FEDERAL MARITIME COMMISSION

DOCKET NO. 83–20

RATES APPLICABLE TO OCEAN SHIPMENT OF AABCO, INC. FILING OF PETITION FOR DECLARATORY ORDER

ORDER

March 14, 1984

By Petition for Declaratory Order (Petition) filed pursuant to Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, AABCO, Inc., requests advice as to which of two rates filed by United States Lines (USL) for the carriage of household goods applied to certain shipments of military household goods. Replies to the Petition have been submitted by USL, by the Military Traffic Management Command (MTMC) on behalf of the Department of Defense (DOD), by Sea-Land Service, Inc., which later withdrew from the proceeding, by Imperial Van Lines International, Inc. (Imperial), which requested and was granted leave to intervene, and by the Commission's Bureau of Hearing Counsel.[1]

BACKGROUND

AABCO tendered two shipments of military household goods to USL for transportation from Bremerhaven, Federal Republic of Germany, to Seattle, Washington. At the time of shipment USL had on file a tariff covering exclusively the transportation of military and United States Government household goods and personal effects, and, in its commercial tariff, a rate for household goods unrestricted against military household goods. AABCO paid ocean freight charges predicated on the military rate. It then filed the present Petition requesting that the Commission declare which rate applies when ocean carriers publish simultaneously both a rate for military household goods and a different rate for commercial household goods. The existing dual tariff situation allegedly creates an uncertainty as to whether AABCO paid the proper charges or whether it can rely on "commercial" rates for future bids and for seeking refunds from USL. Subsequently, AABCO specially requested the Commission to prohibit the application of unrestricted commercial rates on household goods to shipments of household goods for the "account of DOD" when the ocean carrier also keeps on file with the Commission separate rates or tariffs for military household goods.

[1] By Order served September 28, 1983, the Commission directed Bureau of Hearing Counsel to file a reply to the Petition and address, among other matters, the authority of ocean carriers subject to the Commission's jurisdiction to publish two separate tariffs applicable to the carriage of household goods.

DISCUSSION

Rule 68 of the Commission's Rules of Practice and Procedure provides that the Commission may in its discretion issue a declaratory order "to terminate a controversy or to remove uncertainty." 46 C.F.R. § 502.68(a). The Rule's procedures are to "be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to act without peril upon their own view." 46 C.F.R. § 502.68(b). In this instance, the transportation service on the two shipments which constitute the stated basis for the Petition has been completed, both tariffs at issue have been cancelled, and freight charges have been paid. Furthermore, to the extent the order sought by AABCO is intended as a basis for a claim of reparation it is not a proper subject for a declaratory order.[2] Consequently, AABCO's Petition for Declaratory Order will be denied.

However, because valid and significant issues have been raised concerning the practice of certain vessel operating common carriers by water of publishing and maintaining separate tariffs and rates for the transportation of household goods for the account of DOD and other U.S. Government agencies, the Commission, by separate order, intends to institute a nonadjudicatory investigation, pursuant to Subpart R of the Commission's Rules (46 C.F.R. § 502.281 *et seq.*).

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order filed by AABCO, Inc. is denied and the proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

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[2] Rule 68 reads in part:

Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section. Such matters must be adjudicated either by filing of a complaint under section 22 of the Shipping Act, 1916 and § 502.62, or by filing of a petition for investigation under § 502.69 (46 C.F.R. § 502.68(b)).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–42

JONES WASHINGTON STEVEDORING CO., INC.

v.

PORT OF SEATTLE

NOTICE

March 22, 1984

Notice is given that the time within which the Commission could determine to review the February 14, 1984 discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–42

JONES WASHINGTON STEVEDORING CO., INC.

v.

PORT OF SEATTLE

COMPLAINT WITHDRAWN; PROCEEDING DISCONTINUED

Finalized March 22, 1984

On Wednesday, February 1, 1984, counsel for the complainant telephoned the Presiding Administrative Law Judge and advised of plans to withdraw the complaint in this proceeding. Under date of February 3, 1984 (received February 9, 1984), counsel sent the following Notice of Withdrawal of Complaint:

> The complainant, Jones Washington Stevedoring Co., Inc. (hereinafter "Jones"), filed a complaint against the Port of Seattle on September 19, 1983, regarding the indemnity provision of the Port of Seattle's tariff for use of Port of Seattle equipment. Jones withdraws the said complaint.

A complainant may withdraw its complaint. Thus the complaint is withdrawn. This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1119

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF ADM MILLING COMPANY

Application for permission to refund a portion of freight charges in the amount of $2,129,206.77 granted.

An application for waiver under section 18(b)(3) of the Shipping Act is appropriate where the agreed-upon rate was filed after the date shown on the bill of lading for the shipment in question.

Wayne E. Wegman for Lykes Bros. Steamship Co., Inc.

REPORT AND ORDER

March 27, 1984

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

This proceeding is before the Commission upon Exceptions of Lykes Bros. Steamship Co., Inc. to the Initial Decision of Administrative Law Judge William Beasley Harris discontinuing the proceeding on the grounds that there was no error in tariff filing which required the filing of an application for refund or waiver under section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817).

BACKGROUND

Lykes filed the subject special docket application dated December 16, 1983 on behalf of ADM Milling Company (ADM) to waive collection of $2,129,206.77 in freight charges. The application alleges the following facts. On June 7, 1983, Lykes verbally reached an agreement with ADM on a rate of $103.75 per metric ton (2204.6 lbs.) (the agreed-upon rate) for a shipment of 11,531,932 lbs. of bagged flour moving from Lake Providence, Louisiana to Alexandria/Port Said, Egypt. The agreed-upon rate was filed and became effective on June 22, 1983.[1] On June 16, 1983, the bagged flour was loaded aboard seven Seabee barges at Lake Providence. On the same date, a bill of lading for the shipment was prepared in New Orleans showing Lake Providence as the port of loading. The applicable rate on June 16, 1983 was the General Cargo N.O.S. rate of $519.00 W/M (2240 lbs. or 40 cubic feet) (4th Revised Page 53). After

[1] The rate appears on 20th Revised Page 53–A7 of Lykes Bros. Steamship Co., Inc. World Wide Freight Tariff No. 1 (FMC–87).

moving from Lake Providence to New Orleans, the Seabee barges were placed aboard the TILLIE LYKES for ocean transportation to Alexandria/ Port Said. The TILLIE LYKES sailed on June 23, 1983.

The Presiding Officer concluded that the agreed-upon rate was applicable to the shipment because it became effective prior to June 23, 1983, the sailing date of the TILLIE LYKES. Finding no error in tariff filing, he discontinued the proceeding.

DISCUSSION

Tariff Rule 3 of Lykes' World Wide Freight Tariff No. 1 (FMC–87) (3rd Rev. Page 6) provides that, in the case of a rate decrease, the rate shall be calculated as of the date shown on the bill of lading "issued at the port of loading."[2] While the bill of lading here was not, strictly speaking, issued *at* Lake Providence, it shows Lake Providence as the port of loading. Lykes explains that the bill of lading was actually prepared in New Orleans because Lake Providence has no facilities for the preparation of shipping documents and New Orleans is the closest port having such facilities. Under the circumstances, it appears that the bill of lading here could properly be construed as having been "issued at the port of loading" as that phrase is used in Rule 3. Applying Rule 3, the rate must be calculated as of June 16, 1983, the date on the bill of lading.

Because Lykes failed to file the agreed-upon rate prior to June 16, it could not properly apply the rate to the shipment in question. This is the sort of clerical or administrative error that the waiver provisions of section 18(b)(3) of the Shipping Act, 1916 were intended to remedy. Accordingly, the Commission will reverse the Presiding Officer's discontinuance of the proceeding. However, rather than remanding the case to the Presiding Officer for further proceedings, the Commission will itself address the merits of the application.

Although there is no written agreement between the parties, the facts surrounding the shipment indicate that the parties intended that the agreed-upon rate would be filed in time to be applied to the shipment at issue here. Moreover, it is inconceivable that the parties intended for a shipment of some 11 million pounds to move under the Cargo, N.O.S. rate which is typically one of the highest rates in the tariff. In view of the foregoing, the Commission has determined to grant the application.

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[2] The text of Rule 3 is as follows:

> Unless otherwise specified in the event that a rate is increase (sic), the rate, in effect the date the cargo is delivered to the vessel's (*including Seabee Barge*) loading berth, at any loading port, either alongside or on dock, shall be applicable provided that documentary evidence is supplied to substantiate cargo was delivered in shipable form. In the event that a rate is decreased, the rate or amended rule or regulation in effect *on the date Bill of Ladings issued at the port of loading* will be applicable. (Emphasis added).

As indicated above, Rule 3, in addressing situations where "a rate is increased," defines the "loading port" as including the port at which the cargo is placed aboard a Seabee barge. Although "port of loading" is not defined in connection with rate decreases, it is reasonable to assume that the term was intended to have the same meaning.

THEREFORE, IT IS ORDERED, That the Initial Decision served in this proceeding is vacated; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc., is granted permission to waive freight charges as requested in its special docket application, on the condition that Lykes publish the following as a supplement to its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1119, that, subject to all applicable regulations, terms and conditions of this tariff, the matter contained on 20th Revised Page 53–A7 is effective June 16, 1983 and continuing through June 22, 1983.
>
> This notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodities described on 20th Revised Page 53–A7 which may have been shipped during the specified period of time.

and that Lykes shall file with the Secretary within 60 days of the date of this Order a copy of the tariff so amended; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc. 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. 83–7

ATLANTIC & GULF/WEST COAST OF SOUTH AMERICA CONFERENCE, ET AL.

v.

EMPRESA MARITIMA DEL ESTADO

Nathan J. Bayer for Complainants.

Zoe P. Hopkins for Respondent.

ORDER ADOPTING INITIAL DECISION

April 18, 1984

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

This proceeding was initiated by a complaint filed by the Atlantic & Gulf/West Coast of South America Conference (Conference) and its member lines,[1] alleging that Respondent, Empresa Maritima Del Estado (Empremar), violated sections 15 and 18(b)(1) of the Shipping Act, 1916 (46 U.S.C. §§814 and 817(b)(1)) and regulations contained in 46 C.F.R. Part 524, by initiating a service in the U.S./South America trade without first obtaining approval for its arrangement with other carriers. Subsequently, Complainants were granted an opportunity to amend their complaint to include allegations of violations of sections 17 and 18(b)(4) of the Shipping Act (46 U.S.C. §§816 and 817(b)(4)) and 46 C.F.R. Part 536, based on the contention that Empremar transported cargo between the U.S. and Chile pursuant to a transshipment arrangement, yet failed to have a proper transshipment rule in its tariff. Administrative Law Judge William Beasley Harris served an Initial Decision (I.D.) on November 14, 1983, finding no violations. Complainants have filed Exceptions to this decision to which Respondent has filed a Reply.

BACKGROUND

Empremar, the national flag line of Chile, sought to establish a direct, all water service between the United States and the West Coast of South

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[1] The Conference serves the trade between United States Atlantic and Gulf Coast ports and ports and points on the West Coast of Colombia, Peru, and Chile pursuant to F.M.C. Agreement No. 7590. Its members are: Compania Sud Americana de Vapores; Compania Peruana de Vapores; Delta Steamship Lines, Inc.; Flota Mercante Grancolombiana S.A.; Lykes Bros. Steamship Co., Inc.; and Transportes Navieros Equatorianos.

America. Because of market conditions, it was unable to effectuate this plan on its own and instead devised a service which would rely on transshipment at Puerto Rico, with the U.S. to Puerto Rico carriage being accomplished by Puerto Rico Maritime Shipping Authority (PRMSA) pursuant to a non-exclusive transshipment arrangement. Because Empremar did not have enough vessels of its own, it attempted to engage the members of the Euroandino Group (which served the Europe/South America trade and of which Empremar was a member) to assist it in the carriage of cargo from Puerto Rico to South America. Empremar initially proposed the concept to these other carriers in August of 1982, at which time they agreed in principle to such an arrangement. During the course of further negotiations between Empremar and these carriers, Empremar's U.S. agent published an advertisement in the *Journal of Commerce* which listed vessels other than those solely belonging to Empremar. Empremar also carried cargo on three voyages between the United States and Chile without a "routing section" in its tariff indicating its transshipment arrangement with PRMSA.

DISCUSSION

After a recitation of the respective positions of the parties, the Presiding Officer concluded that there was no agreement or understanding between Empremar and any other person which would have been subject to the filing and approval requirements of section 15 of the Shipping Act.[2] He did note that Empremar engaged in negotiations with several other carriers concerning a portion of its proposed service. He concluded, however, that the negotiations never reached the stage of an "agreement" and that, in fact, the prospective co-venturers all rejected Empremar's entreaties. He found that the only agreement reached between Empremar and any other carrier was the one with PRMSA for transshipment between the United States and Puerto Rico, and that that agreement had been properly filed with the Commission for informational purposes only, since it was a non-exclusive transshipment arrangement exempt from section 15's approval requirements. The Presiding Officer refused to accord much significance to Empremar's series of advertisements which included sailings of vessels other than its own. He concluded that these advertisements alone could not justify a finding that action was taken by the involved parties pursuant to an unfiled section 15 agreement. Ultimately, the Presiding Officer found

[2] The Presiding Officer initially found as facts 11 stipulations to which the parties had agreed. He further found: that Empremar was a member of a joint service, the Euroandino Agreement, which operates a rationalized service between Europe and the West Coast of South America, Ecuador, Peru, Bolivia and Chile; that Empremar's' agent Omnium, distributed a press release describing Empremar's new service between the United States and South America, which release was erroneously printed by the *Journal of Commerce* prior to Empremar's prospective partners agreeing to participate; that two Euroandino partners chose not to participate; and that Empremar entered into a non-exclusive connecting carrier agreement with PRMSA, for that portion of its service between the United States and Puerto Rico, and that that agreement was properly filed with the Commission.

that Complainants had not met their burden of proof and thus denied their requested relief. After consideration of the respective positions of the parties and a review of the record, the Commission has decided to adopt the Initial Decision, except to the extent modified by the discussion which follows.

Without alleging any specific errors, Complainants essentially disagree with the Presiding Officer's ultimate conclusion of law—that they had not met their burden of establishing the existence of an agreement subject to the requirements of section 15. In so doing, Complainants misconstrue the basis upon which the Presiding Officer ruled. They contend that he stated that, if there was no *written* agreement, there was no agreement of any kind which would require filing and approval. However, the Presiding Officer nowhere stated that a written agreement was necessary before an agreement became subject to the Act. In fact, he specifically found, as noted by Respondent, that no agreement or *understanding* was reached between Empremar and any carrier, other than PRMSA (I.D. at 10). There is considerable evidence of record which supports this finding.

The most fundamental requirement for jurisdiction under section 15 is ". . . the requirement that there be an actual viable agreement to which all of the parties have given and continue to give their assent until approval is had." *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966). Such does not appear to be the case here. A review of the telexes included in Respondent's Appendix indicates that, between August 11, 1982 and February 28, 1983, Empremar conducted negotiations with three other carriers in an attempt to work out an arrangement whereby they would carry some of Empremar's cargo from Puerto Rico to Chile. These other carriers were already serving the Europe/South America trade, together with Empremar as members of the Euroandino Agreement, and could conceivably divert their vessels to Puerto Rico to assist in Empremar's service between the United States and South America. Though various of these carriers "agreed in principle" with Empremar's initial proposal, there does not appear to have been any firm agreement by any of them at any time during the course of subsequent negotiations. For a period of five months, various proposals and counter-proposals went back and forth between Empremar and these other carriers. However, because of its inability to get any agreement from these carriers, Empremar eventually abandoned its attempts to engage these carriers in its U.S./Chile service.

The only troublesome element in this scenario is the series of advertisements published in the *Journal of Commerce* on January 7, 10, 12, 13 and 14, 1983, soliciting cargo for Empremar's new service. These advertisements included the names of vessels not owned or operated by Empremar and, taken at face value, might indicate the existence of some kind of arrangement between Empremar and the other carriers mentioned therein. However, the contemporaneous negotiations among these parties indicate that no such arrangement had yet been reached. In fact, at least one prospec-

tive co-venturer wired Empremar for an explanation, upon learning of the publication of the advertisements.

Empremar offered unrebutted testimony which explained the circumstances surrounding the advertisements. Empremar's vessel, "M/V ALTAVIA", was scheduled to arrive in San Juan on January 28, 1983, and Empremar was anxious to inaugurate its new service. The advertisement had been prepared some months before, in anticipation that the other carriers would have reached an arrangement with Empremar. Empremar's agent in New York mistakenly released the advertisement which included the other carriers. Upon learning of this error, Empremar stopped the advertisements and inaugurated its service using only its own vessels. There is nothing in the record to indicate that the other carriers reviewed and concurred in these advertisements or were otherwise involved in their preparation. More than the mere publication of the advertisements would be needed to establish the existence of an unfiled section 15 agreement among these carriers. The Presiding Officer was, therefore, justified in concluding that Complainants had not met their burden of proof on this issue.

The Commission's tariff filing rules require tariffs of carriers which have entered into transshipment arrangements to contain a "routing section," which includes: 1) a description of the routing, additional charges, if any, and the participating carriers, and 2) a statement to the effect that participating carriers agree to observe the rules, regulations, rates and routings established in the tariff. 46 C.F.R. § 536(d)(13). For a period of approximately three months, Empremar conducted three sailings under its transshipment arrangement with PRMSA, but during that time did not have the requisite "routing section" in its tariff. Complainants raised this as an issue in their amended complaint, alleging that it resulted in violations of section 17, 18(b)(1), and 18(b)(4).

Empremar has explained its failure to include the transshipment rule as being the result of its original intention to provide a direct, all water service between the United States and South America. At that time, a tariff was prepared and filed by its tariff filing agent reflecting this service. When Empremar later entered into a transshipment arrangement with PRMSA, Empremar claims that its agent erroneously neglected to include a proper transshipment rule. Empremar further claims that once it learned of its omission, it immediately amended its tariff to include such a rule. In addition, Empremar notes that its bills of lading for each shipment indicated a transshipment service, as did its press release and some of its advertisements.

Empremar's conduct concerning its transshipment tariff did result in a technical violation of the Commission's tariff filing rules. However, notwithstanding Complainants' allegations, it does not appear that anyone was adversely affected by this omission. Moreover, the "offense" does not appear to have been intentional but rather to have occurred due to the

negligence of Empremar's tariff filing agent. Therefore, the Commission will impose no penalty upon Empremar for this "technical violation."

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge William Beasley Harris, served in this proceeding on November 14, 1983, is adopted, as modified by the above discussion; and

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

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–7

ATLANTIC AND GULF/WEST COAST OF SOUTH AMERICA CONFERENCE, ET AL.[1]

v.

EMPRESA MARITIMA DEL ESTADO

Allegations of violation of Shipping Act not proved.

Proceeding discontinued.

Nathan J. Bayer, of Freehill, Hogan & Mahar, for complainants;

Zoe P. Hopkins, of Zelby & Burstein, for respondent; and

Donald C. Greenman, of Ober, Grimes & Shriver, as co-counsel.

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

Adopted April 18, 1984

The complainants in this proceeding on March 4, 1983, served (received March 8, 1983) a motion seeking permission to amend the original complaint served January 20, 1983, which had alleged the respondent had undertaken activities and entered into arrangements with other carriers regarding transportation of cargo from the United States to Chile in violation of sections 15 and 18(b)(1) of the Shipping Act, 1916.

At the prehearing conference herein on March 8, 1983, the respondent agreed to accept the amended complaint and to the respondent having ten (10) days in which to reply (Reply received March 17, 1983). The complainants seek an order finding the respondent violated sections 15, 17, 18(b)(1) and 18(b)(4) of the Shipping Act, 1916, and 46 CFR Part 524 and 536; they requested an order be entered imposing a civil penalty on respondent; and to award reparation to the complainants in an amount equal to the freight charges allegedly unlawfully collected by respondent; requested an order enjoining respondent from continuing to operate in violation of the Act and for such other relief as the Commission shall deem just and proper.

[1] Member Lines of Conference are six: (1) Compania Sud Americana de Vapores, (2) Delta Steamship Lines, Inc., (3) Flota Mercante Grancolombiana, SA, (4) Lykes Bros. Steamship Co., Inc., (5) Compania Peruana de Vapores, (6) Transportes Navieros Equatorianos.

[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).

Save for the prehearing conferences on March 8, 1983 and June 21, 1983, this proceeding was conducted without oral hearing.[3]

The Commission's Office of Energy and Environmental Impact examined this Docket No. 83–7 and determined under date of March 24, 1983, that section 547.4 (a) of the Commission's Procedures for Environmental Analysis applies. No environmental analysis need to be undertaken nor environmental documents prepared in connection with this docket.

PRESENTATIONS OF THE PARTIES

The complainants presented (received July 25, 1983) as their direct case the testimony of E. W. Norberg, Chairman of the Atlantic & Gulf/West Coast of South America Conference. He has been Chairman of the Conference for nine years. Mr. Norberg's testimony consists of 80 numbered paragraphs on 23 pages and 12 attachments in addition. Among the attachments is a copy of the Empremar advertisements in the *Journal of Commerce* of January 7, 1983, announcing the inauguration of a New Independent Intermodal Liner Service between USA and Chile. Five ships are listed, the *Altavia, Monfort, Soflot, Lago Lanalhue* and the *Houssmann.*

On or about January 14, 1983, the Conference sought in the United States District Court, Southern District of New York, 83 Civil 0466, a temporary restraining order enjoining Empremar from implementation of alleged unfiled agreement with members of the Eurandino group. Before U.S. District Judge Charles E. Brieant the matter was resolved by stipulation.

The respondent presented (received July 25, 1983) as its case the affidavit of Attorney Hopkins and an appendix of 372 pages, including June 7, 1983, deposition taken by complainants of Laurence C. Rogers (copy of transcript, Page A-195-A-443); June 9, 1983 deposition taken by complainants, Attorney Karem, of Rodolfo A. Catinchi (copy of transcript, Page A-240-A-302); and June 4, 1983 deposition of Rodrigo Alloa, taken by complainants (copy of transcript, Page A-307-A-364).

Rebuttal Statements were presented. The respondent's statement was received August 8, 1983, consisting of 17 pages and attachments A-E Inc. The complainants' statement was received August 9, 1983, consisting of 10 pages and exhibit—the rebuttal testimony of E. W. Norberg.

Complainants' Opening Brief, received August 22, 1983, consisted of 28 pages. Respondent's Opening Brief, received August 22, 1983, consisted of 29 pages. Complainants' Reply Brief, received September 6, 1983, consisted of 5 pages. Respondent's Reply Brief, received September 7, 1983, consisted of 5 pages.

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[3] Excerpt from July 28, 1983 letter to Presiding Judge from Attorney Hopkins, for respondent: "At the prehearing conference in the FMC proceeding No. 83–7, it was agreed that an oral hearing would be held on Wednesday, August 3, 1983. After reviewing the written direct testimony submitted simultaneously on July 21, 1983, Nathan Bayer, attorney for the Complainants, and I have agreed that rebuttal to the written direct testimony can be accomplished through further written statements without the requirement of an oral hearing."

In their opening brief, received August 22, 1983, the complainants proposed 34 findings of fact (pages 6 to 14 inc.). The respondent in its opening brief, received August 22, 1983, proposed 6 findings of fact (pages 11 and 12). Total—40 proposed findings of fact. Both sides precede the request for findings of fact with the Nature and Background of the case (by the complainants, covering pages 1 to 6 inc.) and the respondent the Nature of the Case (pages 1 to 3 inc.) and Statement of Facts (pages 3 to 11 inc.).

In their reply brief, the complainants argued as to jurisdiction of the Commission in this proceeding and application of section 15 of the Act to this proceeding, while the respondent argued there was no agreement and that the tariff for Empremar's transshipment of cargo at San Juan, Puerto Rico, pursuant to a non-exclusive connecting carrier agreement with Puerto Rico Maritime Shipping Authority ("PRMSA") does not violate the intent of the Act.

FACTS

The parties' joint prehearing statement, received June 21, 1983, contains 11 stipulations to which they agreed. The Presiding Administrative Law Judge accepts the stipulations and finds them as facts. The stipulations are:

1. Empremar is a member of the European/South Pacific and Magellan Conference, the Europe/East Coast of South America Third Pool Agreement (Europac III) and the Eurandino Agreement.

2. On or about January 7, 1983, Empremar advertised the inauguration of its service between the United States and the West Coast of South America.

3. Empremar advertised and solicited cargo for vessels owned or operated by itself and other members of the Eurandino Group.

4. At the time those advertisements were placed Empremar had not filed any agreements with the FMC concerning the chartering of space from or transshipment on vessels owned or operated by other members of the Eurandino Group.

5. On or about January 14, 1983, complainants through an Order to Show Cause filed in the United States District Court, Southern District of New York, 83 Civ. 0466, sought a temporary injunction enjoining respondent from implementation of the alleged unfiled agreements with the members of the Eurandino Group.

6. At an oral hearing held January 18, 1983, before the Hon. Charles E. Brieant, U.S.D.J., Empremar entered into a stipulation by which it caused further advertising of vessels other than those owned or operated by it.

7. Judge Brieant ordered that said stipulation had the same force and effect as if it were a preliminary injunction.

8. At a further oral hearing before Judge Brieant, held March 3, 1983, Empremar agreed to stipulate that it would not implement any agreements

without first filing them with the FMC and providing a copy to complainants two weeks prior to filing with the FMC.

9. Judge Briant ordered that said stipulation had the same force and effect as if it were a temporary injunction.

10. Complainants and respondent have agreed to stipulate as to the authenticity and admissibility of all documents provided by respondent during discovery.

11. Complainants and respondent have agreed to the authenticity and admissibility of the transcript of the oral hearings before Judge Brieant and the transcripts of the oral deposition of respondent's witnesses.

Respectfully Submitted

Zelby & Burstein	Freehill, Hogan & Mahar
By Zoe P. Hopkins	By Nathan J. Bayer
Attorneys for the respondent	Attorneys for the complainants

FACTS (CONTINUED)

Empremar is an organization owned by the Government of the Republic of Chile.

Empremar, as a member of the South America Third Pool Agreement (Europac III), shares in the net pool freight earnings derived from carrying pool cargo, which is all cargo in the trade.

Empremar is a party to Eurandino Agreement which is a joint service of Armement Deppe, SA, Compagnie Generale Maritime, Companie Peruana de Vapores, Consorcio Naviero Peruano and Empresa Maritima del Estado trading under the name Eurandino between ports of the Hamburg/Bordeaux range and the West Coast of South America, Ecuador, Peru, Bolivia and Chile.

Pursuant to the Eurandino agreement the parties coordinate and rationalize their sailings, employ common booking and loading procedures and utilize the same berths in European ports. The parties establish a rationalized sailing schedule a year in advance.

In September of 1982, Empremar's coordinating agent in the United States, Omnium Agencies, Inc. ("Omnium"), prepared a press release describing Empremar's new service which it distributed to the *Journal of Commerce.*

The *Journal of Commerce,* without Omnium's permission, printed the press release. The *Journal of Commerce* acknowledged that they issued the release in error.

Empremar communicated its concern to Omnium over the premature release because the Eurandino partners had not been signed.

Two Eurandino partners, Compania Peruana de Vapores and Consorcio Naviero Peruano, by telex of December 23, 1982, only elected not to participate in the venture.

Empremar entered into a non-exclusive connecting carrier agreement with PRMSA which was filed with the Commission as required by its regulation at 46 CFR Part 524 and assigned FMC No. 81972.

The transshipment at San Juan, Puerto Rico, was disclosed to the Commission and to the general shipping public by the filing of the PRMSA agreements in bills of lading issued for each voyage and in the press releases and advertisements of the service.

DISCUSSION, REASONS, FINDINGS AND CONCLUSIONS

The complainants contend that an unfiled, unapproved, illegal agreement existed among Empremar, Compagnie Generale Maritime (CGM) and Armement Deppe, SA (Deppe) (Reply Brief, p. 2). The respondent says the complainants are unable to cite one telex in support of the contention that an agreement or understanding was reached with either CGM or Deppe at any time (Reply Brief, p. 5). The respondent contends the key element necessary for Commission jurisdiction in this matter, an agreement, is lacking. There is no agreement (respondent's brief received August 22, 1983, page 15). The complainants counter that the respondent's contention is specious (Reply Brief, p. 1). And, respondent's attempts to support this theory with language from *Hong Kong Tonnage Ceiling Agreement,* Docket No. 66-29, 10 F.M.C. 134 (1966), demonstrates its inapplicability to the instant situation. In that case, say the complainants, the Commission issued an Order to Show Cause why a certain filed document should not be rejected as failing to constitute a section 15 agreement. All members of the purported agreement, save one, argued that an agreement did exist and should be approved. The party challenging this position was one of the signatories, contending that it would not subscribe to the agreement, even though earlier signing it. The Commission held that the later repudiation of the agreement after it was filed with the Commission resulted in the absence of an agreement (Reply Brief, pp. 1 and 2).

The respondent had argued (Brief received August 22, 1983, p. 14) that in *Hong Kong Tonnage Celing Agreement,* the Commission established three elements necessary for jurisdiction pursuant to section 15 of the Act. There must be: (1) an agreement among, (2) common carriers by water or other persons subject to the Act, (3) to engage in anticompetitive or cooperative activity of the types specified in section 15. If one or more of the elements is lacking, there is no jurisdiction to consider the matter under section 15. In considering each of those elements the Commission has determined that the "most fundamental of all is the requirement that there be an actual viable agreement to which all of the parties have given and continue to give their assent until approval is had." Citing *Hong Kong Tonnage Ceiling Agreement, supra.*

The complainants assert the documentary evidence presented in this matter could hardly be more supportive of a finding that an agreement, final or otherwise, existed within the meaning of section 15. Numerous telexes and other communications sent by and between Empremar and the Eurandino members refer to the "agreement," a "desire to participate," an "agreement in principal," and "intercarriage agreement," and similar language which the Commission has, on previous occasions, found to be entitled to great weight, far greater than the oral testimony by persons under investigation trying to explain away such references (Opening Brief, page 20). The respondent responds that the complainants attempt to misconstrue the nature of the negotiations by citing key words and phrases taken from the telexes out of context and sequence. A careful examination of the telexes, in sequence and in their entirety, reveals that no agreement or understanding was reached between Empremar and any other carrier (Reply Brief, p. 3).

The complainants argue, however, that it is irrelevant that Empremar never actually signed any agreement with the Eurandino members. The mere fact that the carriers agreed to, and did cooperate in attempting to reach an agreement is sufficient to find conduct prescribed in section 15, citing *Unapproved Section 15 Agreements—South African Trade,* Docket No. 882, 7 F.M.C. 159 (1962) (Opening Brief, Page 19). The complainants say the fact that some Eurandino members subsequently withdrew all participation in finalizing the agreement is likewise immaterial (*Ibid.,* page 20).

The Presiding Administrative Law Judge made a careful examination of the 41 telexes herein, covering from August 11, 1982 to August 26, 1982, November 16, 1982 to February 24, 1983, in sequence and their entirety. He found present the references made by the complainant to language. He also found that there was imploring by Empremar for acceptance of the proposal, but there was refusal instead. He agrees with the respondent that no agreement or understanding was reached between Empremar and any other carrier than PRMSA which is covered by FMC No. 81972.

The complainants refer to the repeated appearance of Empremar's advertisement in the *Journal of Commerce,* listing ports of call and sailing schedules for non-Empremar vessels and referring interested shippers to Empremar agents for freight rates and other information regarding any of the vessels or schedules as documentary evidence that work involved in preparing Empremar advertisements and schedule "bespeaks mutual understanding among the participating lines" (*Ibid.,* pages 20, 21), citing *Maatschappij "Zeetransport" N.V. (Oranje Line)* v. *Anchor Line Limited,* Docket No. 833, 6 F.M.C. 199 (1961). (*Ibid.*) The complainants assert that Empremar's contention that the publication of these advertisements was a mistake is unsupportable on any factual ground.

Complainants would have action taken in this proceeding on tacit agreements and advertising. Joint advertising by itself does not justify finding that the action was taken pursuant to agreement. Other than inferences

of conspiring sought to be drawn from advertising and partial pattern of the respondents, no proof of conspiracy and actions against the complainants was produced. More than this is needed and such complaint is found to be unproved.

Upon consideration of the above and the record herein, the Presiding Administrative Law Judge, in addition to the *findings* and *conclusions* heretofore made, *finds* and *concludes* that the complainants have not proved the violations alleged.

Wherefore, it is ordered,

(A) The requested order finding that the respondent violated sections 15, 17, 18(b)(1), 18(b)(4), 46 CFR Part 524, and 46 CFR Part 536, is Denied.

(B) This proceeding is discontinued.

(S) WILLIAM BEASLEY HARRIS
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 536; DOCKET NO. 84–3]

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; INTERMODAL TARIFF FILING REQUIREMENTS—EXEMPTION FROM CERTAIN STATUTORY REQUIREMENTS AND AMENDMENT OF TARIFF FILING REGULATIONS

April 23, 1984

ACTION: Discontinuance of Proceeding

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing tariff filing requirements for intermodal rates will be addressed in future proceedings.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the Federal Register on March 1, 1984, (49 FR 7609), the Commission proposed various amendments to its rules governing the filing of intermodal rates. Time within which comments on the proposal may be made has not yet expired.

The recently enacted Shipping Act of 1984 requires the Commission to conduct a comprehensive review of its tariff filing regulations. Continuation of this proceeding, therefore, is not warranted.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 536; DOCKET NO. 81–50]

PER-CONTAINER RATES—TARIFF FILING REQUIREMENTS APPLICABLE TO CARRIERS AND CONFERENCES IN THE FOREIGN COMMERCE OF THE UNITED STATES

April 24, 1984

ACTION: Discontinuance of Proceeding

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing filing requirements for per-container rates will be addressed in a future proceeding.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the Federal Register on August 28, 1981 (46 FR 43474), the Commission instituted this proceeding to prescribe procedures for filing of per-container rates by carriers and conferences in the foreign commerce of the United States. After receipt and consideration of comments, the Commission published final rules on June 14, 1982 24 F.M.C. 1087 (1982). Subsequently, the effective date of the rules was postponed pending decision on various petitions for reconsideration (47 FR 45883).

The recently enacted Shipping Act of 1984 has made it necessary for the Commission to review all of its tariff filing requirements. The issues raised herein, therefore, are better addressed in a future rulemaking proceeding.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[DOCKET NO. 83–16]

TERRY MARLER AND JAMES BEASLEY D/B/A TITANIC STEAMSHIP LINE—POSSIBLE VIOLATIONS OF SECTION 3(A) OF PUBLIC LAW 89–777

ORDER ADOPTING INITIAL DECISION

April 24, 1984

This proceeding was instituted by Order of Investigation and Hearing issued on March 16, 1982 to determine whether Terry Marler and James Beasley D/B/A Titanic Steamship Line (Respondents), violated section 3(a) of Public Law 89–777 (4 USC § 1817e) by advertising or offering passage from United States ports on a vessel having accommodations for fifty or more passengers without having first obtained a certificate of financial responsibility from the Commission.

Chief Administrative Law Judge John E. Cograve (Presiding Officer) issued an Initial Decision finding that no violations of P.L. 89–777 had been proven.[1] Exceptions to the Initial Decision have been filed by the Commission's Bureau of Hearing Counsel.

BACKGROUND

The facts, as set forth in the Initial Decision may be summarized as follows.

In January of 1981 Respondents registered the "Titanic Steamship Line, Inc." as the "fictitious business name" of a general partnership in San Diego County, California. On February 3, 1981 Federal Maritime Commission (FMC) personnel were provided an unsigned letter which had been sent to a travel agent in Palm Springs, California announcing plans to build a new American flag passenger ship called the "Titanic II". The letter advised of a maiden voyage date of April 10, 1985, and a "starting price" of $1,000 per day per person (double occupancy), with reservations to be taken commencing September 19, 1981. No mention was made of advance payment or deposits.

On March 16, 1981 an editor of a travel magazine forwarded to FMC personnel a copy of a "press release" announcing that reservations on the "Titanic II" were being accepted. The "press release" contained the same basic information as the letter provided to FMC personnel on February

[1] Because no party made a showing that oral testimony and cross-examination were necessary, the Presiding Officer limited the hearing to memoranda of law and affidavits of fact.

3, 1981 as well as further information on the ship and future sailing schedules.

On March 17, 1981 FMC personnel were provided another letter addressed to "Dear Travel Agent" advising that reservations were being accepted on the "Titanic II". This notice specifically stated that deposits would not be accepted until 1984. FMC investigators then called the "reservation number" stated on the notice and spoke with one of the Respondents who confirmed that reservations were being accepted but not deposits.

On June 26, 1981 Commission investigators placed another call to the "Titanic II" reservation number and, under an alias, asked for printed materials. These materials were received on July 1, 1981. They generally promoted the "Titanic II" venture and stated the need to make "reservations" but made no mention of accepting deposits or other payments.

DISCUSSION

The Presiding Officer concluded that Respondents had not violated P.L. 89–777 or Commission regulations because it was not proven that they had "advertised" cruises aboard the "Titanic II". He based this conclusion partly on the finding that Respondents' promotional materials did not contemplate the payment of deposits and Respondents had not otherwise attempted to collect or accept any money from interested persons.

Hearing Counsel excepts to the Presiding Officer construction of the term "advertising" in P.L. 89–777, but does not except to his "ultimate finding" or insist on the assessment of civil penalties. Hearing Counsel submits that the statute's ban on advertising was intended to be absolute. Hearing Counsel argues that the decision of the Presiding Officer on this essential issue, if upheld, would significantly erode the effectiveness of the statute. Hearing Counsel concede, however, that Respondents have discontinued their activities. It therefore advises that the Commission could discontinue the proceeding without further action.

The Commission will adopt the Initial Decision issued by the Presiding Officer and dismiss this proceeding. However, we wish to make clear that this determination is strictly limited to the particular facts of this case. We find no violation in this case on the basis of the objective content of the promotional materials at issue and the manner in which they were published. Respondents' activities simply do not rise to the level of "advertising" within the meaning of P.L. 89–777. In our opinion, they were only intended to gauge the traveling public's interest in the Titanic project.

Hearing Counsel advances the position that virtually any public promotional activities, regardless of surrounding circumstances, constitute "advertising", citing *Wall Street Cruises, Inc.*, 15 F.M.C. 140 (1972). We find, however, that *Wall Street Cruises, Inc.*, is not only distinguishable from this case but generally supports the Presiding Officer's decision.

The respondent in *Wall Street Cruises, Inc.* argued that its "notices" in the *New York Times* were only a "market test" and, because it collected no money as a result thereof, P.L. 89–777 had not been violated. The Commission rejected this argument and found that the "notices, which respondent had caused to appear in the Sunday editions of the *New York Times* on several occasions during the months of May, June and July 1971, constituted 'advertisements' within the real meaning of the word rather than merely reflecting a 'market test.'" 15 F.M.C. at 142. The Commission explained:

> At the outset, we find Respondent's characterization of the advertisements in question as "market tests" to be unconvincing. As Hearing Counsel have pointed out, the advertisements which appeared in the *New York Times* quote specific fares and name specific dates and purport to solicit business for actual cruises. These advertisements are similar to regular advertisements published by established passenger lines, and clearly invite response by the public to either Respondent or travel agents. The advertisements which Respondent published in the *New York Times* do not indicate that their purpose was merely to determine the potential traveling public's reaction to the proposed cruise program. *Id.*

Thus, while *Wall Street Cruises, Inc.* indicates that the collection of money is not essential to finding a violation of the statute, it also recognizes that "market tests" might not violate P.L. 89–777 if conducted in a manner that does not do violence to the statute's legislative purposes.

The Initial Decision here holds that Respondents' promotional publications do not constitute "advertising" within the meaning of P.L. 89–777 because, "based on all the circumstances of the case", they do not convey to the public an immediate intent to book passage or collect money.[2] This finding is supported by the totality of circumstances presented by the record. These include the fact that Respondents did not place standard ads in newspapers and trade publications and only circulated brochures to travel agents and issued press releases to trade publications, the fact that the materials were interpreted by a trade publication as a form of a "market test" (I.D. at 25); and, the disclaimer concerning the collection of deposits in the March 17, 1981 letter to travel agents. While Respondents might have more clearly indicated that they were conducting a "market test", their promotional efforts do not do violence to the legislative purpose of P.L. 89–777.

[2] Although the Presiding Officer failed to rule on whether the activities engaged in by these Respondents constituted "arranging" or "offering" passage pursuant to P.L. 89–777, we also find, based upon the totality of the circumstances, that these activities did no violence to legislative intent.

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

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision filed by the Commission's Bureau of Hearing Counsel are denied; and

IT IS FURTHER ORDERED, That this proceeding is dismissed.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–16

TERRY MARLER AND JAMES BEASLEY D/B/A TITANIC STEAMSHIP LINE—POSSIBLE VIOLATIONS OF SECTION 3(A) OF PUBLIC LAW 89–777

James M. Beasley and *Terry E. Marler pro se.*

John Robert Ewers and *Janet Katz* as Hearing Counsel.

INITIAL DECISION[1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Adopted April 24, 1984

This is the story of two very unfortunate gentlemen who would return "to those glorious days of yesteryear" when "beautiful goddesses of the ocean" carried "the very best people . . . between one side of the world and another." It begins in San Diego, California, at a meeting of the Board of Directors of Transit Risk Corporation. The Chairman of the Board, James M. Beasley, was complaining of the "lack of superior first class accommodations and first class passenger ships" and about "the lack of speed and beauty." The Board, having heard all this before, suggested that if Chairman Beasley "thought he could do better" he should "build a ship and operate it."[2] With this the "Titanic Project was born," and in January 1981, the "Titanic Steamship Line, Inc." was registered by Mr. Terry E. Marler and Beasley as a "fictitious business name" with the San Diego County Clerk. It was registered as a General Partnership. The registration form contains no information on the kind of business to be conducted by the partnership or its purpose.

The Titanic project came to the Commission's attention just a few weeks later on March 17, 1981, when Lyndon Berezowsky, then a District Investigator with the Commission's Pacific District Office, was given a copy of a letter announcing plans to build a seventy-five thousand ton liner with three hundred suites and a crew of twelve hundred.[3] The ship was to fly the American flag and be called the "*Titanic II.*" The letter was

[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 membership of the Board is not identified by name, number or otherwise. Its role here appears somewhat akin to that of the chorus in the plays of Aristophanes.

[3] The letter was addressed to Ms. Ellen Matthews of Gadabout Tours, Palm Springs, California, and was unsigned. The letter was given to Berezowsky by Ron Lord, General Manager of the Pacific Cruise Conference.

unsigned but bore the heading "*S.S. Titanic II.*" The virtues of the new *Titanic* were extolled in a series of one sentence paragraphs such as:

> Not "deluxe" but elegant, grand and graceful.
> No "disco", no "junk," no "ugly" people pretending they are in their backyard standing over their barbecue pit.
> A liner.
> Average voyage: twenty-eight days, nine voyages a year, one of them around the world.

The *Titanic II* was to be built by "Harland & Wolff of Belfast, Ireland," at an expected cost of "Four hundred and Ninety-Five million Dollars."[4] The ship would cruise at thirty-one knots and be one thousand eighty-three feet in length with a one hundred foot beam. There were to be ten passenger decks and like the original, the *Titanic II* was to be crowned with four stacks. The "starting price" for the three hundred passenger suites was "one thousand dollars a day per person double occupancy." The "maiden voyage" was some four years away, scheduled for April 10, 1985, but reservations could be made for it beginning September 19, 1981. No mention was made of any requirement for any advance payment or deposit of any kind.[5]

Mr. Berezowsky's reaction to the letter was that, "Since no mention was made of sailings from United States ports and given the tone and content of the letter, the matter was treated as a crank letter by the Pacific District Office and no official action was taken." About a month later, however, two new documents surfaced.

On March 16, 1981, Ms, Barbara Sturken, Associate Editor of *Travel Magazine,* a Division of the *Official Airlines Guide,* sent to Mr. Frank Bartak, Chief, Office of Certification and Licensing, a copy of a "press release" under cover of a note:

> Dear Mr. Bartak:
>
> Here's the release on the "*Titanic*" I told you about. This has to be one of the weirder things to come out of California in a long time.
> I'll call you later, so we can compare notes on this mysterious company.

The release announced that the "Super Deluxe passenger Liner, S.S. *Titanic II* is now accepting reservations for space on Maiden Voyage, April 10, 1985, as well as regular Trans-Atlantic crossings, Caribbean Cruises and WORLD CRUISE." A number was given to call for booking

[4] "We have found that the original builders of the *Titanic*, Harland & Wolff in Belfast, Ireland, are alive and well and fully capable of building three more *Titanics*." Considering that the original *Titanic* went down in 1912, it seems a minor medical miracle that the original builders are alive.

[5] Except for a telephone number appearing in the letterhead as a part of the business address no reference was made as to how one would obtain a "reservation." Subsequently it was announced that deposits would be asked for beginning sometime in 1984.

information and sailing dates for the ship that was "already being called the 'Wonder Liner of the Future.' " Prospective passengers were advised to "be sure and start saving your pennies as [suites] start out at $1,000 per day, per person, double occupancy, and go skyward."

In a letter which accompanied the release the *Titanic II* showed a tendency which if protracted could prove alarming—a tendency to shrink in length and beam but grow in height. The *Titanic II* was now to be 943 feet in length (down from 1,083 feet); 94 feet in the beam (down from 100 feet), but it was to have 12 passenger decks (up from 10).

Other noteworthy features of the "Wonder Liner of the Future" were listed as: "fully air conditioned, individual cabin controls; 10 elevators; 1 indoor, 1 outdoor swimming pool; 8 cocktail lounges; Specialty shops; Beauty/Barber shops; men's and women's health club; laundry/valet service; 1 library; medical and dental services; 20 public rooms. . . ." Two other matters were thought worthy of mention:

> Dining: 1 dining room. All one sitting. Reservations when booking recommended. Continental Gourmet Cuisine and very lavish.
> Tipping: This liner is super deluxe and passengers are expected to tip accordingly as they would in any first class hotel.

Finally the whole thing was summed up as:

> *Titanic II* is unique in every aspect. Super, Glamorous. Breathtakingly beautiful, both inside and out. Extremely fast, cruising at 33 knots.[6]
> Per square inch, the most expensive passenger liner ever.[7]

Under the enclosed sailing schedule the maiden voyage was scheduled to leave Southampton on April 10, 1985, and arrive in New York on April 14, 1985.[8] The schedule began with the maiden voyage and ended with a New York-Bermuda-Le Havre-Southampton voyage in March of 1986. Included in the schedule was a "World Cruise" which was to begin on January 1, 1986, and end on February 28, 1986.[9] Of the 42 voyages listed in the schedule only four appear to be cruises as they are generally understood. These four leave New York go to Bermuda and return to New York. The remainder of the voyages, except for the "World Cruise"

[6] Along with the addition of two more passenger decks, the *Titanic* picked up two more knots of cruising speed.

[7] In view of the daily rates for the "suites" I am not sure whether this refers to the cost of building the *Titanic II* or the expense of passage aboard her.

[8] The daily rates for the maiden voyage were '$2,000, $3,000 and $5,000 per day per person double occupancy.

[9] A couple going "first class" on this one could look forward to spending about a quarter of a million dollars if one allowed for "generous tips."

are one-way passages from New York to Southampton by way of Le Havre or from Southampton to New York by way of Le Havre.[10]

The day after Barbara Sturken sent Mr. Bartak the press release, Ron Lord gave Lyndon Berezowsky a second letter which read:

> Dear Travel Agent:
> Enclosed is information on the first of three ships of our line, *Titanic II*.
> Our reservation lines are now open, and a first year schedule and reservation form is enclosed.
> No deposit telephone reservations are being taken on all sailings listed. Deposits will not be required until 1984, but space is limited and going fast.

Among the hitherto unmentioned amenities, putative passengers could look forward to "4 orchestras; first run movies daily; Cabaret shows; casinos."

On the same day that Ron Lord gave Lyndon Berezowsky copies of the second letter, March 17, 1981, Berezowsky called the "reservation number" for the *Titanic II* and spoke to Mr. Terry Marler who "confirmed that the line was accepting reservations but said that deposits were not required at this time."

The record contains no evidence of any further investigation or contact with respondents until a month later on April 17, 1981, when the Commission's Director of the Bureau of Certification and Licensing informed Messrs. Marler and Beasley that their "advertising and promotion" were in violation of section 3 of P.L. 89–777 and section 540.3 of General Order 20.[11] The respondents were urgently advised to discontinue their activities and comply with P.L. 89–777 and General Order 20. The Bureau offered aid in helping the respondents obtain the necessary Certificate of Financial Responsibility for Indemnification of Passengers for Non-performance of Transportation. On April 27, 1981, Messrs. Marler and Beasley by telex to the Assistant Secretary of the Commission advised that:

> . . . the Board of Directors of the Titanic Steamship Line have decided that no vessel of the line shall for any reason embark any passengers at any United States Port.

Messrs. Marler and Beasley went on to deny the allegations contained in the letter from the Bureau and said that the action of the Board of Directors was taken "because the moral conscience of the line would prohibit it from agreeing to your gag-order regarding the press of the world."[12]

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[10] Throughout the short life of the Titanic project the respondents could not seem to make up their mind whether it was going to be a cruise operation or a transatlantic passenger service.

[11] P.L. 89–777 makes it unlawful for any person to advertise or offer passage on certain vessels embarking passengers from U.S. ports unless the operator has established financial responsibility with the Commission.

[12] The "gag order" apparently refers to the Bureau's advice that the respondents cease all "advertising" and "promotional activities" which respondents apparently thought included "interviews" with reporters.

On June 26, 1981, Lyndon Berezowsky placed a second call to the Titanic Steamship Line Inc. "and a woman answered as Titanic." Berezowsky told the woman[13] that he was interested in taking a cruise on the *Titanic.* According to Berezowsky, "The woman told me that the company was still going forward with plans to begin cruise service in 1985." Berezowsky then requested that he be mailed copies of all printed materials describing the proposed service. Berezowsky gave the name of "Dave Wilson" and his "real" home address. Dave Wilson A.K.A. Lyndon Berezowsky received the requested material on July 1, 1981.

The material received by Berezowsky revealed that putative *Titanic II* had spawned a couple of offspring. After "tedious examination" of current "so-called first-class ships" and "evaluation and financial studies" and "studies regarding the travel industry" it was decided that three of the "fastest, most glamorous, most beautiful liners ever sent to sea" would be built. These ships would "win prizes for speed," "be talked about" and "become legends in their own time." Passengers would "return in time back to the days when crossing an ocean was an event of excitement and social prestige (excepting perhaps any immigrants in steerage) a thrilling interlude between one side of the world and another."

Seen in the "moonlight" the ships would look like the "*Titanic* of bygone days." However, lest the identification with the "*Titanic* of bygone days" become too complete, the literature goes on to point out "behind the beauty lie the most modern safety devices that any liner has ever possessed." These are to be more than "just the electronic toys of today and tomorrow, but the design of the human beings who will backstop every safety device." As but an example, every deck "will be served by a constantly walking human being" who will 24 hours a day "examine every space for the slightest possibility of fire."[14] "Also four human beings will be in the galley 24 hours a day and armed with fire extinguishers."[15]

As one might surmise, a good deal of money would be involved in realizing the Titanic Project. Indeed, then "current estimates" put the cost at a "billion and a half dollars." However, if the three vessels were to sail regularly at close to capacity, an expected "gross of one billion per operating year" would be realized. The dream was not of "cruise ships." "Oh, no." It was of "fast and sleek liners, for the very best people who are able to afford these very beautiful goddesses of the ocean."

On June 29, 1981, some three days before Berezowsky received the material requested in his phone call, the then Bureau of Investigation and

[13] Apparently District Investigator Berezowsky either failed to ask the "woman's" name or if he did he failed to make a record of it and could not recall it when he gave his affidavit.

[14] This "constantly walking human being" is either possessed of truly extraordinary stamina or more than one human is contemplated for the duty.

[15] No mention is made of any special equipment for the detection of hazardous objects which might cross the path of the *Titanic II.*

Enforcement sent the respondents a "Notice of Claim for Civil Penalty." The claim, for $5,000 [16] was based upon the assertion that:

> Titanic Steamship Line, Inc. (Titanic) advertised passage on a vessel without first having been issued a Certificate (Performance) by the Commission. Titanic sent letters along with sailing schedules and reservation forms to travel agents to describe a new ship the *Titanic II*, that would begin service on April 10, 1985.

The Commission's rules for the compromise of claims were sent along with the letter and the respondents were told that, "Failure to respond or to settle this claim will result in consideration of other courses of action by this Commission, including but not limited to the institution of formal proceedings."

On July 8, 1981, in letter addressed to the Bureau, "Attn. Janet F. Katz," Mr. Terry E. Marler responded to the Notice of Claim in part as follows:

> I. No such ship *Titanic II* currently exists.
>
> II. No deposits, funds, or any other consideration has ever been asked or collected by Titanic Steamship Line.
>
> III. The Titanic Steamship Line has no bank account.
>
> IV. As per our April 20, 1981, Telex to the Federal Maritime Commission (copy attached)—"NO VESSEL OF THE LINE SHALL FOR ANY REASON EMBARK ANY PASSENGER AT ANY UNITED STATES PORT."
>
> V. Furthermore, Titanic Steamship Line has not "arranged, offered, advertised, or provided" passage for any person—only taken names and addresses for future reservation lists.
>
> VI. All claimed "advertising material" was withdrawn pursuant to the request of the Federal Maritime Commission.
>
> VII. All radio interviews, national or international, were refused even though not initiated by this line pursuant to the instructions of the Federal Maritime Commission.
>
> VIII. Notice has been sent to every and all known persons throughout the world who have contacted this line for information regarding the *Titanic II* that pursuant to the wishes of the Federal Maritime Commission no further information will be made available regarding the projected liner.
>
> IX. At the present time, Titanic Steamship Line is a dormant entity and has no ongoing program of any kind and does not anticipate any for the next five years.
>
> PETITION: Due to the above nine statements and due to the fact that this projected liner will not embark or project embarkation

[16] Five thousand dollars is the maximum penalty provided in section 3(c) unless the respondent has actually collected fares in which case there is a penalty of $200 for each passage sold.

of passengers at United States ports, petition is made for Notice of Claim dated June 29, 1981, be withdrawn.

Some five months later, on December 3, 1981, the Bureau by letter told respondents that a "review" of its files revealed that the claim had not been resolved. The Bureau said it would not withdraw its claim but was "willing to pursue negotiations," adding that it would like to hear from the respondents in 30 days.

On December 11, 1981, after a phone conversation with Mr. Marler, the Bureau again declined to withdraw the claim and indicated its willingness to negotiate. The Bureau went on to add that refusal to negotiate would require the Commission "to resort to formal proceedings which would include an Order of Investigation and a possible hearing before an Administrative Law Judge." In a letter dated December 15, 1981, Mr. Marler replied to the Bureau suggesting, among other things, that the Bureau (Commission) if it were interested in settling the matter, should decide on "the dollar value that they wish to negotiate."

The Bureau replied on January 27, 1982, that the amount of the claim, $5,000, was the maximum specified by statute, and it was up to respondents "to explain any mitigating or extenuating circumstances" and that the information supplied would "be considered in determining the amount for which the claim may be settled." Apparently nothing more was heard from respondents and on April 5, 1982, the Bureau told the respondents that unless something was forthcoming by April 23, 1982, they "would be forced to institute a proceeding."

In a letter received on April 19, 1982, Mr. Marler told the Bureau, that from his review of the correspondence to the Bureau it appeared to him that "a rather thorough explanation of why the 'alleged violation' was in actuality no violation at all has been forwarded in this matter." [17] Mr. Marler, however, offered to supply any additional information the Bureau would need "to clear up this matter." On April 23, 1982, the Bureau notified the respondents, that it remained firm in its belief that they had violated the law but that it was still willing to negotiate the amount of the claim.

At this point something seems to have snapped. In a rambling reply to the Bureau, Mr. Beasley speaks of the Commission's "threats" and finds the "papers" in his file on the *Titanic II* "identical to the pieces of paper issued by the McCarthy Commission." "Threats and more threats." With allusions to penalties such as "forty years at hard labor and loss of citizenship" Mr. Beasley decries the attempts to abridge "the freedom of the press" and the "right of free enterprise" and says "it is now time to allow private citizens in open court to make a judgement

[17] From the letters of Beasley and Marler to the Bureau the argument is that no deposits for passenger fares were accepted, that any interviews given the media were at the request of reporters and were not arranged by the respondents and that on the "matter of the printed material that went to a few travel agents . . . again we are talking about requested information."

on this matter." On this note the correspondence ends and the order instituting this proceeding was issued on March 16, 1983.

DISCUSSION AND CONCLUSIONS

Before dealing with the merits of this case it is necessary to dispose of Hearing Counsel's pending "Motion to Have Evidence Withheld from Public Disclosure." The "evidence" which Hearing Counsel would withhold from the public was submitted in compliance with my order of June 23, 1983. Some review of the course of this proceeding is necessary to place the order and motion in their proper context.

The Commission's order instituting this proceeding called for an oral or full trial-type hearing only if there were presented "genuine issues of fact which could not be resolved upon the basis of sworn statements, affidavits, depositions or other documents." On March 21, 1983 I required the parties to tell me whether they wanted an oral hearing. Any party requesting such a hearing had to provide (1) a clear statement of the issues involved, (2) an explanation of the need for an oral hearing to resolve those issues, and (3) the names of the witnesses to be called and an outline of their testimony. Hearing Counsel in a letter dated March 31, 1983, stated that they were "not yet in a position to determine whether there are contested material facts [and] . . . we need discovery to determine whether Respondents collected any fares, which fact will bear upon the amount of civil penalties to be assessed." [18]

Pursuant to my order of April 6, 1983, Hearing Counsel submitted their discovery requests for my approval.[19] In a cover letter accompanying their discovery requests Hearing Counsel said, "We believe it is our duty to develop facts in support of mitigation and aggravation in addition to the facts we already have." [20] The interrogatories demanded among other things identification of all persons the respondents dealt with concerning the *S.S. Titanic II* whether in writing, by phone or in person. No time period is specified for these interrogatories. In addition, respondents were to identify all "documents, discussions and/or meetings" which related to any passenger vessel they had planned to purchase, charter or build. The period covered by this request was June 1981 through the present. In their cover letter, Hearing Counsel also said, "It is possible on the basis of the answers

[18] It would appear that in the two years since the *Titanic II* first came to the attention of Lyndon Berezowsky, no investigation was conducted to establish with any reasonable degree of certainty just what the respondents had been doing. The Bureau did not seem interested in whether any fares had been collected when the claim letter was sent to respondents. See page 9 *supra*.

[19] My order was prompted by an inability to understand why Hearing Counsel after the institution of a formal proceeding in which their role is that of a prosecutor, should find it necessary to engage in what can only be called preliminary investigation. Whether the respondents had in fact collected passage money is it seems to me one of the first inquiries to be made in any investigation leading to a prosecution under this statute.

[20] This is in contrast to Hearing Counsel's unwavering insistence throughout their correspondence with respondents that it was up to the respondents to submit any matters in mitigation.

received to these interrogatories we will need a second round of discovery, not excluding the possibility of depositions.''

The breadth and scope of these discovery requests led me to the conclusion, stated in my order of April 21, 1983, that the discovery was not concerned only, or even primarily, with the amount of civil penalties or mitigation; but rather they were "designed to supply the prima facie case which should have been in hand prior to the institution of this proceeding.'' I then withheld my ruling on the discovery requests pending Hearing Counsel's submission "of a statement of the specific violations they intend to prove together with a summary of the supporting evidence in their possession.''

Hearing Counsel's response stated that they intended to prove that respondents "advertised or offered passage from United States ports on a 600 passenger vessel in violation of section 3(a) of Public Law 89–777 . . . and section 540.3 of the Commission's General Order No. 20. . . .'' According to Hearing Counsel their evidence "included a letter sent to a travel agent with a reservation form and a sailing schedule.'' They also intended to introduce an affidavit from an investigator (Berezowsky) showing that in response to a telephone call "information [on the *Titanic*] was sent which also included a reservations number.''[21] Hearing Counsel also expanded on their need for discovery:

> The evidence we have now or that we could get through discovery would still only equal one violation of section 3(a) for a maximum penalty of $5,000. The responses to our discovery, however, would give a picture of the current status of the project, and, because under oath, would be more probative. It would also provide us with evidence that could bear on aggravation or mitigation of the penalty. We would also intend to introduce the responses into evidence, which, if there were nothing more, could institute [sic] the entire record for adjudication.

Hearing Counsel have now dropped the amount of civil penalty as a justification for their discovery requests. This left only (1) a suggested need to know the current status of the project and (2) the duty to provide evidence in mitigation and aggravation.[22]

I denied Hearing Counsel's request because, as Hearing Counsel themselves had earlier maintained, matters in mitigation were the special province of the respondents and the question of the aggravation of any penalties was ancillary to the primary question of whether the Act had been violated. I set a procedural schedule and Hearing Counsel filed their opening brief and a set of exhibits. The respondents did not file an answering brief

[21] Hearing Counsel also indicated that they would ask for judicial notice, or introduce evidence, of previous settlement(s) of civil penalty claims for similar violations.

[22] Hearing Counsel did not at any time say that the documents sought by discovery were needed to establish the violation itself. Had they done so a quite different question would have been presented.

so there was no need for a reply brief by Hearing Counsel. The case was then before me for decision on Hearing Counsel's brief and exhibits.

On June 7, 1983, I directed Hearing Counsel to submit certain documents which although referred to in the exhibits offered as evidence by Hearing Counsel had not themselves been submitted for inclusion in the record. For example, one of the exhibits offered by Hearing Counsel was a letter from Mr. Marler entitled "In Response To Notice of Claim." The "Notice of Claim" was not, however, offered by Hearing Counsel as an exhibit for the record. Still further review of the record led me, on June 23, 1983, to order Hearing Counsel to submit other documents which I felt necessary to afford a complete record for decision. The documents submitted in response to my June 23rd order are the subject of Hearing Counsel's "Motion To Withhold Evidence From Public Disclosure."

The documents are, according to Hearing Counsel, "all of the correspondence from [their] files between Hearing Counsel and Respondents during the period June 29, 1981 through May 3, 1982. . . ." It is Hearing Counsel's position that because the documents contain "offers of compromise" from Hearing Counsel to the respondents, certain portions of the documents should be kept confidential. Hearing Counsel argues:

> Contained in these documents are offers of compromise to the respondents and their responses. We believe that besides inhibiting compromise negotiations under Part 505 of 46 C.F.R., disclosure of amounts in this case would impede our flexibility in future cases. At the conclusion of this proceeding, Hearing Counsel will make available for release under the Freedom of Information Act, copies of the documents with the confidential portions excised.[23]

A careful review of the documents in issue fails to reveal a single "amount," assuming that Hearing Counsel is using that word in its generally accepted sense and which in this case can only refer to the "amount" of the penalty suggested or offered as a compromise to the original claim. There are simply no such "amounts" anywhere mentioned in the documents Hearing Counsel seeks to withhold from the public.[24] The most charitable view that can be taken of this argument is that it is the result of a lapse of memory. In any event it is argument on a nonexistent ground.

I am not sure whether the "offers of compromise" referred to by Hearing Counsel in the quote above are different from "amounts." If they are not then the "offers of compromise" can only refer to those statements of Hearing Counsel in which they express a willingness to negotiate the amount of the penalty. Just how making these statements of willingness public would either "inhibit compromise negotiations under Part 505" or

[23] Hearing Counsel did not afford the courtesy of specifying those portions of the documents they considered inhibiting or impediments and which they would excise if forced to release the documents under the FOIA.

[24] The $5,000 penalty amount appears only in the Notice of Claim for which Hearing Council sought no confidentiality.

would "impede [their] flexibility in future cases" is never explained. Not a single example in which such a disclosure could work either result is offered by Hearing Counsel. Contrary to Hearing Counsel's "belief" I can find nothing in the documents in question which would in any way hinder future negotiations for compromise. The motion is denied.

The denial of the motion does not, however, lay the matter completely to rest. In a cover letter to the motion Hearing Counsel says that they did not submit the correspondence with respondent because they believed that "either they were inadmissible under Rule 408 of the Federal Rules of Evidence or they were irrelevant." Rule 408 provides basically that evidence of attempts to compromise a claim which is disputed as to either validity or amount is not admissable to prove liability for or invalidity of the claim or its amount. The rule is intended primarily to protect the respondent in a proceeding to impose a penalty. The documents which I ordered Hearing Counsel to produce were needed to explain a hiatus in the proceeding, i.e., the period between June 26, 1981 and May 2, 1982. A period during which it appeared from the record before me that the matter had just languished or found its way into some sort of administrative limbo. As already explained, there is nothing in the documents which could be used to prove or invalidate the claim with perhaps the possible exception of two exhibits which Hearing Counsel argues contain "evidence of conduct," a ground for exclusion under 408.[25] Hearing Counsel did not cast their discussion of Rule 408 in the form of a motion so no ruling is needed. However, it may be necessary to make note of the fact that nothing contained in the material submitted pursuant to my order has been used to dispose of the merits of this case.

Section 3(a) of Public Law 89–777 makes it unlawful for any person to "arrange, offer, advertise, or provide passage on a vessel having . . . accommodations for fifty or more passengers and which is to embark passengers from United States ports" without first having established his "financial responsibility" with the Commission. Once this financial responsibility has been established under the requirements of the Commission's General Order 20 (46 C.F.R. 540) a Certificate (Performance) is issued by the Commission. Respondents are charged by Hearing Counsel with having "advertised" cruises aboard the *Titanic II* without having established their financial responsibility or obtaining the required Certificate (Performance).

[25] An indication of the care and attention given to the drafting of the motion is found in the specific reference to Exhibits 16 and 22 as containing "evidence of conduct" by respondents which Hearing Counsel believe would warrant the exclusion of those exhibits under Rule 408. The reference to Exhibit 22 is surprising to say the least for it is the same document that Hearing Counsel designated Exhibit 10 and submitted as evidence in support of its brief and for which Hearing Counsel claimed no confidentiality. Either Hearing Counsel was unaware that they had already submitted the letter now designated Exhibit 22 or they came late to the idea that Rule 400 presented problems for its admission in evidence. But in neither event have they explained the discrepancy.

To Hearing Counsel, it is clear that the two letters given to the Pacific Investigator, Lyndon Berezowsky, and the press release sent to Mr. Frank Bartak were "advertisements" designed to "draw attention to the *Titanic II*" so that respondents "could sell cruises."[26] They were sent to "travel agents who would be selling cruises to the public." As for the press release, Hearing Counsel says it "was not just about the building of a new ship but about cruises on this ship." All of this according to Hearing Counsel, "is compatible with the definition of advertising: drawing attention to something to be sold."

"Advertising" is one of those words the meaning of which we are all comfortably certain—until called upon to define it. A price tag on an article of clothing, a notice nailed to a tree and the fondly remembered sandwich board are and have all been found to be advertisements. There is no prescribed form, language or content for an "ad". Advertisement is a word the definition of which is peculiarly dependent upon the context and situation in which it is used.

Hearing Counsel approves of one of the Supreme Court's definitions of advertising as "merely identification and description, apprising of quality and place. It has no other object than to draw attention to the article to be sold, and the acquisition of the article to be sold constitutes the only inducement to its purchase." *Rast v. Van Deman & Lewis*, 240 U.S. 342, 365 (1911). Equally appealing to Hearing Counsel are definitions like "to give notice; to inform; to make known to." *Bissell Carpet Sweeper Co. v. Masters Mail Order Co.*, 140 F. Supp. 165, 173 (D. Md. 1956). Finally, Hearing Counsel urges the advertisement need only "include the traditional notice for the selling of goods and services designed and generally circulated to attract public attention." *Garza v. Chicago Health Clubs*, 329 F. Supp. 936 (N.D. Ill. 1971). That the actions of Messrs. Marler and Beasley constituted advertising, Hearing Counsel says:

> It is clear that Titanic was sending letters and press releases to draw attention to the *Titanic II* so that they could sell cruises. The information was disseminated to travel agents who would be selling cruises to the public. The press release was not just about the building of the new ship but about the cruises that could be taken and paid for.

From the definitions quoted by Hearing Counsel and from the argument quoted above, it is clear that Hearing Counsel defines the general purpose of an advertisement as being the sale of a specified commodity or service. An advertisement calls one's attention to an item that is for sale, tells one how much it will cost and tells the prospective purchaser where he can find the item. As an abstract proposition and with some very important

[26] These three exhibits constitute Hearing Counsel's case on the merits. There is a fourth exhibit comprising the material which Lyndon Berezowsky received as a result of his phone call to Titanic's office which is discussed later.

qualifications, the material on the *Titanic II* can be called "advertisements." The letters and the press release "identified," "described," and "apprised of the quality" of the "Titanic Project." Indeed, it did all of these with unequaled panache. But we are dealing with a statute not an abstraction and it is from the purpose and context of the statute that the meaning must be drawn. The operative language is:

> No person shall arrange, offer, advertise, or provide passage on a vessel having berth or stateroom accommodations for fifty or more passengers and which is to embark passengers at United States ports without first having filed with the Federal Maritime Commission such information as the Commission may deem necessary to establish financial responsibility of the Person arranging, offering, advertising or providing such transportation . . . (Public Law 89–777, sec. 3(a)).

The purpose of section 3(a) is "to prevent financial loss and hardship to the American traveling public, who, after payment of cruise passage money are stranded by the abandonment or cancellation of a cruise." Clearly within the ambit of the statute then is that kind of advertisement with which we are all familiar: An "ad" which offers for reasonably immediate sale a particular thing or service and for which payment is expected at purchase. If the advertisement specifies the price for a specific cruise to take place at a certain time and place and the manner or method of booking passage is explained then the chances are that the advertiser or cruise operator will expect to collect the passage money or a deposit at the first response to the ad. And the prospective passenger will in all probability read the ad in just that way. If an operator runs this kind of ad before he obtains a Certificate from the Commission, then he will be in a position to collect money without first establishing his financial ability to make any refunds necessary. And this the statute is designed to prevent. But what if no money is actually collected or if the "advertisemcnt" specifies that no payment is to be made by the prospective buyer or passenger. Hearing Counsel says that the Commission has dealt with just this situation in *Wall Street Cruises, Inc.*, 15 F.M.C. 140, 142 (1972) where Hearing Counsel says the Commission held that the statute is preventative in nature and "bars all advertising prior to the establishment of a person's financial responsibility."

In *Wall Street*, the respondent ran "notices" in Sunday editions of *The New York Times* on several occasions during the months of May, June and July. These "notices" quoted specific fares, gave specific dates and, the Commission found, were designed "to solicit business for actual cruises." The Commission rejected the respondent's argument that the notices were "market tests." This argument was based upon the inclusion in the notices of a statement that the "offer of the above program is based on an Option Agreement." The Commission concluded that the notices did not "clearly condition the sailing of the cruises offered upon

the exercise of the option agreement or otherwise effectively serve notice on prospective passengers of the uncertain status of the cruises.'' From this it would seem to follow that where the prospective passengers are clearly informed of the existence of a condition precedent to a cruise the ''notice'' would not have been an advertisement within the meaning of section 3(a). It could have then been the ''market test'' argued for by respondent. It is clear from *Wall Street* that not all ''material'' calling the public's attention to a commercial cruise need be deemed ''advertisements'' within the ambit of section 3(a). For example, if there were an association of cruise operators and the association took a page in the Sunday Travel Section and filled the page with pictures of tropical isles but included only the message: ''Take a cruise for health'' or some equally moving non-sequitur, this would not constitute an advertisement prohibited by section 3(a) even though its ultimate aim is to sell cruises.

If the purpose of section 3(a) is to prevent potential financial loss and hardship to the traveling public who have paid passage money only to have the cruise cancelled, ''advertise'' as used in that section must refer to those advertisements which solicit or contemplate, even if only by silence, the payment of money by the traveling public when it responds to the advertisement. This squares with the rationale of *Wall Street Cruises* where respondent's failure to clearly inform prospective passengers of the ''uncertain status of the cruises,'' left no doubt that the ''notices'' in question were advertisements within the meaning of section 3(a). Such a construction of the statutory language would, in my view, be in furtherance of the purposes of the Act. The advertisements banned by section 3(a) are those which seek or contemplate the reasonably immediate payment of money—the kind at issue in the *Wall Street* case. A very different situation is presented here.

The respondents did not use the newspaper or any of the other ''mass media.'' The ''ads'' were not ''generally circulated to attract the attention of the public.'' *Garza v. Chicago Health Club, supra.* The letters were, as far as this record shows, sent only to travel agents, a particular class of persons knowledgeable in the cruise business.[27] The ''press release'' was sent by respondents to Don Langley of *Travel Age West*, self-styled as ''The weekly newspaper of the travel agency sales forces in the West, the world's fastest growing travel market.'' *Travel Age West* did indeed run a story on the *Titanic II* in March of 1981 in which, interestingly enough, it specifically referred to the company's statement that it was accepting ''reservations'' for the maiden voyage from Southampton to New York on April 10, 1985. About these reservations the story said, ''The

[27] The record contains only two letters sent by respondents to travel agents. Exhibit 3 is the letter sent to Ellen Matthews of Gadabout Tours. This letter was given Lyndon Berezowsky by Ron Lord. Exhibit 4 is a letter also given Berezowsky by Lord but the addressee is not shown in the record. It might have been sent to Ellen Matthews. The record does not show how many travel agents respondents sent their material to. Indeed, both letters in the record could have been sent to Ellen Matthews.

'reservations' are really only a show of interest since the company does not have a performance bond filed with the Federal Maritime Commission it does not have a certificate and cannot accept money." Indeed, the record establishes that throughout their endeavors on behalf of the Titanic Project, the respondents made it clear that they would not accept deposits or passage money. And of course no money was collected.[28]

Since "advertise," "advertisement," and "advertising" are susceptible to such a wide range of definitions or meanings, a decision under section 3(a) must depend upon all the circumstances surrounding the alleged violation. For example, the act of advertising contemplates some distribution of the material to the people from whom a reaction to the material is sought.[29] Respondents sent the letters in the record to travel agents only. None were sent to the traveling public. The only other document said to be an advertisement, the press release, was sent to a magazine for travel agents. The material stated that if the travel agents took "reservations" for the cruises no deposits were to be taken. It is clear that respondents were not at this time attempting to "sell" cruises to the traveling public—the people protected by the statute. Just as the article in *Travel Age West* said, the "reservations" were no more than "expressions" of interest.

Whether you call respondents' efforts test-marketing, interest-sampling or merely "testing the waters,"[30] I don't think you can call it advertising within the meaning of section 3(a). My conclusion that the respondents did not advertise cruises within the meaning of the statute is based on all of the circumstances of the case and not just the content of the documents in question.

But even if the respondents' actions were found to be in violation of the law, I cannot agree with Hearing Counsel that the maximum penalty is called for here. Hearing Counsel's case for the imposition of the full $5,000 penalty rests not on the extent or gravity of respondents' total conduct, but on the single allegation that respondents "continued to advertise the passenger vessel *S.S. Titanic II* after receiving a letter" telling them to stop. Hearing Counsel's argument is best presented in their own words:

> Since the evidence shows that the respondents violated section 3(a) of Public Law 89–777 and 46 C.F.R. sec. 540.3, Hearing Counsel submit that the statutory penalty of $5,000 be assessed.

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[28] Hearing Counsel is correct when they say that respondents' failure to collect money does not of itself relieve them of liability under section 3(a). And *Wall Street* is quite clear on this point. However, my reading of *Wall Street* leads me to the view that the Commission's holding in that case was based upon the fact that the "notices" published by respondent clearly contemplated the collection of passage money and the fact that none had been collected was therefore irrelevant.

[29] If I were to draft a proposal offering a sensational new mousetrap for sale and then show it only to a friend whose reaction prompts me to tear it up, it certainly can't be said that I had "advertised" my mousetrap.

[30] *Some temptations are simply irresistible.*

> The maximum penalty should be assessed against the respondents since they continued to advertise the passenger vessel *S.S. Titanic II* after receiving a letter from the Commission telling them that their actions could be in violation of Public Law 89–777. The only possible evidence of mitigation are the letters the respondents to [sic] potential customers and the Commission in early July asserting that there would no longer be any communication regarding the *S.S. Titanic II.* Hearing Counsel has no verification of these statements, but even if they were true the aggravation of the penalty through the continued violation after a warning would negate any mitigation available to the Respondents. For these reasons we believe $5,000 is a proper penalty and would deter the respondents from engaging in any schemes without establishing the necessary financial responsibility.

Since Hearing Counsel did not choose to specify which acts of record by respondents constitute this "continued advertising" after the Commission's warning, reconstruction of the chronology of events is necessary.

There are only four exhibits to which Hearing Counsel would characterize "advertising": (1) Exhibit 3, the January 23, 1981 letter to Ellen Matthews; (2) Exhibit 4, the undated letter addressed "Dear Travel Agent" which was given to Lyndon Berezowsky by Ron Lord on March 17, 1981; (3) Exhibit 7, the undated "Press Release" which was sent to *Travel Age West* on or prior to March 16, 1981; and (4) Exhibit 5, the material sent to "Dave Wilson" a.k.a. Lyndon Berezowsky, as a result of his phone call to Titanic. This material was received by Wilson/Berezowsky on July 1, 1981. Since, the Commission's letter "telling them [respondents] that their actions could be in violation of Public Law 89–777" was dated April 17, 1981, the only evidence Hearing Counsel can support their allegation of continued violation with is the material received by Berezowsky on July 1, 1981. In an affidavit prepared for this case Lyndon Berezowsky tells how he obtained this "advertising" material:

> 5. On June 26, 1981, I called the reservation number of the Titanic Steamship Line Inc. and a woman answered as Titanic. I told this person that I was interested in taking a cruise on the *Titanic II.*
>
> 6. The woman told me that the company was still going forward with plans to begin the cruise service in 1985. I requested that Titanic mail copies of all printed materials describing the proposed service and she agreed. I gave the name Dave Wilson and my real home address.
>
> 7. I received the requested material on July 1, 1981.

Thus, Hearing Counsel's case for respondents' continued advertising after they had been warned to stop is based solely upon actions of some unidentified woman who at the specific request of a Commission investigator

using a phony name mailed him some "printed material."[31] Questions of the law of agency aside for the moment, the record fails to establish the identity of the woman, her position in the company, or her authority to act in any capacity for the company. Moreover, Hearing Counsel offers no argument on the basic question of whether this response to a specific request, as distinguished from the unsolicited dissemination of material, itself constitutes "advertising." Finally, Hearing Counsel after raising the question of mitigation immediately dismiss it because they have "no verification of these statements" by respondents concerning the alleged mititgating circumstances. The statements by respondents referred to by Hearing Counsel are found in the letter of July 3, 1981 from Terry Marler to Hearing Counsel, paragraph VIII of which states:

> Notice has been sent to every and all known persons throughout the world who have contacted this line for information regarding the *Titanic II,* that pursuant to the wishes of the Federal Maritime Commission, no further information will be made available regarding the projected liner.

That Hearing Counsel say they have "*no* verification of these statements" (emphasis mine) I find ingenuous at best. The affidavit of Lyndon Berezowsky, submitted by Hearing Counsel, concludes:

> 8. On July 8, 1981, I received a letter from Titanic addressed to Dave Wilson which stated that there would be no further announcements regarding the *Titanic II* until such permission had been granted by the United States Government.

A copy of the letter referred to Berezowsky is included in the record as Exhibit 6.[32] Presumably it is the one sent to "Dave Wilson." In view of this Hearing Counsel's lack of verification must go to the assertion that the same letter was sent to "every and all known persons." If Hearing Counsel challenges that statement, it is up to them to prove it false. Absent that proof, the inference to be drawn from the record is that respondents' statement is correct.

But Hearing Counsel believe that even if the statements of respondents were true "the aggravation of the penalty through the *continued* violation after a warning, would negate any mitigation of the penalty available to

[31] At my direction Hearing Counsel briefed the question of whether Berezowsky's actions constituted entrapment. They have convinced me that technically they do not.

[32] The letter reads:

To Whom It May Concern:

> Please be advised that in compliance with United States Government regulations, there will be no further announcements regarding the proposed liner, "*Titanic II,*" until such time as permission has been granted, by the United States Government in this matter.
>
> We regret any inconvenience or any confusion in this matter, and ask your understanding for our ignorance.
>
> If and when the liner should ever be constructed, you will be advised in the proper, approved fashion.

Respondents''; and, that the maximum penalty of $5,000 is ''proper'' and would ''deter the Respondents from engaging in any schemes to advertise a vessel without establishing the necessary financial responsibility.'' Despite the fact that the record affords no basis for it, Hearing Counsel do not believe respondents when they say that they will not revive the Titanic Project until they have the required governmental approval. I do not share this disbelief and had the actions of respondents in fact constituted a violation, I would not find grounds for the imposition of any money penalty let alone the maximum of $5,000.

The case is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 510; DOCKET NO. 83–35]

LICENSING OF INDEPENDENT OCEAN FREIGHT FORWARDERS

April 24, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing the licensing of independent ocean freight forwarders will be addressed in a future proceeding.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on August 26, 1983 (46 FR 38856), the Commission instituted this proceeding to prescribe certain rules governing the licensing of independent ocean freight forwarders. Comments have been received in response to the Notice.

The recently-enacted Shipping Act of 1984 has made it necessary for the Commission to review all of its rules pertaining to freight forwarders. The issues raised herein, therefore, are better addressed in a future rulemaking proceeding.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 524, 531, 536; DOCKET NO. 83–43]

EXEMPTION OF NONEXCLUSIVE TRANSSHIPMENT AGREEMENTS FROM THE FILING REQUIREMENTS OF SECTION 15 OF THE SHIPPING ACT, 1916 AND CLARIFICATION OF PART 524

April 24, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing exemptions of agreements will be addressed in future proceedings.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on October 4, 1983 (48 FR 45270), the Commission proposed to exempt nonexclusive transshipment agreements from the filing requirements of section 15 of the Shipping Act, 1916. In addition, the Notice contained a clarification of the scope of existing exemptions.

The recently enacted Shipping Act of 1984 has made it necessary for the Commission to review all of its existing exemptions inasmuch as the new statute's treatment of exemptions is somewhat different from the 1916 Act. The issues in this proceeding, therefore, are better addressed in a further rulemaking proceeding.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 528; DOCKET NO. 83–55]

MODIFICATION OF SELF-POLICING REQUIREMENTS FOR SECTION 15 AGREEMENTS

April 24, 1984

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission has determined to discontinue this proceeding in light of the recent passage of the Shipping Act of 1984. Rules governing self-policing of agreements will be addressed in a future proceeding.

DATES: Effective April 27, 1984.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on December 9, 1983 (48 FR 55144), the Commission proposed to amend its procedures with respect to self-policing under section 15 of the Shipping Act, 1916. In response to numerous requests, the Commission stayed this proceeding indefinitely before the date of submission of comments (49 FR 3838).

The recently enacted Shipping Act of 1984 alters radically the statutory scheme with respect to self-policing. Continuation of this proceeding, therefore, is not warranted.

Accordingly, this proceeding is discontinued.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–23

CENTRAL NATIONAL CORPORATION, NANTUCKET NAVIGATION INC., AND T. SMITH & SON (TEXAS) INC.

v.

PORT OF HOUSTON AUTHORITY

ORDER ADOPTING INITIAL DECISION

April 30, 1984

This is a complaint proceeding initiated by Central National Corporation, Nantucket Navigation Inc., and T. Smith & Son (Texas), Inc. (Complainants) against the Port of Houston Authority (Respondent or Port) alleging that certain exculpatory provisions in the Port's tariff are unjust and unreasonable in violation of section 17 of the Shipping Act, 1916, 46 U.S.C. §816. The complaint was filed pursuant to an order of the U.S. District Court for the Southern District of Texas-Houston Division, staying its proceeding involving the same parties in order for them to obtain a ruling from the Commission on the validity of the tariff provisions in question. *Central National Corporation v. S.S. HOLSTENBEK, her engines, appurtenances, etc. and Nantucket Navigation Inc., her charterers and/or owners, and Port of Houston Authority,* C.A. No. H–80–1362 (S.D. Tex.). The Commission's Bureau of Hearing Counsel intervened in the proceeding before this Commission. The parties agreed to the use of the Commission's shortened procedure, 46 C.F.R. §502.181, *et seq.*

Chief Administrative Law Judge John E. Cograve (Presiding Officer) issued an Initial Decision finding the challenged Port tariff provisions in violation of the Shipping Act, 1916, as alleged. Respondent filed Exceptions to the Initial Decision to which Hearing Counsel and Complainants replied. We find the Initial Decision to be well reasoned and comprehensive in its disposition of the issues. We therefore adopt the Initial Decision, with one minor correction.

BACKGROUND

This case arose as a result of water damage to a cargo of newsprint belonging to Central National Corporation which allegedly occurred while the cargo was in the Port warehouse or terminal facilities. Complainants Nantucket Navigation Inc. and T. Smith & Son (Texas), Inc. are the operator of the vessel which delivered the cargo and the stevedoring company, respectively, and are parties in the District Court litigation against whom

the Port filed counterclaims for indemnification and costs, based upon its tariff.

Respondent pleaded the terms of its tariff in its defense and counterclaims in the District Court litigation. The specific terminal tariff provision relied upon by Respondent is Item No. 4 of the Port's FMC Tariff No. 8 which provides, in pertinent part:

> (a) The Port Authority shall not be responsible for injury to or loss of any freight being loaded or unloaded at the public wharves nor for injury to or loss of freight on its wharves or in its sheds by fire, leakage or discharge of water from fire protection sprinkler system; . . .
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> * * * * *
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> (d) Users of its facilities agree to indemnify and save harmless the Port Authority from and against all losses, claims, demands and suits for damages . . . including court costs and attorneys' fees, incident to or resulting from their operation on the property of the Port Authority.

The complaint alleges that Tariff Item Nos. 4 (a) and (d) constitute unjust or unreasonable regulations or practices in violation of section 17 of the Shipping Act, 1916.

DISCUSSION

The Presiding Officer concluded that the Port's Tariff Item 4(a) is violative of section 17 to the extent that it would relieve Respondent of liability for its own negligence. He found this provision to be similar to that determined to be unlawful in *Lucidi Packing Co.* v. *Stockton Port District,* 22 F.M.C. 19 (1979). The Presiding Officer further found tariff Item 4(d), the indemnity provision, similar to that held unlawful in *West Gulf Maritime Association* v. *The City of Galveston,* 22 F.M.C. 101 (1979). He noted that "the fact that the Port of Galveston is a 'political subdivision' of the State of Texas does not exempt the Port from regulation by the Commission under the Shipping Act." [1]

The Initial Decision is well-reasoned and fully dispositive of the issues in this proceeding. The language of the challenged tariff provisions is broad and can be read to apply to exculpate the Port even in situations in which damage may result from its own negligence. To the extent that these provisions may be read to exculpate the Port from liability for its own negligence, we agree with the Presiding Officer that they are unreasonable within the meaning of section 17 of the Shipping Act. Respondent's Exceptions object to the Initial Decision's characterization of its arguments and ask that its tariff provisions be found lawful. Respondent's Exceptions

[1] As discussed below, this reference to the Port of Galveston appears to have been inadvertent.

are, for the most part, re-arguments of points properly and correctly decided by the Presiding Officer.

Respondent's "first" exception is devoted to argument concerning the political status of the Port of Galveston, apparently in response to the reference to that port in the Initial Decision. Respondent notes both that the "Port of Galveston is not a political subdivision of the State of Texas . . ." but a creature of the City of Galveston which is a political subdivision, and that the decision wrongly infers that the Port of Houston claims that it is not subject to the Act because it is a political subdivision. Respondent specifically "acknowledges that it is an 'other person' under the Shipping Act." Respondent's Exceptions at 4.

The reference in the Initial Decision to the Port of Galveston appears to have been inadvertent, and should have been a reference to the Port of Houston Authority, respondent here. The reference to the Port of Galveston in the Initial Decision was harmless error.

The discussion in the Initial Decision of the political status of the Port of Galveston was obviously meant to respond to Respondent's argument before the Presiding Officer that the Port of Houston Authority "is a political subdivision of the state, acting only in a governmental capacity and, unless specifically excepted, [is] immune from liability resulting from its operations." (footnotes omitted). Respondent's Memorandum of Law at 4. This argument may be a matter for determination by the District Court in the proceeding before it, but has no bearing on the question of the lawfulness of the Port's tariff provisions under the Shipping Act. The latter is the sole question raised in the complaint before the Commission. The Presiding Officer correctly ruled that the Port is not exempt from regulation by the Commission under the Shipping Act by reason of its status as a political subdivision, citing *West Gulf Maritime Association* v. *Port of Houston Authority*, 21 F.M.C. 244 (1978).

Respondent's argument that the reasonableness of its tariff provisions should be judged on the basis of its practices in implementation of those provisions is also without merit. That argument was adequately dealt with in the Initial Decision. Respondent cites language from *Investigation of Free Time Practices, supra*, 9 F.M.C. at 547, that:

> . . . it is by application to the particular situation or subject matter that words such as "reasonable" take on concrete and specific meaning. As used in section 17 and as applied to terminal practices, we think that "just and reasonable practice" most appropriately means a practice, otherwise lawful but not excessive and which is fit and appropriate to the end in view.

The only question raised and ruled on here is the validity of the Port's tariff provisions. Its practices in implementation of those provisions cannot validate tariff provisions which are otherwise unlawful. *Investigation of Free Time Practices, supra.*, 9 F.M.C. at 543.

The fact that the Port's practices do not comport with the description set forth in its tariff is, moreover, as the Presiding Officer found, not evidence of the reasonableness of the tariff provisions, but might well be taken as an indication of their unreasonableness.

Respondent expresses the belief that its practices with regard to the exculpatory and indemnity provisions of its tariff "would be better memorialized in its tariff" if Items 4 (a) and (d) were prefaced with language excepting their application in instances where damage or injury results from negligence of the Port which "could be established as a matter of Law." Respondent's Exceptions at 6. The Port's tariff provisions cannot be found lawful on the basis of such an amended reading.

As Hearing Counsel points out in its Reply to Exceptions, Respondent's arguments are inconsistent with its counterclaims for indemnity filed in the District Court. In response to the complaint in the District Court, the Port, in its answer and counterclaim to the original complaint, cited Items 4 (a) and (d) of its tariff, and alleged that it "has been sued in the above-entitled and numbered cause contrary to the provisions of its tariff." It further sought to recover from cross-plaintiff Nantucket Navigation Inc. all costs of the litigation incurred or to be incurred by the Port, which it claimed it "is entitled to recover from Cross-Plaintiff, the Cross-Plaintiff being a user of the facilities of the Port of Houston, and accordingly governed by the tariff quoted above."[2] Contrary to its statements regarding its practices, the Port thus sought to rely upon the terms of its tariff to avoid and to indemnify itself against liability for damages and costs of litigation based upon its tariff, without regard to its own possible negligence or non-liability therefore under state law.

Respondent also argues, as it did below, that the Commission's cases finding similar exculpatory and indemnity provisions unlawful should not apply in this case because it does not perform the functions of "handling, storing or delivering of property." Respondent objects to characterization of its arguments as being based on a distinction between "operating ports" and "non-operating ports," but states that:

> . . . when respondent is not performing the 'receiving, handling, storing and/or delivering of cargo,' and promulgates tariff provisions which govern those particular, non-performing situations, said tariff items should not be compared with those governing situations in which 'receiving, handling storing and/or delivering' does occur. (Footnotes omitted). Respondent's Exceptions at 5.

Respondent's charge that the Presiding Officer's distinction between operating and non-operating ports mischaracterizes its argument appears to us

[2] Pleadings in the District Court filed in this proceeding pursuant to the Presiding Officer's Procedural Notice of May 27, 1983 are: (1) Answer and Counter Claim of the Port of Houston Authority to the Original Complaint, and (2) Answer and Counter Claim of the Port of Houston Authority to the Cross Claim of Nantucket Navigation Inc.

to be a distinction without a difference. The Port is involved in those functions by virtue of the fact that it furnishes the facilities at which such functions may be performed by others.

THEREFORE, IT IS ORDERED, That the Exceptions of Respondent are denied; and

IT IS FURTHER ORDERED, That the Initial Decision served November 28, 1983 is adopted except to the extent indicated above.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–23

CENTRAL NATIONAL CORPORATION, NANTUCKET NAVIGATION, INC. AND T. SMITH & SON (TEXAS), INC.

v.

PORT OF HOUSTON AUTHORITY

Exculpatory provisions of respondent's tariff found unjust and unreasonable under section 17 of the Shipping Act, 1916.

Douglas R. Wight for Central Navigation Corporation.

Stuart B. Collins for Nantucket Navigation, Inc.

James B. Warren for T. Smith & Son (Texas), Inc.

Algenita Scott Davis for Port of Houston Authority.

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

INITIAL DECISION [1] OF JOHN E. COGRAVE, ADMINISTRATIVE LAW JUDGE

Adopted April 30, 1984

The United States District Court for the Southern District of Texas-Houston has stayed its proceedings involving the parties here [2] to afford the Commission an opportunity to rule on the validity of two provisions of the Port of Houston Authority Tariff No. 8.[3] The following findings of fact proposed by Hearing Counsel are fully supported by the record and are adopted for the purposes of the decision in this case:

1. Respondent Port of Houston Authority carries on the business of furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water.
2. Complainants are users of the Port of Houston Authority marine terminal facilities.
3. Item No. 4 of Port of Houston Authority Tariff No. 8, as filed with the Commission, contains the following provisions:

   (a) The Port Authority shall not be responsible for injury to or loss of any freight being loaded or unloaded at the

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

[2] *Central National Corporation v. S.S. Holstenbeck, her engines and appurtenances, etc. and Nantucket Navigation Inc., her charterers and/or owners, and Port of Houston Authority,* C.A. H–80–1362.

[3] The parties agreed to try this case under the Shortened Procedure of Subpart K, 46 CFR 502.181, *et. seq.*

public wharves . . . nor for injury to or loss of freight on its wharves or in its sheds by fire, leakage or discharge of water from fire protection sprinkler system; . . .

(d) Users of its facilities agree to indemnify and save harmless the Port Authority from and against all losses, claims, demands and suits for damages . . . including court costs and attorney's fees, incident to or resulting from their operation on the property of the Port Authority.

4. A lawsuit styled *Central National Corporation v. S.S. Holstenbek, her engines, appurtenances, etc. and Nantuckect Navigation, Inc., her charterers and/or owners, and Port of Houston Authority,* C.A. No. H–80–1362, is currently pending in the United States District Court for the Southern District of Texas, Houston Division. Proceedings in that action have been stayed pursuant to Court Order pending a determination by the Commission of the validity of Item 4, paragraphs (a) and (d) of the Port of Houston Authority tariff.

5. In the U.S. District Court proceeding, The Port of Houston Authority has pleaded the tariff provisions at issue here as a defense and as a basis for affirmative relief. Specifically, Respondent contends:

   The Port Authority has been sued in the above entitled case contrary to the provisions of its tariff.

   . . . all of which constitute costs and expense which the Port Authority is entitled to recover from Cross-Plaintiff, the Cross-Complainant being a user of the facilities of the Port of Houston, and accordingly governed by the tariff quoted above.

6. Over the past ten years, approximately twenty percent of all property and/or damage claims were resolved by payment of appropriate sums of money to claimants where there was some appearance of responsibility for damage by the Port Authority.

The issue presented here is whether the following provisions of Item No. 4 in the Port of Houston's tariff are just and reasonable as required by section 17 of the Shipping Act, 1916: [4]

Item No. 4

(a) The Port Authority shall not be responsible for injury to or loss of any freight being loaded or unloaded at the public wharves . . . nor for injury to or loss of freight on its wharves or in its sheds by fire, leakage or discharge of water from fire protection sprinkler system; . . .

[4] Section 17, Shipping Act, 1916 (46 U.S.C. 816), provides, in pertinent part:
Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property.

> (d) Users of its facilities agree to indemnify and save harmless the Port Authority from and against all losses, claims, demands and suits for damages . . . including court costs and attorneys fees, incident to or resulting from their operation on the property of the Port Authority.

Exculpatory clauses which purport to relieve a port of liability for damage or injury to property which is caused in whole or in part by the negligence of the port are unjust and unreasonable in violation of section 17, of the Act. *I. Charles Lucidi v. The Stockton Port District,* 22 F.M.C. 19 (1979).[5] The Commission stated the rationale against such clauses saying:

> To the extent that the provisions of Item 85 would relieve the Port from damage for liability (sic) to property caused in whole or in part by fault of the Port, and without a *quid pro quo* of any kind, such provisions are unjust and unreasonable, in violation of section 17 of the Act.
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> The provisions of Item 85 are against public policy insofar as such policy required businesses affected with public interest be precluded from taking unfair advantage of those who by necessity must use the facilities of such businesses. To permit the Port to isolate itself from liability, if such liability accrued by reason of the Port's negligence by the mere publication of an exculpatory provision, is unjust and unreasonable in violation of section 17 of the Act. (22 F.M.C. at 27.)

The language of Item 4(a) attempts to relieve the respondent of all liability for damage or injury to cargo and to the extent that 4(a) would relieve respondent of liability for its own negligence, it is an unjust and unreasonable regulation and in violation of section 17 of the Shipping Act.

The other provision in issue, Item 4(d), is an indemnity provision of the kind already found unlawful by the Commission. In *West Gulf Maritime Assn. v. The City of Galveston,* 22 F.M.C. 101 (1979), the Commission struck down a provision of the Port of Galveston's tariff which sought to indemnify the Port against all "claims, actions, damages, liability and expense including . . . attorneys and litigation expenses" in connection

[5] The tariff provision at issue in the *Lucidi* case was quite similar and of the same import as Houston's Item 4(a). It provided:

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

with loss of life, bodily injury or property damage.[6] An indemnification clause which would relieve respondent from all liability in situations even where it was partly responsible is unlawful under section 17. See *West Gulf, supra,* at 104.

Respondent would distinguish its situation from those that the Commission has condemned on several grounds, none of which withstand analysis. The fact that the Port of Galveston is a "political subdivision" of the State of Texas does not exempt the Port from regulation by the Commission under the Shipping Act. See *West Gulf Maritime Assn. v. Port of Houston Authority,* 21 F.M.C. 244 (1978). Respondent says that a review of claims related to the operation of its public wharves revealed that it had consistently paid claims for which it appeared negligent. From this respondent argues that there are no regulations or practices that can be deemed unjust or unreasonable. All that this shows is that respondent does not adhere to its own rules and regulations. It does not show that the tariff provisions at issue are valid.

Respondents would first set up a distinction between "operating ports" and non-operating ports.[7] Then respondents argue that as a non-operating port a different standard should be applied to its tariff. Neither the statute nor the Commission has made such a distinction. It is the act of *furnishing* terminal facilities which makes one an "other person" subject to the Shipping Act. And as an "other person" furnishing terminal facilities, respondent is required to establish just and reasonable regulations for the receiving, handling, storing, or delivering of property. So long as the regulations established would avoid liability even for the Port's own negligence or seek to indemnify the Port against claims based on its own negligence, they are unlawful under section 17 of the Act.

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[6] The Galveston tariff provided:

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

[7] At operating ports, terminal services are performed by the ports' employees. Non-operating ports do not perform terminal services but furnish terminal services for "users" such as stevedores, vessels, etc.

Item 4(a) and (d) of respondent's tariff are found unjust and unreasonable under section 17 of the Shipping Act, 1916.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

NOTICE

May 7, 1984

Notice is given that no exceptions have been filed to the March 28, 1984 initial decision on the rulemaking 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) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–31

VOLUME INCENTIVE PROGRAM—POSSIBLE VIOLATIONS OF THE SHIPPING ACT, 1916

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 Intervnor International Association of NVOCCs.

Howard A. Levy for Intervenor North European Conferences.

Wade S. Hooker, Jr., for Intervenors Atlantic and Gulf-Indonesia Conference, Atlantic and Gulf-Singapore, Malaysia and Thailand Conference, and Inter-American Freight Conference.

Nathan J. Bayer for Intervenors United States Atlantic & Gulf /Southeastern Caribbean Conference and United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Conference.

Elmer C. Maddy for Intervenor Westwood Shipping Lines, Inc.

John Robert Ewers and *Stuart James* for Bureau of Hearing Counsel.

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

Finalized May 7, 1984

This decision is issued in accordance with and should be read in conjunction with the Initial Decision served on January 19, 1984, which is incorporated herein by reference, regarding the adjudicatory aspects of this proceeding. There were no exceptions filed to the aforementioned Initial Decision and, by Notice served on February 29, 1984, the Federal Maritime Commission (the "Commission") declined to review the decision so that it became administratively final.

In the previous Initial Decision, it was noted that the issues were being bifurcated so that the issue regarding rulemaking would be deferred until the other issues had been decided. It was stated that there would be scheduled 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."

On March 6, 1984, a Procedural Order was served wherein all the parties, including those who had been allowed to intervene regarding the

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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).

rulemaking aspects of this proceeding, were "directed to file a report as soon as possible, but no later than March 19, 1984, as to whether or not they believe rulemaking is necessary in light of the holding in the Initial Decision."[2] All of the parties have responded either in writing or orally and each agrees that rulemaking is not warranted or necessary *within the ambit of this proceeding*. While some believe rulemaking is not necessary or is premature, or have simply withdrawn from the proceeding, and others believe there should be rulemaking, all agree that if there is rulemaking, it should be broad enough to encompass consideration of pertinent provisions of the Shipping Act of 1984.

We believe and hold that given the limited parameters of this proceeding and the likelihood that broader and more comprehensive regulations may be required by the Shipping Act of 1984, there is no need for rulemaking in this proceeding. However, we respectfully suggest to the Commission that rulemaking is in order regarding the operation of Volume Incentive Programs generally and call attention to the Time-Volume regulations that are now in effect,[3] as well as to the provision of the Shipping Act of 1984 that allows for the use of "service contracts."[4] Such rulemaking would best be accomplished in accordance with the Commission's rules than are now in effect,[5] rather than by rulemaking arrived at from consideration of the narrow issues presented in this proceeding. In this way the Commission will have the flexibility, time and broad input necessary to the promulgation of a good, practical rule, perhaps of broader application and scope.

In light of the above, it is held that no rulemaking is necessary *in this proceeding*, and it is, therefore, discontinued. Further, we would be remiss if we did not compliment all the parties involved in this proceeding for their diligence and cooperation, which allowed an expeditious and reasoned disposition of the issues involved.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[2] The parties are:
1. New York Freight Bureau and Trans-Pacific Freight Conference (Hong Kong).
2. American President Lines.
3. Sea-Land Service, Inc.
4. International Association of NVOCCs.
5. Bureau of Hearing Counsel.
6. U.S. Atlantic & Gulf/Southeastern Caribbean Conference, et al.
7. Atlantic & Gulf-Indonesia Conference, et al.
8. Westwood Shipping Lines, Inc.
9. North European Conferences.

[3] 46 CFR 536.7.

[4] Section 8(c) of the Act.

[5] 46 CFR 502.51 et seq.

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–57

CLARK INTERNATIONAL MARKETING S.A., A DIVISION OF CLARK EQUIPMENT COMPANY

v.

VENEZUELAN LINE

NOTICE

May 21, 1984

Notice is given that the time within which the Commission could determine to review the April 11, 1984 ruling in this proceeding styled "Ruling on Receipt of Affidavit Filed March 15, 1984," which approved the proposed settlement, has expired. No such determination has been made and accordingly, that ruling has become administratively final.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO 82–57

CLARK INTERNATIONAL MARKETING S.A., A DIVISION OF CLARK EQUIPMENT COMPANY

v.

VENEZUELAN LINE

RULING ON RECEIPT OF AFFIDAVIT FILED MARCH 15, 1984

Finalized May 21, 1984

By order of the Commission served October 5, 1983, in this proceeding, it was ordered that the June 24, 1983, Order approving settlement and granting the motion to dismiss and discontinuing the proceeding be vacated. It was further ordered that the proceeding be remanded to the Presiding Officer for further action, and for supplemental ruling within 60 days.

By Ruling on Remand served November 14, 1983, it was concluded that the parties had not answered certain questions posed by the Commission, and therefore that the proposed settlement could not be approved on the existing record. Further the parties were advised that an oral hearing would be necessary to resolve the matter.

At the request of the parties, the oral hearing set for December 15, 1983, was converted to a further prehearing conference, at which the parties requested time to submit an affidavit to answer the questions posed by the Commission in its order of remand. The time for submission of such affidavit was extended to March 15, 1984, and such affidavit now has been submitted. This affidavit hereby is received as part of the record in this proceeding.

In the complaint, the complainant had alleged that there were overcharges on cargo carried under 58 bills of lading, dated from December 10, 1980, through July 27, 1981. The respondent charged the shipments at the rate for Road Machinery, N.O.S., whereas the complainant sought the rate for Tractors N.O.S.

The Tractors N.O.S., class 19 rate, was $63 per ton of 40 cubic feet (M), or per ton of 2,000 pounds (W), and the Road Making Machinery, N.O.S., class 9 rate, was $99 per ton of 40 cubic feet (M), or per ton of 2,000 pounds (W), both ratings effective August 18, 1980. The affiant, respondent's traffic manager, states that these were the applicable rates for the period in issue herein, and that there were *no changes in these rates* for the carriage of either tractors or road making machinery from December, 1980, through July, 1981.

Effective August 15, 1981, there were increases of $10 per ton in the above class 19 and class 9 rates, respectively making such increased rates $73 and $109 per ton. Exhibits 1 and 2 and attachments to the March 15, 1984, affidavit show all the above rates. The above increased rates were effective *after* the shipments in issue were made.

The shipments actually consisted of "Bobcat skid steer machines," or the attachments for such machines, which attachments were the dirt digging buckets, loaders, etc., for such machines. These buckets, etc., were front loader attachments to the steer machines, which essentially were tractors when viewed without their attachments.

The pertinent applicable tariff did not prescribe a specific rate for skid steer machines. The respondent assessed the $99 rate for Road Making Machinery, N.O.S., believing that the articles shipped were mechanical shovels, or excavating machinery. Respondent further believed that when the attachments like buckets are attached to a tractor, the tractor changes its characteristic and falls within the category of road building machinery.

The major portion of the commodities shipped were skid steer machines with attachments such as dirt buckets. The complainant itself in its advertising brochures consisting of 111 pages used the word "tractor" in only two instances.

On September 28, 1982, the complainant requested the United States Atlantic and Gulf Venezuela Conference to insert in the tariff a separate and new classification and description under the heading of Road Making Machinery, N.O.S., namely, *skid steer-19.*

Complainant's position was that the commodities shipped were tractors, and not road making machinery, that the basic Bobcat series machine is a tractor, and that when attachments such as buckets are attached to the Bobcat machine, it then can perform various functions, as a loader, drill or roller.

The bills of lading show that the attachments were shipped (a) separately, and (b) with the Bobcat machines.

Respondent believed that in all instances the attachments were shipped independently or were shipped separately from the steer machine. This fact remains in dispute between the parties.

Respondent relied on the export declarations and other documents then available in rating the shipments as Road Making Machinery, N.O.S.

Nevertheless, both complainant and respondent now feel that in order to reach a reasonable accommodation in this matter, that a settlement could be reached, thereby eliminating a protracted hearing at a great cost and expense to the parties and to the government.

The settlement agreed on is the payment of $35,000 by the respondent to the complainant, in view of the fact that the alleged overcharge was $54,650.57, which amount was computed by classifying the majority of the shipments as tractors, but classifying the attachments (buckets and load-

ers, etc.) as road building equipment. When shipped separately, the attachments were viewed by respondent as road building machinery only.

In all of the circumstances above, including the explanation in the affidavit received March 15, 1984, it appears that the proposed settlement is reasonable based on the further statement in the affidavit that the parties agreed to the proposed settlement by following the guidelines laid down by the Commission in Docket No. 78–3, *Organic Chemicals (Glidden-Durkee) Division of SCM Corp.* v. *Farrell Lines, Inc.*, 18 SRR 1536a (January 25, 1979), 21 F.M.C. 859, March 14, 1959.

The proposed settlement is approved.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–32

PACIFIC WESTBOUND CONFERENCE—EQUALIZATION AND ABSORPTION RULES AND PRACTICES

ORDER ADOPTING INITIAL DECISION

May 25, 1984

The Commission instituted this proceeding to determine whether the equalization and absorption practices of the Pacific Westbound Conference (PWC), insofar as they affect the Port of Portland, are lawful under section 205 of the Merchant Marine Act of 1936, 46 U.S.C. § 1115, and sections 15, 16 and 17 of the Shipping Act, 1916, 46 U.S.C. §§ 814–816. In addition to the specific issues relevant to Portland, certain of the parties before us have raised important questions regarding the general status of port equalization practices and the continued viability of the concept of "naturally tributary" cargo under the statutes enforced by the Commission.

The PWC practices take the form of tariff rules that are designed to allow the Conference member lines that call at Seattle,[1] but not at Portland, to compete for cargo with carriers that do call at Portland (including other PWC lines). In the context of this case, "equalization" is the practice whereby a shipper with a smaller inland transportation cost to Portland than to Seattle trucks his cargo to Seattle, and a PWC line refunds to him the verified difference between the Seattle and Portland trucking costs. "Absorption" occurs when a shipper pays the cost of moving his cargo from its origin point to Portland, and a PWC line then pays the cost of moving the cargo from Portland to Seattle.[2] The two terms were used interchangeably by the parties and, as in past Commission cases involving such practices there appears to be no legal significance in the choice of terminology. *E.g., North Carolina State Ports Authority* v. *Dart Containerline Company, Ltd.*, 21 F.M.C. 1125, 1128, n. 13 (1979) *aff'd sub nom. Dart Containerline Company, Ltd. v. FMC,* 639 F.2d 808 (D.C. Cir. 1981) ("*Dart*").

Administrative Law Judge Seymour Glanzer (Presiding Officer) served an Initial Decision (I.D.) on April 22, 1983, finding no violation of law. Portland filed Exceptions to the I.D.'s conclusions concerning sections 15, 16 and 17 of the Shipping Act, 1916,[3] to which other parties replied.

[1] There is some evidence in the record of cargo being equalized to Oakland, but the amount is very slight.

[2] Exhibit (Ex.) 1.

[3] Portland did not except to the I.D.'s conclusion that there was no showing of violation of section 205 of the Merchant Marine Act of 1936, which prohibits collective action by ocean carriers preventing service

Continued

Certain parties, led by American President Lines, Ltd., a PWC member, filed self-styled "conditional" exceptions that raise the broad issues mentioned above. The Commission heard oral argument.

THE PROCEEDINGS

The history of this proceeding is exceptionally long and complex, and can best be described by dividing it into two distinct parts.

I. *Preliminary Proceedings*

On February 21, 1975, Portland petitioned the Commission to conduct an investigation into PWC's absorption and equalization practices, complaining that those practices constituted an unlawful diversion to Seattle of cargo "naturally tributary" to Portland. PWC is a steamship conference acting pursuant to FMC-approved Agreement No. 57. The geographic scope of the trade served by PWC's member lines is from U.S. and Canadian Pacific Coast ports westward to Japan, Korea, Taiwan and other Far East destinations.

In addition to its general allegation against PWC's absorption and equalization practices, Portland's petition contended that those practices were unlawful in certain particulars, *i.e.*, that the PWC Agreement was limited in its application to rail or coastal steamer movements and that motor carrier absorptions were not authorized (motor carriage was the inland transportation mode primarily attacked by Portland); that the equalization rules in PWC's tariff should be construed to bar their application to shipments carried by motor carriers exempt from the jurisdiction of the Interstate Commerce Commission; and that PWC's rules were *per se* unlawful because they permitted equalization and absorption of cargo away from Portland where there was direct ocean carrier service sufficient to handle that cargo.

Portland's petition engendered a series of informal and formal (under section 21 of the Shipping Act, 46 U.S.C. § 820) procedures intended to resolve the issues raised without the necessity of a formal proceeding.[4] When those procedures failed to accomplish their purpose, the Commission instituted this proceeding by Order of Investigation and Hearing served September 11, 1978.

The Order of Investigation directed that the proceeding would be governed by the precedents then recently established in *Council of North Atlantic Shipping Associations v. American Mail Lines, Ltd.*, 21 F.M.C. 91 (1978) ("*CONASA*"), and *Board of Directors of the Port of New Orleans v. Seatrain International, S.A.*, 21 F.M.C. 147 (1978) ("*Port of New Orleans*").[5] Under the authority of those decisions, the Order rejected Portland's

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to a port at the same rates as those applicable to the next regularly served port. Portland apparently did not actively pursue this question during the evidentiary hearings.

[4] *See Pacific Westbound Conference—Equalization Rules and Practices*, 21 F.M.C. 937, 938, n. 2 (1979).

[5] These decisions were issued simultaneously on August 8, 1978, long after Portland's petition was first filed. They upheld the lawfulness of through intermodal services offered by ocean carriers. The port and labor interests protesting those services had contended, as Portland does here, that they were being deprived of cargo "naturally tributary" to their geographic bases. The Commission emphasized its obligation to regulate

request that section 8 of the Merchant Marine Act of 1920, 46 U.S.C. §867, be included in the proceeding.[6] The Commission stated that section 8:

> . . . does not require the Commission to incorporate any specific concept of naturally tributary cargo into its Shipping Act considerations, nor does it otherwise create substantive rights in Shipping Act proceedings.[7]

The Order contemplated that trial-type proceedings would be avoided if possible and that the record for decision would consist of new affidavits and memoranda of law, as well as the material submitted under the earlier procedures. In addition to Portland, PWC and the Commission's Bureau of Hearing Counsel, various ports participated as intervenors on a limited basis.[8] Following the submission by the parties of new material as directed by the Order of Investigation, the Commission served on March 30, 1979 a Report and Order of Further Investigation and Hearing (Interim Report). *Pacific Westbound Conference—Equalization Rules and Practices,* 21 F.M.C. 937 (1979).

II. *The Commission's Interim Report*

The Commission concluded that the submissions by the parties had not resulted in a fully developed record on all the issues and that a further

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in an enlightened and progressive manner, so as to encourage modernization of shipping services and expansion of transportation alternatives for shippers. *CONASA,* 21 F.M.C. at 135–136. It concluded that the ports and labor unions had failed to show that the cargo in question had originated in locally tributary areas, or that the ports' viability was threatened by the carriers' practices. *Id.* at 138.

[6] That statute states:

> It shall be the duty of the Secretary of Commerce, in cooperation with the Secretary of the Army, with the object of promoting, encouraging, and developing ports and transportation facilities in connection with water commerce over which he has jurisdiction, to investigate territorial regions and zones tributary to such ports, taking into consideration the economies of transportation by rail, water, and highway and the natural direction of the flow of commerce; to investigate the causes of the congestion of commerce at ports and the remedies applicable thereto; to investigate the subject of water terminals, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, with a view to devising and suggesting the types most appropriate for different locations and for the most expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities regarding the appropriate location and plan of construction of wharves, piers, and water terminals; to investigate the practicability and advantages of harbor, river, and port improvements in connection with foreign and coastwise trade; and to investigate any other matter that may tend to promote and encourage the use by vessels of ports adequate to care for the freight which would naturally pass through such ports: *Provided,* That if after such investigation the Secretary of Commerce shall be of the opinion that rates, charges, rules, or regulations of common carriers by rail subject to the jurisdiction of the Interstate Commerce Commission are detrimental to the declared object of this section, or that new rates, charges, rules, or regulations, new or additional port terminal facilities, or affirmative action on the part of such common carriers by rail is necessary to promote the objects of this section, the Secretary may submit his findings to the Interstate Commerce Commission for such action as such commission may consider proper under existing law.

[7] As discussed *infra,* that action by the Commission is relevant to the "conditional exceptions" filed by APL.

[8] The U.S. Department of Transportation intervened but did not participate.

hearing therefore was necessary.[9] The Commission could only resolve as a matter of law certain of the particular issues raised by Portland. We held that the PWC Agreement did allow equalization or absorption of inland motor carrier rates and cargo; that the rules in PWC's tariffs could apply to transportation of cargo by ICC-exempt motor carriers; and that such rules were not unlawful *per se.*[10]

Portland had argued that *any* absorption of inland freight charges on cargo that would move more cheaply to Portland than to any other port constituted an illegal diversion of cargo "naturally tributary" to Portland, unless it could be shown that Portland's facilities or level of direct ocean service were inadequate.[11] In response, the Commission stated that Portland was relying too heavily on *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106 (1973) and ignoring the more expansive guidelines enunciated in the 1978 *CONASA* decision.[12] The Commission reemphasized that the following principles first stated in *CONASA* would control the disposition of the general issue of the lawfulness of PWC's practices:

> 1. Certain cargo may be naturally tributary to a port, but any "naturally tributary zone" surrounding a port is constantly changing. In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies; and (d) shipper needs and cargo characteristics.
>
> 2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?); (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear

[9] Most significantly, Portland failed to describe the area it considered to be "naturally tributary" to it. 21 F.M.C. at 938, n. 3.

[10] We stated (21 F.M.C. at 941):

> Equalization, as such, is not illegal and a tariff that allows for equalization therefore is not *per se* illegal. It is only the *application* of the tariff in a particular manner that can be illegal. The legality of PWC's Tariff No. 3 apart from its application does not present a separate legal issue in this case. Additionally, the question of adequacy of Portland's service is only *one* of the factors to be considered under the CONASA guidelines, and is not dispositive by itself of the legality of an equalization. For the foregoing reasons, the Commission concludes that PWC's Rule 16, Tariff No. 3, does not, in and of itself, violate sections 15, 16 or 17 of the Shipping Act, 1916, or contravene section 205 of the Merchant Marine Act of 1936. The question of the legal application of the Rule still remains . . . (emphases in original; footnote omitted).

[11] In the subsequent proceedings before the Presiding Officer, Portland continued to define "naturally tributary" by a comparison of inland freight rates.

[12] In the 1973 *Portland* decision, the Commission relied primarily on a comparison of inland mileages in determining that certain cargo was "naturally tributary" to Portland. 17 F.M.C. at 127. To a significant degree, the Commission based its resolution of the issues before it in that case on section 8 of the Merchant Marine Act of 1920. *Id.* at 125–27, 133–35.

upon the carrier's ability to provide direct service (*e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed (*e.g.*, absorption, solicitation). 21 F.M.C. at 939–40.[13]

The Commission restricted the further hearing to consideration of the following components of the ultimate issue (21 F.M.C. at 942):

(1) Whether and to what extent the equalization and absorption practices of the Pacific Westbound Conference cause cargo which would ordinarily move through the Port of Portland to move through ports other than Portland?;

(2) Does the diversion of cargo described in issue (1), if any, cause *significant* economic harm to the Port and the local economy of Portland?; and

(3) If the equalization and absorption practices of the Pacific Westbound Conference do cause significant economic harm to Portland, are they nonetheless reasonable and justified? (Emphasis in original).

Acknowledging that the evidentiary record could become unmanageably large without further guidelines, the Commission structured the proceeding by limiting the introduction of additional evidence primarily to information regarding the ten most important cargo commodities (measured in terms of gross revenue to the Port of Portland) carried by PWC in 1977 and 1978.

Portland did not seek court review of the conclusions of law stated in the Interim Report. Also, Portland did not and does not take exception to the Report's limitation of the scope of the further proceedings as described above.

Altogether, there were 39 days of hearings that produced 5,374 pages of transcript and 161 exhibits. There were 25 witnesses, including three economists. Briefs were filed by Portland, PWC, Hearing Counsel, APL and Sea-Land Service, Inc., which are members of PWC, and by intervenors Delaware River Port Authority, the Port Authority of New York and New Jersey and the Port of Seattle (Seattle).

III. *The Initial Decision*

A. *Findings of Fact*

The Initial Decision examined 214 findings of fact proposed jointly by PWC and Seattle. In all important respects, the Presiding Officer found that those findings were supported by the record and should be adopted. Some of the most critical findings are as follows:

[13] The Commission also rejected the argument that the *CONASA* guidelines should be restricted to through intermodal movements such as "minibridge" and were not applicable to movements between adjacent ports through absorption.

The ten most important commodities equalized or absorbed by PWC member lines in 1977 and 1978 were apples, canned corn, dried peas and beans, frozen corn, hides, lumber, meat and bone meal, metal scrap, onions and wastepaper. In 1977, these commodities accounted for 87% of the total tonnage equalized by PWC carriers. All of this cargo was containerized.[14]

Between 1977 and 1979, Portland was susceptible to shortages in both refrigerated and dry cargo containers because of an imbalance in its inbound/outbound container trade. Far fewer containers were received at Portland inbound than were needed for outbound movements.

Bulk and bulk-type cargo, such as grain, lumber, steel and automobiles make up most of Portland's tonnage, both inbound and outbound. The tonnage volume at Portland increased steadily since fiscal 1971–72. Fiscal 1978-79 was the best year in Portland's history, with non-grain cargo tonnage exceeding mid-range forecasted tonnage for 1980 and 1985.[15]

Portland did not enter the container business until 1971,[16] well after Seattle had already become established as the leading container port in the Pacific Northwest and a container "load center." Seattle made the decision in the 1960's, anticipating the growth of containerization, to make the necessary investments.[17] As a result, Seattle handled 2,400,000 short tons of containerized cargo in 1977 and 2,774,000 short tons of such cargo in 1978, which figures represent ratios of better than 4 to 1 and 3.6 to 1 over Portland's results.[18] Nevertheless, despite its late start, Portland's container business improved substantially during the period of record. Export container tonnage increased from 381,000 in 1975 to 639,000 in 1979 (an increase of 68%), and total container tonnage increased from 521,000 in 1975 to 867,000 in 1979 (an increase of 67%).[19]

To a greater extent than was true of the PWC trade in general, or the PWC Pacific Northwest trade in particular, vessels sailing from Portland to PWC destinations reached operating weight capacity before exhausting their TEU (or container) capacity. Thus, the existence of unused TEU capacity on ships leaving Portland for PWC destinations in 1977 and 1978 does not mean that those ships could have carried any additional cargoes.[20] On the contrary, PWC's chief witness with respect to the capacity of the "Japanese Six" member lines testified that in 1977 and 1978, those lines' vessels calling at Portland operated at or near their actual carrying capacities, even though design capacity may not have been reached. This testimony was credible and significant.

[14] Ex. 95, Schs. 1 and 3.
[15] Ex. 46, p. 6–8; Ex. 54; Ex. 72; Tr. 1315–16.
[16] Tr. 1202.
[17] Ex. 134, p. 2, 11–16.
[18] Id., p. 3; Ex. 54.
[19] Ex. 54; Ex. 46, p. 9.
[20] Ex. 139, p. 18; Ex. 142; Ex. 143; Tr. 4894–95.

Portland engaged in various competitive pricing activities designed to attract cargo to it and away from competing ports such as Seattle. Portland attributed its growth in container cargo from 1977–79 in part to these practices.[21] Portland's witness Mowat could offer no economic or policy reason why these practices should be distinguished from PWC lines competing for cargo via Seattle by equalizing or absorbing inland transportation costs.[22]

Portland is closer than Seattle to the inland origin points places of most, if not all, of the equalized "top ten" commodities. But via ocean navigation routes, Seattle is closer than Portland to many of the principal PWC destinations (particularly Japan).[23] Existing trade routes and traffic patterns make Portland even more distant from PWC destinations. Carriers considering calls at other ports, such as Portland, in the same region as Seattle, the load center, must view the call as an *additional* port call with the attendant additional expenses and scheduling problems. An additional call at Portland would require a vessel to travel many more water miles (including more than 200 miles up and down the Columbia River) than the mere difference in ocean distances, or the overland motor carrier distance from Portland to Seattle (about 172 miles).[24]

It is unlikely that any of the equalizing PWC carriers could have earned a profit by adding a Portland call instead of equalizing.[25]

A port's longshore labor productivity in handling containers is measured by the number of containers that can be loaded per crane, per hour. For a carrier, this productivity affects the unit cost per container and the carrier's ability to adhere to fixed scheduling. Compared to other West Coast ports, including Seattle, Portland was the lowest labor productive port in 1978 and 1979.[26] As late as October, 1979, Portland recognized that berth conflicts and ship queuing were significant problems at its major container terminal.[27]

During 1977 and 1978, export shippers of the "top ten" commodities using Portland encountered recurrent difficulty in obtaining cargo space on vessels making direct calls, particularly during fall and winter months when seasonal cargo flow is high.

A fast transit time and sailing frequency is important to shippers of refrigerated or perishable cargo, as well as to shippers of high-value cargo where the daily interest charge has significance,[28] and for shippers of "spot market" cargo such as wastepaper and metal scrap.[29] The fastest

[21] Tr. 1191–92, 1195.
[22] Tr. 1579–80.
[23] *See* Tr. 705.
[24] Ex. 136, p. 12–13, 18.
[25] Ex. 139, p. 23–33.
[26] Tr. 4994–97.
[27] Ex. 45.
[28] Ex. 136, p. 6.
[29] Tr. 2620–21, 4304–4305.

transit times (measured by sailing days) to PWC destinations from Portland and Seattle in 1978 were as follows:

	Seattle	*Portland*
Japan	9	11
Korea	11	15
Taiwan	12	18
Hong Kong	15	19
Philippines	21	21

Portland's definition of its naturally tributary territory was based almost exclusively on comparative inland freight rates.[30] Since inland freight rates change constantly, so would Portland's naturally tributary territory as Portland defines it.[31] Portland acknowledged that it was obliged to provide adequate service and facilities for shippers and carriers. However, Portland also took the position that adequacy of service for any shipper of a particular commodity was established by a showing that some quantity of that commodity had, at some time, been loaded aboard a vessel sailing from Portland.[32]

All three economists who testified in the proceeding—including Portland's witness Krekorian—agreed that equalization and absorption were market-enhancing, not market-distorting, practices. Krekorian testified that such carrier practices were equivalent to price competition among ports and thus normal marketplace behavior.[33]

Based on exporters' testimony as to their transportation needs, the routing they would apply and their inability to obtain service from Portland, Hearing Counsel's economist Copan concluded that the least costly and most efficient system for ocean carriage of the "top ten" commodities was the movement of those cargoes pursuant to equalized service through Seattle. He concluded that none of the top ten commodities was naturally tributary to Portland because each moves with greater transportation efficiency through Seattle.

There is no showing that any of the "top ten" commodities which were shipped from Seattle pursuant to equalized service would otherwise have been loaded aboard vessels at Portland. No shipper witness was called by Portland.[34] The shipper witnesses who testified were called by Hearing Counsel. Many were Oregonians who expressed a preference, out of loyalty to their state, to ship from Portland. Nevertheless, they used equalized service out of Seattle because that was the only way they could effectively compete with other shippers, foreign and domestic, and get their goods to the marketplace. The other shipper witnesses gave the same or similar reasons for using Seattle. If PWC equalized service were not available,

[30] Ex. 79; Tr. 1250, 1252.
[31] Tr. 395–97.
[32] Tr. 1750–51, 1759–63.
[33] Tr. 2192–99.
[34] *See* Tr. 1100–1101, 1728.

some shippers would be shut out of export markets,[35] some would have used non-conference equalized service out of Seattle[36] and others would have paid the inland charges to Seattle without equalization or absorption.[37]

Portland's evidence purporting to show the extent of the economic harm suffered by it due to diversion of cargo to Seattle was based on an assumption that all of the PWC equalized cargo in 1977–78 would otherwise have been loaded at Portland.[38] There is no basis in the record for that assumption.

Even assuming that all of the PWC-equalized cargo in 1977–78 would otherwise have moved through Portland, the economic harm to Portland and its metropolitan area was not significant.

PWC equalized service provides the means for Conference members to be price competitive at rate levels which enhance the ability of the cargo to be exported.[39] The PWC lines would be at a competitive disadvantage with independent carriers were it not for the PWC equalization and absorption practices. The non-conference carriers could continue to compete for Oregon, Washington and Idaho cargo, without calling at Portland, by means of substituted service or other pricing mechanisms.

The PWC equalization and absorption practices promote transportation efficiency by enhancing both shipper transportation alternatives and carrier competition.

B. *Ultimate Findings and Conclusions*

In light of the findings of fact summarized above, the Presiding Officer concluded under the *CONASA* standards that none of the "top ten" commodities were "naturally tributary" to Portland. He found that Portland, which bore the burden of proof on this issue, failed to show that those commodities moved primarily through it prior to the institution of PWC's equalization and absorption rules, or prior to the key years of 1977 and 1978. While inland transportation rates obviously favor Portland (or there would be no equalization and absorption), the Presiding Officer held that ocean distances and routes generally favor Seattle. Shipper needs and the special characteristics of the cargo (*e.g.*, the importance of quick and regular service for time-sensitive commodities such as agricultural products and those sold in spot markets) also were found to weigh against any finding that the commodities were tributary to Portland.

Although his conclusion that none of the commodities in issue was naturally tributary to Portland essentially ends the inquiry, the Presiding Officer also found that PWC's practices did not harm Portland or its local economy, that PWC's practices were justified by any reasonable oper-

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[35] *See* Tr. 2309–2311.

[36] Tr. 821–22.

[37] Tr. 2387, 2390, 4381–82.

[38] Tr. 949, 1714–15.

[39] Tr. *1605, 2195–99.*

ational or economic test and that there was no showing of violation of sections 15, 16 First or 17 of the Shipping Act.

POSITIONS OF THE PARTIES

I. *Exceptions*

A. *Portland*

With respect to the "naturally tributary" issue, Portland reiterates that if a commodity moved through a port in any quantity in spite of practices intended to direct the commodity elsewhere, then it is reasonable to infer that the commodity is naturally tributary to that port. Portland concedes that one of the "top ten" commodities, apples, has not moved through it, but contends that the other nine commodities "regularly moved through Portland in significant volumes" prior to and including 1977 and 1978.[40] It argues that the Presiding Officer should have ended his analysis after considering inland distances and routes in weighing geographic and transportation efficiencies, and erred in proceeding to consider also Seattle's advantage in ocean distances and routes. Portland also claims that Seattle's advantage is not significant, particularly when the inland distance from Portland to Seattle is factored into the equation, and that, in any event, Portland had equal or faster transit times to most of the PWC destinations during the period of record[41] (though this is based on the same vessel calling at Portland *after* calling at Seattle).

Portland asserts that it meets shipper needs by virtue of its competitive terminal charges and facilities, equal ocean rates,[42] efficient inland transportation and other services.[43] It takes exception to the Presiding Officer's focus on whether there was sufficient cargo space available at Portland to accept the tonnage actually equalized, and claims that its ability to meet shipper needs is proven by the "continued large volumes" of the commodities that move through Portland to PWC destinations.[44]

Portland also argues that unused capacity allegedly experienced by the "Japanese Six" lines calling at Portland and the entry of other carriers into the Portland market show that market forces, when unimpaired by such devices as equalization and absorption, have and will continue to respond to shipper needs.[45] It protests the Presiding Officer's findings concerning berth congestion and labor inefficiency, contending that these problems have been alleviated. With regard to the issue of economic harm, Portland abandons its previous attempt to quantify the monetary loss it

[40] Portland Exceptions at 7.

[41] Id. at 11–12.

[42] This confirms the I.D.'s conclusion that no issue remains regarding section 205 of the Merchant Marine Act of 1936.

[43] Portland Exceptions at 13–14.

[44] *Id.* at 17.

[45] Portland does not state when the specified carriers began service from Portland, but we assume that it took place after the close of the record.

allegedly suffered, but instead claims that it lost ten percent of its total export container tons in 1978 and that the diversion of such a percentage threatens its viability as a container port and justifies remedial action by the Commission.[46]

Portland contends that the I.D.'s findings that an additional call at Portland would be unprofitable is in error, and that the real choice confronting carriers such as APL and Sea-Land is between the profitable service they offered from Seattle, and a somewhat less (but still) profitable service featuring an additional call at Portland. Having so phrased the options, Portland states that the carriers' refusal to serve Portland is "inherently unreasonable."[47] It further states that the question of fair competition between PWC lines and non-conference independents is less important than fairness to ports such as itself. Portland also accuses the PWC lines of concentrating their equalized service on high-rated cargoes that "prejudices shippers and carriers alike that would attempt to move these higher rated commodities through Portland."[48] Portland admits that the applicable PWC tariff rule makes no distinction between high-rated and low-rated commodities, but insists that the rule is applied in a discriminatory manner.

B. *APL'S "Conditional" Exceptions*

APL's Exceptions are to the Presiding Officer's refusal to consider its arguments that equalization and absorption practices cannot in themselves violate sections 16 First or 17 of the Shipping Act.[49] The Presiding Officer considered himself bound by the *CONASA* standards and the Commission's Interim Report in this case.

APL looks first to the language of sections 16 and 17, which forbid a carrier from creating undue or unjust preference, advantage, prejudice or discrimination. The statutes do not forbid the carrier, according to APL, "from creating *equality*, by eliminating the inequality of transport cost otherwise giving advantage to the port geographically closer to the shipper."[50] The carrier asserts that the legislative history of the Shipping Act shows that Congress was at least aware of port equalization practices by carriers and did nothing to condemn them. APL traces the development of the "naturally tributary" doctrine from section 8 of the Merchant Marine Act of 1920 to the *CONASA* guidelines. It then argues that the *CONASA* rules are wrong because (a) there is no true statutory basis for the "naturally tributary" doctrine; (b) the easy intermodal movement of containerized cargo means that it is tributary to no port; (c) the *CONASA* factor of "shipper needs and cargo characteristics" is contrary to the notion behind the "naturally tributary" doctrine that a port has an inherent right to

[46] Portland Exceptions at 27–28.

[47] *Id.* at 31.

[48] *Id.* at 33.

[49] APL's Exceptions are "conditional" in that the carrier wished the Commissiori to consider them only if the I.D. was reviewed on the merits. APL is joined by Sea-Land and PWC.

[50] APL Exceptions at 4 (emphasis in original).

certain cargo; (d) the *CONASA* test of the "reasonableness" of the carrier practice requires the Commission to intrude to an unlawful degree into carrier and shipper business decisions; (e) there is no statutory foundation for protection by the Commission of ports from competition; and (f) rather than providing clear decisional guidelines, the *CONASA* rules have caused only further contradictions and anomalies.[51]

APL also contends that section 205 of the Merchant Marine Act of 1936, and Commission decisions thereunder, *require* conferences to maintain "port equality" in constructing their tariffs, and that a conference cannot at the same time be forbidden to publish a tariff rule that allegedly creates such equality. Finally, APL summarizes various aspects of transportation policy that support the result it urges, including the avoidance of enforced port monopolies, widening of transportation flexibility and encouragement of intermodalism and containerization.[52]

C. *The Port Authority of New York and New Jersey*

The Port Authority of New York and New Jersey ("Port Authority") filed Exceptions similar to APL's. The Port Authority argues that:

> [W]hether or not traffic is being diverted from a particular port's "naturally tributary" area begs the question. The *real* question is whether or not a particular carrier's equalization/absorption practices are reasonable under the relevant circumstances. In other words, the normal analysis under sections 16, First and 17 should be employed, without reference to a doctrine of "naturally tributary traffic.[53]

The Port Authority interprets the *CONASA* decision as recognizing that a case involving equalization and absorption practices "is really no different from any other case arising under sections 16 First and 17."[54] However, it then says that the Commission resurrected the "naturally tributary" doctrine in the subsequent *Dart* decision, and "eased the burden of proof for complaining port interests."[55] The Port Authority urges that the doctrine of "naturally tributary" cargo be abandoned and the Commission hold that equalization and absorption practices cannot, by themselves, violate the Shipping Act.

II. *Replies to Exceptions*

Replies to Exceptions were filed by PWC, the Port Authority, Seattle, Hearing Counsel and APL. The Port Authority's Reply restates the arguments made in its Exceptions and will not be discussed further.

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[51] The alleged contradictions and anomalies are recited at page 17 of APL's Exceptions, n. 42.

[52] *Id.* at 23–24.

[53] Port Authority Exceptions at 4.

[54] *Id.* at 11–12.

[55] *Id.* at 12.

A. *Seattle*

Seattle's Reply is an amalgam, in that in great part it attacks the "naturally tributary" doctrine essentially as APL did, and only in minor part discusses the *CONASA* standards and the lawfulness of the PWC practices. Seattle distinguishes its position from APL by stating that it does not contend that equalization and absorption can never violate the Shipping Act.[56] It contends that the record in this case demonstrates that the Commission should abandon the "naturally tributary" concept as applied to containerized cargo. Seattle argues that if any geographic area or cargoes could, at one time, have been considered "naturally tributary" to a port, containerization "and an everchanging inland transportation infrastructure have resulted in a continuous change in those areas and cargoes." [57] Referring to Portland's claim before the Presiding Officer that it could have as many as 60 naturally tributary territories for the "top ten" commodities at any one time, Seattle states that the actual number could be as high as 240 territories, depending on the number of different inland rates available per commodity, and that these zones could change as often as the rates did (perhaps daily). Seattle contends that it is impossible to base a meaningful regulatory regime on such a malleable concept.

B. *PWC*

PWC first points out that while Portland took exception to 24 findings of fact (and 12 "conclusions") stated by the Presiding Officer in the I.D., 11 of those findings refer to proposed findings submitted jointly by PWC and Seattle but adopted by the Presiding Officer only insofar as they are supportive of other findings. PWC notes that, in substance then, Portland has excepted to only 14 of the 184 findings contained in the I.D. PWC states that the remaining undisputed 170 findings are "more than sufficient to compel adoption of the ALJ's decision."[58]

With respect to Portland's specific exceptions, PWC argues that there is no evidence that supports Portland's contention that actual vessel capacity existed to move the cargoes at issue from Portland during the times the cargoes actually moved during 1977 and 1978. According to PWC, the record shows instead that what little *annual* capacity may have existed among the "Japanese Six" lines was not available at the times and in the amount needed by the shippers of the equalized cargoes, and could not have accommodated the tonnages in question. With regard to the issue of relative transportation efficiencies, PWC stresses that any carrier considering adding a Portland call to pick up the potential additional cargo represented by the "top ten" commodities would face incremental and highly expensive vessel miles (including but not limited to 200 miles of the

[56] Seattle Reply at 3.

[57] *Id.* at 37.

[58] PWC Reply at 1; footnotes omitted. The same argument is made by APL at p. 1–3 and 10 of its Reply to Exceptions. The remainder of APL's Reply makes no arguments not also made by PWC.

Columbia River), which would exceed substantially the total overland distance under the equalization/absorption alternative. The Presiding Officer's consideration of the entire efficiency equation (including relative ocean transit miles) was, in PWC's view, proper and required by the Commission's Interim Report.

PWC states that Portland's contentions that it has cured its labor productivity and congestion problems are either irrelevant to the test years of 1977 and 1978, or were not raised below and are thus improper now.[59] It notes Portland's failure to challenge the I.D.'s finding regarding a structural shortage of containers at the port. PWC defends as fully supported by the record the I.D.'s finding that a weekly service interval by carriers calling at Seattle (which makes an additional call at Portland unfeasible) is necessary to permit them to compete. It attacks as unsupported by the record Portland's "attempts to create a new test" of historical cargo flow by the standard of whether a commodity has ever passed through the port to any destination under any conditions,[60] and Portland's similar contention that because it has provided service to other shippers at other times, it presumably could have served also the needs of the shippers of record, regardless of the shippers' testimony to the contrary. With regard to the question of economic harm, PWC terms Portland's claim of a ten percent loss of containerized cargo as a "straw man" and points out that Portland failed to except to the I.D.'s finding that, even under Portland's definition of "diversion" (*i.e.*, that the equalized cargo would have and could have moved via direct service at Portland), there was in fact no evidence of such diversion.[61] PWC states that if the correct comparison is made between the equalized tonnages and Portland's overall export tonnages, then the equalized tonnage in 1978 (the year of the largest movement of such tonnage) amounted to less than one percent of Portland's export tonnage.[62]

Concerning the effect on carrier profitability of a direct call at Portland, PWC contends that the analysis accepted by the I.D. assumed that all the equalized cargo moved through Portland and found that even in such theoretical circumstances, losses to the carriers nevertheless would occur.[63] Finally, PWC states that Portland's charge of discriminatory application of PWC's equalization rule is unsupported by the record and "directly contrary to the Port's own voluntary withdrawal of any allegations of 'unlawful implementation' of the PWC tariff."[64]

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[59] PWC Reply at 25–26.

[60] *Id.* at 42. PWC notes that Seattle historically has handled far greater volumes of the commodities in issue than Portland. *Id.* at 64.

[61] *Id.* at 54, 52.

[62] *Id.* at 56.

[63] *Id.* at 70.

[64] *Id.* at 74.

C. *Hearing Counsel*

Hearing Counsel's Reply focuses primarily on the broad legal arguments made by APL and the Port Authority of New York and New Jersey. They stress that the language of the Shipping Act forbids only unreasonable discrimination and consequently requires an examination of the particular circumstances under which equalization or absorption is employed, before a determination can be made as to the lawfulness of the practice. Hearing Counsel state that "APL's request for blanket preapproval for all port equalization schemes would preclude the Commission from judging each particular practice on its own merits."[65]

DISCUSSION

I. *The Initial Decision*

The I.D. is fully supported by the record and applicable case law and, except as indicated in our discussion below, is hereby adopted. PWC and APL are correct in their claim that the Presiding Officer's findings of fact that have gone unchallenged by Portland are entirely sufficient, by themselves, to support a conclusion that the PWC practices are lawful under the *CONASA* standards. To make this clear, it is worth summarizing some of those findings. During the period of record, Portland experienced recurrent shortages of containers available for export cargo. During 1977 and 1978, shippers of the "top ten" commodities encountered recurrent difficulty in obtaining cargo space on vessels calling at Portland, particularly during fall and winter months when seasonal cargo flow is high. It is unlikely that any of the equalizing PWC lines could have earned a profit by adding a Portland call instead of equalizing. There is no difference in economic terms between Portland's pricing practices that are designed to draw cargo away from Seattle and the equalization practices of the PWC lines; both are normal competitive behavior and thus are market-enhancing rather than market-distorting. Despite Portland's late entry into the container business, the amount of container tonnage it handled increased substantially during the period of record. Even assuming that all of the PWC-equalized cargo in 1977 and 1978 would otherwise have moved through Portland, there was no significant economic harm caused to Portland and its local economy by the PWC practices. The PWC equalization and absorption practices promote transportation efficiency by enhancing both shipper transportation and carrier competition.

When these and other findings are integrated into the *CONASA* standards, they compel a conclusion that the PWC equalization practices do not violate the Shipping Act. Portland failed to show that the "top ten" commodities were "naturally tributary" to it. The concept of "naturally tributary" has been applied in Commission case law to both geographic *territory*[66] and

[65] Hearing Counsel Reply at 3.

[66] *E.g., Stockton Port District v. Pacific Westbound Conference*, 9 F.M.C. 12 (1965).

to particular *commodities*.[67] The broad notion of a geographic territory tributary to a particular port clearly implies that all commodities exported from (or imported to) that territory are also tributary to the port. Throughout this proceeding, Portland has declined to define the boundaries of the territory that it claimed as tributary to it on any basis other than that area in which any inland freight rate was lower to Portland than to Seattle. Such an area is virtually limitless in size and can certainly include the Middle West of the United States as easily as it does Portland's immediate neighborhood. This approach was specifically rejected in *Port of New Orleans*, the companion case to *CONASA*, for reasons equally applicable to the present case:

> Naturally tributary cargo is basically cargo from a geographic area local to a given port. A naturally tributary zone does not describe a general territory which may be served competitively by a range of ports and it specifically does not include cargo originating from or destined to the central United States. * * * Regardless of historical movement patterns and comparative geographic proximity, the term "naturally tributary cargo" cannot be extended to the point where a port or range of ports can claim a multi-state inland region as its exclusive "territory." 21 F.M.C. at 153.

Although it claimed to rely on inland freight rates, Portland offered virtually no evidence of any actual freight rates because it assumed that if there was equalization or absorption, then the rates favored Portland and no further inquiry with respect to the "naturally tributary" issue was necessary. In other words, Portland's position is that once it has been found that freight rate differentials are being reimbursed by the PWC carriers pursuant to the conference tariffs, then the commodities carried come from within Portland's tributary (but undefined) territory.[68] This is essentially a repetition of Portland's argument during the preliminary stage of this proceeding that any absorption or equalization of inland freight charges on cargo that would move most cheaply to Portland constituted illegal diversion, unless the defending carriers could show that Portland's shoreside facilities or level of direct ocean service were inadequate.[69] Again, however, Portland's position is contradicted by established precedent. In the Commission's Interim Report, which Portland has never challenged, we found that argument to be inconsistent with the *CONASA* principles, which state clearly that inland rates are only one of several factors that must be considered in resolving the "naturally tributary" issue. As discussed below, the factor

[67] *E.g., Proportional Rates on Cigarettes and Tobacco*, 6 F.M.B. 48 (1960).

[68] This is the gist of Portland's argument in its Exceptions that the Presiding Officer "was not required to go further" than determining that inland rates were lower to Portland than to Seattle (Portland Exceptions at 10).

[69] Text accompanying n. 11, *supra*.

of inland rates may favor Portland but the other *CONASA* factors—most notably shipper' needs—strongly disfavor it.

Thus, Portland's efforts to define its "naturally tributary" territory failed on the evidence, the law and as a matter of logic. When the focus is narrowed to the specific *commodities* in issue in this case—the "top ten" commodities equalized in 1977 and 1978—the weakness of Portland's case becomes even more obvious.

It must first be stated that the literal letter of the *CONASA* test, *i.e.*, how the commodities were exported before the carriers began equalizing or absorbing, cannot be followed in this case because the PWC practices have been in place for as long as any witness could remember. Under such circumstances, Portland's resort to a test of whether the commodities have continued to pass through Portland in some quantity during the period of record is not in itself unreasonable. However, such an argument must be supported by evidence that the commodities continued to pass through Portland—despite the availability of equalized service through Seattle—because of some cargo characteristic or transportation factor that made Portland the "natural" port of exit for those commodities. But Portland failed to adduce such evidence. Despite the fact that the investigative focus on the "top ten" commodities made specific shipper testimony vitally important to the "naturally tributary" issue, Portland made no effort to produce any such testimony. The shipper testimony in this case was brought forward by Hearing Counsel. Collectively, that testimony is the most compelling evidence in the record before us. The shippers testified—and Portland does not challenge their statements—that were it not for the equalized service from Seattle offered by the PWC carriers, they would not have been able to export their goods. It should be noted that the shippers did not emphasize inland rates more significantly than other factors; the evidence revealed, in fact, that even without equalization and absorption, some shippers were prepared to pay the inland freight cost themselves in order to ship through Seattle. In the face of such testimony, we have no basis for accepting Portland's assertion that those shippers *could* use Portland because Portland has sometimes been used by shippers of the same commodities and, further, that because those shippers could use Portland, then they *must* use Portland regardless of the impact on their ability to enter export markets. On this record, an order by the Commission forbidding or substantially altering the PWC service could be harmful to U.S. foreign commerce.

In sum, there is no reliable evidence that any of the "top ten" commodities equalized by the PWC carriers in 1977 and 1978 were "naturally tributary" to Portland. That conclusion essentially disposes of this case. However, it should be noted that Portland's contentions regarding adequacy of service and facilities are contradicted by the Presiding Officer's unchallenged finding that it suffered recurrent shortages of export containers during 1977 and 1978; we also agree with PWC that Portland's attempt to rebut

the Presiding Officer's findings regarding poor labor productivity and berth congestion is irrelevant to the test years. It is clear that requiring the equalizing PWC carriers instead to add a direct call at Portland after calling at Seattle would be unreasonable; Portland offers no evidence against the Presiding Officer's finding that it is unlikely that any of the PWC carriers could earn a profit by adding a Portland call.[70] Further, there is no substantial evidence that Portland has been significantly harmed by PWC's practices; on the contrary, it is more likely that the increased motor carrier and export activity caused by the PWC service resulted in a net gain for Portland.[71]

Only one small part of the I.D. appears to be unsubstantiated by the record. In dictum, the Presiding Officer suggests that the Commission consider requiring an amendment to the PWC Agreement and/or to the PWC dual rate contract to excuse shipper obligations under the contract if there should be no PWC direct service available at Portland or other Columbia River ports in the future. The Presiding Officer states without citation to the record[72] that "[t]here is evidence that PWC contract shippers . . . did not consider utilizing independent liner services which might have been available at [Portland] out of fear of being deemed in violation of their contracts."[73] One shipper apparently so testified, but even that fragment of evidence is unclear.[74] The Presiding Officer's concern about "a possibility of substantial harm" to Portland is based on an elaborate set of hypothetical circumstances, none of which are present here. If *present* shippers (it should be borne in mind that this record is nearly three years old) are experiencing difficulties with the PWC dual rate contract, they are free to pursue a remedy under Shipping Act complaint procedures or otherwise bring the matter directly to the Commission's attention.

Any arguments advanced by Portland but not specifically discussed above have been considered and rejected.

II. *The Broader Legal Issues*

As APL recognizes, the Commission is under no obligation to go beyond the facts of this case and address the broader legal issues the carrier poses in its Exceptions. Although the Commission may fashion broad new rules in adjudicatory proceedings, *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), a revision as radical and broad as that requested by APL might have been more suitable for a rulemaking, in which all affected interests

[70] Portland's argument in its Exceptions that an additional call at Portland would be profitable has no support in the record. The relevant testimony assumed that *all* the equalized cargo moved through Portland (despite shipper testimony to the contrary) and found that even in such theoretical circumstances, losses to the carriers nevertheless would occur (Ex. 139, p. 23–33; Ex. 136, p. 10–20). Portland also suggests that there would be *additional* container traffic in the absence of equalization, but there is no evidence on this point.

[71] Ex. 139, p. 68–73.

[72] The I.D. makes no findings of fact relevant to this discussion.

[73] The Presiding Officer also states that there is no evidence that PWC or any of its members caused this concern in any way.

[74] Tr. 4261–62.

(including federal agencies) had an opportunity to participate. APL requests a ruling that would be of considerable importance to all U.S. ports. Although Seattle and New York generally support APL, there might well be other ports (besides Portland) that did not participate in this case but would have opposed APL's position. "Notice-and-comment procedures . . . are especially suited to determining legislative facts and policy of general, prospective applicability." *National Small Shipments Traffic Conference, Inc., et al.* v. *ICC,* 725 F.2d 1442, 1447–48 (D.C. Cir. 1984) *See also Intermodal Service to Portland, Oregon,* 17 F.M.C. 106, 125, n. 10 (1973).

Nevertheless, APL's arguments have considerable force and, to the extent appropriate, deserve a response. One matter can be addressed specifically. APL and Seattle attack the role of section 8 of the Merchant Marine Act of 1920 in the development of the "naturally tributary" doctrine. The Commission at one time explicitly stated that the doctrine is based on section 8. *Investigation of Overland/OCP Rates and Absorptions,* 12 F.M.C. 184, 224 (1969). However, in recent years, the Commission has moved away from section 8, to the point of explicitly refusing to include it in orders of investigation. This was done even in cases where the Commission ultimately found in favor of the complaining port. *North Carolina State Ports Authority* v. *Dart Containerline Company, Ltd.,* 21 F.M.C. 1125, 1126, n. 3 (1979) , *aff'd sub nom. Dart Containerline Company, Ltd.* v. *FMC,* 639 F. 2d 808 (D.C. Cir. 1981). As previously mentioned in this Order, that approach was taken in this case.[75] We reiterate now that section 8 will not be the basis for Commission investigations of carrier equalization practices.

APL faults the "naturally tributary" doctrine for its implication that ports have a "natural right" to certain cargo. But ports are a class specifically protected by sections 16 and 17 of the Shipping Act, 1916, and those sections' prohibitions against unreasonable preference and discrimination are carried forward in essentially identical terms in subsections (b) (6) , (10) , (11) and (12) of section 10, "Prohibited Acts," of the Shipping Act of 1984, Pub. L. No. 98–237. Under those circumstances, the Commission is constrained from concluding on this adjudicative record that ports do *not* have a "natural right" to certain cargo. For the same reason, we decline to adopt APL's argument that equalization practices can never be illegal.[76] Our further comments perforce must be restricted to generalized guidance for the shipping industry.

Like most recent cases involving port challenges to equalized service, this investigation involved containerized cargo. In the 1978 *Port of New Orleans* decision, the Commission discussed at length the possible impact

[75] P. 5–6, *supra.*

[76] That argument was opposed by Hearing Counsel in their Exceptions and during the Oral Argument, where they suggested factual situations in which equalization could be unjustly discriminatory (Oral Argument Tr. 62–65) . Seattle also opposed APL in part (Seattle Reply to Exceptions at 36, footnote marked by asterisk; *see* Oral Argument Tr. 58–59).

of containerization and intermodalism on historical traffic patterns. We recognized that the container revolution might mean the development of regional port "load centers" that would minimize time in port for large containerships and enhance frequency and regularity of service for shippers. 21 F.M.C. at 174. This in turn might cause a territory that had been naturally tributary to a port for breakbulk cargo to not be tributary for containerized cargo. *Id.* at 174–75. We emphasized the Commission's responsibility to avoid rigid regulation based on outmoded concepts that would stifle advances in ocean transportation to the detriment of the public interest. *Id.* at 175.

In examining the record of this case six years after *CONASA* and *Port of New Orleans* were decided, it is clear that the regulatory approach taken in those cases and followed again now was and is appropriate. The expert testimony in this case is unanimous that the equalization practices of the PWC carriers are identical in economic terms to price and service competition between Portland and Seattle or any other two points. In the absence of substantial evidence that such practices are unjustly discriminatory, they should be encouraged rather than discouraged. If ports, as well as carriers, are obliged to compete, then the competition must necessarily redound in improved service to shippers and U.S. foreign commerce. If a port directs its energies to attracting shippers and carriers by improved facilities and services and by reduced traffic congestion—in short, by making it desirable to utilize that port—then the public interest as well as the port's are advanced. On the other hand, if the port's interest is artificially protected by unnecessary regulation so that competition and alternative services are eliminated, the port may benefit temporarily but the public interest will surely suffer.

Given Portland's complete failure of proof as described in this Order, the lesson of this case may be that the "naturally tributary" doctrine has become obsolete insofar as it would apply to a geographic *territory* surrounding a port. The development of containerization and the related phenomena of intermodal services and load centers may mean that no particular geographic point is always tributary to a particular port, no matter how close the port and the point may be.[77] Concomitantly, it may also be that broad investigations like this one into general tariff provisions providing for facially nondiscriminatory equalized service have become obsolete. That situation, however, should be distinguished from one involving a specific *commodity* that appears to have been targeted by a carrier. Simply because a commodity can be placed in a container, it nevertheless may remain best suited to a particular port. *Intermodal Service to Portland,*

[77] The Commission is aware that the concept of a regional "load center" is controversial and still in its developing stage. *See* "Is 'Superport' Needed for Atlantic Coast?" *Journal of Commerce,* April 23, 1984, p. 1; "A Superport for Containers," *Handling and Shipping Management,* February 1984, P. 54. Seattle has no right in law to be the load center in the Pacific Northwest, and Portland must have every fair opportunity to continue the growth in container traffic that the record here shows it achieved in the 1970's.

Oregon, supra, 17 F.M.C. at 127. In at least such a case, the "naturally tributary" doctrine could apply.

In that regard, the Commission wishes to address the suggestion of the Port Authority of New York and New Jersey that our 1979 *Dart* decision represented a "retreat" from *CONASA*. *Dart* represented an application of *CONASA* principles to specific factual circumstances. The true significance of the Commission's decision lies in two facts. First, the carrier's practice of avoiding a direct call at Wilmington and instead moving the tobacco overland to Norfolk was held operationally and economically inefficient. 21 F.M.C. at 1129–30; *see Dart Containerline Co., Ltd.* v. *F.M.C.*, 639 F.2d at 817–18. In the present case, there is overwhelming evidence that the carrier practices represent economic efficiency. Second, Dart's practices were targeted at a single commodity, tobacco, and thereby raised the issue of whether the equalized service was unjustly discriminatory as between shippers, as well as ports. No evidence of such discrimination exists in this record. Application of the *Dart* rationale to this record must therefore lead to a result preserving PWC's practice.[78]

THEREFORE, IT IS ORDERED, That the Initial Decision is hereby adopted except to the extent indicated;

IT IS FURTHER ORDERED, That Portland's Exceptions are denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) FRANCIS C. HURNEY
Secretary

[78] It should be noted that APL agrees that *Dart* was correctly decided. Oral Argument Tr. 73–74.

*Chairman Alan Green, Jr. and Commissioner James V. Day did not participate.

FEDERAL MARITIME COMMISSION

DOCKET NO. 78–32

PACIFIC WESTBOUND CONFERENCE—EQUALIZATION RULES AND PRACTICES

Pacific Westbound Conference's equalization and absorption rules and practices, to the extent they affect the Port of Portland, Oregon, found not to be in violation of sections 15, 16 First, or 17 of the Shipping Act, 1916, or section 205 of the Merchant Marine Act of 1936.

The "top ten" commodities equalized and absorbed by members of the Pacific Westbound Conference during the period from January 1, 1977, through December 21, 1978, found not to be naturally tributary to the Port of Portland.

Equalization and absorption, as practiced by members of the Pacific Westbound Conference, found not to have resulted in substantial ham to the Port of Portland or the Portland community.

The practice of serving the Port of Portland indirectly, by substituted service and not by direct call, by members of the PWC, found to be reasonable and justified.

Patrick F. Boileau, Norman E. Sutherland, Marybeth Ormsby, and *Thomas P. White* for Petitioner, Port of Portland.

R. Frederic Fisher, Eric C. Bettelheim and *Harry Pfeifer* for Respondent, Pacific Westbound Conference.

Warner W. Gardner for Respondent, American President Lines, Ltd.

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

Jonathan Blank, Carol Doherty, and *John W. Angus, III,* for Intervenor, The Port of Seattle.

Patrick J. Falvey, F.A. Mulhern, Arthur L. Winn, Jr., Samuel H. Moerman, Paul M. Donovan and *Gerald L. Richman* for Intervenor, The Port Authority of New York and New Jersey.

Martin A. Heckscher for Intervenor, Delaware River Port Authority.

John Robert Ewers and *Paul J. Kaller* for Bureau of Hearings and Field Operations.

Alan J. Jacobson for Hearing Counsel.

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

Adopted May 25, 1984

This is an investigation into the equalization and absorption practices of the Pacific Westbound Conference. The legality of those practices, only insofar as they affect the Port of Portland, Oregon, is to be determined under the provisions of section 205 of the Merchant Marine Act of 1936,

[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).

46 U.S.C. 1115, and sections 15, 16 and 17 of the Shipping Act, 1916, 46 U.S.C. 814, 815 and 816.

THE NATURE AND BACKGROUND OF THE PROCEEDING

On February 21, 1975, the Port of Portland (hereafter, The Port or POP), an Oregon municipal corporation, petitioned the Federal Maritime Commission to conduct an investigation into the equalization and absorption rules and practices of the Pacific Westbound Conference (PWC or the Conference), claiming and complaining that those practices did constitute an unlawful diversion of "naturally tributary" freight traffic from The Port in violation of sections 15, 16 and 17 of the Shipping Act and were contrary to the policy expressed in section 205 of the Merchant Marine Act.

The respondent, PWC, is a steamship conference acting pursuant to Agreement No. 57, an agreement approved by the Commission under section 15 of the Shipping Act. The geographic scope of the traffic served by PWC and its carrier member lines is from United States and Canadian Pacific Coast ports to Japan, Korea, Taiwan, Siberia, China, Hong Kong, Thailand, Indo-China and the Philippines. PWC relies upon Article 3 of Agreement No. 57 as its authorization to equalize and absorb. As relevant, Article 3 provides:

> [There shall be] no absorption at loading or discharging ports of rail or coastal steamer freights or other charges. . . . except as may be agreed to. . . .

The petition focused on PWC's authority to engage in equalization and absorption practices, in particular, and the manner in which PWC conducted those practices, in general.

In particular, POP contended that: Article 3 is limited in its application to rail or coastal steamer absorptions and that motor carrier absorptions are not authorized (an important distinction, because motor carriage is the inland transportation mode under primary attack by The Port); the equalization rules in PWC's tariff should be construed to bar their application to shipments carried by motor carriers "exempt" from the jurisdiction of the Interstate Commerce Commission; and that such equalization rules are, in effect, per se unlawful because they permit equalization and absorption of cargo away from POP where there is direct service adequate to handle that cargo. Generally, POP alleged that PWC's equalization and absorption practices cause an unlawful and harmful diversion of traffic, that would normally move through The Port, to other ports in California and Washington.[2]

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[2] POP raised another facet of unlawful implementation at the hearing. It contended that PWC was implementing the equalization rules of the Conference's tariff improperly, either by way of making overpayments

Continued

PWC's tariff rules generally provide for equalization and absorption of inland freight costs by PWC's member lines. The rules permit those members which do not serve a port, either on a particular voyage or at all, to compete with other members and independent lines providing direct service to that port and with independent lines which equalize and absorb in like manner. When transportation costs from an inland point to a port not directly served by a member line are less than the costs of carriage from the inland point to the port at which the member line calls, the equalization rules are likely to come into play.

A typical equalization rule in PWC's tariffs contained the following language: [3]

> Equalization is the absorption by the ocean carrier of the difference between the shipper's cost of delivery to the ship's tackle at dock and port at which the lowest applicable common carrier or contract carrier Rates, excluding rates on any time basis apply and cost of delivery to ship's tackle at terminal dock and port of equalizing line. Shipper's cost for inland transportation is to be an amount that is not in excess of the cost computed at the lowest applicable common carrier or contract carrier rates.

* * * * *

Before going on with the narrative of events, I believe it will be helpful to pause, as briefly as clarity permits, to make some observations concerning terms which are central to the issues in the proceeding. Those terms, of course, are "equalization" (and its other forms—equalize, equalized, equalizing) and "absorption" (and, similarly, its other forms).

In the past, when there was no need to distinguish between those terms, both the Commission and the Courts used one to mean the other or to include the other. *See, e.g., North Carolina State Ports Authority* v. *Dart Containerline Company, Limited,* 21 F.M.C. 1125, 1128 n. 13 (1979), *aff'd sub nom., Dart Containerline Co.* v. *Federal Maritime Commission,* 639 F.2d 808 (D.C. Cir. 1981) (hereafter *Dart*), where the Commission said:

> The terms "absorption" and "equalization" tend to be used interchangeably to describe diversionary activities. The choice of terminology has little, if any, substantive significance in such matters,

for equalization or by other noncompliance with those rules, thus further influencing the flow of traffic away from The Port. POP asked for a continued hearing to be devoted especially to the introduction of evidence of this malpractice. Although not entirely free from doubt, I construed the order instituting this proceeding to allow POP to address that issue and authorized POP to take depositions and examine PWC documents by way of additional discovery well after the hearing commenced. After it conducted the additional discovery, POP orally requested that the special hearing be canceled. I informed POP that if it formally made that request, in writing, I would issue an order ruling that the question of PWC's compliance with its tariff's equalization rules was no longer an issue to be litigated in this proceeding. Aware of my intent, POP made the request formally. My order containing the indicated ruling ensued. See, Hearing Canceled; Other Matters, served July 11, 1980.

[3] The language appeared in Rule 16 of PWC's Freight Tariff No. 3. Virtually the same rule appears in PWC's Local and Overland Freight Tariff No. 11, F.M.C. No. 19, which superseded and canceled Freight Tariff No. 3, effective January 1, 1979, at p. 69, Rule 13.3.3. See, also, Rule 13.3.2. relating to transshipment.

> each of which must be examined on its own particular facts. See *Intermodal Service to Portland, Oregon* [17 F.M.C. 106, 132 (1973)].

However, in *Intermodal Service to Portland, Oregon,* at p. 132, there is no reference to "absorption" vis-a-vis "equalization." Instead of "absorption," another term is introduced—"transshipment." In describing the relationship of those two terms, the Commission said:

> The distinction between "transshipment" and "equalization" is one without a difference, insofar as this proceeding is concerned. As we observed in *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.*, [9 F.M.C. 338, 344-346 (1966)], "equalization" and "transshipment" are merely variations on the common theme of serving a port without directly calling there.

It seems clear, then, that the Commission considers "absorption," "transshipment" and "equalization" to be mutually interchangeable terms. Yet, there are distinctions, as the Commission noted in *Sea-Land Service, Inc.* v. *S. Atlantic & Caribbean Line, Inc.* (hereafter, *SACL*), *supra,* at p. 345:

> Port equalization is accomplished in various ways. In its simplist form (sometimes called "equalization" in contradistinction to . . . "transshipment"), the carrier pays to the shipper or, sometimes, to the inland carrier directly, the amount by which the cost to the shipper of overland transportation to the port of loading exceeds the cost of overland transportation from the same point of origin to the nearest port;
>
> Port equalization may also be effected through "transshipment" [marginal note omitted]. As used here transshipment refers to the movement of cargo, usually by land carrier, in the water carrier's name and at its expense, from a dock or terminal at the port where it is originally delivered by the shipper to the water carrier, to the dock or terminal at another port where it is loaded aboard a vessel of the water carrier.

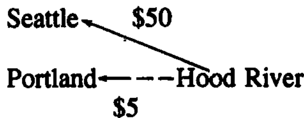
Heretofore, in the narrative, I used the terms "equalization and absorption," "equalization," and "absorption" interchangeably. For the most part, and except where otherwise specified, I will continue using those words and another term—"substituted service"—synonymously.[4] But this explanation does not exhaust the digression from the narrative because along the way, further refinements in terminology were introduced in the record.

It became apparent at the outset of testimony at the hearing that without a working definition distinguishing the terms "equalization," "absorption," and "transshipment," the record would become a mass of confusion. Therefore, I required POP to furnish an exhibit showing how it meant those

[4] Also, previously, I used the terms "rules" and "practices" interchangeably. Inasmuch as PWC's practices follow its tariff rules, see n. 2, *supra*, this usage will continue.

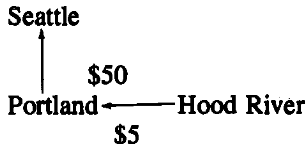
terms to be understood when they were used in testimony and exhibits proffered by The Port. Exhibit (Ex.) 1 contains POP's definitions and illustrations of the application of those terms. Although PWC was not entirely satisfied with the accuracy of Ex. 1, it abided by the contents and the hearing proceeded on that basis. These, then, are the working definitions of those terms when technical distinctions are made:[5]

"Equalization" is defined as the process whereby the ocean carrier assumes the difference in the shipper's inland transportation cost from the origin of the cargo to the port where the lowest common or contract carrier rates apply, and the ocean carrier's port of loading. Equalization is illustrated in this way:



Shipper pays inland carrier freight charges of $50 for actual transportation to Seattle from Hood River. Ocean carrier remits $45—the difference between the amount the shipper paid and the amount the shipper would have paid ($5) had the shipper used an inland carrier to carry the cargo to Portland.

"Transshipment" is defined as the assumption by an ocean carrier of the inland transportation cost from the port the shipper has delivered his cargo, which is served directly by the ocean carrier, to another port, due to an unusual occurrence requiring the ocean carrier to deviate from the originally scheduled route which would have included the direct vessel call to the first port. Illustration:



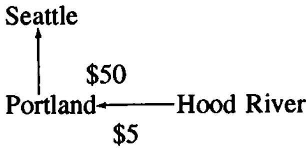
Shipper pays $5 for inland transportation from Hood River to Portland. Ocean carrier, which makes direct vessel calls at Portland, elects not to do so because of operational or other difficulty and transships the cargo overland via inland carrier, from Portland to Seattle at its own expense, instead.

Note: "Transshipment" is not under attack by POP in this proceeding.

"Absorption" is defined as the assumption by an ocean carrier of the inland transportation cost from the port area the shipper delivered his cargo,

[5] I have not altered the language of the definitions, but I have made some editorial and other changes in the illustrations. For example, I have substituted Seattle for Oakland. N.b., the dollar amounts in the illustrations are arbitrary and do not purport to show actual or proportionate values.

which is not served directly by the absorbing ocean carrier, to a port the ocean carrier does serve directly. Illustration:



Shipper pays $5 for inland transportation from Hood River to Portland. Ocean carrier, which does not make direct vessel calls at Portland, has inland carrier transport cargo to Seattle where it does call. Ocean carrier pays inland freight charges from Portland to Seattle.

* * * * *

The petition engendered a series of informal and formal (under section 21 orders) procedures intended to resolve the issues raised by POP without the necessity of a formal proceeding. When those procedures failed to accomplish their purpose, the Commission instituted this proceeding by Order of Investigation and Hearing (Order), served September 11, 1978.

Among other things, the Order directed that the proceeding "will be governed by the precedents and guidelines established and set forth in [*Council of North Atlantic Shipping Associations* v. *American Mail Lines, Ltd.*, 21 F.M.C. 91 (1978) (hereafter *CONASA*), and *Board of Commissioners of the Port of New Orleans* v. *Seatrain International* (*Port of New Orleans*), 21 F.M.C. 147 (1978)]." Under the authority of those decisions, the Order rejected POP's suggestion that section 8 of the Merchant Marine Act of 1920, 46 U.S.C. 867, be specified as a statutory section, the violation of which would be made an issue in the proceeding.[6] The Order contemplated a hearing but without the necessity of a trial-type hearing. Instead, the record for decision would consist of new affidavits and memoranda of law, as well as the material submitted earlier under the informal and formal procedures.

The Order designated the following as the issues under investigation:

(1) Whether article 3 of PWC's basic agreement No. 57 permits equalization and absorption of motor carrier inland freight rates and charges;

(2) whether PWC's equalization and absorption practices, as they affect Portland, are unlawful and detrimental to the commerce of the United States and the general public interest, or unduly preju-

[6] The Commission explained its action as follows:

While certain cargo may be naturally tributary to a port, any "naturally tributary zone" surrounding the Port is constantly changing and is determined by various factors including shipper needs and cargo characteristics. *CONASA, supra*, [21 F.M.C. 94]. But §8 ". . . does not require the Commission to incorporate any specific concept of naturally tributary cargo into its Shipping Act considerations, nor does it otherwise create substantive rights in Shipping Act proceedings." *Port of New Orleans, supra* [21 F.M.C. 152].

dicial or unjustly discriminatory to Portland or to businesses and individuals which depend on Portland's economic viability pursuant to section 205 of the Merchant Marine Act, 1936, and sections 15, 16 and 17 of the Shipping Act, 1916;

(3) whether PWC freight tariff No. 3, rule 16 violates section 205 of the Merchant Marine Act of 1936, and sections 15, 16 and 17 of the Shipping Act, 1916, by permitting equalization and absorption of cargo away from Portland where direct service is adequate to handle such cargo; and,

(4) Whether PWC freight tariff No. 3, rule 16 permits cargo being equalized and absorbed to move on ICC exempt carriers.

The Order designated POP as Petitioner, PWC and its member lines as Respondents, and Hearing Counsel as a party. Pursuant to provision therefor in the Order, Massachusetts Port Authority, Delaware River Port Authority, Board of Commissioners of the Port of New Orleans, and New Orleans Traffic and Transportation Bureau, Inc., became intervenors on a limited basis.[7]

Pursuant to the Order, affidavits and memoranda of law were filed. After examining the new documents and reviewing the earlier submissions, the Commission issued a Report and Order of Further Investigation and Hearing[8] (Further Order). In it, the Commission concluded that the record was not fully developed on all the issues and that a further hearing was necessary.

The particular issues raised by POP were resolved by the Further Order as a matter of law. The Commission determined that Article 3 of Agreement No. 57 does allow equalization of inland motor carrier rates and cargo;[9] that the equalization rules in PWC's tariffs are not unlawful, per se;[10] and that such equalization rules do authorize the transportation of equalized cargo by Interstate Commerce Commission "exempt" motor carriers.[11]

The general (ultimate) issue, expressed as a question, "Do PWC's Equalization and Absorption Practices, as Applied to Portland, Violate Sections

[7] The Department of Transportation of the United States intervened but did not participate.

[8] *Pacific Westbound Conference—Equalization Rules and Practices*, 21 F.M.C. 937 (1979).

[9] *Id.*, 21 F.M.C. 939, 942.

[10] *Id.*, 21 F.M.C. 940–941, 942. The Commission explained, at 941:

> Equalization, as such, is not illegal[11] and a tariff that allows for equalization therefore is not *per se* illegal. It is only the *application* of the tariff in a particular manner that can be illegal. The legality of PWC's Tariff No. 3 apart from its application does not present a separate legal issue in this case. Additionally, the question of adequacy of Portland's service is only *one* of the factors to be considered under the CONASA guidelines, and is not dispositive by itself of the legality of an equalization. For the foregoing reasons, the Commission concludes that PWC's Rule 16, Tariff No. 3, does not, in and of itself, violate sections 15, 16 or 17 of the Shipping Act, 1916, or contravene section 205 of the Merchant Marine Act of 1936. The question of the legal *application* of the Rule still remains within Issue (B), *supra*. If an illegal implementation of PWC's tariff were proved, then modification of the tariff to prohibit such implementation could be required.
>
> [11] *See* CONASA, 18 S.R.R. at 779, *Port of New Orleans*, 18 S.R.R. at 770–772, *Stockton Port District* v. *Pacific Westbound Conference*, 9 F.M.C. 12, 20 (1965), and *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 500, 504 (1941).

[11] *Id.*, 21 F.M.C. 941, 942.

15, 16 or 17 of the Shipping Act, 1916 or Section 205 of the Merchant Marine Act of 1936?"[12] could not be resolved on the existing limited record.

From the outset, POP's position on this issue was that any cargo as to which The Port becomes the base port for an equalization to a "more distant" port is naturally tributary to POP.[13] Thus, relying upon its perception of an earlier Commission decision, *Intermodal Service to Portland, Oregon*, 17 F.M.C. 106 (1973), POP contended that any absorption of inland freight charges on cargo which would otherwise move more cheaply to POP than to any other port constitutes an unlawful diversion, per se, unless it can be shown that The Port's facilities or service are inadequate.[14] Although the order instituting this proceeding specifically directed POP to describe the area which should be considered naturally tributary to POP,[15] POP's submission, in the form of an affidavit/memorandum from Mr. Mowat, again did not address this question. POP maintained, instead, that PWC has the burden of proving its practices to be legal.[16]

Recognizing that POP was taking its position on very narrow ground in relying on *Intermodal Service to Portland, Oregon, supra*, and was ignoring "the fact that this case was substantially expanded in the Commission's *CONASA* decision,"[17] the Commission stressed that the ultimate issue would continue to be governed by the concept of "naturally tributary" cargo which the Commission enunciated in *CONASA, supra*, and *Port of New Orleans, supra*.[18] Accordingly, the Further Order restricted the hearing to consideration of the following components of the ultimate issue:[19]

(1) Whether and to what extent the equalization and absorption practices of the Pacific Westbound Conference cause cargo which would ordinarily move through the Port of Portland to move through ports other than Portland?

(2) Does the diversion of cargo described in issue (1), if any, cause *significant* economic harm to the Port and the local economy of Portland?; and

[12] *Id.*, 21 F.M.C. 939-940. In n. 10, *supra*, this issue was identified in shortened form as "Issue (B), *supra*."

[13] *Id.*, 21 F.M.C. 939, n. 4. POP was required by a section 21 Order issued after POP's petition was filed, to describe, in detail, the area it believed to be "naturally tributary." POP did not describe a specific area but made the assertion that "naturally tributary" usually was a function of distance, instead. Under POP's theory, see n. 14, *infra*, the function of distance is reflected by the difference between the lower cost of inland transportation from point of origin to base port, on the one hand, and the higher cost of that transportation from point of origin to port of loading, on the other hand. See, e.g., Transcript (Tr.) p. 1106.

[14] *Id.*, 21 F.M.C. 939. See, Testimony of Milton A. Mowat, POP's Traffic and Regulatory Affairs Manager, at Tr. 395. There, Mr. Mowat defined naturally tributary territory as ". . . the territory or area where the inland freight rates from origin to Portland are less than the inland freight rates from origin to where the equalization or absorption is being made . . ." and, see, also, POP opening brief at p. 13, for a reaffirmation by POP of the contention referred to in the text, above.

[15] Order, p. 6, par. 1, Item No. 1.

[16] Further Order, 21 F.M.C. 938 n. 3.

[17] *Id.*, 21 F.M.C. 939.

[18] *Id.*, 21 F.M.C. 938, 939-940.

[19] *Id.*, 21 F.M.C. 942.

(3) If the equalization and absorption practices of the Pacific Westbound Conference do cause significant economic harm to Portland, are they nonetheless reasonable and justified?

Acknowledging that these elements could result in a massive record, which might become unmanageable unless further perimeters were established, the Commission structured the proceeding by limiting the 201 introduction of additional evidence to the following: [20]

A. For the years 1977 [marginal note omitted] and 1978, the information described in the first ordering paragraph of the Commission's April 14, 1978 section 21 order, but only as to the ten most important cargo commodities (in terms of gross revenue to the Port of Portland) carried by the Pacific Westbound Conference in 1978;

B. For the years 1977 and 1978, as to the ten commodities described in paragraph A, the amount of equalization paid by the Pacific Westbound Conference and the basis for such equalization payments [marginal note omitted]; and

C. Affidavits or, if considered necessary by the Administrative Law Judge, depositions, concerning the following matters, but only to the extent that these affidavits or depositions relate to the ten commodities described in paragraph A, and then only to the extent that they relate to shipments occurring in 1977 or 1978:

1. Natural, geographical or economic conditions of inland transportation which favor or impede movements through the Port of Portland;
2. The ability of the Port of Portland to meet the needs of shippers, such as timeliness of shipments and special cargo handling facilities;
3. The extent to which equalization payments, as opposed to other factors, induced shippers to move their cargo through a port other than Portland;
4. The extent, if any, to which Portland's ability to meet shipper demand was limited by the level of port calls of members of the Pacific Westbound Conference;
5. The amount of net revenue lost by the Port of Portland as a result of cargo diversion caused by equalization payments, and the effect of such loss on the local economy of Portland; and
6. The methods and scope of cargo solicitation employed by Portland, Seattle, Los Angeles-Long Beach and the Pacific Westbound Conference, to the extent considered relevant by the Administrative Law Judge.

[20] 21 F.M.C. 942–943.

D. Affidavits or, if considered necessary by the Administrative Law Judge, depositions concerning the following matters, but only to the extent that they address time periods after December 31, 1976:

1. The cost to member lines, or the Pacific Westbound Conference as a whole, of providing direct service to Portland with various amounts of frequency;
2. Operational difficulties or other transportation factors bearing upon the ability of the Pacific Westbound Conference to provide increased direct service to Portland;
3. Competitive conditions of carriers in the westbound trade affecting the ability of the Pacific Westbound Conference to increase its direct service to Portland; and
4. The economic feasibility to the Pacific Westbound Conference of serving Portland via feeder vessels to other ports; . . .

In addition, the Further Order continued to limit intervenors to the submission of memoranda of law at the close of the evidentiary hearing. The Port Authority of New York and New Jersey intervened on this basis. However, another intervenor, the Port of Seattle (POS), was given permission to participate fully.

After extensive prehearing discovery and after a two-day prehearing conference at Washington, D.C., on June 19 and 20, 1979, the hearing commenced in Portland, Oregon, on January 22, 1980, and it continued until adjournment on February 1, 1980. The hearing resumed at Portland and continued there from March 11 through March 27, 1980, when it adjourned again. Thereafter, there were sessions at Washington, D.C., from May 13 through May 22, 1980; at San Francisco, California, from October 14 through October 22, 1980; and, again, at Portland on March 24 and March 25, 1981. Altogether, there were 39 days of hearing. The hearing produced 5,374 pages of transcript (Tr.) and 161 numbered exhibits.[21] There were twenty-five witnesses.[22]

The briefing schedule called for the filing of opening and reply briefs by POP and Hearing Counsel and opening briefs (memoranda of law) by all intervenors except POS. Answering briefs were to be filed by respondents and POS. Under that schedule, POP filed an opening brief of 194 pages and a reply brief of 11 pages; Hearing Counsel filed an opening brief of 63 pages and a reply brief of 18 pages; Delaware River Port Authority filed a brief of 5 pages; The Port Authority of New York and New Jersey filed a brief of 16 pages; PWC filed a brief of 339 pages; American President Lines, Ltd. (APL), a member of PWC, filed a brief of 66 pages; Sea-Land Service, Inc., another PWC member, filed a brief of 16 pages; POS filed a brief of 64 pages.

[21] Not all numbered exhibits were received in evidence. E.g., Ex. 133 for identification was rejected. See Hearing Canceled; Other Matters, *supra*, at n. 1.

[22] A list and description of witnesses appears in Appendix A.

FACTS

Separate proposed findings of fact were submitted by POP and Hearing Counsel in their opening briefs and by APL and Sea-Land in their answering briefs. PWC's answering brief contains its own and POS' joint proposed findings of fact. Generally, my findings have been organized to follow the numerical sequence of the PWC/POS joint proposal.[23] To the extent that the findings do not explicitly incorporate particular proposed findings, the latter have been rejected as incorrect, immaterial, argumentative or conclusory, or otherwise not required for full consideration and complete disposition of this case.[24]

A: GENERAL

1. The trade served by PWC is served also by independent, nonconference lines which compete in the trades with each other and with PWC members. According to a United States Department of Commerce statistical study, of all the regions examined, the North Pacific Region trade, of which the PWC trade is a part, shows the most significant overall growth in recent years, and this growth is expected to increase.[25] To meet this anticipated growth, at least one carrier, Sea-Land, intends to increase its 1981 and 1983 carrying capacity by 20% over 1979 levels. The competition in the PWC trade continues to be as intense as it was in 1977 and 1978, although some carriers have left the trade[26] while others have curtailed service, as of the close of the record.[27]

2. Using POP as the basing port for the application of equalization or absorption, the ten most important commodities equalized or absorbed by PWC members in 1977 and 1978 were apples, canned corn, dried peas and beans, frozen corn, hides, lumber, meat and bone meal, metal scrap, onions and wastepaper. In 1977, these commodities accounted for 87% of the total tonnage equalized by PWC carriers. All of this cargo was containerized. See Appendix C showing the number of tons and the

[23] The joint proposal is the most extensive and detailed, numbering 214 items spread over 206 pages. APL's has 71 items, contained in 20 pages of type smaller in size than the type used by the other parties. Sea-Land's 7 items appear on 7 pages. Hearing Counsel's number 103, covering 27 pages. POP presented 22 proposals, in 13 pages, preceded by 136 pages of a "Summary of Evidence." The process must start somewhere, and the joint proposal is the most useful tool for the task.

[24] PWC requests that each of the joint PWC/POS proposed findings be adopted or that a reason be given and record references cited as to why a proposal is not adopted or why it is amended. It invokes the Administrative Procedure Act, 5 U.S.C. 557(c), and the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.225, as authority for their request. Neither of those authorities support PWC's broad assertion. PWC does not suggest that the same consideration be given to the proposals of the other parties. Even if they had, good decision making scarcely requires a grain-by-grain sifting of so massive a record as exists in this proceeding. All that is required is a determination unmistakeably informing the parties of the rulings. See, *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966).

[25] Tonnage is expected to increase from 70 million in 1975 to 199 million in 1990.

[26] States Steamship Co., Knutsen Line, Phoenix Container Line (PCL), Ro-Lo Pacific and Asia-America Line.

[27] Far East Shipping Co. (FESCO), Yang Ming Line and Evergreen Marine Line.

number of containers equalized and absorbed by PWC members in 1977 and 1978.

3. Whatever may have been the case in the past,[28] the PWC trade is a weight trade rather than a measurement trade. In a measurement trade, vessels tend to exhaust their cubic capacity before reaching their deadweight limit. Because it is just the opposite in a weight trade, weight capacity of a vessel is usually of more concern than space utilization. As a general rule, then, container slot capacity is not the appropriate yardstick for actual vessel carrying capacity in the PWC trade. This means that a carrier which is engaged in a weight trade may have actual carrying capacity lower than the designed container slot capacity. Each of the ten most important commodities, except onions, runs to weight rather than measurement.

4. A vast number of commodities are carried outbound from the Pacific Northwest in breakbulk or quasi-breakbulk vessels. Nevertheless, some of these low-rated commodities, like woodpulp, lumber and woodchips, are capable of being containerized. Consequently, container ship operators view these commodities as being opportunity cargo and will compete for them if their ships have not reached capacity. Most outbound container cargo is carried in 35- or 40-foot containers. Very little of the ten most important commodities is carried in 20-foot containers.[29]

5. Agricultural cargos moving from Southern Washington and from Oregon are subject to seasonal variations, causing peaks and valleys in shipper demand for cargo space. This is mostly true for onions[30] and apples, but there are also cyclical movements of wastepaper, metal scrap, and dried peas and beans. Because apples require refrigerated containers, the seasonal demands[31] strain the supply of available containers and shortages result throughout the Pacific Northwest. POP is particularly susceptible to shortages in both refrigerated and dry cargo containers because of an imbalance in its inbound/outbound container trade. Far fewer containers are received at POP inbound than are needed for outbound movements.

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[28] *Cf. Pacific Westbound Conference—Wastepaper and Woodpulp From United States West Coast to Far East*, 17 SRR 929, 959–960 (I.D. 1977), *rev.* 21 F.M.C. 834 (1979), *rev. sub nom.; National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F. 2d 816 (D.C. Cir. 1980).

[29] Hearing Counsel's witness, Mr. Jay Copan, showed that of the 4855 containers equalizers by PWC members in 1977 and 1978, only 121 were 20 footers. Of that number, 44 carried peas and beans and 77 carried hides. See Ex. 37 rev. (identical to Ex. 95 sehed. 3). Mr. Copan is an economist on the Commission's staff.

[30] In 1977 and 1978, the Japanese Six Lines were forced to refuse cargo because of extensive onion carriage.

[31] Improving technology has extended the apple-shipping season but, because the earliest shipments after harvest command the highest prices, shippers try to rush to market, causing a peak demand for space.

B: THE PARTIES

I. POP

a: Geographic and Physical Details

6. POP's municipal district is comprised of Oregon's Multnomah, Clackamas and Washington Counties. In addition to marine terminals, The Port operates Portland International Airport (a commercial airport), two general aviation airports, a ship repair yard, a dredge, a tugboat, and two industrial parks as a single integrated economic unit.[32]

7. POP is located, geographically, at the confluence of the Columbia and Willamette Rivers, about 101 miles upstream from the Columbia River bar near Astoria, Oregon.

8. POP operates five marine terminals, which, in 1978, had twenty-nine berths (perhaps thirty, but a tally of those shown in Ex. 23, pp. 6–10, comes to twenty-nine), including seven container berths. The principal container terminal is the John M. Fulton Terminal 6, which is situated on the Columbia River.[33] It has three berths, two for containers and one for automobiles. Terminal 6 is a sixty-six acre facility with an 1800 foot dock housing the two container berths. Supporting equipment includes three 50 ton capacity container cranes, four 45 ton capacity transtainers, sixteen tractors, forty-eight chassis, one 40 ton top loader mobile container handler and one 15 ton mobile empty container side loader. Terminal 6 has a 60,000 square foot container freight station and immediately adjacent to this terminal is a 200,000 square foot warehouse. One-fifth of the warehouse's space is available for United States Customs bonding. Plans to expand Terminal 6 to include a 1050 foot berth extension, additional paving in the container yard and additional support equipment were approved by The Port's Commission. Completion was scheduled for October 1981.

Terminal 1 is a six berth complex on the west bank of the Willamette, designed primarily for breakbulk container combination vessels and ocean barges. It has more than 200,000 square feet of warehouse space for storage of breakbulk cargo.

Terminal 2 lies on the west bank, downstream from Terminal 1. It has six berths, two for container vessesl, one for ro-ro ships and three for breakbulk and combination vessels. It has a 450,000 cubic foot cold storage warehouse which can hold 50,000 boxes of fresh fruits and vegetables at 32 °F. Support for the container ship operation includes two Hitachi container cranes of 40 and 50 ton capacity, a 50 ton capacity gate/truck scale, a 90,651 square foot container freight station and 15 acres of container yard area.

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[32] E.g., funding for POP's John M. Fulton Terminal 6, a recently built marine container complex, came from airport revenues.

[33] The Japanese Six Lines operate from Terminal 6.

Terminal 4 has thirteen berths. It is located on the east bank of the Willamette, five miles downstream from Terminal 2. Terminal 4 has a two berth container facility, preferentially assigned,[34] equipped with a 33 ton capacity Hitachi container crane and 109,921 square feet of intransit space. The other berths are for automobile, grain, breakbulk ships and tankers.

Terminal 5 is POP's newest one and is located on the east bank of the Willamette, two miles downstream from Terminal 4. It has one berth to service a grain elevator.

POP is served by three railroads, about 34 motor carriers and by Columbia River barges.

b: Traffic and Cargo at POP

9. Measured by tonnage (short tons) moving through United States West Coast ports annually, POP is the third largest Pacific Coast port and the largest in the Pacific Northwest. In export tonnage, POP is the largest port, handling about one-third more than its nearest competitor. As is true of the entire Portland harbor area, including facilities other than POP, bulk and bulk-type cargo make up most of POP's tonnage, both inbound and outbound. Grain, automobiles, steel and lumber are some of the leading examples of bulk and bulktype cargo moving through POP.

The tonnage volume at POP has been increasing since POP's fiscal year 1971–1972. In that year, 1,456,917 tons of commodities, other than grain, were handled; in fiscal 1978–1979, 2,579,471 tons were handled. In the earlier fiscal year, grain[35] tonnage was 956,948, and in 1978–1979 grain tonnage reached 2,691,932 tons.[36] In 1978, overall tonnage was the greatest in POP's history until that time, even exceeding mid-range forecasts, made by POP, through 1985.

10. The other facilities in the Portland harbor area, combined, handle far more tonnage than does POP, individually.

11. A comparison of statistics compiled by the Bureau of Census shows that in 1978, foreign commerce dry tonnage moving through Portland harbor area facilities exceeded similar tonnage moving through Seattle harbor area (including POS) facilities by more than 4,000,000 tons.

12. Export grain tonnage at POP shows an increase from 1,169,000 tons in 1975 to 3,526,000 tons in 1979. POP's 1978 grain tonnage was about half of that flowing through the other Portland harbor area ports.

13. POP handles almost all the import automobile tonnage in the Portland harbor area. From 63,000 tons in 1975 and 254,000 tons in 1978, automobile

[34] It is assigned to Matson Navigation Co., a carrier primarily engaged in the Pacific Coast/Hawaii Trade. POP intends to have Matson use Terminal 6 when the planned expansion is completed.

[35] Grain includes wheat and barley.

[36] Portland harbor area tonnage in that year was nearly double that of POP.

tonnage increased to 274,000 tons in 1979. POP forecasts still more increases by 1985.

14. POP is a major forestry product[37] export port. Two of those products, lumber and logs, are expected to decline markedly in tonnage in the 1980's because of a variety of economic, competitive and regulatory reasons. Tonnage declined from 1975 to 1978, but increased in 1979 above 1975's level.

15. POP's import steel tonnage increased from 263,000 in 1975 to 431,000 in 1978 and 443,000 in 1979. This amounted to about 80 percent of Portland harbor area tonnage.

16. Non-grain bulk dry and liquid tonnage increased from 346,000 tons in 1975 to 389,000 tons in 1978 and 542,000 in 1979. POP forecasts further increases in this tonnage by 1985.

17. POP is a major breakbulk general cargo port.[38] Despite the trend to containerization of many commodities formerly carried as breakbulk cargo by common carriers by water, inbound and outbound breakbulk tonnage increased at POP from 1975 to 1979 by about one-third, but there was an outbound tonnage decrease below 1975 levels in 1978.

18. This finding merits emphasis. *POP did not enter the container business to any great extent until about 1970–1971, well after POP's Northwest rival port, POS, had established itself as that region's container "load center."* (In stressing this finding, I am mindful that in *Dart, supra,* the Court of Appeals criticized the finding of the Administrative Law Judge which focused upon a commodity movement prior to the institution of container service at Wilmington, the complaining port in that case. The historical details in the case at bar are much different than those in *Dart,* involving, as they do, the traffic patterns of inland and ocean carriers which load centers spawn, rather than the movement of a single commodity at a relatively small port.) Anticipating the growth potential of containers, POS committed itself to make the investments in capital improvements necessary for container operation in the 1960's. As a result, Seattle, which in 1959 was handling half the tonnage which flowed through that port

[37] Forestry products include lumber, logs and plywood, among other commodities.

[38] In its "Overview of This Proceeding," PWC's answering brief, pp. 12–26, PWC warns of factual errors in POP's opening brief which PWC characterizes as lacking in integrity. In the same breath, PWC assures that its own brief does not distort the record. Unquestionably, the process of fact finding is aided, measurably, by particularizing errors to be found in statements made by another party. It is regrettable that POP disdained from doing so, although it was given the opportunity by way of reply brief. POP preferred, instead, to "except generally to the proposed findings and conclusions opposed to those enunciated in its opening brief." POP reply brief, p. 2. Nevertheless, PWC's characterization serves no useful purpose in the process. Moreover, despite finical attention to detail, PWC is not, itself, immune from making factual mistakes. For example, in its proposed finding 17, PWC says "Portland is the largest breakbulk general cargo port on the West Coast (Mowat, Tr. 1189)." This may be true of POP, but the testimony at Tr. 1189 does not support the PWC claim. Tr. 1189 shows this:

Line 16: Q. [by PWC] Is Port of Portland the biggest breakbulk port on the U.S. West Coast?
Line 18: A. [Mowat] I don't know.
Line 19: Q. Do you know of any port with a larger breakbulk tonnage?
Line 21: A. I don't know.

in the 1920's, handled 2,400,000 short tons of container cargo in 1977 and 2,774,000 tons of such cargo in 1978. This was a proportion of more than 4 to 1 and 3.6 to 1 better than POP in those respective years.

Nevertheless, as that ratio shows, despite its late entry into the field, POP's container operations are increasing, absolutely, as well as relatively. From its infancy in 1970–1971, POP's container business was described by POP witnesses as a "banner year" in 1979 and as a "thriving" business. These figures show why:

POP Container Tonnage

	1975	*1977*	*1978*	*1979*
Outbound	380,940	486,557	558,886	639,366
Inbound	139,867	176,825	210,761	228,043
Total	520,807	663,382	769,647	867,409

19. PWC's proposed finding 19 is rejected. Without belaboring the accuracy of some of the statistics therein, most of what PWC says is strained speculation. A conclusion which PWC proposes—that 19.1 percent is about the same proportion as 14.6 percent—is unacceptable.

20. The value of cargo moving across POP docks increased by 44.8 percent in fiscal 1978–1979 over the previous fiscal year. This was the greatest dollar value increase among the nation's leading ports.

c: Service at POP in the Trade Served by PWC

21. At varying times and with varying frequency, in 1977, ten PWC carriers[39] and three non-conference independents loaded outbound containers at POP. Similarly, in 1978, ten PWC carriers and six independents performed that service at POP. Of the PWC members, only the Japanese Six, and of the independents, only Far East Shipping Co. (FESCO) and Orient Overseas Container Line (OOCL) were major container carriers in the export trade.[40]

In 1977, the Janese Six made 71 vessel calls at POP, loading 21,750 TEUs, of which 18,639 were full or loaded. In that year FESCO made 36 calls loading 2,661 TEUs, 2,535 loaded, and OOCL made 27 calls, loading 3,557 TEUs, 3,176 loaded. In 1978, the Japanese Six made 70 calls, loading 23,258 TEUs, 22,210 loaded; FESCO made 44 calls, loading 4,160 TEUs, 4,109 loaded; OOCL made 23 calls, loading 2,848 containers, 2,822 loaded.[41]

[39] Six of the ten were the Japanese Six Lines, made up of Kawasaki Kisen Kaisha (K Line), Japan Line, Yamashita-Shinnihon (Y-S), Mitsui O.S.K. (OSK), Showa Line, and Nippon Yusen Kaisha (NYK).

[40] Container carriage is often measured by TEUs. TEU is an acronym for trailer (container) equivalent units. The basic unit is a 20-foot container. A 40-foot container is counted as 2 TEUs.

[41] Comparable statistics for other carriers during those years were:

1977: For PWC, APL made 5 vessel calls, loading 12 TEUs, East Asiatic Company (EAC) made 11 calls, loading 334 TEUs, including some empty containers, Knutsen made 23 calls, loading 127

Continued

Altogether in 1977, 339,056 container tons of cargo were loaded at POP. The PWC carriers loaded 262,464 tons, including the Japanese Six's 229,992 tons. FESCO carried 34,130 tons, and OOCL carried 40,884 tons. In 1978 the total tonnage at POP was 371,759. The Japanese Six carried 265,555 of the 277,666 loaded by PWC members. FESCO carried 50,101 tons, and OOCL carried 33,931 tons.

The Japanese Six call at POS and Vancouver before they call at Portland in the outbound PWC trade.[42] The Japanese Six ships are full containerships, which sail about every 4 or 5 days and call directly at Japanese ports, only. They do provide transshipment (or feeder) services, on other vessels, to Hong Kong, Manila, Busan and Taiwan. They averaged 319 TEUs, loaded and unloaded, per vessel call for the years 1977–1978. The Japanese Six provided virtually all of the refrigerated container service at POP in 1978. Neither Evergreen, OOCL nor FESCO carried refrigerated containers in that year. However, the Japanese Six provided "basically no refrigerated service between Portland and Hong Kong" via their feeder services.[43]

EAC (PWC member) called at both POP and POS every 14 days during 1978, serving Manila and Bangkok. Its vessels are semi-containerships having a slot capacity of 400–600 TEUs, including 88 refrigerated TEUs per vessel.

Knutsen (PWC member) also served POP and POS fortnightly, calling at Hong Kong and Manila with semi-containerships having TEU capacities ranging from 276 to 804.[44]

States Line (PWC member until June 20, 1978, independent thereafter) called at POS and POP, providing 3 sailings a month to Keelung and Manila in semi-containerships with a capacity of 214 TEUs each. It also served POS with ro/ro vessels having capacities of 830 TEUs. The ro/ro vessels off-loaded at Kobe, Kaohsiung, Hong Kong and Busan.

Among the independents, in 1978, FESCO provided two 10-day services from POP and POS to Japan and Hong Kong, loading, first, at POS. Its vessels were semi-containerships (368 TEUs) or full containerships (800 TEUs).

TEUs, including empties, and States Line made 24 calls, loading 353 TEUs, including empties; the other independent, Scindia, made 12 calls, loading 10 TEUs.

1978: For PWC, APL made 3 calls, loading 29 TEUs, EAC made 19 calls, loading 406 TEUs, including empties, Knutsen made 24 calls, loading 555 TEUs, including empties, and States Line (first half of year) made 12 calls, loading 251 TEUs, mostly empties; for the independents, Evergreen made 6 calls, loading 689 TEUs (685 loaded), while the remainder Scindia, Shipping Corporation of India (SCI) and States Line (second half of year) made a total of 18 calls and loaded 203 containers.

Note: The containers lifted by EAC in 1977 and 1978 went to non-PWC as well as PWC destinations.

[42] POP in its proposed finding 7 states that most of the carriers serving both POS and POP had faster transit times crossing the Pacific to the Far East, as POP was the last port of call for those carriers. To the extent that POP implies that direct transit time to Far East destinations is less from POP than from POS, POP's proposed finding is misleading. To most Far East ports, the transit time directly from POS is less than it is directly from POP.

[43] Copan, Ex. 95, p. 46.

[44] Knutsen also served non-PWC destinations with these vessels.

OOCL, in 1978, had fortnightly sailings from POS and POP to Japan, Taiwan, Korea, Manila and Hong Kong. Its vessels had a capacity of 373 TEUs each.[45]

Evergreen, which was serving POS, started to serve POP in October 1978, making six sailings that year. Its 866 TEU capacity vessels called at Osaka, Busan, Keelung, Kaohsiung and Hong Kong.

For FESCO and the Japanese Six, POP was the last West Coast port of call for vessels going to the Far East.

22. To a greater extent than is true of the PWC trade, in general,[46] or the PWC Northwest trade, in particular, ships sailing from POP to PWC destinations tend to reach operating weight capacity before exhausting their TEU (or slot) capacity. For example, APL's "Pacesetter" class of containerships, which operate between POS and the Far East,[47] have a design capacity of 1,482 TEUs. Yet, their average inbound capacity was about 1,364 TEUs, and their average outbound capacity was only about 1,016 TEUs because of stowage and other limitations and factors—weight usually being the primary one. Sea-Land's experience is similar. Its containerships call at POS and Oakland on Far East voyages[48] and reached inbound capacity at 1,184 TEUs and outbound capacity at 1,050 TEUs. Thus, the mere fact that some vessels, including those of the Japanese Six Lines, may sail from POP to PWC destinations with unused slot capacity, fails to establish that additional containers could have been carried on those vessels.

POP's "Summary of Facts," at p. 103, *et seq.*, contains an extended presentation concerning the "Japanese Consortium Capacity at Portland," presumably as support for POP's proposed finding No. 8. Together, the presentation and proposed finding imply that, but for equalization and absorption by Sea-Land and APL via POS (e.g., in 1977 and 1978, of 69,000 tons of "top ten" cargo equalized away from the POP base by APL, all but 550 tons of apples sailed from POS), most, if not all, of the equalized cargo would have been accommodated at POP by vessels, mainly those of the Japanese Six Lines, sailing from there with unused TEU capacity. This finding rejects POP's suggestion.

Mr. Seiichi Hirano was PWC's chief witness with respect to the cargo carrying capacity of the Japanese Six Lines. He is the West Coast general manager of one of those lines and testified on behalf of all of them. Mr. Hirano is a well qualified witness with many years of experience in managing and supervising carrier operations. The upshot of his testimony is that during the years 1977 and 1978, even though design capacity may not have been reached, the Japanese Six Lines' vessels operated at or near their actual carrying capacities, giving consideration to the various

[45] OOCL was providing substituted service from POP to POS when Mr. Copan testified.

[46] See No. 3, *supra*.

[47] APL has other services in the PWC trade which operate between California ports and the Far East.

[48] Sea-Land also has another service, solely between Calfiornia ports and the Far East.

factors affecting the relationship between design and realistic capacity. Included in this consideration, in addition to the weight factor, were matters of cyclical and peak demand, deck stowage, trim and stability, over stowage, equipment availability, booking and cargo readiness and transshipment.

On cross-examination and through its own witnesses, Mr. Mowat and an employee supervised by him, a transportation and pricing specialist, POP sought to discredit Mr. Hirano and his testimony. POP succeeded in showing that on occasion hatch cover limitations may have been exceeded by a Japanese carrier and it made some other minor points in regard to Mr. Hirano's testimony, but neither on cross-examination nor through its own witnesses (who were not qualified in vessel operation and stowage) did POP succeed in detracting from Mr. Hirano's credibility or the worth of his testimony.

d: POP's Revenues

23. The following shows POP's gross revenues from all operations conducted by the Port and from marine operations, only, during recent fiscal years.[49]

	1974[50]	*1975*	*1976*	*1977*	*1978*
Marine (000 omitted)	18,596	18,698	24,736	26,533	26,704
All (000 omitted)	27,580	29,617	36,522	39,133	40,224

Correspondingly, gross revenues from marine terminal operations (a part of marine operations) also increased during those years, as follows:

	1974	*1975*	*1976*	*1977*	*1978*
Marine Terminal (000 omitted)	11,686	12,115	16,651	18,147	20,486

24. The portion of marine terminal revenues derived by POP from container operations (from available full fiscal year statistics) were:

	1976	*1977*	*1978*
Container operation revenues (000 omitted)	6,956	6,332	8,212

[49] The Port's fiscal year begins on July 1 and ends on June 30. E.g., fiscal year 1974 begins July 1, 1974, and ends June 30, 1975.

[50] PWC/POS proposed finding No. 23 cites Exs. 56–61 as authority. They propose that, for 1974, POP had gross marine revenues of $18,596,825 and gross revenues from all operations of $32,100,710. PWC/POS are inconsistent in their references. Ex. 57 shows the comparable respective figures to be $20,701,394 and $32,100,710. Ex. 58 shows them to be $18,596,825 and $27,580,144. I have relied on Ex. 58, the Port's annual report because all other statistics in this finding came from other POP annual reports.

25 and 26. Through fiscal 1978, POP's gross revenues from all operations, from all marine operations, from marine terminal operations, and from marine terminal container operations were on the increase.

e: The Impact of POP's Marine Terminals on the Portland Economic Community

27. Back in 1976, POP was considering additional improvements to insure maintenance of a competitive position with respect to other West Coast ports. To assist it in the overall evaluation of proposed capital projects, POP retained an economic consulting firm, Economic Research Associates (ERA), to analyze the community economic impact of the Port's marine terminals. ERA described the analysis it performed in these terms: "The intent of the impact analysis has been to quantitatively, as well as qualitatively, assess the importance of the Port's Marine Terminals operations to the Portland region during 1975."[51] The area under study included all of the State of Oregon, but it also focused on the Portland-Vancouver Standard Metropolitan Statistical Area (SMSA) comprised of Clark County, Washington, and the Oregon Counties of Clackamas, Multnomah and Washington.

The testimony of Messrs. Lyon and Krekorian, including an updated version of the ERA analysis, prepared for this proceeding, and testimony given by Dr. Ernest Nadel of Manalytics, Inc., an economic consulting firm hired by PWC and POS, constitute the expert evidence concerning the economic effects of the PWC equalization and absorption rules on the business community and economy of the Portland area.

28. ERA's analysis is based upon the concept that there are three types of economic impact on the community due to marine terminal operations. The three are direct, indirect, and induced impact. Generally, despite wide disagreement concerning methods, details, omissions and the like, the PWC/POS economic exercise utilizes ERA's assumptions about impact, although it reaches different conclusions. It would be helpful to explain certain aspects of the three types.

29. Under the ERA analysis, direct impact consists of the value added portion of gross revenues directly generated in the study area. Gross revenues include those received by POP, other vessel expenditures, and gross revenues paid to inland carriers moving cargo to and from the Port. Value added consists of those gross revenues less the cost of goods sold, federal taxes and savings.[52] The shipping activity related categories included in the 1976 study were vessel disbursement, crew expenditures, marine insurance and international banking, inland transportation and miscellaneous port

[51] Ex. 90, Community Economic Impact Of The Marine Terminals Of The Port Of Portland, Volume I: Impact Analysis, Prepared For The Port Of Portland, May 1976, Forward, p. ii. The analysis was conducted under the supervision of Messrs. Richard K. Lyon and Gene P. Krekorian. They were assisted by a POP coordinator, Donald Grigg, on a day-to-day basis.

[52] This is a simplified picture, according to Mr. Lyon. Tr. 2076.

services. The vessel disbursement category is the one which covers POP's claim of lost revenues due to PWC's tariff rules. Overall vessel disbursements constituted 43 percent of direct economic impact. Inland transportation accounted for 39 percent of economic impact. But those two percentages concern all kinds of cargo. For containerized cargo, vessel disbursements amounted to 29 percent of direct economic impact while inland transportation amounted to 50 percent of direct economic impact.[53]

It is fair to mention, at this time, that in preparing its updated analysis for this proceeding, ERA was instructed by Mr. Grigg to "factor out inland transportation" and other items which POP considered to be "economic impacts not applicable in this case."[54] ERA's witnesses complied with POP's instructions.

30.[55] The 1976 analysis showed the direct impact on the entire study area (Oregon and Clark County, Washington) to be $47,586,000. It would be consistent with Mr. Krekorian's testimony to update that amount for 1978 by reflecting a 66 percent cargo increase and a 25 percent inflation increase. Thus, in 1978, the direct impact for the entire study area would be $98,740,000, of which $38,508,000 (39 percent) would constitute the direct impact of inland transportation for all cargo moving through the Port. But, because ERA allocated only 85.3 percent of direct impact to SMSA, the impact on the SMSA would be $84,225,000, of which $32,848,000 would be attributed to inland transportation for all cargo.

31. The second type of impact is indirect and is measured by two components. One is represented by port users and is expressed in terms of value added, employment and payroll. Value added is defined by ERA as the difference between the value of goods and the cost of materials necessary to produce them. The other component is represented by government agencies whose services are port related. Unlike value added, the level of the government agencies' component does not vary with tonnages handled by the Port. According to the 1976 study, 98 percent of indirect impact is attributable to the first component. In 1975, $130,190,000 was apportioned to value added, and the total was $133,070,000. Using the same updating factors applied in No. 30, *supra,* for 1978, indirect impact would amount to $276,120,000. In 1975, ERA allocated 50.4 percent to SMSA or $67,060,000. The comparable SMSA amount for 1978 would then be $139,164,000. By applying the 98 percent factor, port user, value added indirect impact for 1978 would be $136,381,000.

[53] PWC implies that all of the 50 percent derives from motor carrier operations, citing Ex. 90, Table III-12. My own calculations of relevant material in Chapter III of that exhibit lead me to find that motor carrier revenues are 84 percent of inland transportation. Thus, motor carrier revenues would constitute 42 percent of direct economic impact.

[54] Ex. 77. Letter dated December 18, 1979, from Mr. Grigg to Mr. Lyon.

[55] In this finding, I substituted the amount shown in Ex. 90, p. VI-3 (Table VI-1) for the amount proposed by PWC/POS as the base figure to be used in making calculations. Thus, I used 47,586,000 instead of 65,344,000.

32. The third type is induced impact. It is a calculation based upon a mathematical technique designed to approximate the effects of secondary, tertiary and further rounds of spending (respending), in the study area and the SMSA, of portions of gross revenue in determining direct and indirect economic impact. The 1976 study found the induced impact to be $229,706,000 in 1975.

33. For the Port's marine terminal activities as a whole, the total of the three types of economic impact on the entire study area for 1975 was found by ERA to be $410,400,000, of which $233,800,000 was allocable to SMSA.[56] Updating these figures to 1978 to reflect cargo growth of 66 percent and inflation of 25 percent, the total 1978 economic impact of the Port's marine terminal activities under the ERA methodology would be $485,135,000 for SMSA and $851,580,000 for the entire study area. The application of the ERA economic impact analysis to the findings in this proceeding will appear later.

34. For 1978 the total gross personal income for SMSA was $10,420,000,000.

f: Pricing of POP's Services

35. POP is an operating port. This means that it does not allow others to perform port services as a landlord port would, but performs those services, such as stevedoring, terminal services, container freight station operations and the like, itself. POP performs those services under rates and charges contained in tariffs which it files with the Commission. As pertinent, those tariffs are the Port of Portland, Portland, Oregon, Container Tariff No. 1 and the Port of Portland, Portland, Oregon, Terminal Tariff No. 3–A.[57]

POP's tariff charges which bear on this inquiry are those for throughput, extra ins and outs and wharfage. The throughput charge is a per container charge. While the rate may vary under differing conditions, it applies against any container, regardless of size. It covers container movements from terminal gate to vessel stowage.[58] As the name implies, the extra ins and outs charges, also assessed against containers, cover movement of containers over and above those included in the throughput charge. These charges apply almost entirely to movements of a full or loaded container between POP's container yard and its container freight station.[59] Wharfage is levied

[56] The portion of the total impact allocable to SMSA is 56.9 percent of the total under ERA's methodology. But, there has been a certain amount of rounding off which must yield to the actual figure shown in Ex. 90, p. VI–10, Table VI–4.

[57] Ex. 33 contains relevant excerpts from those tariffs, hereafter referred to, individually, as Container Tariff and Terminal Tariff.

[58] Container Tariff, pp. 13, 14, 15, 15–A, B.

[59] Container Tariff, pp. 10, 15–A, B.

against all cargo passing over the wharf and is based on the weight of the cargo.[60]

36. Under an Agreement, approved by the Commission pursuant to section 15 of the Shipping Act, various competing Pacific Northwest ports, which are members of the Agreement, are permitted to discuss and agree on port charges and tariff rates. POP, like POS, is a member of that Agreement. The Agreement authorizes independent action.

Either, by way of independent action, or because certain rates and charges are not within the coverage of the agreement, POP has engaged in competitive pricing actions designed to attract cargo from competing ports to the Port. POP has been successful in attracting cargo by means of competitive pricing, although not in every case. For example, in 1978, POP established a lower throughput rate for minilandbridge containers than the rate applicable to other containers. This tariff action did not succeed in its purpose. (In principle, however, there is no difference between this type of pricing practice and PWC's equalizing and absorption practices.) For another example, POP works with inland carriers to create lower combinations of inland freight rates to POP than to other ports. For yet another example, POP *absorbs* Columbia River barge unloading costs on through shipments to attract traffic from Idaho and Washington. (There is no difference in principle between this pricing practice and PWC's practices.)

The following exchange sums up Mr. Mowat's views concerning the difference between what POP does to meet competition and what PWC may do to meet competition:[61]

> Q. [BY MR. ANGUS.] Mr. Mowat, this morning I believe it was your testimony that it is the Port of Portland's position that it is not unlawful for ports to engage in price competition and in that fashion divert cargo from its normal routing patterns to a new normal pattern, a new routing pattern, is that correct?
>
> A. Yes.
>
> Q. By the same token when an ocean carrier or conference of ocean carriers engages in similar pricing practices, that does result in diversion of naturally tributary cargo from a port and should be declared unlawful, is that correct?
>
> A. That is what we propose today.
>
> Q. What is your basis, either in policy or as a transportation man, to justify such a distinction?
>
> A. It would be the history of regulatory law insofar as the Federal Maritime Commission is concerned, the cases that have dealt with tributary areas that pertain to steamship lines and conferences and not the port, although the tributary area would be a tributary area to a port.
>
> Q. My question was what is your basis in policy or in a transportation sense so that it can make sense to us as operators in

[60] Terminal Tariff, pp. 700–A, AA, B.

[61] Tr. 1579–1580.

the transportation field. Your answer seems to indicate that you rely exclusively on legal precedent, is that correct?
A. Yes.
Q. So you have no either economic policy or rationale or transportation policy or rationale for the Maritime Commission to declare that carriers cannot do certain things, but ports can, is that correct?
A. Yes.

g: Advantages and Disadvantages of Location

37. POP's geographical location is both beneficial and detrimental to the Port in its quest for cargo. It has the obvious advantage of being nearer than POS to the inland places of origin of most, if not all, of the equalized commodities. But, via great circle ocean navigation routes, POP is further than POS from many of the principal PWC destinations. For example, Yokohama is about 165 nautical miles (189 linear miles) closer to POS than to POP.[62]

Existing trade routes and traffic patterns make POP even more distant from PWC destinations. All common carriers, PWC members and independents, in the Northwest/PWC trade call at POS, but, not one calls only at POP. Thus, an additional call at POP would require a vessel to travel many more water miles than the mere difference in great circle distances—roughly 400 miles in the case of Yokohama.[63]

The overland motor carrier distance between POP and POS is about 172 miles.

38. POP was the beneficiary of navigational improvements which opened up the upper reaches of the Columbia River and tributaries in Washington and Idaho to barge traffic. In 1977 and 1978, respectively, POP handled 8,419 TEUs and 14,411 TEUs of barged container cargo.[64]

39. The degree of POP's inland transportation advantage diminishes as the disparity between the distance from origin and POP, on the one hand, and the distance from origin and POS, on the other hand, decreases. Usually, that decrease occurs, insofar as motor carrier transportation is concerned, as the origin point moves northerly toward the approximate line Raymond,

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[62] However, POP may be closer to some southern PWC destinations, such as Manila.

[63] My calculation is based on these factors, one of which is inexact, as follows:

(1) Great circle difference (inexact because it does not measure Puget Sound mileage to POS) .... 189 miles.
(2) Cape Flattery, at head of straits leading to Puget Sound to Columbia River Lightship at mouth of that River .... 113 miles.
(3) Columbia River Bar to POP .... 101 miles.

[64] Cf. the barged TEUs in 1977–78 with the equalized and absorbed TEUs of the top ten commodities during those two years by the three PWC members which participated in that practice (from Ex. 37 Rev.):

	1977	*1978*
APL	2708	3709
Sea-Land	1180	1072
Pacific Container Line (PCL)	370	550
Total	4258	5331

Washington—Toppenish, Washington—Lewiston, Idaho—Drummond, Idaho. (See Ex. 13.) It costs only $17.00 more to move a container of canned corn from Toppenish to POS than from Toppenish to POP.

40. It is evident, from PWC's equalization and absorption practices and POP's absorption practices, that common carrier rates are not necessarily proportionate to common carrier costs. Competition is not the only reason for this anomaly. Sometimes, rate levels are influenced by laws designed to relieve perceived inequality of the effect of other laws. A pertinent illustration is section 205 of the Merchant Marine Act of 1936, which, in effect, has been interpreted by the Commission to prohibit conferences to set rates and charges at one port which vary from equivalent rates and charges at neighboring ports.[65] Applied to the facts of this case, this means that PWC carriers calling at POS and POP cannot charge more for containers lifted at POP even though there may be far greater operational and overhead costs involved in the additional call at POP.

41. The record is sparse with respect to evidence of rail rates pertinent to this inquiry.

42 and 43. Ocean containership common carriers, which do not make calls at POP, but which do so at POS, regard the additional expense of making a POP call as one of the two most important factors militating against the call. The cost of an additional call will, of course, vary from operation to operation depending upon a mix of factors.[66]

Dr. Nadel presented an analysis, based on 1978 costs, of the cost of an additional POP call for three PWC members and one independent operator in the PWC trade. The study took into account direct costs (analogous to "out-of-pocket" costs) and "opportunity costs," which he defined, broadly, as those costs incurred by a carrier in making ship capacity available for a call. The analysis was not contradicted or challenged and correlates well with cost estimates testified to by Douglas A. Pfaff, an APL witness. As set forth herein, I find it to be accurate.

Dr. Nadel determined that the individual carrier's total cost (direct and opportunity) for an additional POP call would be as follows:

Sea-Land	APL	OSK	OOCL
$44,338	$46,265	$38,940	$15,397

On a projected basis, assuming Sea-Land and APL made one call a week, it would mean additional annual costs of $2,305,576 and $2,405,780, respectively. For OOCL on a projected biweekly service, its annual cost would be an additional $400,322.

[65] See *Far East Conference Amended Tariff Rule*, 20 F.M.C. 772, 774 (1978), and cases cited therein.

[66] E.g., Sea-Land's Northwest service includes calls at POS and California ports. Thus, a POP call would not be proportionately as great for Sea-Land as it would be to APL or Hapag-Lloyd, a German flag independent, which do not steam south along the coast, but go directly to the Far East.

44. Dr. Nadel's analysis also considered the additional cost to APL due to lost revenue arising from the fact that, if a POP call were not made, a vessel would have been otherwise productively employed. He calculated the loss to be $83,000 per day per call.[67] This cost could be lessened by speeding up the vessels. However, the increased fuel costs associated with higher speeds would cost an additional $19,000 per day.[68]

45. A vessel calling at POP is required to engage a bar pilot to cross the sandy bar at the mouth of the Columbia and a river pilot to navigate that river and the Willamette. In adverse weather the bar cannot be crossed. On the rivers, fog may cause delay and, sometimes, groundings. Delays in crossing the bar or on the rivers are costly in their own right, but they may become even more costly if they result in schedule disruption. Although carrier concerns about Columbia River and bar delays are legitimate factors to be considered by management in determining whether to serve POP, the quantification of the delay factor is too speculative to deal with on this record.[69]

h: The Effect of POP's Belated Decision to Compete for Container Vessel Traffic

Capital intensive containership operations have high fixed costs. When prevailing rates are highly competitive, as they are in the PWC trade, these high costs can be recouped and a profit turned, only if sailings are kept at or near optimum level. In order to maintain that level, turnarounds must be of short duration and must be kept to a minimum. These needs led to "load centers," a load center being a single regional port of call to meet those needs.

POS, much the smaller port, and one that was in the decline in the 1950's, invested heavily in containerization in the early 1960's and, as a container port, leaped ahead of POP, which did not commit to containerization until late 1970 or 1971. Thus, POS became the Pacific Northwest Region's load center and it continues to maintain that position, as is evidenced by the fact that all the containership carriers serving the Pacific Northwest call at POS.[70]

It follows that, in considering whether to retain or add another load center in the same region, carrier management must weigh the additional vessel costs and scheduling problems associated with another port of call

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[67] There are 1.5 days per call, additional, assuming no delays.

[68] This figure does not include some of the other debits of high speed, such as more maintenance and less cargo space because of the additional fuel weight.

[69] See, e.g., Ex. 136, prepared testimony of Mr. Pfaff, at p. 13. "If we had a weekly service to Portland, a few of our ships would, on an unpredictable basis, be held up at the bar by weather." PWC/POS references to the Mt. St. Helen's eruption and silting of the river channel as disadvantages to POP seem to me to be overreaching, particularly as the likelihood of the occurrence was not shown to have been a management consideration, when, years before that unique event, APL and Sea-Land decided not to call at POP.

[70] For these purposes, it is appropriate to include the proximate Puget Sound port of Tacoma, a separate port, within the POS load center complex.

against the potential for additional cargo at the second port in order to maintain or ensure a profit balance in the ratio that optimum vessel utilization bears to high fixed vessel costs. The major carriers in the trade consider a weekly northwest sailing essential. OOCL, which had biweekly sailings, recognized that its frequency was inadequate.

47. It is evident that the various carrier decisions not to add a POP call were based on those criteria. For APL and Sea-Land, among others, the cost of making the additional call (see Nos. 42 and 43, *supra*) compared unfavorably to the revenues to be gained from carrying additional cargo inbound and outbound. Equally, and, perhaps more important, were the scheduling problems occasioned by the additional distance and time spent both in traveling that distance and in protracted stays at POP's docks.[71] Given the carriers' need for optimum voyages and the shippers' need for regular, rapid service, neither APL's nor Sea-Land's management could justify the additional call for the limited number of containers available at POP,[72] see *infra*.

i: Availability of Container Cargo at POP and Its Effect on POP's Ability to Meet Shippers' and Carriers' Needs

48. In examining port usage, it is essential to consider the relationship between outbound and inbound movements. At POP, for all trades, outbound container cargo movements outweigh inbound movements by about 2.76 to 1. The ratio for the pertinent transpacific movements is about 4 to 1.[73] APL's experience of equalized cargo was that it "weighed out" heavier than other cargo at POS because it amounted to 6 percent of weight capacity but provided only 4½ percent of gross revenues. One of those weight commodities is lumber, which tends to move via bulk carrier. It is opportunity cargo for containership carriage. Consequently, this cargo is economically attractive only when there is excess or otherwise unused vessel capacity, because, as opportunity cargo, it is low rated due to competition.

49. On this record, it is hardly likely that any of the equalizing PWC carriers could have earned a profit by adding a POP call during 1977 or 1978 instead of equalizing. Mr. Mowat understood this to be true from his own experience. Mr. Mowat maintained that POP was not trying to attract those equalizing carriers to call at POP. (In *Intermodal Service to Portland, Oregon, supra,* 17 F.M.C. at 129, the Commission made it

[71] APL's experience in 1974 and 1975, when it called at POP, shows that the average time at the dock was 13½ hours. The minimum was 6 hours, and the maximum was 39¾ hours.

[72] Another PWC carrier, Knutsen Line, could no longer justify serving POP and transferred its Columbia River service to Longview about 45 miles closer to the coast. An independent carrier, OOCL, dropped POP in favor of a call at Oakland.

[73] This finding is based upon Mr. Mowat's informed guess. Contrary to what PWC/POS propose, Captain Paul Mead, a former OOCL employee, did not testify that it was 4 to 1. He testified that the proportion of inbound POP to inbound POS container traffic was "one-quarter." He did add, however, that the amount of inbound to POP was not sufficient to justify OOCL vessel calls at POP.

clear that it is not empowered to require a carrier to call or to continue to call at a particular port.) He recognized that POP calls by the PWC equalizing carriers would not create a greater flow of cargo at POP (except for equalized cargo, which he believes would otherwise sail from POP). Thus, the introduction of additional direct call carrier competition at POP could give impetus to a struggle for existing container cargo. In the opinion of the major containership operators at POP, the Japanese Six, Sea-Land or APL would not compete at POP because, even if they made some market penetration, they could not get sufficient shipper support to draw cargo away from the Japanese Six and thus couldn't justify a call. There is, then, sufficient record support to find that, at least through March 1980, when the above testimony was given by Mr. Mowat, there was no likelihood of additional container traffic moving through POP were APL, Sea-Land or PCL to have called there.[74]

In 1978 PWC carriers equalized an average of 17.5 containers per vessel call at POS. APL had the highest average, 36.8, and PCL the lowest, 5.3. At POP, PWC carriers averaged 31.3 per call, independents averaged 57.4. The average for all carriers was 35.4. OOCL had the highest average, 83.7, and Scindia the lowest, 1.0. But, these figures are based on a container count, not a TEU count. Those averages are based upon the following totals of loaded containers of all sizes handled during 1978 by the leading carriers:

	Containers Loaded to PWC Destination
At POP:	
PWC	
Japanese Six	14,309
Independent	
FESCO	2,598
OOCL	1,924
Evergreen	374
Total of all carriers (including those shown)	19,976
Equalized and Absorbed*	
APL	1,915
Sea-Land	536
PCL	275
Total	2,726

*Does not include independents.

[74] Mr. Mowat, an experienced practitioner before this Commission and an extremely cautious witness (he protested giving yes or no answers to questions calling for either response because of "connotations" he perceived), also recognized that had they called at POP, neither of those equalizing PWC carriers could have attracted the containerized cargo, equalized by independent carriers, to any appreciable extent.

50. In 1978, FESCO, OOCL and Evergreen, the leading independents serving POP that year, averaged 70 westbound containers per call to PWC destinations,[75] but none of them continues to serve POP by direct call.

51. In 1978, APL paid out $505,182[76] to motor carriers by way of equalization and absorption, or an average of $269.00 per container. Inasmuch as it would have cost APL about $46,000 to make an additional POP call and that about 20 percent of that cost may be attributable to inbound containers, APL's allocation for outbound containers would be about $37,000. Thus, APL would have needed about 137 containers per call (weekly) to make POP calls less costly than equalization in 1978. Assuming APL would have been able to load all 2,665 containers equalized by PWC carriers in 1978,[77] it could have loaded only 51.25 containers per call.

It should be noted, again, that POP neither encourages nor insists upon equalizing PWC carriers calling at POP. POP simply wants them to forego equalization so that carriers calling at POP will handle that cargo. But, it has already been seen that the Japanese Six could not have carried any appreciable amount of additional containers from POP in 1978 and POP made no valid showing that other PWC carriers or independents serving POP, by direct call, could have carried additional outbound containers in 1978. It is left to speculation whether, but for APL's, Sea-Land's and PCL's equalization, another carrier would have tested POP's competitive waters. On the other hand, as will be seen, *infra,* there is a good deal of evidence that, but for equalization, shippers might not have been able to get their goods and wares to market.

52. OOCL, which, except for the Japanese Six, had the largest market share of POP cargo in 1977, and vessel costs per Portland call about one-third those of APL, withdrew from direct service at POP in 1978. Withdrawal was due to scheduling problems. OOCL had to choose between an Oakland call and a POP call. It chose Oakland because there was a lack of sufficient cargo at POP, and what was available was mainly low rated cargo.

53. Sea-Land had, from time to time, considered POP calls, and had in the past called at Portland in its Alaska and Puerto Rico service. Sea-Land still has an unused leased facility at POP. Nevertheless, Sea-Land cannot justify a business decision to serve POP. The amount of available cargo does not warrant the capital and other expenditures needed to re-institute a service at this facility.

54. In 1979, APL had gross revenues of $1,329 per equalized container, carrying an average of 27 such containers per voyage. Therefore, it received $35,883 gross revenues per 1979 voyage from equalized containers. At

[75] Per No. 48, *supra,* inbound is estimated at 17 containers.

[76] This figure does not include apple shipments, which, in 1978, amounted to 37 containers.

[77] The 121 20-foot containers were treated as 60 forty footers. Thus calculated, there were 2,665 containers equalized in 1978 by PWC carriers.

the indicated cost of $46,000 per additional call at POP, APL would have lost $10,000 per voyage, had it made that call.[78]

55. A port's longshore labor productivity in handling containers is measured by the number of containers which can be loaded per crane, per hour. In terms of cost to a carrier, this productivity not only affects the unit cost per container, it affects the ability to adhere to fixed scheduling. The evidence shows that compared to other West Coast ports, Oakland and POS, POP was the least efficient labor productive port in 1978 and 1979.[79]

56. As late as October 25, 1979, POP recognized that berth conflicts and ship queuing were an immediate problem at POP's major container terminal—Terminal 6—and that additional construction would be needed to alleviate that problem. This recognition is contained in a study undertaken by POP. It is sufficient to note only this one conclusion from the study, based upon simulations made by the Port:—if one new line were added to those then serving POP "(the equivalent of a replacement for OOCL with 13-day service) [it] would result in queuing about 15 ships a year."[80] This congestion factor was exclusive of "the total congestion problem compounded by [labor] gang shortages."[81]

57. The imbalance (4 to 1 ratio) of outbound to inbound container cargo at POP creates equipment shortage problems at that Port, causing carriers to turn away cargo or undergo the additional expense of repositioning equipment to serve its shippers.[82]

j: POP's Ability to Meet Shipper Needs

58. The primary market for Hood River, Oregon, apples, one of the top ten commodities, is Hong Kong. Shipments are seasonal and are made in 40-foot refrigerated containers. There is virtually no scheduled direct liner refrigerated container service from POP to Hong Kong.

59. Hood River grown apples might not move at all to PWC destinations were it not for equalization. Without equalization, Hood River shippers could experience a decline in exports because of competition from foreign and domestic growers in other states. Prior to the growth of containerization, there was less than half the current demand for these apples at PWC destinations. Volume apple movements coincided with both the expansion

[78] For this finding, I do not find it necessary to take into account other expenses which APL would incur, such as greater fuel costs occasioned by the need to maintain APL's schedule of calling once a week at Northwest ports. This finding subsumes that APL's loadings would have remained nearly constant whether it called at POP or equalized.

[79] In 1978, OOCL averaged 8 TEUs per hour at POP, 12 TEUs at POS and 20 TEUs at Oakland. The 1979 figures were: 10 at POP, 13 at POS and 20 at Oakland.

[80] Ex. 45, p. 1.

[81] *Id.*, Table 2.

[82] Japanese Six Lines turned away about 50 containers per month during the winter months of 1978. Repositioning costs in 1980 (no earlier figures were furnished) cost the Japanese Six Lines between $150.00–$200.00 per container.

of refrigerated containerization and the emergence of POS as a load center, and were aided by equalization. In 1977 and 1978, respectively, apples constituted about 12.1 percent (5,257 tons) and 4.8 percent (2,745 tons) of equalized cargo.[83] With respect to apples, historical events, which dictated the traffic pattern through POS, overtook the desirability of a competing service from POP. Moreover, a shift to POP, solely because it is closer to the orchards, did not occur when POP improved its container facilities because the inadequate refrigerated container capacity at POP was a deterrent.

60 through 62. From an industry economist's standpoint, the preferred method to be used to determine adequacy of service of a port, which in turn is used to resolve the question of whether cargo is naturally tributary, is not an aggregate capacity analysis (broadly, slot capacity), but an analysis seeking to ascertain whether a commodity would have entered the export market if a shipper only had the options of shipping through a nearby port or paying the additional cost of inland transportation to a more distant port. Using the preferred analysis, if the commodity would not have moved under either of those options, but would have moved by equalizing the inland transportation costs to the more distant port, then the nearby port is an inefficient port and, consequently, not a naturally tributary port for that commodity. Under the preferred test, particular shipper experience in getting goods to a market may be used in reasoning to the general.[84]

63. PWC/POS proposed finding No. 63 is rejected, except as otherwise specifically found elsewhere herein.

64. Yuasa Trading Company was the shipper of 75 percent of the equalized frozen corn shipments made in 1978. Yuasa experienced difficulties in getting the needed refrigerated containers from the Japanese Six Lines at POP (at POS, as well, at times) and in getting vessel space at POP. In that year, at least 30 percent of the equalized frozen corn shipped by Yuasa came from the area of Salem, Oregon. Salem is located about 47 miles south of POP and is about 219 miles from POS. Because Yuasa must meet shipping date requirements established by the overseas customer, if it cannot ship from POP, it must ship from POS, pursuant to equalization, or not at all, "because growers in the Salem area will permanently lose the chance to sell their products if we are forced to pay transportation charges from here to Seattle."[85] In 1977 and 1978, respectively, there

[83] During those years only 16 tons of apples moved outbound from POP to a PWC destination (Thailand) in liner service. During the years 1974 through 1978, inclusive, only about 600 tons of apples left POP for PWC destinations. Assuming that one 40-foot container will hold 40,000 pounds, only 30 containers of apples were handled at POP in those five years.

[84] Copan, Ex. 102, Tr. 3238–3253. He explained why he was compelled to use the aggregate method in the testimony he prepared before the hearing began, but later was able to make the transition to the preferred method. Under the preferred method, not one of the top ten commodities is naturally tributary to POP.

[85] Tr. 2324. In fact, for reasons immaterial to this proceeding, Yuasa stopped selling Salem corn and began to sell Central Washington corn to its customers in 1979. It was shipped via POS without equalization.

were 26 TEUs and 134 TEUs of frozen corn equalized by APL (158 TEUs) and Sea-Land (2 TEUs).

65. Historically, lumber destined for Japan, the major importing nation of that commodity, has moved via POP and POS. By far, the larger volume has moved and still moves through POP. But the POP movements are primarily bulk shipments on non-liner vessels. For example, in the years 1974 through 1978, non-liner movements from POP accounted for 93.5 to 98.8 percent of the tonnage. In 1977 and 1978, respectively, there were 15,296 tons and 19,671 tons of liner shipments compared to 713,630 tons and 1,687,261 tons of non-liner shipments. At POS, in 1974, non-liner shipments accounted for 78.2 percent of lumber shipments. This dwindled to 10.1 percent in 1977 and rose from there to 21.8 percent in 1978. On the basis of available data, Mr. Copan correctly reasoned "In the export of lumber therefore, there are factors other than geographical proximity and inland freight costs that are causing most shippers seeking a liner service to Japan, to utilize Seattle rather than Portland." [86]

Virtually all of the equalized lumber originates in the Willamette Valley from POP south to Eugene, Oregon, about 110 miles from POP. Caffall Bros. Forest Products is a major lumber exporter, shipping both breakbulk and in containers. In 1977 and 1978, respectively, Caffall's shipments to Japan constituted 39 percent and 52.2 percent of all equalized lumber. Most of these shipments originated at Molalla and Estacada, Oregon, about 35 miles southeast and 25 miles east of POP, respectively. The lumber is trucked to a container freight station in the Portland area, not a POP facility, where it is containerized and sent overland by truck to POS.[87] Based on 1979 rates, the cost of inland transportation to POS was almost four times greater than the cost to POP.[88] Caffall also used State Line's roll on/roll off service at POP, but primarily it used APL at POS.

There were several reasons for Caffall to ship via APL out of POS. In 1977 and 1978 the APL rate was lower than the rate of any carrier serving POP. The rate was then so much lower that Caffall would have paid the entire cost of inland transportation rather than ship via POP. Although neither Caffall nor another Oregon lumber shipper, Avison Lumber Company, now use APL, they still ship out of POS via Lykes Bros. roll on/roll off, and pay the entire cost of inland transportation because the sum of the inland and ocean charges is less than the cost of shipping by liner from POP. Moreover, Caffall and Avison, from 1977 on, have had difficulty in obtaining vessel space and 40-foot containers at POP.

The export of lumber is a substantial portion of Caffall's and Avison's business. Together they ship about 15 to 20 percent of Pacific Northwest

[86] Ex. 95, p. 21.

[87] This was true of APL shipments. Sea-Land shipments were sent to POS to be containerized. More than 99 percent went via APL.

[88] The 1979 cost to POP was $88.00; to POS it was $340.00. These figures and the ratio mentioned in the text, above, correlate well with APL's equalization average of $254.00 per container in 1977 and of $269.00 per container in 1978.

lumber to Japan. Canadian shippers are extremely competitive. If the cost of inland transportation had increased because equalization had not been permitted, sales would have been lost to the Canadian shippers in 1977 and 1978.

There were 7,342 tons of equalized lumber in 1977, amounting to about 17 percent of the top ten in that year and 21,641 tons in 1978, or about 38 percent of the top ten equalized commodities in the latter year.

66. There were 11,462 tons of wastepaper absorbed in 1977 and 11,015 tons in 1978. Respectively, those tonnages amounted to 26 percent and 19 percent of equalized cargo in those years.

The experience of two wastepaper shippers were similar in that both had difficulty in obtaining space on carriers calling at POP.

Most of the equalized paper is collected in the POP SMSA area and is exported to Korea. Vessel space at POP is never certain because wastepaper is lower rated than many other commodities carried to Korea. For example, Evergreen Line canceled a shipper's confirmed wastepaper bookings at POP in favor of cotton, a higher rated cargo, which it loaded at Oakland. Wastepaper moves most efficiently in 40-foot containers, but these are generally in short supply or simply not available at POP. Shippers are unable to wait for containers or vessel space because wastepaper is a time and price sensitive commodity and it must move rapidly from collection point to the dock. Therefore, without equalization, it is likely that export sales could not be consummated and this means that wastepaper collected in the POP area would not be exported.

The problem of container shortage is particularly acute for one shipper which must coordinate multiple container shipments, on a single bill of lading, with wastepaper containers exported from Long Beach, California. There is no PWC carrier which provides the direct service to Korea from both POP and Long Beach,[89] although there are carriers that stop at both POS and Long Beach. One of the latter is PCL, which was frequently used by this shipper for that reason.

67. Historically, dried peas and beans (referred to in the trade as "pulses") have moved through both POP and POS. Although some pulses originate at Salem, Oregon, the most significant volume comes from the Palouse area of Washington. Pasco, which may be considered in this area, is just about equidistant from POP (211 miles) and POS (215 miles).

There is no intramodal (rail or motor carrier) freight rate difference to the two ports from Moscow, Idaho or Spokane, Washington, both of which are in the Palouse area.

[89] Evergreen, an independent, once provided that service, but it no longer serves POP. As seen, it was not a reliable carrier for that shipper. Moreover, the use of an independent, such as Evergreen, might have affected the shipper's right to ship via PWC carriers at low contract rates under applicable provisions of exclusive patronage contracts. Several shippers feared that their use of an equalizing PWC carrier might preclude them from using non-conference carriers at POP. In its opening brief, at p. 174, POP expressed a particular concern about the fairness of this practice with respect to equalized cargo. See discussion, *infra*.

For example, according to a September 1979 study submitted by Mr. Mowat,[90] it would cost $497.25 by truck from Spokane or Moscow to either port. By rail, depending upon the number of containers which could be loaded on a flat car, the charges would range from a low of $333.25 to a high of $428.50 per container. But the per container charge would be the same to either port in the same circumstances. By barge, however, the charge to POP[91] would be $206.24 from Moscow and $344.40 from Spokane. However, in 1977 and 1978, barging was not an effective mode of export transportation for pulses and was not widely used.

Why, then, were pulses equalized in 1977 and 1978, when the cost of intramodal rail or truck carriage to POS and POP was equal? In 1977 and 1978, respectively, there were 158 containers (3,284 tons) and 363 containers (7,660 tons) of pulses equalized.[92] North Pacific International, a shipper of 39 percent of pulses equalized in 1977 and 31 percent in 1978,[93] explained that, for quality control purposes, the shipments were routed from Palouse through the Portland area to POS. Pulses are not containerized at the point of origin. They are either bagged or placed in hopper cars or trucks at origin and sent to a container loading facility. The shipper found that an off-dock facility in the Portland area was more efficient than the one in Seattle. This off-dock facility was also closer to the shipper's offices, making it easier for officials to oversee the loading process, from time to time, to make certain that the commodity was not damaged.

However, service from POP was inadequate. A Taiwanese customer needed a direct service. The Japanese Six provided a transshipment service which was unsatisfactory. Evergreen did have a direct service, but space was often difficult to get from Evergreen. (This shipper was closed out when Evergreen was transporting cotton out of California ports.) This shipper would have lost its customer in Taiwan to foreign competitors had it not been for equalization in 1977 and 1978.

68. Metal scrap includes both ferrous and non-ferrous metals. In 1977 and 1978, respectively, 3,228 tons (171 containers) and 2,777 tons (154 containers) were equalized.[94] Most were carried by Sea-Land to Taiwan. A major shipper, Cascade, generated about one-fourth of all equalized containers in those years. The shipments originated in the Portland SMSA

[90] Ex. 14.

[91] There is no comparable service to POS. However, barging in the export trades is "commercially prohibitive." Tr. 2744. This is so because pulses cannot be booked out of POP due to lack of available service. Yet, if barged, the containers would be subject to POP's port charges even if they had to be sent on to another port for loading. POP absorbs port charges for barged containers only if the containers are loaded on outbound vessels at POP.

[92] The containers were 35 and 40 footers. All but two containers were carried by APL. Almost all went to Taiwan.

[93] Ex. 95, schedule 15.

[94] Cascade Steel Metal Scrap prefers to ship this high density cargo in the more economical 20-foot containers, but all the equalized containers in 1977 and 1978 were 35 and 40 footers.

and the McMinnville, Oregon area. McMinnville is about 35 miles south of POP and 210 miles from POS.

Historically, beginning in 1974, POS has been the major export port to PWC destinations for metal scrap. For destination Taiwan, the ratio was almost 6 to 1 in favor of POS. By 1978, the ratio dwindled to 3.6 to 1. These statistics correlate with Cascade's use, during the critical two years, of Evergreen from POP and Sea-Land from POS.

Metal scrap is a time sensitive spot market commodity. This means that Cascade customers, which in 1977 and 1978 controlled the transportation beyond Portland, needed to get the cargo to destination rapidly, without transshipment through Japan.[95] During peak periods (roughly for half the shipments), it is difficult, if not impossible, to obtain direct service to Kaohsiung, the preferred Taiwanese port, because vessel space is inadequate at POP. It is Cascade's business judgment that absent equalization, it could very easily be relegated to the domestic market, and it would have to forego the more profitable export market for metal scrap.

69. Onions accounted for about 2 percent of all equalized cargo in 1977 and 1978. These onions originate at Brooks, Oregon,[96] about 35 miles from POP and 210 miles from POS. Fast and specialized handling (ventilation)[97] are essential to prevent spoilage while the onions are in route in 40-foot containers. The shipping season extends, primarily, from October through February.

Most of these onions are loaded at POP. During the peak season it is not unusual for the Japanese Six Lines to carry between 500 to 1,000 tons per vessel (note—in all of 1977 and 1978, less than 2,100 tons were equalized), often displacing other cargo, such as wastepaper, metal scrap and lumber. Yet there was insufficient space on vessels calling at POP, even with this displacement, to transport all the onions during peak season. In the main, it was this overflow which was equalized. Without PWC equalization (one onion shipper had excess spoilage on two independents and could no longer use them), the overflow would not have entered the stream of foreign commerce to PWC destinations.

70. In 1977 and 1978, respectively, 2,243 tons (121 containers) and 121 tons (6 containers) of canned corn were equalized.[98] Most of the

[95] The Japanese Six transship to Taiwan via Japan. N.b., however, that in 1977, of 9,960 tons of metal scrap destined for Taiwan, only 1,730 tons were shipped direct. Nevertheless, lending credibility to the Cascade witness testimony is the fact that this was greatly altered in 1978 when 7,750 tons, out of 9,925 tons, went direct.

[96] Some onions came from Sherwood, Oregon, about 16 miles from POP. The Brooks and Sherwood onions are of a variety particularly favored in the Far East, primarily Japan and Hong Kong, where most are shipped. This variety does not compete with onions grown in Washington.

[97] Onions are shipped in containers from which the rear door is removed. They are carried above deck, if possible, although some shippers prefer below deck stowage, especially in the colder months.

[98] Mr. Copan performed the research which yielded the statistics (accepted as accurate by all parties) for tonnage and containers which were equalized by PWC. Appendix C, annexed hereto, is a restatement of Exhibits 16 revised and 37 revised, which he prepared. Table I = Ex. 16 revised; Table II = Ex. 37 revised. Mr. Copan believes, however, that the 1978 canned corn statistics may be understated due to possible

1977 movements went to Hong Kong. In 1978 most moved to Japan. Del Monte Corporation is the major shipper of canned corn. The corn is packed in Toppenish, Washington, a site about equidistant from POP and POS. There is no historical data concerning the movement of the commodity.

Del Monte ships canned corn from both POP and POS. Truck charges to POP were about $17.00 less than they were to POS in 1977 and 1978. Consequently, Del Monte prefers to ship from POP to most destinations. However, the APL service from POS to Hong Kong was more desirable because it was conducted as part of a relay system (direct transfer between two line haul type vessels) and not as part of a feeder system (used by the Japanese Six Lines from Japan to Hong Kong). Del Monte found the relay to be more efficient and safer than the feeder service.

The $17.00 difference is considered to be "a very significant factor" by Del Monte. Thus, despite its belief that the APL/POS service to Hong Kong was more desirable than the feeder service from POP, if absorption were not available Del Monte would ship from POP.

71. There is very little evidence of probative value concerning the transportation of meat and bone meal other than the facts that 4,924 tons (225 containers) and 3,786 tons (178 containers) were equalized in 1977 and 1978, respectively. From the fact that equalization took place, it must be assumed that this commodity, which is a by-product of packing plants, originated at locations nearer to POP than to POS. Most of this equalized cargo was carried by APL to Taiwan. The commodity was used there as a high protein feed additive. There is no evidence that any amount of this commodity was shipped from POP to PWC destinations.[99]

Similarly, there is scant evidence of cattlehide movements. In 1977 and 1978, respectively, 4,619 tons (474 TEUs) and 4,823 tons (419 TEUs) were equalized. This cargo originates at slaughterhouses, mostly in Texas and the Midwest, but some cattlehides originate at Yakima and Boise. The product is usually salt cured and containerized at the point of origin. Yakima hides move through POS and Boise hides move through POP, both without equalization. It is assumed that, because equalized hides were loaded at POS, they originated at locations nearer to POP. Hides, historically, have moved in quantity from both POP and POS. POS hides usually go to Korea, directly, or by a transshipment service from Japan. Most of the equalized hides (more than 80 percent) had a Korean destination. This product is used in the manufacture of footwear.

misclassification of canned corn under the description "canned goods." This belief does not rule out other causes.

[99] Ex. 83 shows that in the two critical years, about 1,100 tons of a product described as Meat N.O.S. was exported from POP. Assuming that Meat N.O.S. may be included in the description meat and bone meal, there is no evidence to indicate the destination of the former.

72. PWC/POS proposed finding No. 72 is not rejected. It is essentially accurate, but because it represents a recapitulation of findings previously proposed and accepted, I need not include it here.

73. In determining the capacity of a liner service to carry cargo, theoretical capacity based on design concepts is not the proper standard in this proceeding. The criteria to be used is the service's actual ability (slot) to handle cargo, at a particular time (voyage), at a particular port, with the particular container equipment required to move the cargo to destination, at the time the shipper requires the cargo to be so moved.[100]

74. The Japanese carriers' allocated deadweight capacity limitation is an operational guideline. It may be exceeded only with the master's permission. The master's determination is based on the particular circumstances of the sailing, such as where the weight cargo is loaded, anticipated weather conditions, etc. The master also may exercise discretion to accept less weight than the guidelines depending on the same circumstances. In 1977, 21 of the Japanese Six Lines' 72 voyages from the Pacific Northwest sailed at 90 percent or more of the guideline limit (including 8 sailings above the guideline limit). In 1978, 55 of their 72 voyages sailed at 90 percent or more of the limit (including 34 sailings above the limit).[101]

75. PWC/POS proposed finding No. 75 is not rejected. It is generally accurate. Boiled down, it proposes a finding that POP did not meet its burden of persuasion which it needed to overcome the testimony of Mr. Hirano concerning the individual voyage capacity of the Japanese Six Lines. I made this finding earlier.

76. By 1980 the Japanese Six Lines made hatch corrections to some of their vessels and substituted one vessel for another, which had stability problems. These changes increased the services' actual carrying capacity. Yet, by the end of 1980, the Japanese Six Lines were sailing to PWC destinations with capacity loads.[102]

77. PWC/POS proposed conjectural finding No. 77 is rejected.

78. In 1977 a total of 339,056 tons of containerized cargo, in 17,098 containers, was loaded at POP on vessels engaged in whole, or in part, in service to PWC destinations. Most of this cargo was carried to PWC destination ports, although some of the vessels in question also served and carried cargo to non-PWC destinations in Australia, Singapore, Malaysia, India and Indonesia. The chart below summarizes the 1977 tonnage percentage and number of TEUs carried, by carrier:

[100] See, Tr. 4852–4855.

[101] Ex. 142.

[102] POP, itself, is the source of this data. Because the Japanese Six lifted about 71 percent of the container cargo going from POP to PWC destinations in 1978, and because the carriers which lifted most of the remainder had left the trade from POP, PWC/POS posit that from "this fact," the 1979/1980 actual vessel capacity at POP "to handle export needs on cargo equalized or absorbed via Seattle, at the time the shippers needed to ship the cargo, was below 1977–1978 levels." Contrary to PWC/POS belief, "this fact," alone, does not "make the proposed conclusion inevitable."

Carrier	Percent By Tons	TEUs
*OOCL (Ind.)	12.1	3,176
Japanese Six (PWC)	67.7	18,639
*FESCO (Ind.)	10.1	2,535
*States** (PWC)	4.8	202
*Knutsen** (PWC)	2.2	115
EAC** (PWC)	1.5	297
APL** (PWC)	1.1	12
Scindia** (Ind.)	.5	10

*Indicates carrier which withdrew from direct POP service at time hearing ended. EAC added about 10 POP vessel calls per annum but its vessel calls now include Australia.

**Indicates primarily a breakbulk, bulk or neo-bulk service.

79. In 1978 a total of 371,759 tons of containerized cargo, in 19,976 containers, was loaded at POP on vessels engaged in whole, or in part, in service to PWC destinations. The chart below summarizes the 1978 tonnage percentage and number of TEUs carried, by carrier:

Carrier	Percent By Tons	TEUs
*FESCO (Ind.)	13.5	4,109
Japanese Six (PWC)	71.4	22,210
*OOCL (Ind.)	9.1	2,822
*Evergreen (Ind.)	2.2	685
*Knutsen** (PWC)	1.8	533
EAC** (PWC)	.9	288
*States** (PWC/Ind.)	.7	160
APL** (PWC)	.2	29
SCI** (Ind.)	.2	31
Scindia** (Ind.)	.0	4

*Indicates carrier which withdrew from direct POP service at time hearing ended. EAC added about 10 POP vessel calls per annum but its vessel calls now include Australia.

**Indicates primarily a breakbulk, bulk or neo-bulk service.

80 and 81. The only carrier adding a POP call to PWC destinations after 1978 was Lykes. Lykes was using breakbulk vessels which had a small capacity for containers. It is not possible to determine what portion of the cargo, previously lifted by carriers who stopped calling at POP, devolved upon the Japanese Six Lines. As of the close of hearings, the only carriers serving POP, directly, in the PWC trade with full container service were the Japanese Six Lines, even though overall export movements from POP were increasing.

82. In 1977 and 1978, APL carried the largest quantity of PWC equalized or absorbed cargo. In 1979, APL's volume of equalized cargo decreased below 1978 levels.

II. POS[103]

83. POS is a municipal corporation, organized and existing under the laws of the State of Washington. It is an all weather, deep harbor port which serves virtually all classes of ocean carriers. POS owns substantial marine terminal facilities and warehouses which it either operates or leases to ocean carriers.

84. POS is a member of the same rate agreement as POP. Rates for services at POS are established to generate sufficient revenue to cover operating costs, but those rates need to be competitive with other ports offering the same services. POS, POP and other ports on the West Coast have competed keenly over the years in terms of rates and service and continue to do so. There is some evidence to indicate that in 1977 and 1978, containership stevedoring and terminal service rates at POS were lower than those at POP. Ex. 109, pp. 4, 5.

85. POS is a container load center in competition with all other ports in the United States, but mostly with West Coast, particularly Northwest ports, in the Far East trade.[104] It maintains fully staffed marketing offices at many cities, foreign and domestic, and it solicits cargo wherever it can, including the Willamette Valley and Hood River areas. There is no evidence in the record to support a finding that POS' solicitation of cargo in Oregon includes an explanation of the equalization and absorption practices of PWC—". . . It is not a selling tool that we can use to get cargo out of the Portland area" (McQuigg, Tr. 4119).

86. POS enjoys a geographical advantage in the Far East container trade because it is the closest port, in terms of distance and sailing time, to Japanese, Taiwanese, Korean, and other ports served by the PWC.

87. POS invested early in containerization and is heavily dependent on container cargo moving in the Far East trade. Exports to nations served by the PWC represented 75 percent of the export containerized cargo handled by POS in 1977 and 1978. Cargo carried to PWC destinations by the PWC carriers represented a substantial portion of all the export cargo which moved through POS in those years. POS has served as an historical port of export for many of the "top ten" commodities.

POS' 1978 volume of more than half a million tons of PWC "top ten" commodities (including equalized and non-equalized cargo) represented

[103] PWC/POS proposed findings 83–94 relate to POS. My findings do not include the vast array of detail proposed by PWC/POS, not because of inaccuracy, but because so much is irrelevant to the issue of PWC's absorption practices. Only by broadening the scope of this proceeding would any of that irrelevant detail become germane.

[104] POS also competes intermodally with East Coast and Gulf Coast ports for cargo destined to the Far East.

about 19 percent of all the containerized cargo handled by POS.[105] Containerized cargo represented about 31 percent of POS' foreign dry cargo tonnage for that year. By contrast containerized cargo amounted to less than 7 percent of POP's similar tonnage for that year.

POS is the third largest American container port. On the West Coast it is second to Los Angeles, but it is the dominant container load center in the Northwest, where, in 1978, it handled about 650,000 containers compared to POP's 80,000.

88. POS is perceived as a container load center in the trade. POP is not so regarded. POS' position as a load center arose out of its capital investment program in the 1960's, which was designed specifically to attract container vessel traffic.[106] As found earlier, calling at a single regional load center is a far more efficient operation for containerships. The load center also makes for an efficient interchange of cargo between inland carriers and ocean carriers.[107]

89. See Appendix D for a description of the extensive facilities at POS and Seattle harbor.

90. The Seattle area is served by two major railroads and 37 motor carriers. It is also served by the various ancillary services and businesses associated with a major port. There are foreign and domestic freight forwarders, customhouse brokers, stevedoring contractors, marine employees, adjusters and insurance brokers, ship chandlers and suppliers, bankers, foreign consulates, public warehouses, cold storage plants, etc. The availability of these services influences the decision of shippers as to cargo routing. In this respect, POS is not appreciably different than POP, which also has ancillary services available.

91. As found earlier, all liner services calling at POP in 1977 and 1978 also called at POS (or nearby Tacoma). PWC carriers calling only at the latter were Sea-Land, APL, Knutsen, Korea Marine Transport, Galleon, PCL and Hanjin. Independents calling only at the latter were OOCL, FESCO, Hapag-Lloyd, Neptune-Orient, Evergreen, Ro-Lo Pacific, Korea Shipping and Yang Ming.

92. From POS, APL's container vessels have the shortest advertised transit time from the Pacific Coast to Japan and Taiwan of any similar

[105] In 1977 POS handled 2,143,000 tons of containerized cargo. In 1978 it handled 2,477,000 tons, an increase of 16 percent over the previous year. POP showed a 12 percent increase for the same period.

[106] POS seeks a finding that "A loss of volume of cargo would affect the ability of the port to amortize its facilities." Assuming, but not finding, this to be true, how could this fact affect any of the enumerated issues in this proceeding? To deal with the effect on POS of a finding or conclusion concerning the lawfulness of PWG equalization and absorption tariff provisions would be to expand the investigation far beyond the terms of the Order and Further Order.

[107] Because of the high cost of serving a second port in a region, both in terms of the expense of an additional sailing and the effect upon maintaining an optimum voyage schedule, two carriers, APL and Sea-Land, testified that regardless of the outcome of this proceeding, they would not add a POP call. A former OOCL employee who testified indicated that this would be OOCL's decision also. I can find, only, that they so testified, but I also find that, on this record, their managements could not justify an additional call at POP.

service (though Lykes' irregularly scheduled Ro-Ro service from POS is a day faster to Japan). APL's days in transit from POS and the two shortest times (days) advertised by its competitors, as well as the shortest time from POS, as of 1980, were:

To	APL	Advertised in Pac. Shipper	
Japan	10	Neptune	10 (POS)
		Hapag-Lloyd	12 (POS)
		Japanese Six	13 (POP)
Taiwan	13	Neptune	16 (POS)
		Hapag-Lloyd	17 (POS)
		Japanese Six	21 (POP)
Korea	19	Neptune	13 (POS)
		Japanese Six	17 (POP)
		Hapag-Lloyd	17 (POS)
Hong Kong	25	Neptune	18 (POS)
		Sea-Land	19 (POS)
		Hapag-Lloyd	19 (POS)
		Phoenix	19 (POS)
		Japanese Six	21 (POP)
Philippines	29	Sea-Land	24 (POS)
		Hapag-Lloyd	26 (POS)
		Japanese Six	23 (POP)

In 1980, service by the above carriers was faster from POS than from POP to all PWC destinations except the Philippines. A fast transit time and sailing frequency is important to shippers of refrigerated or perishable cargo, as well as to shippers of high-value cargo where the daily interest charge has significance, and for shippers of "spot market" cargo such as wastepaper and metal scrap. The fastest transit times (measured by sailing days) to PWC destinations from POP and POS in 1978 were as follows:

	POS	POP
Japan	9	11
Korea	11	15
Taiwan	12	18
Hong Kong	15	19
Philippines	21	21

93. In 1980, the fifteen conference and independent carriers serving PWC destinations from POS offered 440 more sailings to PWC destinations than were available at POP.

94. During 1978, among the independent carriers, FESCO provided two regular services from POP and POS to the Far East. These services called directly at ports in Japan and Hong Kong. Hapag-Lloyd, which offers a substituted service from POP, provided a regular independent container service between POS and the Far East. Hapag-Lloyd calls directly at Tokyo,

Kobe, Taiwan and Hong Kong and provides feeder services to Korea, the Philippines and Thailand.

III: APL and Sea-Land [108]

The emergence of POS as a container load center, before POP made its commitment to container terminals, had far-reaching effects upon the operations of ocean carriers. APL and Sea-Land, in particular, had to make arrangements and undertakings which tied them to POS as a single regional port of call, lest they fall by the competitive wayside. In so doing, they opened up previously unpenetrated export markets which could be exploited by shippers only if those and similarly situated carriers could employ inland substituted service through equalization and absorption.

95. APL operates four individual transpacific services, with 17 line-haul containerships and five combination breakbulk/container shippers. All the ships receive operating-differential subsidy under the Merchant Marine Act, 1936, 46 U.S.C. 1101 *et seq.* The five breakbulk ships are in an irregular service, with flexible itineraries, between the U.S. Pacific Coast, the Far East, Southeast Asia and India/Pakistan. They occasionally call at POP.

APL's service from POS to the Far East is weekly, calling POS/Japan/Taiwan/Japan/POS. Each port city is served on the same day of every week. APL's weekly service from POS to the Far East uses an integrated relay system with APL vessels in the Far East. This requires an exact 28-day turnaround [109] and coordination in the Far East with APL's California service vessels with which the Northwest service vessels exchange cargo. Hong Kong, Korea and Taiwan containers are relayed at Kobe, but APL sometimes uses a feeder service to Korea. APL now conducts its Northwest service [110] with the "Pacesetter" class of vessels, the *SS President's Jefferson, Madison, Pierce* and *Johnson.* They were built in 1973–74 and have a design speed of 23 knots and design capacity of 1,482 TEUs (excluding nonrevenue slots used for the convenience of the vessel), of which 174 slots are usable only for 20-foot boxes. Reefer capacity is 150 TEUs.

96. In 1978 Sea-Land provided an almost weekly service from POS. The full containerships utilized by Sea-Land have a capacity of about 2,000 TEUs and a refrigerated capacity of 315 TEUs each. Sea-Land is a U.S. flag ocean common carrier, with worldwide operations serving 130 ports throughout the world with 51 container vessels. Sixty to seventy of the ports are served by direct vessel call; the remainder are served

[108] PCL, another PWC carrier, offered fortnightly sailings from POS to Busan (Korea), Hong Kong, Keelung and Kaohsiung (Taiwan). The record does not require a detailed examination of PCL.

[109] During the fish and crab seasons, aggregating about two-thirds of the year, APL calls in the Aleutians for westbound cargo. The Aleutian ports are so close to the great circle route that very little time is wasted on the voyage to Yokohama.

[110] The Northwest service is the only APL container service which has the necessary subsidy contract authority to serve POP.

by land transportation or local ferry. Five linehaul vessels provide a weekly service between the California ports of Long Beach and Oakland and the Far East; and five other linehaul vessels provide a separate weekly service between POS and Oakland and the Far East. In 1980 Sea-Land's mini-bridge service was conducted half from Oakland and half from POS. In 1979 Sea-Land handled 18,086 containers from POS. They were laden with cargo from the Seattle, Portland and Vancouver, British Columbia area; a small proportion was land-bridge cargo from the northeast United States. Sea-Land anticipates that in 1981 the 18,000 figure will increase to 29,000 containers with the bulk being land-bridge and increased penetration of the Canadian market. Sea-Land's land-bridge service from the East Coast is based on railroad service which goes directly to POS and does not pass through Portland. Sea-Land's weekly services are necessary in terms of making connections with other Sea-Land vessels in the Far East and connecting with the United States railroads used for connecting its mini-landbridge and micro-landbridge services to ports and points all over the continental United States.

97. APL's Linertrain has for the past five years been very heavily engaged in the intermodal movement of Far East cargo to and from the Atlantic Coast ports and for the last three years in such movement to and from the interior points of the United States. In October 1979 APL inaugurated its weekly Linertrain service which operates with precision. APL by agreement with Burlington Northern railroad has two flatcar trains of 50 cars each which are in constant movement over the circuit Seattle/New York/Oakland/Seattle. In effect, if not in fact, APL has a guaranteed schedule under this arrangement.

The Linertrain [111] arrives in Seattle every Friday, the same day as APL's inbound vessel. It leaves on Saturday with the eastbound cargo for New York and the vessel sails on Sunday with the westbound cargo for the Far East. Thus, a regular vessel arrival at Seattle is essential lest APL's precision service between the Far East and New York be impaired. (Ex. 136, p. 9.) In addition, this arrangement enables APL to locate any container consigned to it, whether in transit or at rest, in one minute or less.

98. APL acknowledges that, although POP may be a difficult port for a large containership to serve, there is no physical barrier to service. It couches its inability to serve POP in more realistic and valid managerial concerns. "The incapacity of APL arises from the impact upon its regular, weekly service of the length and unpredictability of the time required for a Portland call." [112]

The overriding objective of APL's and Sea-Land's managements is to have their respective containership services operate with a fixed day of the week regularity like most of their competitors. Regularity of service,

[111] APL also moves a "block train" from POS each weekend to deliver APL containers to sites other than New York. Unlike the Linertrain's schedule, this schedule is not guaranteed by the railroad.

[112] APL's proposed finding No. 43.

and in the case of the PWC trade-weekly service, is of paramount importance to many shippers and to carriers. Shippers can manage production schedules, warehouse space, letters of credit financing, and drayage, and consignees who know that cargo will be unloaded on a day certain can similarly manage their own reciprocal affairs on fixed schedules when service is regular. Weekly service is necessary for carriers to compete with other lines.

99.[113] As found, earlier, containership operations are expensive. In addition to the cost of the vessel,[114] APL maintains an 800 unit inventory of "on board" containers per ship. They are valued at $6,855,000 per ship—$27,422,000 for the four Pacesetter vessels. For the service, there is an additional pool of containers valued at about $12,000,000. APL has invested another $22,000,000 in support equipment. Pier rental at POS, based on use, averages about $2,000,000 per year.

100. Sea-Land also has a high capital investment in the transpacific trade.[115] For similar reasons to those applicable to APL, Sea-Land must also operate on a weekly schedule. It estimates that its break-even point may be achieved on a round-trip voyage space utilization rate of 75 percent to 80 percent. To do this, Sea-Land must limit the number of Northwest calls to POS.

101 through 103. PWC/POS proposed findings 101, 102 and 103 are not adopted because of redundancy, a lack of materiality or relevancy.

104. PWC/POS proposed finding 104 is rejected.

C: NATURALLY TRIBUTARY TERRITORY

I. DEFINITIONS OR DESCRIPTION

a: POP's Description

105. As noted earlier, from the beginning of this proceeding, the Commission viewed POP's perception of its naturally tributary territory to be a factual issue.[116] To find out what POP considered its proprietary territory to be, the Commission asked this question of POP in the section 21 Order:

> 5. Describe in detail the area you believe is "naturally tributary" to the Port of Portland. Explain. If you believe that the area "naturally tributary" to the Port of Portland changes depending upon a comparison to other ports, e.g., Seattle, Oakland, explain in detail; [117]

[113] PWC/POS proposed finding No. 99 is not rejected, but parts are duplicative of other findings herein.

[114] An APL vessel, then in construction, was expected to cost about $113 million ($57 million after subsidy).

[115] It was expected to reach $672,000,000 by 1982.

[116] See THE NATURE AND BACKGROUND OF THE PROCEEDING, n. 13 and related text, *supra*.

[117] Ex. 79, par. 5.

POP gave this answer:

> The simplest and most direct test to determine whether a particular cargo movement is naturally tributary to Portland is to ask this question: Was Portland the basis for the equalization on the movement to a more distant port? If the answer is "yes," the cargo is obviously tributary to Portland.
>
> Inland freight rates by the various modes of inland transportation, rail, truck and barge, are not constant, and in fact change periodically. To establish and maintain a map or maps showing the geographical boundaries of the interior area naturally tributary to Portland as compared to other Pacific Northwest and California ports for each commodity shipped would be a Herculean task. The subject of the existence of Portland's naturally tributary area was discussed by the Commission on pages 30 through 32 in the mimeo order on F.M.C. Docket No. 70–19, "Intermodal Service to Portland, Oregon," served on October 29, 1973.[118]

Later on, during direct examination, Mr. Mowat amplified POP's description of its perceived proprietary territory as follows: [119]

> Q. [Mr. Boileau.] Can you describe Portland's Natural Tributary Territory?
>
> A. [Mr. Mowat.] Yes.
>
> Q. Would you describe Portland's Natural Tributary Territory?
>
> A. It is at the territory or area where the inland freight rates from origin to Portland are less than the inland freight rates from origin to the Port to where the equalization or absorption is being made.
>
> Q. Are you saying that inland freight rate is the only consideration?
>
> A. No. It would be incumbent upon in this case Portland to have adequate steamship service for the needs of the shippers and adequate marine terminal facilities and services for the ocean carriers and the shippers.
>
> Q. With reference to your definition of the Portland Natural Tributary Territory, would you be able to define that on a map?
>
> A. That would be most difficult in that it is a constantly changing thing insofar as inland freight rates change.
>
> Q. Have you attempted to define Portland's Tributary Territories on a map?
>
> A. I attempted to but gave up the effort in that insofar as I realized that a map would be required for each commodity that has, is or could be equalized or absorbed and it would be a separate map for the Puget Sound area and Portland versus the San Francisco Bay area and Portland and for each mode of transportation, rail, truck and truck-barge.

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[118] *Id.*

[119] Tr. 395–397.

Q. Just concerning the 10 top commodities principally considered here, could you estimate how many possible tributary territories Portland has?
A. I would say 60.

* * * * *

THE WITNESS: Yes, ten times three times two. It would be ten times three modes.

* * * * *

JUDGE: . . . Now, ten stands for what?
THE WITNESS: The 10 would be for the 10 top commodities.
JUDGE: And the three stands for?
THE WITNESS: The three major modes of transportation, rail, truck and truck-barge.
JUDGE: And the two stands for Seattle and Oakland and San Francisco?
THE WITNESS: Seattle-Tacoma, Puget Sound.

106. Although Mr. Mowat, on direct examination,[120] amplified the description of naturally tributary territory, areas of ambiguity remained. In order to meet the charges levied against them, the respondents sought more particulars from Mr. Mowat during extensive cross-examination.[121]

Before going forward with the information elicited, I believe that, in addition to those comments which appear in the marginal notes accompanying this finding and n. 74, *supra,* some other observations concerning Mr. Mowat are appropriate. It should be made clear at the outset that none of these comments is intended to reflect adversely on Mr. Mowat's competence or credibility. Mr. Mowat is an intelligent and skillful witness.

It is fair to find that the position taken by POP with respect to the critical issue in this proceeding is derived from Mr. Mowat's thoughts

[120] When appearances were made at the hearing, I ruled that Mr. Mowat, who was scheduled to testify as a witness, could not occupy the roles of witness and practitioner. He was authorized, except when on the witness stand, to remain at counsel table and to assist POP's counsel, but he was restricted from asking questions of witnesses and from participating in colloquies and motions, except as a witness under oath. (Tr. 7–8.)

[121] At its request at the prehearing conference, POP was given the option of serving prepared testimony of witnesses in advance of the hearing or proceeding by question and answer at the hearing. For its economic witnesses, POP opted for prepared testimony, but it elected to have Mr. Mowat testify by way of Q. and A. Early on, at the hearing, this presented a problem. Mr. Mowat took the stand with a handful of papers, referring to some of them as he answered some initial questions posed by POP's counsel. At first, when the matter of these papers was brought to my attention, I assumed that the papers simply contained material to refresh Mr. Mowat's recollection. I was wrong. Mr. Mowat was holding 27 pages (in fact, 28 pages, including insert, p. 20A) of typewritten questions, organized according to subject matter. In the space provided after each question, there were handwritten answers to all, save the ones on p. 20A. Those papers became Ex. 2. See Tr. 96–107. I refrained, at the time, from calling Ex. 2 "prepared testimony." Tr. 101. Nevertheless, it did smack of just that. I mention this sequence of events not as a belated rebuke, but to explain why PWC was placed at a disadvantage in organizing its defense and why the record contains what otherwise might be considered repetitious references to POP's definition of naturally tributary territory and other matters.

on the subject. It is evident that he has a preoccupied conception of what constitutes naturally tributary territory. Consequently, despite acknowledging some of CONASA's criteria (see Finding No. 105). Mr. Mowat obstinately returns to another, more simplistic test to describe what he and POP consider to be proprietary territory,[122] i.e., if the cargo which sailed from another port was equalized or absorbed over POP, as the base port, then there was an unlawful diversion from POP's naturally tributary territory.

On cross-examination Mr. Mowat again emphasized that the primary test to determine naturally tributary territory invoked by him (and, therefore, the test which he believed the Commission should apply) is whether the inland freight was equalized or absorbed. Under this test Mr. Mowat claimed for POP all cargo originating at any point in Idaho, Washington, or Oregon[123] for which there was a lower inland freight rate to POP than to POS.[124] Mr. Mowat also reiterated, on cross-examination, that adequacy of facilities and service was a factor to be considered, but when pressed, he returned to his primary test as the sole test, because he deemed adequacy of service to be conclusively established by a showing that a quantity of a particular commodity had been loaded aboard a vessel sailing from POP. Examples abound in the record. These are a few:

> Q. [Mr. Fisher]. Can you give me an instance, Mr. Mowat, of a situation in which the inland freight rate differential favored Portland where the origin point and commodity would be outside Portland's naturally tributary territory as you define it? You can refer to any exhibit, all those cargo statistics you have there. Just give me one.
>
> * * * * *
>
> [Objection Overruled.]
>
> A. No, we haven't developed that type of evidence.
>
> JUDGE: Well, isn't your evidence in this case of the top ten commodities that you claim are naturally tributary to Portland, simply the fact that movement of this particular cargo took place through Portland and the fact that there was a diversion that was paid for by way of equalization or absorption? Isn't [that really] the only evidence you have concerning why the cargo moving from the various points shown on Exhibit 13 are naturally to the Port of Portland?

[122] I do not mean to imply that these views, or the views of any party, concerning naturally tributary territory, may substitute for the Commission's judgment. My purpose is to place my findings in perspective in the light of POP's theory of the case, and the evidence, as presented.

[123] Some cargo may have originated in other states, but sites in these three are the only ones that are pertinent on this record.

[124] There is some evidence of equalized cargo sailing from Oakland, but the amount is too slight to be considered on this record.

THE WITNESS: Yes.[125]

After admitting that he had no knowledge of apple shippers' transportation requirements in the PWC trade or whether the Japanese Six Lines serving POP held out a service to carry apples to Hong Kong or why apples that are shipped to PWC destinations do not sail from POP, this occurred: [126]

> JUDGE: You have answered a prior question of Mr. Fisher's to the effect that you do not know whether it is the equalization and absorption rules or some other reason why the apples do not go through—the apples that go to PWC destinations do not originate at the Port of Portland. Are you suggesting that insofar as apples alone are concerned that it may not be the equalization and absorption that causes the movement of apples through the Port of Seattle?
> THE WITNESS: No, I am not suggesting that.
> JUDGE: You are suggesting that you don't know why it is?
> THE WITNESS: That is correct. I do not know.
> JUDGE: If you do not know, does that mean you do not know whether or not these apples are naturally tributary to the Port of Portland under your own view of what naturally tributary means?
> THE WITNESS: Yes, they are naturally tributary to Portland.
> JUDGE: Under what definition?
> THE WITNESS: That the freight costs to Portland are less than the freight costs to Puget Sound or to Oakland.

When Mr. Mowat testified, he offered no evidence of probative value concerning the adequacy of carrier service at POP. Indeed, POP would offer none on its direct case. At the time he testified, Mr. Mowat had no knowledge of shipper needs (a reciprocal of adequacy of service). The importance which POP attached to adequacy of service may be seen from the following: [127]

> Q. [Mr. Fisher.] . . . Can you give us, from any source, your own knowledge, an instance, actual location, actual commodity, in which freight rate differential as between Portland and Seattle favored Portland, inland freight rate differential, favored Portland, as to which that commodity and origin point fell outside Portland's naturally tributary territory?
> A. No, I know of no instance.
> Q. Could there even be such an instance?
> A. Possibly.
> Q. But you can't think of one?
> A. No, I cannot.

[125] Tr. 1750–1751.
[126] Tr. 1105–1106.
[127] Tr. 1759–1763.

Q. As to any commodity?

A. Correct.

Q. And that's because, as to most commodities, you can show, as a result of the Port of Portland's considerable success. some movement through the port, can't you?

A. That and that there is unused capacity among your member vessels to the Orient.

* * * * *

Q. So we're down to adequacy of service and facilities at Portland, inland freight rates favoring Portland as compared to the other port, Seattle, and some cargo moving via Portland from the origin point, isn't that it?

A. And then, of course, we must have covered the shipper's needs or he wouldn't have shipped through Portland.

Q. Yes, but I'm saying that the shipper's needs, under your theory, are wrapped into the fact that some cargo of that particular commodity classification is moving from the origin point through Portland?

A. Yes, in part.

* * * * *

JUDGE: Aren't you saying then that if you can establish that Portland handled a shipment for a particular shipper out of Portland wherever it went, that establishes the shipper's need is fulfilled by the Port of Portland for all time?

THE WITNESS: No, Your Honor. I think I mentioned there should be a preponderance of movement to, a large movement, not just one shipment. I don't think one shipment will do the job.

* * * * *

JUDGE: But if we had shown that 100 containers of apples from that particular shipper went to Hong Kong through the Port of Portland, would that establish that every shipment of that shipper, if there were 1,000 of them, would have to go through the Port of Portland to Hong Kong?

THE WITNESS: No.

JUDGE: Why?

THE WITNESS: There may be reasons why they would want to use a different port, that that other port might fulfill their needs better—

JUDGE (interrupting): Suppose there's no other evidence in the case?

THE WITNESS: Oh, then it's Portland because there's every opportunity to bring that evidence into the case.[128]

107 through 111. PWC/POS proposed findings Nos. 107 through 111, inclusive, are not rejected. They are, however, largely redundant and need not be included herein.

b: *CONASA* Guidelines

The *CONASA* guidelines are set forth in the Further Order and appear, in detail, *infra.*[129]

112. POP did not apply the historical flow test in any way in attempting to prove that the commodities are naturally tributary to POP. It offered no evidence concerning movements of any of the top ten commodities prior to the first usage of equalization and absorption by PWC members.[130] Neither did Hearing Counsel, although it did introduce some historical evidence of cargo movements before 1977. It is clear, from the testimony of Mr. Mowat, that POP is well aware of this criterion as one of *CONASA's* standards.[131]

c: Transportation Efficiency: The Economist's Approach

113 and 114. Economists agree, generally, that pursuant to sound principles of economics, a definition of naturally tributary territory must be derived from an analysis of economic efficiency among many alternatives, including substituted service. Under this theory, the relative cost of inland transport is only one of the elements to be considered. Thus, to measure transportation efficiency and costs in the system, the cost applicable to each land and water portion from origin to destination should be examined and compared. Mr. Copan paraphrased the process this way: [132]

> Theoretically, in analyzing various courses of action an economist is essentially concerned that the optimal solution be one that results in the most efficient allocation of scarce resources. The general well-being of the public is maximized if resources are allocated most efficiently.

Each of the economists—Mr. Copan for Hearing Counsel, Dr. Nadel for PWC/POS, and Mr. Krekorian for POP—agreed that substituted service was a market enhancing but not market distorting practice. Market distorting practices create inefficiencies, whereas market enhancing practices promote efficiency.

[128] N.b. POP failed to meet its burden of persuasion irrespective of whether *vel non* it had the burden of proof to show adequacy of service. POP simply offered little or no worthwhile evidence beyond the fact that the top ten commodities were carried in substituted service.

[129] Further Order, *supra*, 21 F.M.C. at 940; see, Discussion and Conclusion B.

[130] The PWC rules predate Mr. Mowat's experience at POP.

[131] Tr. 1756–1757.

[132] Ex. 95, p. 5.

115 through 123. Applying that economic approach to the evidence of record, including the testimony of export shippers concerning the transportation requirements, routings and adequacy of service, Mr. Copan offered his opinion that the least costly and most efficient of the available transportation systems for ocean carriage of the top ten commodities was the movement of those cargoes pursuant to substituted service through POS. He concluded that under this approach and the preferred methodology, none of the top ten commodities was naturally tributary to POP because each moves with greater transportation efficiency through POS via substituted service.[133] He based this upon the evidence of record which showed that a wide variety of market factors (testified to by shipper witnesses) outweighed both geographical proximity of POP to the port of origin and lower rated freight rates to POP in the selection of carriers and the port of export.[134]

Among the reasons given by the shippers for using substituted service out of POS were these: [135] (a) they could not obtain space or equipment from carriers calling at POP; (b) they were required to ship from POS in order to avoid transshipment by water in the Far East; (c) on open rated cargo, the rates and capacity were more favorable at POS; (d) there was greater frequency of service at POS; (e) sales would have been lost with the substituted service at POS; (f) Oregon and Southern Washington and Idaho products could not have been sold in the export market.

124. A study of transport effiency must also include cost factors relevant to carriers. Substituted service saves the cost of additional fuel expenditures and those other costs associated with scheduling charges arising from an additional call. But because section 205 of the Merchant Marine Act of 1936 has been interpreted to require equality of rates for adjoining West Coast ports, these additional costs may not be reflected in the carrier's charges under PWC's tariffs.

II. Shippers and Their Requirements

125 through 135. The twenty-four pages of PWC/POS proposed findings Nos. 125 through 135 are not rejected for reasons of accuracy, relevancy or materiality. They contain extensive evidentiary record references supporting a showing that each of the top ten equalized commodities either would not have moved at all in the export market from POP or would have moved through another port with or without equalization aboard the vessels of PWC members or independents. However, I believe that the findings made or yet to be made (primarily those appearing in Part B.I.j., generally,

[133] Mr. Krekorian viewed substituted service as equivalent to competition between ports and, thus, as normal competitive marketplace behavior.

[134] Predictably, Dr. Nadel came to the same conclusion as Mr. Copan based upon the same and other considerations.

[135] This finding is somewhat redundant. However, I repeat some of the reasons given by shippers merely to place the parenthetical reference in the previous paragraph in context.

and Nos. 58 through 71, in particular) sufficiently show the gist of what PWC/POS propose in their Nos. 125 through 135, i.e., that POP could not meet the ocean transportation needs of the shippers of the top ten commodities who availed themselves of substituted service.

D: DIVERSION FROM OR HARM TO POP AND ITS SMSA

136 through 139. There is no clear showing that any of the commodities which were shipped from POS pursuant to substituted service would have been loaded aboard vessels at POP. No shipper witness was called by POP. The shipper witnesses who testified were called by Hearing Counsel. Many were Oregonians who expressed a preference, out of loyalty to their state, to ship from POP. Nevertheless, they used substituted service out of POS because that was the only way they could effectively compete with other shippers, foreign and domestic, and get their goods to the market-place. The other shipper witnesses gave the same or similar reasons for using PWC substituted service out of POS. If PWC substituted service were not available, some shippers could not have shipped at all from POP, some would have used non-conference substituted service out of POS, and others would have paid the inland charges to POS without equalization or absorption. There is some evidence that on occasion there was unused capacity on Japanese Six Lines' vessels when they sailed from POP, but there has been no showing that this unused capacity was available (or, if available, was relevant) to satisfy the needs of any of the shippers who testified. Indeed, Mr. Mowat testified that POP had no evidence to present concerning the needs of any shippers of the equalized ten commodities.[136] However, it is fair to find there is some indication that some of the equalized cargo would or could have been loaded at POP in the absence of PWC substituted service. Yet, there is no evidence of record to permit a more specific quantification, other than that the amount which could have been accommodated at POP was slight.

140 through 142. POP presented evidence purporting to show the extent of its harm and the extent of harm to its SMSA due to diversion of cargo to POS. The presentation, which underwent several revisions,[137] was based on an unfounded assumption that all of the PWC equalized cargo would have been loaded at POP.

143. PWC/POS proposed finding No. 143 is adopted. It appears as Appendix C, Tables I and II.

144. In its brief, POP uses the word "diversion" to mean that the cargo which moved pursuant to PWC substituted service would have and

[136] Tr. 1100–1101, 1728.

[137] See, e.g., Exs. 29, 29 revised, 29 2nd revised, 88 and 89. The several Exs. 29 represent POP's calculation of revenues lost due to PWC's substituted service. Ex. 89 is, in effect, a revision of Ex. 88. Both 88 and 89 were prepared by POP's economic witnesses. They purport to calculate the Direct Revenue and Total Value Impact of Diversions on the SMSA (see Nos. 27–34, *supra*) and are based upon figures shown in Exs. 29 and 29 revised. When offered for identification, Ex. 89 did not reflect changes shown in Ex. 29 2nd revised. The last named exhibit, itself, reflects changes made in Ex. 16 by Ex. 16 revised.

could have been shipped aboard vessels calling at POP. I find there has been no evidence of diversion from POP under that definition, except for the indication mentioned in the last two sentences of Nos. 136 through 139, above.

145 through 149. PWC/POS proposed findings 145 through 149 are not rejected. The material contained therein is generally accurate, but it involves matters concerning shippers and cargo movements previously explicitly found or inherent in earlier findings.

E: QUANTIFYING THE LOSS TO POP AND TO PORTLAND'S SMSA

I. Harm to POP

150 through 155. Despite the title of this portion of my findings, I must caution that, having found there was a failure of proof to establish that the top ten commodities would have sailed from POP absent PWC substituted service, I must find, perforce, there was no showing of monetary harm to The Port.[138]

Nevertheless, it is useful to examine POP's contention that it was harmed because the evidence discloses how grossly overstated was POP's claim of harm.

Manifestly, POP's contention that it suffered harm is grounded on the assumption that all the equalized containers would have sailed from POP and would have generated revenues for The Port under tariff provisions calling for "wharfage," "throughput," and "extra ins and outs" charges.

From the beginning of this proceeding, even before the hearing commenced, POP exaggerated the claim of monetary harm. Whatever the underlying reasons for hyperbole, Mr. Mowat's affidavit of October 31, 1978,[139] and other nearly contemporaneous writings,[140] claimed revenue losses of $858,225.00 for 1977. By January 1980, when Mr. Mowat testified, POP's claim was reduced to $536,686.00 for 1977, and its revenue loss for 1978 was stated to be $603,198.00. By the time Mr. Mowat left the stand, POP's supportable claim was revised downward to $300,785.00 for 1977 and to $390,462.00 for 1978.[141]

To be sure, the Further Order directed POP to furnish additional evidence of "net revenue lost by [POP] as a result of cargo diversion caused by equalization payments." This, POP did not do. It furnished no evidence

[138] Inasmuch as this decision also determines that the top ten commodities are not naturally tributary to POP and that there was no diversion of cargo away from POP, this finding should not be construed as being limited to the cited failure of proof.

[139] Ex. 34.

[140] Exs. 35 and 36.

[141] For the chronology of downward revision, see Exs. 29 revised, 29 2nd revised, 48 and 49 and related testimony. PWC/POS would reduce the claim still more by deleting extra ins and outs, amounting to about $3,000.00 in 1977 and $8,000.00 in 1978, contending there is no support therefor in the record. However, for the stated purpose of this finding, it is not necessary to rule on those relatively minor adjustments.

of variable costs (let alone, fully distributed costs) needed to produce the gross revenues to which it laid claim.

II. Harm to SMSA

155 through 169.[142] For background, see Findings Nos. 27 through 34, inclusive, in which I explained some of the theories employed by expert economic witnesses to determine the impact of PWC substituted service on the SMSA composed of Clark County (Vancouver), Washington, and Clackamas, Multnomah and Washington Counties, Oregon.

The ERA witnesses proffered by POP were directed to make certain assumptions in preparing for this proceeding. As pertinent, they were told to assume that all the cargo equalized or absorbed would have sailed from POP, absent PWC's rules; to assume the accuracy of POP's calculations of the amount of revenues which The Port would have collected if the cargo had sailed from POP; and to factor out any offsetting economic impact on SMSA of motor carrier revenues connected with inland movements to other ports. Consequently, their critical conclusions suffer not only from the same impairments found in Nos. 150–155, inclusive, but the additional infirmity of factoring out a significant positive economic impact on SMSA.

Nevertheless, I will go through the economists' exercises, in an abbreviated way, to determine a worst case scenario. I start by assuming that POP would have received all the traffic that was carried by PWC members by way of substituted service. I also assume the accuracy of Exs. 48 and 49 with respect to POP's claim of lost revenues, i.e., $300,785.00 in 1977 and $390,462.00 in 1978.[143] Applying ERA's approach to these figures, the total value-added impact on SMSA was $337,678.00 in 1977 and $438,354.00 in 1978. Based on undisputed evidence,[144] provided by Dr. Nadel, concerning the positive impact of inland motor carriers, it is fair to conclude that the residual impact (a balance of the positive and negative impacts) upon SMSA was about $66,000.00 in 1977 and $57,000.00 in 1978.[145]

A factor not included in the ERA analysis was the potential impact on SMSA due to the inability of some shippers within that SMSA to export at all because PWC substituted service was denied to them. Without attempting to quantify this impact, the very fact that exporting did occur must be viewed as a positive impact and a further dilution of the residual

[142] PWC/POS proposed finding No. 165 is rejected as it involves matters beyond the scope of this proceeding.

[143] According to economic theory, direct impact is a subset of lost gross revenues and should not be counted twice by adding total economic impact on SMSA to the gross losses claimed by POP.

[144] Although seeking and being given the opportunity, POP chose not to rebut Dr. Nadel's testimony because "it was mutually agreed between [POP] and Gene Krekorian of ERA that the things that he could attest to were probably not worth the effort involved." Tr. 5086.

[145] In arriving at those results, it was assumed that apples would not have moved through POP. Virtually *all apple shipments were equalized* and not absorbed.

impact on the SMSA to a level lower than the figures shown in the preceding paragraph.

Accordingly, I find that, even if all of the cargo were wrongfully diverted away from POP, there would have been a negligible negative impact (harm) to the SMSA.

F: JUSTIFICATION OF PWC SUBSTITUTED SERVICE [146]

I. Carrier Competition

170 through 184. The two principal American flag carriers in the PWC trade are APL and Sea-Land. In the aggregate, they carried, from POS, about 90 percent of the cargo equalized or absorbed over the base of POP.

After studying the problem of serving POP, directly, the respective managements of Sea-Land and APL determined that they cannot call at POP as a matter of good business practice. An additional call at POP would disrupt their vessel schedules on which their entire transpacific service depends. For example, APL's weekly POS service is integrated into domestic rail movements between POS and East Coast and Midwest points; its Far East relay system requires coordination for a cargo exchange in Japan between the POP service and the California service vessels. In addition, both Sea-Land and APL must provide a weekly regularity of service to be competitive with other carriers, but a POP call would either preclude that regularity or would make a regular service unprofitable.

These facts are recognized by POP, which is not seeking to induce Sea-Land or APL to call at POP. Indeed, Mr. Mowat is aware how pointless it would be for either of them to call there.[147]

In the PWC trade, APL competes with Hapag-Lloyd's weekly non-conference service. Like APL, Hapag-Lloyd makes POS its last West Coast port of call for Tokyo, Kobe, Hong Kong and Taiwan. Hapag-Lloyd, a German flag containership carrier, commenced its service in the trade in 1978. It does not call at POP, but it also serves POP by substituted service. Also, like APL, Hapag-Lloyd coordinates its Puget Sound sailings with railroad timetables.

In October 1980, ten foreign flag, non-conference containership operators competed in the trade with PWC carriers. Each of them offered similar substituted service for the same Oregon, Washington and Idaho area to POS. Among them were OOCL, Evergreen, Neptune Orient, Korea Shipping and FESCO.

[146] The justification of PWC's practice was made an enumerated component of the ultimate issue by the Further Order. Therefore, in this portion of the findings, it is necessary to reiterate some earlier findings in order to provide continuity of context. In proceeding in this way, I do not intend to exclude other earlier findings which bear on this component.

[147] Mr. Mowat testified at Tr. 731, "They would not generate any greater cargo than the equalized or absorbed amount, probably."

Obviously, those non-conference carriers would not be subject to any order issued in this proceeding. But, even if they were ordered to stop providing equalization and absorption, they would still be able to attract cargo from POP to POS by means of competitive devices not available to PWC, e.g., special commodity rates applicable to POS.

The primary reason for PWC substituted service is that equalization and absorption provide the means for Conference members to be price competitive at rate levels which enhance the ability of the cargo to be exported.

Clearly, APL and Sea-Land, or any other PWC member, would be at a competitive disadvantage with independent carriers were it not for the PWC equalization and absorption practices. This disability would not affect non-conference carriers which could continue to compete for Oregon, Washington and Idaho cargo, without calling at POP, by means of substituted service or other pricing mechanisms. Non-conference carriers may compete for cargo of the Conference's domestic contract shippers, as well, because the designation of carrier is often made by a foreign non-contract consignee.

II. Effect of Substituted Service on Shippers

185 through 194. It is useful to preface the findings in this portion with the following responses of Mr. Mowat to hypothetical questions asked of him:[148]

> Q. [Mr. Fisher]: Let's assume there were no steamship lines providing refrigerated containers in adequate numbers or of adequate size or whatever out of the Port of Portland to Hongkong. There are slots on the vessel in this hypothetical, but no refrigerated containers which the carriers would be willing to supply. Are you saying under those circumstances that equalization or absorption of Hood River apples up to the Port of Seattle where they are carried by Sea-Land and APL to Hongkong should be outlawed?
>
> A. Yes.
>
> Q. And that means in turn that the shippers under my hypothetical would have to pay the inland freight charges, right?
>
> A. The additional inland freight charges, yes.

Despite these answers and the leading role played by Mr. Mowat in this proceeding, I am reluctant to find that POP shares the punitive (to shippers) views expressed by him in his replies to the hypotheticals. His answers, however, do reinforce the findings in Nos. 105 and 106, *supra*, because they are further evidence that Mr. Mowat perceives APL's and Sea-Land's substituted service to be unlawful under his theory of the law, a theory which begins and ends with a comparison of inland freight rates

[148] Tr. 828–829.

and rejects shippers' needs and transportation efficiencies and other components of *CONASA's* guidelines.

In 1977 the Japanese Six Lines carried more than two-thirds of their container tonnage (lifted at POP) to the Far East. In 1977 that proportion rose to more than 70 percent. Thereafter, when the non-conference lines stopped calling at POP, the proportion rose to about 95 percent. The Japanese Six Lines do not provide a sufficient service for all of the shippers of the top ten commodities which export their cargo to the Far East.

Substituted service gives the exporters in Oregon, Washington and Idaho the necessary expanded transportation alternatives to market their products without extra inland transportation costs. See Appendix E for a calculation of additional sailings available to shippers because of equalization and absorption in 1977. A further advantage of substituted service is that on occasions, it offers total transit time savings to shippers, which, in turn, serves to reduce the inventory cost to shippers.[149]

But those benefits are incidental. The primary benefit to shippers is that substituted service provides them with the means to place their goods in the export trade to the Far East. The evidence of record is massive in showing that, but for the economics of substituted service, many of the shippers could not sell to Far East consignees.[150] The loss to shippers and to the four county SMSA, were the shippers unable to export to the Far East, cannot be calculated with accuracy on this record, but it is fair to find that if only a tiny portion could not reach the overseas market, that loss would be greater than all of the revenues which might have been gained by POP had all of the top ten commodities been lifted at The Port.

III. Transportation Efficiency

195 through 202. The essence of substituted service is that in terms of transportation costs it is not more expensive for shippers to use than a transportation system which does not incorporate equalization and absorption. From the shippers' standpoint, it is more efficient to have a system which permits substituted service because of beneficial elements other than the fact that it costs no more. As seen, substituted service allows shippers to get their goods to market, and, on time—results which were not always

[149] On cross-examination by PWC, Mr. Copan agreed that some of his initial prepared testimony concerning transportation efficiencies might have been deficient in that it compared only inland transportation costs from point of origin to export ports and ignored other costs at destination. The cross-questioning implied that PWC would show that the overall cost from point of origin to point of destination was lower because the cargo sailed from POS rather than from POP. With due regard for the finding that PWC must charge the same for ocean freight from POS as it does from POP, I note that PWC does not propose a finding matching the implied promise to performance. Nevertheless, I do not believe this omission detracts from the showing that overall transportation efficiency is served by substituted service.

[150] The fact that some shippers would or did pay the cost of inland transportation to POS, without reimbursement from APL or PWC, in order to get their goods to market, not only shows benefits from substituted service-it is strong evidence of inadequate service or facilities at POP.

possible without substituted service. Substituted service also permits shippers to get their goods to market quicker due to the availability of faster transits, a result which may actually save money for shippers in the form of reduced financing charges, warehouse charges, etc.

Manifestly, substituted service is a more efficient system for APL and Sea-Land. It enables them to compete with non-conference carriers, which also offer substituted service, for Oregon, Washington and Idaho traffic. Without substituted service, neither APL nor Sea-Land could engage in such competition because there is, on this record, simply not enough container traffic available at POP to warrant the enormous expense of an additional call there. The cargo obtained by Sea-Land and APL, which is only a small proportion of the cargo they load at POS, helps to make their overall operations more cost efficient.

IV. Effect on Trade Stability and Flag Vessels

203. Clearly, if substituted service is available to non-conference carriers but is forbidden to conference carriers, this would tend to destabilize the conference system in two ways. It could constitute a disincentive for non-conference carriers to join conferences, and it could act as an incentive for conference carriers to withdraw from conferences.

On this record, the prohibition of substituted service to PWC would impair the ability of APL and Sea-Land, American flag carriers, to compete against non-conference foreign flag carriers.[151]

V. Economic Feasiblity to PWC of Serving POP Via Feeder Vessels

205 through 214.[152] Feeder vessel service from POP to Oakland or POP to POS is economically not feasible. Without considering other costs which may be attendant upon a feeder service, it is certain that the charges to shippers for loading and unloading containers at two ports would be nearly triple what they are when only one port is involved. E.g., there would be throughput and wharfage at POP, throughput and wharfage inbound at POS, and throughput and wharfage outbound at POS. Inasmuch as those charges are about the same at the two ports, this would mean that the charges for a loaded container would increase from about $140.00 (POP's charges)[153] to about $425.00. Subtracting the cost of loading at POS (a charge that would be incurred, in any event), this would result

[151] I have made this finding that the two are "American flag carriers" because the record warrants it and PWC/POS, Sea-Land and APL have requested that it be made. However, I have not treated it as a compelling factor in arriving at the conclusions reached in this decision. Neither have I given weight to evidence that some shippers "prefer" to use United States flag carriers.

[152] PWC/POS request that official notice be taken of a voluntary petition for bankruptcy filed by American Pacific Container Line, Inc. (Am-Pac) in October 1980, a carrier which had just commenced a coastwise container service between California and Northwest ports, including one stop at POP. The request is denied on the grounds of relevancy and materiality.

[153] POP would not be inclined to reduce its charge to provide encouragement for a feeder service. Tr. 694.

in extra costs of about $285.00, or about $11.00 more than the cost of substituted inland carrier service (about $274.00).

Evidence of the actual cost of establishing a feeder service is sparse, as is any evidence of an existing service.[154] However, it would be foolish to expect that if APL or Sea-Land were to establish a feeder service there would be no cost at all. Given the reality that the carriers' out-of-pocket costs for port charges must be about the same for a feeder service as for substituted motor carrier service, it is evident that the necessary capital outlays and ordinary expenses attendant upon a water feeder service would make such service economically unfeasible.

THE STATUTES INVOLVED

Section 205 of the Merchant Marine Act of 1936 provides:

> Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

Section 15 of the Shipping Act, 1916, provides, in pertinent part:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued. . . .

Section 16 of the Shipping Act, 1916, provides, in pertinent part:

> That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description or traffic in any respect whatsoever, or to subject any particular

[154] A single call by Am-Pac at POP can hardly be viewed as an existing service.

> person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: . . .

Section 17 of the Shipping Act, 1916, provides, in pertinent part:

> 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.

DISCUSSION AND CONCLUSIONS

A: Preliminary Matter

One thing needs to be set at rest before I can proceed to the issues placed under investigation by the Order and Further Order.

For its first point of argument, APL advances the proposition that "Equalization or absorption as between ports cannot violate sections 16, First, or 17 of the Shipping Act." [155] Underlying this elaborate argument is APL's conviction that the *CONASA* decision is wrong and *CONASA's* guidelines are defective. APL concedes that this "issue"—the validity of *CONASA* and its guidelines—"was not specifically set for hearing in this case." Consequently, APL reasons that it is "incumbent upon [me] to decide this issue. . . ." [156] Having instructed me in my duties, APL urges me to reexamine *CONASA's* foundations, find them to be flawed, and deny the application of *CONASA's* guidelines to the facts of this case.[157]

The portion of the first point which seeks to confer upon me the authority to revisit *CONASA* tantalizes and the portion allotted to *CONASA's* substantive underpinnings is alluring, but I must decline APL's seductive invitation to enter upon and explore the exotic terrain, because acceptance would be improper. Briefly, my reasons follow.

APL is right in saying that the Commission did not specifically set the issue of *CONASA's* validity for hearing in this case. But, it is absurd to reason that this means the issue is now before me. Contrary to what APL says the omission implies, the Order and Further Order, directing that this case be tried under *CONASA's* precedents and guidelines, barred my reentry into *CONASA* and its guidelines. I do not construe Rule 147(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.147(a) [158] to have the meaning which APL ascribes to it. That rule simply does not explicitly (or even implicitly) empower me to overrule the Commission

[155] APL Brief, p. 21.

[156] *Id.*, p. 22.

[157] *Id.*

[158] As pertinent, Rule 147(a) provides:

> The officer designated to hear a case shall have authority to . . . delineate the scope of a proceeding instituted by order of the Commission by amending, modifying, clarifying or interpreting said order. . . .

by restructuring an investigation, ordered by the Commission, to include issues "wall[ed] off" from me under the precise terms of a Commission order.

Moreover, I do not interpret n. 13 in *Dart*, 639 F.2d at 813, to have the effect of placing the validity of *CONASA* before me. That note was inserted at the request of APL and Sea-Land in the memorandum they filed with the court as *amici curiae* in February 1980.[159] N. 13 states:

> *Amici curiae* have summarily urged that the *CONASA* guidelines are not within the Commission's statutory authority. Such a contention has not been briefed or argued by the parties and we therefore intimate no view on its merits.

As I read the memorandum, *amici curiae* advised the court that the issue was "being raised before the Commission" in Docket No. 78–32.[160] I am certain that this may well have been what APL and Sea-Land intended. The infirmity of APL's first point is that APL failed to carry out this intent by requesting an enabling amendment to the Order before the hearing was closed and before briefs were filed. Elsewhere, in brief, APL shows an awareness that its initial argument does not lie before me for this precise reason.[161]

Accordingly, APL's first point of argument is rejected.[162]

B: CONASA'S GUIDELINES

The *CONASA* guidelines are not precise rules of conduct under which a particular practice may be judged valid or invalid by the simple process of matching a particular practice against the language of a rule. Nevertheless, the Commission enunciated and established the following standards as the general principles to be considered in all future proceedings in which violation of sections 16, First, and 17 of the Shipping Act are alleged based upon diversion of cargo from a port.[163]

> 1. Certain cargo may be naturally tributary to a port, but any "naturally tributary zone" surrounding a port is constantly chang-

[159] The memorandum was distributed to the parties to this proceeding and to me about that time.

[160] Memorandum, *amici curiae*, p. 4.

[161] See APL Brief, p. 48, n. 55, where APL comments:

> If the *CONASA* and *Dart* cases were as opposed as Hearing Counsel sometimes believes, the presiding officer would still have to look to CONASA alone. The Commission's 1979 direction, in this proceeding, to apply the CONASA standards is the law of the case, the "controlling legal rule of decision between the same parties in the same case." 21 CJS § 195(a), p. 330. While the Commission itself *could* change the law of the case, it is "the practice of courts generally to refuse to reopen what has already been decided * * *." *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). What APL sees as governing in its n. 55 also controls its opening argument.]

[162] The Port Authority of New York and New Jersey made a similar argument, independent of APL. POS, PWC and Sea-Land, in one way or another, adopted APL's first point of argument. All of those arguments which state that equalization and absorption cannot violate sections 16, First, or 17 of the Shipping Act are rejected.

[163] *CONASA* 21 F.M.C. at 93–94.

ing.[11] In a particular case, this zone is determined by consideration of: (a) the flow of traffic through the port prior to the conduct in question, including points of cargo origin or destination; (b) relevant inland transportation rates; (c) natural or geographical transportation patterns and efficiencies, and (d) shipper needs and cargo characteristics.

2. A carrier or port may not *unreasonably* divert cargo which is naturally tributary to another port. When diversion of naturally tributary cargo occurs, the reasonableness of the practice must be determined. The reasonableness of the particular practice is determined by consideration of: (a) the quantity and quality of cargo being diverted (is there substantial injury?), (b) the cost to the carrier of providing direct service to the port; (c) any operational difficulties or other transportation factors that bear upon the carrier's ability to provide direct service (*e.g.*, lack of cargo volume, inadequate facilities); (d) the competitive conditions existing in the trade; and (e) the fairness of the diversionary method or methods employed (*e.g.*, absorption, solicitation).

[11] A port's locally tributary zone will not only vary over time, but with the nature of the commodity shipped. The tributary zone for cotton may differ from that for apples or for computer parts.

In order to keep these guidelines in proper perspective, it is important to recall some aspects of their development, procedures, application and areas of impact.

The guidelines do not treat the concept of naturally tributary territory in the abstract. "They are to be considered in all future proceedings wherein violations of sections 16, First, and 17 of the Act are alleged based upon the diversion of cargo from a port." *CONASA*, 21 F.M.C. at 94. The reason for this, as Chief Judge John E. Cograve explained in his initial decision, which the Commission adopted, in *CONASA*, "is the fact that the sections of the Shipping Act alleged to have been violated are sections 16, First, and 17 and that it is undue preference or prejudice to ports and unjust discrimination against ports, not diversion of cargo, which those sections proscribe." *CONASA*, 21 F.M.C. at 122. Section 15 of the Shipping Act was not at issue in *CONASA*, but remedies thereunder may be available in appropriate circumstances, in cases involving such things as adequacy of carrier service. *CONASA*, 21 F.M.C. at 122.

In establishing *CONASA's* guidelines, the Commission assigned no relative weight to any of the individual components making up those guidelines. They are general principles of future decision making pursuant to which the Commission will undertake to strike the delicate balance between shippers', carriers' and ports' needs and benefits in a given factual context. *Dart* represents a particular application of that weighing process. *Dart* is not in conflict with *CONASA*; it is entirely compatible, for, in *Dart*, the Commission weighed the competing interests under *CONASA's* principles and, on the discrete facts of that case, found the diversion of traffic to

be unlawful. *Dart*, 639 F. 2d at 814. This process of weighing competing interests and arriving at a balance in judging and applying terms not defined by statute (as is true of "naturally tributary") has often met with approval by the Supreme Court. See *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 293 (1974). That precept is fitting where Congress has entrusted this Commission with the power to determine whether certain conduct conforms to or is in violation of sections 16, First, or 17 of the Shipping Act, a delegation which affords administrative discretion to the Commission "to draw its conclusion from the infinite variety of circumstances which may occur in specific instances." *Cf., Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65 (1945).

The allocation of evidentiary burdens falls on the competing parties to the dispute, seriatim. First, the complaining party (here, in effect, Hearing Counsel[164] and POP may be so considered) has the particularized burden of proof of establishing that the diverted cargo originated in territory naturally tributary to it. Second, the complaining port must show it was harmed. The respondent then assumes the burden of establishing the reasonableness (or justification) of the practice. *Dart*, 639 F.2d at 814–815.

The particularized burden of the complaining party needs some clarification because its meaning seems to have been blurred during the proceeding by loose usage of key terms. For example, "diversion of traffic" was occasionally used as a code word substitute for equalization or absorption in order to symbolize unlawful conduct.[165] For the purposes of the particularized burden, it should be emphasized that the burden cannot be met by a mere showing that the cargo originates at a point nearer to the basing port or that the inland rates to the basing port are lower (or both) and that there is adequate service at the basing port. *CONASA* stands for the proposition that there can be no culpable diversion unless it has been established that the cargo originated in a naturally tributary zone. This zone, in turn, cannot be determined until all of the components set forth in 1(a) through 1(d) of the guidelines are measured.

With those principles in mind, I turn to the issues under investigation, beginning with the seminal question whether any of the top ten commodities is naturally tributary to POP under *CONASA's* guidelines.

C: THE TOP TEN COMMODITIES ARE NOT NATURALLY TRIBUTARY TO POP

In my judgment, none of the top ten commodities has been shown to be naturally tributary to POP. The reasons follow.

[164] Of course, in urging, on brief, that there be no finding of violation of sections 16, First, or 17, Hearing Counsel later departed from the role of complainant.

[165] Diversion (meaning substituted service) is not synonymous with wrongdoing. What is unlawful is undue preference or prejudice to a port caused by diversion.

The first of *CONASA's* standards to be considered is the flow of traffic through the port prior to the conduct in question, including points of cargo origin and destination.

It is undisputed that the practices under investigation have been going on for a very long time. For at least as far back as Mr. Mowat can remember—in 1969 or 1970[166]—PWC had equalization and absorption rules in its tariff, and it applied those rules to POP base cargo transported inland to POS and other ports in substituted service.

There is a paucity of evidence concerning movements of any of the top ten commodities, except for apples, to PWC destinations prior to the events of 1977–1978.[167]

Apples never moved in substantial quantities from POP. The burgeoning export market for Hood River apples was occasioned by the development of direct refrigerated container service from POS to Hong Kong. There is, even now, no scheduled direct liner refrigerated container service to Hong Kong.[168]

With respect to the other five commodities which POP contends historically flowed through the Port, POP relies on Mr. Copan's testimony.[169] But Mr. Copan's testimony is not helpful to POP's position. For example, POP says that metal scrap historically moved through POP. However, Mr. Copan demonstrated that while metal scrap moved through POP, it also moved through POS. More to the point, Mr. Copan showed that historically, POS was the major PWC export port for metal scrap. Neither historically, nor through 1978, did scrap metal destined for Taiwan move through POP, except for a "very limited amount."[170] In 1977, more than 75 percent of equalized scrap metal went to Taiwan. In 1978, that figure rose to nearly 90 percent.

For another example, POP claims that the evidence shows that historically, lumber was shipped from POP. This is true, but it is also true that, historically, lumber was shipped from POS, as well. In addition, there are other

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[166] Mr. Mowat was employed by POP before then, but his memory of PWC's equalization and absorption practices does not antedate that period.

[167] POP concedes that there is scant evidence of record concerning historical movements. (And most of that was introduced through Mr. Copan.) To compensate for this inattention to its burden and concomitant lack of proof, POP asks that it be inferred "from the tonnage figures of what was equalized and absorbed and what went out of Portland to the PWC destinations in 1977 and 1978," that there was an historical flow through POP for five of those commodities. An inference drawn from evidence so meager would be unreasonable.

[168] POP contends that cargo does not cease to be naturally tributary to an area merely because it is containerized. It cites no authority for this proposition. Nevertheless, a statement to that effect does appear in the Commission decision in *Intermodal Service to Portland,* 17 F.M.C. 106, 127 (1973). Yet, having made this point, POP rests on it and offers nothing more, perhaps in recognition that the statement can have only limited application and is generally inapposite to the facts of this case. Obviously, it cannot apply to apples or other commodities whose transportation characteristics are altered by containerizing. *See, e.g., Pacific Westbound Conference, Wastepaper and Woodpulp, etc., supra.* In any event, that statement cannot substitute for POP's failure to introduce any evidence of historical flow.

[169] POP concedes there is no historical evidence in the record with respect to canned or frozen corn, onions or meat and bone meal.

[170] Ex. 95, p. 37.

historical facts which POP's claim ignores. Most of the POP-exported lumber—a constant of about 95 percent—was and is carried in non-liner service. On the other hand, since 1974, POS-exported lumber carried in non-liner service declined from about 78 percent to about 22 percent in 1978.[171] In 1974 only slightly more liner-borne lumber was carried from POP than from POS to PWC destinations. POP's tonnage of liner-carried lumber has remained nearly constant, but POS' tonnage has increased substantially. Equalized lumber amounted to less than 10 percent of the liner lumber exported from POS in 1977 and 1978. Therefore, separate and apart from equalization, it is apparent that, insofar as containerized liner carriage of lumber is concerned, history and trend favor POS over POP.[172]

In the past, both POP and POS were exporters of wastepaper to Korea, where most of the equalized wastepaper goes.

Historically, POP and POS were large exporters of pulses to Taiwan, the destination of most of the equalized pulses, although in 1974, more was shipped from POS. In 1978, POP's share was only about 20 percent of what it was in 1974.[173] POS' exports of pulses to Taiwan increased tenfold in that same period. Only a tiny fraction of 1 percent of POS' exports of pulses to Taiwan was equalized in 1978.

Historically, cattlehides moved to Korea from both POS and POP, although the greater proportion—about 4½ to 1—was shipped from POS. POP's share of this market has been increasing since 1974. Equalized cattlehides are a minute fraction of the exports of this commodity from either port.

To summarize, POP failed to meet its burden of proof with respect to the historical flow of any of the top ten commodities, although this infirmity was partially remedied by evidence adduced by Hearing Counsel. But this evidence establishes that, with respect to the particular predominant destinations of equalized apples, metal scrap, and lumber, POP was not the historical port of export. With respect to the major destinations of equalized pulses, wastepaper and cattle-hides, there is insufficient evidence to show that historically, POP was favored over POS as the principal port of export. With respect to the remaining commodities, there was a failure of proof. Over and above the evidence concerning particular commodities, it is manifest that with the advent of containerization in the 1960's, POS emerged as the container load center in the Pacific Northwest and, as a consequence, it attracted a great deal of cargo which, in the past, was not exported to PWC destinations from POP. POS's eminence as a container load center has resulted in the continuance of the flow pattern which began in the 1960's.

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[171] In 1976, only 7 percent was carried by non-liners. Ex. 95, pp. 19–20.

[172] The total tonnage of lumber exported from POP far exceeds the total for POS.

[173] Apparently, at least for Taiwan-bound pulses, the Columbia River barge service is not attractive to shippers, even though it may be less expensive than other modes of carriage. This is due to the fact that the lack of adequate service at POP makes the slower moving barge service more costly in the long run, because the containers would still have to be moved inland to POS after having incurred POP's charges.

Relevant inland transportation rates is the second of the *CONASA* factors to be considered in determining whether cargo is naturally tributary to a particular point. As seen, the substituted service in this case is provided almost exclusively by inland motor carriers. Obviously, those inland motor carrier rates favor POP or there would have been no equalization or absorption. The evidence of inland rate disparity between the two ports is not very specific, but this is no great defect. It is sufficient to note that, generally, the difference ranges from about $17.00 to about $270.00 per truckload, depending on the commodity and point of origin. Overwhelmingly, except for instances of slight difference in rates, this factor must be balanced on the side of POP. (Note, however, the Del Monte witness did not consider $17.00 to be slight.)

Geographical or natural transportation patterns and efficiencies is the next factor. An analysis of this factor, as the case was presented, is more complicated than measuring distances or drawing lines through contour maps to determine the shortest or fastest inland routes. Of course, the shortest or fastest inland routes, as reflected by the freight rates, are those which go to POP. However, this reckoning does not take into account the transpacific or Far East geographical and natural transportation patterns and efficiencies. Neither does it measure the effect of the load center on those patterns and efficiencies.

The transpacific elements are not favorable to POP. First, measured by way of time or distance, most of the more significant PWC destinations are nearer to POS than to POP. Second, because POS became the load center, the more numerous transportation options and liner services are available there. Those elements, together, make it more natural and efficient to coordinate the several requisite transshipment services in the Far East with the liners which sail from POS. Were APL or Sea-Land to call at POP, either as a sole or supplemental port of call, these efficiencies would be lost and the ability of those carriers to compete in the trade would be adversely affected.

Moreover, because it is the Pacific Northwest load center,[174] POS is the more natural and efficient of the two ports in terms of least costly availability of containers and least expensive container support activity. It is also the naturally more efficient port of the two because there is no river bar to cross and no narrow river channel to navigate.

Thus, a balancing of those natural and geographic patterns and efficiencies leaves the two ports nearly even. POP has the advantage, at origin, of inland distances and routes, but the oceanic and Far East distances and routes are more advantageous to POS. The latter advantage and the derived benefits from being the container load center make POS a more efficient port in terms of options available to shippers whose shipments originate

[174] It should be recognized that POS is the load center for both local and intermodal movements, and the enhanced activity of the whole benefits the efficiencies of the component parts.

at points more proximate to POP. Although the balance is about even, I believe the scales tilt slightly toward POS because more and better tailored service is available there.

The final factor to be considered involves shipper needs and cargo characteristics.[175] It will be recalled that POP offered no proof concerning the transportation requirements of shippers and perceived no effect of cargo characteristics upon those requirements. The evidence concerning those needs and characteristics was elicited from witnesses produced by Hearing Counsel. Their testimony clearly and convincingly established that substituted service was a *sine qua non* for them to stay in the export ball game because of disincentives or disadvantages of various kinds at POP. Those shippers found the options and efficiencies of substituted service essential for them to get their goods to market in a timely manner, without damage and in accordance with their special needs, including special characteristics of certain cargo (e.g., need for refrigerated containers for apples). Overwhelmingly, those shippers established that if not for substituted service, they could not compete against foreign or domestic competitors in the export trade.[176]

Weighing the four factors, I find that the balance lies heavily in favor of the conclusion that none of the top ten commodities is naturally tributary to POP. I deem the factors of historical flow, transportation efficiencies, shippers' needs, and cargo characteristics to be controlling. When POS got the jump on POP, first as a container facility port, and then as a container load center, it created export markets not previously available to shippers. As POP's role of load center enlarged, it drew more container traffic going from east to west and west to east. APL and Sea-Land expanded their operations because of the increased options and efficiencies created by POS as a local and intermodal port of choice in the Pacific Northwest. In turn, those carriers were able to pass on the efficiencies[177]

[175] The inclusion of the term cargo characteristics in the *CONASA* guidelines would indicate a retreat from the statement which appeared in *Intermodal Service to Portland, Oregon, supra. Cf.* n. 168, *supra.*

[176] POP makes an argument, in its brief, p. 155, that it was not required "to prove that the traffic which was diverted from Portland to Seattle and California ports would have moved through Portland *but for* the Respondents having equalized and absorbed the inland freight differential," citing the Commission's rejection of the "but for" test in *Sea-Land Services, Inc.* v. *South Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338, 350 (1966). POP misses the mark with this argument. It was proved here that the vast majority of the equalized shipments would not have moved in the export trade at all if substituted service did not exist as an available option.

[177] Although "adequacy of service" is not explicitly mentioned in the *CONASA* guidelines, it does survive. See Further Order, *supra*, 21 F.M.C. at 941, 943; *Dart*, 21 F.M.C. 1129 n. 16; *Dart*, 639 F.2d 817. Briefly, insofar as the issue of naturally tributary territory was concerned in pre-*CONASA* days, the adequacy-of-service test meant this—a cargo diversion could be justified only if there was inadequate service at the complaining port. Heretofore, I found that there was inadequate service at POP: (a) historically, in the development of container transport, it did not provide the necessary facilities for container service; (b) afterwards, when it was expanding its container facilities, it could not attract or keep the liner services. Clearly, those components of adequacy of service are subsumed in the findings and discussion of historical flow, efficiencies, shipper needs, and cargo characteristics.

and options to the shippers who, thereby, found new or greater markets for their goods.

I am unable to find on this record what POP implies in claiming that the top ten commodities are naturally tributary to it. It is POP's implicit suggestion that PWC and its equalizing member lines, together, or in combination with POS, are stealing traffic from POP. There is no evidence to support that kind of conclusion. I do find that, even though POP is steadily improving its facilities and is becoming a more significant container port, on the basis of their requirements in 1977 and 1978, shippers needed the options and efficiencies of substituted service to reach their overseas markets.[178]

D: NEITHER POP NOR POP'S SMSA HAVE BEEN HARMED BY SUBSTITUTED SERVICE

Having found that the top ten commodities are not naturally tributary to POP, I must find that neither POP nor POP's SMSA was harmed by PWC's equalization rules and practices.[179]

Assuming, however, that all of that cargo was naturally tributary to POP, I must still find that the harm to POP was insubstantial and the harm to SMSA was imperceptible.

At best, POP would have received about $300,000 more in 1977 and $390,000 more in 1978 if all of the equalized cargo had been loaded at the Port. Those figures represent less than 5 percent, per each of those years, of POP's total container revenues, and less than 2 percent, for each of those years, of POP's total marine terminal operation. (N.b., no one of the top ten commodities would contribute to more than 37½ percent of the 5 percent or 2 percent in either of those two years. The 37½ percent figure is not a refined estimate. It is based solely upon the particular 1978 statistics for lumber which appear in Appendix C, Table II.) On this record, I can find no basis for concluding that these small percentages of revenue, which POP did not earn in 1977 and 1978, would have caused substantial injury to POP in 1977 and 1978.[180]

As seen, the residual impact to SMSA from equalization was about $66,000 and $57,000 in the years 1977 and 1978, respectively. In a community which had gross personal income of more than $10 billion, this was infinitesimal. It certainly cannot be regarded as substantial harm.

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[178] In the discussion leading to my conclusion that the top ten commodities are not naturally tributary to POP, I attempted to avoid a duplication of the detailed findings of fact. For example, I made no further mention of the queuing delays at POP, a fact which goes to adequacy of service, transportation efficiency, and shipper needs and cargo characteristics. In addition, except where I believed it to be appropriate, I tried not to rely on facts not specifically found in the Fact section of this decision. These approaches will apply to other portions of the discussion which follow.

[179] See, Finding Nos. 150 through 155.

[180] I might add that POP offers nothing in its brief to aid in the process of quantifying the extent of harm. Indeed, it cannot on this record, which is lacking in probative evidence of both the cost to service the additional containers and the real, as opposed to imagined, repercussions of losing them to substituted service.

E: PWC'S SUBSTITUTED SERVICE IS JUSTIFIED

Having found that the traffic was not naturally tributary to POP and that neither POP nor its SMSA was harmed, it would seem to follow that the issue of justification is moot. But this would be an oversimplification.

Under *CONASA's* guidelines, the issue of justification, like the issue of harm, seems to come into play only when a diversion of naturally tributary traffic is established. However, there is an obvious overlap between the issues of diversion from a tributary zone and justification, at least to the extent that evidence relevant to one issue may also be germane to the other. For example, evidence of the extra time and expenses caused by queuing delays and gang deficiencies at POP serves to justify APL's and Sea-Land's decisions not to call at POP and also establishes certain inadequacies of service and inefficiencies at POP.

Whether in recognition of this overlap, or out of an abundance of caution, the respondents introduced evidence which establishes, clearly and convincingly, that the cost to APL and Sea-Land, severally, of providing direct service at POP was not warranted by any transportation need or by any operational or economic test. An examination of all the evidence plainly shows that the cost of making a call at POP[181] would far exceed the revenue that could be expected or received from the amount of cargo available at POP.

Another factor involved in the question of reasonableness is the fairness of the methods employed in obtaining the equalized cargo. Before dealing with this factor directly, a separate aspect of fairness should be explained.

It should be manifest that despite comparisons necessarily made between POP and POS, this case is not a contest between those ports, nor was it my intention, in this judgmental exercise, to compare their relative values. Any findings in this respect are intended solely for the purpose of making a determination of the issues with which this investigation is concerned. A further indication of the fact that this is not a challenge between two ports lies in the fairness of their competition. POS does not use equalization or absorption as an inducement in its solicitation of traffic in the Hood River or Willamette Valley areas.

There are two aspects to the question of the fairness of the equalization and absorption methods employed by Sea-Land and APL. First, it is evident that they are not drawing any substantial amount of traffic away from POP that would otherwise have been shipped from there, and there is no indication that they are doing anything different in providing substituted service than the independent liner services are doing in providing a similar and competing service. Indeed, it would be unfair to permit the non-conference competition to continue to provide substituted service and, at the same time, to proscribe such activity by members of PWC. Viewed

[181] Including a feeder service.

in this light, and there is no evidence to the contrary, I find that PWC's methods comport with acceptable standards of fairness.

There is another approach to fairness, and that is the relationship between substituted service and the PWC exclusive patronage agreement and the effect thereof on POP.

There is evidence that PWC contract shippers, who used Sea-Land's or APL's substituted service, did not consider utilizing independent liner services which might have been available at POP out of fear of being deemed in violation of their contracts.[182]

On the basis of that evidence, I am unable to conclude, or even infer, that this represents an unfair practice by PWC or its members. Nevertheless, I do foresee a potential for harm to POP,[183] if, in fact, PWC would, under its approved section 15 agreement, be authorized to deem a contract shipper to have acted in contravention thereof and be authorized to take appropriate action against that shipper because it used a non-conference carrier, serving POP directly, when the only other PWC service available was substituted service at another port.

During the critical years scrutinized in this proceeding, POP did not have sufficient traffic or adequacy of service to warrant more calls by PWC members, or by independents in the PWC trades. However, POP did have more nearby cargo than could be handled by the PWC carriers which did call there. Should that nearby container traffic increase, under ordinary marketplace conditions, a currently disinterested liner operator might reconsider and wish to institute or reinstate a direct service at POP. However, should that operator be an independent, the fear of a threatened contract violation might serve as a disincentive to the shipper and, consequently, a disincentive to the independent operator. This inhibiting factor could prove harmful to POP's growth as a container port as its facilities are expanded and improved.

Because I do not find a violation of law in these circumstances—rather a possibility of substantial harm to POP—I am not certain that the Order or Further Order empowers me to issue an order under section 15 requiring a modification of Agreement No. 57. On the assumption that I am not authorized to do so, in lieu of an order, I do recommend that the Commission consider a modification of the PWC agreement to remove the potential for harm to POP. This kind of modification would enhance the transportation options available to shippers, a cause fervently espoused by respondents

[182] There is no evidence that this concern was occasioned by any warning from PWC.
It is assumed that none of the Japanese Six Lines offered the particular service which the shipper needed or had space available on its vessels at that time.

[183] *Dart*, 639 F.2d at 817, teaches that, after a complaining port has established a diversion of naturally tributary cargo, it need only show the possibility of substantial harm rather than loss of cargo to place the burden of demonstrating reasonableness upon the offending carrier. Although the complaining port has not made the requisite showing in this case, it is, nevertheless, appropriate to consider the question of fairness to determine whether a remedy may lie under section 15. *CONASA*, 21 F.M.C. at 122. Unlike *Dart*, this proceeding is conducted, in part, under section 15.

throughout this proceeding, without interfering with the ability of PWC members to compete with independents which also offer substituted service.[184]

With respect to section 15, I find that PWC's substituted service rules and practices are required by and meet a serious transportation need, necessary to secure important public benefits, and are in furtherance of a valid regulatory purpose of the Shipping Act. See *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien (Swedish American Line)*, 390 U.S. 238, 243–246 (1968). I also find, on balance, that future public benefits and transportation needs would be better served by the kind of modification proposed in n. 184.

This modification would also comport with the concept that naturally tributary territory may vary over time. I do not construe this to mean that the tributary zone may change from week to week or, necessarily, from year to year, or with any pendulum-like precision. I interpret it to mean that as reality requires and the efficiencies of transportation dictate, cargo will tend to go through the port which offers the most efficient service—witness POS' resurgence as a port of choice when it created a climate favorable to container traffic.

Accordingly, for all of the foregoing reasons, I find that there has been no showing of violation of sections 15, 16 First, or 17 of the Shipping Act, 1916, and there has been no showing of violation of section 205 of the Merchant Marine Act of 1936.[185]

ORDER

It is ordered that the above proceeding be discontinued.

(S) SEYMOUR GLANZER
Administrative Law Judge

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[184] I do not recommend that the modification permit shippers the option of using non-conference substituted service. I do suggest a clause in the exclusive patronage contract which provides that a shipper is not in violation only if it uses a non-conference carrier offering direct service at POP when there is no PWC direct service available at POP, or another port, which may be considered an integral part of the Columbia River Basin complex. See *Stockton Port District* v. *Pacific Westbound Conference, supra*, 9 F.M.C. at 21.

[185] Other than making passing reference to it in the conclusionary portion of its brief, POP does not deal with section 205 in this proceeding at all. The purpose of section 205 was explained by the Commission in *Pacific Coast European Conference—Rules 10 and 12*, 14 F.M.C. 266, 284 (1971). It is to:

> prevent collective action designed to create discrimination in the form of a difference in rates at which federally improved ports are served, but more importantly to forbid conferences to impose restrictions on their member lines which would interfere with the free exercise of the lines' discretion in the determination of which ports they choose to serve.

Section 205 absolutely prohibits collective action preventing service to a port at the same rates as those applicable to the next regularly served port. *Intermodal Service to Portland, Oregon, supra*, 17 F.M.C. at 135. This kind of situation might occur if there were a conference imposed rate differential between direct water service and indirect overland service. There is no evidence of that or of anything else which might invoke the reach of section 205 in this proceeding.

APPENDIX A
LIST OF WITNESSES

A: Called by POP

1. Milton A. Mowat, Manager, Traffic and Regulatory Affairs, POP.
2. Doris Elaine Lycan, Transportation Pricing Specialist, POP.
3. Glenn Russell Morris, Senior Dispatcher, POP.
4. Richard K. Lyon, Senior Vice President, Economics Research Associates.
5. Gene P. Krekorian, Principal Economist, Economics Research Associates.

B: Called by Hearing Counsel

6. Jay Copan, Industry Economist, Office of Economic Analysis, Federal Maritime Commission.
7. Shigeto Uchida, Yuasa Trading Company, Inc., a shipper of frozen corn.
8. Laurence Arthur Kromer, Avison Lumber Co., a shipper of lumber.
9. Emil Cahen, Cahen Trading Co., a shipper of hides and onions.
10. Harriet Clothier, K-C International, Ltd., a shipper of wastepaper.
11. Ron Hendrick, Phil A. Livesley Co., a shipper of onions.
12. Carroll Kirk, Cascade Steel Rolling Mills, Inc., a shipper of metal scrap.
13. Allan Spencer Gordon, North Pacific International, a shipper of dried peas and beans.
14. William B. Wagstaffe, Del Monte Corporation, a shipper of canned corn.
15. George Hajime Noda, Kasho Company, a shipper of wastepaper.
16. Franklin Battat, Liberty Gold Fruit Co., a shipper of apples.
17. Ted I. Coleman, W. M. Dickerson Co., a shipper of apples.
18. Delbert Larry Pearson, Manager of Marketing Projects, POP.

C: Called by PWC or its member lines

*19. Dr. Ernest Nadel, Economist-Senior Analyst, Manalytics, Inc.

20. Seiichi Hirano, General Manager, Pacific Coast, U.S.A. and Canada, Yamashita-Shinnihon Steamship Company (on behalf of all six Japanese containership operators).
21. Ronald B. Gottshall, Director of Pricing, Sea-Land Service, Inc.
22. Douglas A. Pfaff, Managing Director, Pacific Northwest Region, American President Lines.

* Dr. Nadel was co-sponsored by POS.

23. Capt. Herman Tobiassen, Vice President, Operation, Bakke Steamship Corporation, agent for Knutsen Line.
24. Capt. Paul Sather Mead, former Vice President of Eckert Overseas Agency, Inc., a subsidiary of Orient Overseas Container Line.

D: Called by POS:

25. Robert C. McQuigg, Director of Marketing Department, POS.

APPENDIX B
CARRIERS IN THE PWC TRADE

I. A:

PWC Member Lines 1977

American President Lines, Ltd. (APL) [R][1]

East Asiatic Company, Inc. (EAC) [R]

Japan Line, Ltd. [R]

Kawasaki Kisen Kaisha, Ltd. (K Line) [R]

Knutsen Line [R]

Maritime Company of the Philippines, Inc. [R]

Mitsui O.S.K. Lines, Ltd. (OSK) [R]

Moller-Maersk Line [R]

Nippon Yusen Kaisha (NYK) [R]

Pacific Far East Line, Inc. (PFEL)

Phoenix Container Lines (1976), Ltd. (PCL) [R]

Sea-Land Service, Inc. [R]

Seatrain International, S.A.

Showa Line, Ltd. [R]

States Steamship Co.

United States Lines, Inc. [R]

Yamashita-Shinnihon Steamship Company, Ltd. (Y-S) [R]

Zim Container Service [R]

I. B:

PWC Associate Members

Barber Blue Sea Line [R]

Waterman Steamship Corporation [R]

[1] [R] stands for a line named as a Respondent in the Order of Investigation and Hearing.

II. A:

Changes in PWC Membership During 1978

Withdrawn

States Steamship Co.

Seatrain International, S.A.

Pacific Far East Line, Inc.

New Members

Korea Maritime Transport Co., Ltd.

Seatrain Pacific Services, S.A. [R]

Galleon Shipping Corporation [R]

III.

Non-Conference Lines in the PWC Trade 1977–1980

Hapag-Lloyd A.G.

Orient Overseas Container Line, Inc. (OOCL)

Evergreen Marine Line

Far Eastern Shipping Co. (FESCO)

Yang Ming Line

Neptune Orient Lines

Asia-America Line

Ro-Lo Pacific Lines

Korea Shipping Corp.

Lykes Bros. Steamship Co., Inc.

States Steamship Co. (last half, 1978)

Scindia Steam Navigation Co. [R][2]

IV.

When the record was closed in 1981, neither Evergreen, FESCO nor OOCL.was serving POP, directly.

[2] The Order of Investigation and Hearing names Scindia and the Shipping Corporation of India (SCI) as PWC members and respondents. Marginal note No. 1 of PWC's proposed findings of fact shows Scindia as an independent during 1977–1980 and does not mention SCI as a PWC member or as having been in the trade at all. POP's proposed finding of fact No. 6 states only that Scindia was a member of PWC when POP's petition was filed in 1975. However, POP agrees that from 1977 through 1980 neither of them was a container carrier or a PWC member. See, Tr. 401. There is some testimony that in 1981 Scindia might have converted to containerships which call at Portland, but the testimony was sketchy and inconclusive. Tr. 5331, 5339.

APPENDIX C
EQUALIZATION AND ABSORPTION
TABLE I—QUANTITY—SHORT TONS

	APL		Sea-Land		PCL		Total	
	'77	'78	'77	'78	'77	'78	'77	'78
Apples	2,048	666	2,369.2	2,078.8	840	—	5,257.2	2,744.8
Wastepaper	3,254	1,365	4,647.3	3,342.3	3,561	6,308	11,462	11,015.3
Onions	99	218	814.7	949.4	—	—	913.7	1,167.4
Cattlehides	4,535	4,710	84	112.6	—	—	4,619	4,822.6
Canned Corn	2,135	103	108	17.9	—	—	2,243	120.9
Meat & Bone Meal	4,660	3,786	264.2	—	—	—	4,924.2	3,786
Lumber	7,187	20,719	514.6	921.7	—	—	7,341.6	21,640.7
Metal Scrap	429	—	2,638	2,776.5	161	—	3,228	2,776.5
Dried Peas & Beans	3,213	7,660	70.7	—	—	—	3,283.7	7,660
Frozen Corn	248	1,376	18	—	—	—	266	1,376
Total These Commodities	27,808	40,603	11,168.7	10,199.2	4,562	6,308	43,538.7	57,110.2
Total All Commodities	31,768	(*)	13,672.9	11,994.4	4,562	(*)	50,002.9	(*)

* N.A. indicates the information is not available in the record.

TABLE II—QUANTITY—CONTAINERS

		APL		Sea-Land			PCL		Total		
		20′	40′	20′	35′	40′	20′	40′	20′	35′	40′
Apples	'77	—	111	—	96	67	—	45	—	96	223
	'78	—	37	—	132	1	—	—	—	132	38
Wastepaper	'77	—	156	—	85	135	—	132	—	85	423
	'78	—	62	—	22	134	—	275	—	22	471
Onions	'77	—	5	—	—	42	—	—	—	—	7
	'78	—	11	—	—	49	—	—	—	—	60
Cattlehides	'77	—	223	—	4	—	—	—	—	4	223
	'78	77	164	—	7	—	—	—	77	7	164
Canned Corn	'77	—	115	—	5	1	—	—	—	5	116
	'78	—	5	—	1	—	—	—	—	1	5
Meat & Bone Meal	'77	—	213	—	12	—	—	—	—	5	116
	'78	—	178	—	—	—	—	—	—	1	5
Lumber	'77	—	327	—	3	—	—	—	—	3	327
	'78	—	951	—	28	18	—	—	—	28	969
Metal Scrap	'77	—	26	—	71	66	—	8	—	71	100
	'78	—	—	—	69	75	—	—	—	69	75
Dried Peas & Beans	'77	—	156	—	2	—	—	—	—	2	156
	'78	44	319	—	—	—	—	—	44	—	319
Frozen Corn	'77	—	12	—	1	—	—	—	—	1	12
	'78	—	67	—	—	—	—	—	—	—	67
Total These Commodities	'77	1,354	—	—	279	311	—	—	185	279	1,850
	'78	1,794	—	—	259	277	—	275	121	259	2,346

APPENDIX D
(Finding No. 89)

The facilities of the Seattle harbor include 16 modern terminals and 46 berths ranging from 350 to 1,000 feet in length with a MLLW depth ranging from 18 to 73 feet. There are over 1,066,000 square feet of transit shed space. In terms of container facilities, POS currently operates 11 berths with over 10,000 feet of berthage space and, with the completion of another terminal, Terminal 37, will have 14 containership berths, served by 17 container cranes. At present, nearly 300 acres at POS are committed to container facilities at a total initial investment cost of $150 million. (In comparison, in 1978 POP possessed facilities covering about 100 acres, approximately 5,000 continuous feet of container berths, and 7 container cranes.) POS owns 17 container cranes, 11 of 45-ton lifting capacity and six of 33-ton capacity. Additionally, there are eight Whirley cranes, five of which are 50-ton capacity, one of 45-ton capacity, and two of 35-ton capacity. There are two 25-ton mobile truck-mounted cranes and ten 45-ton container yard cranes. POS also has available one shearleg derrick, heavy-lift crane with a 200-ton lifting capacity. There are currently five container freight stations located at POS. There are seven public warehouse facilities available in the Seattle metropolitan area and two private container storage companies. There are six private packing, crating, and lashing service companies and three private enterprises which provide container repair services. The warehouse space available at Terminals 25 and 91 can accommodate over 290,000 cases of fresh fruit, and at Terminals 20 and 91 POS operates 275,000 cubic feet of transit freezer facilities. The chill facilities are used predominantly for apples, pears and a small percentage of cherries and citrus fruit. An additional 6,800,000 cubic feet of privately operated general purpose cold storage facilities are available on POS property as well. There are about 850 "plug-in" spaces available for "reefer" containers. POS has the largest amount of freeze and chill space in the Northwest and its reefer plug-in spaces exceed those of POP. The Terminal 106 complex includes 56.6 acres with a total space for warehouse/office buildings of 1,222,427 square feet. This area is used primarily for the short-term storage of container cargo destined for OCP (inland) territory. Eight acres at Terminal 102–W are allocated for the storage of empty containers. POS has a new export tracing system which enables exporters to track their cargo from points of inland origin to loading on the vessel at POS.

APPENDIX E

ADDITIONAL SAILINGS CONTRIBUTED BY[1] EQUALIZATION AND ABSORPTION

Destination	Direct Service Via Portland Total	Substitute Service Via Seattle Total	Substitute Service Via Seattle Increase (%)
Japan			
—Direct	12	8	67
Korea			
—Direct	0	3	(cannot be calculated arithmetically)
—Transshipped	7	8	114
Total (Korea)	7	11	157
Taiwan			
—Direct	6	5	83
—Transshipped	6	6	100
Total (Taiwan)	12	11	92
Hong Kong			
—Direct	13	7	54
—Transshipped	6	4	67
Total (Hong Kong)	19	11	58
Manila			
—Direct	8	0	0
—Transshipped	6	4	67
Total (Manila)	14	4	29
Bangkok			
—Direct	2	0	0
—Transshipped	1	6	600
Total (Bangkok)	3	6	200

[1] Ex. 139, Table 1.

APPENDIX F
CONTENTIONS OF THE PARTIES
A: POP
I: Opening Brief

Under *CONASA's* guidelines and the particular adoption of those guidelines to the practice of absorption of inland freight rates to divert local traffic from a port in *Dart,* it should be found that POP has assumed and carried the burden of proving that, by the practice of absorbing inland freight charges, respondents diverted cargo which originated from points within POP's naturally tributary territory, to its damage and prejudice,

and that respondents failed to carry their burden of proving that the diversion under their practices is reasonable under the circumstances; the ten commodities which respondents diverted from Portland by equalization and absorption of inland freight rates all originated in a zone naturally tributary to POP; there is substantial harm to POP and Portland's SMSA arising from respondents' diversionary practices and respondents did not prove otherwise; respondents did not prove the existence of any operational difficulties precluding direct service; respondents did not prove the fairness of their diversionary practices; respondents have failed to prove the reasonableness of their practices through preference of customers for certain carriers; respondents did not prove that the port facilities or steamship service at POP were inadequate; respondents have failed to prove that POP provided inadequate steamship service; and that PWC's agreement and rules and practices violate the following Acts and declared policies of the Congress: sections 15, 16 and 17 of the Shipping Act, 1916, section 8 of the Merchant Marine Act, 1920, and section 205 of the Merchant Marine Act, 1936.

II: Reply Brief

The concept of naturally tributary territory has not been abandoned; reasonableness is not shown by analysis of costs to serve POP; and existing precedent for decision has not and should not be abandoned.

B: HEARING COUNSEL

I: Opening Brief

PWC's equalization and absorption practices, as they affect POP, are not unlawful and detrimental to the commerce of the United States and the general public interest, or unduly prejudicial or unjustly discriminatory to POP or to business and individuals which depend on POP's economic viability pursuant to section 205 of the Merchant Marine Act, 1936, and sections 15, 16 and 17 of the Shipping Act, 1916; the equalization and absorption practices of the PWC do not cause cargo which would ordinarily move through the POP to move through ports other than POP; if the Commission determines that PWC carriers are diverting cargo away from POP, that diversion causes significant economic harm to the Port and the local economy of Portland; if the Commission determines that PWC carriers are diverting cargo away from POP and that diversion has caused substantial harm, the equalization and absorption practices of the PWC have not been shown to be reasonable and justified.

II: Reply Brief

Equalization and absorption as between ports may violate sections 16, First, and 17 of the Shipping Act, 1916; the Commission should not prohibit PWC equalization and absorption while allowing non-conference lines to

equalize and absorb; PWC overstretched their arguments concerning competition; and the distinctions which respondents draw between the facts in *Dart* and those present here are not significant, but *Dart* does not compel a finding against respondents.

C: PWC

Equalization or absorption as between ports cannot violate sections 16, First, or 17 of the Shipping Act; cargo was not shown to be naturally tributary to POP; there was no diversion; there was no harm and therefore no significant harm; competitive considerations give PWC the right to equalize and absorb; POP's proposed relief would constitute severe flag discrimination; containership service patterns and elementary economics justify equalization and absorption; water feeder service is utterly uneconomic; adequacy of service must be shown by POP as part of POP's burden of proof that cargo is naturally tributary; and *Dart* does not overrule *CONASA*, but it is factually distinguishable from the present case.

D: POS

The Shipping Act has been interpreted to imply that a port has a right to "naturally tributary cargo"; that interpretation results from section 8 of the Merchant Marine Act, 1920; section 8 was not intended to build walls between ports, but rather to encourage the flow of commerce; the *CONASA* standard is based on a misinterpretation of section 8 and thus should be abandoned; containerization has rendered the concept of "naturally tributary" meaningless; the development and maintenance of POP does not "depend upon traffic from inland areas naturally tributary . . ." to the Port because POP is a large business enterprise with various functions and POP uses revenues from other business activities for the maintenance and development of marine facilities and POP does not depend on local cargoes for its maintenance and development; if guidelines must be applied, the *CONASA* guidelines are applicable; and the record shows the practices of the PWC are lawful under *CONASA* standard.

E: APL

Equalization or absorption as between ports cannot violate sections 16, First, or 17 of the Shipping Act; APL's absorption practices are valid under the *CONASA* guidelines; *Dart* and *CONASA* are compatible; there is no naturally tributary zone and POP has shown none; absorption practices are of long standing; shippers need substituted service; shipper preferences are relevant; the boundaries of a naturally tributary zone cannot be determined by inland freight costs alone; container transport is tributary to no port; the criteria of inadequacy of service is not among the *CONASA* standards; the substituted service practices are reasonable because APL

cannot call at POP; APL must compete for cargo; shippers need it; and water feeder service feasibility evidence was not required to be addressed by APL in the absence of some showing by proponent or Hearing Counsel.

F: SEA-LAND

Neither equalization nor absorption as between ports can be found to violate sections 16, First, or 17; competitive conditions in the trade would make a finding of unlawfulness discriminatory; and that feeder service to POP is not feasible.

G: DELAWARE RIVER PORT AUTHORITY

POP should be protected against diversion of cargo because if it is not, other carriers will be encouraged to divert other cargo from other ports by the same means as those used by PWC.

H: THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

The doctrine of naturally tributary traffic should be abandoned as a rationale for invalidating carrier absorption and equalization practices and the sole inquiry in any case should be whether those practices are unduly preferential or unjustly discriminatory; and absorption or equalization of inland rates by an ocean carrier does not, standing alone, constitute undue prejudice, preference or unjust discrimination among ports.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–12

CERES GULF, INC.

v.

BATON ROUGE MARINE CONTRACTORS, INC., ET AL.

ORDER

May 25, 1984

By ruling served May 10, 1984, Administrative Law Judge Charles Morgan granted complainant's request to withdraw complaint and motion to dismiss with prejudice in this proceeding. The Commission's 30-day period to request review of this ruling, pursuant to 46 CFR 502.227, is currently scheduled to expire with June 11, 1984.

Complainant has now filed a motion to reduce the Commission's 30-day review period so as to permit Judge Morgan's ruling to become effective immediately. This immediate effectiveness is sought to hasten the dismissal of a court proceeding whose dismissal will become effective only after this Commission proceeding is dismissed with prejudice, and to expedite implementation of a terminal lease between complainant and the Port of New Orleans. Complainant states that respondent will not appeal Judge Morgan's ruling and concurs in complainant's motion.

Complainant has established just cause for the requested reduction of time in this instance. The subject proceeding is only in its initial stages, the motion is unopposed and granting it will facilitate resolution of the disputed issues without adversely affecting any party. Therefore, the Commission has determined to grant this motion and also has determined that it will not review Judge Morgan's May 10, 1984, ruling.

THEREFORE, IT IS ORDERED, that the motion of Ceres Gulf, Inc. to reduce time is granted; and

IT IS FURTHER ORDERED, that the May 10, 1984, ruling in this proceeding styled "Withdrawal of Complaint and Dismissal with Prejudice" has become administratively final.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–12

CERES GULF, INC.

v.

BATON ROUGE MARINE CONTRACTORS, INC., ET AL.

WITHDRAWAL OF COMPLAINT AND DISMISSAL WITH PREJUDICE

Finalized May 25, 1984

On May 4, 1984, the complainant submitted the withdrawal of its complaint in the above proceeding, and requested the dismissal of its complaint with prejudice.

The respondents do not oppose this withdrawal and motion to dismiss. There are no other parties to the proceeding.

On May 2, 1984, Judge Thomas A. Early, Jr., Civil District Court for the Parish of Orleans, State of Lousiana, Division A, in Case No. 84–3462, entitled *Baton Rouge Marine Contractors, Inc.* v. *The Board of Commissioners of the Port of New Orleans,* in which Ceres Gulf, Inc., had been admitted as a party intervener, issued an order providing:

> . . . that, upon the dismissal with prejudice and at its cost by intervener Ceres Gulf, Inc. of its complaint in the proceeding entitled "Ceres Gulf, Inc. v. Baton Rouge Marine Contractors, Inc., et al.", No. 84–12 on the docket of the Federal Maritime Commission, the petition herein of plaintiff Baton Rouge Marine Contractors, Inc. shall, without further action by this Court, be dismissed with prejudice and at plaintiff's cost. Also that, upon dismissal of the said FMC proceeding, Baton Rouge Marine Contractors, Inc., its officers, directors, shareholders, agents and employees be and they are directed not to oppose the implementation of the lease agreement between Ceres Gulf, Inc. and the Board of Commissioners of the Port of New Orleans pertaining to the Jourdan Road Terminal, Berths 4 and 5.

Based solely upon the terms of the said Court Order, the complainant now seeks withdrawal of its complaint and its dismissal with prejudice in No. 84–12.

Good cause appearing, the request to withdraw the complaint in No. 84–12 and motion to dismiss it with prejudice hereby are granted.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–2
AGREEMENT NO. 10293
DOCKET NO. 79–3
AGREEMENT NO. 10295

ORDER PARTIALLY ADOPTING INITIAL DECISION

May 30, 1984

These proceedings were initiated by separate Orders of Investigation and Hearing[1] to determine whether Agreement No. 10293, a space chartering agreement between Flota Mercante Grancolombiana S.A., (Flota) and Andino Chemical Shipping Company (Andino), in the United States Gulf/Atlantic Coast of Colombia trade, and Agreement No. 10295, between Flota and Maritima Transligra S.A. (Transligra), a similar space chartering arrangement in the United States Gulf/Pacific Coast of Colombia trade[2] should be approved, disapproved, or modified pursuant to section 15, Shipping Act, 1916 (46 U.S.C. § 814).[3] The Orders of Investigation were subsequently amended to include two "private agreements" between Flota and Andino, and Flota and Transligra, supplementing the Agreements.[4]

On May 27, 1983, Administrative Law Judge Charles E. Morgan issued an Initial Decision (I.D.) finding that: (1) Andino, Transligra, and Flota (Proponents) are common carriers by water within the meaning of section 1 of the Shipping Act, 1916 (46 U.S.C. § 801), (2) the Agreements, including the "private agreements," had been implemented prior to Commission approval, and (3) the Agreements are now presently contrary to the public interest and detrimental to the commerce of the United States and should therefore be disapproved.[5] Exceptions to the Initial Decision and Replies to Exceptions were filed by the Commission's Bureau of Hearing Counsel,[6]

[1] Although these proceedings were not formally consolidated they were considered together at the parties' request. This Order addresses both proceedings.

[2] The space chartering authority in both agreements is limited to liquid bulk commodities, such as chemicals and fats.

[3] Agreement No. 10293 and Agreement No. 10295 are collectively referred to herein as "the Agreements".

[4] These "private agreements" were filed for approval on May 20, 1980, and designated as Agreement No. 10293 (Sub.-1) and Agreement No. 10295 (Sub.-1), respectively (hereinafter, the private agreements will be included in the term "the Agreements" unless otherwise specified). Notice of their filing in the *Federal Register* elicited no protest or comment.

[5] Although the Presiding Officer found that the Agreements had been implemented prior to the Commission's approval, he further found that the Agreements had been "in the public interest." (I.D. at 1, 75 & 76.)

[6] Hearing Counsel's Exceptions challenge only the finding that the Agreements were previously in the public interest (See Note 4, *supra.*)

Flota, Andino and Transligra. O.N.E. Shipping Company, Ltd., a party opposed to the Agreements, filed a Reply to Proponents' Exceptions.[7] The Commission heard oral argument.

BACKGROUND

This section summarizes the facts relevant to the disposition of the issues raised on exception. A more thorough factual exposition is set out in the Initial Decision, which we incorporate by reference.

Flota is a Colombian corporation that provides regular liner service for general cargo in Colombia's import and export trades. Flota does not own or operate any specially equipped parcel tankers designed for the carriage of liquid bulk cargoes.[8] On occasion, Flota carries liquid bulk cargoes in the deep tanks of its general cargo vessels. (Transcript (TR) at 419, 420, and 569; Exhibit (Ex.) 20, at 3.)

Andino charters and operates parcel tankers for the carriage of liquid bulk commodities. Andino uses these vessels to meet its obligations to Flota under Agreement No. 10293 and to provide liquid bulk service in its own name to other South American ports. Andino is a wholly-owned subsidiary of Holland Chemical International (HCI), a holding company that purchases chemicals and resells them to HCI-affiliated companies and other companies in South America. (Ex. 61 at 3, 9; Ex. 14, 18; Tr. at 486, 711–1712, 1713–1760.)

Transligra, an Ecuadorian company, is owned by HCI, Flota, and Ecuadorian interests. Transligra owns and charters parcel tankers for the carriage of liquid bulk commodities in the United States Gulf/Pacific Coast of Colombian trade. Transligra also offers liquid bulk service to other South American Pacific Coast ports. (Tr. at 427–433, 962, 1659, 1698.)

O.N.E. Shipping Company, Ltd. offers a liquid bulk service from the United States Gulf to Venezuela, Ecuador, and other Caribbean, Central and South American ports. O.N.E. also makes occasional calls to Colombian ports for liquid bulk commodities. O.N.E., which was established in 1973, is the successor of Overseas Liquid Gas, Inc., a liquid bulk carrier that began to serve the Colombian market in 1963. (Ex. 79 at 2; Ex. 85 at 3; and Tr. at 1062 and 1072.)

The Agreements provide that Andino and Transligra will make available to Flota the necessary space on vessels owned or operated by them in their respective trade areas. Flota agrees to commit itself to a service

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[7] Esso Chemical Supply Co., Inc., Dow Chemical International of Delaware, and Shell Chemical Company, a Division of Shell Oil Company, were named Protestants in the Order of Investigation in Docket No. 79–2. However, these parties withdrew prior to the hearing.

On August 12, 1982, the Commission granted the Government of the Republic of Colombia leave to file an *amicus curiae* statement on "the operation of its [Colombia's maritime laws and the policy underlying them." (*See* Order of August 12, 1982.)

[8] Parcel tanker vessels generally contain several tanks that are lined with either epoxy or zinc, or are made of stainless steel. The tanks can be heated to facilitate discharge, and, with the exception of older vessels, each tank generally has its own pump.

frequency of 15 days in the Colombia Atlantic trade and to a 35-day service frequency in the Colombia Pacific trade. Flota fixes the freight rate to the shipper and contracts for the cargo, while Andino and Transligra quote the space charter hire to Flota.

Andino and Transligra also signed individual so-called "private agreements" with Flota that supplement their basic Agreements. These "private agreements" provide that the shippers will be issued Flota's bills of lading, that Flota will canvass and contract in Colombia for the movement of bulk liquid cargo, that Andino/Transligra will be the sole coordinator of all shipments originating in the United States Gulf, that Andino/Transligra will take responsibility for the freight in accordance with the Tanker Bills of Lading or other contracts, and that Andino/Transligra will supply Flota with itineraries for "regular shipments" and establish the space charter hire for various liquid bulk commodities.[9]

DISCUSSION

The Exceptions[10] and Replies to Exceptions raise two major issues:

(1) Whether Andino and Transligra act as common carriers by water within the meaning of section 1, Shipping Act, 1916 by carrying liquid bulk commodities in the United States/Colombian trades pursuant to their arrangements with Flota? If so,

(2) Should Andino's and Transligra's respective arrangements with Flota be approved, disapproved, or modified pursuant to section 15, Shipping Act, 1916?

Jurisdiction

Proponents except to the Presiding Officer's common carrier finding. They argue that the Agreements are essentially arrangements between a vessel owner and a charterer wherein the owner furnishes the vessel and the charterer attends to all details in connection with obtaining cargo, issuing bills of lading and collecting freight. Proponents maintain that Andino and Transligra themselves lack any of the characteristics that are generally attributable to common carriers by water. They point out that Andino and Transligra do not offer or advertise a regular service for the carriage of bulk liquid commodities in the trade between the United States Gulf and

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[9] The Agreements are successors to a 1973 arrangement between Flota and Andino. The 1973 arrangement established a space chartering arrangement for the transportation of liquid bulk commodities between the United States Gulf Coast and the Atlantic and Pacific Coast of Colombia. (Ex. 26, 27; I.D. at 10).

[10] Andino and Flota, without explanation, seek to have their Exceptions afforded confidential treatment. Andino likewise labels its Reply to Exceptions as confidential. These pleadings for the most part, contain arguments of counsel without direct reference to the confidential business data included within the Presiding Officer's Confidentiality Order. (Order of Confidentiality, served June 22, 1981). Legal argument is not entitled to confidential treatment under the Commission's Rules of Practice and Procedure, 46 C.F.R. §502.167 (1983). Accordingly, the requests for confidential treatment are therefore denied. The pleadings for which confidentiality was sought will be included in the public docket book, but the Commission Secretary is directed to sanitize the few pages that refer directly to sensitive business data.

Colombia.[11] Andino and Transligra have allegedly agreed only to offer Flota, their sole Colombian customer, space on their vessels for the carriage of liquid bulk commodities.[12] Proponents point out that since 1973 they have not carried any commodity in the Colombia trades for their own account but rather only have carried cargo in the trade pursuant to the Agreements with Flota. Accordingly, the Commission is urged to reverse the Presiding Officer's jurisdictional finding.

The Commission finds that the Presiding Officer properly decided the jurisdictional issue. Section 1 of the Shipping Act, 1916 defines a common carrier by water in the foreign commerce of the United States as a:

> . . . common carrier . . . running on regular routes, engaged in the transportation by water of passengers or property between the United States . . . and a foreign country in the import or export trade. . . .

The Commission has determined that the common carrier described in section 1 is one that:

> . . . holds himself out to accept goods from whomever offered to the extent of his ability to carry. *Activities, Tariff Filing Practices and Carrier Status of Containerships, Inc.*, 9 F.M.C. 56, 62 (1965) (*Containerships*).

It is not necessary, however, for a carrier to hold himself out to transport *all* commodities for *all* shippers. A line may be a common carrier of certain commodities as long as it is willing to carry those commodities for all who wish to ship with them. Other indicia of common carrier status are regularity of service, solicitation of cargo, advertised sailings, issuance of bills of lading, responsibility of the carrier toward the cargo, establishment of rates and charges, and the number of shippers served per voyage. *Containerships, supra.* The absence of one or more of these factors does not, however, negate common carrier status. As the Commission explained in *Puget Sound Tug and Barge* v. *Foss Launch and Tug Co.*, 7 F.M.C. 43, 48 (1962), the term common carrier is not a rigid and unyielding dictionary definition but rather a flexible regulatory concept.[13]

When this "regulatory concept" is applied to the facts presented here, there can be little, if any, doubt that the parties to the Agreements are

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[11] Andino and Transligra do not dispute that they carry bulk liquid commodities under their own bills of lading from U.S. Gulf Coast ports to countries adjacent to Colombia.

[12] The Agreements commit Andino and Transligra to provide Flota with all its space requirements. (Exs. 2, 2A, 28 and 29.)

[13] The facts in *Puget Sound* are nearly identical to those present in these proceedings. In *Puget Sound*, Foss, a contract barge operator, entered into an arrangement with Northland for the transportation of cargoes between Alaska and Washington. Northland, a non-vessel operating common carrier (NVOCC), did not own or have an interest in the cargo but rather solicited it from the general shipping public which received a Northland bill of lading. The goods tendered by Northland were towed by Foss in the same tow as its contract cargo. The Commission rejected Foss' claim that it was not a common carrier with regard to the cargo tendered by Northland. *See infra*, at 9–13.

acting as common carriers by water with regard to liquid bulk commodities in the United States Gulf/Colombia trades. Andino and Transligra take responsibility for the cargo and its transportation, provide the ship, control the loading and navigation, publish sailing schedules in conjunction with Flota, provide regular service at regular intervals from the United States Gulf to Colombia, and in general serve the entire shipping public in the trade.[14]

Some of the evidence disputing Proponents' arguments to the contrary is contained in Exhibits 30 through 40 and Exhibit 76. These documents, which are captioned, respectively "Sailing Schedule and Fleet Information" (Ex. 30–40) and "Weekly Vessel Position Schedule" (Ex. 76) are regularly published and distributed to the liquid bulk shipping public at large. They clearly indicate that Flota, Andino and Transligra are *offering* regular liquid bulk service. For example, Exhibit 37, dated February, 1977, describes a regular service of approximately 15 days frequency from the United States Gulf to Colombia or Venezuela with a range of loading dates for each voyage.

The record indicates further that Andino and Transligra are in fact carrying cargoes belonging to more than one shipper per voyage.[15] Although the cargo is carried for Flota's account pursuant to Andino's and Transligra's respective arrangements with Flota, the individual parcels are actually owned by the manufacturer or purchaser of the liquid bulk commodity. These cargo interests must, because of the restrictions of Colombia's cargo preference laws,[16] book their shipments with Flota, which in turn has prearranged with Andino and Transligra for the ocean transportation to Colombia. Because Colombian law prevents the actual shipper from negotiating freely for ocean transportation, the Commission believes it particularly inappropriate to view Flota as an ordinary shipper vis-a-vis Andino and Transligra, as Proponents argue. On the contrary, the Commission believes that the common carrier responsibilities that Flota has assumed should be imputed to Transligra and Andino who actually provide the ocean transportation and are ultimately responsible for cargo losses.[17]

As the Commission explained in *Puget Sound:*

> [W]here, as here, the holding out to carry cargo for the public is *indirect,* this holding out will nevertheless be attributed to the [actual] carrier, and considered to bring it within the scope of

[14] I.D. at 69; Ex. 2, 28; *See also* Confidential Ex. 2B, 29. Confidential Exhibits 2B and 29 are the "private agreements". Because they are part of the Agreements which have been found subject to the Shipping Act, 1916 these "private agreements" must be made available to the public pursuant to 46 C.F.R. Part 503 (1983).

[15] Andino and Transligra also appear to carry Venezuelan and Ecuadorian cargoes respectively on their voyages from the United States Gulf to Colombia. (Ex. 119, Tr. at 998.)

[16] The Colombian cargo preference laws require that at least the first 50% of a shipment be transported by a Colombian-flag vessel. (Exs. 3, 4, 20, 41; Tr. at 45, 404, 406; I.D. at 10–12, 28–32.) Because liquid bulk commodities in the Colombian trades are shipped in small lots, it is not efficient to divide a shipment among two or more lines.

[17] Flota pays cargo claims for Andino's and Transligra's account after obtaining their approval of the claim. (Ex. 2B, Article 11; Ex. 29, Article 8).

> the ancient phrase saying that a common carrier is a carrier "*which holds itself*" out as *willing to carry for the public.* [T]he Supreme Court has held that common carrier status cannot be avoided by the device of acting as *agent* for a common carrier. Where . . . the service is essentially the carriage of cargo for the general public; *it is nonetheless common carriage* because the [actual] carrier adopts a device . . . to make it appear that the vessels are serving one shipper, whereas they actually are serving many.
> 7 F.M.C. at 48. (Emphasis in original, citations omitted).[18]

The rationale expressed in *Puget Sound,* has been followed by the Interstate Commerce Commission in *Transamerica Freight Line, Inc.—Petition For Declaratory Order,* 335 I.C.C. 46 (1969), *aff'd sub nom. Locust Cartaqe Company* v. *Transamerica Freight Lines, Inc.,* 430 F.2d 334 (lst Cir. 1970). In *Transamerica,* the ICC determined that a motor common carrier, acting as an agent for another common carrier, does not lose its status, nor can it avoid its common carrier obligations, by virtue of its agency arrangement with that other carrier.

Transamerica had an arrangement with Locust Cartage Co.[19] which required Locust to perform certain transportation services on Transamerica's behalf. Transamerica solicited the cargoes, collected the freight, and issued its own bill of lading to the shippers, but tendered the cargo to Locust for delivery. Transamerica paid Locust a fixed fee for its transportation services. The court affirmed the ICC's finding that Locust was a common carrier vis-a-vis Transamerica. In so doing, the court agreed with the ICC that Locust's independent "control" of the handling and the routing of the cargo, its overall "responsibility" for safe delivery, as well as the carriage of other shippers' cargoes on the same truck supported the Commission's finding that Locust was a common carrier in its relationship with Transamerica.

Andino and Transligra, like Locust Cartage, serve more than one shipper per voyage, control the routing, manning and operation of their vessels, and assume through their respective agreements the ultimate financial responsibility for any shipper claims against Flota. In addition, as noted above, Andino and Transligra hold themselves out to the public by publishing and distributing their sailing schedules to liquid bulk shippers and brokers. All of these factors support the Presiding Officer's finding that both are common carriers by water within the meaning of section 1 of the Act.

This finding is not undermined, as Proponents argue, by the fact that the Agreements do not require Flota to share its freight receipts with

[18] *See also Agreement No. 9597 Between Flota Mercante Gran Centroamericana S.A., Continental Lines, S.A. and Jan C. Uiterwyk Co.,* 12 F.M.C. 87, 1968.

[19] Locust did not have operating authority as a common carrier when it originally entered into its arrangement with Transamerica. Locust subsequently purchased common carrier operating authority from another carrier.

Andino and Transligra.[20] The *Transamerica* decision makes clear that a division of fees is not determinative of common carrier status. The parties there were held to be common carriers even though Locust Cartage was being paid a fixed fee, as are Andino and Transligra, for its transportation services. While the fee splitting arrangement in *Puget Sound* was a factor which the Commission considered, the Commission's jurisdictional finding there was not premised on the fee arrangement. The Commission found the underlying vessel operator in *Puget Sound* to be a common carrier because it was holding itself out, albeit indirectly, to carry cargoes for the general shipping public. *Puget Sound, supra* at 48. There is nothing in the *Puget Sound* decision to suggest that the Commission's holding turned on the fee splitting provision. The absence of a fee sharing provision here does not therefore mandate a different result. Accordingly Proponents' exceptions are denied and the Commission adopts, with the explanation provided above, the Presiding Officer's jurisdictional finding.[21]

Merits of Agreements Nos. 10293 and 10295

Should jurisdiction be found, Proponents urge the Agreements' approval.[22] Proponents take exception to the finding that the Agreements, in combination with Colombia's preference laws, have resulted in a monopoly in the trade, to the exclusion of other carriers, and that this monopoly has caused Colombian freight rates to be higher than the rates for comparable transportation to countries adjacent to Colombia. First, Proponents point out that Colombia's preference laws restrict only the shipment of the first fifty percent of a consignment; shippers are free to offer, and other carriers are free to carry, the remaining fifty percent of a consignment. They also note that Colombian law allows waivers from its cargo reservation requirements when a Colombian-flag vessel is unable to lift the cargo or when the Colombian-flag freight rate is not competitive.

Proponents argue further that the parcel carriers which had operated in the trade prior to 1973, Stolt Nielsen, Vee Marine, O.N.E., and A.S. Rederiet Odfjell, were no longer interested in serving the trade for commercial or operational reasons. Proponents allege that these parties are only interested in serving the trade on a spot basis because of other commitments and the limited draft that is available in some Colombian ports.[23]

[20] Proponents argue that because Flota sets and collects for itself the freight rate to the underlying shipper, the Presiding Officer should not have applied the rationale expressed in *Puget Sound Tug & Barge* v. *Foss Launch and Tug Company*, 7 F.M.C. 43 (1962).

[21] This determination also disposes of Proponents' argument on exception that the Presiding Officer erred in finding that the Agreements had been implemented prior to approval because the Commission has no jurisdiction over the Agreements.

[22] Proponents also except to the Presiding Officer's finding that the Agreements are cooperative working arrangements within the meaning of section 15. They argue that the Agreements do not obligate Flota to charter space on their vessels. The Agreements, they contend, merely offer Flota the right to charter space if Flota is satisfied with the cost of the charter hire. We disagree. The Agreements clearly provide for a cooperative working arrangement between two common carriers by water by allocating, *inter alia*, Flota's service between the Atlantic and Pacific Coasts, coordinating sailing, and committing cargo space to Flota.

[23] See Flota's Exceptions at 32; Exs. 96, 99.

Proponents also contend that the Agreements have not resulted in higher freight rates. They point out that the trade is essentially a "drug store trade" where the shipments are in smaller lots. These small shipments allegedly do not qualify for the lower rates that are available to volume shippers under contracts of affreightment. As a result, Proponents explain that Flota generally offers rates on a per shipment basis which are higher than the rates available to high volume shippers in adjacent trades under contracts of affreightment. Proponents state that if their rates are not competitive, shippers could take advantage of lower rates offered by other carriers by seeking a waiver from Colombia's cargo preference laws.

Proponents believe that the Agreements are in the public interest and should be approved. Proponents explain that prior to 1973 the liquid bulk trade between the United States and Colombia was served sporadically by tramp carriers. Since that time Flota, through its arrangements with Andino, and subsequently Transligra, has allegedly provided regular efficient service which has resulted in a significant increase in the movement of liquid bulk commodities between the United States and Colombia. Moreover, the Agreements are said to be in the public interest because they avoid international conflict between United States and Colombian law and therefore should be approved under the rationale expressed in *Agreement No. 10066—Cooperative Working Arrangement,* 21 F.M.C. 462 (1978).

Finally, Proponents argue that Hearing Counsel has failed to prove that the Agreements are *per se* violative of the antitrust laws or otherwise have significant anticompetitive effects so as to trigger the *Svenska* doctrine.[24] They therefore, submit that Hearing Counsel had the burden of establishing and proving a basis for the Agreements' disapproval. Proponents conclude that they have failed to do so.

The Commission finds that the Presiding Officer's disapproval of the Agreements is supportable both in law and fact.[25] Section 15 requires the Commission to:

> . . . disapprove, cancel, or modify any agreement, . . . 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

[24] 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.

[25] We do not, however, adopt the Presiding Officer's finding that the Agreements were previously in the public interest. Section 15 makes clear that an agreement is not lawful unless it has been approved by the Commission. An unlawful agreement cannot, therefore, be in the public interest within the meaning of section 15. Accordingly, we will grant Hearing Counsel's exception and vacate the Presiding Officer's finding to the contrary.

> Act, . . . and approve all other agreements, modifications, or cancellations.

Agreements that are *per se* violative of the antitrust laws or which have been shown to have significant anticompetitive effects must be disapproved under the standards of section 15 unless the agreements' proponents demonstrate that the agreements are required by serious transportation needs, necessary to secure important public benefits or serve valid regulatory purposes. The burden is on the proponents of such agreements to come forward with the supporting evidence.[26]

The Commission agrees with the Presiding Officer that the Agreements have significant anticompetitive effects and, as a result, are not only contrary to the public interest but also detrimental to the commerce of the United States. The Presiding Officer also correctly found that Proponents have failed to demonstrate any benefits flowing from the Agreements that outweigh these adverse consequences.

Because the Agreements, or their predecessor, have been implemented since 1973, the Commission need not speculate about their effect. The impact of these Agreements on the United States/Colombian liquid bulk trade was fully developed on the record in these proceedings. That record clearly establishes that the implementation of these Agreements under the restrictive umbrella of Colombia's cargo preference system has resulted in a restraint of trade that has led to Flota's near monopolization of the United States/Colombia liquid bulk market.[27]

Prior to the application of Colombia's preference laws to the liquid bulk trade, and Flota's 1973 arrangement with Andino, at least four other carriers, including Andino, served the United States Gulf/Colombian market. These carriers all withdrew after Flota executed its first agreement with Andino. Although Proponents argue that these withdrawals were by choice and for commercial reasons, the record suggests that the reservation laws and the Agreements were a major consideration. First, the record establishes that at least 50% of the trade is reserved to Colombian-flag vessels and that it is inefficient to divide the small lots that are characteristic in the trade. Second, the record demonstrates that these factors enabled the Flota-Andino-Transligra service to capture 83% of the market in 1977, the first full year the Agreements were implemented.[28] Andino admitted that without its chartering arrangement it "could not move reserved cargo on its own behalf in this trade."[29] In addition, although Flota's arrangements are characterized by Proponents as being non-exclusive, Flota with very few excep-

[26] *Federal Maritime Commission* v. *Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238 (1968); *United States Lines* v. *Federal Maritime Commission*, 584 F.2d 519 (D.C. Cir. 1978); *Agreement No. 10066—Cooperative Working Arrangement*, 21 F.M.C. 462 (1978).

[27] The Sherman Antitrust Act, 15 U.S.C. 1 makes "[e]very contract, combination in the form of trust . . . in restraint of trade, or commerce among the several states or with foreign nations . . . illegal."

[28] The record indicates a market share of 83% in 1977, 78% in 1978, and 89% in 1979, the most recent years for which statistics are available. (Ex. 148, Table 1; Ex. 168.)

[29] Andino's Exceptions, at 43, 55.

tions, has shipped exclusively with Andino and Transligra. The anticompetitive nature of these Agreements under the Colombian cargo reservation scheme is further evidenced by Andino's and Transligra's unwillingness or inability to independently solicit and carry Colombian cargoes for their own account in the space that is not committed to Flota. In short, the substantial market power exercised by Flota gives it, as well as Transligra and Andino the leverage to induce, if not compel, shippers to give them preference, to the exclusion of other competitors, in the transportation of liquid bulk commodities.[30] Although there is a procedure for obtaining waivers from the effects of Colombia's cargo reservation laws, that procedure has not prevented the Flota service from dominating the trade insofar as the carriage of liquid bulk commodities are concerned.

This restraint on competition also appears to have artificially increased transportation rates in the trade to the detriment of the commerce of the United States. Liquid bulk commodities destined for South America generally move under contracts of affreightment. These contracts, which are offered by the carriers that serve countries adjacent to Colombia, generally provide a lower rate than the spot rates that Flota offers its shippers.[31] Because the carriers that provide liquid bulk service to other South American trades cannot freely compete in the Colombian trade, shippers which move similar liquid bulk commodities to South America have higher transportation costs for their cargoes destined for Colombia. This results from the shippers' inability to use a contract rate to move the same product from the United States Gulf to Colombia and other South American countries on the same movement.[32] For instance, Shell, which in 1980 had a contract of affreightment with a carrier to move certain liquid bulk chemicals from the United States Gulf to Venezuela, paid Flota a much higher amount for moving the same commodity to Colombia, which is closer than Venezuela to the Gulf.

Proponents have argued that the adverse consequences flowing from the Agreements are justified by the Commission's "international harmony" policy[33] and evidence of increased cargo tonnage and service regularity. This argument is without merit. First, the Commission's international harmony policy would not appear to apply here. That policy has only been applied to agreements that ameliorate the restrictive features of cargo pref-

[30] *See Northern Pacific Railway Co., et al.* v. *United States,* 356 U.S. 1 (1957); *Coleman Motor Co.* v. *Chrysler Corp.,* 525 F.2d 1338 (3rd Cir. 1975).

[31] Ex. 149.

[32] Shell, Dow, and Esso which ship liquid bulk commodities to Colombia also ship the same or similar commodities to other South American countries.

[33] Agreement No. 9939–1—Modification and Extension of a Pooling, Sailing and Equal Access Agreement, 21 F.M.C. 702, 18 S.R.R. 1623 (1979); *Agreement No. 9932—Equal Access to Government Controlled Cargo and Interim Cooperative Working Arrangement,* 16 F.M.C. 293 (1973); *Agreement Nos. 10386, as Amended and 10382, as Amended—Cargo Revenue Pooling/Equal Access Agreements in the United States/Argentine Trade,* 24 F.M.C. 660 (1982); *Agreements Nos. 10349 and 10346—Cargo Revenue Pooling Agreements in the United States/Argentine Trade,* 21 F.M.C. 1100 (1979); *Agreement Nos. 9847 and 9848—Revenue Pools, U.S. Brazil Trade,* 14 F.M.C. 149 (1970); *Malpractices—Brazil/United States Trade,* 15 F.M.C. 55 (1970).

erence laws by granting carriers equal access to government reserved cargo. The Agreements do not provide for Andino's or Transligra's equal access to liquid bulk cargoes reserved by Colombian law, nor do these parties independently compete for such cargoes. In fact, because Andino discontinued its independent Colombian service when Flota entered the trade, the Agreements appear to restrict Andino's ability to compete or have access to reserved commodities.

Secondly, there is no support in the record for Proponents' argument that the Agreements' disapproval would frustrate the intent of the sovereign state of Colombia by preventing Flota from providing a Colombian-flag liquid bulk service. Clearly, disapproval would not preclude Flota from making *ad hoc* arrangements with any carrier or vessel owner desiring to compete for Flota's cargo.

Finally, while the evidence does indicate that cargo tonnages have increased since the Agreements were first implemented, this increase cannot clearly and solely be attributed to the Agreements' operation. Economic progress and industrial growth would appear to be responsible for at least some of the increase. The Commission therefore believes that Proponents have failed to demonstrate a sufficient nexus between the increased cargo tonnages and the Agreements to justify their approval given the anticompetitive effects flowing from the Agreements under Colombian law.

THEREFORE, IT IS ORDERED, That the Initial Decision served in these proceedings is adopted except to the extent indicated above, and,

IT IS FURTHER ORDERED, That Andino's and Transligra's Exceptions are denied, and,

IT IS FURTHER ORDERED, That Hearing Counsel's Exception is granted, and,

IT IS FURTHER ORDERED, That Agreement Nos. 10293 and 10295 as supplemented by their respective "private agreements" are disapproved pursuant to section 15 of the Shipping Act, 1916, and,

IT IS FURTHER ORDERED, That Flota, Andino and Transligra shall, within 30 days of the date of this Order, cease and desist implementing Agreement Nos. 10293 and 10295 as supplemented by their respective "private agreements";[34] and,

[34] To avoid the disruption to shippers and the trade that the abrupt cessation of the service provided for by these Agreements might occasion, the Commission is allowing the parties 30 days to fulfill existing transportation obligations and wind down their operations.

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

(S) FRANCIS C. HURNEY
Secretary

By the Commission.*

Commissioner Moakley, dissenting.

I do not concur with the majority's conclusion that Agreements No. 10293 and No. 10295 are subject to our jurisdiction under section 15 of the Shipping Act 1916, because I cannot find that Andino and Transligra are operating as common carriers in this trade.

The facts that I rely upon in arriving at this position are as follows:

1. Andino and Transligra hold themselves out to no one except Flota in the Colombian trade;
2. Flota alone issues the bills of lading to shippers;
3. Flota alone establishes the rates paid by shippers;
4. Flota alone solicits the cargo from shippers in the Colombian trade; [1] and
5. Andino and Transligra are paid in accordance with their contractual arrangements with Flota. The freight revenues collected by Flota are not shared.

Under this set of facts, it seems clear to me that Flota is the only common carrier to be found in these arrangements. Andino and Transligra are contracting their services solely to Flota and do not hold themselves out to perform services for the general public in the Colombian trade.

This conclusion requires the perception of the Colombian trade as separate and legally distinct from other South American Trades. Otherwise, the apparent status of Andino and Transligra as common carriers in trades between the United States and other South American countries would require finding that they are common carriers for the purpose of these agreements.

The Commission and the industry have traditionally viewed each South American country as a separate trade destination and there doesn't appear to be anything in this record that would warrant a departure from that approach. Colombia, like most South American nations, has its own, unique set of cargo preference laws and its own national flag carrier who is the primary beneficiary of those laws. Equal access and/or pooling agreements exist in most of these trades, which tend to reenforce the distinctions established by the various cargo preference laws. There are even separate

* Commissioner Thomas F. Moakley's dissenting opinion is attached.

[1] The record does contain joint advertisements by Flota and Andino and Transligra of the sailing schedules of the relevant bulk vessels in this trade but these sailing schedules apply to other South American trades also, where Andino and Transligra are dealing directly with the shipping public. It is clear that liquid bulk shippers in the Colombian trade must tender their cargo only to Flota.

government-to-government agreements relating to the carriage of bilateral cargo in two of the South American trades.[2]

These distinct laws and related government and commercial agreements combine to establish different sets of rules for trade with each South American country which tend to prevent a carrier from freely moving from one trade to another. The record in this case supports the conclusion that Colombia is no exception to this rule. For these reasons, I would continue to treat the Colombian trade separately from other South American trades and would not stretch the long arm of regulation to impute any common carrier status that Andino or Transligra may have in other trades to their liquid bulk activities in the Colombian trade.

Without jurisdiction over Andino and Transligra, there is no jurisdiction over the agreements under investigation here. I would therefore discontinue these proceedings for lack of jurisdiction.

[2] Argentina and Brazil.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–2

AGREEMENT NO. 10293

DOCKET NO. 79–3

AGREEMENT NO. 10295

Found, (1) that Flota Mercante Grancolombiana, S.A., Andino Chemical Shipping Co., Inc., and Maritima Transligra, S.A., are common carriers by water subject to section 15 of the Shipping Act; (2) that Agreement Nos. 10293 and 10293 Sub-1 are the complete agreement of Flota and Andino; that Agreements Nos. 10295 and 10295 Sub-1 are the complete agreement of Flota and Transligra; and that these four agreements were implemented without Commission approval; (3) that these agreements are unlawful, not in the past, but for the present and the future, under section 15 of the Shipping Act, because they are cooperative working arrangements which control, regulate, prevent and destroy competition in the two trades herein (U.S. Gulf/Atlantic Colombia; and U.S. Gulf/Pacific Colombia), because these agreements operate to the detriment of the commerce of the United States, and because these agreements are contrary to the public interest; and (4) that the proponents of these agreements have failed to demonstrate that the benefits of these agreements outweigh their anticompetitive consequences.

Agreements disapproved.

Renato C. Giallorenzi for proponents Flota Mercante Grancolombiana, S.A., in No. 79–2; and for proponents Maritima Transligra, S.A., and Flota Mercante Grancolombiana, S.A., in No. 79–3.

Zachary B. Schwal, Myra Platt and *Neal R. Platt* for proponent Andino Chemical Shipping Co., Inc., in No. 79–2.

Caspar F. Ewig for intervener O.N.E. Shipping, Ltd.

Laurence G. Cohen for protestant Esso Chemical Supply Company, Inc.

Pedro A. Freyre for protestant Dow Chemical International, Inc., of Delaware.

Alan M. Grimaldi for protestant Shell Chemical Company, a division of Shell Oil Company.

Edward Schmeltzer and *George Weiner* for the Government of the Republic of Colombia, as *amicus curiae.*

John Robert Ewers, Joseph B. Slunt and *Deana E. Rose* as Hearing Counsel.

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

Partially adopted May 30, 1984

THE ISSUES AND ORDERS OF INVESTIGATION

The subject two proceedings are concerned with agreements establishing space chartering arrangements for the transportation of liquid bulk cargoes in two trades, one trade between the United States Gulf ports and ports of Colombia on the Atlantic coast of Colombia (Atlantic trade or A trade), and the other trade between the United States Gulf ports and ports of Colombia on the Pacific coast of Colombia (Pacific trade or P trade). Transit through the Panama Canal is necessary in the P trade.

The space chartering arrangements are between Flota Mercante Grancolombiana (Flota or Granco), a non-vessel operating common carrier in these two trades, on the one hand, and on the other, vessel operating common carriers, Andino Chemical Shipping Co., Inc. (Andino), in the A trade, and Maritime Transligra, S.A. (Transligra), in the P trade.

Briefly under the agreements in issue Flota offers regular services in the two trades, solicits cargoes from any shipper or consignee, and issues the bills of lading in its name. Andino and Transligra provide the ships, crews, control the navigation, and charter parts of their ships' spaces to Flota. Andino and Transligra attempt to fill out, or succeed in filling out, the rest of their ships' spaces not chartered to Flota, by soliciting and carrying liquid bulk cargoes destined to non-Colombian ports.

At the agreement of, and for the convenience of, the parties, these two proceedings were heard together. Docket No. 79–2 concerns the A trade; Docket No. 79–3 concerns the P trade. Principal Colombian ports are Barranquilla and Cartagena in the A trade, and Buenaventura in the P trade.

The two original orders served January 4, 1979, placed under investigation Agreement No. 10293 (A trade) and Agreement No. 10295 (P trade), so-called "Public Agreements."

Two subsequent orders of the Commission, both served September 26, 1980, amended the original orders to include the two so-called "Private Agreements," i.e., Agreement No. 10293 Sub-1 in the A trade, and Agreement No. 10295 Sub-1 in the P trade, respectively, Docket Nos. 79–2 and 79–3.

The original "public" agreements, both dated and signed December 22, 1976, were filed with the Commission in April 1977 (No. 10293—April 4, 1977; and No. 10295—April 25, 1977).

[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 above two "Private Agreements" were filed with the Commission on May 20, 1980. These two private agreements were produced as a result of the discovery process relative to the original orders of investigation.

Agreement No. 10293 Sub-1, the "Private Agreement" between Flota and Andino signed on December 22, 1976, incorporates certain annexes and addendums thereto. Included as addendum No. 2 is a reference to an agreement between these parties signed February 16, 1973.

This 1973 agreement between Flota and Andino covered the trade between the U.S. Gulf ports and *all* Colombian ports, both Atlantic and Pacific. As in the case of the 1976 agreements, also in 1973 there were both a public and a "Private" agreement of the same date.

In other words, by the 1973 agreements Flota chartered space on Andino's ships both in the A and P trades. But, by the 1976 agreements here in issue Andino's operations were reduced to the A trade only, as of January 1, 1977. This was a consequence of the agreement of Flota with Transligra for Transligra's operation in the P trade, beginning in 1977.

Generally, the respondents have produced numerous statistics referring to the 10293 trade (A trade) and to the 10295 trade (P trade), but the captions on these statistics sometimes are not literally true, insofar as they refer to the years 1973, 1974 and 1975, because Agreement Nos. 10293 and 10295 were not filed and numbered until April, 1977. For example, Exhibit No. 168, Table O, page 18, lists the years 1974, 1975, and 1976, but the freight revenues collected for those years covered both the A and P trades in total. For the years 1977, 1978, 1979, and 1980, the freight revenues collected for these years are for the A trade only.

All tonnage figures set out in this decision are *metric* tons.

To recap, by the combination of the original orders served on January 4, 1979, and the amended orders served on September 26, 1980, the Commission instituted these two investigations, pursuant to sections 15 and 22 of the Shipping Act, 1916 (the Act), to determine whether, in No. 79–2, Agreement No. 10293 and Agreement No. 10293 Sub-1, and, in No. 79–3, Agreement No. 10295 and Agreement No. 10295 Sub-1, shall be approved, disapproved, or modified, under the provisions of section 15 of the Act.

COMMODITIES CARRIED IN THE TRADES

Liquid bulk cargoes in the two trades herein consist of two general categories, one category being chemicals, and the other category being vegetable oils and animal fats.

Major commodities carried in the trade to and from Colombian Atlantic coast ports have included vegetable oils and fats (such as soybean oil, cottonseed oil, fish oil, hog greases, lard, tallow and pig fat), and chemicals (such as phosphoric acid, styrene, caustic soda, vinyl acetate monomer and monoethylene glycol).

Major commodities in the trade to and from Colombian Pacific coast ports have included vegetable oils, animal fats, caustic soda, methanol and vinyl acetate monomer.

Specially equipped parcel tankers generally are required to handle these chemicals, and fats and oils.

Most of the liquid bulk cargoes in the trades herein are carried southbound from U.S. Gulf ports to Colombian ports. The agreements in issue also cover backhaul, or northbound movements, from Colombian ports to U.S. Gulf ports. Since 1971, the backhaul movement peaked in 1973 with 44,331 tons, and steadily declined until 1979 with 2,681 tons. Over 90 percent of the backhaul tonnage carried since 1971 was loaded in Barranquilla, with the rest loaded in Cartagena. Aromatics accounted for about 92 percent of the backhaul tonnage from 1971 to 1979, and the backhaul dwindled to practically zero when local Colombian consumption could absorb the aromatics. Presently from the West Coast of Colombia, the Flota/Transligra service backhauls some molasses.

The record statistics, and this decision, relate primarily to the southbound trade to Colombia.

TARIFFS NOT REQUIRED FOR THESE TRADES

Section 18(b)(1) of the Act provides for the filing of tariffs of rates and charges of common carriers by water in the foreign commerce. This section provides, in part, that "*this section shall not be applicable to cargo* loaded and carried *in bulk* without mark or count." Thus, the liquid *bulk* carriers in this trade are not required to file tariffs.

TWO METHODS OF SETTING FREIGHT CHARGES

In practice, there are two methods of setting freight charges in these trades. One, there are long-term (usually one-year) contracts of affreightment (c.o.a.'s) entered into between the carrier and a Colombian importer; and two, there are published freight rates, which may be used for single shipments or otherwise.

The parties stipulated that, "Rates under contracts of affreightment are usually lower than the published rates of Flota Mercante Grancolombiana."

THE AGREEMENTS

Agreements Nos. 10293 and Sub-1 in No. 79–2 provide for the establishment of a space chartering arrangement for the transportation of liquid bulk cargo in the A trade, whereby Andino would provide Flota with the necessary space on vessels owned or operated by Andino.

The *issues in No. 79–2* include whether Agreements 10293 and Sub-1 should be approved, disapproved, or modified, whether section 15 of the Act has been violated by the implementation of an unapproved agree-

ment or agreements, whether the "Private Agreement," No. 10293 Sub-1, represents the true agreement of the parties, and whether Agreement No. 10293 represents the complete agreement.

An order served February 1, 1980, issued in response to the motion of Hearing Counsel, provided for the addition of certain of the above issues to the proceeding in No. 79–2. A similar order in No. 79–3 also similarly expanded the issues in that proceeding.

The agreements in No. 79–3 are similar to those in No. 79–2, except that *Agreements Nos. 10295 and Sub-1* in No. 79–3 provide for the establishment of a space chartering arrangement for the transportation of liquid bulk cargo in the P trade whereby Transligra would provide Flota with the necessary space on vessels owned or operated by Transligra.

The *issues in No. 79–3,* similar to those in No. 79–2, include whether Agreements Nos. 10295 and Sub-1 should be approved, disapproved, or modified, whether section 15 of the Act has been violated by the implementation of an unapproved agreement or agreements, whether the "Private Agreement," No. 10295 Sub-1, represents the true agreement of the parties, and whether Agreement No. 10295 represents the complete agreement.

In addition to the above issues, the proponents raise *the issue of jurisdiction* of the Federal Maritime Commission.

Agreement No. 10293 (Exhibit No. 2–A) was signed in Bogota, Colombia, on December 22, 1976, providing Flota's intention to "open its service" for the transportation of liquid bulk cargo between the ports of the U.S. Gulf and the ports of the Colombia Atlantic. With *service provided in the name of Flota and with vessels provided by Andino,* space on these vessels would be chartered by Flota. Andino committed itself to providing such space to Flota as of January 1, 1977, as Flota would require in the trade. Andino would provide space to Flota for a quoted space charter hire. Flota would fix the rates charged to importers and exporters. Flota would contract the cargo with the consignees in Colombia and exporters from Colombia. Flota can make long term contracts with its clients (importers and exporters).

Flota expressed its intent to give "*a regular service, with an approximate frequency of 15 days,* * * *; this frequency could be increased according to the volume of cargo available." The agreement could be terminated by either party on not less than 90 days notice.

Agreement No. 10293 Sub-1, besides incorporating the 1973 agreements, also covers various matters governing the operation of the charter arrangement which are not contained in Agreement No. 10293. In other words, this private (Sub-1) agreement is an essential part of the entire agreement between Flota and Andino.

This Sub-1 "Private Agreement" provides that Flota will canvass and contract in Colombia for the movement of liquid bulk cargo in the Atlantic Colombia ports trade, that Andino will be the sole coordinator of all shipments originating in U.S. Gulf ports, that Andino will execute transportation

contracts, will take responsibility in accordance with Tanker Bills of Lading or contracts, and will be responsible for the carrying of the cargo to Colombian ports. Andino will supply Flota with itineraries for "regular shipments," for which Flota will canvass and contract the cargo to use at a maximum the carrying capacity of Andino. For "sporadic shipments," Flota will try to use the "regular vessels" of Andino and will communicate with Andino to obtain additional capacity. In case Andino cannot provide the additional capacity or tonnage required, Flota will be free to look for other transportation.

Flota's tanker bills of lading will be issued and signed by Andino as Flota's agent in the New Orleans and Baton Rouge areas. In the Houston and Galveston area, Flota's bills of lading are signed by the Texas Star Shipping Company acting for Andino as Flota's agent.

Flota will collect the freight and other charges in Colombia. Andino, as agents of Flota at U.S. Gulf ports, will be responsible for the operations of the vessels and for all commercial matters which derive from the agreement. Flota will take care of all agency matters regarding Andino's vessels in Colombia.

The *"Private Agreement," No. 10293 Sub-1,* also provides that Andino will pay Flota as Andino's agent in Colombia 2.5 percent on space charter hire of import cargo, and 5.0 percent of total freight on export cargo to U.S. Gulf ports, except on molasses or export products of Ecopetrol or Holland Chemical International, Flota would receive a commission of 2.5 percent of the total freight to U.S. Gulf ports and destinations other than to Europe.

Many other details are provided in this "Private Agreement," including payments by Andino to Flota of Colombian port fees, telex, mail, local telephone calls, crew repatriation, and demurrage collection fees. Flota will receive all claim notices, make investigations, and process the claims. Claims will be paid by Flota for the account of Andino, only after authorization by Andino. If Flota were to use its own specialized vessels in the trade or charter vessels not from Andino, Flota and Andino will decide jointly the participation of Andino in those activities for the coordination of the shipments.

The 1973 agreements between Flota and Andino differed somewhat from the 1976 agreements in that Andino (not Flota) set the ocean freight rates, and Flota contracted with the Colombian importers and exporters at the rates set by Andino. The 1973 agreements between Flota and Andino were the same as the 1976 agreements in that Andino agreed to provide vessel space to Flota.

Agreement No. 10295 (Exhibit 28) was signed in Bogota on December 22, 1976, providing Flota's intention to "open its services" for the transportation of liquid bulk cargo between the ports of the U.S. Gulf and ports of the West' (Pacific) Coast of Colombia. *With service provided in the name of Flota and with vessels provided by Transligra,* space on the

vessels would be chartered by Flota. Transligra committed itself to providing such space to Flota as of January 26, 1977 (with the first sailing of the *MT Thomona* estimated time of leaving the U.S. Gulf), as would be required by Flota in the trade. Transligra will quote to Flota the space charter hire. Flota will fix the rates charged to importers and exporters. Flota would contract the cargo with the consignees in Colombia and the exporters from Colombia. Flota can make long term contracts with its clients (importers and exporters).

Flota expressed its intent to give "a regular service, with an approximate frequency of 35 days, * * *; this frequency could be increased according to the volume of cargo * * *." The agreement could be terminated by either party on not less than 90 days notice.

Agreement No. 10295, Sub-1, the "Private Agreement" between Flota and Transligra (Exhibit No. 29) was signed on December 22, 1976. It has one addendum. This 10295 Sub-1 Private Agreement provides that Flota will canvass and contract in Colombia for the movement of liquid bulk cargo in the Pacific Colombia ports trade, that Transligra, through its U.S. Gulf agents, will be the sole coordinator of all shipments originating in the U.S. Gulf ports, that Transligra will execute transportation contracts, will take responsibility in accordance with Tanker Bills of Lading or contracts, and will be responsible for the carrying of the cargo to Colombian ports. Transligra will provide Flota with itineraries for "regular shipments," for which Flota will canvass and contract the cargo to use at a maximum the carrying capacity of Transligra. For "sporadic shipments," Flota will try to use the "regular vessels" of Transligra and will communicate with Transligra to obtain additional capacity. In case Transligra cannot provide the additional capacity or tonnage required, Flota will be free to carry the goods with other carriers on its own risk.

Transligra will give Flota the space charter hire, and Flota will fix the rates charged Colombian importers and exporters. When the space charter hire given by Transligra does not correspond to levels applied by the competition, Flota will be free to carry goods with other carriers at its own risk. Flota's bills of lading will be used. Flota will collect the freight and other charges in Colombia. Transligra's agents will be Flota's agents in the U.S. Gulf ports and will be responsible for the operation of the vessels and all commercial matters. Flota's agents in Colombia will take care of all agency matters regarding Transligra's vessels in Colombian Pacific ports. Fees and commission arrangements provide that Transligra will pay Flota, similarly to the Flota-Andino Agreement No. 10293 Sub-1.

As in the case of the A trade, so also in the P trade, the so-called "Private Agreement" (10295 Sub-1) is an essential part of the entire agreement between Flota and Transligra.

SHIPPER TESTIMONY AND LETTERS

The two major importers of phosphoric acid, Abocol and Monomeros, whose plants are in Cartagena and Barranquilla, respectively, have found the service of Flota/Andino to be satisfactory.

Certain other shippers and importers by letter support the continuance of the Flota services from the U.S. Gulf to both Atlantic and Pacific ports of Colombia. One of these letters is from Union Carbide Colombia, S.A., an importer of substantial amounts of liquid chemical bulk products into Colombia. Another letter is from a group of five Colombian companies (Grasco, Gracetales, Progral, Detergentes, and Jaboneria Central) which together import a total of about 30,000 tons of edible oils and tallows yearly.

THE PARTIES AND A NON-PARTY (LYKES)

The parties to these proceedings include the three proponents, an intervener, the Colombian government as *amicus curiae,* and Hearing Counsel.

The proponent *Flota* is a Colombian corporation established in 1946 to provide regular liner service for general cargo in the Colombian import and export trades. Flota is owned by the Colombian Coffee Growers Association (78 percent), by Banco de Fomento of Ecuador (20 percent) and by other Colombians (2 percent). Flota operates 29 owned vessels and about 30 to 40 chartered vessels monthly in its general cargo and dry bulk cargo services. Occasionally Flota has carried liquid bulk cargo in the deep tanks of its general cargo vessels. However, *Flota does not own nor operate any specialty parcel tankers* designed for the carriage of liquid bulk cargoes in the trades herein.

Specialty parcel tankers or chemical parcel tankers usually contain several lined tanks. Some tanks are stainless steel, others are lined with epoxy, zinc or other coatings. Generally each tank can be heated and has its own pump. Older tankers may have common pumps, which makes the possibility of accident or contamination more likely.

The proponent *Andino* is a company incorporated in Panama. It is engaged in the chartering and operation of parcel tankers for the carriage of liquid bulk cargo. The vessels operated by Andino fly third flags (i.e., neither Colombian flag nor American flag). Such flags include Liberian, Japanese, British, Panamanian/Singapore, Panamanian, and Norwegian. Andino used some 19 vessels during the years 1976 through 1979 in the U.S. Gulf-Atlantic ports of Colombia trade, serving the ports of Barranquilla and Cartagena, Colombia. For 1976, Andino lists 31 voyages from Houston, Texas City, Baton Rouge, Beaumont, Uncle Sam and New Orleans. Other listed origins include Bayport, Freeport, Taft, and Baytown which are sometimes grouped with Houston or with Texas City; also Plaquemines is sometimes grouped with Baton Rouge. For 1977, Andino lists 35 voyages from U.S. Gulf ports to Atlantic Colombian ports. For 1978, Andino lists 34

such voyages. (Exhibit No. 61–C). The *Fuji Andina* (Japanese flag) and the *Chemie Carrier* (Liberian flag) were used in all of the years 1976 through 1979 by Andino.

Andino is a wholly owned subsidiary of Holland Chemical International (HCI), a holding company which buys chemicals and sells them to HCI affiliates and to other companies in South America. The president and vice-president of HCI are president and vice president, respectively, of Andino.

The proponent *Transligra* is a company incorporated in Ecuador. Transligra is owned by Flota (33⅓ percent), by Holland Chemical International (33⅓ percent), and by Ecuadorian interests (33⅓ percent). Flota is Transligra's agent in Colombia. Andino is Transligra's agent in the U.S. Gulf. Transligra owns the parcel tanker, *Chimborazo* (formerly named the *Thomona,* then an Andino-operated vessel) registered under the Ecuadorian flag. Transligra operates additional vessels, not owned, in the U.S. Gulf-Pacific Colombia trade. Transligra serves Buenaventura on the Pacific West Coast of Colombia in the trade in No. 79–3. Transligra usually operates two vessels in this trade, sailing twice a month. Transligra's statistics and other documents including bills of lading are maintained by Andino.

Intervener *O.N.E.* Shipping Ltd. (O.N.E.), is the successor company to Overseas Liquid Gas, Inc. The latter offered regular service from the United States to Colombia and Venezuela since 1963, and O.N.E. was established in 1973 to continue the prior service of Overseas Liquid Gas. O.N.E. presently serves U.S. ports and ports in the Caribbean, Central and South America in the liquid bulk trades. Due to the proximity of Colombia and Venezuela, the ability of O.N.E. to carry cargoes to Atlantic Colombia would be a natural addition to O.N.E.'s present regular service to Venezuela. The major shippers of liquid bulk cargoes in the U.S./Venezuela trade are the same in the U.S./Colombia trade. O.N.E. also now serves the U.S. Gulf/Ecuador liquid bulk trade, and the ability of O.N.E. to carry cargoes to Buenaventura, Colombia, would be a natural adjunct of O.N.E.'s service to Guayaquil, Ecuador.

Since the implementation of the 1973 Flota/Andino agreements, despite the fact that O.N.E. continued to advertise its U.S. Gulf/Colombia service and continued to contact brokers and agents for the solicitation of cargo, O.N.E. found that it could no longer call at Colombian ports.

O.N.E. sought to provide service to Colombia through arrangements with Flota, and with *Lykes Bros. Steamship Co., Inc.* (Lykes). O.N.E. also had some preliminary discussions with NAVENAL, another Colombian line, which is no longer in business.

Andino and Flota stress that O.N.E. sought to take Andino's place in its agreement with Flota. But, regardless of this effort by O.N.E., and regardless of O.N.E.'s later position that the Flota/Andino agreement is unlawful, these two circumstances have no bearing on the lawfulness of the Flota/Andino agreements.

Lykes sought to enter the U.S. Gulf/Colombia liquid bulk trades herein, by certain proposed arrangements with O.N.E., similar to those between Flota and Andino.

The Lykes/O.N.E agreement, No. 10183, was approved by the Federal Maritime Commission (Exhibit No. 44) on June 2, 1976. Thereby, Lykes would have issued its bills of lading for cargo transported on vessels owned or controlled by O.N.E. Ostensibly this agreement would have paralleled the agreement between Flota and Andino.

O.N.E. understood and agreed that Lykes, by entering this agreement would have exerted its best efforts to make its present equal access agreement with Flota available to O.N.E., but Lykes offered no guarantee on which O.N.E. relied.

Lykes and Flota made an agreement, which is still in effect, No. 10064, approved by the Federal Maritime Commission (Exhibit No. 43) on January 24, 1974, which granted Lykes and Flota free access to total import and export cargoes available without restrictions as a result of any governmental regulations, with regard to the trade between U.S. Gulf ports and ports in Colombia.

Flota objected to the Lykes/O.N.E. agreement, and opposed the entry of O.N.E. into the trade upon the ground that such entry was in violation of Colombian law. Article 80 of Colombian Decree 2349 of 1971 stated:

> It is understood that the associated flags may have at their services ships of its own flags and third country flags. (Exhibit No. 4–A, English translation.)

Flota's interpretation of the law was that it did not extend to Lykes the benefit of using foreign flag vessels in the liquid bulk trade herein, unless Lykes placed at least one American-flag parcel tanker in this service. By contrast Flota has no Colombian flag parcel tanker in the trades, and by its agreement with Andino uses third flag vessels exclusively.

No explanation was given by Flota why Lykes' vessels in the liner trade, capable of carrying liquid bulk cargoes in these vessels' deep tanks would not qualify as American flag vessels for the purposes of Lykes' agreement with O.N.E. in this liquid bulk trade.

In any event, Lykes did not pursue the matter of its agreement with O.N.E., presumably in deference to its relations with Flota with regard to the general cargo liner trade. Lykes filed comments on both Agreements No. 10293 and No. 10295, but was not named a party to either of these proceedings. Such comments of Lykes occurred prior to the institution of the two subject proceedings, and have not been entered into the present record.

Hearing Counsel contend that the agreements in issue are unlawful, in that the proponents have not shown a need for their agreements which outweighs their anticompetitive consequences; that the proponents are common carriers; that the agreements are exclusive, preferential, cooperative

working arrangements, subject to section 15 of the Act; that both the agreements and the "sub" agreements ("private agreements") when taken together constitute the complete agreements of the proponents; and that the agreements have been implemented without Commission approval in violation of section 15.

THE GOVERNMENT OF COLOMBIA

The Government of the Republic of Colombia was denied permission to intervene after the close of the hearings as a party to these proceedings, but was granted leave to proceed as *amicus curiae* to the extent that certain pages of its brief were accepted to explain the operation of the national maritime laws of Colombia and the policy underlying them.

THE FORMER PROTESTANTS

The background of these proceedings is not complete without the story of the former protestants, who have since withdrawn from the proceedings. Hearing Counsel, by subpoenas, obtained the testimony of two witnesses for Esso (or Exxon) and one witness for Shell. In addition there are exhibits in the record, resulting from responses to discovery requests, which relate to the problems which beset the three protestants in these trades.

In No. 79–2, *Dow Chemical International, Inc.,* of Delaware (Dow); and *Shell Chemical Company,* a division of Shell Oil Company (Shell), protested Agreement No. 10293 and requested that a hearing be held. *Esso Chemical Supply Company, Inc.* (Esso), filed general comments and later advised that it supported Dow's and Shell's requests for a hearing. These three, Dow, Shell, and Esso, were named protestants in the Commission's original order in No. 79–2. In time, these protestants withdrew from this proceeding. These same three, Dow, Shell, and Esso, also filed comments in No. 79–3, but were not named parties therein. The most detailed comments of these three in No. 79–3 came from Esso, which stated that it was dissatisfied with the quality of the service offered by Flota/Transligra, and that it feared the Loss of its markets in Colombia should Agreement No. 10295 be approved.

Esso, by notice of withdrawal in No. 79–2, dated October 10, 1979, moved to withdraw from that proceeding. Previously in Esso's view, the *de facto* implementation of Agreement No. 10293 since 1973, the Colombian Cargo Reserve Law (Decree 1208 of July 21, 1969) and the interpretation of said Law, precluded shippers from transporting liquid bulk chemical/specialty cargoes from the U.S. Gulf to Colombia on any vessels other than those of Flota/Andino, and that Flota's freight rates were not competitive with rates being offered by other carriers, which could not be used because of the Colombian Laws and regulations. Esso also objected to Agreement No. 10293 because of its dissatisfaction with the quality and nature of the Flota (Andino) service.

Esso in its withdrawal notice pointed out that Flota/Andino improved the quality of their service to a minimally acceptable basis, and was advised that Flota would not object to the shipment by Esso and will facilitate Esso in obtaining the waivers required to permit unrestricted shipment by Esso on United States or Third Nation Flag vessels of certain cargoes originating from Baton Rouge, Louisiana, and further because the Republic of Colombia on August 29, 1979, substantially increased the number of Liquid chemical/specialty products on the Free Import List which Esso and others import from the U.S. Gulf into Colombia. Esso said the effect of this amendment of the Free Import List was to enable Esso and others to ship about 50 percent of their customers' semi-annual requirements of said products on U.S. flag or third nation flag liquid bulk product carriers.

In addition, said Esso, the Republic of Colombia, which had previously required import licenses issued for all imports to be stamped requiring shipment of 100 percent of said imports on Colombian flag or associated vessels, had recently amended its stamp to require shipment of only 50 percent of said imports on Colombian flag or associated vessels.

Esso also referred to Diplomatic Note No. 3211/E 179 dated July 6, 1979, by which the Republic of Colombia guarantees that 50 percent of all liquid bulk products may be carried to Colombia without any vessel flag restrictions.

Esso reserved the right, among others, to reenter this proceeding, should the conditions, assurances or guarantees above be rescinded or modified to affect Esso detrimentally.[2]

The overall impression received from studying the record and listening to the oral testimony leads to the conclusion that these trades between U.S. Gulf ports and ports in Colombia for the carriage of liquid bulk cargoes in parcel tankers were and most likely remain in near monopoly situations, with the Flota/Andino and the Flota/Transligra services enjoying the near monopolies; and the further related conclusion is reached that to any extent that these services may not be complete monopoly situations, this is in large part due to the institution and pendency of these proceedings, with the regulation of agreements of the nature of those herein by the Federal Maritime Commission.

Under such circumstances, whatever conclusions are reached by the Federal Maritime Commission, it is believed that it would be well to continue to monitor the trades herein, and should the subject agreements be approved it appears advisable that time limits be placed on the duration of these agreements. Thereby, if and when renewals of the agreements are sought, it would be incumbent on the proponents to state how the agreements are affecting the ability of Colombian importers to obtain competitive services consistent with the public interest.

[2] Esso's withdrawal notice is Exhibit No. 89, copy of which is appended to this decision.

Dow based its protest on its view that the Flota Andino space chartering agreement in conjunction with existing Colombian flag restrictions provisions would result in a monopoly position for Flota-Andino in the Colombian Atlantic trade herein. Dow stated in a motion to withdraw dated November 21, 1979, that starting in 1979, there was a change in the implementation of the Colombian Flag Restrictions Provisions, and that there was a Diplomatic Note from the Republic of Colombia dated July 6, 1979, which changed Dow's views. Accordingly, subject to the right to re-enter the proceeding should the Colombian governmental positions be changed, Dow moved to withdraw.

Hearing Counsel submitted statistics prepared by Esso, regarding its shipments of liquid bulk cargoes from the U.S. Gulf to Colombia for the years 1970 through 1980, inclusive, with a projection for all of 1980 based upon statistics through December 1, 1980. These statistics (Exhibit 110) show that in each of the years 1970, 1971, and 1972, prior to the subject agreements, Esso's shipments far exceeded Esso's tonnages for certain of the years 1974 through 1980, when Esso used only the services of Flota (years 1974, 1975, 1976, 1978, 1979). In 1977, Flota handled 3,792 tons, and Odfjell 388 tons; in 1980, Flota handled 3173 tons, and O.N.E. 394 tons. For 1973, Stolt-Nielsen handled 2,894 tons, Andino handled 149 tons on its own, and the Flota/Andino service handled 975 tons.

These Esso statistics show 5,465 tons in 1970; 6,079 tons in 1971, and 6,153 tons in 1972 all handled by Stolt-Nielsen. Compared with the above are the lesser tonnages ranging from a low of 1,753 tons in 1976, to a high of 3,978 tons in 1975 handled by Flota during the years 1974 to 1980.

These statistics clearly refute the contentions of Flota and Andino that only "irregular" or "tramp" parcel tanker carriers served the trade from the U.S. Gulf to Colombia prior to the 1973 agreements. In other words, if Stolt-Nielsen were to be considered only a "tramp' service in 1970, 1971, and 1972, then so would the Flota service in 1973 to 1980, inclusive, also be considered only a "tramp" service, based on its lesser yearly tonnages transported for Esso.

Esso made a cost comparison (Exhibit 109) showing the differences between its freight costs, comparing what its Colombia affiliates were charged·by the Flota/Andino service, with the charges which Esso's affiliates might have been assessed by O.N.E. if O.N.E. had been able to provide the same services for the years 1973 to 1980 inclusive.

Flota's rates for the years 1974 through 1980, ranged from $24.56 to $53.30 a metric ton, or an average of $35.33 a ton for the years 1973–1980. The year 1973 is not shown but by deduction it would be $19.00 a ton for the 975 tons handled by Flota in that year for Esso.

The deemed freight costs to Esso from O.N.E., based upon Esso's c.o.a.'s for the same type ships used by Flota average $25.50 per metric ton

for the years 1973 through 1980, or a cost difference under Flota's average of $9.83 per ton.

Based upon a total of 23,105 metric tons for the years 1973–1980 inclusive handled by Flota, Esso computes total cost savings of $226,861 if it had used O.N.E. rather than Flota/Andino.

Because Flota at times had not offered service from origins such as Baton Rouge, resulting in Esso paying inland U.S. charges from Baton Rouge to Houston, where Flota picked up the cargoes, Esso estimates that it paid additional (inland) freight costs for 1978, 1979, and 1980 of $38,942.

Adding the above $226,861 computed extra cost, plus the inland extra cost of $38,942, Esso computes a grand total of extra costs of $265,803.

ENVIRONMENTAL ANALYSIS AND CONSOLIDATED RECORD

The Commission's Office of Environmental Analysis has determined that the environmental issues herein do not constitute a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969, and that preparation of an environmental impact statement is not required.

In accordance with the parties' wishes, the two subject proceedings were not requested to be consolidated under Rule 148 of the Commission's Rules of Practice and Procedure, 46 CFR 502.148. Nevertheless, at the behest of the parties, a consolidated evidentiary hearing procedure was followed, and the parties stipulated that the testimony and data developed in the hearing for the No. 79–2 Colombian Atlantic trade, where applicable, also would be applied and considered as evidence in No. 79–3 for the Colombian Pacific trade. Consolidated briefs covering both Nos. 79–2 and 79–3 were filed by the parties, except that Andino is not a party to the agreements in the Pacific Coast Colombia trade (No. 79–3), and its briefs relate only to the Atlantic Coast Colombia trade (No. 79–2).

IMPORT LICENSES

All imports into Colombia need a license. Licenses are issued by the Colombian Institute of Foreign Trade, known as *Incomex.*

Incomex stamps the import licenses with appropriate stamps *reserving* the *cargo in whole or in part to Colombian ocean carrier lines and/or associated lines.*

Colombian cargo reservation laws, discussed in detail below, apply on all imported cargoes. At the time of the hearing the general practice was to use the Incomex import stamp covering the first 50 percent of the cargo specified in the license.

Ex. 89, Attachment B–1, Incomex Import Register No. G–069017–A, shows that on occasion as late as February 14, 1979, one of Incomex's

stamps showed 100 percent of the total of 150 tons of cargo licensed was reserved as follows, English translation:

> Assets or goods covered by this Register must only be transported on vessels or ships of Colombian registry or on vessels of United States of America registry belonging to firms affiliated with Colombian registry or on other [vessels] of lines affiliated with our registry/flag. (Decree 1208 of July 21, 1969).

At times, a stamp, such as the above 100-percenter, might have been placed in error. Witness Dowling for Esso stated that mistakes are made down there, and even now (December, 1980) some of them are stamped 100 percent, and Esso goes back and asks Incomex to stamp them 50 percent for liquid bulk.

Exhibit 89, Attachment B-2, Incomex Import Register No. G-104549-A, shows that as of March 21, 1979, an Incomex stamp showed the first 50% of the total of 150 tons of cargo licensed was reserved as follows, English translation:

> First shipments, corresponding to 50%, the equivalent of 75 tons of the goods covered by this Register, must be transported on vessels or ships of Colombian or Ecuadorian registry or on other [vessels] of lines affiliated with our registry when dealing with bulk liquid or solid cargo. (Decree 1208 of July 21, 1969.) Once the foregoing has been complied with, the remaining 50% may be transported on board vessels of independent registry.

COLOMBIAN LAWS, DECREES, ETC

Colombian cargo reservation laws and procedures are set largely by certain decrees and resolutions.

Decree #994, dated April 29, 1966, provided that the Colombian Government could fix the percentage of import and export cargo reserved for vessels of Colombian flag.

Decree #1208, dated July 21, 1969, implemented Decree #994, and provided that *no less than 50 percent* of import and export cargo was reserved to vessels of Colombian registry on trade routes served by these vessels. Under this decree it was clear that if Colombia desired, it could reserve 100 percent of import and export cargoes for vessels of Colombian flag.

Decree #2349, dated December 3, 1971, allowed foreign flag companies to participate in the carrying of cargo reserved for the Colombian flag. As shown in Exhibit 4, Article 3, paragraph 12, the Colombian Director General of Maritime and Port Matters could authorize "Colombian shipowners to obtain under lease or charge temporarily vessels of Colombian and foreign flag." Under paragraph 13 of that article, the Director General could approve or disapprove agreements between Colombian shipowners and transportation associations and agreements, based on equality or reciprocity of treatment for Colombian shipowners, etc.

Resolution #0097 of June 8, 1973, recites that Flota requested authorization to apply the cargo reserve law to liquid bulk cargo in special ships from U.S. Gulf ports to Colombian ports, and Flota was so authorized as of March 1, 1973, to sail and to apply the reserve law.

Decree #1208 of July 21, 1969, has been interpreted by Incomex, the Colombian Institute of Foreign Trade, as follows, as shown in Exhibit 19, page 2:

> The goods or merchandise covered by this Registration must be transported on vessels flying the Colombian flag, or on vessels of the Ecuadorian flag, or the flag of the USA, belonging to companies associated with the Colombian flag, or on vessels of other lines associated with our flag (Decree 1208 of July 21, 1968.)

As seen *the cargo reservation decrees date back to 1966, 1969 and 1971, whereas it was not until later, that is, sometime late in 1973,* that *Flota began its service,* which resulted in due time in these proceedings. *So, it was not the Colombian decrees or laws alone* which caused the problem or main issue herein, *but rather these decrees and laws, together with the implementation of the Flota/Andino and Flota/Transligra services,* resulted in the virtual *de facto* shut-out of independent liquid bulk carriers from these trades, from about late in 1973 until about late in 1979, and maybe or likely even later than 1979. Statistics below for 1980 show the continued growth of the Flota services in the two trades herein.

ANDINO'S SERVICES PRIOR TO AND AFTER 1973

Prior to initiating service in the trades herein pursuant to the 1973 Flota-Andino agreement, Andino independently provided service in the trades beginning in 1971, using Andino bills of lading. Following its agreement with Flota, Andino ceased offering services to Colombian importers and exporters under Andino's own bills of lading, and then transported such Colombian cargo only under Flota's bills of lading.

Since February 16, 1973, when the first Flota/Andino agreement was signed, Flota and Andino have implemented the terms of the 1973 and 1976 agreements in the same manner, that is, in the Atlantic trade Flota has chartered space only from Andino, except in one instance in early October, 1980, or just prior thereto, Flota chartered space on a Colombian flag barge to carry lubricant bases to an Atlantic Colombian port for Esso. This was done simply because Flota wanted to help a small Colombian company to get into business.

In the Pacific Colombia trade from 1973 through 1976, Flota chartered space only from Andino, and from 1977 onward Flota chartered space only from Transligra.

CONFLICTING PROPOSED FINDINGS

There is considerable conflicting testimony in this proceeding, and as a result opposing counsel come up with considerable conflicting proposed findings of facts, or interpretations of what the record shows. Also, some counsel have accused others of retroactively bringing in alleged "evidence" not found in the record, nor supported by the record. Some of the witnesses were fluent in both the Spanish and English languages, but at times experienced troubles in converting Spanish to English.

For example, one proposed finding of fact concerns whether or not a Colombian importer obtains a license for each shipment. Hearing Counsel correctly conclude that this is the "procedure used" by the Colombian importer. Counsel for Andino argues otherwise. Perhaps, the parties' differences lie in the differences between the practices actually extant, and the procedures which technically may be possible under Colombian laws and decrees. Pertinent record facts follow.

Carlos Lleras De La Fuente, the Managing Director of Flota Mercante Grancolombiana, S.A. (Flota) for many years, and also an attorney licensed in Colombia, submitted his direct testimony in the form of an exhibit (No. 20).

Witness Lleras stated in paragraph 25 of Exhibit 20, "If the license covers several shipments, the first 50% are required to be carried by a Colombian company and the remainder is free and available to other carriers."

On cross-examination, at page 404 of the transcript, Lleras testified:

> Q. Now, the license is valid for you say six to nine months. If I take out a license, for argument's sake, of vegetable oils for a thousand tons, is it your testimony that I can make the first—and I take this out, let's say on October 1st. Is it your testimony now that I can ship the first shipment of let's say 300 tons on October 10th, the next shipment of let's say 200 tons on February 2nd, and the third shipment of the balance 500 tons on March 5th?
>
> A. Yes.

On page 410, Lleras testified:

> Q. Was that always the case that an import license was valid for any number of shipments made during a six-month period now or nine-month period or is even the six-month period a recent development?
>
> A. I think I cannot answer very precisely your question. But I think six months has been the time or the valid period for quite some time.

At page 406, Lleras explained that we, meaning Flota, are not involved in imports, but in transportation; that Flota transports imports, but does

not import. In other words, Lleras appears to say that the Colombian importer is the expert on obtaining licenses for imports into that country.

Also, on further cross-examination, transcript page 413, witness Lleras amended his statement in Exhibit 20 as follows:

> Q. No, I'm just asking you your use of the word "shipments." Forget the license for a moment.
>
> A. Oh, no, no, no, I cannot. I am sorry, I cannot forget it because probably I expressed wrongly myself in this statement. The license covers cargo. The license is for allowing an importer to bringing certain tonnage into the country. The license doesn't mention shipments. Probably—I'm sorry, I made a mistake in the use of the English language when writing this statement. (Exhibit 20).
>
> The importer is the one to decide if he loads in one ship or in several.
>
> Q. Then he also gets a license when he decides to put all his tonnage on one ship.
>
> A. Correct.
>
> Q. Now, in the event he puts all his tonnage on one ship, its obvious that the whole 100 percent has to go via Colombian flag, is it not?
>
> A. If he decides to put all his cargo on one ship and having to ship the first 50 percent with a Colombian company, of course 100 percent will be shipped with a Colombian company.

Elisso Restreppo, General Manager of Monomeros Colombo Venezolanos, S.A., also known as Monomeros, a corporation, producing fertilizers, and importing raw materials into Colombia, including phosphoric acid from the United States Gulf ports, testified:

> Q. Now, is it your understanding that for obtaining an import license for phosphoric acid, that you have to obtain a separate import license for each shipment of each parcel of 3,000 tons, or that you could obtain one license to cover the entire 6,000 tons, 10,000 tons or whatever number of tons you want?
>
> A. *The procedure we use in Colombia is that we have a license for each shipment.* (Emphasis supplied.)
>
> Q. And each shipment, you're talking about each amount of cargo that arrives on one ship?
>
> Do you understand what I'm saying? In other words, if I do a purchase of let's say 6,000 tons but I have it brought in by three ships, over 2,000 tons each ship, and your use of the word shipment, are we talking about one shipment or two shipments?
>
> A. Again, I'm not an expert on these matters, but as I understand it, it would have been per shipment, in other words, that *one has to obtain an import license for each load, simply because it is easier* in terms of the import taxes that we must pay, the

> tariffs, the documents, bills of lading, and the overall movement. (Emphasis supplied.) (Transcript pages 160, 161).

Ivan Amaya, formerly president of Abonos Colombianos, S.A., also known as Abocol, another Colombian corporation which manufactures fertilizer and imports phosphoric acid, testified on page 75:

> Q. Now, how many import licenses do you file during the course of a year in importing phosphoric acid? Do you file one covering the entire year, do you file one for each shipment, one for each six months, each two months?
> A. *In practice in generally this is what is done, is that one obtains an import license for each shipment.* In other words, that is what happens in practice. However you can obtain licenses, import licenses, for more than one shipment. (Emphasis supplied.)
> Q. Is there any particular reason that you only get one license for each shipment rather than a license to cover a number of shipments.
> A. *Yes, it has to do with a problem of red tape. To obtain a license of a larger amount of phosphoric acid might take a longer period than it would to get a normal shipment, in other words a shipment for a smaller amount.* (Emphasis supplied.)
> Q. When you say a normal shipment you are talking about this quantity of approximately 2,300 metric tons that would come on board one ship arriving at Cartagena?
> A. Correct.

Counsel for Andino in his reply brief refers to Exhibit 113 as showing an import license for two products, i.e., "150 tons of Solvesso 100, Nafta Disolvente, a granel," and "150 tons of Solvesso 150, Nafta Disolvente, a granel," in support of his argument that Hearing Counsel are incorrect in proposing a finding that "the procedure used is for the Colombian importer to request and obtain a license for each shipment." Exhibit 113 merely shows that Productor Quimicos Esso, Inc., a Colombian importer, got one import license covering two similar products, both carrying the same import classification number 27.07.02.03.

Exhibit 113 shows little to establish what was the actual *practice* regarding the issuance of import licenses, particularly as to whether any one license in practice covered shipments made on two or more ships. No example was shown or testimony given, naming two or more ships used for one license. In other words, all the evidence shows is that all cargo on one license went on one ship, and such licensed cargo was not split between two or more ships.

Counsel for Andino also in reply brief refer to the testimony of William G. Dowling, Vice President of Exxon Chemical International Supply, S.A., a shipper of chemicals from the U.S. Gulf ports to Colombia. This company's affiliate in Colombia is Productos Quimicos Esso, Inc., and the latter is responsible for obtaining import licenses. At page 1541 of the transcript,

Mr. Dowling *speculated* that if two products (MEK and MBIK) came under the same import license, authorizing 250 tons of MEK and 250 tons of MBIK, then you *might be able to ship* 250 tons of MEK first (apparently meaning on a Colombian associated ship) and then the 250 tons of the MBIK second (apparently meaning on a third flag ship). This speculative statement does nothing to show what the actual practice was or is.

FINDING MADE AS TO THE ACTUAL PRACTICE USED IN OBTAINING IMPORT LICENSES

From the above facts of record, and from the overall entire record, including the nature of the trade, referred to as a "drug store" trade, requiring a continuing supply of relatively small tonnages because of storage problems in Colombia, as well as because of storage problems of at least one supplier in the United States, it is concluded and found that *the actual practice* used was for the consignee importer to obtain one license for each shipment, and that each lot of licensed cargo would be loaded and brought to Colombia on a single ship under a separate license.

The significance of the above finding relates to the fact that in the Atlantic trade, the Flota/Andino service had a near monopoly since late in 1973, when the Flota/Andino agreement was effectuated. Similarly, in the Pacific trade, Flota/Transligra had a near monopoly since its service was instituted in early 1977, following the discontinuance of the Flota/ Andino service to the Pacific (West) Coast Colombian ports. It also appears that Flota/Andino had a near monopoly in the service to the Pacific Coast Colombian ports from some time in 1973 through the end of 1976.

SERVICES OF PARCEL TANK CARRIERS OTHER THAN FLOTA

Prior to 1973, the foremost carrier in the United States Gulf/Colombia trade was Stolt-Nielsen. Since the implementation of the agreements here in issue, Stolt-Nielsen withdrew from the trade. A/S Rederiet Odfjell (Odfjell) and Vee-Marine served the trade prior to 1973, but subsequent to the agreements herein discontinued that service. O.N.E. offered a regular service prior to 1973, but discontinued that service subsequently. Presently O.N.E. has four vessels devoted to the movement of liquid bulk cargo from the U.S. Gulf to the Atlantic Coast of South America, and it appears that O.N.E. could (if conditions permitted) offer service to Colombia in conjunction with its U.S. Gulf/South American service.

Currently, Shell has a two year contract with Vee-Marine for the transportation of chemicals from the U.S. Gulf to Brazil. Shell has a contract with Pan-American Tankers for the transportation of liquid bulk chemicals from the U.S. Gulf to Venezuela. Shell has a contract with Stolt-Nielsen for the transportation of chemicals to Chile and Peru.

During the period November 1977 through October 1978, Odfjell, a Norwegian Flag line, transported 100 percent of the imports of phosphoric acid from the U.S. Gulf to Cartagena for ABOCOL, a fertilizer manufacturer. This service was very satisfactory. The Flota/Andino service was equally satisfactory in Abocol's view to that of Odfjell. Odfjell contracted with NAVENAL, a Colombian shipping company, in order to provide its service to Abacol. Odfjell during the above 1977 to 1978 period had offered $3.00 per metric ton lower than the rate offered by Flota/Andino. Both Abocol and its phosphoric acid supplier, Freeport Chemical and Minerals Company, have storage problems for phosphoric acid, and therefore shipments of parcels of 1,800 to 2,300 tons must be made to Abocol on a regular basis. Abocol's imports between 1973 and 1980 were between about 15,000 to 25,000 tons of phosphoric acid a year.

Odfjell proposed to Abocol to continue its c.o.a. from November 1978 through October 1979, but the rate offered by Odfjell was too high in Abocol's view. Flota then provided the service. During 1977, Odfjell also transported 7,000 metric tons of phosphoric acid for Monomeros, another manufacturer of fertilizer and the only other Colombian importer of phosphoric acid.

Odfjell was able to transport these cargoes because it entered into an arrangement with Navenal, a Colombian shipping company. Navenal had obtained permission to serve the U.S. Gulf/Colombian trade herein through an agreement with Flota approved by the Colombian Maritime Administration. In time Navenal went out of business.

Monomeros arranged for 1980 with Pan American Tankers for it to carry 6,000 to 12,000 metric tons of phosphoric acid from the U.S. Gulf to Barranquilla. The same contract also "considers" the transportation of cyclohexane from the U.S. Gulf or from Puerto Rico. This 1980 contract between Monomeros and Pan American Tankers is for 50 percent of Monomeros' 1980 tonnage of phosphoric acid to be carried by Pan American Tankers; with the other 50 percent to be carried by Flota/Andino. The 50 percent allocated to Pan American was because its bid was better than the bids of other parcel tanker carriers.

The above 50 percent (Flota)-50 percent (Pan American)-arrangement for 1980 is consistent with the changes in the Colombian cargo reservation laws, said to have been implemented sometime in 1979.

Prior to 1973, there were several major parcel tank operators which served the liquid bulk cargo trades herein. These were Stolt-Nielsen, VeeMarine, Odfjell, Andino, O.N.E., and Bamar Marine. Since February, 1973, generally, the only liquid bulk service offered U.S. shippers in these trades has been the Flota/Andino service and the Flota/Transligra service, bearing in mind that Abocol and Monomeros (Colombian fertilizer manufacturers) are not considered to be U.S. shippers.

FLOTA'S "MONOPOLY" SHARES

In 1977, Flota attained an 83 percent market share in the movement of liquid bulk cargoes from the U.S. Gulf to Colombia (total A and P trades). In 1978, Flota had a 78 percent share. The liquid bulk cargoes transported by other carriers in these years (Exhibit 58) include commodities, such as anhydrous ammonia, which cannot be transported in vessels owned or operated by Andino or Transligra. In 1979, Flota had an 89 percent market share, as listed in Exhibit 148, Table I. That is, out of a total of 318,347 metric tons handled by all carriers in 1979, Flota carried 283,300 tons to Colombian A and P ports. It is not clear from Exhibit 148, where the 1979 figures were obtained, but they were referred to in testimony, and are generally confirmed by Exhibit 168. Exhibit 168, Table U, shows a slightly different figure of 286,458 tons, as Flota's share for 1979, total of the A and P trades. There are no figures in Exhibit 168 for the total metric tons carried in 1979 by all carriers in the A and P trades.

A copy of Exhibit 168, Table U, is attached as an appendix to this decision.

CONTRACTS OF AFFREIGHTMENT AND RATES IN THE TRADES

Rates of Flota under contracts of affreightment were and are lower than the published rates of Flota. Flota has c.o.a.'s with Abocol and with Monomeros, the only two Colombian importers of phosphoric acid from the U.S. Gulf. For all other importers including the Dow, Shell and Esso customers or affiliates in Colombia, Flota does not enter into c.o.a.'s, but its rates on liquid bulk cargoes are assessed on a shipment by shipment basis according to circulated rate schedules.

U.S. shippers prefer entering into c.o.a.'s with carriers, because the carriers then can assure the U.S. shippers of service on a regular continuing and efficient basis. U.S. shippers also prefer c.o.a.'s because one shipper can arrange with one carrier to cover all its transportation needs over a large geographic area.

Contracts of affreightment covering the carriage of liquid bulk cargoes from the U.S. Gulf to Colombia and other Latin American countries are general characteristics of these other trades.

Prior to 1973, Esso freely made arrangements for the delivery of liquid bulk cargoes to Esso's terminals in Cartagena. From 1969 to 1973, Esso had a c.o.a. with Stolt-Nielsen for the transportation of liquid bulk chemicals from the U.S. Gulf to the Colombian ports of Barranquilla, Cartagena and Buenaventura. This contract included various Latin American ports, including Venezuela and others. From about March 1974, when the Stolt-Nielsen contract terminated, Esso has had a contract with O.N.E. for the transportation of liquid bulk chemicals from the U.S. Gulf to the Caribbean area, including the north coast of South America, the west coast of South

America including as far south as Peru, and the west coast of Central America.

Esso's contract with O.N.E. has included optional discharge at ports in Colombia, but from 1974 through 1979, O.N.E. did not discharge Esso's cargo in Colombia. In 1980, O.N.E. made one discharge of Esso's cargo in Colombia. From 1974 to 1979, nearly 100 percent of Esso's cargo from the U.S. Gulf to Colombia was carried by Flota/Andino.

Shell Chemical Company exports liquid bulk chemicals to South American countries including Colombia, Venezuela, Peru, Chile and Brazil. Prior to the Flota/Andino agreement, Shell had a c.o.a. with Vee-Marine for carriage of liquid bulk chemicals to Colombia and to other South American countries.

Colombian importer-consignees of liquid bulk cargoes, such as Shell's customer or affiliate, usually purchase in large quantities, but take delivery in numerous small parcel quantities, precluding full shipload shipments. Most parcels are in the range of 200 metric tons, but even a shipment of 400 to 600 metric tons represents a small parcel.

When Vee-Marine carried such parcels to Colombia for Shell, Vee-Marine also carried the same generic chemicals to importers in other South American countries. Shell exports several of the same generic chemicals to Colombia, which Shell also exports to Brazil, Venezuela and Chile.

It is more economical to a parcel carrier to carry large quantities of cargo on the same southbound voyage to both Colombia and its neighbors.

Because other parcel tanker operators, such as Vee-Marine, no longer carry chemicals to Colombia for Shell, these other operators are unable, as previously to carry as many parcels on the same voyage, thus resulting in Shell's paying higher overall freight charges, than before the implementation of the Flota/Andino agreement.

When Vee-Marine carried chemicals for Shell, it loaded in the U.S. Gulf for discharge in Colombia, used the same space in Loading again at Curacao, discharged again in Venezuela, returned to Curacao to use the same space for Brazil, and on the northbound leg again loaded in Curacao for discharge in the U.S. Gulf. Vee-Marine's inability to call in Colombia prevents it from making the above efficient use of its space, which ultimately influence the rates Vee-Marine must charge for non-Co lombian shipments.

Shell now has a two-year contract with Vee-Marine to transport Shell's chemicals from the U.S. Gulf to Brazil. Prior to 1975 Shell's contract with Vee-Marine combined transportation of liquid bulk chemicals from the U.S. Gulf to Colombia and Brazil.

The service offered by Vee-Marine to Shell has been excellent for the 8 or 9 years up to about November 15, 1980, when witness Gallagher prepared his written statement.

In November 1980, Shell also had a contract with Pan American Tankers for the transportation of liquid bulk chemicals from the U.S. Gulf to Venezuela.

The same generic chemicals carried by Flota/Andino for Shell from the U.S. Gulf to Colombia bear a rate of from $40 to $45 a metric ton, plus bunker surcharge. Although Venezuela is further distant from the U.S. Gulf, the rate charged by Flota/Andino to Colombia is much higher than the comparable rate charged to Shell by Pan American Tankers to Venezuela.

Shell also at the same time as above had a contract with Stolt-Nielsen for the carriage of Shell's liquid bulk chemicals to Chile and Peru. The chemicals to Peru are the same as those to Colombia, but Stolt-Nielsen is, or was, unable to call at Colombia.

Although Shell's Colombian imports have increased, Shell Chemical's exports from the U.S. Gulf to Colombia have decreased significantly in the eighteen months prior to November 15, 1980.

Stolt-Nielsen, Vee-Marine and Odfjell all have expressed their interests in carrying liquid bulk chemicals from the U.S. Gulf to Colombia for Shell but in Shell's opinion, the Colombian laws in conjunction with the Flota/Andino service have precluded these three carriers from transporting Shell's cargo in the trade.

Shell insists that Colombian importers must request an import license to cover each individual shipment, for the U.S. Gulf to Colombia; and that the requirement that the first 50 percent of a shipment must be carried on a Colombian line or associated line dictates that Flota get the whole of each shipment because it is not economically feasible to split a small parcel of a few metric tons between Flota and another parcel tanker operator.

From 1973 through the first quarter of 1979 (Exhibit 47), as far as the statistics offered go, the Flota service transported all of Shell's liquid bulk cargo from the U.S. Gulf to Colombia. Similar statistics showed the same for Dow's liquid bulk cargo.

FLOTA'S, ANDINO'S AND TRANSLIGRA'S OPERATIONS

On a normal voyage Andino carries parcels belonging to four to sixteen different shippers. On the same southbound voyage Andino loads liquid bulk cargoes at U.S. Gulf ports, and discharges in the Caribbean area en route to Colombia. The same vessel after calling at Atlantic Colombian ports on an unspecified number of occasions also discharges cargo at Venezuela, and then returns northbound to the U.S. Gulf.

For cargo carried by Andino pursuant to the Flota/Andino agreements and solicited by Flota, Flota issues the bills of lading.

But, for cargo destined to other Caribbean or South American ports, *Andino issues the bills of lading.* For example, Andino issues the bills of lading on cargoes to Venezuela.

Andino's witness admitted on cross-examination that serving Venezuela in the trade from U.S. Gulf ports "would help in the flexibility of serving the Colombian trade."

Andino carries cargo in its vessels in the space not chartered by Flota. In 1977, out of 35 voyages in the U.S. Gulf/Colombia trade, Flota chartered the full vessel for 23 voyages. On a 24th voyage, Flota space chartered 92 percent of the vessel. On the other 11 voyages Flota chartered only a part of the vessel space. Andino's other shippers using the excess space not chartered by Flota have included Dow prior to July 25, 1979, but to a port not in Colombia. Andino and Dow entered into a c.o.a. with regard to this cargo of Dow.

The space on Andino's vessels not chartered by Flota is on a first come, first served basis, subject to the proviso that the products transported outside of Colombia be compatible with those destined to Colombia. Andino adheres to U.S. Coast Guard and IMCO[3] regulations for the carriage of dangerous liquid bulk chemicals. Andino always tries and usually succeeds in having its vessels leave U.S. Gulf ports fully loaded, subject of course to deadweight and stowage limitations.

Flota issues bills of lading for more than one shipper for each voyage in which Flota charters space from Andino or Transligra in the trade herein. There appears to be no question that Flota acts as a common carrier by water in the foreign commerce of the United States, considering Flota's issuance of bills of lading, and other facts of record, including its regularly scheduled service, solicitation of cargoes, number of shippers served, and variety of cargo transported. Flota also circulates advertising schedules listing dates on which vessels call at specified ports. Flota also distributes published rate circulars setting forth freight rates to be paid depending upon the sizes of the parcels shipped.

Flota exercises no control over the vessels' navigation, Flota does not hire the crews, nor pay the crews, nor arrange the vessels' stowage. These functions are those of Andino in the Atlantic Colombia trade, and Transligra in the Pacific Colombia trade.

Flota more precisely is a non-vessel operating common carrier (NVOCC) in these trades for the transportation of liquid bulk cargoes.

Andino and Transligra carry liquid bulk cargoes belonging to the general public, but tendered to Andino and Transligra by Flota.

Andino publishes and circulates sailing schedules advertising its service between the U.S. Gulf and Latin America, including Colombia.

Andino regularly serves the Caribbean area, Venezuela, Chile and Ecuador.

Flota and Andino jointly circulate advertising schedules listing dates on which vessels call at specified ports.

[3] Inter-Governmental Maritime Consultative Organization.

Flota, Andino, and Transligra jointly circulate advertising schedules listing dates on which vessels call at specified ports (Exhibit 40), with Andino acting as agent for the Flota/Andino and Flota/Transligra cargoes destined, respectively, to the Atlantic coast of Colombia, and the Pacific coast of Colombia, after loading in the U.S. Gulf.

Transligra and Andino, both in connection with Flota, provide regularly scheduled services.

Andino and Transligra are the underlying vessel-operating common carriers (VOCC's) in the trades herein. Andino and Transligra carry cargo for the shipping public, after such cargo is assembled by Flota, and with the agreements of Andino and Transligra to carry such cargoes as Flota may obtain from the shipping public.

"ACS (Andino) will be the sole coordinator of shipments of all cargo shipped from U.S. Gulf ports and consequently, takes over the execution of transportation contracts and the corresponding *responsibility* in accordance with Tanker Bills of Lading and/or contracts that cover the shipments and will be responsible for the carrying of such cargo from the above mentioned ports to Colombian ports." Such ports are defined as Atlantic Colombian ports in the public agreement, which the private agreement implements. (Private Agreement December 22, 1976, between Flota and Andino, Exhibit 2B).

A like provision sets out Transligra's undertaking to be sole coordinator of all cargo, etc., in connection with the U.S Gulf/Colombian Pacific ports (Exhibit 29).

WAIVERS OF DECREE 1208

A procedure exists for obtaining waivers from the requirements of Decree 1208. When a trade route is not covered by a Colombian company, the Incomex stamp is not applied to import licenses. *Where, as in the present proceedings, Flota, a Colombian company, serves the trades, waivers may be granted* when Flota or its foreign associates (Andino or Transligra in these trades) cannot provide vessels or space on the vessels used in the trades.

To obtain a waiver, the Colombian consignee-importer must address a letter to the Colombian shipping company holding the right to serve the trades (Flota in the present proceedings), asking Flota to certify whether it has a vessel in position for a certain period of time and has enough space to accommodate the cargo. If the shipping company (Flota) cannot carry the cargo, Flota will issue a letter to Incomex certifying the fact, and Incomex will issue the waiver.

Exhibit 11 contains twelve waivers, all that were found by Flota, purportedly granted for the transportation of liquid bulk cargo shipments between the period March 23, 1976, to about July 15, 1980. In fact, Exhibit 11 contains another waiver, but it is not for liquids, and relates in large part to origins in foreign countries, such as "Urea in bulk in sacks, 20,000/

30,000 tons, to be loaded in the Black Sea or Baltic.'' Insofar as this waiver for Monomeros Colombo Venezolanos is concerned with the United States, it refers to solids, such as potash salts and phosphates.

In each of the above twelve instances, Flota gave consent to the waiver requests on the basis that Flota did not have a vessel available to carry the tonnage. At the time of the hearing Flota was the only Colombian carrier with the right to carry liquid bulk cargoes in the trades herein. Navenal once had such rights, but never got established in the trades, and went bankrupt on or about June of 1980. Navenal was owned by the Colombian government, and had attempted to serve the trade with chartered vessels, and by agreement with Flota. When Flota signed the agreement with Navenal Flota intended that Navenal only have rights for dry bulk cargoes.

The above twelve Flota waivers included waivers for phenol, fish oil, monoethylene glycol, monomere acetate vinyl, hog grease, caustic soda, styrene monomere, cottonseed oil and soybean oil, in lots as small as 178 tons (monomere acetate vinyl) and as large as 4,000 tons (caustic soda).

In reference to the years 1976, 1977, and 1978, Dow responded to discovery requests, that only one formal (written) application for waiver was made during this period by its customer in Colombia, with the result that such waiver was granted in December 1978; also, Dow stated that to its best knowledge ''formal'' waiver applications have never been refused; and that Dow itself never has officially applied for a waiver. Dow also responded that it lost local sales to its Colombian customers because of delays of vessel arrival; and that a plant was ''shut down again March 13, 1979 due to delay of *La Selva* 7 vessel from ETA end February to ETA March 20.'' ''This situation meaning again Dow loss of local sales of Styrene.'' (Exhibit No. 107). Exhibit No. 60–C shows that the *La Selva* apparently sailed from the U.S. Gulf coast loading ports on February 19, 1979, and returned on April 7, 1979, taking much longer than its usual 4 weeks or so round trip.

From the above information on Exhibit No. 107, it is apparent that at least some waiver requests are made orally or informally, whereas other waiver requests are made in writing, or officially, or formally. It is fair to assume, at least in some instances, that if a waiver request is refused informally, that in such instance, or instances, no written or official request is made, because it would be vain to do so.

Witness, Terence A. Gallagher, International Distribution Manager for *Shell* Chemical Company, stated (Exhibit No. 96) that it is common knowledge that *it would be futile, at least up until this proceeding was brought to the attention of the Federal Maritime Commission, to make a request for waivers* to permit the carriage of liquid bulk chemicals on non-Colombian flag vessels. In 1973, Shell was advised by Bruno Le Hocque, in his then capacity as general manager of Flota, that Shell would have to

use Flota's service to ship 100 percent of Shell's liquid bulk chemicals out of the U.S. Gulf to Colombia, using Andino's vessels. Mr. Le Hocque further advised Shell in 1973 that waivers would be granted if the Flota/Andino service did not have space on its vessels.

Shell reached the conclusion on August 29, 1973, that Mr. Le Hocque "was evasive at times, using veiled threats regarding his influence over import licensing and stalling for time in order that Andino could bring in enough tonnage to handle virtually all liquid bulk cargo into Colombia and Granco[4] would be in a position to get a 'lock' on all inbound cargo." Exhibit No. 99.

At the same time, August 29, 1973, a Mr. Parody of Cia Transportada S.A. (shipping agents for both Flota and Shell Colombia) stated that he could obtain waivers for Shell within 24 hours whenever needed. However, a group of Shell representatives concluded that "comments made by Lehoucq and Parody must be taken with a 'grain of salt' until experience, if any, proves otherwise."

In response to discovery requests propounded by Andino, *Esso* Chemical Supply Company, Inc., responded on March 30, 1979, in part, Exhibit No. 116:

> The cooperative working agreement contemplated by Agreement No. 10293 could operate to the detriment of the commerce of the United States in general due to the artifically high freight rates for carriage of bulk liquid chemical cargoes, the cost of which must be reflected in the price of the products exported to Colombia thereby making them less competitive with the same products exported from areas not subject to the effect of Agreement No. 10293. Secondly, the refusal of proponents to load at ports where Esso's shipper has cargo for shipment causes extra expense in transporting the products to alternate ports. Such expense must necessarily be reflected in the price of the products, thereby providing a competitive edge to producers who are not under the restraints of said Agreement. Finally, the scheduling of proponents' vessel often does not coincide with the requirements of Esso's customers and thus such customers often do not receive product at the desired time.
>
> Mr. Andres Umana of Productos Chemicos Esso was informed by Mr. Bruno Le Hocque of Flota that no waivers would be granted. The statement is also based upon trade rumors that Dow Chemical and Shell Chemical were never granted any waivers and Union Carbide Colombiana S.A. was granted only one waiver since 1973.
>
> *Esso has not applied for such waivers because of the Colombian law * * * which requires a letter from the Colombian shipping company (Flota) to accompany said application* indicating that said company can not carry the product in question.

[4] Flota.

P&E (Productos Quimicos Esso) made one application for waiver in January 1979. Said waiver was granted but there was no carrier available to transport the product.
Said tanker operators (Parcel Tankers Inc. and O.N.E. Enterprises Ltd.) do not maintain a "regular" service between the U.S. Gulf and Atlantic ports of Colombia because of the Colombian Cargo Reserve Law and its present interpretation. However, *O.N.E. Enterprises Ltd. is presently capable of carrying Esso's products to Colombia at substantially lower rates and is presently carrying similar bulk liquid chemical products to the adjacent countries of Panama and Venezuela at such lower rates.*

IMPORTERS SELECT CARRIERS

The Colombian importer-consignee buys the liquid bulk cargo which it imports from the U.S. Gulf on a F.O.B. basis at the U.S. Gulf port. Thus *the ocean freight charges are paid by the importer-consignee, and he determines and controls which liquid parcel tanker will be selected.* In other words the shipper located in the United States when shipping via a U.S. Gulf port in the trades herein, has no say-so, and no control over the selection of the liquid bulk carrier used to carry his cargo to Colombia. This requirement is by Colombian law and decree which also requires the Colombian importer-consignee to obtain import licenses for the cargo in these trades.

BARRANQUILLA'S SAND BAR

There was some testimony in the record that a sand bar in the River Magdalena impeded the safe delivery of liquid bulk cargo at the port of Barranquilla (Exhibits 61 and 99). The statement in one letter gives the superficial impression that only Andino's vessels were small enough to cross the sand bar. The facts are that Andino's vessels have a draft of about 21 feet, and O.N.E.'s vessels, the *Onestar, Onesky, Broad Atlantic, Broad Pacific,* have the same draft, and can pass the same sand bar. Vee-Marine's vessels in 1973 had drafts of more than 28 feet, and consequently *at that time* were willing to unload only into barges outside the sand bar. From time to time other shipping companies have served Colombia since 1973, and in more recent years, Andino, for one, has upgraded the quality of its parcel tankers. Presumably other carriers have done the same over the passing years. In any event, the sand bar near Barranquilla has little relevance to the merits of the proceeding in No. 79–2.

VESSEL PUMPS

Prior to 1979 and 1980, Andino chartered quite a number of vessels with common pumps for more than one tank, which vessels were used

in the trade herein. It is preferable to have one pump per tank. When one pump services more than one tank on a vessel, the risk of accidents or contamination is greater, and there is more expense in cleaning the lines handling the cargoes.

Apparently, from at least 1980 on, Andino has chartered modern vessels with separate pumps for separate tanks. The record does not disclose whether other parcel tank carriers also have chartered or owned modern parcel tankers, but various other such carriers are active in serving countries other than Colombia, and presumably also have used modern-style tankers.

GENERAL STATISTICS

In the year 1971, Andino on its own made six voyages, carrying 7,590 metric tons of cargo in the Atlantic trade. In 1972, Andino on its own made eleven voyages carrying 10,560 metric tons in this trade. (Exhibits 64 and 78).

The year 1973 totalled 25 voyages in this trade, with Andino on its own making four of these voyages, and Flota/Andino making 21 voyages after the Flota/Andino agreement was made. Total cargo carried by Andino alone (4 voyages) end by Flota/Andino (21 voyages) in 1973 was 55,195 metric tons in this A trade.

The tonnage figures for the Flota/Andino service were 96,633 tons in 1974; 85,319 in 1975; 86,139 in 1976; 121,013 in 1977; 137,477 in 1978; 187,379 in 1979; and 127,789 for the first half of 1980, as shown in Exhibits 78 and 64.

In the years 1971, 1972, 1973, there were other carriers in the U.S. Gulf/Colombia trades besides Andino and Andino/Flota. The tonnages of these other carriers are not shown in Exhibits 78 and 64 which are-limited to tonnages carried on Andino's vessels.

Andino carried additional cargo besides that destined to Atlantic Colombian ports, on the same vessels, which additional cargo was destined to other ports en route to Atlantic Colombian ports. None of such additional cargo as shown in Exhibit No. 78 was destined to Pacific Colomblan ports. For instance for the year 1973, 44,018 tons went to these other ports en route. For 1974, the cargo to such other ports was 28,498 tons; for 1975 it was 41,879 tons; for 1976 it was 40,069 tons; for 1977 it was 28,507 tons; for 1978 it was 25,818 tons.

Andino issued its own bill of lading to these other ports, such as ports in Venezuela, showing, together with its regular service, sailing schedules, etc., that Andino was providing common carrier service to the Latin American area generally. Exhibit 37, for example, lists "Sailing Schedule & Fleet Information," showing three voyages, in February, three in March and two in April, 1977, from the U.S. Gulf to the North Coast of South America, with some voyages showing the discharging area of Colombia only, but with other voyages showing the discharging area of Colombia/Caribbean/Mexico or Colombia/Venezuela.

Exhibit 47, pages 4 and 5, lists "Graneles Liquidos" (liquid bulk) shipments of Dow, Shell and Esso imported from the U.S. Gulf into Colombia for the years 1971 through 1978, separating tonnages handled by Flota from tonnages handled by other liquid bulk carriers. The information in Exhibit 47 was obtained by counsel for Flota, and was received without objection by the counsel for the other parties. Somewhat different figures are shown for these three importers in Confidential Exhibit No. 70, data provided by Andino, limited to the years 1976, 1977, and 1978. To get a complete picture of the trade it is advisable to use the figures for more years (1970 through 1978) found in Exhibit No. 47.

Exhibit 47 shows for *Dow,* 4,602 tons in 1970; 3,818 tons in 1971; and 5,553 tons in 1972, all handled by carriers other than Flota. For Dow in 1973, there were 5,157 tons by Flota and 2,595 tons by other carriers. From 1974 through 1978, the carriage was all by Flota, being 13,228 tons in 1974; 5,828 tons in 1975; 8,004 tons in 1976; 12,304 tons in 1977; and 16,460 tons in 1978. These figures appear to show that Dow generally enjoyed increased tonnages in the trade with the use of the Flota service, but other factors than the use of Flota's service may have affected these tonnages.

Exhibit 47 shows for *Shell* 7,507 tons in 1970; 2,257 tons in 1971; 5,572 tons in 1972, all handled by carriers other than Flota. In 1973 for Shell there were 3,963 tons by Flota, and 3,593 tons by other carriers. For 1974 through 1978, all Shell's liquid bulk cargo in this U.S. Gulf/ Colombia trade was carried by Flota. There were 4,468 tons in 1974; 1,594 tons in 1975; 1,990 tons in 1976; 2,406 tons in 1977; and 4,180 tons in 1978.

For Shell, for the period 1970 through 1978, the total handled by other carriers was 18,929 tons (1970–1973), which slightly exceeded the total handled by Flota of 18,601 tons (1973–1978). Of course, these figures do not include imports by Shell from Europe. However, even if one adds the 2,890 tons shipped from Europe in 1978, to the 4,180 tons shipped from the United States, the total for 1978, of 7,070 tons remains less than the total imported by Shell from the United States in 1970, of 7,507 tons, using carriers other than Flota. Of course, there can be many reasons for changes in tonnages imported into Colombia, other than the carriers used, such as competition with other importers.

From the above figures, one can see that Shell had reason to protest.

Exhibit 47 shows for *Esso,* 1,469 tons in 1970; 1,922 tons in 1971; and 1,267 fans in 1973, all handled by carriers other than Flota. For the years following through 1978, Flota handled most of Esso's cargo in this trade, including 497 tons in 1974; 3,347 tons in 1975; 384 tons in 1976; 7,112 tons in 1977; and 9,220 tons in 1978. Other carriers handled for Esso, 388 tons in 1977 and 500 tons in 1978, according to Exhibit No. 47.

From all of the above figures shown in Exhibit 47 for Dow, Shell, and Esso, no clear conclusions are evident as to the effects of Flota's service on the businesses of Dow, Shell, and Esso in regard to the U.S. Gulf/Colombia trade. Thus, one must turn to the testimony of the witnesses. No witness for Dow testified, but those for Shell and Esso clearly favored having the ability to be served by at least two or more liquid bulk parcel carriers in this trade.

In the U.S. Gulf to the west (Pacific) coast of Colombia trade, Flota/Transligra made about two trips a month using two vessels regularly. At times Transligra has used a third vessel in this trade. Each vessel completes a round trip in about a month. Andino kept records for Transligra in this trade, and Exhibit 75 shows tonnages from January 1, 1976 through June 30, 1980, which were compiled from bills of ladings. The leading category of liquid bulk cargoes in this trade was vegetable oils and animal fats, and caustic soda was the principal chemical transported. Total metric tons were 16,174 in 1976; 19,879 tons in 1977; 45,597 tons in 1978; 91,219 tons in 1979; and 56,198 tons for six months of 1980. These figures show a steady and substantial increase over the years from 1976 to 1980.

These figures apparently have been updated by those found in Exhibit 168, Table U, which is attached as an appendix to this decision.

Exhibit 168, Table O, page 18, states, "C. For the years 1974–76, Agreement 10293, between Flota Mercante Grancolombiana, S.A. and Andino Chemical Shipping Company, Inc., covered the trade in liquid bulk chemicals and fats and oils between the U.S. Gulf and *both the Atlantic and Pacific Coasts* of Colombia." (Emphasis supplied.)

That was not literally true since Agreement 10293 was not filed until April 1977, but apparently it was the intent of the respondents' witness in compiling his statistics to treat Agreement 10293 as if it had been effective prior to 1977.

In any event, where there are conflicts in the statistics in the various exhibits, such as between those in Exhibit 149 and Exhibit 168, the statistics in the latter were prepared last and should be used.

Also, some statistics of record were based on the records of Flota, and some on the records of Andino, and they differ in some instances even though ostensibly both records cover shipments of the same cargoes for the same periods. Exhibit 58, compiled from Flota's records, shows tonnages for 1977 and 1978, which differ from the tonnages shown in Table U of Exhibit 168, compiled from Andino's records.

However, all the statistics are useful in showing general trends in the trades here in issue.

Exhibit 168, Table U, page 24, gives a broad picture of Flota's participation in these U.S. Gulf-Colombian liquid bulk cargoes trades for the years 1974–1980, inclusive. Table U is a significant presentation of data.

Total cargoes grew from 98,789 tons in 1974, to 204,067 tons in 1980, in the Atlantic trade. Total cargoes grew from 15,409 tons in 1974, to 101,926 tons in 1980, in the Pacific trade.

Grand totals for these *two trades* grew from 114,198 tons in 1974 to 305,993 tons in 1980. In other words, the total tonnage in 1980 was more than two and two-thirds as much as it was in 1974.

Cargoes in 1980 were 66.7 percent in the Atlantic trade, and 33.3 percent in the Pacific trade.

Respondents generally attribute the growth in tonnages in the two trades to the quality and regularity of the Flota services, but this is only speculation. One may speculate, also, that these growths in tonnage were the result in the growths of the businesses of Colombian industries during the seven-year period 1974–1980. In other words, did the ships bring the tons, or did the tons bring the ships?

Table U shows 305,993 tons of liquid bulk cargoes were handled by Flota in 1980, and Table A of Exhibit 168, page 3, and Table 1 of Exhibit 149, together, show a total of 592 parcels for both trades in 1980. Dividing the above figures shows an average parcel size for the two trades combined of about 524 tons per parcel in 1980 handled by Flota. In 1977, total cargoes in both trades were 154,634 tons. Total parcels in both trades in 1977 were 324.

In 1977 in the Atlantic trade there were 268 parcels, total of chemicals and of fats and oils. This total grew to 368 in 1980 for the Atlantic trade.

In 1977 in the Pacific trade there were 56 parcels, total of chemicals and of fats and oils. This total grew to 124 in 1980 for the Pacific trade.

With a total of 592 parcels for both trades, in 1980 and with 305,993 tons, the question remains is there only enough business essentially for one principal carrier in each trade? Or, is there enough business for more carriers?

Exhibit 168, Table O, page 18, shows the "collected freight revenues" paid by importer-consignees; the so-called "cancelled freight revenues" (the amounts paid by Flota to Andino for chartered space); and the "gross profits" of Flota, the differences between the first two figures for the years 1974–1976 inclusive for both the Atlantic (79–2) and Pacific (79–3) trades, and for the years 1977–1980, inclusive, for the Atlantic (79–2) trade only.

Flota's collected freight revenues in the A trade grew from $4,301,059 in 1977 to $7,299,032 in 1980, and Flota's gross profits before taxes grew in the same years from $467,151 to $687,207.

Exhibit 168, Table P, page 19, shows similar collected freight revenues, cancelled freight revenues (paid to Transligra), and gross profits of Flota for the years 1977–1980 inclusive for the Pacific (79–3) trade only. Cancelled freight revenues in this table are those paid by Flota to Transligra.

Flota's collected freight revenues in the P trade grew from $1,245,603 in 1977 to $4,515,294 in 1980, and Flota's gross profits grew in the same years from $184,735 to $550,777 in 1980.

For the years prior to 1977, Flota's collected freight revenues and gross profits are shown as combinations of its services in both the A and P trades in Table O.

A compilation of Flota's total yearly collected freight revenues, obtained from data in Exhibit 168, Tables O and P, and Exhibit 149, Table 20, shows how Flota's cargo carryings in the trades herein grew greatly from 1974 through 1980, with a "?" inserted where the tables do not show data broken down as between the Atlantic and Pacific trades:

Years	From Exhibit 168 Table O Alantic Trade	From Exhibit 168 Table P Pacific Trade	From Exhibit 149 Table 20 Totals: Alantic and Pacific Trades
1974	?	?	$3,736,895
1975	?	?	3,271,142
1976	?	?	3,779,104
1977	$4,301,059.25	$1,245,603.25	5,546,663
1978	4,332,035.04	1,823,872.07	6,155,907
1979	5,843,632.41	4,070,969.17	9,914,602
1980	7,299,032.62	4,515,294.09	11,814,327

As seen, from the above compilation, Flota's freight revenues, as a total of both the Atlantic and Pacific trades, much more than tripled from 1974 ($3,736,895) to 1980 ($11,814,327).

The individual trades also greatly increased, from 1977 to 1980, for the Atlantic from $4.3 million to $7.3 million, and for the Pacific from $1.2 million to $4.5 million.

Both the Atlantic and Pacific trades of Flota increased in 1979 over 1978, and in 1980 over 1979, leading to the conclusion that the Colombian diplomatic note of July 6, 1979, and the change in the Incomex stamp in the same year from 100 to 50 percent did not result in inhibiting the growth of Flota's cargoes in these trades.

The record, as seen, discloses the "cancelled freight revenues" paid by Flota, to Andino in the A trade, 1977–1980, and in the A and P trades totals 1974–1976; as well as paid by Flota to Transligra in the P trade, 1977–1980.

What is not shown, are the gross profits of Andino and Transligra. From this record, it cannot be determined whether Andino and Transligra profited or lost in these trades, nor the extent, nor the reasonableness of such profits if they profited.

While Flota's rates may have been reasonable in relation to what Flota paid Andino and Transligra the record as a whole indicates that Flota's rates were high, in view of comparable rates to Venezuela, and in view of the testimony of a witness for Esso that over the years from 1973 through 1980, Flota's charges were higher than those Esso could have

provided to its Colombian importer-affiliate under existing contracts of affreightment with the parcel tank carriers including Stolt-Nielsen and O.N.E. Esso believes that it suffered additional costs totalling about $266,000 for these years because of Esso's being compelled to use Flota's service in the A trade, including costs of inland freight caused by Flota/Andino in declining to load IPA (a liquid bulk chemical) at Baton Rouge.

Flota's charges to Esso (Exhibit 109) increased from $19 a ton in 1973 ($18,525 for 975 tons) to $53.30 a ton in 1980 ($169,113 for 3,173 tons).

For the years 1974 through 1980, in the U.S. Gulf/Atlantic trade (No. 79–2), Flota/Andino transported a total of 690,132 tons of chemicals, and 239,304 tons of fats and oils, or a grand total of 929,436 tons. Of this amount a total of 237,484 tons, or 25.55 percent, was handled under contracts of affreightment. Such c.o.a. shipments totalled 187,276 tons of chemicals, or 27.14 percent, of the chemical total, and 50,208 tons of fats and oils, or 20.98 percent, of the fats and oils total. (Exhibit 149, tables 8 and 9).

For the same years, 502,856 tons of chemicals, or 72.86 percent of the chemical total, were handled by Flota/Andino in this Atlantic trade as non-c.o.a. shipments. Also 189,096 tons of fats and oils, or 79.02 percent of the fats and oils total were handled by Flota/Andino as non-c.o.a. shipments.

Non-c.o.a. rates often apply to smaller parcels under single-voyage arrangements, whereas c.o.a.'s apply for multiple voyages. The smaller the parcel, generally the higher is the non-c.o.a. rate. Flota's non-c.o.a. rates, of course, were higher than its terms under c.o.a.'s.

Exhibit 149, Table 1, shows that Flota/Andino's cargo in the Atlantic trade, chemicals plus fats and oils, totalled 98,861 tons in 1974, and grew to 204,240 tons in 1980. (Computed by multiplying average parcel size by number of parcels.)

Average parcel sizes were 487 tons in 1974 and 555 tons in 1980. Average chemical parcel sizes were 458 tons in 1974 and 487 tons in 1980, and average fats and oil parcel sizes were 800 tons in 1974 and 847 tons in 1980.

Table 2 of Exhibit 149 shows that for the years 1974–1980, inclusive, the average parcel size for all chemicals was 464 tons, but for c.o.a. shipments of chemicals was 2,256 tons, and for non-c.o.a. shipments of chemicals was 358 tons.

The similar story for fats and oils for 1974–1980, shows an average parcel size of 652 tons for all fats and oils, 688 tons for c.o.a.'s and 643 tons for non-c.o.a.'s.

Table 3 of Exhibit 149 breaks down the number of parcels by parcel size, again for the years 1974–1980. For chemicals, out of a total of 1,487 parcels, in the 150 ton or less category were 463 parcels or 31.1 percent, and in the 151–250 ton category were 429 parcels or 28.9 percent.

These two categories total 60 percent, indicating the "drug-store" nature of the chemical trade.

Exhibit 149, table 4, shows parcel sizes for fats and oils, shipped by Flota/Andino in this Atlantic trade. Out of a total of 367 parcels of fats and oils, 168 parcels or 45.8 percent were in the 300–500 ton category; and 138 parcels or 37.6 percent were in the 501–1,000 ton category. These two categories together made up 83.4 percent of the fats and oils total.

As seen, there were fewer total parcels of fats and oils (367) than parcels of chemicals (1,487), but the fats and oils parcels generally were larger (mostly 301–1000 tons) than the chemical parcels (mostly 250 tons or less).

The average number of parcels (including chemicals, and fats and oils) for Flota/Andino for 1974–1980 (table 5) was seven parcels per voyage. Over these years 265 voyages were made, or an average of nearly 38 per year. Table 6 of the same exhibit shows the average number of shippers was 4.2 per voyage.

Andino found it necessary to carry cargo for other parties than Flota on the above voyages, and the statistics for these other shippers, and how many other shippers there were are not included in the above tables, which were derived from Flota's bills of lading, and did not include Andino's bills of lading for these other shippers to other destinations such as to Venezuela.

In other words, the tables in Exhibit 149 referred to above pertained only to cargo shipped on Andino vessels under its Agreements with Flota.

Table 7 in the above category shows that the number of U.S. Customs' Districts (port areas) in the U.S. Gulf called on by the Flota/Andino service in the years 1974–1980 averaged 2.2 per voyage. This number would add to vessel time and vessel expenses, depending upon how many port areas of origin of the shipments in excess of one were involved in a voyage.

The statistics in tables 1 to 7 above generally confirm the "drug store" nature of the trade.

Table 1 on page 17 of Exhibit 148, shows Flota's shares of liquid bulk cargoes from the U.S. Gulf to Colombia for the years 1977, 1978, and 1979.

Out of a total of 199,056 tons in 1977, Flota carried 165,561 tons, or 83 percent.

Out of a total of 206,320 tons in 1978, Flota carried 160,426 tons, or 78 percent.

Out of a total of 318,347 tons in 1979, Flota carried 283,300 tons, or 89 percent.

The latter figure is significant, in that it shows Flota's large share persisted even following the guarantee dated July 6, 1979, by the Government of the Republic of Colombia that 50 percent of all liquid bulk products

may be carried to Colombia without any vessel flag restrictions (Diplomatic Note No. 3211/E 179).

Witness Schmitt, called by Hearing Counsel, concluded that the anti-competitive impact of the subject agreements is large. He also concluded that Flota's overwhelming market share occurred in these trades since the inception of Flota's space chartered services between the U.S. Gulf and Colombia.

When queried about whether Flota's high rate of participation in the trades in 1977, 1978, and 1979 would carry over to 1980, 1981, and 1982, witness Schmitt said he had no reason to think such participation would not carry over.

Mr. Schmitt on cross-examination (transcript 2066) stated that the total cargo carried by all parcel tanker carriers from the U.S. Gulf to Colombian ports in 1977 was roughly 200,000 tons (199,056 tons in Exhibit 148, table 1), and went to 318,000 tons (318,347 tons in Exhibit 148, table 1) in 1979, and that where an outsider, Pan American Tankers, had a contract to move 6,000 to 12,000 tons in 1980 (transcript 129), that isolated amount of tonnage did not indicate that there was no monopoly in the trade.

According to respondents' witness French, the Pacific trade yet does not have a sufficient volume of cargo to utilize fully the chemical parcel tankers operated by Transligra under the Flota/Transligra agreement 10295. Exhibit 168, Table Y, shows an average vessel percentage of utilization to capacity over the years 1974 through 1980 (Flota/Andino 1974–1976; and Flota/Transligra 1977–1980) in the Pacific trade of 40.9 percent, for a total of 102 voyages. The remaining cargo capacity of the vessels was used largely to transport parcels to Ecuador.

Exhibit 168, Table Y, does not break down the statistics year by year, and no doubt the vessel utilization to capacity percentage in 1980 was much higher than the comparable percentage for 1974. This conclusion is reached of necessity from the tonnages shown in Exhibit 168, Table U. That table shows 15,409 tons of cargo in 1974 and 101,926 tons of cargo in 1980 in this U.S. Gulf/Pacific Colombia trade. Exhibit 168, Table E, shows 9 voyages in 1974 and 27 voyages in 1980 in this Pacific trade, which equate to about averages of 1,712 tons per voyage in 1974 and 3,775 tons per voyage in 1980, for cargo to Pacific Colombia (Buenaventura).

Of course, the percentage of utilization depends upon the sizes of the vessels used. The vessels used in the Pacific trade, from 1974 through 1980, ranged in cargo capacity from 2,900 tons (*Chemie Carrier*) to 14,000 tons (*Espoir*), each of which made only three voyages in the Pacific trade in these years. (Exhibit 168, Table Y). The four vessels which made the most voyages were the Chimborazo, cargo capacity 7,200 tons and 17 voyages; the *Fuji Andina*, 7,200 tons and 16 voyages; the *Silver Magpie*,

10,500 tons and 16 voyages; and the *Thomona*, 6,900 tons and 27 voyages. (Exhibit 168, Table Y).

Exhibit 168, Table A, shows 22 parcels were shipped on the nine voyages in 1974 in the Pacific trade, compared with 124 parcels on 27 voyages in 1980. For all of the years 1974–1980 together in the Pacific trade the average number of parcels per voyage was 3.8, and the average number of shippers per voyage was 3.3. (Exhibit 168, Tables E and F). For 1980, as seen, there was an average of 4.6 parcels per voyage, and the same or less of an average of shippers per voyage for cargo in the Pacific trade, compared with 2.4 parcels per voyage in 1974, and that number or less average shippers in 1974.

Overall from the statistics above, it is clear that the Atlantic is a larger volume trade than the Pacific, but the latter trade has been growing at a greater rate. (Exhibit 168, Table U).

Further, it is clear that Flota has profited from these trades, having gross profits, exclusive of agency and port fees, of $467,151 in the A trade, and of $184,735 in the P trade, in 1977. These gross profits of Flota grew to $687,207 in the A trade, and to $550,777 in the P trade, in 1980.

The gross profits of the underlying vessel operating common carriers, Andino and Transligra, are not shown, but presumably they would have terminated their agreements with Flota sometime between 1973 and 1980 (Andino) or sometime between 1977 and 1980 (Transligra) if these agreements were either unprofitable or showed little likelihood of profits.

Witness Cina, for intervener O.N.E., made a total market analysis for the liquid bulk cargo in these A and P trades, from the U.S. Gulf to Colombia for the years from 1974 through the first six months of 1980. (Exhibit 81–A). He determined the total profit potential for O.N.E. based on a total capture of the market by O.N.E.

He uses an average freight rate for the years 1974–1980 of $38.74 a ton, and an average O.N.E. operating cost of $27.35 a ton. For a total of 1,176,795 tons of cargo for these years, Mr. Cina computes gross revenues of $45,586,487 for O.N.E., and O.N.E. operating costs of $32,181,236. The difference would have been $13,405,251 of net potential revenue for O.N.E. total for 1974 through first six months of 1980. (Exhibit 81–A, page II–8).

Witness French for the respondents criticizes the Cina study for a number of reasons, including that O.N.E. in no way is entitled to capture the entire market in these A and P trades, because the Colombian cargo reservation law ostensibly would permit O.N.E. to compete only for 50 percent of the tonnage in the trades, and that the only way O.N.E. would be able to capture the market would be for O.N.E. to displace Andino and Transligra as parties to the space chartering agreements with Flota.

Mr. French criticizes Cina's use of average freight rates, each, for all chemicals, and for all fats and oils, without allegedly proper reference

to the variances of rates by parcel sizes. Mr. French criticizes the use by Cina of the costs of the vessels *Onesky* and *Onestar*, because of their design and capabilities the failure to include downtime of vessels for repairs, delays because of heavy weather and port congestion, and the charter hire rate not stated for O.N.E.'s two newer vessels, the *Brage Atlantic* and the *Brage Pacific*.

Mr. French points out that Andino cannot always make full use of its vessels in the A trade with only Colombian cargo, that on an average for 1974–1980 about 20.5 percent of the Andino vessels' capacities had cargoes bound for destinations other than Colombian ports. Also, that if cargo destined to ports in Venezuela were added to the Cina voyage patterns, there would be more voyage time and resulting increased operating costs. Andino is able to fill its ships only through aggressive efforts to obtain cargo other than cargo carried under Agreement No. 10293.

Mr. Cina used as a typical voyage in his calculations, the route, New Orleans-Houston-Barranquilla-Cartagena-New Orleans. Mr. French insists that this is not typical of Andino's voyages and rather that this Cina voyage pattern is based on the "cream" of the A trade; and that the addition of other ports and their berths would increase voyage time and port costs. Mr. French also insists that the Cina calculations contain errors regarding commissions, and errors regarding the P trade, including transit time of the Panama Canal.

Mr. French contends that Mr. Cina overestimated gross revenues and underestimated operating costs in both the A and P trades.

In lieu of the Cina calculations, Mr. French refers to his Exhibit 149, table 11, where he computes that the weighted average of Flota's rates for chemicals increased from $27.03 per ton on July 1, 1975, to $45.28 per ton on July 1, 1980. Tables 12 and 13 of the same Exhibit 149 show Flota's weighted average rate for fats and oils increased from $42.37 per ton on July 1, 1975 to $49.85 on July 1, 1980. Excluded from Mr. French's analysis were rates charged under contracts of affreightment, which c.o.a. rates are negotiated individually with a few large volume shippers.

Mr. French also points out that besides the factors considered by Mr. Cina, consideration also must be given to such factors as gross national product in Colombia, relative prices in Colombia and the United States and other variables which may influence the "demand" side of the trades, as opposed to the supply and costs side of the market.

Mr. French states that, an inescapable conclusion, from the statistics of record, is that the demand for liquid bulk cargo imports in Colombia has increased.

Any rates of Flota in the trades, it is concluded by Mr. French, "must consider both the demand for and supply of transportation services in the market."

Without the costs of Andino and Transligra, there is no way of ascertaining whether the rates, published in tariff style or in contracts of

affreightment, were reasonably related to the costs of the services in the A and P trades. At least some of the shippers in the trades believed that the Flota near monopolies resulted in higher costs to them than would have obtained if other carriers could have operated in the trades. These shippers' views are bolstered by the rates available to Venezuela, which were lower than those to Colombia.

GENERAL DISCUSSION AND CONCLUSIONS

1. JURISDICTION OVER THE PARTIES

Are Andino and Transligra common carriers by water subject to the jurisdiction of the Commission?

Andino argues that while its service in the A trade is frequent, that its service is not regular, because its vessel schedules change according to the requirements of its "sole customer, Flota," and the composition of the cargo. Also, Andino argues that while it constantly serves Cartagena and Barranquilla, the precise point of loading at the U.S. Gulf is not specified in Andino's statements of sailing positions. Andino concludes therefrom that its service is irregular between unspecified ports.

Andino also argues that it does not solicit cargo in the A trade, does not advertise sailings, and does not carry general cargo, but instead carries specialized bulk parcel tanker cargoes. Andino says it serves only one shipper in the A trade, does not issue bills of lading, and that without the charter of Andino's space by Flota, Andino could not move reserved cargo in this trade.

Exhibits 37, 38, and 39 show "Sailing Schedules & Fleet Information," listing Andino Chemical Shipping Co., Inc., Flota Mercante Grancolombiana S.A., Maritima Transligra, S.A., and others. Pages 2 of these exhibits shows 4 sailing schedules, one of which is "U.S. Gulf/North Coast South America Service" listing "Sailing Schedules" for three-month periods. The loading Area is "Gulf," the Loading Date is a range of dates, and the "Discharging Area" is Colombia or Colombia Venezuela. Another sailing schedule on pages 2 lists "U.S. Gulf/West Coast South American Service," showing the discharging area of Colombia/Ecuador. These schedules are specific enough to show a regularly scheduled service. These schedules were regularly sent to shipping brokers for the U.S. Gulf/Colombian/Venezuelan/Caribbean trade. In addition, Exhibit 76 shows Andino's "Weekly Vessel Position Schedules" and these were sent to shipping brokers. For example, one small part of the first page of some 284 pages of Exhibit 76 shows the vessel, *Fuji Andina,* voyage 42, in 1979 as follows:

New Orleans, Houston,	October 30, November 5.
Cartagena,	November 11/12.
Barranquilla,	November 13.
Gulf,	November 18.

The same page shows for the vessel, *La Selva*, voyage 45, in 1979:

Gulf,	November 20, 25.
Colombia,	December 2, 4.
Venezuela,	December 7, 9.
Gulf,	December 16/17.

The same page of Exhibit 76 shows the vessel, *Chimborazo*, voyage 420, in 1979 (in the P trade) as follows:

New Orleans,	October 3.
Buenaventura,	October 12/13.
Manta,	October 15.
Guayaquil,	October 16/20.
Gulf,	October 29/31.

Andino is the agent for Transligra in this service in the P trade. Exhibit 76 shows that the public was given notice of Andino's and Transligra's services from the U.S. Gulf to Colombia and to other South American and Caribbean destinations.

Andino does not charter its entire vessel space to Flota in the A trade, nor does Transligra charter it entire vessel space to Flota in the P trade. Andino solicits and carries cargo in spaces not used by Flota to fill up its vessels. There is no doubt at all that Andino acts as a common carrier by water to destinations such as Venezuela in connection with its service in the A trade, and the same is true for Transligra in its services to Ecuador in the P trade.

Flota exercises no control over the navigation of the vessels. Such control is exercised by Andino in the A trade and by Transligra in the P trade. Both Andino and Transligra provide regularly scheduled services between specified ports, which are more particularly named in Exhibit 76, the weekly position schedules.

It is true that Andino and Transligra in their services to Colombia only, do not issue bills of lading in their own names, but this fact alone does not negate their status as common carriers respectively in the A and P trades to Colombia, where any and all shippers are served by the Flota/Andino and Flota/Transligra services.

Flota in these trades operates no vessels itself, and must be classed as a non-vessel-operating common carrier.

Further, Agreement No. 10293 Sub-1 between Flota and Andino provides that Andino will take "responsibility in accordance with Tanker Bills of Lading and/or contracts that cover the shipments and will be responsible for the carrying of such cargo" to Colombian ports. "The claims will be paid by FMG[5] for the account of ACS,[5] only after duly[5] authorization by ACS." (Exhibit 2B). Agreement No. 10295 Sub-1 between Flota and Transligra, similarly to the agreement of Flota and Andino, provides that

[5] FMG is Flota; and ACS is Andino. "Duly" is the language of Exhibit 2B.

Transligra will take "responsibility in accordance with Tanker Bills of Lading and/or contracts that cover the shipments, and will be responsible for the carrying of such cargo to Colombian ports."

As seen, Andino and Transligra take the "responsibility" for the shipping contracts, they provide the ships, control the loading, navigation, etc., issue sailing schedules, provide regular service at regular intervals, and in general serve the entire shipping public in the A and P trades. Accordingly it is concluded and found that Andino and Transligra are common carriers by water in the foreign commerce of the United States in the A and P trades, respectively.

2. JURISDICTION UNDER SECTION 15 NOT AFFECTED BY SECTIONS 18(b)(1) AND 14b(8) OF THE ACT

As discussed previously, liquid bulk cargo rates are not required to be filed. Section 18(b)(1) of the Act provides an exemption for cargo carried in bulk without mark or count. Legislative history suggests that it was intended that common carriers be free to change their rates on bulk cargoes so as to compete for such cargoes with unregulated "tramp" carriers in the foreign commerce. Section 18(b)(1) so far as here pertinent provided a tariff exemption, but did not give up jurisdiction over common carriers of liquid bulk cargoes under other provisions of the Shipping Act.

Flota contends that the liquid bulk parcel tanker industry is not within the reach of section 15 of the Act, as a consequence of section 14b(8) of the Act, which provides that approved dual rate contracts of common carriers or conferences of such carriers must "exclude cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots." In other words, a dual rate contract may include some liquid bulk cargoes in less than full shipload lots, but not liquid bulk *chemical* cargoes in less than full shipload lots.

Again, as in the case of the provisions of section 18(b)(1), the provisions of section 14b(8) do not affect the jurisdiction over common carriers in the foreign commerce of the United States of liquid bulk cargoes under other provisions of the Act, such as section 15. If such carriers are to be exempted from the provisions of section 15 of the Act, that section must so provide, and it does not.

3. THE SUBJECT AGREEMENTS AS COOPERATE WORKING AGREEMENTS

Andino once operated on its own in the A and P trades prior to its 1973 agreement with Flota. Transligra might very well operate on its own in the P trade were it not for its agreement with Flota. The subject agreements surely limit competition between Andino and Flota, and between Transligra and Flota, and even also between Transligra and Andino.

The main question under section 15 is whether the agreements in issue herein are cooperative working arrangements. It must be concluded that they are. They have allocated the U.S. Gulf/Colombia liquid bulk cargo trade into two services, the Flota/Andino service in the A trade, and the Flota/Transligra service in the P trade. The agreements dictate the frequency and number of sailings in these two trades. The agreements have resulted in Flota's obtaining near monopolies in these two trades since 1973, through Flota's space charters with Andino and Transligra.

Andino and Transligra have committed themselves to provide Flota with all the vessel space needed to serve both trades. Flota will space charter only from Andino and Transligra, except when Andino and Transligra cannot provide the necessary space to Flota, in which event Flota will be free to use other carriers to transport the cargoes. In fact, Flota has not obtained vessel space on any carriers other than Andino and Transligra. In sum, the subject agreements control nearly all of the freight carried in these two trades, and they provide for two exclusive preferential working arrangements within the language of section 15 of the Act. Such agreements require approval by the Commission.

In general, section 15 of the Act requires common carriers by water in the foreign commerce of the United States to obtain Commission approval of any agreements limiting competition between such carriers.

4. THE LAWFULNESS OF THE NEAR MONOPOLIES

Flota admits or concedes that it has a dominant position in these A and P trades, but argues that such position cannot be attributed to the subject agreements, and that its position cannot be attributed to anything done by Flota itself, or by Andino or by Transligra. Rather, Flota argues that its dominant position results from the Colombian Cargo Reservation Decrees, which reserve to Flota or to other Colombian or to U.S. flag vessels the first fifty percent of the cargo to be moved under each import license. Flota argues that should the subject agreements be disapproved the Commission would involve itself in the exercise of assuming to overrule the lawful and valid acts of a friendly, sovereign foreign government.

Flota insists that if the subject agreements were to be canceled, Flota's dominant share of the trade would remain the same. This may be true in theory, but would not be true in practice, because Flota has no liquid parcel tank carriers of its own and has not shown that it can serve these trades on its own. Without the subject agreements it appears that there would be no near monopolies, or "dominant" position, of Flota in these trades. This would remain true unless, for example, Flota were to make similar exclusive agreements with some other carrier or carriers, such as O.N.E., to take the place of its exclusive agreements with Andino and Transligra. Of course, Flota conceivably might acquire its own vessels.

The Colombian Cargo Reservation decrees preceded the subject agreements herein. Decree #994 was dated April 29, 1966; Decree #1208 was dated July 21, 1969; and Decree #2349 was dated December 3, 1971.

Prior to March 1, 1973, although these Colombian decrees authorized the fixing of import and export cargo reserved to Colombian-flag vessels, in actual practice there were no restrictions on the entry of independent carriers of any flag in these trades. Numerous foreign flag carriers plied these trades prior to 1973. This was true because there was no Colombian flag carrier in these trades.

So, it must be concluded, that *the decrees alone* did not cause the near monopoly situations in these trades.

Nor, did the *subject agreements alone* cause the near monopoly situations.

It is the *combination of the* Colombian Cargo Reservation *decrees and the subject agreements* which has caused the near monopoly situation in these trades.

All parties agree that the lawfulness of the Cargo Reservation decrees is not in issue herein. But, in issue is the lawfulness of the subject agreements.

Not all monopolies are unlawful. A trade may be of such a nature that its economic features may justify only one dominant carrier, or only one carrier with a near monopoly.

Flota contends that the subject agreements have been most beneficial to the public interest of the United States and have caused no detriment to its foreign commerce.

Respondents' witness French stated that the absence of purely competitive conditions may be in the public interest in some situations; and that if more than one carrier were in a trade, shippers may have to pay a higher price than if one principal carrier operated in the trade. He stated that "the trade in question is characterized by decreasing average costs and so can best be served by once principal carrier."

Mr. French believes that one principal carrier (Flota) can provide frequently scheduled service at a lower cost than two or more competing carriers because of the one carrier's ability to place and commingle cargoes and use its capacity more efficiently.

But, the question remains, would not some competition stimulate improved services and more competitive, and thus lower, rates in these trades?

5. THE PUBLIC INTEREST IN THE AVAILABILITY OF THE SERVICES OF TWO OR MORE PARCEL CARRIERS IN THESE TRADES

The only certain way to find out what would best serve the public interest of the shippers, consignees, carriers and others concerned with these A and P trades is to provide a way that permits the services of two or more parcel tank carriers in each of these trades.

It may be true that the near-monopoly services of Flota have been in the public interest, but that is less likely now than it may have been in 1973, or 1974 or in 1976.

The statistics of record show very substantial growths in both the A and P trades between 1974 and 1980 (Exhibit 168, Table U, attached to this decision.)

The statistics from 1977 through 1980 as to freight revenues, and gross profits show the true picture as to these elements trade by trade, because in 1976 and prior thereto, these statistics were a combination of both trades because Andino together with Flota then served both trades.

From 1977 to 1980, Flota's collected revenues in the A trade grew from $4.3 million to $7.3 million, and its gross profits grew from $467 thousand to $687 thousand. (Exhibit 168, Table 0.)

From 1977 to 1980, Flota's collected revenues in the P trade grew from $1.2 million to $4.5 million, and its gross profits grew from $185 thousand to $551,000. (Exhibit 168, Table P).

The above growths in these A & P trades, no doubt, resulted at least in part from the very satisfactory services of Flota/Andino and Flota/Transligra. Many shippers attested to their services.

The above growths in these two trades also, no doubt, resulted from the general progress and growth of the industries of Colombia.

It is concluded and found, principally from the above statistics, that there is enough business and industry in Colombia to support at least two or more principal parcel tankers in each of these two A and P trades, and that it is in the public interest to provide a way that permits such services. The testimony of record is that shippers would welcome the introduction of more principal carriers, and that some believe their shipping costs would be less as a result of more competition in the trades.

ULTIMATE CONCLUSIONS AND FINDINGS

It is concluded and found that generally in the past the services of Flota/Andino and Flota/Transligra have been near monopolies, but have been largely in the public interest, particularly in earlier years.

But, it is concluded and found also that for the present and for the future, these near-monopoly services are contrary to the public interest.

In view of the record as a whole, and in particular the growths of the tonnages in these trades, and the growths of the gross profits of Flota, it further is concluded and found that for the present and foreseeable future, the subject agreements herein between Flota/Andino in No. 79-2 and between Flota/Transligra in No. 79-3 are unlawful under section 15 of the Shipping Act, because they are cooperative working arrangements which control, regulate, prevent and destroy competition in these A and P trades, because these agreements now operate and will operate to the detriment of the commerce of the United States, and because these agreements are contrary to the public interest.

It is further concluded and found that Flota, Andino, and Transligra are common carriers by water subject to section 15 of the Act.

It is further concluded and found that Agreement No. 10293 and Agreement No. 10293 Sub-1 constitute the complete agreement of Flota and Andino; that Agreement No. 10295 and Agreement No. 10295 Sub-1 constitute the complete agreement of Flota and Transligra; that these agreements were implemented without Commission approval.

It is further concluded and found that the proponents of these agreements have failed to demonstrate that the benefits of these agreements outweigh their anticompetitive consequences.

These subject agreements are disapproved.

(S) CHARLES E. MORGAN
Administrative Law Judge

Attachments (2):

Notice of withdrawal of Esso
Exhibit No. 168—Table U

APPENDIX I

BEFORE THE FEDERAL MARITIME COMMISSION

AGREEMENT NO. 10293

DOCKET NO. 79–2

NOTICE OF WITHDRAWAL

Pursuant to Rule 5(m) of the Commission's Rules of Practice and Procedure, 46 CFR § 502.73, Esso Chemical Supply Company Inc. hereby moves to withdraw from this proceeding for the reasons set forth hereunder:

On or about June 7, 1977 Esso Chemical Supply Company Inc. (hereinafter "Esso") filed with the Federal Maritime Commission a letter setting forth its reasons for protesting the approval of Agreement No. 10293, submitted to the Federal Maritime Commission on April 14, 1977, by Flota Mercante Grancolombiana S.A. (hereinafter "Flota") and Andino Chemical Shipping Inc. (hereinafter "Andino"). A copy of said letter is attached hereto as Exhibit A.

The primary objection of Esso to Agreement No. 10293 focused upon the fact that the Agreement did not reflect that, under Colombian law, United States shippers had the unconditional right to transport a minimum of 50 percent of bulk liquid chemicals/specialty cargoes from the United States Gulf to Colombia on chemical/specialty tankers registered under United States or Third Nation flags.

Further objection to Agreement No. 10293 was raised by Esso on the ground that the de facto implementation of Agreement No. 10293 since 1973, the Colombian Cargo Reserve Law (Decree 1208 of July 21, 1969) and the interpretation of said law precluded shippers from transporting bulk liquid chemical/specialty cargoes from the U.S. Gulf to Colombia on any vessels other than those of Flota/Andino at freight rates which were not competitive with rates being offered by other carriers who could not be used because of the aforesaid laws and regulations.

Esso raised further objections to Agreement No. 10293 on the grounds that the quality of the Flota/Andino service had been unsatisfactory; Flota/Andino vessels often being incapable of carrying Esso's products in tanks separate from those of other shippers, and often being unable to heat Esso's cargoes sufficiently to permit efficient discharge. Esso also objected to the fact that Flota/Andino vessels were not willing to call at all ports where Esso had cargoes for transport thereby requiring Esso to incur substantial additional costs to transport these products overland to ports where Flota/Andino vessels would call, in order to obtain transport of its cargoes from the U.S. Gulf to Colombia. In addition Esso objected to Flota/Andino's

inefficient scheduling of vessels which prevented Esso from providing an orderly supply of products to its customers.

In the penultimate paragraph of its letter to the Federal Maritime Commission dated June 7, 1977 Esso, however, stated that it would take no exception to Agreement No. 10293 if suitable guarantees were presented enabling any interested party to import a minimum of 50 percent of its bulk liquid chemical/specialty cargoes from the U.S. Gulf to Colombia on chemical/specialty tankers having United States or Third Nation flags as provided in Decree 1208.

During the pendency of these proceedings before the Federal Maritime Commission, Flota/Andino have improved the quality of their transport to a level which Esso presently deems minimally acceptable. Further, Esso has recently been advised by Flota that Flota will not object to the shipment by Esso, and will facilitate Esso in obtaining waivers required to permit unrestricted shipment by Esso, on United States or Third Nation flag vessels, of IPA cargoes originating from Baton Rouge, Louisiana.

Furthermore, the Republic of Colombia has on August 29, 1979 substantially increased the number of liquid chemical/specialty products on the Free Import List which Esso and others import from the U.S. Gulf into Colombia. The effect of this amendment of the Free Import List is to enable Esso and others to ship approximately 50 percent of their customers' semi-annual requirements of said products on United States flag or Third Nation flag bulk liquid chemical/specialty product carriers.

In addition, the Republic of Colombia, which had previously required import licenses issued for all imports to be stamped requiring shipment of 100 percent of said imports on Colombian flag or associated vessels, (See Exhibit B(1)), recently amended its stamp to require shipment of only 50 percent of said imports on Colombian flag or associated vessels, (See Exhibit B(2)). A translation of the INCOMEX stamp is attached as Exhibit B(3).

Moreover, it now appears that by virtue of Diplomatic Note No. 3211/E179 dated July 6, 1979, attached hereto as Exhibit C, the Government of the Republic of Colombia guarantees that 50% of all bulk liquid products may be carried to Colombia without any vessel flag restrictions.

Given the conditions, assurances and guarantees aforementioned which are the material and sole inducement for this Notice of Withdrawal, Esso respectfully advises the Federal Maritime Commission and the parties to Federal Maritime Commission Docket No. 79–2 of its withdrawal from said proceedings, the objections set forth in its letter dated June 7, 1977 having been substantially eliminated. In the event, however, that any of the conditions, assurances or guarantees described herein should be rescinded, modified or in any way altered to detrimentally effect Esso or other shippers front the U.S. Gulf to Colombia, Esso reserves its right to take such measures as it deems necessary including, but not limited to, the right to reenter the aforesaid proceeding.

Furthermore, said withdrawal is without prejudice to Esso's right to commence a new proceeding before the Federal Maritime Commission pursuant to Sections 15 and/or 17 of the Shipping Act, 1916 (46 USC §814, §816) should the facts and circumstances at any time so warrant, for example, on the grounds that the rates charged by Flota/Andino are unjustly prejudicial to exporters of the United States as compared with their foreign competitors or on the grounds that Agreement No. 10293 is unfair as between exporters from the United States and their foreign competitors or detrimental to the commerce of the United States or contrary to the public interest.

In view of all of the foregoing Esso respectfully requests this Court to issue its Order approving Esso's withdrawal from the proceeding herein.

Dated: New York, New York, October 10, 1979

ESSO CHEMICAL SUPPLY COMPANY, INC.

(S) ______________________________

KIRLIN, CAMPBELL & KEATING

(S) LAWRENCE G. COHEN

Attorneys for Protestant Esso Chemical Supply Company, Inc.

APPENDIX II
EXHIBIT NO. 168

TABLE U.[a]—U.S. GULF-COLOMBIAN CARGO, 79–2 (ATCOL) CARGO, AND 79–3 (PACOL) CARGO TRANSPORTED BY FLOTA MERCANTE GRANCOLOMBIANA, 1974–80

Year	Atlantic Colombia			Pacific Colombia	
	Total 79–2 and 79–3 cargo (metric tons)	79–2 cargo (metric tons)	79–2 cargo as a percent of total cargo	79–3 cargo (metric tons)	79–3 cargo as a percent of total cargo (metric tons)
1974	114,198	98,789	86.5	15,409	13.5
1975	109,042	92,752	85.1	16,290	14.9
1976	108,462	86,751	80.0	21,711	20.0
1977	154,634	122,589	79.3	32,045	20.7
1978	178,350	137,473	77.1	40,877	22.9
1979	286,458	187,015	65.3	99,443	34.7
1980	305,993	204,067	66.7	101,926	33.3
Total	1,257,137	929,436	73.9	327,701	26.1

[a] Replaces Exhibit 165 and Table 26, Exhibit 149.
Source: Bill of lading data compiled by Andino Chemical Shipping Company, Inc.

FEDERAL MARITIME COMMISSION

DOCKET NO. 79–83
INVESTIGATION OF UNFILED AGREEMENTS IN THE U.S. NORTH ATLANTIC TRADES

ORDER OF CONDITIONAL DISCONTINUANCE

May 30, 1984

This proceeding was instituted by Order of Investigation served August 14, 1979 (August 1979 Order). On December 30, 1983, Respondents[1] filed a Motion to Dismiss the proceeding on the ground that no useful regulatory purpose would be served by continuing it. The Commission's Bureau of Hearing Counsel filed a Reply supporting the Motion. On March 14, 1984, Administrative Law Judge Seymour N. Glanzer (Presiding Officer) certified the Motion and Reply to the Commission.

BACKGROUND

The August 1979 Order noted the filing by the Department of Justice on June 1, 1979 of criminal antitrust indictments in U.S. District Court in Washington, D.C. The indictments charged certain ocean common carriers in the North Atlantic foreign trades with conspiring to fix rates outside the scope of agreements approved by the Commission pursuant to section 15 of the Shipping Act, 1916, 46 U.S.C. §814. The charges concerned events that allegedly occurred from 1971 to 1975. The Order further noted the acceptance by a United States District Judge of *nolo contendere* pleas to those charges.

The August 1970 Order pointed out that if the allegations in the indictments were accurate, the defendants had also violated section 15 and were subject to civil penalties. The Order further stressed that the Commission is required by section 15 to oversee the operation of agreements previously approved by it and to disapprove, cancel or modify agreements that it finds to be operating in a manner contrary to the public interest or in violation of the Shipping Act. The Commission stated that:

[1] Atlantic Container Line, Ltd., Dart Containerline Company Limited, Hapag-Lloyd A.G., Sea-Land Service, Inc., United States Lines, Inc., Continental North Atlantic Westbound Freight Conference, Germany-North Atlantic Port Rate Agreement, North Atlantic Baltic Freight conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Westbound Freight Association, North Atlantic/West Europe Rate Agreement, Scandinavia Baltic U.S. North Atlantic Westbound Freight Conference, South Atlantic North Europe Rate Agreement and Associated North Atlantic Freight Conferences. Certain other respondents were dismissed during the proceeding.

> In the fulfillment of its statutory responsibilities, the Commission must focus its attention on remedial matters raised by the indictments and subsequent *nolo contendere* pleas, in order to insure that the actions alleged in the indictments will not and cannot occur in the future. Accordingly, the Commission believes an investigation is necessary . . . both to adjudicate past violations while at the same time to develop an evidentiary basis for remedial action to prevent such occurrences in the future.

Because the Commission was attempting to obtain from the District Court the record of the grand jury proceedings, further proceedings in Docket No. 79–83 were deferred.

On May 26, 1982, the Commission issued a second Order of Investigation (May 1982 Order], which recited that following the entry of the *nolo contendere* pleas, a private treble damage action was brought on behalf of a class of shippers against the major carriers operating in the North Atlantic trades. The parties to that action had recently entered into a settlement agreement that provided for a total payment of over $50 million to the shippers. The Order also noted that the Commission's efforts to obtain the record of the grand jury proceedings had been unsuccessful.[2] Recognizing that the monies paid under the settlement and the fines previously imposed by the District Court in the criminal proceedings were likely to provide sufficient deterrence, the Commission deleted civil penalties as an issue to be considered in this proceeding. The other issues described by the August 1979 Order remained intact. In this regard, the May 1992 Order reaffirmed the Commission's responsibility to monitor the implementation of agreements, to investigate alleged violations of the Shipping Act and to take remedial action as warranted.

Following the issuance of the May 1982 Order and pursuant to discovery procedures negotiated by Hearing Counsel and Respondents and approved by the Presiding Officer, Respondents made available to Hearing Counsel several hundred thousand pages of documents that had been produced pursuant to grand jury subpoenas. Hearing Counsel, with the assistance of the Commission's Bureau of Investigations,[3] reviewed the material supplied to determine whether a formal hearing was necessary. Those prehearing procedures culminated in Respondent's Motion to Dismiss and Hearing Counsel's Reply in support of the Motion.

DISCUSSION

The only remedy now possible in this proceeding, assuming violations were found, is the cancellation or modification of relevant section 15 agreements. The alleged activities that led to the indictments were primarily unapproved inter-conference rate-fixing. Respondents point out that many of the inter-conference discussion agreements approved by the Commission

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[2] *United States* v. Bates, 627 F.2d 349 (D.C. Cir. 1980) (*per curiam*).

[3] At that time, the Office of Investigations of the Bureau of Hearings and Field Operations.

(that *arguendo* facilitated Respondents' alleged unlawful rate-fixing) already have been cancelled voluntarily by the parties[4] Other discussion agreements that were in effect during the relevant period have been modified substantially to limit their scope to matters such as self-policing.

In addition, since 1975, procedures for the conduct of conference business have been restructured in each of the seven North Atlantic conferences on the basis of advice from special antitrust counsel in order to insure strict compliance with all requirements of law. These procedures are described in detail by Bruce A. McAllister, chief officer of the seven conferences, in an affidavit attached to Respondents' Motion.[5] They include:

(1) Strict demarcation of business conducted within any one conference from that conducted in any other conference;

(2) Monitoring of conference activities by conference and carrier counsel;

(3) Promulgation and implementation of guidelines for the preparation and conducting of conference meetings;

(4) Review of minutes of conference meetings to insure their accuracy before they are filed with the Commission; and

(5) Adoption and filing with the Commission of guidelines for dealing with shippers and shipper groups.

In their Reply to Respondents' Motion, Hearing Counsel state that the Commission's staff now has sufficient information regarding the activities of Respondents to meet any regulatory need. Obviously, it is impossible to be certain that Respondents will never engage in unlawful concerted activity in the future. However, given the substantial monetary fines and settlements already paid by Respondents, the cancellation or modification of most of the discussion agreements previously in effect, the adoption of the new conference procedures described above, the information obtained by the Commission's staff and the renewed emphasis by the staff on trade monitoring, we believe that the original purposes of this investigation have been substantially achieved and that the cost of further proceedings would not be justified.

An evidentiary hearing would be exceptionally costly and time-consuming, given that the unlawful rate-fixing described in the indictments allegedly occurred from nine to thirteen years ago. The age of the alleged violations also makes it unlikely that, even assuming the Commission could determine the precise extent of Respondents' malfeasance, such information would be useful in constructing a remedy relevant to present-day conference oper-

[4] Those include: the North Atlantic Discussion Agreement, FMC No. 9899; the North Atlantic Talking Agreement, FMC No. 9R09; the All Coasts Agreement, FMC No. 10022; the Canadian American Discussion Agreement, FMC No. 10057; the Canadian American Working Agreement, FMC No. 10090; and the South Atlantic North Europe Rate Agreement, FMC No. 9984.

[5] In addition to his affidavit, Mr. McAllister was interviewed concerning conference procedures by representatives of the Commission's staff, including the Director, Bureau of Agreements and T-ade Monitoring.

ations which, as noted above, are substantially different from their predecessors.

Respondent's Motion therefore will be granted. However, the Commission's action is conditioned upon the resignations of the Continental North Atlantic Westbound Freight Conference from Agreement No. 9427 and the North Atlantic Continental Freight Conference from Agreement No. 9552. These Agreements are "48-hour rate agreements" between the Conferences and independent lines. While the Agreements currently have only one independent party (Polish Ocean Line), other independents are free to apply for membership. Because these Agreements provide the means by which the Conference lines may meet with and engage in limited rate collaboration with independent lines, it is at least arguable that if the Conference lines did in fact engage in rate-fixing outside the bounds of their approved authority, these Agreements may have also facilitated such activities. For that reason, the Commission is unwilling to discontinue this investigation unless the Conferences resign from Agreements Nos. 9427 and 9552 and thereby render them nullities.

THEREFORE, IT IS ORDERED, That Respondents' Motion to Dismiss this proceeding is hereby granted on condition that, within 30 days from the date of this Order, Respondents Continental North Atlantic Westbound Freight Conference and North Atlantic Continental Freight Conference submit to the Commission appropriate notices of resignation from Agreements Nos. 9427 and 9552, respectively.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–54

PETITION FOR EXEMPTION FROM TARIFF FILING REQUIREMENTS PREVIOUSLY GRANTED BY COMMISSION ORDER AND CROSS-PETITION FOR REVOCATION OF EXEMPTION

ORDER GRANTING TRADE-WIDE EXEMPTION

June 5, 1984

Kugkaktlik, Ltd. (Kugkaktlik or Proponent) petitioned the Federal Maritime Commission (Commission or FMC) for a declaratory order extending the exemption from the tariff filing requirements of the Shipping Act, 1916 (46 U.S.C. §801 *et seq.*) and the Intercoastal Shipping Act of 1933 (46 U.S.C. §843 *et seq.* granted it in Docket No. 80–30, *In The Matter of Exemption of Kugkaktlik, Limited, From Tariff Filing Requirements,* 23 F.M.C. 70 (1980). In its petition, Kugkaktlik requested that the geographic scope and operating limits of the previously granted exemption be expanded. A reply to the petition and cross-petition for revocation of the exemption was filed by Kuskokwim Transportation Company (Kuskokwim or Protestant). Kugkaktlik filed a reply to the cross-petition.

Upon consideration of the petition and cross-petition, the Commission by Order served November 25, 1983 (November Order) instituted an investigation and hearing pursuant to section 35 of the Shipping Act, 1916, (the Act)[1], to determine whether the existing exemption and the requested expansion should be allowed or denied, or whether all common carrier service to the area of Western Alaska surrounding the Kuskokwim River should generally be exempt from the tariff filing requirements of the Shipping Acts.[2] The November Order also noted other material issues of fact raised by the petition and cross-petition: the degree of actual competition between Kugkaktlik and Kuskokwim, the relative size of the two operations, the existence and degree of integration between Kuskokwim and Crowley Maritime Corporation (Crowley), and the level of common carrier service in the Kuskokwim Bay area.

[1] Section 35 of the Act, 46 U.S.C. §833a, provides in relevant part that:

> The Federal Maritime Commission, upon application or on its own motion, may by order or rule exempt for the future any class of agreements between persons subject to this Act or any specified activity of such persons from any requirement of the Shipping Act, 1916, or Intercoastal Shipping Act, 1933, where it finds that such exemption will not substantially impair effective regulation by the Federal Maritime Commission, be unjustly discriminatory, or be detrimental to commerce.

[2] In its November Order, the Commission treated Kugkaktlik's Petition for Declaratory Order as a general petition pursuant to Rule 69 (46 C.F.R. §502.69).

The hearing was limited to simultaneous filing of affidavits, memoranda of law and replies. Intervention was sought by, and granted to, Tariff and Printing Services, Inc. Memoranda of law and affidavits were filed by Proponent and the Commission's Bureau of Hearing Counsel. Protestant filed an opening statement and a reply. Hearing Counsel filed a reply memorandum. Tariff and Printing Services, Inc. did not participate in the proceeding.

BACKGROUND

Kugkaktik is a native corporation organized under the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601, *et seq.* It operates a tugboat and barge service from Bethel, Alaska to eight native villages in Western Alaska north of the Kuskokwim River. In 1980, the Commission exempted Kugkaktlik from the tariff filing requirements, at Kugkaktlik's request. Docket No. 80–30, *supra.* The Commission found that the exemption would not be detrimental to commerce or unjustly discriminatory in view of the limited size and geographically remote nature of Kugkaktlik's services, the relatively large expense of filing a tariff, and the absence of protest from the only known competitor serving the area, United Transportation, Inc. The exemption granted was limited to service from Bethel to the eight villages named, by a tug and barge of a specified size.[3] Kugkaktlik now requests expansion of the exemption to include four additional villages and service by two additional vessels.[4]

Protestant Kuskokwim, formerly United Transportation, Inc., serves Western Alaska under tariffs filed with the FMC and the Interstate Commerce Commission. Kuskokwim operates six tugs and eight barges. Its tariff "applies to" all of the villages which Kugkaktlik presently serves and proposes to serve, and the two carriers allegedly "compete to carry the same type of cargo." Opening Statement of Kuskokwim Transportation Company, 1. Kuskokwim's ICC Certificates of Convenience and Necessity cover a broader area, covering the Kuskokwim River, its tributaries from its mouth to Tuluksak and continuing north, including the villages of Medfra and Nikolai. Kuskokwim's service to the twelve villages within the requested exemption totalled 1,260 short tons of dry cargo and 1,577 short tons of bulk petroleum in 1983. *Id.*, 1–2.

Kuskokwim is a joint venture of Kuskokwim Transportation Services Corporation, a wholly owned subsidiary of The Kuskokwim Corporation,

[3] The eight villages are: Tuntutuliak, Kongiganak, Kwigillingok, Kipnuk (Kugakaktlik's home village), Chefornak, Tooksook Bay, Nightmute and Tununak. The vessels specified are "a sixty-foot all steel tugboat with tonnage 73 gross and 49 net and two 500 horsepower diesel engines; and a steel combination deck cargo and oil barge with dimensions of 120′ x 30′ x 7′ and a cargo fuel capacity of approximately 3,000 barrels."

[4] Kugkaktlik wishes to add service to the villages of Quinahagak, Goodnews Bay, Platinum and Mekoryuk as well as use of a steel oil tanker barge with dimensions of 80 feet by 30′ by 6.5′, with a cargo fuel capacity of approximately 71,000 gallons, and a power barge, "LCM"-type, with dimensions 68′ by 20′ by 5.5′, gross tonnage 107.4 and net tonnage 36.9.

and Puget Sound Tug and Barge Company, a wholly owned subsidiary of Crowley. A majority interest in Kuskokwim (51 percent) is owned by Kuskokwim Transportation Services Corporation. Its parent company is, like Kugkaktlik, a native corporation organized under the Alaska Native Claims Settlement Act, *supra*. The Crowley subsidiary was responsible for daily operations of the joint venture at start-up but such responsibility now rests with an employee of Kuskokwim.[5]

The Kuskokwim Bay area is apparently served by three carriers,[6] in addition to those serving Bethel from the Pacific Northwest.

DISCUSSION

Proponent requests that the Commission extend the existing exemption from the tariff filing requirements to permit service to four additional villages with two additional vessels or, in the alternative, grant a trade-wide exemption for all common carrier service to villages in Western Alaska from Platinum to Mekoryuk.

Protestant opposes the requested extension of Kugkaktlik's exemption and asks that the existing exemption be revoked. Kuskokwim also opposes a trade-wide exemption.

Section 35 of the Act requires the Commission to determine, after opportunity for hearing, that an exemption of a specified activity will not substantially impair effective regulation, be unjustly discriminatory, or be detrimental to commerce.

The trade factors which underlay the Commission's decision in Docket No. 80–30 have not changed substantially since Kugkaktlik was granted an exemption in that proceeding. The area served by Kugkaktlik is geographically remote and limited in scope: the four additional villages Kugkaktlik proposes to serve are within the same Kuskokwim River area and are all within 100 miles of the area presently being served.

Proponent states that only a small portion of its tug and barge business is common carriage, involving only 240,900 gallons of fuel, and deck cargo freight gross receipts of $71,065 in 1983. Proponent's Memorandum, 2. Most of its operation involves transport of fuel oil which it owns for itself and for sale to the other native village corporations. Kugkaktlik is a Native Corporation providing services to other Native village corporations and Native individuals in addition to serving the needs of its own Native stockholders.

[5] In an Amendment to its opening statement, Protestant advises that its opening statement "correctly described" Puget Sound Tug & Barge as being responsible for Kuskokwim's daily operations, but goes on to say that Puget Sound's responsibility was on an interim basis, that Puget Sound has "no management responsibilities" and that responsibility for daily operations rests with an employee of Kuskokwim, its general manager.

[6] In addition to Kugkaktlik and Kuskokwim, Protestant identified Northwest Navigation as serving the area. Kuskokwim Opening Statement, 2. While the Commission's files do not reflect a tariff on file for Northwest Navigation, they do reflect one for Arctic Lighterage Company for service from Bethel to points on the Kuskokwim River. Affidavit of Mamie H. Black, FMC Transportation Industry Analyst.

The affidavit of FMC Transportation Industry Analyst Mamie H. Black of the Bureau of Tariffs, and Maritime Administration statistics for the Alaska trade submitted by Hearing Counsel indicate that the number of carriers serving the Kuskokwim Bay region is limited and the volume of cargo moving in the trade is small. The cost of preparing and filing a tariff is disproportionate to the amount of revenue which may be earned in the trade. The size of Kugkaktlik's operation, despite a 100 percent increase in vessels employed, remains very small. The addition of four villages of a similar nature in the same area, and two additional barges, will not substantially affect the size or nature of Kugkaktlik's operation.

Protestant has brought forth no evidence which shows substantial change in any of these factors. Protestant argues that circumstances in the trade have substantially changed since 1980 in that: it now offers services comparable to Kugkaktlik's; it opposes continuation or expansion of the exemption; and Kugkaktlik has made no present showing of strong customer support and has increased the number of vessels it employs. Kuskokwim's arguments that circumstances have changed substantially are not persuasive.

The mere existence of opposition by a competitor, without specific allegation of commercial harm, does not indicate that the exemption would be detrimental to commerce or impair effective regulation. Protestant has offered no evidence that its own operations are adversely affected by Kugkaktlik's exemption. In fact, although the Commission requested information as to the level of service being offered in the area, and the degree of competition between Proponent and Protestant, Kuskokwim's submissions indicate only that its tariff "applies to" the villages Kugkaktlik serves and proposes to serve and that it carried a specific tonnage to those villages: no evidence as to the number or frequency of calls has been provided by either party. On this record, neither continuation of the existing exemption, or grant of the requested expansion, appears to be detrimental to commerce.

Protestant's allegation that the exemption will impair effective regulation is based solely on its assertion that serious danger of undetectable rebating exists. This allegation is speculative and is totally unsupported by any evidence—or even allegation—that Kugkaktlik has engaged in rebating since the original exemption was granted in 1980 or will do so in the future. It does not appear that continuation of the existing exemption, or grant of the requested expansion, will substantially impair effective regulation.

Protestant argues that continued exemption of Kugkaktlik from the tariff filing requirements is discriminatory because Kuskokwim and Northwest Navigation file tariffs and because the exemption makes it possible for Kugkaktlik to engage in unlawful rebating without a means of detection. No other competitor has commented on the requested exemption and no finding of possible discriminatory impact as to other competitors is justified on this record.

Protestant's operation of six tugs and eight barges over a wider area of Western Alaska than that served by Kugkaktlik does not alone appear to be sufficiently dissimilar in size or nature to Kugkaktlik's operation to justify requiring one to file tariffs while the other does not. Protestant's cargo statistics for the villages in question would seem to indicate that it is also a small operation. (Kuskokwim Opening Statement at 1). Although no cargo figures are provided for the remainder of its service in the region, we see no reason to suppose that Protestant's operation is substantially larger than Kugkaktlik's, so as to render the two operations dissimilar in nature. To the contrary, the Maritime Administration cargo statistics indicate that cargo volume for the entire region is small. Protestant is affiliated with a much larger common carrier operator—Crowley, parent company of one of the joint venturers with a 49 percent interest in Kuskokwim. Some 40% of Kuskokwim's 1983 cargo was transshipped to or from other points via other Crowley subsidiaries. This relationship renders it dissimilar to Proponent. We believe that they are, nevertheless, both Native corporations serving Native villages with operations having minimal common carrier impact.

Grant of a trade-wide exemption obviates the possibility of any discriminatory impact on Kuskokwim of an exemption for Kugkaktlik. Moreover, a trade-wide exemption appears to be justified by the small total volume of common carrier business available and the personal relationships between the present carriers and their customers. Protestant's sole basis for "vigorously" opposing a trade-wide exemption is its allegation that serious danger of undetectable rebating exists. Reply of Kuskokwim Transportation Company, 2. This allegation is as speculative and unsupported with respect to a trade-wide exemption as it is with respect to the exemption of Kugkaktlik.

THEREFORE, IT IS ORDERED, That a trade-wide exemption from the tariff filing requirements of section 18(a) of the Shipping Act, 1916 (46 U.S.C. § 817(a)) and section 2 of the Intercoastal Shipping Act of 1933 (46 U.S.C. § 844) is granted to all common carriers by water for service between Bethel, Alaska and villages in the Kuskokwim Bay region in the range from Platinum to Mekoryuk; and

IT IS FURTHER ORDERED, That The Petition for Exemption From Tariff Filing Requirements is granted to the extent indicated above; and

IT IS FURTHER ORDERED, That the Cross-Petition for Revocation of Exemption is denied; and

IT IS FURTHER ORDERED, That 46 C.F.R. Part 531,* Publishing, Filing and Posting of Tariffs In Domestic Offshore Commerce, is amended to add a new paragraph (g) to section 531.1, Exemptions, to read as follows:

* Part 531 is being redesignated as Part 550 as of June 18, 1984.

"(g) Transportation between Bethel, Alaska and points in the Kuskowim Bay region in the range from Platinum to Mekoryuk." and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–53

U.S. ATLANTIC & GULF/AUSTRALIA-NEW ZEALAND CONFERENCE (AGREEMENT NO. 6200–24—APPLICATION FOR U.S. INTERMODAL AUTHORITY)

ORDER

June 6, 1984

By Order served November 15, 1983 (November Order), the Commission instituted this proceeding to determine whether Agreement No. 6200–24, an application for U.S. intermodal authority filed by the U.S. Atlantic & Gulf/Australia-New Zealand Conference (Conference), should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. §814). Proponents of Agreement No. 6200–24 had submitted substantial supporting information which specifically addressed the Commission's standards applicable to requests for intermodal ratemaking authority[1] Nevertheless, a protest filed by KKL (Kangaroo Line) Pty., Ltd. (KKL), an independent competitor in the trade, was deemed by the Commission to require further hearing under *Marine Space Enclosures.*[2] Among other arguments, KKL alleged that the Conference's purpose for obtaining intermodal authority was to engage in collective action to eliminate KKL as a competitor. The principal issue, as set forth in the November Order, was whether the Commission's standards applicable to requests for intermodal ratemaking authority have been met.[3] Included within the general inquiry under the *Agreement No. 6200–20* standards was the issue of predation raised by KKL. The November Order urged the Presiding Officer to use all appropriate procedures to direct this proceeding to an expeditious conclusion.

Subsequently, the Conference and KKL undertook efforts to resolve their differences which resulted in the filing of a proposed settlement agreement

[1] *See U.S. Atlantic & Gulf/Australia—New Zealand Conference (Agreement No. 6200–20—Intermodal Authority),* 21 S.R.R. 89 (1981) *(Agreement No. 6200–20).*

[2] *Marine Space Enclosures, Inc.* v. *Federal Maritime Commission,* 420 F.2d 577 (D.C. Cir. 1969).

[3] Two other issues were noted in the November Order. Article 2(c) of the proposed agreement would require Conference members to give the Conference 15 days' advance notice before offering an intermodal service that is within the scope of the agreement but is not covered by a Conference tariff. The November Order stated that Proponents must explain why some period of notice is necessary with respect to such offerings. In addition, the November Order noted a technical deficiency in the proposed agreement's use of the term "point" which required clarification.

(Agreement No. 6200–24A).[4] The settlement agreement provides that KKL shall withdraw its protest and all objections to the approval of Agreement No. 6200–24, and that the Conference shall refrain from utilizing a dual rate or loyalty contract for a period of five years, with respect to whatever intermodal service which it might be authorized to provide.[5] The parties filed a joint letter, dated December 9, 1983, in support of Agreement No. 6200–24A. Because Agreement No. 6200–24A related directly to and arose out of the subject matter of this proceeding, the Commission, on February 6, 1984, amended its November Order to include as an issue whether Agreement No. 6200–24A should be approved, disapproved or modified pursuant to section 15.

On March 8, 1984, the Presiding Officer in a ruling entitled "(A) Procedural Schedule (B) Restatement of Ruling Concerning Severance of Settlement Agreement From Application For Intermodal Authority For Purposes of Initial Decision" (Ruling), held that the settlement agreement embodied in Agreement No. 6200–24A could not be considered apart from Agreement No. 6200–24. The effect of the ruling would have been to postpone consideration of the settlement agreement until further hearing was conducted on Agreement No. 6200–24.

On March 14, 1984, KKL filed a document entitled "Motion For Waiver of Rule 73 and Amendment or Revocation of Commission Order, Dated February 6, 1984" (Motion).[6] Hearing Counsel filed a Reply to the Motion.[7] The Conference filed a Reply and a Supplemental Reply to the Motion.[8]

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[4] Notice of filing of Agreement No. 6200-24A was published in the *Federal Register* on December 20, 1983 (48 *Fed. Reg.* 56272–56273).

[5] As originally filed, Agreement No. 6200–24A also contained a provision authorizing each party to the settlement agreement to enforce its provisions in a court of competent jurisdiction. The Presiding Officer questioned this provision and the parties subsequently deleted it.

[6] KKL argued that the Presiding Officer's Ruling was inconsistent with the Commission's policy favoring settlement of litigation and did not observe the specific suggestion in the November Order that the Presiding Officer use all appropriate procedures to bring this proceeding to an expeditious conclusion. KKL also argued that the reasons advanced in the Ruling did not support the refusal to decide a settlement agreement prior to further hearing. KKL stated that the settlement agreement had a different purpose than the underlying intermodal agreement (Agreement No. 6200–24) and may be considered apart from it. KKL asked the Commission to waive Rule 73, to consider its Motion, and either to amend the Order of February 6, 1984 (February Order) and instruct the Presiding Officer to issue an Initial Decision on Agreement No. 6200–24A prior to further hearing, or to revoke its February Order and approve Agreement No. 6200–24A.

[7] Hearing Counsel stated that the purpose of Agreement No. 6200–24A is not to avoid litigation but to prevent the Conference from implementing a dual rate contract system. Hearing Counsel stated that there is not a sufficient factual basis for separate consideration of Agreement No. 6200–24A, and that Agreement No. 6200–24A is linked to Agreement No. 6200–24. Considering Agreement No. 6200–24A alone, Hearing Counsel opposed approval of the agreement, absent additional justification. However, if considered in connection with Agreement No. 6200–24, Hearing Counsel stated that it did not support or oppose approval of Agreement No. 6200–24A.

[8] The Conference filed a Reply to the Motion which merely stated that the Conference is a proponent of Agreement No. 6200–24A and supports its approval. Subsequently, the Conference filed a Supplemental Reply in which it supported KKL's second option, i.e., that the Commission revoke its February Order and grant approval of Agreement No. 6200–24A. The Conference stated that no further evidence regarding Agreement No. 6200–24A would be presented and that no purpose would be served by referring Agreement No. 6200–24A to the Presiding Officer for disposition. The Conference contended that the settlement agreement is reasonable and that a grant of approval had been justified.

Prior to the filing of the various replies, the Presiding Officer certified the KKL Motion to the Commission.

Upon consideration of the KKL Motion, the Commission on April 11, 1984, decided to set aside its February Order and approve the settlement agreement (Agreement No. 6200–24A). The Commission also determined to have the entire record certified to the Commission by the Presiding Officer. On April 16, 1984, the Commission received a letter from counsel for KKL, in which KKL withdrew its protest. On May 11, 1984, the Commission directed the Presiding Officer to certify the record in this proceeding to the Commission. On May 14, 1984, the record was certified to the Commission. The Commission has now considered the entire record in this proceeding and, for reasons set forth below, determined to approve Agreement No. 6200–24, subject to certain conditions.

DISCUSSION

A. Agreement No. 6200–24A (Settlement Agreement)

The Ruling of the Presiding Officer raises a question as to whether Agreement No. 6200–24A may be considered apart from, and prior to, further hearing on Agreement No. 6200–24. The Ruling interpreted the November Order as not permitting a separate consideration of the settlement agreement because it raised a question of predation.

The purpose of the November Order was to define the scope of this proceeding as clearly and narrowly as possible and thereby avoid protracted hearing. The November Order stated that a full exploration of tangentially related issues would be unduly burdensome and was unnecessary inasmuch as the dispositive question was whether Agreement No. 6200–24 had been justified under the *Agreement No. 6200–20* standards. The November Order further explained that a separate inquiry into issues of predation would not be necessary because this factor is already included in the criteria to be considered under the *Agreement No. 6200–20* standards. It was not the intention of the November Order to preclude consideration of any settlement agreement which might be entered into by the parties. Agreement No. 6200–24A, therefore, may be considered on its own merits apart from any further hearing on Agreement No. 6200–24.

The Commission concludes that the restriction on the use of a dual rate contract on intermodal services for a five year period is not violative of the antitrust laws or otherwise anticompetitive so as to invoke the application of the *Svenska* standard.[9] Agreement No. 6200–24A would not for that reason appear to be contrary to the public interest within the

[9] 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.

meaning of section 15. Nor does the agreement otherwise appear to contravene the standards of section 15. Moreover, the benefits of settlement are supportive of approval of Agreement No. 6200–24A. The Commission will therefore approve Agreement No. 6200–24A.

B. Agreement 6200–24 (U.S. Intermodal Authority)

The remaining issue to be resolved is whether Agreement No. 6200–24, an application for U.S. intermodal authority should be approved, disapproved, or modified, pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. § 814). Proponents of Agreement No. 6200–24 in their original submission provided trade data and other information which specifically addressed the *Agreement No. 6200–20* standards. Agreement No. 6200–24 was set down for investigation and hearing because of a protest filed by KKL. KKL has now withdrawn its protest. The question, therefore, is whether the record established by the Conference is sufficient to meet the *Agreement No. 6200–20* standards. The Commission concludes that approval of Agreement No. 6200–24 is warranted. Such approval, however, is conditioned upon three modifications to Agreement No. 6200–24.

First, as noted in the Order of Investigation and Hearing, Article 2(c) contains language which requires a Conference member to give the Conference 15 days advance notice before offering an intermodal service that is within the scope of the Agreement but is not covered by a Conference tariff. Such a provision is contrary to current Commission policy unless adequately explained or justified.[10] Proponents have provided no explanation as to why some period of notice is necessary. Approval of Agreement No. 6200–24, therefore, shall be conditioned upon the addition of language which clearly indicates that the advance notice provision does not apply to such intermodal offerings.

Second, as indicated in the Order of Investigation and Hearing, the use of the term "points" in the Preamble does not accurately reflect the authority actually sought by Proponents and is not consistent with the Commission's use of that term. A technical amendment to the Preamble changing the term "points" to "inland points" will remove any ambiguity as to the intended geographic scope of Agreement No. 6200–24 and would be consistent with Proponents' use of the term "inland points" in Article 2. The Commission therefore will require such a change as a condition of approval of Agreement No. 6200–24.

Third, Article 2(b) of Agreement No. 6200–24 contains language which would authorize the parties collectively to make arrangements with other modes of transportation for the movement of cargo to and/or from inland points moving in the trade covered by the agreement. It is questionable whether such language could be approved under the 1916 Shipping Act,

[10] *Pacific Coast European Conference Agreement No. 5200*, 26 F.M.C. 172 (1984); *Application for Approval of an Amendment to the American West African Freight Conference Agreement No. 7680–36*, 18 S.R.R. 339 (1978).

even if the Proponents had offered justification for this provision.[11] No such justification, however, has been provided by the Proponents in this proceeding. The Commission, therefore, shall require as a further condition of approval that the cited language in Article 2(b) be deleted from the Agreement.

THEREFORE, IT IS ORDERED, That the relief requested in KKL's Motion is granted and the Commission hereby sets aside its Order of February 6, 1984 in Docket No. 83–53; and

IT IS FURTHER ORDERED, That Agreement No. 6200–24A is approved pursuant to section 15 of the Shipping Act, 1916; and

IT IS FURTHER ORDERED, That Agreement No. 6200–24 is approved on the conditions that:

(1) Article 2(c) of Agreement No. 6200–24 be amended by adding the following language:

> "And provided further that nothing in this Article shall be construed to require any period of notice by a member line which desires to offer an intermodal service within the scope of this Agreement, but not being offered by the Conference."

(2) The Preamble of Agreement No. 6200–24 be amended by deleting the word "points" and in its place inserting the words "inland points";

(3) Article 2(b) of Agreement No. 6200–24 be amended by deleting the following language:

> "(1) with other modes of transportation for the movement of cargo to and/or from inland points moving in the trade covered by this agreement, whether moving under through bills of lading or otherwise";

(4) The Commission receives on or before June 15, 1984 a complete, accurate copy of Agreement No. 6200–24, modified in accordance with the above-ordering language and signed by the parties or their duly authorized representatives; and

IT IS FURTHER ORDERED, That the approval of Agreement No. 6200–24 shall be effective on the date all of the above conditions are met.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

[11] Such activity is specifically prohibited under the Shipping Act of 1984. *See* section 10(c)(4) of the 1984 Act. 46 U.S.C. app. 1709(c)(4). In addition, section 7(b) of that Act (46 U.S.C. app. 1706(b)) specifically exempts from antitrust immunity such agreements with inland carriers and any discussions or agreements among ocean carriers regarding the amounts paid to inland carriers for the inland U.S. portion of a through intermodal service.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–14

PRUDENTIAL LINES, INC.

v.

FARRELL LINES, INC., ZIM CONTAINER SERVICE AND ZIM ISRAEL NAVIGATION CO., LTD.

NOTICE

June 7, 1984

Notice is given that no exceptions were filed to the April 30, 1984 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) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–14

PRUDENTIAL LINES, INC.

v.

FARRELL LINES, INC.,
ZIM CONTAINER SERVICE AND
ZIM ISRAEL NAVIGATION CO., LTD.

Complainant, a U.S.-flag carrier, alleges that respondent Farrell Lines, Inc, another U.S.-flag carrier, and Zim Israel Navigation Co., Ltd., an Israeli carrier, entered into and carried out a transshipment agreement whereby Zim provided Farrell with a feeder service at Haifa, Israel for on-carriage of Farrell's cargo to Alexandria, Egypt. Complainant alleges that the agreement was not approved by the Commission nor timely filed under General Order 23, 46 CFR 524, and that respondents have therefore violated section 15 of the Shipping Act, 1916. Complainant seeks damages for alleged injury resulting from the unfiled agreement, penalties, and a cease and desist order. It is held:

(1) The arrangement between respondents is not a simple booking arrangement but a type of non-exclusive transshipment agreement which was not filed under General Order 23 until long after the agreement was carried out, and respondents have therefore violated section 15 of the 1916 Act.

(2) The arrangement, by which Zim gave Farrell fixed rates to enable Farrell to complete its through service to Alexandria, Egypt, gave special advantages to Farrell and constituted a cooperative working arrangement under section 15 of the 1916 Act.

(3) The agreement may have been pro-competitive by enabling Farrell to reenter the trade and may have had minimal anticompetitive consequences but these facts are relevant to its approvability, not to jurisdiction under section 15.

(4) Although respondents delayed in filing a memorandum of their agreement under General Order 23, the nature of the violation of law, the doubtful existence of legal and equitable factors warranting an award of reparation under section 22 of the 1916 Act, such as a reasonable relationship between the type of violation and the damages alleged, and furthermore, serious legal deficiencies in complainant's theories of recovery indicate that further proceedings for the purpose of determining whether complainant should be awarded reparation would not be warranted.

Terence J. Ingrao for complainant.

Edward Aptaker for respondent Farrell Lines, Inc.

William Karas and *Dale C. Andrews* for respondent Zim Israel Navigation Co., Ltd.

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

Finalized June 7, 1984

This proceeding began with the filing of a complaint by Prudential Lines, Inc. on March 8, 1983, which complaint was served on the following day. Complainant is a U.S. flag vessel-operating common carrier providing service from U.S. Atlantic ports to ports in the Mediterranean Sea. Complainant alleged that two vessel-operating carriers, respondents Farrell Lines, Inc. and Zim Israel Navigation Co., Ltd.,[2] who had operated from U.S. Atlantic ports to ports in the Mediterranean, had entered into a cooperative working agreement in the form of a transshipment agreement by which cargo carried by respondent Farrell and restricted by law to U.S. flag vessels would be transported from U.S. ports to Haifa, Israel, and thence by Zim feeder vessel to ports not directly served by Farrell's vessels. Complainant alleged that respondents had entered into such an agreement without obtaining approval of the Commission, in violation of section 15 of the Shipping Act, 1916, 46 U.S.C. §814, asked for an order directing respondents to cease and desist from carrying out the alleged agreement, and for an award of $1,000,000 or such other sum as the Commission might determine as reparation for alleged injury suffered by Prudential. Furthermore, complainant alleged that respondents had engaged in other unlawful practices, allegedly by agreeing to rates, rules, and other terms for the carriage of cargo via transshipment while participating as members in various agreements approved by the Commission, by engaging in predatory pricing, by allocating, regulating, or pooling their services, and by utilizing misleading advertisements to shippers.

On July 25, 1983, after the parties had been engaging in the Commission's prehearing inspection and discovery processes commencing in March, and after several prehearing conferences had been conducted, the issues in the proceeding were narrowed by the filing of an amended complaint by Prudential. In this complaint, Prudential confined its allegations to those alleging that respondents Farrell and Zim had entered into and carried out a transshipment agreement by which cargo, including U.S.-flag-preference cargo, was carried from U.S. East Coast ports to Mediterranean ports, more specifically to the port of Alexandria, Egypt via Haifa or Ashdod, Israel, by means of Zim feeder vessels. This alleged agreement, described as a transshipment agreement, cooperative arrangement, or understanding, was entered into and carried out without requisite approval as

[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] Prudential named Zim Container Service as a respondent in addition to Farrell and Zim Israel Navigation Co., Ltd. However, as respondent Zim Israel stated several times, Zim Container Service is merely a division of Zim Israel and is not a separate legal entity subject to a complaint proceeding under the Commission Rule 62, 46 CFR 502.62 or section 22(a) of the Shipping Act, 1916, 46 U.S.C. §821(a). I will therefore treat only Farrell and Zim Israel as the proper respondents.

required by section 15 of the Act and without complying with the filing requirements of the Commission's regulation, General Order 23, 46 CFR 524. Prudential further alleged that by reason of the violation of section 15 and the regulation, respondents had captured certain U.S.-flag-preference cargo and had thereby caused Prudential to sustain damages. Prudential therefore asked for the issuance of a cease and desist order, sanctions against respondents, and "reparations" in an amount equivalent to the quantum of damages which Prudential allegedly sustained and for any other relief which the Commission might deem just and proper.

Respondents, while admitting certain facts regarding their services, denied the material allegations regarding violations of section 15 or General Order 23.

As mentioned, the parties utilized the Commission's discovery devices, i.e. depositions, interrogatories, and requests for production of documents, from the inception of the proceeding and several conferences were held in an effort to obtain evidence and bring the proceeding to as prompt a conclusion as possible. A final prehearing conference was held telephonically on October 12, 1983, and discovery concluded the following month. An oral hearing was held in New York City on January 4, 1984, during which two witnesses testified, Mr. John L. Morris, Prudential's Director of Marketing and Pricing, and Mr. Thomas R. Tarbox, Farrell's Senior Vice President in charge of Farrell's Mediterranean and West African Services. Their testimony plus various documents obtained during discovery (Farrell and Zim bills of lading, correspondence of Farrell and Zim relating to the Farrell/Zim arrangement, various tariffs of Farrell or Zim, and Farrell's filing under General Order 23) constitute the evidentiary record.

Because of the undue length of time which was consumed during the prehearing phase of the proceeding caused by complications arising out of the discovery process, the complaints of respondents regarding the unnecessary complexity of the litigation, and complainant's own request, I ruled that the issue of reparation, i.e., damages, would be deferred until the question of violations had been determined. (See Notice of Rulings Made at Informal Conference, October 17, 1983, pp. 3–4; Confirmation of Ruling on Bifurcation of the Issue of Reparation, November 29, 1983.) This ruling was made in order to move the proceeding along to a prompt determination of the question of violations and to save litigation expenses in the event that complainant could not prove its allegations regarding the issue of violations. However, if complainant were to succeed in proving its allegations, complainant, not having abandoned its claim to reparation, would normally be entitled to an opportunity to prove its entitlement and the extent of its damages. Because of the possibility that violations of the kind involved in this case, especially a violation of General Order 23, might not entitle a complainant to an award of reparation because of equitable considerations or the absence of a nexus between the type of violation and the injury alleged, I invited the parties to present arguments

in their briefs on these questions. The purpose obviously was to avoid an unnecessary remand and further litigation if it appeared that there was an insurmountable legal impediment to an award of reparation even if violations were proven. As I discuss below, I find that complainant has proven that respondents have violated section 15 and General Order 23 by entering into and carrying out a cooperative working, transshipment arrangement. However, even the limited record developed indicates serious deficiencies in Prudential's claim for reparation because of an indication that the requisite factors warranting the exercise of the Commission's discretion to award monetary damages enunciated by the courts and the Commission are lacking. More significantly, however, Prudential's inconsistent and confusing theories of recovery of damages appear to suffer from insuperable legal infirmities. Therefore, I conclude that a remand for the purpose of taking evidence on the question of Prudential's alleged financial injury would lead to an inexcusable waste of time and money for all parties involved.

BASIC FACTUAL FINDINGS

The basic facts relating to the origin and carrying out of the arrangement between respondents Farrell and Zim and the competitive status of each of the three carriers (Prudential, Farrell, and Zim) are essentially not in dispute, since the issues concerning respondents' alleged violations of section 15 and General Order 23 turn on interpretations of these facts. The following basic findings therefore are drawn mainly from those submitted by respondents in their brief, with certain supplementations. When appropriate, furthermore, additional factual findings appear in the following sections of this decision pertinent to the discussion of applicable law.

1. Complainant is Prudential Lines Inc., which provides common carrier service operating U.S. Flag LASH (Lighter-Aboard-Ship) vessels between certain U.S. Atlantic Ports and certain ports in the Mediterranean, including Alexandria, Egypt.

2. Respondent Farrell provides common carrier service operating U.S. Flag container ships between U.S. North Atlantic and South Atlantic ports and ports in the Mediterranean. Respondent Zim offers a service from North Atlantic ports to ports in the Mediterranean.

3. Until December of 1981 Farrell called directly at Alexandria with vessels equipped with cargo gear. Thereafter Farrell discontinued operation of vessels equipped with cargo gear in its Mediterranean service, and instead performed its Mediterranean service only with non-self-sustaining containerships (i.e., containerships not carrying cargo gear and therefore dependent upon shore-based container cranes).

4. Shore-based container cranes are not available at the Port of Alexandria. In consequence, Farrell's Mediterranean service discontinued its direct calls at Alexandria.

5. In the spring of 1982, Farrell concluded that cargo offerings justified the resumption of service to Alexandria. Farrell instructed its office in Genoa to investigate the availability of feeder services which Farrell could use to reestablish a service to Alexandria.

6. After evaluating several possible feeder services, Farrell's Genoa office concluded that the best proposal for feeder service was that of ZEMS, an intra-Mediterranean service which is a division of respondent Zim. ZEMS' quotation to Farrell of its rate for the carriage of full containers from Haifa to Alexandria, and returned empty from Alexandria to Haifa, was $850 per 20-foot container and $1,600 per 40-foot container.

7. Farrell's New York office then advised the Genoa office that the ZEMS feeder rate of $850 per 20-foot container could be utilized to solicit cargo on a pre-paid basis. On June 17, 1982, Farrell's Genoa office advised ZEMS in Haifa of the acceptance of its feeder service quotation of $850 per 20-foot container and $1,600 per 40-foot container, full from Haifa to Alexandria and return of empty from Alexandria to Haifa, on liner terms at both ports. At the same time, Farrell's Genoa office advised its agents in Alexandria that Farrell would re-commence service to Alexandria, with Farrell shipping its containers from Haifa to Alexandria aboard ZEMS feeder vessels.

8. On July 19, 1982, Farrell accepted ZEMS' quotation of rates of $1,250 for 20-foot and $2,200 for 40-foot containers where carriage was to be of full containers in both directions between Haifa and Alexandria.

9. Farrell advised all its branch offices that commencing with sailing of the EXPORT FREEDOM, Voyage 94, full container cargo for Alexandria would be acceptable for delivery via feeder from Haifa to Alexandria with a total transit of 21 days; that only freight pre-paid cargo would be accepted; and that any cargo from ports other than New York, Baltimore, Philadelphia and Norfolk would have to be cleared by Farrell's New York office prior to booking.

10. With respect to each shipment made by Farrell using the ZEMS feeder service, Farrell's Haifa agents, Aaron Rosenfeld and Sons, Ltd., were named as shipper, and Farrell's Alexandria agents, Memphis Shipping Agency, were named as consignee on the ZEMS bills of lading.

11. In accepting cargo from Farrell's Haifa agent for carriage to Alexandria, ZEMS undertook no obligation vis-a-vis Farrell's underlying shippers. It had no way in the normal course of business of knowing who such shipper might be, or what rate might be paid by such shipper to Farrell for the transportation from U.S. ports of origin to Alexandria undertaken by Farrell.

12. The rates charged to shippers by Farrell for transportation from U.S. to Alexandria were those in Farrell's published tariff, either as a participant in the North Atlantic Mediterranean Freight Conference Freight Tariff No. 13, FMC No. 8 through February 8, 1983 (when Farrell was a member of that conference), and thereafter, in Farrell's Freight Tariff

No. 1, FMC No. 135. The rates which Farrell's Genoa, Italy, office had negotiated with ZEMS in June and July 1982, which Farrell would pay to ZEMS for the use of the ZEMS feeder service between Haifa and Alexandria were lump sum rates per container regardless of commodities carried. These rates remained constant from the inception of the arrangement through at least April 1983.

13. The terms of the arrangement between Farrell and ZEMS, which had been negotiated between Farrell's Genoa office and ZEMS in Haifa during June and July 1982, were later, in effect, reduced to writing when Farrell, as a precautionary measure, filed a memorandum with the Commission's Secretary by letter dated September 12, 1983. The only feature in this memorandum which did not reflect the terms of the arrangement related to a provision that either party could terminate the arrangement by giving the other party thirty-day's notice. Farrell also filed a notation concerning the feeder-service arrangement with ZEMS (and with another carrier out of Naples) in its North Atlantic tariff (FMC 135), effective October 27, 1983, and filed a similar notation in its South Atlantic tariff (FMC 136) on January 10, 1984, effective February 8, 1984.[3]

14. The Farrell/ZEMS arrangement, when it was used, was nonexclusive both with respect to Farrell and ZEMS; i.e., Farrell was free to employ other feeder services during the period of time when it was shipping via ZEMS, and ZEMS was free to carry cargo for shippers other than Farrell. Farrell's use of the ZEMS feeder service was on a space-available basis. On occasion, Farrell was unable to ship via ZEMS because its vessels were already full, but Farrell's containers were carried on later sailings on ZEMS vessels.

15. Since April 1983, Farrell has utilized a feeder service other than that of ZEMS. That service operates from Italy to Alexandria and is more suitable to Farrell's needs than was the ZEMS service.

16. Farrell's failure to file any memorandum concerning its acceptance of ZEMS' quotation of feeder service rates was based upon Farrell's belief that a carrier's use of a feeder service does not constitute a transshipment agreement within the scope of 46 CFR 524, and that a carrier's use of another carrier's feeder service does not constitute any other type of agreement within the scope of section 15 of the Shipping Act, 1916.

17. While Farrell was using the ZEMS feeder service via Haifa to Alexandria on or after August 1982 through April 1983, it carried at least 45 shipments of various commodities for various shippers. The record does

[3] These filings appear to have been made as precautionary measures to comply with the Commission's regulation, General Order 23, 46 CFR 524, although respondents do not concede that the regulation applied to the arrangement. The filing in the South Atlantic tariff, incidentally, can be verified by inspection of that tariff in the Commission's tariff-filing office, and I take official notice of the filing. 46 CFR 502.226(a). The notations in the tariff do not show an agreement number as is customary with such filings' nor does the record show how the Commission's staff may have processed the filing of the memorandum under General Order 23. (Tr. 145, 146).

not show how many of these shipments were required by law to move on U.S. flag vessels.

DISCUSSION AND CONCLUSIONS

The issue to be determined is simply whether the evidence presented shows that respondents Farrell and Zim entered into and carried out a transshipment or other type of agreement subject to the provisions of section 15 of the Act without filing that agreement for approval as required by that law, or, at least, without filing that agreement with the Commission and obtaining exemption from the approval requirement, as provided by General Order 23, 46 CFR 524. The second basic issue is whether, if it is found that there has been a violation of section 15 or General Order 23, there is any legal impediment to an award of reparation to Prudential so that a remand or other proceeding designed to augment the record on the question of Prudential's alleged financial injuries would not be warranted.

CONTENTIONS OF THE PARTIES

Prudential contends that the evidence presented shows that Farrell and Zim entered into and carried out a cooperative working arrangement some time after June 1982, by which Farrell would tender cargo carried on Farrell's vessels from U.S. East Coast ports to ZEMS at the port of Haifa, Israel, where the cargo would be transshipped onto ZEMS feeder vessels for subsequent carriage to Alexandria, Egypt. Prudential contends that the correspondence between Farrell and ZEMS and relevant bills of lading show at least 45 instances of transshipment at Haifa pursuant to an agreement between Farrell and ZEMS, under which agreement rates charged by ZEMS to Farrell for the oncarriage of Farrell's containers remained constant throughout the entire period of approximately ten months. Prudential further contends that both Farrell and Zim published their own independent tariffs as of February 8, 1983, offering service from U.S. Atlantic Coast ports to Mediterranean ports in Egypt and are thus in competition with each other as well as with Prudential, and that both resigned from various conferences prior to filing their independent tariffs. Prudential contends that this evidence shows, contrary to respondents' contentions, that ZEMS had merely quoted rates to Farrell upon Farrell's inquiry to ZEMS in the event Farrell wished to book cargo on ZEMS' feeder vessels, that Farrell and ZEMS had an understanding that ZEMS would complete Farrell's service from U.S. East Coast ports to Alexandria by a transshipment arrangement at Haifa at agreed-upon rates. Prudential cites several leading decisions holding that section 15 is to be broadly construed, that carriers must file memoranda of agreements reached with other carriers, that a transshipment agreement is well recognized as falling within the scope of section 15, and that section 15 includes a variety of relatively

informal arrangements, whether oral or written.[4] Prudential argues that the Farrell/ZEMS agreement constitutes one fixing or regulating rates, controlling or regulating competition, or, at the very least, a cooperative working arrangement, which are three of the seven types of agreements specified by section 15. Even if the agreement were not one subject to section 15 as an understanding between two competing carriers falling under one of the three specified categories set forth in that law, Prudential argues that the agreement was at the very least a non-exclusive transshipment agreement which is required to be filed with the Commission in order to be exempted from the normal approval requirements applicable to most other agreements between carriers. The filing requirement is set forth in General Order 23, 46 CFR 524, but, according to Prudential, no such filing was made until September 12, 1983, although Farrell and ZEMS were transshipping Egypt-bound cargo in July of 1982. Accordingly, since the filing requirement is made mandatory if the exemption is to be granted under the regulation (46 CFR 524.1(b)), Prudential argues that respondents have violated both the regulation and the underlying statute, section 15. Therefore, Prudential argues that since respondents only filed their memorandum in an attempt to comply with the regulation after having carried out their agreement without approval, the Commission should subject the agreement to the approval process under section 15 and declare the filing and exemption to be nullities.

On the question of Prudential's entitlement to reparation (i.e., damages) for loss of net revenue which it would have earned on the 45 shipments carried by respondents under the alleged agreement, Prudential argues that there is no legal impediment precluding it from proving their injury. Prudential cites *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, 24 F.M.C. 934 (1982), a case in which reparation was awarded for injuries arising out of violations of section 15 and other decisions recognizing that carriers have standing to seek reparation under the Shipping Act, 1916, if injured by other carriers who have violated that Act. Prudential argues that but for the alleged agreement, Zim and consequently Farrell would not have been able to carry the 45 shipments of record to Alexandria because Zim, an Israeli carrier, would have been barred from carrying U.S.-flag-preference cargo, and Farrell, without a direct vessel call at Alexandria would not have been able to carry the cargo. Therefore, argues Prudential, Prudential was deprived of an opportunity to participate in the transportation of U.S.-flag-preference cargo and was directly affected by the alleged violation. Furthermore, it argues, an award of reparation is within the discretion

[4] Prudential cites, among others, *Volkswagenwerk* v. *F.M.C.*, 390 U.S. 261 (1968); *American Export Isbrandtsen Lines, Inc.*, 14 F.M.C. 82 (1970) (section 15 is to be broadly construed; memoranda and informal oral agreements are to be filed for approval); *Transshipment Agreement Between S. Thailand and U.S.*, 10 F.M.C. 199 (1966) (transshipment agreements have long been held to require filing under section 15); *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962); *Spanish Portuguese Trade—Unapproved Section 15 Agreements*, 8 F.M.C. 596 (1965) (section 15 applies to informal oral arrangements and understandings).

of the Commission which can consider factors such as culpability of respondents, enforcement of the Act, whether there was compensable injury, and whether an award of reparation would be consistent with previous application of the Act, citing *Consolo* v. *F.M.C.*, 383 U.S. 607 (1966); and *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474, 486 (1932). Finally, Prudential asks the Commission to assess penalties against respondents.

Respondents counter the above arguments as follows. Essentially, they argue that there was no agreement between Farrell and Zim, but merely a request for and receipt of a rate quotation in the event that Farrell wished to book cargo on ZEMS feeder vessels operating between Haifa and Alexandria. Thus, they argue that Farrell merely constituted a shipper when it booked cargo at Haifa on ZEMS feeder vessels or a "bailee" of the cargo when it tendered it to ZEMS at Haifa, and the only "agreement" consisted of ZEMS' bill of lading which it issued to Farrell at Haifa as it would do for any shipper. Thus, the booking of cargo carried by Farrell to Haifa on ZEMS feeder vessels was merely a contract of affreightment shown in the ZEMS bills of lading and ZEMS had no undertaking toward Farrell's original shippers nor did ZEMS hold out in any way to those shippers regarding this transportation. Respondents argue that a simple booking by one carrier or another cannot rise to the level of a section 15 agreement citing *Isbrandtsen Co.* v. *States Marine*, 6 F.M.B. 422 (1961), and as the second carrier, ZEMS, has no responsibility under Farrell's bill of lading as regards Farrell's shippers, there was no joint undertaking between the two carriers and no joint through service.[5] Respondents also argue that there was no special treatment accorded to Farrell by ZEMS, thereby taking the arrangement out of any of the seven categories set forth in section 15, that the arrangement between the two carriers promoted competition rather than destroyed it by making possible Farrell's reentry into the trade, and that there would be no regulatory purpose in requiring containerized carriers to file non-exclusive booking arrangements with feeder vessels, a requirement which would subject containership operations to unnecessary burdens when they were attempting to promote efficiencies by limiting port calls for oceangoing vessels.

As to the possibility that their arrangement might have constituted a non-exclusive transshipment agreement within the scope of General Order 23, respondents argue that even if it was such, these types of agreements are considered to be *de minimis* by the Commission, which exempts them from approval if they are filed with the Commission because of their minimal anticompetitive effects. Furthermore, the subject agreement is so

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[5] Respondents distinguish their arrangement from the joint holding out by the carriers in *Sea-Land Service, Inc.* v. *F.M.C.*, 404 F. 2d 824 (D.C. Cir. 1968) and *Alaska Steamship Co.* v. *F.M.C.*, 399 F. 2d 623 (9th Cir. 1968). Respondents also cite *IML Sea Transit Ltd.* v. *U.S.*, 343 F. Supp. 32 (N.D. Cal. 1972), aff'd 409 U.S. 1002 (1973), a case involving an F.M.C. non-vessel operating common carrier utilizing the services of a vessel-operating carrier that held that the former carrier was not subject to the Interstate Commerce Act although indirectly utilizing motor carriers certificated by the I.C.C.

inconsequential, argue respondents, that respondents had difficulty even filing a memorandum with the Commission under the regulation because their arrangement was too simple to be included in the form set forth in the regulation, which required explanations of apportionments of rates and other features of intercarrier cooperation which are missing from the subject arrangement between respondents.

Finally, respondents argue that even if it could be found that respondents have technically violated the informational filing requirements of General Order 23 (which they stoutly deny), there would nevertheless be no need for further evidentiary proceedings because reparation could not be awarded as a result of such a violation. This is because reparation can be awarded only if: 1) there is shown to be a violation of law; 2) the violation caused direct injury; and 3) the equities of the case supported the exercise of the Commission's discretion in making such an award. But respondents argue that there has been no violation of law, and even if there occurred a technical failure to file under General Order 23, that would not constitute a violation of law under section 22 of the Act. Next respondents argue that if Prudential has been harmed at all, it is because of Farrell's reentry as a competing carrier in the U.S./Alexandria trade, not because of a failure to file an agreement or a memorandum of such agreement, comparing this situation to that in *Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, 5 SRR 67, 77 (I.D. 1964), in which the presiding officer had found that complainant had suffered as a result of respondents' rates which were found to be lawful, not because of respondents' failure to file their agreement. Respondents contend that their failure to file an informational memorandum about a feeder service did not cause Prudential to lose business because Farrell's service would have operated with or without the filing. The cause of Prudential's losses, if any, would be that carrier's lack of ability to compete successfully. If complainant in *Puget Sound* was found not entitled to reparation when respondents had failed to file and obtain approval of their agreement for 2½ years, then there is even less reason to consider awarding reparation to Prudential on account of an innocuous non-exclusive transshipment agreement which does not even need approval to go into effect. Respondents cite a decision of the Supreme Court in *Brunswick Corp.* v. *Pueblo-Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), in which plaintiffs alleging antitrust violations were held not entitled to damages on account of antitrust violations which had resulted in increased competition. Respondents analogize that case to the present one in which they view their arrangement as restoring Farrell to the trade and providing additional service in competition with Prudential. Respondents contend further that Prudential's reliance on decisions holding that carriers have standing to seek reparation or to file complaints fails to acknowledge that there are stringent requirements of proof in reparation cases and that the decision to award reparation in *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, cited by Prudential, was based upon "an incredibly intricate

and convoluted network of conspiracies and unfiled agreements aimed directly at making it impossible for the complainant to serve the relevant trade.'' (Respondents' brief, p. 26). That case in no way resembles the relatively simple one here, argue respondents, and furthermore, awarding reparation in a case of this kind would lack equity and not be supportable under the criteria enunciated by the Supreme Court in *Consolo* v. *F.M.C.*, 383 U.S. 607, cited above. This is so, say respondents, because awarding reparation for failure to file a memorandum of a non-exclusive transshipment agreement (which their arrangement does not even constitute) which agreements are considered to be competitively inconsequential, not even requiring approval by the Commission, would not enhance enforcement of the Act, there is no compensable injury to Prudential, its injury, if any, being caused by Farrell's open competition, an award would not be consistent with previous application of the Act, and there is lacking culpability on the part of respondents in regard to their simple arrangement.

In its final brief, Prudential counters the above arguments. Prudential sees no merit to the contention that Farrell is merely a shipper *vis a vis* ZEMS since the question is whether there is an agreement between the carrier Farrell and the carrier ZEMS, which Prudential claims to be the case, as shown by telexes between the two carriers prior to the first sailing which included transshipment at Haifa. Prudential sees no relevance to the arguments regarding ZEMS' privity of contract or lack of same with Farrell's shippers or merit to any suggestion that ZEMS might be immune from some type of liability for its carriage of cargo for Farrell if shippers sued Farrell for loss or damage. Prudential contends again that competition was reduced, not increased because instead of having three carriers competing, Farrell, Zim, and Prudential, the agreement resulted in only two, Farrell and Prudential competing. Prudential replies further that even if the agreement was merely a non-exclusive transshipment agreement of less regulatory significance, it still was required to be filed under the Commission's regulation in order to enjoy the exemption from the approval requirement. Prudential argues again that the inability of respondents to comply with the form prescribed in General Order 23 only illustrates their failure to comply with that regulation in a timely fashion and further underscores a violation of section 15. Prudential counters respondents' arguments that they did not hold out jointly by contending that they had established, in effect, a through route and through rate, albeit not a joint rate, and agreed to share the revenue by allocating fixed payments to Zim's feeder service.

As to the question of its entitlement to reparation, Prudential refutes respondents' contentions that Prudential is precluded by various legal impedimenta. Prudential cites the *Saipan Shipping* case once again as showing that an award of reparation is permissible for violations of section 15 and distinguishes the decision in *Puget Sound*, 5 SRR 67, cited by respondents, as denying reparation only after all the peculiar facts were considered,

not as a matter of per se denial of such an award. Prudential also sees no bar to an award because of antitrust doctrines enunciated in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, cited above, 429 U.S. 477, and indeed quotes language from the Court's decision which it believes supports its contention that respondents committed acts which caused Prudential injury, which acts were made possible by respondents' violations of section 15 and General Order 23. Prudential sees no legal impediment to its seeking to prove its entitlement to damages based upon any case cited by respondents and does not read the decision in *Consolo* v. *F.M.C.*, cited above, as denying its entitlement on equitable grounds especially if Prudential can show loss of its expected profits resulting from violations of law. Nor does Prudential see that respondents were unaware of their status as competing carriers subject to filing requirements or that they had no way of knowing that they should have filed their transshipment agreement, especially in view of a previous transshipment agreement which Farrell's predecessor carrier (AEL) had filed with Zim, which agreement Prudential states to be similar to the alleged unfiled agreement in this case. Therefore, Prudential concludes that there is no automatic bar preventing it from proving its quantum of damages on account of respondents' confusion or their good-faith misunderstandings as to the filing requirements established by law.

APPLICABLE PRINCIPLES OF LAW

Since the basic issue to be determined is whether a particular agreement, understanding, or arrangement between respondents Farrell and Zim, whether substantial or inconsequential, is subject to the requirements of section 15 of the Act, I begin by quoting the statute by which such agreement must be evaluated. In pertinent part, section 15 of the Act states:

> 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, (1) fixing or regulating transportation rates or fares; (2) giving or receiving special rates, accommodations, or other special privileges or advantages; (3) controlling, regulating, preventing, or destroying competition; (4) pooling or apportioning earnings, losses, or traffic; (5) allotting ports or restricting or otherwise regulating the number and character of sailings between ports; (6) limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; (7) or in any manner providing for an exclusive, preferential or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements. . . . (arabic numerals added.)

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 evaluating agreements under the broadly-drafted expansive statute quoted above, furthermore, the Commission is not strictly bound by what the parties claim to be their intent, any ambiguities in agreements are construed against the parties who drafted them, and the Commission looks to the effects and consequences of such agreements, not merely the words which the parties insert into them. See discussion in *Armada/GLTL East Africa Service*, 26 F.M.C. 147 (1984) and cases cited therein.

Clearly the scope of section 15 extends beyond written agreements and covers oral, informal tacit or general agreements, understandings and arrangements. This is seen by the language of the statute itself as well as by previous decisions of the Commission. See, e.g., *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159, 182, 188 (1962). Furthermore, the reach of section 15 into such informal agreements or understandings does not depend upon how detailed and explicit an agreement is. Informal agreements sometimes may have greater anticompetitive effects than those reduced to detailed, written instruments. In *Unapproved Section 15 Agreements—South African Trade*, cited above, the Commission went to great pains to explain that "oral, tacit or general agreements, understandings and arrangements" are within the scope of section 15 and that "Section 15 is not concerned with formality but with the actual effect of the arrangement." 7 F.M.C. at 188–189. The Commission stated that oral, informal tacit or general arrangements or understandings may be "even more effective anti-competitive vehicles than formal, detailed and legally-binding agreements." 7 F.M.C. at 188. The Commission stated that Congress had enacted section 15 with provisions for exemptions from antitrust laws but with the understanding that the Commission would maintain "some form of effective government supervision," which objective would be frustrated "unless the Act were made broadly applicable to all agreements, understandings and arrangements including particularly the kind of informal arrangement which existed among the respondents here." 7 F.M.C. at 189–190. The Commission cited the Alexander Report, the basic document to the legislative history of the 1916 Act, which commented on the "tendency toward oral understandings, instead of written agreements, between the lines operating to and from ports of the United States," which oral understandings

were utilized by carriers because they were considered to be "safer" than written agreements and could be concealed from the public. 7 F.M.C. at 190. The Commission emphasized the broad scope of section 15 as follows:

> Accordingly, section 15 requires—as it has for the 45 years since enacted—the filing of a copy, or "if oral" a true and complete memorandum, of "every agreement" covering any of the wide range of anticompetitive activities therein mentioned, "or in any manner providing for an exclusive, preferential, or cooperative working arrangement." The word "agreement" is specifically defined to include "conferences, understandings, and other arrangements." (footnote omitted.) The language of the section thus clearly embraces every agreement, understanding, or arrangement, whether formal or informal, written or oral, detailed or general. The section has been applied in other cases to informal working arrangements not nearly so conspicuous as this one. 7 F.M.C. at 190–191.

The importance of filing memoranda of agreements or understandings was also emphasized by the Commission which stated that "failure immediately to file an anticompetitive agreement was intended by Congress to be a distinct violation of section 15." 7 F.M.C. at 191–192. The Commission stated that as to the language of section 15 that "[t]here is nothing perfunctory about the language in question. It does not say file if and when you plan to effectuate, nor does it indulge in the fantasy that an anticompetitive arrangement will be kept on ice and not effectuated . . . Effective government supervision, which was the cornerstone of the whole regulatory plan Congress embodied in section 15, would be greatly handicapped if not defeated were parties to anticompetitive agreements allowed to file them at their convenience, which could be never. Supervision cannot be effective, and may well be nonexistent, if the supervisor is uninformed." 7 F.M.C. at 192.

The Commission commented on respondents' arguments which had been raised as defenses or contentions favoring extenuation or mitigation of the violations of section 15. To respondents' contentions that their unfiled agreements promoted stability, aided the subsidy program, were in the public interest, and were not objectionable under section 15, the Commission responded that all of these arguments were "quite beside the point." This was because "[s]uch matters were for the [Commission], the agency administering the Shipping Act, to weigh and determine before and during the time the anticompetitive activities occurred. They were not for the respondents to decide themselves. Respondents prevented any [Commission] consideration by ignoring the eminently clear requirements of section 15 and thus frustrated it for years. We think it impossible for anyone now to state that what transpired between respondents was all well and good but even if this were not so, the impact of the statute manifestly cannot be

made to depend on the *ex post facto* chance that the violation was not harmful. Section 15 may as well be scrapped as to attempt to administer it in this fashion.'' 7 F.M.C. at 196–197.

Section 15 is therefore broadly drafted, it covers oral, informal understandings and arrangements, and it is not an excuse for failure to file that the agreement was beneficial, approvable, or not harmful under the standards of section 15. These matters may bear upon the approvability of such agreements or perhaps on the question of assessing penalties but the violation of section 15 for failure to file stands.[6]

As for proving the existence of an agreement, understanding, or arrangement, the Commission has recognized that it is not necessary to pile up clear and convincing documentary evidence and testimony. By the nature of many such agreements, they often are created in secrecy with no intention of public disclosure. Thus, an agreement may be proven merely by a few contemporaneous documents notwithstanding later oral testimony disavowing any such agreement. As the Commission stated in *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, 7 F.M.C. 337, 342–343 (1962):

> Considering the penalty prescribed by law for illicit anticompetitive activity it is not to be expected that proof of such activity will be obtained either easily or in abundance. In such cases the solid evidence may consist of no more than a few contemporaneous memoranda or other documents. These, however, are and of necessity must be entitled weight, and far greater weight than oral testimony given at some later date by those who are under investigation and whose ''explanations'' of the documents simply cannot be squared with their contents . . . In two other recent cases involving unlawful section 15 activity, we have had occasion to rule on the acceptance of testimony which is contradicted by contemporaneous documents or by logic. (Case citations omitted.) We cannot regard such testimony as credible.

Proof of an unfiled agreement may sometimes require ''the putting together of numerous individual evidentiary items so as to construct an integrated whole that will provide the basis for a conclusion.'' *Unapproved Section 15 Agreements—South African Trade*, cited above, 7 F.M.C. at 182–183 (1962). Actual conduct may also be used to prove the existence of an underlying or preceding agreement or understanding. *Maatschappij ''Zeetransport'' N.V. (Oranje Line)* v. *Anchor Line Limited*, 6 F.M.C. 199,

[6] Similarly, it is no excuse for failure to file to contend that the violation was merely a ''technical'' one or that respondents' motives were good. The Commission has often held that section 15 ''affords little room for so called 'technical' violations'' and that ''it is not necessary under section 15 to impute an evil motive. For the purposes of this statute nonfeasance is as objectionable as malfeasance. There is little, if any, excuse for failing to file . . . We cannot view such failure lightly no matter what the parties' state of mind might have been especially when . . . easy and safe courses are available to them.'' *Unapproved Section 15 Agreement—Coal to Japan/Korea*, 7 F.M.C. 295, 303–304 (1962); *Investigation, Practices, Etc. N. Atlantic Range Trade*, 10 F.M.C. 95, 110–111 (1966).

207–210 (1961). Proof of the existence of an unfiled agreement may be shown by circumstantial evidence and reasonable inferences to be drawn therefrom. *Saipan Shipping Co., Inc.* v. *Island Navigation Co., Ltd.*, cited above, 24 F.M.C. at 980 ("The existence and the substance of an agreement may be proven through inferences from circumstantial evidence that are 'reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry'. . . .") Indeed, the Commission has even found the existence of an agreement on the basis of two interoffice memoranda and surrounding circumstances, e.g., resignation of a carrier from a conference which continued to consult with the carrier on rate changes, notwithstanding testimony denying the existence of any such agreement. *Unapproved Section 15 Agreement—North Atlantic Spanish Trade*, cited above, 7 F.M.C. at 340–341. Interestingly, the same standards regarding use of circumstantial evidence and inferences to be drawn therefrom prevails in the antitrust field to prove the existence of concerted action. See II Kintner, *Federal Antitrust Law*, section 9.17; *Interstate Circuit, Inc.* v. *U.S.*, 306 U.S. 208 (1939); *American Tobacco Co.* v. *U.S.*, 328 U.S. 781, 809–810 (1946).

It cannot be seriously disputed that the evidence in this case shows that respondents Farrell and Zim had discussions leading to an arrangement by which Farrell would book cargo for re-loading at Haifa on Zim's feeder service known as ZEMS for subsequent carriage to Alexandria. Contemporaneous telexes between Farrell's New York and Genoa offices and between Farrell and ZEMS show that negotiations with Zim began in the spring of 1982 and culminated in an arrangement. The contemporaneous correspondence shows that on June 17, 1982, there had been an acceptance by Farrell of ZEMS' offer to carry Farrell's containers at the lumpsum rates of $850 per 20-foot container and $1,600 per 40-foot container, full from Haifa to Alexandria and return of empty containers from Alexandria to Haifa on liner terms at both ports. At the same time, furthermore, Farrell's Genoa office advised its agents in Alexandria that Farrell would re-commence service to Alexandria with Farrell shipping its containers from Haifa to Alexandria aboard ZEMS feeder vessels. On July 19, 1982, moreover, Farrell accepted ZEMS' quotation of rates of $1,250 for 20-foot and $2,200 for 40-foot containers where carriage was to be of full containers in both directions between Haifa and Alexandria. The record also shows that following the consummation of the negotiations, Farrell advised all its branch offices that commencing with the sailing of the EXPORT FREEDOM, Voyage 94, full container cargo for Alexandria would be acceptable for delivery via feeder vessels from Haifa to Alexandria, that only freight pre-paid cargo would be accepted, and that cargo from ports other than New York, Baltimore, Philadelphia and Norfolk would have to be cleared by Farrell's New York office prior to booking. Thereafter the record shows at least 45 shipments to Alexandria carried by Farrell with re-loading at Haifa and at the rates quoted and accepted by Farrell for a period of

10 months or so. The record also shows that Farrell's agents were shown on ZEMS' bills of lading whenever Farrell's cargoes were re-loaded at Haifa for carriage to Alexandria and there is no evidence that ZEMS undertook any obligation directly with Farrell's shippers or that ZEMS ever knew in advance who Farrell's American shippers might be or what rates Farrell would be charging those shippers under Farrell's tariff which offered the through service from U.S. ports to Alexandria. This arrangement was also nonexclusive, i.e., Farrell was not required to employ ZEMS exclusively and ZEMS was similarly free to carry cargo for shippers other than Farrell. Furthermore, Farrell's use of ZEMS' feeder vessels appears to have been on a space-available basis and on occasion Farrell's cargo might not have been carried on a particular ZEMS vessel which was full. Since April 1983, furthermore, Farrell has utilized a feeder service other than ZEMS, which service operates from Italy to Alexandria and is considered more suitable to Farrell's needs than was the ZEMS service. The record also shows that the purpose of the arrangement with ZEMS was to enable Farrell to return to the U.S.-to-Alexandria trade after Farrell had been forced to discontinue service to Alexandria after December 1981 when Farrell ceased using self-sustaining containerships, i.e., ships which could load and unload containers at ports like Alexandria which did not possess shore-based container cranes. There is no evidence that either respondent Farrell or Zim intentionally conspired to violate either section 15 of the Act or the requirements of General Order 23 requiring an informational filing of non-exclusive transshipment agreements. Farrell and Zim apparently believed that a carrier's use of another carrier's feeder service did not constitute a transshipment agreement under General Order 23 or any other type of agreement within the scope of section 15. However, after this litigation was underway for some time, on September 12, 1983, Farrell did file a copy of a Memorandum of Rates and Terms regarding the non-exclusive feeder service arrangement with ZEMS as compliance with General Order 23, 46 CFR 524(b), and inserted a notice concerning the feeder service with ZEMS and another carrier in its North Atlantic tariff, effective October 27, 1983.

Very basically, to constitute an agreement falling within the scope of section 15, the above agreement, understanding, or arrangement, needs three elements: "(1) an agreement among (2) common carriers by water or other persons subject to the Act (3) to engage in anticompetitive or cooperative activity of the types specified in section 15." *Hong Kong Tonnage Ceiling Agreement,* 10 F.M.C. 134, 140 (1966).

In this case, the focus of contention appears to be not so much on the parties to the above understanding or arrangement between Farrell and ZEMS but on the type of activity involved. Thus, there appears to have been some type of agreement, whether it is characterized as informal understanding, a non-exclusive feeder service, or merely a series of contracts of affreightment by which Farrell merely booked cargo on ZEMS. Neverthe-

less, respondents suggest that their arrangement is simply one of booking in which Farrell acts as a shipper *vis a vis* ZEMS' feeder service and thus lies outside the scope of section 15.

As I explain more fully below, I find the arrangement to be a non-exclusive transshipment agreement and, furthermore, one that is even less complicated than the relatively innocuous agreements defined by General Order 23, which merely requires informational filing and exempts such agreements from the normal approval requirements of section 15. As the Commission's discussions in *Transshipment Agreement Between S. Thailand and U.S.*, 10 F.M.C. 199 (1966), and *Transshipment Agreement, Indonesia/United States*, 10 F.M.C. 183 (1966) show, transshipment agreements have long been held to be subject to the requirements of section 15. Moreover, even though the cited cases involved transshipment agreements with exclusivity features, unlike the one in this case, the Commission made clear that such agreements have always been subject to section 15 even if they are non-exclusive, citing a decision of the Commission in 1935 (*Intercoastal Rates From Berkeley*, 1 U.S.S.B.B. 365, 367), cited in 10 F.M.C. at 211. The Commission specifically rejected the arguments of one carrier which had contended that no transshipment agreement is a section 15 agreement, commenting that "[t]he transportation of property to and from the United States by means of transshipment arrangements is, in fact, a major element in the foreign commerce of the United States" and "[t]o remove it from regulatory control would obviously have a profound impact on our foreign commerce." 10 F.M.C. at 211. Furthermore, the Commission stated that although "some transshipment agreements contain exclusive features which prohibit either side dealing with other carriers in through shipments in the particular trade . . . [o]thers do not contain the exclusive feature" and "[c]ontrary to the contention of Holland-America, all such agreements have been held to fall within section 15," since "such agreements are invariably 'cooperative working arrangements' under section 15" which frequently deal with rate fixing and exclusive dealings. 10 F.M.C. at 211. The answer to the contention that some transshipment agreements have minimal competitive impacts (such as non-exclusive agreements) was provided in the same decision. Thus, the Commission suggested that although the innocuous types of agreements might fall under section 15, they could enioy some type of exemption or exclusion from the normal requirements following an appropriate rulemaking proceeding. 10 F.M.C. at 221. The Commission followed this suggestion with just such a rulemaking proceeding, Docket No. 68–4, *Exemption of Nonexclusive Transshipment Agreements From the Approval Requirements of Section 15*, Shipping Act, 1916, 10 SRR 148 (1968). Of course, the very issuance of General Order 23, which relaxed requirements for non-exclusive transshipment agreements from full filing and approval to informational filing in a memorandum and in tariffs only, illustrates that the Commission has jurisdiction over such agreements under section 15.

It is clear, then, that the statute is broadly drafted and that if the subject agreement falls within one of the seven enumerated categories set forth in section 15, as quoted above, it is subject to the requirements of that law. Furthermore, it is clear that a nonexclusive transshipment agreement is at the very least considered to be a "cooperative working arrangement," category number 7 in the statutory list. This is not to say that every agreement between carriers falls within section 15. For example, the Commission has found simple landlord-tenant leases, occasional bookings by one carrier with others, joint sharing of office space, one-shot settlements, and strictly routine day-to-day transactions among carrier members of conferences not to be subject to section 15.[7] However, transshipment agreements, even non-exclusive ones, have been held subject to that law regardless of their minimal anticompetitive effects, although because of such slight effects, they are relieved of the normal approval requirements.

Faced with a history of regulation and filing of non-exclusive transshipment agreements under section 15 and General Order 23, respondents present arguments, which I have summarized above, attempting to distinguish their agreement from other non-exclusive transshipment agreements by describing it as merely a booking arrangement in which Farrell was the shipper or "bailee" of cargo and ZEMS the carrier, the latter having no privity with or responsibility to Farrell's American shippers and therefore no joint undertaking toward Farrell's shippers. Respondents go on to argue, furthermore, that their arrangement gave no special privileges to Farrell, was pro-competitive, had little impact on competition, and that even if it should have been filed under General Order 23, it is so simple an agreement that respondents had trouble completing the informational filing form set forth in that regulation. I find these arguments to be rather weak and non-persuasive.

As to the argument that as to ZEMS, Farrell was merely a shipper or "bailee" of cargo and that the bills of lading issued by ZEMS reflect this situation, this argument fails to impress for a number of reasons. In other contexts, carriers attempt to find their operations exempt from regulation by calling themselves by other names. For example, non-vessel operating common carriers by water have designated themselves as shippers' "agents" rather than carriers and have even disavowed cargo liability for cargo loss or damage or they have called themselves some other thing rather than what they truly are. The reason for these erroneous self-designa-

[7] See *Levatino & Sons, Inc.* v. *Prudential-Grace Lines, Inc.*, 18 F.M.C. 82, 108–112 (1984) (carrier's simple lease or other arrangement with warehouse company for additional terminal space); *Agreement No. 9955–1*, 18 F.M.C. 426, 483 (1975) (occasional, ad hoc bookings by one carrier on vessels of another without repetitive, through-movement patterns); *Crown Steel Sales, Inc. et al* v. *Port of Chicago*, 12 F.M.C. 353, 359, 376–377 (1967) (sharing of office space and administrative services); *Continental Nut Company* v. *Pacific Coast River Plate Brazil Conference*, 9 F.M.C. 563, 570 (1966) (routine, day-to-day rate adjustments or other transactions by conference members do not require separate approval under section 15); Docket No. 83–28, *In Re Agreement Nos. 10457 etc.*, Order Partially Adopting Initial Decision 26 F.M.C. 191 (February 29, 1984) (modifications of proposed agreement in response to protests in formal proceeding not a section 15 agreement).

tions is usually to avoid some requirement of law, e.g., tariff-filing, avoidance of liability as a carrier or amenability to suit under section 22 of the 1916 Act, or avoidance of section 15 consequences. Thus, in *Possible Violations of Section 18(a) of the Shipping Act, 1916,* 19 F.M.C. 44 (1975), respondent claimed that it was not a carrier but a "shipper's agent" not subject to tariff-filing requirements. However, respondent was found to be a carrier by virtue of what it actually did, not what it named itself, and liability as a carrier was found to be imposed on respondent as a matter of law. Similarly, in *Capitol Transportation, Inc.* v. *United States,* 612 F. 2d 1312 (1st Cir. 1979), Capitol, a nonvessel operating common carrier, argued that it was not amenable to suit under section 22 of the Act and that it was really only a "trucker" and "household mover" rather than a consignee *vis a vis* the underlying vessel-operating carriers who were holding Capitol liable for unpaid demurrage bills. The Court upheld the Commission's decision that Capitol was a carrier as well as a consignee subject to liability for payment of demurrage under the underlying vessel-operating carriers' tariffs. This case illustrates not only that a carrier's status is determined by what it does and how it holds itself out and not by what it claims to be or names itself, but also that a common carrier may be a common carrier for some purposes and a shipper or consignee for other limited purposes. In this regard it has long been recognized that a non-vessel operating common carrier by water and sometimes a vessel-operating carrier may take the position of shipper *vis a vis* another carrier, although maintaining its basic nature as a common carrier towards its own shippers. See, e.g., *Puget Sound Tug and Barge* v. *Foss Launch and Tug Co.,* 7 F.M.C. 43, 47 (1962); *Bernhard Ulmann Co., Inc.* v. *Porto Rican Express Co.,* 3 F.M.B. 771, 775–776 (1952); cf. *Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *Acme Fast Freit, Inc.,* 336 U.S. 465, 468, 476–477 (1949), for similar holdings as to comparable non-equipment operating carriers under the Interstate Commerce Act; see also *Isbrandtsen Co.* v. *States Marine,* 6 F.M.B. 422 (1961), a case illustrating how a vessel-operating carrier needing space to carry out its carrier obligations to its own shippers, can become a shipper itself when it books cargo on another carrier's vessels. The fact that a carrier may be shown as shipper or consignee on another carrier's bill of lading may determine the relationship between the two carriers but does not change the first carrier's status as a common carrier *vis a vis* the first carrier's shippers. Indeed, in some transshipment agreements, one of the carriers transporting the through movement on a relatively short leg of the through transportation route may not even issue a bill of lading. *Transshipment Agreement Between S. Thailand and U.S.,* cited above, 10 F.M.C. at 205, 209.

Nevertheless, respondents maintain that Farrell was merely a shipper or "bailee" of its shipper's cargo when it tendered the shipment to ZEMS at Haifa, an argument which, I find, does not render Farrell something

other than a common carrier as regards its own shippers to whom it holds out to provide through transportation from U.S. ports to Alexandria under Farrell's own bill of lading and rates. However, respondents also contend that ZEMS has no privity with Farrell's shippers and has no joint undertaking with Farrell toward Farrell's shippers. This argument, too, fails to persuade. In some transshipment agreements, one of the carriers handling a short leg of the voyage issues no bill of lading at all, merely some type of dock receipt. The only bill of lading issued to cover the through transportation and to establish the carrier's through liability as a carrier is that of the carrier transporting the cargo over the longer leg of the through route. That is precisely what happened in *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 205, 209. As the Commission stated:

> In most, if not all transshipment agreements either the originating carrier or the oncarrier issues a through bill of lading for the whole trip, but this has never been held to prevent the agreement being subject to section 15. 10 F.M.C. at 209.

So, too, the arguments that Farrell is somehow only a shipper or "bailee" of cargo in its relationship with ZEMS and that, therefore, there is no transshipment agreement between two carriers as far as Farrell's shippers are concerned is extremely unpersuasive. Not only is the through transportation from U.S. East Coast ports to Alexandria carried under Farrell's bills of lading and under Farrell's rates but respondents themselves proclaim that their agreement was beneficial because it restored Farrell to the Alexandria trade, obviously not as a shipper or "bailee" but as a carrier. Thus, in their own brief, respondents refer to "Farrell's use of ZEMS' feeder vessels to complete its undertaking to shippers" (brief, p. 2), state that "the simple arrangement promoted competition by making possible Farrell's reentry into the relevant trade" (brief, p. 7), reiterate that "Farrell's use of ZEMS' feeder service increased competition by bringing Farrell back into the Alexandria trade a year after it had discontinued its direct service" (brief, p. 11), that "Farrell alone assumed the sole responsibility for the carriage of the subject shipments from U.S. ports of origin to Alexandria" (brief, pp. 11 and 15) and that "Farrell has every right to compete with Prudential in the U.S. to Alexandria trades and that Farrell has the right, if it chooses, to compete by serving Alexandria by feeder vessels" (brief, p. 20). All of these arguments would seem to indicate that it is a carrier, not a shipper or "bailee" which has reentered the Alexandria trade and that it has done so by means of an arrangement entered into with ZEMS, making use of the ZEMS feeder vessels.[8]

[8] Nor does respondents' argument that Farrell became a mere "bailee" of cargo when it tendered the cargo to ZEMS' feeder vessels at Haifa sound plausible in view of respondent's reiteration of the point that Farrell reentered the trade to provide services to Alexandria and undertook "sole responsibility for the carriage of

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Similarly, respondents' argument that Farrell had no joint undertaking with ZEMS, joint rate, or joint through service because ZEMS acted merely as a carrier toward Farrell, a shipper on the Haifa-to-Alexandria leg of the transportation, doesn't persuade. As seen, in *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 205, 209, one carrier to a transshipment arrangement may not even issue a bill of lading and it may operate solely between two foreign ports as part of its contribution toward the other carrier's holding out to provide a through service, yet the foreign carrier has been found to be a carrier operating in U.S. foreign commerce and to be a party to a transshipment agreement. The determination that two carriers had entered into an agreement that a second carrier would complete the service and voyage of the first carrier does not rest on the need to find that the second carrier has direct obligations under a bill of lading or otherwise towards the first carrier's shippers. Nor does respondents' contention that there was no through route, joint through service, or joint rate show that respondents had no agreement subject to section 15. Carriers may enter into a variety of arrangements, establishing joint rates, explicit through routes, single-factor rates, or make other arrangements. Thus, in the cases cited by respondents, *Sea-Land Service Inc.* v. *F.M.C.*, 404 F. 2d 824 (D.C. Cir. 1968); and *Alaska Steamship Co.* v. *F.M.C.*, 399 F. 2d 623 (9th Cir. 1968), the courts held that two carriers had lawfully established through routes and joint rates under the Interstate Commerce Act and could therefore file their tariffs with the I.C.C. under a particular section of that Act dealing with Alaska. The case had nothing to do with section 15 of the Shipping Act, and in each instance one of the carriers was a motor carrier. In another case cited by respondents, *IML Sea Transit Ltd.* v. *U.S.*, 343 F. Supp. 32 (N.D. Cal. 1972), aff'd 409 U.S. 1002 (1973), an F.M.C.-regulated non-vessel operating common carrier (NVOCC) chose to utilize an underlying service provided by a water carrier which included inland pickup and delivery. The court found that the NVOCC was not subject to the Interstate Commerce Act. The point is that two carriers may establish a through service, directly or indirectly, expressly or impliedly, and may offer shippers joint rates, single-factor rates, or combinations of local rates. See, e.g., discussion in *U.S.A.* v. *F.M.C. (Gulf-U.K. Rate Agreement et al.)*, 15 SRR 851, 875–877 (D.C. Cir. 1980); *Intercoastal Investiation*, 1 U.S.S.B.B. 400, 445–446 (1935); *Inland Waterways Corp.*, 2 U.S.M.C. 458, 463 (1940); *Thomp-*

the subject shipments from U.S. ports of origin to Alexandria." One wonders what Farrell's American shippers would think if, in case of loss or damage between Haifa and Alexandria, they were told by Farrell that Farrell had acted only as another shipper or a "bailee" for their cargo and could only be held liable if found negligent under the law of bailments. As I note later, furthermore, Farrell has published notice in both its North Atlantic and South Atlantic tariffs (FMC 135 and 136) that it has an arrangement with ZEMS for a feeder service out of Haifa as well as an arrangement with another carrier out of Naples. Such tariff publishing constitutes a public holding out as a carrier providing a through service with through liability to Alexandria. If Farrell believed it really was only a shipper out of Haifa and ZEMS had no agreement under Farrell's tariff, perhaps it would have been better not to file the notice in Farrell's tariff section entitled "Transshipment Agreements," since a carrier is supposed to publish accurate information in its tariff.

son v. *U.S.*, 343 U.S. 549, 557 (1952) ("A through route is a continuous line of carriage formed by an arrangement express or implied between connecting carriers.")

Finally, although respondents contend that their filing of a memorandum of their arrangement and a notation in Farrell's tariff was done as a precautionary measure without conceding that the arrangement constituted a non-exclusive transshipment agreement within the meaning of General Order 23, as of October 27, 1983, Farrell's North Atlantic tariff (FMC 135) contains the standard language concerning transshipment agreements set forth in the regulation and refers to its feeder services with ZEMS out of Haifa and another carrier out of Naples. (Ex. 4). The language in the tariff states:

> The rules, regulations, and rates in this tariff apply to all transshipment arrangements between the publishing carrier or carriers and the participating connecting or feeder carrier. Participating connecting or feeder carriers, party to transshipment arrangements, have agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement on file with the Federal Maritime Commission. (Tariff, 1st rev. page 22–A).

Similar language and reference to the two carriers appear in Farrell's South Atlantic tariff (FMC 136) effective February 8, 1984, filed January 10, 1984, a fact of which I take official notice. 46 CFR 502.226(a).

Whether filed as a precautionary measure or without prejudice to respondents' position, the fact is that a tariff represents a public holding out and it has long been considered to have the force and effect of law. *Penna. R.R. Co.* v. *International Coal Co.*, 213 U.S. 184, 187 (1913); *Farr Co.* v. *Seatrain*, 20 F.M.C. 411, 414, 417 n. 8 (1978). Thus, although normally a belated compliance with law or similar adjustment is not taken as evidence of guilt, a filing in a tariff has special significance. Thus, it is difficult to argue that there is no transshipment agreement involving ZEMS' participation and willingness to observe rules and routings established in Farrell's tariffs while at the same time Farrell publicly announces an agreement in its tariffs on which shippers are entitled to rely. If respondents really believed that their arrangement did not constitute a nonexclusive transshipment agreement, perhaps it would have been better for them not to file tariff notations and references so that the public would not be misled. If proven wrong, they would be no worse off since they did not file anything under General Order 23 anyway until September 12, 1983, apparently, and have in any case operated without filing or approval.

But, argue respondents, their agreement confers no special privileges or advantages, is non-exclusive, and pro-competitive, and has little outside anticompetitive impact. These arguments fail to persuade that respondents had no agreement. In reality, they bear more on the question of approvability of their agreement rather than on jurisdiction over the agreement under

section 15. It would be well to recall briefly what I discussed earlier about section 15, namely, that it is a broadly drafted statute that should not be narrowly construed. Moreover, as the Supreme Court admonished the Commission in *Volkswagenwerk* v. *F.M.C.*, cited above, 390 U.S. at 276, Congress intended the Commission to scrutinize a "myriad of restrictive agreements in the maritime industry" and also cautioned the Commission not to read into the statute language that these agreements must somehow always affect competition. In other words, one determines whether an agreement falls within the scope of section 15 by evaluating that agreement under the seven categories set forth in that law and not by determining that the agreement is anticompetitive or violates antitrust laws, etc. As the Court stated (390 U.S. at 275):

> To limit section 15 to agreements that "affect competition," as the Commission used that phrase in the present case, simply does not square with the structure of the statute.

Furthermore, the Court quoted language from the legislative history to the 1916 Act (the Alexander Report), as I have previously noted, showing that Congress was motivated in enacting section 15 by the near unanimous support for the idea that the Commission would be maintaining supervision of contracts, agreements, and arrangements and "the general supervision of all conditions of water transportation which vitally affect the interests of shippers." 390 U.S. at 275. Similarly, it has been recognized that although there are many agreements subject to section 15 which obviously violate antitrust laws (e.g., rate-fixing, pooling, restricting service) and indeed may be per se violations of those laws, section 15 stands on its own feet and must he read in the light of its own words and purposes. See, e.g., *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 213 n. 8 ("To the extent that the antitrust laws might not be applicable [to certain described conduct]. If they are considered to be applicable, this does not solve the problem since Congress intended the section 15 standards to apply to situations falling within its coverage, rather than the antitrust laws."); *Agreement Nos. 9718–3 and 9731–5*, 16 SRR 1087, 1112–1113 n. 26; (I.D. reversed on other grounds, 19 F.M.C. 351 (1976)). The question of how anticompetitive an agreement may be or how serious are the inroads made upon antitrust laws may, however, be relevant to the question of the degree of proof and justification necessary for approval. See *Agreement 9951–1*, cited above, 18 F.M.C. at 462.

In any event the point here is that it does not matter for purposes of determining whether respondents' non-exclusive transshipment agreement is a cooperative working arrangement falling within section 15 of the Act that the purpose or effect of the agreement was pro-competitive. That fact may be relevant to the question of approvability, however. Moreover, as discussed earlier, the Commission has already found that even non-exclusive transshipment agreements fall under section 15, innocuous though

some of them may be, and that the proper course for carriers is not to ignore the jurisdiction of section 15 but to take advantage of any relaxation in law which the Commission may grant and has granted under General Order 23 as regards such agreements. *Transshipment Agreement Between S. Thailand and U.S.*, cited above, 10 F.M.C. at 211, 221.[9] Indeed, following the decision in the case cited, the Commission did issue the regulation which relaxed the requirements of section 15 as to non-exclusive transshipment agreements. Significantly, in the rulemaking proceeding which culminated in the issuance of General Order 23, 46 CFR 524, the Commission specifically rejected arguments similar to those now made by respondents, namely, that the Commission lacks jurisdiction over non-exclusive transshipment agreements because they are not "anticompetitive." The Commission responded by finding that these agreements, while not anticompetitive in the same sense as exclusive transshipment agreements, nevertheless conferred an "advantage" on carriers entering into them because the agreements, if approved, enabled the carriers to provide a service that they would not otherwise be able to provide lawfully. In this regard the Commission stated: [10]

> Although nonexclusive transshipment agreements may not be "anticompetitive" in the same sense as exclusive transshipment agreements, they nevertheless have an impact upon competition to the extent that those entering into such agreements have an advantage inasmuch as they are able to provide a service which those not entering into such agreements could not lawfully provide in the absence of an approved agreement. The Supreme Court of the United States has recently stated that the Commission's scope of authority under section 15 of the Shipping Act extends to all agreements between carriers falling within the literal language of section 15 and not exempted by the Commission (see *Volkswagenwerk* v. *FMC*, decided March 6, 1968, slip opinion pages 11–15).
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> Therefore, the suggestion by the parties of the deletion of language in section 524.1 which indicates that nonexclusive transshipment agreements are subject to section 15 unless exempted must be rejected.

[9] This refutes another argument of respondents, namely, that to require carriers to file non-exclusive transshipment agreements which may include arrangements with feeder vessels assisting containerized lines to offer efficient services from certain ports designated "load centers" would seriously hamper the development of modern services. All that the carriers need do under the present regulation is file memoranda and notices in their tariffs. The Commission is even considering relaxing that requirement further under current law. See Docket No. 83–43, *Exemption of Nonexclusive Transshipment Agreements, etc.*, Notice of Proposed Rulemaking, 48 Fed. Reg. 45270; October 4, 1983. The Commission may even consider exempting such agreements from informational filing under the new Shipping Act of 1984. Incidentally, I may officially notice that there are well over 1,000 non-exclusive transshipment agreements filed with the Commission under General Order 23. Apparently these filings have not prevented carriers from improving their services.

[10] Docket No. 68–4, *Exemption of Nonexclusive Transshipment Agreements From the Approval Requirements of Section 15, Shipping Act, 1916*, 33 Fed. Reg. 7116 (May 14, 1968), 10 SRR 148, 149.

Therefore, respondents' argument that their agreement is procompetitive is irrelevant to the question of jurisdiction under section 15. Moreover, their argument that the agreement confers no special privileges or advantages because it is non-exclusive and because Farrell was treated like any other shipper by ZEMS on a space-available basis would seem to have been refuted by the Commission in the many decisions cited above. However, regardless of those decisions, examination of the subject agreement reveals "special privileges or advantages" (category no. 2 in the list of the types of agreements set forth in section 15). That is because Farrell and ZEMS negotiated special lumpsum rates per container and Farrell enjoyed the benefit of those rates for a considerable length of time (10 months or more of actual shipments) without change. Not only did the rates remain constant but they did so regardless of the commodities involved, a situation that one knowledgeable witness (Morris of Prudential) considered to be unusual in the subject trade. (Tr. 53–54).[11] Indeed, in a non-exclusive transshipment agreement once in effect between Zim and a predecessor carrier of Farrell's, American Export Lines, Inc., by which AEL offered service from U.S. ports to ports in Italy and Yugoslavia via transshipment at Israeli ports on Zim vessels, which agreement was filed for approval by the parties, AEL did not even enjoy the right to have fixed rates during the life of the agreement but paid Zim "at rates to be agreed upon by the parties."[12]

I conclude, therefore, that the subject agreement is at least a cooperative working arrangement (category no. 7) and that it confers special privileges or advantages (category no. 2) as the Commission has held in its rulemaking proceeding leading to the issuance of General Order 23, and on the basis of evidence showing that Farrell enjoyed fixed lumpsum rates which ZEMS had charged it over a considerable length of time.

Finally, respondents contend that even though they ultimately filed a memorandum of their arrangement (and a notation in the Farrell tariff) as required by General Order 23, this was done only as a precautionary step and not because they believed that their agreement really constituted a non-exclusive transshipment agreement within the meaning of that regulation. Respondents point out the difficulty they encountered in trying to comply with the reporting form set forth in the regulation. For example, the form requires that the connecting carrier must concur in the publishing carrier's tariff and calls for an explanation of how the through rate is apportioned or shared between the publishing and connecting carrier. As

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[11] "Tr." refers to the pages of the stenographic transcript of the hearing.

[12] The agreement was designated as No. 10254, and was designated a "Slot Charter Agreement." In addition to providing for rates to be negotiated from time to time, it did not require Zim or AEL to use each other's services and Zim would carry for AEL only on a space-available basis. It specified that cargo moving under the agreement was to be carried pursuant to AEL's tariffs and bills of lading but that Zim would be responsible for loss or damage for such cargo occurring on Zim's vessels. Agreement No. 10254 was approved by the Commission on January 25, 1977, and was cancelled by Farrell on August 27, 1982. 47 Fed. Reg. 39612 (September 8, 1982). A copy of the agreement is attached as an appendix to this decision.

mentioned earlier, furthermore, respondents claim that they had established no through route or joint responsibility anyway so that there was not even an agreement under section 15 at all, only a single responsibility by Farrell to carry to Alexandria with the use of ZEMS' feeder vessels to complete Farrell's through undertaking. Prudential, on the other hand, as discussed earlier, contends that respondents' difficulties in complying with the regulation only illustrate their violation of that regulation and hence a violation of section 15 since they operated without even filing anything with the Commission and therefore could not enjoy the exemption from the normal approval requirements granted to parties complying with General Order 23.

I have already found that an agreement existed between Farrell and ZEMS which is generically a non-exclusive transshipment agreement, even if it does not have all the classic features set forth in General Order 23, and that the agreement by Zim to assist Farrell by completing its service to Alexandria and charging Farrell unchanging lumpsum rates constitutes a transshipment agreement notwithstanding Zim's remoteness from Farrell's American shippers. It does not really matter whether the subject agreement qualified under General Order 23 as a classic agreement with all the features set forth in that regulation for purposes of determining past violations of law by respondents. If their agreement did not have all the features of General Order 23 agreements, then respondents should have filed it for approval under section 15, as did AFL and Zim with respect to Agreement No. 10254. Not having done so and having carried out this agreement, respondents have therefore violated section 15. If their agreement did qualify under General Order 23, then that regulation makes it mandatory that they file it for informational purposes in order to obtain the exemption from the normal approval requirements of section 15. As the regulation states in no uncertain terms:

> Compliance is mandatory and failure to meet these filing requirements will result in the party desiring exemption remaining bound by the approval requirements of section 15 of the Shipping Act, 1916. 46 CFR 524.1(b).

Prudential is therefore correct in arguing that failure to file the agreement under the regulation subjects the agreement to the same standard as any other unfiled agreement, i.e., it must be filed for approval and the parties cannot carry it out prior to obtaining approval. Hence, whether the subject agreement was or was not subject to General Order 23, the failure to file anything until September 12, 1983, when respondents filed an informational memorandum with the Commission's Secretary, constituted a violation of section 15. (Furthermore, it is not strictly correct to argue, as do respondents, that a violation of a regulation cannot constitute a violation of the Act for purposes of reparation. The Commission has held to the contrary in *Tractor and Farm Equipment Ltd.* v. *Waterman Steamship Corp. and*

Cosmos Shipping Co., Order on Appeal, 25 F.M.C. 375 (1982).) That the subject agreement might not have qualified for exemption from approval requirements under General Order 23 because it was even simpler than the type of agreements defined in that regulation does not mean that the agreement assumed significantly more anticompetitive consequences and that it was more likely to cause greater injury to Prudential in its operation. It might have been even less consequential than the typical General Order 23 agreement. The only practical significance to a determination whether respondents have now met the requirements of General Order 23 is whether they should be allowed to carry out their agreement even after making their information filing in an attempt to satisfy that regulation without seeking formal approval of their agreement now. However, there is a pending proposal to relax General Order 23, and a new regulation to supplant General Order 23 will no doubt be forthcoming in the very near future, pursuant to the new law, secs. 16, 17, and 21, Shipping Act of 1984.[13] It is possible therefore that parties may be able to carry out such agreements as the one in question by simple informational filing in tariffs, as the proposed revision to current General Order 23 would require, or perhaps by no filing at all under a new interim regulation issued under the new law. Or if the agreement is not deemed to fall under the present or interim regulation dealing with non-exclusive transshipment agreements, the parties may simply effectuate the agreement within 45 days after filing pursuant to section 6 of the new law. However, the question of past violations and reparation for such violations will not disappear.[14]

The Reparation Issue and Subsequent Proceedings

As I mentioned earlier, I attempted to shorten this proceeding by avoiding what might have been unnecessary litigation. I did this by confining the hearing to the question of whether respondents have violated law so that if no violations were proven by Prudential, there would be no need to

[13] According to a recent press release (84-22, April 9, 1984) the Commission plans to issue interim regulations concerning exemptions of agreements from the filing requirements not later than mid-May.

[14] Prudential argues that if the subject agreement is a non-exclusive transshipment agreement, respondents still violated law by failing to file something under General Order 23 until September 12, 1983, when it appears that a memorandum was mailed to the Commission's Secretary (Ex. 7). Prudential argues, however, that the filing should be regarded as a nullity and that the agreement should go through the approval process anyway. (Prudential Opening Brief, p. 25). This argument would be valid if Prudential had proven that respondents had not complied with General Order 23 or that General Order 23 did not cover the subject agreement at all. However, a memorandum does appear to have been mailed and a notation was made in Farrell's tariff (FMC 135) from North Atlantic ports in the U.S. regarding the subject feeder service with ZEMS as well as with another carrier via Naples, effective October 27, 1983. (Ex. 4). I officially notice that in Farrell's South Atlantic tariff (FMC 136), such a notation was not filed until January 10, 1984, effective February 8, 1984 (1st Rev. page 30). The memorandum does not strictly conform to the form set forth in General Order 23 since it appears to be less complicated than the form. This does not necessarily prove that the subject agreement does not fall within the scope of General Order 23. Incidentally, the tariff notations cited comply with the regulation and expressly state that "[p]articipating, connecting, or feeder carriers, party to transshipment arrangements, have agreed to observe the rules, regulations, rates, and routings established herein as evidenced by a connecting carrier agreement on file with the Federal Maritime Commission."

fill the record with evidence as to Prudential's alleged financial injury. In addition, because of the possibility, now the reality, that Prudential could prove violations, I again attempted to avoid unnecessary expense of litigation by having the parties in their briefs focus on the question of Prudential's entitlement to prove injury on the basis of such violations as had been alleged and proven. If, as a matter of law, there would be no way in which Prudential could recover money damages as a result of the violations in question, it would obviously be a monumental waste of time and money to remand this proceeding for the purpose of hearing evidence on this matter.

As discussed above, respondents argue that Prudential is barred as a matter of law from seeking to prove damages in this type of case essentially because any violation was merely technical, it caused no direct injury to Prudential, and there were no equities in favor of awarding damages to Prudential. Respondents argue that if Prudential suffered any financial losses, they were not caused by respondents technical failure to file informational memoranda of a non-exclusive transshipment agreement (if respondents' arrangement could even be considered to be such an agreement) but rather by Prudential's own lack of ability to compete successfully with Farrell. Respondents see no nexus between the failure to file an informational memorandum and tariff notation and Prudential's lost profits and distinguish the one case in which respondents who had operated under section 15 agreements without approval of the Commission were ordered to pay reparation by contending that the case involved intricate conspiracies deliberately designed to harm the competing carrier. Finally, respondents do not believe that the factors, which the court in *Consolo* v. *F.M.C.*, cited above, 383 U.S. 607, authorized the Commission to consider before awarding reparation under section 22 of the Act, are present in this case and cite a leading case in the antitrust law of damages, *Brunswick Corp.* v. *Pueblo Bowl-O-Matic,* cited above, 429 U.S. 477, holding that the mere unlawful market presence of a competitor is not enough to support an award of damages under antitrust law.

Prudential, of course, argues that there is no legal impediment barring it from an opportunity to prove the extent of its alleged monetary losses caused by the violations of section 15 and argues that equities do not lie with respondents who knew or should have known that they had to file their agreement with the Commission before carrying it out.

I conclude that the present record is understandably incomplete as to the factors which the Commission may consider according to the decision of the Supreme Court in *Consolo* v. *F.M.C.*, cited above, 383 U.S. 607. I find also that I have considerable doubt that as a matter of law the nature of the violations shown meets the requirements of proximate cause and essential relationship to the type of injury claimed to justify an award of reparation. For these reasons and others, I cannot recommend a remand to develop full evidence on these matters. Although the record, being con-

fined almost exclusively to the question of whether violation of section 15 or General Order 23 had occurred may be incomplete on these matters, it is nevertheless important not to prolong a proceeding and inflict on parties unnecessary expenses of continued litigation if, as a matter of law, there is no basis on which the Commission could award reparation. On this latter point, in view of the somewhat inconsistent theories of recovery which Prudential has confirmed only recently in its last brief (reply brief, p. 24), it appears that, as a matter of law, its theories of recovery have no validity, and I cannot recommend a remand on such theories. I now explain.

Applicable Principles of Law

There is nothing in section 22 of the 1916 Act which sets a violation of section 15 apart from any other violation of that Act and states that reparation cannot be awarded. Section 22(a) simply states:

> That any person may file with the Commission a sworn complaint setting forth any violation of this Act by a common carrier by water . . . and asking reparation for the injury, if any, caused thereby . . . The Commission, if the complaint is filed within two years after the cause of action accrued, may direct the payment . . . of full reparation to the complainant for the injury caused by such violation. 46 U.S.C. sec. 821(a).

Although not common, the Commission has awarded reparation in a case involving respondents' carrying out of unfiled agreements in violation of section 15. This was *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, 24 F.M.C. 934 614 (I.D., F.M.C. notice of finality, May 5, 1982). That the decision to award reparation in cases involving violations of section 15 turns on the facts of each case is illustrated by another case involving violation of section 15, *Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, 5 SRR 67 (I.D. 1964, subsequently discontinued following withdrawal of complaint). In the latter case reparation was not awarded because it was found that respondents' lower rates, not the fact that they had failed to file their agreement, had been the proximate cause of complainant's injury and furthermore because the equities favored respondents who had relied on decisions later reversed and otherwise had operated in good faith. 5 SRR at 75–77.

The decision to award reparation is discretionary with the Commission and concerns not only considerations of proximate causation and traditional evaluations utilized by courts of law in damage cases but peculiar equitable and other factors. Thus, the Supreme Court in *Consolo* v. *F.M.C.*, cited above, 383 U.S. at 622, identified certain factors for the Commission to consider when determining whether to grant reparation as follows:

> (1) whether a reparation award would enhance the enforcement of the Act, (2) whether the shipper had suffered compensable

> injury and (3) whether the award of reparations would be consistent with the previous application of the Act, as well as the factors of culpability of the carriers.

In addition to considering these factors, the Commission has also held that more traditional concepts of proximate cause and other such doctrines utilized by courts of law must also be considered. Thus, although the Commission's authority to award reparation for financial injury is discretionary, the Commission does operate under certain limiting standards, and it has been held that something more than a finding of violation of the Act is necessary before the Commission will exercise its discretion. *Consolo* v. *F.M.C.*, cited above, 383 U.S. at 621; *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority, et al.*, 11 F.M.C. 494, 510–511 (1968); *Parson and Whittemore, Inc.* v. *Fred Olsen & Co.*, 7 F.M.C. 721, 731 (1964).

More specifically, an award of reparation in many respects follows the law of damages in court cases and restricts damages to those which are reasonably foreseeable or proximately caused by the violation proven, not to remote, consequential damages. The Commission has stated, furthermore, that a complainant must show actual injury and show that such injury is essentially related to the type of violation proven. For example, the Commission has stated:

> It has long been established by the courts and Government agencies having jurisdiction in such matters that (a) damages must be the proximate result of violations of the statute in question; (b) there is no presumption of damage; and (c) the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation. (Citations omitted.) *West Indies Fruit Co.* v. *Flota Mercante Grancolombiana*, 7 F.M.C. 66, 70 (1962).

Even if a complainant shows that it has been injured by a respondent's violations of the Act, the Commission has refused to award reparation if the above principles have not been found to apply. Thus, in *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority, et al.*, cited above, 11 F.M.C. at 510–511, despite finding violations, the Commission declined to award reparation, stating:

> As the Examiner correctly pointed out, the awarding of reparation is a matter of discretion by the Commission. Section 22 of this Act states that we "may" direct the payment of reparation. The language is permissive and hence the mere fact of a violation of the statute does not necessitate the grant of a reparation award. (Citation omitted.) In the instant proceeding, we feed that a reparation award is unwarranted. We have recognized that Ballmill has been disadvantaged. . . . However, we are not convinced that the nature of the violations is such as would warrant the requested reparation award. Furthermore, we are not satisfied that the dam-

> ages alleged by Ballmill are real or whether the alleged damages are sufficiently related to the violations of the Act. . . . [T]o award damages alleged to have been incurred by reason of unjust discrimination, there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for a judgment in Court.

In addition to the above considerations, respondents have called my attention to a leading case in the field of antitrust damages, namely, *Brunswick Corp.* v. *Pueblo Bowl-O-Matic,* cited above, 429 U.S. 477. This case is worth considering not only because the Commission in the above quotation stated that it would be guided by principles similar to those followed by courts of law in damages cases but also because section 15 has an obvious relationship to antitrust laws. See, e.g., *Carnation Co.* v. *Pacific Westbound Conference et al.*, 383 U.S. 213 (1966); *F.M.C.* v. *Pacific Maritime Association et al.*, 435 U.S. 40 (1978). Indeed, as the Court stated in *Carnation,* the 1916 Act was the "end product of an extensive investigation of the shipping industry that was conducted by the Congress which enacted the Clayton Act" (383 U.S. at 218), the latter Act being the very law involved in the *Brunswick* case and further held that plaintiff in *Carnation* had rights under the Shipping Act which were "collateral" to those under the antitrust laws and could have sought damages under either the Shipping Act or the antitrust laws but not both. 383 U.S. at 224. In *PMA,* furthermore, the Court described the duty of the Commission to consider antitrust implications under section 15 of the 1916 Act. 435 U.S. at 53. Furthermore, in *F.M.C.* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 737–738 (1973), the Court specifically recited legislative history to the 1916 Act showing that Congress enacted section 15 in order to forestall the development of monopolies which would result from open competition in the shipping industry. Therefore, I commend the *Brunswick Corp.* decision to the Commission's attention.

In *Brunswick,* plaintiffs, who operated bowling centers, sought treble damages for injuries allegedly resulting from Brunswick's acquisition of bowling centers that would have gone out of business absent Brunswick's acquisitions. The acquisitions were held to have violated section 7 of the Clayton Act under the so-called "deep pocket" theory enunciated in previous decisions. Plaintiffs argued that but for Brunswick's acquisitions, the acquired centers would have gone out of business and the plaintiffs would have gained customers and increased profits. Hence plaintiffs claimed that they were injured by reason of Brunswick's section 7 acquisitions. However, the Supreme Court rejected this theory of recovery holding that plaintiffs must prove more than a section 7 violation and a causal link between that violation and the alleged injury. The Court noted that plaintiffs' real complaint was that Brunswick's acquisitions of the bowling centers preserved competition, thereby depriving plaintiffs of the increased profits

they would have realized had the acquired bowling centers gone out of business. The Court stated:

> Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violations. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." (Case citation omitted.) 429 U.S. at 489.

Elsewhere the Court commented on plaintiffs' theory of recovery in *Brunswick,* namely, that increased competition resulting from the acquisitions by the financially-sound Brunswick Corporation deprived plaintiffs of benefits they expected would result to them if the acquired competitors had been allowed to go out of business. The Court rejected the theory, stating:

> The antitrust laws, however, were enacted for "the protection of competition not competitors." . . . It is inimical to the purposes of these laws to award damages for the type of injury claimed here. 429 U.S. at 488.

Since the plaintiffs in *Brunswick* had offered no alternative theory to support their damage award, the Court directed judgment in favor of defendant *Brunswick* notwithstanding the verdict in the lower court in favor of plaintiffs. 429 U.S. at 490. The *Brunswick* doctrine has been extended to other provisions of the antitrust laws. See, e.g., *Chrysler Corp.* v. *Fedders Corp.,* 643 F. 2d 1229 (6th Cir. 1981); Shepard's *Antitrust Adviser* (2nd Ed.) Carla Anderson Hills, Ed., (1983 cumulative supplement, section 1.49A.)

As to the factors to be considered by the Commission according to *Consolo* v. *F.M.C.,* cited above, 383 U.S. 607, namely, enhancement of enforcement of the Act, compensable injury, consistency with previous application of the Act and culpability, the record leans toward respondents. Thus, the type of agreement which respondents carried out is not the classic non-exclusive transshipment agreement as defined in General Order 23 but is of a type that is even less complicated than the classic type which the regulation determined to have "inconsequential effect[s] upon the commerce of the United States" when determining to exempt them from the normal approval requirements of section 15. Docket No. 68–4, *Exemption of Nonexclusive Transshipment Agreements,* cited above, 10 SRR at 150. The Commission is even considering relaxing the already relaxed filing requirements as to non-exclusive transshipment agreements, as noted earlier, a further indication that such agreements are considered to have minimal anticompetitive consequences. See Docket No. 83–43, *Exemption of Nonexclusive Transshipment Agreements, etc.,* cited above,

48 Fed. Reg. 45270. It is difficult to see how the Commission could award substantial reparation as a result of the failure to file a memorandum of such agreement on a finding that the agreement directly caused significant financial injury to a competitor after the Commission has for years determined that such agreements have minimal effects. It is also difficult to see how such an award would be consistent with previous application of the Act, when the Commission had never awarded reparation merely on the basis of a technical lack of filing as opposed to the carrying out of a section 15 agreement specifically designed to eliminate competition, as was the case in *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, cited above, 24 F.M.C. 934. There is also doubt as to the effectiveness of such an award for a technical type of violation when the parties involved had no clear precedent that the type of agreement they had carried out did in fact qualify under General Order 23 and may not have even risen to the level of a simple non-exclusive transshipment agreement since the agreement did not even have all the features of the simple agreement defined in that regulation.

As to the question of compensable injury, there is no doubt that a violation of section 15, such as that which occurred in *Saipan Shipping*, cited above, i.e., forced elimination from a trade or destruction of competition by concerted design, has such a nexus with the victim carrier that the injury, the victim's loss of profits, is compensable. But this is not a *Saipan Shipping* type of case. Instead, there are indications that any harm suffered by Prudential was only the result of Farrell's reentry into the trade and the open competition offered by Farrell.[15]

Finally, as to the question of culpability on the part of respondents, there is no indication on the record that respondents entered into their arrangement with nefarious plans to eliminate Prudential or that they believed that their otherwise innocuous looking transshipment agreement at Haifa would have substantial anticompetitive consequences. All that the record indicates thus far is that Farrell wished to reenter the Alexandria trade after having been forced to leave it temporarily because of a change in the ships it operated. (Tr. 107, 134–136, 156).

Admittedly the record may not be as fully developed on these *Consolo* factors as it could be. However, even the limited record tends in a direction which does not favor Prudential as far as seeking a reparation award is concerned and because of the nature of the type of violation involved, a remand would not be warranted for other reasons.

As I stated, I have serious doubts as to whether, as a matter of law, Prudential would be able to justify an award of reparation for other reasons.

[15] It perhaps bears noting that Prudential's witness Morris testified that Prudential had acquired notice some time ago of the subject agreement of which they complain even though it had not been filed. (Tr. 22). Furthermore, it nowhere appears that Prudential was driven from the trade as was Saipan Shipping but rather it appears that Prudential remained as an active competitor against Farrell and had itself unsuccessfully negotiated with the shipper of bakery equipment which Farrell attracted for its through service to Alexandria. (Tr. 23, 73–80).

These have to do with the question of proximate cause and the essential relationship of the type of injury alleged to the type of violation involved. This is because the type of damages alleged does not appear to be "sufficiently related to the violations of the Act." *Ballmill Lumber & Sales Corp.* v. *The Port of New York Authority et al.*, cited above, 11 F.M.C. at 510. This is another way of saying that the failure to file a memorandum of an agreement was not the proximate cause of Prudential's loss of business but rather the cause was Farrell's competition, as assisted by ZEMS' feeder service. Because the failure to file and obtain approval was not the proximate cause of damage to complainant but it was rather respondent's lower rates which caused the complainant to lose business, no reparation was found to be warranted despite a section 15 violation in *Puget Sound Tug & Barge Co.* v. *Foss Launch & Tug Co.*, cited above, 5 SRR 67.

But even if a remand for the purpose of taking further evidence could somehow show that an award of substantial moneys to Prudential would enhance enforcement of the 1916 Act, would relate to compensable injury, would be consistent with previous application of the Act and deal with culpability, and even if such further evidence could show a reasonable nexus between the failure to file a memorandum and Prudential's loss of business, Prudential's inconsistent theories of recovery seem to present an insuperable obstacle as a matter of law. Although not always clear and seemingly inconsistent, Prudential's arguments seem to run as follows. Prudential was the only other U.S.-flag carrier operating from Atlantic Coast ports to Alexandria in addition to Farrell and thus was eligible to carry U.S.-flag-preference cargo. Prudential would have carried the 45 shipments of record but for the subject transshipment agreement which enabled Farrell to carry the shipments instead.[16] The other respondent, Zim, being an Israeli carrier, was not eligible to carry such cargo, from U.S. ports at least. This argument can only mean that Prudential contends that the failure to file a memorandum of the agreement and the unapproved carrying out of the transshipment agreement enabled Farrell to take business away from Prudential which no other competitor was eligible to carry. (Prudential's Opening Brief, pp. 29–30). As Prudential states, "[w]ithout the agreement or arrangement, Farrell would not be able to provide a service of any kind to Alexandria although entitled to carry the cargo. Since PLI operated the only alternative ocean service between U.S. Atlantic coast ports and Alexandria, it was deprived of an opportunity to participate in the transportation of this cargo." (Prudential's Opening Brief, p. 30.) I leave aside the question of whether it was Farrell's failure to file a memorandum or Farrell's open competition and possibly preferable rates which caused Prudential to lose the shipments and whether Prudential, which had the right to compete with Farrell, could really have been deprived

[16] This assumes that all 45 shipments were required to be carried by U.S.-flag vessels, a fact not established on the present record.

of any opportunity to bid for the cargo since Prudential nowhere alleges that Prudential was forced to leave the marketplace because of the resumption of Farrell's service. However, after seemingly arguing that the restoration of Farrell to the trade by means of the unfiled agreement took business away from Prudential, Prudential confuses the argument by also contending that it was not increased competition that caused its injury but *reduced* competition! Thus, Prudential argues that the transshipment agreement reduced the number of competing carriers from three (Farrell, Zim, and Prudential) to two (Farrell and Prudential). This seemingly inconsistent argument is perplexing. It is difficult to discern how Prudential could suffer harm if the number of its competitors was reduced from three to two. One would assume that Prudential, facing only one competitor, would be in a better position to gain business at least by attracting the business abandoned by the departed carrier. What makes the argument even more inscrutable is the fact that Prudential itself contends that Zim, the supposed third competing carrier, was presumably never eligible to carry the 45 shipments in the first place, not being U.S. flag. Thus, in reality, it appears that at one time there were two carriers competing for U.S.-flag-preference cargo in the subject trade, Farrell and Prudential, that Farrell left for a while at the end of 1981, leaving only Prudential, and that Farrell returned in the summer of 1982, restoring the number of competing carriers to two. Therefore, Prudential has merely returned to a previous situation wherein it apparently faces Farrell as its only competitor for U.S.-flag-preference cargo in the subject trade.

Hence, while Prudential seems partially to argue increased competition of Farrell (resulting from the unapproved agreement) as the cause of its injury, it nevertheless later seems to argue that reduced competition caused its injury. In reality, however, it appears that it began with one competitor and ended with the same one competitor (Farrell). However, as a matter of law, neither the increased competition argument nor the reduced-competition argument seems to have merit. In *Brunswick Corp.* v. *Pueblo Bowl-O-Matic*, cited above, 429 U.S. 477, the Court held that increased competition resulting from the preservation of competitors in the marketplace accomplished by Brunswick through illegal means did not justify an award of damages to the plaintiff competitors who had hoped to face fewer competitors prior to the Brunswick acquisitions. The Court in *Brunswick* found that awarding damages on plaintiffs' theory that the violations had increased competition and deprived plaintiffs of anticipated benefits which would have flowed from the departure of their competitors was "inimical to the purposes of [the antitrust laws]." 429 U.S. at 488.[17]

[17] In previous decisions under section 15, the Commission has held that it is not grounds to disapprove an agreement under the standards of section 15 merely because protesting carriers "face greater competition for cargo than they would in the absence of an agreement. This, standing alone, is not grounds for disapproving the agreements." *Agreements Nos. 10186, 10332*, 25 F.M.C. 538, 548 (1983), and cases cited therein. If the Commission cannot find that an agreement would harm competing carriers merely because it creates more competition, it is difficult to see how the Commission would exercise its discretion to award money

On the other hand, if Prudential is claiming that the subject agreement resulted in the departure of a competing line, i.e., Zim, from the marketplace (although as regards U.S-flag-preference cargo, it does not appear that Zim was really in the marketplace), the courts reject this theory of recovery as well. Thus, in *California Computer Products* v. *IBM*, 613 F. 2d 727 (9th Cir. 1979), the Court followed the *Brunswick* decision in holding that the injury complained of must be some type of antitrust injury, i.e., an injury which the antitrust laws were enacted to prevent, but also held that to obtain an award of damages, plaintiffs must show more than loss of business or departure of a competitor from the marketplace. In this regard the court stated as to antitrust injury:

> Satisfying the latter burden is dependent on a showing that the injury was caused by a reduction, rather than an increase in competition flowing from the defendant's acts since "[t]he antitrust laws . . . were enacted for the protection of competition not competitors." '(Citations omitted.) Accordingly, *the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor.* 613 F. 2d at 732. (Emphasis added.)

I conclude, therefore, that if Prudential's theory of recovery is that the subject agreement enabled Farrell to compete with Prudential and deprive Prudential of business, there could be no recovery as a matter of law since neither the antitrust laws nor the Shipping Act were designed to stifle competition and something more, such as intention to monopolize or destroy competition, would be necessary to warrant an award of reparation, as in *Saipan Shipping Co., Inc.* v. *Island Navigation Co.*, cited above. However, if Prudential's theory of recovery is that the subject agreement reduced competition from three to two, this is incorrect on the facts since, as Prudential itself asserts, one competitor, Zim, was not eligible for the cargo in question. But even if so, mere loss of business or the departure of another competitor from the marketplace is insufficient to justify an award of damages absent some type of predatory, monopolistic or other objectionable intent or effect cognizable under the antitrust laws and the Shipping Act, as found in *Saipan Shipping*. The latter type of situation is not involved in this case.

I therefore conclude that although respondents violated section 15 and General Order 23 by failing to file their memorandum of agreement and appropriate tariff notations, the violation was technical and inconsequential and that there is no basis to prolong the proceeding and expend time and money in further litigation by remanding for the purpose of developing

damages to competing carriers when operation under the agreement had not been preceded by the filing of a memorandum and tariff notation, the competing carriers had become aware of the operation notwithstanding the failure to file, and there was neither allegation nor evidence of deliberate evasion of the filing requirement for the purpose of harming competitors.

evidence on the question of reparation for Prudential. As to the question of assessment of penalties for the violation, which Prudential also requests, the Commission has recently held that this is a matter solely for the Commission to decide and that private complainants have no standing in the matter. See *East Coast Colombia Conference and Agropecuaria y Maritima, etc.*, Petition for Investigation, 22 SRR 723 (1984).[18]

ULTIMATE CONCLUSIONS

In conclusion, I find that Prudential has shown that respondents Farrell and Zim carried out a cooperative working arrangement sometime after June 1982 through April 1983, by which ZEMS, a division of Zim, transshipped Farrell's cargo at Haifa to enable Farrell to restore a through service from U.S. ports to Alexandria that Farrell had temporarily discontinued. The arrangement constituted a type of nonexclusive transshipment agreement, and a memorandum and tariff notation should have been filed with the Commission under General Order 23, but were not until September 12, 1983, and thereafter. I find, however, that although a violation of the regulation and underlying statute, such failure to file a memorandum and tariff notation is not the type of violation inherently likely to be the direct cause of substantial financial injury to a competing carrier like Prudential. Unlike a case in which an unfiled agreement is deliberately designed to eliminate competition and succeeds in that objective, the facts in this case shows that the non-exclusive transshipment merely enabled a U.S.-flag carrier, Farrell, to return to the marketplace and compete with the only other U.S.-flag carrier there and that the other carrier, Prudential, although it again faced competition, was not disabled from competing.

Prudential's argument that three competing carriers (Prudential, Farrell, Zim) were reduced to two (Prudential, Farrell) and that this caused Prudential harm makes little sense since the facts show that, as far as U.S.-flag-preference cargo is concerned, the non-exclusive transshipment agreement re-established the status quo by re-enabling a second U.S. flag carrier, Farrell, to compete with the only other such carrier, Prudential. Prudential's argument that the number of competing carriers was reduced, as far as any cargo is concerned, presumably by Zim's departure from the trade, is also not supported by the facts since Prudential has furnished no probative evidence that Zim ceased competing from U.S. ports to Alexandria for any cargo it could carry before, during, and after its local division, ZEMS, carried Farrell's cargo from Haifa to Alexandria pursuant to the subject transshipment agreement.

Given the type of case that this is, as outlined above, a remand for the purpose of developing evidence on the quantum of Prudential's alleged

[18] In Docket No. 83–7, *Atlantic & Gulf/West Coast of South America Conference, et al.* v. *Empresa Maritime del Estado*, 26 F.M.C. 258, April 18, 1984, the Commission found a technical failure to file a tariff notation of a transshipment agreement and discontinued the proceeding without assessing penalties or remanding to determine damages.

injury would be a wasteful and costly exercise of the resources of all parties since it appears by the very nature of this case that an award of reparation would not enhance enforcement of the Act, be consistent with previous application of the Act, or be based upon a violation as to which there was any significant degree of culpability or any meaningful relationship or nexus between the type of technical violation involved and any loss of business in the marketplace by a competing carrier.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

SLOT CHARTER AGREEMENT

THIS AGREEMENT is enterėd into this 6th day of January 1976, between AMERICAN EXPORT LINES, INC. (''AEL'') ZIM ISRAEL NAVIGATION CO., LIMITED (''Zim''), both of whom are common carriers by water offering services between the United States and the Mediterranean ports ''Trade'').

The parties agree as follows:

1. From time to time, AEL shall, for its cargo moving in the Trade, charter space on vessels owned or operated by Zim (or related entities) for carriage of AEL containers between Israeli ports on the one hand and Koper, Trieste and Venice on the other, i.e., eastbound and westbound, provided that transshipment shall take place only at Israeli ports. AEL shall compensate Zim for each TEU carried at liner terms at rate(s) to be agreed upon by the parties. All transshipment expenses including delivery to and/or removal of said containers from Zim's terminal facilities shall be borne by AEL.

2. AEL shall be under no obligation to use Zim's service (as described in paragraph in 1 above) and Zim shall be under no obligation to offer such service or to reserve space for AEL's cargo. It is the intent of the parties that AEL shall from time to time use such service but only to the extent it desires to do so, and that Zim shall carry such cargo to the extent it offers such service and has space available, but shall be under no obligation to offer such service or reserve space for AEL.

3. Zim shall be responsible for any loss or damage for such cargo occurring from the time it is loaded aboard its vessels until discharged.

4. AEL shall file semi-annual reports with the Federal Maritime Commission during the months of July and January covering the preceding six-month period or fraction thereof for the duration of the agreement showing with respect to each instance cargo moves pursuant to this agreement, the voyage number, the date of sailing, the origin and destination ports, and the number of containers transported in 20-foot equivalents.

5. Cargo moving under this Agreement shall be carried pursuant to AEL's applicable tariffs and bills of lading on file with the Federal Maritime Commission.

6. AEL shall immediately notify the Federal Maritime Commission of the cessation of further operations under this Agreement.

AMERICAN EXPORT LINES, INC.

(S) ______________________________

JOHN A. SMITH
Director of Conferences

ZIM ISRAEL NAVIGATION CO., LIMITED

Re-executed January 3, 1977
to Comply with FMC Order of 12/22/76.