a Respondent was granted by the Presiding Officer. On Exception, OOCL-Seapac contends that because the amended complaint was not served upon it until after the hearing and it entered no formal appearance, it should not be deemed a respondent in its own right. We disagree. OOCL-Seapac is the successor corporation to Seatrain and Seapac and because it has assumed the outstanding liabilities of those corporations it ordinarily would be held as a party in the proceedings. Furthermore, it was at all times fully apprised of all relevant issues in this proceeding and has fully participated in this proceeding before the Presiding Officer and the Commission. It has been afforded due process and therefore will be held to be a party respondent in its own right. *See Aloha Airlines, Inc. v. C.A.B.*, 598 F.2d 250, 262 (D.C. Cir. 1979).

by the parties.[2] The I.D. discusses the nature of the charge at issue here and how it is applied to IP. It discusses the theories of the parties and the law to be applied to the facts of this case. The I.D. does fail to include a succinct discussion of whether the facts presented on the record constitute a *prima facie* case of discrimination under section 16 and 17 and relies on rhetorical questions. However, for reasons stated below, Respondents are correct that IP has failed to prove a *prima facie* case of discrimination under section 16 and 17 in light of existing case law. The Presiding Officer was therefore correct in ultimately finding no violations of law.

IP correctly argues that the "absolute obligation" test of section 16 discrimination is the most relevant method of analysis that could be applied in this proceeding.[3] A CAF is an across-the-board surcharge levied without regard to the particular commodity or other transportation factors involved.[4] As such, it is viewed as a separate charge from the underlying freight rates which must be equally applied to all commodities. Although Respondents are technically correct that a "triangular relationship" must still be shown, such a relationship need not be competitive and is always present when a carrier treats a shipper differently than others it serves.

There is however no evidence in the record that IP or the commodities it ships have been singled out for adverse treatment by Respondents. Although the surcharge method selected by Respondents results in different levels of charges depending on the particular commodity involved, and may not be the fairest or most desirable available alternative, it is not illegal. The equality of treatment required under the "absolute obligation" test cannot be carried to the point of requiring that all shippers, regardless of the commodity or service provided, be charged identical rates or surcharges.

A percentage method of imposing surcharges has been found to be lawful in a prior Commission proceeding.[5] There is no legal requirement that a surcharge be imposed on a uniform per ton basis as opposed to a percentage basis. Both types of surcharges have been accepted by the Commission as lawful alternative methods of spreading common costs across a carrier's service.[6] We cannot accept IP's argument that a CAF must be calculated on the basis of the underlying cost factors of specific movements which require currency conversions. The Commission will not, in the context of a section 16 or 17 complaint proceeding, require a movement-specific method of cost allocation in the setting of such rates.[7]

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[2] *See Harborlite Corp. v. I.C.C.*, 613 F.2d 1088, 1092–1093 (D.C. Cir. 1979).
[3] *See Valley Evaporating Co. v. Grace Line, Inc.*, 14 F.M.C. 16 (1970).
[4] *See Nonassessment of Fuel Surcharges on Military Sealift Command Rates*, 15 F.M.C. 92, 98 (1972).
[5] *See Surcharge at U.S. Atlantic and Gulf Ports*, 6 S.R.R. 657, 673 (I.D. 1965) *sustained*, 10 F.M.C. 13, 20 (1966).
[6] *Id., Surcharge on Cargo to Manila*, 8 F.M.C. 395, 400 (1965).
[7] *See Ludwig Mueller Co. v. Peralta Shipping Corp.*, 8 F.M.C. 361, 366 (1965).

Respondents argue that the CAF must be viewed as an adjunct of the underlying freight rate and that IP's complaint must therefore meet the section 16 "traditional" discrimination test. This IP has allegedly failed to do because it has not established on the record the necessary "competitive triangular relationship" between itself, Respondents, and a preferred shipper utilizing all-water rates.[8] The Presiding Officer adopted this analysis and held that because the rate differences that result from the CAF are based upon the differences in the underlying rates of the different shippers, the complaint is not against the currency adjustment *per se* but rather against the underlying rate structure of the carriers. Because the same misconception is present in both IP's "traditional" and "absolute obligation" test analysis, i.e. that CAF's must be based upon the currency conversion requirements underlying a specific cargo movement, it need not be determined whether IP has proven that such a "competitive triangular relationship" exists in this case.

IP submitted no evidence that the rate structure of the carriers is discriminatory. The discrimination theory it presented depends entirely upon its allegations that the mini-landbridge rate includes a cost element, the rail division, which does not entail currency exchanges. There is no basis to find that CAFs must be imposed on each movement of cargo in strict accordance with the underlying cost factors attendant to moving that cargo. Respondents have adequately established that currency conversion "costs" cannot be allocated with precision to each cargo movement and must be treated as "overhead." The fact that this "overhead" item has been apportioned among shippers in proportion to established rate relationships does not, standing alone, establish unlawful rate discrimination.

Under a "traditional" discrimination theory IP must show that the *overall* rate differential is unreasonable in light of costs and other transportation factors. A showing of a disparity in one "cost" element in the overall rate is insufficient to establish "undue or unreasonable" rate discrimination in the absence of a particularized and significant injury proximately caused thereby. By its own admission and the evidence of record, IP's only injury is the difference in the amount of CAF it pays. Because mini-landbridge and local rates are for substantially different services, it is not sufficient to merely show that there is a difference in rates between mini-landbridge and local shippers.[9]

Finally, IP has failed to prove a prima facie case of discrimination under section 17 of the Shipping Act. Respondents correctly argue that to find a violation of section 17 it must normally be shown that two shippers of similar commodities have been charged different rates for the

[8] *See North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202, 209 (1967).

[9] See *Cargill, Inc.* v. *Waterman Steamship Co.*, 24 F.M.C. 442, 461 (1981).

same movement.[10] It is clear that the mini-landbridge movement and the local movements at issue here are not similar services even if it is assumed that they involve similar commodities.[11]

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge William Beasley Harris, issued in this proceeding on February 25, 1983, is adopted, and,

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision are, except to the extent noted herein, denied, and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

[10] *North Atlantic Mediterranean Freight Conference—Rates on Household Goods, supra,* at 213 (1967). However, a surcharge which violates section 16 under the "absolute obligation" test of discrimination will also normally violate section 17. *See Nonassessment of Fuel Surcharges on Military Sealift Command Rates, supra* at 99.

[11] *Council of North Atlantic Shipping Associations* v. *American Mail Lines,* 21 F.M.C. 96, 140 (1977) *adopted,* 21 F.M.C. 91 (1978).

FEDERAL MARITIME COMMISSION

DOCKET NO. 80–22

INTERNATIONAL PAPER COMPANY

v.

SEATRAIN PACIFIC SERVICES, S.A., ET AL.

Complainant IP is found not entitled to a refund of the difference between the CAF paid by IP for intermodal transportation from the Gulf to Japan and the CAF paid by its competitors shipping directly from the West Coast to Japan. IP expects to pay more and does for mini-landbridge than for the local tariff because there is an additional service in mini-landbridge. There is no violation of section 16 First or section 17 by the respondents.

Proceeding is discontinued.

Robert N. Kharasch, Olga Boikess, Richard D. Gluck, Rhonda G. Magdail, Kathleen Mahon and *William E. Cohen,* of Galland, Kharasch, Calkins & Short, P.C., for complainant International Paper Company.

Robert B. Yoshitomi, Edward D. Ransom, R. Frederick Fisher, Thomas E. Kimball, Charles L. Coleman, III, and *Juliana A. Jensen,* of Lillick, McHose & Charles, for 7 respondents: (1) Japan Line, Ltd., (2) Kawasaki Kisen Kaisha, Ltd., (3) Mitsui O.S.K. Lines, Ltd., (4) Nippon Yusen Kaisha, (5) Sea-Land Service, Inc., (6) Showa Line Ltd., and (7) Yamashita-Shinnihon Steamship Co., Ltd.[1]

Neal Michael Mayer, Paul D. Coleman, David S. Healy and *Peter J. King,* of Hoppel, Mayer & Coleman (formerly Coles & Goertner) for respondent Seatrain Pacific Services, Inc., now OOCL-Seapac Service.

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

Adopted August 23, 1983

The complaint in this proceeding, pursuant to section 22 of the Shipping Act, 1916, and Rules 61, 62 and 63 of Rules of Practice and Procedure, 46 CFR 502.61, 62 and 63, received April 10, 1980, was served April 11, 1980. The Commission was asked to (a) find that the carriers' purported surcharge on intermodal minibridge traffic violates section 16 First and section 17 of the Shipping Act, 1916; (b) order that the carriers cease and desist from any further imposition of discriminatory currency adjustment or similar surcharges on intermodal minibridge traffic; (c) order that the carriers pay reparation to International Paper Company (IP) in the amounts

[1] Is a steamship company, headquartered in Tokyo, which serves ocean trades around the world with liner, tanker and tramp vessels (Exh. 36, p. 2).

[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).

shown below, plus interest, for unlawful currency surcharges paid by IP on shipments of woodpulp and milk carton stock moving to Japan via New Orleans.

		Since Amended To:
Seatrain	$159,756.35 (OOCL-Seapac & predecessor)	$181,556.85
Kawasaki Kisen Kaisha, Ltd.	18,045.16	28,200.00
Mitsui OSK Lines, Ltd.	8,220.62	13,759.40
Sea-Land Service, Inc.	2,663.76	13,629.79
Nippon Yusen Kaisha	7,520.43	20,087.15
Showa Line, Ltd.	506.89	1,565.19
Japan Line, Ltd.	786.54	2,285.28
Yamashita-Shinnihon Steamship Co. Ltd.	7,398.11	9,740.82
		$270,824.51

An issue arose about subpoenas and enforcement of those subpoenas. The proceeding in the Commission was in abeyance while IP and the FMC went to federal court to enforce the subpoenas, *International Paper Co.* v. *Mitsui OSK Lines, Ltd.*, No. C–81–11 Misc. (N.D. Ca., April 21, 1981). The Court refused to enforce the subpoenas. Aff'd No. 81–4263 and 81–4325 (9th Cir. February 4, 1982).

IP presented its case through the written direct testimony of T.A. Przedpelski, Manager, IP Operations (Exh. No. 17); Edward R. Mooney, IP's Manager, Export Services (Exh. No. 18); Charles J. Nash, Jr., IP's Marketing Manager, Chemical Cellulose, Pulp Division (Exh. No. 19); and Harvey R. Thomas, III, IP's Manager, Business Analysis, Consumer Packaging Group. These witnesses were presented for cross-examination and cross-examined, on June 28, 1982, witness Przedpelski; on June 29, 1982, witness E.R. Mooney; on June 30, 1982, witness Charles J. Nash, Jr.; and on July 23, 1982, witness Harvey L. Thomas, III.

The respondents sponsored the testimony of Dr. Ernest Nadel (Exh. No. 35) and Donovan D. Day, Jr. (Exh. No. 37). (In a letter dated July 12, 1982, signed by Peter J. King, it was stated "OOCL-Seapac Service and Seapac Container Service, SA, advises that it respectfully declines to submit direct written testimony on their part. OOCL-Seapac believes that the presentation of a direct case is neither warranted nor required by the present state of the record."

They jointly sponsor testimony prepared by witnesses Don D. Day, Jr., and Dr. Ernest Nadel; not the testimony of Seiichi Hirano.

The testimony of Seiichi Hirano, Senior President, Representative and General Manager for the Pacific Coast of Yamashita-Shinnihon Steamship Co., Ltd., commonly known as Y-S Line was presented (Exh. No. 36).

In its opening brief, IP submitted 69 proposed findings of fact; the 7 respondents in their reply to the brief of IP, proposed 101 findings of fact and OOCL-Seapac Service in its reply brief to the opening brief

of IP proposed 139 findings of fact. Thus, the parties have presented 309 proposed findings of fact. All of the proposed findings of fact have been considered and have been granted, granted in substance, or denied as indicated from the facts found as follows:

FACTS

The complainant, IP, a New York corporation, manufactures and exports large quantities of wood-pulp and milk carton stock to Japan.

The complainant IP's initial step prior to filing this complaint was to protest the assessment of the currency adjustment factor (CAF) to the Pacific Westbound Conference (PWC) (Exh. 17, page 2, attachment 1). Tadeusz H. Przedpelski, Manager, International Distribution Operations, for International Paper Company, sent the protest in a telex March 9, 1979, to D.D. Day, Jr., Chairman of the Pacific Westbound Conference (*Ibid.*).

Under date of March 12, 1979, Mr. Day replied to Mr. Przedpelski's March 9, 1979 telex: "Acknowledge your message which we will distribute to our member lines who may then consider your claim that the currency surcharge in the PWC intermodal tariff is inappropriate. Nevertheless the member lines are each required by law to assess this charge as it is a tariff requirement."

The conference took no action (Tr. 6/28/82, p. 21).

The instant complaint was served April 11, 1980. The Pacific Westbound Conference is not a respondent (Tr. 6/28/82, p. 20). The PWC is a steamship conference acting pursuant to FMC approved Agreement No. 57 (Exh. 37, page 2). The eight (8) named respondents[3] in this proceeding were each members of the PWC at the time the complaint was filed (*Ibid.*, p. 3). The respondents are common carriers by water in the foreign commerce of the United States and subject to the Shipping Act, 1916.

The claim involves two commodities—woodpulp and milk carton stock which IP ships to Japan (Exh. 17, page 2). Lost sales of woodpulp or milk carton stock is not an issue herein.

Terms Acetakraft, Viscokraft, AV–19 or Tyrecell, Supercell $A0_2$ and Supersoft all are grades of woodpulp produced by IP in its Natchez, Mississippi, manufacturing facility (Tr. 6/30/82, p. 332). For convenience the following definitions were given (Tr. 6/30/82, p. 338).

Acetakraft is a high purity chemical cellulose grade used for the production or the manufacturing of various cellulose acetate products. Acetakraft is a trade name (Exh. 19, p. 4).

Viscokraft is a lower purity, lower alpha chemical cellulose grade that is used for the manufacturing of cellophane or rayon.

[3] Since the time the complaint was filed Seatrain was succeeded and substituted for in this case by Seapac Container Service, S.A. OOCL-Seapac Service (OOCL-Seapac) is the successor to the liabilities of Seatrain and Seapac in this case (Exh. 37, p. 3).

AV–19 or Tyrecell is a high purity, high alpha grade used for manufacturing in high tenacity industrial rayon or in the case of a shipment to Japan, it is used to manufacture carboxy methyl cellulose.

Supercell AO_2 is a commodity woodpulp used primarily by fine paper makers to make business papers.

Supersoft is a specialty paper pulp used to manufacture disposable diapers or female personal products.

IP prefers to ship all milk carton stock in containers. From time to time due to container shortages or other contingencies woodpulp is shipped breakbulk (Exh. 18, p. 3). The use of containers minimizes handling and reduces the chance for contamination or other damage in transit (Exh. 18, p. 3). Largely for the same reasons, IP also prefers to use containers for the shipment of woodpulp (*Ibid.*).

Milk carton stock originates at IP's mill in Pine Bluff, Arkansas, while woodpulp originates at a mill in Natchez, Mississippi (Exh. 17, p. 2). IP makes its own land arrangements from these mills to New Orleans (Tr. 6/28/82, p. 24). For the milk carton stock IP's cargo is a polyethylene coated variety. There is a small amount of milk carton stock that is uncoated (Tr. 6/29/82, p. 203).

With the inception of intermodal container service by the PWC from New Orleans, starting about 1976, IP began to rely more and more on the containerized intermodal service to Japan, due at first to the superior "outburns" (lack of damage to cargo at destination) experienced with the intermodal service, and more recently because few alternatives now exist (Exh. 8, p. 4).

The volume of IP present shipments of milk carton stock and woodpulp to Japan, added together, amounts to approximately 5,000 tons per month. Each 40 foot container can accommodate approximately 20 tons. Seatrain now guarantees IP approximately 35 containers per week, or 140 per month. IP needs approximately 250 containers per month for its U.S.-Japan shipments (250 × 20 tons = 5,000 tons) (Exh. 18, p. 8).

IP is the No. 2 world supplier of chemical cellulose (Exh. 19, p. 4). The No. 1 supplier and IP's major competitor is Rayonier with 4 mills in the U.S. (*Ibid.*, page 5). At present, IP's only Acetakraft customer in Japan is Daicel (*Ibid.*).

In the case of milk carton stock, there is one competitor, Potlatch (Tr. 6/28/82, p. 26), located just across the border from Washington in Idaho. IP has two mills in the U.S. producing 470,000 tons annually of milk carton stock for sale within the U.S. and offshore. These mills are located at Pine Bluff, Arkansas, and Texarkana, Texas.

For the milk carton stock IP's cargo is predominantly a polyethylene coated variety (Tr. 6/29/82, p. 203). There is a small amount of milk carton stock that is uncoated. Most of the milk carton stock manufactured by IP and by its U.S. competitors is used to produce cartons sold under the trade name "Pure-Pak" (Exh. 20, p. 3).

No milk carton stock is produced in Japan (Exh. 20, p. 6). Four American companies presently supply the Japanese market. They are Potlatch, Weyerhauser, Champion and IP. An additional company has entered the Japanese market selling milk carton stock: Enzo Gutzeil, a Finnish corporation (Tr. 7/28/82, p. 398). IP recognizes that because its mill is located in Arkansas, it must pay more freight than its major competitor, Potlatch, whose mill is located in Lewiston, Idaho, closer to the West Coast and Japan (*Ibid.*, p. 8).

IP is the largest annual producer of milk carton stock in the world (Tr. 7/23/82, p. 423). Milk carton stock is essentially interchangeable no matter where or by whom it is produced (*Ibid.*, p. 405).

PWC publishes currently Tariff No. 11 from the Local and Overland Territory to ports in the Far East and Southeast Asia, and Tariff No. 708–A from U.S. Port cities on the Atlantic and Gulf Coasts to the Far East (Tr. 2/24/81, p. 30). Since the imposition of a currency adjustment factor (CAF) under the PWC—after 1978—the CAF expressed as a percentage has been the same percentage to Japan on local or water service or on intermodal service. (*Ibid.*, p. 50). IP expects to pay more for mini-landbridge than the local tariff because there is an additional service in mini-landbridge.

PWC has 15 regular members and two associate members. The 15 regular members consist of carriers whose corporate nationalities include 7 nations—the United States, Japan, Liberia, Philippines, Denmark, Korea and Israel. (Exh. 37, p. 2).

Each carrier member of PWC submits for itself (and without disclosure to any other member carrier) on a calendar quarter basis the percentages for the PWC Japan trade constituting the items described by letters A, B, C, and D in the formula (Exh. 37, p. 11).

The formula by which the PWC calculates the revenue loss of its membership in the U.S. to Japan trade is as follows:

$$(A - (A \times D) + (B \times C)) \times R = X$$

A is the percentage of revenue from cargo bound for Japan which is collected in Japanese yen.

B is the percentage of such revenue which is collected in U.S. dollars.

C represents the percentage of U.S. dollar collections converted into yen.

D is the percentage of yen collections which are converted into U.S. dollars.

R is the percentage increase in the value of the yen with respect to the dollar.

X is the percentage of that revenue derived from cargo consigned to Japan which is lost due to the depreciation of the value of the dollar.

(Exh. 37, p. 8)

Since the inception of the CAF on March 1, 1978, at any point in time, the CAF has been the same percentage in both the Local/Overland and the MLB tariffs (*Ibid.*, p. 12).

IP is not a PWC Dual Rate Contract signator. Therefore, IP is not obligated to ship on PWC member vessels under any PWC tariff but, rather, is free to utilize any carrier it wishes (Exh. 37, p. 19).

The transit time from the Gulf to Japan all-water is slightly longer than the minibridge transit time from the Gulf to Japan. It is approximately one week quicker by mini-landbridge (Tr. 6/29/82, p. 174).

Tr. 6/29/82, pages 226, 227, 228, 229 show the stipulations entered into herein covering some figures and statistics.

DISCUSSION, REASONS, FINDINGS, AND CONCLUSIONS

IP's theory in this case is that IP pays for minibridge transportation in U.S. dollars and that the money paid by the ocean carrier to the railroad is solely in dollars and doesn't involve a currency exchange; that since there is no foreign currency exchange on the rail division, it is improper to apply the currency exchange to the rail division (Tr. 6/28/82, pp. 46, 47). IP asserts that no transportation considerations justify imposition of the surcharge on the inland portion of the rates, and that the ineluctable conclusion emerges that the assessment of the CAF on the inland portion of the carriers' intermodal rates both subjects the intermodal cargo to undue and unreasonable prejudice and disadvantage in violation of section 16 and is unjustly discriminatory between shippers in violation of section 17 (IP opening brief, p. 36). IP feels it is entitled to a refund of the difference between the CAF paid by IP for intermodal transportation and the CAF paid by its competitors shipping directly from the West Coast to Japan (Exh. No. 20, p. 10).

IP contends while it is possible to analyze the section 16 violations by the respondent carriers in this instance in terms of the classical triangular case (involving the carrier, a preferred shipper and a prejudiced shipper, which IP says was described in *North Atlantic Mediterranean Freight Conference—Rates on Household Goods,* Docket No. 66–49, 11 F.M.C. 202 (1967)) of disparity in transportation charges, the assessment of the currency adjustment factor of which IP complains, because it applies across the board and is not dependent on the particular commodity IP ships, falls most plainly within the criteria stated by the Commission in *International Trade & Development, Inc.* v. *Sentinel Line & Anchor Shipping Corp.*, Docket No. 78–28, 22 FMC 231 (1979), that a competitive relationship is not required when the facts reveal a clear comparative disadvantage or other type of "special injury" to the complaining shipper (or locality)

which (1) goes beyond the simple payment of a higher rate; and (2) cannot reasonably be justified on the basis of traditional transportation factors (IP opening brief, p. 40).

IP says it and other shippers of intermodal cargo suffer a clear comparative disadvantage which goes beyond the simple payment of a higher rate and is completely without justification on the basis of traditional transportation factors: IP must pay a surcharge for the carriers' currency conversion costs—which the carriers incur only with respect to the ocean portion of their rates—based on the portion of the rate allocated to inland transportation in addition to the portion of the rate allocable to the ocean carriage. That, says IP, is a "clear comparative disadvantage" imposed on intermodal cargo which is not imposed on all-water cargo. According to IP, the assessment of the CAF on the inland portion of the carriers' intermodal rates violates section 16.

IP asserts the violation of section 16 found by the Commission in *Violations of Sections 14 Fourth, 16 First and 17 in the Nonassessment of Fuel Surcharges*, Docket No. 71-17, 15 F.M.C. 92 (1972), is closely analogous to the one at bar. (IP opening brief, p. 43). And, says IP, ". . . the violation of section 16 found by the Commission in *Nonassessment of Fuel Surcharges* is very nearly a mirror image of the situation now presented to the Commission" (*Ibid.*, p. 45). In their reply, the seven (7) respondents say "IP labels the *Nonassessment of Fuel Surcharges* case as 'very nearly a mirror image' of IP's complaint, when the complaint is in fact the *exact opposite* of that case. That case has no similarity to the position urged by IP, but rather is the *reverse* of that position." (7 respondents reply brief, p. 142). The 8th respondent (OOCL-Seapac Service) asserts the complainant's reference to *Nonassessment of Fuel Surcharges* is unsupportive of IP's position, but the facts are inapposite to the instant case (reply brief, p. 103).

IP says further, the exaction of a currency adjustment factor based on the inland portion of an intermodal rate, to compensate for currency conversion costs incurred only with respect to the water portion of the rate, is plainly an unjust discrimination between shippers utilizing the carrier's intermodal service and those utilizing its all-water service, is a violation of section 17 (IP opening brief, p. 49).

In sum, says IP, the respondent carriers' assessment of a currency charge on the inland portion of its intermodal rate as well as on the water portion, when the carrier has no currency costs on the inland portion of its rates, is a patent failure to administer its surcharge fairly and impartially, and creates a clear situation of undue prejudice to intermodal cargo vis-a-vis all water cargo in violation of section 16. (opening brief, p. 48).

The 7 respondents reply that IP's claim is defective for each of two separate reasons. First, IP cannot be compared with Pacific Coast shippers because there is no common leg between the MLB and all-water movements so the traffic does not in any way move "over the same line." Second,

even if there were a common leg between these movements, it would not be sufficient to state a claim under section 17 because "between the same points" means the same points of origin and destination (reply brief, p. 154). The 7 respondents further say IP has failed to prove it has suffered any special injury which goes beyond the simple payment of a higher rate; that IP has not lost any sales as a result of the PWC CAF (*Ibid.*, p. 143).

Witness T. A. Przedpelski, Manager, International Distribution Operations, for International Paper Company, whose direct testimony is Exhibit No. 17, on cross-examination was asked (Tr. 6/28/82, p. 20), is the PWC a defendant in this case? He replied, No. Then (on page 21 Tr. 6/28/82) stated ". . . being a member of the PWC was not the ingredient involved, it was whoever assessed the charge, and I believe it was exclusively by the PWC members, as far as I know."

"The initial step was to approach the Conference itself because the Conference is the machinery to which you speak to the various members." Tr. 21. The approach had to do with an attempt to prevent continuation of the situation as it then existed. The Conference failed to respond favorably to that, leaving the matters apparently in the hands of the individual members and not taking any Conference action. So when lodged, the complaint was aimed at those parties who were assessing the charge rather than the conference itself (Tr. 6/28/82, p. 22).

IP in its dealings with the Conference and the carriers discussed the fact that the level of the CAF was too high, but IP did not bring any legal action on that subject. (*Ibid.*, p. 39).

Respondent Yamashita-Shinnihon Steamship Co., Ltd., provides both all-water and intermodal service to Japan as a PWC member. The all-water service is provided under the PWC Local and Overland Tariff (Exh. 36, p. 4). Witness Hirano testified that if a PWC-MLB rate or charge is to be compared with anything, it should be compared with (a) a Gulf or Atlantic all-water rate or charge or (b) an independent carrier MLB rate or charge (*Ibid.*, p. 6).

Witness Hirano testified the Japanese yen is a widely used currency in the PWC trade to Japan. Some debts are payable in yen—long term such as shipbuilding costs, equipment leases, crews' and stevedores' wages payable under labor contracts, etc., and short-term such as administrative salaries, agents' commissions, supplies, repair and maintenance of vessels, etc. (*Ibid.*, p. 7).

Further, there are yen expenses directly related to the rail segment of the MLB movement. For example, containers owned by some carriers were manufactured in Japan and are financed in yen. Rental payments for some of leased containers are also in yen. So, a carrier pays in yen the capital or lease cost of many of its containers and this includes payment for the periods when the containers are used in the rail movement (*Ibid.*).

Witness Dr. Nadel testified steamship companies operating in the foreign trade of the United States have financial expenses and commitments and therefore revenue needs, in many foreign currencies (Exh. 35, p. 13).

The sharp and uncertain changes in the value of the U.S. dollar measured against the currencies of other major trading countries has created a risk of significant economic loss to carriers engaged in the foreign commerce of the United States. The depreciation of the U.S. dollar vis-a-vis the Japanese yen has at times been particularly severe in recent years. The problem for the carriers arises because the dollar value of revenues is fixed in the tariff but the yen value is not. Carrier dollar revenues become increasingly insufficient to meet yen commitments, expenses and needs. As the dollar depreciates relative to the yen, the need arises for carriers to increase revenues (*Ibid.*, p. 14).

For example, a carrier with a base freight revenue of $100,000 has determined that, for a variety of business reasons, has a need for 10 million yen. At an exchange rate of, say, 275 yen to the dollar, this yen revenue need equates to $10,000,000 ÷ 275 = $36,364. So long as the exchange rate does not change, $36,364 of the carrier's earnings converts to 10 million yen. (The remaining $63,636 of the earnings stay in dollars). But, if the exchange rate subsequently falls to, say 230 yen to the dollar, the carrier's $36,364 earnings convert to only 36,364 x 230 = 8.364 million yen. Under these circumstances, the carrier would be revenue deficient, by approximately 1.636 million yen, due to the depreciation of the dollar (*Ibid.*, p. 15).

To make the carrier's revenue "whole in terms of yen" a currency adjustment factor is required (*Ibid.*, p. 16).

The PWC–MLB rates are far more closely related to FEC rates than to PWC local rates (*Ibid.*, p. 57).

IP's implicit theory that MLB is "local service plus a train ride" is simply incorrect (*Ibid.*, p. 60).

If MLB rates were cost-based, the MLB rates would exceed the local rates for "corresponding" commodities by more than they do now (*Ibid.*, p. 83).

IP makes a simplistic and unrealistic evaluation of the economic difference between local or MLB service. IP has focused only on the rail division, and has ignored other economic components of MLB. (*Ibid.*, p. 87).

The carriers do not know the precise amount of yen revenue losses caused by dollar depreciation, or the impact of these losses in their revenue needs, until after freight charges are paid by shippers and financial commitments are met by the carriers. (*Ibid.*, p. 17).

The CAF could just as well take the form of a percentage general rate increase (GRI) as it could a surcharge (*Ibid.*, p. 34).

Witness Day testified separating out the rail division when the bill of lading is prepared is a physical impossibility. At the time the bill of

lading is prepared and the freight rate including surcharge is calculated, a PWC carrier does not know how much the rail division is (so that it can be substituted for the through rate freight). The ICC has deregulated the Trailer on Flatcar and Container on Flatcar rates which constitute the "rail division" of the MLB rate. This deregulation included removal of the requirement that the rail carriers publish or file their rates. The FMC has a similar exemption for ocean tariffs, and the PWC no longer publishes the rail division in PWC tariffs (Exh. 37, p. 16).

There is no sound rationale to justify treating rail divisions differently from any of the myriad other dollar expenses incurred by the ocean carrier (*Ibid.*, p. 17).

IP is not a PWC Dual Rate Contract signator. Therefore, IP is not obligated to ship on PWC member vessels under any PWC tariff but, rather, is free to utilize any carrier it wishes (*Ibid.*, p. 19).

The basic purpose behind surcharges is to reimburse the carriers for additional costs temporarily incurred by the performance of their services, and which costs the carriers are not recovering through their basic freight rates. *Surcharge on Cargo to Manila,* Docket No. 1155, 8 F.M.C. 395, 399 (1965). As the United States Shipping Board Bureau said in *Intercoastal Rate of Nelson SS Co.,* Docket No. 139, 1 U.S.S.B.B. 326, 336 (1934), "the interest of the public demands that the carrier shall receive revenues which will enable them to keep their fleets in good repair and maintain efficient service." That is just as true today as it was in 1934.

It is true that the Commission has been and is concerned about the development of methods of transportation to serve shipping needs. IP says that the Commission's references to its desire to foster intermodal transportation are legion (opening brief, p. 54) and that the Commission said in *Disposition of Container Marine Lines Through Intermodal Container Freight Tariffs Nos. 1 and 2, FMC Nos. 10 and 11,* Docket No. 68–8, 11 F.M.C. 476, 489 (1968) (*Ibid.*, p. 55), ". . . the Federal Maritime Commission can and must play an important role in encouraging improved services for shippers." In that same paragraph the Commission said, ". . . the Commission does not intend to create or permit impediments to the improvement of shipping services. Enlightened regulation is the key to effective regulation."

In the instant case IP calls attention to the case of *Harborlite Corp.* v. *ICC,* 613 F.2d 1088 (1979), and the opinion of Circuit Judge Tamm upon review of a decision of the ICC dismissing a complaint that alleged unlawful rate discrimination in violation of section 3(1) of the Interstate Commerce Act, 49 U.S.C.A. § 10741(b). The case was remanded for further proceedings consistent with the opinion.

Circuit Judge Tamm wrote in the *Harborlite* case (p. 1091), "In the leading case of *Chicago and Eastern Illinois Railroad* v. *United States,* 384 F. Supp. 298 (N.D. Ill. 1974) (three Judge court) (per curiam), aff'd mem. 421 U.S. 956, 959 Ct. 1943, 44 L. Ed. (2d) 445 (1975), the court

stated the four elements of a section 3(1) action and the burden of proof on these elements to support a finding of a violation of section 3(1), it must be shown (1) that there is a disparity in rates, (2) that the complaining party is competitively injured, actually or potentially, (3) that the carriers are the common source of both the allegedly prejudicial and preferential treatment, and (4) that the disparity in rates is not justified by transportation conditions. The complaining party has the burden of proving the presence of the first three factors and the carriers have the burden of justifying the disparity, if possible, in connection with the fourth factor."

To connect, IP cites *North Atlantic Mediterranean Freight Conference—Rates on Household Goods,* Docket No. 66–49, 11 F.M.C. 202, 209 (1967), that it is well settled that the provisions of the Shipping Act which confer upon the Commission authority over the rates and practices of water carriers and prescribe its mode of exercise closely parallel those of the Interstate Commerce Act establishing relations of the Interstate Commerce Commission to carriers by rail; and where dissimilarities in the respective modes of transportation do not warrant a different construction, the Shipping Act should be construed in the light of the similar provision of the Commerce Act. Section 16 of the Shipping Act is substantially identical with section 3(1) of the Interstate Commerce Act.

Containerization has been one of the developments in the maritime field that has moved rapidly and changed the face of the industry in recent years. Intermodal service, similarly, has been greeted as part of the present and future service in transportation. The Federal Maritime Commission and the various conferences are interested in such developments. However, as the Commission said in *Agreement No. 17–34—Application of the Far East Conference for Intermodal Authority,* Docket No. 74–53, 21 F.M.C. 750, 753 (1979): Overall this evidence shows that conferences generally have not acted quickly to develop intermodal services after approval of their intermodal amendments, and the majority of those which did implement intermodal service did so only after an individual member pioneered in the field. The record here, therefore, tends to run counter to previous Commission findings regarding the expected public benefit of promoting intermodal development under conference rate authority.

In this case, the CAF is under PWC authority. The conference has developed a formula for the CAF. No one brought the PWC into this proceeding as a respondent, nor did the PWC seek intervention. Since the tariff is on file, the tariff is approved and lawful. No one has questioned the operation of the tariff. Nevertheless, how can one check on the application of the formula without the information supplied by the carriers in the conference only to the conference and not even to the individual members of the conference?

It is patently clear that intermodal service is distinctive, a sought after service in a new, still developing phase of change in transportation. Users such as IP benefit from such service and to sanction no CAF on the

services land leg and to require a rate for mini-landbridge from the Gulf to Japan to be the same as the all water route from the West Coast to Japan would be an irony not encompassed by any ICC action, or common sense.

Undoubtedly, the issue of foreign currency, revenue needs, costs and many other factors are prevalent in the maritime picture today more so than ever before. Is the PWC–CAF the answer?

Upon consideration of the above and the record herein the Presiding Administrative Law Judge *finds* and *concludes* that the respondents have not violated section 16 First[4] or section 17[5] of the Shipping Act, 1916, as amended.

Wherefore, for the reasons given above and the record herein, IP's requests are denied.

It is *ordered:*

This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

[4] Section 16 First—To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

[5] Section 15—That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1021

APPLICATION OF KOREA SHIPPING CORPORATION FOR THE BENEFIT OF SUNKYONG MAGNETIC, LTD.

SPECIAL DOCKET NO. 1022

APPLICATION OF HANJIN CONTAINER LINES, LTD. FOR THE BENEFIT OF LATEX GLOVE CO., INC.

SPECIAL DOCKET NO. 1023

APPLICATION OF AMERICAN PRESIDENT LINES, LTD. FOR THE BENEFIT OF LUX CHEMICAL CORP.

SPECIAL DOCKET NO. 1024

APPLICATION OF YAMASHITA-SHINNIHON STEAMSHIP CO., LTD. FOR THE BENEFIT OF MELCO SALES SINGAPORE PTE., LTD.

In special docket applications, the Commission has discretion whether to require the identification of every affected shipment for which refund or waiver of freight charges is sought.

Under the present circumstances, caused by a single error and involving a very large number of shipments, a detailed description of each shipment would be unnecessarily burdensome. The Order of Discontinuance is, therefore, reversed and the relief sought is granted.

Ted F. Fordney for the applicants.

REPORT AND ORDER

August 23, 1983

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* Thomas F. Moakley, *Vice Chairman;* James Joseph Carey, James V. Day and Robert Setrakian, *Commissioners.*

These four proceedings are before the Commission upon its determination to review the April 20, 1983 discontinuance by Administrative Law Judge William Beasley Harris "for failure to prosecute."

Special docket applications were filed on March 9, 1983 by Ted F. Fordney, a registered practitioner with the Pacific Coast Tariff Bureau (PCTB), on behalf of the above-captioned carriers. The carriers allege that on October 1, 1982, "approximately 450 tariff amendments to FMC tariffs were inadvertently delivered to the ICC." The error was discovered on

October 14, 1982, whereupon PCTB filed the intended rates. However, for three weeks, shipments were rated in accordance with amendments erroneously believed to be on file with the Commission.

The instant applications consist of documents describing a single affected shipment for each carrier. Each application requests that:

> [i]f the waiver of freight charges is approved it is intended that the required notice be published in a general way without noting any one specific shipment or tariff item and then to be filed as a supplement to the effected [sic] tariffs instead of within each tariff item involved.
>
> This "general" approach is requested to lessen the burden to the applicant, to PCTB and also to the FMC in its workload directed towards the application and the other applications citing this unfortunate mishap.

By letter dated March 23, 1983, the Presiding Officer advised the carriers that they failed to conform with the form prescribed for special docket applications at 46 C.F.R. § 502.92(a)(5). He noted that each application included only one bill of lading for one shipment, and appeared to suggest that this rendered the applications defective.* He requested an amended application or individual applications within 10 days of the letter. In a March 29, 1983 telephone conversation with Mr. Fordney, the Presiding Officer advised him that possibly the wrong applicant had gone forward and that he might submit a brief in support of his position. Finally, on April 20, 1983, having received no response, the Presiding Officer discontinued the proceedings for "failure to prosecute." The Commission determined to review that decision *sua sponte.*

DISCUSSION

It is unclear whether the Presiding Officer's action stemmed from the carriers' failure to address each individual shipment, the failure to brief the Presiding Officer on Mr. Fordney's standing to file the applications, or both. As a registered practitioner before the Commission, Mr. Fordney could file on behalf of the carriers. Thus, any misgivings by the Presiding Officer on the latter issue were unfounded.

On the former issue, the Commission has discretion whether to require or waive the identification of specific shipments. In Special Docket No. 1026, *Application of F.M.C. Agreement No. 10107 for the Benefit of Atari, Inc. and Others,* also served on April 20, 1983, the administrative law judge granted a waiver of freight charges where the applicant-Agreement identified "at least 10" affected shipments by a single member line and requested relief for other shipments of the commodity which may have

*The Presiding Officer's letter stated:

> It is my judgment that your proposed disposition is not in keeping with the handling of special docket applications. Since you know or should know all affected, you should provide for each the information required by the form referred above.

been carried by unspecified other member lines. It was not deemed necessary that the applicant provide detailed information on every affected shipment with its application.

In the instant proceedings, there are very likely a large number of shipments affected by the misfiled tariff amendments. To require a detailed description of each shipment in the applications would be extraordinarily burdensome under these circumstances, and would serve little purpose. The error which caused all the misratings has been fully described. Moreover, when special docket relief is afforded, carriers are required to publish notice of the corrected tariffs for the information of any and all affected shippers during the relevant period.

The Commission has determined, therefore, to reverse the Presiding Officer's discontinuance of these proceedings and to grant the requested relief. The Commission is satisfied that it received, prior to the filing of these applications, the effective tariff amendments setting forth the rates on which any waivers would be based. *See* 46 C.F.R. § 502.92(a)(2).

THEREFORE, IT IS ORDERED, That the Order of Discontinuance in these proceedings is reversed; and

IT IS FURTHER ORDERED, That Korea Shipping Corporation, Hanjin Container Lines, Ltd., American President Lines, Ltd., and Yamashita-Shinnihon Steamship Co., Ltd. are granted permission to refund and/or waive freight charges as requested in their special docket applications, on the condition that each carrier publish the applicable portion of the following as a supplement to its tariff:

Korea Shipping Corporation Tariff FMC No. 19:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The currency surcharge of 3% and the bunker surcharge of $2.00 per revenue ton, published on 50th Revised Page 5, are effective October 1, 1982 and continuing through October 18, 1982.
(b) The matter contained on 66th Revised Page 66–A, 66th Revised Page 72 and 34th Revised Page 74–B is effective October 1, 1982 and continuing through October 5, 1982.
(c) The matter contained on 72nd Revised Page 52, 75th Revised Page 54, 34th Revised Page 64 and 68th Revised Page 74, is effective October 1, 1982 and continuing through October 7, 1982.
(d) The matter contained on 58th Revised Page 50, 51st Revised Page 51–A, 32nd Revised Page 66–B and 57th Revised Page 77–A, is effective October 1, 1982 and continuing through October 12, 1982.
(e) The matter contained on 54th Revised Page 65 and 6th Revised Page 76–A, is effective October 1, 1982 and continuing through October 14, 1982.

(f) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 18, 1982, except as otherwise noted:

21st R/P 1	2nd R/P 64–C (except special rate to Nagoya of $1600 per 20′ container in Item 5240, effective 11/18/82)	55th R/P 74–A
36th R/P 52–E		65th R/P 76
35th R/P 52–F		2nd R/P 76–B
20th R/P 57–B		17th R/P 77–B–1
58th R/P 60		17th R/P 77–C–1
45th R/P 62–A	83rd R/P 72–A	12th R/P 77–C–2
44th R/P 64–A	52nd R/P 72–B	

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 20:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The matter contained on 8th Revised Page 83–A, 32nd Revised Page 85–A, 48th Revised Page 91–A and 31st Revised Page 93–A, is effective October 1, 1982 and continuing through October 3, 1982.

(b) The matter contained on 41st Revised Page 95 and 29th Revised Page 99, is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities contained on the above referenced pages which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 22:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 3% and the bunker surcharge of $20.00 per revenue ton, published on 29th Revised Page 8, are effective October 1, 1982 and continuing through October 27, 1982.

(b) The matter contained on 11th Revised Page 167 (except for the special rate applicable to Japan in Item 646–1/a which is effective October 8, 1982) and 14th Revised Page 316–B, is effective October 1, 1982 and continuing through October 14, 1982.

(c) The matter contained on 10th Revised Page 182 is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes or waiver of bunker and currency surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities described on the above referenced pages except as noted, which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 23:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The currency surcharge of 3% and the bunker surcharges of $16.00 per revenue ton, published on 20th Revised Page 7, are effective October 1, 1982 and continuing through October 18, 1982.
(b) The matter contained on 3rd Revised Page 79 is effective October 1, 1982 and continuing through October 18, 1982.
This Notice is effective for purposes of refund or waiver of surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities contained on the above referenced pages which may have been shipped during the specified period of time.

Korea Shipping Corporation Tariff FMC No. 25:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The matter contained on 56th Revised Page 56–A, 4th Revised Page 56–A–2 and 11th Revised Page 56–D, is effective October 1, 1982 and continuing through October 3, 1982.
(b) The matter contained on 22nd Revised Page 56–B is effective October 1, 1982 and continuing through October 12, 1982.
This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

Korea Shippinq Corporation Tariff FMC No. 27:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1021, that, subject to all applicable regulations, terms and conditions of this tariff:
(a) The currency surcharge of 4% published on 3rd Revised Page 7, is effective October 1, 1982 and continuing through October 18, 1982.
(b) The bunker surcharge of $10.00 per revenue ton, published on 5th Revised Page 8, is effective October 1, 1982 and continuing through October 18, 1982.
This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time.

Hanjin Container Lines, Ltd. Tariff FMC No. 2:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The bunker surcharges of $12.00 per revenue ton, $400 per 20′ container and $600 per 40′ container, published on 33rd Revised Page 8, are effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 15th Revised Page 157 is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes of refund or waiver of surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

Hanjin Container Lines, Ltd. Tariff FMC No. 4:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 4% published on 40th Revised Page 8 is effective October 1, 1982 and continuing through October 19, 1982 and the bunker surcharges of $10.00 per revenue ton, $325 per 20′ container and $400 per 40′ container, published on 40th Revised Page 8, are effective October 10, 1982 and continuing through October 19, 1982.

(b) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 20, 1982, except as otherwise noted:

Supplement No. 7
2nd R/P 199
2nd R/P 201
2nd R/P 202
2nd R/P 203
2nd R/P 204
2nd R/P 205
2nd R/P 206
2nd R/P 207
2nd R/P 208
2nd R/P 209
2nd R/P 210
2nd R/P 211
2nd R/P 212
3rd R/P 213
7th R/P 214 (except as noted in Item 1320–00)
2nd R/P 215
2nd R/P 217
2nd R/P 218
2nd R/P 219
2nd R/P 220
2nd R/P 221
2nd R/P 222
4th R/P 223
2nd R/P 225
2nd R/P 226
2nd R/P 227
2nd R/P 228
2nd R/P 229
2nd R/P 230
2nd R/P 231
2nd R/P 232
4th R/P 233
2nd R/P 234
2nd R/P 235
2nd R/P 236
2nd R/P 237
2nd R/P 238
2nd R/P 239
2nd R/P 240
4th R/P 241
10th R/P 242 (except as noted on rates from Japan in Item 33440–10)
2nd R/P 243
6th R/P 244
1st R/P 245
8th R/P 245–A
2nd R/P 248
5th R/P 249
4th R/P 251
3rd R/P 252
3rd R/P 253
2nd R/P 254
3rd R/P 255–A

10th R/P 256
3rd R/P 257
1st R/P 258
3rd R/P 259
2nd R/P 260
1st R/P 261
5th R/P 262
8th R/P 263
5th R/P 264 (except for 40′ per container rates for Stethoscopes applicable from Japan in Item 4720–20)
2nd R/P 265
6th R/P 266
2nd R/P 267
2nd R/P 268
2nd R/P 269
2nd R/P 270
3rd R/P 271
4th R/P 272
3rd R/P 273
4th R/P 275
3rd R/P 276
2nd R/P 277
2nd R/P 278
3rd R/P 279
6th R/P 280
1st R/P 281
1st R/P 282
5th R/P 283
3rd R/P 284
2nd R/P 285
4th R/P 286
2nd R/P 287
2nd R/P 288
2nd R/P 289
2nd R/P 290
3rd R/P 291–A
2nd R/P 292
2nd R/P 293
2nd R/P 294
2nd R/P 295
2nd R/P 296
6th R/P 297
1st R/P 298
2nd R/P 299
6th R/P 300
2nd R/P 301
1st R/P 302
3rd R/P 303
7th R/P 304
6th R/P 305
8th R/P 306
1st R/P 307
1st R/P 308
1st R/P 309
1st R/P 310
3rd R/P 311
8th R/P 312
7th R/P 313
2nd R/P 314
2nd R/P 315
8th R/P 316
2nd R/P 317
4th R/P 318
13th R/P 319
2nd R/P 320
5th R/P 321
2nd R/P 323
2nd R/P 324
3rd R/P 325
3rd R/P 326
2nd R/P 327
2nd R/P 328
2nd R/P 329
2nd R/P 330

(c) The matter contained on the pages listed is effective October 1, 1982 and continuing through October 26, 1982, except as otherwise noted:

9th R/P 246 (Except as noted in Item 3610–00)
8th R/P 246–A (Except as noted in Item 3612–00 and Item 3615–00)
18th R/P 247 (Except as noted in Item 3650–05, Item 3650–07 and Item 3655–05)
16th R/P 250 (Except as noted in Item 4110–00)
8th R/P 255 (Except the addition of New Orleans for Special Rate in Item 4360–00 is effective October 8, 1982)
10th R/P 274
23rd R/P 291 (Except as noted in Item No. 5573–00)

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 5:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff;

(a) The currency surcharge of 4% published on 39th Revised Page 7, is effective October 1, 1982 and continuing through October 19, 1982 and the bunker surcharges of $10.00 per revenue ton, $325 per 20′ container and $400 per 40′ container, published on 39th Revised Page 7, are effective October 10, 1982 and continuing through October 18, 1982.

(b) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 19, 1982, except as otherwise noted:

Supplement No. 7
2nd R/P 188
2nd R/P 190
2nd R/P 191
2nd R/P 192
3rd R/P 193
2nd R/P 194
2nd R/P 195
2nd R/P 196
2nd R/P 197
2nd R/P 198
2nd R/P 199
2nd R/P 200
6th R/P 201
4th R/P 202
12th R/P 203
2nd R/P 205
8th R/P 207
3rd R/P 208
3rd R/P 210
5th R/P 211
5th R/P 212
2nd R/P 213
2nd R/P 214
3rd R/P 215
3rd R/P 216
2nd R/P 217
4th R/P 218
2nd R/P 219
2nd R/P 220
2nd R/P 221
2nd R/P 222
4th R/P 224
2nd R/P 226
4th R/P 227
18th R/P 228
7th R/P 228–A
10th R/P 229
19th R/P 231
6th R/P 232
4th R/P 233
20th R/P 234
9th R/P 235
5th R/P 236
3rd R/P 237
3rd R/P 238
3rd R/P 239
5th R/P 240
4th R/P 243
1st R/P 244
5th R/P 245
2nd R/P 246
1st R/P 247
5th R/P 248
7th R/P 249
3rd R/P 250
2nd R/P 251
2nd R/P 252
10th R/P 253
2nd R/P 254
8th R/P 255
5th R/P 256
9th R/P 257
6th R/P 258
5th R/P 259
4th R/P 260
2nd R/P 261
1st R/P 262
1st R/P 262–A
3rd R/P 263
7th R/P 264
2nd R/P 265
4th R/P 266
2nd R/P 267
3rd R/P 268
9th R/P 269
1st R/P 270
1st R/P 271
17th R/P 272
3rd R/P 274
11th R/P 275
2nd R/P 276
4th R/P 277
2nd R/P 278
3rd R/P 279
2nd R/P 280
23rd R/P 281
2nd R/P 282
3rd R/P 283
2nd R/P 284
2nd R/P 285
2nd R/P 286
1st R/P 288
2nd R/P 289
9th R/P 290
2nd R/P 291
1st R/P 292
2nd R/P 293
9th R/P 294
8th R/P 295
1st R/P 297
1st R/P 298
1st R/P 299
1st R/P 300
6th R/P 301

2nd R/P 302
12th R/P 303 (except as noted in Item 6200–00)
5th R/P 304
3rd R/P 306
2nd R/P 307
4th R/P 308
4th R/P 309
5th R/P 310
5th R/P 312
3rd R/P 313
2nd R/P 315
2nd R/P 316
6th R/P 317
5th R/P 318
4th R/P 319
7th R/P 320
3rd R/P 321
2nd R/P 322
5th R/P 323
2nd R/P 324
3rd R/P 325
2nd R/P 326
2nd R/P 327
2nd R/P 328
1st R/P 329
5th R/P 330
7th R/P 331
3rd R/P 332
3rd R/P 333
8th R/P 334
4th R/P 335
4th R/P 336
7th R/P 337
2nd R/P 338
2nd R/P 339
2nd R/P 340
2nd R/P 341
2nd R/P 342
9th R/P 344

(c) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 24, 1982, except as otherwise noted:

8th R/P 206
15th R/P 209
8th R/P 225
9th R/P 227-A
18th R/P 230
13th R/P 241 (Except the Special rate of $1590 per 40′ container for Wooden Kitchen and Vanity Cabinets from Korea to Los Angeles and Long Beach only, published in Item 4360-14, which is effective October 4, 1982.)
24th R/P 242 (Except the $2133 per 40′ container rate applicable from Japan, published in Item 4380-05, which is effective October 4; 1982.)
14th R/P 287 (Except the $2150 per 40′ container rate applicable from Korea in Item 5820-12, which is effective October 4, 1982.)
14th R/P 296
10th R/P 305 (Except the $2375 per 40′ container rate applicable from Korea in Item 6240-00, which is effective October 4, 1982.)
12th R/P 311 (Except the $2125 per 40′ container Special rate for 2 or more containers per vessel in Item 6540-00, which is effective October 4, 1982.)
16th R/P 343

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 6:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 4% and the bunker surcharges of $12.00 per revenue ton, $400 per 20′ container and $600 per 40′ container applicable from Hong Kong and Taiwan, published on 41st Revised Page 7, are effective October 1, 1982 and continuing through October 18, 1982 and the bunker surcharges of $10.00 per revenue ton, $325 per 20′ container and $400 per 40′ container, applicable from Korea and Japan, published on 41st Revised Page 7, are effective October 10, 1982 and continuing through October 18, 1982.

(b) The matter contained on 163rd Revised Page 1 is effective October 1, 1982 and continuing through October 5, 1982.

(c) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 18, 1982:

Supplement No. 9	4th R/P 92	5th R/P 107
3rd R/P 78	6th R/P 93	1st R/P 108
3rd R/P 80	3rd R/P 94	1st R/P 109
4th R/P 82	3rd R/P 96	11th R/P 111
6th R/P 83	3rd R/P 97	12th R/P 113
4th R/P 84	3rd R/P 98	17th R/P 114
7th R/P 85	4th R/P 100	7th R/P 115
3rd R/P 86	11th R/P 101	1st R/P 116
24th R/P 87	10th R/P 102	1st R/P 117
7th R/P 87-A	4th R/P 103	1st R/P 118
3rd R/P 88	6th R/P 104	1st R/P 120-A
8th R/P 89	7th R/P 105	8th R/P 121
12th R/P 91	11th R/P 106	3rd R/P 122

(d) The matter contained on the pages listed below is effective October 1, 1982 and continuing through October 24, 1982, except as otherwise noted:

14th R/P 79

21st R/P 81 (Except for the $2600 per 40′ container rate applicable from Korea to Chicago and the $2650 per 40′ container rate applicable from Korea to Dallas in Item 0100-00, which are effective October 4, 1982.)

10th R/P 90

15th R/P 95

15th R/P 99

16th R/P 110

6th R/P 112

14th R/P 119

20th R/P 120

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 9:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The matter contained on 81st Revised Page 1 is effective October 1, 1982 and continuing through October 5, 1982.

(b) The currency surcharge of 3% and the bunker surcharges of $18.00 per 1000 kilos or $16.50 per 1 cubic meter, published on 31st Revised Page 8, are effective October 1, 1982 and continuing through October 18, 1982.

(c) The matter contained on 8th Revised Page 84-A-1 is effective October 1, 1982 and continuing through October 7, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Hanjin Container Line, Ltd. Tariff FMC No. 10:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1022, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The currency surcharge of 3% and the bunker surcharge of $13.00 per revenue ton, published on 31st Revised Page 5, are effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 24th Revised Page 104 is effective October 1, 1982 and continuing through October 12, 1982.

(c) The matter contained on 37th Revised Page 127 is effective on October 1, 1982 and continuing through October 6, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 124:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1023, that, subject

to all applicable regulations, terms and conditions of American President Lines, Ltd. Tariff FMC No. 80:

(a) The bunker surcharge of $27.50 per revenue ton applicable from Sri Lanka, as published on 66th Revised Page 7-A of American President Lines, Ltd. Tariff FMC No. 80, is effective October 1, 1982 and continuing through October 18, 1982.

(b) This matter contained on 2nd Revised Page 76-A-2 of American President Lines, Ltd. Tariff No. 80, is effective October 1, 1982 and continuing through October 18, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 81:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1023, that the bunker surcharge applicable to Hong Kong, Manila and Japan of $2.50 per revenue ton, the bunker surcharge applicable in India, Pakistan and Sri Lanka of $21.00 per revenue ton, and the currency adjustment factor applicable to Japan of 3%, as published on 55th Revised Page 7, are effective October 1, 1982 and continuing through October 18, 1982, subject to all applicable regulations, terms and conditions of this tariff.

This Notice is effective for purposes of refund or waiver of bunker and currency surcharges assessed during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 118:

Notice is hereby given, as required by the decision of the Federal Maritime Ccmmission in Special Docket No. 1023, that the bunker surcharge of 16½%, as published on 13th Revised Page 5, is effective October 1, 1982 and continuing through October 17, 1982, subject to all applicable regulations, terms and conditions of this tariff.

This Notice is effective for purposes of refund or waiver of surcharges assessed during the specified period of time.

American President Lines, Ltd. Tariff FMC No. 119:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1023, that, subject to all applicable regulations, terms and conditions of this tariff:

(a) The matter contained on 4th Revised Page 3 and 8th Revised Page 167 (except as noted by telex filing of September 27, 1982 to Item 5650), is effective October 1, 1982 and continuing through October 18, 1982.

(b) The matter contained on 9th Revised Page 168 is effective October 1, 1982 and continuing through October 5, 1982.

This Notice is effective for purposes of refund or waiver of currency and bunker surcharges assessed during the specified period of time and of the freight charges on any shipments of the commodities contained on the above referenced pages, except as noted, which may have been shipped during the specified period of time.

Yamashita-Shinnihon Steamship Company, Ltd. Tariff FMC No. 33:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1024, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on the pages listed below is effective October 1, 1982 and continuing through October 20, 1982:

7th R/P 2
11th R/P 5
27th R/P 25
Original 28
2nd R/P 29
Original 30
Original 31
Original 32
Original 33
Original 34
Original 35
2nd R/P 36
2nd R/P 37
2nd R/P 38
Original 39
2nd R/P 40
2nd R/P 41
Original 42
2nd R/P 43
3rd R/P 44
Original 45
Original 46
Original 47
2nd R/P 48
Original 49
3rd R/P 50
2nd R/P 51
Original 52
Original 53
4th R/P 54
Original 55
2nd R/P 56
Original 57
Original 58
2nd R/P 59
Original 60
Original 61

This Notice is effective for purposes of refund or waiver of the freight charges on any shipments of the commodities contained on the above referenced pages which may have been shipped during the specified period of time.

Yamashita-Shinnihon Steamship Company, Ltd. Tariff FMC No. 37:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1024, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on 66th Revised Page 1, 1st Revised Page 4, 8th Revised Page 60 and 9th Revised Page 61, is effective October 1, 1982 and continuing through October 17, 1982.

This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

Yamashita-Shinnihon Steamship Company, Ltd. Tariff FMC No. 40:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1024, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on 2nd Revised Page 3 and 1st Revised Page 530, is effective October 1, 1982 and continuing through October 17, 1982.

This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on the above referenced pages which may have been shipped during the specified period of time.

and that each carrier shall file with the Secretary within 60 days of the date of this Order a copy of the tariffs so amended; and

IT IS FURTHER ORDERED, That each carrier shall notify the Commission of the actual waiver or refund of charges within five days of said waiver or refund; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–36

[46 C.F.R. PART 536]

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

REQUIREMENTS FOR FILING CURRENCY ADJUSTMENT FACTORS REFLECTING CHANGES IN THE EXCHANGE RATE OF TARIFF CURRENCIES

September 6, 1983

ACTION: Discontinuance of Proceeding.

SUMMARY: The Commission has determined to discontinue this proceeding without issuing a final rule.

DATE: Effective September 13, 1983.

SUPPLEMENTARY INFORMATION:

By notice published in this proceeding (47 F.R. 31407–31410, July 20, 1982), the Federal Maritime Commission proposed to amend its rules to provide requirements for filing currency adjustment factors reflecting changes in the exchange rate of tariff currencies. Comments were received from conferences, carriers, and shippers. Upon consideration of these comments the Commission has decided to discontinue this proceeding. The Commission will continue to monitor industry practices and shipper complaints concerning currency adjustment factors in the foreign trades of the United States.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 C.F.R. 538.10; DOCKET NO. 81–54]

PROPOSED RULEMAKING TO ALLOW A THIRD REBUTTABLE PRESUMPTION UNDER ARTICLE 6, CLAUSE (D) OF THE UNIFORM MERCHANT'S CONTRACT

September 27, 1983

ACTION: Discontinuance of Proceeding.

SUMMARY: The Commission has determined to discontinue this proceeding without modifying the Uniform Merchant's Contract to allow for the inclusion of an optional provision raising a third rebuttable presumption "that the merchant paying the freight charges on a given shipment has the legal right to select the ocean carrier."

DATES: Effective October 4, 1983.

SUPPLEMENTARY INFORMATION:

The Uniform Merchant's Contract (46 C.F.R. 538.10) implements the provisions of section 14(b) of the Shipping Act, 1916, which authorizes the use by carriers or conferences of carriers of a dual-rate system that provides for lower freight rates for merchants who pledge all or a fixed portion of their shipments to said carriers. By "Notice of Proposed Rulemaking" (46 FR 4498) published in the *Federal Register* on September 9, 1981, the Commission instituted this proceeding to allow the optional inclusion in the Uniform Merchant's Contract of a rebuttable presumption "that the merchant paying the freight charges on a given shipment has the legal right to select the ocean carrier." In response to the Notice, comments were received from 18 conferences, 7 shippers, and an association representing approximately 400 freight forwarders and customs brokers.

Upon review of the comments submitted and reexamination of the rule proposed, the Commission has determined that no regulatory purpose would be served by promulgating that rule at this time. Accordingly, the Commission is withdrawing the proposed rule and discontinuing this proceeding.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–34

AGREEMENT NO. T–3856

NOTICE

October 7, 1983

Notice is given that no exceptions have been filed to the August 29, 1983, 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.

As set forth in the initial decision, a revised copy of Agreement No. T–3856, signed by the parties or their duly authorized representatives, shall be filed with the Commission amending Article 8 to provide for the agreement's termination five years from the date of approval. The agreement will stand approved effective on the date the appropriately modified agreement is received by the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–34

AGREEMENT NO. T–3856

Proponents have established that certain anticompetitive provisions of Article 2 of Agreement No. T–3856, which authorize members to discuss and make non-binding recommendations with respect to rates and charges, are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose.

Application approved upon condition that Proponents file an amendment, providing for termination of Agreement No. T–3856 five years after the date of approval by the Commission.

Robert L. McGeorge and *Joseph Tasker, Jr.*, for Proponents, Mid-Gulf Seaports Marine Terminal Conference, Terminal Operators Conference of Hampton Roads, and South Atlantic Marine Terminal Conference.

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

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

Finalized October 7, 1983

This proceeding is an investigation instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916, 46 U.S.C. 814 and 821, to determine whether Agreement No. T–3856 should be approved, disapproved or modified.

The proceeding was initiated by Order of Investigation and Hearing (Order), served July 7, 1982. The Order designated the three parties to Agreement No. T–3856 as Proponents and named Hearing Counsel as a party. The Proponents are Mid-Gulf Seaports Marine Terminal Conference (MGSMTC), Terminal Operators Conference of Hampton Roads (TOCHR) and South Atlantic Marine Terminal Conference (SAMTC).

As their names indicate, each of the Proponents is a regional marine terminal conference, operating under an approved section 15 agreement.[2] TOCHR's membership is comprised of Virginia ports at the mouth of Chesapeake Bay in the area known as Hampton Roads. SAMTC's members range from North Carolina to, and including, Florida, but not those Florida ports which are members of the agreements shown in the note below.[3]

[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 CFR 502.227).

[2] MGSMTC's approved agreement is No. T–2002; TOCHR's is No. T–8435; and SAMTC's is No. T–8455.

[3] Port Everglades Freight Handlers, Agreement No. T–2592; Marine Freight Handlers, Agreement No. T–2629; Marine Terminal Operators of Tampa, Agreement No. T–2291.

MGSMTC's members are the ports in Alabama, Louisiana, Mississippi and Texas.[4]

Agreement No. T-3856 was entered into on August 1, 1979, and was filed with the Commission, for approval, on September 4, 1979. The substantive purposes of Agreement No. T-3856 are contained in Article 2, which, as pertinent, provides that the members of the Proponent conferences, acting through those conferences, may ". . . meet, confer, discuss, exchange information and make recommendations with respect to rates, charges, practices, legislation, port administration and on matters of concern to the marine terminal industry." Article 8 of Agreement No. T-3856 provides that the agreement shall become effective when approved by the Commission and that, upon approval, another agreement—No. T-2299—between TOCHR and SAMTC shall terminate. Agreement No. T-2299 essentially authorizes TOCHR and SAMTC to engage in those practices which approval of Agreement No. T-3856 would empower TOCHR, SAMTC and MGSMTC to do.

Although the filing of Agreement No. T-3856 evoked neither protest nor comment, the Commission determined that it was not approvable, as filed. In lieu of unconditional approval, the Commission issued an Order, dated April 16, 1981, granting approval conditioned upon deletion of those parts of Article 2 which would allow Proponents to discuss and make recommendations concerning rates and charges.[5]

The Commission imposed its conditions because it was concerned that there was insufficient support, in the material submitted by Proponents, to demonstrate that the discussion of rates and charges was required by legitimate transportation needs or other public interest objectives. In the Order initiating this proceeding, the Commission explained its concerns as follows:

> The Commission imposed the above conditions because the discussion of matters relating to rates, even though the Agreement does not confer rate-making authority or bind the members to recommendations made pursuant to the Agreement,[6] can be expected to affect the level of rates and charges or result in the establishment of uniform rates and charges in the relevant port areas. As such, the Agreement is anticompetitive and cannot be approved unless Proponents can demonstrate that the Agreement is required by a serious transportation need, necessary to secure public benefits, or is in furtherance of a valid regulatory purpose. *Federal Maritime Commission, et al.*, v. *Aktiebolaget Svenska Amerika Linien, et al.*, 390 U.S. 238 (1968) [hereinafter, *Svenska*], *United*

[4] A list of the members of each of the Proponents at the time of filing of Agreement No. T-3856 appears in Appendix I. A list of current members appears in Appendix II.

[5] The Order of April 16, 1981, also required that parallel references to discussions and recommendations with respect to rates and charges, which appear in a Whereas clause of Agreement No. T-3856, be deleted.

[6] The several conference agreements—Nos. T-2002, T-8435 and T-8455—do include ratemaking authority, but, at the present time, only TOCHR publishes a conference-wide tariff.

States Lines, Inc. v. *Federal Maritime Commission,* 584 F.2d 519 (1978).

The Order of April 16, 1981, further provided that, if the conditions were not met, Agreement No. T–3856 would be disapproved unless a request for further hearing were to be filed by one of its signatories. On August 17, 1981, the Proponents filed a petition declining to make the changes suggested by the Order of April 16, 1981, and requested a hearing to determine whether said Agreement should be unconditionally approved, as filed. The petition was granted by the Order initiating the proceeding.

There were two prehearing conferences.[7] Afterwards, there was one day of hearing.[8] At the hearing, Proponents submitted several volumes of prepared documentation,[9] together with proposed findings of fact[10] based on the evidence contained in those documents. Hearing Counsel joined with Proponents in the proposed findings of fact.[11] Hearing Counsel and Proponents each called one witness to testify in support of unconditional approval of Agreement No. T–3856.[12] Thereafter, on April 11, 1983, Hearing Counsel and Proponents submitted separate briefs in support of approval of the Agreement.[13]

In my judgment, the Agreement, as filed (and as modified, see n. 13 below) should be approved.

STIPULATED FACTS[14]

1. Pursuant to Agreement No. T–8435, TOCHR members meet periodically to discuss issues of common concern to port authorities and operators. Agreement No. T–8435 grants authority to TOCHR to publish conference-wide tariffs applicable to all members, subject to each member's reserved right of independent action. TOCHR currently has a conference-wide tariff published and on file with the Commission.

2. Pursuant to Agreement No. T–8455, SAMTC members meet periodically to discuss issues of common concern to port authorities and operators.

[7] August 3, 1982, and December 7, 1982.

[8] March 21, 1983.

[9] Exhibit Nos. 1, 2, 3, 3(a), 4(a), 5 and 6.

[10] Exhibit No. 7.

[11] Thus, in effect, the facts are stipulated.

[12] On January 10, 1983, the California Association of Port Authorities and Northwest Marine Terminals Association wrote a letter to the Secretary of the Commission advising the Commission of its support "of the inclusion of rate making discussion rights" in Agreement No. T-3856. A copy of that letter was addressed to me. By letter dated January 17, 1983, the sender of the letter was advised by the Secretary that I rejected the letter and that I would not consider any of the views expressed therein.

[13] Proponents' brief contained some additional proposed findings of fact based upon testimony adduced at the hearing. In addition, Proponents acquiesced in the recommendation concerning the term of the Agreement made by Hearing Counsel's witness at the hearing. Proponents had sought an open-ended term upon approval. Hearing Counsel's witness, Mr. Robert E. Hollifield of the Commission's Shoreside Agreements staff, suggested a definite term of five year's duration. In their brief, Proponents agreed to this modification.

[14] With slight editing, these findings generally accept the stipulated facts (including Proponents' unopposed additional proposed findings) as submitted.

Agreement No. T–8455 grants authority to SAMTC to publish conference-wide tariffs applicable to all members, subject to each member's reserved right of independent action. SAMTC does not at the present time have a conference-wide tariff published or on file with the Commission.

3. Pursuant to Agreement No. T–2002, MGSMTC members meet periodically to discuss issues of common concern to port authorities and operators. While Agreement No. T–2002 grants authority to MGSMTC to publish conference-wide tariffs, there have been no conference-wide tariffs for several years. Each MGSMTC member sets and publishes its own rates and charges independently.

4. Members of TOCHR and SAMTC met periodically since 1969 to discuss issues of common concern to port authorities and operators in the Hampton Roads and South Atlantic port ranges pursuant to Agreement No. T–2299, as amended. This agreement authorizes the parties to discuss, but not to agree upon, terminal rates and charges.

5. Proposed Agreement No. T–3856 would permit MGSMTC members to join in inter-port discussions (including discussions of terminal rates and charges) currently authorized by Agreement No. T–2299, as amended. As is the case under Agreement No. T–2299, participants in discussions under Agreement No. T–3856 could discuss rates and charges in a multitude of contexts but would not have authority to set rates and charges among the participants.

6. United States maritime ports are vital elements of our national transportation system, particularly that portion of the transportation system which serves our foreign and domestic offshore trades.

7. In 1980, imports and exports amounting to 847.5 million short tons moved through the nation's ports.

8. As much as 95 percent of all United States foreign trade moves through the nation's ports.

9. On a tonnage basis, TOCHR, SAMTC and MGSMTC ports handle about one-third of the nation's import and export ocean-borne cargoes.

10. Historically, most United States ports were operated as public services. A significant portion of their operating and capital costs were furnished by local, state and federal governments because terminal rates and charges were not sufficient to operate or develop the ports on a self-sustaining basis. This governmental support was based, at least in part, on the perception that economic benefits to the general public are to be derived from port activity.

11. At present, but in terms of 1977 dollars, the cash value of all types of marine terminal facilities at the nation's 189 seaports is over $40 billion and the estimated replacement cost of these facilities is about $54 billion.

12. The value of capital assets at those TOCHR, SAMTC and MGSMTC ports which were able to provide data are:

(a) Port facilities at Lambert's and Sewell's Points, Norfolk, Newport News and Portsmouth—$137.8 million (acquisition basis).

(b) Facilities of the South Carolina State Ports Authority at Georgetown, Charleston, and Port Royal—$176.7 million (acquisition basis) and $436.6 million (replacement cost basis).

(c) Facilities at the Port of Gulfport, Mississippi—$28 million.

(d) Facilities owned by the Port of Lake Charles—$71.2 million (in 1975 dollars). Current replacement cost is estimated at $100 million.

(e) Facilities of the Port of Orange—$13.3 million invested. The estimated replacement cost is $43 million.

13. The United States Department of Transportation, Maritime Administration (MarAd) estimates that total capital requirements for development of necessary marine facilities in the United States from 1980 to 1990 will be more than $5 billion.

14. Particular port development plans for the 1980's, exclusive of dredging, at TOCHR and MGSMTC ports, are expected to involve the following outlays:

(a) TOCHR ports—$50.75 million.

(b) MGSMTC ports—$76 million at the Port of Mobile, Alabama; $380 million by 1992 at the Port of New Orleans (the Port of New Orleans currently spends $100,000 on capital improvements every working day); $1.8 million at the Port of Orange (now under construction).

15. MarAd also estimates that these new marine terminal facilities will be required during the 1980's to handle a 40 percent increase in the total volume of foreign trade moving through U.S. ports.

16. The Chairman of MGSMTC estimates that expenditures of $3.8 billion will be needed for port facilities throughout the State of Louisiana by the year 2000 because it is estimated, also, that cargo at all of Mid-America's ports will exceed existing capacity by almost 700 million tons annually.

17. Historically, ports relied heavily upon state, local or port authority bonds to finance necessary capital improvements. However, in recent years, the capital formation process has become more difficult and expensive for the nation's ports, in part due to highly volatile financial markets.

18. Historically, the federal government provided significant amounts of financial and other assistance to the ports' maintenance and development programs. Primarily, the United States Army Corps of Engineers constructed and maintained navigation channels and harbors. In addition, the United States Department of Commerce's Economic Development Administration provided loans and grants to help finance port improvements. However, since the beginning of the fiscal year, 1983, the latter no longer provides such federal funding.

19. Federal support for dredging the nation's harbors declined since World War II. While expenditures for Corps of Engineers maintenance dredging increased 400 percent from 1963 to 1979, actual yardage dredged increased by only 8 percent.

20. No new seaport dredging project has been authorized by Congress since 1976, despite the fact that, generally, larger and deeper draft ships were coming on line. For example, at the Port of New Orleans, the number of large vessels (60,000 deadweight tons and over) that could draw up to 55 feet (if channels were that deep) increased from 23 to 3,000 between 1970 and 1979.

21. Currently, some officials and some private sector groups are proposing that the federal government impose a user fee on the nation's ports to recoup all or a significant portion of the Army Corps of Engineers dredging costs.

22. In the meantime, some ports are assuming the increasing dredging costs themselves. For example:

(a) The Jacksonville Port Authority spent $1 million per year for each of the last five years on maintenance dredging.

(b) The South Carolina Ports Authority spent more than $1.1 million on dredging projects over the last five years.

(c) The Mississippi State Port Authority at Gulfport spent $100,000 over the three years 1980-1982 on dredging.

(d) The Port of Houston spent $5.8 million on maintenance dredging in 1981 alone.[15]

23. All of Proponents' ports were subjected to rapidly escalating operating costs in the last several years, due to inflation and resultant increases in the areas of construction, energy and labor.

24. Cost increases in the recent and more distant past vary significantly among the ports, sometimes even within a single conference. For example, those member ports which provided data on cost increases reported the following:

(a) TOCHR ports, from 1976–1980:
Labor—57% increase;
Equipment maintenance—48% increase;
Fuel and power—48% increase.

(b) Georgia Ports Authority (SAMTC): Total costs increased 300% from 1970 to 1980.

(c) South Carolina State Port Authority (SAMTC), from 1978–1982:
Labor—64.5% increase;
Equipment Maintenance—100% increase;

[15] The Port of New Orleans is contemplating plans, including a financial support program, for dredging its existing 40-foot deep channel to a depth of 55 feet. The estimated cost is $435 million.

Fuel and Power—127.6% increase;

General repairs—40.9% increase.

(d) Mississippi State Port Authority at Gulfport (MGSMTC), from 1976–1980:

Labor (excluding ILA labor)—60.7% increase;

Fuel and Power—93.9% increase.

(e) Orange County Navigation and Port District, Texas (MGSMTC), from 1976–1980:

Labor—112% increase;

Fuel and Power—96.7% increase;

General repairs—112% increase.

25. The nation's ports, collectively, are spending about $42 million per year to comply with mandatory federal and state environmental, employee health and safety and cargo security regulations. These expenditures are expected to increase about 50% (to $64 million) during the 1980's. TOCHR, SAMTC and MGSMTC ports bear a proportionate share of these costs.

26. Faced with prospective diminishing federal, state, and local financial support, the TOCHR, SAMTC and MGSMTC ports must develop methods to become self-sufficient. This means that the ports will be operated more as businesses than as municipal services and that port revenues, rather than tax dollars, will have to provide funding to cover operating costs as well as capital for future development.

27. To achieve this self-sufficiency, ports need to initiate and maintain procedures to insure that they possess the most accurate and current information before undertaking programs designed to control costs and to develop terminal facilities.

28. In recognition of these needs, MarAd recommended that:

> Individual ports should (not already having done so):
> 1. Develop a careful and realistic assessment of the revenue supportive short fall in their tariff rated facilities, taking into account depreciation factors and replacement requirements; a fair rate of return; rates of inflation; and levels of cargo volume.[16]

In order to implement those recommendations, MarAd further recommended that those ports, voluntarily:

> 2. Consider participation with existing or new regional or subregional Maritime Terminal Conferences *for the purposes of discussing rates and charges.*[17] (Emphasis supplied.)

29. Members of the TOCHR and SAMTC discussion agreement (Agreement No. T–2299) utilized their existing discussion authority to improve

[16] MarAd, *Current Trends in Port Pricing* (August 1978) at ii. (Ex. 1, Exhibit C attached to Keown affidavit).

[17] *Id.*

the efficiency of their ports. TOCHR/SAMTC discussions focused on topics such as: (a) operations and procedures; (b) cost management; (c) compliance with government regulations; (d) ratemaking philosophies; and (e) planning. Some of the details of those topics are, as follows:

(a) Discussion of operations and procedures over the past five years included such things as federal and state regulations relating to the handling of hazardous materials; Coast Guard regulations; a TOCHR/SAMTC Port Procedures Committee study on ways to increase operating efficiencies; the advantages of uniform dock receipts and delivery order forms; collection problems and solutions; and cost accounting systems to identify all relevant costs and determine whether existing tariff charges cover associated costs. Of necessity, these discussions involved related issues including such matters as the imposition of charges to cover those costs and the appropriate level of those charges.

(b) TOCHR/SAMTC cost management discussions concerned projections regarding ILA wage demands in forthcoming labor negotiations, including analyses of the impact of a "50 mile rule" and ILA's proposal for a unified contract for all Atlantic and Gulf ports.

(c) TOCHR/SAMTC discussions with respect to compliance with federal and state regulations involved such matters as MarAd reports and contracts; federal record retention requirements; federal and state hazardous materials regulations; and Federal Maritime Commission regulations, including licensing of independent ocean freight forwarders and the impact of those regulations on marine terminal operators, free time and demurrage regulations and rules concerning section 15 agreements.

(d) TOCHR/SAMTC ratemaking discussions[18] examined the many facets of marine terminal ratemaking philosophy. In the course of these discussions, members exchanged information on costs and prices, including the following:

(i) the proper level of wharfage charges for loaded containers, empty containers and containers stuffed or stripped at the pier;

(ii) incentive container-handling rates;

(iii) dockage charges;

(iv) minimum assessments and the proper definition of a "shipment" for assessment purposes;

(v) free time and demurrage charges;

[18] Of course, neither Agreement No. T-2299 nor Agreement No. T-3856 confers ratemaking authority, as such. However, because discussing rates and charges and making recommendations pursuant to those discussions may "affect the level of rates and charges or result in the establishment of uniform rates and charges in the relevant port areas" (pp. 3-4, *supra*), I will refer to those features of the two agreements as ratemaking, hereafter.

(vi) charges for in-transit cargoes;

(vii) terminal services charges;

(viii) charges for stevedores' use of terminal equipment;

(ix) charges for cleaning rail cars;

(x) surcharges for late-arriving vessels; and

(xi) surcharge for hazardous cargoes.

(e) TOCHR/SAMTC planning discussions involved:

(i) projections indicating further declines in break-bulk traffic and increases in containerized traffic, and resulting requirements for acquisition of additional container-handling equipment and facilities.

(ii) estimates of the frequency and legal implication of mainland China-flag vessel calls at Atlantic ports.

(iii) analysis of the increased exposure of terminal operators to claims for liability arising from a recent container accident case.

(iv) analysis of the proposed federal user fee's impact on harbor improvement and maintenance costs.

30. One of the benefits to be derived from ratemaking discussions under Agreement No. T–3856 is the continuing education of participants concerning the factors which should be given consideration when a pricing structure is established. Those factors, of course, include costs and the appropriate levels of charges (rates) to recover those costs. The experiences of TOCHR/SAMTC ratemaking discussions, some of which were detailed above, show that members acquired those benefits and were thereby aided in their daily operations and in developmental planning.

31. Some topics which MGSMTC members suggested for future discussion, upon approval of Agreement No. T–3856, are:

(a) the economics of a COFC/TOFC facility. This would involve utilizing particular traffic studies of various participating ports;

(b) capital improvement programs examining the possible role of U.S. customs revenue;

(c) procedures for collecting delinquent accounts;

(d) the effects of trigger price mechanisms;

(e) the effects of government or labor induced embargoes;

(f) the establishment of dual metric criteria in tariffs; and

(g) free time and demurrage charges.

32. Statistical studies[19] for 1970 show that the port industry was responsible directly and indirectly for:

(a) gross sales (revenues) of $28 billion;

[19] MarAd, *Economic Impact of the U.S. Port Industry*, pp. ii–iii (1978).

(b) a $15 billion contribution to the gross national product;

(c) over 1 million jobs;

(d) personal income of $9.6 billion;

(e) business income totaling $3.7 billion;

(f) federal taxes totaling $5.7 billion; and

(g) state and local taxes amounting to $2 billion.

It is estimated that the foregoing dollar impact figures have doubled since 1970.[20]

33. The following are some illustrations of the economic impact of particular ports on communities and surrounding regions:

(a) *Hampton Roads Ports.* In 1979 general cargo operations generated 7,315 jobs, $117 million in payroll and $12.9 million in tax revenues. In that same year, throughout the Commonwealth of Virginia, there were 134,693 jobs related to the movement of cargo through the Hampton Roads ports. The port related jobs resulted in earnings of $2.3 billion and yielded tax revenues amounting to $267.4 million. In the Hampton Roads area alone, the ports created more than 50,000 jobs, approximately $1 billion in payroll and $120 million in state and local taxes. Directly and indirectly, the businesses which are attracted to the ports create another 10,000 jobs, a payroll of $184 million and taxes of $20.4 million.

(b) *Georgia Ports Authority.* In 1982 the public ports were responsible for 10,000 port related jobs, a payroll of $200 million and $100 million in retail sales throughout Georgia. Directly and indirectly, port activities induced another 19,900 jobs, $290 million in personal income and $162 million in statewide retail sales.

(c) *Port of Houston.* In 1981 port activities provided employment, directly and indirectly, for 160,000 people and generated more than $3 billion in wages and sales. Port activities resulted in more than $47 million in state and local tax revenues.

(d) *Port of New Orleans.* Total direct and indirect employment from oceangoing commerce at the port is estimated to be over 44,000 jobs, paying $600 million in wages. Total employment, including that induced by the presence of the port is estimated to be 100,000 jobs with an almost $1.3 billion payroll in a six parish area. State tax revenues, measured by the annual value of Louisiana goods and services generated by port activities, amount to $143 million a year. A 1980 study indicated that the overall impact on the State of Louisiana amounts to almost 9 percent ($2.9 billion) of the State's gross product.

34. Members of TOCHR, SAMTC and MGSMTC must develop terminal facilities which are closely matched to the Nation's future transportation needs.

[20] *Id.*

35. Any significant shortages of necessary general or specialized marine terminal facilities are likely to lead to bottlenecks in the Nation's transportation system, thereby reducing the efficiency of the national economy and defense. Nevertheless, TOCHR, SAMTC, and MGSMTC ports cannot afford to build superfluous facilities which will not be amortized by user fees.

36. The Nation's ports in general, and TOCHR, SAMTC and MGSMTC ports in particular, are essential factors in the U.S. defense program.

37. Most of the public TOCHR, SAMTC and MGMTC members were created by state law in the public interest.

38. If they are to continue to provide the marine terminal services which are essential to the economy and national security, TOCHR, SAMTC and MGSMTC members soon must make crucial, near- and long-term decisions concerning the operation and future development of their facilities. The quality of this decisionmaking will be greatly enhanced if it is based on the most current information available and the shared knowledge and experience of other port operators.

39. Agreement No. T–2299 demonstrates that TOCHR, SAMTC and MGSMTC members will gain valuable insights into managing their ports more efficiently by becoming familiar with the methods of operation, organizational structures, rate-setting philosophies, labor-management relationships, accounting principles and management programs of other operators in their regions.

40. At the beginning of an era of self-sufficiency, in which ports will be required to depend upon operational revenues instead of tax dollars to finance operations and improvements, the need to exchange shared knowledge and experience with respect to terminal management, generally, and ratemaking, in particular, takes on added importance in decisionmaking. However, these exchanges of information are not likely to result in competition between ports being stifled because Agreement No. T–3856 does not empower the participants to fix common rates or to allocate rates to individual ports or conferences.

41. The right of each port operator to independent action will not be altered by approval of Agreement No. T–3856, just as it was not affected by approval of Agreement No. T–2299. Experience under the latter Agreement demonstrates that the right of independent action continued to be exercised on many occasions.

42. There are other examples establishing that Agreement No. T–2299 did not produce TOCHR/SAMTC common rates and charges merely because discussions of those subjects were authorized and, in fact, took place:

(a) Wharfage charges are not equal and uniform. During October 1982, wharfage charges on breakbulk cargo per net ton were \$1.55 at Hampton Roads, Charleston, and Savannah and \$1.60 at Jacksonville and Wilmington. Wharfage charges for container-

ized cargo per net ton were $1.20 at Charleston, Jacksonville and Savannah, $1.25 at Hampton Roads, and $1.30 at Wilmington.

(b) Handling charges are not equal and uniform. During October 1982, handling charges per net ton on plywood were $5.05 at Wilmington, $5.15 at Charleston, $5.00 at Savannah, $5.00 to $7.75 at Hampton Roads, and $4.10 to $6.60 at Jacksonville.

(c) Dockage charges are not equal and uniform. Dockage charges during October 1982 were 11 cents per registered gross ton and $1.75 per lineal foot at Wilmington, Charleston, Savannah and Jacksonville, and 12¼ cents per registered gross ton and $1.85 per lineal foot at Hampton Roads.

43. There are at least three forcing factors which acted as safeguards against uniform ratemaking under Agreement No. T–2299 and, concomitantly, are likely to continue having that effect under Agreement No. T–3856. They are competition between ports, local economic conditions which cause rates and charges to reflect the community's cost structure[21] and vigorous state government regulation of public ports. The latter two factors also serve as a further stimulus to competition.

44. There is no evidence of abuse of the discussion authority, with respect to rates and charges, under Agreement No. T–2299. There continues to be a great diversity of rates and charges at TOCHR/SAMTC ports. Yet there is evidence of relative rate stability among the port members of those conferences. Although there is no necessary direct connection between this stability and Agreement No. T–2299, it is a fact that, from 1974 to 1981, terminal charges at the member ports rose only about 57 percent compared to an increase of about 83 percent in the producer price index, an overall economic indicator measuring approximately equivalent levels of economic activity.[22]

45. A number of ocean carriers serving the affected ports have increased their bargaining power in negotiating terminal rates and charges by forming Commission-approved joint service agreements. Among the leading joint services currently providing services in these port ranges are:

Hoegh Lines
Atlantic Container Line, G.I.E.
Dart Container Line
Associated Container Transportation (Australia) Ltd.
Hoegh-Ugland Auto Liners, A/S
Orient Overseas Container Line
Barber Blue Sea Line
Gulf Europe Express

[21] E.g., there are separate rate structures at each of the two Georgia Ports Authority's ports due to differences in local conditions and cost factors.

[22] The Commission's Office of Shoreside Agreements, which has the responsibility to review all marine terminal agreements and to prepare recommendations to the Commission concerning approval, disapproval or modification thereof, pursuant to section 15, suggests that the lag behind the producer price index demonstrates that those terminal charges are depressed.

Other joint services with authority to serve one or more of these ports include:

Moller-Maersk Line, A.P.
R.C.D. Shipping Services
Central Gulf Container Line
Combi Line
Sea Express Service
Celtic Bulk Carriers
Georgia-Aztec Line
Pakistan Line
Bank and Saville Line

46. Inter-conference terminal discussion agreements which permit the parties to discuss terminal rates and charges should provide ports with a carefully measured and controlled counterbalance to the bargaining power enjoyed by participants in joint service agreements, even though there is nothing in the record to show that so far, ports have been placed at a disadvantage by this bargaining power.

47. TOCHR, SAMTC and MGSMTC ports face strong competition from Canadian and Mexican ports. This is manifest from evidence that Servico Multimodal Transistmico, a Mexican container landbridge system, now competes directly with Continental United States surface carriers and carriers using the Panama Canal for European and Far East cargo and by sightings of Canadian port based CAST Lines containers in Atlanta, Georgia. The ability to discuss rates and charges is expected to be a useful tool to enable member ports to meet Canadian and Mexican competition.[23]

48. The empiric evidence supports Proponents' premise that members of terminal conferences need authority to discuss ratemaking factors and make non-binding recommendations with respect to rates and charges in the developing era of public, as well as private, port self-sufficiency and Proponents' other premise that, if allowed, this authority will enable ports to become more cost effective and operationally efficient without adversely affecting inter-port competition, all of which will permit those ports to continue to induce economic growth in and provide other public benefits to their communities.

DISCUSSION AND CONCLUSIONS

I. GENERAL

The vital role of terminal operators in the stream of interstate and foreign commerce subject to regulation by the Federal Maritime Commission is

[23] There are indicators that its government has allocated billions of dollars to be spent over the next twenty years for Mexican port development. Coupled with Mexico's natural labor and fuel cost advantages, this funding is expected to presage even greater competitive impact in the future.

well established. "Terminal operators form an intermediate link between carriers and the shippers or consignees." *The Boston Shipping Association, Inc.* v. *Port of Boston Marine Terminal Association,* 10 F.M.C. 409, 414 (1967).[24] The importance of that link to the regulatory scheme formulated by the Congress was pinpointed by the Court of Appeals for the District of Columbia Circuit in *American Export-Isbrandtsen Lines, Inc.* v. *Federal Maritime Commission,* 444 F.2d 824, 828, 829 (D.C. Cir. 1970):

> The law for centuries has recognized that public wharves, piers, and marine terminals are affected with a public interest. [Footnote omitted.]
>
> These terminals stand athwart the path of trade. . . . Efficiency of the manpower, ships and vehicles is dependent upon the prompt handling of such cargo and determines whether the flow of interstate and foreign commerce is obstructed or facilitated. The public interest in their efficient operation is unquestioned. . . .
>
> . . . Because of the vital importance of these Terminals to interstate and foreign commerce, Congress in the Shipping Act of 1916 provided for their regulation by the Federal Maritime Commission and authorized it to promulgate and enforce just and reasonable regulations and practices related to or connected with the receiving, handling, storing, or delivering of property at harbor terminal facilities. . . .
>
> The power thus conferred . . . is to be used for the purpose of facilitating the free flow of commerce by guaranteeing an efficient terminal system.

Manifestly, then, "facilitating the free flow of commerce by guaranteeing an efficient terminal system" is the beacon by which the Commission charts the course of marine terminal regulation, and the ratemaking features of Article 2 must be examined in that light.

The Order of April 16, 1981, is not to the contrary. It does not stand for the proposition that, under the standard for marine terminal regulation, Agreement No. T–3856 is unapprovable, substantively, if the ratemaking features remain. That order finds that the ratemaking provisions are anticompetitive and thereby invade the territory of the national antitrust laws. It is well settled that such anticompetitive provisions in an agreement submitted for approval pursuant to section 15 cannot be approved absent a proper showing that the agreement is required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.[25] Because the justification

[24] After the decision in the cited case became administratively final, it was collaterally attacked in the United States District Court for the District of Massachusetts, but the District Court refused to review the merits. The Court of Appeals for the First Circuit disagreed, allowing a collateral review on the merits. *Port of Boston Marine Terminal Assn.* v. *Boston Shipping Assn., Inc.,* 420 F.2d 419 (1 Cir. 1970). The Supreme Court reversed the First Circuit and upheld the District Court on the collateral review issue. *Port of Boston Marine Terminal Assn.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

[25] Svenska, supra, 390 U.S. at 243.

submitted by Proponents at that time failed to meet the *Svenska* requirements, the ratemaking provisions could not pass muster. Thus, the Order of April 16, 1981, simply holds that there was a failure of proof.

In my judgment, Proponents remedied that failure at the hearing, and now the ratemaking features of Agreement No. T–3856 merit approval.

II. THE ANTITRUST ISSUE

Although Proponents generally acquiesce in the Commission's determination, expressed both in the Order of April 16, 1981, and in the Order, that the ratemaking features are anticompetitive and an incursion into antitrust principles, they suggest that, perhaps, these features are not an intrusion into the antitrust laws.[26] This suggestion is rejected.

The argument, as conceived by Proponents, has its genesis in some Supreme Court cases holding that some exchanging of price information among competitors is permitted under the antitrust laws or that the per se violation rule has never been applied to the dissemination of price information itself.[27] Whatever validity there may be to that argument in those cases, the contention is wide of the mark in this proceeding for the very reason contained in the statement of the standard by which Proponents ask that this issue be judged—the "rule of reason."

The "rule of reason," which governs analysis of exchanges of price information among competitors, frequently has been cited with approval by the courts. *See, e.g., Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 49 (1977). In *Chicago Board of Trade* v. *United States,* 246 U.S. 231, 238 (1918), Mr. Justice Brandeis explained the rule this way:

> . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

It is not necessary to belabor the issue to understand the differences between the circumstances and commercial enterprises involved in those cases where dissemination of price information may be permitted under

[26] Proponents' brief, pp. 4, 13–27.

[27] Proponents cite *United States* v. *Citizens and Southern National Bank,* 422 U.S. 86, 113 (1975), and cases cited therein.

the antitrust laws and those involved in this proceeding. It is sufficient to recognize that here (1) the Proponents are bodies which are empowered to fix rates for their members[28] under limited antitrust immunity granted by approved section 15 agreements; (2) Proponents' members' individual terminal practices are subject to regulation by this Commission; and (3) although the authorization to recommend rates and charges may not be binding upon Proponents or their members, it would be folly to believe that the sought for power to recommend rate action is intended solely for the purpose of having the participants in the discussion agreement reject the recommendation.

Thus, applying the "rule of reason" to the facts and circumstances of this proceeding, I find that the ratemaking features of the agreement are anticompetitive and invade the antitrust laws.

III. THE *SVENSKA* TEST HAS BEEN MET—THE AGREEMENT IS REQUIRED BY A SERIOUS TRANSPORTATION NEED, NECESSARY TO SECURE PUBLIC BENEFITS AND IS IN FURTHERANCE OF A VALID REGULATORY PURPOSE

Preliminarily, it may be observed that, by specifying Agreement No. T-3856 is to be measured by the *Svenska* yardstick, the Order subsumes that the other criteria for approval under section 15 have been adjudged satisfied and are not in issue at this time.

Proponents have established that the ratemaking features of Agreement No. T-3856 are required by a variety of earnest transportation imperatives, each of which reflects a serious transportation need, but overall, may be seen as constituent elements of the need to maintain and preserve an efficient marine terminal system in order to accommodate the present and future demands of the nation's commerce and defense. In turn, the ratemaking features represent a measured response and minimal intrusion into the antitrust laws, but one necessary to secure the public benefits (contained in the statement of the need) and one which serves the regulatory purpose of "facilitating the free flow of commerce by guaranteeing an efficient terminal system."

As more fully set forth in the Facts, *supra*, the Proponents demonstrated that the nation's port system is in transition from an age of public funding of operational and capital investment costs to an era in which ports must finance their operations and capital improvements from revenues alone. This incoming era has brought with it an urgent need for sophisticated and exact decisionmaking by port managers in order to avoid the potential for profligate redundancy, while maintaining port efficiency, providing the shipping public with essential transportation services, preserving the delicate competitive balance within the system and fostering effective competition with foreign ports.

[28] Albeit the right of independent action is preserved.

I find that the ratemaking features of Article 2 of Agreement No. T–3856 meet the criteria enunciated in *Svenska* and warrant approval under section 15 of the Shipping Act.

I find further that the Agreement shall be amended to include a provision for termination at the end of five years from the date when Agreement No. T–3856 is approved by the Commission.[29]

ORDER

It is ordered that Agreement No. T-3856 be approved upon condition that Article 8 be amended to provide for termination five years after the date of approval by the Commission.

It is further ordered that, within five days after approval by the Commission, Proponents shall file with the Commission the amendment required under the terms of the preceding ordering paragraph.

(S) SEYMOUR GLANZER
Administrative Law Judge

[29] The provisions of 46 CFR 521.2(c) set forth the procedures for applying for an extension of an approved agreement due to expire by its own terms.

APPENDIX I

List of Members of Proponent Conferences at Time of Filing of Agreement No. T–3856

I. *MID-GULF SEAPORTS MARINE TERMINAL CONFERENCE (MGSMTC)*

(1) Alabama State Docks Department
(2) Board of Commissioners of the Port of Beaumont Navigation District of Jefferson County, Texas
(3) Board of Commissioners of Lake Charles Harbor and Terminal District
(4) Board of Commissioners of the Port of New Orleans
(5) Board of Trustees of the Galveston Wharves
(6) Greater Baton Rouge Port Commission
(7) Mississippi State Port Authority at Gulfport, Gulfport, Mississippi
(8) Orange County Navigation and Port District of Orange, Texas
(9) Port Commission of the Port of Houston Authority of Harris County, Texas
(10) South Louisiana Port Commission

II. *TERMINAL OPERATORS CONFERENCE OF HAMPTON ROADS (TOCHR)*

(1) Elizabeth River Terminals, Inc.
(2) Lamberts Point Docks, Inc.
(3) Maritime Terminals, Inc.
(4) Peninsula Terminals, Ltd.
(5) Portsmouth Terminals, Inc.
(6) Virginia Port Authority

III. *SOUTH ATLANTIC MARINE TERMINAL CONFERENCE (SAMTC)*

(1) Almont Shipping Company
(2) Brunswick Ports Authority
(3) Georgia Ports Authority
(4) Jacksonville Port Authority
(5) North Carolina State Ports Authority
(6) South Carolina State Ports Authority

APPENDIX II

Current List of Members of Proponent Conferences

I. *MID-GULF SEAPORTS MARINE TERMINAL CONFERENCE (MGSMTC)*

(1) Alabama State Docks Department
(2) Board of Commissioners of the Port of Beaumont Navigation District of Jefferson County, Texas
(3) Board of Commissioners of Lake Charles Harbor and Terminal District
(4) Board of Commissioners of the Port of New Orleans
(5) Board of Trustees of the Galveston Wharves
(6) Greater Baton Rouge Port Commission
(7) Mississippi State Port Authority at Gulfport, Gulfport, Mississippi
(8) Orange County Navigation and Port District of Orange, Texas
(9) Port Commission of the Port of Houston Authority of Harris County, Texas
(10) South Louisiana Port Commission

II. *TERMINAL OPERATORS CONFERENCE OF HAMPTON ROADS (TOCHR)*

(1) Elizabeth River Terminals, Inc.
(2) Lamberts Point Docks, Inc.
(3) Portsmouth Terminals, Inc.
(4) Virginia Port Authority
(5) Port Authority Terminals, Inc.
(6) Virginia International Terminals Corp.
(7) Pier 8 Terminal

III. *SOUTH ATLANTIC MARINE TERMINAL CONFERENCE (SAMTC)*

(1) Almont Shipping Company
(2) Brunswick Port Authority
(3) Georgia Ports Authority
(4) Jacksonville Port Authority
(5) North Carolina State Ports Authority
(6) South Carolina State Ports Authority
(7) Port Carriers, Inc.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–56

SNYDER GENERAL CORPORATION AND AIRCONDI REFRIGERATION (PTY), LTD.

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.

NOTICE

October 7, 1983

Notice is given that no exceptions have been filed to the August 31, 1983, 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. 82–56

SNYDER GENERAL CORPORATION AND AIRCONDI REFRIGERATION (PTY), LTD.[1]

v.

SOUTH AFRICAN MARINE CORPORATION, LTD.[2]

M. Troy Murrell for Complainants.

David A. Brauner for Respondent.

INITIAL DECISION[3] OF WILLIAM BEASLEY HARRIS, ADMINISTRATIVE LAW JUDGE

Finalized October 7, 1983

The complainants allege they have been injured by reason of respondent's overcharge for freight in the amount of $64,278.35 and seek reparation thereof in accordance with section 18(b)(3) of the Shipping Act, 1916. This proceeding, by consent of the parties and with approval of the Presiding Administrative Law Judge, was conducted under Shortened procedure, 46 C.F.R. 502.181 et seq., without oral hearing.

The original complaint herein was served December 3, 1982. At the prehearing conference in Washington, D.C., on Tuesday, February 1, 1983, the complainants requested and were granted leave to file an amended complaint (Tr. 11). The First Amended Complaint was served February 28, 1983. The respondent served its Answering Memorandum of Facts and Argument to First Amended Complaint March 16, 1983. The respondent stated, among other things, "There is absolutely no change in the substance of the Complaint or in the evidence submitted in support thereof . . . all of the arguments and citations contained in Respondent's Answering Memorandum of Facts and Argument to the original Complaint are equally applicable to and are hereby incorporated herein, and renewed in reply to the First Amended Complaint."

The amended complaint alleges that the Complainant Snyder is a Texas corporation engaged in the manufacturing of heating and air conditioning equipment. Its principal place of business is Red Bud, Illinois. Its export operations are conducted from its office in Carteret, New Jersey. Complain-

[1] Added as a complainant in First Amended Complaint.

[2] Two, named as respondents in the original complaint, Springbok Line Limited and Springbok Shipping Company Limited, by stipulation of the parties at February 1, 1983 prehearing conference (Tr. 16), were dismissed from this complaint.

[3] 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).

ant Aircondi is a concern in the business of buying and selling refrigeration equipment. Its principal place of business is Pretoria, South Africa.

Respondent, South African Marine Corp., Ltd., does not dispute the fact that the shipments which are the subject of this proceeding were made and billed as set forth in the complaint and further concedes that it was the common carrier by water with respect thereto (Answering Memorandum of Facts and Argument served December 22, 1982, Received December 27, 1982).

The Commission's Office of Energy and Environmental Impact, under date of December 21, 1982, reported it had examined this Docket No. 82–56 and determined that no environmental analysis needs to be undertaken and no environmental documents prepared in connection with this docket.

There are six (6) shipments involved. The South African Marine Corporation (N.Y.), as Agents, Bills of Lading show:

B/L No. 18 dated at New York (date illeginle). The Singer Company Climate Control Division shipped on the vessel *Iktinos* for discharge at Capetown, South Africa.

One—20′ Container—STC
52 Cartons of Industrial Air Conditioning & Parts
Gross Weight 6,351 lbs. 292 cft.
Freight Forwarder—American Forwarder Service, Inc. FMC–1657–R
Paid Freight
Consignee—Aircondi Refrigeration, Pretoria, South Africa
Freight Prepaid—Sailing date July 10, 1982. Alleged overcharge for freight is $3,333.41

1. *S.A. Iktinos*. The complainant alleges the products coded as CC are self-contained products and less than 60,000 BTU/HR as illustrated by Climate Control Brochure attahced as document #2. The freight rate charged for the products was $166.50 M3. The total freight bill for these products was $4,858.13 as illustrated by Document #3. As stated above, Document #3 is illegible. Copy of check is also illegible. Nor has complainant proved by a preponderance of the evidence that the commodity shipped was Air Conditioners, Self-Contained (nor Air Conditioning Equipment). Complainant says the units shipped on the *Iktinos* were entirely self-contained air conditioners. It was without question that the "CC" units were heat pumps.

Respondent says Claimant attaches to its memoranda a tariff page that shows a higher rate for self-contained air conditioners.

B/L No. 3 dated at New York (date illegible). The Singer Company Climate Control Division shipped on the vessel *S.A. Morgenster* for discharge at Durban/South Africa,

3–40′ H/H Containers STC
Industrial Air Conditioners
Container #1TLU5035777

Said to contain 255 ctn—21,955 lbs. 1973–0 cft.

Container #SCXU4263632

Said to contain 193 ctn—16,757 lbs. 1517–10 cft.

Container #SCXU4302580

Said to contain—29,600 lbs. 1640–0 cft.

Freight Forwarder—The Singer Co. Export Import Dept.
Paid Freight
Consignee—Aircondi Refrigeration, Pretoria, South Africa
Freight Prepaid—Sailing date May 8, 1981. Overcharge for freight allegedly is $10,601.74

2. *S.A. Morgenster.* The complainant alleges the products coded as EA are self-contained products and less than 60,000 BTU/HR. The respondent says the EA unit is conceded to be apparently self-contained.

The documents as to payment are illegible.

B/L No. 13 dated 12/31/82 at New York. The Singer Company Climate Control Division shipped on the vessel *S.A. Constantia* for discharge at Durban/South Africa,

One—40′ Container STC

228 Ctns Air Conditioning Machinery Equipment
Gross Weight 32,180 lbs. 1966 cft.

One Container NR CTIU443900–7

One—40′ Container STC

138 Ctns and 8 crates Air Conditioning Machinery Equipment
Gross Weight 36,196 lbs. 1691 cft.

One—40′ Container STC

294 Ctns Air Conditioning Machinery Equipment
Gross Weight 32,028 lbs. 1969 cft.

One—40′ Container STC

228 Ctns Air Conditioning Machinery Equipment
Gross Weight 31,616 lbs. 1846 cft.

Freight Forwarder—American Forwarding Services, Inc. FMC 1657–R

Consignee—Aircondi Refrigeration, Pretoria, South Africa
Freight collect. Sailing date December 31, 1981. Overcharge of $14,190.18 alleged.

3. *S.A. Constantia.* The complainant alleges the products, coded as EA, are self-contained products and less than 60,000 BTU/HR. The products, coded as AJ and AK, are compressors for the products coded EJ and EK.

Respondent says although the EA, EJ and EK units appear to be self-contained the only way this shipment could be entitled to self-contained

air conditioner rate would be on the basis of Rule 2(G). However Tariff contains specific rates for compressors.

B/L No. 35 dated 5/7/82 at New York. The Climate Control Division of Snyder Gen. Corp. shipped on the vessel *Ostfriesland* for discharge at Durban/South Africa,

One—40′ Container H/H STC
238 Cartons—Air Conditioning Machinery & Parts
Gross Weight 31,356 #1825 cft.
14,223 Kg 51.679M3
One—40′ Container H/H STC
262 Cartons—Air Conditioning Machinery & Parts
Gross Weight 31,644 #1846 cft.
14,354 Kg 52.274M3
One—40′ Container H/H STC
210 Cartons—Air Conditioning Machinery & Parts
Gross Weight 31,020 #1799 cft.
14,071 Kg 50.943M3
One—20′ Container H/H STC
70 Cartons—Air Conditioning Machinery & Parts
Gross Weight 14,140 # 814 cft.
6,414 Kg 23.050M3
Freight Forwarder—Rohner, Gehrig & Co. Inc. FMC 375
Notify Aircondi Refrigeration, Pretoria, South Africa
Freight Collect
Sailing date May 7, 1982. Complainants claim to have been overcharged $13,644.37

4. *Ostfriesland.* The complainant alleges the products, coded as EA, are self-contained products and less than 60,000 BTU/HR. Checks are illegible.

Respondent says the EA unit described herein appears to be self-contained. However says complainant submits wrong tariff page in support of claim. It would be the 21st revision of Page 153 which reflects a rate of $77.00 not $85.50 as sought by claimant. Complainant says it will gladly accept respondent's suggestion of a $77.00 tariff rate with respect to this shipment.

B/L No. 11 dated at New York (date illegible). The Singer Company Climate Control Division shipped on the vessel *Iason* for discharge at Durban/South Africa. Overcharge for freight allegedly $3,615.56.

One—40′ Container STC
227 Cartons Air Conditioning Machinery Equipment
Gross Weight 18,728 lbs.-1,545 cft.

Freight Forwarder—American Forwarding Services, Inc. FMC 1657–R

Consignee—Aircondi Refrigeration, Pretoria, South Africa

Freight collect. Sailing date December 4, 1981.

5. *Iason.* The complainant alleges the products, coded as HW, are self-contained air conditioners and less than 60,000 BTU/HR. The products, coded as EJ, are self-contained products and less than 60,000 BTU/HR. The products, coded as AR, are self-contained products and less than 60,000 BTU/HR.

Respondent says the HW system described herein is, by its own literature, a split system and therefore irrefutably not self-contained although it does appear to be under 60,000 BTU's in capacity. The EJ unit appears to be self-contained. The AR unit is not by any means an air conditioner, it is a "remote condensing unit." The appropriate rate for this unit is probably, "machinery NOS" at $274.00.

Neither the HW nor AR units are entitled to self-contained air-conditioner treatment.

B/L (No. and date illegible) at New York. The Singer Company Climate Control Division shipped on the vessel *Alanti* for discharge at Durban/South Africa,

One—40′ Container STC

233 Cartons—Air Conditioning Machinery Equipment

Gross Weight 31,140 lbs. 1779 cft.

Freight Forwarder—American Forwarding Services, Inc. FMC 1657–R

Consignee—Aircondi Refrigeration Freight Collect.

Sailing date January 8, 1982. Overcharge of $3,425.57 alleged.

6. *Alanti.* The complainant alleges the products, coded as EA, are self-contained products and less than 60,000 BTU/HR.

The respondent says the EA unit described is self-contained but the part in question is the heating coil bringing into focus the previously made argument concerning whether these combined heating-cooling units are, under any circumstances, entitled to air conditioner treatment.

Claimant says such heat pumps are entitled to air conditioner treatment.

The burden of proof that the complainant has to meet is proof by a preponderance of the evidence as to what is claimed.

The applicable tariff covering all shipments is United States/South and East Africa Conference, Southbound Freight Tariff No. 6, FMC No. 8, From: United States Atlantic and Gulf Ports To: Ports in Southwest, South, Southeast and East Africa and the Islands of Malagasy Republic (Madagascar) Reunion, Mauritius, Comotos, Ascension, Seychelles, St. Helena, as named. The 16th Revised Page 153 of the Tariff, effective date July 1, 1981 Item 130—Air Conditioners, Self Contained (See Rule 21) (not air conditioning machinery) C (contract) Capetown, 142.50, 1 Note: when

shipped in carriers standard 12.19 m container on a house-to-house movement shall be subject to minimum utilization of 49.53 CBM per container of one commodity or any combination of the following commodities at $85.50 W/M Contract basis Capetown/Durban Range Exception to Rule 20–13–15, 16 and 17.

The complainant stated, because of the number of shipments and the volume of documents presented herewith for each shipment, the Memorandum of Facts and Argument is presented separately by shipment, with the documents pertaining to each shipment immediately following the recitation of facts and arguments for that shipment (page 1 complainant's Memorandum of Facts and Argument received June 14, 1983).

Discussion, Reasons, Findings and Conclusions

In this proceeding the complainants seek, *inter alia*, reparation in the amount of $64,278.35; an order commanding the respondent to cease and desist from violation of the Shipping Act, 1916. Of course, the burden of proof is upon the proponent of the . . . order (Rule 155, Commission Rules of Practice and Procedure, 46 C.F.R. 502.155), to prove by a preponderance of the evidence the claim.

The complainant Snyder General Corporation's allegation of being the successor in interest to the Climate Control Division of the Singer Company, brought a prove it response from the respondent. Respondent asserts that the claimant's bold allegation of being the "successor in interest" to the Singer Company's Climate Control Division hardly constitutes even a scintilla of evidence to that effect much less that such allegation, even if true, gives claimant standing to pursue this claim. (Respondent Memorandum of Facts and Argument, received December 27, 1982, page 3.) And, respondent says, insofar as the standing of Aircondi to pursue this claim is concerned, there is no more evidence that Aircondi paid the freight charges on some or all of the subject shipments than there was that Snyder had paid such charges. The mere fact that the bills of lading indicate "freight collect" is not sufficient to give Aircondi standing herein. Documentary evidence of the actual payment of the freight charges by Aircondi or Snyder, as the case may be, or an assignment from the person who did pay such charges, is required to confer standing. (Answering Memorandum of Facts and Arguments to First Amended Complaint, received March 21, 1983, pages 2 and 3.) The complainants in their reply (served July 5, 1983) to respondent's contention that no evidence has been submitted to support the proposition that Snyder is the successor in interest to the Singer Company, state that Snyder purchased the Climate Control Division of the Singer Co. on April 3, 1982. The contract pursuant to which that purchase was made is voluminous; the closing documents comprise two bound volumes consisting of almost 2,000 pages. That is not, and should not be, an issue in this case. However, if the Commission feels that such proof is necessary, it can be furnished by supplemental affidavit, although

the complainant maintains that the same is not material and constitutes an invasion of privacy of both the Singer Company and Snyder General Corporation (pages 2 and 3). The complainant failed to cite any Commission or judicial decision in support.

Respondents argue that the complaint is deficient in that it failed to provide paid freight bills in support of the claim for reparation as provided in Rule 186 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.186. Without these documents it cannot even be determined whether, in fact, claimant paid the freight charges. Claimant submits, in support of its complaint in this regard, copies of five checks, four of which are such poor copies as to be illegible in various significant respects such as payee and amount. Respondent requests that it be provided with legible copies of the documents. (Answering Memorandum of Facts and Argument, received December 27, 1982, page 2.) No evidence was submitted with the First Amended Complaint other than duplicate copies of documents submitted with the original complaint which, incidentally, are as illegible as those submitted previously. (March 23, 1983 Answering Memorandum to First Amended Complaint, page 3.)

The respondent asserts that complainant's submission of Memorandum of Facts and Arguments under cover letter of June 13, 1983, represents complainant's third "formal" opportunity to document and support its case. (Respondent's Answering Memorandum of Facts and Arguments received June 28, 1983, page 2.) Respondent says that complainant has still failed to submit adequate evidence of the payment of the freight charges by either Snyder or Aircondi (Ibid. p. 3). Only the actual payment of freight charges by a Complainant or receipt of an assignment from the actual payor of freight charges creates standing to pursue a claim for reparation (Ibid. p. 4). Complainant having failed to provide such evidence on at least three separate occasions in formal submissions to the Commission, it must be concluded that no such evidence exists and/or no such payment was made (Ibid.).

Complainants submit that the evidence of payment to South African Marine is complete with respect to each and every shipment; that respondent presents absolutely no evidence, and indeed does not even argue, that South African Marine was not paid (Complainant's Reply Brief received July 12, 1983, page 2).

As to issue of legibility, the complainants argue that those attachments which were submitted are as legible as can be obtained from the microfilm records which were thereafter photocopied.

The Presiding Administrative Law Judge upon consideration of the above, *finds* and *concludes* that the complainant acknowledges if proof is needed that Snyder is successor in interest to the Climate Control Division of the Singer Co., it can be furnished by supplemental affidavit. Thus complainant tacitly admits such proof is needed. The respondent has alluded to the complainant having had three "formal" opportunities to document

and support its case. This case is not the same as a special docket application under section 18(b)(3) of the Act where there is only the applicant(s) seeking permission to waive collection of or refund a portion of freight charges for the benefit of person who paid or is responsible for payment of freight charges. In such cases additional information is sometimes sought and obtained to complete processing the application. In this shortened procedure case, in which there is a complainant and respondent, it is an adversary proceeding. And, the memorandum should contain concise arguments and fact, the same as would be offered if a formal hearing were held and briefs filed. If reparation is sought, paid freight bills should accompany complainant's original memorandum (Rule 186 of Commission's Rules of Practice and Procedure, 46 C.F.R. 502.186). Complainants have had ample opportunity to prove they have standing to pursue their claim. There is no reason, equitable or otherwise, to allow complainants any further opportunity to prove they have standing to sue. Respondent has already been subjected to lengthy proceedings and fairness dictates that the decision in this proceeding be made on what has been submitted. See *Pacific Freight Audit, Inc.* v. *Sea-Land Service, Inc.*, Docket No. 78–24, *Pacific Freight Audit, Inc.* v. *American President Lines*, Docket No. 78–25, 22 F.M.C. 207 (1979).

The complainants seek reparation. To seek reparation a person must show proof of pecuniary loss or valid succession to another's claim. See *Fiat-Allis Construction Machinery Co.* v. *Sea-Land Service Co.*, Docket Nos. 810(I), 811(I), 20 SRR 481, 482 (1980) citing *Trane Co.* v. *South African Marine Corp.*, Docket No. 76–25, 19 F.M.C. 375 (1976), *Ocean Freight Consultants, Inc.* v. *The Bank Line, Ltd.*, Docket No. 1185, 9 F.M.C. 211 (1966).

In its answering memorandum of facts and argument received December 27, 1982, the respondent requested that it be supplied with legible copies of documents. The complainant did not comply. Rule 111 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.111 calls for clear and legible copies. The Presiding Administrative Law Judge *finds* and *concludes* some of the documents are not clear and legible, for example Documents 2 (consisting of 5 pages), 4 and 7 as to the vessel *S.A. Iktinos*.

Thus, the failure of the complainants to prove they have standing to sue, after at least three opportunities to do so, warrants no further opportunity by amendment of the complaint but does warrant dismissal of the complaint.

The merits as to each separate shipment was considered herein above as the complainant aligned them in the booklet containing them in complainant's Memorandum of Facts and Argument received June 14, 1983.

The only case mentioned by the complainants is the *Fedders* case cited by the respondent, *Fedders World Trade Corporation* v. *South African Marine, Ltd.*, Informal Docket No. 1242(I), 1983. The complainants respectfully urge that Commission applied the wrong interpretation to the phrase

''self-contained.'' If one strictly applied the Commission's standard enunciated in *Fedder*, then even a through-the-window air conditioning unit would not qualify for self-contained treatment, since all it does is ''bestir ambient air.'' Yet, no one would seriously argue that such unit is not a self-contained air conditioner. Complainants submit that the Commission should carefully re-examine the meaning of ''self-contained.'' However the complainant offers no substantive suggestions as to what any re-examination should consider or for that matter what is self-contained as it applies in this case.

One further observation, the tariff page submitted herein presents a code (C) denotes contract rates, (S) single rates. (See Rule 14 for noncontract rates.) The rates the complainant proposes as applicable are all C or contract rates. The complainants did not introduce any evidence tending to show they were eligible for the carrier's contract rate. The Commission has determined that where a claimant is seeking the benefit of a contract rate, evidence should be adduced showing that the shipper was indeed eligible for such rate. *National Starch & Chemical Corp.* v. *Hapag-Lloyd & United States Navigation, Inc., Agent,* Informal Docket No. 340(1), 20 F.M.C. 321 (1977).

In addition to the findings above, the Presiding Administrative Law Judge *finds* and *concludes* that the complainants have failed to prove by a preponderance of the evidence the burden of their claims. This complaint should be dismissed.

Wherefore, it is *ordered:*

(A) Complaint is dismissed.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 81–75

E.A. JUFFALI & BROTHERS

v.

WATERMAN STEAMSHIP COMPANY

ORDER OF ADOPTION

October 21, 1983

The proceeding is before the Commission on Exceptions of Complainant E.A. Juffali and Brothers and the Reply of Respondent Waterman Steamship Company, to the Initial Decision of Administrative Law Judge Joseph N. Ingolia, in which he denied the Complainant's request for refund of freight overcharges. Complainant also excepts to the Presiding Officer's Order of July 12, 1983, denying a motion that he recuse himself. For the reasons set forth below, the Initial Decision rendered in this proceeding as well as the Presiding Officer's denial of the Motion to Recuse Himself are hereby adopted by the Commission.

DISCUSSION

The complaint alleges freight overcharges in the amount of $19,191.77 on five shipments of household freezers carried by Respondent from Norfolk, Virginia, to Damman, Saudi Arabia. The overcharges allegedly stem from Respondent's refusal to grant a $3.00 pallet allowance provided in Rule 28 of the applicable tariff.[1]

The Presiding Officer denied relief on the ground that, although the shipments were delivered on pallets, Complainant had failed to prove that the pallets complied with the requirements of the tariff. The Presiding Officer also rejected a request of counsel for Complainant to recuse himself from the case for his allegedly "intemperate overreaction" to Complainant's request for a postponement of the hearing and "insuitability" to be impartial in this matter.

On Exceptions, Complainant contends that the Presiding Officer misinterpreted both the facts and the tariff when he concluded that the conditions set forth in Rule 28 were material elements which called for strict compliance and that Complainant had not shown that the shipments met those requirements. Complainant's position is that Items 2 through 5 of the Rule

[1] "8900" Rate Agreement, F.M.C. Agreement No. 8900, Freight Tariff No. 8, F.M.C. No. 8, 1st and 2nd rev. page 35, effective 11/1/80 and 6/1/80, respectively, and original page 36, effective 8/1/79.

are merely "technical" in nature so that non-compliance with those requirements should not bar recovery if what was actually shipped can be identified. Complainant points out that the bills of lading not only confirm that the freezers moved on pallets, but also show the total weight and measurements of each shipment, which confirm that on the average, the pallets exceeded the 2000 pounds or 40 cubic feet minimum requirement of Tariff Item (3)(b).

With respect to the Presiding Officer's refusal to remove himself from the case, Complainant contends that the Presiding Officer's "patently improper conclusion" supports the request for recusal, as well as his "intemperate and unjudicial" treatment of an application for extension of time which demonstrated obvious predisposition towards one of the parties. Complainant therefore asks that the Initial Decision be reversed and Complainant be granted the relief requested.

Respondent disagrees with the argument that the mere statement in the bills of lading of the gross weight and measurements and of the number of pallets satisfied the requirements of Rule 28. Respondent maintains that Complainant has failed to show by a preponderance of the evidence that the packing of the cargo actually complied with the material elements of the palletization allowance rule.[2]

Upon a careful consideration of the record in this proceeding, the Commission affirms the Presiding Officer's finding that Complainant has not sustained its burden of proving by a preponderance of the evidence that the pallets satisfied the requirements of Rule 28 of the tariff and supports his refusal to recuse himself from the proceeding.

Complainant's argument that the conditions set forth in Rule 28 are merely "technical" and "procedural" and need not be strictly adhered to is without merit. As the Presiding Officer correctly found, those conditions are material elements of the palletization rule in that the rationale for requiring that the pallets be constructed in a certain manner is the benefit to the carrier of greater efficiency in loading and handling the cargo.[3] While the bills of lading confirm that the shipments were palletized, the record contains no evidence that the pallets complied with the other requirements of the palletization rule.

A tariff must be considered in whole and not in part in order to avoid discrimination among shippers. *Storage Practices at Longview, Wash.*, 6 F.M.B. 178, 182 (1960). Rule 28 requires among other things that the pallets be constructed to provide a lip of at least 4 inches on two opposite sides for the lighting aboard vessel with ship's own equipment and that the pallets be double decked and constructed so as to permit the entry

[2] Even though it finds it irrelevant, Respondent also objects to Complainant's introduction at this stage of the proceeding of a telex and a letter from the export packer, attached to Complainant's brief on exceptions, which were not offered in evidence in the course of the hearing nor mentioned in Complainant's post-hearing brief.

[3] Rule 28 does not apply to palletized cargo moving in containers or on trailers.

of forks or fingers of fork lift trucks or pallet trucks. Apart from showing that the shipments were palletized, Complainant has failed to prove that the pallets met any of those requirements. Furthermore, Complainant's attempt to show that the pallets complied with the weight and measurements requirements of the Rule is meaningless. Because not all the pallets contained the same number of pieces, averaging the total weight and measurement of the pallets in each shipment, as Complainant suggests, does not necessarily prove that each pallet exceeded the minimum weight or measurement requirement of Item (3)(b) of the Rule. See *e.g. Singer Manufacturing Co., Inc.* v. *Delta Steamship Lines, Inc.*, 24 F.M.C. 907 (1982); *The Carborundum Company* v. *Venezuelan Line*, 17 F.M.C. 195 (1973); *Kraft Foods* v. *Prudential Grace Line*, 17 F.M.C. 159 (1973).

With respect to Complainant's challenge to the Presiding Officer's denial of the Motion to Recuse Himself, the record is completely devoid of any evidence that Complainant's counsel was subjected to any abuse. In *National Labor Relations Board* v. *Webb Ford, Inc.*, 689 F.2d 733 (7th Cir. 1982), the court stated:

> Our standard in determining whether an ALJ's display of bias or hostility requires setting aside his findings and conclusions and remanding the case for hearing before a new ALJ is an exacting one, and requires that his conduct be so extreme that it deprives the hearing of the fairness and impartiality necessary to the fundamental fairness required by due process. [Citations omitted.]

Nothing in this record reflects a lack of fairness and impartiality on the part of the Presiding Officer. Rather, in light of the Commission's time limit on the hearing, it tends to indicate the Presiding Officer's concern for an orderly and speedy disposition of the proceeding. *See In re IBM Corp.*, 618 F.2d 923 (2d Cir. 1980). Furthermore, the rendering of an adverse decision is not an indication of bias on the part of the Presiding Officer. *Capitol Transportation, Inc.* v. *U.S.*, 612 F.2d 1312 (1st Cir. 1979).

In conclusion, the Commission finds that the record supports the Presiding Officer's denial of the pallet allowance as well as his refusal to remove himself from the proceeding. Other contentions and arguments not specifically discussed have nevertheless been carefully considered and found to be either without merit or irrelevant to the issues presented.

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge Joseph N. Ingolia rendered in this proceeding as well as his denial of the Motion to Recuse Himself are adopted by the Commission and made a part hereof.

IT IS FURTHER ORDERED, That the complaint is dismissed.

FINALLY IT IS ORDERED, That the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 81–75

E.A. JUFFALI & BROTHERS

v.

WATERMAN STEAMSHIP COMPANY

1. Where a tariff provided for a pallet allowance of $3.00 per 40 cu. ft., and further contained specific requirements including those that the pallets had to be constructed and stacked in a prescribed manner for loading, it is the complainant's burden of proof to establish that those requirements have been met. Such requirements are not merely "technical" in nature and are the basis of the pallet allowance in the first instance.
2. Where the record contains bills of lading indicating that household freezers moved on pallets, such description standing alone is insufficient to establish that the tariff requirements giving rise to a pallet allowance have been met and the complainant has failed in its burden of proving what was actually shipped.

Henry Martin and *Paul S. Aufrichtig* for complainant.

George H. Hearn for respondent.

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

ADOPTED OCTOBER 21, 1983

By complaint filed on December 10, 1981, E.A. Juffali & Brothers (Juffali) alleged that Waterman Steamship Corporation (Waterman) had subjected it to payment of rates for ocean transportation in violation of section 18(b)(3) of the Shipping Act, 1961. The allegation is based on the failure of Waterman to make a pallet allowance for household freezers shipped by Juffali aboard vessels owned by Waterman. More detailed facts and discussion are set forth below.

FINDINGS OF FACT

1. On December 10, 1981, the complainant filed a complaint wherein it alleged that the respondent had subjected Juffali to:

> * * * assessment of an ocean freight rate on an exported commodity which is entitled to a pallet allowance properly applicable in accordance with the issued tariff filed with the Federal Maritime Commission and in effect at the time of this shipment.
>
> We challenge the omission of the pallet allowance for tariff No. 8, rule 25, page 5.

[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 CFR 502.227).

> * * * E.A. Juffali & Brothers has been subjected to payment of freight rate(s) without pallet allowance which is unjust and unreasonable and in violation of 18(b)(3)[2]
>
> Complainant prays that the respondent be required to * * * pay to said complainant by way of reparation for the unlawful charge(s) described in the attached claims the sum of "19,191.77." (Complaint)

2. The complainant submitted bills of lading for the record indicating that it made five shipments of household freezers from Norfolk, Virginia, to Damman, Saudi Arabia, during the period March 20, 1980, through July 8, 1980, aboard Waterman vessels (Attachment to Complaint).

3. At the time the shipments described in paragraph (2) above were made, "The '8900' Rate Agreement (under F.M.C. Agreement No. 8900), Freight Tariff No. 8, FMC No. 8" tariff was in effect. Page 35, Rule 28 of the tariff, in pertinent part, is as follows:

28. *PALLETIZED CARGO:*

1. The provisions in these rules will apply only to prepalletized cargo on shipper's non-returnable pallets, *except not applicable* to the following commodities:

TARIFF ITEMS:

(*)30	Air Conditioners/Coolers & Parts.
305	Sodium Tripolyphosphate.
....	All Dangerous and Hazardous Cargo Items in Accordance with Rule 16.
420	Drilling Muds, Clays and Additives.
425	Drugs, Medicines and Pharmaceuticals (Refrigerated Stowage only).
490	Feed, Animal or Poultry, Packed.
530	Flour, not prepared, packed in Bags or Balers.
795	Meal, including Soybean, Cottonseed and Meat.
905	Photographic Apparatus, Equipment etc. as described in Item 905 (Refrigerated Stowage only).
995	All Refrigerated Cargo.
(*)1000	Refrigerators or Freezers, H.H.
1015	Rice, packed in bags or balers.
1065	Salt, Table
(*)1155	Stoves, Ranges or Ovens and Parts.
(*)1265	Washing Machines & Dryers, H.H.

(*) Applicable via Waterman-Isthmian Line Only.

Rule 28 at Page 36 also provided, in pertinent part, that:

[2] The complainant later amended the complaint to include section 22 of the Shipping Act, 1916.

28. *PALLETIZED CARGO: (Continued)*

2. These rules do not apply to palletized cargo shipped in cargo containers and trailers.

3. (a) Shipper to indicate at time of booking that the shipment will be pre-palletized (it being understood that each unit is to comprise cargo destined for one port of discharge and to one consignee only.)

   (b) The gross weight or measurement of the pallet and cargo shall not be less than 2000 lbs. or alternatively 40 cubic feet, nor exceed 4480 lbs.

   (c) Pallets with cargo (unit load) are to be of sufficient strength to withstand the ordinary risks of the ocean voyage and for handling and movement during loading and discharge by slings, for lift trucks etc. in respect of which it is the shipper's responsibility to ensure that these conditions are fulfilled.

Pallets must be constructed to provide a lip of at least 4 inches on two opposite sides for lifting aboard vessel with ship's equipment.

Furthermore, the pallet must be double decked and constructed so as to permit the entry of forks or fingers of fork lift trucks or pallet trucks preferably from any side but at least from two opposite sides.

Recommendable size of pallet 40" by 48".

   (d) The unit load (cargo and pallet) must be squared on all four sides, level on top, be of sufficient strength to allow overstowage by other pallets and/or other cargo and the cargo must completely cover and preferably overlap the pallet. It is recommended that the overlap does not exceed about one inch on any one side.

Cargo must be securely fastened on pallets.

   (e) When pallet load is made up of more than one commodity, and provided the carrier is supplied with shipper or supplier's packing list showing dimensions and contents of each package on the pallet, the freight will be assessed on basis of the rate applicable on each individually packed commodity. However, if a package contains more than one commodity, the rate for the highest rated commodity contained therein must be assessed on the package.

   (f) The identifying marks including the port mark and gross weight of the cargo and pallet to be clearly visible on two opposite sides, viz.: those sides adopted for fork lift entry.

   (g) Where dangerous cargo is concerned, if more than one commodity is included in the unit load, the commodities must be compatible in classification and stowage requirements and the statutory regulations of the country of the carrying Line as to marking, labelling and packing both of unit load and individual package must be strictly observed.

4. Bills of Lading shall be claused as follows:
   "__________ pallet (s) said to contain __________ packages of __________ pounds gross weight, including gross weight of Pallet (s)."

5. (a) Freight-charges on shipments complying with this rule will be assessed on the measurement (based on tariff rule 21) or weight of the cargo which information must appear on the Bill of Lading and supported by certified packing list. If the measurement of the unit load (cargo and pallet) Rule 5(b) below applies. In the event at time of shipment the packing list is not supplied by the shipper or forwarder or alternatively at the shipper's request Rule 5–B will apply instead of 5–A.

   (b) On Unit loads complying with this rule the cubic measurement shall be determined by subtracting 10% of the overall cubic measurement of the unit load. On cargo freighted on a weight basis the freight to be charged on the gross weight of the unit load less an allowance of 5%.

   (c) Further a discount of three dollars ($3.00) per revenue ton for cargo moving under the terms and conditions of this rule will be made.

(Exhibits 1, 2 and 5)

4. Effective September 26, 1980, Page 35 of Rule 28 was changed as follows:

28. *PALLETIZED CARGO:*

1. The provisions in these rules will apply only to pre-palletized cargo on shipper's non-returnable pallets, *except not applicable* to the following commodities:

TARIFF ITEMS:

305	Sodium Tripolyphosphate.
....	All Dangerous and Hazardous Cargo Items in Accordance with Rule 16.
425	Drugs, Medicines and Pharmaceuticals (Refrigerated Stowage only).
490	Feed, Animal or Poultry, Packed.
530	Flour, not prepared, packed in Bags or Balers.
795	Meal, including Soybean, Cottonseed and Meat.
905	Photographic Apparatus, Equipment etc. as described in Item 905 (Refrigerated Stowage only).
995	All Refrigerated Cargo.
1015	Rice, packed in bags or balers.
1065	Salt, Table.

(Attachment to Complainant's Post Hearing Brief.)

5. After the shipments involved here were made Ocean Freight Consultants (OFC) conducted a post-audit of the complainant's shipping expenses. As a result it filed five overcharge claims for a total amount of $19,191.77 with Waterman, dated December 8, 1980. The basis for the claims was as follows:

> "*Reason for correction:* Pallet allowance omitted in error, see Rule 28, 'applicable via Waterman Line only. PLEASE SEND US A COPY OF CORRECTION NOTICE'."
> (Attachments to complaint.)

6. After receiving the overcharge claims Waterman issued correction notices in the amount claimed during the period December 1980, through March 1981. However, Waterman later cancelled the corrections and made no refunds. (Attachment 3 to Respondent's Post Hearing Brief.)

7. By letter dated April 23, 1981, the complainant wrote the Federal Maritime Commission (FMC) as follows:

Mr. James A. Warner, Chief
Office of Foreign Tariffs
Bureau of Tariffs
Federal Maritime Commission
Washington, D.C. 20573

Dear Mr. Warner:

We are sorry to be directed to you so needlessly but we have encountered a confusing exemption which leads us to a dual interpretation of Rule 28 on page 35 1st rev. in freight tariff No. FMC No. 8.

In this rule there is a list of tariff items that are excluded from the benefits of the provision. Within the list item 1000 appears exempting refrigerators from being eligible for the pallet allowance. However, the asterisk and its explanations denote that shipments of refrigerators carried via Waterman Line would in fact be granted the allowance provided by Rule 28. If this is not the case, it is our contention that all other carriers maintained by your conference would have been listed instead making it clear that the exemption for refrigerators is *NOT APPLICABLE* to them but it is applicable to Waterman only.

In addition, we would also like to make mention of the fact that this particular carrier had amended previous shipments via manifest correction notices therefore agreeing with our contention as stated above. We ask kindly for your informal opinion so we may have the understanding intended and will consequently be guided in the right direction.

Sincerely,
(S) ROBERT LEE

P.S. Another point for consideration is the matter of ambiguity in the tariff, which as a general rule and if ambiguity does exist, it should be decided in favor of the shipper and not the writer of the tariff, in this case the conference or the steamship company.

(Attachment to complaint.)

8. The reply to the letter dated May 28, 1981, was as follows:

Mr. Robert Lee
The OFC Group
World Headquarters
1 World Trade Center
Suite 2473
New York, New York 10048

Dear Mr. Lee:

Reference is made to your letter dated April 23, 1981, with enclosures, seeking our informal opinion on the interpretation of Rule 28 published on 1st Revised Page 35 to 8900 Lines, Freight Tariff, FMC–8, as it applies to Waterman-Isthmian Line.

We agree with your contention, and the position as allegedly concurred in by Waterman-Isthmian Line, that those items annotated with an asterisk on the above tariff reference are subject to a pallet allowance when shipped via Waterman-Isthmian Line.

As you are perhaps aware, 3rd Revised Page 35 effective September 26, 1980, provides that Rule 28 is not applicable to Waterman-Isthmian Line. Therefore, from that date forward Waterman-Isthmian Line offers no allowances for pre-palletized cargo on shipper's non-returnable pallets.

If we can be of further service please feel free to call on us.

Sincerely yours,
(S) JAMES A. WARNER
JAMES A. WARNER, CHIEF
OFFICE OF FOREIGN TARIFFS
BUREAU OF TARIFFS

(Attachment to complaint.)

ULTIMATE FINDINGS OF FACT

9. The pallet allowance provided for in the pertinent tariff is applicable only after certain requirements set forth in the tariff have been satisfied.

10. Many of the requirements are not mere "technical" or "bookkeeping" requirements, but rather are material requirements directed to the manner in which the cargo is loaded and unloaded, which in turn, affect the costs of handling the cargo and the reason for the "pallet allowance" in the first instance.

11. The record in this case is insufficient and does not establish that the material requirements contained in the tariff have been satisfied so as to justify the pallet allowance. The complainant has failed to sustain its burden of proof.

DISCUSSION AND CONCLUSIONS

There is no controversy in this proceeding regarding the fact that the complainant made five shipments of household refrigerators aboard vessels of the respondent, and as to the date the shipments took place. The parties also agree that the tariff on file governing the shipment contained a basic rate of $106.00 per 40 cu. ft. Where they do disagree is on whether or not a pallet allowance of $3.00 per cu. ft. should be applied to each of the shipments giving rise to a refund of $19,191.77.

Initially, the parties argued the applicability of the pallet allowance on the basis of the meaning of page 35 of the tariff as set forth in the Findings of Fact, paragraph 3. The complainant argued that Rule 28, excepted certain tariff items from the palletized cargo rules, but that the four items bearing an asterisk and applicable to Waterman only, were not excepted and gave rise to the $3.00 per 40 cu. ft. allowance. On the other hand, the respondent argued that the text of Rule 28 identifies 13 commodity items for which no palletization will be provided by any of the member lines, and that as to the four asterisked items, including household refrigerators, the rule's nonapplicability would extend only to Waterman.

Once the case was at issue, the respondent also asserted that the complainant was not entitled to the pallet allowance "absent a showing that he has complied with the rule." He asserts that:

> Complainant's only evidence to substantiate his claim consists of bills of lading and single-page freight claims prepared by a freight consultant up to eight months after the cargoes were shipped. The bills of lading show only the gross weight and measurement of each shipment. The freight claims simply give a number of pallets and a gross measurement.
>
> Provisions of Rule 28(5) of the applicable tariff provide that shipments complying with all of the provisions of the rule will be assessed on the measurement or weight of the cargo, less the measurement of the pallet, if this information appears on

> the bill of lading and is supported by a certified packing list. In the event that the measurement of the pallet itself exceeds 10% of the measurement of the unit load (cargo and pallet), or if a certified packing list is not supplied, or upon the shipper's request, the freight charges will be reduced by 10% of the unit load measurement on measurement-rated cargo, or 5% of the unit load weight on weight-rated cargo.
>
> Section 4 of the Palletized Cargo Rule requires that bills of lading shall contain a clause stating the number of pallets, the number of packages, and the gross weight of the unit loads.
>
> Complaint has not complied with these requirements.

On the other hand the complainant argues that the "bills of lading issued by the Respondent correctly identify on their face that the goods in question were palletized." Further the complainant asserts:

> A review of the testimony demonstrates that the Respondent placed its principle emphasis for seeking to escape liability in this proceeding upon the alleged technical noncompliance by the Complainant with certain procedural aspects of Rule 28. The conditions to which Respondent alludes are procedural in nature only. Nothing can gainsay the fact that the shipment was accepted by Respondent and shipped as palletized cargo (and is identified as such on the bills of lading issued by the respondent). * * *

In their briefs both of the parties agree with the principle enunciated by the Commission in *Western Publishing Co.* v. *Hapag-Lloyd A.G.*, 13 SRR 16 (1972), that reparation for overcharges is based on what is actually shipped.[3] In supporting its view that the tariff palletization requirements here are merely technical in nature and should not bar recovery the complainant cites a series of cases. They indicate that the Commission has allowed reparation even though the shipper did not comply with the tariff trademark rule,[4] or has failed to indicate on the bill of lading that the cargo was proprietary even though the tariff requires such a designation.[5]

While we do not disagree with the holdings in these cases as well as others cited by the complainant, we do not think they are controlling here. In those cases the Commission *determined what was shipped and then held* that having once determined what moved it would apply the tariff rate despite the fact that the bill of lading might be in error, or

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[3] See also *Ocean Freight Consultants Inc.* v. *Italapacific Line*, 15 F.M.C. 314, 13 SRR 151 (1972); *Merck Sharp & Dohme (I.A.) Corp.* v. *Flota Mercante Grancolombiana, S.A.*, 18 F.M.C. 384, 14 SRR 1624 (1975).

[4] *Pan-American Health Organization* v. *Prudential Lines, Inc.*, 19 F.M.C. 412 (1976), where the tariff provided that, "Bills of lading describing articles by trade name are not acceptable for commodity rating. * * * Bill of lading reflecting only trade names will be automatically subject to application of the rate specified herein for Cargo N.O.S. as minimum." See also *Abbott Laboratories* v. *Venezuelan Line*, 19 F.M.C. 412 (1976); *Carborundum Co.* v. *Royal Netherlands Steamship Co. (Antilles) N.V.*, 19 F.M.C. 431 (1977).

[5] See *Durite Corp., Ltd.* v. *Sea-Land Service, Inc.*, 20 F.M.C. 674 (1978), where the tariff required the bill of lading to be claused. "All materials included in this bill of lading are of a wholly proprietary nature and may not be resold at destination * * *." See also *Cities Service International, Inc.* v. *The Lykes Bros. Steamship Co., Inc.*, 19 F.M.C. 128 (1976).

that the shipper misdescribed the cargo or that requirements as to trade names and proprietary cargo may not have been complied with. Here, we must determine "what moved" in light of the issue presented. In determining "what moved" we are not faced with the usual dilemma of identifying a particular commodity—there is no question that household refrigerators were shipped. Rather, in determining "what moved" here we must ascertain whether in shipping the refrigerators on pallets the complainant complied with the material requirements of the tariff which give rise to the pallet allowance in the first instance.

In essence, the complainant urges us to hold that since the bills of lading indicate the refrigerators were on pallets that is sufficient and all other tariff requirements are "technical" in nature. We cannot agree. While it may be true that some of the tariff's paper requirements are not material, it is obvious that others are. The $300 allowance is clearly based on the shipper's ability to construct the pallet to provide a 4 inch lip on two opposite sides, to permit the entry of fork lift trucks from at least two opposite sides, to allow the load to be stowed in a particular manner, etc.[6] These prerequisites are not technical but are obviously intended to allow for more efficient loading of the cargo, and that efficiency is precisely why any carrier would give a pallet allowance. Merely placing the refrigerator on a pallet is not sufficient.

So here, the complainant has the burden of establishing what was actually shipped.[7] Admittedly, that burden is in the Commission's words a "heavy burden" in that it is difficult to assimilate the necessary facts after shipment.[8] Such is the case here and the burden has not been met. The record is silent as to whether or not the palletized cargo satisfied any of the material requirements of the tariff rule and therefore the pallet allowance cannot be allowed. While cases of this nature will generally rise or fall on their own facts this case is similar to the Commission's holding in *Singer Products Co. Inc.* v. *Delta Steamship Lines Inc.*, 24 F.M.C. 907 (1982), Informal Docket No. 1120(I). Like *Singer*, there is a failure of proof.

In their briefs the parties make argument about whether the pallet allowance was ever claimed before by the complainant and about the effect of the respondent's issuance of correction notices. These facts while indirectly material are not controlling to the resolution of the issue here. The same is true regarding the correspondence with Commission personnel, especially where there is a question of whether or not all facts were known at the time the correspondence took place.

Finally, since we have held that the complainant has not met its burden of proof in establishing what was shipped, it is unnecessary to "interpret" the meaning of the respondent's tariff rule 28, page 35. We would be

[6] See Finding of Fact No. 3.
[7] *Western Publishing Co. Inc., supra.*
[8] *Sanrio Company, Ltd.* v. *Maersk Line*, 23 F.M.C. 150, 204 (1980).

remiss, however, if we did not comment by way of dicta that the language of the tariff and the rule itself was ambiguous and should be avoided in the future. In summary, we again wish to stress the fact that in our view, where a pallet allowance is predicated on satisfying material requirements enumerated in a tariff it is the responsibility of the shipper to prove what was actually shipped; namely whether cargo was correctly palletized so as to warrant the allowance. Conclusory statements on bills of lading are not enough to satisfy the "preponderance of the evidence" test, and the record must contain additional facts to establish just how the cargo was palletized in light of the tariff requirements. Any other result would establish a precedent whereby, in effect, the respondents in these cases would be asked to carry a burden of proof which rightfully is that of the complainants.

In light of the above, the relief sought in the complaint is denied and this matter is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–29

UNITED STATES NORTH ATLANTIC-ITALY POOL AGREEMENT
(AGREEMENT NO. 10286–2)

NOTICE

October 25, 1983

Notice is given that no appeal has been taken to the September 8, 1983, discontinuance of this proceeding and that the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-29

UNITED STATES NORTH ATLANTIC-ITALY POOL AGREEMENT (AGREEMENT NO. 10286-2)

MOTION TO WITHDRAW AGREEMENT GRANTED

Finalized October 25, 1983

The Proponents filed Agreement No. 10286-2 (Amendment No. 2), which amends Agreement No. 10286, a revenue pooling agreement among Costa Line, Farrell Lines, Inc., "Italia" S.p.A.N., Jugolinija, Sea-Land Service, Inc., and Zim Israel Navigation Company, Ltd. The Commission served an Order of Investigation and Hearing on July 13, 1983. By letter dated July 29, 1983, the Proponents by their counsel, withdrew Agreement No. 10286-2 and requested that this proceeding be discontinued. The Bureau of Hearing Counsel, the only other party to the proceeding, has not offered any objection to the discontinuance. Wherefore, it is

Ordered, that Docket No. 83-29 is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. PART 540]

DOCKET NO. 83–30

SECURITY FOR THE PROTECTION OF THE PUBLIC

ACTION: Discontinuance of Proceeding

SUMMARY: By notice published in this proceeding (48 F.R. 35675, August 5, 1983) the Federal Maritime Commission solicited comments regarding its regulations concerning the Proof of Financial Responsibility to meet Liability Incurred for Death or Injury to Passengers and Other Persons on Voyages and for Indemnification of Passengers for Nonperformance of Transportation (46 C.F.R. Part 540). This notice was published in conjunction with the Commission's review of the instant regulations conducted pursuant to section 610 of the Regulatory Flexibility Act (Pub. L. 96–354 94 Stat. 1164, 1169). No comments were received. Since the Commission is unaware of any need or basis for amending or modifying the requirements of Part 540 at this time and no comments were received, the Commission has decided to discontinue this proceeding.

DATE: Effective October 27, 1983.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–34

CONTRACT MARINE CARRIERS, INC.

v.

RICHMOND WATERFRONT TERMINALS, INC.

NOTICE

November 7, 1983

Notice is given that no appeal has been taken to the September 28, 1983 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. 83–34

CONTRACT MARINE CARRIERS, INC.

v.

RICHMOND WATERFRONT TERMINALS, INC.

COMPLAINT DISMISSED

Finalized November 7, 1983

This proceeding began with the filing of a complaint on August 17, 1983, by Contract Marine Carriers, Inc. which, for the purposes of the complaint, alleged that it is a common carrier by water. Complainant alleged furthermore that respondent Richmond Waterfront Terminals, Incorporated, a marine terminal operator, filed a "Port Improvement Fee" in its tariff effective August 1, 1983, which would be assessed against all cargo moved by complainant through respondent's wharves. Such fee, according to complainant, constituted an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916, and was prohibited by the Commission's regulations dealing with wharfage. At the request of the parties, I permitted respondent to defer filing its answer to the complaint to allow the parties to discuss the situation.

On September 22, 1983, complainant notified me and respondent by letter that it wished to withdraw its complaint on the ground that respondent has withdrawn the subject fee from its tariff, effective September 17, 1983.

In the instant case, as complainant notes, no answer has been filed. Customarily both the federal courts under Federal Rule 41(a)(1), 28 U.S.C.A., and the Commission recognize that a complainant has the right to withdraw its complaint without conditions when no answer has been filed and can do so under the federal rules merely by filing a notice of dismissal. See discussion in *Companhia Siderurgica Nacional* v. *Lloyd Brasileiro*, Complaint Dismissed, 25 F.M.C. 655 (1983).

Accordingly, the complaint is dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

46 C.F.R. PART 531

GENERAL ORDER 38, AMENDMENT 5; DOCKET NO. 83–51

PUBLISHING, FILING AND POSTING OF TARIFFS IN DOMESTIC OFFSHORE TRADE

December 8, 1983

ACTION: Final Rule.

SUMMARY: This amends Federal Maritime Commission tariff filing rules to provide for 24-hour receipt of tariff filings in the domestic offshore commerce, including those transmitted by use of electronic filing methods. This will benefit carriers and shippers by enabling them to meet commercial exigencies.

DATE: Effective December 14, 1983.

SUPPLEMENTARY INFORMATION: By Notice published in the *Federal Register* of October 25, 1983 (48 F.R. 49308-49309) the Commission proposed to amend its tariff rules for filings in the domestic offshore trade to permit the receipt of tariff filings on a 24-hour basis, including those transmitted by means of electronic filing methods.

Comments were received from Matson Navigation Company and United States Lines in response to the Notice. Both carriers supported the proposal fully. Accordingly, the Commission is adopting the proposed in final form.

The provisions of the Regulatory Flexibility Act (5 U.S.C. §601 *et seq.*) do not apply to this final rule. Section 601(2) of that Act excepts from its coverage any "rule of particular applicability relating to rates . . . or practices relating to such rates. . . ."

List of Subjects in 46 C.F.R. Part 531 Maritime Carriers, Reporting and Recordkeeping Requirements

Therefore, pursuant to 5 U.S.C. 553; section 43 of the Shipping Act, 1916 (46 U.S.C. 841(a)); and section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844), Part 531 of Title 46 is amended as follows:

Section 531.2 is amended by revising paragraph (i) to read as follows:

> (i) *File, Filed, Filing (of Tariff Matter).* The actual receipt by the Federal Maritime Commission at its offices in Washington, D.C., including those received by electronic transmission.
>
> (1) Electronic filings are those transmitted through the use of commercial data processing terminals and conforming to all the regulations applicable to permanent tariff filings.

Section 531.3 is amended by revising paragraph (e) to read as follows:

(e) Tariff matter will be received by the Commission at its Washington, D.C., offices on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time stamped at a tariff mail drop in the lobby of the Commission's Washington, D.C., offices. Electronic tariff filings transmitted by electronic modes will be receipted by a date/time device on the receiving machine.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–50

GENERAL MOTORS CORPORATION V. MAERSK LINE AND W.R. FILBIN & CO., INC.

NOTICE

December 13, 1983

Notice is given that no appeal has been taken to the November 3, 1983 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. 82-50

GENERAL MOTORS CORPORATION

v.

MAERSK LINE AND W.R. FILBIN & CO., INC.

SETTLEMENT APPROVED; COMPLAINT DISMISSED WITH PREJUDICE

Finalized December 13, 1983

The complainant, General Motors Corporation (GM), and the two respondents, Maersk Line and W.R. Filbin & Co., Inc., filed a joint motion requesting approval of their settlement agreement [1] and dismissal of the complaint with prejudice.

In my judgment the motion should be granted.

PROCEDURAL BACKBROUND

GM filed a complaint, served by the Secretary of the Commission on October 27, 1982, seeking reparation in the amount of $25,812.10 from Maersk,[2] a common carrier by water in the foreign commerce of the United States, in connection with thirty-nine shipments of internal combustion diesel engines or such engines and parts from Oakland, California, to Singapore during the period from August 1981 through April 1982.

As later amended,[3] the complaint alleged that Maersk had misclassified the shipments and charged higher rates for them than should have been charged had another classification with lower rates been applied, all in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3).

Maersk responded to the complaint, alleging that it had applied the proper tariff classification and rate to the shipments and requesting that the complaint be dismissed.[4]

[1] The settlement agreement (Settlement) is appended to this order as Appendix II.

[2] A.P. Moller-Maersk Agency and, A.P. Moller-Maersk Line were named as respondents in the complaint. Later, Maersk Line was substituted for those respondents, and the caption of the proceeding was amended to reflect that change. See Procedural Schedule, served April 6, 1983. Maersk is a member of the Pacific Straits Conference.

[3] Amendment to Complaint, November 10, 1982.

[4] Memorandum of Arguments on Behalf of Respondents Maersk Line Agency and Maersk Line (Answer), December 6, 1982.

Thereafter, GM again amended the complaint,[5] this time to bring in Filbin as an additional respondent. Filbin is a licensed foreign freight forwarder.[6] In effect, GM alleged that after Filbin was informed by Maersk that the tariff classification affording the lower rates could not be applied to GM's shipments, Filbin failed to relay this information to GM, in violation of 46 CFR 510.32 (c) and (d), and, therefore, in violation of section 44(c) of the Shipping Act, 1916, 46 U.S.C. 841b(c).[7]

Filbin filed an answer to the amended complaint,[8] denying that it had failed to inform GM of Maersk's refusal to apply the tariff classification with the lower rate.

There was an extensive prehearing conference on April 5, 1983. Near the conclusion of that conference, the parties indicated a willingness to enter into discussions to explore the possibility of settlement,. With the understanding of all parties that my presence during settlement discussions and negotiations would not result in a request for my recusal should the effort fail to succeed, I agreed to participate, to the extent requested, in order to facilitate the settlement process.[9] In accordance with that standard, I did participate in off-the-record discussions at the prehearing conference and in subsequent telephone conferences.

THE TARIFF PROVISIONS IN ISSUE

The governing tariff is Pacific Straits Conference Local and Overland Freight Tariff No. 12—FMC–8. The following Commodity Descriptions and Commodity Item Numbers appear in that tariff:

Commodity Description	*Commodity Item*
(1) Engines, Internal Combustion Piston-Type Engines; Compression-Ignition Engines, Including Locomotive	660 4130 50 [10] (Hereafter, 600 series)
(2) Parts of Internal Combustion Engines, Including Parts of Non-Piston Type Engines	660 5000 30 [11] (Hereafter, 600 series)

[5] Second Amendment to Complaint, January 10, 1983.

[6] F.M.C. No. 803.

[7] *See Tractors and Farm Equipment Ltd.* v. *Waterman Steamship Corp.*, 25 F.M.C. 375 (1982), and *Terfloth and Kennedy Ltd.* v. *American President Lines, Ltd.*, 22 F.M.C. 81 (1979), administratively final (1979). Both stand for the proposition that the Commission has jurisdiction to entertain a complaint alleging a violation of section 44 arising from a violation of 46 CFR 510 *et seq.*, the Commission's regulations prescribing the conduct of licensed freight forwarders, and to award reparation therefor under section 22 of the Shipping Act, 1916, 46 U.S.C. 821.

[8] Answer to Complaint and Affirmative Defenses (Filbin Answer), February 17, 1983.

[9] Transcript (Tr. 43–45).

[10] Tariff, p. 287.

[11] *Id.*, p. 289.

Commodity Description	*Commodity Item*
(3) *Mixed Commodities* Parts as Per Following Replacement Assembly and Component Tractor Parts, and Roadmaking Machinery Parts, and/or Combined With Engine Parts and Generator Parts	795 0000 11 [12] (Hereafter, 700 series)

NOTE

Bills of Lading must be claused as follows:

> "This will certify the commodities contained in this shipment comply with Item 795.000.11 of Pacific Straits Tariff No. 12–FMC–8." [13]

GM urges that the proper classification and rating for the shipments is the 700 series, whereas Maersk takes the position that the proper classification is one of the two Items in the 600 series, depending on whether the shipment consisted of engines or engines and parts. The rates for the 600 series are higher than the rates for the 700 series.

FACTS [14]

GM conducts its business through various manufacturing divisions and wholly owned subsidiaries.[15] Among the many things GM so produces and sells are diesel engines and parts. Over the past twenty years, one of its customers of those products has been General Diesel Supply(S) PTE, Ltd. (GDS) of Singapore. GDS is a fabricator, assembler and distributor of machinery, including generator sets and diesel electric power plants.

In February 1981, GM informed Maersk that it would be making shipments of diesel engines and parts to GDS. GM advised Maersk that it believed the 700 series classification and rates to be applicable and, shortly thereafter, commenced shipping the engines and parts to Singapore. In

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[12] Id., p. 348.

[13] Among other things, Maersk defended on the grounds that the 39 Bills of Lading did not contain the cited clause. A parallel situation was presented in *Durite Corporation, Ltd.* v. *Sea-Land Service, Inc.*, 20 F.M.C. 674 (1979), *aff'd sub nom. Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 610 F.2d 1000 (D.C. Cir. 1979). In *Durite*, the Commission ruled that a Commission regulation directing the publication of a similar clausing statement in a tariff (i.e., special project rates) was an obligation placed on the carrier but "does not itself impose any obligation on the shipper." 20 F.M.C. at 676. Thus, the shipper's failure to clause the Bill of Lading is not fatal to its cause in a section 18(b)(3) reparation case because "what actually is shipped governs the rate to be applied." *Id.*

[14] The facts are disputed. The statement of facts which appears in the text and which, generally, paraphrases complainant's untested allegations, is intended for the dual purposes of explaining the circumstances underlying the proceeding and placing the Settlement in perspective. The statement shall not be deemed to constitute findings of fact.

[15] No useful purpose will be served by singling out the division and subsidiary participating in the shipments, although they are specified in the various documents which make up the administrative record.

March 1981, Maersk notified GM that it was Maersk's preliminary opinion that the 600 series commodity description was applicable.

In May 1981, GM received confirmation from GDS that the end use of the engines and parts conformed to the standards contained in the 700 series commodity description. This information was transmitted to Maersk, whereupon Maersk's Detroit office agreed that the 700 series classification and rates would be appropriate. At approximately the same time, GM notified Filbin, its freight forwarder, to use the 700 series on the documents for all upcoming shipments to GDS.

Still later, on September 3, 1981,[16] Maersk decided that the shipment's were not entitled to the 700 series rates and that the 600 series rates should be charged. Maersk notified Filbin of its decision to terminate the 700 series rates and to apply the 600 series rates. Filbin failed to inform GM of Maersk's decision.[17]

GM did not discover the effect of the September 3rd decision until the paid freight bills were audited.[18]

Sometime during the latter part of May 1982, Maersk again permitted the traffic to move at the 700 series rates.[19]

THE SETTLEMENT

As more fully described in the Joint Motion For Dismissal of Complaint and Approval of Settlement (Joint Motion), the Joint Affidavit In Support of Settlement Agreement,[20] and in the Settlement, in order to avoid the expense of what might otherwise become costly and time-consuming litigation, including an oral hearing to resolve both disputed material facts and expert testimony, the parties have agreed to an allocation whereby the $25,812.10[21] claim can be settled. The allocation requires Maersk to pay GM the sum of $13,500.00 and requires Filbin to pay GM the sum of $4,000.00 in full satisfaction of GM's claims against them. Mutual releases will be exchanged. Neither respondent admits to a violation of the Shipping Act.

The parties also agree that the Settlement shall become effective only upon approval by the Commission.

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[16] None of the shipments which took place before August 1, 1981, is in issue. Apparently, the September 3rd decision was given retroactive effect 10 August 1st by way of the issuance of corrected freight bills. *See, e.g.*, Complaint, Appendix J. Nevertheless, Filbin's Answer, Appendixes D, E and F, indicates that, with the knowledge and approval of someone at Maersk, some August shipments were carried at 700 series rates.

[17] There are three different versions concerning the events which occurred on or about September 3rd.

[18] Tr. 37.

[19] The events which precipitated this action are unclear, but the use of the 700 series rates seems to have received the sanction of the Pacific Straits Conference. Complaint, Appendix I; Answer, p. 7; Tr. 21–29, 38–40, 41.

[20] The Joint Affidavit is appended as Appendix I.

[21] By my calculations, based on Complaint, Appendix K, the claim should be reduced to $25,655.28. This minimal difference does not, however, affect the Settlement.

DISCUSSION AND CONCLUSION

It is well settled that legislative and Commission policy encourage settlement of administrative proceedings and that this policy has met with judicial favor. *See. e.g., Terfloth and Kennedy, Ltd.* v. *American President Lines, Ltd., supra,* 22 F.M.C. at 85, and *Del Monte Corp.* v. *Matson Navigation Co.,* 22 F.M.C. 364, 367–369 (1979), and the authorities cited in each. Nevertheless, "it is the responsibility of the Commission to ensure that settlements of section 18(b)(3) complaints do not result in payment of charges for transportation which would not otherwise be permitted under the carrier's tariff." Docket No. 82–57, *Clark International Marketing S.A., A Division of Clark Equipment Company* v. *Venezuelan Line,* Order of Remand, served October 5, 1983. Otherwise, the Commission explained, "to permit application of an improper rate contrary to the provision of a tariff would be to permit a refund or rebate prohibited by section 18(b)(3)." *Id.*

In accordance with those principles, the established test to determine approvability of a settlement of a section 18(b)(3) complaint[22] is as follows:

> A settlement of a section 18(b)(3) complaint, therefore, can only be approved on a finding that the settlement reflects a reasonable interpretation of the carrier tariff, unless circumstances make such a finding infeasible. [Footnote omitted.] [*Id.*]

The test laid down is stringent, but it is infused with an elastic capability enabling adaptation to situations where circumstances warrant. Thus, the strictness of the requirement that the settlement reflect a reasonable interpretation of the tariff may be alleviated if it is shown that circumstances exist which make infeasible an application of rates and charges exactly conforming to the tariff rates indicated by the reasonable construction. The following are some illustrative examples.

Tupperware Co. v. *Compania Sud-Americana De Vapores (Chilean Line),* 24 F.M.C. 140 (1981), exemplifies the application of the compound strict test.[23] There, the Commission vacated an order approving a $40,000 settlement of a section 18(b)(3) complaint seeking reparation in the amount of $72,072.37. Although the tariff reasonably could have been interpreted to mean what the complainant claimed, and the carrier and shipper agreed that under that construction there was an overcharge of $72,072.37, no infeasibility factors were present to invoke the flexibility approach. Consequently, a settlement for less than the amount claimed could not be approved.

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[22] The test was developed to give parties the opportunity to settle section 18(b)(3) disputes without a finding of violation. *Organic Chemicals (Glidden-Durkee) Division of SCM Corp.* v. *Atlanttrafik Express Service,* 18 SRR 1536a, 1539 (1979) *(Organic Chemicals).*

[23] N.b. The twofold test requires that: (a) a reasonable construction of the tariff permits application of lower rates to the shipments; and (b) the settlement conform precisely to the specified rates which match that interpretation.

The flexible test was applied in *Terfloth and Kennedy, Ltd.* v. *American President Lines, Ltd., supra.* The complaint in that case, as here, alleged violations of section 18(b)(3) by a carrier and violations of section 44(c) by a freight forwarder. Approval was given to a settlement whereby the allegedly culpable carrier and freight forwarder agreed to make individual payments, which, together. amounted to less than the precise charges under the tariff, as reasonably interpreted.

Similarly, in *Organic Chemicals, supra,* the Commission departed from the strict test in favor of the more flexible approach stating that a proposed settlement may be approved, even if a finding that the settlement is consistent with the tariff cannot be made, provided "* * * (3)[24] the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable."

Again, in *Robinson Lumber Co., Inc.* v. *Delta Steamship Lines, Inc.,* 21 F.M.C. 354 (1978), a settlement was approved for less than the full amount of the section 18(b)(3) claim where the complaint also alleged other violations of the Shipping Act (sections 15, 16 and 17, 46 U.S.C. 814, 815 and 816), and where termination of a companion court action was included in the settlement.

In applying the approvability test to the Joint Motion, I find that the Settlement reflects a reasonable interpretation of Pacific Straits Conference Tariff No. 12–FMC–8 and that circumstances exist which make it infeasible for the Settlement precisely to conform to the 700 series rates.

The finding that the Settlement reflects a reasonable interpretation of the tariff is manifest from the text of the 700 series commodity description and this interpretation is buttressed by Maersk's rating of identical shipments made before September 1, 1981, and, with apparent Conference approval, after April 30, 1982.

The finding that there are circumstances which make infeasible the need for the Settlement exactly to conform to the 700 series rates is based on several factors. As seen, the complaint alleges violations of section 18(b)(3) by a carrier and of section 44(c) by a freight forwarder. *Cf. Terfloth and Kennedy, Ltd.* v. *American President Lines, Ltd., supra.* Moreover, it is clear that absent a settlement, this proceeding will continue to be vigorously contested and will require an oral hearing in Detroit, Michigan, and possibly San Francisco, California, to resolve disputed facts

[24] Subparagraphs (1) and (2), the technical standards of *Organic Chemicals,* require the following conditions to be met:

(1) a signed agreement is submitted to the Commission; (2) the parties file with the settlement agreement an affidavit setting forth the reasons for 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; . . .

I have characterized subparagraphs (1) and (2) as technical standards for ease of reference only. Obviously, the information required by those subparagraphs provides the substantive basis for the decision-maker to determine whether the settlement is bona fide and approvable under the broader criteria for settlement of formal proceedings, generally.

(including the putative testimony of expert witnesses) and issues of culpability, if any.

Generally, I find that the Settlement and Joint Affidavit, appended hereto, meet the technical standards of *Organic Chemicals, supra.* More important, I find that the Settlement reflects a valid, fair and rational solution to a knotty dispute and obviates the need for extensive and costly litigation. Finally, I find that the Settlement is a bona fide attempt by the parties to terminate the controversy and is not a device to obtain transportation at other than applicable rates or charges. I find the Settlement does not do violence to the regulatory scheme nor does it otherwise seek to circumvent the requirements of the Shipping Act.

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

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I

BEFORE THE FEDERAL MARITIME COMMISSION

GENERAL MOTORS CORPORATION
Complainant,
v.
MAERSK LINE and W. R. FILBIN & CO., INC.
Respondents.

DOCKET NO. 82–50

JOINT AFFIDAVIT IN SUPPORT OF SETTLEMENT AGREEMENT

We, the undersigned, on behalf of complainant General Motors Corporation and respondents Maersk Line and W.R. Filbin and Company, Inc., and being each first severally sworn, depose and say for and on behalf of our respective parties.

1. The claim involved in Docket. No. 82–50 arises under the Shipping Act, 1916 and presents a genuine dispute, the facts critical to the resolution of which are not readily ascertainable.

2. The parties to Docket No. 82–50 have entered into the accompanying Agreement of Settlement and Mutual Release (Settlement Agreement) which, upon approval by the Commission, will conclusively resolve their dispute.

3. The accompanying Settlement Agreement was entered into after a full and thorough consideration of all the material circumstances involved herein including, among other things, the estimated cost of further litigating the issues herein, the possibility to each party of an unfavorable decision on the merits after further litigation, and the desirability of maintaining amicable relations between the parties.

4. The accompanying Settlement Agreement is a fair and reasonable commercial settlement of the dispute in this case which will avoid the need for further extensive, costly and economically unjustified litigation.

5. The accompanying Settlement Agreement is a *bona fide* attempt by the parties to terminate this controversy in a commercially reasonable manner, and is not a device to obtain transportation at other than the lawfully applicable rates and charges or otherwise circumvent the requirements of the 1916 Shipping Act or any other applicable law.

WHEREFORE, for all the foregoing reasons, the parties respectfully request Commission approval of their settlement, and dismissal of the proceed-

ing herein, in accordance with the terms of the accompanying Settlement Agreement.

MAERSK LINE

By: (S) MARC J. FINK
ROBERT A. HAZEL
2033 K Street, N.W.
Washington, D.C. 20006
(202) 429–9090

NOTARIZED

GENERAL MOTORS CORPORATION

By: (S) BENSON T. BUCK
3044 West Grand Boulevard
Detroit, Michigan 48202
(313) 556–4013

NOTARIZED

W.R. FILBIN & COMPANY, INC.

By: (S) ROBERT L. HINDELANG
235 Lincoln Road
Grosse Pointe, MI 48230
(313) 834–0608

NOTARIZED

APPENDIX II

BEFORE THE FEDERAL MARITIME COMMISSION

GENERAL MOTORS CORPORATION
Complainant,
v.
MAERSK LINE and W. R. FILBIN & CO., INC.
Respondents.

DOCKET NO. 82–50

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

It is hereby agreed, by and between the undersigned, complainant General Motors Corporation (GM) and respondents Maersk Line (Maersk) and W.R. Filbin & Company, Inc. (Filbin), that the dispute between these parties as embodied in Docket No. 82–50 should be fully settled and resolved by mutual accord, on the following terms and conditions:

1. Within fifteen days after approval of this Agreement by the Federal Maritime Commission, Maersk shall pay to GM the sum of $13,500 in full satisfaction of GM's claims against Maersk in Docket No. 82–50.

2. GM, in consideration of said payment as provided in paragraph 1 above, hereby releases Maersk from any and all claims arising out of the shipments which are the subject of the claim in Docket No. 82–50. GM shall, in addition, consent to Maersk's taking all necessary action to have the complaint against it in Docket No. 82–50 dismissed with prejudice.

3. Within fifteen days after approval of this Agreement by the Federal Maritime Commission, Filbin shall pay to GM the sum of $4,000 in full satisfaction of GM's claims against Filbin in Docket No. 82–50.

4. GM, in consideration of said payment as provided in paragraph 3 above, hereby releases Filbin from any and all claims arising out of the shipments which are the subject of the claim in Docket No. 82–50. GM shall, in addition, consent to Filbin's taking all necessary action to have the complaint against it in Docket No. 82–50 dismissed with prejudice.

5. Neither GM, Maersk, Filbin nor any successor in interest of the foregoing parties, shall initiate any new claim against any of the other parties arising in connection with the complaint in Docket No. 82–50 except for enforcement of any provision of this Agreement.

6. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all the claims involved in Docket No. 82–50.

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

8. This Agreement of Settlement and Mutual Release constitutes the entire agreement between the parties.

MAERSK LINE

By: (S) MARC J. FINK
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NOTARIZED

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By: (S) BENSON T. BUCK
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NOTARIZED

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1059

APPLICATION OF DISTRIBUTION SERVICES LTD.
FOR THE BENEFIT OF TARGET STORES, A DIVISION
OF DAYTON HUDSON CORPORATION

ORDER

December 14, 1983

This proceeding arose from an application filed by Distribution Services Ltd. (DSL), requesting permission, pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), to waive portions of freight charges on certain shipments of various commodities. The applications are based on DSL's alleged inadvertent failure to file timely time-volume contracts which it negotiated with Target Stores, a shipper.

In his Initial Decision issued on September 16, 1983, Administrative Law Judge Norman D. Kline granted the application subject to certain minor adjustments and required the following notice published in DSL's tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1059, that this contract became effective on January 1, 1983, for the purposes of refunding or waiving any portion of freight charges on any shipment that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

No exceptions were filed to the Initial Decision, but by Notice served October 24, 1983, the Commission determined to review the decision of the Presiding Officer.

The Commission has reviewed the Initial Decision and has determined that the Presiding Officer's findings and conclusions were proper and well-founded. However, because the Commission is concerned that the notice which the Presiding Officer required may not adequately define the period during which shipments must have moved in order to qualify for a refund or waiver of freight charges, and may not indicate clearly that other, qualified shippers may take advantage of these contract rates, this notice will be revised by the Commission. The Initial Decision will otherwise be adopted.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding be modified to delete the first ordering paragraph and substitute in its place the following:

(1) DSL shall publish 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. 1059 that this contract was effective January 1, 1983, continuing through June 24, 1983. This notice is effective for the purposes of refund or waiver of freight charges on shipments qualifying for the time-volume contract rates which were shipped during the specified period of time. Retroactive contracts for other qualified shippers during this time period are hereby offered at the same terms applicable to Target Stores.

IT IS FURTHER ORDERED, That in all other respects, the Initial Decision issued in this proceeding is adopted and is made a part hereof.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1059

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF TARGET STORES, A DIVISION OF DAYTON HUDSON CORPORATION

Application for permission to waive portions of freight charges on approximately 190 shipments of various commodities granted.

Applicant had negotiated a time-volume contract with the shipper, Target Stores, but its tariff-publishing agent had inadvertently neglected to file the contract in the tariff before January 1, 1983, as intended. The contract was filed effective March 6, 1983, was rejected on March 28, 1983, refiled on April 8, and further clarified on April 19 and June 24, 1983.

Supplemental evidence furnished by applicant's tariff-filing agent provides justification to permit applicant to apply the time-volume contract from January 1, 1983 to June 24, 1983, and thereafter notwithstanding the temporary rejection and subsequent filing and clarifications. Otherwise the innocent shipper would be deprived of its contractual rights and similar shipments would be treated differently.

Slight misratings occurred on three shipments, resulting in a small net undercharge. Applicant will adjust the account accordingly.

John Collins, Lee Meister, and *Roy R. Sumner* for applicant.

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

Partially Adopted December 14, 1983.

This is the first of three applications filed by a non-vessel operating common carrier by water known as Distribution Services Limited (DSL) located in California involving the failure of DSL to file time-volume contracts which it had negotiated with three individual shippers in its tariff.[2]

The application was first filed (received by the Commission's Secretary) on June 27, 1983, and was prepared by DSL's tariff publishing agent, Transworld Tariff and Research Service, Inc., located in Washington, D.C. Essentially, by this application, DSL is seeking permission to waive approximately $66,000 in connection with over 190 shipments of various commodities which DSL carried from Taiwan, Hong Kong, and Japan to Los Angeles utilizing vessels of underlying ocean carriers during the period January 1, 1983 through early April 1983. The reason for the application, in short, is that DSL's tariff publisher, Transworld, failed to file the time-

[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 CFR 502.227).

[2] The other two applications involve Wal-Mart Stores (Special Docket No. 1060) and Edison Brothers, Inc. (Special Docket No. 1061).

volume contract which DSL had negotiated with the shipper, Target Stores, in DSL's tariff to be effective on January 1, 1983, as intended. Instead the contract was not filed to be effective until March 6, 1983 and, because of certain technical problems with the filing, was rejected on March 28, 1983, refiled on April 8 and further clarified on April 19 and June 24, 1983. The upshot of this failure to file was that, except for the period March 6 to March 28, DSL's time-volume contract with Target was not on file in its tariff and the numerous shipments carried under that tariff for Target were subject to higher tariff rates and, in the aggregate, substantially higher freight costs. Because DSL honored the contract and generally charged the rates which the contract provided, DSL is now asking permission to waive the substantial additional freight due under non-contract tariff rates in effect at the times of the shipments. DSL therefore is simply trying to implement the time-volume contract which it had negotiated with Target from January 1, 1983 to the time it filed the contract in its tariff, notwithstanding the initial failure to file, on the ground that such failure constituted the type of clerical, administrative, or inadvertent error which caused unintended freight increases and which section 18(b)(3) was amended to cure.

The application and supporting evidence originally submitted with it presented a number of problems. Thus, although the evidence included a tabulation of the 190 or so shipments and copies of the relevant bills of lading, the time-volume contract, and tariff pages, the factual narrative was relatively sketchy and did not fully explain the error involved nor the various events following the error and the subsequent filing of the time-volume contract. Because of the inadequacy of the initial evidence, furthermore, it was impossible to determine a number of critical matters relating to the validity of the application under law. For example, one could not determine if the error involved an inadvertent failure to file rather than a mistaken understanding of law, whether the time-volume contract had ultimately been filed in the tariff prior to the filing of the application as required by law, whether an application was necessary during the period March 6 through March 28, 1983, when the time-volume contract was on file with DSL's tariff, whether the application could be granted for the period between March 28, 1983, when the time-volume contract had been rejected by the Commission's staff for technical reasons and April 8, 1983 when it was refiled, whether DSL had misrated a number of shipments, whether the time-volume contract in some instances provided for higher rates than the regular tariff, and whether there were discrepancies between applicant's tabulation of shipments and the data shown on the underlying bills of lading. (See my letter to Messrs. Sumner and Granthan dated July 22, 1983, asking for explanations of these particular matters.) In response to my inquiries, Mr. Lee Meister of Transworld obtained answers to these various questions, conducted a more thorough analysis of the critical events, and furnished supplemental evidence which corrected

the various deficiencies in the original record. (See Applicant's Submission of Additional Justification Statements, August 19, 1983, "Addendum A," and various tariff pages and bills of lading attached.) On the basis of these supplementary materials, the record has been sufficiently developed to permit the following findings and conclusions.

FINDINGS AND CONCLUSIONS

As shown by the supplemental evidence furnished by DSL's tariff publisher, Transworld, DSL failed to file a time-volume contract which it had negotiated with the shipper, Target Stores, in its tariff, and had intended to become effective on January 1, 1983. This time-volume contract was originally executed between DSL and Target on December 16, 1982, and, as is customary with such contracts, provided that DSL would charge Target certain rates for the transportation of containerized cargo from Far Eastern countries to Los Angeles or Long Beach, California in return for Target's commitment to ship a certain minimum volume of cargo. The rates set forth in the contract were f.a.k. (freight all kinds) rates ranging from $37 to $48 per cubic meter. However, if DSL's tariff published a lower per-container rate on a particular commodity, Target would get the benefit of that lower rate. (Paragraph 4 E of the original contract). Such contracts are lawful provided they are filed in the carrier's tariff and comply with other conditions set forth in the Commission regulation, 46 CFR 536.7.

After negotiating and executing the time-volume contract, DSL sent a letter to its tariff publishing agent in Washington, Transworld, on December 26, 1982, instructing Transworld to file the contract in DSL's then current tariff (FMC No. 2). However, the instructions were sent during the holiday season which was rather hectic and Transworld set them aside to permit other filings and then overlooked them with the result that the contract was not filed to be effective on January 1, 1983, as intended. The failure to file, furthermore, which normally would have been promptly detected by DSL, was not discovered because DSL's pricing supervisor who had been involved with the contract had taken personal leave from the office in early January and that person's acting successor had not been informed that there were any problems about the filing of the contract in DSL's tariff. DSL therefore believed that its time-volume contract with Target had been properly filed in its current tariff and accordingly carried and rated shipments of Target at the rates prescribed in the contract between the two. It was not until DSL prepared its new tariff (FMC No. 7) which included the contract with Target and instructed that it be filed with the Commission, which filing was accomplished on or about February 4, 1983, to be effective March 6, 1983, that the failure to file the time-volume contract in DSL's tariff was initially corrected. However, even after March 6, 1983, further problems with the filing occurred. Thus, on March 28, 1983, the Commission's staff rejected the contract because of certain ambi-

guities which the staff believed required correction under the provisions of the relevant regulation, 46 CFR 536.7.[3] Promptly after this rejection, DSL and its tariff publishing agent, Transworld, consulted with the Commission's staff in order to correct the deficiencies and on April 8, 1983, the corrected time-volume contract was filed once more in DSL's current tariff (FMC No. 7). Still further modifications and corrections were necessary as a result of the Commission's staff's concern regarding publication of a mailing address in the United States and the arrangement of certain items in the contract. These matters were corrected on April 19, 1983. Finally, on June 24, 1983, DSL, through its agent Transworld, filed further revisions to the contract concerning the method for calculating penalty charges to the shipper and how minimum-volume quantity levels would change if the force majeure clause had to be invoked. To summarize, DSL's time-volume contract was not filed with its then current tariff (FMC No. 2) between January 1, 1983 and March 6, 1983. From March 6, 1983 to March 28, 1983, it was on file. It was not on file from March 28, 1983 to April 8, 1983, because of the staff's rejection. It was again on file with certain modifications and clarifications after April 8, 1983, and remained in the tariff but was again clarified in certain respects on April 19, 1983 and on June 24, 1983, in response to certain concerns expressed by the Commission's staff.

The above history of filings, rejections and corrections may appear to complicate the validity of this application. That is because DSL is seeking to implement an unfiled time-volume contract which it negotiated with Target although for a period of time (March 6 to March 28, 1983) the contract was in fact on file in its tariff (FMC No. 7), was temporarily out of the tariff (between March 28 and April 8, 1983) while corrections and clarifications were made, and was again on file in the tariff but was subjected to further clarifications and modifications. The question arises whether the application can be granted to implement the contract notwithstanding the various changes in the contract and the fact that from March 28 to April 8, 1983, the contract was out of the tariff not because of DSL's inadvertence in failure to file it but because of the staff's concern over technical requirements and ambiguities in the contract. Upon careful consideration of this situation, however, I conclude that the particular technical deficiencies and peculiar filing history of the contract ought not to be interpreted so as to deny the innocent shipper, Target, the relief which the remedial statute was intended to grant.

[3] The corrections to the contract which the staff required had to do with clarifying what rates covered what cargo and a change in the force majeure clause of the contract. As originally filed, effective March 6, 1983, the contract provided for f.a.k. rates per cubic meter ranging from $37 to $48 depending on the country of origin. It also provided for alternative commodity rates when application of such rates would result in lower freight. (See paragraph 4 E of the original filing.) This rating situation was clarified by the filing on April 8 to specify the alternate commodity rates. The force majeure clause (paragraph 8) was also amended to eliminate reference to commercial contingencies, as required by 46 CFR 536.7(b)(6).

It is clear that P.L. 90–298, which amended section 18(b)(3) of the Shipping Act, 1916, was designed to be remedial, i.e. to relieve innocent shippers of additional freight costs which they in no way caused but were brought about because of carriers' tariff-filing errors. The statute is therefore to be liberally construed and not hindered by narrow interpretations in order to effectuate its remedial purposes. *Nepara Chemical, Inc.* v. *Federal Maritime Commission,* 662 F.2d 18, 22 (D.C. Cir. 1981) (". . . [T]he statute is intended to remedy carrier tariff errors which have adverse economic effects on shippers: 'shippers . . . should not be made to bear the consequences of a carrier's bona fide neglect or omission'."); *D. F. Young, Inc.* v. *Cie. Nationale Algerienne de Navigation,* 21 F.M.C. 730, 731 (1979) ("P.L. 90–298 is a remedial statute enacted to relieve shippers from the economic consequences of a carrier's error in the filing of tariff rates. Too narrow a construction of the statute would defeat the legislative intent."); *Ghiselli Bros.* v. *Micronesia Interocean Line, Inc.,* 13 F.M.C. 179, 182 (". . . [T]here is no reason to impose such a strict interpretation to the filing of 'special docket' applications. P.L. 90–298 itself is permissive and affords the Commission wide latitude of discretion in the granting of special docket applications."); *Application of Lykes Bros. to Benefit Texas Turbo Jet, Inc.,* 24 F.M.C. 408, 411 (1981) ("As a remedial statute section 18(b)(3) needs to be liberally construed.")

In order to effectuate the purposes of the remedial statute and to ensure uniformity to all shipments rated under the contract negotiated between DSL and Target and ultimately filed in DSL's tariff, I conclude that the application should be granted so as to implement the time-volume contract from the original date (January 1, 1983) on which it should have been filed but through the inadvertence of DSL's tariff-publishing agent, Transworld, was not so filed. Therefore, from the period January 1, 1983 to March 6. 1983, when the time-volume contract was not on file in either DSL's tariff FMC No. 2 or its later tariff FMC No. 7, relief clearly ought to be granted and DSL ought to be permitted to waive collection of additional freight due under tariff rates other than those provided in the time-volume contract. From March 6, 1983 to March 28, 1983, technically DSL may not need permission to apply the time-volume contract rates. That is because that contract had been filed effective March 6 and remained in the tariff until rejected by the Commission's staff on March 28, 1983, because of certain ambiguities or deficiencies in the contract which the staff believed to require clarification under the relevant regulation, 46 CFR 536.7. For the period March 28 to April 8, 1983, however, when the contract was temporarily out of the tariff, I conclude that DSL should likewise be permitted to waive collection of additional freight due under higher non-contract tariff rates. Although one may argue that during this period the failure to have the contract on file was not caused by the usual type of clerical or administrative error encountered in special-docket proceedings, one could also argue that the failure was the result of an

inadequate or unclear filing, that DSL had therefore committed another error which is remediable under section 18(b)(3) of the Act, and that DSL had never succeeded in filing the contract in fully satisfactory condition until June 24, 1983. If so, then relief should be given the shipper from January 1, 1983 through that date so as to eliminate all adverse effects flowing from the original error and any subsequent errors.

Regardless of how one construes the error involved in the March 28 rejection by the staff, however, there are independent grounds for granting the relief requested during the entire period between January 1, 1983 and June 24, 1983. First, the remedial provisions of section 18(b)(3) of the Act require uniformity among similar shippers and shipments by providing that applications can be granted only if discrimination among shippers does not thereby result. Section 18(b)(3), first proviso, last clause. Although the statute refers to "shippers" rather than "shipments," clearly it promotes uniformity among shipments of similar commodities in accordance with the traditional purpose of tariff law.[4] As DSL argues, denial of relief for the brief period March 28–April 8 on technical grounds would result in disparate treatment of shipments which were all intended to be covered by rates provided in the contract, namely, application of the contractual rates from January 1, 1983 to March 28, 1983, application of non-contract tariff rates between March 28 and April 8, 1983, and application of contractual rates thereafter. This result would upset the contractual expectations of both parties and produce a bizarre disparity in rating among shipments of similar commodities. Such denial would also penalize the innocent shipper, Target, by prohibiting application of its contractual rights because of ambiguities in the original filing of the contract of a technical nature and a consequent staff decision to reject the filing pending clarifications. Second, the Commission does not usually penalize parties because of technical errors which result in temporary rejection of a filing which is later corrected, especially under a remedial statute. See *Application of Southern Pacific International, Inc. for the Benefit of General Motors Overseas Corp.*, 21 SRR 833 (I.D., F.M.C. notice of finality, June 11, 1982); *TDK Electronics Co., Ltd.* v. *Japan Lines, Ltd.*, 22 F.M.C. 769 (1980).[5] I conclude

[4] Moreover, the implementing regulation, Rule 92(a), 46 CFR 502.92(a), indicates that uniformity among similar shipments is also intended when it specifies that applicants must state whether there are shipments of other shippers "of the same or similar commodity." See also *Application of Pacific Westbound Conference for the Benefit of Minnesota Mining & Mfg. Co.*, 21 SRR 793 (I.D., F.M.C. notice of finality, May 14, 1982). In that application, relief was granted to shipments of the same commodity for the single shipper even though some early shipments fell outside the 180-day period of limitation. This was done to prevent discrimination among similar shipments.

[5] In the former case cited, the Commission permitted the grant of an application which had first been rejected for technical reasons by the Commission's Secretary but had been corrected and refiled beyond the 180-day period of limitation prescribed by section 18(b)(3) of the Act. The Commission considered the original defective filing, which had been within the 180-day period, as valid for purposes of meeting the time limitation. In *TDK Electronics*, similarly, the Commission considered the merits of a complaint alleging violations of law even though the complaint had originally been returned because of technical deficiencies but had been corrected and refiled beyond the two-year period permitted by section 22 of the Act. Moreover, in an effort to ensure uniformity among shipments of similar commodities in special-docket proceedings, the

therefore that there are valid grounds to permit DSL to waive collection of additional freight costs on every shipment moving between January 1, 1983, and June 24, 1983, when the final corrected version of the contract was filed in satisfactory condition, including the brief period March 28 to April 8 when the contract was out of the tariff undergoing correction in response to the requests of the Commission's staff.

I conclude, in summary, that DSL committed an error of the type contemplated by section 18(b)(3) of the Act when its tariff publishing agent inadvertently failed to file in DSL's tariff the time-volume contract which DSL had negotiated with the shipper, Target Stores, by January 1, 1983. I conclude furthermore that to ensure uniformity among shipments and eradicate all effects of the original tariff filing error, DSL should be allowed to implement the time-volume contract from January 1, 1983, when it should have been filed, to the time it finally filed a fully satisfactory form of the contract in compliance with the Commission's regulation, which was done on June 24, 1983 (and of course to implement the contract thereafter as published in DSL's tariff). The effect of this decision is to relieve the shipper, Target Stores, of some $60,000 of additional freight costs (less some additional costs which DSL erroneously included in its application during the period March 6 to March 28, 1983 when the contract had been on file and such costs would not have been due.)[6]

I find also that the three statutory conditions regarding the time of filing the application, the filing of the new, corrective tariff, and the prevention of discrimination among shippers have been satisfied.[7] The only remain-

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Commission has permitted retroactive application of unfiled tariff rates for over a year's time notwithstanding the normal 180-day period of limitation in the filing of such special-docket applications. See *Application of Pacific Westbound Conference on Behalf of Korea Marine Transport Co., Ltd. for the Benefit of Mitsui and Co. (U.S.A.), Inc.*, 25 F.M.C. 350 (1982). See also *Application of Pacific Westbound Conference for the Benefit of Minnesota Mining & Mfg. Co*, cited above, 21 SRR 793.

[6] Although the original filing of the time-volume contract on March 6, 1983, was rejected by the staff on March 28, 1983, for certain technical reasons and ambiguities of language, the general rule is that the tariff contract, while it was on file, was legally binding and did not become unlawful until after rejection. Therefore, DSL would have been bound to charge contract rates during the period March 6 to March 28, 1983. See *E.I. DuPont de Nemours and Co.* v. *Sea-Land Service, Inc.*, 22 F.M.C. 525, 535–536 (1980), and cases cited therein.

[7] As mentioned earlier, the application was originally filed (received by the Commission's Secretary) on June 27, 1983. The application was lacking a certificate showing the date of delivery or mailing, which certificate was furnished on July 8, 1983. The Commission has permitted the original date of filing to control, notwithstanding later corrections and refilings, as I have discussed above. See *Application of Southern Pacific International, Inc.*, cited above, 21 SRR 833, and *TDK Electronics Co., Ltd.* v. *Japan Lines, Ltd.*, cited above, 22 F.M.C. 769. All of the shipments concerned moved on or after January 5, 1983, which is only 173 days before June 27, 1983, and therefore within the 180-day period required by law. The time-volume contract was filed in DSL's tariff (FMC No. 7) initially effective March 6, 1983, and again with clarifications on April 8 1983, April 19, 1983, and finally, on June 24, 1983. (See DSL's tariff (FMC No. 7) original, first, second, and third revised pp. 147, 148, 149.) The affected shipments all concern one shipper, Target Stores. As required by section 18(b)(3) and the Commission's regulation concerning the filing of time-volume contracts, DSL will be required to file a tariff notice which will publicize the contract with Target. This should prevent discrimination among shippers. However, it should be noted that there is no evidence of another Target-like shipper seeking such a contract and DSL has negotiated and filed contracts with other large-volume shippers, for two of whom DSL has also filed special-docket applications because of similar failures to file the contracts.

ing matter concerns a few misratings which DSL will be required to correct as a condition for the granting of the application.

INADVERTENT MISRATINGS AND NECESSARY CORRECTIONS

As mentioned above earlier in this decision, examination of the bills of rating under which the approximately 190 shipments moved revealed several apparent discrepancies and rating errors. On certain shipments it appeared that DSL had applied incorrect rates not found in the tariff or in the TVC and initially that on some shipments, granting the application might result in increased freight costs because contract rates were higher. However, applicant has furnished explanations and evidence showing that in most of the questionable shipments DSL applied correct rates and that freight costs did not increase under the contract rates. On three shipments out of more than the 190 involved, however, it appeared that DSL had made inadvertent rating errors, and after DSL had been notified of these apparent mistakes, DSL acknowledged them. (See my letter to Messrs. Collins of DSL and Meister of Transworld, dated August 23, 1983, and Mr. Meister's sworn statement of September 7, 1983.) The net result of the rating errors on the three shipments is an undercharge of $67.31, which DSL will be required to recover by an appropriate adjustment in its account with Target.[8]

Accordingly, the application is granted provided that DSL complies with the following instructions:

1. DSL shall publish the following notice in an appropriate place in its time-volume contract filed in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1059, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portions of freight charges on any shipments that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

2. DSL shall waive portions of freight charges in connection with the shipments discussed above for the benefit of the shipper, Target Stores, within 30 days of service of the Commission's notice rendering this Initial Decision administratively final, and shall within 5 days thereafter notify the Commission of its action in this regard.

[8] The three shipments are shown as nos. 2, 10, and 16 on applicant's "Addendum A" and in my letter of August 23, 1983. In no. 2, DSL had inadvertently applied a rate of $45 to a shipment from Japan instead of the correct rate of $48, resulting in an undercharge of $27.83. In no. 10, DSL had charged a shipment of furniture k/d under a $2,000 per container rate for two containers and a $37 rate for the third. The correct rate for each container was $1680. The error resulted in an overcharge of $660.52. In no. 16, DSL had charged a shipment of seven containers at $1400 per container instead of the correct rate of $1500 per container for a shipment of seven containers. The result was an undercharge of $700. The net result of these undercharges and overcharge is $67.31 ($727.83 less $660.52). (See Meister statement of September 7, 1983.)

3. DSL shall make an appropriate adjustment to its account with Target to correct the rating errors that occurred on three shipments discussed above and similarly notify the Commission.

NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1060

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF WAL-MART STORES, INC.

SPECIAL DOCKET NO. 1061

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF EDISON BROTHERS INC.

ORDER

December 14, 1983

This proceeding arose from two applications filed by Distribution Services Ltd. (DSL), requesting permission, pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. §817(b)(3)), to waive portions of freight charges on certain shipments of various commodities. The applications are based on DSL's alleged inadvertent failure to file timely time-volume contracts which it negotiated with two shippers, Wal-Mart Stores, Inc. and Edison Brothers Stores, Inc. The applications were consolidated for decision by Administrative Law Judge Norman D. Kline.

In his Initial Decision issued on October 3, 1983, the Presiding Officer granted the applications subject to certain minor adjustments and required the following notices published in DSL's tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1060, that this contract became effective on January 1, 1983, for the purposes of refunding or waiving any portion of freight charges on any shipment that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Docket. No. 1061, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portion of freight charges on any shipment that may have moved at a time when the contract was not filed in this tariff or in the previous tariff (FMC No. 2).

No exceptions were filed to the Initial Decision, but by Notice served October 26, 1983, the Commission determined to review the decision of the Presiding Officer.

The Commission has reviewed the Initial Decision and has determined that the Presiding Officer's findings and conclusions were proper and well-founded. However, because the Commission is concerned that the notices which the Presiding Officer required may not adequately define the period during which shipments must have moved in order to qualify for a refund or waiver of freight charges, and may not indicate clearly that other qualified shippers may take advantage of these contract rates, those notices will be revised by the Commission. The Initial Decision will otherwise be adopted.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding be modified to delete the first and second ordering paragraphs and substitute in their place the following:

(1) DSL shall publish the following notice in an appropriate place or places in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket Nos. 1060 and 1061 that this contract was effective January 1, 1983, continuing through June 24, 1983. This notice is effective for the purposes of refund or waiver of freight charges on shipments qualifying for the time-volume contract rates which were shipped during the specified period of time. Retroactive contracts for other, qualified shippers during this time period are hereby offered at the same terms applicable to Wal-Mart Stores, Inc. and Edison Brothers Stores, Inc.

IT IS FURTHER ORDERED, That in all other respects, the Initial Decision issued in this proceeding is adopted and is made a part hereof.

By the Commission.

FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1060

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF WAL-MART STORES INC.

SPECIAL DOCKET NO. 1061

APPLICATION OF DISTRIBUTION SERVICES LTD. FOR THE BENEFIT OF EDISON BROTHERS INC.

Applications for permission to waive portions of freight charges on approximately 300 shipments of various commodities granted.

Applicant had negotiated time-volume contracts with two shippers but its tariff-publishing agent had inadvertently neglected to file the contracts in the tariff before January 1, 1983, as intended, subjecting the two shippers to substantial increases in freight costs. Essentially the same error occurred affecting another contract in Special Docket No. 1059, *Application of Distribution Services Ltd. for the benefit of Target Stores,* which application was granted.

Slight misratings occurred on three shipments of Wal-Mart Stores, Inc., resulting in a small net undercharge. Applicant will adjust the account accordingly.

John Collins, Lee Meister, and *Roy R. Sumner* for applicant.

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

Partially adopted December 14, 1983.

This decision involves two applications filed by a non-vessel operating common carrier by water known as Distribution Services Limited (DSL) located in California and concerns DSL's inadvertent failure to file timely two time-volume contracts which it had negotiated with two shippers, Wal-Mart Stores, Inc., and Edison Brothers Stores, Inc. Because the applications involve virtually the same problems, I have consolidated them for decision as designee of the Chief Judge. (Rule 148, 46 CFR 502.148).

The facts surrounding DSL's inadvertent failure to file the two time-volume contracts and DSL's subsequent filings and clarifications of the contracts in its tariff are virtually identical to those existing in an earlier special-docket proceeding, Special Docket No. 1059, *Application of Distribution Services, Ltd. for the Benefit of Target Stores, a Division of Dayton*

[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 CFR 502.227).

Hudson Corporation, 26 F.M.C. 123.[2] Essentially, as in No. 1059, DSL had negotiated time-volume contracts with the shippers, Wal-Mart and Edison Brothers, some time in December of 1982 (December 16 and December 27, respectively) providing for certain rates in return for a specified minimum volume of cargo, the contracts to expire on December 31, 1983, and September 30, 1983, respectively. However, as in No. 1059, DSL sent instructions in late December of 1982 to its tariff publishing agent, Transworld Tariff and Research Service, Inc., located in Washington, D.C., but because of end-of-the-year pressures, Transworld overlooked the instructions and failed to file the contracts by January 1, 1983, as DSL had intended. Furthermore, because of DSL's failure to note that the time-volume contracts had not been filed in DSL's current tariff (FMC No. 2) as of January 1, 1983, the contracts were not filed until early February to be effective on March 6, 1983, in DSL's new tariff (FMC No. 7). As with the Target contract in No. 1059, furthermore, the two contracts were found to be defective under the Commission's regulations, 46 CFR 536.7, were rejected by the Commission's staff on March 28, 1983, to allow appropriate clarifications, and were refiled on April 8, 1983, after the corrections had been made. In response to other staff concerns, the contracts were again corrected and refiled on June 24, 1983.[3]

DSL's inadvertent failure to file the contracts by January 1, 1983, and the subsequent rejection on March 28, 1983, affected numerous shipments which DSL had carried for Wal-Mart and Edison Brothers beginning on or after January 7 and January 8, 1983, respectively, approximately 141 shipments for Wal-Mart and 160 for Edison Brothers. Unless DSL is granted relief and is allowed to implement its contracts with these two shippers, DSL will have to recover something like $23,000 in additional freight from Wal-Mart and $18,000 from Edison Brothers although those shippers had entered into contracts with DSL in the expectation of having the contracts honored under the lower rates prescribed and DSL honored the contracts and charged the rates prescribed therein notwithstanding the tariff-filing error.[4]

[2] In No. 1059, applicant's original application and supporting evidence were incomplete and unclear as to the nature of the tariff-filing error, the events surrounding the filing of the contract, and other matters. The record was satisfactorily developed by supplemental evidence, however, and the various ambiguities and uncertainties were eliminated. Similarly, applicant has supplemented the record in these two proceedings, showing that the contract involved in No. 1059 and the two contracts involved in these two proceedings were essentially all affected by the same events. See sworn statement of Lee Meister, September 27, 1983.

[3] As with the Target contract, the staff had rejected the filings on March 28, 1983, because of lack of clarity as to what rates applied on particular commodities and because of a problem with the wording of the force majeure provisions of the contracts. After refiling on April 8, there were other technical problems with the contracts which were corrected on May 9 and June 3, 1983, having to do with inclusion of a United States mailing address, description of the foreign ports covered, and inclusion of a rate on handtrucks. On June 24, 1983, the contract was clarified again with respect to the force majeure and penalty provisions. See sworn statement of Lee Meister, September 27, 1983.

[4] As in the case of the Target application (No. 1059) these figures may be somewhat overstated because they include the period March 28 through April 8, 1983, when the contracts were on file in the tariff and

Continued

I have discussed the facts and legal consequences in detail in my Initial Decision in No. 1059, cited above, and need not repeat them here in detail. Briefly, I found that the initial failure to file the time-volume contract qualified under the remedial provisions of section 18(b)(3) of the Shipping Act, 1916, as an inadvertent failure to file negotiated rates resulting in increased costs to an innocent shipper. I further found that the subsequent rejection, clarifications, and refilings on March 28, April 8, and June 24, 1983, in that case, ought not to prevent the granting of complete relief. In other words, as in No. 1059, DSL ought to be able to implement its contracts from January 1, 1983 to date and give the shippers the benefits of their bargains, regardless of the peculiar filing history of the contracts and the question of whether during the period March 6 through March 28, 1983, when the contracts were on file, relief is technically required. As in No. 1059, I rely upon the remedial purposes of the statute, the various admonitions of a court and the Commission to read the statute broadly rather than narrowly and technically, in order to effectuate its beneficial purposes, the specific need to ensure uniformity among similarly situated shipments carried throughout the affected periods, and the Commission's policy of not penalizing parties because of their technical filing errors which are later corrected.

I conclude, therefore, that, as in No. 1059, DSL committed a tariff-filing error in failing to file two time-volume contracts in its tariff by January 1, 1983, as intended, and that the application should be granted to cover the entire period January 1, 1983 to June 24, 1983, the date of final filing, so as to implement the contractual rights of the innocent shippers and ensure uniformity among shipments. I find also that the three statutory conditions regarding the time of filing the application, the filing of the new, corrective tariff, and the prevention of discrimination among shippers have been satisfied.[5] The only remaining matter concerns a few misratings in connection with three Wal-Mart shipments which DSL will be required to correct as a condition for the granting of the application.

INADVERTENT MISRATINGS AND NECESSARY CORRECTIONS

As happened in the Target case, it appears that out of some 141 shipments for Wal-Mart DSL inadvertently committed some minor errors in rating. These rating errors occurred on three shipments, on bills of lading dated January 20, January 24, and March 23, 1983. On the first bill of lading, DSL charged a rate of $40.00 WM instead of the contract rate of $60.60

were probably legally binding. If so, then DSL would have had to charge contract rates anyway and arguably need not seek permission to waive additional charges for that period of time.

[5] The applications were both filed (received by the Commission's Secretary) on June 27, 1983, which is less than the 180 days required by law from the date of shipment (on or after January 7, 1983). The contracts were filed effective March 6, 1983, and with clarifications, on June 24, 1983. The affected shipments involve only Wal-Mart and Edison Brothers. The tariff notice which DSL will be required to file will publicize the contracts, and there is no evidence of any similar shippers who were seeking the same contracts but were denied such contracts.

WM from the Philippines. On the second bill of lading, DSL charged a rate of $43.18 WM instead of the contract rate of $42.52 from Korea. On the third bill of lading, a tiny shipment of only .24 cubic meters, DSL apparently showed no charge at all on its bill of lading. These apparent errors I called to DSL's attention through its tariff-publishing agent, Transworld, to allow DSL to check and verify them. After so doing, DSL acknowledged the errors. The net result of the three errors is an undercharge of $258.95. (See Addendum A attached to sworn statement of Lee Meister, September 27, 1983.) DSL will be required to recover this amount by an appropriate adjustment to its account with Wal-Mart.

Accordingly, the applications are granted provided that DSL complies with the following instructions:

1. DSL shall publish the following notice in an appropriate place in its tariff applicable to the subject contract with Wal-Mart:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1060, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portions of freight charges on any shipments that may have moved at a time when the contract was not filed in this tariff or in DSL's previous tariff (FMC No. 2).

2. DSL shall publish the following notice in an appropriate place in its tariff applicable to the subject contract with Edison Brothers:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1061, that this contract became effective on January 1, 1983, for the purpose of refunding or waiving any portions of freight charges on any shipments that may have moved at a time when the contract was not filed in this tariff or in the previous tariff (FMC No. 2).

3. DSL shall waive portions of freight charges in connection with the shipments discussed above for the benefit of the shippers, Wal-Mart Stores, Inc., and Edison Brothers Stores, Inc., within 30 days of service of the Commission's notice rendering this Initial Decision administratively final, and shall within 5 days thereafter notify the Commission of its action in this regard.

4. DSL shall make an appropriate adjustment to its account with Wal-Mart to correct the rating errors that occurred on the three shipments discussed above and similarly notify the Commission.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–21

MODIFICATION OF NEW YORK FREIGHT BUREAU AGREEMENT NO. 5700–29

NOTICE

December 21, 1983

Notice is given that no appeal has been taken to the November 14, 1983 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. 83–21

MODIFICATION OF NEW YORK FREIGHT BUREAU AGREEMENT NO. 5700–29

MOTION TO DISMISS GRANTED

Finalized December 21, 1983

On November 3, 1983, the respondents filed a motion to dismiss this proceeding pursuant to Rule 73 of the Commission's Rules of Practice and Procedure (46 CFR 502.73). They state:

> * * * In a duly constituted action taken in Hong Kong on November 1, 1983, the Bureau voted to withdraw the application (i.e., Agreement No. 5700–29) and to notify the Commission's Secretary of the said withdrawal action. * * *
>
> This motion is grounded upon the premise that inasmuch as the subject matter of the proceeding has become moot, there is no longer a need to pursue the issues assigned in the docketed case and the proceeding should be dismissed.

On November 7, 1983, Hearing Counsel which is the only other party to the proceeding, other than the respondents, filed a reply to the respondents' Motion to Dismiss, wherein they stated they had no objection to the motion being granted.

Wherefore, in view of the above, it is,

Ordered, that the respondents' Motion to Dismiss this proceeding is granted and the proceeding is hereby discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 C.F.R. 508; DOCKET NO. 82–58]

ACTION TO ADJUST OR MEET CONDITIONS UNFAVORABLE TO SHIPPING IN THE UNITED STATES/VENEZUELA TRADE

December 30, 1983

ACTION: Discontinuance of Proposed Rule.

SUMMARY: On September 13, 1983, Concorde/Nopal Line moved the Commission to suspend action on its Petition For Issuance of Rules To Adjust Or Meet Conditions Unfavorable to Shipping in The United States/Venezuela Trade filed on July 8, 1983. In that motion, the Commission was advised that the United States and Venezuela had entered into a "Memorandum of Consultation" encompassing terms permitting Concorde/Nopal to apply for provisional status to participate in the U.S./Venezuela trade. Concorde/Nopal has now notified the Commission, by letter from its counsel, that its application for provisional status has been granted.

Concorde/Nopal will thus be able to carry cargoes otherwise reserved by the Government of Venezuela to Venezuelan-flag and associate carriers, continuing its longstanding service in the trade. Concorde/Nopal states that its status is "provisional pending the outcome of further negotiations (scheduled for the first quarter of 1984) between the U.S. and Venezuela concerning a bilateral maritime agreement" and is subject to certain unspecified conditions applicable only to the operations of Concorde/Nopal in this trade. Concorde/Nopal asks the Commission to "continue to suspend further proceedings" on this matter.

Concorde/Nopal's concerns regarding its continued participation in the trade appear to have been alleviated by the Venezuelan government's grant of provisional associate status. The Commission sees no reason to continue the present docket because of Concorde/Nopal's apparent fears that its provisional status will prove transitory or because of dissatisfaction with the unnamed conditions imposed on its service. The information provided the Commission by Concorde/Nopal indicates simply that it has been granted provisional associate status, a state of affairs no more transitory or less secure than the interim associate status previously granted the two U.S. flag carriers whose petitions for relief under section 19(b) of the Merchant Marine Act, 1920, 46 U.S.C. 876(b), resulted in initiation of this proceeding.* If Concorde/Nopal's status changes, or its service suffers from the imposition of significant discriminatory conditions, it may again petition

*Delta Steamship Lines, Inc. and Coordinated Caribbean Transport.

the Commission for action pursuant to section 19. No purpose would be served by continuation of the present inactive proceeding.

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

DATE: Effective January 12, 1984.

SUPPLEMENTARY INFORMATION:
None.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–33

IN THE MATTER OF RATES APPLICABLE TO OCEAN SHIPMENT OF ASSOCIATED FACTORIES, INC.

Because neither the carrier's tariff nor prevailing steamship practice define the method to be used to calculate the cube of rolls of carpet, shipper may have the benefit of the measurement method which yields the lowest rate.

Where an ambiguity exists in the carrier's tariff, it will be construed in a manner most favorable to the shipper.

Edward T. Brennan and Stephen W. Irving for Associated Factories, Inc.

Claudia E. Stone and Stephen F. Wahl for Sea-Land Service, Inc.

REPORT

December 30, 1983

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day, Thomas F. Moakley and Robert Setrakian, *Commissioners*)

This matter comes before the Commission on referral from the United States District Court for the Southern District of Georgia.

The case before the Court concerns a dispute between Associated Factories, Inc. (Associated) and Sea-Land Service, Inc. (Sea-Land) over the correct method of rating shipments of carpets. Associated has refused to pay ocean freight which Sea-Land believes is due on several shipments of carpets. As a result, the 8900 Rate Agreement to which Sea-Land belongs has revoked Associated's credit privileges. Associated brought the action in District Court seeking to have its credit privileges restored and is seeking punitive damages. The specific question referred to the Commission by the District Court is how the volume of carpet rolls should be measured for the purpose of calculating ocean freight.

By Notice served August 3, 1983 (August Notice), the Commission advised that it would treat the matter as a request for declaratory order under Rule 68 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.68). The August Notice also established a briefing schedule allowing for the filing of memoranda of law and affidavits of fact. Both Associated and Sea-Land have responded to the Commission's August Notice.

DISCUSSION

The ultimate issue presented here is simply whether Sea-Land properly rated the shipments of carpets tendered to it by Associated in calculating

the cubic measurement of the rolled carpet using the greatest dimensions of the roll (hereinafter "rectangularization").

Sea-Land argues that Rule 21(A) of the 8900 Rate Agreement Freight Tariff No. 8, FMC No. 8, Original Page 29 governs the measurement of carpet rolls. Rule 21(A) states in relevant part: "(1) All cargo shall be measured on the overall measurements of the individual packages, unless otherwise specified." Sea-Land contends that applying Rule 21(A) to the measurement of a roll of carpet results in a volume which is the product of the length of the roll times its width (*i.e., diameter*) times its height (*i.e., diameter*).

Associated, on the other hand, claims that the tariff rule is ambiguous and believes the proper and commercially acceptable method for measuring the volume of rolls of carpet is pi (3.14) times the radius squared times the length, which is the formula for finding the volume of a cylinder (hereinafter "the geometric formula"). Upon consideration of the arguments presented and review of the tariff provisions relied upon, the Commission finds for Associated.

Rule 21(A) states only that all cargo shall be measured on the *overall measurements* of the individual packages. What is meant by the "overall measurements" of a package is not defined or explained. Nor does Rule 21 specify what method is to be used to calculate the "overall measurements" of a package. In this regard, it is unlike those tariffs which state that the cubic measurement shall be the product of the three greatest dimensions. Specifying that the cubic measurement of the cargo shall be based on the depth, width and length of the cargo precludes the use of the geometric formula for calculating the cubic volume of a cylinder. In contrast, nothing in Rule 21 precludes the use of the geometric formula in determining the "overall measurements" of the carpet rolls.* By this decision we are in no way overruling the general rule stated in *Orleans Material and Equipment Co., Inc.* v. *Matson Navigation Co.*, 8 F.M.C. 160 (1964). Where rectangularization is clearly indicated, it continues to be a valid and essential means of rating cargo. Our holding here is based on our judgment that Rule 21(A) is sufficiently ambiguous to lead us to rule in favor of Associated.

In the absence of a tariff rule which clearly specifies the method to be used in order to determine the "overall measurements" of cargo, we conclude that in this instance Associated may have the benefit of the geometric formula. Ambiguous tariff provisions are construed against the maker, *i.e.*, the carrier, and in a manner most favorable to the shipper

*The Commission may look to matters outside the express language of the tariff to aid in its construction if there exists a custom or usage of a trade or course of dealing of the parties which, although not in the tariff, is such that it should be applied. *Great Northern Ry.* v. *Merchants Elev. Co.*, 259 U.S. 285, 291, 292 (1922); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 F.M.C. 551, 560 (1966). Although many tariffs specifically require "rectangularization" of cargo in calculating the cubic measurement for rating purposes, this does not establish that "rectangularization" is such a universal custom or usage in this trade and with this commodity so that it must be applied even though it is not specifically required by the tariff.

in terms of yielding the lowest rate. *Bratti* v. *Prudential et al.*, 8 F.M.C. 375, 379 (1964); *Sacramento-Yolo Port Dist.* v. *Fred F. Noonan Co., Inc.*, 9 F.M.C. 551, 558 (1966); *United Nations Children's Fund* v. *Blue Sea Line*, 15 F.M.C. 206, 209 (1972).

We therefore find and conclude that under the facts presented the carpet rolls at issue should have been measured for rating purposes using the geometric formula rather than the rectangularization method.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–39

ARMADA/GLTL EAST AFRICA SERVICE (AGREEMENT NO. 10464)

NOTICE

January 5, 1984

Notice is given that no exceptions have been filed to the November 23, 1983 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. 83–39

ARMADA/GLTL EAST AFRICA SERVICE (AGREEMENT NO. 10464)

An Agreement between a company known as Armada Great Lakes/East Africa Service Ltd. (Armada/East Africa), a purported non-common carrier, and Great Lakes Transcaribbean Line (GLTL), an admitted common carrier, establishes by joint venture a common carrier known as Armada/GLTL East Africa Service (Armada/GLTL line). The parties to this Agreement contend that it is not subject to section 15 of the Shipping Act, 1916, because Armada East Africa is not a common carrier. Protesting carriers and Hearing Counsel disagree. It is held:

(1) There are significant continuing relationships between the common-carrier joint service and GLTL, the common-carrier owner, relating to options to charter vessels to the joint service, handling claims, voting on sailings and vessels, and not competing with the service. These relationships alone support section 15 jurisdiction.

(2) The very words of the Agreement, contemporary affidavits, and other evidence show that the Agreement is really intended to include common-carrier affiliates of Armada East Africa and GLTL.

(3) Armada East Africa operates the common-carrier service as a full, active partner with GLTL, using a trade name for the joint service, shares earnings and liabilities for the joint service, provides funds, makes operational decisions, and carries out the very purpose for which Armada East Africa was first formed, and has even filed Anti-rebating Certificates as required of common carriers. Armada East Africa is therefore a common carrier itself.

Thomas D. Wilcox for proponents.

John W. Angus III for protestants.

John Robert Ewers, Joseph B. Slunt, and *Stuart James* for Hearing Counsel.

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

Finalized January 5, 1984

On January 11, 1983, Agreement No. 10464 was filed with the Commission under section 15 of the Shipping Act, 1916. The Agreement is between two companies, one known as Armada Great Lakes/East Africa Service, Ltd. (Armada East Africa) and the other, a company known as Great Lakes Transcaribbean Line, GMBH (GLTL). Under the Agreement, these two companies agreed to operate a common-carrier service as a joint venture in the trade between Canada/U.S. Great Lakes, Atlantic and Gulf Coasts ports and South/East Africa known as Armada/GLTL East Africa Service (Armada/GLTL line).

[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 CFR 502.227).

The Commission noted that although one of the owners of the new line, GLTL, was a common carrier by water operating between ports in the United States and various ports in the Caribbean and South America, the other, Armada East Africa, did not appear to be operating as a common carrier subject to the Act. Therefore, the Commission was concerned that it might not have jurisdiction to approve or disapprove the Agreement and before turning to the question of the merits of the Agreement, the Commission wished to determine the jurisdictional question. Therefore, by Order of Investigation, served September 9, 1983, the Commission instituted this expedited proceeding limited to the jurisdictional question and ordered the presiding judge to serve an Initial Decision no more than 75 days after service of its Order, i.e., on or before November 23, 1983.

In describing its concerns as to the jurisdictional question, the Commission delineated several areas of inquiry. First, it specified that "the issue that must be resolved is whether Agreement No. 10464 involves two or more common carriers by water over which the Commission has *in personam* jurisdiction." (Order, p. 2, footnote citation omitted.) In this regard, the Commission noted that Armada East Africa, the apparent non-common carrier owner of the new joint service, was part of the so-called "Armada Group," which consists of a number of companies providing shipping services, among which companies were two common carriers by water subject to the Act, Armada Lines and Atlantic Cross Shipping. Because the Agreement apparently contained a covenant not to compete which bound not only the signatory owners but affiliates, the Commission was concerned that this covenant involved two common carriers, namely, the Armada/GLTL line joint service itself and at least one affiliate of the owner, Armada East Africa, namely, Armada Lines. Therefore, the Commission questioned whether Armada East Africa should be considered to be a common carrier, in other words, whether the common-carrier status of the affiliate, Armada Lines, should be imputed to Armada East Africa.

A second area of inquiry set forth by the Commission concerned the question whether the two owners of the Armada/GLTL line existed as separate entities in the subject trade by doing such things as issuing separate bills of lading or furnishing crews and operating vessels in that trade. If such separate identities existed and were not subsumed in the Armada/GLTL line, the Commission opined that both owners might be common carriers subject to the Act.

Finally, the Commission stated that even if Armada East Africa could not be considered to be a common carrier subject to the Act, there may yet be section 15 jurisdiction over the Agreement "if it establishes a continuing relationship between [the Armada/GLTL line] and GLTL, both of which are common carriers subject to the Act." (Order, p. 3.) In this regard, the Commission cited a previous decision in which it had found jurisdiction on the basis of a continuing relationship (*Agreement No. 9955–1*, 18 F.M.C. 426 (1975)) and even though the Armada/GLTL line did

not itself sign the Agreement, the Commission nevertheless stated that "it may be appropriate to consider [the Armada/GLTL line] a party to the Agreement if it places obligations on the joint venture vis-a-vis its owners." (Order, p. 4.)

In order to meet the expedited schedule mandated by the Commission's Order, I convened a prehearing conference on September 27, 1983. The conference was attended by counsel for proponents, for the protesting members of the United States/South and East Africa Conference,[2] and by Hearing Counsel. At the conference it was agreed and established that proponents would answer certain questions posed by Hearing Counsel mainly in affidavit form, would attempt to stipulate the facts, and would file a single round of briefs if all parties agreed that the Commission had jurisdiction over the Agreement. If not, the parties would file opening and reply briefs. As it turned out, following the submission of affidavits, proponents continued to contend that the Commission lacked jurisdiction whereas protesting members of the Conference and Hearing Counsel contended to the contrary. The parties expressed satisfaction with the adequacy of the record and, accordingly, these briefs were filed. (See my rulings, served September 30 and October 19, 1983.) [3]

FACTUAL BACKGROUND

The Parties to the Agreement and Their Operations

1. Great Lakes Transcaribbean Line GmbH (GLTL), formerly known as KG Great Lakes Transcaribbean Line GmbH, has since 1965 operated a common-carrier service only between U.S./Canadian Great Lakes ports and ports in the Caribbean Sea/West Coast of South America under a tariff filed with the Federal Maritime Commission. GLTL has not and does not own or operate any ships in any trade between U.S. ports and ports in East, South or West Africa.

2. GLTL is currently owned by Mr. Hellmuth Essen of Hamburg, Germany, a private person and by KG MONSUN Schiffahrtsgesellschaft & Co. Nachfolger, Hamburg, a company which is owned and controlled by

[2] Two protests to the Agreement had been filed in February 1983 by members of the Conference and by Ceres Navigation, Ltd., having to do with the merits and approvability of the Agreement, which protests, because of the limited jurisdictional issue in this expedited proceeding, are not now relevant. (On request of the protesting member lines, I amended the Commission's Order which had stated that the Conference had filed the protests. See 46 CFR 502.147(a) and Notice of Rulings Made at Prehearing Conference, September 30, 1983.) Protestant Ceres, although kept informed of the conference and the proceeding, did not participate in this limited proceeding.

[3] As finally developed, the evidentiary record consisted of two affidavits of officers or managers of Armada East Africa and of GLTL, a copy of the Agreement No. 10464 and two amendments, and a copy of the letter of transmittal of the Agreement to the Commission, dated January 11, 1983, with supporting statements. (See my ruling, October 19, 1983.)

Hugo Stinnes Mulheim, a private limited partnership.[4] GLTL does not know of Mr. Essen's ownership, if any, in any other common carrier by water in the U.S. foreign commerce. KG MONSUN does not own or operate a common-carrier service in the U.S. foreign commerce. Hugo Stinnes Mulheim are engaged in industrial and shipping businesses. They partially own and operate five general-cargo vessels which are chartered to other lines. They do not operate any other common-carrier service operating in the U.S. foreign commerce. Hugo Stinnes Mulheim and another, independent company known as Ozean-Linie GmbH, Hamburg, own Ozean/Stinnes-Linien Gemeinschaftsdienst, a carrier operating in the trade between Mexico-Gulf and North Europe.

3. Armada Great Lakes/East Africa Service Ltd., (Armada East Africa), the other party to Agreement No. 10464, was incorporated under the laws of the Republic of Liberia on March 26, 1981, for the sole purpose of entering into a joint venture with GLTL to provide common-carrier service between U.S. and Canadian ports on the Great Lakes and ports in South and East Africa. Armada East Africa neither owns nor operates vessels in any trade and is a one-half owner only of the Armada/GLTL line joint service.

4. Armada East Africa is a member of the Armada Group. (See table in Appendix.) The Armada Group is owned two-thirds by Guldan Maritime Co., Ltd. and one-third by Skua (Holding) Ltd., both Liberian companies. The Armada Group owns, in whole or in part, several companies engaged in all aspects of maritime commerce world-wide, of which only three are engaged in common carrier service at United States ports. The three are: (a) Armada Lines Ltd., a Liberian corporation organized in 1978 to operate as a common carrier between Montreal, U.S. Atlantic and Gulf ports and ports in West Africa, changing in 1979 to concentrate between U.S. and Canadian Great Lakes ports and Montreal as loading areas. Armada Lines files a tariff with the Commission. It is managed jointly by three companies which are also members of the Armada Group (Armada Shipping S.A. (Switzerland); Armada Shipping Aps. (Denmark); and Armada Shipping Inc. (Houston, Texas, U.S.)). It has three general agents for booking and ports services (Protos Shipping Company, Montreal; Protos Shipping Company, Chicago, Illinois; and Bateaux Maritime Inc., New York, N.Y.).

(b) Atlantic Cross Shipping Co., a joint venture between Clipper Maritime, Inc., a Liberian corporation and member of the Armada Group, and Georgia Pacific Corporation (FMC Agreement No. 10434). Atlantic Cross operates as a common carrier between U.S. East and Gulf Coast ports and ports in Europe and the United Kingdom pursuant to tariffs filed with the Commission. Since November 1981 Atlantic Cross has been managed by Armada Shipping Inc., (Houston, Texas). Initially Atlantic Cross

[4] For ready reference and visual aid, a table of ownership, showing how the parties to the Agreement are owned by and related to other companies discussed in this decision, is attached to this decision as an Appendix.

employed ships furnished by Georgia Pacific but later chartered ships itself. Atlantic Cross has three managing agents (Armada Shipping Aps. (Denmark); Armada Shipping S.A. (Switzerland); and Armada Shipping Inc. (Texas, U.S.)). These three do not own or operate vessels.

(c) Armada/GLTL East Africa Service (Armada/GLTL line), the joint venture created by the subject Agreement, is described more fully below.

5. Armada/GLTL line is a vessel-operating common carrier which is jointly and equally owned by Armada East Africa and GLTL. It began as a joint-venture agreement which these two parties entered into on April 24, 1981. Since its beginning, it has operated as a common carrier pursuant to tariffs on file with the Commission between ports in the U.S. and Canadian Great Lakes and ports in East and South Africa under the trade name of Armada/GLTL East Africa Service. In December 1982 the owners decided to expand the service to include U.S. Atlantic and Gulf Coast ports and filed the appropriate tariffs with the Commission.

6. Armada/GLTL line is managed jointly by Armada Shipping S.A. (Switzerland); Armada Shipping Aps. (Denmark); and Armada Shipping Inc. (Houston, Texas, U.S.). Initially, Protos Shipping Company (Montreal and Chicago) were booking and port agents for the service but later Norton Lilly Co. Inc. (New York) was added as agent with the expansion of service to the U.S. Atlantic and Gulf ports.

7. Armada/GLTL line owns no vessels, to date has employed vessels chartered on the open market, and has not employed or chartered vessels owned by any Armada company, GLTL, or the Stinnes Group of Hamburg, Germany. All cargo of the service has been carried under bills of lading issued in the trade name of Armada/GLTL East and South Africa Service pursuant to the tariffs on file with the Commission. No cargo has been carried by the service under a bill of lading issued by any other carrier or agent of any such carrier.

8. Since there is no westbound cargo available to the service from ports in East and South Africa, the service presently is eastbound only from the United States and is performed by vessels that are voyage or trip chartered on the free market and returned "off-hire" to the owner or chartered at the completion of the eastbound voyage.

9. The broad or general operational decisions of the service are made by representatives of its owners, Armada East Africa and GLTL. Day-to-day management is under the direction of Per Gullestrop, Armada Shipping Inc. (Texas, U.S.).

10. The service does not coordinate its operations with GLTL or with Atlantic Cross Shipping or Armada Lines, Ltd. Each of these is a separate legal and operational entity. GLTL does provide certain services for the Armada/GLTL line as discussed below and does participate in broad policy decisions. However, the parties to the joint service view the Agreement as not legally binding on affiliates of either Armada East Africa or GLTL. Similarly the parties view their covenant not to compete (Article 6 of

the Agreement) as being an agreement between the two owners of the joint service that neither owner will compete with the joint service without the consent of the other owner.

Description of the Agreement

11. Agreement No. 10464, originally entered into on April 24, 1981, was established for the purpose of operating "a line between Canada/US-Great Lakes and East-/South Africa . . ." as a joint venture between its two owners, Armada East Africa and GLTL. The parties agreed to "participate with a share of 50% each on the expenditures, earnings, responsibilities and liabilities of the joint venture." The liner service was to be operated "in accordance with the general cargo policy to be always mutually agreed between the parties."

12. Article 2 of the Agreement provides for agreement between the parties as to the frequency of the sailings and the insertion of vessels in the liner service. It also provides that:

> When Armada which shall deem to include any company in the Armada group, shall have a vessel in position, Armada shall have the first option to fix such vessel to the line at the market rate prevailing . . . and in the event Armada shall have no vessel in position or does not exercise their option, GLTL shall have the second option of fixing one of their or Stinnes-group's own or chartered vessels to the line.

13. Article 3 of the Agreement provides for the appointment of Armada Shipping Aps. (Fredensborg, Denmark) as the exclusive agents and manager of the line and sets forth the agents' commission. It also provides that tonnage shall be fixed with Armada East Africa as charterers and "that GLTL shall indemnify Armada with 50% on claims and/or disputes arising under such charter or bills of ladings and that GLTL shall have the same rights and obligations under such charter party or bills of lading as if they had been inserted as joint charterers with Armada." GLTL also agrees to provide a cargo superintendent for the line to "supervise the loading and discharging of the cargo and see that voyages are prosecuted with the utmost dispatch." Article 3 also provides that "all cargo claims and claims in connection with the chartering of vessels are to be handled by GLTL" and that "as to the handling of claims a commission at 0.25 per cent of the gross amount of voyage freight of all cargoes booked to the line is to be paid to GLTL."

14. Article 4 of the Agreement, among other things, gives GLTL authority to commence legal proceedings or defend in them in the matter of claims or other proceedings brought against "the ship, her owners, charterers or managers." GLTL is authorized to settle claims up to less than $1,000. All claims are to be "forwarded directly to GLTL who will register such

claims enabling the parties at all times to ascertain the exact claims amount settled/outstanding on each voyage.''

15. Article 5 provides for the furnishing of funds to operate the line by the parties and, among other things, provides for the funds to be deposited in a separate bank account for the line and for "surplus of financial liquidity'' to be distributed to the parties under certain conditions.

16. Article 6 provides:

> None of the parties of this agreement nor any of their affiliated, controlled or associated companies shall during the duration of the joint venture carry out similar or competing liner service in the same trade provided for in this agreement unless the other party shall give its consent thereto.

The parties now state that this covenant not to compete means only that the two parties to the Agreement will not compete with the joint service without the consent of the other party and not that the covenant is legally binding on any companies affiliated with Armada East Africa or GLTL. The only way to bind those affiliates, in the view of the parties to the Agreement, would be to have those companies sign the Agreement themselves, which they have not done.

17. The remaining Articles of the Agreement (7 through 11) deal with effective dates of its existence, termination and agreement not to use the trade name of the line in such event, the sending of notices to the parties, scheduling of meetings every three months, and the applicability of English law.

18. The Agreement was amended twice. In the first amendment, dated February 5, 1982, the Agreement was extended from April 1, 1982 to March 31, 1983, and Article 5 was amended regarding the furnishing of statements of account of the line and distribution of surplus. In the second amendment, dated December 16, 1982, the line was expanded beyond the Great Lakes to serve U.S. Atlantic and Gulf ports, GLTL's name was changed to reflect its current status, and the Agreement was extended to March 31, 1984.

The Filing of the Agreement for Approval and Contemporaneous Statements

19. The Agreement was filed with the Commission on January 11, 1983. At that time the proponents requested "the Commission to approve pursuant to its authority under section 15 of the Shipping Act, 1916,'' and requested expedited processing to permit sailings out of the Atlantic by late January or early February 1983 and to meet shipper needs. They contended that the requirements of section 15 had been met and that "the agreements should be approved.''

20. The parties to the Agreement acknowledged that they had not previously filed their agreements for approval by the Commission but stated that the reason for this failure was the fact that Armada East Africa had

not been a common carrier although GLTL was. At the time they first filed on January 11, 1983, however, they thought that Armada East Africa "presumably" might have become a common carrier when the Armada/GLTL line's tariffs were first filed with the Commission and the Armada/GLTL line's service was advertised to the shipping public. They stated no intention to avoid any legal obligations, cited the fact that they duly filed tariffs required by law, and stated that they made a true and complete disclosure of all material facts underlying their agreements.

21. In support of their request for approval, the proponents submitted a Statement of Affidavit, dated January 21, 1983, in the name of three gentlemen, Mr. Wolf Neuendorff, GLTL Line Manager; Mr. Dietrich Moehle v. Hoffmannswaldau, "Manager of the Legal Department" of GLTL; and Mr. Jens-Erik Valentin, Treasurer of Armada East Africa.[5] They stated:

> In order to establish an efficient, regular, workable Liner Service the Parties agreed that only with the consent of the Partners of the Joint Venture their affiliated, controlled or associated Companies shall carry out a similar Liner Service in the same trade and to assure participation of all subsidiary or controlled Companies of the two Partners.

Identical language is contained in a companion "Statement" in the name of the above three-named gentlemen, also dated January 21, 1983.

Contentions of the Parties

As noted earlier, notwithstanding the filing of the Agreement on January 11, 1983, or the earlier beliefs of the parties to the Agreement regarding the status of Armada East Africa, proponents of Agreement No. 10464 now contend that the Commission lacks jurisdiction over it. Essentially proponents contend that one of the parties to the Agreement, Armada East Africa, is not now and never has been a common carrier by water subject to the Shipping Act, that the Agreement cannot legally bind common-carrier affiliates of Armada East Africa or of GLTL, and that there are no ongoing relationships between the Armada/GLTL line and its common-carrier owner, GLTL, which could subject the Agreement to section 15 of the Act. In more detail, proponents argue that Armada East Africa

[5] Mr. Jens-Erik Valentin is also Secretary of Armada East Africa, the non-common carrier party to the Agreement, is Senior Vice-President of Armada Shipping Inc. (Texas), and is an officer of other companies of the Armada Group. According to the Anti-rebating Certificates filed with the Commission pursuant to 46 CFR 552, Mr. Valentin was Chief Executive Officer of Armada East Africa and of Armada Lines Ltd., the common carrier affiliate of Armada East Africa, in July 1981 and August 1982, when the certificates were filed. The facts of these filings are officially noticed under 46 CFR 502.226. Interestingly, Armada East Africa, one of the parties to the Agreement which contends that it is not a common carrier, does not own or operate ships nor publish tariffs, and which contends that its common-carrier affiliates are not affected by the Agreement and that their common-carrier status cannot be imputed to Armada East Africa, nevertheless filed the Anti-rebating Certificates under 46 CFR 552 which normally are filed by common carriers or other persons subject to the Act. As noted, however, at least as of January 1983, the parties thought that Armada East Africa might have become a common carrier when the Armada/GLTL line filed tariffs and advertised its service.

does not own or operate ships, does not publish any tariffs, and does not hold itself out as a common carrier in any trade. Proponents argue further that the mere fact that Armada East Africa is a member of the Armada Group which comprises at least two common carriers (Armada Lines and Atlantic Cross) or that GLTL is affiliated with a common-carrier member of the Stinnes group (Ozean/Stinnes Linien) does not mean that Armada East Africa should be considered to be a common carrier itself or to have the common-carrier status of its common-carrier affiliates imputed to Armada East Africa. That is because, according to proponents, each of the companies is a separate entity which cannot be bound by the parties to the Agreement. Furthermore, notwithstanding the language of Articles 2 and 6 of the Agreement stating that Armada "shall deem to include any company in the Armada Group" and that "none of the parties of this agreement nor any of their affiliated, controlled or associated companies shall" carry on competing services etc., the parties to the Agreement contend that such language cannot legally bind those affiliated companies, and these two Articles merely express an agreement between the two owners of the joint service, one of which is not a common carrier, not to compete with their jointly owned subsidiary without the consent of the other parent. Proponents argue that neither Armada East Africa nor GLTL issues bills of lading, files tariffs, or furnishes crews for ships in the subject trade, in other words, that the identities of the two owners are totally subsumed in the joint venture which alone holds out to provide service to the trade. Proponents see no ongoing relationships between the joint service and GLTL which subject the Agreement to section 15. The various functions which GLTL provides for the joint service, according to proponents, i.e., appointment of the managing agent, cargo supervision and claims handling, are only managerial functions incidental to ownership as are decisions regarding frequency of sailings and insertion of vessels. Finally, the language of Article 2 of the Agreement which gives Armada East Africa a first option and GLTL a second option to "fix" a vessel to the joint service does not convert the Agreement into one requiring approval under section 15. All that Article means is that "if either owner, or a company related to an owner, has a ship 'in position' and wants to offer it (at market rate prevailing) to the joint service, then the owners, first Armada [East Africa] and then GLTL, shall have the first option to fix the ship to the joint service." (Proponents' Opening Brief, pp. 8-9.) Proponents state that neither owner has ever chartered a ship to the joint service in the past and that unlike the agreement in the *Dart Containerline* case, cited below, the joint service, if it charters from its owners, would do so at market rates rather than at rates to be determined by the owners. Nor is the joint service here required to charter from its owners and compensate the owners by a portion of the profits derived from the operation of the ship by the joint service, as was the situation

in another case, *Agreement No. 9955-1 (Star Shipping)*, 18 F.M.C. 426, 428 (1975).

Protesting members of the United States/South and East Africa Conference strongly dispute proponents' contentions. Protestants argue that Armada East Africa became a common carrier when it signed the Agreement or even before when it was incorporated solely to operate a common-carrier service and that Armada East Africa is part of the Armada Group which owns in whole or in part three common carriers by water including the present Armada/GLTL line joint service. Protestants argue that the Agreement confers rights, privileges, and obligations on members of the Armada Group as well as on GLTL, a recognized common carrier, with respect to the common-carrier joint service, and notes that the Chief Executive Officer of Armada East Africa is also the Chief Executive Officer of a common-carrier Armada affiliate. Protestants argue vigorously that the Commission ought to "pierce the corporate veil," citing much case law, because of the close affiliation of Armada East Africa with other common carriers in the Armada Group, common management or officers, and in order to carry out statutory objectives. Protestants point out that members of the Armada Group and GLTL have certain options to charter ships to the Armada/GLTL line joint service, that GLTL is given authority to handle claims for the line, and that proponents' contentions now that the language in Article 6 (covenant not to compete) that appears to cover companies affiliated with or related to the parties to the Agreement has no binding effect on such companies, contradicts the proponents' statements when they first filed the Agreement.

Hearing Counsel argue similarly. Hearing Counsel contend that Armada East Africa was formed solely to enter a joint service with GLTL, is a member of the Armada Group, and has common management and other ties with the common-carrier members of that Group. Hence common-carrier status ought to be extended to Armada East Africa. Hearing Counsel also argue that there are certain ongoing relationships between the Armada/GLTL line joint service and with GLTL. Thus Hearing Counsel point out that GLTL has second-option rights to charter vessels to the joint service and that GLTL provides supervising services and handles claims for the joint service. Hearing Counsel express concern that if the subject Agreement can be found not subject to section 15 because of the formation of a new corporation, Armada East Africa, which joins with a common carrier to do something otherwise covered by section 15, and no one looks behind the formation of such corporation, "it will open the door for any common carrier to evade the requirements of section 15 by merely forming new corporations to enter into any new section 15 agreements." (Opening Brief of Hearing Counsel, pp. 5-6.)

In the final round of reply briefs, proponents argue against jurisdiction under section 15 by pointing out that the joint-service line, as well as the common carrier, GLTL, and any common-carrier member of the Armada

or Stinnes Group, are still subject to the Shipping Act and that the Agreement is designed to promote competition. Proponents also contend that the protesting members of the Conference actually desire to restrict competition and are seeking to "artificially transform a non common carrier owner into a common carrier owner" in order to limit or prevent competition in their trades. Proponents contend, furthermore, that it was not the intent of Congress to have the Commission engage in legal fictions simply to exercise jurisdiction over an agreement which increases competition and that there is no reason in this case to "pierce any corporate veil."[6] Proponents concede, however, that there is an obligation on the part of the joint service to its owners regarding the owners' options to fix vessels to the line but contend that the charter rates for such vessels will ultimately be fixed by arbitrators in case of dispute. (Proponents' Reply Brief, p. 5.)

Hearing Counsel, in their reply brief, reiterate their earlier contentions, namely, that there are ongoing relationships between the joint service and GLTL, the common-carrier owner, regarding sailings, vessels, funding, handling claims and legal proceedings, supervising, not competing, and making operational decisions. Hearing Counsel also reiterate their argument that the common-carrier status of members of the Armada Group ought to be imputed to Armada East Africa because of language in the Agreement tying those members to the Agreement, especially with respect to the covenant not to compete with the joint-service line, and because of common management between common-carrier members of the Armada Group and the joint service. Hearing Counsel note that the proponents even explain in their opening brief (p. 6) that the purpose of Article 6 of the Agreement was to ensure that the "joint service would be free from direct competition by the owners or the owners' affiliated, controlled or associated companies without the consent of the owner. . . ."

DISCUSSION AND CONCLUSIONS

As mentioned earlier, the Commission advanced three areas of inquiry: (1) whether Armada East Africa should be considered to be a common carrier because of its relationship with common-carrier members of the Armada Group and because of certain language in the Agreement appearing to apply to those members; (2) whether the two owners and parties to the Agreement, Armada East Africa and GLTL, retain separate identities

[6] Proponents' final arguments that their Agreement promotes rather than restricts competition, in my opinion, goes to the merits of the Agreement rather than to the question of jurisdiction over it. If parties enter into cooperative working arrangements or other ventures falling under section 15, the fact that the arrangements may promote competition by introducing a new competitor or otherwise does not mean that the arrangements are removed from section 15 jurisdiction. See discussion in *Agreement No. 9955-1 (Star Shipping)*, 18 F.M.C. at 456. Similarly, the possible motivations of protestants in opposing approval of the subject Agreement are not relevant to the question of jurisdiction. Finally, as will be seen later in this decision, the facts of record are sufficient to determine the status of Armada East Africa without engaging in fictions or piercing corporate veils.

in the subject trade and are therefore, in effect, common carriers in the trade; and (3) whether there was a continuing relationship between the Armada/GLTL line joint service and GLTL, both of which are common carriers subject to the Act, such as if the joint service had certain obligations toward its owners imposed upon it by the Agreement.

I find that there are clearly continuing relationships which create rights, privileges, and obligations between the Armada/GLTL line joint service and at least one of its owners, the common carrier GLTL, so that there is section 15 jurisdiction on that basis alone. I find also that there are sufficient grounds to consider that the parties to the Agreement include common-carrier members of the Armada Group. I find finally that the record persuasively shows that Armada East Africa, far from losing its identity, is a full and active partner in running a common-carrier service with GLTL, funding that service, sharing earnings and liabilities, and carrying out Armada East Africa's sole purpose, which was to operate a common-carrier service in partnership with GLTL. Accordingly, Armada East Africa is itself a common carrier by water, as apparently it believed itself to be until recently arguing to the contrary.

The Continuing Relationship Between the Joint Service and GLTL

It is of course basic that section 15 jurisdiction does not attach to an agreement unless there is an ongoing relationship between two or more common carriers by water subject to the Commission's jurisdiction rather than a single, discrete event over which the Commission would have no continuing duty of surveillance. *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 729 (1973). In the case of a joint venture in which one party only is clearly a common carrier by water subject to Commission jurisdiction but the other or others are not, it has been held that jurisdiction will still lie over the agreement if there is a continuing relationship between at least one common-carrier owner and the common-carrier joint venture itself. See *Dart Containerline Company, Ltd. (Agreement No. 9745–3)*, Report on Remand, September 2, 1983, 22 SRR 352, 355;[7] *Agreement No. 9955–1 (Star Shipping)*, 18 F.M.C. 426, 453, 455 (1975).

Section 15 of the Act, 46 U.S.C. § 814, provides in pertinent part that a common carrier must file:

> a true copy, or, if oral, a true and complete memorandum of every agreement with another such carrier or other person subject to this Act . . . to which it may be a party or conform in whole or in part . . . giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; allotting ports or re-

[7] This case is back before the Court of Appeals and is pending decision of that Court in *Dart Containerline Co. Ltd. v. Federal Maritime Commission*, No. 82–1403 (D.C. Cir.).

> stricting or otherwise regulating the number and character of sailings between ports; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

The above statute has been held to be broadly drafted and therefore not to be given unduly narrow interpretations. *Volkswagenwerk v. F.M.C.*, 390 U.S. 261, 273 (1968) ("The Commission thus took an extremely narrow view of a statute that uses expansive language."); *Federal Maritime Commission v. Pacific Maritime Association*, 435 U.S. 40, 54 (1978) ("It is appropriate, therefore, that the Court has recognized the broad reach of section 15 and resisted improvident attempts to narrow it."); *Id.*, at 55–56 (". . . but the Court [in *Volkswagenwerk*] did emphasize the breadth of the statutory language and the determination of Congress, reflected in section 15, to 'subject to the scrutiny of a specialized governmental agency the myriad of restrictive agreements in the maritime industry'.").

In interpreting agreements under the Shipping Act and determining their scope, furthermore, it has also been held that the Commission has some flexibility, is not strictly bound by what the parties claim to be their intent, and in case of ambiguity the agreement is construed against the parties who drafted them. See *Swift & Co. v. Federal Maritime Commission*, 306 F. 2d 277, 281 (D.C. Cir. 1962); *Federal Maritime Commission v. Australia/U.S. Atlantic & Gulf Conference*, 337 F. Supp. 1032, 1037 (S.D.N.Y. 1972) (. . . "having drafted the Agreement [a dual-rate contract under section 14b of the Act] any ambiguity in its terms will be resolved against the Conference."). Furthermore, although usually encountered when determining the approvability of agreements rather than jurisdiction over them, it is established doctrine that the Commission is not confined to the mere words in an agreement submitted under section 15 of the Act but must consider the effects of such agreement. See, e.g., *Agreement No. T–4; Terminal Lease Agreement, Long Beach, California*, 8 F.M.C. 521, 529 (1965) ("Where agreements are strongly protested, as here, we must examine not only the terms of an agreement, but also the competitive consequences which may be expected to flow from the agreement and other facts which show the objectives and results of the agreements."); see also discussion in *Agreement No. 9955–1 (Star Shipping)*, cited above, 18 F.M.C. at 465–466.

In the instant case I find that there are clearly ongoing relationships between the Armada/GLTL line joint service and its owners, of which one, GLTL, is admittedly a common carrier by water subject to the Act, which relationships furthermore are the type specified in section 15. This is most clearly seen in Article 2 of the Agreement which confers a right of first option on Armada East Africa and a second option on GLTL for the fixing of vessels to the joint service at market rates. Although proponents contend that the joint service has never had to charter ships from its owners and that even if it did, the charter rates would simply be the prevailing market rates, it is clear that the joint service cannot

simply go out into the charter market to obtain ships but first must see if its owners have a ship available and wish to charter it to the joint service. The owners, in other words, enjoy an option which is a special right or privilege not enjoyed by other shipowners or ship charterers generally. Thus, this option granted to Armada East Africa and the common carrier-owner, GLTL, constitutes a "special privilege or advantage" as well as "providing for an exclusive, preferential, or cooperative working arrangement."[8] Of course, if Article 2 is read as it is written, then any number of the Armada Group, which includes two common carriers, would also have the right of first option to fix vessels.[9]

The ongoing or continuing relationships between the joint service and its owners GLTL is also shown elsewhere in the Agreement. Thus, Article 2 also imposes some control over the joint service's decisions as to frequency of sailings and insertion of vessels because GLTL has the right to vote down sailing or vessel plans which the joint service might proffer to the owners. Perhaps this is merely an agreement between the two owners and deals with management or is incidental to ownership as proponents would contend. This might be the case if the literal terms of the Agreement were to be construed in favor of the parties who drafted it. As noted, however, it is more proper to construe any doubts against the persons drafting the Agreement.

There are, however, perhaps clearer examples of continuing relationships between the joint service and GLTL which fall within the scope of activities set forth in section 15. Article 3 of the Agreement gives GLTL certain rights and obligations toward the joint service. Thus, GLTL agrees to handle "all cargo claims and claims in connection with the chartering of vessels" for which it is paid a commission derived from gross amount of voyage freight earned by the joint service. Article 4 further describes GLTL's authority in handling claims against the joint service by authorizing GLTL to prosecute legal proceedings or arbitrations or oppose and defend in such proceedings brought against "the ship, her owners, or charterers or managers," including the right to settle certain claims. It is very difficult to conclude that this undertaking by the common-carrier owner in behalf of the common-carrier service does not constitute at the very least a "cooperative working arrangement" within the meaning of the expansively written section 15. It is also arguable that the undertaking by GLTL to act for the joint service in this fashion gives that joint service a "special privilege

[8] In other contexts, an "option" is considered to be a right or privilege conferred on someone for consideration to purchase, lease, etc. See Black's Law Dictionary (5th Ed.) at 986. ("A right, which acts as a continuing offer . . . a privilege existing in one person . . . .")

[9] As I discuss later, the record shows that it was the intent of the parties or their understanding that related companies of the parties would be involved notwithstanding their later disclaimers. Indeed, even in proponents' opening brief (pp. 8–9) proponents explain that "All that Article 2 of Agreement No. 10464 means is that if either owner, *or a company related to an owner*, has a ship 'in position' and wants to offer it (at market rates prevailing) to the joint service, then the owners, first Armada [East Africa] and then GLTL, shall have the first option to fix the ship to the joint service." (Emphasis added.)

or advantage'' not normally enjoyed by other common carriers. Cf. *Agreement No. 9955–1 (Star Shipping)*, cited above, 18 F.M.C. at 456–457, and *In the Matter of Agreement FF 71–7*, 17 F.M.C. 302, 305 (1974) regarding the enhanced competitive abilities of parties to an agreement as constituting ''special privileges and advantages.''

Finally, although the full meaning and extent of the words cannot be ascertained in this limited proceeding, it appears from Article 3 that, in addition to agreeing to indemnify Armada East Africa with 50 percent on claims or disputes arising under charters or bills of lading, GLTL is given the ''same rights and obligations under such charter party or bills of ladings as if they had been inserted as joint charterers with Armada.'' Without a full record which would describe what these words or other words in the Agreement are supposed to mean, it is difficult to find with certainty how the Agreement operates. However, again construing any doubts against the persons drafting the Agreement, I would at least have to conclude that GLTL has some rights or obligations in connection with the joint service's bills of ladings which must constitute a type of cooperative working arrangement and that, contrary to proponents' contentions, the GLTL entity might not have become completely subsumed in the Armada/GLTL line joint service which issues bills of lading in the name of the joint service. As I discuss below, whether there is a continuing relationship between GLTL and the common-carrier members of the Armada Group because of the covenant not to compete in Article 6 depends upon the interpretation of the literal language of Article 6 and the weighing of certain contradictory evidence.

Involvement of Armada Group Members in the Agreement

Although the above discussion demonstrates that the Commission has jurisdiction over the Agreement because of continuing relationships written into the Agreement between the Armada/GLTL line joint service and at least one of its owners, the common carrier, GLTL, there are further grounds on which jurisdiction can be based although the record is limited. However, even on this limited record the preponderance of the evidence shows that the Agreement was drafted with the intention of involving members of the Armada Group notwithstanding later denials.

As discussed above, proponents contend that despite the explicit language in Article 2 which refers to ''Armada, which shall deem to include any company in the Armada Group'' and in Article 6, which refers not only to the parties to the Agreement but to ''any of their affiliated, controlled or associated companies,'' these other companies have not signed the Agreement and therefore cannot be legally bound by it. In other words, notwithstanding clear language, proponents contend that the members of the Armada Group or affiliates of GLTL are not involved in the Agreement. Protestants and Hearing Counsel, on the other hand, ask me to pierce the corporate

fictions and extend the common-carrier status of two members of the Armada Group, at least, to Armada East Africa.[10]

The Agreement here is certainly clearly written to include "any company in the Armada group" (Article 2) and "affiliated, controlled or associated companies" (Article 6). Furthermore, contemporaneously (more or less) with the filing of the Agreement in January of 1983, the statements of the three officers of Armada East Africa and GLTL asserted that "only with the consent of the Partners of the Joint Venture their affiliated, controlled or associated companies shall carry out a similar Liner Service in the same trade and to assure participation of all subsidiary or controlled Companies of the two Partners." (Statement of Affidavit, January 21, 1983, and Statement, January 21, 1983, found in Exhibit 4.) As late as the filing of the proponents' opening brief, on October 31, 1983, proponents explained Article 2 to mean "that if either owner, *or a company related to an owner*, has a ship 'in position,'" then the two nominal parties, Armada East Africa and GLTL, have the options described above. Proponents' Opening Brief, p. 8. (Emphasis added.) In contrast to the above evidence, the same three officers who gave the evidence above at the time of filing, now contend that Article 6 has no legal effect because the related companies are not signatories to the Agreement and cannot be bound to it. (No express mention is made by them of Article 2 regarding the options to fix vessels to the joint service but there is a general statement in Mr. Valentin's later affidavit that there is no operational coordination or relationship between the joint service and common-carrier members of the Armada Group in the matter of vessel utilization.)

This later evidence, which was prepared and submitted in response to questions of Hearing Counsel during litigation, must be compared with earlier statements which were prepared in order to seek approval under section 15 without regard to the jurisdictional issue. It is usual to give more weight to evidence given without contemplation of litigation than to evidence prepared in contemplation of or during litigation. However, even if this rule were not applied, proponents' own remarks in their opening brief interpreting Article 2 to refer to "related" companies would tilt the balance against proponents. Furthermore, as discussed above, if there were any doubt, such doubt should be construed against the parties who drafted the Agreement. *Federal Maritime Commission* v. *Australia/U.S. Atlantic & Gulf Conference*, cited above, 337 F. Supp. at 1037.

On the basis of the above evidence of record, limited though it may be by the time constraints established in this proceeding, I find that the

[10] Protestants and also Hearing Counsel argue that I should disregard corporate fictions and "pierce the corporate veil" so as to impute common-carrier status to Armada East Africa because of its affiliation with common-carrier members of the parent Armada Group. Protestants provide numerous case authorities holding that courts and regulatory agencies can disregard corporate fictions when necessary to prevent fraud, injustice, circumvention of law, etc. As I discuss below, however, I find no deliberate attempts by proponents to circumvent law in the past on this record, and, in any event, find ample evidence to show that it is not necessary to pierce any corporate veils in order to find jurisdiction over the Agreement.

preponderance of credible evidence shows that the Agreement was intended to apply to members of the Armada Group and to affiliates of GLTL, which members and affiliates include several common carriers by water subject to the Act. I note, furthermore, that the evidence tending to show that the affiliates of the nominal parties were intended to be participants in the Agreement is fortified by other facts consistent with such a conclusion, cited by protestants and Hearing Counsel relating to the management and staffing of Armada East Africa. Thus, Armada East Africa shares the same three management companies, members of the Armada Group, with Armada Lines, a common-carrier member of the Group. Armada East Africa has or did have the same Chief Executive Officer, Mr. Valentin, as Armada Lines, and Armada East Africa employs the services of the same agents, Protos Shipping Company, as Armada Lines. While these facts of commonality may not by themselves show that the members of the Armada Group were supposed to participate in the fixing of vessels under the option granted in Article 2 or the covenant not to compete under Article 6, such common relationships certainly are consistent with that conclusion and would facilitate such intentions. The cumulative effect of all of the above evidence therefore is to support the conclusion that it really was the parties' intention "to assure participation of all subsidiary or controlled companies of the two partners," as all three witnesses for proponents stated in January 1983.[11] There is therefore sufficient evidence to find that the affiliates of the two nominal parties are involved with the Agreement and that they are, in effect, parties to it even if they did not themselves sign it. Cf. *Dart Containerline Company Ltd. (Agreement No. 9745–3),* cited above, 22 SRR at 354–355.

Armada East Africa Is Itself a Common Carrier by Virtue of its Partnership Arrangement With GLTL

As discussed above, the Commission's two areas of inquiry into the question whether there are continuing relationships between the Armada/GLTL joint service and GLTL and whether common-carrier members of the Armada Group or affiliates of GLTL are involved with the Agreement can be answered affirmatively, thus conferring jurisdiction over the Agreement. The Commission, however, also inquired whether Armada East Africa

[11] As Hearing Counsel noted in their reply brief (p. 3), furthermore, even as late as October 31, 1983, proponents, in their opening brief (p. 6) seem to concede that the purpose of Article 6, the covenant not to compete, was to make sure that the joint service "would be free from direct competition by the owners or the owners' affiliated, controlled, or associated companies . . . ." Proponents insist that this covenant is really only an agreement between Armada East Africa and GLTL. However, under a more realistic and common-sense analysis, it appears at least that neither of the owners would want to compete with their off-spring, as the courts recognize in cases involving joint ventures under the antitrust laws. See *United States* v. *Penn-Olin Co.,* 378 U.S. 158, 169 (1964). The effect, then, is that the new common-carrier joint service would enjoy a protection against competition from either of its owners and, as even proponents seem to concede in their opening brief, from any affiliates of the owners. In effect, then, the Agreement either involves the joint service and its owner, GLTL, another common carrier, or involves the joint service and carriers affiliated with its owners.

and GLTL maintained their separate identities so that both could be considered to be common carriers and not to have been subsumed in the joint service. Although the Commission cited such possible facts as providing crews and issuing bills of lading as facts showing separate common-carrier identities, I find that the record shows persuasively a number of reasons why Armada East Africa as well as GLTL, far from erasing their identities as common carriers, have maintained themselves as common carriers, to a large extent because, unlike the situation in the *Dart Containerline* and *Star Shipping* cases, cited above, or the *Viking* Line case, cited below, Armada East Africa and GLTL formed not a corporation but a simple partnership in which the partners retain responsibility and liability personally for the activities of the partnership, provide funds, and make operational decisions, thereby demonstrating that they are not simply "incorporators" who lie silently in the background. In addition, other evidence relating to Armada East Africa's purpose when it became a corporation and its own previous actions tending to show that even it believed that it had become a common carrier notwithstanding the more recent denials in this proceeding, demonstrate that Armada East Africa itself became a common carrier in partnership with GLTL, another common carrier when these companies decided to operate their partnership under the Armada/GLTL line trade name. Therefore, for purposes of jurisdiction the Commission may consider the joint service as a trade entity with continuing relationships with GLTL, its common carrier "owner," may conclude that common-carrier members of the Armada Group are involved in the Agreement, or may look at the arrangement between the parties more realistically and conclude that all it is is a partnership between two common carriers operating jointly under a trade name.

The record shows that Armada East Africa was formed for only one purpose, namely, to enter into a joint venture with another common carrier, GLTL, to provide common-carrier service in a United States trade and that in April 1981, it became "half owner" in the joint service. The Agreement which embodies this joint venture, however, does not appear to be a corporation but rather a partnership. Indeed, the three witnesses for the joint service referred to each of the owners as "partners" in the affidavit and statement submitted in January 1983. It appears to be true that Armada East Africa neither owns nor has it chartered ships to the joint service. However, as in any partnership arrangement, the Agreement provides that Armada East Africa shares "expenditures, earnings, responsibilities and liabilities of the joint venture." (Agreement No. 10464, first page.)

Proponents, however, contend that Armada East Africa has no identity in the trade as a common carrier, does not publish tariffs, own or operate ships, etc., therefore, it should not be considered to be a common carrier itself but has been subsumed in the joint service. The above contention gets into the question of who or what is a common carrier, i.e., when

does an owner itself become the common carrier rather than being a person or company remaining silently in the background. Interestingly, at one time proponents thought that Armada East Africa itself became subject to the Act when tariffs of the joint service were filed and the joint service was advertised to the shipping public. (See letter of transmittal, dated January 11, 1983, page 4, Exhibit 4.)

The Commission has held for some time that one may become a common carrier although not owning or operating vessels. Such a carrier has long been known as a "non-vessel operating common carrier" (NVOCC). See *Common Carriers by Water-Status of Express Companies, Truck Lines and Other Non-Vessel Carriers*, 6 F.M.B. 245 (1961); *Puget Sound Tug & Barge* v. *Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962); *Charging Higher Rates than Tariff*, 19 F.M.C. 43, 51 (1975). Therefore, owning or operating vessels is not the factor determining status. The Commission has also held that *incorporators* do not become common carriers by water merely because they have formed a new company. See *Grace Line, Inc.* v. *Skips A/S Viking Line et al.*, 7 F.M.C. 432, 448–449 (1962). In the *Viking* case, it was argued that two companies which otherwise appeared to be shipowners located in Norway (known as Laly and Imica), who had incorporated the Viking Line, themselves became common carriers by so doing. The Commission rejected this argument because "if it be correct, it means that all individual incorporators of a steamship line have always been and are violators of section 15 of the 1916 Act." 7 F.M.C. at 448–449. Cf. also *Agreement No. 9955–1 (Star Shipping)*, cited above, 18 F.M.C. 436, 451, 452–453, 462, in which the Star arrangement which set up a corporation under Norwegian law did not serve to convert the non-common carrier owners of Star into common carriers subject to the Act.

In the instant case, it does not appear that the joint service is a corporation but rather a partnership, in which case it is really two companies, Armada East Africa and GLTL, doing business as the Armada/GLTL line. The joint service itself is therefore no corporate entity. Indeed, as proponents' witnesses themselves state: "The use of the name Armada/GLTL Line East Africa Service is purely a marketing decision unrelated to any legal considerations." (Valentin Affidavit, Exhibit 1.) Nor is it therefore necessary to "pierce the corporate veil" so as to impute to Armada East Africa the common-carrier status of affiliated companies in the Armada Group. All that is necessary is to recognize that Armada East Africa was set up to operate a common carrier service as a partner with another company, a common carrier, that such a partnership was set up, that the two partners share earnings and liabilities as in all partnerships, and that they do business as common carriers as the Armada/GLTL line, a trade name only "unrelated to any legal considerations." In previous cases the Commission has looked behind mere forms to determine who the real carriers were even though such scrutiny required disregarding corporate entities and even though the person found to be a common carrier had suppressed its own name, its

identity, and its holding out in favor of another carrier. In *Agreement 9597 (Uiterwyk),* cited above, 12 F.M.C. 83, the Commission rejected claims of companies known as Uiterwyk and Continental which argued that they were agents of a common carrier known as Flomerca because, among other things, the carrier operation in question was conducted in the name of Flomerca only, whose name was used in manifests, bills of lading, advertising, solicitation, and tariffs, and that neither Uiterwyk nor Continental had ever operated as a common carrier. 12 F.M.C. at 92, 100. The Commission found, however, that Uiterwyk/Continental were in reality the common carriers notwithstanding their disclaimers and that they had entered into agreements with Flomerca which had not been filed as required by section 15 of the Act. The Commission also answered the argument that Uiterwyk/Continental could not be the common carriers involved because only Flomerca held itself out as such in the trade by holding that both Flomerca and Uiterwyk/Continental were common carriers, the former, a nonvessel operating common carrier and the latter, the underlying common carrier. 12 F.M.C. at 100.[12] The Commission was also motivated by the legal principle that corporate fictions may be disregarded when necessary to prevent parties from attempting to circumvent a statute or when companies are erected as implements for avoiding clear legislative purposes. 12 F.M.C. at 101–102. (The record in the *Uiterwyk* case showed that the arrangements in question had been drafted in order "to free the operation from Commission jurisdiction and to immunize it from protests by competing carriers," and that the parties "felt that this could best be done by putting it 'purely in the name of Flomerca.' " 12 F.M.C. at 93.)

In the instant case, the limited record does not show that the Armada Group deliberately formed the Armada East Africa corporation as a means to avoid the requirements of section 15 of the Act or any law. On the contrary, as mentioned, Armada East Africa believed, at least in January 1983, that Armada East Africa had "presumably" become a common carrier itself when it published tariffs in the name of the Armada/GLTL line joint service and advertised the service. Moreover, Armada East Africa filed two Anti-rebating Certificates, as required of common carriers by Commission regulations, again indicating an apparent belief that it was operating as a common carrier. Nor does the record show that Armada East Africa was formed as a "shell" corporation in order to conceal the fact that common-carrier members of the Armada Group were intended to be participants in the Agreement. On the contrary, the parties did file

[12] Interestingly, although Flomerca, which otherwise in other trades was a vessel operating common carrier, in the subject trade was merely a sort of dummy whose name was being used by the real operators of the service, Uiterwyk, who gave Flomerca royalty payments for the use of the Flomerca name, Flomerca doing little else. Nevertheless the Commission found Flomerca as well as Uiterwyk to be a common carrier in the subject trade. In the instant case the Agreement provides that Armada East Africa shall "share earnings, responsibilities, and liabilities of the joint venture." Armada East Africa is far more than the mere dummy that was Flomerca in the Uiterwyk agreement, yet the Commission found Flomerca to be a common-carrier party to the agreement.

the Agreement in January 1983 and even submitted affidavits conceding that they intended to "assure participation" of all "subsidiary or controlled companies of the two partners." Therefore, I cannot find on this record that there is an element of concealment or deception as there was in the *Uiterwyk* case in which Uiterwyk had established a number of puppet corporations and otherwise suppressed its name in order to avoid the requirements of section 15.[13]

Nevertheless, although apparently free of the scheming that was prevalent in the *Uiterwyk* case, Armada East Africa is as much as or more of a common carrier in the subject trade than was Flomerca, the dummy "owner" in the *Uiterwyk* case, since unlike Flomerca, which had merely lent its name to the common-carrier operation and received "royalty" payments, Armada East Africa shares earnings, responsibilities and liabilities of the Armada/GLTL line, provides funds, "whenever necessary for operating of the line," and participates in operational decisions for the line, in other words, is a full, active partner operating a common-carrier service under a different trade name with a recognized common-carrier partner.

In conclusion, then, I find Armada East Africa, which was formed specifically "for the sole purpose of entering into a joint venture . . . to provide common carrier service," which believed it had become a common carrier when it filed tariffs and advertised for the joint service, which filed Anti-rebating Certificates with the Commission, as common carriers are required to do, which shares earnings, responsibilities and liabilities of the common-carrier joint service, which presumably provides its share of funds to operate the line, and which participates in operational decisions for the line, is itself a common carrier doing business as a partner with another common carrier using a trade name which admittedly was selected for marketing, not legal purposes. To paraphrase a common saying, if it walks like a duck, acts like a duck, quacks like a duck, and was born to be a duck, it is indeed a duck.[14]

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[13] I am aware of the protest filed by Ceres Navigation, Ltd. relating to the question of approvability of the Agreement, an issue not before me, in which Ceres argues against approving the Agreement on the ground that the parties operated without approval and should have been or were aware of the requirements of section 15 as evidenced by the filing of Anti-rebating Certificates by GLTL or Armada officials. My findings in this proceeding have nothing to do with approvability nor with the parties' motivations or beliefs in failing to file for approval. I cite the evidence regarding the filing of Anti-rebating Certificates and the belief that Armada East Africa may have become a common carrier at some time as showing just that, namely, that at some time before January 1983, Armada East Africa came to the belief that it might have become a common carrier by water and should file its Agreement with GLTL with the Commission under section 15. In other words, the record before me is not sufficient to find that the parties were engaging in the type of deliberate deception that was the situation in the *Uiterwyk* case.

[14] It is surprising that neither protestants nor Hearing Counsel, who are concerned that corporate fictions not be used to shield the real parties and carriers from their legal obligations, did not quite perceive that the Armada/GLTL line joint service is not even a corporation but is simply a partnership and a trade name. If corporation A, incorporated to be a common carrier, had operated and advertised the "C Line," a trade name only, would anyone doubt that the common carrier was corporation A? Why should it make any difference if corporation A and corporation B, a common carrier, operated the "C Line" as a partnership, the "C Line" being a trade name only? That is precisely what Armada East Africa and GLTL have done in operating the Armada/GLTL line.

ULTIMATE CONCLUSIONS

Proponents of Agreement No. 10464 contend that it is not subject to section 15 of the Act because one of the nominal parties to the Agreement, Armada East Africa, is not a common carrier by water and that there are no continuing relationships with the common-carrier line joint service, Armada/GLTL line, which Armada East Africa and GLTL, a recognized common carrier, formed by the Agreement. Protestants and Hearing Counsel disagree strongly, arguing that Armada East Africa is tied to common-carrier members of the so-called Armada Group by the very terms of the Agreement, should therefore be considered a common carrier itself, and that there are continuing relationships between GLTL, the common-carrier owner of the Armada/GLTL line, and the line.

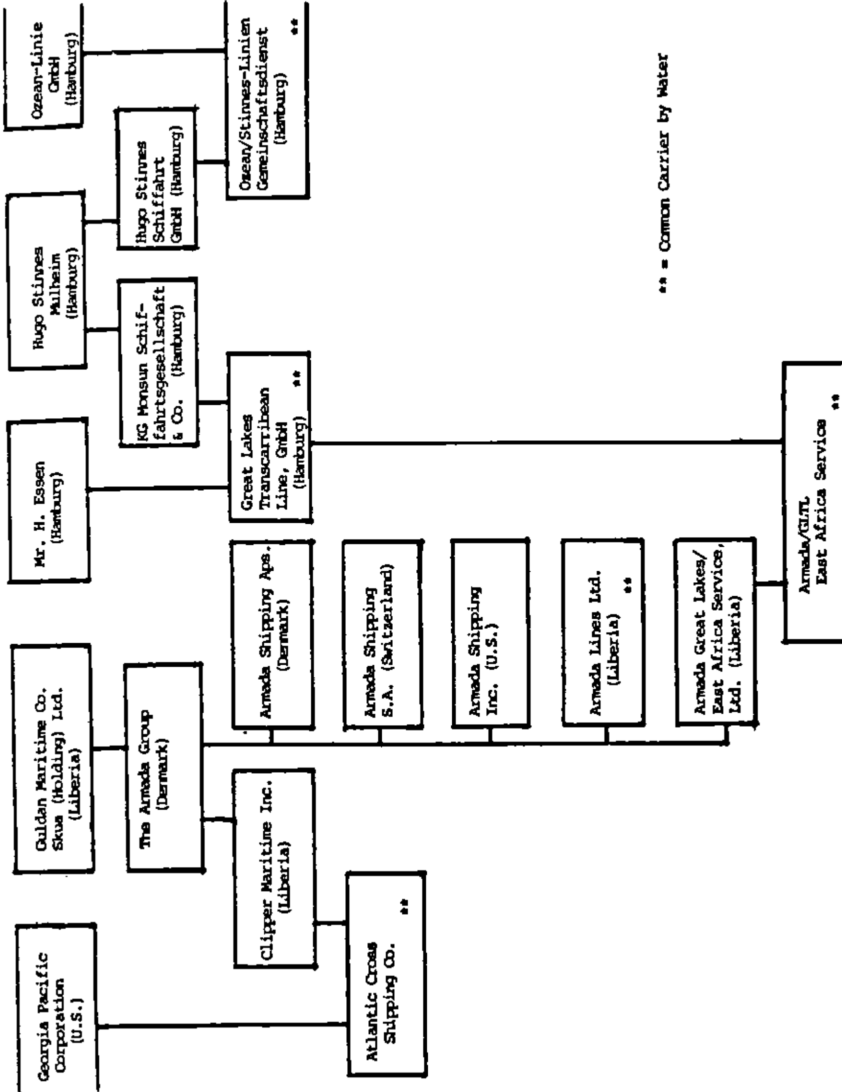
The record shows three grounds for finding jurisdiction over the Agreement. First, there are continuing relationships between GLTL, the admitted common-carrier owner of the Armada/GLTL joint service, which are critical, relating to GLTL's option to charter vessels to the joint service, to vote on sailings and insertions of vessels, to handle claims and legal proceedings, and a covenant not to compete with the joint service. These relationships constitute special privileges or advantages or cooperative working arrangements between GLTL and the joint-service line within the meaning of section 15 of the Act.

Second, as shown by the very words of the Agreement, by affidavits filed contemporaneously with the Agreement when it filed for approval, and even by the parties to the Agreement in their more recent opening brief, these parties intended to "assure participation" of companies affiliated with and related to Armada East Africa in the Armada Group and to GLTL. Therefore, the Agreement really includes common-carrier members of the Armada Group, which owns Armada East Africa, regarding critical covenants not to compete and options to charter vessels.

Third, the record leads persuasively to the conclusion that Armada East Africa has itself become a common carrier by water so that it is not even necessary to pierce corporate fictions or impute common-carrier status to Armada East Africa because of its ties to common-carrier members of its parent Armada Group. That is because, as the record shows, Armada East Africa is operating a common-carrier service, a partnership, not a corporation, as a full partner with GLTL, using the trade name for marketing, not legal purposes, of the Armada/GLTL line. In so operating, Armada East Africa is carrying out the purpose for which it was specifically formed, namely, to operate a common-carrier service jointly with GLTL. Furthermore, Armada East Africa itself had believed that it had become a common carrier when the joint service filed tariffs and advertised to the shipping public and Armada East Africa had even filed Anti-rebating Certificates with the Commission, as common carriers are required to do. Armada East Africa also shares earnings, responsibilities and liabilities of the joint service line as is customary in partnerships, and Armada East Africa pro-

vides its share of funds to operate the line and participates in operational decisions for the line. To paraphrase a common saying, if it walks like a duck, acts like a duck, quacks like a duck, and even was born to be a duck, it is indeed a duck.

(S) NORMAN D. KLINE
Administrative Law Judge


APPENDIX 1
Ozean-Linie GmbH (Hamburg)
Ozean/Stinnes-Linien Gemeinschaftsdienst (Hamburg) **
Hugo Stinnes Schiffahrt GmbH (Hamburg)
Hugo Stinnes Mülheim (Hamburg)
KG Monsun Schiffahrtsgesellschaft & Co. (Hamburg)
Great Lakes Transcarribean Line, GmbH (Hamburg) **
Mr. H. Essen (Hamburg)
Armada/GLTL East Africa Service **
Armada Shipping Aps. (Denmark)
Armada Shipping S.A. (Switzerland)
Armada Shipping Inc. (U.S.)
Armada Lines Ltd. (Liberia) **
Armada Great Lakes/East Africa Service, Ltd. (Liberia)
Guldan Maritime Co. Skua (Holding) Ltd. (Liberia)
The Armada Group (Denmark)
Clipper Maritime Inc. (Liberia)
Atlantic Cross Shipping Co. **
Georgia Pacific Corporation (U.S.)
** = Common Carrier by Water

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–26

PACIFIC COAST EUROPEAN CONFERENCE (AGREEMENT NO. 5200)

A 120-day advance notice provision in the Conference Agreement is found to be contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916, and ordered to be deleted from the Agreement.

David C. Nolan for Pacific Coast European Conference.

Stuart James and *John Robert Ewers* for Bureau of Hearing Counsel.

REPORT AND ORDER

January 18, 1984

BY THE COMMISSION: (Alan Green, Jr., *Chairman;* James J. Carey, *Vice Chairman;* James V. Day and Robert Setrakian, *Commissioners;* Thomas F. Moakley, *Commissioner,* dissenting in part) *

This proceeding was initiated by Order of May 31, 1983, directing the Pacific Coast European Conference (PCEC) and its member lines to show cause why Agreement No. 5200 should not be modified to delete from the Agreement a 120-day advance notice provision on intermodal rate offerings, and if not so modified why the Agreement should not be found contrary to the public interest within the meaning of section 15 of the Shipping Act, 1916 (46 U.S.C. § 814), and disapproved pursuant to that section. The proceeding was limited to the filing of affidavits of fact and memoranda of law but allowed for requests for evidentiary hearing and discovery. PCEC filed a response with exhibits.[1] The Bureau of Hearing

* Commissioner Moakley's opinion dissenting in part is attached.

[1] PCEC submitted the following exhibits: a portion of the sworn statement, dated December 3, 1976, of Raymond A. Velez, a former PCEC Chairman (Exh. A); a statement dated November 16, 1976, of Manuel Diaz, the Executive Director of the Associated North Atlantic Freight Conferences (Exh. B); the sworn testimony, dated July 8, 1983, of Donald Thiess, the present PCEC Chairman (Exh. C); an affidavit, dated July 7, 1983, submitted on behalf of Johnson Scanstar (Exh. D); an affidavit, dated July 7, 1983, submitted on behalf of Scan Pacific Line (Exh. E); an affidavit, dated July 8, 1983, submitted on behalf of United Yugoslav Lines (Exh. F); an affidavit, dated July 8, 1983, submitted on behalf of Compagnie Generale Maritime (Exh. G); an affidavit, dated July 8, 1983, submitted on behalf of Intercontinental (ICT) B.V. (Exh. H); an affidavit, dated July 8, 1983, submitted on behalf of Hapag-Lloyd A.G. (Exh. I); an affidavit, dated July 11, 1983, submitted on behalf of d'Amico Societa Di Navigazione SpA (Exh. J); an affidavit, dated July 11, 1983, submitted on behalf of Italian Line (Exh. K); and an affidavit, dated July 11, 1983, submitted on behalf of Zim Israel Navigation Co. Ltd. (Exh. L).

Counsel (Hearing Counsel) filed a reply and one exhibit.[2] The parties did not request an evidentiary hearing or discovery.

BACKGROUND

Agreement No. 5200 is the basic agreement of the Pacific Coast European Conference. The members of the Conference are: Johnson Scanstar; Scan Pacific Line; United Yugoslav Line; French Line; Incotrans Line; Hapag-Lloyd; D'Amico Line; Italian Line; and Zim Container Line. The Conference was originally established in 1937 to provide all-water service in the trade from U.S. Pacific Coast ports to European destination ports.

In 1977, the Commission approved, subject to certain conditions, Agreement No. 5200–29 (Amendment 29), an amendment authorizing Conference service to inland points in Europe. *See Conditional Approval of Agreement No. 5200–29,* January 12, 1977. Amendment 29 required an individual member line to give the Conference 120 days advance notice before offering an intermodal service which is within the scope of the Agreement and which is not being served under a Conference tariff.[3] One of the conditions to approval imposed by the Commission required amendment of the notice clause to add a proviso that an individual intermodal tariff would be superseded only where the Conference tariff is no less favorable to the promotion and development of the intermodal service involved than the parallel provisions of the applicable individual tariff. The Conference accepted this condition of approval.

Subsequent to the approval of Amendment 29, the Commission, in addressing another conference's request for intermodal authority, ruled that an individual member of a conference may not be required to provide *any* advance notice to a conference where the member wishes to offer a new intermodal service that is within the scope of conference authority and that is not included in a conference tariff. *See Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36,* 18 S.R.R. 339, 342 (1978) (*AWAFC*). The Commission found that advance notice provisions generally burdened the filing of indi-

[2] Hearing Counsel submitted the affidavit of Austin L. Schmitt, Chief Economist of the Office of Policy and Planning and International Affairs, Federal Maritime Commission (Schmitt Affidavit).

[3] The notice provision in the third paragraph of Article 1, as modified, provided that:

> In the event a member line desires to offer an intermodal service within the scope of this Agreement, but not being offered by the Conference under its tariff, it shall first present the matter to the Conference in writing for consideration and joint action. Only in the event the Conference does not, within one hundred twenty (120) days of such presentation, establish such service shall the proposing member, or any other member line, be free to act unilaterally in respect to the matter proposed. In the event the Conference shall, by such vote, subsequently adopt and effectuate a tariff or tariffs covering the service embraced by any such member's individual tariff, the member's tariff, to the extent of such duplication, shall be cancelled by said member or members which are parties thereto coincidentally with the effectiveness of such Conference tariff or tariffs. Provided, however, that such cancellation shall be required only to the extent the relevant tariff rates, rules or regulations so adopted by the Conference are no less favorable to the promotion and development of the intermodal service involved than the parallel provisions of the applicable independent tariff or tariffs.

vidual intermodal tariffs to an unreasonable degree and therefore held that the only notice period which an individual member line must observe is the 30-day statutory notice upon filing of a tariff required under section 18(b) of the Shipping Act, 1916 (46 U.S.C. § 817(b)).

The 120-day notice provision contained in Agreement No. 5200 came to the attention of the Commission in connection with the filing of Agreement No. 5200–40 (Amendment 40). This amendment divided the Conference into trade area groups and authorized each group to take independent action. Amendment 40 also restated the entire basic agreement. The Commission found that the previously approved 120-day notice provision was contrary to the policy and precedent established in *AWAFC* and therefore approved Amendment 40 on the condition that the 120-day notice provision be deleted from the Agreement. *See Modification of the Pacific Coast European Conference Agreement (Agreement No. 5200–40),* Order of Conditional Approval, August 20, 1982.

Subsequently, and as a result of a petition filed by PCEC, the Commission modified its August 20, 1982 order and approved Amendment 40 as filed, without condition,[4] but, at the same time, initiated this proceeding by separate Order to Show Cause.[5]

DISCUSSION

In the Order commencing this proceeding, the Commission directed PCEC to show cause why its 120-day advance notice provision should not be deleted from Agreement No. 5200. Despite extensive briefing of general issues relating to advance notice, the Conference has not addressed the specific issue which caused the Commission to initiate this action. For reasons stated below, we adhere to established precedent on this issue and will require PCEC to delete the provision from its Agreement.

PCEC's advance notice clause must be analyzed under the principles expressed in the Commission's *AWAFC* decision. *AWAFC* stated as Commission policy that conferences generally may not require a member to observe a notice period prior to the filing of an individual intermodal tariff where the proposed service is within the scope of the conference agreement and is not being provided under a conference tariff. This policy is based on the Commission's finding that the practice of requiring a member line to provide advance notice to the conference prior to the publication of an intermodal tariff had not brought about the rapid development of intermodal transportation by conferences. The Commission adopted this policy in order to secure the development of innovative transportation services by protecting the initiative of an individual member line.

The Commission has in a number of instances required agreements which do not comply with the *AWAFC* policy to be modified. The Commission

[4] *See Modification of the Pacific Coast European Conference Agreement (Agreement No. 5200–40),* Order, May 25, 1983.

[5] In its petition, PCEC indicated its willingness to defend the 120-day notice clause in a proceeding.

has required that any expansion of an agreement's intermodal authority be conditioned upon the deletion of advance notice provisions.[6] The Commission has also required the deletion of previously approved advance notice clauses.[7] In order to justify a departure from this policy, a conference must demonstrate the existence of specific trade conditions which require some specific period of notice (beyond that otherwise required of a member line by section 18(b))[8] prior to the filing of an individual intermodal tariff or otherwise adequately explain the need for any such notice.[9]

PCEC suggests that its advance notice provision should be judged under a legal standard which is similar to that applied in the case of independent rate action provisions.[10] PCEC believes that the independent naming of a new inland point is similar to the taking of an independent rate action and argues that a notice period should be permitted in both instances. The concept of notice prior to independent rate action, however, should not be confused with advance notice prior to the offering of an independent intermodal service. Notice of independent rate action and advance notice of a new intermodal service differ in terms of their manner of operation, and the particular interests which are at stake. The Commission, therefore, has formulated different policies with regard to each.

Independent rate action provides that a conference member may offer its own rate for a particular commodity which differs from an already existing conference rate. Some period of notice to the conference is generally required before the member may file its own tariff. In the case of independent rate action there is already a service being offered by the conference for a particular commodity at a particular rate. Independent rate action contemplates that the independent rate will co-exist with the conference rate. The purpose of an independent rate action provision is to introduce an element of flexibility into the conference ratemaking mechanism. Independent rate action may help to maintain conference stability by allowing enough flexibility to retain membership and by providing a means by which members compete more effectively with non-conference carriers. The Commission has recently announced an interim policy or presumptive approval of independent rate action authority which provides for a 30-day notice period. Such a period of notice is deemed to strike a proper balance between the conflicting interests of stability and flexibility, while at the same time taking into account the potential predatory effects of conference line independent action on non-conference carriers in the

[6] *Philippines North America Conference (Agreement No. 5600–42),* 21 S.R.R. 345, 347 (1981).

[7] *Conditional Approval of Agreement No. 8090–16,* 19 S.R.R. 831, 833 (1979).

[8] Section 18(b) provides that a new rate or service may not become effective until 30 days after the filing of the tariff with the Federal Maritime Commission. This 30-day statutory waiting period would apply to the naming of a new inland point by a PCEC member.

[9] *U.S. Atlantic & Gulf/Australia-New Zealand Conference (Agreement No. 6200–20,—Intermodal Authority),* 21 S.R.R. 89, 93 (1981); *Japan/Korea Atlantic and Gulf Conference Intermodal Amendment Agreement No. 3103–67,* 23 F.M.C. 941, 948 n. 24 (1981).

[10] Hearing Counsel takes the position that the Commission's decision in *AWAFC* is the controlling standard by which PCEC's advance notice clause must be judged.

trade. Shorter or more extended notice periods require explanation and justification in order to ensure that independent action is neither ineffective nor predatory.

A notice period prior to the offering of a new intermodal service by an individual conference member operates in a different manner and involves different concerns than independent rate action and calls for a different policy. Advance notice provisions with respect to intermodal service apply where an individual conference member wishes to offer an intermodal service that is within the scope of the agreement and that is not offered by the conference. Such provisions require the member to notify the conference and then wait for a specified period of time before filing an intermodal tariff with the Commission. In the event that the conference subsequently files a tariff which offers the same service, the individual tariff is automatically superseded by the conference tariff. The purpose of such a clause is to prevent the individual member from offering a new service until the conference has had an opportunity to consider, for example, the naming of a new inland point. Balanced against this collective desire for stability, however, is not only the interest of the individual member, but also a public interest in the development of new, efficient, innovative transportation services. The Commission has determined that the development of such new services by an innovative member should not be hampered in any way and that no notice, other than the 30-day statutory notice required by section 18(b) of the Shipping Act, need be given.[11]

Because of the different underlying interests, the Commission has established different policies with regard to intermodal service and advance notice on independent rate action. It is not correct, therefore, to treat intermodal notice provisions as if they were independent rate action clauses. Commission policy regarding independent rate action is not applicable to the question of whether PCEC's 120-day advance notice provision is justified. The relevant legal standard and policy by which that provision must be judged is that expressed in the *AWAFC* decision.

As support for its 120-day clause, PCEC relies upon the Commission's decision in *Atlantic & Gulf/West Coast of South America Conference Agreement No. 2744–30,* 13 F.M.C. 121 (1969) (*Atlantic & Gulf*). In the *Atlantic & Gulf* case, Hearing Counsel had urged that the grant of intermodal authority be linked to a provision which would allow an individual member to establish an independent intermodal service where the conference failed to do so. Hearing Counsel's position in that case was based upon its concern that a conference might refuse to file a conference intermodal tariff and thereby frustrate the desire of an individual member to establish an intermodal service on its own. Although it recognized the validity of Hearing Counsel's concern, the Commission required individual conference

[11] PCEC only argues that some advance notice is required. However, as noted above, section 18(b) already applies a 30-day notice period to the naming of a new inland point by a PCEC line. PCEC would, in fact, have such notice if it monitored the tariffs filed by its members with the Commission.

members to wait 12 months before negotiating their own tariffs. In this early statement of intermodal policy, the Commission favored collective action by the conference because of the novelty of intermodalism.[12] Subsequently, the Commission acquired additional experience in intermodal transportation[13] that led to a change from the view expressed in *Atlantic & Gulf,* and the adoption of the policy in *AWAFC.* The decision relied upon by PCEC has been superseded by *AWAFC* which is the present controlling policy.

PCEC takes exception to this change in policy and to the general application of the principles expressed in *AWAFC.* PCEC states that *Atlantic & Gulf* represents the correct determination on the issue of whether advance notice should be permitted and further states that it does not know what facts or evidence led to the change in policy. PCEC also believes that the general rule of "no-notice" enunciated in *AWAFC* should have been adopted by rulemaking rather than adjudication. PCEC claims that it had no opportunity to comment on the *AWAFC* policy at the time it was promulgated.

These objections are without merit. The *AWAFC* decision, itself, clearly articulates the background for the change in policy and discusses the early approaches that the Commission tried regarding intermodalism. What PCEC would prefer is an earlier, interim policy of the Commission. PCEC apparently would not object to the general application of the *Atlantic and Gulf* decision. PCEC cites *Patel* v. *INS*, 638 F.2d 1199 (9th Cir. 1980) (*Patel*) for the general proposition that the practice of adopting rules of general application through adjudication rather than rulemaking has been disapproved. However, the *Patel* decision itself acknowledges that an agency is not precluded from announcing new principles or policies in an adjudicatory proceeding and that the choice between rulemaking and adjudication lies primarily in the informed discretion of the administrative agency. *See NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 294 (1974); *see also British Caledonian Airways, Ltd.* v. *C.A.B.*, 584 F.2d 982, 992–93 (D.C. Cir. 1978). PCEC has introduced nothing into the record which would in any

[12] The Commission stated in *Atlantic & Gulf,* 13 F.M.C. at 126–127, that:

> Current forms of the intermodal concept are new and their fruition will occur, undoubtedly, only after some experimentation and much give-and-take among the parties in interest. It can come about only through the cooperation of all concerned. Thus, if each member of a conference is free to pursue his own way at any point in the midst of conference efforts, the possibility is very real that successful conference action would be frustrated.

[13] *See,* for example, the Commission's summary of its subsequent experience as stated in *Application of the Far East Conference for Intermodal Authority,* 21 F.M.C. 750, 753 (1979):

> Statistical evidence in this record indicates that of the thirty-two intermodal amendments to conference agreements approved by the Commission, only six have even filed intermodal tariffs. Of those six, five conferences did not file tariffs until after individual members had instituted intermodal service. Overall, this evidence shows that conferences generally have not acted quickly to develop intermodal services after approval of their intermodal amendments, and the majority of those which did implement intermodal service did so only after an individual member pioneered in the field. The record here, therefore, tends to run counter to previous Commission findings regarding the expected public benefit of promoting intermodal development under conference authority.

way indicate that the Commission abused its discretion by adopting a new policy in the *AWAFC* decision.

Finally, PCEC argues that the *AWAFC* standard should not be applied where a conference has implemented its existing intermodal authority through the filing of an intermodal tariff, as it has done for its European intermodal service.[14] PCEC believes that such tariff filing is a sufficient indication that intermodalism has not been stifled.[15] Therefore, PCEC concludes that *AWAFC* should not apply and that its advance notice clause should not be deleted.

While the policy enunciated in *AWAFC* is based upon the Commission's finding that the practice of requiring advance notice had not brought about the rapid development of intermodal transportation by conferences, its objective is not limited to those cases where the conference has never implemented its intermodal authority through the filing of a tariff. The rationale of the *AWAFC* decision has a broader purpose—namely to ensure that the development of intermodalism is not hindered and that the transportation benefits achieved by such service are not arbitrarily restricted. An advance notice requirement is a mechanism that, on its face, restrains innovative action by an individual member.[16] In order to justify such a restraint the Conference must show trade conditions which require it or otherwise explain why such a restriction is necessary.

In this proceeding, the burden is on the Conference to justify the 120-day restraint. The mere fact that the Conference has filed an intermodal tariff does not justify an exception to the established policy. The purpose of the policy would be defeated were it possible to avoid its requirements by the mere filing of a tariff. The tariff might be a paper tariff under which no cargo moved. PCEC makes no effort to describe the services provided under its European intermodal tariffs by, for example, indicating how much cargo moves under these tariffs.

PCEC argues that Conference control over the inland portion of a physically intermodal movement is necessary in order to preserve Conference stability. Moreover, according to PCEC, unless such control is maintained,

[14] PCEC refers to its European inland tariffs but does not further describe this service (Exh. C at 11). Hearing Counsel cites the following PCEC inland European tariffs: FMC Tariff Nos. 2, 3 and 18 (Hearing Counsel Reply at 3).

[15] The affidavits of PCEC members also state that, in their view, the development of intermodalism has not been inhibited by the 120-day rule (Exhs. D–L).

[16] The restraining effects of such a provision were described in *AWAFC*, 18 S.R.R. at 341, as follows:

> This procedure requires any member line of the Conference that wishes to offer an intermodal service to expend that member's time, money, and effort to research the points of origin of different commodities, negotiate agreements with land carriers, calculate the appropriate intermodal rates for various commodities, and fashion an intermodal tariff, and then, hand the result of those expenditures to its purported competitors in the Conference, who, after preventing the implementation of the proposal for 90 days, may adopt it as their own. The result would be to deny to the innovative carrier any reward for its efforts. There being no reward, it is not to be expected that the efforts will be expended.

Such a restraining impact would appear to be heightened in a trade where short season agricultural products are a significant portion of the commodities shipped.

competitive forces within the Conference will be unleashed which will hamper the ability of the Conference to stabilize the trade and which may even destroy the Conference.[17] PCEC contends that a notice requirement is necessary in order to prevent uncontrolled and reckless point naming. According to PCEC, some period of notice is needed in order to give other members of the Conference an opportunity to consider a proposed new point for possible collective action. Without the control provided by a notice period, PCEC believes that a proliferation of individual tariffs naming a host of inland points would result which would produce intense intra-conference competition and undermine Conference stability.[18]

Instead of offering evidence of actual conditions to support its instability argument,[19] PCEC offers a theory illustrated by hypothetical examples. One example posits that a PCEC member might establish a rate on pencil slats to Nuremberg while another might name a competing rate on pencil slats to Stuttgart. In another example, PCEC theorizes that Conference rates could be avoided by naming Monza rather than Milan on walnut shipments.

While we do not dismiss the possibility of a theoretical justification of an advance notice provision, we believe that a theoretical justification must go beyond the general assertion that a "no-notice" rule will increase intra-conference competition and that intra-conference competition is destabilizing. Some specific potential for this instability in the PCEC trade in the absence of a notice clause should be demonstrated. PCEC also might demonstrate the existence of destabilizing point-naming in a similar conference trade which does not have a notice provision. No attempt at submitting this kind of evidence was undertaken by the Conference.

PCEC also maintains that some period of advance notice is necessary in order to provide other members of the Conference with a fair opportunity to consider the naming of a new inland point and to compete with the proposed new service. PCEC states that the naming of new inland points involves substantial operational changes. Without sufficient notice of the naming of a point, an individual member who was the first to file a new tariff allegedly could obtain an unfair advantage over other Conference members in soliciting cargo. As a hypothetical example, PCEC describes a situation which might occur on a shipment of walnuts to Hanover, Germany. Walnuts, as do other agricultural products which make up a large part of the PCEC trade, have a short shipping season. Without any notice

[17] PCEC cites the reasons for its original application for European inland authority in Amendment 29, namely that without such authority Conference members would be able to undercut other Conference members by offering benefits or making concessions on the inland transportation arrangements beyond the terminal gate.

[18] Both the statement of the Conference Chairman and several member lines' statements express the belief that a "no-notice" rule would lead to intense intra-conference competition.

[19] We recognize that, in this instance, PCEC may not be able to introduce evidence of actual destabilizing point naming. The fact that PCEC is currently operating under the 120-day provision prevents actual impact of "no-notice" conditions from being established. This is to be expected because of the highly restrictive nature of a 120-day notice requirement.

requirement, an individual member allegedly could secretly make all of the necessary arrangements to support an independent intermodal rate to an inland point not named in the Conference tariff and then use this rate to undercut the Conference rate. On the hypothetical walnut shipment, it is alleged that a carrier could gain a competitive advantage over other Conference members and could solicit and obtain a significant portion of that cargo before other members could respond to the new point and complete the difficult and time-consuming arrangements for offering a competitive service (Exh. C at 8–10). According to PCEC, an advance notice provision prevents the possibility of such *sub rosa* bookings by which an individual member might gain an unfair competitive advantage.

This argument is, for the most part, based on the assumption that naming a new inland point involves a substantial amount of time and effort. PCEC offers no evidence to indicate how difficult it might be to name a new inland point or how much lead time might be required. Moreover, in a different context, PCEC maintains that there is no difficulty at all in naming a new inland point on walnut shipments.[20] Furthermore, in a short season market of 2–6 months, a long notice period such as appears in Agreement No. 5200 might effectively preclude an individual member from ever offering a new intermodal service. Finally, PCEC's argument overlooks the fact that the naming of a new inland point could not become legally effective until the 30-day statutory notice under section 18(b) is observed. An attentive Conference would be aware of the filing of any new intermodal service and would have 30 days notice before cargo could be carried under the new tariff. Other member lines would have an opportunity to match the proposed new service. The Conference could adopt the tariff of the individual member, thereby superseding that service and obviating any possible competitive advantage.[21]

PCEC maintains that the notice provision in its Agreement should not be deleted or modified in any way (Response at 8). PCEC therefore seeks to retain the full 120-day period of notice. Throughout its submission, PCEC, however, argues only that some period of notice is necessary. At

[20] *See* Response at pp. 3–4: "In this day and age of containerized shipping there is virtually no operational obstacle to delivering a container of, *e.g.*, California walnuts, to anywhere in Western Europe. If an individual PCEC member line wished to increase or reduce the walnut rate, it would have to go to the Conference, and, if the member line were out-voted, that would be the end of the proposal. Perhaps one could say its "innovative proposal" has been "stifled," yet the procedure represents the very essence of the steamship conference system, something which has not only been permitted, but encouraged in U.S. trades since 1916. Under the apparent view espoused in the Show Cause Order, however, that same member line could take that same container of walnuts at the same total rate proposed, not to Milan which the PCEC tariff covers, but to Monza, a few kilometers further, where the Conference does not (yet) have tariff coverage, all without any consideration, let alone democratic vote, by the other member lines. *No "costly service" is involved; all it takes is a booking.*" (Emphasis added).

[21] Nor would there necessarily be any lag time in the effective date of a superseding conference tariff because section 18(b)(2) (46 U.S.C. §817(b)(2)) empowers the Commission, in its discretion and for good cause, to allow a tariff change to become effective upon less than 30 days notice. The Commission's Rules allow for expedited means of filing such applications for special permission in emergency situations. *See* 46 C.F.R. §536.15(c).

one point, PCEC approaches the question of how long that period of notice should be, but does not expressly state that 120 days is needed (Exh. C at 7–8).

Hearing Counsel states that although PCEC should be allowed to retain some period of advance notice in its Agreement, the present 120-day period is excessive. It suggests 30 days as being sufficient to provide adequate notice to the Conference.

Neither Hearing Counsel nor PCEC discuss the effect of the statutory notice provisions of section 18(b). At least for the first filing of a rate to a particular inland point, a 30-day notice period prior to tariff filing would, in effect, result in a 60-day delay because of the additional 30-day statutory notice on new or initial rates required under section 18(b). With respect to short season commodities, such a waiting period can render meaningless the option to offer an independent service.

Finally, we note that it would not be inconsistent with Commission policy for PCEC, through amendment to its Agreement, to require members to notify the Conference at the time that an individual intermodal tariff is filed. Such a provision would relieve the Conference of the task of monitoring intermodal filings by its members and would ensure that the Conference and each of its members had 30 days actual notice before a new intermodal service became effective.

CONCLUSION

PCEC has failed to provide either evidence of actual trade conditions or an adequate rationale which would justify the highly restrictive 120-day notice requirement in its Agreement or the lesser 30-day period suggested by Hearing Counsel. Accordingly, we conclude that the 120-day advance notice provision is contrary to the public interest within the meaning of section 15.

PCEC shall have 60 days in which to file an appropriate modification which deletes the advance notice requirement from its Agreement. Otherwise the Agreement shall be disapproved pursuant to section 15, as contrary to the public interest.

PCEC is free at any time to seek to reinstate a notice period by showing actual or potential trade conditions which require it. Moreover, PCEC may, through appropriate amendment to its Agreement, require its members to give actual notice to the Conference of a new intermodal service simultaneously with the filing of an individual tariff.

THEREFORE, IT IS ORDERED, That the Pacific Coast European Conference shall, by March 19, 1984, file an amendment with the Secretary which deletes the 120-day notice provision from the third paragraph of Article 1 of Agreement No. 5200.

FURTHER, IT IS ORDERED, That if by March 19, 1984, the amendment required by the first ordering paragraph is not filed as required, then Agreement No. 5200 is disapproved pursuant to section 15 on March 20, 1984.

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

By the Commission.*

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part.

While I agree with the majority that 120 days' notice is an excessive time period for conference review of a member's proposal for new intermodal service, I disagree with their decision to permit *no* such notice. The reasons for this policy disagreement are essentially those set forth in my recent partial dissents in connection with *Agreement Nos. 93–30 and 93–31—North Europe-U.S. Pacific Coast Freight Conference Agreement* and *Agreement Nos. 9314–31, et al.—North Atlantic Intermodal Agreements.* However, the majority here have offered a rationale for this "no notice" policy which did not appear in those prior decisions.

In attempting to explain why the decision in *American West African Freight Conference (AWAFC)* [1] is better policy than earlier, contrary decisions upon which respondent PCEC relies, the majority opinion explains that additional experience with intermodal transportation between 1969 and 1978 led to this change in policy.[2] I wholeheartedly agree that regulation of intermodal transportation has been rapidly evolving since the late 1960's, but would strongly suggest that the pace of this evolution has *accelerated* since the late 1970's. Ritual adherence, in 1983, to an intermodal policy decision founded upon 1978 circumstances is therefore at least as questionable as such adherence would have been in 1978 to a policy founded on 1969 circumstances.

The Commission's concern expressed in *AWAFC* in 1978 and in *Far East Conference, supra,* in 1979, that some conferences had used their intermodal authority to stifle the intermodal initiatives of member lines was well founded and well documented. Today, however, most conferences must either offer meaningful and attractive intermodal services or face the risk of extinction. Shippers have become accustomed to the service, and independent carriers or individual conference members will offer such service if the conference is unwilling or unable to do so. The Commission had graphic evidence of this before it recently in connection with the applications by various North Atlantic Conferences for intermodal authority.[3]

In this case, PCEC has implemented its intermodal authority since 1977, without complaint from either carriers or shippers. There is no allegation,

* Commissioner Thomas F. Moakley's dissent in part is attached.

[1] *Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36,* 18 S.R.R. 339 (1978).

[2] Curiously, the only citation to a record in which facts were developed as the basis for this policy change is *Application of the Far East Conference for Intermodal Authority,* 21 F.M.C. 750, 753 (1979), decided the year *after* the *AWAFC* policy pronouncement.

[3] *Agreement Nos. 9314–31 et al.—North Atlantic Intermodal Agreements,* Order of Approval, served December 9, 1983.

much less any evidence, that this conference has used its authority to stifle the initiative of member lines. In fact, all of the member lines have submitted affidavits in support of retaining the present notice provision and the conference chairman states that he is aware of no instance where a member indicated that it was in any fashion inhibited from providing a proper service demanded by a customer because of this particular notice provision.

Thus, despite the majority's attempts to broaden the scope of the holding in *AWAFC,* the factual predicate for that policy pronouncement is not valid in this case, and I question whether it has any validity at all in today's intermodal environment.

As counsel for PCEC succinctly argued,

> "It is not the intent of the 'prior notice' requirement to inhibit any member line from developing new services or intermodal concepts, but only to have a *reasonable opportunity to discuss the same with a view toward adopting the proposal as a group,* exactly the same way as PCEC handles the yearly hundreds of other tariff modification requests and suggestions." (Response to Order to Show Cause, p. 3) (emphasis supplied).

I would not preclude this conference from adopting a reasonable notice period for discussion of members' proposals for new intermodal services.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–37

IN THE MATTER OF RATES APPLICABLE TO CHARITABLE SHIPMENTS BY U.S. ATLANTIC AND GULF/JAMAICA AND HISPANIOLA STEAMSHIP FREIGHT ASSOCIATION

ORDER

February 24, 1984

The United States Atlantic and Gulf/Jamaica and Hispaniola Steamship Conference (Conference or Petitioner) has petitioned the Commission pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, for a declaratory order to remove uncertainties concerning the refund/waiver of port charges paid to the Conference by various charitable organizations.[1]

The Petition advises as follows. By letter dated May 4, 1983, the Haitian Minister of Finance instructed the Director General of the National Port Authority of Haiti to exempt Catholic Relief Services, Church World Services, Cooperative for American Relief Everywhere, Inc. and Seventh Day Adventist Welfare Service from port charges assessed on cargo entering Haiti. The Conference learned of the exemption approximately one month later and amended its tariff to exempt the charitable organizations from the port charges shown in the tariff.

During the month between the time the Haitian authorities acted and the Conference amended its tariff, there were several shipments for the account of the charitable organizations involved. The Conference seeks a declaratory order authorizing it to waive collection of, or refund, Haitian port charges for any shipment of Public Law 480, Title II aid cargo on behalf of the aforementioned charitable organizations during the period May 4 through June 3, 1983. Petitioner believes that such an order is required to enable its members to make the necessary adjustments without violating sections 16 and 18 of the Shipping Act, 1916, 46 U.S.C. §§ 815 and 817.

Upon consideration of the Petition, the Commission determined that no action could be taken because the Petition, as filed, failed to provide certain relevant information. Accordingly, by letter dated November 29, 1983, the Commission requested Petitioners to provide the following:

1. The relevant tariff provisions involved.

[1] The Petition was published in the *Federal Register* on September 1, 1983, but elicited no replies.

2. Bills of lading and other documents evidencing the dates of shipments in question and amounts paid.
3. The statutory authority or legal theory upon which the Petition for declaratory order is based.
4. An explanation as to the precise method or procedure by which the Haitian fees at issue are assessed, *e.g.*, are they assessed against the carrier and passed on to the shipper or assessed directly against the cargo?

In response to the Commission's November 29 request, the Conference filed a supplemental brief and furnished some tariff pages and bills of lading. The tariff pages identify the charges only as "additional charges." However, Petitioner's brief states that:

> The charge in question is assessed against the cargo; collected by the carrier from the party paying the freight charges; then remitted to the Haitian Port Authority by the carrier. The carrier merely acts as the collection agent for the Haitian Port Authority. In this case the Haitian Port Authority exempted this cargo from their charge before advising the Conference. (Supplemental Brief at 3).

The supplemental brief further advises that the waiver/refund procedure of section 18(b) of the Act is inapplicable here because there is no clerical error involved. Although the original Petition cited no statutory authority for the relief sought, the supplemental brief relies on the Commission's exemption authority under section 35 of the Shipping Act, 1916, 46 U.S.C. § 833a.

Based upon the representations contained in the supplemental brief, the Commission finds that the charge at issue is a form of tax or fee which is solely within the province of the Government of Haiti. Although the charge appears in the Conference tariff, it does not appear to be a rate or charge for the transportation of freight or a "terminal or other charge . . . under the control of the carrier or conferences of carriers" within the meaning of section 18(b)(1) of the Act, 46 U.S.C. § 817(b)(1). The charge at issue is therefore not subject to the tariff filing and rate adherence requirements of section 18 and section 16.[2] Accordingly, these sections do not preclude the Conference members or the Government of Haiti from making adjustments with respect to that charge.

[2] There is therefore no need for the Commission to consider Petitioner's request for a section 35 exemption.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed in this proceeding is granted to the extent indicated above.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–25

BURLINGTON INDUSTRIES, INC.

v.

DART CONTAINERLINE CO., LTD.

NOTICE

February 28, 1984

Notice is given that no exceptions have been filed to the January 23, 1983 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. 83–25

BURLINGTON INDUSTRIES, INC.

v.

DART CONTAINERLINE CO., LTD.

Shipment properly classified. Reparation denied.

Ben J. Tyler for Burlington Industries, Inc.

E.C. Dickinson for Dart Containerline Co., Ltd.

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

Finalized February 28, 1984

Complainant, Burlington, claims that its shipment of "woven fiberglass piece goods" was improperly rated by respondent, Dart, with a resulting overcharge of $3,040.62.

The shipment consisting of 85 cartons stowed in one 40′ container was described on the bill of lading as "Woven Fiber Glass Piece Goods." Dart classified the shipment under item 653.8009.003 of the North Atlantic United Kingdom Freight Conference Tariff No. FMC 12. This item covered "Piece Goods, Fiberglass." Burlington challenged the classification and filed an overcharge claim with Dart arguing that the shipment should have been classified as "Fabrics, Piece Goods, viz, Cotton, Denim, Corduroy, Pocketing, or other Woven Fabrics, N.E.S." under Item 652.2305.017. Dart rejected the claim pointing out that this N.E.S. (Not Elsewhere Specified) rate could not apply since there was indeed a rate specified elsewhere which described Burlington's product exactly—"Fiberglass Piece Goods."

Burlington then went to the Conference arguing that the rejection of its overcharge claim was unreasonable since "the transportation characteristics of woven piece goods and woven fiberglass piece goods are the same." The Conference too rejected the claim and Burlington filed this complaint alleging the foregoing and claiming that it had been "subjected to the payment of rates for transportation which were, when exacted, discriminatory, unreasonable and in violation of the Shipping Act, sections 16 and 17." Burlington asked that the matter be handled under Subpart K of the Commission's Rules of Practice and Procedure (46 CFR 502.181 et

[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 CFR 502.227).

seq.). Notwithstanding its desire to use the Shortened Procedure of Subpart K, Burlington failed to accompany its complaint with the verified and subscribed to memorandum of fact and argument as required by Rule 182.

Dart answered the complaint saying that it agreed with the facts as stated in the complaint but failed to indicate its consent to the shortened procedure. Since the facts were not in dispute, I set up a schedule for the submission of the case pursuant to the provisions of Subpart K. In response to the schedule Burlington filed a "Memorandum of Facts" which was but a shortened version of its complaint. Dart filed a restatement of its original answer to the complaint. Burlington failed to file a reply.

Burlington says Dart has violated sections 16 and 17 of the Act by exacting rates which were "discriminatory and unreasonable." As relevant here, section 16 makes it unlawful for a common carrier:

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

Section 17, again as here relevant, makes it unlawful for a common carrier to "demand, charge or collect any rate, fare or charge which is unjustly discriminatory. . . ." Neither section speaks of rates which are fixed at unreasonable levels.[2] Instead they deal with dissimilar treatment, and "There must be at least two interests involved in any case of preference, prejudice or discrimination. . . ." *West Indies Fruit Co. et al.* v. *Flota Mercante,* 7 F.M.C. 66 (1962). Burlington fails to make mention of any other shipper who received the treatment from Dart that Burlington seeks here. This failure is fatal to Burlington's claim under sections 16 and 17. This ultimate reliance on sections 16 and 17 seems curiously out of kilter with the rest of the complaint which reads like the typical prelude to a charge of simple misclassification in violation of section 18(b)(3) of the Act. Indeed, it would appear that Burlington's overcharge claim was couched solely in terms of a tariff misclassification. It seems odd that no reliance whatsoever was placed on 18(b)(3) by Burlington in its complaint. But whatever the reason for its omission, the inclusion of an 18(b)(3) allegation would not have saved Burlington's claim. Based on the slim record before me it is clear that Dart's treatment of the shipment was correct. The classification sought by Burlington was available only for those products not specifically dealt with elsewhere in the tariffs. Fiberglass Piece Goods were so dealt with and the shipment was properly classified under that item.

[2] The only section of the Shipping Act dealing with foreign commerce which addresses the level of rates is 18(b)(5) which prohibits rates which are so unreasonably high or low as to be detrimental to the commerce of the United States.

The complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–28

IN RE AGREEMENT NOS. 10457, 10458, 10332–3, 10371–2 AND IN RE AGREEMENT NOS. 10457–1 AND 10458–1

ORDER PARTIALLY ADOPTING INITIAL DECISION

February 29, 1984

The proceeding was instituted by Order of Investigation and Hearing and Approval *Pendente Lite* served June 17, 1983 to determine whether Agreement No. 10457, an agreement between Korea Marine Transport Company (KMTC) and Nippon Yusen Kaisha (NYK) (Proponents) to cross-charter space, jointly schedule and advertise sailings, pool revenue or cargo, interchange equipment and appoint reciprocal agents, and Agreement No. 10458, an agreement between KMTC and NYK to subcharter space to Showa Line, Ltd., should be approved, disapproved or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). Sea-Land Service, Inc., United States Lines, Inc., American President Lines and Lykes Bros. Steamship Co., which opposed approval of the Agreements, were named Protestants in the proceeding.

After discussions with Protestants, Proponents withdrew Agreement Nos. 10457 and 10458 and substituted Agreements Nos. 10457–1 and 10458–1, which deleted authority for revenue pooling and joint agencies, placed limitations on vessels, capacity and sailings* and restricted transshipment.

On December 30, 1983, Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision in which he approved Agreements Nos. 10457–1 and 10458–1. In addition, he concluded that the negotiations between Protestants and Proponents which led to the filing of Agreement Nos. 10457–1 and 10458–1 were not agreements subject to the filing and approval requirements of section 15. On January 30, 1984, the Commission determined to review that portion of the Initial Decision relating to the existence and need for filing of any settlement between Proponents and Protestants. The remainder of the Initial Decision including the approval of Agreements Nos. 10457–1 and 10458–1 became administratively final in accordance with Rule 227 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.227).

* As originally filed, Agreement No. 10457 would have authorized the Proponents to operate ". . . such other vessels as they may subsequently agree to operate under this Agreement."

DISCUSSION

Upon review of the Initial Decision's treatment of the settlement negotiations between litigants under section 15, the Commission is satisfied that the Presiding Officer correctly concluded that there was no agreement between Proponents and Protestants which would be subject to the filing and approval requirements of that section. We do not agree, however, with portions of the expressed rationale underlying the Presiding Officer's conclusion.

In concluding that no agreement between litigants here need be filed, the Presiding Officer appears to draw a distinction between formal executed settlement agreements of the type present in *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970) (*Isbrandtsen*) and oral agreements. The distinction finds no support in section 15 which expressly requires oral understandings to be reduced to writing and filed for approval. In determining whether a settlement among litigants must be filed for approval pursuant to section 15, it is necessary to look at the terms of the settlement. The form of the settlement is not controlling.

The Presiding Officer distinguishes *Isbrandtsen* on other grounds. Citing *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973) (*Seatrain*) and *American Mail Line* v. *Federal Maritime Commission,* 503 F.2d 157 (D.C. Cir. 1974) (*AML*), he finds that the settlements here "involve a discrete event and do not govern ongoing relationships." The Commission is not convinced that *Seatrain* and *AML* can be applied to this case. A merger of the type in *Seatrain* and *AML* "effectively destroys one of the parties to the agreement." *Seatrain,* 411 U.S. at 732. The parties to a settlement of litigation remain separately functioning entities.

Accordingly, we are not adopting the Presiding Officer's rationale based on *Seatrain* and *AML*. We need not, however, resolve that issue conclusively here because the record otherwise does not evidence an agreement among the parties. In deciding to amend Agreements Nos. 10457 and 10458, Proponents were no doubt influenced by the discussions they had with Protestants, but those discussions with Protestants, without more, did not, however, rise to the level of an agreement which must be filed and approved pursuant to section 15.

THEREFORE, IT IS ORDERED, That the conclusion in the Initial Decision, served in this proceeding on December 30, 1983, that the negotiations between Protestants and Proponents do not result in an agreement subject to section 15 of the Shipping Act, 1916, is adopted except as indicated above; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–28

(A) IN RE AGREEMENTS NOS. 10457, 10458, 10332–3 AND 10371–2; (B) IN RE AGREEMENT NOS. 10457–1 AND 10458–1 [1]

Publication of the revised agreements (Agreement Nos. 10457–1 and 10458–1) in the *Federal Register* as a condition precedent to consideration for approval is not required.

On this record, there is no need for section 15 approval of the "settlements" arrived at by the former Protestants, individually, and the Proponents.

Proponents have established that the revised Agreement Nos. 10457–1 and 10458–1 are required by a serious transportation need, are necessary to secure public benefits, and are in furtherance of a valid regulatory purpose.

Charles F. Warren, George A. Quadrino, David N. Dunn and *Benjamin K. Trogdon* for Proponents, Korea Marine Transport Co., Ltd., Nippon Yusen Kaisha and Showa Lines, Ltd.

Robert T. Basseches and *David B. Cook* for American President Lines, Ltd.

Edward M. Shea and *John E. Vargo* for Sea-Land Service, Inc.

J. Alton Boyer and *William H. Fort* for Lykes Bros. Steamship Co., Inc.

John Robert Ewers, Alan Jacobson and *Janet Katz* for Hearing Counsel.

INITIAL DECISION [2] OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Partially Adopted February 29, 1984

This proceeding began as an investigation, instituted under the provisions of sections 15 and 22 of the Shipping Act, 1916, 46 U.S.C. 814 and 821, to determine whether Agreement Nos. 10457, 10458, 10332–3 and 10371–2 should be approved, disapproved or modified.[3]

BACKGROUND

The proceeding was initiated by Order of Investigation and Hearing and Approval Pendente Lite (Order), served June 17, 1983.[4] The Order designated Korea Marine Transport Company (KMTC) and Nippon Yusen

[1] I amended the caption by adding Part (B) to the original, which I designated Part (A), to reflect changes which occurred during the course of the proceeding. As will be seen, the Proponents of Agreement Nos. 10457 and 10458 withdrew those agreements from consideration and proffered, in place thereof, unilateral, more restrictive modifications for consideration. The modified agreements were identified by the "–1" suffix to distinguish them from the earlier versions. Agreement No. 10457–1 is set out in Appendix I. Agreement No. 10458–1 appears in Appendix II.

[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).

[3] Notices of filing were published in the *Federal Register* on September 20, 1982 (47 F.R. 41423–24) and on March 22, 1983 (48 F.R. 11987).

[4] The Order was published in the *Federal Register* on June 22, 1983 (48 F.R. 28550-52).

Kaisha (NYK) as Proponents with respect to all four captioned agreements and designated Showa Line, Ltd. as a Proponent with respect to Agreement Nos. 10458 and 10371-3 only. American President Lines, Ltd. (APL) was made a Protestant as to all agreements, while Lykes Bros. Steamship Co., Inc., Sea-Land Service, Inc., and United States Lines, Inc. (USL)[5] were made Protestants as to Agreement Nos. 10457 and 10458 only. Hearing Counsel was made a party to the proceeding.

Agreement No. 10457 between KMTC and NYK would permit the parties to cross-charter space, jointly schedule and advertise their sailings, have reciprocal agency representation and interchange equipment. This agreement would allow the parties to operate three or more vessels, as they might later agree, between ports in Korea, Hong Kong and Taiwan in the Far East and ports on the United States Pacific Coast, including those in Hawaii and Alaska. In addition, it would authorize the parties to pool revenue or cargo originating in or destined to Korea and to subcharter space, not to exceed 780 TEUs[6] month to Showa.

Agreement No. 10458, between KMTC, NYK and Showa, sets forth the terms upon which Showa could subcharter space from KMTC and NYK.

Agreement No. 10332-3, between KMTC and NYK, proposes to extend, until July 1, 1986, the term of previously approved Agreement No. 10332 between the same parties. Agreement No. 10332 is similar to Agreement No. 10457 but it is applicable to a direct, non-intervening ports of call service between Korea and the United States Pacific Coast.

Agreement No. 10371-2, between KMTC, NYK and Showa, proposes to extend, until July 1, 1986, the term of previously approved Agreement No. 10371. Agreement No. 10371 is an arrangement allowing NYK and KMTC to subcharter a maximum of 420 TEUs per month to Showa.

Agreement Nos. 10457 and 10458 were intended to succeed Agreement Nos. 10332, as amended, and 10371, as amended. These amendments were among the subjects of Docket No. 80-52, Agreement Nos. 10186, as amended, 10332, as amended, 10371, as amended, 10377, 10364 and 10329.[7] In that proceeding, the Commission approved Agreement No. 10371-1 and granted conditional approval to Agreement No. 10332-2. Upon findings that the record in that proceeding did not justify provisions for the use of joint agents, coordination of sailings and revenue pooling by KMTC and NYK, the Commission insisted that those provisions be deleted as conditions of approval.

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[5] On June 23, 1983, USL moved to be dismissed as a party because it no longer sought to oppose approval of Agreement Nos. 10457 and 10458. The motion was granted, with prejudice, on July 19, 1983. See order entitled "Dismissal Of A Party," served July 21, 1983.

[6] Container carriage is often measured by TEUs. TEU is an acronym for trailer (container) equivalent units. The basic unit is a twenty foot container. A forty foot container is counted as two TEUs.

[7] Report And Order, served December 22, 1982, 25 F.M.C. 538; Order Of Modification, served May 13, 1983, at 22 SRR 113.

After reviewing the agreements identified in Part (A) of the caption, the statements submitted in support thereof and the comments and protests thereto, the Commission determined that an evidentiary hearing was required to resolve certain specified issues in order to ascertain whether the agreements met the so-called *Svenska* test.[8] The Commission noted that the available information was not complete enough to permit an evaluation of the scope of the agreements and the degree to which they would restrict competition. To remedy this deficiency, the Commission directed the parties to address the following issues:

1. Have NYK and KMTC engaged in bloc voting in the conferences to which they belong?

2. Should Agreement No. 10457 provide for a vessel or TEU limitation, or both? What should the limitation be?

3. What is the relationship between Agreements Nos. 10457 and 10458, on the one hand, and operations of Japanese-Flag vessels in the Transpacific trades, on the other?

4. What is the geographic scope of the authority of Agreement No. 10457? How, if at all, should that scope be limited?

5. What reporting provisions, if any, should be included in the Agreements to enable the Commission to perform its oversight function?

In addition to those issues, the Order directed that the following questions concerning "legitimate commercial objectives" be addressed:

[6] Does KMTC, a carrier with several years experience in the trade, continue to require technical assistance from NYK (see Article 4, Agreement No. 10457) in order to compete in the trade?

[7] Do NYK and KMTC require a joint sales force in order to adequately compete in this trade (see Article 4, Agreement No. 10457)?

[8] Is the authority to coordinate sailings (see Article 1(a), Agreement No. 10457) necessary in order for the shipping public to benefit from the space chartering provisions of Agreement No. 10457 and can the space chartering provisions feasibly operate without coordinating the sailings?

[9] Given Showa's historical carriage, what is the justification for authorizing Showa to charter an average of 600 TEU's per month?

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[8] The Order explained the *Svenska* test this way:

Section 15 agreements which interfere with the policies of the antitrust laws will be disapproved as "contrary to the public interest" unless justified by evidence establishing that the agreement, if approved, will meet a serious transportation need, secure an important public benefit or further a valid regulatory purpose of the Shipping Act, 1916. The burden is on proponents of such agreements to come forward with the necessary evidence. *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238 (1968).

[10] Is the U.S.-Far East trade (including the trades between the U.S., Japan, Korea, Taiwan and Hong Kong) over-tonnaged as a whole? If so, what impact will the subject agreements have on the problem?

[11] What public benefit can be expected if NYK and KMTC are authorized to enter into a space charter agreement in the U.S./Hong Kong/Taiwan trades?

[12] Is revenue sharing on Korean origin/destination cargo necessary to offset NYK's status as a third-flag carrier in the Korean trade, and is it necessary for KMTC's continued development in this trade? Is this revenue sharing necessary for the continued functioning of the entire arrangement?

Finally, the Order sought clarification of certain terms concerning agreements which might be reached in the future under Articles 1(a), 5(a) and 6 of Agreement No. 10457.

In the meantime, because of the Commission's concern for the preservation of stability in the United States/Korea trade, and a fear that a sudden cessation of approved space chartering authorities could be disruptive to that trade, the Order permitted the continuation of Agreement Nos. 10332 and 10371 on the same terms allowed in Docket No. 80–52, *supra*, pending the outcome of this proceeding.

On June 24, 1983, one week after the Order was served, APL filed a "document" embracing issues in this proceeding and Docket No. 80–52. With respect to the issues in Docket No. 80–52, the document responded to a petition filed by KMTC and NYK seeking continuance of existing joint agency arrangements for a limited period of time.[9]

With respect to this proceeding, the document was treated as a motion seeking a determination that no agreement, which might be approved, would be permitted to contain provisions authorizing revenue pooling, sailing coordination or joint agency. It was the gravamen of the motion that, in the light of the Report and Order in Docket No. 80–52, those provisions were barred under the related doctrines of collateral estoppel or res judicata.[10] This motion was overtaken by later events and may be regarded as withdrawn for all practical purposes. However, it was important because it appears to have led, in part, to the "settlements" reached by the parties, as hereinafter described.

There were three prehearing conferences. The first was held on July 6, 1983 (Prehearing I), the second on September 7, 1983 (Prehearing II),

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[9] The Docket No. 80–52 issues spilled over into this proceeding. Consequently, when the petition was approved, the order of approval was issued in this proceeding. See, Docket No. 83–28, *In Re Agreements Nos. 10457, 10458, 10332–3 and 10371–2*, Order Permitting Temporary Continuance of Existing Agency Arrangements, served July 1, 1983.

[10] See, Order Severing Issues, served June 30, 1983. In support of its motion, APL urged that the justification, submitted by Proponents for approval of the agreements identified in Part (A) of the caption, relied on the same facts presented in Docket No. 80–52.

and the third on October 11, 1983. The third was converted into a hearing on the merits.

At the hearing there was introduced into evidence the sworn statement of Mr. Morisaki, Assistant General Manager, Business Division No. 1, NYK, on behalf of all Proponents. Mr. Morisaki's statement was supported by twelve appendixes. Hearing Counsel presented Bruce A. Dombrowski as a witness. Mr. Dombrowski, who now is the Assistant Secretary of the Commission, testified in his former capacity of Senior Transportation Industry Analyst, with the Commission's Bureau of Agreements and Trade Monitoring.

Mr. Morisaki's statement included an explanation of the circumstances which gave rise to the withdrawal of the agreements identified in Part (A) of the caption and the substitution therefor of the agreements shown in Part (B) of the caption. For the purpose of placing subsequent events in context, these are the pertinent passages from the statement: [11]

> 6. After initial clarification at the executive level that settlement discussions might be possible, our review of the Commission's order noted that many of the issues to be investigated were matters either that we had previously offered to withdraw or modify in our Reply to Protests last year or were matters that we had internally considered were not essential to our operations, at least over the long term. Accordingly, we instructed our attorneys to approach the Protestants, and later Hearing Counsel, to ascertain their particular concerns on the issues under investigation and to discuss whether amendments could be made to the Agreements that would make them more palatable.
>
> 7. Subsequently, meetings and discussions were held in Washington, both among attorneys for all the parties and, when appropriate, between our attorneys and the attorneys for one or another of the protestants. Our attorneys reported to us on the progress of these discussions and recommended to us the modifications they believed would be required to resolve the opposition to the Agreements. After several internal meetings and discussions, we decided it was in our best interests to accept certain of the amendments recommended to us and to amend our Agreements accordingly. On other matters, however, we concluded we could not accept an amendment without jeopardizing the basis of our service itself or the needs of our customers. Subsequently, at the Prehearing Conference held on September 7, 1983 in Washington, Agreement Nos. 10457 and 8, as originally filed, were withdrawn by our attorneys and copies of the amended Agreements were submitted and identified as Prehearing Exhibit No. 2 (Appendix 2).
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> 8. Following the Prehearing, our attorneys met with Hearing Counsel to attempt to resolve the remaining matters Hearing Coun-

[11] APL, Sea-Land and Lykes, in separate memorandums, generally are in accord with these passages insofar as they describe the activities of the Protestants. Obviously, they cannot confirm the references to the Proponents' internal discussions and meetings.

> sel had identified on the record as concerns. As these matters were largely technical, we agreed to all of Hearing Counsel's requests. . . .

As a result of the withdrawal of the agreements, identified in Part (A) of the caption, and the substitution of Agreement Nos. 10457–1 and 10458–1, therefor, Sea-Land, Lykes and APL withdrew as Protestants. Perhaps overpedantically or overtechnically, they pointed out, individually, that since the original agreements were withdrawn, their protests ended and, inasmuch as they had no opposition to the revised agreements, they should no longer be regarded as Protestants. However, out of an abundance of caution, should I or the Commission approve the revised agreements more expansively than submitted for approval by Proponents,[12] they asked for and were given permission to remain as parties to the proceeding.

Proponents submitted a Brief, including proposed findings of fact, in support of the revised agreements. Individually, Sea-Land, APL and Lykes submitted memorandums explaining certain facts and their positions with respect to particular aspects of the proceeding.

FINDINGS OF FACT [13]

1. NYK and KMTC currently operate a two-vessel container service in the Korea-U.S. trade pursuant to Agreement No. 10332–3 as approved *pendente lite* in the Order.

2. NYK and KMTC subcharter, on Agreement No. 10332 vessels, the maximum of 420 TEUs of container space per month to Showa pursuant to Agreement No. 10371–2 as also approved *pendente lite* in the Order.

3. Agreement No. 10457, as originally filed, was a space charter arrangement between NYK and KMTC, establishing a coordinated vessel service between ports in Korea, Hong Kong and Taiwan and the U.S. Pacific Coast, including Hawaii and Alaska. The agreement provided for space charter among the parties, revenue pooling, joint scheduling and advertisement of the parties' vessels, reciprocal agency representation, and interchange of equipment. Chartering a maximum of 780 TEUs per month to Showa was also permitted.

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[12] See *Sea-Land Service, Inc.* v. *Federal Maritime Commission*, 653 F. 2d 544 (D.C. Cir. 1981), discussed, *infra*.

[13] Proponents' proposed findings of fact were not opposed by Hearing Counsel. (Hearing Tr. 30–32.) The facts may be regarded as stipulated for all practical purposes. Some editorial changes have been made by me.

> N.b. It was stipulated by APL, Sea-Land and Lykes and by Proponents that the adoption of the proposed findings of fact submitted by Proponents or any other findings and conclusions made by the Administrative Law Judge or the Commission in this proceeding would not be relied upon by Proponents as preclusive against either of them in any other pending or future litigation in this or any other forum. However, this stipulation shall not be construed to bar Proponents or any of them from establishing the same facts or conclusions derived from them based upon an independent record in any other proceeding. See Hearing Tr. 17–26.

4. Agreement No. 10458, as originally filed, was an implementing agreement by which NYK and KMTC were to charter to Showa space not to exceed 780 TEUs per month.

5. Following initial clarification at their executive level, Proponents and Protestants, through their attorneys, held meetings and discussions in Washington, D.C., following which Agreement Nos. 10457 and 10458 were withdrawn by the parties. Substitute agreements were proffered on the record at Prehearing II, and Protestants stated on the record that they did not oppose the substituted agreements. (Prehearing Ex. No. 2, Prehearing II Tr. 8–9; 27–29.)

6. Subsequent discussions with Hearing Counsel following the prehearing conference caused Proponents further to amend their agreements (Hearing Ex. 1, App. 4, Tr. 28). As a result, Hearing Counsel and the Commission's staff announced their support for the revised agreements. (Hearing Tr. 20, 30.)

7. The revised agreements, redesignated Agreement Nos. 10457–1 and 10458–1, are the only ones offered for Commission approval. The major changes from the agreements, as originally filed, are the deletion of revenue pooling and joint agency, and the limitations on vessels, capacity and sailings and the restrictions on transshipment.

8. Agreement No. 10457–1 is a space charter arrangement between NYK and KMTC establishing a three-vessel direct service between ports in Korea, Taiwan and Hong Kong and the Pacific Coast of the United States, excluding the ports in the states of Hawaii and Alaska and providing for block chartering, vessel coordination, container and equipment interchange and chartering of space to Showa.

9. Under Agreement No 10457–1, the parties will operate three vessels with a capacity not exceeding 2,923 TEUs[14] and offer not more than 28 annual sailings. The maximum amount of space which may be operated and cross-chartered during any calendar year will not exceed 27,343 TEUs eastbound or westbound.

10. NYK and KMTC will schedule and advertise their sailings in the trade so as to promote optimum vessel utilization, and charter space to and from each other on terms as they may agree and the essential details of the space charter arrangement in writing to the Commission. NYK and KMTC are authorized to subcharter up to an average of 600 TEUs per calendar month, not to exceed 780 TEUs in any single month, to Showa.

11. The parties may transship up to 3,000 TEUs of cargo originating in or destined to Alaska, the Philippines, Singapore or Malaysia in any calendar year.

12. Agreement No. 10457–1 shall terminate on the third anniversary of approval by the Commission.

[14] One vessel (Pacific Express) has a capacity of 851 TEUs. The others (Pacific Trader and Pacific Sunshine) have a capacity of 1,036 TEUs.

13. Agreement No. 10458–1 is a space charter arrangement by which NYK and KMTC agree to subcharter space to Showa up to 600 TEUs per average calendar month, not to exceed 780 TEUs in any single month on vessels operated pursuant to Agreement No. 10457–1.

14. The direct service offered by the three parties pursuant to Agreement No. 10457–1 shall be their exclusive direct service in the trades between Korea, Taiwan and Hong Kong and the Pacific Coast of the United States, excluding the states of Hawaii and Alaska.

15. Showa is authorized to transship cargo which originates in or is destined to Alaska, the Philippines, Singapore or Malaysia, subject to the 3,000 TEU limitation on all parties on transshipment of cargo imposed under Article 5(b) of Agreement No. 10457–1.

16. The vessels to be operated, initially, under Agreement No. 10457–1 are: *Pacific Trader* operated by NYK; *Pacific Sunshine* and *Pacific Express* operated by KMTC. Each vessel is a fully cellularized containership having an operating speed of 20 to 22 knots and having a turnaround time of 38 to 40 days. Vessel itineraries include calls at Kaosiung, Hong Kong, Keelung, Busan, Kobe and/or Tokyo, Los Angeles, Oakland and Seattle.

17. NYK and KMTC will continue their existing public terminal operations at Busan, Seattle, and Taiwan and will continue to use approved arrangements with Matson terminals at Los Angeles and Oakland and with Hong Kong Modern Terminals at Hong Kong. KMTC will use NYK's terminal facilities in Japan.

18. NYK and KMTC may employ common (but not joint) agents in the United States until March 1984.[15]

19. The three-vessel operation under Agreement No. 10457–1 will provide essentially the same semimonthly service as is currently being provided by two vessels under Agreement No. 10332–3, but with the addition of direct call service at Taiwan and Hong Kong.

20. Direct service to Hong Kong and Taiwan under Agreement No. 10457–1 is deemed by Proponents to be superior to their current indirect or transshipment service because it reduces losses resulting from extra handling and shipping of cargo on and off vessels at transshipment ports and absent Agreement Nos. 10457–1 and 10458–1, NYK would be forced to introduce two more vessels, KMTC one, and Showa three, in order for each to separately offer the shipping public a semimonthly service in these trades.

21. Since the agreements identified in Part (A) of the caption were filed for approval, KMTC has independently introduced its new vessel, *Pacific Express*, in the U.S.-Korea trade, and would consider continuing to operate independently of NYK if the revised agreements are not approved. Showa has planned to introduce at least one new vessel in the U.S.-

[15] See Agreement No. 10483 (Prehearing II Tr. 17–18).

Far East trades to be used in conjunction with its existing transshipment service, and NYK has internally decided to initiate its own Far East service, if Agreement Nos. 10457–1 and 10458–1 are not approved.

22. All major carriers in the Far East-U.S. trades serve Hong Kong and Taiwan directly except Proponents and two Japanese carriers.

23. In filing Agreement Nos. 10457–1 and 10458–1, requests for joint agency, solicitation, revenue sharing, and technical assistance, have been deleted.[16] In addition, the issue of bloc voting (Order: Issue No. 1) has been removed by the withdrawal of Protestants who raised it.[17]

24. The public benefits which are currently realized in the U.S.-Korea service operated under approved Agreement Nos. 10332 and 10371, as amended, are likely to flow from space chartering in the U.S.-Hong Kong/Taiwan trades. These include better capacity utilization of vessels and equipment with less total capital expenditures, a more quantifiable reduction of tonnage deployed in the trade as compared to "space available" charter agreements, and the opening of new shipping opportunities for shippers and consignees in the growing Far East markets.

25. The benefits of direct service provided under Agreement Nos. 10332 and 10371 in the Korea market, such as reduction in transit time and losses incurred in handling, should accrue to the Hong Kong/Taiwan market under Agreement Nos. 10457–1 and 10458–1.

26. Direct service to Hong Kong/Taywan is important to carriers operating in the trades because many consignees include "no transshipment" clauses in their letters of credit.

27. Agreement Nos. 10457–1 and 10458–1 should reduce shipper and consignee inventory requirements, storage and warehouse expenses, and related capital expenditures through the frequent and regular service to be offered under these agreements.

28. Fuel consumption under Agreement Nos. 10457–1 and 10458–1 should amount to about two-thirds less than that which would be consumed if NYK, KMTC and Showa each were to establish individual semimonthly service to the Far East.

29. The space charter and vessel coordination provisions of Agreement No. 10457–1 allow NYK and KMTC to use common terminal facilities. Utilizing a single berth at U.S. and foreign ports should increase the efficiency of each line's service and of terminal operations at those ports. The ability to coordinate vessel schedules in the U.S./Hong Kong trades should alleviate port and terminal congestion. Coordination should enable Proponents to operate the minimum number of vessels required to provide viable service in the trades.

[16] The deletion of those items has the effect of satisfying the Commission's interest in having the Proponents provide answers to questions Nos. 6, 7 and 12 posed in the Order.

[17] Hearing Counsel did not independently address these matters. Moreover, this issue does not appear, facially, to involve anticompetitive restraints other than those suggested by Protestants' comments and does not, therefore, require further scrutiny under the "public interest" standard of section 15 See *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission*, 420 F. 2d 577 (D.C. Cir. 1969).

30. Vessel coordination is essential for space chartering and the concommitant benefits to the shipping public. It would allow NYK and KMTC to provide regular and reliable semimonthly service. None of the parties could provide competitive service without availability of the other party's vessels. Independent scheduling would adversely affect the competitive benefits expected to be derived from the services offered under Agreement Nos. 10457–1 and 10458–1. Coordination of sailing is the catalyst for the benefits to be derived from optimal employment of resources and the enhanced competitive service which is expected to result.

31. A "space available charter" arrangement would not be sufficient for the Proponents, as it would require them to operate more vessels in order to offer a complete service. It would not improve the efficiency or reliability of service, nor permit the use of joint or common terminal arrangements. Operation of an individual service obviously increases the potential for overtonnaging, an ever-present concern.

32. There is no vessel scheduling under Agreement No. 10332, as amended, and NYK and KMTC each operate one vessel on a 30-day turnaround. They have been serving Korea and the U.S. Pacific Coast pursuant to the same itineraries established and followed without variation for nearly five years.

33. Under Agreement No. 10457–1, three vessels will be operated with direct calls in Korea, Hong Kong, Taiwan and Japan. This expanded geographical scope of operation is another factor underlying the need for coordination of sailings.

34. Liner cargoes in the Korea/Hong Kong/Taiwan-U.S. Pacific Coast trades have shown strong and consistent growth for the last 15 years. Eastbound cargoes have almost tripled in the U.S. Pacific Coast-Philippines/Malaysia/Singapore/Peoples Republic of China trades from 1976 through 1982, and Japan-U.S. Pacific cargoes have grown at a compounded rate of 3 percent eastbound and 4.5 percent westbound between 1974 through 1982

35. A Commission economist has forecast growth rates of from 1 to 8 percent annually for the next two years for various non-Japanese segments of the transpacific trades.[18]

36. In 1982 cargoes remained virtually stable, although substantial additional tonnage was introduced by established carriers and newcomers in the trade.

37. NYK, KMTC, and Showa's carryings, both eastbound and westbound, improved steadily each year under Agreement Nos. 10332 and 10371. Eastbound utilizations rose to 60 percent in 1982 and to over 70 percent in the first eight months of 1983.

[18] The Commission economist testified in Docket No. 82–54. Other economists testifying in that proceeding were equally or more sanguine.

38. Capacity increases by individual lines in the trades make it difficult to predict whether overtonnaging will become a problem; however, Agreement Nos. 10457–1 and 10458–1 should ameliorate its threat.[19]

39. The combined effect of increasing turnaround times and the introduction of the *Pacific Express* result in an approximate continuation of NYK, KMTC and Showa's current annual capacity under Agreement No. 10332, as amended, as maximum annual capacity under Agreement No. 10332 is limited to 25,200 TEUs, while under 10457–1 it is 27,343 TEUs, an 8.5 percent increase. When the discontinuance of KMTC's independent operation of the *Pacific Express* under Agreement No. 10457–1 is taken into account, the overall annual capacity is decreased by 20 percent.[20]

40. The proviso contained in Agreement No. 10457–1, which allows KMTC to serve Japan, resulted from the acknowledged policy of the Korean Government requiring KMTC to carry cargo other than Korean cargo.

41. The increase in space to be chartered to Showa under Agreement No. 10458–1 reflects the expected growth in Showa's carryings based on Showa's historically higher utilizations than the other parties and its experience in the Far East trades outside of Japan and Korea.

42. The only evidence adduced, concerning a "relationship" between Agreement Nos. 10457–1 and 10458–1 and the "operations of Japanese flag vessels in the transpacific trades," indicates that none exists.[21]

43. The reporting requirements attached to Agreement Nos. 10457–1 and 10458–1 have met with the approval of the Commission's staff and appear sufficient to fulfill the Commission's needs to oversee operations under the agreements and to satisfy its interest, as set forth in Order: Issue No. 5.

44. Given the limitation on overall capacity, and on transshipment cargo which may be carried under the agreements, NYK and Showa will continue to transship some cargo via Japan as a supplementary service. Direct service under Agreement Nos. 10457–1 and 10458–1 will not be in competition with any other direct services by the parties.

45. KMTC's commencement of direct service in the Japan/U.S. trades is not likely to have a significant impact on those trades.

DISCUSSION AND CONCLUSIONS

I. PRELIMINARY MATTERS

A: Publication of the Revised Agreements in the *Federal Register* as a Condition Precedent to Consideration for Approval is Not Required

[19] Cf. Finding Nos. 31, 35 and n. 18, *supra*. Taken together, these facts and Finding No. 45, *infra*, furnish as complete an answer to Order: Issue No. 10, as could be made available.

[20] Given the withdrawal of the Protestants and Hearing Counsel's and the Commission's staff's support for the revised agreements, Findings Nos. 2, 9 and 39 appear to satisfy the Commission's interest in Order: Issue No. 2. See, also, *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission, supra.*

[21] See Hearing Ex. 1, par. 60, which addresses Issue No. 3, specified in the Order. See also Finding No. 23 and n. 17, *supra*.

As noted on September 20, 1982, the Commission published notice in the *Federal Register* that Agreement Nos. 10457 and 10458 had been filed, accompanied by a descriptive summary of those agreements. The summary included all the provisions which were later modified by Agreement Nos. 10457–1 and 10458–1.

When the revised agreements were proffered, I solicited advice whether I or the Commission could proceed to consider and process them without prior publication in the *Federal Register*. On the basis of the authorities cited by the parties, I am satisfied that such publication is not necessary in these circumstances.

Recently, a substantially identical question was presented to the court in *Sea-Land Service, Inc.* v. *Federal Maritime Commission, supra*. The section 15 issue concerned joint services to be performed by several carriers. The proposed agreement was extensively negotiated and compromised by the Proponents and Protestants therein. After that, the Commission modified the agreement on its own initiative. The issue before the court, on judicial review, concerned the Commission's modification. The Commission sought to distinguish between modifications formulated by private, interested parties which, the Commission suggested, might require new notice to allow non-parties to protect their interests, and modifications made by the Commission in the discharge of its responsibilities, which the Commission argued did not require publication.

The court addressed only the question before it—whether publication of changes made by the Commission would be required. It appears to me, however, that the standards enunciated by the court for determining whether new publication is required when the modification is made by the Commission have equal validity for privately made alterations to agreements *sub judice*.

Chief Judge McGowan, speaking for an undivided panel, stated that the distinguishing factor to examine is whether the changes expand the authority sought or restrict that authority, for expansive changes do require notice but restrictive changes do. not. He wrote, 653 F. 2d at 552–553:

> The generally accepted distinguishing factor, and one we consider applicable to this case, is whether the final agency action expands the authority proposed by the parties to the agreement. This limitation is sound from the standpoints of legal precedent and policy. Where the modification does not alter the substance of the agreement in any respect, the Commission should have every right to edit the agreement to conform with Commission practices or simple principles of organization. Similarly, any modification which serves only to restrict, not to expand, the authority of the parties to the agreement should not require notice and hearing. In that event, only the proponents will be aggrieved, and they are always free to abandon the modified agreement and to submit an amended agreement for new consideration. . . .

* * * * *

> We think, however, that "agency action *expanding proposed authority* is improper without proper findings based on substantial evidence, adequate notice, and consideration of objections." . . .

It is clear that Agreement Nos. 10457–1 and 10458–1 sharply restrict the much broader authority initially sought by Proponents in Agreement Nos. 10457 and 10458. Accordingly, under the rationale of *Sea-Land Service, Inc.* v. *Federal Maritime Commission,* I find that notice of those revised agreements need not be published in the *Federal Register.*

B: On this Record, There is No Need for Section 15 Approval of the "Settlements" Arrived at by the Former Protestants, Individually, and the Proponents

Another issue which I asked the parties to address is whether the "settlements" arrived at by Lykes, Sea-Land and APL, individually, with Proponents, whereby Proponents modified their agreements restrictively, were themselves subject to section 15 approval in the light of the *Isbrandtsen* decision, *American Export Isbrandtsen Lines, Inc.,* 14 F.M.C. 82 (1970).

I expressed a preliminary view that I saw distinctions between the "settlements" and the operative agreement in *Isbrandtsen* and suggested that, in the circumstances, it might only be necessary to explain, for the record, how the "settlements" came about. As noted, the parties complied. In addition, they noted some of the differences between the "settlements" and the *Isbrandtsen* agreement.

Factually, *Isbrandtsen* began with a subsidy application which went to hearing before the Maritime Subsidy Board of the Federal Maritime Administration. During the proceedings, some protestants and the applicant entered into a stipulation which was determined to provide for an exclusive, preferential or cooperative working arrangement; to constitute a special privilege or advantage; and to control, regulate or destroy competition. The Commission concluded that the stipulation constituted an independent section 15 agreement requiring filing for approval by the Commission.

I find that the "settlements," here, are not agreements of the *Isbrandtsen* type.

Section 15 applies to agreements between persons subject to the Shipping Act,[22] which fix or regulate transportation rates or fares; give or receive special rates, accommodations or other special privileges or advantages; control, regulate, prevent or destroy competition; pool or apportion earnings, losses, or traffic; allot, put or restrict or otherwise regulate the number or character of sailings between ports; limit or regulate in any way the volume or character of freight or passenger traffic to be carried; or in any manner provide for an exclusive, preferential or cooperative working arrangement. Under *Isbrandtsen,* a formal, executed agreement between per-

[22] The Proponents and former Protestants are such persons.

sons subject to the Act which results in conduct encompassed by any of section 15's subject matter categories becomes subject to the Commission's filing and approval requirements whether *vel non* it results from a settlement of differences between parties to a formal proceeding.

There are a number of differences between what went into these "settlements" and the *Isbrandtsen* agreement. The "settlements" are not formal, executed agreements. The "settlements" involve a discrete event and do not govern ongoing relationships—cf. *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726 (1973); *American Mail Line* v. *Federal Maritime Commission*, 503 F. 2d 157 (D.C. Cir. 1974)—for, if the Proponents wish, they may, in the future, seek approval of an agreement or agreements containing provisions of the kind they changed or deleted from Nos. 10457 and 10458 without subjecting themselves to allegations of breach.

Arguably, it may be said that the resulting deletions and more restrictive provisions than appeared in the original agreements might subject the "settlements" to section 15 jurisdiction. I think not, at least in this case. The "settlements" were much like what the court referred to as the "agreements," which "were the product of negotiation and compromise between the parties to the agreements, on the one hand, and various independent carriers . . . who were likely to be significantly affected by the agreements on the other." *Sea-Land Service, Inc.* v. *Federal Maritime Commission, supra*, 653 F. 2d at 546. Those negotiations and compromises were not placed under the independent scrutiny of section 15 process. It appears that the Commission's requirements were satisfied simply by spreading those facts on the record.

But there is one thing more which tilts these "settlements" away from *Isbrandtsen*. Without belaboring the arguments made in APL's motion for a determination that the principles of collateral estoppel and res judicata govern the agreements identified in Part (A) of the caption or deciding that motion,[23] it is clear that the "settlements" resulted, in effect, in the acceptance by Proponents of the major conditions for approval enunciated in the Commission's Report and Order in Docket No. 80–52. It does not seem to me that "settlements" which are built on the foundation of a pertinent Commission decision require independent section 15 approval.

It should be made clear that I do not find, generally, that negotiations and compromises which result in "settlements" are not subject to section 15's requirements for filing and approval. I merely find that these "settlements," in the limited circumstances of this proceeding, do not require an independent filing for section 15 approval.

II. Proponents Have Established That the Revised Agreement Nos. 10457–1 and 10458–1 Are Required by a Serious Transportation Need, Are

[23] Proponents were not required to and did not reply to the motion.

Necessary to Secure Public Benefits and Are in Furtherance of a Valid Regulatory Purpose.

A: Preliminary Matters

As noted, the Order requires that the agreements identified in Part (A) of the caption be scrutinized under the *Svenska* test.[24] This mandate continues to apply to the revised agreements despite the withdrawal of the originals and the withdrawal of opposition. "[T]he Commission retains an affirmative duty to review an agreement in some detail even when proponents and opponents alike have settled their differences below, because mere acquiescence by private parties does not determine whether the agreement fosters competition in the shipping industry as a whole. *Agreement No. 9902–3 et al. (Modification of Euro-Pacific Joint Service),* [21] F.M.C. [959], 19 S.R.R. 141, 143 (1979)." *Sea-Land Service, Inc.* v. *Federal Maritime Commission, supra,* 653 F. 2d at 550.

Nevertheless, the fact that the agreements were revised has eliminated some issues from consideration as I indicated, without objection, at Prehearing II, pp. 52–57, and as I reiterated in my Findings of Fact. Thus, there will be no need further to address the issues specified in the Order as Nos. 1, 2, 3, 5, 6, 7, 10 and 12, except as they may bear upon other features of the case. In this connection, it should be noted that some of those numbered issues, such as Issue No. 2 regarding vessel or TEU limitations, seemed to be directed more at clearing up ambiguities than with concerns about substantive values. Thus, the insertion of particular vessel and TEU limitations, acceptable to the Commission's staff and Hearing Counsel, appears to satisfy the Commission's interest in Issue No. 2. For similar reasons, Issue No. 4, with respect to the geographic scope of Agreement No. 10457, may be considered removed from consideration.

Issue No. 9 presents a somewhat different problem of clarification, but one which need not be discussed under the *Svenska* test. The Commission asked for justification for authorizing Showa to charter an average of 600 TEUs per month. Mr. Morisaki's testimony demonstrates that, even though those 600 TEUs will apply to the expanded geographical scope of the agreements, they represent only a slight proportional increase over historical experience solely in the Korea/U.S. trade.

Finally, the general, unnumbered ambiguities which the Commission wanted addressed have been resolved under the terms of the reporting requirements, sought by the Commission's staff, which have been made a part of Agreement No. 10457–1.

B: The *Svenska* Considerations

When Agreement No. 10457 was filed, it contained authority for NYK and KMTC to act as one another's agents in, respectively, the U.S. and Korean trades, and to pool revenue carried in the Korea-U.S. trade. These

[24] *See* n. 8, *supra.*

two features, each of which had been disapproved by the Commission in Docket No. 80–52, were eliminated from Agreement No. 10457–1. There remains for consideration a straight space charter/vessel coordination agreement in which the parties compete head-to-head. By virtue of its space charter and vessel coordination features, the revised agreement dilutes some competition which might otherwise have been occasioned.

In general, Agreement No. 10457–1 should not have a serious, adverse impact on other carriers in either the Korea/U.S. trades or the Hong Kong, Taiwan/U.S. trades. With the addition of direct calls at other Far East ports, the capacity deployable in the Korea/U.S. trades may even decrease from the current level. It is unlikely that the expansion of service to the Hong Kong, Taiwan/U.S. trades would result in any anticompetitive effect in those trades, given the limitations on capacity and frequency.

Approval of Agreement No. 10457–1 should, instead, promote competition, as it will allow new services to enter the Hong Kong, Taiwan/U.S. trades. Also, it will permit KMTC to provide a direct Japan service. The agreement should enhance the commercial stability of the proposed services because fewer resources are to be committed than would be the case if each participant placed vessels in the Hong Kong, Taiwan/U.S. trades. If NYK and KMTC attempted to enter these trades independently, the capital costs and risks to each would be higher than those reasonably to be anticipated under the revised agreements.

It is perceived that the limited reach of Agreement Nos. 10457–1 and 10458–1 will have little anticompetitive effect on the relevant trades. This is reflected by the withdrawal of opposition to the revised agreements. The limited anticompetitive effect is more than balanced by the additional competition likely to flow from allowing new carriers to enter the trades on a stable economic footing.

The Commission recognizes the public benefits which flow from space charter agreements similar to the proponents amended agreements. See, e.g., *Agreement No. 9835*, 14 FMC 203 (1970); *Agreement Nos. 9718–3 and 9731–5*, 19 FMC 351 (1976); *Agreement No. 10470*, Order of Conditional Approval, served August 29, 1983 (FMC). When those benefits seem achievable without the presence of revenue pooling or joint agency, and where no protests are outstanding, the Commission has approved that kind of agreement. E.g., *Agreement No. 10459*, approved, February 23, 1983.

One of the benefits of space charter arrangements is the moderating effect on possible overtonnaging in the trade. Order Amending Order of Investigation and Conditionally Approving Certain Agreements Pendente Lite, Docket No. 82–54, served August 19, 1983. Proponents have shown that they should be able to maintain service levels which would otherwise be difficult to sustain without substantially increasing the number of vessels deployed if they are permitted to block charter and coordinate sailings. It has also been shown that NYK, KMTC and Showa are likely to introduce additional vessels into the trade if the revised agreements are not approved.

Thus, it is fair to find that the space chartering and vessel coordination provisions of the revised agreements should produce the benefit of restricting capacity in the trade.

The Hong Kong/Taiwan-U.S. trade has been volatile in recent years due to the high growth in cargo relative to other Far East countries. Carriers in the Far East trades have added substantial capacity to their services or have announced plans to do so in the near future. By introducing a service with a limited number of vessels, the parties have shown an understanding of the need to limit the potential for overtonnaging in the trades. That understanding is demonstrated further by the parties' limitations on the total vessel capacity to be deployed in the trades to vessels of the size currently operated and on the number of annual sailings. These limitations also should produce the public benefits of reduced fuel consumption and lower transportation costs to shippers which are derived from decreased fuel costs.

Another benefit to be derived of the operations under the revised agreements is a reduction of cargo transshipments from Hong Kong and Taiwan and, in the case of KMTC, Japan. By calling directly at Hong Kong and Taiwan, the parties will be able to provide more efficient and faster service, with a significant reduction in loss and damage often inherent to transshipments. Accordingly, shippers and consignees should, in the future, be provided with a better service than that currently offered by the parties.

The space charter and vessel coordination provisions should allow the parties to establish reliable service on a regular schedule. This produces the further economic benefit which shippers and consignees derive from being able better to plan their shipping schedules.

Another benefit which should be achieved is the reduction of port and terminal congestion in U.S. and foreign ports. The vessel coordination and space charter provisions allow the parties to fix their arrivals at regular intervals, thus allowing use of common terminal and berthing facilities which, in turn, reduces congestion at ports. This, in turn, allows ports better to allocate their own resources.

The revised agreements are likely to serve the valid regulatory purpose of easing the entry of three competitors, each of which has the potential to offer an individual direct service into the Hong Kong/Taiwan trades. Frequent, regular service and elimination of wasteful competition are benefits which the Commission does consider in determining whether to approve agreements. Agreement No. 10116–1, 21 FMC 775, 807–08 (1979).

The remaining particular issue to be considered is Issue No. 8. Here the Commission requested evidence showing whether the authority to coordinate sailings was necessary to achieve the benefits expected. Although there was no opposition to Proponents' revised request for such authority, Proponents furnished sufficient evidence to show that coordinated sailings are needed to obtain the expected benefits under both revised agreements.

Under Agreement No. 10457–1, the beneficial effect to be obtained by way of reducing the vessels and tonnage needed to provide regular, semi-monthly service with only three vessels would be seriously impaired, if not prevented entirely, absent vessel coordination. Moreover, the benefits of reducing port and terminal congestion and maintenance of regular, reliable service would be at risk absent vessel coördination. Without the ability to rely upon the schedule established by the other party or parties, it would be difficult to guarantee shippers or consignees regular sailing dates. In addition, Showa would be deprived of guaranteed sailing dates under Agreement No. 10458–1.

I find that the authority to coordinate sailings is a necessary part of this chartering agreement.

Accordingly, I find that Agreement Nos. 10457–1 and 10458–1 are required by a serious transportation need, are necessary to secure public benefits and are in furtherance of a valid regulatory purpose.

ORDER

It is ordered that Agreement Nos. 10457–1 and 10458–1 be approved.

It is further ordered that these agreements shall not be implemented or take effect until such time as the Federal Maritime Commission receives appropriate notice that the Korea Maritime and Port Administration has approved Agreement Nos. 10457–1 and 10458–1. These agreements, under their own terms, shall expire on the third anniversary after approval by this Commission.

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I
FMC AGREEMENT NO. 10457–1

This Agreement made in Seoul, Korea the 6th day of September, 1983, by and between the undernoted parties.

Witnesseth:

WHEREAS, Korea Marine Transport Co., Ltd. (KMTC) and Nippon Yusen Kaisha (NYK) (hereafter sometimes the ''parties'') currently coordinate their containership services in the trade between Korea and the Pacific Coast of the United States under the terms of Agreement No. 10332 as approved by the Federal Maritime Commission; and

WHEREAS, KMTC and NYK now desire to inaugurate as their exclusive direct services in the trades between Korea, Taiwan and Hong Kong and the Pacific Coast of the United States a space chartering arrangement as hereinafter described.

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings of the parties, it is hereby agreed as follows:

1. *Service and Sailings:*

(a) The parties will operate three containership vessels between ports in Korea, Taiwan and Hong Kong and the Pacific Coast of the United States, excluding ports in the States of Hawaii and Alaska. The total capacity of the said vessels shall not exceed 2923 TEU's and the parties shall offer no more than 28 sailings per annum, with the maximum amount of space which may be operated and cross-chartered on the vessels during any calendar year not exceeding 27,343 TEU's Eastbound and 27,343 TEU's Westbound. The parties shall schedule and advertise their sailings in the trades as to promote optimum vessel utilization, provided that one or more of the parties' vessels may call at a port or ports in Japan to load and discharge any KMTC cargo moving to or from Japan. All vessels operated by the parties to this Agreement or by either of them in the trades between Korea, Taiwan, and Hong Kong and the Pacific Coast of the United States shall be operated under this Agreement.

(b) In the event any vessel is lost or damaged, the parties may substitute another appropriate vessel provided that the capacity limitation stated in Article 1(a) is not exceeded. The Parties will notify the Korea Maritime and Port Administration (KMPA) and the Federal Maritime Commission (FMC) of any such substitutions.

2. *Containerized Cargo:*

The cargo subject to this Agreement is that which is placed in containers for shipment of the parties' container vessels, but nothing herein shall preclude the parties from carrying on their own container vessels other available cargo.

3. *Bills of Lading:*

The parties shall operate their own respective common carrier services, issuing their own separate bills of lading.

4. *Agents:*

Neither party shall act as the agent of the other in the trades covered by this Agreement, and the parties shall not have a common agent, except in the United States until March 31, 1984.

5. *Charterage:*

(a) The parties shall ship their loaded and empty containers (including containers which they own, lease or control) on their vessels and on each other's vessels, and shall charter space to and from each other on terms as they may agree. The parties shall report the essential terms of their space charter arrangements in writing to the FMC and shall provide the level of compensation under the charter agreement upon the request of the FMC's Director of the Bureau of Agreements and Trade Monitoring. Subject to their own priorities, the parties may also charter and/or subcharter no more than 600 TEU's per average calendar month, but not to exceed 780 TEU's in any single month, to Showa Line, Ltd. only, on terms as they may agree. KMPA and FMC shall be notified within 30 days of any and all charter arrangements agreed upon. Any continuing charter agreement with Showa Line shall not be implemented without prior FMC approval.

(b) The parties may load or discharge cargo, on or from the vessels which they employ for direct calls within the trades as referred to herein, provided that the parties will not transport in the service authorized herein any transshipment cargo except such cargo originating or terminating in Alaska, the Philippines, Singapore, or Malaysia. Not more than 3000 TEU's Eastbound and 3000 TEU's Westbound of the capacity shall be used for the carriage of such transshipment cargo during any calendar year. Any transshipment arrangements which they may individually conclude with other carriers shall be filed with the FMC as may be necessary.

6. *Force Majeure, Strikes:*

In the event of force majeure, marine casualty, or any circumstances where a carrying vessel is "off-hire" and the chartering arrangements provided for in Article 5 are frustrated, the parties shall adjust their account to the extent that services have been contracted for but not rendered. In the case of strikes, lockouts, work stoppage or slowdowns, or other labor disturbances which render it necessary to cease operation of one or more of their container vessels, the parties may utilize or operate under the terms of this Agreement such substitute vessel or vessels as they may agree, provided that the capacity limitation stated in Article 1(a) is not exceeded.

7. *Container Interchange:*

The parties may interchange their empty containers and/or related equipment as the circumstances and conditions of the trade may require, subject to such mutually acceptable terms and conditions as they may see fit. The parties shall report the essential terms of their interchange arrangements in writing to the FMC.

8. *Modifications:*

The terms of this Agreement may be modified upon mutual consent in writing of the parties. Copies of such modifications shall be promptly furnished to KMPA and FMC for whatever approvals may be required by the laws of the Republic of Korea and of the United States.

9. *Withdrawal:*

NYK may withdraw from this Agreement by giving one hundred eighty (180) days' prior written notice to the other party, KMPA and the FMC, and KMTC may withdraw from this Agreement by giving ninety (90) days' prior notice to the other party, KMPA and the FMC.

10. *Non-assignment:*

The parties hereto shall not assign or transfer this Agreement or all or any part of its rights hereunder to any person, firm or corporation without the prior written consent of the other party.

11. *Effectiveness:*

This Agreement shall become effective when approved by the KMPA and by the FMC, and upon the said effective date, Agreement No. 10332, as then in effect, shall terminate. The parties shall notify the FMC of the date of KMPA's approval.

12. *Reports:*

The parties shall submit to the FMC, on a semiannual basis, reports describing their operations under the Agreement. A copy of the form on which the reports will be filed is attached to this Agreement.

13. *Termination:*

This Agreement shall terminate on the 3rd anniversary of the FMC's approval.

IN WITNESS WHEREOF, the parties have executed this Agreement through their responsible representatives duly authorized as of the date and year hereinabove first written.

Korea Marine Transport Company, Ltd.
Nippon Yusen Kaisha

GEORGE A. QUADRINO
Attorney-in-Fact

TABLE NO. 1
AGREEMENT NOS. 10457/10458
WESTBOUND
LEVELS OF CAPACITY
FOR THE PERIOD__________ THRU __________[1]

			Capacity[4]		
Carrier	Vessel Name[2]	Vessel Type[3]	On-Deck (TEU's)	Below-Deck (TEU's)	Total Bale (Cubic Feet)
	(a)	(b)	(c)	(d)	(e)

[1] E.g., January–March, 1983. This report should be compiled quarterly and submitted semi-annually no later than 60 days after the conclusion of each semi-annual period, concluding June 30 and December 31.

[2] List each vessel deployed as part of this agreement by each participating carrier.

[3] C = Container; SC = Semi-container; and B = Breakbulk.

[4] For fully containerized vessels, it is sufficient to provide total TEU capacity rather than On-Deck TEU's, Below-Deck TEU's and Total Bale.

Total Capacity

No. of Sailings	On-Deck (TEU's)	Below-Deck (TEU's)	Bale (Cubic Feet)	Vessel Utilization[5]
(f)	(g) (c) × (f)	(h) (d) × (f)	(i) (e) × (f)	(j)

[5] Estimate vessel utilization at departure from last American port. Explain how capacity utilization was calculated for each type of vessel deployed.

TABLE NO. 2
AGREEMENT NOS. 10457/10458
EASTBOUND
LEVELS OF CAPACITY
FOR THE PERIOD__________ THRU __________[1]

Carrier	Vessel Name[2]	Vessel Type[3]	Capacity[4]		
			On-Deck (TEU's)	Below-Deck (TEU's)	Total Bale (Cubic Feet)
	(a)	(b)	(c)	(d)	(e)

[1] E.g., January–March, 1983. This report should be compiled quarterly and submitted semi-annually no later than 60 days after the conclusion of each semi-annual period, concluding June 30 and December 31.
[2] List each vessel deployed as part of this agreement by each participating carrier.
[3] C = Container; SC = Semi-container; and B = Breakbulk.
[4] For fully containerized vessels, it is sufficient to provide total TEU capacity rather than On-Deck TEU's, Below-Deck TEU's and Total Bale.

Total Capacity

No. of Sailings	On-Deck (TEU's)	Below-Deck (TEU's)	Bale (Cubic Feet)	Vessel Utilization [5]
(f)	(g) (c) × (f)	(h) (d) × (f)	(i) (e) × (f)	(j)

[5] Estimate vessel utilization at departure from last Far East port. Explain how capacity utilization was calculated for each type of vessel deployed.

TABLE NO. 3
AGREEMENT NOS. 10457/10458
USAGE OF SPACE CHARTER ALLOCATIONS
FOR THE PERIOD __________ THRU __________ [1]

Cargoes Booked By: [2]	On Vessels of:	Eastbound	Westbound
KMTC	KMTC		
	NYK		
NYK	KMTC		
Showa	KMTC		
	NYK		

[1] I.e., July–Sept. 1983. This report should be compiled quarterly and submitted semi-annually no later than 60 days after the conclusion of each semi-annual period including June 30 and December 31.

[2] If containers report in TEU's. If breakbulk report in short tons.

APPENDIX II

FMC AGREEMENT NO. 10458–1

THIS AGREEMENT made in Seoul, Korea on the 6th day of September, 1983, by and between the undernoted parties.

WITNESSETH:

WHEREAS, pursuant to the authority contained in Article 5 of Agreement No. 10457, Korea Marine Transport Company, Ltd (KMTC) and Nippon Yusen Kaisha (NYK) desire to continue to charter space to Showa Line, Ltd. (Showa) on vessels which they are authorized to operate in the trades between Korea, Taiwan and Hong Kong and the Pacific Coast of the U.S.A; and

WHEREAS, Showa desires to continue to charter space from KMTC and NYK on the said vessels.

NOW, THEREFORE, in consideration of the premises and of the mutual undertakings of the parties, it is hereby agreed as follows:

1. KMTC and NYK hereby agree to subcharter to Showa space not to exceed 600 TEU's, to be accomplished on an average monthly basis, but not to exceed 780 TEU's in any single month, on the vessels which they are authorized to operate in the said trades, and Showa hereby agrees to charter space from KMTC and NYK not to exceed the said maximum. The term of this Agreement and the charter shall commence upon the termination of Agreement No. 10332, as amended, and shall expire upon the earlier of (1) termination of Agreement No. 10457 or (2) the third anniversary of the FMC's approval of this Agreement. In the event the Agreement expires because of termination of Agreement No. 10457, the parties shall promptly notify the Commission of such event. Said charter may also include such customary terms and conditions of charter as the parties may agree not inconsistent with this Agreement regulating the relationship between charterer and vessel owners, including space allocation, stowage, charter hire, cargo claims, marine liability, vessel liens, breaches and arbitration. The parties may implement the said charter as authorized herein upon notification to Korea Maritime and Port Administration (KMPA) and Federal Maritime Commission (FMC).

2. In connection with said charter, Showa shall at all times issue its own bills of lading in respect to the cargo, including such transshipment cargo as it is permitted to carry herein, it books and shall be responsible to its customers for delivery, care and carriage of the cargo, and shall hold KMTC and NYK harmless. Showa shall not transport in the service authorized herein any transshipment cargo except such cargo originating or terminating in Alaska, the Philippines, Singapore, or Malaysia. Showa shall carry such transshipment cargo subject to the limitation as is imposed under Article 5(b) of Agreement No. 10457. Showa's direct service in the trades between Korea, Taiwan, and Hong Kong and the Pacific Coast

of the United States shall be provided exclusively on space chartered under this Agreement.

3. This Agreement shall take effect when approved by KMPA and FMC, whichever is the later. The parties shall notify the FMC of the date of KMPA's approval.

IN WITNESS WHEREOF, the parties have executed this Agreement through their responsible representatives duly authorized as of the date and year hereinabove written.

Korea Marine Transport Company, Ltd.
Nippon Yusen Kaisha
Showa Line, Ltd.

(S) GEORGE A. QUADRINO
Attorney-in-Fact

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

NOTICE

February 29, 1984

Notice is given that no exceptions have been filed to the January 19, 1984 initial decision on the adjudicatory portion of 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) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31
VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

Held:

1. Where two conferences published tariffs containing a novel marketing scheme called a Volume Incentive Program (VIP), wherein each conference member gives refunds to qualified enrollees based upon a portion of the freight revenues it receives during a twelve-month period, provided the total freight dollars paid by the enrollee exceed certain stated levels of revenue, and where each of the two conferences has general rate-making authority in agreements previously approved by the Commission under section 15 of the Shipping Act, 1916, the VIP, as reflected in the appropriate tariff, is interstitial to the basic agreements which themselves contain the authority to implement the VIP.
2. Where each VIP provides that it is to be administered by an independent accounting firm which is to collect funds from each carrier to pay out the refunds; and where the accountant invoices each carrier monthly and places the funds received in separate accounts for each member, which funds are also kept separate and apart from conference revenues; and where the accountant will pay refunds directly to the qualified enrollee—the operation of the VIP does not result in a pooling agreement requiring approval under section 15.
3. Where the VIPs provide for refunds ranging from 5 to 10 percent based on increments of freight dollars ranging from five hundred thousand dollars to two million dollars, the allocations are reasonable and based on recognized rate-making factors and do not violate sections 16 or 17 of the Shipping Act, 1916. Further, none of the other provisions of the VIPs are unjustly discriminatory or unduly or unreasonably preferential so as to violate section 16 or 17 of the Act.
4. Where the adjudicatory aspect of a proceeding is bifurcated from possible rulemaking so as to expedite disposition of the adjudicatory issues; and where the record establishes that disposition of the adjudicatory case warrants approval of the VIPs; and where the record indicates that approval of the VIPs will not hinder or thwart any possible rule-making, and indeed, may aid in such rulemaking; the VIPs may be implemented as soon as possible without having to await the outcome of any rulemaking that may later ensue.

Charles F. Warren, George A. Quadrino, David N. Dunn and *Benjamin K. Trogdon* for Respondents New York Freight Bureau and Trans Pacific Freight Conference (Hong Kong).

Robert T. Basseches, Timothy K. Shuba and *David B. Cook* for Respondent American President Lines.

Edward M. Shea, John E. Vargo and *Linda J. Gyrsting* for Respondent Sea-Land Service, Inc.

Raymond P. DeMember for Intervenor International Association of NVOCCs.

John Robert Ewers and *Stuart James* for Bureau of Hearing Counsel.

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

Finalized February 29, 1984

Preliminary Matters

On July 29, 1983, the Commission served its Order of Investigation and Hearing and Notice of Rulemaking wherein it recited that, "On July 1, 1983, the members of Agreements Nos. 10107 and 10108 instituted a novel marketing scheme which they have designated the 'Volume Incentive Program' (VIP). The salient feature of this arrangement is a refund to the shipper based upon the total freight dollars received by all agreement members during a twelve month contract period."[2]

In its Order, the Commission discussed certain aspects of the VIP program in question and stated:

> THEREFORE, IT IS ORDERED, That pursuant to sections 15, 16, 17, and 22 of the Shipping Act, 1916, (46 U.S.C. §§814, 815, 816, and 821) an investigation shall be instituted to determine whether the practices of respondents named herein, as they related to their Volume Incentive Programs, are in violation of sections 15, 16 First, or 17 of the Shipping Act, 1916. This investigation will address only material factual and legal issues, including those discussed above; and
>
> IT IS FURTHER ORDERED, That as part of this investigation a determination shall be made as to whether the Commission's General Order 13 should be amended to include a rule governing volume incentive programs (refunds based on total freight revenues received). If the record developed in this proceeding demonstrates that such a rule is needed, the initial decision shall propose the promulgation of an appropriate rule; and
>
> IT IS FURTHER ORDERED, That the members of Agreements Nos. 10107 and 10108 are hereby made Respondents in this proceeding; and
>
> IT IS FURTHER ORDERED, That in accordance with the Commission's Rules (46 C.F.R. §502.42) the Bureau of Hearing Counsel is hereby made a party to this proceeding; . . .
>
> * * * * *
>
> IT IS FURTHER ORDERED, That persons other than those named herein having an appropriate interest and desiring to participate in this proceeding may petition for leave to intervene pursuant

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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 CFR 502.227).

[2] As will become clearer in latter portions of this decision, as of September 12, 1983, the agreements themselves were dissolved and the agreement members became members of either the Trans Pacific Freight Conference (TPFC(HK)) or the New York Freight Bureau (NYFB), whose tariffs are now in question in this proceeding.

to section 502.72 of the Commission's Rules (46 C.F.R. § 502.72); . . .

As the case progressed, several petitions to intervene were filed. The International Association of NVOCCs (NVOs) were allowed to intervene for all purposes. The Atlantic & Gulf-Indonesia Conference, et al.; the United States Atlantic & Gulf-Southeastern Caribbean Conference, et al.; the Westwood Shipping Lines, Inc.; and the North Europe Conferences (NEC) were allowed to intervene with respect to the rulemaking aspects of the proceeding. In addition to the petitions to intervene, the respondents filed a motion to sever the section 15 authority issue in the case and to expedite the hearing of that issue. The motion was denied as to section 15 alone. Instead, all parties agreed to adjudicate expeditiously all of the merit issues relating to sections 15, 16 and 17. After several prehearing conferences, the case was heard on November 18, 1983.

Before setting down any findings of fact, discussing the issues involved and reaching any decision, it must be made clear at the outset that this decision applies only to the provisions set forth in the agreements and the tariffs involved. It is an ad hoc decision which does not apply to other agreements or tariff provisions which may contain dissimilar provisions or even factual variations within the ambit of the provisions considered herein. Further, while this decision may refer to "the VIP," it means *this* VIP and no other. The temptation to lump together all VIP agreements or tariff provisions to which one might ascribe validity because of statements made within this decision is great, but such an approach would be wrong. There is no magic in the label "VIP" and, in future cases, standing alone, it should connote nothing more than a type of agreement which may or may not be approvable under section 15, and acceptable under other provisions of the Shipping Act, 1916.

Findings of Fact

1. The Trans Pacific Freight Conference, Hong Kong (TPFC(HK)), functions pursuant to Commission approved Agreement No. 14, as amended, from or via Hong Kong and ports or inland points in Macao, Taiwan, Cambodia, and Vietnam to Hawaii, Alaska and U.S. Pacific Coast ports or inland points in the United States via such ports. Ex. 1, para. 3; App. 1.

2. The New York Freight Bureau (NYFB) functions pursuant to Commission approved Agreement No. 5700, as amended, from ports in Hong Kong, Macao, and Taiwan to United States Atlantic and Gulf Coast ports. Ex. 1, para. 3; App. 1.

3. On July 1, 1983, the members of Agreements Nos. 10107 and 10108 instituted a novel marketing plan which they designated the "Volume Incen-

tive Program'' (VIP).[3] Order of Investigation and Hearing, etc., served July 29, 1983.

4. The VIP provisions, referred to in paragraph 3 above, provided that upon the cancellation of the Agreements, the obligations of the members would inure to, and be binding upon, those members of the successor conferences who might elect to join. On September 12, 1983, Agreements Nos. 10107 and 10108 were cancelled because all of their members withdrew. Those members, with the exception of Mitsui O.S.K. Lines, Ltd., which only became a member of NYFB, then became members of TPFC(HK) and NYFB, which Conferences became the successors to the VIP originally set forth in Agreements Nos. 10107 and 10108.[4] Ex. 1, para. 6; Apps. 2, 3, 4.

5. On October 19, 1983 (effective November 18, 1983), the Conferences suspended their VIP tariff rules. They now read as follows:

(I) Effective 18th November, 1983, Rules 150 and 150.1 of this Tariff are hereby temporarily suspended pending the Federal Maritime Commission's determination of Section 15 issues in FMC Docket No. 83–31. In the event said issues are decided in favour of the Bureau, the Rules shall be promptly reinstated in which event the period of suspension shall be added to the period of enrollment in computing the enrollee's twelve (12) month period.

Rule No. 150 VOLUME INCENTIVE PROGRAM (VIP)

Members of New York Freight Bureau will pay refunds as set forth below to qualified shippers and consignees who have enrolled under, and who comply with all of the terms and conditions of, the Volume Incentive Program (VIP) as described in this rule.

The VIP refund will be applied to total VIP freight dollars by all transportation modes utilized by Bureau members and shall be calculated according to the following scale for each enrollment period:

12 Month Total VIP Freight Dollars	Percentage of Refund (Note 3)
From US $500 thousand to US $999,999.99	5.0 percent
From US $1.00 million to US $1,999,999.99	7.5 percent

[3] The VIP was set forth in Rule 150, et seq., of FMC Agreement No. 10107 Common Tariff No. 2–FMC–3, and in FMC Agreement No. 10108 Common Tariff No. 1–FMC–1.

[4] As of July 1, 1983, the members of Agreement No. 10107 were American President Lines, Ltd.; Barber-Blue Sea Line J/S; The East Asiatic Company, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Korean Marine Transport Co., Ltd.; Mitsui O.S.K. Lines, Ltd.; Moller-Maersk Line, A.P.; Sea-Land Service, Inc.; United States Lines, Inc.; and the Trans Pacific Freight Conference (Hong Kong). The members of Agreement No. 10108 were Barber-Blue Sea Line J/S; Kawasaki Kisen Kaisha, Ltd.; Moller-Maersk Line, A.P.; United States Lines, Inc.; and the New York Freight Bureau.

The VIP was incorporated in TPFC(HK) and NYFB tariffs.

12 Month Total VIP Freight Dollars	Percentage of Refund (Note 3)
US $2.0 million and over	10.0 percent

Examples of application of refund are as follows:

Account A—12 months revenue dollars of 700,000 qualifies for 5% refund equal to 35,000.

Account B—12 months revenue dollars of 1.5 million qualifies for 7.5% refund equal to 112,500.

Account C—12 months revenue dollars of 3.0 million qualifies for 10% refund equal to 300,000.

Except as otherwise provided, the provisions of the VIP may be modified or cancelled subject to the following:

(a) Changes which result in a monetary benefit to the qualified enrollee under this Rule will be effective immediately.

(b) Changes which result in a reduction of monetary benefit to the qualified enrollee will apply only to new or renewed enrollments.

Note 1: VIP freight dollars will be composed only of port to port (ocean) freight charges and will exclude the following additionals and charges:

1. Macao Arbitraries
2. Heavy Lifts Charges (Rule 4)
3. Long Length Charges (Rule 5)
4. Diversion Charges (Rule 23)
5. Destination Delivery Charges (Rule 64A)
6. TRS Charges (Rule 48)
7. CFS Receiving Charges (Rule 59)
8. Container/Equipment Detention Charges at Base Loading Ports (Rule 61)
9. Container/Equipment Detention Charges at Discharging Ports (Rule 62)
10. Demurrage Charges at Discharging Ports (Rule 67)
11. Detention in Transit Charges (Rule 79)
12. Storage Charges at Base Loading Ports (Rules 80 & 80A)
13. Bunker Surcharge (if applicable)
14. Currency Surcharges (if applicable)

(C) Note 2: For purpose of calculating the quatum [sic] of the refund, all VIP freight dollars paid to all members of New York Freight Bureau for cargo moving under the Bureau tariff will be combined.

Note 3: Refunds will be paid in U.S. dollars only to the qualified enrollees.

Terms & Conditions

1. A "qualified enrollee" must be the manufacturer, seller or purchaser having a proprietary financial interest (other than in the transportation or physical consolidation or deconsolidation) in the export or import cargo as applicable and who is named as a shipper or consignee on bills of lading or whose corporate affiliate is so named.
2. All enrollees must complete the enrollment form contained in Rule 150.1 and submit same to the Bureau Chairman/Secretary. The Bureau Chairman/Secretary shall assign the enrollment number which must be placed on all bills of lading covering cargo moving under VIP. Only one number may appear on a bill of lading to ensure the appropriate VIP refund. The name of the qualified enrollee or its affiliate and the applicable enrollment number must also appear on the bill of lading. All communications in connection with the VIP must be sent directly to the Bureau Chairman/Secretary's office. To assure prompt attention, each communication originating outside of Hong Kong should be sent by registered air mail and the notation "VIP" should be clearly marked on the envelope.

   Exception: On cargo shipped during the month of July, 1983 by a qualified enrollee or affiliate, any bills of lading which do not contain the enrollment number, may be submitted to the Chairman/Secretary by the enrollee or its affiliate for inclusion in the VIP.
3. Each enrollment shall run for 12 months starting from the first day of the month immediately following enrollment. The bill of lading date shall determine the month in which each shipment is to be credited.

   Exception: Initial application for enrollment during the month of July will be in effect on all shipments from 1st July, 1983.
4. VIP refunds shall become due and payable as soon as practicable, but not later than 60 days after completion of each individual 12 month enrollment period. Payment of VIP refunds shall be made by the Bureau's Independent Accountant directly to the qualified enrollee. In the event an enrollee ceases to ship with the Bureau at any time during the 12 month period, any refunds accrued for his account during the period of his participation will be paid as above.
5. All freight payments in respect of cargo originating in Hong Kong, Macao and Taiwan carried by all members of the Bureau destined to all New York Freight Bureau ports will be included in the VIP.

6. All freight payments in respect of commodities moving under the following tariff or successor or reissues thereto: New York Freight Bureau Tariff No. 27–FMC–14 will be included in the VIP.
7. Carriers will supply directly to the Bureau Chairman/Secretary and/or the party designated by the Bureau Chairman/Secretary such supporting documents as are required to ensure appropriate and timely application of the VIP refund. Any question regarding the application or administration of VIP shall be referred to the Bureau Chairman/Secretary by the enrollee with such supporting documentation as may be applicable. Decisions of the Bureau Chairman/Secretary shall be final and binding.
8. All tariff rates and conditions in effect at the time of shipment shall apply to VIP.
9. No refunds will be paid unless and until all freight and charges for the period and shipments in question, including charges for cargo in transit, have been paid to the carriers.
10. Freight revenue of a "qualified enrollee's" parent, subsidiary, or other related companies listed in the enrollment form who may engage in the shipment of commodities under this tariff and over whom the enrollee regularly exercises direction and working control in relation to shipping matters, whether the shipments are made by or in the name of the enrollee, any such related company, or an agent or shipping representative acting on the enrollee's behalf, shall be counted as revenue to the enrollee. The names of such related companies shall be listed on the VIP enrollment form. The enrollee warrants and represents that the list is true and complete, that he will promptly notify the Bureau Chairman/Secretary in writing of any future changes in the list, and that he has the authority to enroll under the VIP on behalf of the related companies so listed. To insure proper credit under the VIP, all bills of lading covering qualified shipments must contain the enrollment number.

    Exception: Bills of lading covering qualified shipments during the month of July, 1983 may be submitted to the Bureau Chairman/Secretary without the enrollment number.

    Effective 18th November, 1983, Rules 150 and 150.1 of this Tariff are hereby temporarily suspended pending the Federal Maritime Commission's determination of Section 15 issues in FMC Docket No. 83–31. In the event said issues are decided in favour of the Bureau, the Rules shall be promptly reinstated in which event the period of suspension shall be added to the period of enrollment in computing the enrollee's twelve (12) month period.

(C) Rule No. 150.1 SPECIMEN OF VOLUME INCENTIVE PROGRAM (VIP)

The following specimen enrollment form on enrollee's company letterhead shall be completed signed and forwarded to the Chairman/Secretary, New York Freight Bureau c/o Commercial Management Ltd., 801–4 Sincere Building, 173 Des Voeux Road Central, Hong Kong (Telex Number: 73701 ANSWERBACK SIGNAL: COMMAN HX, Telephone Number: 5–445077) and a copy of the form, with an enrollment number, will be promptly returned to the enrollee:

Chairman/Secretary,

New York Freight Bureau,

c/o Commercial Management Ltd.,

801–4 Sincere Building,

173 Des Voeux Road Central,

Hong Kong.

Re: New York Freight Bureau's—FMC Agreement No. 5700—Volume Incentive Program

Dear Sir:

(Name of Shipper or Consignee) hereby applies for enrollment in Volume Incentive Program (VIP) on terms and conditions as are specified in Rule 150 of FMC Agreement No. 5700 tariff as on file with the Federal Maritime Commission.

We understand that our participation in the VIP will run for a period of 12 months commencing on the first of the month immediately following enrollment, and as soon as possible after each 12 month period (but not later than 60 days therafter), a refund will be paid for shipping cargo on Bureau members' vessels in accordance with the terms and conditions of Rule 150.

Under terms of Rule 150, we further understand that refunds will be paid in U.S. dollars only to the qualified enrollee, but will not be paid unless the assigned enrollment number appears on the bills of lading covering the cargo movement.

Yours faithfully,

(S) ______________________

ENROLLEE'S NAME (PLEASE PRINT)

____

ADDRESS

____

____

____

TELEX

____

NAME AND ADDRESSES OF LEGALLY AFFILIATED COMPANIES (SEE RULE No. 150, SECTION 10) AUTHORIZED TO USE OUR ENROLLMENT NUMBER ARE AS FOLLOWS:

____

____

____

____

(C) Enrollment Number Assigned by Chairman/Secretary of New York Freight Bureau

______________________[5]

Ex. 1, App. 4.

[5] In essence, the TPFC(HK) tariff is exactly like that of the NYFB tariff, except that the Freight Dollars in relation to Percentage of Refunds are as follows:

12 Month Total VIP Freight Dollars	*Percentage of Refund (Note 3)*
From US $1.00 million to US $2,499,999.99	5.0 percent
From US $2.50 million to US $4,999,999.99	7.5 percent
US $5.0 million and over	10.0 percent

Examples of application of refund are as follows:

Account A—12 months revenue dollars of 1.5 million qualifies for 5% refund equal to 75,000.

Account B—12 months revenue dollars of 3.0 million qualifies for 7.5% refund equal to 225,000.

Account C—12 months revenue dollars of 7.0 million qualifies for 10% refund equal to 700,000.

6. As of October 31, 1983, 106 enrollees were participating in the TPFC(HK) VIP, and 66 of these use affiliates. The NYFB has 72 enrollees, 47 of whom list affiliates. Five enrollees have qualified for a refund in the TPFC(HK), and one enrollee has qualified in the NYFB. Ex. 1, App. 7, paras. 4, 5.

7. The difference in the range of freight dollar increments in paragraph (5) above is attributable to the substantially smaller volume of cargo moving in the NYFB trade. Ex. 1, para. 10.

8. Under Tariff Rule No. 150 as filed, a "qualified enrollee" was defined to be a manufacturer, seller or purchaser having a proprietary financial interest in the cargo and who is named as a shipper or consignee on the bill of lading, or whose corporate affiliate is so named. Ex. 1, para. 11; App. 4.

9. The enrollee, however, must have listed the names of its affiliates on the enrollment form and only then may an affiliate use the enrollee's enrollment number on the shipments it makes. Ex. 1, para. 11; App. 4.

10. The Conferences have taken action in Hong Kong, however, to revise the definition of "qualified enrollee" in Rule 150 to specifically include NVOCCs within that definition. Tr. p. 23; App. 4.

11. In order to qualify, an enrollee must complete the enrollment form contained in Rule 150.1, which is then processed by the Chairman/Secretary of the Conference for assignment and issuance of an enrollment number. Ex. 1, para. 11; App. 4.

12. It is required that the assigned number and the name of the enrollee or affiliate appear on all bills of lading covering the cargo moving under the VIP. Ex. 1; para. 11; App. 4.

13. The cargo shipped by an enrollee over 12 consecutive months is the basis the rule specifies for purposes of calculating the refund entitlement. This period commences on the first day of the month following submission of the completed enrollment form. Ex. 1, para. 11; App. 4.

14. Upon the completion of each 12 month period, but not later than 60 days thereafter, refunds are due and payable, provided all freight and charges have been paid. Ex. 1, para. 11; App. 4.

15. After the enrollment period has been completed, there is no obligation on the enrollee to do anything more in order to receive the benefit to which it is entitled. Ex. 1, para. 12; App. 4.

16. The Conferences have each appointed the international accounting firm of Peat, Marwick and Mitchell (PMM) to administer the task of paying out the refunds directly to each qualified enrollee. Ex. 1, para. 12; App. 4.

17. PMM will invoice each carrier for the amount for which it is liable under the VIP on a monthly basis, with collections within 60 days. Ex. 1, App. 7, para. 8.

18. The only Conference members who advance monies for the maintenance of accounts in their names are those which move cargo for qualified enrollees. Ex. 1, App. 7, para. 8.

19. The amount each conference member pays into its member account with PMM is based on the revenues paid to it by enrollees. Ex. 1, App. 7, para. 8.

20. PMM will notify the individual conference members of their potential VIP refund liability on a monthly basis, and the members will, in turn, submit the monies to PMM. Ex. 1, App. 7, para. 8.

21. The individual contributions to be made will be based upon each member's recent carryings plus an additional 10 percent to account for anticipated growth. Ex. 1, App. 7, para. 8.

22. All member accounts are maintained separate and apart from conference revenues, as the monies are collected by PMM and placed in a separate account for each member. Ex. 1, App. 7, para. 8.

23. The accounts will not be commingled with conference funds, and they will be maintained so that each enrollee's status can be determined at any time. Ex. 1, App. 7, para. 8.

24. No revenues derived outside of the VIP will be included in the separate member accounts. Ex. 1, App. 7, para. 8.

25. PMM will handle only monies derived from and related to the VIP. Ex. 1, App. 7, para. 8.

26. PMM will send a detailed monthly statement to each enrollee showing the calculation of the revenue generated pursuant to the VIP both on a monthly and cumulative basis. Ex. 1, App. 7, para. 9.

27. PMM will also determine the level and amount of any refund at the end of the VIP pursuant to the governing tariff rule. Ex. 1, App. 7, para. 9.

28. Any question regarding the application or administration of the VIP will be referred to the Chairman/Secretary by the enrollee with supporting documentation. Ex. 1, App. 7, para. 10.

29. Any refund earned will be paid solely to the enrollee whose VIP number must appear on the bill of lading. Ex. 1, App. 7, para. 12.

30. Since each member will pay PMM his contribution on a regular current basis, if a member should resign, there should be sufficient funds available to satisfy his obligations to an enrollee. Ex. 1, App. 7, para. 13.

31. The VIP uses "revenue" received rather than "quantity" as a basis for determining a refund because of the nature of the Hong Kong/Taiwan-U.S. trade. Ex. 1, App. 7, para. 1.

32. The trade is dominated by consignees who are major retailers and department stores who import a wide variety of consumer goods. Ex. 1, App. 7, para. 1.

33. Inherent in the importation of consumer goods for retail sale is the problem that the commodity mix of goods which is shipped varies

greatly, not only from season to season, but also from sailing to sailing. Ex. 1, App. 7, para. 1.

34. Additionally, the same consignees will use all major forms of transportation offered by the Conference including all water, mini-landbridge, and interior point intermodal. Ex. 1, App. 7, para. 1.

35. This wide range of commodities, types of shipments, and use of various forms of carriage makes it difficult to base a VIP on the "quantity" of cargo shipped. Ex. 1, App. 7, para. 1.

36. By utilizing the amount of revenue produced, variables resulting from use of different types and sizes of containers, relative cargo mix between consignees, and the difference in rates filed by individual members under independent action are all harmonized. Ex. 1, App. 7, para. 1.

37. TPFC(HK) and NYFB separately established, through conference deliberation, the refund levels in their respective tariff rules. Ex. 1, App. 7, para. 5.

38. The qualifying refund levels were established after considering various trade factors including the rates being offered by non-conference lines on an average basis. Ex. 1, App. 7, para. 5.

39. Currently, 19 non-conference carriers offer regular service with modern vessels and equipment in competition with the 11 TPFC(HK) members while 8 non-conference carriers compete with a similar number of NYFB members. Ex. 1, paras. 23–24; App. 10; Ex. 3, para. 3.

40. By 1982 competition from non-conference carriers had pushed rates below levels prevailing in 1978. Ex. 1, para. 25; App. 11.

41. As non-conference carriers have adjusted their rate schedules to attract larger shippers, the conferences believed that it was necessary to provide for increased percentage refunds in the VIP to assure that the larger shippers and consignees would continue to use their services once the initial qualifying refund level was met. Ex. 1, App. 7, para. 5.

42. It was believed by the conferences that a 10 percent maximum refund, when combined with the revenue level, was sufficient to provide adequate incentive for large volume shippers and consignees to use their services. Ex. 1, App. 7, para. 5.

43. The VIP was suspended effective November 18, 1983, in an attempt to limit any potential antitrust liability. Ex. 1, paras. 7–8; App. 4.

44. The conferences, in establishing the VIPs, relied upon the basic ratemaking authority contained in Article 6, entitled "Freight Charges," of each respective conference agreement. Ex. 1, para. 14; App. 1, Tr. pp. 32–33, 35.

45. At the present time, the Commission has in place time-volume rules. 46 CFR 536.7.

46. The Commission's current time-volume rules are based on a specific or minimum quantity of cargo moving over a specified period of time. Tr. p. 27; 46 CFR 536.7.

47. The beneficiaries of the time-volume contracts are the major importers and exporters in the foreign commerce of the United States. Tr. p. 27.

48. The effect of time-volume rules upon smaller shippers was considered by the Commission to be no different than volume rates which were in tariffs that apply on a particular sailing. Tr. p. 27.

49. The Commission stated in its final Order, regarding time-volume rules, that time-volume rate making was routine and is interstitial to most basic rate making agreements. Tr. p. 28; Docket No. 80–54.

50. The basic difference between time-volume contracts and the VIP is that one is a contract based on quantity and the other is a tariff application based upon revenue. Tr. p. 30.

51. From a shipper's perspective, there is no basic, fundamental difference between basing a refund upon the quantity of cargo carried or the amount of revenue received. Tr. p. 30.

52. The Commission's staff believes that the Commission should look favorably upon a VIP type concept. Tr. p. 31.

53. The Commission's staff does not believe that any of the provisions in the proposed VIP are inherently discriminatory. Tr. p. 31.

54. It is the Commission's staff opinion that the Conference already possesses sufficient section 15 authority to implement the VIP.

55. When dealing with multiple commodity shippers, it is easier to keep accounting records on a revenue basis as opposed to a time-volume rate that is based on the commodity or mix of commodities. Tr. p. 33.

ULTIMATE FINDINGS OF FACT

56. Both the NYFB and the TPFC(HK) possess rate-making authority in their basic Agreements, and the implementation of the VIP program is interstitial to the basic agreements. Entire record.

57. The VIP involved here does not result in a pooling agreement requiring approval under section 15. Entire record.

58. The VIP adjusts the tariffs involved pursuant to normal, recognized rate-making factors, which are includable in the Conferences' tariffs as a routine rate-making matter, not requiring approval under section 15. Entire record.

59. The VIP is neither unjustly discriminatory nor unduly or unreasonably preferential and does not violate sections 16 or 17. Entire record.

60. The provisions establishing levels of revenue which are necessary to participate in the VIP, as well as the increments of freight dollars set forth, are reasonable and do not constitute a violation of sections 16 or 17. Entire record.

61. The provisions of the VIP which include affiliated companies within the definition of "qualified enrollee" do not constitute a violation of sections 16 and 17. Entire record.

DISCUSSION AND CONCLUSIONS

Section 15 Authority

Section 15 of the Shipping Act, 1916, (46 CFR 814) provides that:

> Every common carrier by water, or other person subject to this Act, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrange ment. The term "agreement" in this section includes understandings, conferences, and other arrangements, but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether of [sic] not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Here, the question is not whether the VIP is subject to and requires section 15 approval—for clearly it is a rate-making activity coming under the statute—but rather whether the Conferences have already been granted sufficient authority to implement the VIP. We think it clear that the TPFC(HK) and NYFB both have such authority. There is no question that Article 6 of Agreement Nos. 14 and 5700 provides for comprehensive rate-making authority within the Conferences' respective geographic scopes. (F.F. 1, 2.) Under the rate-making provisions of Article 6, the Conferences have implemented conference-wide tariffs establishing rates, charges, rules and regulations applicable to all cargo moving within the scope of the Agreements. Over the years, the Conferences have published in their tariffs rates of many types and varieties, including local and OCP rates—rates based on weight alone or weight/measure, per container rates, ad valorem

rates, and rates based on volume. The VIP, while a "novel" rate-making device, as the Commission's Order points out, is nevertheless a form of rate making which when analyzed is similar to other forms of rate making which the Commission has already characterized as interstitial to the basic rate-making agreement.

In Docket No. 80–54, which authorized the establishment of time-volume rates and contracts, the Commission directly considered whether conferences offering discounted rates based on time-volume concepts require separate rate-making authority. It held:

> Finally, there is the question of whether conferences, and dual rate conferences in particular, should be authorized to participate in time/volume ratemaking. Certain commentators argue that time/volume rates are not conventional or routine ratemaking and that contracts for such rates contravene section 14(b) of the Act (46 U.S.C. § 813a). The Commission disagrees. Time/volume rates are a routine form of ratemaking, interstitial to agreements approved pursuant to the Shipping Act, 1916. Docket No. 80–54, Final Rule, served July 2, 1982.[6]

Given the record made in this proceeding, where all of the parties agree that time-volume rates and the VIP are similar and differ significantly only in that one uses the quantity of cargo as a basis, while the other uses revenues, it seems clear as Hearing Counsel points out that, "The situation associated with the VIP is almost indistinguishable. . . . It is a novel rate making system, filed in the conference tariffs, by two conferences which already possess approved rate-making authority."

Prior to the time-volume ruling, the Commission, in *Investigation of Overland and OCP Rates and Absorptions*, 12 FMC 184 (1969), considered whether overland or OCP rates and absorptions which had been filed in various conference tariffs, were covered by the conferences' basic rate-making authority or whether additional section 15 approval must be sought. The Commission found that the "overland/OCP rates were the product of 'routine' activities within the cover of authority conferred by the conference agreements; therefore, there was no need for separate Commission approval of overland/OCP rates or rate-making practices." It states further that:

> [t]he Commission and its predecessors have uniformly held that the issuance of tariffs, including rules and regulations covering their application, is a routine matter authorized by an approved basic conference agreement, not requiring separate approval under section 15. [Citations omitted.] In 1961, section 15 of the Act was amended to reflect this principle, and more specifically excepts, "tariff rates, fares and charges, and classifications, rules, and regulations explanatory thereof" from the requirement of prior

[6] See *In Time Volume Rate Contracts—Tariff Filing Regulations Applicable to Carriers and Conferences in the Foreign Commerce of the United States*, 25 F.M.C. 1 (1982).

> approval where agreed upon by "approved conferences" . . . and filed and published in accordance with section 18(b), the tariff filing section of the Act. (*Id.* at 205.)

It is significant that in the above-cited case, as it has in others, the Commission recognized as a "cardinal principle" the right of conferences to compete for shippers' patronage. *Id.* at 206; *Agreement No. 134–21—Gulf Mediterranean Ports Conference,* 8 FMC 703, 709 (1965).

In discussing the question of section 15 authority, the Commission's Order of Investigation and Hearing states that the "VIP itself might be considered a *new* ratemaking arrangement requiring separate section 15 approval" (emphasis supplied), citing *Persian Gulf Outward Freight Conference,* 10 FMC 61, 65 (1966). While the inquiry is certainly valid, the record made in this proceeding places this case apart factually. In *Persian Gulf,* a unique two-tier ratemaking plan based upon the flag of a vessel was involved. The Commission characterized it factually as a ratemaking plan bearing, "no resemblance . . . to any recognized ratemaking method" and just as the Commission upheld the interstitial nature of the OCP rates and the time-volume rates, so too is the VIP interstitial and the *Persian Gulf* holding inapplicable. As the Commission stated in the *Investigation of OCP Rates, supra,* at pp. 212, 213:

> That the Commission found [the Persian Gulf scheme] to require separate approval as an entirely new scheme of rate combination and discrimination, is no more pertinent than the similar finding in the case of the exclusive patronage dual-rate system.

So here, in the final analysis, we believe that the theory of the VIP, as witnesses Dick, Gottshall, Velez and Schwarz all affirmed, is conceptionally no different from time-volume rate making. In both cases, shippers who ship a specified quantity of cargo during an agreed upon time period are entitled to a reduction in their total freight charges. In the case of time-volume rates, the quantity of cargo is variously measured in terms of weight tons, revenue tons or TEUs. Under the VIP, quantity is measured in terms of revenue paid by the shipper. In time-volume contracts, the reduction in freight charges is based on a negotiated rate applicable only if the volume commitment is met. Under the VIP, the reduction is based on published tariff levels which are also applicable only if the volume (revenue) commitment is met. Conceptually, and pragmatically, there is no real distinction in terms of the rate-making authority required under section 15.

A further issue raised by the Commission's Order of Investigation and Hearing, as it applies to section 15, is placed in focus by the Commission's statement that:

> While the VIP tariff rules do not directly address the point, it seems apparent that members of the Agreements (Conferences) who receive revenues from qualifying for a refund must somehow

> remit a portion of those revenues to the Agreement Chairman so that the refunds can be made. The process by which these payments are gathered and allocated *could* result in an agreement among common carriers to pool or apportion earnings which *might* require approval under section 15 of the Shipping Act (46 U.S.C. § 814). [Parenthesis and emphasis supplied.]

Here, the Commission's concern is again concise and appropriate. However, the record made in the proceeding clearly negates the idea that the method used in the VIP to gather and allocate funds constitutes a pooling agreement requiring section 15 approval. Such an agreement is defined as:

> An agreement which provides for the division of the cargo carryings or earnings and/or losses among the parties in accordance with a fixed formula. Part 522.2(a)(3), Commission's Rules of Practice and Procedure (46 CFR 522(a)(3)).

In this proceeding, the uncontroverted evidence supplied by all witnesses, which we have found as fact, indicates that there is no division of carryings or earnings much less a formula for doing so. The record establishes that each Conference member contributes revenue only to the extent it carries for a particular enrollee. Further, the level of the contribution is limited strictly by the level of the member's carriage for each enrollee. If a member does not carry for a particular enrollee no contribution need be made. If, for example, only one member carries for an enrollee, then the entire contribution is made by that member. As to the funds themselves, a separate account is maintained by PMM for each Conference member. Each account is kept separate and apart from all other accounts and from all Conference accounts and monies, without commingling at any time for any purpose. At the end of a twelve-month period, refunds earned by the enrollee are paid directly to that enrollee by PMM.

From all of the above, as well as the remaining evidence in the record, we hold that the process by which these VIP funds are gathered and allocated does not result in a pooling agreement requiring approval under section 15.

Another aspect of this proceeding having to do with section 15 approval is whether or not the general rate-setting authority contained in the Conference agreements under which this VIP becomes operative is limited to the adjustment of rates "as the normal economic forces which govern the establishment of such rates may require," as the Commission decision in the *Investigation of Overland/OCP Rates and Absorptions, supra,* requires. In other words, under the VIP, have the tariffs been adjusted pursuant to normal, recognized, rate-making factors, such as competition, so as to be includable in published tariffs as routine matters, or do the VIP provisions in the tariffs merely constitute a device having some unacceptable purpose and effect, such as the stifling of competition within the trade? We think the record here establishes clearly, without even a semblance

of evidence to the contrary, that this VIP tariff provision was based on legitimate recognizable and permissible rate-making factors. The Chairman/Secretary of the NYFB and TPFC(HK) stated, and we have found as fact, that this VIP was promulgated in response to the current time-volume rules adopted by the Commission. He noted, and we have found as fact, that because of the nature of the Hong Kong/Taiwan-U.S. trade that his Conference members could not utilize the time-volume rules, citing that because of the presence of multi-commodity shippers in the trade and the various forms of carriage utilized by these shippers, a volume incentive program based upon the "quantity" of cargo carried would not be feasible. As a result, the Conferences perceived that the independent, single-commodity carriers were enjoying a competitive advantage over them by being able to utilize the Commission's time-volume rules. In answer to that competition, the VIP system was designed and based upon "revenue" received, which represented a practical common denominator, both from the point of view of the nature of the trade and the administration of the program. In addition to the Conferences' witnesses, the above facts and their effect were corroborated by the testimony of the Commission's Senior Transportation Industry analyst, who is also a member of the Tariff Compliance Review Board in the Bureau of Tariffs. So here, in view of the above, we hold that the VIP involved was filed pursuant to recognized rate-making factors, and as such is includable in the Conferences' published tariffs as a routine rate-making matter, not requiring section 15 approval.

In light of the preceding discussion and based on the entire record, we hold that the VIPs involved here are neither unjustly discriminatory or unfair as between carriers or shippers, nor do they operate to the detriment of the commerce of the United States or contrary to its public policy. Further, it is held that the Conference Agreements already contain sufficient section 15 authority to allow implementation of the VIPs contained in their tariffs.

Possible Violations of Sections 16 and 17

As to possible violations of sections 16 and 17 of the Shipping Act, 1916, the Commission's Order of Investigation, etc., states:

> A review of the VIP provisions filed with the Commission raises several areas of concern. Section 16 First of the Shipping Act makes it unlawful for any common carrier to make or give any undue or unreasonable preference or advantage to any particular person or to subject any particular person to any undue or unreasonable prejudice or disadvantage (46 U.S.C. §815). Section 17 prohibits common carriers from charging any rate which is unjustly discriminatory as between shippers (46 U.S.C. §816). The levels of revenues necessary in order to participate in the VIP, together with the procedures for aggregating revenues from affiliated companies, may discriminate against small shippers or shippers of low value commodities *to such a degree* that sections 16 First

> and/or 17 are violated. In addition, the definition of qualified shipper, based as it is on a proprietary interest in the cargo, excludes certain categories of shippers from the VIP, including, but not necessarily limited to, non-vessel operating common carriers (NVOCCs), consolidators, deconsolidaters, warehousemen, and freight forwarders. This kind of discrimination may also violate sections 16 First and/or 17. [Emphasis supplied.]

Section 16, first, provides that it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

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

Section 17 provides:

> That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, . . .

There is no question but that the VIP involved here is discriminatory and/or preferential in that shippers who meet certain revenue prerequisites receive lower rates than do those shippers who do not meet those prerequisites. The real question, however, is whether or not the discrimination involved is "unjust" and the preference "undue or unreasonable." See, *Matson Navigation Co.*, 21 FMC 538, 540 (1978). Given the record made in this case, we hold that there was neither unjust discrimination nor undue or unreasonable preference and that the VIP does not violate either section 16 or section 17 of the Shipping Act. It is axiomatic that a common carrier ought to be able to compete for traffic. *Texas & Pac. Ry.* v. *ICC*, 162 U.S. 197 (1896); *North Atlantic Freight Conference*, 11 FMC 202, 210 (1967); *Matson Navigation, supra*. Here, the record establishes that the Conferences wished to attract to members' services shippers who are largely responsible for sustaining the Hong Kong/Taiwan-United States trades. Currently, nonconference carriers have been able to secure increasingly large portions of cargo that are being shipped by major shippers (F.F. 38–41) by use of time-volume contracts. The Conferences are now seeking to implement the VIP, which is more workable for them, in place of time-volume contracts. In so doing, they do not discriminate or establish preferences any differently than do time-volume contracts which the Commission has already approved. Further, as to the effect the VIP would have on small shippers, once again that effect is the same as what takes place in establishing time-volume rules, where the Commission has decided that the effect of the rules is no different than the volume rates which were in ordinary tariffs that apply to a particular sailing. It has been

consistently held that such volume rates are not *per se* violative of any section of the Shipping Act. *In the Matter of the Carriage of Military Cargo*, 10 FMC 69, 73 (1966); *Puerto Rican Rates*, 2 U.S.M.C. 117, 121–2 (1939); *Docket No. 82–54, supra*. So here, the VIP and time-volume rules are the same in that both allow a discount based on the volume of cargo moved, which, standing alone, does not violate sections 16 or 17.

As to the levels of revenue which are necessary to participate in the VIP, the evidence establishes they are between 5 and 10 percent on increments of freight dollars ranging from $500,000.00 to $2,000,000.00. These are reasonable ranges, and the fact that a large number of qualified enrollees—178—have become members of the VIPs indicates that the system is not intended for a select group of large shippers. Also, the testimony of all witnesses, including the Commission expert, establishes that the level of refunds are not unduly preferential or discriminatory within the meaning of sections 16 and 17.

In its Order of Investigation, the Commission noted that the VIP procedure of aggregating revenues from affiliated companies might discriminate against small shippers. Once again, while the concern is valid, the facts in this case establish that as with Merchant's Contracts, the inclusion of affiliates was made to allow shippers and consignees to avail themselves of the VIP without forcing them to restructure their corporate organizations. The VIP includes only affiliates "over whom the enrollee regularly exercises direction and working control in relation to shipping matters." It thereby allows shippers and consignees the flexibility they need in maintaining their corporate structures. Excluding their controlled affiliates might unreasonably discriminate in favor of "unitary" companies that conduct their operations through unincorporated divisions or offices and might cause the rejection of the VIP by the Conferences' major consignee accounts. Finally, the Commission has recognized the use of affiliates and subsidiaries by shippers and consignees, and adopted regulations treating affiliates as parties to shipping arrangements entered into by parent corporations. The *Dual Rate Cases*, 8 FMC 16, 33 (1964). So here, the record is devoid of any evidence establishing discrimination under sections 16 and 17, by virtue of the inclusion of affiliated companies as qualified enrollees under the VIPs, and we hold that the provision does not violate those sections of the Shipping Act.

As to whether the VIP use of a revenue based discount would unjustly discriminate against shippers of low rated cargo, we hold that it does not so unjustly discriminate. The respondents argue, and we agree, that the fundamental concept behind traditional commodity pricing dictates that certain low value cargoes must be rated at relatively low levels or they otherwise would not move in the foreign commerce. In other words, it is probable that the shippers of those low valued, low rated cargoes already receive discounts as reflected in the Conferences' existing rate structure.

Thus, any shipper of such cargo who might not qualify for the VIP refund levels is not unjustly discriminated against as to the price paid for moving his cargo, since his discount has already been included in the base rate. Further, in these particular VIPs, the testimony establishes that the trades involved are dominated by large department store accounts and not by large shippers of low rated, quasi-bulk commodities, so that the danger of unjust discrimination against such shipper is less a concern than it otherwise might be.

Finally, with respect to sections 16 and 17, the Commission, in its Order, raises a question regarding the definition of a "qualified enrollee" as used in the VIPs. It notes that since the VIPs exclude those shippers who do not have a "proprietary interest" in the cargo, it excludes NVOCCs. The National Association of NVOCCs intervened in the proceeding alleging violation of sections 15, 16 and 17. However, the Conferences have now agreed to include NVOCCs within the definition of a "qualified enrollee," and the National Association of NVOCCs have withdrawn from the adjudicatory phase of the proceeding, and the issue regarding them has become moot.[7]

In light of the above, we hold that the VIP is not unjustly discriminatory nor does it give undue or unreasonable preference or advantage so as to be violative of sections 16 and 17 of the Shipping Act, 1916. We think the holding is all the more justified because no adverse party has appeared to contest the VIP or to allege harm or injury resulting from its implementation.

Bifurcation of Issues—Adjudication and Rulemaking

We have already noted that the adjudicatory phase of this proceeding having to do with violations of sections 15, 16 and 17 of the Shipping Act, 1916, has been bifurcated from the issues raised in that portion of the Commission's July 29, 1983, Order having to do with Rulemaking. We have also noted that there are several intervenors who have been allowed to intervene in the rulemaking aspect of the proceeding. We propose to schedule hearings on the rulemaking phase as soon as possible wherein we will consider whether or not rulemaking is appropriate in the first instance, and if it is, what provisions the rule should contain. There will be an initial decision on rulemaking, which, as the Commission's Order requires, "shall propose the promulgation of an appropriate rule."

In the meantime, this initial decision shall become operative as to the adjudicatory aspects of the VIP. The particular VIPs involved here need not and should not await rulemaking before being allowed to go into effect. The record made here, which occasioned the bifurcation of issues in the first instance, demonstrates a need to expedite implementation of the VIPs if this holding is to have any real, practical application. The

[7] It is our understanding that the pertinent tariffs will be or have been amended to include NVOs within the meaning of "qualified enrollee." Approval of these VIPs is predicated on that change being made.

record shows that the VIPs have already obtained many enrollees who have made qualified shipments toward a refund. Any uncertainty as to the future status of the program or any unreasonable delay, such as the need to await the outcome of possible rulemaking, is both unnecessary and, more importantly, unfair. Such uncertainty and delay can only adversely affect the respondents' good will and their ability to attract cargo from those customers who are interested in the VIP.

In addition to the above, the record in the proceeding lacks any viable reason why these VIPs should not be implemented. Indeed, Hearing Counsel's expert witness testified that:

> . . . I don't think it would be detrimental to a rulemaking to have the VIP effective, particularly because I think the experience that would be gained paralleling the time the rulemaking would be going on would probably be beneficial to the Commission in determining what rules would be applicable through that experience.

Thus, it appears, allowing the VIPs to go into effect prior to rulemaking would provide the Commission with data that could be used in promulgating any rule that might be necessary, based on the experience gained in the operation of the VIPs. Such a foundation for any necessary rule would serve to aid in the administration of the Commission's regulatory responsibility and might well allow for a more definitive approach to the implementation of VIPs generally.

Finally, it must again be stressed that this decision, including the holding that these VIPs be promptly implemented, is based on these specific VIPs and the record made in this proceeding. That record compels one to suggest that since these are the first VIPs coming before the Commission, care must be taken to properly monitor them to insure that they function as the respondents say they will and that any changes in the VIP tariff provisions are properly evaluated regarding any possible violations of sections 15, 16 and 17.[8]

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[8] The fact that this decision holds that these VIPs should be implemented expeditiously, prior to any rulemaking that may ensue, should not be taken to mean that these VIPs will not be subject to any rules the Commission may later adopt. Indeed, the import of this decision is that if the Commission adopts any rules that require changes in these VIPs, then such changes will be made by the respondents.

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

(GENERAL ORDER 16, AMDT. 44, DOCKET NO. 82–48)

MISCELLANEOUS AMENDMENTS TO INFORMAL COMPLAINTS PROCEDURES

March 8, 1984

ACTION: Final Rules

SUMMARY: The Commission amends its Rules of Practice and Procedure to (1) increase the jurisdictional limit for the adjudication of small claims from $5,000 to $10,000; (2) provide for tariff notification of decisions of Administrative Law Judges and Settlement Officers in formal and informal docket proceedings; and (3) provide for submission of petitions for reconsideration in informal adjudications to Settlement Officers. The increase in the ceiling reflects the present-day cost of doing business. Tariff notice is necessary to ensure that all shippers are treated equally. The procedure for filing of petitions for reconsideration will remedy a defect in the rules which permits parties to file such petitions with the Commission itself even though parties in informal claims procedures have waived the right to file exceptions to Settlement Officer decisions.

DATE: Effective March 16, 1984.

SUPPLEMENTARY INFORMATION:

On October 18, 1982, the Commission published in the *Federal Register* a Notice of Proposed Rulemaking (46 F.R. 46338–46339) which would amend its Rules of Practice and Procedure to provide for revised procedures with respect to overcharge claims. Specifically, the jurisdictional limit for small claims would be raised from $5,000 to $10,000; tariff notices may be required to be published in cases involving overcharge claims; and petitions for reconsideration in small claims procedures would be submitted to Settlement Officers rather than the Commission itself.

In response to the notice, Sea-Land Service, Inc. (Sea-Land) and the Transportation Department of 3M (3M) submitted comments. Sea-Land supported the proposed rules. 3M proposed the following:

(1) Eliminate the jurisdictional limit entirely;
(2) Not require tariff notification;

(3) Permit formal proceedings only under certain circumstances and within certain limitations; and

(4) Raise the jurisdictional limit for special docket applications from 180 days to 2 years.

With respect to 3M's comments, the suggestion that the jurisdictional limit be eliminated entirely was not contemplated within this proceeding. In addition, its assertion that the $10,000 limit was set arbitrarily is not accurate. The limit was established after review of all overcharge claims filed since 1975.

3M's objection to the tariff notification requirement is that it would add another element to "already crowded and ambiguous tariffs." The purpose of the notification is to assure that all shippers are treated equally. This outweighs any problems which may be experienced with additions to tariffs.

3M's remaining two comments with respect to the conduct of formal proceedings and special docket applications are outside the scope of this proceeding. In particular, the suggestion as to special docket applications would require a legislative change.

After consideration of the comments submitted in response to the Notice of Proposed Rulemaking, the Commission has determined to adopt the rules as proposed.

List of subjects in 46 CFR 502: Administrative Practice and Procedure.

Therefore, pursuant to 5 U.S.C. 553 and sections 22 and 43 of the Shipping Act, 1916 (46 U.S.C. 821 and 841a), Part 502 is amended to read as follows:

(1) Section 502.301 is amended by changing the $5,000 limitation in the first sentence to read "$10,000".

(2) Section 502.304(g) is amended by addition of the following sentence after the first sentence.

Where appropriate, the Settlement Officer may require that the carrier publish notice in its tariff of the substance of the decision.

(3) A new section 502.304(h) is added to read as follows:

Within thirty days after service of a final decision by a Settlement Officer, any party may file a petition for reconsideration. Such petition shall be directed to the Settlement Officer and shall act as a stay of the review period prescribed in section 502.304(g). A petition will be subject to summary rejection unless it: (1) specifies that there has been a change in material fact or in applicable law, which change has occurred after issuance of the decision or order; (2) identifies a substantive error in material fact contained in the decision or order; or (3) addresses a material matter in the Settlement Officer's decision upon which the petitioner has not previously had the opportunity to comment. Petitions which merely elaborate upon or repeat arguments made prior to the decision or order will not be received. Upon issuance of a decision or order on

reconsideration by the Settlement Officer, the review period prescribed in section 502.304(g) will recommence.

(4) Section 502.261 is amended by addition of a new paragraph (c) to read as follows:

(c) The provisions of this section are not applicable to decisions issued pursuant to Subpart S of this Part.

(5) Section 502.225 is amended by the addition of a new sentence to read as follows:

In proceedings involving overcharge claims, the presiding officer may, where appropriate, require that the carrier publish notice in its tariff of the substance of the decision; this provision shall also apply to decisions issued pursuant to Subpart T of this Part.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–52

IN THE MATTER OF THE STATUS OF MATSON AGENCIES, INC. AND MATSON FREIGHT AGENCIES, INC.

ORDER ON PETITION FOR DECLARATORY ORDER

March 13, 1984

Matson Agencies, Inc. (Matson Agencies) and Matson Freight Agencies, Inc. (MFA) (Petitioners) have petitioned the Commission to issue a declaratory order determining that neither is a common carrier by water or other person subject to section 1 of the Shipping Act, 1916 (46 U.S.C. § 801). Matson Agencies and MFA advise that an uncertainty has arisen because of their affiliation with Matson Navigation Company, Inc. (Matson), a common carrier, and Matson Terminals, Inc. (Matson Terminals), an "other person" subject to the Act. Petitioners explain that they perform steamship agency services exclusively and submit that they are not subject to the Act unless they are so deemed because of their affiliation with Matson and Matson Terminals.

A Notice of the Matson Agencies/MFA Petition for Declaratory Order (Petition) was published in the *Federal Register* (48 *Fed. Reg.* 51978). In response to that Notice, the Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA) petitioned to intervene and filed a reply to the Petition. The Commission's Bureau of Hearing Counsel has also filed a petition to intervene and a reply. The petitions of ASBA and Hearing Counsel will be granted and their replies considered herein.

BACKGROUND

The Petition provides the following information relating to the activities and affiliations of Petitioners, Matson, and Matson Terminals.

Petitioners are both Hawaii corporations with headquarters in San Francisco, California. Matson Agencies and its predecessor, Matson Agencies Inc., have performed steamship agency services since 1973. Services are presently performed for Nippon Yusen Kaisha under FMC Agreement No. 10052 and until January 31, 1984 were performed for Korea Maritime Transport Company Ltd. under Agreement No. 10483. Since January 1, 1983, Matson Agencies has been a wholly-owned subsidiary of MFA. The officers and directors of Matson Agencies are also officers and directors of MFA. Matson Agencies has no employees of its own and the employees of MFA manage its day-to-day business.

MFA currently performs agency services for Columbus Line in Hawaii, freight traffic services for Delta Line in Los Angeles and Portland and has, in the past, provided agency services for Moore McCormack Lines and United Yugoslav Lines. In addition, it provides husbanding services for various tramp vessels. MFA is a wholly-owned subsidiary of Matson. The list of officers and directors of MFA is not identical to the list of officers and directors of Matson or Matson Terminals.[1] Certain corporate functions such as personnel, legal, purchasing, corporate accounting and treasurers' functions are performed for MFA by Matson pursuant to an agreement between the companies.

Matson operates as a common carrier in the domestic offshore commerce between the U.S. Pacific Coast and Hawaii/Johnston Atoll. In the foreign commerce of the United States, Matson serves only Kwajalein and Majuro which are part of the Pacific Islands Trust Territory administered by the United States.

Matson Terminals, a subsidiary of Matson, performs stevedoring and terminal services for Matson and other vessel operators at Oakland and Los Angeles, California, Seattle, Washington, and Honolulu, Hawaii. In addition, it performs container equipment maintenance services at Hayward, California and Portland, Oregon and operates and manages a container terminal under contract with and on behalf of the City of Richmond.

POSITIONS OF THE PARTIES

Petitioners maintain that if they were not affiliated with Matson and Matson Terminals, they would not be considered subject to Shipping Act requirements. However, Petitioners advise that, because of that affiliation, they have filed various agency agreements which they have with the carriers they serve. In those instances, the parties asked that the agreements be determined not subject to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814) but if they were that they be approved. Petitioners advise that in all such instances the agreements were approved. Petitioners argue that the necessity of their obtaining section 15 approval of these agency agreements places them at a competitive disadvantage vis-a-vis other steamship agents that are not affiliated with persons subject to the Act and which need not file their agency agreements. Petitioners advise that while this filing burden has been lessened due to the exemption provisions in 46 C.F.R. § 520.12[2] there are still instances when they must file their agency agreements.

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[1] Most of MFA's officers and directors are, however, also officers of Matson. Standard & Poor's Register of Corporations, Directors and Executives 1625 (1984).

[2] 26 C.F.R. 520.12 provides, in relevant part:

> Agency agreements between persons subject to the Act except those: (a) where a common carrier is to be an agent for a competing carrier in the same trade, or (b) which permit an agent to enter into similar agreements with more than one carrier in a trade, are exempted from the filing and approval requirements of section 15.

Petitioners acknowledge that certain agency agreements entered into between competing carriers in a trade may require filing and approval pursuant to section 15. They argue, however, that the relationship of the agent's carrier-principals should not determine the status of the agent under the Act.

Petitioners claim that the purposes of section 15 are not served by concluding that they are subject to the Act. Petitioners point out that because they perform services solely for vessels operating in the foreign commerce of the United States and Matson's services are limited to domestic offshore commerce, except for a monthly barge call at Majuro and Kwajalein, they do not perform services for a Matson competitor.

Petitioners advise that they were created for corporate, not regulatory reasons and that the scope of work performed by them differs from that performed by their affiliates, Matson and Matson Terminals, which are admittedly subject to the Shipping Act, 1916. Petitioners therefore believe that the Commission should recognize the corporate distinctions. Petitioners point out that the Supreme Court has held that if the legislative purpose is not frustrated, corporate entities should not be disregarded. *Schenley Distillers Corp. v. United States*, 326 U.S. 432 (1946).

ASBA contends that companies acting as steamship agents, whether for common carriers or others subject to the Shipping Act, are not themselves persons or "other persons" subject to the Shipping Act, by virtue of their activities as agents. ASBA goes on to argue that the mere fact that a controlling stockholder, or even a sole stockholder, is itself subject to the Shipping Act, is immaterial. ASBA does not take a position as to the relief sought by Petitioners to the extent it depends upon particular facts surrounding the Petitioners' individual circumstances, or the particular manner or means in which they accomplish their agency functions.

Hearing Counsel supports the Petition. It submits that while a person subject to Commission jurisdiction may not segment its operation to make part of it subject and part of it exempt if such segmentation results in unjust discrimination, absent a showing that the segmenting of operations results in some activity which is proscribed by the Act, the entity subject to the Act may organize its operations in any fashion it chooses. *Puerto Rican Forwarding Co. Inc.—Possible Violations of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933*, No. 75–8 (F.M.C., Initial Decision served September 24, 1976), 16 S.R.R. 1433, 1451. Hearing Counsel believes that the particular facts here indicate that the performance of agency operations by Petitioners, which are corporately separate from Matson, does not result in any activity proscribed by the Shipping Act, 1916. Accordingly, Hearing Counsel believes that no regulatory purpose would be served by asserting jurisdiction over Petitioners.

DISCUSSION

Section 15 jurisdiction extends to any agreement between two or more common carriers:

> . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number or character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

An agreement which would authorize a common carrier to be an agent for a competing carrier in the same trade is an agreement "controlling, regulating, preventing or destroying competition." Such an agreement does not fall within the exemption in 46 C.F.R. § 520.12 and is fully subject to the filing and approval requirements of section 15. (*See*, for example, *Agreements Nos. 10186, As Amended, 10322, As Amended, and 10371, As Amended, Agreement No. 10377, Agreements Nos. 10364 and 10329*), Docket No. 80–52 (F.M.C., Order of Modification served May 13, 1983).

Carriers may not use the device of separately incorporated subsidiaries in order to avoid the filing and approval requirements imposed on such agreements by section 15. For example, an agreement between a steamship agent and a common carrier may be considered an agreement among two common carriers if the agent is a subsidiary of a competing carrier in the trade. It is well established that where the statutory purposes of the Shipping Act could be frustrated through the use of separate corporate entities, the Commission is entitled to look through corporate form and treat the separate entities as one and the same for purposes of regulation. *General Telephone Company* v. *United States*, 449 F.2d 846, 855 (5th Cir. 1971); *Mansfield Journal Co.* v. *F.C.C.*, 180 F.2d 28, 37 (D.C. Cir. 1950). The reasons for separate incorporation are not controlling when the fiction of corporate entity defeats a legislative purpose. *Kavanaugh* v. *Ford Motor Company*, 353 F.2d 710, 717 (7th Cir. 1965). Accordingly, the Commission may not disregard the fact that Petitioners are subsidiaries of Matson in determining their status under the Shipping Act.

To the extent the Petition seeks to have the Commission declare that under no circumstance would Petitioners be considered common carriers or other persons subject to the Act, it must be denied. However, the Commission is satisfied that the particular facts surrounding the present operations of Matson and Petitioners form a sufficient basis upon which to grant relief to Petitioners. At present, Petitioners appear to be operating solely as steamship agents for steamship lines operating in trades in which Matson does not participate. There is no evidence that the separate organization of Petitioners enables Matson to engage in activities which would

otherwise be proscribed by the Shipping Act, 1916. We believe that no purpose, regulatory or otherwise, would be served by asserting jurisdiction over all agency agreements between Petitioners and their carrier principals solely on the basis of Petitioners' affiliation with Matson. Absent such a purpose, the Commission will not impute the common carrier status of Matson to Petitioners. The Petition will therefore be granted to the extent that it seeks a determination that Petitioners' agency agreements with common carriers, which are not Matson competitors, are not agreements subject to the requirements of section 15 of the Act.

It must be emphasized that our determination here is based on the particular facts set forth in the Petition and may be modified or rescinded on the basis of changed facts.

THEREFORE, IT IS ORDERED, That the petitions for intervention filed by the Association of Ship Brokers and Agents (USA), Inc. and Hearing Counsel are granted.

IT IS FURTHER ORDERED, That the Petition of Matson Agencies, Inc. and Matson Freight Agencies, Inc. for Declaratory Order is granted to the extent indicated above.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary