FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

NON-SUBSTANTIVE AGREEMENTS; EXEMPTION

February 13, 1985

ACTION: Correction of Final Rule.

SUMMARY: This amends the Commission's rule regarding the exemption of non-substantive agreements to clearly and consistently provide that the exemption applies both to new agreements and modifications to existing agreements. The amendment corrects an inadvertent incongruity in the earlier rule and conforms the rule in all respects to the earlier expressed intention of the Commission.

DATE: February 13, 1985.

SUPPLEMENTARY INFORMATION:

The Commission's final rule in this proceeding (27 F.M.C. 430), in section 572.302, *Non-substantive agreements and non-substantive modifications to existing agreements—exemption,* defines non-substantive agreements and modifications and provides an exemption for them. The supplementary information to that rule indicates that in response to comments on the Interim Rule, the Commission had determined to clarify and enlarge the reach of the exemption so that it would coincide with the exemption previously in effect at 46 CFR 524.3 and 524.4. To accomplish this, it was necessary, *inter alia,* to provide for application of the exemption to *new* non-substantive agreements as well as *modifications* to non-substantive agreements. The Interim Rule's application had been limited to modifications. This intention to clarify and enlarge the reach of the exemption was carried out only partially. In the Final Rule, appropriate references were added in the section heading and in paragraph (a) of section 572.302 which defines a non-substantive agreement or modification. However, a similar reference was inadvertently omitted from paragraph (b) of the section which states the parameters of the exemption. The Commission hereby is correcting the incongruity in the rule created by this inadvertence.

Additionally, paragraph (b) also inadvertently failed to include a reference to "the Act" when describing the parameters of the exemption. This omission also is corrected by this document. This conforms the language of

this exemption to the language of sections 572.304, 572.305 and 572.306 of this part regarding other exemptions.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) an annual effect on the economy of $100 million or more;

(2) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or,

(3) significant adverse effect on competition, employment, investment productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental jurisdictions.

The Commission finds that good cause exists for dispensing with the prior notice, opportunity for comment, and deferred effective date requirements of 5 U.S.C. 553 in that this amendment imposes no new substantive requirements, but merely corrects an incongruity in the Final Rule and conforms the rule in full to the extent expressed by the Commission in its Final Rule.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553, and Sections 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1715 and 1716), paragraph (b) of section 572.302 of Title 46 CFR is revised to read as follows:

§ 572.302 *Non-substantive agreements and non-substantive modifications to existing agreements—exemption.*

* * * * *

(b) A copy of the non-substantive agreement or modification shall be submitted for information purposes in the proper format but is otherwise exempt from the Information Form, notice and waiting period requirements of the Act and of this part.

* * * * *

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 84–37

APPLICATION OF THE SHIPPING ACT OF 1984 TO CERTAIN TRANSSHIPMENT AGREEMENTS

February 13, 1985

ACTION: Final rule.

SUMMARY: This rule sets forth the approach the Commission will take under the Shipping Act of 1984 with regard to transshipment agreements where one party to the agreement provides a service in the domestic offshore commerce of the United States and the other party provides a service in the foreign commerce of the United States. The Shipping Act of 1984 does not provide for the regulation of common carriers by water operating exclusively in the domestic offshore trades. However, when the movement of cargo in a domestic trade is part of a through movement of cargo via transshipment involving the foreign commerce of the United States, the entire arrangement will be considered to be in the foreign commerce of the United States and, therefore, subject only to the Shipping Act of 1984.

EFFECTIVE DATE: March 21, 1985.

SUPPLEMENTARY INFORMATION:

The proposed rule in this proceeding was published in the *Federal Register* on December 14, 1984 (49 FR 48764) with comments due on January 28, 1985. The availability of the finding of no significant impact on the quality of the human environment was published in the *Federal Register* on January 24, 1985 (50 FR 3369).

In order to clarify the question of jurisdiction, the proposed rule indicated that the Commission would interpret the Shipping Act of 1984 (46 U.S.C. app. 1701–1720) to apply to all agreements involving domestic offshore movements when such movement is part of a continuous through movement of cargo via transshipment involving the foreign commerce of the United States.

The Atlantic and Gulf/West Coast of South America Conference; the West Coast of South America Northbound Conference; and the United States Atlantic and Gulf/Colombia Conference (collectively) filed the only

comment which indicated that the conferences fully support the rule and urge the Commission to adopt the rule as proposed.

Accordingly, the proposed rule is adopted as final without change.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and sections 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1715 and 1716), the Commission hereby amends Part 572 of Title 46 of the Code of Federal Regulations as follows:

1. The Authority Citation for Part 572 is revised to read as follows:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. 1701–1707; 1709–1710; 1712; and 1714–1717.

2. § 572.104 is amended by adding the following language at the end of paragraph (ff) to read:

§ 572.104 Definitions.

* * * * *

(ff) *Transshipment Agreement.* * * *

An agreement which involves the movement of cargo in a domestic offshore trade as part of a through movement of cargo via transshipment involving the foreign commerce of the United States shall be considered to be in the foreign commerce of the United States and, therefore, subject to the Shipping Act of 1984 and the rules of this part.

By the Commission.

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–36

JORGE REYNOSO IMPORT AND EXPORT CO., POSSIBLE VIOLATION OF SECTION 44(A), SHIPPING ACT, 1916

NOTICE

FEBRUARY 21, 1985

Notice is given that no exceptions were filed to the January 14, 1985, 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.

In the appearances for respondent on the first page of the initial decision, "Anthony G. Luongo" should read "Arthur G. Luongo."

(S) FRANCIS C. HURNEY
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–36
JORGE REYNOSO IMPORT AND EXPORT CO., POSSIBLE VIOLATION OF SECTION 44(A), SHIPPING ACT, 1916

Respondent found to have been carrying on the business of forwarding without a license. Cease and desist order issued. Assessment of penalty found unwarranted.

Meyer M. Brilliant and *Anthony G. Luongo* for respondent, Jorge Reynoso Import & Export Co.

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

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

Finalized February 21, 1985

This proceeding was instituted by Order of Investigation and Hearing (Order) served August 24, 1983. The Order was issued pursuant to sections 22, 32 and 44 of the Shipping Act, 1916, 46 U.S.C. 821, 831 and 841(b), to determine whether Jorge Reynoso Import and Export Co., a Florida corporation, had violated section 44(a) of the Shipping Act, 1916, 46 U.S.C. 841b(a), by carrying on the business of freight forwarding without a license. The Order required that the following specific issues be determined:

> 1. Whether Jorge Reynoso Import and Export Co. violated section 44(a) of the Shipping Act, 1916 (46 U.S.C. 841b), by carrying on the business of forwarding without a license issued by the Commission; and
> 2. Whether a civil penalty should be assessed against Jorge Reynoso Import and Export Co. pursuant to section 32 of the Shipping Act, 1916 (46 U.S.C. 831), for violation of section 44(a) of the Shipping Act, 1916, and, if so, the amount of penalty which should be imposed; and
> 3. Whether the Commission should order Jorge Reynoso Import and Export Co. to cease and desist from carrying on the business of forwarding without a license obtained pursuant to section 44 of the Shipping Act, 1916.

The Order named Jorge Reynoso Import and Export Co. as the respondent and named Hearing Counsel as a party in the proceeding.

Pursuant to order, issued August 31, 1983, on September 16, 1983, Hearing Counsel provided respondent with a statement setting forth 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).

facts they intended to introduce at the hearing; a list of, and copies of, all exhibits they intended to introduce in evidence; the names and a brief description of the witnesses they intended to call to testify; and a statement of the relevant law in the case.

Thereafter, also pursuant to the August 31st order, Hearing Counsel moved for a stay to permit them to conduct and conclude settlement negotiations with the respondent. The respondent joined in the motion, which was granted on October 11, 1983.[2] On January 6, 1984, Hearing Counsel submitted a proposed settlement, accompanied by their memorandum and other material in support of the settlement.

By Interim Order With Respect to Proposed Settlement, served February 16, 1984, I indicated my concern that the dollar amount of the proposed settlement was excessive. The "settlement" was for $5,000—the maximum penalty permitted to be assessed in a formal proceeding under sections 22 and 32 of the Shipping Act, 1916, for a violation of section 44 of that Act.

It is sufficient to note the following matters touched on in the Interim Order. I was perturbed because Hearing Counsel's memorandum advised, in effect, that among the matters they considered in evaluating a settlement, were mitigating factors and, while the memorandum demonstrated that some mitigating factors were present in the case, Hearing Counsel seemed to have given no weight to those factors in the "settlement." Yet, I did not reject the settlement outright. Instead, I suggested that the two parties reenter negotiations leading to a settlement which either reflected the matters in mitigation or explained why the maximum penalty provided by law should be approved.

In response to the Interim Order, Hearing Counsel submitted a supplemental memorandum in support of the proposed settlement contending it still believed the settlement to be reasonable, although they acknowledged that the "settlement" had become unsettled. For respondent's part, its counsel submitted a memorandum focusing on mitigation and maintaining that the "settlement" was based upon a fear that the cost of litigation would exceed the amount of penalty which could be imposed.

Because negotiations had come to a standstill, and the issues were still unresolved, a hearing was ordered to be held on June 19, 1984. In advance of the hearing, the parties entered into a stipulation sufficient to support a conclusion that the respondent was engaged in the business of freight forwarding without a license.[3] Thus, the sole issue left for determination at the hearing was the amount of the penalty to be assessed.

[2] Procedural Schedule Stayed, served October 12, 1983. Later, on November 3, 1983, the schedule was modified and, after a status report and motion for a further procedural schedule was filed, it was ordered that the proposed settlement and accompanying materials and memoranda be submitted by January 6, 1984.

[3] Respondent's reply brief, filed after the hearing, admitted that it had "previously stipulated it has violated section 44(a) of the Shipping Act, 1916." Reply brief, p. 2.

After a one-day hearing in West Palm Beach, Florida, Hearing Counsel filed an opening brief and respondent filed a reply brief.

SOME PERTINENT STATUTES AND REGULATIONS

The unnumbered section preceding section 2 of the Shipping Act, 1916 (46 U.S.C. 802), 46 U.S.C. 801, contains the following definitions:

> The term "carrying on the business of forwarding" means the dispatching of shipments by any person on behalf of others, by oceangoing common carriers in commerce from the United States, its Territories, or possessions to foreign countries, or between the United States and its Territories or possessions, or between such Territories and possessions, and handling the formalities incident to such shipments.
>
> [The term "independent ocean freight forwarder" means a person that is carrying on the business of forwarding for a consideration who is not a shipper, consignee, seller, or purchaser of shipments to foreign countries.]
>
> An "independent ocean freight forwarder" is a person carrying on the business of forwarding for a consideration who is not a shipper or consignee or a seller or purchaser of shipments to foreign countries, nor has any beneficial interest therein, nor directly or indirectly controls or is controlled by such shipper or consignee or by any person having such a beneficial interest.*

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*Sec. 1608(c) of Public Law 97–35, approved August 13, 1981, provides that the previous definition shall remain in effect until December 31, 1983, after which time this definition shall apply. In addition, Sec. 1608(c) provides "By June 1, 1983, the Federal Maritime Commission shall submit a report to Congress evaluating the enforceability of this section and describing any reasons why this section should not be made permanent law."

Section 44 of the Shipping Act, 1916, provides:

> (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: *Provided, however,* That a person whose primary business is the sale of merchandise may dispatch shipments of such merchandise without a license.
>
> * * * * *
>
> (e) A common carrier by water may compensate a person carrying on the business of forwarding to the extent of the value rendered such carrier in connection with any shipment dispatched on behalf of others when and only when, such person is licensed hereunder and has performed with respect to such shipment the

solicitation and securing of the cargo for the ship or the booking of, or otherwise arranging for space for, such cargo, and at least two of the following services:

(1) The coordination of the movement of the cargo to shipside;

(2) The preparation and processing of the ocean bill of lading;

(3) The preparation and processing of dock receipts or delivery orders;

(4) The preparation and processing of consular documents or export declarations;

(5) The payment of the ocean freight charges on such shipments:

The Commission regulations governing independent ocean freight forwarders, 46 CFR Part 510, contain the following definitions of terms at 510.2:

(f) "Freight forwarder" is anyone who performs, or holds itself out to perform, the dispatching of a shipment of cargo for another by rendering any one or more of the services enumerated in § 510.2(h) of this part.

(g) "Freight forwarding fee" means charges billed by a freight forwarder to a shipper, consignee, seller, purchaser, or any agent thereof, for the performance of freight forwarding services as specified in § 510.2(h) of this part.

(h) "Freight forwarding services" refers to the dispatching of shipments on behalf of others, in order to facilitate shipment by an oceangoing common carrier, which may include, but is not limited to, the following:

(1) Ordering cargo to port;

(2) Preparing and/or processing export declarations;

(3) Booking, arranging for or confirming cargo space;

(4) Preparing or processing delivery orders or dock receipts;

(5) Preparing and/or processing ocean bills of lading;

(6) Preparing or processing consular documents or arranging for their certification;

(7) Arranging for warehouse storage;

(8) Arranging for cargo insurance;

(9) Clearing shipments in accordance with United States Government export regulations;

(10) Preparing and/or sending advance notifications of shipments or other documents to banks, shippers, or consignees, as required;

(11) Handling freight or other monies advanced by shippers, or remitting or advancing freight or other monies or credit in connection with the dispatching of shipments;

(12) Coordinating the movement of shipments for origin to vessel; and

(13) Giving expert advice to exporters concerning letters of credit, other documents, licenses or inspections, or on problems germane to the cargos dispatch.

FACTS

CHAPTER I

JORGE REYNOSO IMPORT AND EXPORT CO.

(In which the reader may find a brief description of the notorious respondent and its officers, and how the respondent came to provide succor to its correspondent in a faraway island.)

The respondent's name indicates that it is both an importer and exporter. In fact, it is engaged in business, almost exclusively, as an exporter of goods from Miami, Florida, to an island off the coast of Colombia. The island is San Andres, and it is the only free port in Colombia.

Jorge Reynoso is the president and his wife, Edith, is the vice-president of the corporation, which has its place of business in Miami. Mr. Reynoso does not speak English.[4] Mrs. Reynoso, who testified at the hearing, does speak English.

The Reynosos have three children of their own, plus nine others of Mr. Reynoso's former marriage. Four of the nine are emancipated. The eight dependent children attend parochial schools or universities which charge tuition.

As a small business, the respondent files a Form 1120S[5] for its annual federal income tax return. According to its 1983 federal return, prepared shortly before the hearing, the respondent had ordinary income of only $16,350. The income was divided amongst inventory on the shelf and cash on hand at the end of the year. Although both Reynosos devote full time to the respondent, neither drew any salary in 1983. In order to live, they borrowed $38,727 from corporate assets. In addition to current and short-term liabilities of about $30,000,[6] the corporation owes $50,000 pursuant to a putative commitment made by Mr. Reynoso in connection with an investment in a river terminal.[7]

The respondent was incorporated in June 1979. Although the facts are not entirely clear, its entry into freight forwarding seems to have occurred, accidentally, in 1981. It came about this way. One of the persons the respondent did business with in San Andres became the agent for Hoover and Company in Colombia. The agent, a Mr. Basmagi, began to encounter some problems with Hoover shipments from Miami. Presumably because the respondent had gained a familiarity with processing shipments from Miami to San Andres, Mr. Basmagi asked the Reynosos to supervise the

[4] At the hearing, an interpreter was provided for Mr. Reynoso.

[5] U.S. Income Tax Return for an S Corporation.

[6] Not including about $23,000 in accounts payable.

[7] The circumstances surrounding this investment and debt were not clear to Mrs. Reynoso. It is clear, however, that the terminal is neither an asset nor a revenue producing property of the respondent.

shipments and the documentation for him. The same thing seems to have happened with Swift's customers in San Andres. All the services provided by the respondent—whether the cargo got to Miami in good condition; whether the pallets were unbroken; whether the cargo was in order; whether the documentation was prepared timely so that the consignors would be paid timely from letters of credit—were provided for the consignees and were paid for by them.[8]

Since January 1984, because the Colombian government then placed severe restrictions on importation of goods, the business of respondent has been brought to an all-time low. Whereas, in the first six months of 1983, respondent exported about 200 to 250 shipments to San Andres, during that same period in 1984, it exported only about ten shipments.

CHAPTER II

MARCH 1981—THE VISITOR

(In which the respondent learns that the comfort given Mr. Basmagi and other correspondents causes it to be accused of giving the appearance of an unlicensed freight forwarder.)

One day in March 1981, two of the Federal Maritime Commission's investigators arrived at the premises of the respondent. They went there because one of them[9] came across the respondent's name as forwarding agent on a bill of lading he saw at another place of business, a fact which "sort of indicated that the company might be acting as a forwarding agent."[10]

The investigator identified himself to Mrs. Reynoso (Mr. Reynoso was not in) and told her that the reason he was "visiting" was "to look through their shipping files to determine whether or not they were or were not engaged in unlicensed forwarding."[11]

"I didn't have anything to hide from him," Mrs. Reynoso recalled during her testimony.[12] She did not think of the respondent as being engaged in the freight forwarding business and with a clear conscience and spirit of cooperation "I showed him many, all my papers."[13]

After examining twelve to fifteen files, the investigator informed Mrs. Reynoso "that several of the shipping files gave her company the appearance of having participated in unlicensed freight forwarding."[14] Mrs. Reynoso disagreed. It was her understanding that a freight forwarder is an agent who is paid a commission by a steamship company and the

[8] On a few occasions, the consignor was billed for services or for ocean freight by the respondent, but this occurred only because of peculiarities or deficiencies in the consignee's letters of credit incident to a particular transaction.

[9] The other investigator seems to have played no further role in the events which followed.

[10] Tr. 14.

[11] *Id.*

[12] Tr. 62.

[13] *Id.*

[14] Tr. 15.

respondent had "never been paid any fees by a steamship company on our shipments." [15]

The record of trial evidences nothing to show that the investigator attempted to disabuse Mrs. Reynoso of her notion about payments from steamship companies being the *sine qua non* for freight forwarding. Nevertheless, pressed for an explanation why it was his opinion that the respondent "appeared" to be an unlicensed freight forwarder, the investigator replied that for some shipments the company prepared the bills of lading and that "their invoices to the customers were invoices that had charges similar to those that were put on invoices by ocean freight forwarders to their customers." [16] Essentially, all that the investigator imparted to Mrs. Reynoso was that "these documents indicate to me that you are engaged in freight forwarding." [17] He did not explain what it was about respondent's activities that section 44 of the Shipping Act and the Commission's regulations governing freight forwarding, 46 CFR Part 510, frowned upon. Here is what the investigator said he did not say to Mrs. Reynoso in March 1981, after listening to a colloquy with Hearing Counsel concerning the elements of freight forwarding activity: [18]

> Q. You didn't explain to her what it was in specific detail that the statutes or the regulations frowned upon?
>
> A. No. If I can recall exactly what I said to her, I would tell you.
>
> Q. But you don't recall spelling out the details of what constituted freight forwarding?
>
> A. Not to the extent that I did on the second visit.
>
> Tr. 123.

The investigator left the premises without telling Mrs. Reynoso to "stop" the activities he said gave the "appearance" of being (or "appeared to be") unlicensed freight forwarding. He did say the activities should "not be continued without a license." [19] But he did not say, unequivocally, that the respondent was in violation of law.[20]

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[15] Tr. 55.

[16] Hearing Counsel's PFF (proposed finding of fact) No. 8 would have me find that in March 1981, the investigator explained that one of the reasons it "appeared" that respondent was engaged in freight forwarding was that respondent "paid ocean freight." I am unable to make that finding. In response to a question of what explanation he made, the investigator said ". . . and as I recall—I am not sure at this time on those particular shipments, whether they paid the ocean freight on any of them. I believe they did pay the ocean freight on some of them." Tr. 25–26. The investigator's uncertain recollection is what controls. The fact that he "believes" that ocean freight was paid on "some of them" adds nothing because among the files he examined at that time were those relating to shipments of goods in which the respondent had a financial interest.

[17] Tr. 121–123.

[18] Tr. 115–121.

[19] Tr. 24–25, 4950, 127–128.

[20] At first blush, these may appear to be trivial semantic distinctions. However, they were not, at least in the mind of the investigator who seemed to be guided in his choice of words by a sincere belief that he was following clearly defined investigative procedures, as will be seen, *infra*. Moreover, as a witness,

Continued

There was a bemused ending to the visit. When he left, the investigator *thought* that Mrs. Reynoso understood what he was telling her.[21] But, *he knew* when he left that "she thought she was not a freight forwarder."[22] She did not think the respondent was a freight forwarder or was in violation of law. She had not been told that respondent was in violation of law. The investigator told her, apparently at the end of the visit, that he would come back. Consequently, in the context of all that was said and discussed during the visit, when there was no follow-up contact, she thought the "business had passed government inspection."[23]

CHAPTER III

MARCH 1981—THE VISIT

(In which the reader discovers that the visitor was not conducting an investigation during his visit. Or, when an investigation is not an investigation until it becomes an investigation.)

As noted (n.20, *supra*), the explanation of why the investigator employed vague euphemisims in lieu of straight talk in his conversation with Mrs. Reynoso may be found in his understanding of outstanding investigative procedures.

Although the picture that emerges to reveal those investigative procedures is not exactly lucid, it does provide some insight. Those procedures seem to work this way. According to the investigator, there is no procedure "at the beginning of an investigation * * *," "whereby people are warned in any way in writing that some of their activities might constitute violations of law."[24] The way we notify them is by telling them face-to-face at the time of the investigation."[25] Having heard this explanation, the reader might conclude that the investigator meant that the March 1981 visit was

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the investigator parried repeated questions asking if he told Mrs. Reynoso to "stop" by replying with variations of the theme that she should "not continue." The investigator knew full well the distinction between the stern admonition "stop" and the more permissive "not continue." E.g., on the second visit, *infra*, he told her to "stop," and on the second visit he discarded the word "appear" in favor of an affirmative statement that the company's activities constituted unlicensed freight forwarding. There is no evidence that on the second visit the investigator uncovered any data different that he found on the first visit to warrant the difference in terminology. In this respect, were the consequences not so serious, the investigator's partial response to questioning asking him why he used the term "appeared to be in violation," rather than saying that the respondent was in violation, might be regarded as humorous. He said, "I am not going to make a determination. I am not the Judge. I am just there to get the facts . . ." Tr. 24. Yet, as seen, with no more facts to go on than he obtained on his first visit, on his second visit he did make that determination and did say that the respondent was in violation.

[21] Tr. 26.

[22] Tr. 33.

[23] Tr. 62. According to Mrs. Reynoso, he said, "Okay. We will have to make a report, so we will contact you and we will come back." When asked, on cross-examination, if he said why he would contact her again, she replied, ". . . He said if they had other questions, something like that that I couldn't repeat exactly the way he told me, but something like meaning if they wanted more information they would come back to our office and get more information from us or papers from us." Tr. 100. See, also Tr. 128.

[24] Tr. 30.

[25] Tr. 31.

the beginning of the investigation of the respondent. That would be a mistake on the part of the reader. While it surely was the commencement of the investigation, it was not the commencement of the "formal investigation." The "formal" or "official" investigation was not opened until the investigator requested that it be opened.[26] Applying those definitions to the March 1981 visit, the plain meaning of the investigator's testimony is that it was the beginning of the investigation, but not a "formal" investigation, therefore the respondent could not be warned "face-to-face" that it was in violation. That warning would have to await the "official" investigation.

Inasmuch as there already have been some references to a second visit during which Mrs. Reynoso was given "face-to-face" warning that the respondent was in violation of law, it will come as no surprise that the investigator requested that his District Director open a "formal" investigation and that the request was granted.

Jumping out of sequence for a bit, it must be observed that *the second visit did not take place until sometime in January 1983—some twenty-two months later.* One, then, might reason that the "formal" investigation was not requested or granted until sometime in the late fall of 1982 or the winter of 1982–1983. That would be a faulty conclusion for, as the investigator testified, "An investigation was formally opened at the time that I requested it be opened, immediately after my first visit."[27] More precisely, the "formal" investigation was opened almost simultaneously with the first visit "in March of 1981 * * *"[28]

CHAPTER IV

JANUARY 1983—THE VISITOR RETURNS

(In which there is an investigation that is an investigation for real. Or, the respondent is informed that it has run afoul of the law and must refrain from any further freight forwarding.)

Sometime in January 1983, the investigator revisited the respondent's premises. He again spoke to Mrs. Reynoso and asked for her files. Again she cooperated by giving him access to all the information he wanted. After he examined the documents, he told her that the respondent was in violation of the Shipping Act because it was engaged in unlicensed freight forwarding[29] and it must stop. Although Mrs. Reynoso, even then, retained the impression that freight forwarding meant receiving compensation

[26] *Id.* To unravel the complexities of the investigation procedures which the text attempts to simplify, see Tr. 24–25, 27–29, 30–33.

[27] Tr. 31.

[28] Tr. 29.

[29] It was at some point during this conversation, that he first explained in detail why the respondent was a freight forwarder in connection with Swift and Hoover shipments. Tr. 123, *supra.*

from an ocean carrier, she obeyed the investigator's command and thenceforth the respondent ceased handling the Hoover and Swift shipments.

A stipulation entered into by respondent's counsel and Hearing Counsel[30] agrees that the documents examined by the investigator disclose that the respondent engaged in freight forwarding transactions in connection with forty-six shipments made by Swift and Hoover during the period from February 2, 1981, through December 28, 1982, inclusive. (N.b., however, that in its post-hearing brief, Hearing Counsel reduced its claim to thirty-one instances of alleged violation. Brief, p.14) All of those thirty-one shipments took place after the first visit.

The stipulation[31] states that the respondent prepared the bills of lading for all shipments.[32] The stipulation states that respondent booked, arranged or confirmed space for the cargo for all shipments.[33] The stipulation states that the respondent did not have a financial interest in any of the shipments.[34] The stipulation goes on to recite that for one or more of the shipments, the respondent prepared and/or processed a Shipper's Export Declaration; prepared or sent advance notifications of shipments or other documents to banks, shippers or consignees; advanced monies for ocean freight to the carrier; advanced monies for inland freight; prepared consumer documents; handled letters of credit.

The problem with the foregoing portions of the stipulation (giving effect to the material contained in the marginal notes to the preceding paragraph's text) is that because of the lack of specificity and the possible combinations and permutations, there is no way of telling for certain for which of the remaining thirty-one shipments the respondent was a freight forwarder. To some extent this is remedied by other parts of the stipulation which show that, for a particular shipment, the respondent performed a particular combination of services.[35] Nevertheless, despite the lack of clarity, it is fair to say that in connection with enough of the shipments enumerated in the stipulation, there was a sufficient showing of freight forwarding activity to permit me to find that the respondent was carrying on the business of a freight forwarder. I find, as well, that the respondent did

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[30] Ex. 1.

[31] Par. 5.

[32] In fact, the respondent did not do so for all shipments. See, e.g., Tr. 89.

[33] In fact, the respondent did not do so for all shipments. See, e.g., Tr. 89–90.

[34] In fact, it may have had such interest. See, e.g., Tr. 59–60. Perhaps this is a good a time as any to quote passages which appeared in respondent's counsel's Memorandum Reflecting Matters in Mitigation in response to the Interim Order. At p. 1, counsel wrote:

> The Settlement dated January 5, 1984 entered into between the Respondent and Hearing Counsel * * * was based upon the fact that the expense and inconvenience of an evidentiary hearing would exceed the amount of the penalty imposed, and as a practical matter and because of the economic status of the Respondent, it was more feasible to enter into the Settlement Agreement.
>
> * * *
>
> * * * We discussed the matters set forth in the interim Order but could not reach any decision in mitigation of the penalty. Hearing Counsel's stubbornness was matched only by the splendid co-operation, advice and help she has rendered to me in all these proceedings, for which I am sincerely grateful.

[35] See, e.g., Ex. 2, par. 53.

not hold a license issued by the Federal Maritime Commission and in effect during the period from February 2, 1981, through December 28, 1982, inclusive, authorizing it to carry on the business of freight forwarding.

CHAPTER V

FINIS

(In which a visit of another kind is recounted, and the reader may wish to reflect on whether the tale that is told in these five chapters is a detective story, a courtroom drama, an human drama, a comedy of errors or an horror story.)

On February 26, 1984, respondent's office was burglarized. Over $32,000 in cash was removed by a person or persons unknown.[36] The money did not belong to respondent. It was entrusted to Mr. Reynoso by four of respondent's customers and was to be paid to others or to be deposited in accordance with the customers' instructions. The loss was not covered by respondent's insurance. Respondent felt the loss was its responsibility and a debt of honor, so it borrowed against its own line of credit to repay the monies.[37]

All in all, the respondent's current economic situation is so bad that it is "seeking for different business now in order to continue." [38]

DISCUSSION AND CONCLUSION

I.

Except as explicitly or impliedly adopted in the preliminary statement and Facts, *supra*, or in this Discussion and Conclusion, Hearing Counsel's proposed findings of fact, including statements tantamount to proposed findings in their argument in brief,[39] are rejected for reasons of inaccuracy, irrelevancy or immateriality.

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[36] See Ex. 4. A Dade County, Florida Police Incident Report.

[37] Tr. 69–72.

[38] Tr. 72.

[39] E.g., in its Brief, at p. 13, Hearing Counsel writes, "Mrs. Reynoso admitted that the only difference between the activity of [respondent] and a freight forwarder was that [respondent] did not receive compensation from a carrier. (PFF 76)". There is no PFF 76. Obviously, PFF 75 was meant to be cited. PFF 75 reads:

> Mrs. Reynoso believes that because [respondent] did not receive compensation from a steamship company, it was not a forwarder but that was the only difference between [respondent] and a freight forwarder concerning the shipments in Hearing Exhibit 2 (Tr. 97).

I agree with everything in that sentence which precedes the word "but," and I have so found. However, the rest of the sentence is lacking in record support anywhere in the exhibits or transcript, let alone Tr. 97. Moreover, to the extent that the sentence implies that Mrs. Reynoso believed that this was the *only* difference between respondent's handling of the Swift and Hoover shipments and what a freight forwarder does, this too is not sustained by the record. Although Mrs. Reynoso was obviously wrong in her belief that the respondent was not a forwarder because it did not receive compensation from a carrier, the fact of her misconception is credible. She was not given copies of the statutes or regulations pertaining to freight forwarding. Although section 44(a) prohibits carrying on the business of forwarding, section 44 does not, itself, define the characteristics of the business. One must go to the definitions section of the Shipping Act to learn those

Continued

II.

The Respondent was engaged in carrying on the business of freight forwarding without a license in violation of section 44 of the Shipping Act, 1916.

It is admitted that the respondent was engaged in the freight forwarding business without a license in violation of section 44(a) of the Shipping Act, 1916.[40] Absent that admission, and even if the respondent did not forward every one of the thirty-one shipments, the respondent's overall handling of the Swift and Hoover accounts fits the statutory and regulatory definitions of freight forwarding. In order to facilitate oceangoing carrier transportation of cargo, for a sufficient number of those shipments, the respondent did perform that wide range of services involving handling and dispatching of cargo, which are components of freight forwarding services within the meaning of 46 CFR 510.2(b). Docket No. 80–5, *Dynamic International Freight Forwarder, Inc.—Independent Ocean Freight Forwarder License Application and Possible Violation of Section 44, Shipping Act, 1916,* Report and Order Partially Adopting Initial Decision, 23 F.M.C. 537.

This conclusion implies no *mens rea* on the part of the respondent for, indeed, none has been established. However, the statute does not require a guilty intent for a finding concerning the legality of respondent's conduct. All that is necessary is a showing that the respondent has done what the law proscribes. This was decided long ago in *Bullen v. Wisconsin,* 240 U.S. 625 (1916), where Mr. Justice Holmes wrote at 630–631:[41]

> We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion, what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law.

III.

Cease and Desist Order

Inasmuch as the respondent urges that a cease and desist order against future violations be issued,[42] one will be entered.[43]

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characteristics and then go to the regulations in 46 CFR 510.2 for a clearer understanding. On the other hand, a part of section 44, subparagraph (e) does explain aspects of freight forwarding, in terms of compensation from carriers.

[40] See n. 2, *supra.*

[41] See, also, *Interstate Commerce Commission v. AAA Car Drivers Exchange, Inc.,* 340 F. 2d (820, 826 (2 Cir. 1965).

[42] Respondent's Reply Brief, p. 4.

[43] A cease and desist order is "a remedy traditionally fashioned to discontinue ongoing violations or to forestall future violations." *Windjameer Cruises, Inc.,* 19 F.M.C. 112, 123 (1976). Here, as seen, the violations were voluntarily discontinued as of the second visit in January 1983, and there is no evidence to indicate

IV.

No monetary penalty is warranted.

Hearing Counsel relentlessly continues to pursue the imposition of the maximum penalty permitted by law, although the evidence cries out for no penalty at all. Their reasons may be paraphrased this way: The respondent engaged in the business of freight forwarding after March 1981 and because the respondent previously agreed to settle for $5,000, it is only reasonable to assess that amount as the penalty.

The underpinning of Hearing Counsel's argument is what they call the "warning" of March 1981. Their argument concerning the warning, in its entirety,[44] is shown below:

> More importantly, some 31 shipments occurred after a visit from a Commission investigator who told an officer of [the respondent] that its activities could be considered forwarding [The respondent] did not stop forwarding or even question the possibility of a violation. The Commission has held that:
>
> > Once Commission warnings not to engage in ocean freight forwarding have been clearly disseminated to a respondent so that a reasonable man would understand them, or lacking such understanding, would undertake to inquire as to matters he did [sic] not understand, the subsequent act of engaging in freight forwarding without a license in [sic] not a "technical" violation and will not be excused because of alleged lack of willfulness, ignorance, lack of harm or other similar factors.
>
> *Air/Compak Inc.—Independent Ocean Freight Forwarder License Application,* Docket No. 79–98, Initial Decision served August 5, 1980. 23 F.M.C. 224[45] Mrs. Reynoso knew enough to realize that there was a problem with [the respondent's] activities since she disputed [the investigator's] conclusions about possible unlawful freight forwarding during his first visit. [The respondent] can-

a likelihood of resumption. However, it is appropriate to enter a cease and desist order when requested by a respondent as part of the disposition of a proceeding.

[44] Brief, p. 14.

[45] The Initial Decision in that case, hereafter *Air/Compak,* is published at 20 SRR 263 (23 F.M.C. 224). It was adopted by the Commission on September 10, 1980. I do not understand why Hearing Counsel failed to provide the SRR citation in their brief. My curiosity is whetted by the fact that Hearing Counsel seem to be quoting from the SRR headnote rather than the decision. The equivalent language of the decision appears at 20 SRR 268, as follows:

> The holding in this case stands for the proposition that once Commission warnings not to engage in ocean freight forwarding have been clearly disseminated to a respondent so that a reasonable man would either understand them, or lacking such understanding, would undertake to inquire as to matters he does not understand, the subsequent act of engaging in freight forwarding without a license is not a "technical" violation and will not be excused because of alleged lack of willfulness, ignorance, lack of harm or other similar factors.

My inquiry does not end there. As will be seen later, Hearing Counsel chose not to include, in its selection, a significant sentence of the paragraph from which they quoted, beginning after the words ". . . similar factors."

> not now claim that it was not warned or did not understand the warning.
>
> Hearing Counsel recognize that [the respondent] was cooperative in providing documents for [the investigator] to examine. This does not offset the effect of the warning nor did [the investigator's] inspection constitute approval of [the respondent's] activities as Mrs. Reynoso claimed. [References to PFF omitted.]

Where Hearing Counsel go astray is on the facts and the law. The "facts" they rely upon find no support in the record and the legal rationale upon which they rely, while otherwise valid, is inapposite to the facts.

In the first place, with respect to the "facts," it must be manifest by now that the investigator's admittedly vague and non-specific remarks in March 1981 hardly qualify as a warning of any kind, let alone a clear warning.[46] Second, the statement that the respondent "did not . . . even question the possibility of a violation," standing alone, boggles the mind. In juxtaposition with the later statement that "Mrs. Reynoso . . . disputed [the investigator's] conclusions about possible unlawful freight forwarding during the first visit," Hearing Counsel's earlier statement leaves one breathless. Third, Hearing Counsel seem to lay at respondent's door, alone, the claim that it was not "warned" or that it did not understand the "warning." Plainly and simply, it was the investigator who bore witness that he did not clearly and affirmatively inform Mrs. Reynoso that the respondent was a freight forwarder and that she never did understand that the respondent was a freight forwarder. Fourth, there is no claim that the "inspection" constituted approval of the respondent's activities. Rather, it was the investigator's failure to respond to Mrs. Reynoso, within a decent interval after the "inspection" to resolve the questions that had been raised that brought about the reasonable belief on her part that the respondent had passed muster.

Hearing Counsel's reliance on the rationale of *Air/Compak* is misplaced. The facts of *Air/Compak* are nowhere near akin to those in the instant proceeding. The facts are patently distinguishable, a matter of no small moment, especially if one were to go on to read more of the *Air/Compak* holding than proffered by Hearing Counsel (see n. 45, *supra*), where the following is found:

> Further, a civil penalty of at least $5,000[47] is warranted in such cases, where there are no *material* distinguishing facts. 20 SRR 268 (23 F.M.C. 231).

[46] N.b. Hearing Counsel's seeming recognition that the "warnings" were, at best, feeble by their lukewarm characterizations of those warnings: (a) the investigator telling the respondent "that its activities *could be considered* freight forwarding; and (b) the respondent disputed the investigator's "conclusions about *possible* unlawful freight forwarding." [Emphasis supplied.]

[47] At the time *Air/Compak* was decided, each forwarding transaction was treated as a separate unit of offense carrying a maximum penalty of $5,000.

The facts in *Air/Compak*, with respect to "warnings" may be summarized as follows: (1) Air/Compak had filed an application for a freight forwarder's license; (2) one of the principals of Air/Compak had about four years' experience working at the various activities engaged in by freight forwarders; (3) on June 1, 1978, a representative of the Commission's Office of Freight Forwarders discussed the application with that principal, telling him that Air/Compak was not permitted to engage in freight forwarding without a license; (4) one week later, on June 7, 1978, the Commission's Chief, Office of Freight Forwarders, notified Air/Compak, *in writing*, saying: that its application for a license had been received; that the applicant's attention was directed to section 44 of the Shipping Act, 1916, which prohibits freight forwarding without a license; that " 'Carrying on the business of forwarding' is defined under Section 510.2 of the *enclosed*[48] General Order 4 and Section 1, Shipping Act, 1916;"[49] that if Air/Compak engaged in freight forwarding prior to the issuance of a license, it would be subject to penalties provided by law; (5) thereafter and notwithstanding the clear warnings, Air/Compak engaged in forwarding activities; (6) that on December 18, 1978, during an inspection, a Commission investigator[50] discovered freight forwarding activity which occurred after the letter of June 7, 1978, and he informed Air/Compak not to conduct such activity without a license in the future; and (7) on January 30, 1979, Air/Compak was found out by another investigator to have engaged in yet more freight forwarding activity after the December 18, 1978, warning.

It does not take the wisdom of a Solomon to recognize the contrast between the clear and repeated cautioning of Air/Compak and the tepid euphemisms here.

Finally, with respect to "warning," it must be said that a situation of the kind disclosed here, which may be a worst case scenario, is unlikely to recur. I take official notice of the Commission's Director of Programs' memorandum to Bureau Directors, dated December 19, 1983. The subject of the memorandum is "Interim Procedures for Handling Investigative Reports." The following instructions concerning the need for written warnings before instituting penalty procedures in certain kinds of cases (of which this is one) may be found at page 6;

Administrative Closing

> Hearing Counsel may recommend discontinuance with reasons of a referred matter by referring the matter to the substantive bureau or Bureau of Investigations which shall prepare and transmit a warning or cautionary letter or a letter informing the subject that the matter is closed. *Generally, a warning letter should issue for an insignificant violation, especially one which occurred prior to an official warning (written notification) or other non-serious*

[48] Emphasis supplied.
[49] The unnumbered section preceding section 2 of the Shipping Act, 1916, is also called section 1.
[50] The same person identified in n. 9, *supra*.

situations. A number of other possible situations arise where a warning letter may be appropriate.[51]

Presumably, the warning letter to unlicensed persons believed to be engaged in forwarding, sent pursuant to those Interim Procedures, includes copies of relevant portions of the statute and regulations governing forwarding activities. This would comport with what the facts in *Air/Compak* indicate to be standard practice for persons who apply for forwarding licenses.[52] Obviously, if this detailed information is given to persons who have extensive and intensive experience in forwarding, can any less be given those, like respondent, who are not well oriented?

Unfortunately, for respondent, those Interim Procedures did not apply to formal proceedings already instituted. It is unfortunate, too, that Hearing Counsel did not understand the worth of the Interim Procedures in evaluating the mitigating factors present in this case. Even more unfortunate is the fact that, after hearing the evidence showing that there was no effective communication of a warning; showing fewer forwarding transactions than claimed during the settlement process; and showing the deterioration of the respondent's financial condition, Hearing Counsel did not soften its demands.[53]

I have already mentioned several factors bearing on mitigation, e.g., respondent's financial condition and the number of persons dependent upon profits from the business. There are others, all of which confirm my prehearing impression that the settlement was unreasonable.[54] But in view of my determination that a monetary penalty is unwarranted because the respondent was not adequately forewarned and there is convincing evidence

[51] Emphasis supplied.

[52] N.b. To be eligible for a license, an applicant must demonstrate that its "qualifying individual has a minimum of three (3) years of experience in ocean freight forwarding in the United States." 46 CFR 510.11(a)(4).

[53] While it is not my intent to intrude into the settlement process (except as I am required, as for example, when called upon to rule on a proposed settlement) and substitute my judgment for that of Hearing Counsel, I am compelled to direct some remarks to Hearing Counsel's recommendation for a specific dollar amount to be assessed by me. Just as the amount of settlement of claims is Hearing Counsel's prerogative, the function of the imposition of a penalty is the province of the trier of the facts. It is my preference that this task be performed without prompting. This does not mean, of course, that Hearing Counsel should not express its general views, based upon the record, concerning the severity of an offense.

[54] Hearing Counsel contend that the $5,000 penalty, to be paid out over a period of three years under the settlement agreement, was and continues to be reasonable. They say that "this penalty was based on considerations including ability to pay." Brief, p.14. Whatever those other considerations may have been, the only one which seems to have survived the hearing, as a point of their argument, is "ability to pay." However, one may search Hearing Counsel's proposed findings of fact in vain to uncover even a scintilla of evidence indicating an "ability to pay." When the settlement was submitted for approval, Hearing Counsel tendered an affidavit prepared by a Commission accountant who said that he had examined the respondent's 1982 income tax returns and came to the conclusion that the respondent could pay $5,000, but only if spread over three years. Hearing Counsel did not offer the 1982 return in evidence, nor did it produce a witness to testify on the subject of "ability to pay." My evaluation of the 1983 tax return and the testimonial evidence is that the assessment of any penalty would work a hardship on the respondent and its officers.

that, if properly informed, the respondent would have stopped the unlawful forwarding at once,[55] it is unnecessary to belabor the mitigation issue.

ORDER

The respondent, Jorge Reynoso Import and Export Company, having been found to have violated section 44(a) of the Shipping Act, 1916, by carrying on the business of forwarding without a license issued by the Federal Maritime Commission during the period from January 1982 through December 1982, is ordered to cease and desist and thereafter to refrain from carrying on the business of forwarding unless and until such time as there is issued to respondent and in effect a license authorizing respondent to carry on the business of forwarding.

The assessment of a civil penalty having found to be unwarranted, it is further ordered that no assessment be imposed upon the respondent.

(S) SEYMOUR GLANZER
Administrative Law Judge

[55] In their argument, Hearing Counsel write "We have no evidence whether [the respondent] is acting as a freight forwarder." Brief, p. 15. The short and simple rejoinder to that remark is that the evidence of record shows that the respondent stopped forwarding activity after the second visit.

FEDERAL MARITIME COMMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION

Initial Decision adopted with factual and legal clarifications and modification to remove all "excepted" treatment for transhipped/rehandled cargo.

Clarification made with respect to application of Maritime Labor Agreements Act and remedies available to PRMSA/PRMMI. Agreement No. LM–86 modified and schedule prescribed for effectuating necessary modifications and assessment adjustments. General procedure established for "phasing out" of special treatment for transshipped/rehandled cargo.

Appearances as below, except for the following additional appearances:

Kevin Marrinan for Intervenor ILA.

Edward J. Sheppard for Intervenor Massachusetts Port Authority.

REPORT AND ADOPTION WITH MODIFICATIONS OF INITIAL DECISION

February 27, 1985

By the Commission: (Alan Green, Jr., *Chairman*; James J. Carey, *Vice Chairman*; Edward J. Philbin, *Commissioner*. Thomas F. Moakley, *Commissioner*, dissenting in part. Robert Setrakian, *Commissioner*, concurring and dissenting.)

These consolidated proceedings [1] came before the Commission on Exceptions to an Initial Decision (I.D.) of Administrative Law Judge Norman D. Kline (Presiding Officer or ALJ) by New York Shipping Association (NYSA) and its members, International Longshoremen's Association, AFL–CIO (ILA), Puerto Rico Maritime Shipping Authority (PRMSA) and Puerto

[1] The complaints in Docket No. 84–6 and Docket No. 84–8, filed on February 22, 1984 and February 27, 1984, respectively, were consolidated by the Presiding Officer for hearing and decision. The complaint in Docket No. 84–8 was subsequently amended, for purposes of clarification, on May 15, 1984. (I.D. 5.)

Rico Marine Management, Inc. (PRMMI), the Port Authority of New York and New Jersey (Port Authority), Sea-Land Service, Inc. (Sea-Land), a member of NYSA appearing through separate counsel and also acting as an intervenor in Docket No. 84–8, Maryland Port Administration (MPA), Massachusetts Port Authority (Massport), and Hearing Counsel. The Presiding Officer found that the assessment formula used by NYSA and the ILA to fund certain fringe benefits for longshoremen under Agreement No. LM–86 (Agreement or LM–86) was "unfair and unjustly discriminatory" to PRMSA/PRMMI and the Port Authority and directed that it be modified and that prospective credits be granted PRMSA/PRMMI for payments under the present formula made between the time of the filing of its complaint and the conclusion of these proceedings. The Presiding Officer denied certain modifications to the present formula requested by PRMSA/PRMMI, interest on the credits made, and reparations for assessments made between the formation of the agreement and the filing of PRMSA/PRMMI's complaint. Replies to the exceptions were filed by all of the aforementioned parties. We heard oral argument on January 10, 1985. Under the Maritime Labor Agreements Act of 1980, P.L. 96–325, 94 Stat. 1021 (1980), our "final decision" must be issued by February 27, 1985, *i.e.*, within one year of the filing of the complaint.

Before turning to our disposition of these proceedings, we feel that a brief discussion of the nature of LM–86 and the modifications found necessary by the ALJ may be helpful.

BACKGROUND

These proceedings involve the lawfulness under the Maritime Labor Agreements Act of 1980 (MLAA)[2] of the whole tonnage assessment formula used by the NYSA and ILA to fund fringe benefits under Agreement No. LM–86, for the period from October 1, 1983 to September 30, 1986. Under this formula assessments are levied against carriers, with certain exceptions explained below, with respect to each ton of cargo carried in and out of the Port of New York/New Jersey. The present rate of assessment is $8.90/ton. The benefits funded through the assessments include holidays, vacations, welfare, clinics, pensions, and Guaranteed Annual Income (GAI). The two challenges to the Agreement were filed by the Port Authority and PRMSA, a carrier in the Puerto Rican trade operated by the Commonwealth of Puerto Rico, and PRMMI, its operating agent.

The Port Authority essentially claims that LM–86 is "unjustly discriminatory" and "unfair" to the Port of New York/New Jersey because it places an improper burden on the Port's ability to compete for cargo with other

[2] Under the MLAA, assessment agreements become "effective" upon filing with the Commission, subject to subsequent "modification or disapproval" and assessment adjustments upon a finding of "unjustness" or "unfair discrimination" to shippers, carriers, or ports. the original MLAA also contained "detriment to commerce" as a disapproval standard, but this standard was removed by the Shipping Act of 1984, Pub. L. No. 98–237, 98 Stat. 67 (1984).

North Atlantic ports. PRMSA/PRMMI claims unfairness and unjust discrimination to it as a carrier and to the shippers of Puerto Rico. Both the Port Authority's case and that of PRMSA/PRMMI are based on the alleged unfairness of the present formula. Specific challenges are made concerning allegedly unlawful "special privileges" granted under that formula whereby certain activities (handling of empty containers, stuffing/stripping containers, and maintenance work at marine terminal facilities) are unassessed, and certain other activities are assessed at an "excepted" or man-hour rate (*e.g.*, transshipped/rehandled cargoes, domestic trade cargoes).

The Port Authority seeks modification of the present assessment formula to fund most costs (about two-thirds) on a man-hour basis and the remainder on a per-container basis. PRMSA/PRMMI seeks modification of the formula to allow most costs (about two-thirds) to remain on a tonnage basis, but to assess the remainder on a man-hour basis. PRMSA/PRMMI also seeks an additional 25% reduction for cargo moving in the Puerto Rican trade on the tonnage portion of the new assessment, assessment adjustments for the period from the filing of its complaint to date of Commission decision, plus interest on its adjustments, and reparations from October 1, 1983, the date of LM–86, to February 27, 1984, the date of the filing of its complaint.

Following extensive discovery, 10 informal telephonic conferences, 2 formal pre-hearing conferences, seven days of evidentiary hearings, and the filing of briefs, the Presiding Officer issued his Initial Decision on November 9, 1984.

In his Initial Decision the ALJ found the whole tonnage formula which is presently the basis of LM–86 "unfair and unjustly discriminatory" to the Port Authority and PRMSA/PRMMI. He ordered the Agreement modified substantially along the lines suggested by PRMSA/PRMMI, but without the additional 25% reduction for the tonnage portion of the new assessment for cargo moving in the Puerto Rican trade. While granting PRMSA/PRMMI assessment adjustments for the period from the date of filing its complaint to date of Commission decision, he denied interest on the adjustments and reparations from the date of LM–86 to the date of the filing of PRMSA/PRMMI's complaint.

We find that the Initial Decision is, in general, well-reasoned, supported in law and by the preponderance of the evidence of record, and reaches the proper resolution of the matters in issue. We therefore adopt it, except for certain factual and legal clarifications which we here make, and for the treatment of transshipped/rehandled cargo, for which we find all excepted treatment is unlawful and should be removed.

We turn now to a detailed consideration of the Initial Decision and the exceptions and replies to exceptions.

THE INITIAL DECISION

Respondents' Affirmative Defenses

In his Initial Decision, the Presiding Officer first disposed of several affirmative defenses raised by NYSA and ILA going to the ability of the Commission to deal with the merits of the complaints—(1) claims of waiver, estoppel and *res judicata* based on the Commission's approval of a settlement between NYSA, ILA and PRMSA/PRMMI's predecessor carrier and approval of a whole tonnage formula in 1974; (2) the timeliness of the complaints here as a challenge to a formula which NYSA and ILA assert has existed since 1974; (3) the binding effect of the collective bargaining agreement and the grievance and arbitration procedures; and (4) the inapplicability under the MLAA of any other substantive provisions of the shipping statutes and the unavailability of reparations as a remedy for periods prior to the time of the filing of PRMSA/PRMMI's complaint. The Presiding Officer rejected all but the last category of affirmative defenses, holding that he had authority to entertain the claims on the merits but that the Port Authority's remedy was limited to modification or disapproval of the assessment agreement (the only relief they had requested), and that PRMSA/PRMMI's relief was confined to disapproval or modification and one year's prospective assessment credits (I.D. 8–38).

More specifically, the Presiding Officer found: (1) PRMSA's predecessor's settlement dealt only with the 1969–1977 period and was not intended to be a permanent bar to later challenges, and that the Commission had never approved or investigated the assessment agreements for 1971–1974 and 1974–1977 on their merits, so that no defenses could be based on their "approval" (I.D. 21–26, 33–38); (2) each three-year agreement must be treated as a separate agreement regardless of its terms, in accordance both with Commission precedent and the practice of the parties in renegotiating and refiling them every three years (I.D. 12–16); (3) the MLAA was intended to preserve the right of parties to collective bargaining agreements (and others) to challenge the lawfulness of assessment provisions, and the collective bargaining agreements' grievance procedures were inadequate and arbitration irrelevant with respect to PRMSA/PRMMI's claims of unlawful contract provisions under federal law (I.D. 16–20, 26–33); and (4) the MLAA established limited standards of agency review for assessment agreements and created assessment adjustments and disapproval or modification as exclusive assessment agreement remedies and specifically removed application of other substantive standards and remedies (I.D. 38; 59–65).

Applicable Legal Standards

After a discussion of the contentions of the parties (I.D. 38–52; see also 3–7), the Presiding Officer established "preponderance of the evidence" as the standard for burden of proof in the proceedings (I.D. 52–54), and "benefit/burdens" as the applicable general test for judging the

lawfulness of the assessment formula's application to different categories of "assessees." (I.D. 54–58).[3] As far as the Port Authority is concerned, the standard is conceded to be "port discrimination" as enunciated in cases like *Boston Shipping Association* v. *FMC*, 706 F.2d 1231, 1240 (1st Cir. 1983) and *Port of New York Authority* v. *AB Svenska et al.*, 4 F.M.B. 202 (1953). The Presiding Officer clarified this standard by holding that "unfairness" or "unjust discrimination" to a port need not involve "naturally tributary" cargo or "adsorptions" but might also include such lesser factors as "limitation of ability to participate in a market" or "clear probability of substantial harm." (I.D. 65–69).[4] The Presiding Officer then found it unnecessary to make a specific determination as to whether the Shipping Act, 1916 (1916 Act) or the Shipping Act of 1984 (1984 Act) applies to the proceeding since he determined that the provisions of the MLAA applicable to these proceedings are substantially the same under both Acts. (I.D. 69–70).[5]

The Port Authority's Case

The Presiding Officer then turned to the merits of the Complainants' cases. He concluded that the Port Authority has carried its burden of proof by demonstrating by the "preponderance of the evidence" that the present tonnage assessment formula is unfair and injustly discriminatory to it because it injures the Port by placing it at a competitive disadvantage, especially with regard to Midwest containerized cargo, such disadvantage resulting from a $200–$300 cost differential on containerized cargo which could be alleviated if NYSA/ILA would modify their formula to one recognizing both man-hours used and cargo or containers transported. He also found that "the facts are that the Port of New York/New Jersey competes with other ports, especially with Baltimore, that the differential handicaps the Port in its efforts to attract carriers to serve New York rather than Baltimore, for example, and that the differential is unnecessary, being the product of an unreasonable and unfair formula, which taxes

[3] Although NYSA and ILA at first contested this as the proper test, they suggested no other and concluded that it is unnecessary to decide whether that test still applies because the current formula satisfies that test. (I.D. 44; see also NYSA op. br. at 127). That NYSA/ILA finally admit that "benefits/burdens" is the proper test may be seen from their criticism on their Reply to Exceptions of a formula suggested by the Port Authority: "Suffice it to say that it is patently illegal because it doesn't even make a pretense of balancing benefits and burdens." (Reply to Except. 2).

[4] The ALJ discounted, as beyond the scope of the proceedings, the creation of a "superfund" to be raised by assessments at all ports as a remedy for possible discrimination against the Port of New York. Concern over such "superfund" had been raised by MPA and Massport. (I.D. 51, fn. 18).

[5] NYSA, PRMSA/PRMMI, and Hearing Counsel would have the Commission apply the 1916 Act, while the Port Authority and Sea-Land contend that the 1984 Act applies (see I.D. 69). Although we agree with the ALJ that, as a practical matter, it makes little difference in most instances whether we apply the MLAA before or after the 1984 amendments, we will make specific findings under the MLAA before such amendments to insure that "manifest injustice" does not occur, as could be the case, at least under one interpretation with respect to the requirements relating to the payment of interest under the 1984 amendment. See FMC Notice, 49 Fed. Reg. 21798 (May 23, 1984) and pages 113, 116, *infra*.

carriers in inverse proportion to the amount of labor used for all costs." (I.D. 73).

The Presiding Officer explained that his findings were based upon written, documentary, and testamentary evidence, as well as inferences drawn from such evidence and credibility determinations with respect to testifying witnesses. (I.D. 74–75). Among his critical findings supporting the Port Authority's case are:

(1) Although the assessment formula at New York in general provides for assessment on a whole tonnage basis, there are numerous exceptions, both with respect to certain "excepted" cargoes, which are assessed on a "man-hour basis," and "special status" cargoes, which are assessed by "special rates of payment or special status with regard to measurement." (I.D. 78–79).

(2) "Since empty containers, by definition, do not contain any assessable tons, no fringe benefits are collected from the handling or movement of empty containers through the Port of New York/ New Jersey." (I.D. 81).

(3) In most other ports, assessments are on a man-hour basis, and hence fringe benefit assessments are collected there on empty containers. (I.D. 81–82).

(4) Empty containers constitute 32% of all containers handled at the Port of New York and 29% of containers in the Far East Trade. (I.D. 82).

(5) There is no assessment at the Port of New York on stuffing and stripping containers, even though containers which are stuffed and stripped required 3 times as many man-hours as "throughput" containers. Assessment at other ports, including Baltimore, reflects man-hours used and is proportional to their use. (I.D. 82–83).

(6) No assessment at New York is made for man-hours used in maintenance work since assessment is on a tonnage basis, yet one carrier used between 25% and 30% of its over one million man-hours on such work. (I.D. 83).

(7) "A tonnage assessment assesses labor costs in inverse proportion to the use of labor. It therefore shifts costs from low productivity operators to high productivity operators because low productivity operators do not pay labor costs in proportion to their use of labor." (I.D. 83)

(8) Tonnage assessments are paid by steamship lines. Man-hour assessments, at New York and other ports, are paid by the direct employer of the longshore labor, *i.e.*, the stevedore or terminal operator. (I.D. 84; 101).

(9) Cost studies of several carriers serving both New York and other ports show that fringe benefit costs per container at New York are much higher than at other ports. (I.D. 85–86).

(10) Carrier officials indicated that they take assessment costs into consideration in making cargo routing decisions. (I.D. 85–86).

(11) One carrier's cost study contains the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/ Man-hour; Portsmouth $10.35/Man-hour." (I.D. 86).

(12) "On average, a loaded container handled at the Port of New York/New Jersey costs from $200–$300 more in assessments than a similar container handled at other U.S. ports." (I.D. 87).[6]

(13) "If other North Atlantic ports used the NYSA tonnage assessment system for funding fringe benefit requirements, the assessment differential between New York/New Jersey and these ports would be an average of $90 per container." (I.D. 87).

(14) "If the Port of New York/New Jersey were to use a man-hour assessment method to collect fringe benefit obligations, the assessment differential between New York/New Jersey and other North Atlantic ports would average less than $50 per container. The man-hour rates of New York/New Jersey would have been $17.73 based on 1983 collection requirements." (I.D. 87).

(15) "The fact that fringe benefit packages at Baltimore, Hampton roads, and Philadelphia are considerably less costly than at New York does not account for the magnitude of the assessment differential per container at New York, as seen from the preceding comparisons." (I.D. 87).

(16) The Port Authority's primary competition for Midwest containers comes from the Port of Baltimore, but costs and competitive advantages of the two ports, apart from the container assessment differential, are about the same. (I.D. 88).

(17) Steamship lines control cargo routing through the use of intermodal rates and route code systems, port-to-port rate limitations quoted to exclude New York, New York surcharges, and outright denial of a particular port. (I.D. 89).

(18) Ports also solicit sales directly from steamship lines. (I.D. 89).

(19) A shipper has indicated that it can no longer use New York because carriers refuse him space there but attempt to direct his cargo to other ports. (I.D. 89–90).

(20) Steamship lines route cargo away from New York because of assessment differentials. (I.D. 90).

(21) NYSA–ILA Contract Board Members have frequently expressed concern that too high an assessment will divert cargo away from New York. (I.D. 90).

[6] NYSA/ILA claimed that the differential is $150. The ALJ's finding of the $200-$300 cost differential is based to some extent upon the credibility of a witness who contradicted himself in this respect, having earlier testified as to the $200-300 range of cost differential. (I.D. 87). An assessment differential of roughly $250 between Baltimore and New York is corroborated independently by a carrier witness in these proceedings. (See Tr. 847–848).

(22) Twelve different steamship line executives of eleven different lines admitted that the New York tonnage assessment caused them to divert cargo to other ports. (I.D. 91–94).[7]

(23) Of all the containers handled in the Port of Boston in 1983, 47.5% were transshipped through the Port of New York/New Jersey. (I.D. 96).

(24) But for the tonnage assessment at New York, it would be less expensive to move the cargo between New York and Boston by Truck. The payment of assessments for cargo transshipped between New York and Boston on a manhour basis (see page 4, *supra*) results in an assessment cost of $300 per container less than the tonnage assessment for cargo moving by truck between these two ports. (I.D. 96).

(25) The Contract Board, which grants assessment exceptions or special status to cargoes to keep them in the Port or to regain cargo which formerly moved through the port, sometimes grants relief and sometimes denies it. In some circumstances, denial results in further cargo loss to the Port. (I.D. 96–98).

(26) Although the amount of tonnage handled at New York has remained relatively stable, New York's market share with respect to other North Atlantic ports has decreased, particularly with respect to containerized cargoes. (I.D. 98–99).

(27) A fairer system of assessment would distinguish between present fringe benefit costs of employed longshoremen, assessed on a man-hour basis, and "transition costs" of containerization assessed on a tonnage basis, as advocated by the Port's expert witness, Mr. Leo Donovan. (I.D. 101–102).[8]

The Presiding Officer summarized his conclusions with respect to the Port Authority's case, stressing the significance of the limited relief requested by the Port Authority (*i.e.*, some formula adjustment), the strength of carrier admissions respecting cargo diversion from New York, the decreasing proportion of New York cargo vis-a-vis other Atlantic ports, the fact of the $200–$300 container cost differential at New York carrier cost studies which reflect the differential and, at least in one instance, specifically link it with diversion, and the possibility of full funding of assessment costs at New York using several fairer alternative formulas. (I.D. 103–108).

[7] Respondents attempted to discredit these admissions as "alleged statements" and "hearsay." The fact they were made has not been rebutted, "admissions" are not hearsay under the Federal Rules of Evidence, and, in any case, hearsay is not excludable solely on such grounds in administrative proceedings. (I.D. 94; 105–106).

[8] Mr. Leo Donovan suggested several alternative formulas which would reduce the burdens of the assessment at New York by shifting to variants of a combination container/man-hour formula. The Presiding Officer found it unnecessary to choose between the Donovan formulas as he found the formula of PRMSA/PRMMI's economic expert, Dr. Silberman, will give the Port relief, and at the same time is more appropriate in its analysis of categories of assessment benefits/burdens. (See I.D. 101–102, 107–108). Mr. Leo Donovan should not be confused with Mr. Paul Donovan, the Port Authority's counsel.

Problem of Witness Credibility and Evidence Admissibility

The Presiding Officer explained that he found Complainants' cases more persuasive because Respondents improperly attempted to impose a higher standard of burden of proof than preponderance of the evidence and improperly characterized their own officials' admissions as "hearsay". He also found Respondents' witnesses advocating their own self interest to preserve special treatment under the present formula with respect to empty containers or transshipped cargoes less credible than the above discussed carrier admissions. (I.D. 105–108). The ALJ's main findings on credibility, however, were centered around NYSA's economic expert witness, Mr. Sclar. The ALJ found Mr. Sclar not credible in expounding support for a tonnage assessment because he testified in support of a man-hour assessment on the West Coast, failed to make cogent and internally consistent arguments with respect to the characterization of different types of longshoremen's benefits, and contradicted another highly qualified NYSA witness with respect to the apportionment of pension benefits. (I.D. 109–112). In the course of discussing Mr. Sclar's testimony, the Presiding Officer denied a motion of Respondents to strike Exhibit 48, Mr. Sclar's West Coast testimony, on the grounds that Respondents had adequate opportunity at the hearing to re-examine Mr. Sclar with respect to the exhibit. The ALJ pointed out that he and the parties even offered Respondents several additional days to recall Mr. Sclar. (I.D. 113–120).

PRMSA/PRMMI's Case

The Presiding Officer then considered the merits of PRMSA/PRMMI's case. Basically, PRMSA/PRMMI contends that while all containerized cargo benefited equally from containerization, the burdens under the present assessment formula on containerized cargo are not equal. It asserts that such improperly allocated burdens result from a whole tonnage formula, because such a formula imposes on all carriers the costs related to current employment of longshoremen, which should be borne by individual employers rather than the industry as a whole, and also penalizes carriers for efficiencies not related to containerization. The present formula in addition gives favored treatment to certain carriers, like those who operate in the domestic trades and rehandle or transship containers, who pay "excepted" man-hour assessments, and carriers engaged in moving empty containers, stuffing and stripping, and maintenance work, who pay *nothing* toward the fringe benefits of longshoremen engaged in these activities. (I.D. 120–123).

The Presiding Officer cited five critical facts showing unfair distribution of burdens at New York caused by the assessment formula:

(1) In 1982–1983 PRMSA paid $16.1 million under the formula and moved 59,142 containers for an average assessment cost of $272 per container. Another carrier moving ⅓ more containers paid

only $141 per container, and another bigger carrier, moving more than twice the containers of PRMSA, paid $168 per container;

(2) PRMSA employed 2.5% of man-hours at the Port but paid 8.5% of the total assessment;

(3) Three carriers avoided $20 million in assessments because of the special treatment for domestic and transshipped/rehandled cargoes;

(4) PRMSA must pay the assessment costs for stuffing and stripping and handling of empties, because the fringe benefits of longshoremen engaged in these activities are covered by assessments funded under the agreement, and these activities are assessed nothing under the present formula.

(5) In 1982–1983 PRMSA paid $50.74 per man-hour to fund fringe benefits under the formula, whereas the direct wage was only $14 per man-hour. (I.D. 123–127).

The Presiding Officer found a sound theoretical basis for removing such inequities in the formula proposed by PRMSA/PRMMI's expert economic witness, Dr. Silberman. Like the formulas proposed by the Port's expert, Mr. Leo Donovan, the Silberman formula would divide longshoremen's fringe benefits into costs of different types. Dr. Silberman divides fringe benefits costs onto Type I costs, which relate to the current labor costs of presently employed workers, which costs are essentially substitutes for direct wages (holidays, vacations, welfare and clinics) or deferred compensation (pension), and Type II costs, which are industry-wide expenses related to containerization, and include benefits for displaced workers (GAI, and those portions of holiday, vacation, welfare, clinic and pension benefits attributable to GAI recipients). Welfare and clinic benefits for retirees and their dependents and the unfunded portion of pension benefits for retirees would also be treated as Type II costs under Dr. Silberman's approach. (I.D. 174, 176). Type I costs would be assessed on a man-hour basis, and Type II costs on a tonnage basis. Under Dr. Silberman's formula 67% of the costs of assessments would be Type II costs and thus would still be assessed on a tonnage basis. To prevent breakbulk cargo, which is very labor-intensive, from being unduly burdened, however, Dr. Silberman would place a "cap" on breakbulk contributions so that they will not exceed present levels. He would also continue the present special treatment for all activities other than domestic and transshipment transportation, and the transportation of empty containers and stuffing and stripping. (I.D. 127–130). (See also PRMSA/PRMMI Opening Brief, 24–25).

The ALJ rejected Respondents' contention that all ILA men are industry-wide employees for all purposes and thus all fringe benefits may be funded by tons on an industry-wide basis. The facts that ILA longshoremen work for more than one employer and accrue benefits by working 700 hours or achieving GAI credits from different employers do not, he found, mean that all benefits should be paid on an industry-wide basis. Wages, for which fringe benefits are substitutes, are not paid on an industry-wide

basis, and the requirement for eligibility for benefits does not determine who is responsible for labor costs related to the use of eligible employees. (I.D. 133–134).

In examining in detail the special privileges granted to transshipped or rehandled cargoes and domestic cargoes, the ALJ concluded that three carriers, Sea-Land, United States Lines (U.S. Lines), and McAllister Brothers, Inc. barge service (McAllister) are the only beneficiaries, and cost the industry an additional $20 million a year, of which PRMSA pays over $3 million. Transshipped cargoes alone constitute 12% of the containers subject to the tonnage assessment. On transshipped/rehandled and domestic cargoes, Sea-Land paid an average assessment of $23 per container and U.S. Lines $13.05, compared to PRMSA's $272. In fact, Sea-Land and U.S. Lines failed to pay even their direct labor utilization Type I costs with respect to domestic and transshipped/rehandled cargoes, which would have been $6.35 per man-hour, rather than the $5.50 per man-hour presently assessed under the current formula.[9] (I.D. 135–139).

The Presiding Officer rejected the defense that Sea-Land and U.S. Lines require special treatment for transshipped and rehandled cargoes to prevent such cargoes from leaving the Port of New York/New Jersey and thus aggravating the GAI costs at the Port. He found that the additional cost to Sea-Land of paying for these services on a man-hour/tonnage basis is small, that leaving New York/New Jersey would cause major unrealistic modifications of Sea-Land's operations, and that there is no credible evidence to support its likelihood of making such changes. (I.D. 139–142). The ALJ found U.S. Lines' transshipment expanding and unlikely to change because of assessment formula modifications (I.D. 142–143).

The exception for "domestic" cargoes rests upon an assumption that the ALJ found the record does not support—*i.e.*, that these cargoes are marginal based on declining volume and profits and the existence of inland competition. U.S. Lines moves over half a million tons a year in these trades, and pays only an average of $10 per container, compared to PRMSA's $272. There is no credible evidence that U.S. Lines' domestic cargoes will be lost to the Port of New York/New Jersey if a modified version of Dr. Silberman's formula is adopted, the ALJ concluded. He further found that U.S. Lines' vessels involved in the "domestic" movement would make their sailings in any case and that the domestic cargoes are "incremental" in nature, and could thus be carried at very low rates. (I.D. 143–148).

PRMSA, the Presiding Officer found, unlike U.S. Lines and Sea-Land, has already shown actual diversion from New York/New Jersey because of the operations of a competing carrier at the Port of Philadelphia, Trailer

[9] U.S. Lines actually paid even less than this because it pays under a formula which only approximates the $5.50 per man-hour rate. (I.D. 138, 145).

Marine Transport, Inc. (TMT), which does not employ ILA labor and thus does not pay assessments (I.D. 149–150).

The Presiding Officer found no justification for the failure to pay anything toward fringe benefits on the transportation of empty containers and on stuffing and stripping of containers. There is no likelihood, he determined, that a man-hour assessment on these activities would drive work away from the Port. There is already a higher man-hour assessment on these activities at other ports than would exist under Dr. Silberman's formula ($10.49 at Baltimore and $12.28 at Philadelphia as compared to an estimated $6.35 per man-hour at New York under Dr. Silberman's formula). (I.D. 81, I.D. Appendix). Moreover, the stuffing and stripping activity cannot be "lost" to New York because it is mandated by the Rules on Containers. Dr. Silberman and the Presiding Officer would retain the total exemption for maintenance activities because of the substantial likelihood that any payment for that activity would lead to utilization of non-ILA deep-sea (ILA "METRO") labor, which PRMSA already uses, and consequently aggravate the funding situation. (I.D. 150–155).

The ALJ preserved a "man-hour" exception to the Silberman man-hour/tonnage assessment for the transshipment services of the McAllister barge service between New York/New Jersey and Boston/Providence. He found that to assess McAllister under the Silberman formula would kill this service, which depends upon the absence of a tonnage assessment to survive, and would grossly aggravate the GAI situation at Boston. (See page 13, *supra*, findings 23 and 24). It would also, the ALJ found, remove an alternative routing for shippers. A "McAllister exception" does not let the service off free, however, since it would still pay for its Type I benefits under the man-hour portion of the Silberman formula. (I.D. 155–159).[10]

The ALJ made another (and major) departure from the Silberman formula in denying an additional 25% reduction from the tonnage portion of the new assessment for Puerto Riccan cargoes. He did so on the grounds that: (1) Such additional reduction is not supported by quantitative evidence; (2) PRMSA will obtain substantial benefits for the people of Puerto Rico in modifying the basic formula and obtaining assessment adjustments; (3) PRMSA's relief in the past in assessment cases has not gone beyond protecting it against assessments it should not have borne because of lack of responsibility; (4) the MLAA does not contain a "public interest" standard; and (5) the burden on the public might not be affected by the requested 25% reduction in the tonnage charge since PRMSA is in a loss position and has increased its rates some 70% since February, 1981. (I.D. 159–168).

[10] To protect against "unfairness between carriers" all carriers offering competing services with McAllister, including Sea-Land, would be given the same "excepted" man-hour treatment. (I.D. 159).

The Presiding Officer then turned to problems related to the allocation of specific types of fringe benefits to Dr. Silberman's Type I and Type II costs. Such procedure is necessary to assure proper credit adjustments for PRMSA/PRMMI and to provide for proper application of the assessment formula in the future. (I.D. 169).

Insofar as *holiday* payments are concerned, holiday payments for presently-employed workers were allocated to Type I costs, GAI recipients' holiday payments to Type II costs. The ALJ rejected NYSA/ILA's contention that an additional $5 million should have been allocated to holiday payments for GAI recipients for the 1982–1983 contract year on the grounds that the NYSA/ILA witness who so testified (Mr. Fier) was not credible and that Dr. Silberman made the best calculations he could from the evidence submitted by NYSA. (I.D. 170–172).[11]

The Presiding Officer allocated all *vacation* payments between Type I and Type II workers, rejecting NYSA/ILA's contention that two of the vacation weeks should be allocated to Type II benefits as industry-wide costs and obligations, on the grounds that insofar as currently employed workers are concerned, vacations are, like holidays, compensation in lieu of wages and should be paid by the employers of such workers, who have the benefit of their skills, and not by the industry as a whole. (I.D. 172–174).

PRMSA and NYSA/ILA agree that *welfare and clinic* costs should be allocated so that benefits for GAI recipients and for all retirees and their dependents should be treated as Type II costs, but disagree with respect to exact allocation (the difference is $3.1 million). The ALJ accepted Dr. Silberman's allocation as more accurately reflecting that portion of welfare and clinic costs attributable to GAI recipients. Since no contributions are made on behalf of retirees and dependents, he agreed with Dr. Silberman that it would be improper to base GAI upon contributions made to the fund rather than upon benefits received. (I.D. 174–175).

The most difficult allocation problem faced by the ALJ related to *pension* liability. There is theoretical agreement between Respondents and PRMSA/PRMMI that Type I costs include contributions for currently working employees, and that Type II costs include contributions for currently enrolled GAI recipients and the as yet unfunded portion attributable to retirees. There are at least four methods of calculating this unfunded liability for retirees, one suggested by PRMSA's expert, Mr. LoCicero, and three suggested by NYSA's expert, Mr. Camisa. Although the ALJ found all of the methodologies reasonable, he accepted Mr. Camisa's lowest estimate because he felt Mr. LoCicero's method had not been shown to be better and PRMSA had the burden of persuasion, Mr. Camisa's lowest figure was tantamount to a "statement against interest," and its acceptance would

[11] Although Respondents assert that the allocation between Type I and Type II benefits is unnecessary and improper (see page 18, *supra*), they go on to attack some of the allocations made by Dr. Silberman, assuming, *arguendo* that allocation is a proper procedure. (See page 34, *infra*).

cause least disruption of the status quo, and finally, that the unfunded nature of the pension liability and large proportion of retirees was due in some unquantified way to the advent of containerization, the expenses of which are to be borne on an industry-wide basis. (I.D. 175–181).

Lastly, the Presiding Officer allocated NYSA's *administrative costs* in the same proportion as benefit costs in general, *i.e.*, he required that the same proportion be divided between Type I and Type II costs as is divided between them for the total of fringe benefits. The ALJ however directed a separation from administrative expenses of those which relate to a labor contract with a different union and found that the proper allocation to the contract in issue is $7 million. (I.D. 182–183).

The Presiding Officer then summarized what he felt to be the most significant factors indicating the reasonableness of those portions of Dr. Silberman's formula which he had adopted, *i.e.*, those other than the McAllister barge treatment, and the special 25% discount for the Puerto Rican trade:

(1) The willingness to allocate 67% of the benefit costs to Type II benefits, which is contrary to PRMSA's interest.

(2) The cap on breakbulk assessments, which is also contrary to PRMSA's interest, although of benefit to the industry as a whole in reducing GAI costs by retaining work for the Port of New York/New Jersey on breakbulk cargoes.

(3) The willingness to allow maintenance activities to remain free of benefit assessments, in spite of the fact that PRMSA doesn't use ILA deep-sea labor for maintenance work.

The ALJ noted that any hardship from the shift to the Silberman formula could be protected against by the joint NYSA–ILA Contract Board's ability to give special consideration to specific commodities and by the Commission's ability to phase in the increases in assessments for carriers which had formerly enjoyed unjustified special privileges. (I.D. 183–187).

The Presiding Officer then discusses the remedies to be employed in making adjustments in PRMSA/PRMMI's favor, suggesting that a period for verification and resubmission of contested computations to the Commission may be proper. He denied interest, however, as a part of PRMSA/PRMMI's adjustments on the grounds that it is not equitably warranted. (I.D. 187–189).[12]

[12] A good summary of the Presiding Officer's conclusions and reasoning is contained in the final portion of his Initial Decision, which is styled "Ultimate Conclusions" and found at I.D. 189–195. Also useful for quick analysis is the appendix to his decision, which is a graphic display of the effects of the various assessment formulas upon different categories of cargoes and transportation activities.

POSITIONS OF THE PARTIES ON INITIAL DECISION

Exceptions

All of the parties except to some extent to the Initial Decision, their exceptions ranging from minor requests for clarification to full scale attacks on the major findings and holdings of the Presiding Officer.

NYSA/ILA

The most far reaching of the exceptions are those of NYSA/ILA, which assert that the ALJ erred to the extent he ordered any modification of the assessment formula and granted any relief to the Port Authority and PRMSA/PRMMI.

NYSA/ILA's basic attack on the Initial Decision is their contention that the ALJ substituted his own judgment for that of the parties to the assessment agreement without properly finding that the present assessment formula is unlawful. (Brief on Excep. 3–6).

Attack on the Port Authority's Case

In analyzing the Presiding Officer's conclusions with respect to the Port Authority's case, NYSA/ILA contend that the Port Authority has failed to carry its burden of proof on three of the four critical elements necessary to show an unlawful effect on the Port created by the assessment formula. NYSA/ILA acknowledge the existence of competition between the Port of New York/New Jersey and the other North Atlantic ports (Brief on Excep. 8), but contend that the ALJ improperly found the existence of "injury," "proximate causality" of injury due to the formula, and "unreasonableness" of the formula (Brief on Excep. 7–32).

NYSA/ILA contend that the Presiding Officer applied the wrong legal standard in determining the existence of "harm" (Brief on Excep. 8–12). They maintain that the ALJ "confuses the substantive element of injury with the standard of proof needed to establish it" (Brief on Excep. 9), and that the proper standard is "real harm, either existing or certain to occur." (*Id.*) They further contend that in order to show injury, a port must show loss of "naturally tributary" cargo (Brief on Excep. 11–12).

NYSA/ILA then contend that the facts of record relied upon by the ALJ were lacking in probative value because they consisted only of a study showing that New York/New Jersey's share of the market for containerized cargo decreased from 69% to 56% from 1972 to 1982 and testimony of a Port Authority official, who recited statements made by carrier representatives (Brief on Excep. 12–21). They assert that the market share study is as easily explainable by conclusions that consumption demand in New York has not kept pace with that of other ports, or that other ports have been containerizing their breakbulk cargoes at a faster rate than that experienced in New York. Either of these explanations, they maintain, is as likely as the ALJ's conclusion that the loss of market

share is attributable to a shift of container cargoes from New York to other North Atlantic ports (Brief on Excep. 13–14).

NYSA/ILA then contend that the testimony of the Port official, Mr. Robert N. Steiner, which the ALJ had characterized as containing "admissions" (see I.D. 105–106, 94, fn. 30), is not of sufficient probative value because it merely relates his impressions of statements made to him by others and fails to contain quantification of the tonnages involved, specification of the favored ports or in the origins/destinations of the cargoes, particularization of the entities having control over the routing, or indication that the statements, which were made more than a year prior to institution of these proceedings, remain viable today (Brief on Excep. 14–21).

NYSA/ILA then asserts that the record evidence in fact shows lack of injury because it demonstrates that the carriers lack the control over the routing of cargo which would be necessary to divert it away from the Port of New York/New Jersey. They assert that carriers no longer use intermodal rates for 90% of their traffic, and that even where point-to-point rates are used, shipper preference still usually dictates the choice of port. NYSA/ILA further assert that routing cargo away from New York to avoid the assessment there would be self-defeating because lost work in New York would increase GAI there and cause carriers to pay twice—once in New York on remaining cargo and once in the port to which cargo has been diverted (Brief on Excep. 21–23).

NYSA/ILA then turn to the third test of unlawful discrimination against a port—"proximate causality." They maintain that any loss of cargo which New York/New Jersey may have suffered because of the assessment cost differential between that port and other North Atlantic ports is due solely to the higher assessment costs at New York/New Jersey and not to the formula for apportioning those costs. NYSA/ILA make computations which they purport show that even under the modified assessment formula adopted by the ALJ, the differential of assessment costs per container between New York and Baltimore is still in the range of between $131.35 and $227.72.[13] There is no showing, NYSA/ILA assert, that reduction in the differential would help the Port compete for cargo. A straight man-hour formula would greatly reduce the assessment differential per container but would do so at the price of shifting the cost to the breakbulk sector, which allegedly would be unfairly burdened by man-hour assessment (Brief on Excep. 23–31).

Lastly, NYSA/ILA assert that the Port Authority has failed to demonstrate the "unreasonableness" of the present formula since the ALJ's finding that the formula is unreasonable because it "taxes carriers in inverse proportion to the amount of labor used for all costs" (I.D. 73) is based on an error of law borrowed from PRMSA's case (Brief on Excep. 31–32).

[13] NYSA/ILA compute the assessment cost differential per container between New York and Baltimore under the present formula as ranging between $158.58 and $335.02. (Brief on Excep. 27) (see also Excep. Nos. 26–30).

Attack on PRMSA/PRMMI's Case

NYSA/ILA maintain that the Presiding Officer erred in finding their formula unlawful with respect to PRMSA/PRMMI because PRMSA/PRMMI's higher payments under the formula result from its own business judgments, rather than the formula itself. Specifically, NYSA/ILA assert that the ALJ erred in his conclusions that the formula is unfair because it contains no man-hour component and that it gives unwarranted special privileges to certain categories of cargo and transportation activities (Brief on Excep. 32–49).

Insofar as the absence of a man-hour component in the present formula is concerned, NYSA/ILA assert that there is no requirement in law that an assessment formula contain a man-hour component, and that the Commission has approved assessment formulas without such components (Brief on Excep. 33–35). NYSA/ILA claim that the ALJ's treatment of maintenance work and of the cap on breakbulk cargo are admissions that a man-hour component is not necessary even for funding benefits due presently working employees (Brief on Excep. 35–36). They assert that the formula adopted by the Presiding Officer benefits only PRMSA/PRMMI, and that the efficiencies PRMSA/PRMMI claims are being taxed arise only from its use of non-deep-sea ILA workers and non-compliance with the Rules on Containers, not from the employment of more efficient workers. PRMSA/PRMMI, NYSA/ILA assert, is thus able to shift its costs to other container carriers (Brief on Excep. 36–42).

NYSA/ILA's objection to the ALJ's disallowance of "excepted" (*i.e.*, man-hour) treatment for transshipped/rehandled cargoes is based on their contention that the exception is fair because PRMSA/PRMMI can utilize it to the same extent as any carriers which have operations involving transshipment or rehandling. The statute, they assert, forbids discrimination between carriers, not between carrier operations. The exception for the McAllister barge service, a type of transshipment, on the other hand, does, they maintain, create an unlawful discrimination between carriers. To impose a tonnage assessment on transshipment/rehandling, NYSA/ILA maintain, would result in making such operations pay for lost man-hours due to containerization, when they are actually adding man-hours through an activity only tangentially related to containerization and not in the minds of the parties when they negotiated to protect against lost man-hours due to containerization (Brief on Excep. 42–47; see also Excep. 45).

NYSA/ILA contend that the absence of assessments for handling empty containers and stuffing and stripping is justified because all carriers are treated equally with respect to these activities, these activities are not "benefits of containerization," but rather add hours and hence reduce GAI, and that assessing them will drive cargo from the port of New York/New Jersey. (Brief on Excep. 47–48).

NYSA/ILA contend that the excepted (man-hour) treatment of domestic cargo is justified because such cargo is "marginal," that volume is declin-

ing, and that it will be diverted from the Port to move via inland carriers if the exception is removed. (Brief on Excep. 49).

NYSA/ILA maintain that the overall labor cost to PRMSA/PRMMI (*i.e.*, the total of direct wage costs, container royalty, and tonnage assessment) is roughly the same as that of Sea-Land and U.S. Lines, and thus the assessment formula treats PRMSA/PRMMI fairly under the "benefits/burdens" test. (Brief on Excep. 50–53).

NYSA/ILA conclude that, regardless of the legality of the ALJ's decision, it would be virtually impossible to implement because the necessary data could not be collected. (Brief on Excep. 53–54).

Appended to the Brief on Exceptions of NYSA/ILA is a separate listing of some 62 numbered exceptions. To the extent they have not been elaborated upon in the above discussion, they include the following:

(1) The alleged misreading of PRMSA/PRMMI's complaint by the ALJ to include an allegation of diversion of cargoes "naturally tributary" to the Port of New York. (Excep. 1).

(2) The preservation of the "affirmative defenses" to the assessment agreement rejected by the ALJ. (See pages 6–8, *supra*) (Excep. 2).

(3) The characterization of NYSA/ILA's argument with respect to the "burden of proof." (Excep. 3–6).

(4) The ALJ's characterization of the "benefits/burdens" test under *Volkswagen* v. *FMC*, 390 U.S. 261 (1968) (Excep. 5).

(5) The ALJ's reference to an alleged NYSA/ILA "plan," not of record, which they state merely is an intent to reduce the tonnage assessment rate based on projected tonnage increases. (Excep. 13).

(6) An alleged inconsistency in the ALJ's witness credibility rulings. (Excep. 14).

(7) The ALJ's findings with respect to NYSA control over fringe benefit funds, NYSA member control over formulas at other ports, and the amounts of pension and welfare benefits at various ports. (Excep. 15–17).

(8) The ALJ's failure to find that the increase in empty containers is due to trade imbalance. (Excep. 18–20).

(9) The ALJ's failure to find that the handling of empties and the stuffing/stripping of containers are funded through the assessment formula. (Excep. 21).

(10) The ALJ's use of carrier cost studies in connection with the Port Authority's case, which NYSA/ILA claim are flawed in methodology and underlying data. (Excep. 22–25, 39).

(11) The ALJ's findings that New York has lost midwest cargo to Baltimore, that ships discharging loaded minibridge containers on the West Coast pick up the empties at New York, that intermodal ratemaking is the wave of the future, and that carriers generally control routing. (Excep. 31–35).

(12) The Initial Decision's allegedly inconsistent findings with respect to the effect of the assessment on "diversion" from New York by U.S. Lines and Sea-Land, on the one hand, finding that the assessment differential has forced them to divert cargo from New York, and, on the other hand, asserting that removal of the excepted treatment for transshipped/rehandled cargo will not create such diversion. (Excep. 37, 53).

(13) The findings that New York lost frozen meat to Philadelphia because of the tonnage assessment at New York, "New York is an ever-increasing consumption and production area," and that New York has lost a substantial share of cargo and is losing its share of containerized cargo to other North Atlantic ports. (Excep. 40–43).

(14) The treatment of NYSA/ILA witnesses in general, and Mr. Sclar in particular, and the refusal to strike Exhibit 48, Mr. Sclar's testimony in the West Coast case. (Excep. 44, 46–47, 60).

(15) The failure to find that longshoremen are industry employees for all benefit assessment purposes. (Excep. 49).

(16) The failure to find that the domestic trade is declining, rather than expanding. (Excep. 50).

(17) The failure to find that 16 steamship lines, rather than 3, use the McAllister barge transshipment service. (Excep. 51).

(18) The failure to find that U.S. Lines will incur a $14.5 million increase in assessment costs if Dr. Silberman's formula is adopted rather than the $3.5 million increase found by the ALJ. (Excep. 52).

(19) The distinction between Type I and Type II costs, and the allocation between them assuming such distinction is proper (Excep. 58). In this connection NYSA/ILA maintain that a proper allocation of costs shows that the excepted $5.50 man-hour rate fully funds Type I costs. (Excep. 54).

(20) The finding that U.S. Lines' domestic cargoes will not be lost to New York if exposed to a tonnage assessment. (Excep. 55).

(21) The finding that PRMSA/PRMMI has established a case of diversion to TMT because of the NYSA/ILA assessment formula. (Excep. 56).

(22) The finding that $5 million in holiday payments to GAI recipients was already involved in the GAI Fund account. (Excep. 59) (see pages 22–23, *supra*).

(23) The finding that administrative costs properly allocated to the NYSA/ILA labor contract amount to only $7 million. (Excep. 51) (see pages 24–25, *supra*).

(24) Lastly, NYSA/ILA object to certain procedural rulings relating to: (1) subpoenas which they attempted to obtain directed to TMT; (2) carrier cost studies; and (3) testimony by a PRMSA official

(Mr. Carr) relating to alleged diversion of PRMSA cargo to TMT. (Excep. 62).

Hearing Counsel

Hearing Counsel adopt a position similar to that of NYSA/ILA, contending that neither PRMSA/PRMMI nor the Port Authority has made out a case against the legality of the present assessment formula. Hearing Counsel assert that the ALJ misapplied the "benefits/burdens" test as enunciated in *Volkswagen* v. *FMC*, 390 U.S. 261 (1968) and its successor cases, asserting that only a "reasonable relationship" between benefits and burdens is required. They further assert that all container carriers benefited equally from containerization and so should be taxed equally under the formula, as they are under the tonnage basis (Excep. 3–5). Hearing Counsel contend that the ALJ's treatment of maintenance work is inconsistent with his treatment of stuffing/stripping, empties, and rehandled/transshipped containers because all of these activities add work and therefore should be similarly treated. They attack the Type I/Type II cost dichotomy on the grounds that all employees are industry-wide employees for all purposes and thus all costs are industry-wide costs. To the extent the dichotomy is proper, they maintain that container carriers are equitably assessed because even if they overpay for Type I costs, they underpay for Type II costs, just as non-containerized operators overpay for Type II costs and underpay for Type I costs. (Excep. 5–7).

Insofar as the Port Authority's case is concerned, Hearing Counsel contend that the Port has failed to show that it has lost "naturally tributary" cargo which should have moved through New York/New Jersey, and that such showing is a legal requirement of its case. It must also show, they assert, that any cargo loss was the result of an "unjust" diversion. The essential elements missing from the Port Authority's case, Hearing Counsel assert, are a showing that the assessment formula was the "proximate cause" of cargo loss, and that the loss, if any, was unreasonable. The Port Authority, Hearing Counsel contend, has shown neither that the assessment formula was the sole cause of the higher container handling costs at New York, or that it is the sole cause of New York's declining market share. (Excep. 8–13).

Sea-Land

Sea-Land also generally supports NYSA/ILA, and contends that the present formula has not been shown to be unlawful. Insofar as PRMSA's case is concerned, Sea-Land contends that the ALJ improperly and inconsistently held that a tonnage formula is unlawful *per se*, and that his findings that excepted or exempt treatment for certain cargoes or types of activities is not justified are an improper shift of the burden of proof, and contrary to the preponderance of record evidence. (Excep. 3–9). Sea-Land contends that the excepted treatment of relay cargo is justified because Sea-Land

pays for its direct costs on a man-hour basis and adds, rather than reduces, man-hours. (Excep. 9–11). Sea-Land maintains that it can easily shift its operations to other ports to avoid paying a tonnage assessment at New York/New Jersey and has done so in the past, and that the records shows it would be "prohibitively expensive" for it to stay in New York/New Jersey if it had to pay such assessment. (Excep. 11–16). Sea-Land asserts that the Initial Decision's excepted treatment of the McAllister barge service is inconsistent with its denial of excepted treatment to relay and transshipment services in general. (Excep. 17–18).

Insofar as the Port Authority's case is concerned, Sea-Land contends that the Port has failed to show that it has been injured by the assessment formula at New York since it has not shown that the formula, rather than the total costs at New York, is responsible for any diversion from New York, or that carriers have the ability to control cargo routing. The record, Sea-Land asserts, is to the contrary. Sea-Land also contends that the ALJ's conclusion with respect to diversion of cargo from New York/New Jersey by Sea-Land in the Port Authority's case are inconsistent with his conclusions that such diversion would not occur as a result of the removal of the transshipment/rehandling exception in PRMSA's case (Excep. 21–25). Sea-Land contends that the ALJ erred in choosing another assessment formula over the present one merely because it is "fairer." (Excep. 26–27).

Lastly, Sea-Land asserts that the Commission cannot modify the Agreement, as opposed to directing the parties to modify the Agreement, and, in any case, should allow the parties to work out any modification themselves, if such proves to be necessary. (Excep. 28–32).

PRMSA/PRMMI

PRMSA/PRMMI excepts to only four conclusions of the Initial Decision: (1) the denial of a 25% discount from the tonnage component of the assessment for the Puerto Rican trade; (2) the exeption (*i.e.*, man-hour assessment) created for the McAllister barge service and competitive services; (3) the denial of interest on the adjustments due PRMSA/PRMMI for the period from date of filing its complaint to date of decision; and (4) the denial of reparations for the period from formation of the assessment agreement to filing of the complaint.[14]

PRMSA/PRMMI asserts that the 25% reduction for the Puerto Rico trade is justified because of the unique problems of the Puerto Rican economy and the Commission's recognition of Puerto Rico's problems in rate and other assessment cases. (Excep. 4–10). PRMSA/PRMMI contends that the Presiding Officer erred in failing to give proper weight to the Commission's actions and articulated reasons for those actions in earlier

[14] PRMSA/PRMMI has chosen not to pursue its contention that the allocation of pension costs was improper under one of the formulas outlined by Respondents' witness Mr. Camisa and adopted by the Presiding Officer. (Excep. 4, fn. 2).

cases. It asserts that the removal of the "public interest" standard from the MLAA does not prevent the Commission from considering the welfare of Puerto Rico under the "unfair" and "unjustly discriminatory" provisions, and that PRMSA/PRMMI's recent rate increases, far from showing that PRMSA/PRMMI is not harmed by the assessment formula, show that the failure to grant the 25% reduction would cause greater harm. PRMSA/PRMMI also states that it requires relief in addition to that granted by removing the special privileges, and that the 25% reduction is based on expert judgment similar to that which the Commission has exercised in favor of the Puerto Rican trade in the past. (Excep. 10–18).

PRMSA/PRMMI objects to the McAllister exception because it results in making other carriers pay for McAllister's fringe benefits solely to preserve a service which is not necessary fully to fund all fringe benefits. The exception will extend not only to McAllister but competing carriers, including new ones. If cargo can move more cheaply by truck absent the exception, if should do so, and there is no showing of shipper support for McAllister's service. PRMSA/PRMMI suggests the possibility of phasing in a man-hour/tonnage assessment or freezing assessment at the present revenue level to protect against hardship. (Excep. 18–27).

PRMSA/PRMMI asserts that it has an absolute right to interest under the MLAA (Excep. 28–32), but that even if the award of interest were discretionary, the facts here show it should be granted. (Excep. 32–55).

PRMSA/PRMMI lastly argues that its claim for reparations for the period between the creation of the assessment formula agreement and the filing of the complaint is preserved by the MLAA, as shown by its legislative history and *California Cartage Co., Inc.* v. *United States,* 721 F. 2d 1199 (9th Cir. 1983), *cert. denied,* 53 U.S.L.W. 3230 (U.S. Oct 2, 1984) (*Cal Cartage*). (Except. 35–40).

Port Authority

The Port Authority agrees with the conclusions of the Initial Decision with respect to the unlawful effect of the assessment formula on the Port of New York/New Jersey, but excepts to the failure of the Initial Decision to adopt the formulas proposed by its expert, Mr. Leo Donovan, which would have allocated only GAI and some GAI-related costs on a per container basis, and funded the costs for other benefits on a man-hour basis. The Port Authority's latest proposal would impose a $9.00 per man-hour charge on all uses of labor, including maintenance and assess container cargo a flat $87.96 per container charge. The Port Authority would remove all exceptions and exemptions except the $.05 per box rate for bananas, and assess transshipped cargo the per container rate only once. The Port Authority specifically charges that the exemption for maintenance work is unjustified, and that the excepted treatment of the McAllister barge service is discriminatory and an unlawful burden on other carriers. The Port Authority concludes that the formula adopted by the ALJ does not

sufficiently remove the unlawful discrimination against the Port of New York/New Jersey, and that the formula it proposes will do so and at the same time be of greater benefit to PRMSA/PRMMI than Dr. Silberman's formula.

Other Exceptions

MPA excepts generally to the Presiding Officer's conclusions with respect to the Port Authority's case, asserting that he improperly ignored cases relating to cargo diversion and absorptions and maintaining that the Port Authority's problem of lost cargo relates, not to the formula, but to the overall size of the benefit package at New York compared to that of other ports. MPA also expresses continued concern over the use of a "superfund" as a possible remedy in assessment cases.

Massport urges that if the Presiding Officer's approach is adopted, his treatment of transshipment services between New York and Boston (see I.D. 155–159, esp. fn. 43; and 21, *supra*) be clarified to insure that all transshipment between the two ports, not only those of the McAllister barge service, be assessed on an "excepted" man-hour basis. Transshipment, Massport asserts, is a substantial and expanding service upon which the Port of Boston depends.

Replies to Exceptions

All parties have filed replies to exceptions to the Initial Decision, the most lengthy being those of PRMSA/PRMMI and the Port Authority, the Complainants, who largely prevailed before the ALJ.

Port Authority

The Port Authority reaffirms its position that the ALJ properly found that the present assessment formula is unfair and unjustly discriminates against the Port. It details 13 specific factual findings which the ALJ made which it claims constitute the necessary evidence to support his conclusion. (Reply to Excep. 2–4). It reasserts its contentions that the "naturally tributary" concept is not applicable, that the Port's limitation on its ability to compete is legally cognizable injury, and that the Port has in fact shown actual cargo loss. (Reply to Excep. 5–8). The Port Authority states that the statements made by various carrier officials to Mr. Steiner were admissions of considerable value, which were not challenged by cross-examination or presentation of the "admitters" as witnesses. The one "admitter" who was presented as Respondents' witness was not even examined on the matter. (Reply to Excep. 7–8). In response to specific errors alleged by NYSA/ILA on exceptions, the Port Authority asserts:

(1) The $100–300 container cost differential is admitted by one of Respondents' own witnesses, and the lower $158.58 differential is based upon an admittedly erroneous productivity figure. (Reply to Excep. 9).

(2) The formula, rather than the greater costs at New York, is responsible for the differential. (Reply to Excep. 9–10).

(3) Carriers diverting cargo from New York are not worried about GAI increases. Any increase in GAI caused by diversion would be minimal compared to costs savings from the diversion. (Reply to Excep. 10–11).

(4) It is absurd to contend that a reduction in cost differential does not ease competitive disadvantage because a differential which could cause diversion still remains. (Reply to Excep. 11).

(5) The record does not support NYSA/ILA's assertion that carriers don't control routing because 90% of container traffic moves under port-to-port rates. The record evidence does not support the 90% figure and, moreover, shows that lines do control traffic, even under port-to-port rates. (Reply to Excep. 11–12).

Due weight must be given to the ALJ's credibility determinations, the Port Authority asserts, which show from his observation and consideration that NYSA/ILA's witnesses in general were not credible. (Excep. 12–13).

The New York/Boston transshipment service should, the Port Authority maintains, be treated like any other transshipment service and, under the formula suggested in the Port's Exceptions, would be taxed substantially less than under the ALJ's formula. The Port Authority ends its Reply to Exceptions with a reiteration of its argument in support of its latest proposed formula. (Reply to Excep. 13–18).

PRMSA/PRMMI

PRMSA/PRMMI contends that the ALJ properly found that the present formula was unfair and unjustly discriminatory in its general treatment of "benefits/burdens," and that this unfairness is exacerbated by additional special favoritisms.[15] Contrary to NYSA/ILA's position, PRMSA/PRMMI asserts that the ALJ found the present formula unlawful because of its basic unfairness shown on the record, not because Dr. Silberman's formula was better. Dr. Silberman's formula was adopted because, once the present formula was shown to be unfair, it appeared to be the best way to remedy the defects. (Reply to Excep. 5–7).

PRMSA/PRMMI contends that the Presiding Officer properly found the present formula unlawful because it improperly assigned Type I costs and penalized efficiencies having nothing to do with the problems of containerization which the tonnage formula was designed to meet. Dr. Sliberman's alternative formula recognizes the distinction between current individual employer costs and industry costs and does not penalize carriers

[15] The bulk of PRMSA/PRMMI's comments is directed to the exceptions of NYSA/ILA. PRMSA briefly challenges Sea-Land's assertion that the Commission cannot legally modify the agreement, and Hearing Counsel's support of NYSA/ILA's position. The "special treatment" for transshipment cargo of concern to Sea-Land and Massport PRMSA/PRMMI treats in response to similar arguments by NYSA/ILA. (See Reply to Excep. 4–5).

for efficiencies unrelated to containerization. It also is "neutral" with respect to the breakbulk sector by freezing breakbulk's contribution at the present level. (Reply to Excep. 7–17).

PRMSA/PRMMI contends that NYSA/ILA's error with respect to carrier responsibility is caused by NYSA/ILA's use of the word "productivity" to include both innovations related to containerization loading/unloading and efficiencies not so related, but having to do with non-loading/unloading functions—*i.e.*, handling of empties, stuffing/stripping, and maintenance. PRMSA/PRMMI argues that its efficiency is so great that the proper calculations show that even with the exclusion of non-loading and unloading functions, PRMSA/PRMMI is still about twice as efficient as Sea-Land and U.S. Lines. (Reply to Excep. 17–30).

The Presiding Officer did not find, PRMSA/PRMMI asserts, that a tonnage formula is illegal *per se*; he held that it is unfair here because of the improper allocation of costs in general. The result allegedly would have been different if containerized operations of the different carriers were more uniform and if there were not a substantial Type I component of overall fringe benefit costs. (Reply to Excep. 30–33).

PRMSA/PRMMI attacks NYSA/ILA's argument that the formula is fair because all carriers have the equal opportunity to tailor their operations to take advantage of exceptions. It asserts such argument is legally defective because it is contrary to a court decision and the legislative history of the MLAA, and also factually defective. It further contends that all parties do not in fact have equal ability to take advantage of exceptions. (Reply to Excep. 33–36).[16]

PRMSA/PRMMI contends that practical difficulties in administration of an alternative formula cannot justify the perpetuation of unfairness of the existing formula. It notes, however, that a combined man-hour/tonnage formula has been used by NYSA/ILA in the past and is used by many other ports at the present time. It further notes that the present formula contains many special classifications which require separate calculations, some on a man-hour basis. (Reply to Excep. 36–39).

PRMSA/PRMMI contends that the ALJ properly found the favoritisms which he disallowed to be "unfair and unjustly discriminatory." The "excepted" treatment of transshipped/rehandled cargo was allegedly properly denied because it is not necessary to prevent diversion. PRMSA/PRMMI accuses NYSA/ILA of attempting to create a new justification ("fairness") *post hoc*, which it cannot lawfully do, having invited the Judge to utilize the "diversion" test. They further argue, however, that the exception is not required by "fairness" because GAI, GAI-related obligations, welfare and clinic benefits for retirees and their dependents, and unfunded pension benefits for those now retired are industry-wide costs, a fair share of

[16] PRMSA notes that "NYSA expressly defines 'domestic' to exclude the Puerto Rican trade . . . ." (Reply to Excep. 35).

which must be borne by transshipped/rehandled cargo. (Reply to Excep. 39–44).

The Boston/New York transshipment service for which Massport asserts a broad exception is in fact increasing and will, PRMSA/PRMMI contends, further burden those who must pay for the costs evaded by the carriers taking advantage of the exception. (Reply to Excep. 45–46).

PRMSA/PRMMI maintains that Sea-land mischaracterizes the ALJ's treatment of the handling of the transshipment/rehandling exception. He did not "shift the burden of proof," as Sea-Land contends, but found on the record that the cargo diversion which Sea-Land (and U.S. Lines) claimed would take place under the tonnage assessment would not be likely to occur. PRMSA/PRMMI contends that the evidence of record supports this finding since cross-examination defeated the self-serving claims of the Sea-land and U.S. Lines' witnesses. The facts of record, PRMSA/PRMMI maintains, show that the diversion would not occur, but that if diversion did occur and "only 23.5% of the Sea-Land and U.S. Lines transshipped, rehandled, and domestic activities were returned, the Port's fringe benefit funding program would have been better off in the 1982–83 contract year without the exception." (Reply to Excep. 46–51).

PRMSA/PRMMI claims that the unfairness of the transshipment/rehandling exception is shown by its own proof of already existing diversion of New York cargo by TMT to Pennsauken, New Jersey (a part of the Port of Philadelphia), which NYSA has refused to recognize, while accepting the arguments of Sea-Land and U.S. Lines with respect to a diversion which the record here shows in unlikely to occur. (Reply to Except. 51–54).

PRMSA/PRMMI asserts that NYSA/ILA offer virtually no defense for the continuation of the exception for domestic cargoes. The problem of diversion is the only proferred excuse, and the record shows none. The isolated "statistic" of cargo decline since 1973 which NYSA/ILA highlight is misleading since in fact cargo has shown a steady increase from 1980 to 1983. (Reply to Excep. 55). The record shows U.S. Lines, which receives 95% of the benefits for the domestic cargo exception, will continue to transport such cargo regardless of cost increases because it is incremental in nature. Moreover, even if U.S. Lines lost all domestic cargo, it admitted it would be reasonable to expect that such cargo would be replaced with additional cargoes from the Far East to the East Coast. (Reply to Excep. 54–59).

PRMSA/PRMMI maintains that assessment of empties and stuffing/stripping for direct man-hour costs is not unfair as such activities would pay only their own direct labor costs and nothing for GAI or other industry-wide costs. PRMSA/PRMMI further contends that such assessment will not divert cargo because it would be operationally infeasible and too costly to divert empty containers, and the Rules on Containers forbid "diversion" of stuffing/stripping work. (Reply to Excep. 59–62).

PRMSA/PRMMI appends an "Appendix A" to its Reply to Exceptions in which it responds to the specific numbered exceptions of NYSA/ILA which it feels are not otherwise adequately dealt with and which are significant for decisional purposes as follows:

(1) NYSA/ILA incorrectly state that PRMSA/PRMMI's complaint didn't allege diversion of cargo naturally tributary to New York. (Reply to Excep. 1) (A 2).

(2) The ALJ's ruling on NYSA/ILA's "affirmative defenses" was based not on presence or absence of "changed circumstances," but on the findings that NYSA/ILA's tonnage formula was never approved on the merits, the new agreement (LM–86) gave rise to a new cause of action, and principles of labor law cannot extinguish a carrier's rights under the Shipping Act to challenge an assessment agreement. (Reply to Excep. 2) A 2–3).

(3) The ALJ correctly stated the "burden of proof." (A 3).

(4) The ALJ correctly stated the "benefits/burdens" standard. (Reply to Excep. 3 and 4) (A 3).

(5) The ALJ correctly characterized the present formula as shifting labor costs from low productivity operators to high productivity operators. This is the necessary effect of a whole tonnage formula which includes Type I costs. (Reply to Excep. 12) (A 3).

(6) The ALJ properly found the extent to which credibility determinations influenced his decision. (Reply to Excep. 14) (A 3–4).

(7) NYSA/ILA err in asserting that empties, stuffing/stripping, and maintenance are assessed under the formula. (Reply to Excep. 21) (A 4–5).

(8) The ALJ criticized NYSA/ILA's witnesses, not because they had "strong feelings," but because they were "doctrinaire" and "unduly rigid." (Reply to Excep. 44) (A 5).

(9) The ALJ did not exclude or strike Mr. Sclar's testimony or give it little weight solely because of its inconsistency with his testimony in another proceeding. He give it minimal and proper weight for seven specified reasons. (Reply to Excep. 46) (A 5).

(10) The motion to strike Exhibit 48 was properly denied for the reasons stated by the ALJ. (Reply to Excep. 47) (A 6).

(11) The ALJ did not find that longshoremen were not industry employees for any purpose. He found that certain costs were single employer costs which should not be borne by the industry as a whole. The benefit of containerization is the same for all carriers, with efficiencies differing among them due to their effectiveness of labor use. All carriers continue to pay for continuing costs of containerization under the formula adopted by the ALJ. (Reply to Excep. 49) (A 6).

(12) The ALJ properly found the removal of the transshipment exception would increase U.S. Lines' assessment burden by $3.5 million,

and that the total increase for U.S. Lines would be $6.9 million. He properly declined to find that U.S. Lines' assessment will actually increase by $14.5 million. (Reply to Excep. 52) (A 7–8).

(13) The ALJ properly found that transshipped/rehandled and domestic cargoes do not even pay their own Type I costs under the proper allocation of Type I costs under the proper allocation of Type I and Type II costs. (Reply to Excep. 54) (A 8).

(14) NYSA/ILA were not prejudiced by the ALJ's failure to subpoena data from TMT since NYSA/ILA had adequate opportunity to test PRMSA/PRMMI's diversion claims by cross-examining PRMSA/PRMMI's witnesses. The ALJ also properly disregarded arguments concerning PRMSA/PRMMI's purported loss of Baltimore cargo to TMT and New York cargo to Sea-Land since the argument was based on meaningless statistics. (Reply to Excep. 56) (A 8–9).

(15) The ALJ made properly supported findings with respect to the apportionment of Type I and Type II costs. (Reply to Excep. 58) (A 9).

(16) The ALJ correctly accorded little weight to Mr. Fier's testimony with respect to the accounting of holiday payments received by GAI recipients because the record showed Mr. Fier did not know how the auditors prepared their accounts. (Reply to Excep. 59) (A 9).

(17) The ALJ correctly found that Mr. Sclar's position respecting vacation benefits as in part involving Type II costs was inconsistent with his prior testimony in another case (Reply to Excep. 60) (A 10).

(18) The ALJ properly found that the assessments should not fund administrative costs for other collective bargaining agreements. The discrepancy between assessment revenues and NYSA/ILA expenses arises from the fact that neither all fringe benefits nor all administrative expenses are funded from assessments (Reply to Excep. 61) (A 10–11).

(19) The ALJ properly denied the various motions to strike Mr. Carr's testimony on diversion (Reply to Excep. 62 (d), (e)) (A 11).

NYSA/ILA

NYSA/ILA respond to the exceptions of both the Port Authority and PRMSA/PRMMI. They contend that the Port's proposed formulas are not justified by the "benefits/burdens" test but rely solely on a reduction of the impact of the present assessment formula on New York, without showing that such impact is unlawful (Reply 2–3). They contend that PRMSA/PRMMI's four exceptions to the Initial Decision are all unwarranted. They assert that the 25% discount for the Puerto Rican trade is outside the Commission's authority to grant, and that the need for, and

benefit from, such discount are unsubstantiated by the record (Reply to Excep. 4.) They maintain that the MLAA creates an exclusive damage remedy under a single provision of the Shipping Act and thus forecloses reparations for a period prior to the filing of PRMSA/PRMMI's complaint (Reply to Excep. 4–5). They contend that the remedy of interest on assessment adjustments is a discretionary one under the MLAA, and that the ALJ correctly denied such interest based on the usual and proper considerations in assessment agreement cases (Reply to Excep. 5–8). They maintain that PRMSA/PRMMI's exception to the Initial Decision's treatment of the New York/Boston transshipment service is a "sacrifice [of] the Port of Boston to eke out a few more dollars for PRMSA's purse." (Reply to Excep. 4). NYSA/ILA's reply concludes with a reiteration of their contention that the Initial Decision merely constitutes a substitution of judgment by the ALJ for that of the parties to the assessment agreement (Reply to Excep. 8–9).

Hearing Counsel

Hearing Counsel limit their replies to a defense of the Presiding Officer's denial of the 25% discount on the tonnage portion of the assessment for the Puerto Rican trade. They contend that such discount is justified neither by Commission precedent nor the record in these proceedings.

Sea-Land

Sea-Land replies in support of the ALJ's determination with respect to the four types of relief denied PRMSA/PRMMI. Specifically, Sea-Land asserts that Puerto Rico has made out no case for a 25% discount on the tonnage assessment (Reply to Excep. 7–8), that it is not entitled to reparations as a matter of law (Reply to Excep. 4–5), that it is not entitled to interest (Reply to Excep. 5–7),[17] and that the transshipment exception recognized by the ALJ was proper but should be broadened to include all transshipment operations, which Sea-Land contends is required by fairness and shown as needed by the facts of record (Reply to Excep. 8–9). Sea-Land concludes that the parties to the assessment agreement should be allowed to negotiate a settlement (Reply to Excep. 2–4, 10).

Other Replies

MPA supports the ALJ's conclusion that the Port Authority's formula was not proper merely because it would have reduced the container "handicap" between New York and Baltimore to a greater extent. It also generally associates itself with the exceptions of Hearing Counsel, Sea-Land, and NYSA/ILA.

Massport supports the ALJ's conclusion with respect to the propriety of excepted treatment for New York/Boston transshipment services on the

[17] Sea-Land maintains, in fact, that the Commission has no authority to grant interest on assessment adjustments (Reply to Excep. 6–7).

grounds that such services should not be required to pay for GAI because they are adding hours of work, and that to deny the exception would act to kill the McAllister barge service and severely injure the Port of Boston, which depends on transshipment cargo for half of its container operations. Massport further asserts it would be unfair to make such services pay for full labor costs at New York when they already pay full labor costs at Boston (Reply to Excep. 2–6). Massport asserts that the formula suggested by the Port Authority of New York/New Jersey in its exceptions will not adequately solve Boston's problem because the per container charge element of it will improperly burden transshipment services with labor costs they should not have to bear (Reply to Excep. 6–7).

DISCUSSION

We find that the exceptions to the Initial Decision are, for the most part, merely reiterations of matters raised before, and fully and correctly disposed of by the ALJ.

NYSA/ILA's "Affirmative Defenses"

As a threshold matter, the Commission finds no merit to the various arguments that we should not or cannot entertain one or both complaints because of problems relating to *res judicata,* estoppel, waiver, settlement, timeliness, and the effects of labor law principles. These "defenses" were adequately addressed and correctly rejected by the ALJ. See pages 6–8, *supra,* and I.D. 9–38.[18]

Correction and Clarification of Certain Factual Findings

We find that in general the factual determinations of the Presiding Officer are proper and well-supported by the record. Although there are minor errors, none of them is outcome determinative. For the sake of accuracy, however, we here correct those findings which we feel could be the source of confusion:

(1) On page 19 of the I.D. at fn. 7, the Presiding Officer refers to *Council of North Atlantic Shipping Associations* v. *F.M.C.,* 672 F.2d 171 (D.C. Cir.), *cert denied,* 459 U.S. 830 (1982), as holding that the MLAA preserved our jurisdiction over certain portions of collective bargaining agreements. The statement should more correctly read that the MLAA preserved our jurisdiction over rates, charges, regulations, or practices required to be set forth in tariffs, regardless of whether or not such matters arose out of, or were otherwise related to a collective bargaining agreement.

[18] As PRMSA/PRMMI correctly points out (Reply to Excep., A 2–3), the ALJ's ruling on NYSA/ILA's "affirmative defenses" was based not merely on the presence or absence of "changed circumstances," but also on findings, *inter alia,* that NYSA/ILA's tonnage formula was never approved on the merits, the new agreement (LM–86) gives rise to a new cause of action, and principles of labor law cannot extinguish rights under the Shipping Act to challenge an assessment agreement.

(2) On page 49 of the I.D. at fn. 16, the Presiding Officer states that Sea-Land pays "nothing" on its relay containers. As will be seen from other portions of the I.D., (*e.g.*, 135, 137), it is clear what is meant is that Sea-Land pays nothing on a tonnage basis. It pays on a man-hour basis. The movement is "excepted," not exempt from assessment.

(3) On page 73 of the I.D., the Presiding Officer states that the tonnage formula "taxes carriers in inverse proportion to the amount of labor used for all costs." As will be seen from his statement in finding 27 on page 83, what the Presiding Officer intended to express is the idea that the effect of a whole tonnage assessment, as opposed to a man-hour assessment, is to assess costs with respect to work performed in an inverse proportion to the labor used in that work. Thus, since the assessment is used to fund *all* fringe benefit costs, including costs for those benefits that are substitutes for wages or that represent deferred compensation, the effect is to shift labor costs for expenses of direct employment of labor from low productivity operators to high productivity operators. Industry-wide costs (GAI, GAI-related costs, welfare and clinic costs for retirees and their dependents, and unfunded pension liability for pensioners) are properly borne by all in proportion to cargo handled. The statement might better read "taxes carriers in inverse proportion to the amount of labor used for direct costs of their employees."

(4) On page 77 at findings Nos. 8 and 9, the Presiding Officer makes certain determinations with respect to the relationship of the master contract and local contracts insofar as pension and welfare benefits are concerned. The findings on this matter should more properly read: The master contract sets the rate of contribution for pension and welfare benefits, but the amounts of these benefits vary from port to port and are negotiated on a local basis.

(5) The Presiding Officer found that the assessment differential between New York/New Jersey and other North Atlantic ports if all ports funded fringe benefits on the tonnage basis used at New York/New Jersey would be an average of $90 per container. NYSA/ILA maintain that the differential should be higher because the Port Authority used an average load factor of 21.7 assessment tons rather than the correct figure of 28.78 ton. We acknowledge the correctness of this observation. (See *e.g.*, page 137 of the I.D., where the ALJ used a load factor of 29 assessment tons in his computations.) We note, however, that the proper load factor only acts to magnify the differential between ports based on a whole tonnage formula and a different type of formula.[19]

[19] We also take this opportunity to correct minor wording errors in the I.D.:
(1) The reference on line 9 on page 82 should be to "Port Authority" opening brief.

LAWFULNESS OF THE PRESENT NYSA/ILA ASSESSMENT FORMULA AGREEMENT

INTRODUCTORY STATEMENT ON APPLICABLE STANDARD

The basic issue for Commission determination is the question of whether or not the present NYSA/ILA assessment formula agreement is "unfair" or "unjustly discriminatory" as between shippers, carriers, or ports within the meaning of the MLAA. Such determination requires application of the "benefits/burdens" test, about which some confusion appears to exist.

There is no dispute at this stage of the proceeding over the applicability of the "benefits/burdens" test. (See page 8, *supra*). The "benefits/burdens" test is the appropriate one for determining the legality of the assessment formula. As the Initial Decision found, it is the well-established test and the one which the Congress intended to preserve (see I.D. 54–58). The test requires that an assessment formula impose charges which are "reasonably related to benefits" (*Volkswagen* v. *FMC*, 390 U.S. 261, 295 (1968) (Opinion of Justice Harlan)) and that the formula achieves a "broadly equitable arrangement of benefits and burdens" (*New York Shipping Ass'n* v. *FMC*, 571 F. 2d 1231, 1238 (D.C. Cir. 1978)). It does not require "absolute equity" (*Transamerican Trailer Transp., Inc.* v. *FMC*, 492 F.2d 617, 620 (D.C. cir. 1974)) (*TTT*) or "perfect" or "exact" correlation of benefits and burdens (*Volkswagen* at 295 (Opinion of Justice Harlan)).

It is true, as NYSA/ILA assert, that "any analysis of the present problem must leave room for the implementation of some uniform, practical, general rule of assessment even though it have some features that are less desirable than some alternative imperfect rule." (*Volkswagen* at 293 (Opinion of Justice Harlan)). It appears that the present formula could not, however, be defended on that basis. It is neither general nor uniform. It imposes special (and lower) types of assessments on particular commodities. It also creates numerous exceptions for certain cargoes or activities. Domestic, transshipped/rehandled cargoes, as well as numerous other commodities, are "excepted" from the tonnage assessment and pay on a man-hour basis (I.D. 78–79). Other activities, such as handling empty containers, stuffing/stripping, and maintenance work, are totally exempted from assessment and pay nothing. (I.D. 81–83.)

While the present system may be "practical," it is no more practical than the one the ALJ requires. Both will fund the assessments, and to the extent that practical problems arise with respect to the administration of the formulas, they should be no greater under the formula adopted by the ALJ than the present one. In fact, the type of problems that NYSA/ILA recite with respect to difficulties caused by exceptions and different systems of assessment (Brief on Excep. 53–54) are present now. If anything,

(2) The first sentence on page 108 should read: "But for the existence of Dr. Silberman's alternative formula, which, with modifications to eliminate certain excessive features I adopt, I would recommend Mr. Donovan's formula (third alternative) with some modifications."

the removal of some of the "special treatment" may simplify the administration of the assessment formula. A small, uniform charge, evenly applied, might be reasonable even if all did not receive equal benefits. See *Volkswagen* at 281; *Evans Cooperage Co.* v. *Board of Commissioners of the Port of New Orleans,* 6 F.M.B. 415 (1961).[20] A large charge unevenly applied, however, would not. See *Volkswagen* at 281; 293–294 (opinion of Justice Harlan).

Nor may it be sufficient to say that since an assessment may be uniform within a single group, it is "fair" as required by the statute. "The uniformity of an assessment does not necessarily make it fair and reasonable." (*TTT* at 629). In fact, in *TTT* the Commission was upheld by the Court of Appeals in finding that the container operators in the Puerto Rican trade were not responsible for a "shortfall" in man-hours and thus should not have to bear the assessment burden based on shortfall, while other container operators had to bear such burden. *TTT* at 625–628; see also *Agreement No. T–2336,* 15 F.M.C. 259, 265–272 (1972).

In addition, where, as here, special treatment of large assessments is created for certain categories of cargoes and shipping activities, the Commission, as both Justice Harlan and the Court of Appeals for the District of Columbia Circuit have observed, has the obligation to examine different methods of allocation to see if the "special" rules created are "the fairest that could be devised." It also has the obligation, in the case of different assessments on different groups, to see that the charges "are as appropriately proportioned as would be feasible." See *Wolfsburger Transport* v. *FMC,* 562 F.2d 827, 829–830 (D.C. Cir. 1977) (*Wobtrans*); *see also Volkswagen* at 293–294; *TTT* at 624.

As noted above, "precise calculations are elusive, and absolute equity is beyond concrete demonstration" (*TTT* at 620), "charges need only be 'reasonably' related to benefits, and not perfectly or exactly related" (*Volkswagen* at 295 (Opinion of Justice Harlan)), and the Commission need only see that "the parties acting independently have achieved a broadly equitable arrangement of benefits and burdens" (*New York Shipping Ass'n* v. *FMC,* 571 F.2d at 1238). Nevertheless, the inquiry required to assure that such equity exists must, as *Volkswagen, TTT,* and *Wobtrans* mandate, be sufficiently searching to see that adequate explanation exists both for the formula in general and any of the "special" treatment created under it.

The burden of proof is, of course, on complainants. See *Boston Shipping Ass'n* v. *FMC,* 706 F.2d 1231, 1239–1240 (1st Cir. 1983). This means that complainants must at least summon record support for contentions that any "special treatment" is "unfair" or "unjustly discriminatory".

[20] Another example of a small, uniform charge evenly applied is the container royalty charge. See Brief for Respondent Federal Maritime Commission at 30–32, *Boston Shipping Association* v. *FMC,* 706 F.2d 1231 (1st Cir. 1983).

The Port Authority's Case

As the Port Authority itself recognizes, it must show competitive injury caused proximately by the tonnage assessment formula here challenged. See *e.g., Port of New York Authority* v. *AB Svenska Amerika Linien,* 4 F.M.B. 202 (1953). The Port Authority must also show that the effect upon it is "unreasonable", which in the context of this proceeding, means unjustified by the "benefits and burdens" test. *Boston Shipping Ass'n* v. *FMC,* 706 F.2d at 1240–1241.

Although the matter is not one on which the record evidence is so overwhelming that an argument could not be made that "reasonable men" could not have made the contrary conclusion, we are convinced that the "preponderance of the evidence"[21] is such that the Port Authority has established that the present formula is "unfair and unjustly discriminatory" to the Port of New York and New Jersey.

The Commission finds that the Port Authority has shown by a preponderance of the evidence that competitive cargo has been diverted from the Port of New York/New Jersey by the assessment formula and that it has been injured by such diversion.[22]

We do not agree, as opponents to the Port Authority's claim contend, that any diversion must be caused *solely* by the assessment formula or that unlawful diversion may take place only with respect to "naturally tributary" cargoes. "Proximate cause" is not the same as "sole cause." While there must be sufficient evidence to show that the assessment formula is the cause in fact of the diversion, there is no authority for the proposition that so long as other factors contribute to the diversion, the Commission is powerless to act. *Cf. e.g., McDonald* v. *Santa Fe Transportation Co.,* 427 U.S. 273, 282 (1976). Similarly, NYSA/ILA's contention that only "naturally tributary" cargo can be diverted from a port, and that the diversion of any other cargo, even if intentional and the result of unlawful practices, is not unlawful [Excep. 11–12] is completely unfounded. No authority is cited for such proposition, and none exists. Obviously, if a diversion exists as a result of an unlawful practice, it is unlawful.

As a general matter, as we have explained in *Pacific Westbound Conference—Equalization Rules,* 26 F.M.C. 313, 332 (1984) (*PWC*), the "naturally tributary" concept seems to have little continuing validity, and the proper means of determining the lawfulness of port competitive practices in the container age is to examine whether the contested practice is directed against certain commodities or exists at the expense of economic or oper-

[21] The ALJ properly determined that "preponderance of the evidence" is the criterion for testing MLAA complaints. It is true, as NYSA/ILA contend (Excep. No. 4), that they were not the proponents before Congress of a "clear and convincing" standard of proof in MLAA cases. Nevertheless, this latter, higher standard was rejected by the Congress, as the ALJ correctly found.

[22] As the ALJ properly found, the Commission need not find that the one causing an unlawful discrimination must control both the action relating to the discrimination and the actions relating to those not discriminated against, *i.e.,* in the context of these proceedings the Commission need not find that the same carriers control assessments at ports other than New York/New Jersey. See I.D. 67, fn. 22, and cases thus cited.

ational efficiencies. The Port Authority's case is buttressed by an analogy to *PWC*. If the assessments could be fully and fairly funded by a means which would reduce the per container cost at New York/New Jersey vis-a-vis the other ports with which it competes, then the failure to adopt such means could be said to be "economically and operationally inefficient."

A finding of unlawful discrimination against a port has never necessarily depended upon a showing that the cargo involved was "naturally tributary" to the port. See *e.g., Boston Shipping Association* v. *FMC,* 706 F.2d, and *Port of New York Authority* v. *AB Svenska et al.,* 4 F.M.B., neither of which relies on "naturally tributary" considerations. Similarly, *Port of New York Auth.* v. *FMC,* 429 F.2d 663 (5th Cir. 1970), *cert. den.* 401 U.S. 909 (1971) and *Intermodal Service to Portland, Oregon,* 17 F.M.C. 106, 128–130, 138–139 (1973) hold that the ability of ports to be able to compete for *all* cargoes, regardless of origin, without unlawful impediments is the goal of the Commission's regulatory activities.

Hearing Counsel's attempt at oral argument to "reconcile" the court decisions in *Boston Shipping Association* v. *FMC,* 706 F.2d (*BSA*) and *Dart Containerline Co., Ltd.* v. *FMC,* 639 F.2d 808 (D.C. Cir. 1981) (*Dart*) from a "naturally tributary" approach is misguided. It is true that *Dart* involved naturally tributary cargo, and the Commission there found unlawful diversion. It is also true that, so far as appeared, *BSA* did not involve naturally tributary cargo, and the Commission there found no unlawful diversion. The distinction, however, is irrelevant for our purposes here. *Dart* involved an "absorption" of land transportation cost expenses which was found to be operationally and economically inefficient, and which discriminated against shippers of a particular commodity. (See *PWC,* 22 S.R.R. at 962.) *BSA,* on the other hand, involved the payment of container royalties on transshipped cargoes to longshoremen at New York rather than to longshoremen at the Port of Boston.

Boston had two theories for recovery, one of which depended upon a naturally tributary approach and one of which did not. Boston's main theory was that the payment of royalties to New York longshoremen rather than to Boston longshoremen caused Boston to impose greater assessments and carriers to divert cargo because of these greater assessments. The origin or destination of the cargo was irrelevant for purposes of this theory, and neither the Commission's decision nor that of the Court considers it. The theory failed for lack of proof. (See pages 72–73, *infra*).

Boston's second theory was that the payment of the royalties to New York longshoremen rather than Boston longshoremen was basically wrong. See BSA brief in *Boston Shipping Association* v. *FMC, 706 F.2d at 15;* see also FMC brief in *BSA* at 24–25; 33. In order to prove this, Boston would have had to show that Boston longshoremen were somehow fundamentally entitled to that cargo, and that New York longshoremen were not. It failed to do so.

The second theory of Boston in *BSA* and the Port Authority's theory here are entirely different. Boston had to prove that Boston longshoremen alone were entitled to the royalties in order to prevail, and thus some sort of "tributary" approach was necessary to its case. The Port Authority here, however, does not seek to prove, and need not prove, such entitlement. As the cases above discussed show, it need only show an improper impediment to its ability to compete for cargo with other ports.

NYSA/ILA err when they contend that the ALJ "confuses the substantive element of injury with the standard of proof needed to establish it." (Brief on Excep. 9.) The Presiding Officer correctly held that injury of the type shown by the Port Authority here is injury of the type of which we may take legal cognizance. In *NARI* v. *FMC*, 658 F.2d 816, 827 (D.C. Cir. 1980), the court held that injury amounting to "detriment to commerce" could exist in the form of market place disadvantage even if a shipper's sales were increasing. Insofar as the "standard of proof" is concerned, the ALJ correctly found that *Dart* clearly indicates that no "smoking gun" is necessary to show the existence of injury.

In point of fact, there is much evidence of record of injury to the Port's ability to compete caused by the assessment formula, both of a general and of a very specific nature. Simple mathematical computations show that the greater assessment cost at New York/New Jersey vis-a-vis the ports with which it competes is not alone responsible for the assessment differential on containerized cargo at New York/New Jersey. (See I.D., page 87, findings 41–44, and page 12, *supra.*)[23]

The evidence also shows that the proportion of cargo moving through the Port of New York/New Jersey in comparison to other North Atlantic ports has decreased, particularly with respect to containerized cargo. (I.D. 98–99.) That decrease cannot be fully explained by other factors such as later expanding containerization at other ports, since the record does not show this to be true. As the ALJ found, even in New York/New Jersey a good deal of container facilities were not developed until 1975 or later (completion of Sea-Land, Maersk Terminal, Red Hook, South Brooklyn Marine Terminal, etc.). (Ex. 31, pp. 6–7.) There was also much

[23] A differential of approximately $250 on loaded containers is admitted by a carrier witness in these proceedings (see page 12, *supra*) and is confirmed by NYSA/ILA's own figures:

NYSA–ILA Formula

New York: Throughput Container (2 man-hours) 28.78 tons x $8.90 = $256.14.
Baltimore: 2 man-hours x $10.49 = $20.98.
Per Container Differential + $235.16.
The differential if 4 man-hours in moving the container is used would be $214.18. (See NYSA/ILA Brief on Excep., 27.)
NYSA's witness (Mr. Sclar) had originally used as 9.3 man-hour number as the time required to handle an "average" container. Since this figure included non-cargo handling hours, like maintenance, and empty, "stuffed/stripped," and throughput containers, which have very different productivities, it was not meaningful. (Ex. 29, pp. III–11 through III–13.) Mr. Sclar admitted on cross-examination that the "incremental" man-hours required to move one throughput container was in the range of 4–5 rather than 9.3 man-hours (Tr. 554–556).

development of container facilities at other North Atlantic ports by 1970 although it continued to 1975. Also, the same full containerships calling at New York also called at Baltimore and Hampton Roads (*Id.*).

The uncontradicted testimony of record, moreover, shows that the tonnage assessment was responsible for carrier diversion from the Port of New York/New Jersey. This testimony came from officers of Respondents and constituted, as the ALJ found, "admissions" very much against the declarers' interests. One would hardly expect a carrier to declare that it could not afford to serve a certain port if it were not true, in light of the effect such declarations would have on the activities of shippers wishing to use that port. It is particularly interesting to note NYSA/ILA's attempt to discredit these admissions. Despite NYSA/ILA's assertions to the contrary, a simple reading of these statements quoted in NYSA/ILA's Brief on Exceptions to the Initial Decision (at pages 24–25) shows repeated references to the tonnage form of assessment mandated by the NYSA/ILA assessment agreement as the cause of carrier concern and determinations relating to use of the Port of New York/New Jersey.[24]

NYSA/ILA (Brief on Excep., 14–21) exaggerate the imprecision of the admissions. While they in most cases specifically do not quantify lost cargo, they do highlight the severity of the problem. The Chairman of Dart Line admitted that "Dart was forced whenever possible to move cargo around the Port of New York/New Jersey *due strictly* to the tonnage assessment." (I.D. 92, finding 63; Ex. 1, Testimony of Steiner, 10, Attachment 1) (Emphasis supplied), Similar statements are made by officers of Costa Line and Barber Blue Sea. (I.D. 92, 93, findings 62, 68; Ex. 1, Testimony of Steiner, 9–11, Attachment 1) Quantifications are made by officials of Sea-Land and Hapag-Lloyd. The present container assessment at the New York/New Jersey ranges from $256.14 to $356.00 on throughput containers. (See NYSA/ILA Brief on Ex., 27.) Sea-Land admitted that it could not afford to pay assessment costs at New York/New Jersey in the $300–$500 range. (I.D. 93–94, finding 69; Ex. 1, Testimony of Steiner, 12, Attachment 1.) The present container assessment differential on throughput containers ranges from $214.18 to $335.02. (See NYSA/ILA Brief, Ex. 27.) Hapag-Lloyd admitted that a $128 assessment differential would make a difference in how it would route cargo. (I.D. 90, finding 54; Ex. 9, Att. F, p. 43.)[25]

[24] If the statements were untrue or misleading, the fact could have been shown by calling the "admitters" as witnesses. NYSA chose not to do so. Sea-Land indicates on brief that one of them may not have been available at the time of hearing. (See Sea-Land Ex., 25.) Assuming this is so, Sea-Land could have protected itself against consequences flowing from the unavailability of the witness for cross-examination at the time of the hearing by attempting to depose the witness and submitting his deposition. See Rule 209(a)(3), FMC Rules of Practice and Procedure, 46 C.F.R. §502.209(a)(3). No reason appears why the other "admitters" were not called, or why the "admitter" who was called (Mr. Scioscia of U.S. Lines) was not examined about his admission.

[25] It is not surprising that the admissions of the carrier executives are not more detailed or definitive as to actions which will be taken when one realizes such actions would be highly detrimental to their interests. As the Supreme Court observed in *FMC v. Svenska Amerika Linien*, 390 U.S. 238, 249 (1968), in upholding

The record, moreover, does show some "smoking gun" type evidence from a carrier and from a shipper of diversion away from the Port of New York/New Jersey caused by the assessment formula. Spanish Lines lost 25,000 tons of waste paper to another carrier through the Port of Boston because the NYSA/ILA Contract Board refused to give waste paper an "exception" from the tonnage assessment, as shown by evidence from NYSA's own files. (See I.D. 97, finding No. 82; Ex. 1, Steiner Testimony pp. 15–17, Att. 3–4). An importer of "Perrier" water can no longer use the Port of New York because steamship lines refuse to handle his cargo there, but will handle it at Baltimore or Norfolk. Perrier is a low-rated commodity that would have approximately 40 revenue tons per container. (See I.D. 89–90; Steiner Testimony, Ex. 1, 14–15).

The arguments about who controls the routing of cargo and the effects of such routing miss the point. The evidence of record shows, as the ALJ properly found, wide-spread and expanding use of intermodal rates. (Exhibit 1, Testimony of Tozzoli, p. 13; Exhibit 1, Testimony of Steiner, p. 5–6; Exhibit 1, Testimony of Longschein, pp. 5–6; Exhibit 9, Attachment A; Deposition of Everhard, pp. 41–42; Exhibit 9, Attachment F: Deposition of Leedy, p. 13; Exhibit 10, Attachment N: Deposition of Halpin, pp. 64, 68; Exhibit 10, Attachment W: Deposition of Moriconi, pp. 21–23; Exhibit 14(d), Attachment B: Deposition of Tozzoli, pp. 84–85). It also shows, however, as indicated by the Perrier shipper's experience, that the question of who technically controls routing doesn't matter, as a shipper can and is persuaded by carriers not to use certain ports. Uncontradicted testimony shows that competing ports actively solicit lines for cargo (Ex. 10, Att. N), and that steamship lines control routing by influencing shippers to choose certain ports, route code systems, port-to-port rates quoted with the understanding that they would not be used through New York/New Jersey, surcharges only on cargo moving through New York/New Jersey, as well as (in the case of the "Perrier" shipper) outright denial of a particular port. (Ex. 1, Steiner Testimony, pp. 13–15).

The cost studies cited by the ALJ (I.D. 85–85) as supporting the Port Authority's position have been attacked by NYSA/ILA as fatally flawed because of defective methodologies. If the studies were intended to make exact comparisons between assessment costs at different ports, there might well be merit in NYSA/ILA's contention. We believe, however, that the ALJ intended to use the studies, as we use them, only as supplying corroboration for the recognition by carriers of the higher per container assessment

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a factual finding of the Commission that travel agents were forced by a disparity in commissions paid by sea and air carriers to direct prospective passengers to air transport:

> "It is true that no agent testified that he had ever persuaded a customer to travel by air over the customer's preference to travel by sea. Agents heavily dependent on [ocean] conference business could hardly be expected to make such an admission, but one agent did go so far as to concede that under some circumstances, there was a 'definite tendency' to encourage a customer to choose air travel because 'it is easier to sell' and 'you make more money.' This amply supports the Commission's conclusion."

burden created by the tonnage assessment at New York/New Jersey vis-a-vis other ports. At least one comparison shows that when the assessment at New York/New Jersey was only $7.50 per ton, rather than the present $8.90 per ton, it was described as "the killer" compared to the Baltimore assessment of $8.10 per man-hour and the Portsmouth assessment of $10.55 per man-hour. Other cost studies, not attacked by NYSA/ILA (I.D. 86, finding 39), moreover, clearly show the much greater container cost created by the tonnage assessment at New York/New Jersey vis-a-vis the total stevedoring container costs at other ports.

Perhaps the most instructive comparison that can be made for "burden of proof" purposes is one of the record in this case with the record in *BSA*. In *BSA* the Commission was upheld by the Court of Appeals for the First Circuit in its determination that the Port of Boston had not made out a case of "unjust discrimination" or "unfairness" to it caused by the payment of container royalties to New York, rather than Boston, longshoremen. The failure there to make a case, however, resulted, apart from the inability to show "entitlement" on the exclusive part of Boston longshoremen alluded to above (see pages 64–66), from the fact that the record rebutted any causal connection between the payment of royalties to New York, rather than Boston longshoremen, and injury to the Port of Boston. The record there demonstrated that, contrary to Boston's contention, the additional dollar per ton assessment imposed by the Port of Boston ("Boston dollar") was unrelated to any injury caused by "loss" of container royalties. The "Boston dollar" was not necessary to protect longshoremen's pensions, since all benefits had always been paid, pension benefits had frequently been increased over the period in question, and would have substantially increased without the additional dollar assessment. The record, moreover, did not show that a carrier's decision to call at Boston was in any way influenced by the existence of the "Boston dollar," revealed Boston witness admissions that a carrier's decision to serve Boston was not influenced by the "Boston dollar", and reflected the expansion of services between Boston and Canadian ports, on which the "Boston dollar" was also imposed. Lastly, the record showed that the decline in Boston cargo could have been due to other factors, because cargo not subject to the dollar suffered a worse decline than that which was, and competing over-the-road services expanded. In the light of such evidence, it was appropriate for the Commission to expect Boston to come forward with some evidence to show the necessary connection between the practice and alleged injury. It failed to do so. See generally, *BSA* v. *NYSA, et al.*, 24 F.M.C. 1110, 1135–1138, *adopted* 24 F.M.C. 1104, 1107–1108 (1982); *BSA*, 706 F.2d at 1235, 1239–1241; FMC brief in *BSA*, p. 36.

Here the facts of record are much different. There is a definite nexus shown between injury and the assessment formula at New York/New Jersey by carrier admissions, corroborated by cargo statistics, and carrier cost studies. Shipper and carrier testimony relating to their activities shows

diversion caused by the assessment formula. Injury has been shown to the Port by relative cargo decline vis-a-vis other ports.[26]

We also find that the Port Authority has shown, by a preponderance of the evidence, that the present assessment formula is "unreasonable" because it improperly assesses users of longshore labor, forcing some users to pay the cost of others.[27] Moreover, such unreasonable assessment formula creates "unfairness" and "unjust discrimination" to the Port of New York/ New Jersey by creating a diversion from the Port of cargo which has been routed away from the Port because of the assessment formula.[28] We therefore conclude that the Port Authority has sustained its burden of showing that the present assessment formula must be modified.

The major problem of the Port Authority's case lies not so much with the question of "proximate cause" or the "reasonableness" of the present formula but with the propriety of the relief sought by the Port Authority. As we have explained, there is sufficient evidence of record to demonstrate that the formula acts to inhibit the movement of cargo through the Port of New York/New Jersey. There is also, as we have found and will explain in detail in connection with PRMSA/PRMMI's case, a sufficient showing that the present formula is unreasonable. This alone, however, does not demonstrate that the formulas proposed by the Port Authority are proper. Unreasonableness arises when a formula improperly allocates benefits and burdens relating to the subject matter of a particular assessment agreement. (See pages 57–61, *supra*, and cases there cited). The fact that the formula proposed by the Port Authority would reduce the assessment burden at the Port of New York/New Jersey more than another formula may show (or help show) "injury" resulting from the latter formula, but it shows nothing about the appropriate apportionment of benefits and burdens.

By failing to take cognizance of all of the expenses relating to industry wide cost the formulas suggested by the Port Authority understate that proportion of benefit expenses which should be borne on a tonnage basis, *i.e.*, by the industry as a whole in proportion to the amount of tonnage

[26] While other factors may have contributed to the relative cargo decline, here, unlike the situation in *BSA*, we have evidence that injury was caused by the tonnage assessment in the form of carrier admissions, and the "smoking guns" of Spanish Line and the "Perrier" shipper, which should be contrasted with the absence of any evidence of linkage of injury to the challenged practice in *BSA*.

[27] We are uncertain of the intent of NYSA/ILA's argument that the "unreasonableness" argument of the Port Authority in Docket No. 84–6 is derived by the ALJ from PRMSA/PRMMI's case in Docket No. 84–8. (See Excep. 31). It certainly would not have been improper for the ALJ to have so acted since, by his rulings of March 20 and April 3, 1984, the proceedings were consolidated for evidentiary purposes. However, the statement is in error. The "unreasonableness" of the current assessment formula and the need for modification was, as the Presiding Officer found, demonstrated by Mr. Leo Donovan, the Port Authority's expert witness. (I.D. 101–102, 107–108). Only the data as to the extent of the necessary modifications come from PRMSA/PRMMI's cases.

[28] Contrary to NYSA/ILA's assertion (Brief on Excep. 22–23), diversion away from the Port of New York/ New Jersey would not be self-defeating because of the increase in GAI caused by such diversion. As the port Authority points out (Reply to Excep. 10–11), while the assessment differential caused by the tonnage formula is in the neighborhood of $250 per container, the additional GAI cost per container would be minimal, say at the high end $60 (4 man-hours x $15 per man-hour), which would be spread across all cargo remaining in the Port).

each carrier transports. All pension, welfare, clinic, holiday, and vacation costs of GAI recipients are industry costs related to reduced manhours and were properly treated as such by the ALJ. Similarly, welfare and clinic costs of retirees and their dependents and unfunded pension costs of pension recipients cannot be allocated directly to any single employer and should, as the ALJ found, be borne on a tonnage basis by the industry as a whole.

While the Port Authority's proposals would undoubtedly be a greater benefit to the Port of New York/New Jersey, any adjustments shifting more expenses to the Type I category would result in improperly relieving carriers of industry-wide burdens which they should bear.[29] Moreover, the greater shift to Type I expenses would create an even greater burden on labor intensive carriers which all parties, including the Port Authority, agree must be protected against further assessment cost increases.

The Port Authority's latest proposal would make no allowance for any of the categories of cargo for which special treatment was adopted other than bananas. The Commission finds, however, that the record supports the need for a broader protection for all breakbulk cargo, since it shows that breakbulk cargo has experienced an extreme decline in tonnage in contrast to virtual constancy in total assessment tons and that although breakbulk cargo accounts for less than 10 percent of the Port's assessment tons, it is responsible for nearly one quarter of total cargo man-hours. (See PRMSA/PRMMI Opening Brief, 119–121, and record references there cited). Moreover, the Port Authority's expert, Mr. Leo Donovan, himself testified that breakbulk cargoes are "extremely important to the port's welfare" and that "care must be taken to assure that no assessment formula change causes a substantial increase in breakbulk assessment charges." (Ex. 31, at 30). The man-hour basis of assessment adopted by the ALJ will protect breakbulk cargo from bearing any share for costs relating to containerization, and the cap placed on total breakbulk assessments at present levels will protect against further breakbulk cargo loss to the Port. While the Port Authority's proposed $9.00 per man-hour would be lower than the current man-hour rates at other ports, it cannot be justified on a "benefits/burdens" basis, and we cannot act on the basis of figures lacking proper analytical support.

Moreover, the record will not support a conclusion that the present "special treatment" for cargoes other than transshipped cargoes and domestic cargoes and the handling of empty containers and stuffing/stripping is unlawful, and these are matters upon which, as we have noted (see page 61,

[29] We do not mean to imply that the formula we here adopt will not be beneficial to the Port. The remaining container assessment differential under the formula adopted by the ALJ is computed by NYSA/ILA to be between $161.52 and $153.24 on average throughput containers. This is a reduction from differentials of between $235.16 and $214.18 on such containers under the present formula. (See NYSA/ILA Brief on Excep., 27–28). It also is in the neighborhood of the $128 assessment differential that a Hapag-Lloyd official said could make a difference in cargo routing by carries, and thus should be of some benefit to the Port. (Ex. 9, Att. F, p. 43).

supra), the Port Authority has the burden of proof. The Port Authority itself observes in its Exceptions (page 15), "If the [NYSA/ILA] Contract Board determines that other exceptions are necessary, it could design future exceptions in a way that it finds administratively feasible." The Contract Board has, however already granted such exceptions, and absent some showing that it should not have done so, they cannot be overturned here.

Lastly, the Port's proposed charge on "container" rather than a charge on "tonnage" seems less appropriate to fund Type II benefits since the amount of cargo actually moved is a better measure of benefits accruing from containerization.

We conclude our consideration of the Port Authority's case by observing that even if the Port Authority had not made out its case, the ultimate result here reached with respect to the lawfulness and necessary modifications to the present formula would be the same, because of our conclusions with respect to PRMSA/PRMMI's case. In other words, since we find that PRMSA/PRMMI has sustained its burden of proof and shown that the present assessment formula is "unfair" and "unjustly discriminatory" as to it and other carriers not given unjustified special treatment, the effects of the necessary modification would also redound to the benefit of the Port Authority. The injurious effect of the whole tonnage formula will be mitigated to the extent it has been shown to be unreasonable in the apportionment of benefits and burdens, and to that extent the Port will be better able to compete for the cargo which it has lost because of the tonnage formula.

PRMSA/PRMMI's Case

PRMSA/PRMMI's case depends upon contentions of two types—that the basic structure of the Agreement is unlawful, and that this unlawfulness is exacerbated by various unjustified "special privileges".

The NYSA/ILA Whole Tonnage Formula

The Commission agrees with the ALJ that the basic structure of the NYSA–ILA whole tonnage formula is unlawful under the facts and circumstances of this case. There is no hard and fast rule as to how assessments must be funded in all situations. A whole tonnage formula could be found lawful in some circumstances, although we have never found it to be so in a fully litigated proceeding.[30] The examples of *Volkswagen*

[30] Sea-Land's contention that the ALJ found the whole tonnage formula to be unlawful *per se* is incorrect. He found it unlawful here for the reasons enumerated. (See I.D. 120–122). Moreover, Sea-Land's whole approach to the question of the relationship of man-hour and tonnage formulas and legality is confused at best. First, it contends on brief (Excep., 5) that a pure man-hour form of assessment is lawful *per se* because it has been removed from our jurisdiction. If this is true, why doesn't it follow that the farther one moves from a man-hour form of assessment, the less likely the result is to be lawful? How can one say that a man-hour form of assessment is presumed good and then criticize the ALJ for incorporating man-hour elements in an assessment formula? Moreover, is it really true that the removal of a pure man-hour assessment from our jurisdiction shows that that form of assessment is good? The injury caused by a man-hour assess-

Continued

and *Wobtrans* are of little utility here as they involved only the assessments on automobiles and, in any case, the Commission actions there were reversed on review. Those cases, moreover, involved a mix of carrier productivities and mix with respect to the kinds of benefits far different from that involved here. Where, as here, and unlike the situations in *Volkswagen* and *Wobtrans*, we deal with a mix of fringe benefits which includes many not related to work displacement caused by containerization (*e.g.* pensions, welfare, clinic, holidays, and vacations of currently employed workers) and an industry where, within a single sector (*i.e.*, containerized carriers) there are marked differences in productivities, a whole tonnage formula does not meet the "benefits/burdens" standard. In this situation, industry wide expenses (*e.g.*, Guaranteed Annual Income (GAI) and fringe benefits paid to those on GAI, as well as welfare and clinic benefits for retired employees and their dependents and the unfunded pension liability for those now on pension, which cannot be directly and quantitatively related to responsibility of current employers) are properly applied to the industry at large on a tonnage basis. But expenses relating to currently employed workers are not.

Use of a whole tonnage formula in the circumstances shown in these proceedings will have the effect, as explained by the ALJ (I.D. 120–122; 125–126; 129–133), of taxing PRMSA/PRMMI and other containerized carriers which have developed efficiencies in non-cargo loading/unloading functions not related to the containerization which lay behind the adoption of the full tonnage formula for those efficiencies by assessing benefits for currently employed workers on a tonnage basis.[31] Moreover, the "exceptions" to the formula for transshipped/rehandled cargoes and domestic cargoes exacerbate this basic unfairness by creating additional penalties on efficiencies not directly related to the containerization which was the concern of LM–86 and its predecessor agreements. (See I.D. 122; 125–126).[32] As PRMSA/PRMMI has shown, the present formula is particularly unfair to it because it has great efficiencies not related to the decision to containerize, both in the non-cargo loading/unloading functions and in cargo loading/unloading functions. (See I.D. 123–126; 130–131; and PRMSA/PRMMI Reply to Ex., 23–30, and record computations there made).

The best means of record to remedy the unfairness created by the whole tonnage formula in the context of the proceedings is the "Type I/Type II" formula adopted by the ALJ, where Type I costs, those related to current fringe benefit expenses for currently employed workers, are funded

ment to breakbulk cargo because of its low productivity was the very reason for the creation of a formula based partially on tonnage in the first place. See *NYSA* v. *FMC*, 571 F.2d at 1233–1234, *TTT*, 492 F.2d at 622.

[31] An elaboration of the unfairness of the effects of a whole tonnage formula on non-cargo loading/unloading functions is found at pages 85–89, *infra*.

[32] An elaboration of the unfairness of the "exceptions" to the whole tonnage formula for transshipped/rehandled and domestic cargoes is found at pages 89–101, *infra*.

on a man-hour basis, and all other expenses are funded on a tonnage basis.[33]

The argument in support of the whole tonnage formula here rests upon the expert testimony of Respondents' witness Mr. Sclar, and upon the general contention that longshoremen are industry-wide employees for all purposes.

There is nothing in law or fact to convince us that all longshoremen are industry wide employees for the purpose of determining who should bear the expense of those longshoremen actually employed for benefits which are substitutes for wages or designed as deferred compensation. The ALJ's treatment of this matter is thorough and correct. The facts are as found by the ALJ, and the law is not to the contrary. (See I.D. 133–134). *NLRB* v. *Truck Drivers Local Union No. 449,* 353 U.S. 87 (1957) (*Truck Drivers*), cited by Hearing Counsel, does not stand for the proposition that all longshoremen should be treated as industry wide employees for the purposes of allocating responsibility for benefits. It merely holds that in a multi-employer bargaining unit employer solidarity to preserve that unit could be enforced by an industry wide lock out of union employees when a union struck a single employer. It does not address employer responsibility for benefit cost—or how employees are to be treated with respect to such costs.[34]

Respondents' own actions, moreover, are inconsistent with the idea that all benefits must be borne by the entire industry on a tonnage type basis. Wages, like benefits, are fixed generally by the multi-employer collective bargaining agreement. Yet these wages are paid, not on some proportion of tonnage moved basis, but on an hourly basis by the employer utilizing the labor. Why should not fringe benefits which are substitutes for such wages or "wages deferred" for men actually working not be paid on the same basis?

Insofar as witness Sclar's testimony is concerned, we find it unconvincing on the point of appropriate assignment of assessment burdens here. Even if it were not inconsistent with his earlier testimony in the West Coast

[33] We reject Hearing Counsel's contention that the present NYSA/ILA formula is "fair" because it over-assesses some cargo for some benefits and underassesses it for others and makes up for it by under-assessing certain other cargo for some benefits and over-assessing it for others. (See Excep. 5–7 and pages 35–36, *supra*). Such a formula would hardly appear to be "fair". *Cf.* the famous *dictum* in the Constitutional realm of fairness, the "equal protection" clause of the 14th amendment: "Equal protection of the laws is not achieved through indiscriminate imposition of inequalities." *Shelley* v. *Kraemer,* 334 U.S. 1, 22 (1948). More importantly, however, the present formula does not balance "over assessments" and "under-assessments". It properly assesses breakbulk cargo, in light of the great burden upon it which would be imposed by a man-hour assessment. The cap on the total breakbulk assessment we and the ALJ adopt preserves this treatment. The present formula also properly assesses containerized cargo for industry-wide Type II costs. However, the present formula over-assesses certain containerized cargoes for wage-type benefits for other containerized operators' employees, a fault corrected by the man-hour/tonnage formula required here.

[34] Justice Harlan's reference to *Truck Drivers* in his concurrence in *Volkswagen* was solely for the purpose of noting that the longshore industry, like the trucking industry, was one in which collective bargaining was done with multi-employer units (at 283). Nothing was said about the consequences of this for the purposes of assigning responsibility for benefit funding, and aside from the fact that benefit responsibility must be assigned within such unit, nothing follows from it.

case,[35] it would not convince us. Regardless of the existence of the West Coast testimony, we find that, because of the varying productivities within the containing sector and the mix of benefits here involved, many of which relate to benefits paid in lieu of wages or as deferred compensation to presently working longshoremen, a whole tonnage assessment is not appropriate.

NYSA/ILA's criticism of the ALJ's treatment of witnesses as inconsistent (Excep. 14) is unwarranted. The ALJ's statement that "the case does not essentially appear to rely upon sense perception, memory, reputation, etc., which are amenable to cross-examination" was made in a preliminary order prior to hearing, whereas the ALJ's credibility determinations were made after hearing and after he had had the opportunity to observe and analyze the conduct of witnesses on the stand. Nor is it fair to contend, as NYSA/ILA do (see Excep. 44), that the ALJ found their witnesses generally not credible. The Presiding Officer found witness Sclar and witness Fier not credible, but only in the context of these proceedings and only for sufficient reasons fully described. (See I.D. 108–112; 171–172). On the other hand, the ALJ found Respondents' witness Camisa very credible, and in fact adopted his analysis of computation of unfunded pension benefits for pensioners over that proferred by PRMSA/PRMMI's witness.

The "Special Privileges"

We agree with the ALJ that the "special privileges" for domestic and transshipped/rehandled cargoes and for the handling of empty containers and the "stuffing/stripping" activity are unwarranted. As NYSA/ILA recognize, the standard justification for special treatment is the likelihood that the cargo or work involved will be diverted away from a port. On exception, NYSA/ILA argue for the first time that "fairness" is also a justification, and PRMSA/PRMMI criticizes such approach as improperly timed. (See page 46, *supra*). We are inclined to agree with PRMSA/PRMMI, but need not decide the question. Assuming, *arguendo,* that the justification is properly raised at this time, it adds nothing to NYSA/ILA's case. "Fairness" in the context of these proceedings means a proper allocation of benefits and burdens, a matter which must be reached in any case. (See pages 57–61, *supra*).

It must be borne in mind that under the present formula, the carriers engaged in handling of empty containers and the "stuffing/stripping" activity pay nothing toward the fringe benefits of their employees who perform such activities. This is so because the present formula is based on tonnage, and these activities involve no cargo transportation. The consequence of

[35] We find that the ALJ properly admitted Exhibit 48 (Mr. Sclar's West Coast case testimony) for impeachment purposes, and that the Respondents had adequate opportunity to rehabilitate Mr. Sclar, both on oral examination, which they declined, and on brief. We further find that although points of difference between the West Coast case and this one were pointed out by Respondents on brief, they did not adequately rebut Mr. Sclar's basic admission in the West Coast case that there is a "substantial overkill potential" in assessment on a tonnage basis during times of declining man-hours. (See I.D. 111).

this is that because all deep-sea employees are covered by the assessment formula agreement, including those involved in handling empty containers and stuffing/stripping, other employers must pay for the benefits due the employees of those carriers who engage in such activities. NYSA/ILA's assertion that the handling of empties and the stuffing/stripping of containers are "assessed under the NYSA–ILA formula" (Excep. 21) is merely a euphemistic way of saying that carriers who do not engaged in these activities pay for all of the fringe benefit expenses of those who do, including employee wage-type benefits.

There is no showing that either the handling of empty containers or the "stuffing/stripping" activities will be diverted away from the Port of New York/New Jersey if the special privilege they now enjoy is removed. Removal of the privilege will result in their paying the man-hour portion of the man-hour tonnage assessment found by the ALJ to be proper. The man-hour rate at the other ports is considerably higher than the approximately $6.35 per man-hour rate which would apply at New York/New Jersey under the modified formula. (See I.D. 81, finding 20). Similarly, the "stuffing/stripping" activity is required under the Rules on Containers in the Master Contract in effect at all relevant ports. One cannot evade the Rules by diverting cargo to other ports.[36]

Nor is there anything "unfair" or "unjustly discriminatory" in making the carriers for whom these activities are performed bear the cost of paying for the fringe benefits of the longshoremen they actually use in these activities. The fact that, as NYSA/ILA point out, the increase in empty containers is due to trade imbalance refers to a peculiarity of certain carriers' operations, the direct, wage-type expenses of which should not be borne by carriers not engaging in those operations. We agree with NYSA/ILA that so far as GAI and related activities are concerned, there should be no assessment against the handling of empty containers and "stuffing/stripping". As NYSA/ILA assert, with respect to transporting empties, stuffing/stripping, and maintenance work, containerization is irrelevant. (See NYSA/ILA brief on Excep. 45–48). These activities do not involve the transportation of cargo and are in effect in no different position now from that which would have obtained in pre-containerization days. Stuffing/stripping is like breakbulk cargo handling (NYSA/ILA brief on Excep. 48), and "the repositioning of empties is not a benefit the carriers secured at the bargaining table". (NYSA/ILA Brief on Excep. 47–48).

[36] NYSA/ILA contend that PRMSA does not comply with the Rules on Containers and therefore enjoys a special privilege its competitors do not. The record appears to indicate that the ILA may have granted some concession to PRMSA with respect to compliance with the Rules on Containers. (See Ex. 14, Att. E, pp. 44–45; Tr. 244–248). If this is true, it is hardly free to complain about the consequences of its actions. The Rules themselves provide for no such exception. The question of the Rules' validity under the labor laws is now pending before the Supreme Court (Docket No. 84–861, *NLRB v. ILA*), and the Commission is presently investigating their lawfulness under the shipping laws in Docket No. 81–11, "*50 Mile Container Rules.*" Their existence is, however, a fact of transportation life, and their necessary embodiment in tariffs renders compliance with them, until their validity has ultimately been determined, a necessity.

The man-hour component of the assessment formula is, however, so constructed that no assessment will be levied under it for anything other than benefits due employees actually working. This frees those carriers handling empty containers, and engaged in "stuffing/stripping" from paying for GAI and other industry costs related to containerization. It also provides another very significant advantage to such carriers. It frees such carriers from paying for industry wide expenses not related in any tangible way to containerization—*i.e.*, welfare and clinic benefits for retirees and their dependents and the unfunded liability for pension benefits for already retired longshoremen. (See pages 76–80, *supra*). If in fact some special recognition should be given employers engaged in these activities because of the man-hours which they add and hence reduce port-wide GAI obligation, surely this additional privilege provides sizeable special recognition.[37] We therefore concur that a man-hour assessment on these activities for Type I benefits is proper.

We also agree with the ALJ that the likelihood of diversion to ILA "Metro" labor for maintenance work justifies the retention of the exemption of such activity from assessment. There is no requirement that deep-sea labor be used for such work, and PRMSA in fact already uses "Metro" labor for maintenance work. Its willingness to bear the cost of other carriers' maintenance work in the interests of reducing GAI is indeed commendable.

Transshipment and Domestic Cargoes

At this point some preliminary discussion seems appropriate with respect to a contention that runs through NYSA/ILA's position with respect to the "exceptions" generally—that no assessment should be made for GAI and GAI-related benefits for transportation services on which man-hours are expanding. It is not true that the mere fact that man-hours are increasing means that an activity should be excepted from the responsibility to pay for an increasing GAI obligation. This is precisely the argument made by the Puerto Rican carriers in *Agreement No. T–2336* and rejected by the Commission and the Court of Appeals. See 15 F.M.C. at 255–270; see also *TTT* at 625–628. The obligation to pay for GAI is unrelated to the question of whether or not man-hours are expanding or contracting on an absolute basis. The critical question is the relationship of the man-hours utilized in the involved activities before and after the advent of containerization. The fact that man-hours are expanding fails to take into account the much greater extent to which man-hours for those activities would expand if such operations were not containerized.

[37] The Port Authority, which seeks man-hour assessment which would include industry wide costs not related to containerization, computes such assessment as in the neighborhood of $9.00 per man-hour. (See Excep., 11–12). The man-hour assessment which would have obtained during 1982–1983 under the modifications we require would have been about $6.35 per man-hour. Thus the additional saving to carriers engaged in handling of empty containers and performing "stuffing/stripping" activities over and above what they receive from the freedom of paying for expenses related to containerization would appear to be around $2.65 per man-hour.

Insofar as transshipment is concerned, NYSA/ILA themselves recognize that "The ability to transship cargoes is not a benefit provided by the NYSA–ILA labor contract. The benefit received by the carriers was the union's permission allowing them to transport cargo in containers * * * Transshipment is not synonymous with containerization. Breakbulk carriers can transship." (NYSA/ILA Brief on Excep., 45, 46). It is the use of transshipment in connection with containerization rather than for breakbulk transportation that creates a GAI problem for which carriers utilizing the containersized service are responsible. There is no "unfairness" in making them bear the burden of such operation. As NYSA/ILA continuously point out, all carriers are free (at least theoretically) to engage in any particular type of transportation service. Those choosing to engage in containerized transshipment should not make carriers not so choosing bear the increase in GAI due to their containerized, as opposed to breakbulk, operations.[38]

The more difficult issue relates to the likelihood of diversion which will be created if the "exception" for transshipped/rehandled cargo is removed. Sea-Land claims that it will occur because it cannot be expected to bear the additional $8.3 million which will be assessed against it as a result of the removal of the exception. (See I.D. 138). The ALJ found that removal of the exception will cause Sea-Land to bear an additional $6 or so per ton under the modified assessment formula, and that there is no showing that it cannot afford to do so without leaving New York/New Jersey. (See I.D. 140–141). The matter comes down to one of drawing inferences from the available evidence. (See *Svenska,* 390 U.S. at 249). On the one hand, it is not at all clear that transshipped cargo will be lost if the exception is removed. Although Sea-Land's witness stated in prepared testimony that Sea-Land would "seriously consider" leaving the Port of New York/New Jersey if the transshipment/relay exception were removed, on cross-examination the "seriously consider" was rendered virtually meaningless by testimony that even a $.05 increase would cause "consideration." (Tr. 725–726).[39] Moreover, as the ALJ found, Sea-Land's operations are such that a shift away from New York/New Jersey as its primary transshipment center is neither likely nor feasible.[40]

Removal of the transshipment exception does not cause inconsistency between the treatment of the likelihood of diversion in the Port Authority's case and such likelihood in PRMSA/PRMMI's case. On the other hand, the ALJ finds that the assessment differential between New York/New

[38] The fact that transshipment services pay assessment costs at one port should not, as Massport alleges (see page 53, *supra),* relieve them of the obligation of paying such costs at the other port they utilize. Carriers engaging in containerized transshipments operate, for their own reasons, in a fashion which utilizes labor (and creates GAI and related problems) at both ports and should bear the responsibility for their actions.

[39] Sea-Land's testimony here should be contrasted with the admissions of the carriers in the Port Authority's case, which ware unequivocal and not undermined by cross-examination.

[40] The case of possible diversion for U.S. Lines because of the removal of the transshipment exception is even weaker, and is adequately and correctly dealt with by the ALJ. (See I.D. 142–143). In this connection, we agree with PRMSA/PRMMI that the ALJ's figures with respect to the increase of U.S. Line's assessment burden because of the removal of the exception for transshipped cargo are correct. (See pages 34, 50, *supra*).

Jersey and other ports is responsible for diversion of cargo from New York/New Jersey. On the other hand, he finds that the removal of the "excepted" treatment for transshipped cargo will not result in diversion of such cargo from New York/New Jersey. The inconsistency is apparent rather than real. First of all, the removal of the exception would result in an average assessment cost for throughput containers of about $203.75 ($6.15 per ton × 29 tons per container plus $6.35 per man-hour × 4 man-hours), or an increase in per container assessment cost of about $178.35 ($6.15 per ton × 29 tons per container). This is far removed from the $300–$500 per container assessment cost which Sea-Land indicated would cause a diversion from the Port. Moreover, the ALJ's factual finding of diversion in the Port Authority's case was made in quite a different context from his finding of lack of diversion in the transshipment situation. It is one thing to divert containers from the Port of New York/New Jersey to avoid an assessment differential. It is something entirely different to change one's entire operations to avoid an increased cost, which, as shown, would be less per container than the assessment differential under the present formula.

The Port of New York/New Jersey is presently the *only* Atlantic Coast port served by both Sea-Land's European services and its Central American/Caribbean service and the *only* North Atlantic port with more than one Sea-Land service of any type. (Tr. 687–694, 715). The only other North Atlantic call, at Portsmouth, presently produces only small amounts of cargo (under 320 weekly units) compared to the 2200 weekly slots available in Sea-Land's North Atlantic operation. (Tr. 688–689). Sea-Land's existing terminal facility in Portsmouth consists of only 20–22 acres (Tr. 703) and is insubstantial in comparison to its 194 acres of space, 5,383 trailer spaces, and six cranes in Elizabeth, New Jersey. (Ex. 49 at 15). Its feeder vessels from Baltimore do not stop at Portsmouth because they must go up to New York to connect with the three line-haul vessels which serve that port. (Tr. 688–689). Under these circumstances, any substantial shifting of Sea-Land's relayed cargoes away from the Port of New York/New Jersey is extremely unlikely.[41]

The ALJ, although finding that a general transshipment exception was not justified, found that a special transshipment exception was justified for services between New York-New Jersey/Boston-Providence. (See I.D. 155–159). As we have shown above, the mere addition of man-hours does not justify an exception from paying for GAI and related expenses. The exception of the New York-New Jersey/Boston-Providence service must rest upon something else. The ALJ justified the exception on the basis

[41] Contrary to Sea-Land's contention on exceptions (page 13), there is no evidence of record that it has previously used its Portsmouth facility as a relay point. Such relay activity does not show up in Sea-Land cargo carrying evidence. (Ex. 23, Att. D at 000012–14). Sea-Land's witness (Mr. Sutherland) testified that Baltimore cargoes are moved through Portsmouth "only on an exceptional basis, force majeure, or misconnection, something like that." (Ex. 14d, Att. A at 38).

of the injury its removal would cause to McAllister, the Port of Boston, and shippers. It is clear that McAllister will be forced out of its present transshipment service if the exception is removed. It is also clear that removal of the exception will aggravate the GAI problem at Boston. There was no shipper testimony on the matter, but, as a theoretical matter, it is always to a shipper's advantage to have alternative forms of service. The problem is whether it is "fair" to preserve the exception based on these considerations. We find that it is not. McAllister is able to perform its transshipment service only by virtue of its exception. If there is, as we have found, no justification for the transshipment exception for Sea-Land and U.S. Lines, it should follow that there should be no exception for the same transshipment when performed by McAllister. McAllister is not a member of NYSA and does not directly pay assessments. (Ex. 27, Att. A, 21–23; Ex. 30, Att. D, 2). It performs its service for NYSA members who reap the benefit of the exception. U.S. Lines itself uses McAllister's barge service (Tr. 810), and Sea-Land alleges that it uses McAllister's tugs for some of its transshipments. (See Sea-Land Excep., 17). The result of the removal of the exception for Sea-Land and U.S. Lines but its preservation for McAllister would be the expanded use of McAllister's service for Sea-Land and U.S. Lines. Massport informs us that new towing and barge services similar to that of McAllister are entering the market. (See Excep. of Massport, 7). The result of all of this will be that what the ALJ intended to be a limited exception will be turned into a broad exception allowing carriers to do indirectly what they cannot do directly.

The sole justification for the ALJ's treatment was his well-intentioned desire to protect McAllister. The possible desire of shippers to use an alternative service and the protection of the Port of Boston against increasing GAI liability were not deemed sufficient to grant an exception to Sea-Land and U.S. Lines. The ALJ recognized that "[O]ne can argue, as may PRMSA, that private industry at New York, which has its own costs and problems, ought not to be called upon to subsidize McAllister or the Port of Boston, and there is no evidence on this record that any New England shippers are asking for a choice between truck and water service through Boston." (I.D. 158). The exception was given because "McAllister is not Sea-Land nor U.S.L. but a single-operation carrier. . . ." (I.D. 158) and because fairness required that an exception be given to competing carriers. (I.D. 159, fn. 43). The basic reason for the exception was the ALJ's determination that "Although PRMSA's evidence and logic is, for the most part, appealing, I cannot find under a standard of fairness and unjust discrimination that killing McAllister is the right thing to do." (I.D. 157.)

We cannot allow the "McAllister type" exception to remain. There is no record shipper support for it, and if shipper support exists the service may continue without such exception. Moreover, the carriers at New York

cannot be called upon to protect against industry problems at Boston, so long as the formula itself is reasonable and fair. See *BSA*, 706 F.2d at 1240–1241. Finally, McAllister should not be allowed to retain the cargo, as the record clearly shows it does, solely because of the existence of the exception, in the absence of which "All the Boston/Providence container traffic would be diverted to competing truck transport." (Ex. 30, Att. D, 3–4; see also Ex. 46 at 26; I.D. 156.) The exception provides an economically artificial prop, the expense of which must be borne by other carriers.[42]

We recognize that our conclusion with respect to the lawfulness of excepted treatment may cause a peculiar problem for the McAllister service. Unlike the other transshipment services, there is a clear showing that but for the man-hour exception for transshipped cargo, the McAllister service will not survive. This places McAllister in a special situation. Although one should not be allowed to profit from activities which are found to be unlawful, it seems unfair to impose a sudden shift in assessment burden, the result of which would be to drive a carrier apparently operating in good faith reliance upon an existing exception to the tonnage formula, out of a particular service. PRMSA/PRMMI itself recognizes the peculiarity of McAllister's situation and suggests that some method might be used to protect it against sudden great shifts in financial burdens. (PRMSA/PRMMI Exceptions 26–27.)

The Commission finds one of the suggestions of PRMSA/PRMMI appealing. We agree that a gradual phasing out of the man-hour assessment and a phasing in of a man-hour/tonnage assessment of the type prescribed will act as a cushion against too sudden a shift in cost burdens.[43] Such an approach is similar to the approach proposed in the past with respect to credits granted to those due assessment adjustments. Partial credits spread over a larger period of time have been deemed proper if a grant of full credits at once might create too sudden a shift in costs. See *Agreement*

[42] The contention that the transshipment exception should be preserved because it provides additional work for longshoremen is without merit. As noted above (see pages 89–90), the transshipment exception improperly removes the obligation to pay for GAI-related expenses, which should be borne by containerized transshipment operators. Moreover, the contention that more man-hours may be consumed in barge transportation as compared to truck transportation (a contention which may be presumed but is certainly not proved in the record—see Tr. 404, 408) does not justify the exception. The record shows, for example, that even assuming a loss at the Port of New York/New Jersey of all man-hours for McAllister's service to man-hours for truck transport, the assessments would be fully funded. (See Excep. of PRMSA/PRMMI, 21–22, and computations there made). The contention that the ILA wishes jobs rather than GAI because GAI is based only on a minimum hourly guarantee (Oral Argument, Tr. 54–55, 58–59) is of course true. However, insofar as assessment agreements are concerned, the courts have observed that the union has no "proper interest" in how assessments are funded so long as they are funded. See *e.g.*, Judge Friendly's opinion in *NYSA & ILA* v. *FMC*, 495 F.2d 1215, 1222 (2d Cir. 1974), and Justice Harlan's concurrence in *Volkswagen* v. *FMC*, 390 U.S. 261, 290 (1968). NYSA and ILA themselves recognize that it is not the function of the assessment formula agreement here in issue to provide full work opportunity as opposed to the GAI guarantee. As they themselves state, "a fringe benefit assessment has one objective—to ensure that the collective bargaining contractual obligations are funded and the benefits provided." (See NYSA/ILA Opening Brief, 73–74; see also Ex. 29, VI–2). An assessment formula could well provide for a guarantee in excess of an hourly minimum, but this one did not do so.

[43] We reject the other PRMSA/PRMMI suggestion, that a cap could be placed on the assessment payments of McAllister and competing services at present levels, as too much akin to an award for unlawful operations.

No. 2336, 19 F.M.C. 248, 263 (1976), *aff'd sub nom., New York Shipping Association* v. *F.M.C.*, 571 F.2d 1231 (D.C. Cir. 1978).

The choices of phasing out the man-hour "excepted" treatment are many, and could range from complete exception for a certain time period, with a shift to regular man-hour/tonnage assessment at the end of the period, to a gradual increase by small increments over that period. We leave the choice to NYSA/ILA and the parties involved in such services. Only three conditions will be imposed with respect to the phasing out process. First, the phasing out ought not to extend beyond September 30, 1986, the expiration date of LM–86, the agreement upon which a carrier's good faith reliance may be presumed to be founded. Secondly, although the phasing out is intended to protect the McAllister service from sudden shifts in costs and to allow it an opportunity of finding other means of operating, it would be unfair to competing services not to allow them the ability to compete with McAllister on an equal basis. Therefore the "phasing out" must be made available to all competing carriers.[44] Lastly, to protect against unfairness and the possible expansion during the phasing out period of services at Boston/Providence at the expense of such services at other ports, the phasing out of the excepted treatment will apply to all transshipment services. With these three limitations, the parties are free to fashion a means of gradually removing the unfairness and unlawful discrimination caused by the special treatment of the transshipment services.

The Commission recognizes, of course, that the remainder of the present collective bargaining period may not in fact be sufficient to permit accommodation of transshipment operations to a man-hour/tonnage assessment. We cannot presume, however, that commitments or capital expenditures have been made, or operational difficulties exist, which would prevent the phasing-out of the "special privilege" within the period remaining under the present collective bargaining agreement. If in fact such is the case, and data is submitted to us to support such commitments, expenditures, or operational difficulties, we would, pursuant to our authority under the MLAA (see page 110, *infra*), permit an additional period up to and including September 30, 1987, to allow such "phasing out." Those supporting a "phasing out beyond September 30, 1986 should, however, so advise us, together with supporting data, within the time set herein for implementation of our Order.

Insofar as the exception for domestic cargoes is concerned, we agree with the ALJ's disposition of the matter. (See. I.D. 143–148). The only data that NYSA/ILA are able to muster in support of the need for the continuance of this "exception," besides the discredited argument that expanding man-hours should result in the relief of GAI responsibility, are the isolated "statistic" that the domestic trade has experienced a decline

[44] The necessity for equality of treatment of McAllister and its competitors in the interests of fairness was recognized by both PRMSA/PRMMI (Exceptions 26–27) and the ALJ. (I.D. 159, fn. 43).

in volume since 1973 and the fact that the Commission at one time found the exception lawful. (See NYSA/ILA Brief on Excep., 49; Excep. 50). NYSA's own statistics, however, show a steady increase in domestic container carryings from 1980 to 1983. (Ex. 51). Moreover, whatever the situation may have been when the Commission last examined the assessment burden on the domestic trade,[45] it is clear, as found by the ALJ (I.D. 143–148), that the trade is now healthy and expanding.

Respondents accuse the ALJ of inconsistency with respect to the treatment of certain activities for which continued special treatment was allowed—*i.e.*, breakbulk cargoes, maintenance work, and the New York-New Jersey/Boston-Providence transshipment service. They claim that activities such as handling of empties, stuffing/stripping, and transshipment in general, like the activities for which special treatment was sanctioned, add manhours and thus should be given special treatment. What respondents fail to consider, however, is that the ALJ did not base his conclusions with respect to the special treatment which is preserved merely upon the addition of manhours. A reading of his decision will show that each special assessment sanctioned is based upon special consideration—*i.e.*, breakbulk cargoes' inability to bear the consequences of a straight man-hour assessment (I.D. 184–185; and page 77, *supra*), and the clear possibility of driving maintenance work away from deep-sea ILA labor if an assessment were imposed on such work (I.D. 154–155, and page 89, *supra*).[46]

There is no inconsistency in our treatment of handling of empty containers and "stuffing/stripping," which will be assessed on a man-hour basis, breakbulk cargo, which will be assessed on a "capped" man-hour basis, and transshipped/rehandled and domestic cargoes, which will be assessed on a man-hour/tonnage basis. The assessment of transshipped/rehandled and domestic cargoes on a man-hour basis alone would allow them to escape liability for GAI-related expenses, which in light of the containerized nature of these operations would be unfair (see pages 89–90, 100–101, *supra*). Handling empty containers and "stuffing/stripping," however, bear no GAI-type responsibility and should be relieved from such obligation. (See pages 85–88, *supra*). The additional relief of handling of "empties" and "stuffing/stripping" from industry expenses not related to containerization in any definable way (*i.e.*, welfare and clinic benefits for retirees and their dependents, and unfunded liability for pension benefits for those now retired) acts to reward those activities for reduction of port-wide GAI expenses.

Similarly, it would be unfair to tax breakbulk cargoes on a straight man-hour basis in light of the substantial disparity between man-hours

[45] The record before the Commission during its last examination showed a small and declining domestic trade. See *Agreement No. T–2336*, 15 F.M.C. at 274.

[46] The ALJ's exception for the New York-New Jersey/Boston-Providence transshipment was also based on a circumstance apart from the addition of man-hours—the certainty of the demise of a transshipment carrier, so far as the subject transshipment is concerned, if excepted treatment were not granted to such carrier. We have disallowed this exception because it is based upon an inequity of cost burdens, but have permitted a phasing out of the transshipment exception to cushion the impact of our decision. (See pages 97–100, *supra*).

of labor employed and amount of cargo moved. (See page 77, *supra*). The cap adopted by the ALJ is a sensible and equitable solution which at the same time preserves the essential soundness of the man-hour/tonnage type formula and protects against inequities which could arise from a too-rigid application of that formula. On the other hand, transshipped/rehandled and domestic cargoes, like containerized cargoes in general, bear some responsibility for industry-wide expenses not directly related to containerization. The removal from breakbulk, "empties", and "stuffing/stripping" of the burden of these industry wide expenses relates not to the mere fact that man-hours are expanding on those activities, but to the fact that they are expanding in ways which are not related in any way to "benefits" of containerization. Breakbulk is a "pre-containerization" operation, "stuffing/stripping" is a surrogate for breakbulk operations, and handling of "empties" is really a "burden", rather than a "benefit" of containerization. On the other hand, as the ALJ explained, the fact that there are more pension beneficiaries than employees actively working or available for work in the New York/New Jersey longshore industry is attributable to some extent to containerization and consequent incentives to men to retire. (I.D. 181/ see also Ex. 36, Att. A, at 3, 5–6). The "indirect" containerization expenses are and should be borne by carriers which, as NYSA–ILA notes, could perform their operations in a non-containerized fashion (Brief on Ex. 45–46) and choose to take advantage of containerization in connection with their operations.

NYSA/ILA's contentions that the assessment is fair to PRMSA/PRMMI because it could engage in the activities for which special treatment is granted under their current assessment formula (Brief on Excep. 42–44), and that over-all PRMSA/PRMMI is as well off as other carriers (Brief on Excep., 50–53), are without merit. PRMSA/PRMMI bears the burden under the current assessment formula of other carriers' lesser productivities not the result of the containerization expansion, which was the problem which the assessments were designed to solve. As we have noted, a uniform assessment is improper where responsibilities and productivities vary, even within a single transportation sector. (See pages 79–81, *supra,* and *TTT*, 492 F.2d at 525–629; *Agreement No. T–2336,* 15 F.M.C. at 265–272.[47] Nor can it be seriously argued that PRMSA/PRMMI is as well off as other containerized carriers when wages and container royalties are factored into the equation. Wages and container royalties are not funded under the assessment agreement. Their validity does not depend upon the lawfullness of the assessment formula agreement, and the Commission has been upheld in making a separate decision relating to container royalties without reference to the assessment agreement. See *BSA,* 706 F. 2d.

[47] The full extent of the inequities caused to PRMSA by the special privileges is seen graphically in the comparisons set forth at pages 125–126 of the Initial Decision.

We need not reach PRMSA/PRMMI's diversion arguments in light of our resolution of its complaint. Since the Commission finds that the formula is unfair and unjustly discriminatory to PRMSA/PRMMI and must be modified on the basis of PRMSA/PRMMI's "benefits/burdens" arguments, it is unnecessary to go on to determine if it has also made out a case of unlawful diversion. The exceptions to the Initial Decision based on PRMSA/PRMMI's diversion theory are therefore rendered moot.

The Specific Type I/Type II Allocations

We concur with the ALJ's determinations with respect to the specific allocations of assessment expenses between Type I and Type II costs. (See I.D. 169–187). We find them to be well reasoned and correct and adopt them as our own.

The 25% Reduction On The Tonnage Assessment For The Puerto Rican Trade

The Commission agrees with the ALJ's conclusion that an additional 25% reduction in the tonnage portion of the assessment for the Puerto Rican trade is not warranted. First, the 25% figure is admittedly merely the product of an expert's opinion. (See Excep. of PRMSA/PRMMI, 16–18; Ex. 46 at 28). This in itself might not be fatal, but there seems to be no practical way to quantify how much relief the trade needs or how much any relief granted will actually find its way to the citizens of the Commonwealth.[48] Moreover, even were we able to make such quantifications, relief of the type here sought for the Puerto Rican Trade does not appear to be appropriate in these cases.

In part PRMSA/PRMMI'S position rests on its contention that it should be taxed no more heavily with assessment burdens than the domestic trades because it has similar expenses, *e.g.*, the employment of ILA labor at both water terminals for its transportation. (See Exc. 5). Our modification of the assessment formula agreement to remove the excepted treatment for domestic cargoes, however, places the Puerto Rican trade on an equal footing with the domestic trades.

The main legal argument raised by PRMSA/PRMMI in support of its requested 25% reduction is that the reduction is in keeping with the special treatment given the Puerto Rican trade in our earlier consideration of Puerto Rico's position vis-a-vis assessments in *Agreement No. 2336,* 15 F.M.C., which was affirmed by the Court of Appeals in *TTT.* Examination of our action in the earlier proceeding, however, reveals that the relief there granted the Puerto Rican trade from a particular man-hour assessment was based on its lack of responsibility for the short-fall in man-hours funded by that assessment. See 15 F.M.C. at 265–272; TTT at 525–628; and page 60, *supra.* Although the Commission and the Court noted the beneficial

[48] It us quite possible that none of any special relief we did grant would reach Puerto Rican citizens because of PRMSA's financial situation. (See I.D. 162, 166–168).

effect of cushioning the Puerto Rican economy from severe shifts in assessment burdens, no greater relief was granted the Puerto Rican trade than that based solely on its lack of responsibility for man-hour shortfall. Therefore, *Agreement No. 2336* and *TTT* do not offer a precedent for the 25% reduction over and above the assessment burden which PRMSA/PRMMI would otherwise bear. On the other hand, the effect of such reduction would be to make other carriers bear the Puerto Rican trade's responsibility for GAI, precisely the approach rejected in *Agreement No. 2336.* See 15 F.M.C. at 255–270; see also *TTT* at 625–628.

The requirement that carriers be made to bear other carriers GAI burden is precisely that to which PRMSA/PRMMI, rightly we have found, objects with respect to the McAllister barge service. That a broader interest is represented by the Puerto Rican trade than is represented by the McAllister service is undoubtedly true. It is not, however, the type of interest which an organization like NYSA should be made to bear in proceedings of this type. We assume, *arguendo,* that the removal of the "public interest" standard from the MLAA would not prevent the Commission from considering public interest factors in making determinations under the "unfair" and "unjustly discriminatory" standards. *Cf. Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico,* 8 F.M.C. 404 (1965) (*Automobiles*). The situation presented in a rate case like *Automobiles* is, however, far different from that presented here. Although, as PRMSA/PRMMI correctly observes, NYSA's members are profit making entities, NYSA itself is not, and its objective here is only to pay the employers' obligations to the longshoremen to whom they are due. These obligations do not involve any "profit," but are merely necessary business expenses which are paid under the collective bargaining agreement. It would be unfair to require that these expenses be shifted to force carriers to pick up other carriers' GAI type responsibilities, a course of action which, as noted above, was explicitly rejected in *Agreement No. 2336* in requiring the Puerto Rican trade to pay its own GAI expenses.[49]

The Remedies

Modification and Assessment Adjustments

If, as we have found, the present Agreement is unlawful, the MLAA requires both disapproval/modification and assessment adjustments.[50] Such adjustments are due only Complainant PRMSA/PRMMI, since it is the only complainant which has paid them. The Port asks only for, and would

[49] As the court in TTT noted, ". . . even the Commonwealth's economic witness properly conceded that Puerto Rico must be prepared to bear some fair share of the common burden." (at 628).

[50] The MLAA states that the Commission "shall . . . *disapprove,* cancel or *modify* any [assessment] . . . agreement, or charge or assessment pursuant thereto, that it finds . . . to be unjustly discriminatory or unfair as between carriers, shippers, or ports . . . [and] *shall remedy* the unjust discrimination or unfairness [caused by an assessment of charge] for the period of time between the filing of the complaint and the final decision *by means of assessment adjustments.*" (Emphasis supplied).

be entitled only to, modification/disapproval. In the context of these proceedings, direct modification by the Commission is preferable to a simple disapproval to be followed by negotiation, or conditional type Commission action for several reasons. Mere disapproval, or in the alternative conditional modification, could result in a lapse in the funding of the Agreement, which would be contrary to the public interest in maintaining continuous funding of such agreements which lay behind the MLAA. (S. Rep. No. 854, 96th Cong., 2nd Sess. 14 (1980). Moreover, Justice Harlan made clear, in his concurrence in *Vokswagen,* that the Commission should not reject an assessment formula "when there are no preferable alternative routes to collection of the necessary amount." (at 290). This implies a requirement that there be some minimal determination by the Commission of what preferable alternative routes exist. The time constraints of MLAA, which mandate that the Commission's proceeding end by February 27, 1985, require a final form of agreement by that date. (S. Rep. No. 854 at 11, 14; Amend the Shipping Act, 1916: Hearing on H.R. 6613 Before the Subcommittee on Merchant Marine and Tourism of the Senate Committee on Commerce, Science, and Transportation, 96th Cong., 2d Sess. 20–22 (1980) (Statement of Peter Lambos, Counsel, NYSA)]. As a practical matter, the parties to these proceedings do not have the usual option of rejecting a conditional modification, since there is an existing obligation to fund agreements independent of the shipping statutes. Lastly, direct modification is the traditional form of Commission action for assessment agreements shown to be unlawful. See *Agreement No. T–2336,* 15 F.M.C. at 287.

While the Commission is required by the MLAA to issue its "final decision" within one year of the date of filing of the complaint, PRMSA/PRMMI, as a successful complainant, is entitled to assessment adjustments "for the period of time between the filing of the complaint and the final decision . . . ." Therefore, if the "period of adjustments" extends to the final day of decision, the Commission cannot as a practical matter issue an order on that day finally disposing of the case. Until the final day, the total of adjustments due does not even exist, and of necessity its value will not be known until some time thereafter. We find therefore that the "final decision" language relates to the substantive modifications of the assessment formula, and not to the necessary assessment adjustments. Congress expressly recognized the "complexity" of the assessment adjustment process, and advised that the "Commission [has] broad discretion, unfettered by the constraints of . . . other provisions of the Shipping Act, to fashion appropriate remedies for unfair or discriminatory assessments." S. Rep. No. 854 at 14.

This "broad discretion . . . to fashion appropriate remedies" allows us to resolve another quandary posed by the assessment adjustment process. Since the present formula is unlawful, it must be modified, and since the Commission's "final decision" must be issued by February 27, 1985,

the modification must be effective on that day. We realize, however, that as a practical matter this may be difficult. Moreover, insofar as the assessment adjustments are concerned, as noted above, the effectuation of a remedy on the "final decision" date is impossible. The flexibility granted us to fashion a remedy for unlawful assessment adjustments, however, provides a solution to the quandary, and one which permits Respondents sufficient time in which to implement the mixed man-hour/tonnage method of assessment here mandated without undue disruption to their operations. We will, as we must, modify LM–86 as of February 27, 1985. We will, however, permit NYSA/ILA 61 days from the date, *i.e.*, until April 29, 1985, to make the adjustments to effectuate any necessary changes. By that date of modified LM–86 conforming to the requirements here set down as well as a statement of the adjustments made in PRMSA/PRMMI's favor must be filed. To the extent such adjustments cannot be made until after February 27, 1985, additional adjustments must be made to insure that PRMSA/PRMMI receives credits for any portion of the period between February 27 and April 29 during which it may have been assessed at the rate applicable under the formula which we here modify. NYSA and PRMSA/PRMMI are directed to exchange any information necessary for the computation and verification of any credits due PRMSA/PRMMI during the 61-day period.

The Commission urges the parties to act reasonably in carrying out this computation and verification process. If, for example, it can be shown that holiday payments for GAI recipients for the period following February 27, 1984 in fact were properly accounted for in the Vacation and Holiday Fund (see pages 22–23, *supra*), we would expect PRMSA/PRMMI to accept this showing. Tonnages and man-hours should, in most instances, be easily verified from NYSA/ILA, carrier, and terminal operator records, and the parties are expected not to demand extended verification of such data. We believe that the parties here best understand their own operations and trust that they will act intelligently and reasonably in implementing our Order.

Additional Remedies Sought by PRMSA/PRMMI

Although we find that PRMSA/PRMMI is entitled to assessment adjustments, we do not agree that it is entitled to the additional relief it seeks, namely, interest on the assessment adjustments or reparation from the time of the formation of LM–86 to the date of the filing of its complaint.

It seems clear that, as a matter of law, a cause of action exists for interest on assessment adjustments, and that the grant of such interest is discretionary. Although the Commission may decide to deny such interest on equitable grounds as it has done in the past (see *Agreement No. T–2336,* 19 F.M.C. 248, 261–262 (1976), *affirmed sub nom. New York Shipping Ass'n* v. *FMC,* 571 F.2d 1231, 1241–1242 (D.C. Cir. 1978)), the MLAA makes clear that the Commission's broad discretion with respect

to assessment adjustments is preserved. S. Rep. No. 854 at 14. There was no specific grant of authority in section 22 of the Shipping Act, 1916 (46 U.S.C. §821) to grant interest, yet this was routinely done in the agency's discretion. Although the MLAA says the Commission "shall" remedy "unjust discrimination" and "fairness", it does not state how, and the legislative history indicates the statute is to "*permit*", not require, "full restitution". See S. Rep. No. 854 at 11 (emphasis supplied). The fact that the word "full" is used in connection with restitution is to be compared to the words "full reparation" in section 22, where it has frequently been held, as in *Agreement No. T–2336*, that an award of interest is discretionary. We believe the ALJ properly denied interest here and adopt his decision in that regard.[51]

PRMSA/PRMMI contends that the remedies existing prior to the MLAA were presented under the rationale of *CalCartage*, which indicated that, at least for standing purposes, section 22 of the Shipping Act, 1916 was applicable to actions under the MLAA. On the other hand, supporters of the present formula assert that the holding in *CalCartage* was restricted to "standing" and did not reach the question of remedies available to one who had standing. It could also be contended that the reparation remedies which were preserved were only those which related to interests other than carriers, shippers, or ports, with respect to which specifically named interests the adjustment remedy was intended to be exclusive.[52] The Shipping Act of 1984 removed any damage remedy for assessment agreements other than adjustments. See Conf. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984).[53] We find that the best reading of the legislative history of the MLAA as originally enacted is that the statute was intended to provide assessment adjustments as the exclusive remedy for unfair or discriminatory type treatment of shippers, carriers, and ports, because such interests are specifically mentioned, a remedy with respect to them for

[51] The fact that the Commission has awarded interest more or less as a matter of course in reparation actions does not control our action here. As noted in our report and order in 19 F.M.C. on the adjustments due carriers which had been over-assessed, adjustment actions are factually different from ordinary reparation actions and somewhat different considerations necessarily apply. The most significant differences are that, as we noted in 19 F.M.C. (at 260–262), and as the ALJ noted here (see I.D. 188–189; see also 136, 125, fn. 36), neither the fact of overcharge nor the amount could have been expected to have been determined prior to conclusion of the Commission's proceedings. The ALJ correctly applied the standards used in the earlier case, and correctly limited those standards to consideration of the period in question since, as PRMSA/PRMMI recognizes (see page 54, *supra*), each assessment period (and actions relating to it) must be considered on its own. The fact that generally reparations are mandatory under the MLAA as revised by section 11(g) of the Shipping Act of 1984 (46 U.S.C. app. §1710(g)) (the 1984 Act) once violation and causal connection between it and the claimed injury has been shown, is irrelevant for our purposes here, both because it is clear, as PRMSA admits (Except., 36), that under the 1984 Act the only substantive and remedial provisions applicable to cases involving assessments are those of the MLAA, and because it would in any case create "manifest injustice" to apply such standard retroactively. See FMC Notice, 49 Fed. Reg. 21798 (May 23, 1984).

[52] The complainants to whom standing was granted in *CalCartage* are off-dock container freight station operators, *i.e.*, not shippers, carriers, or ports.

[53] Although Conference Report No. 600 states that assessment adjustments were always the exclusive damage remedy under the MLAA, as noted above, *CalCartage* could be read to the contrary.

such treatment detailed (*i.e.*, adjustments), and a clear conflict would be created by supplementing such remedy with an additional remedy.[54] We need not here reach the question of whether remedies under section 22 exist for the complainants in *CalCartage*, a matter which is before us on remand in that proceeding.[55]

Even were we to find that a reparation remedy were preserved to PRMSA/PRMMI under the MLAA, in this particular case, that conclusion would not affect the result. The agreement in issue, LM–86, was not filed until February 15, 1984 and did not become legally effective until that day. As PRMSA acknowledges, each filing must be treated as a separate agreement, and its claim is only against LM–86. PRMSA/PRMMI's complaint was filed February 27, 1984. In the circumstances of PRMSA/PRMMI's complaint, we would deny reparations.[56] If PRMSA/PRMMI is correct, then a complainant could wait up to two years to file its complaint under section 22 and recover reparation, an action plainly inconsistent with the one-year statute of limitations in the MLAA. Even if such action were deemed too inconsistent with the MLAA to prevail, a complainant could wait 11 months and 30 days before filing a complaint, and recover reparation for such period. This would plainly be inconsistent with the MLAA remedy and procedures provided, at least for shippers, carriers, and ports (see fn. 54, *supra*), and would clearly be improper. All of this is really also another way of proving the intent of Congress to make assessment adjustments the exclusive remedy for assessment claimants like PRMSA/PRMMI.[57]

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[54] See *e.g.*: "To the extent that complainant has borne, either directly or indirectly, assessment charges ultimately set aside or modified by the FMC, complainant shall be entitled to, and the FMC shall award assessment adjustments from the date of the filing of the complaint." S. Rep. No. 854 at 11;

> "The remedy for an assessment found unfair or discriminatory by the Commission shall be in the form of adjustments to future assessments, except for a complainant who has ceased the shipping activity subject to assessment." *Ibid*, at 14.

The language of the legislative history stating "the bill retains the existing protections of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements" must be read in context. The full quote is:

> "By enlarging the number of such agreements which will be exempt from filing and approval, and by providing expedited procedures for those assessment agreements which remain subject to FMC jurisdiction, the bill should significantly reduce the costs of regulation. At the same time, the bill retains the existing protections of the Shipping Act for shippers, carriers and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements." *Ibid*, at 13.

The "existing protection' language clearly is intended to refer to things "required to be set forth in tariffs," rather than to assessment agreements. See §5, MLAA, Section 45, Shipping Act, 1916, 46 U.S.C. 841c.

[55] We also need not here reach the question of what separate remedies might have been applicable under the "detriment to commerce" standard when it appeared in the MLAA since such standard is not an issue here. (See I.D. 70).

[56] Section 11(g) of the 1984 Act makes reparations, like interest, mandatory in the case of violation and injury caused thereby. We find, for the reasons stated with respect to the mandatory award of interest, that were 11(g) of the 1984 Act applicable here, it would not be equitable to apply it. (See page 113, *supra*).

[57] PRMSA/PRMMI does raise a valid point with respect to LM–86, albeit one outside of the scope of these proceedings. We do not know under what authority NYSA/ILA claimed to operate between October 1, 1983 and February 15, 1984 for collection of assessments. This is a matter we will pursue independently of these proceedings.

CONCLUSION

In concluding, we wish to emphasize several points about our decision and the procedures employed in reaching it. First, the modifications here required will in no way adversely affect the funding of the fringe benefits required under the collective bargaining agreements between NYSA and ILA. In fact, the modifications would, had they been in effect during the 1982–1983 contract year, have fully funded all benefits, unlike the present formula, which in fact underfunded the benefits. (Ex. 41, Table II). Moreover, the changes from the present formula are relatively small. Over two-thirds of the benefit costs will continue to be funded on a tonnage basis under the combination man-hour/tonnage formula. The cap on breakbulk cargoes will ensure that they continue to pay no more than their present assessment costs. All exceptions and special privileges are preserved except those for handling empty containers, "stuffing/stripping," domestic cargo, and transshipments, which we find on the record to be unjustified. To the extent that financial difficulty may arise from the removal of exceptions, a gradual phasing-in of the new assessment treatment has been provided.

The Commission has not been able to treat specifically and in detail every exception to the Initial Decision. Nevertheless, we have considered all the exceptions and those not specifically treated have been disposed of otherwise in the decision, either by rulings on their merits or by rulings which rendered such exceptions moot or immaterial for purposes of the decision. This decision is, after all, substantially an adoption of the Initial Decision, and the discussions, factual findings, reasoning, and conclusions of the ALJ are those we have utilized, unless explicitly overruled or unless such use would create an obvious inconsistency.

An order will be entered, requiring that the necessary modifications to Agreement No. LM–86 be made, along with assessment adjustments in favor of PRMSA/PRMMI, and establishing a time period and procedures for such modifications and adjustments.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

Commissioner Moakley, dissenting in part

While I concur in the majority's decision that many aspects of the subject assessment formula are unfair and unlawful, I cannot concur with their conclusions and rationale with respect to transshipped cargo. Unlike the decision of the majority or the initial decision, I would not find that complainants have carried their burden of demonstrating the unlawfulness of the exception of transshipped cargo from the tonnage assessment. In order to do so, they would have had to establish that breakbulk cargo was routinely transshipped in the port of New York prior to containerization, a conclusion which is contrary to economic logic as well as the limited evidence of record in this proceeding. Therefore, I would leave transshipped

cargo as we found it, free from a tonnage assessment designed to compensate the union for a problem to which transshipped cargo does not contribute and which, in fact, it may help to alleviate.

Commissioner Robert Setrakian concurring in part and dissenting in part

I concur in every aspect of the majority's Report except for its departure from Administrative Law Judge Kline's treatment of the transshipment issue.

The majority's decision considers but rejects several factors critical to the administrative law judge's determination not to remove the special transshipment exception. Removal of the exception, he reasoned, would have a fatal impact on the McAllister operation; would be detrimental to the ports of Boston/Providence; and would eliminate a service option for shippers. I am swayed by these considerations and would adopt the Initial Decision on this issue.

The Maritime Labor Agreements Act charges the Commission to consider whether an assessment agreement is unjustly discriminatory or unfair to carriers, shippers, or ports, or operates to the detriment of the commerce of the United States. I fear that the desirability of providing uniform treatment for three essentially unequal carriers (McAllister vis-a-vis U.S. Lines and Sea-Land) does not outweigh the resulting deleterious effects on this small, single-operation carrier, the shippers who have chosen this means of transport, and not least, this small port and its work force, now dependent in part on cargo transshipped via a major load center, as well as the negative impact of all of these factors on U.S. commerce generally.

Therefore, to the extent the majority's decision modifies the Initial Decision on this issue, I respectfully dissent. In all other respects I fully concur with the majority's Report.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION

Respondents New York Shipping Association and its members utilize a formula to fund all fringe benefits under a collective bargaining agreement which, unlike that at any other port, is based on assessment rates per ton but also allows lower excepted man-hour rates or other special charges on certain types of activities and even no charges whatsoever on other activities. The Port of New York Authority complains that the formula is unfair and unjustly discriminatory as to New York because it imposes higher assessments per container than are necessary. PRMSA, the main carrier serving the Puerto Rican trade, also complains that the formula is unfair and unjustly discriminatory as it affects PRMSA and the Puerto Rican trade, in violation of the Maritime Labor Agreements Act of 1980 (MLAA), and other provisions of the Shipping Act, 1916. Both complainants urge adoption of alternative formulas and PRMSA seeks monetary adjustments and reparation. Respondents and other parties defend the formula, contending that complainants have not carried their burden of proof. Additionally, respondents ask that PRMSA's complaint be summarily dismissed on various legal grounds and argue that its remedies have been limited by law. It is held:

(1) Respondents' legal defenses have no basis in law or fact and cannot preclude the Commission from considering the merits of the complaints;

(2) The applicable standard of proof is "preponderance of the evidence," and the substantive standard is whether the current assessment agreement is unfair or unjustly discriminatory. As to PRMSA, this standard employs the "benefits-burdens" test, and, as to the Port Authority, this standard employs the test of unfair competitive disadvantage to a port. The MLAA excludes sections 16, 17, 18(a), and 22 of the 1916 Act and limits monetary remedies to prospective adjustments for PRMSA. The 1916 and 1984 Acts are essentially unchanged in this regard;

(3) As to the merits of its case, the Port Authority has shown competitive harm and disadvantage resulting from the type of formula currently in use. PRMSA has similarly shown an unfair and discriminatory shift of cost burdens among containerized carriers caused by unjustified favoritisms to certain carriers and by a conceptually unsound formula which lumps different types of costs together and taxes individual carriers' efficiencies unfairly;

(4) Alternative formulas modifying the current tonnage formula have been proposed which would alleviate the unfairness and unjustly discriminatory aspects of the current formula. PRMSA's proposed formula, based on credible expert testimony and supporting evidence, is the most carefully fashioned and with certain modifications, which would eliminate its excessive discount for the Puerto Rican trade, should be ordered adopted under the Commission's express authority to modify an unfair or unjustly discriminatory agreement. Appropriate prospective credits for PRMSA should likewise be ordered, as provided by law.

Paul M. Donovan, Jean C. Godwin, and *Lauren V. Kessler* for complaint Port Authority of New York and New Jersey.

Amy Loeserman Klein, William E. Cohen, and *Marc A. Berstein* for complaints PRMSA and PRMMI.

C.P. Lambos, Donato Caruso, and *William M. Spelman* for respondents NYSA and 89 of its members.

Thomas W. Gleason and Ernest L. Mathews, Jr. for intervenor ILA.

Robert S. Zuckerman, Eldered N. Bell, Jr., and *Ann E. Isaac* for respondent/intervenor Sea-Land Service, Inc.

Richard A. Lidinsky, Jr. and *Thomas K. Farley* for intervenor Maryland Port Administration.

Dorothy Sanders and *R. Moriconi* for intervenor Massachusetts Port Authority.

John Robert Ewers, Aaron W. Reese, Stuart James, and *Janet F. Katz* for Hearing Counsel.

INITIAL DECISION [1] OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Partially Adopted February 27, 1985

This proceeding involves the question as to whether a formula devised by respondents New York Shipping Association, Inc., (NYSA), its members, and the International Longshoremen's Association (ILA) and incorporated into a collective bargaining agreement for the purpose of funding various fringe benefits to labor at the Port of New York violates standards set forth in the Maritime Labor Agreements Act of 1980, P.L. 96–325, 94 Stat. 1021 (MLAA), which Act, as relevant here, was codified as section 15 of the Act, 1916, 46 U.S.C. sec. 814, fifth paragraph, and, effective June 18, 1984, as section 5(d) of the Shipping Act of 1984, 46 U.S.C. app. 1704. The proceeding was initiated by the filing of two complaints. The first complaint was filed on February 22, 1984, by the Port Authority of New York and New Jersey (Port Authority) and the second compliant, on February 27, 1984, by the Puerto Rico Maritime Shipping Authority (PRMSA) and by Puerto Rico Marine Management, Inc. (PRMMI). The Port Authority alleged that the agreement between the NYSA and the ILA filed with the Commission as Agreement LM–86 is unjustly discriminatory and unfair as between carriers, shippers and ports and operates to

[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 detriment of the commerce of the United States because it imposes assessments on containerized cargo which are much higher at the Port of New York than at competing ports, in violation of section 15, fifth paragraph, of the 1916 Act. The Port Authority asked that the Commission modify the allegedly harmful assessment agreement so as to establish some basis for the assessments which would be nondiscriminatory and fair as between carriers, shippers, and ports.

The second complaint was filed by an ocean carrier, PRMSA, which is also a public corporation created by the Legislative Assembly of the Commonwealth of Puerto Rico on June 10, 1974, to provide reliable shipping services to the citizens of Puerto Rico at the lowest possible cost, and by its operating agent, PRMMI, which, incidentally, is a member of the NYSA. PRMSA/PRMMI alleged that the subject assessment agreement is unlawful in a number of respect, not only under section 15 of the 1916 Act but under sections 16, 17, and 18(a) of that Act as well. More specifically, PRMSA/PRMMI alleged that the subject assessment agreement treats Puerto Rican-trade carriers unfairly and with unjust discrimination by assessing that trade as a foreign trade and unduly burdening it with costs not reasonably related to any benefits received under the labor contract or related to any responsibility for decrease in man-hours worked at the Port of New York. PRMSA/PRMMI also alleged that shippers and ports suffered unfair or unjust discriminatory treatment because the assessments imposed under the subject agreement are higher than those imposed on other domestic trade cargoes and lead to diversion of cargoes away from the port of New York in favor of other competing mainload ports, which cargoes are tributary to the Port of New York. This unfavorable situation to the Puerto Rican trade, furthermore, allegedly ignores prior Commission recognition that special and less detrimental treatment is required for Puerto Rico in the light of the Island's economy and extreme dependence upon maritime commerce with the U.S. Mainland. Therefore, PRMSA alleged that the assessment agreement is unjustly discriminatory and unfair in violation of section 15 of the 1916 Act, and also confers undue and unreasonable preference and advantage and creates undue and unreasonable disadvantages among carriers, localities and cargoes, unjustly discriminatory rates and charges, and unjust and unreasonable rates and charges and practices, in violation of sections 16, 17, and 18(a) of the 1916 Act, 46 U.S.C. secs. 815, 816, and 817. PRMSA/PRMMI accordingly ask the Commission to order Agreement LM–86 modified to remove the various violations alleged and to order appropriate assessment adjustments and full reparations to remedy the past impact of the alleged violations. On May 15, 1984, PRMSA/PRMMI filed an amended compliant which repeated the essential allegations of the original complaint but modified portions of it to emphasize that the essential basis of the complaint was not related to PRMSA's financial situation or ability to pay assessments in relation to PRMSA's profitability or to loss of cargo to a non-ILA

carrier although diversion of cargo to that carrier was still a factor indicating harm to PRMSA and the Port of New York resulting from the assessments. PRMSA/PRMMI also clarified their original complaint by specifying that they sought "full reparations with interest" back to October 1, 1983, i.e., the beginning of the labor contract year rather than the date of filing of the assessment agreement (LM–86), which was February 15, 1984.

Respondents NYSA, Inc. and its members answered the two complaints, denying any violations of law. In addition, respondents raised a number of affirmative defenses having to do with the possible lack of Commission jurisdiction over the assessment agreement because of previous Commission approval of the assessment formula, the conduct of PRMSA/PRMMI in failing to file their complaint earlier, doctrines of laches, estoppel, waiver, the statute of limitations, or the applicability of doctrines of labor law as they affect PRMSA's ability to maintain such a complaint before the Commission, and the nonapplicability of sections 16, 17, 18(a) or 22 of the 1916 Act. These defenses all deal with matters other than the merits of the complaints and, if valid, would preclude the Commission from considering whether the assessment agreement is unfair or unjustly discriminatory. As I discuss later, however, I find that almost all of them have no validity and that there is no legal impediment to a full consideration of the merits of the complaints.

In addition to three complainants (Port Authority, PRMSA, and PRMMI) and the more than 100 respondents (NYSA, Inc. and 102 or so member companies, including steamship carriers, agents, marine terminal operators, stevedores, and others), four parties have been granted permission to intervene in the proceedings. These are: the ILA, the unincorporated labor organization which is the collective bargaining representative for longshoremen and other dockworkers employed on the Atlantic and Gulf Coasts and in Puerto Rico; the Maryland Port Administration (MPA), a state governmental agency responsible for the development and promotion of maritime commerce in Maryland, principally in the Port of Baltimore; the Massachusetts Port Authority (Massport), a state governmental agency responsible for the development and promotion of the Port of Boston; Sea-Land Service, Inc. (Sea-Land), a respondent in No. 84–6 who wished to become an intervenor in No. 84–8 as a carrier operating in the Puerto Rican trade; and the Bureau of Hearing Counsel, who stated that the issues in the case concerned possible unfairness among carriers, shippers, and ports, all of which issues are of general public interest and further stated that Hearing Counsel's participation might reasonably be expected to assist in the development of a sound record.

Because the complaints were filed under governing provisions of the MLAA, which requires a decision of the Commission within one year of the filing of a complaint and Commission Rule 75, 46 CFR 502.75, the corresponding regulation implementing the statute, which requires an *Initial Decision* in eight months, it was necessary to establish a schedule

which would enable all the parties to conduct necessary prehearing inspection and discovery, develop and present their evidence and cases, allow sufficient time to file post-hearing briefs, and to allow the presiding judge to issue a comprehensive Initial Decision. To achieve these objectives, the parties established appropriate schedules which I approved and conducted extensive discovery (depositions, interrogatories, documents production, requests for admissions), from the inception of the proceedings to shortly before the filing of written testimony, which testimony was filed in four stages (complainants' opening testimony, respondents' opening testimony, complainants' rebuttal testimony, and respondents' surrebuttal testimony). All of these matters were accomplished between late February when the complaints were filed through August 14, 1984, when the final surrebuttal testimony was filed by respondents. To facilitate the completion of discovery and the filing of the written cases, furthermore, 10 informal telephonic conferences were conducted together with two formal, on-the-record prehearing conferences. Oral hearings were held commencing on August 16 for seven days, during which 14 witnesses were cross-examined in accordance with specific designations for cross-examination by the various parties. The hearings were concluded on August 29, 1984. At the conclusion of the hearings, the evidentiary record consisted of some 50 volumes of written testimony and supporting documentary materials as well as the oral testimony of the 14 witnesses. Because of the size of the record and the complexity and great importance of the case, the parties were granted permission to file opening briefs on September 28 and reply briefs on October 12, 1984.[2] This schedule would thereafter permit me only 15 calendar days to prepare and issue my Initial Decision, which, as provided by Rule 75, would have been due on October 27, 1984, eight months after the filing of the second complaint. Relief was obviously warranted, and, in response to my request to the Commission for a waiver of Rule 75, the Commission granted me an additional 13 calendar days beyond October 27, i.e., until November 9, 1984, to issue my Initial Decision. (See Enlargement of Time to Issue Initial Decision, September 11, 1984; my memorandum to the Commission, September 4, 1984.)

RULINGS AS TO RESPONDENTS' AFFIRMATIVE DEFENSES

As seen from the complaints, the ultimate issue raised by both of them is whether the subject assessment formula embodied in the current collective bargaining agreement between the NYSA and ILA is unfair or unjustly discriminatory among shippers, carriers, or ports, and, if so, whether the formula should be modified to eliminate the unfairness and unjust discrimination and whether the carrier, PRMSA, should receive compensation in the form of assessment adjustments or otherwise. However, before I can

[2] This schedule was later modified to permit opening and reply briefs to be filed on October 3 and 15, respectively.

decide these ultimate issues, I must first determine whether any of respondents' affirmative defenses are valid because, if they are, the Commission cannot or should not even consider whether the formula is harmful and ought to be modified.

Respondents' Affirmative Defenses

As mentioned briefly earlier, NYSA and its members raised a number of affirmative defenses in their answers to the complaints. There were eleven of them. The first four had to do with the Commission's previous "approval" of the subject formula in 1974 and the involvement of PRMSA or its predecessor or subsidiary carrier in the proceedings leading to the 1974 settlement which the Commission approved. It was contended by NYSA that the Commission's order of approval of the 1974 settlement has resolved the issues now before the Commission in these proceedings and, furthermore, because of the participation of PRMSA's predecessor or subsidiary carrier in the settlement proceeding, PRMSA is not barred from challenging the formula under the doctrines of *res judicata,* estoppel, and waiver.

NYSA's next three affirmative defenses concerned the alleged untimeliness of the complaints. NYSA contended that the assessment formula under attack in these proceedings was first filed with the Commission in 1974 as Agreement No. T–3007 and was last filed on September 30, 1980, as Agreement No. LM–66. Therefore, the two complaints, which were not filed until more than three years after the filing of LM–66, are time-barred by the two-year statute of limitations set forth in the MLAA (section 15, fifth paragraph of the 1916 Act; section 5(d) of the 1984 Act.) Furthermore, because the formula under challenge now was "approved" as of September 30, 1974, the complaints have been filed over nine years later and should be dismissed under the doctrine of laches.

NYSA's next two affirmative defenses stated that the PRMSA/PRMMI complaint should be dismissed because complainants utilized arbitration procedures provided by the labor contract and because complainants failed to resign from the NYSA before the filing of the subject Agreement LM–86. NYSA contended that under labor law, the policies favoring arbitration of disputes arising out of labor contracts, and policies favoring the results of collective bargaining, PRMSA and PRMMI cannot now challenge the assessment formula incorporated into the labor contract. Also, complainants' utilization of the arbitration procedures before filing their complaint and their failure to withdraw from the bargaining unit may have constituted a voluntary and knowing waiver of their rights under federal shipping laws.

Finally, NYSA raised affirmative defenses alleging that the relief requested by complainants would itself be unjustly discriminatory and unfair, that complainants are not entitled to reparations for any period prior to

the filing of the complaints, and that sections 16, 17, 18(a), and 22 of the 1916 Act do not apply under the MLAA.

I find that none of the affirmative defenses, except those concerning the limitation on reparations and exclusion of sections other than section 15 of the 1916 Act, have merit. Accordingly, there is no legal obstacle preventing the Commission from deciding the merits of the complaints.

In their post-hearing brief, respondents (NYSA, joined by the ILA) again raise these affirmative defenses under five categories: (1) that the complaints are time-barred; (2) that PRMSA and PRMMI cannot now withdraw from the collective bargaining agreement under principles of labor law which must also be considered under shipping law; (3) that the formula under attack has been found to be lawful by the Commission in 1974, which finding binds PRMSA and PRMMI under the principle of *res judicata*; (4) that PRMSA has invoked the labor contract's grievance and arbitration machinery and cannot now seek relief before agencies or courts; and (5) that PRMSA's predecessor carrier, TTT, entered into a settlement agreement in 1974, promising not to challenge the subject assessment formula in the future, which agreement is also binding on PRMSA under the principle of estoppel.

I find that these defenses have no more validity now that the record has been more completely developed than they did when I indicated at an earlier stage of the proceeding on the limited record before me at the time, that they did not appear to have merit.[3]

Respondents' arguments that the complaints are time-barred and should be dismissed because of the two-year period of limitations in the MLAA or because of laches are unsound because, as both the Port Authority and PRMSA/PRMMI have noted, respondents are asking the Commission to find, contrary to fact, that complainants are not challenging Agreement LM–86 which was filed on February 15, 1984, but are actually challenging a formula first incorporated into Agreement No. T–3007 and filed in 1974. Furthermore, respondents wish the Commission to find that the filing of

[3] On May 29, 1984, PRMSA and PRMMI filed a motion asking me to strike nine of respondent's affirmative defenses, including all of these discussed above. Complainants had argued persuasively in the motion that seven of the grounds for affirmative defenses regarding the question of the timing of the filing of the complaints mistakenly assumed that complainants were challenging Agreement No. T–3007, which first incorporated the subject assessment formula and was effective from 1974 to 1977. Complainants contended that they were challenging the current agreement, LM–86, which was filed and deemed approved under law on February 1984. Complainants also contended that they could not be barred from filing complaints under shipping law because of arbitration principles and denied that they had invoked arbitration procedures under the labor contract or that they had waived their rights to file complaints under the MLAA. Although I indicated that I was not impressed by the affirmative defenses and recognized that motions to strike invalid defenses could save time later, I refrained from issuing a final ruling because of the incomplete state of the factual record, the complexity of the legal issues raised, and the need for more developed arguments. Courts often refrain from deciding jurisdictional-type issues on a summary basis until the record becomes clearer. See, e.g., *EEOC* v. *Ford Motor Co.*, 529 F. Supp. 643 (D. Col. 1982); *United States* v. *729,773 Acres of Land*, 531 F. Supp. 967, 971 (D.Haw. 1982). The record is now clear enough to decide that the defenses in question lack merit.

Agreement No. LM–86 was only a technicality and did not trigger any rights regarding the filing of complaints challenging its lawfulness.

The fact, however, is that Agreement No. LM–86 was filed and, as the MLAA provides, was "deemed approved" by the Commission on February 15, 1984. Although NYSA and the ILA had adopted essentially the same tonnage formula as of October 1, 1974, which was designated as Agreement No. T–3007, and which was approved as part of a settlement of three pending proceedings, the settlement agreement approved by the Commission being Agreement No. T–3017, there were subsequent filings of agreements inasmuch as the labor contracts at New York run for only three years apiece. Thus, it was necessary to file the assessment agreement to cover each new contract year period. Agreement No. LM–66, including the assessment formula, was filed on September 30, 1980, and extensions of that agreement were filed as Agreement Nos. LM–83 and LM–86. The MLAA grants carriers, shippers, or ports the right to challenge the lawfulness of assessment agreements and to obtain relief provided that the complaint is filed "within 2 years of the date of filing of the agreement . . ." MLAA, sec. 4, section 15, fifth paragraph, 1916 Act, 46 U.S.C. sec. 814.[4] Furthermore, since the MLAA removed from the Commission its previous authority under section 15 of the 1916 Act to investigate assessment agreements on the Commission's own motion, the interests adversely affected by assessment agreements and given the right to file complaints would have no other remedy under shipping law if they cannot now challenge LM–86. This means that although NYSA and the ILA agree on three-year labor contracts and file something with the Commission every three years extending their agreements as far as the assessment formulae are concerned, complaining parties would be required to file complaints within two years of the original formula, first effective in 1974. There is no basis in logic, the language or legislative history of the MLAA to impose such a requirement on complaining parties.

The MLAA, as I discuss later, was a compromise between industry interests who desired removal of the Commission from jurisdiction over collective bargaining agreements, including those portions of the agreements concerning assessments used to fund fringe benefits, and other interests who were fearful that total removal of the Commission would leave affected persons with no protection against possible abuses, more specifically, the possibility that affected parties would not be paying a fair share of fringe benefit obligations. See Sen. Rep. No. 96–854, 96th Cong., 2d Sess. (1980)

[4]The MLAA was recodified as sections 5 (d) and (e) of the Shipping Act of 1984, 46 U.S.C. app. 1704(d),(e). There were essentially no changes from the 1916 Act except that assessment agreements "become effective on filing," complaints must be filed "within 2 years after the date of the agreement," the "detriment to the commerce of the United States" standards was removed, and the language of section 45 of the 1916 Act regarding applicability of the 1916 and 1933 Acts to tariff practices as opposed to assessment agreements was rewritten. I agree with complainant Port Authority (opening brief, p. 4) that the 1984 Act made no significant changes to the 1916 Act as far as this case is concerned. Therefore, my findings apply under section 15 of the 1916 Act or section 5(d) of the 1984 Act.

at 1–2, 14. As even respondents concede, the MLAA was enacted "against the backdrop of more than ten years of decisional law." (NYSA op. br. 123.) The backdrop consisted of a number of Commission proceedings determining whether assessment agreements violated the standards set forth in section 15 of the 1916 Act and other sections of that Act incorporated by then section 15, and implementing certain tests such as the "benefits-burdens" test which was first enunciated by the Supreme Court in *Volkswagenwerk Aktiengesellschaft* v. *F.M.C.*, 390 U.S. 261 (1968). Since Congress was aware of the ten-year history of Commission proceedings, it presumably was aware of long-established Commission decisions holding that extensions of agreements were considered to be the same as new agreements as far as approval was concerned and that such extensions had to be filed and processed notwithstanding approval of the basic agreements previously. See, e.g., *Agreement Nos. 8200, 8200–1, 8200–2, etc.*, 21 F.M.C. 959, 962 (1979) (each extension of an agreement must stand alone and be judged in light of present circumstances); *Investigation of Passenger Steamship Conferences Regarding Travel Agents*, 10 F.M.C. 27, 34 n. 6 (1966), aff'd sub nom. *F.M.C.* v. *Svenska*, 390 U.S. 238 (1968) (prior approval of an agreement under section 15 may not be converted into a vested right of continued approval simply because the parties to the agreement desire continued approval.); cf. *New York Shipping Association—NYSA–ILA Man-Hour Tonnage Method of Assessment*, 16 FM.C. 381, 396–397 (1973), aff'd sub nom. *New York Shipping Association* v. *F.M.C.*, 495 F. 2d 1215 (2d Cir. 1974) (determination of lawfulness of current formula depends upon current circumstances and conditions, not upon previous circumstances and conditions which warranted findings against a previous agreement.).

In the light of this backdrop it makes no sense to contend that Congress gave affected persons the right to file complaints within two years of the filing of agreements with the Commission but this right did not apply to extensions of assessment agreements which are filed every three years and, as the above discussion illustrates, were a type traditionally treated as new agreements requiring independent processing under section 15 of the 1916 Act. If NYSA really wants immunity from the filing of complaints for ten years or more, it can obtain it within the mechanism of the MLAA merely by entering into labor contracts which do not expire for ten years and require only one filing of the assessment portion of the labor agreement every ten years. If, however, NYSA and the ILA believe that circumstances and conditions change in three years and therefore wish to devise new labor contracts every three years, they should not object to the fact that some persons claiming to suffer adverse effects from assessment agreements might wish to claim that changes in circumstances and conditions in the

last few years necessitate their seeking relief from an assessment formula which keeps getting renewed and refiled every three years.[5]

The second category of affirmative defense set forth in NYSA's opening brief is the argument that PRMSA and PRMMI cannot withdraw from the collective bargaining agreement at this time because they failed to observe requirements imposed by federal labor law concerning notice, union consent, bargaining impasse, unusual circumstances, good faith, etc. Many cases are cited for the proposition that federal labor law prohibits an employer who has failed to withdraw or disassociate itself from the bargaining unit from later disavowing the labor accord. (See NYSA's op. brief at 98–101). NYSA contends that PRMSA has been a member of the multi-employer bargaining unit, the NYSA, that labor policy embodied in the case law cited must form a part of shipping law analysis and that PRMSA, by being bound to the labor contract, has waived its rights under the MLAA. I cannot agree.

As far as I am aware, PRMSA and PRMMI are living up to the terms of the collective bargaining agreement and are paying assessments under that agreement. Furthermore, I am not aware that PRMMI has withdrawn its membership in the NYSA.[6] What is happening is that, although complying with the terms of the agreement with respect to paying the assessments, PRMSA and PRMMI are challenging the lawfulness of the assessment agreement, not under labor law, but under shipping law which has applicability, limited though that may be by the MLAA. NYSA would have the Commission refuse even to consider whether their assessment agreement is unjustly discriminatory or unfair as to PRMSA, a carrier paying under the agreement notwithstanding the clear right given to carriers under the MLAA to seek relief from the Commission. Indeed, as the Senate Report to the MLAA stated, the Act retained Commission jurisdiction "to assure equal treatment of shippers, cargo and localities, and to prevent abuses made possible by concerted activity of ocean carriers and others" and to ensure that "all affected parties pay only their fair share of fringe benefit obligations." S. Rep. No. 96–854, cited above, at 10, 14. If a carrier paying assessments under the agreements cannot even seek relief under the MLAA when the MLAA expressly refers to "carriers, shippers, or ports" as parties to be protected, one might ask who then, can seek relief, only non-affected carriers who do not pay assessments or carriers

[5] NYSA's reliance on Commission cases arising under tariff over-charge claims illustrates the weakness of their contentions. NYSA attempt to liken the right to file a complaint within two years after the filing of an assessment agreement (or its extension, as discussed) with the right to seek recovery of tariff over-charges within two years after the shipper paid the freight and suffered pecuniary injury. See, e.g., *Aleutian Homes, Inc.* v. *Coastwise Lines*, 5 F.M.B. 602, 611 (1959). Shippers are held to that standard because section 22 of the 1916 Act required their complaints to be filed "within two years after the cause of action accrued." Under the MLAA, it is not accrual of the cause of action or suffering of pecuniary injury which triggers the running of the two-year period but simply the filing of the assessment agreement.

[6] The record shows, as PRMSA advises, that PRMII stated its reservations to the assessment formula contained in the collective bargaining agreements and expressly dissented from the agreement as regards that formula even though otherwise signing the collective bargaining agreement. (PRMSA r. br. at 74.)

who pay but who were not part of collective bargaining units that negotiated the contract? If Congress was aware of Commission involvement with previous assessment agreements, it was presumably also aware that members of the NYSA have in the past challenged the very agreements which their association devised notwithstanding NYSA by-laws which purported to bind the carrier members to the will of the other members. See *New York Shipping Association* v. *Federal Maritime Commission*, 571 F. 2d 1231, 1239, n. 18 (D.C. Cir. 1978); *Agreement No. T-2336; TTT et al.* v. *NYSA, Inc.*, 15 F.M.C. 259 (1972), affirmed, *TTT* v. *F.M.C.*, 492 F. 2d 617 (D.C. Cir. 1974) (Puerto Rican carrier members of NYSA challenging lawfulness of NYSA agreement voted by majority of members of NYSA). There is no indication that Congress, in allowing the Commission to retain limited jurisdiction over collective bargaining agreements intended to bar affected carriers from challenging the unfairness of assessment agreements merely because the affected carriers had been represented at the bargaining table by an association. Moreover, since the MLAA does not authorize the Commission to investigate such agreements on its own motion, barring affected carriers could also insulate a possibly unfair agreement from any scrutiny under the MLAA if carriers were adversely affected.

What all of this defense really seems to be saying is that the rights of PRMSA and PRMMI are governed by labor law, not shipping law, and that having consented to be represented by the NYSA in collective bargaining with the ILA, PRMSA and PRMMI must shut up as far as the MLAA and Commission are concerned no matter how harmful or unfair they believe the assessment agreement to be and must confine their efforts to seek relief to appeals to the very people who negotiated the agreement in the first place. I know of no doctrine of law that holds that an activity can never be subject to two bodies of law or, in this context, holding that because the NYSA and ILA reached agreement and complied with labor law, shipping law has been totally ousted. On the contrary, from the very beginning of the many shipping-labor cases before the Commission and the courts, it has been seen that shipping law can and does apply and it seems clear that the MLAA codified the principle that, under certain circumstances, shipping act standards can apply notwithstanding the genesis of an agreement or practice in collective bargaining.[7]

[7] Thus, from the very first of these combined labor-shipping cases, *Volkswagenwekaktiengesellschaft* v. *F.M.C.*, cited above, 390 U.S. 261, it was recognized that an agreement among carrier and other employers of longshore labor could raise problems of concern to the National Labor Relations Board and of concern to the Federal Maritime Commission. 390 U.S. at 291 n. 7. From this beginning the Commission has been involved continually in determining the lawfulness under Shipping Act standards of arrangements devised to fund fringe benefit obligations, which arrangements were contained in various collective bargaining agreements. Many of these cases are discussed in PRMSA/PRMMI's opening brief at 49–59. See also *New York Shipping Association* v. *F.M.C.*, 495 F. 2d 1215 (2nd cir.), cert. denied, 419 U.S. 964 (1974) affirming Commission jurisdiction over the 1971–1974 collective bargaining agreement insofar as the assessment formula embodied therein was concerned notwithstanding the presence of the ILA and its concern that the assessment formula be workable and reliable. Probably the high-water mark of Commission jurisdiction over collective bargaining agreements prior to the enactment of the MLAA was *F.M.C.* v. *Pacific Maritime Association*, 435

Nor does NYSA's citation of *Council of North Atlantic Shipping Assocations* v. *F.M.C.*, 672 F. 2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982), persuade me that the Commission cannot consider PRMSA's complaint on the merits. All that that decision seems to say, insofar as relevant here, is that the Commission is supposed to consider and weigh labor factors when deciding whether certain practices affecting certain shippers of containerized cargo are undue or unreasonable in violation of sections 16 or 17 of the 1916 Act, in accordance with another section of the MLAA, section 5, codified in section 45, 1916 Act, 46 U.S.C. sec. 841c. No one is questioning in this proceeding that the NYSA has to fund the fringe benefit obligations fully and that the ILA has a legitimate concern that these obligations are fulfilled. The court in *NTSA* v. *F.M.C.*, cited above, 495 F. 2d at 1215, recognized that the ILA had a concern that the fringe benefit payments be made but "no proper concern over who makes the payments as long as they are forthcoming" and that the union's concern was also primarily with enforcement of the agreement rather than the allocation formula. The court further advised the Commission to "weigh the Shipping Act and labor interests" and "move with caution in areas of greater collective bargaining concern." It appears from the present record that the ILA as well as NYSA are concerned that assessment rates may on some occasion lead to loss of cargo and further decline of work at the Port of New York. However, the real question in this case is not whether the funding will be accomplished but rather whether each carrier or other party paying assessments is paying its fair share and whether the method of allocation burdens carriers unduly so that they are motivated to leave the Port of New York.

As I mentioned below, finally, NYSA's argument that PRMSA has waived its rights to complain about the assessment agreement requires a firm factual basis showing the existence of a voluntary, intentional relinquishment of a known right by express statement or clear conduct. The fact that PRMSA or PRMMI was nominally part of the NYSA bargaining unit and that labor law requires employers to adhere to labor contracts or remain in bargaining units absent special circumstances does not demonstrate the existence of a waiver of rights granted under shipping law.

The third category of affirmative defense raised by NYSA is that the Commission approved the formula which is now under attack in this proceeding in 1974 and that PRMSA is bound by the Commission's decision under the principle of *res judicata.* NYSA argues that the formula was the subject of three prior Commission proceedings, Docket Nos. 69–57,

U.S. 40 (1978), holding such agreements subject to the filing requirements of section 15 of the 1916 Act notwithstanding possible disruption of collective bargaining. The MLAA was enacted partially in response to the *PMA* decision, retaining limited Commission jurisdiction over collective bargaining agreements and establishing special procedures and standards to determine the lawfulness of portions of such agreements devoted to assessments. Commission jurisdiction over other portions of collective bargaining agreements relating to furnishing of containers has been upheld under another section of the MLAA in *Council of North Atlantic Shipping Associations* v. *F.M.C.*, 672 F. 2d 171 (D.C. Cir.), cert. denied, 459 U.S. 830 (1982).

73–34, and 74–49, and that PRMSA's principal, the Commonwealth of Puerto Rico, was a party to the first two proceedings while PRMSA was a party to the third. NYSA further argues that the first two of these proceedings were settled with the filing of Agreement No. T–3017, which the Commission approved, and the last of them was concluded when the Commission issued an order approving the assessment formula (Agreement No. T–3007) on June 16, 1975. NYSA contends that PRMSA had an adequate opportunity to litigate the legality of the assessment formula in these three proceedings and ought therefore to be barred from relitigating the lawfulness of the same formula.

As NYSA correctly argues, the doctrine of *res judicata* holds that when a court has entered a final judgment on the merits of a cause of action, the parties to the suit and their privies are thereafter bound as to every matter which was offered and received to sustain or defeat the claim and as to any other admissible matter which might have been offered for that purpose. *Commissioner* v. *Sunnen*, 333 U.S. 591, 597–98 (1948); *Montana* v. *United States*, 440 U.S. 147 (1979). As the cases cited by NYSA show, the doctrine is based upon policy considerations of judicial economy, the establishment of certainty in legal relations, and applies to administrative agencies as well as to the courts. *St. Louis Typographical Union* v. *Herald Co.*, 402 F. 2d 553, 556 (8th Cir. 1968); *United States* v. *Utah Construction and Mining Co.*, 384 U.S. 394 (1966). However, the doctrine applies only when the agency acts "in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States* v. *Utah Construction and Mining Co.*, cited above, 384 U.S. at 421–422. Furthermore, it applies only when the *same issue* has been adjudicated in the prior proceeding. *Cargill* v. *F.M.C.*, 530 F. 2d 1062, 1067–1068 (D.C. Cir.), cert. denied, 429 U.S. 868 (1976); *Marine Terminal* v. *Rederi. Transatlantic*, 400 U.S. 62, 71–72 (1970).

In short, NYSA is arguing that the Commission issued a final judgment in a judicial capacity as to the merits of the formula embodied in the 1974–1977 labor contract which is essentially the same tonnage formula (with exceptions) as exists today and is under attack in this proceeding. However, all that seems to have occurred is that the various parties involved in the three proceedings, i.e., NYSA, ILA, Puerto Rican carriers, automobile, and newsprint interests, entered into settlement agreements in an effort to bring an end to three proceedings involving assessment agreements for the contract years 1971–1974, 1974–1977, and assist in ending litigation which ensued as a result of the Commission's orders modifying the labor agreement of 1969–1971. Despite NYSA's contention that the Commission expressly approved the present assessment formula in Agreement No. T–3007 applicable to the contract year 1974–1977, it does not appear that what the Commission did constitutes a final judgment on the merits so as to invoke the doctrine of *res judicata*. First, I would have to assume

that the Commission's approval of Agreement No. T–3007, which expired in 1977, is the same thing as approval of LM–86 which runs from 1983–1986 and, as discussed above, is the precise agreement under attack in this proceeding. Next, I would have to find that the Commission issued a final judgment on the merits of the agreement formula and resolved factual disputes and matters which were brought before it or could have been brought before it during the course of the litigation. However, there was no litigation. The earlier cases terminated in settlements and the Commission built no record on which findings could be made as to whether the assessment agreements in issue met the standards set forth in section 15 of the 1916 Act regarding unfairness and unjust discrimination among carriers using the "benefits-burdens" test. The Commission itself indicated quite clearly that its approval of the assessment formulas for the 1971–1974 and 1974–1977 period was an approval of settlement agreements, not determinations under section 15 of the merits of the agreement formulas. Thus, in its decision in *Agreement No. T–2336–N.Y. Shipping Assn.*, 19 F.M.C. 248 (1976), aff'd *sub. nom. NYSA* v. *F.M.C.*, 571 F. 2d 1231 (D.C. Cir. 1978), in which the Commission ordered certain claims of carriers who had overpaid under the 1969–1971 assessment agreement to be honored, the Commission commented on its so-called "approval" of the assessment formulas as regards Puerto Rican cargo, which approval NYSA now claims to have binding effect as a final judgment, as follows:

> The context in which the assessment formulas for Puerto Rican cargo for the 1971–1974 and 1974–1977 periods were approved was one of settlement. As stated in our order of conditional approval of the agreement between NYSA, the ILA, and the Puerto Rican carriers for assessments for those periods, we approved that agreement because "the parties' approach to settlement of the rights and obligations between and among themselves does not appear to be improper. . . ." *Considerations underlying settlements do not necessarily coincide with the process of making findings on a record in a litigated proceeding.* (Citation omitted.) 19 F.M.C. at 256. (Emphasis added.)

The Commission proceeded to distinguish between full litigation and approval of a settlement agreement in the footnote to the above quotation, stating:

> Nothing we say herein is to be construed as casting doubt upon the validity of the Puerto Rican carrier or other approved settlement agreements as between the parties thereto. By virtue of those agreements, the parties have resolved their differences in a manner which we have found to be proper. Regardless of *how the issues with regard to the assessments for the 1971–1974 and 1974–1977 periods may have been resolved if they had been fully litigated,* the parties to the settlement agreements exercised good faith in attempting to predict rights and liabilities and cannot

> be faulted in desiring that, as between themselves, assessment litigation should cease. *Id.*, n. 8. (Emphasis added.)

As if these statements were not enough to make the point, the Commission stated also:

> We take no position as to what Puerto Rican assessment formula would have been approved for the 1971–1974 and 1974–1977 periods if these matters had been litigated. We wish only to highlight the highly speculative nature of predictions in this regard. *Id.*, n. 10.

Moreover, even if the Commission had issued a final judgment on the merits of the assessment formula applicable to the years 1974–1977 in Agreement No. T–3007, it is doubtful if the Commission would refuse to hear any challenge to such formula based on changed circumstances and conditions, which would raise different issues, even if the MLAA did not give carriers the right to file complaints within two years after each agreement was filed with the Commission. The Commission was careful to point out that even when it decided the merits of a previous formula, such decision rested upon the facts, circumstances, and labor contract existing at the time of the decision and the decision "has . . . significance only to the extent that the facts and circumstances are the same in the 'future' (i.e., 1971–1974, 1974–1977) as they were in 1969–1971." *Id.* But, as the Commission stated:

> We cannot assume, absent findings on a record, that conditions are the same now as they were with respect to Agreement No. T–2390. . . . *Id.* (footnote citation showing that this quotation came from the Order of Investigation in Docket No. 74–49, *Agreement No. T–3007*, covering the 1974–1977 assessment period, omitted.) *Id.*

In the court proceeding reviewing the Commission's order in *Agreement No. T–2336*, cited above, *NYSA* v. *F.M.C.*, cited above, 571 F. 2d at 1239, the court commented on the Commission's representation that its "approval" of the settlements did not rest upon findings under the "benefits-burdens" test established in *Volkswagenwerk-aktiengesellschaft*, cited above, but rather on the finding that each party to the settlement agreements had received "valuable compensation" from the compromises. The court did not dispute the Commission's representations as to the standard it used in approving the settlements although not specifically endorsing the standard. 571 F. 2d at 1239–1240 n. 20.[8]

[8] In the footnote citation, the court further emphasized that in approving the agreements to settle, the Commission had not made findings as to at least one significant group of carriers under the "benefits-burdens" test, namely, the twelve breakbulk carriers known as the States Marine Group. See footnote 20, last paragraph, p. 1240.

The fourth category of affirmative defense raised by NYSA in its brief is that PRMSA has on several occasions sought relief from the assessment formula under the labor contract's grievance and arbitration machinery and should have pursued the matter further with the NYSA–ILA Contract Board or in negotiations with the ILA before filing its complaint with the Commission. NYSA cites case authority holding that parties to contracts must pursue contractual grievance procedures and restricting the role of courts in hearing disputes arising under contracts. See, e.g., *General Drivers Local 89* v. *Riss & Co.*, 372 U.S. 517 (1963); *Vaca* v. *Sipes*, 386 U.S. 171, 184 (1967); *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 546, 569 (1960).

The record shows that PRMSA sought relief in the form of reduced assessments on at least three occasions under the contractual machinery, in 1979, 1982, and 1983.[9] In 1979 and 1982, a special committee designated to hear the requests recommended that the PRMSA requests be turned down. In 1983, the Assessment Committee, because of pending labor negotiations, recommended that PRMSA bargain directly with the ILA for its requested relief. The 1979 Assessment Committee report indicates that it was worried that a significant change in assessment for PRMSA could have serious, disruptive effects and that "[u]nder these circumstances, a request for reduced assessments for a major trade route will only be granted upon the most compelling evidentiary showing. PRMMI and PRMSA have not met this heavy burden of proof." (Ex. 30, Att. I, Committee Report of 1979, p. 3.) The case presented to the Committee was based largely upon PRMSA's alleged financial losses and projected diversion to Southern ports because of a competing barge service operating down there. The Committee was not persuaded although stating that "we are sympathetic to the serious financial difficulties currently afflicting PRMSA." (Report, cited above, p. 4.)

In the 1982 Assessment Committee Report, the Committee again considered PRMSA's case, which again was largely based upon financial losses but also upon alleged nearby diversion by a non-ILA competing carrier as well as low revenue compared to longer-distance foreign trades. The Committee considered these factors but found them unpersuasive for a number of reasons. It again expressed concern that changing the assessment for PRMSA or the Puerto Rican trade would seriously interfere with the ability to fund obligations and require increasing the tonnage assessment. It states that the Puerto Rican matter "was taken up in negotiations preceding the 1980 NYSA–ILA Collective Bargaining Agreement and that the end result was the determination to continue the Puerto Rican Trade under the same assessment arrangements as are applicable to all other trades. This Committee feels that in the light of such history it should not rec-

[9] The record also shows that PRMSA or PRMMI had brought up the Puerto Rican problem on earlier occasions at least as early as 1976. See Ex. 1, testimony of Allan J. Lonschein, pp. 28–29, and minutes of NYSA–ILA Contract Board, December 16, 1976, Ex. 8, Att. L.

ommend a change from the position taken by the parties to the Collective Bargaining Agreement except under the strongest change in circumstances. Such a change has not been shown to exist." Significantly, however, the Assessment Committee, citing the portion of the Tonnage Assessment Agreement which authorized a Contract Board to hear grievances and to modify tonnage definitions so as to lower costs of the assessments on petitioning parties, doubted that the Contract Board could give relief to the Puerto Rican trade without amending the labor contract. Thus, the Committee stated:

> The above clear language [i.e., regarding authority of the Contract Board to modify tonnage definitions] conditions the authority of the Contract Board to modify the tonnage definition. It is apparent that the above requirement does not refer to an exemption to be given to an entire trade. The Committee doubts that it has the power, absent contractual amendment, to recommend a trade-wide form of relief. (Ex. 30, Att. I, 1982 Committee Report, pp. 5–6.) [10]

The most recent efforts of PRMSA to obtain relief from the tonnage assessment began on August 30, 1983, when Mr. Roberto Lugo D'Acosta, PRMSA's Executive Director and PRMMI's Chief Executive Officer, wrote to Messrs. Dickman and Gleason, co-chairmen of the NYSA–ILA Contract Board, advising that the Governor of the Commonwealth had directed PRMSA to seek parity of treatment with other domestic trades, and asked for a meeting.[11] At the meeting held on the following day, PRMSA/PRMMI were advised that NYSA was then engaged in negotiations with the ILA for a contract covering the period October 1, 1983, through September 30, 1986, that the request would be referred to the Assessment Committee and then to the Contract Board for consideration, and that to dispel arguments that PRMSA/PRMMI had waived their rights to object to the tonnage/agreement for 1983–1986, PRMSA/PRMMI should request a view by NYSA and, following that review, commencement of specific negotiations with the ILA. As advised, Mr. Lugo D'Acosta wrote a letter to NYSA President Dickman requesting the appointment of a subcommittee to consider the report to NYSA's Negotiating Committee on PRMSA/PRMMI's proposals. On October 26, 1983, Mr Dickman appointed a three-man subcommittee which was suppose to report to NYSA's Negotiating Committee. Mr. Lugo

[10] Interestingly, at a meeting of the NYSA–ILA Contract Board held on December 16, 1976, at which meeting the "Puerto Rican problem" was discussed, which Mr. Dickman of NYSA stated "had been discussed by his Board on at least four separate occasions," counsel for NYSA advised that the Contract Board had the right to increase or decrease certain assessment rates without filing with the F.M.C. "However, should one carrier or shipper file a complaint with the FMC that body may decide to hold hearings. It should be remembered that we are still involved in 1969 litigations." Ex. 8, Att. L. NYSA–ILA Contract Board minutes.

[11] The following detailed findings of fact relating to these most recent efforts by PRMSA/PRMMI are based upon the testimony of Mr. Lugo D'Acosta and supporting documents and the testimony of Mr. Whitehouse. (Exs. 42 and 30, Att. I.)

D'Acosta wrote the subcommission on November 10, 1983, requesting that they establish a schedule and report to the NYSA Negotiating Committee by December 15, 1983, and requesting that representatives of PRMSA/PRMMI be permitted to appear before the subcommittee. However, the subcommittee never met through the completion of NYSA/ILA negotiations on January 25, 1984, and through the followup actions taken to secure ratification of the labor contracts by ILA members and subscription by the employer members of NYSA, which continued through February and March of 1984. The subcommittee's assignment ended when PRMSA/PRMMI filed their complaint with the Commission on February 27, 1985. It was suggested, however, that PRMSA/PRMMI seek relief by going to the bargaining table and presenting their proposal directly to the ILA on a one-to-one basis. The suggestion was not considerd feasible or practical by PRMSA/PRMMI because of the nature of multi-employer negotiations in the industry and the lack of sponsorship of their proposals by NYSA, and PRMSA/PRMMI did not therefore act upon it. Instead, PRMSA/PRMMI felt it necessary to seek relief before the Commission.

In view of this factual history of PRMSA/PRMMI's continued futile efforts to obtain relief within the mechanisms of the labor contract or from the NYSA–ILA Contract Board, NYSA's arguments that PRMSA/PRMMI's complaint before the Commission brought under the MLAA should be thrown out without considering the merits are singularly unimpressive and audacious. It may be true that under labor law, parties to labor contracts ought to resort to arbitration and grievance machinery to obtain relief under the terms of the contracts and should not seek the same relief from courts or agencies before exhausting their remedies under the contract. However, not only did PRMSA/PRMMI continually seek relief under the contracts without success but even the NYSA's Assessment Committee did not believe that it or the Contract Board could grant the type of relief which PRMSA was requesting, i.e., trade-wide reduction of assessments, and believed that such relief would require a totally new assessment agreement. Moreover, as discussed above, when PRMSA/PRMMI tried for the last time to obtain relief through the contract mechanism, they were told to negotiate with the ILA themselves. Why, then, should PRMSA/PRMMI have continued their futile efforts to obtain relief under the labor contract machinery and why can they not seek relief which is provided under an overriding federal statute, the MLAA?

It has often been held by the courts that the rights granted under federal law cannot be supplanted by arbitration procedures contained in contracts because those procedures concern relief within the terms of the contract and are not capable of affording relief under the supervening statutory standards. Furthermore, even if a party has lost in an arbitration proceeding, that party still has the right to bring suit in court under the supervening statute. For example, in *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), the plaintiff, after losing before an arbitrator under the provisions

of a collective bargaining agreement, who found that he had been discharged from employment for cause, brought suit in federal court under Title VII of the Civil Rights Act of 1964. The Supreme Court held that he had the right to bring suit notwithstanding the decision in the arbitration proceeding. The Court made clear that a person's rights under a separate federal law are not supplanted by arbitration procedures under a contract and that an arbitrator is limited in the scope of his authority and by the procedures he follows, which are not comparable to judicial proceedings brought under the federal law. Furthermore, an arbitrator is confined to interpreting rights under a contract, not rights under the federal law. Thus, the Court stated:

> As the proctor of the bargain, the arbitrator's task is to effectuate the intent of the parties. His source of authority is the collective-bargaining agreement, and he must interpret and apply that agreement in accordance with the "industrial common law of the shop" and the various needs and desires of the parties. The arbitrator, however, has no general authority to invoke public laws that conflict with the bargain between the parties: "[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement . . ." 415 U.S. at 53.
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> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Where the collective-bargaining agreement conflicts with Title VII, the arbitration must follow the agreement. To be sure, the tension between contractual and statutory objectives may be mitigated where a collective-bargaining agreement contains provisions facially similar to those of Title VII. But other facts may still render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land . . . [T]he resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts. Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. 415 U.S. at 56–58.

Courts have rendered similar decisions holding that persons cannot be barred from seeking relief under federal laws merely because of arbitration procedures established in contracts. See, e.g., *Breyer* v. *First Nat. Monetary Corp.*, 548 F. Supp. 955 (D. N.J. 1982) (arbitral forum not adequate to effectuate the policies of the Commodity Exchange Act); *McDonald* v. *City of West Branch, Michigan et al.*, ____ U.S. ____, 80 L. Ed. 2d 302, 309–310 (1984) (arbitration award against employee not given *res judicata* effect in his suit in court under the federal civil rights law; giving preclusive effect to arbitration awards would severely undermine the protection of federal rights that the statute is designed to provide); *Applied Digital Tech., Inc.* v. *Continental Cas. Co.*, 576 F. 2d 116 (7th Cir. 1978) (arbitration proceedings enjoined to allow suit to proceed in court under antitrust laws which are more appropriately enforced in courts than in arbitration).

In a case involving the Commission's own authority under the Shipping Act to determine the validity of a dual-rate contract notwithstanding a decision by an arbitrator, and to award reparation, *Swift & Co.* v. *F.M.C.*, 306 F. 2d 272 (D.C. Cir. 1962), the court held that the Commission was not precluded from exercising its jurisdiction under the Shipping Act because of the arbitration decision. The court held for the Commission, stating (306 F. 2d at 282):

> No private arbitration could negate the Board's statutory power to determine the validity of the dual-rate agreement. The more serious issue is whether the Board is precluded by the arbitration from awarding Swift reparations. We think not, for the arbitration opinion decided only the meaning of the Freighting Agreement, as garnered from the intent of the parties and the surrounding circumstances. That may have been appropriate for the arbitration, but, as we have pointed out, the Board's function is to interpret the rule on the legality of the agreement's language and effect in the light of the public interest.

The fifth category of affirmative defense raised by NYSA in its brief is that PRMSA or its subsidiaries or principal were parties to settlement agreements which terminated three previous proceedings and by which PRMSA or its subsidiary agreed not to challenge the assessment formula embodied in the 1974–1977 assessment agreement, essentially the tonnage formula now contained in LM–86. In its third and fourth affirmative defenses to PRMSA/PRMMI's amended complaint contained in NYSA's answer to that complaint, served May 17, 1984, NYSA provides more details. According to NYSA, the Commission approved the settlement agreements as Agreement No. T–3017 in 1974, and no Puerto Rican carrier or interest raised any objection to such approval. Furthermore, according to NYSA, NYSA carried out the terms of the settlements by paying substantial sums of money to other carriers not engaged in the Puerto Rican trade. Therefore, according to NYSA, PRMSA and PRMMI are estopped and precluded

from challenging the assessment formula in this proceeding. Furthermore, because TTT, a wholly-owned subsidiary of PRMSA in 1974, accepted the settlement, this action constitutes a waiver binding upon PRMSA and PRMMI of the right to challenge the assessment formula in this proceeding.

I have found above that the so-called "approval" of the tonnage formula contained in Agreement No. T–3007, which agreement was effective for the contract years 1974–1977, was in reality only an approval of a settlement without litigation or a full record and without findings under the standards set forth in section 15 of the 1916 Act. Indeed, as I noted, the Commission specifically commented that it had taken "no position as to what Puerto Rican assessment formula would have been approved for the 1971–1974 and 1974–1977 periods if these matters had been litigated" and further remarked on the "highly speculative nature of predictions in this regard." *Agreement No. T–2336,* cited above, 19 F.M.C. at 256 n. 10. NYSA now relies on the settlement agreement and on a written statement of the President of TTT, a subsidiary of PRMSA at the time, that TTT "accepts the full tonnage formula set forth in the 1974–1977 NYSA–ILA collective bargaining agreement as it relates to the New York-Puerto Rico trade and that it does not intend to initiate FMC or other proceedings contrary thereto." (Ex. 34, Att. F, last page.)

If TTT made the above representation and was a party to the settlement, and these appear to be the facts, and if PRMSA was its owner at the time, as also appears to be the fact, PRMSA might be found to have waived its rights to file the present complaint against Agreement LM–86 if it could be found that there was a voluntary, intentional relinquishment of a known right or privilege manifested either by express statement or by conduct which can only reasonably be considered consistent with such relinquishment. See *Buffum* v. *Chase Nat. Bank,* 192 F. 2d 58, 60–61 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952); *Williams* v. *State of Alabama,* 341 F. 2d 777, 780–781 (5th Cir. 1965). If PRMSA is to be estopped from filing the present complaint, I must also find misleading conduct on PRMSA's behalf, reliance on such conduct by NYSA, and detriment to NYSA as a result of such reliance. See, e.g., *Matsuo Yoshida* v. *Liberty Mutual Ins. Co.,* 240 F. 2d 824, 829–830 (9th Cir. 1957); *Upper Columbia River Towing Co.* v. *Maryland Casualty Co.,* 313 F. 2d 702, 706–707 (9th Cir. 1963); *District of Columbia* v. *Chevrah Tefereth Israel,* 280 F. 2d 61 (D.C. Cir. 1960). I have no basis in fact to make such findings.

Nothing in the Commission orders of approval, either that of January 16, 1975, approving Agreement No. T–3017, or that of June 16, 1975, approving Agreement No. T–3007, indicates that any assessment agreement extending beyond contract years 1974–1977 was "approved." On the contrary, both orders of the Commission specify no period beyond "1971–1974 and 1974–1977" (Agreement No. T–3017, Approval with Condition, January 16, 1975, p. 3) or "the three-year period beginning October 1,

1974" (Agreement No. T–3007, Order of Approval, June 16, 1975, p. 1). (Ex. 34, Atts. F, I.) The text of Agreement No. T–3017, which embodies the Puerto Rican settlement, states that "[t]he P.R. Carriers hereby withdraw from the proceedings in Docket No. 73–34 and hereby waive any and all rights to any recovery from NYSA, ILA or any NYSA–ILA fringe benefit funds pursuant to the issues involved in said Docket and agree that they shall not seek any such recoveries without regard to the ultimate disposition of said proceeding by the Federal Maritime Commission." (Ex. 34, Att. F, Agreement No. T–3017, paragraph 3.) The letter of TTT's President, quoted above, stated that TTT accepted the full tonnage assessment formula set forth in the 1974–1977 collective bargaining agreement (Agreement No. T–3007), and that TTT "does not intend to initiate FMC or other proceedings contrary thereto."

The history of the various settlements among the members of the NYSA is rather complicated. They were the result of the efforts of NYSA members "to adjust their rights and liabilities under two subsequent and successive collective bargaining agreements fixing the level of benefits that they would have to fund for the 1971–1974 and 1974–1977 periods respectively." *NYSA* v. *F.M.C.*, cited above, 571 F. 2d at 1235–1236. As far as the Puerto Rican carriers were concerned, they had been found to have underpaid for the 1969–1971 period but claimed to have overpaid during the 1971–1974 period. However, rather than litigate the merits of the Puerto Rican claims under the 1971–1974 formula period, NYSA agreed to give up its right to recover payments due from the Puerto Rican carriers because of their underpayments during the 1969–1971 period and to offset Puerto Rican claims under the second period in return for the Puerto Rican carriers' agreement not to contest the formula contained in the 1971–1974 period or apparently the 1974–1977 period as well. See *NYSA* v. *F.M.C.*, cited above, 571 F.2d at 1235–1237; letter of TTT's President, October 31, 1974. (Ex. 34, Att. F.) Apparently, the Puerto Rican carriers or their successors paid the NYSA's assessment formula during the 1971–1974 and 1974–1977 periods and for every period thereafter.

From all of the above, NYSA now contends that PRMSA has waived its right to file the present complaint or should be estopped. I can find no intentional relinquishment of a right granted to PRMSA/PRMMI under the MLAA to file a complaint in 1984, either expressly or by clear conduct. At most, I see a letter from TTT's President agreeing to pay under the 1974–1977 agreement without bringing any proceedings against that agreement, and as far as I am aware, Puerto Rican carriers have paid under every agreement's formula from 1971–1974 to the present and did not sue NYSA under the 1974–1977 agreement. Customarily a plaintiff wishing to release a defendant from suit by means of a settlement and for consideration makes clear in a release that the plaintiff is indeed relinquishing all rights and claims arising out of the dispute in unequivocal terms. It is, furthermore, unusual for a person to relinquish all future rights in

perpetuity, but even if a person did wish to take such an extreme step, one would expect to find clear language which courts could enforce. There is no such language here. I cannot therefore find that PRMSA, as successor to TTT, surrendered its rights under the MLAA to file a complaint in 1984, almost ten years after the settlements and the TTT letter.

Nor can I find the essential elements of equitable estoppel to exist so as to bar PRMSA. As discussed, at most, it appears that the Puerto Rican carriers and TTT agreed not to sue under the 1974–1977 agreement. There is therefore no basis for NYSA to rely on TTT's representations by converting its statements regarding the 1974–1977 agreement into a promise never to sue under any subsequent agreement. Furthermore, NYSA has long since made adjustments to carriers such as the States Marine Group and cannot reasonably argue now that its ability to make such payments or give credits was adversely affected by the complaint filed by PRMSA years later in 1984. Finally, in view of the continued lack of success which PRMSA has experienced in its continual efforts to obtain relief from the assessment agreements from at least 1976 to the present time through the agreement grievance mechanisms, it would be rather perverse to invoke the doctrine of estoppel, which is rooted in equity, against PRMSA which has felt compelled to seek relief outside of those contractual mechanisms by presenting evidence of unfairness and unjust discrimination under the standards established by federal law pursuant to independent rights granted to it under that law.

I conclude, therefore, that none of the above affirmative defenses is valid and that the Commission can proceed to determine the merits of the complaint.[12]

DISCUSSION OF APPLICABLE LAW

Contentions of the Parties

The Port Authority contends that the tonnage assessment formula is inherently unfair and unjustly discriminatory because it puts an undue burden on highly productive carriers who pay assessments in inverse proportion to the amount of labor they use and, in some instances, some carriers pay nothing toward fringe benefit obligations for non-cargo handling functions such as movement of empty containers or for maintenance, which functions also require ILA labor. The result of this unfair assessment formula is to cause containerized carriers to avoid using the Port of New York when possible because the comparable tonnage assessment per container at competing ports, such as Baltimore, is so much less. The formula therefore hurts the Port of New York competitively. The Port Authority acknowledges that it has the burden of proof in this case but claims that

[12] Two defenses raised by NYSA concerning the limitation on complainants' rights to reparations and non-applicability of sections of the 1916 Act other than section 15 I find to be correct as matters of law and will discuss them later.

it has met that burden by meeting certain tests as to competitive relationships among ports, proximate causation of injury to the Port, and unreasonable discrimination established by the Commission under sections 16 and 17 of the 1916 Act.[13] It points to evidence that top executives of eleven major carriers have admitted to the Port Authority's Deputy Director that they avoid the Port of New York/New Jersey particularly for Midwest cargo, because of the tonnage assessment at New York, that the Port has suffered a loss in its market share on container traffic in the North Atlantic, and to expert testimony showing that the present assessment formula is inherently unfair and does not relate payments to labor utilization in a fair manner. The Port Authority offers alternative formulas which would, in its opinion, allow carriers to pay only their fair share in the correct proportion to the labor used and to their responsibility for labor displacement while ending special, unjustified privileges of carriers that pay little or nothing for certain activities.

PRMSA/PRMMI contend that their interests as well as those of the Port Authority and the NYSA are actually the same, i.e., to fund the commitment to labor in such a way as does minimum damage to the competitive position of the Port of New York and the competitive position of every member of the NYSA. To achieve that purpose, it is in the interests of all of these parties to find a method to apportion the $200 million or so in fringe benefit obligations under the labor contract in a way that is economically sound, fair and justifiable. Instead of utilizing an assessment formula that would achieve these objectives, PRMSA/PRMMI argue that NYSA has "dug in its heels" and adheres rigidly to a 10-year old assessment formula which is "unjust, discriminatory, and economically counterproductive, riddled with unjustified favoritisms for special carriers, categories of cargo, and labor activities." (PRMSA/PRMMI op. br. at 4.) PRMSA argues further that it has asked NYSA for years to change its formula as regards the Puerto Rico trade without success, contending that it has lost cargo to carriers not serving the Port of New York. However, PRMSA argues that while diversion of traffic from New York is one of a number of factors that must be weighed by the Commission when determining whether the subject assessment formula is fair, reasonable, and non-discriminatory, the evidence which PRMSA has developed and presented shows that the tonnage assessment formula currently in use lumps all fringe benefits into one category, to be funded by tonnage assessments regardless of the type of benefit and of the amount of labor which a paying carrier uses. Therefore, certain carriers are picking up the share of costs that other carriers should be paying, and the problem is aggravated

[13] The Port Authority cites such cases as *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441 (1966), a case arising under sections 17 and 18(b)(5) of the 1916 Act; *Boston Shipping Association, Inc.* v. *F.M.C.*, 706 F. 2d 1231 (1st Cir. 1983), affirming *Boston Shipping Association* v. *N.Y.S.A. et al.*, 21 SRR 955 (1982), arising under sections 15, 16, 17, and 18 of the 1916 Act; *N.C. State Ports et al.* v. *Dart Containerline*, 21 F.M.C. 1125 (1979), aff'd sub nom. *Dart Containerline Co., Ltd.* v. *F.M.C.*, 639 F.2d 809 (D.C. Cir. 1981), arising under sections 16 and 17 of the 1916 Act.

by the fact that certain carriers and activities pay lower, excepted rates or even nothing at all. For example, transshipped, rehandled, and domestic cargoes constituting 12.9 percent of total loaded containers moving through the Port of New York in contract year 1982–1983 paid less than .016 percent of the total assessment, a special privilege enjoyed by only two carriers, Sea-Land and United States Lines. PRMSA argues further that the reasons for these special privileges, i.e., the alleged fear of diversion if such cargoes pay regular rates, do not stand up and, moreover, there is strong evidence of actual diversion of Puerto Rican cargoes from New York which NYSA fails to acknowledge and instead continues to require PRMSA, a carrier serving an economically disadvantaged trade, to subsidize other carriers like Sea-Land and United States Lines and those carriers not paying their fair share because of the inherently unfair tonnage formula. PRMSA offers an alternative formula, supported by its expert witness, Dr. Silberman, which would, in its opinion, discontinue the unfairness which comes from levying a straight tonnage assessment regardless of type of fringe benefit and would instead restore a proper balance and require carriers to pay their fair shares by correlating certain costs, mainly GAI, to past dislocation of work caused by containerization, and other costs, pensions, clinic, etc. to current-type costs not related to past dislocation, and by funding these two costs on the basis of tons and man-hours, respectively. Furthermore, all unjustified special privileges on domestic cargoes, empty containers, transshipped and rehandled cargoes, etc. would be terminated. Finally, in consideration of the depressed economic situation in Puerto Rico, PRMSA urges that the Puerto Rican trade be given a 25 percent discount from the tonnage assessment under its proposed alternative formula.

Respondents NYSA and 89 of its members represented by the same firm raise a number of affirmative defenses concerning the two-year statute of limitations, estoppel, waiver *res judicata*, failure of PRMSA to withdraw from the bargaining unit, etc., which I have discussed above and have found to be without merit. However, NYSA also argues that complainants have the burden of proof which is a "heavy burden of proof which must be met by clear and convincing 'substantial proof' supported by 'specific evidence.'" (NYSA op. br. at 93.) This allocation of burden, furthermore, is confirmed by the legislative history to the MLAA, which set up the special complaint procedure by which the Commission can hear such a case as the present. NYSA argues that the Port Authority has not produced evidence adequate to support its legal theories as to detriment to commerce and unjust discrimination. NYSA contends that the Port Authority has not identified the particular ports with which the Port of NY competes, nor shown that the assessment formula is the proximate casue of any alleged diversion which may be harming the Port of NY, that the real problem is the rising costs of fringe benefits at New York, not the formula which raises money to pay them, that respondents cannot be found guilty of discriminating against the Port of New York because they do not control

the assessment formulas devised at other ports, that the Port Authority's Director, Port Department, conceded that neither NYSA nor the ILA adopted the challenged formula for the purpose of placing other ports in a better competitive position than New York, and that the Port Authority's case rests upon supposition, argument, and unsubstantiated conclusions. More specifically, NYSA contends that the Port Authority has not shown any cognizable diversion of cargo from New York to other ports, that the Port Authority is erroneously claiming inland territories as being naturally tributary to New York, that shippers are controlling most routing, not carriers, that tonnages are holding up in New York and other Ports are increasing volumes handled relative to New York because the other ports are now experiencing increasing containerization. NYSA contends finally that the Port Authority's alternative formulas are flawed and would cause problems worse than the alleged disease and that, in any event, the present formula has not been shown to be unlawful.

As to PRMSA/PRMMI, NYSA contends that, first of all, their remedies, if any, are limited to section 15 of the 1916 Act, fifth paragraph, and do not extend to sections 16 First, 17, 18(a), or 22 of that Act, which no longer apply in assessment agreement cases. Furthermore, as to remedies, the MLAA authorizes the Commission to make adjustments for the time period after the filing of the complaint and does not authorize "reparations" prior to that time. NYSA does not agree that the so-called "benefits-burdens" test, i.e., that assessment formulas should fairly impose a charge or burden that is reasonable related to the labor contract benefits received by the persons against whom the assessment is levied, still applies to assessment formula cases because of the removal of sections 16 and 17 of the 1916 Act from assessment cases by the MLAA. However, NYSA argues that it is unnecessary to decide whether that test still applies because the NYSA formula satisfies that test. (NYSA op. br. at 127). NYSA contends that PRMSA's case is faulty and legally unsound. First, according to NYSA, PRMSA is seeking to have the formula protect PRMSA against loss of business to competitors, (i.e., the non-ILA carrier who allegedly is pulling business away from New York and from PRMSA in the Puerto Rican trade). But it is not a violation of federal shipping law if the subject agreement formula does not grant "affirmative protection against the vicissitudes of competition." (NYSA op. br. at 128.) NYSA cannot be expected to adjust the formula every time a carrier faced competitive problems. If so, "[t]he potential for claims by dissatisfied carriers would be staggering because every time the formula was adjusted to meet the needs of one, others would be affected." (NYSA op. br. at 128). Moreover, the facts do not show that the formula is causing any diversion of cargo from PRMSA to the non-ILA carrier which is not serving New York.

As to the alternative formula proposed by PRMSA, NYSA argues that it extends the "benefits-burdens" test beyond its intended limits because, according to NYSA, PRMSA is trying to break down benefits and burdens

within the same group of carriers, i.e., containerized carriers, and is claiming that certain of these carriers are receiving different benefits than other carriers within the group, and therefore, seeking special treatment for one of the containerized carriers, PRMSA, which is highly productive and utilizes relatively few hours of labor. All highly productive carriers like PRMSA enjoy full benefits of containerization and are responsible for labor dislocation more or less equally, according to NYSA. Therefore, one such carrier should receive no special reduced assessment rate at the expense of another within the group. Also, PRMSA's attempts to have certain operations such as transshipments pay regular rates is unsound even under the benefits-burdens test because those operations provide increased hours of employment as by-products of containerization and are not responsible for the decline in employment. PRMSA's request for a special 25 percent reduction for the Puerto Rican trade has no legal justification, according to NYSA, and is itself an admission that Dr. Silberman's alternative formula is not even satisfactory to PRMSA. Both the Port Authority's and PRMSA's suggested formulas would bring "disastrous" consequences to New York and would drive cargo away from the Port of New York, states NYSA, and there is no basis for tampering with the current formula which was agreed upon by the parties whose interests are at stake and has functioned for more than a decade.

Sea-Land Service, Inc., an intervenor in No. 84–8 and respondent in No. 84–6, "fully supports and defends the collective bargaining agreement entered into between it (via the NYSA) and the . . . ILA." However, Sea-Land also believes that "the record herein shows that special treatment need be given to cargo moving via [the Port of New York] in the Puerto Rican trade." (Sea-Land op. br. at 2, 3). Sea-Land states that the parties to the collective bargaining agreement and not the Commission or the courts are best suited to make whatever adjustments are required. Having stated these beliefs, Sea-land argues that complainants have not met their burdens of proving that LM-86 violates the Shipping Act. Instead, according to Sea-Land, complainants have offered alternative assessment formulas, which, in the case of PRMSA, merely seeks to accomplish "narrow parochial interests of that Complainant without regard to the interests of the shipping public, the carriers as a group, or the workers . . ." (Sea-Land op. br. at 3.) Even if the alternative formulas proposed are more reasonable or fairer, however, Sea-Land argues that the true test is whether the present formula in LM–86 is unlawful, which Sea-Land contends has not been shown. On legal points, Sea-Land argues that the 1984 Act and the 1916 Act are essentially the same as far as assessment agreement cases are concerned and that the 1984 Act makes clear that sections 16, 17, 18, and 22 of the 1916 Act were not intended to apply to such cases, the exclusive standards and remedies being contained in section 15, fifth paragraph, of the 1916 Act and section 5(d) of the 1984 Act. These limited standards refer to whether an assessment agreement is "unjustly discrimina-

tory or unfair as between carriers, shippers, or ports'' and the limited remedy consists of disapproval, cancellation, or modification of such agreements and assessment adjustments for the period of time between filing of the complaint and final Commission decision, ''reparation'' allowed only if a complainant has ceased activities subject to assessments.

Sea-Land submits that although the MLAA does not define the anti-discriminatory standards, it is proper for the Commission to consult previous case law under the 1916 Act to give meaning to similar-language in the new law. Under previous case law, for example, the Commission has usually required a showing of disparity of treatment among similarly situated entities that results in injury not justified by valid transportation factors. See, e.g., *North Atlantic Mediterranean Freight Conference*, 11 F.M.C. 202 (1967), rev'd on other grounds sub nom. *American Export Isbrandtsen Lines* v. *F.M.C.*, 409 F. 2d 1258 (D.C. Cir. 1967). For preference or prejudice to be proven, again, similarly situated entities must be shown and usually the existence of a competitive relationship between the entities.[14] However, as Sea-land seems to concede, absence of competition is not fatal to proof of a violation of the 1916 anti-discrimination standards. ''It can be supplanted by a showing of 'clear comparative disadvantage' causing 'special injury.' '' Sea-Land cites *Internationall Trade & Development, Inc.* v. *Sentinel Line and Anchor Shipping Corp.*, 22 F.M.C. 231, 232 (1979). (Sea-Land op. br. at 13). Therefore, Sea-Land contends that complainants must either show that they have been prejudiced with respect to competitors or they have been subjected to a comparative disadvantage causing special injury. Sea-land argues that complainants have failed to make the requisite showings. Thus, it is argued, the higher per-ton assessment at New York than exists at other ports under their man-hour formulas is ''totally immaterial in the context of this proceeding.'' (Sea-Land op. br. at 16.) Assessments at New York are higher simply because costs at New York are higher. Also, since LM–86 applies only at New York, as a matter of law, respondents have not discriminated against the Port of New York because respondents have not treated similarly situated ports differently. But even if alleged harm to the Port of New York can constitute a valid cause of action under law because cargo may be diverted from New York to other ports because of the higher tonnage assessments at New York under the current formula, the Port Authority has not proven that any specific cargo has been diverted solely because of the higher assessments at New York. Sea-Land ''lauds the efforts'' of the Port Authority to devise some means to help the Port of New York attract intermodal containerized cargoes moving to and from the Midwest, for which cargoes New York competes with other ports such as Baltimore. However, the Port Authority's suggested means, an alternative assessment formula which would lower the tonnage

[14] Sea-Land cites such case authority as *CONASA* v. *American Mail Lines*, 21 F.M.C. 91, 140–141 (1978); *Far East Conference—Inchon Arbitrary*, 21 F.M.C. 522, 524 (1978); *Pacific Westbound Conference*, 21 F.M.C. 834, 838 (1979).

assessment rates, is something that in Sea-Land's opinion, is "best left for commercial negotiations and [is] insufficient to warrant intervention in the assessment process by the FMC." (Sea-land op. br. at 19.)[15]

As for PRMSA, Sea-Land argues that PRMSA makes no showing that the present NYSA formula is unlawful and merely proposes a formula which it argues to be better or fairer. Sea-Land attacks the proposed formula presented by PRMSA's witness, Dr. Silberman, as a proposal which "is clearly intended to benefit only its proponent and is not intended to be fair and equitable to all concerned," being especially unfair to Sea-Land and United States Lines. (Sea-Land op. br. at 19.) Sea-Land expresses regret that the PRMSA formula would affect Sea-Land adversely in certain respects because Sea-Land itself appears to agree with PRMSA that "the Puerto Rico trade should be treated just as other domestic trades are treated rather than the foreign trades with which it is presently placed by the NYSA assessment formula." (Sea-Land op. br. at 19.)[16] In this regard, furthermore, Sea-Land agrees with PRMSA that the Puerto Rican trade is unlike foreign trades, requiring American-flag vessels, using ILA labor at both ends, subject to public utility type rate regulation, etc. Sea-Land states that if PRMSA had merely confined itself to seeking parity between the Puerto Rican and other domestic trades (i.e. by assessing them all under the excepted man-hour rates), it would have perhaps co-signed PRMSA's brief. However, Sea-Land opposes PRMSA's contentions that the entire formula should be revamped, contending that PRMSA's proposed alternative formula is "blatantly biased" and would endanger domestic transshipped, and other cargoes by terminating their special assessment rates, thereby harming all parties at New York by driving away such business. Sea-Land concludes by arguing that the Commission has no authority to "modify" the current assessment formula and that the parties should negotiate a solution.[17]

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[15] In its reply brief, the Port Authority suggests that the Commission might issue an order indicating that it would modify the present assessment formula to eliminate its unfair and discriminatory effects "unless the parties in this proceeding can come to an agreement on a new formula." (Port Authority r. br. at 32.) Although it is not certain, perhaps this suggestion by the Port Authority picks up on the possible suggestion by Sea-Land that the return to a partial man-hour formula as proposed by expert witnesses Donovan and Silberman makes some sense and could form the basis for a settlement among the parties. Even NYSA does not appear to reject the idea of Type I-Type II costs and a man-hour/tonnage formula in principle, at least in its opening brief. Thus, at page 132 of that brief, NYSA states: "While the Type I-Type II analysis is appropriate for allocation between sectors . . ." Does this mean that the Port Authority believes that NYSA may be willing to consider modifying the present formula, at least to this limited extent, and wishes to negotiate and seek possible settlement?

[16] It is interesting to observe that Sea-Land castigates PRMSA for advocating a formula which will benefit PRMSA (and other containerized lines as well, due to the man-hour portion of the proposed formula) but would upset Sea-Land's special treatment (paying nothing on its relay containers). However, Sea-Land, while not filing its own complaint, joins with PRMSA in urging something in its own self-interest, namely, that its domestic service be treated just as other domestic trades are treated.

[17] The MLAA, codified in section 15, fifth paragraph of the 1916 Act and section 5(d) of the 1984 Act, expressly states that the Commission shall . . . "disapprove, cancel, or modify any such agreement . . . if it finds . . ." Notwithstanding the presence of the word "modify" in the statute, Sea-Land argues that all the Commission can really do is approve an agreement on condition that the parties accept certain changes to it. Therefore, Sea-Land argues that only the parties have the power to modify their agreement. (Sea-Land

The three remaining intervenors (Maryland Port Administration (MPA), Massachusetts Port Authority (Massport) and Hearing Counsel) have limited interests. MPA readily acknowledges its participation to protect the competitive interests of Baltimore, argues that the Port Authority has not carried its burden of proof, questions its standing to seek relief, contends that it has not shown that the Port Authority is losing cargo to Baltimore because of the current assessment formula, that there is no basis to change the current New York formula to offset New York's competitive disadvantages if such exist, and that the Commission ought not to do anything that would adversely affect Baltimore such as, for instance, by establishing a "superfund" which would spread New York's labor costs to other ports.[18] Massport does not want any modification of the New York assessment formula to jeopardize the barge service which carries Boston cargo via New York. If anything jeopardizes this barge service through New York, Massport states that "the Port of Boston will immediately lose 50% of the containerized cargo it is presently handling." (Massport op. br. at 3.) This would cause loss of work on barges at Boston and force ILA members in Boston onto GAI rolls. Massport also fears establishment of a so-called "superfund." Hearing Counsel ask that nothing be done to the current assessment formula by the Commission. Hearing Counsel appear to acknowledge that complainants "may have shown that the assessment formula contains some problem areas" but recommend that these problems be left to the parties to negotiate when "it is time to draft a new agreement." Hearing Counsel state that the assessment agreement is not violative of the 1916 Act and that it is not the purpose of this proceeding to decide whether the current formula is the "best" formula possible. (H.C. op. br. at 33.) Hearing Counsel further argue that neither complainant has carried its burden of proof. For example, the Port Authority has not shown that the assessment formula has caused diversion of cargo from New York to other ports under the standards of law enunciated in cargo diversion cases previously before the Commission. PRMSA, according to Hearing Counsel, incorrectly uses the "benefits-burdens" test, its formula would harm domestic and other cargoes enjoying special treatment, it has not shown that the current formula causes PRMSA to lose cargoes to

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op. br. at 11 n. 8.) I fail to see any practical difference between "conditional approval" and modification since no one can force parties into an agreement they do not want. Although the Commission may have followed the "conditional approval" approach, it has also clearly enunciated its authority to "modify" agreements and has ordered modifications under section 15 of the 1916 Act. See *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 136 (1965); and *Rates on U.S. Government Cargoes*, 11 F.M.C. 263, 287 (1967). Cf. *Agreement No. 57-96*, 19 F.M.C. 291, 305 (1976); and *Inter-American Freight Conference*, 14 F.M.C. 58, 62 (1970).

[18] This so-called "superfund" idea is, in my opinion, a total red herring. It was also a concern of Massport. Although I tried to put the matter to rest by indicating that the matter of a "superfund" was not in this case and was probably beyond the power of the Commission to establish, certainly in a case of this type concentrating on New York, under principles of due process, the matter has been mentioned on brief. Since it is not an issue in this case, I will not discuss it further and hope that MPA and Massport can finally rest easy.

a non-ILA carrier operating in the Philadelphia area, and there is no basis to give the Puerto Rican trade a 25 percent discount or any reduction to help the Puerto Rican economy because it is not shown how such a reduction would help that economy or how PRMSA is burdened any more than any other container carrier by paying the regular tonnage assessment.

Applicable Standard of Law Regarding Burden of Proof

In view of several arguments by the parties regarding burden of proof and complainant's failure to sustain that burden, I first must establish the prevailing standard of proof in administrative cases. That standard is not "clear and convincing" or "beyond a reasonable doubt" but rather merely a "preponderance of the evidence." *Steadman* v. *S.E.C.*, 450 U.S. 91 (1981); reh. denied, 451 U.S. 933 (1981); *Sanrio Co. Ltd.* v. *Maersk Line*, 23 F.M.C. 154, 160–162 (I.D.), adopted by the Commission, 23 F.M.C. 150 (1980).

The "preponderance of the evidence" standard is not a quantitative standard but a qualitative one. That is to say, the trier of fact does not merely weigh the evidence on a scale or count the number of witnesses on one side or the other. The standard means that the evidence makes the existence of a fact more probable than not. See discussion in *McCormack on Evidence* (3rd Ed. 1984), sec. 339, pp. 956–957.

There is absolutely no question but that complainants have the burden of proof in this case as well as in any other case under prevailing principles of administrative law, as NYSA argues so virgorously, citing numerous authorities. (See NYSA op. br. at 90–93, citing, among other things, the APA, 5 U.S.C. sec. 556(d); Rule 155, 46 C.F.R. sec. 502.155; *Boston Shipping Ass'n* v. *F.M.C.*, 706 F.2d 1231, 1239 (lst Cir. 1983); *Ship's Overseas Service, Inc.* v. *F.M.C.*, 670 F.2d 304, 307 n. 7 (D.C. Cir. 1981); *Steadman* v. *S.E.C.*, cited above, 450 U.S. at 95.) However, contrary to NYSA's arguments, the MLAA does not impose something called a "heavy burden which must be met by clear and convincing 'substantial proof' supported by 'specific evidence.'" (NYSA op. br. at 93.) This "clear and convincing" standard is not only not the standard governing administrative and most civil cases but it appears to have been proposed before by the NYSA to Congress which failed to adopt it when enacting the MLAA.[19]

Complainants must produce a preponderance of reliable and probative evidence under the usual standard. However, this does not mean that complainants must produce a "smoking gun" when seeking to show diversion, harm, loss of traffic, burdens, etc. It has been recognized by the Commission and the courts that the Commission may draw inferences from certain

[19] See Senate Hearing, June 4, 1980, 96th Congr. 2d Sess. on H.R. 6613, at 43 and 44. In commenting on an apparent NYSA proposal to mandate the "clear and convincing standard" in the MLAA, a stevedoring association specifically criticized such standard, which Congress did not enact.

facts when direct evidence is not available because of the Commission's particular knowledge and expertise and even on the basis of inferences that any reasonable person would draw from the facts. See, e.g., *F.M.C. v. Svenska*, 390 U.S. 238, 249 (1968) ("Having correctly noted that positive proof . . . was simply not available one way or the other, the Commission was fully entitled to draw inferences on these points from the incomplete evidence that was available. 'Conjecture' of this kind, when based on inferences that are reasonable in light of human experience generally or when based on the Commission's special familiarity with the shipping industry, is fully within the competence of the administrative agency and should be respected by the reviewing courts."); *U.S. v. F.M.C.*, 15 SRR 927, 934–935 (D.C. Cir. 1980) hearsay and indirect evidence used to support finding of rebating, there being no direct evidence so that inferences were required to be drawn); *Agreement No. 57–96*, 19 F.M.C. 291, 303 (1976).

The MLAA and the "Benefits-Burdens" Test

Earlier in this decision I referred to the MLAA and its genesis as a compromise between industry interests who wished to be free of Commission jurisdiction in collective bargaining matters and other interests who feared that total ouster of the Commission from such matters would leave them vulnerable to abuse and without adequate protection. The result was that the Commission was given limited jurisdiction under section 15 of the 1916 Act (later, section 5(d) of the 1984 Act) over assessment agreements contained in collective bargaining agreements. The history of the enactment of this compromise as the MLAA is summarized rather well in *CONASA v. F.M.C.*, cited above, 672 at 181–182, as follows (footnote citations omitted);

> The Maritime Labor Agreements Act of 1980 was the product of a legislative attempt to clarify jurisdictional boundaries in the area where labor law and shipping law intersect-the provisions of maritime collective bargaining agreements. Historically the FMC had taken the position that none of these agreements were subject to the provisions of Section 15 of the Shipping Act, which requires a wide range of maritime agreements be filed with and approved by the Commission before they may enter into effect. However, beginning in 1968, judicial decisions had held that Section 15 covered certain collective bargaining agreements and multi-employer agreements to implement promises made in collective bargaining. In 1980 the House, citing the national policy of "free collective bargaining without a requirement of prior government approval," adopted a bill which completely exempted collective bargaining agreements from FMC regulations. The House bill removed FMC jurisdiction to review maritime labor agreements, before or after implementation, or to determine their legality under the substantive provisions of the shipping laws. This blanket labor exemption aroused strong opposition.

> At hearings held by the Senate committee, shippers, consolidators and other witnesses objected that the bill "stripped the FMC of jurisdiction to assure equal treatment of shippers, cargo, and localities and to prevent abuses made possible by one concerted activity of carriers and others." In response, the Senate committee drafted a revised bill to assure "that the Federal Maritime Commission jurisdiction is preserved to the extent necessary" to assure equal treatment and to prevent abuses. The bill was adopted by the Senate without debate, and passed the House, again without debate.

As the parties acknowledge on brief, the MLAA restored FMC jurisdiction over assessment agreements after an early attempt to oust FMC jurisdiction had aroused opposition from shippers and other witnesses. Furthermore, the Commission was given jurisdiction to ensure "equal treatment of shippers, cargo, and localities and to prevent abuses made possible by concerted activity of ocean carriers and others." Sen. Rep. No. 96–854, cited above, at 2, 10. This jurisdiction, however, did not extend to assessment agreements based on uniform man-hour rates which were the usual type of industries but only to those agreements based upon something other than uniform man-hours. Sen. Report, cited above, at 11, 13. The Commission was supposed to determine, upon complaint, whether, under such agreements, "all affected parties pay only their fair share of fringe benefit obligations." S. Rep. cited above, at 14.

While all parties discussing this matter agree on the above general parameters, there is some dispute as to what standards are to be employed when determining whether the agreements are "unjustly discriminatory or unfair as between carriers, shippers, or ports," which, if so found, would warrant disapproval or other remedial action by the Commission, whether other sections of the 1916 Act apply besides section 15, fifth paragraph, and whether relief can be granted beyond assessment adjustments to compensate for overpayments under a formula, starting from the date of the filing of the complaint, as provided by section 4 of the MLAA (section 15, fifth paragraph, 1916 Act; section 5(d) 1984 Act,) As discussed, NYSA does not agree that the "benefits-burdens" test still applies when determining unfairness or unjust discrimination, and PRMSA does not agree that its only relief lies under section 15, fifth paragraph, of the 1916 Act, or section 5(d) of the 1984 Act, or that it cannot obtain full "reparations" in the form of money damages plus interest retrospectively, i.e., back to October 1, 1983, the beginning of the current labor contract year.

There is little doubt in determining what is unfair or unjustly discriminatory among carriers under assessment agreements that the "benefits-burdens" test, which was first enunciated in the *Volks-wagenwerk* decision in 1968 and applied in numerous other cases involving such agreements under section 15 as well as 16 and 17 of the 1916 Act, is a proper test to apply. Even NYSA, on brief, acknowledges the numerous cases

which utilized that test and cites them.[20] (NYSA op. br. at 126–127.) PRMSA furnishes a detailed history of these numerous cases staring with *Volkswagenwerk* in 1968 and proceeding beyond enactment of the MLAA. (PRMSA op. br. at 49–58.) These cases show that perfect correlation between benefits and burdens is not possible nor expected but only a reasonable correlation or a "broadly equitable arrangement." (*NYSA* v. *FMC*, 628 F.2d at 257; 571 F. 2d at 1238); cf. also *Volkswagenwerk*, cited above, 390 U.S. at 293 (Harlan, J. concurring) ("must leave room for the implementation of some uniform, practical general rule of assessment even though it have some features that are less desirable than some alternative imperfect rule.") *Wolfsburger* v. *F.M.C.*, 562 F. 2d 827, 829 (D.C. Cir. 1977) ("the question is whether the Agreement . . . is the fairest that could be devised and whether the charge levied is reasonably related to the benefits received by automobile shippers.")

As I mentioned earlier in this decision, NYSA acknowledges that the MLAA was enacted "against the backdrop of more than ten years of decisional law." (NYSA op. br. at 123.) If Congress did not intend to continue to allow the Commission and courts to continue using the "benefits-burdens" test when it restored jurisdiction to the FMC to prevent abuses and ensure "equal treatment" among those paying under such agreement formulas in response to pleas from shippers, what on earth test did the Congress intend? I doubt whether NYSA would prefer a simple dictionary definition of "fair" which would be so broad as to forbid favoritism or less than evenhanded treatment under even a broader standard than the "benefits-burdens" test, in view of the record in this case which shows favoritisms and special privileges aplenty.[21] NYSA, however, rests its argument on the ground that Congress enacted a special limited procedure for assessment agreements, excluding section 22 of the 1916 Act and all other provisions of that Act. I agree that Congress did this. However, the argument overlooks the fact that some of the cases cited relied on section 15, not merely 16 or 17, where NYSA states the "benefits-burdens" test to have arisen in the *Volkswagen* decision. (See, e.g., *Agreement No. T–2336*, cited above, 15 F.M.C. 259.) Furthermore, the "unjustly discriminatory and unfair" language appears not only in section 15, fifth paragraph, as provided by the MLAA, but the same language always appeared in the original section 15 of the 1916 Act as the very first standard authorizing disapproval of agreements. In view of this case history, the retention of the same language of the first standard in section 15, and the express statement of the Senate Report that "the bill retains the existing protections

[20] Among them are: *Wolfsburger* v. *F.M.C.*, 562 F. 2d 827 (D.C. Cir. 1977); *NYSA* v. *F.M.C.*, 571 F. 2d 1231, 1239, n. 20 (D.C. Cir. 1978); *Transamerican Trailer Transport, Inc.* v. *F.M.C.*, 492 F. 2d 617 (D.C. Cir. 1974), affirming *Agreement No. T–2336*, 15 F.M.C. 259 (1972).

[21] Thus, Webster's Third New International Dictionary (1967), p. 815, defines "fair" as follows: "7a—characterized by honesty and justice; free from fraud, injustice, prejudice, or favoritism . . . Fair, the most general of the terms, implies a disposition to achieve a fitting and right balance of claims or considerations that is free from undue favoritism."

of the Shipping Act for shippers, carriers, and localities which may be adversely affected by shipping practices which may arise out of maritime labor agreements" (Sen. Rep. at 13), NYSA's argument that the exclusion of sections 16, 17, 18, 22 from section 15, fifth paragraph, in assessment agreement cases means that the "benefits-burdens" test has been eliminated, is not tenable.

The MLAA's Limitations on Standards and Remedies

Where I do agree with NYSA is in the matter of the special remedy and procedure which the MLAA established for the protection of persons complaining about the harmful effects of assessment agreements. NYSA explains (NYSA op. br. at 121–126) that section 4 of the MLAA amended section 15 of the 1916 Act by inserting a fifth paragraph to section 15. By this law, Congress permitted persons to file a complaint within two years after the filing of an assessment agreement and to ask the Commission to "disapprove, cancel or modify" that agreement if the Commission finds the agreement to be "unjustly discriminatory or unfair as between carriers, shippers, or ports or to operate to the detriment of the commerce of the United States." If the Commission so finds, the Commission is required to "remedy" the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments." These adjustments are supposed to be implemented by "prospective credits or debits to future assessments or charges," except if the complainant has ceased activities subject to assessments, in which case such person is entitled to "reparation." Section 4, MLAA.

The above language says nothing about the other standards of section 15, namely, "contrary to the public interest," or "to be in violation of this Act," which incorporated sections 16, 17, 18, and other substantive provisions of the 1916 Act, nor of section 22 of that Act which authorized normal private complaints and Commission-instituted investigations. Thus, not only did Congress limit the standards to apply to assessment agreements to only two, it also limited the remedy both in terms of time and in terms of form, i.e., between filing of the complaint and decision as to time, and future credits or debits rather than money "reparation" for persons still operating subject to assessment agreements. To ensure that the other provisions of the 1916 or 1933 Acts did not apply to this special procedure, Congress enacted the so-called "preemption clause" which is the last sentence to section 4 of the MLAA and the last sentence of the fifth paragraph of section 15, 1916 Act (now section 5(d) of the 1984 Act). This "clause" states:

> To the extent that any provision of this paragraph conflicts with the language of section 22 or any other section of this Act, or of the Intercoastal Shipping Act, 1933, *the provisions of this paragraph shall control* in any matter involving assessment agreements described herein. (Emphasis added.)

Although the language of the "preemption clause" would appear to close debate, PRMSA argues that the other sections of the 1916 Act are still applicable as is section 22 of the 1916 Act, and that, accordingly, PRMSA should be permitted to show undue prejudice under section 16 and unreasonable practices under section 17 of the 1916 Act, and can ask for section 22-type reparation with interest. PRMSA cites a recent court decision, *California Carthage Co.* v. *United States,* 721 F. 2d 1199 (9th Cir. 1983), cert. denied, 53 L.W. 3230 (Oct. 2, 1984), which in turn refers to the Senate Committee Report to the MLAA. According to PRMSA's argument, the court decision means that section 22 as well as the other sections of the 1916 Act cited are still alive and well and can be applied to this case and that PRMSA can seek money damages (reparation) under section 22 retrospectively with interest even in an assessment agreement case. I disagree.

First, the *California Cartage* decision only held that an off-pier consolidator had standing to sue under the MLAA under the "detriment to commerce" standard which was then contained in the fifth paragraph of section 15 of the 1916 Act (but has been deleted from the 1984 Act). In so holding, the court was impressed by the language of the Senate Committee Report which explained that this "preemption clause"

> is intended to give the Commission broad discretion, unfettered by the constraints of sections 18, 22, and other provisions of the Shipping Act, to fashion appropriate remedies for unfair or discriminatory assessments. (Sen. Rep., cited above, at 14, cited at 721 F.2d at 1205.)

PRMSA also cites court language holding that repeals by implication are not favored and that there is no apparent conflict between the fifth paragraph of section 15 and section 22 of the original 1916 Act as far as standing is concerned. (PRMSA op. br. at 59.) Be that as it may, the fact remains that the court's holding goes to the question of standing, not remedies, and that the only standard which the court considered as giving standing to the off-pier consolidator was "detriment to the commerce of the United States," a standard now deleted from the corresponding portion of the 1984 Act, as I have mentioned. Maybe, to repeal the consolidator's standing, previously granted by section 22 of the 1916 Act, by implication is disfavored, but there is no repeal of section 22 or the other provisions of the 1916 or 1933 Act by implication in the "preemption clause." It is express. The MLAA did not delete the substantive standards of the original section 15 by implication. It specifically cut out all of them except "unjustly discriminatory or unfair as between carriers, shippers, or ports" and "detriment to the commerce of the United States." Furthermore, it established a remedy in the form of prospective credits or debits for persons still operating under such agreements and limited the time period for which that remedy would be applicable, i.e., from filing of

the complaint to date of judgment. Such remedy is quite different from the normal section 22 remedy of reparation, i.e., money damages running from the date the "cause of action accrued."

Nor does the language of the Senate Committee Report quoted above demonstrate that Congress intended that section 22 and all the other provisions of the 1916 and 1933 Acts apply to assessment agreement cases in the face of what appears to be clear statutory language excluding those other provisions of law. That Committee's language can be understood in the context of the history of assessment cases before the Commission, especially Docket No. 69–57, *Agreement No. T–2336,* cited Above, 15 F.M.C. 259, and the several cases following that one, concerning adjustments and credits. In that case, as Congress was presumably aware, the Commission had to fashion a unique remedy to make adjustments after a lengthy proceeding so that underpaying and overpaying carriers would be made whole. The Commission did so by ordering prospective credits for carriers still operating and cash for those not operating, although section 22 of the Act made no provision for such adjustments. The MLAA, in effect, not only codified the remedy employed by the Commission in Docket No. 69–57, but clarified the Commission's authority to devise such remedies "unfettered by the constraints of section . . . 22." Thus, seen in this light, Congress wanted the Commission to hear complaints against assessment agreements under limited standards but wished to give the Commission "broad discretion" to devise "appropriate remedies," i.e., to fashion adjustments in the form of credits (or debits if necessary) in whatever manner necessary to remedy unfairness or unjust discrimination as was done in the long aftermath of Docket No. 69–57. This does not mean, however, that the Commission can go outside the clear time limits or the credit, debit limitations such as by ordering payment of money damages with interest retrospectively, as PRMSA argues, under sections 16, 17, and 22 of the 1916 Act.

As if it were not clear enough that Congress intended that the standards and remedies applicable to assessment agreement cases be limited to the fifth paragraph of section 15 of the 1916 Act, the legislative history to the 1984 Act would seem to put the nail in the coffin to PRMSA's arguments. In re-enacting the fifth paragraph of section 15 of the 1916 Act as section 5(d) of the 1984 Act with only one major change, namely, the deletion of the "detriment to commerce" standard, the Joint Conference explained:

> The House and Senate bills both adopt provisions of Section 15 of the Shipping Act, 1916, applicable to assessment agreements. *Under existing law* and under both bills, *the remedies and regulatory standards applicable to assessment agreements are intended to be exclusive.* In making this explicit, the conferees have reconciled the two versions to preclude any inference that the many new and restated provisions in the bill respecting rate, conference,

> and terminal regulation are also to be applied to assessment agreements. Joint Explanatory Statement of the Committee of Conference, Report 98–600, 98th Cong. 2d Sess. 30 (1984). (Emphasis added.)

To illustrate further that the MLAA set up a restricted procedure apart from other provisions of the 1916 and 1933 Acts than section 15, one need only compare the other application of the MLAA to carrier rates, charges, regulations, or practices which are required to be set forth in a tariff, whether or not such things arise out of collective bargaining agreements. Commission jurisdiction over such practices was confirmed by section 5 of the MLAA and codified in section 45 of the 1916 Act (later, section 5(e) of the 1984 Act.) Unlike the preemption clause discussed above, which was intended to confine the Commission to a special procedure under limited standards and remedies as regards assessment agreements, section 5 of the MLAA made clear that all of the relevant sections of the 1916 and 1933 Act still applied to carrier practices though they stemmed from labor agreements. Thus, after referring to the limited grant of jurisdiction to the Commission over assessment agreements, section 5 of the MLAA conferred this broad grant of authority over carrier practices required to be set forth in their tariff as follows:

> Notwithstanding the preceding sentence, nothing in this section shall be construed as providing an exemption from the provisions of this Act [i.e., the 1916 Act] or of the Intercostal Shipping Act, 1933, for any rates, charges, regulations, or practices of a common carrier by water . . . which are required to be set forth in a tariff, whether or not such rates . . . arise out of, or are otherwise related to a maritime labor agreement.

The legislative history confirms the congressional intention not to limit the Commission's authority over such practices. See Sen. Rep., cited above, at 14.

Finally, in addition to the above, a good argument can be made that, as to assessment agreements, Congress did not intend the savings clause to apply and that, consequently, only the 1984 Act can apply to this case. That is because the last sentence of section 5(d) of the 1984 Act governing assessment agreements states that "[e]xcept for this subsection and section 7(a) of this Act, this Act, the Shipping Act, 1916, and the Intercostal Shipping Act, 1933, do not apply to assessment agreements." This language would exclude section 20(e)(2) of the 1984 Act, the savings clause, from application to assessment agreement cases and leave such cases exclusively under the provisions of section 5(d) of the 1984 Act (and section 7(a) of the 1984 Act regarding antitrust immunity). The omission of reference to section 20(e) must be construed to mean an intended exclusion of that section in a comprehensive statutory enactment. See 2A

Sutherland, *Statutory Construction*, sec. 47.23 (4th ed. 1973); *Feldmand* v. *Philadelphia National Bank*, 408 F. Supp. 24, 34 (E.D. Pa. 1976).

The MLAA's Standard Applicable to the Port Authority's Case

The above discussion emphasizes utilization of the "benefits-burdens" test, which lies at the heart of PRMSA's case. The Port Authority's case, on the other hand, although also criticizing the present assessment formula for not changing to a partial man-hours basis to bring utilization of labor more in line with the burdens imposed on parties paying under the agreement, rests more heavily on the unfair or unjustly discriminatory impact which the Port believes the formula to have on the Port and which adversely affects the Port in its efforts to secure cargo in competition with other ports. The Port bases its case, in other words, on standards of unjust discrimination and unfairness which it believes are separate from the more narrow standards of port "diversion" cases which utilize such concepts as "naturally tributary" cargo, "absorptions," and other artificial inducements utilized by carriers to "divert" cargo from one port to another. The Port Authority is content to rely upon the principles enunciated in *Boston Shipping Association* v. *F.M.C.*, cited above, 706 F. 2d 1240, which in turn relied upon the same standards employed by the Commission in *Port Authority of New York* v. *AB Svenska et al.*, 4 F.M.B. 202 (1953). The Port Authority accepts the burden of proving the criteria set forth in those cases as follows:

(1) The complaining port and the preferred port are in competition;
(2) The discrimination complained of is the proximate cause of injury to the complaining port;
(3) The discrimination is unreasonable.

NYSA and other parties opposing the Port Authority, as noted earlier, answer the Port Authority by arguing that it has not carried its burden of proof. In so arguing, respondents and others contend that the Port Authority has not shown "diversion" of cargo from New York that is proximately caused by the assessment formula nor that whatever cargo the Port Authority believes may have been "diverted" from New York to, say, Baltimore, was cargo "naturally tributary" to New York. NYSA itself cites the three standards set forth in *Boston Shipping Association* as controlling (NYSA op. br. at 7), and the Port Authority, despite citing some cases more relevant to impediment of movement under "detriment to commerce" standards, specifically asks that I apply the 1984 Act, which deleted the "detriment to the commerce of the United States" standard. Consequently, I agree that the basic test for the Port Authority's case is that set forth in *Boston Shipping*. However, although the parties cite numerous cases arising under the cargo "diversion" and "naturally tributary" doctrines, that does not mean that unless a complaining port shows "absorptions," "naturally tributary" cargo, etc., that the port cannot make out a case

under the *Boston Shipping* standards.[22] The court in *Boston Shipping* noted that the section 15 standard retained by the MLAA, i.e., "unjustly discriminatory or unfair as between carriers, shippers, or ports" is separate from the section 16 standard of "undue or unreasonable preference or advantage to any . . . locality" (*Boston Shipping Association* v. *F.M.C.*, 706 F. 2d at 1237). The court also went on to say that Commission cases concerning allegedly unfair discrimination against ports "breathes life into these provisions." (*Id.*) Thus, consideration of port "diversion" cases may serve some purpose. However the court discussed both the "diversion," "naturally tributary," "absorption"-type cases and the plain port disadvantage type case such as *Port of New York Authority* v. *AB Svenska et al.*, cited above, 4 F.M.B. 202 (706 F. 2d at 1238, 1240). Consequently, I believe it is proper to apply the standards of *Boston Shipping Association*, giving consideration to cargo "diversion" cases to the extent they may be useful in determining whether the evidence adduced by the Port Authority meets the standard of "unfair or unjustly discriminatory" retained by the MLAA from the original language of section 15 of the 1916 Act.[23] Furthermore, when determining whether the NYSA's assessment formula discriminates against New York and causes harm, I see no reason why the Commission is precluded from considering the less rigid "intangible limitation of the

[22] NYSA also argues that the Port Authority cannot prevail because prevailing law in discrimination-type cases requires a showing that NYSA members controlled assessments at both New York and at the other ports which the Port Authority claims to have a competitive advantage or a showing of collusive or other affirmative conduct among NYSA members to discriminate against New York in favor of some other port. (NYSA op. br. at 113–114.) The Port Authority replies that a great number of important carrier members of the NYSA serve all or many of the ports up and down the coast and that the Port Authority was precluded from obtaining detailed information about their roles in negotiating assessment formulas at other ports by NYSA's members' recalcitrance to answer questions in prehearing discovery. (Port Authority r. br. at 10, footnote.) The record shows that these carriers do serve the other ports and, accordingly, have something to do with negotiations of formulas at the other ports. However, it is not necessary to show that the same carrier serves both ports to prove discrimination at one port. The law has long since changed in this regard, at least since 1947, when the Supreme Court decided *New York* v. *United States*, 331 U.S. 284 (1947). The Commission has specifically followed this case and refused to adhere to the requirement that a carrier must serve both ports in order to be found guilty of discriminating against one of the ports. See *Reduced Rates on Machinery and Tractors to Puerto Rico*, 9 F.M.C. 465, 479 (1966). In this regard, the Commission stated:

> Some cases of our predecessors suggest that "[u]nude prejudice under section 16 is not shown when the carriers serving the alleged preferred point do not serve or participate in routes from the alleged prejudiced point for the movement of the traffic involved." This suggestions is contrary to the *New York* case, and we will not follow it.

See also *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 139 (1965) (same holding regarding discrimination under section 17 of the 1916 Act.) As the Port Authority states, furthermore, the applicable standard is not limited to unjust discrimination. The MLAA also refers to the word "unfair" in the disjunctive, a broader standard. (Port Authority, r. br. at 10, footnote.)

[23] As I have mentioned earlier, the MLAA retained the first standard of the original section 15 of the 1916 Act, i.e., "unjustly discriminatory or unfair as between carriers, shippers, . . . or ports." However, original section 15 also incorporated the standards of other provisions of the Act in the fourth standard for disapproval(. . ."or to be in violation of this act . . ."). The first original standard, which applies in this case, must therefore mean something more than "undue or unreasonably prejudice or disadvantage" in section 16, which was the usual standard applied in the port "diversion" cases, or even the "unjustly discriminatory" rates and charges standard of section 17 of the 1916 Act. If not, then Congress used surplus language in the original section 15, something which one cannot presume in construing statutes, or, if the first original standard is the exact same thing as the standards of section 16 or 17, then Congress did not really confine the MLAA to the first standard at all, although that is what Congress expressly intended to do.

ability to participate profitably in a market" standard or "clear probability of substantial harm" standard previously utilized in discrimination and "diversion" cases such as *Outbound Rates Affecting Export High-Pressure Boilers,* 9 F.M.C. 442, 456 (1966); and *N.C. State Ports et al.* v. *Dart Containerline,* 21 F.M.C. 1125, 1130 (1930), affirmed sub nom. *Dart Containerline Co., Ltd.* v. *F.M.C.,* 639 F. 2nd 809 (D.C. Cir. 1981). Utilization of less rigid standards would appear to be more consistent with the broad standard of unfairness retained in the MLAA for the protection of parties adversely affected by assessment agreements, whose pleas for protection were answered by the Congress.

Applicability of the 1916 and 1984 Acts

A spin-off issue appears to have arisen out of the above arguments, namely, whether the 1916 or 1984 Act applies to this proceeding. NYSA, PRMSA, and Hearing Counsel appear to believe that the 1916 Act applies. The Port Authority believes that the 1984 Act made no substantial changes to the 1916 Act applicable to this proceeding and asks that I apply the 1984 Act. (Port Authority, op. br. at 4, footnote.) Sea-Land also argues that the 1984 Act should apply and that I should so rule under the Commission's notice authorizing presiding judges to determine the applicability of the 1984 Act on a case-by-case basis using court-developed criteria which would allow application of the 1984 Act unless "manifest injustice would result." See Notice, 49 Fed. Reg. 21798 (May 23, 1984). (Sea-Land op. br. at 4–6.)

In my opinion, this case can be decided under the MLAA, which is essentially the same in both the 1916 and 1984 Acts with the slight exceptions noted above. As PRMSA notes, both section 15, fifth paragraph, of the 1916 Act, and section 5(d) of the 1984 Act authorize the Commission to disapprove, cancel, or modify an assessment agreement which is found to be unjustly discriminatory or unfair as between carriers, shippers, or ports. (PRMSA, r. br. at 60.) As discussed above, furthermore, in both Acts, the procedure is limited to the filing of complaints within a two-year period and the remedies are limited to prospective credits to compensate for the time period between filing of the complaint and date of judgment. The only change that might have been significant is the deletion of the "detriment to commerce" standard in the 1984 Act. However, PRMSA's case is built upon evidence showing unfairness or unjust discrimination as is that of the Port Authority, which has not asked that the "detriment to commerce" standard be applied. Therefore, I see no difference whether I apply the 1916 or 1984 Acts since the evidence presented would show violations under the same standards set forth in both, and the remedies would likewise be the same under either Act.[24]

[24] PRMSA presents an interesting argument that the Commission's Notice which would not retain applicability of the 1916 Act to this proceeding under the so-called "savings" provision of the 1984 Act, sec. 20(e)(2), is wrong. PRMSA believes that the 1916 Act granted complainants the right to seek retrospective

Findings as to the Port Authority's Case

In the following section I provide an overview of the Port Authority's case and make findings of facts relevant to that case. As mentioned, the substantive standards are those of the *Boston Shipping Association* case, namely, a showing of competition among ports, proximate cause of injury, and unreasonable discrimination. However, in adducing proof, the standard is not "beyond a reasonable doubt" or "clear and convincing" but merely a "preponderance of the evidence," i.e., that the existence of the fact is shown to be more probable than its non-existence. Direct evidence is not always available. In other words, complainants cannot always produce the "smoking gun." For that reason, the Commission and courts have recognized that inferences may be drawn from a set of facts, which inferences an expert agency or even a reasonable human being can be expected to draw.

NYSA's, Sea-Land's, MPA's, and Hearing Counsel's answer to the Port Authority's case is that the Port Authority has not carried its burden of proof. However, NYSA, the main opponent to the Port Authority, argues that the burden of proof is so strict that virtually no port could make out a case and obtain the protection which Congress intended to give to parties adversely affected by assessment agreements, whose parties' pleas to Congress that the Commission retain some jurisdiction over such agreements to prevent "abuses," were answered affirmatively. Thus, NYSA as I mentioned earlier, argues that the Port Authority has a "heavy burden which must be met by clear and convincing 'substantial proof' supported by 'specific evidence.'" (NYSA op. br. at 93.) But as I further mentioned, Congress refused to give the NYSA this "clear and convincing" standard when enacting the MLAA. Having lost before the Congress, apparently the NYSA is trying to persuade the Commission to utilize such a standard, which is contrary to all relevant principles of administrative law.

In addition to the above arguments, NYSA and others argue that narrow concepts like "naturally tributary" cargo areas and technical definitions of cargo "diversions" apply, and that the Port Authority has not satisfied those tests.[25] Again, imposing such narrow technical standards and hanging them around the neck of the Port Authority like the proverbial albatross,

reparation whereas the 1984 Act does not grant such a right. (PRMSA r. br. at 61.) As I have discussed, I believe that neither Act gave PRMSA such a right. However, if PRMSA is correct and the 1916 Act did give the right, I would have had to decide whether removal of the 1916 Act would result in "manifest injustice" under the Commission's Notice of May 23, 1984, cited above. I do not need to decide that question for the reasons given above. However, PRMSA argues that the Commission's interpretation of the "savings" provision in the 1984 Act, i.e., limiting applicability of the 1916 Act to "judicial" proceedings rather than to administrative proceedings, is incorrect and unsupported by the legislative history to the 1984 Act. (PRMSA r. br. at 63.) PRMSA cites the House Committee Report, indicating an intent to save all remedies, not just judicial remedies, and shows how the Commission's interpretation could lead to absurd results. (PRMSA r. br. at 64–65.)

[25] Interestingly, as the Port Authority notes (r. br. at 7, footnote), NYSA itself seems to worry about "diversion" of cargoes and uses the term to justify its special reduced assessment (man-hours) on transshipped and rehandled cargoes because these cargoes are "highly divertible to other ports" (NYSA op. br. at 25). No one claims that NYSA must show that these cargoes are "naturally tributary" to the New York.

in my opinion, would be an unreasonable interference with the protective and remedial provisions of the MLAA. Throughout the answering case of respondents, there runs the theme of rigid resistance, of not retreating an inch, and of raising every technical argument on evidence, burden of proof, etc., rather than considering whether the proposals put forth by the Port Authority (or PRMSA) have any merit and can lead to negotiations.[26] Under the standards discussed and, as explained below, I therefore find that the Port Authority has carried its burden of proof and has shown that the current assessment formula has injured and continues to injure the Port Authority by placing it at a competitive disadvantage, especially with regard to Midwest containerized cargo, such disadvantage resulting from a $200–$300 differential on containerized cargo which could be eliminated if NYSA would modify its tonnage formula as suggested by the two expert witnesses. Furthermore, the facts are that the Port of New York/New Jersey competes with other ports, especially with Baltimore, that the differential handicaps the Port in its efforts to attract carriers to serve New York rather than Baltimore, for example, and that the differential is unnecessary, being the product of an unreasonable and unfair formula, which taxes carriers in inverse proportion to the amount of labor used for all costs.

Findings of Facts Relevant to the Port Authority's Case

The voluminous briefs of the parties contain over 400 numbered proposed findings of fact. Most of these are contained in the briefs of the two complainants and respondents NYSA et al. They reflect much effort and also demonstrate the bulky size of the evidentiary record. There is considerable overlapping of certain basic background-type facts and many other instances in which these three parties are proposing essentially the same findings of fact. In order to keep this decision from becoming gargantuan, I have generally attempted to confine the fact-finding in this discussion to material areas and have not attempted to make rulings on every proposed finding of fact. Such conservation of energy is especially warranted in consideration of the time constraints imposed by the governing statute and regulation. However, under applicable principles of administrative law, a

[26] Sea-Land and Hearing Counsel recommend negotiations to settle the problems. This indicates that they recognize that problems exist which should be addressed by the parties through negotiations. It might have been helpful if Hearing Counsel, instead of merely arguing that complainants did not carry their burden of proof, advised everyone exactly what were the "possible inequities" which Hearing Counsel state that the Port Authority has shown (H.C. r. br. at 9) and what are the "problem areas" which Hearing Counsel say that complainants "may have shown" (H.C. op. br. at 33). However, if I were PRMSA, I would not be encouraged by Hearing Counsel's or Sea-Land's advice to resolve these problems through negotiations with the NYSA and ILA after the long history of PRMSA's continual failures to obtain some relief from the NYSA–ILA. Perhaps, the NYSA's publicized "plan" to reduce assessments "early next year," which PRMSA cites in its reply brief (at 2), is an answer, although PRMSA's chief executive, who is also a Director of the NYSA, knows nothing about the "plan." If it offers a solution, this proceeding does not stand in the way, contrary to NYSA's representation. (PRMSA r. br. at 3.) Why does not PRMSA present the "plan" now to the parties and see if the parties can present a settlement to the Commission well in advance of the February 27, 1985 due date for the Commission's decision?

presiding judge need not rewrite every proposed finding or argument or even make findings on every proposal presented. *Adel International Development Inc.* v. *PRMSA*, 20 SRR 687, 690 (1980); *Mediterranean Pools Investigation*, 9 F.M.C. 264, 267 (1966). Moreover, even summary findings of fact and conclusions may suffice if the path being followed can be discerned and the findings are not vague or obscure. *Colorado Interstate Gas Co.* v. *F.P.C.*, 324 U.S. 581 (1945); *Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173 (1959).

Although the largest portion of the record consists of written testimony, depositions, and supporting documentary evidence, there was also considerable oral testimony and cross-examination of 14 witnesses. Thus, my findings of fact and conclusions, especially when they resolve material disputes of fact, are not merely confined to written materials but are based, to the extent applicable, on observation and my conclusions as to credibility of the witnesses. As the presiding judge and finder of fact, it is, of course, my responsibility to evaluate the credibility of witnesses and the weight to be given to their testimony. See, e.g., *N.L.R.B.* v. *Anthony Co.*, 557 F. 2d 692 (9th Cir. 1977). Furthermore, not all of my findings are based on mere analysis of facts and reasonable inferences to be drawn therefrom but rest upon credibility determinations based upon observations and demeanor. See *Ewing* v. *N.L.R.B.*, 732 F. 2d 1117, 1122 (2d Cir. 1984) (must not disregard ALJ's recitation that his findings were based on observation and demeanor of witnesses.)

I therefore find the following facts to be supported by a preponderance of credible evidence as regards the Port Authority's case:

1. Complainant, The Port Authority of New York and New Jersey (The Port Authority) is a "body corporate and politic" created in 1921 by compact between the States of New York and New Jersey with approval of the Congress of the Untied States. The two states established the Port Authority as the joint agency for the purpose of unifying, promoting and developing the New York-New Jersey Port District. The Port Authority's principal office is located at One World Trade Center, New York, New York 10048. The Port Authority compact requires that it "protect and promote" the commerce of the port.

2. Respondent, New York Shipping Association (NYSA) is a corporation organized under the laws of the State of New York having its principal place of business at 80 Broad Street, New York, New York 10004. NYSA is a multi-employer bargaining association consisting of 102 companies and is the employer or management negotiating representative for all collectively bargained longshore labor-management agreements affecting the Port of New York/New Jersey and is the administrator of all fringe benefit funds collected pursuant to such agreements.

3. The respondent members of NYSA are steamship lines, terminal operators, carrier agents, maintenance firms, contracting stevedores, carpentry companies, and other employers of waterfront labor operating in the Port

of New York/New Jersey. Many or most of these members are also members of one or more employers' collective bargaining units representing employers at other ports competing with the Port of New York/New Jersey.

4. Intervenor International Longshoremen's Association, AFL–CIO (ILA) is an unincorporated association and a labor organization within the purview of the Labor Management Relations Act with its principal office located at 17 Battery Place in the City of New York. The ILA represents longshoremen and other waterfront workers in the 36 Atlantic and Gulf Coast ports.

5. Intervenor Maryland Port Administration (MPA) is a State agency charged with the responsibility for developing facilities for the movement of export and import traffic through the Port of Baltimore and elsewhere within the State of Maryland. In carrying out its responsibilities, MPA owns or leases five of the ten major international cargo terminals in the Baltimore Harbor.

6. Intervenor Massachusetts Port Authority (Massport) is a body politic and corporate organized by virtue of the laws of the Commonwealth of Massachusetts with principal offices located at 99 High Street, Boston, MA. Massport is responsible, among other things, for promoting, developing and protecting the waterborne commerce of the Port of Boston. In carrying out these responsibilities, Massport owns, leases and/or operates a number of public marine terminals located within the boundaries of Boston Harbor.

7. The Bureau of Hearing Counsel consists of attorneys employed by the Commission who, from time to time, intervene in complaint cases "in the public interest" and to help develop the record.

8. The longshore labor negotiations on the East and Gulf Coasts are two fold. The ILA negotiates a master contract with 36 ports which sets the hourly wage for longshoremen and pension and welfare benefits which are the same in all ports. In addition, payments of the container royalty fund and job security program are negotiated. The Master Contract is negotiated by NYSA, Council of North Atlantic Shipping Associations (CONASA), West Gulf Maritime Association (WGMA), New Orleans Steamship Association, Inc. (NOSSA), Mobile Steamship Association (MSSA), Southeast Florida Employers Association (SFEA) and South Atlantic Employers Negotiating Committee (SAENC).

9. Local conditions in each port including pension, welfare, medical and clinical services, vacation and guaranteed annual income ("GAI") are negotiated port by port.

10. Thirty-six of the thirty-eight ocean carrier members of NYSA that answered the Port Authority's interrogatories call or are affiliated with carriers that call at a wide variety of ports, ranging from Halifax, Nova Scotia to ports in Alaska on the North American continent. Thus, Sea-Land Service calls at such ports as Boston, Mass., Baltimore, Md., Portsmouth, Va., Wilmington, N.C., and ports on the Gulf and Pacific Coasts plus ports in Alaska and Halifax, Nova Scotia. Grancolumbiana, Inc. calls at such ports as Philadelphia, Pa., Baltimore, Md., Charleston, S.C., and

Gulf and West Coast ports. The overwhelming majority of all of these lines call at Baltimore and usually Philadelphia as well.

11. Eight of the fifteen stevedore or terminal operator members of NYSA that answered interrogatories operate or are affiliated with companies that operate at a similar wide variety of ports, ranging from Halifax to ports in Alaska, and virtually all operate at Baltimore. Examples are Sea-Land Service, Inc., Maersk Container Service Co., Maher Terminals, Inc., and International Terminal Operating Co., Inc.

12. Twenty-one of the 54 NYSA members that answered interrogatories are members of associations at other reports which are the management collective bargaining representatives negotiating with the ILA.

13. The current NYSA–ILA collective bargaining agreement covers the period October 1, 1983 through September 30, 1986. This agreement incorporates by reference "existing contractual provisions," including the tonnage assessment agreement, Attachment B to the local contract negotiated for the three year period ending September 30, 1983.

14. In the Port of New York/New Jersey fringe benefits and accessorial expenses such as the NYSA administrative cost requirements are collected through a tonnage assessment paid directly by the steamship lines. The tonnage assessment is currently $8.90 per assessment ton (weight or measurement ton, whichever is greater). Cargoes excepted from the tonnage assessment currently pay a man-hour rate of $5.50 per man-hour. These include plywood (in lots of 5,000 tons or more); wastepaper and cardboard (in lots of 1,000 tons or more, moving breakbulk); linerboard for export which originates more than 500 miles outside the Port (in lots of 500 tons or more); steel, steel products and raw metals (partial and full loads, minimum of 1,000 tons per ship, non liners); lumber (shiploads, at any port or terminal in the Port); newsprint (not containerized); domestic cargo; bulk cargo; sugar (in bulk); scrap; transshipped cargo and foreign sea to foreign sea cargo. There are also certain special status cargoes with special rates of payment or special status with regard to measurement. These include bananas (5 cents per box measuring 1.8 cu. ft. or less inside measurement); refined sugar (20 cents per box in bags of 50 kilos, bagged in the Port of New York/New Jersey for export breakbulk, on which the applicable assessment was paid on import before bagging); perishable fruit including potatoes and dried dates (assessed at 40% of the tonnage assessment rate effective with a maximum of $2.00 per assessment ton if not carried in containers); bagged coffee and cocoa (assessed at 40 cu. ft. to a 2240 pound per ton); unboxed autos, trucks and buses (assessed on a wright basis, 2240 pounds per ton); and yachts (pleasure boats of 15′ and over assessed at the tonnage rate per lineal foot).

15. Prior to 1974, the assessment formula at the Port of New York/New Jersey was a combination man-hour and tonnage formula, but was converted to a straight tonnage formula (with exceptions) effective October 1, 1974.

16. The tonnage assessment and excepted man-hour assessment rates in the Port of New York/New Jersey from 1974 to present are as follows:

Effective date	Tonnage rate	Excepted man-hour rate
10/1/74	$4.00	$3.52
7/1/75	5.00	
11/15/77	6.85	
1/1/76	8.28	
4/1/76	6.85	
1/1/77	5.85	
4/1/78	.....	3.87
10/1/80	.....	4.29
7/1/82	7.50	5.50
4/4/83	8.90	

The passenger rate has remained at $2.50 per man-hour since October 1, 1974.

17. The amount of fringe benefits required to be raised by the assessment has increased steadily. According to audited records of the NYSA–ILA, these amounts including Waterfront Commission levies and ancillary or administrative costs less container royalties, increased from the 1974/1975 fiscal year to the 1982/1983 fiscal year as follows: 1974/1975 ($129.7 million); 1975/1976 ($132.2 million); 1976/1977 ($136.8 million); 1977/1978 ($139.4 million; 1978/1979 ($147.4 million); 1979/1980 ($153.1 million); 1980/1981 ($166.4 million) 1981/1982 ($193.7 million); 1982/1983 ($219,468,464). It is estimated that this amount will decline to some extent in fiscal years 1984/1985 and 1985/1986.

18. The total number of active longshoremen in the Port of New York/New Jersey during the last ten years (as of the end of each fiscal year) is as follows:

September 30, 1974	14,252
September 30, 1975	130,088
September 30, 1976	12,393
September 30, 1977	11,827
September 30, 1978	11,035
September 30, 1979	11,016
September 30, 1980	10,568
September 30, 1981	9,900
September 30, 1982	9,410
September 30, 1983	9,101

19. Under the tonnage assessment system, fringe benefits are raised by assessing each weight or measurement ton of nonexcepted cargo handled by longshore labor and the amount of assessment collected does not relate to the number of man-hours utilized in handling such cargo. The assessment collected on a tonnage basis is paid directly by the steamship lines.

20. In most other Atlantic and Gulf Coast ports, fringe benefits including pension, welfare, clinics, vacations, holidays, G.A.I. and security funding are collected primarily on a man-hour basis and are paid by the direct employer of longshore labor. The current man-hour assessment at Baltimore is $10.49, at Philadelphia is $12.28 and at Hampton Roads is $12.87 for breakbulk and $13.27 for containers due to higher GAI assessments on containers.

21. Since empty containers, by definition, do not contain any assessable tons, no fringe benefits are collected from the handling or movement of empty containers through the Port of New York/New Jersey. By contrast empty containers moving through ports using a man-hour assessment pay fringe benefits according to the number of man-hours required to handle the container. For example, an empty container at Baltimore, typically utilizing 2 man-hours of labor to handle, would pay a total of $20.98 ($10.49 man-hour rate × 2 man-hours) in fringe benefits.

22. The total number of empty containers handled in the Port of New York has more than doubled over the last 10 years while the tonnage assessment has been in effect. Thus, for the fiscal year ending September 30, 1974, a total of 117,175 empty containers moved through New York while in the fiscal year ending September 30, 1983, total empties were 283,487. (For a more detailed breakdown by year and by direction, see table in NYSA op. br. at 31.) By contrast, the total number of loaded containers handled at the Port increased only 7 percent from 836,207 in fiscal 1974 to 898,179 in fiscal 1983.

23. While the number of full containers handled at the Port of New York has grown only 3% between 1980 and 1983, during that time period there has been a forty-five percent increase in the number of empty containers handled at the Port so that empties have increased from 22% to 32% of all containers. In the Far East trade, the percentage of empties increased from 10% in 1980 to 29% in 1982.

24. In the Port of New York/New Jersey, there is no assessment levied on stuffing and stripping containers. Therefore, containers that are stuffed and stripped pay fringe benefit costs on the same basis as throughput containers even though the handling of a stuffed and stripped container requires significantly more man-hours. For example, at the Port of New York/New Jersey a stuffed and stripped container containing 25 assessment tons and typically requiring 12 man-hours to handle would pay $222.50 in assessment costs—exactly the same amount as a 25 assessment ton throughput container typically requiring only 4 man-hours to handle. By contrast, a container requiring 12 man-hours at Baltimore would pay $125.88 while a container utilizing 4 man-hours of labor would pay $41.96, one-third of that amount, in direct proportion to the number of man-hours used in handling the container.

25. The use of labor for purposes other than handling cargo does not result in the collection of fringe benefit costs at the Port of New York/

New Jersey. For example, a steamship line may utilize longshore labor for purposes such as maintenance without making any contribution to fringe benefits.

26. During 1983, a major carrier employed over a million man-hours. Of these man-hours, between 25 and 30 percent were used for non-cargo handling functions (maintenance and other activities).[27]

27. A tonnage assessment assesses labor costs in inverse proportion to the use of labor. It therefore shifts costs from low productivity operators to high productivity operators because low productivity operators do not pay labor costs in proportion to their use of labor.

28. When the tonnage assessment method was adopted in 1974 there was considerably more low productivity breakbulk cargo in the Port of New York/New Jersey because there were still major trade routes that had not been containerized. Today the vast majority of cargo through the Port of New York/New Jersey moves in containers and all of the major trade routes in the world except for parts of Africa and Latin America are containerized.

29. The Port of New York/New Jersey competes, to some extent, with virtually every U.S. and Canadian port. However, the most competitive cargo is containers to and from the Midwest, particularly the states of Ohio, Indiana, Illinois, Kentucky, western Pennsylvania, Wisconsin, and Michigan, which can move through any number of ports. In addition to competing for Midwest traffic, the Port of New York/New Jersey competes for local traffic with minibridge movements (containers discharged on West Coast ports and shipped east by rail).

30. At the Port of New York/New Jersey the tonnage assessment is a direct cost paid by the steamship lines. At ports using a man-hour formula, the man-hour assessment is paid directly by the employer.

31. A loaded container moving in the European trade contains an average of 23 assessable tons while a container in the Far East trade contains an average of 40 assessable tons.

32. An empty throughput container requires 2–3 man-hours to handle, a loaded throughput container requires 2–4 man-hours to handle, and a stuffed and stripped container requires 10–12 man-hours to handle.

33. Labor productivity is comparable at New York/New Jersey and other North Atlantic ports.

34. An average loaded container from Europe containing 23 assessable tons and requiring 2–4 man-hours to handle would pay $204.70 in assessment costs at the Port of New York/New Jersey (23 assessable tons × $8.90), $20.98 to $41.96 at Baltimore (2–4 man-hours × $10.49) and $24.56 to $49.12 at Philadelphia (2–4 man-hours × $12.28). An average loaded container from the Far East containing 40 assessable tons would pay $356.00

[27] The identity of this carrier and the exact figures have been requested to be treated as confidential. The confidential information is kept in the confidential portion of the record.

at New York/New Jersey while still paying $20.98 to $41.96 at Baltimore and $24.56 to $49.12 at Philadelphia.

35. Several cost studies performed by carriers serving New York and other ports illustrate that fringe benefit costs per container are substantially higher at New York by various measures per container, as percentage of revenue per container, and as percentage of total cost of moving the container. (The identity of the carriers and many of the precise figures are considered sensitive by the carriers and are being treated as confidential. The confidential information, however, is on file in the confidential portion of the record.) Thus, one carrier's cost study performed in 1984 shows that at New York, average assessment per 40-foot container is $391, which is 18.8 percent of the average revenue earned on that container. All other ports were much lower. At Baltimore, the comparable assessment was only $69.74, or only 3.5 percent of revenue per container, and at Norfolk, the figures were $60.10 and 3.1 percent, respectively.

36. Another carrier's cost study performed in late 1983 showed that its assessment cost per 40-foot container at New York was $265 compared to the total cost of handling the container, which was $351. At Baltimore, the assessment cost was only $8! Total cost of handling the average container there was $166.80. (The complete study is seen in the confidential portion of the NYSA op. br. at 37.)

37. A carrier official testified in deposition that he took assessment costs into account in making routing decisions for this line and that the assessment discrepancy, as indicated by his operations people, was $61 at Baltimore and $220 in New York for a 17–18 assessment ton container under the previously existing $7.50 per assessment ton rate. The current assessment differential between Baltimore and New York/New Jersey for Far East cargo is now over $200.

38. Cost studies by another carrier in early 1983 indicated that at that time the NYSA assessment cost at the then existing rate of $7.50 per assessment ton was 68% of the total cost of moving a container with 35 assessment tons through New York. The study also bears the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Manhour; Portsmouth $10.55/Manhour."

39. Cost studies submitted by two other carriers show that for one carrier the tonnage assessment at New York raises the cost of moving a container through New York to $400.11 for a container with 25 assessable tons whereas the total cost of moving a container (including assessment costs) is only $262.43 at Baltimore, $254.54 at Philadelphia, and $122.41 through Charleston. Another carrier's cost studies show that the stevedoring cost (including assessment cost) per revenue ton at the Port of New York is higher than at any other U.S. port. For example, the study shows stevedoring costs in early 1983 per revenue ton of $26.56 at Newark compared to $17.15 at Baltimore, $12.14 at Norfolk, and $19.83 at Los Angeles.

The current tonnage assessment rate of $8.90 is 33.5 percent of the total stevedoring cost for this carrier.

40. Evidence given by carrier and other witnesses is that the assessment cost of moving a container through the Port of New York is significantly higher than to move it through other North Atlantic ports.

41. On average, a loaded container handled at the Port of New York/ New Jersey costs from $200–$300 more in assessments than a similar container handled at other U.S ports.[28]

42. If other North Atlantic ports used the NYSA tonnage assessment system for funding fringe benefit requirements, the assessment differential between New York/New Jersey and these ports would be an average of $90 per container.

43. If the Port of New York/New Jersey were to use a man-hour assessment method to collect fringe benefit obligations, the assessment differential between New York/New Jersey and other North Atlantic ports would average less than $50 per container. The man-hour rates at New York/New Jersey would have been $17.73 based on 1983 collection requirements.

44. The fact that fringe benefit packages at Baltimore, Hampton Roads, and Philadelphia are considerably less costly than at New York does not account for the magnitude of the assessment differential per container at New York, as seen from the preceding comparisons.

45. Since the steamship lines pay the tonnage assessment at the Port of New York, to the extent that they can route cargo to a less expensive port, the cost savings directly benefit the lines.

46. The Port Authority of New York/New Jersey's primary competitor for Midwest containers is the Port of Baltimore. The record contains considerable detail about competitive advantages or disadvantages as between New York and Baltimore with respect to inland carriers' rates and services, distances, drayage costs, backhaul opportunities for New York which New York offers to motor carriers. Some factors seem to favor Baltimore and others favor New York so that one cannot find with any degree of assurance that New York is at a competitive disadvantage to Baltimore generally as regards Midwest container cargo. (See NYSA op. br. at 43–46.) Nevertheless, despite the lack of any clear competitive disadvantage overall in inland transportation, the Port of Baltimore has succeeded in attracting Midwest cargo away from the Port of New York. Indeed, the MPA's Port Adminis-

[28] Although NYSA denies that a $200–$300 differential between New York and Baltimore exists, placing it at a $150 level (and, of course, contending that it is the underlying costs of labor fringe benefits that leads to any differential), it bears noting, as the Port Authority has done, that the differential in the $230–250 range was admitted even by NYSA witness Costello at hearings held before New York State Assemblyman Koppell in 1983. Mr. Costello, who now says that he only agreed with the mathematics presented by Mr. Goldmark, the Port's Executive Director, at the Koppell hearings, agreed with Mr. Goldmark's figures, even to a $250 differential. (NYSA op. br. at 79, citing Ex. 11.) NYSA made a fuss about admitting Exhibit 11, but there was adequate evidence of its authenticity and reliability as to the testimony of NYSA personnel made at the Koppell hearings, and the exhibit was admitted to show any previous inconsistent statements by such personnel.

trator acknowledging Baltimore's success, commented that New York is now a "neighborhood port." [29]

47. The Port of New York/New Jersey faces competition from West Coast ports on locally destined Far East minibridge cargo which may be discharged on the West Coast and shipped to the New York area by rail. In some cases, the same ship travels through the Panama Canal and calls at the Port of New York/New Jersey where it picks up the very same container, now empty and not subject to the tonnage assessment.

48. The Shipping Act of 1984 specifically authorizes and encourages intermodal ratemaking by ocean carriers.

49. Sea-Land's intermodal service is of sufficient significance to have been described in great detail in R.J. Reynolds' May 10, 1984 information statement.

50. Under intermodal ratemaking, the steamship line, which pays the tonnage assessment at New York/New Jersey, arranges the inland transportation and can control the routing of cargo. Intermodal ratemaking is the wave of the future and steamship lines are and have been aggressively seeking to control the routing of cargo.

51. Gregory Halpin, Administrator of the Maryland Port Administration, testified in deposition that because of the intermodal trend, MPA has "shifted the emphasis in our sales solicitation to the steamship lines."

52. In addition to establishing point-to-point intermodal rates, steamship lines have controlled routing of cargo in other ways including influencing shippers to choose certain ports, route code systems, port-to-port rates quoted with the understanding that they would not be used through New York/New Jersey, surcharges only on cargo moving through New York/New Jersey, and outright denial of the use of a particular port.

53. Robert Steiner, Deputy Director of the Port Department of the Port Authority, was recently told by a major importer of "Perrier" water that the importer can no longer use the Port of New York because whenever he asks for spots from Europe to New York, the steamship lines consistently tell him that there is no space available to New York, but that they would be glad to handle his cargo through Baltimore or Norfolk. Perrier water is a low-rated commodity that would have approximately 40 revenue tons per container. The importer, whose principal storage facilities are in Connecticut, also told Mr. Steiner that the inland costs from Baltimore and Norfolk are onerous and that the company has been compelled to consider using Canadian ports.

54. In determining how to route cargo, steamship lines take assessment costs into account, and it is their policy to route cargo in the cheapest

[29] This finding is not meant to call into question the success that Baltimore may be having in free and open competition with New York, nor is it the purpose of this proceeding to place New York in an advantageous position over Baltimore. The purpose is to determine if the current assessment formula at New York is unfair or unjustly discriminatory as to New York by imposing unjustified handicaps, such as a $200–$300 container tax differential that Baltimore or other ports do not have to bear, and, if so, whether the formula at New York should be modified to eliminate or ameliorate such handicaps.

manner possible. For example, Hapag-Lloyd's Vice President of Intermodal Services testified in deposition that a $128 assessment differential would make a difference in how the steamship line would route cargo.

55. NYSA–ILA Contract Board Members have frequently expressed concern that too high an assessment will divert cargo away from New York. The record shows numerous examples of this concern. For example, when, in early 1976, the Board reduced the tonnage assessment from $8.28 to $6.85, Mr. James Dickman, NYSA President, states at that time that he hoped the reduction would enable New York to recapture cargo it had lost when the assessment had reached $8.28. Thomas W. Gleason, ILA President, testified in deposition that if the tonnage assessment was increased beyond $8.90, it "would probably drive the freight away." John J. Farrell, Jr., President of ITO Terminal Co., stated in New York State legislative hearings that the present rate of $8.90 was taking business away from New York.

56. Michael Maher, Chairman of the Board of Maher Terminals testified in deposition that he has been told that lines take cargo through other ports to avoid paying the assessment.

57. Gregory Halpin, Administrator of MPA, in discussing whether the assessment costs at New York/New Jersey caused a diversion of cargo to other ports, testified in deposition that "* * * we have had lines and others who have said to us we have to escape the costs in New York and we would like to move more cargo through Baltimore."

58. Robert Steiner, Deputy Director of the Port Department, Port Authority of New York and New Jersey was told by Chairman Chang, the top executive of Evergreen Line, and his senior executive staff in November 1982 and February 1984 that Evergreen handles their Midwest cargo through the Port of Baltimore because the tonnage assessment makes New York noncompetitive for these cargoes. They also indicated generally that the tonnage assessment makes the Port of New York/New Jersey noncompetitive for other than New York area cargo. Evergreen Line is a member of NYSA and a respondent.

59. Mr. Steiner was told by John Hsia, Deputy Managing Director of Orient Overseas Container Line (OOCL) in February 1984 that the tonnage assessment is a major problem for OOCL in New York/New Jersey and that they prefer to put their competitive cargo (i.e., Midwestern cargo) through other ports. Orient Overseas Container Line is a member of NYSA and a respondent.

60. Mr. Steiner has been told by numerous U.S. Lines officials, including Mr. Anthony Scioscia, that the tonnage assessment has forced them to route cargo around New York/New Jersey. U.S. Liens is a member of NYSA and a respondent and presented two witnesses (including Mr. Scioscia) at the hearing.

61. Mr. Steiner was told by Poul Rasmussen, Executive Vice President of Maersk Line in May 1983 that because of the tonnage assessment,

Maersk Line must favor ports to the south for non-New York area origin and destination cargo and that Maersk sees no other solution than to avoid the Port of New York/New Jersey whenever possible. He also indicated an expectation that in the long run there would be an increase in both minibridge and microbridge movements for Maersk's Far East cargo. Maersk Lines is a member of NYSA and a respondent.

62. Mr. Steiner was told by E. Waage-Nielson, President of Barber Blue Sea, in May 1983 that the tonnage assessment forces Barber Line to direct tonnage to ports other than New York. This had been confirmed by other Barber officials in a meeting the year before. Barber Blue Sea is a member of NYSA and a respondent.

63. Mr. Steiner was told by M.Y. Stone, Chairman of Dart Line in May 1983 that Dart, particularly on lower-rated freight, is forced whenever possible to move cargo around the Port of New York/New Jersey due strictly to the tonnage assessment. Dart Line is a member of NYSA and a respondent.

64. Mr. Steiner was told by R. Heim, Director of European Operations for U.S. Lines in May 1983 that the tonnage assessment made it so onerous for U.S. Liens to carry lower-rated freight, particularly during this time of depressed freight rates, that they did all they could to avoid New York/New Jersey.

65. Mr. Steiner was told by H. Bulch, Director of American Australian Services for Columbus Line in May 1983 that the tonnage assessment is costly and that they preferred to handle their general cargo exports through ports other than New York/New Jersey. Columbus Line is a member of NYSA and a respondent.

66. Mr. Steiner was told by Mr. J. deJonge, Manager, North America Services for Nedlloyd Line in May 1983 that since a lot of Nedlloyd's exports can go through many ports, they route around New York because of the assessment formula. Nedlloyd Line is a member of NYSA and a respondent.

67. Mr. Steiner was told by Mr. M. Sportorno, Commercial Director of Italian Line in May 1983 that although he believes that New York/New Jersey labor is better than at other North Atlantic ports, they route around New York/New Jersey whenever possible because of the tonnage assessment. He also indicated that if there were another increase in the tonnage assessment, it would be cheaper to put cargo into Savannah and then truck it to New York. Italian Line is a member of NYSA and a respondent.

68. Mr. Steiner was told by Mr. G. Canera, Director and Mr. P. Hancock, president, U.S.A. of Costa Line, in May 1983 that the cargo they handle in the Port of New York/New Jersey is strictly local and that their competitive cargo to and from the Midwest is handled in other ports because of the tonnage assessment. Costa Line is a member of NYSA and a respondent.

69. Mr. Steiner was told by Captain Parada, Mediterranean Sales Manager for Sea-Land and his staff in May 1983 that even though the service at New York/New Jersey is far superior, principally for Midwest cargo, they are forced to use Portsmouth, VA. for low rated commodities in order to have a revenue return on those boxes. They also indicated that Sea-Land could not afford to pay assessment costs at New York/New Jersey in the $300–$500 range with an average revenue requirement per box of only $2300. Mr. Steiner has also been told on other occasions by Sea-Land officials that as long as New York has a tonnage assessment, Sea-Land will handle as many of their commodities as possible through other ports. Sea-Land is a member of NYSA and a respondent and presented a witness at the hearing.[30]

70. Most of the major shippers who had used the Port of New York/New Jersey from Massachusetts, Connecticut, Pennsylvania, Ohio, Michigan, Indiana, Illinois, Wisconsin, Minnesota and Missouri in 1980 diverted a significant share of their cargo to other ports by 1983 while few have increased usage. The Port of New York/New Jersey has lost market share in all of these ten states since 1980 and the major beneficiaries have been other Atlantic and pacific Coast ports.

71. The number of full container ship arrivals at the Port of New York/New Jersey has declined at a greater rate than at other North Atlantic ports during the past three years.

72. Cargo handling costs (excluding assessment costs) are lower at the Port of New York/New Jersey than at other North Atlantic ports.

73. Transshipped cargo, that is, cargo shipped to or from another U.S. port by water, is excepted from the tonnage assessment and pays $5.50 per man-hour at the Port of New York/New Jersey.

74. Sea-Land has a feeder service for the ports of Baltimore and Boston and its line-haul vessels do make direct calls at New York/New Jersey. Import cargo arriving at New York and transshipped to Baltimore or Boston before being transported to its destination pays the $5.50 excepted man-hour rate at New York/New Jersey. If this import cargo were shipped

[30] NYSA, faced with the evidence of officials of its own member lines, calls the evidence "hearsay testimony of alleged statements made by certain carrier officials . . ." (NYSA op. br. at 59.) Of course, as the Port Authority states, these statements are not hearsay at all (as if that made a difference in an administrative hearing) but are "admissions." The statements are, furthermore, not "alleged" but proven by the testimony of Mr. Steiner who heard them. But, aside from that, NYSA states as a fact that "all but six of the thirteen companies [not 11 as the Port indicated] alleged to have made the statements have actually increased their non-excepted container cargo movements through the . . . Port during the past four complete contract years . . ." (NYSA op. br. at 60.) Another way of stating this fact is that nearly one-half of the 13 decreased their cargo movements. NYSA further states that some of the decreases were negligible and others explainable by conditions pertaining to frozen meat facilities at Philadelphia. (*Id.*. at 60–61.) Whatever the aggregate experience of these carriers may have been, NYSA's statements do not offset the fact that the carrier officials showed that they attempt to avoid New York when possible because of the assessment differential. Aggregate volumes of tonnages moving do not necessarily prove that there has been no impediment to business. See *NARI* v. *F.M.C.*, 658 F. 2d 816 (D.C. Cir. 1980), where the court criticized the Commission and vacated its decision which had found no violation of law and no harm to waste paper exporters because overall volume of movement of waste paper exports had increased over the years.

inland directly from New York, it would pay the $8.90 tonnage assessment. Similarly, export cargo shipped first to Baltimore or Boston and transshipped to New York for loading on the line-haul vessel pays the excepted $5.50 man-hour rate, but if the cargo moved directly to New York/New Jersey for export, it would pay the $8.90/ton assessment.

75. The policy at Sea-Land is to route cargo in the cheapest manner possible.

76. One of the reasons that Sea-Land uses New York/New Jersey as a relay port is that relayed cargoes pay the $5.50 excepted man-hour rate and are excepted from the tonnage assessment.

77. Of all the containers handled in the Port of Boston in 1983, 47.5% were transshipped through the Port of New York/New Jersey. The Port of Boston has encouraged steamship lines to transship by barge rather than truck to and from New York because the NYSA assessment on barge traffic is the excepted $5.50 per man-hour rate resulting in an assessment cost more than $300 less than the tonnage assessment applied to movements by truck.

78. It would be less expensive to move cargo by truck between Boston and New York/New Jersey but for the tonnage assessment.

79. The NYSA–ILA Contract Board is the body that implements the tonnage assessment and is authorized to grant modifications and excepted status to commodities. In making such decisions, the Contract Board is required to consider the "protection of the continued movement in the Port of New York of marginal commodities."

80. The Contract Board, in determining whether to grant a modification or exception, examines whether the change would retain cargo, bring back cargo that once moved through the port, or attract new cargo.

81. Thomas W. Gleason, President of the ILA, stated in his direct testimony that the Contract Board creates excepted and special status for cargoes which would otherwise discontinue coming to the Port of New York.

82. The record contains detailed instances of requests and actions by the Contract Board which sometimes granted special treatment for certain cargoes when carriers or terminal operators have presented such requests. The Contract Board has made decisions based upon the individual presentations and has shown a desire to protect low productivity breakbulk cargoes which maintain work opportunities at the Port. However, several of the presentations made by carriers or terminal operators demonstrate that the high tonnage assessment prevented cargo from moving through New York or even caused cargo to leave New York in favor of other ports. For example, A.G. Escalera, the agent of the Spanish Line, who had requested excepted status for waste paper which was denied, informed the Contract Board that such denial had caused 25,000 tons of waste paper, 98 percent of which had moved through New York, to move via another carrier through Boston. Mr. A.B. Ruhly, President of Maersk Line's agent, wrote to the Contract Board on June 9, 1982, indicating that the increase in

the tonnage assessment rate to $7.50 would cause them to route Canadian cargo through Philadelphia rather than New York. Maher Terminals had requested an exemption for Canadian cargo in September 1981 in order to obtain cargo being routed through Halifax. Maher had indicated that the carrier involved preferred to use New York but that the tonnage assessments in most cases would equal or exceed the costs of diverting the vessel to Halifax. Mr. J.E. Butcher, Vice President of the agent for Hoegh Ugland Auto Liners, wrote to the Contract Board on May 22, 1984, requesting that earth-moving equipment be given a lower assessment. He stated that the current assessment represented 25 percent of the ocean freight on this cargo and that if the assessment were not lowered, the carrier's European offices would book these cargoes for ports other than New York whenever possible. He also noted that automobile shippers were moving vast volumes through other ports because of the assessment at New York. Columbus Line asked for lower assessments on frozen meat in 1979, which request was denied. Thereafter, Philadelphia became the line's first port of call due to the large amount of meat unloaded there.

83. On other commodities, the evidence that the assessment rates were preventing the cargo from moving through New York persuaded the Board to modify the assessment. For example, steel commodities had apparently been lost to Philadelphia, and they were granted excepted cargo status on February 10, 1976. Tonnage assessments on coffee and cocoa were modified by the Contract Board on the basis of evidence that movement of those commodities through New York had been hindered or prevented by the assessments. Favorable modifications to the assessments were also made with respect to dried dates, yachts, and other commodities. Refined sugar in bags for export was granted special status on September 26, 1980, in order to encourage the movement of this labor-intensive cargo through New York.

84. The amount of tonnage handled at the Port of New York/New Jersey has remained relatively stable, New York being an ever-increasing consumption and production area. Thus, in contract year 1975, there were 22,689,696 non-excepted tons and in contract year 1983 there were 22, 659,540 non-excepted tons. It is estimated that the volume will increase to 24.2 million tons in contract year 1984 owing to an increase in the first eight months of that contract year. NYSA has derived figures indicating that non-excepted container tons has increased through New York from 15.9 million in 1975 to 20.1 million in 1983. According to Maritime Administration data, however, since the introduction of the tonnage assessment, the Port of New York/New Jersey has lost a substantial market share to other North Atlantic ports as well as other port ranges in the United States. (Ex. 2, pp. 6–9.) Thus, New York's share of liner cargo in the North Atlantic decline from 57 percent in 1974 to 55 percent in 1983 but the share for the total U.S. market declined from 23 percent to 16 percent. (*Id.*, at 7.) More significantly, New York's share of containerized cargo moving in

the North Atlantic has declined from 69 percent in 1972 to 56 percent in 1982. (*Id.*, at 8.) This indicates that New York has been losing its share to other North Atlantic ports in the container segment. (Ex. 2, p. 9.) Data obtained from port authorities shows, furthermore, that from 1981 to 1983, container vessel calls at New York have declined by 14 percent while such calls at Philadelphia, Baltimore & Hampton Roads declined only 5 percent. (*Id.*) NYSA attributes the increase in container tons at other ports to their later development of container facilities since 1972. (NYSA op. br. at 59, citing Ex. 33, p. II–7.) However, even in New York a good deal of container facilities were not developed until 1975 or later (completion of Sea-Land, Maersk Terminal, Red Hook, South Brooklyn Marine Terminal, etc.) (Ex. 31, pp. 6–7). There was much development of container facilities at other North Atlantic ports by 1970 although it continued to 1975. Also, the same full container ships calling at New York also called at Baltimore and Hampton Roads. (*Id.*)

85. The Contract Board has not seriously considered or evaluated in depth alternative assessment formulas in recent years. However, there has been concern over the raising of tonnage assessment rates and occasional suggestions by interested parties as to possible changes to the formula. For example, Joseph Barbera of Global Terminal & Container Services, Inc., wrote to NYSA on March 15, 1974, suggesting changes in the formula by decreasing the tonnage assessment on containers, increasing it on LCL cargoes, increasing the man-hour assessment on excepted cargoes, and charging a man-hour assessment on empty containers. As to the effects of raising the tonnage assessment rate, Robert B. Murphy of U.S. Lines testified in deposition that choosing the $8.90 per ton level was like choosing a sales price of $8.99 for psychological reasons. David Richman of United Terminals testified in deposition that deciding to what level to raise the assessment was somewhat like playing God because at some level diversion would occur.

86. Various witnesses testified in opposition to any change in the current formula which would cause them to lose the special treatment accorded them under the current formula or which would cause them to bear additional costs. For example, banana shippers wish to have the current rate at 5 cents per box remain untouched, and, if this is done, they would have no interest in this proceeding. Witnesses for U.S. Lines, Sea-Land, and McAllister Brothers, Inc. all testified in favor of preserving certain favorable treatment accorded their interests. Thus, the U.S. Lines witness opposes any change from the excepted man-hour basis for his line's domestic service, Sea-Land opposes any change from the excepted basis for its transshipped cargoes, or any change from its total exemption from any assessment for maintenance and other non-cargo handling functions, and Mr. Mullally of McAllister testified to the effect that he could not afford to pay the regular tonnage rate and remain viable. Mr. James G. Costello of University Maritime Service Corp. does not wish an increase

in the man-hour portion of assessment payments under an alternative formula. Under any such increase, terminal operators like Universal would be affected because they are responsible for paying assessments under the man-hour basis but not the tonnage basis. Universal utilizes a substantial number of man-hours of employment, and under the Port Authority's first suggested alternative formula, Universal would be paying quite a sizeable amount of money. (The figures are confidential but are available in the confidential portion of the record.) (Port Authority op. br. at 78–79.)

87. The Port Authority's expert witness, Mr. Leo Donovan, has presented testimony criticizing the current tonnage assessment formula and proposing alternative formulas based on a combined man-hour/tonnage basis broken down by the type of fringe-benefit cost being funded. He distinguishes between "transition" costs, i.e., those that are attributable to the advent of containerization (GAI) and all other costs, and would fund the first type on a per-container basis and the latter on a man-hour basis. (Ex. 31, pp. 25–30) Mr. Donovan is a Vice President within the Transportation Division of Booz, Allen & Hamilton, Inc., the well-known consulting firm, and in nearly 13 years has conducted or directed over 100 assignments for maritime clients. (Ex. 2, last page.) (A more complete discussion of his alternative formulas will be given below, and the reader is referred to the table of comparisons of the NYSA, Donovan, and PRMSA formulas in the appendix to this section for visual aid.)

88. Mr. Donovan's proposed alternative formulas would fund all fringe benefit costs, be responsive to marketing and competitive situations vis-a-vis other ports, and would assign responsibility for "transition" costs to the container sector which caused them. Mr. Donovan presents three forms of his alternative formula, using 1983 figures. The first would result in a rate of $11.64 per man-hour and $64 per container. The second version of his formula would modify the man-hour rate to retain presently excepted cargo and would result in the same $11.64 per man-hour plus a lower excepted man-hour rate ($5.50 per man-hour in 1983) and retain the per-container rate of $64. The third version of his proposal would consider price sensitivity of different types of containers and would assess full containers at $77 per unit but empty and stuffed and stripped containers a half rate of $38 per unit. (Ex. 31, cited above.) Mr. Donovan's formulas are flexible and can be further changed, according to him, to accommodate domestic, rehandled or transshipped containers, or breakbulk cargoes that might be diverted from the port or into containers. (Ex. 31, p. 29.) He states that breakbulk cargoes are "extremely important to the port's welfare" (*Id.*, at 30) and that "care must be taken to assure that no assessment formula change causes a substantial increase in breakbulk asssements charges." (*Id.*) Moreover, he advocates not changing who is responsible for paying the assessments so as to minimize disruption. Mr. Donovan concludes that the "current system is no longer responsive to market condi-

tions and should be changed" and states that his alternatives "are responsive and result in a pricing structure that the market can accept." (*Id.*)

Conclusions as to the Port Authority's Case

As I have indicated earlier, I conclude that the Port Authority has shown by a preponderance of the evidence that the current assessment formula is harming the Port competitively, especially as regards Baltimore, because it maintains a $200–$300 assessment differential that only New York has to bear and is not present in competing ports, which use man-hour formulas to fund their labor fringe-benefit costs. This showing is made not on the basis of cargo "diversion" under the "naturally-tributary" type cases which NYSA, Hearing Counsel and others seem to believe are controlling. The Port Authority does not claim that it is fundamentally entitled to Midwest container cargo or that such cargo is "naturally tributary" to New York rather than to Baltimore or Philadelphia, and the Port does not claim that NYSA is engaging in artificial monetary inducements like "absorptions" or "equalizations." What the Port is claiming is that it is being hurt in its attempt to attract carriers to route their services primarily to and from the Midwest, because of this unnecessary $200–$300 differential which the current formula at New York imposes on the Port. The Port Authority points to admissions of eleven carrier officials, whose companies are respondents in this case, regarding their efforts to avoid New York because of the assessment differential plus carriers' own cost studies which show the differential and, indeed, in one of which the carrier made the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Manhour; Portsmouth $10.55/Manhour." (Of course, the current rate at New York has since increased to $8.90 per ton.) There is, furthermore, evidence showing that the NYSA–ILA Contract Board members are always apprehensive when they have to raise the tonnage assessment rates about possible loss of cargo to competing ports, that they have tried, on occasion, to lower the rates in hopes of attracting cargo, that at least one NYSA member, Mr. Barbera, suggested that the formula needed revision to pick up contributions from certain specially-treated categories of cargo, and that NYSA hired an expert, Mr. Sclar, whose task initially was to look into the problems with the current formula. Furthermore, as seen by previous actions of the NYSA–ILA Contract Board, the Board often had to grant special reduced treatment to a number of commodities to retain their movement through New York and in some cases, especially that of the Spanish Line and waste paper, the assessment rate caused a loss of that commodity to Boston.

Data accumulated from the Maritime Administration and other sources indicate that although New York maintains its volume of aggregate tons, it is stagnating and has declined in its share of containerized cargo in the North Atlantic from 69 percent in 1972 to 56 percent in 1982. These declines are not explainable simply in terms of other ports' catching up

to New York in containerizing their facilities, notwithstanding NYSA's contentions. However, it is not necessary to point to specific items of cargo that have moved via Baltimore rather than New York solely because of the tonnage assessment at New York, and harm can be shown under law even if the aggregate volume of movement is holding its own or even increasing. That is the lesson of *NARI* v. *F.M.C.*, 658 F. 2d 816 (D.C. Cir. 1980), where the court chastised the Commission for finding no illegality under various sections of the 1916 Act merely because the commodity continued to move in increased volumes. It is also the lesson of *N.C. State Ports et al.* v. *Dart Containerline,* cited above, 21 F.M.C. 1125, affirmed *sub nom. Dart Containerline Co., Ltd.* v. *F.M.C.*, 639 F. 2d 809 (D.C. Cir. 1981). In the *Dart* case there was no "smoking gun," i.e., no specific ton of cargo that moved via Norfolk instead of Wilmington, N.C. that the evidence showed to move that way because of Dart's inland absorptions. Nevertheless, the Commission found competitive harm to Wilmington.

With the above type of evidence, including so many admissions and the additional fact that the Port is not asking for nor is it entitled to specific money damages, one wonders what more the NYSA, Hearing Counsel, and other parties opposing the Port's request for relief want the Port to prove. Nevertheless, NYSA wants the Port to be held to a "clear and convincing" evidentiary standard of proof which does not exist in these proceedings and was rejected by the Congress when NYSA first proposed it prior to enactment of the MLAA. Furthermore, NYSA insists on evidence of the "smoking gun," i.e., it wants specific tons of specific cargoes to be shown to have moved through Baltimore or some other competing port *solely* because of the assessment differential at New York, which NYSA also denies to exist in the magnitude of $200–$300 per container notwithstanding the admission of one of its members, Mr. Costello, before the New York State legislative hearings and its own members carriers' cost studies. Furthermore, NYSA constantly attacks its members' own admissions as "hearsay" and as "alleged" statements made to Mr. Steiner, the Port's Deputy Director. This type of contention undermines NYSA's credibility since, as NYSA counsel must well know, statements of *parties* out of court are not hearsay at all and, even if they were, hearsay is admissible in administrative hearings and can constitute substantial evidence even without corroboration. See Federal Rule 801(d)(2); *Richardson* v. *Perales*, 402 U.S. 389 (1971). The Commission has often relied upon "hearsay" even when finding malpractices and has been chastised by the court when refusing to rely upon probative hearsay. See *U.S.* v. *F.M.C.*, cited above, 15 SRR 927, and *NARI* v. *F.M.C.*, cited above, 658 F.2d at 825.[31] If NYSA had evidence that these eleven carrier officials

[31] The court, after criticizing the Commission for disregarding hearsay evidence of impediment to movement of waste paper to the Far East stated:

never made any such admissions, NYSA could have called them as witnesses, since they are NYSA's own people. Not having done so, it ill behooves NYSA to challenge their statements and the Commission is entitled to infer that their testimony would have been adverse to NYSA's position had they been called. See *Interstate Circuit* v. *United States,* 306 U.S. 208, 226 (1939).

One of the defenses of NYSA, furthermore, is that if there is any assessment differential, it is the fault of the underlying labor costs at New York, which admittedly are much higher than those at any other port, especially the GAI, which reflects the great decline in work opportunities caused by containerization. However, as Mr. Donovan and other evidence [32] has shown, it is not the underlying costs so much but rather the particular type of tonnage formula which competitively disadvantages New York. Mr. Donovan has prepared three alternative formulas which would fully fund these huge underlying costs but without causing the $200–$300 per container differential. Mr. Donovan's formulas would raise money from activities such as handling empty containers, stuffing and stripping, and maintenance at terminals, which enjoy free rides under the current formula, and would increase rates on the presently "excepted" domestic and rehandled cargoes. His formulas are also flexible enough to adjust to accommodate other special cases which may need protection, and would make New York more competitive as regards Midwest throughput containers without seriously disrupting domestic cargoes, according to Mr. Donovan. (Port Authority op. br. at 74–75.) Mr. Donovan's formulas are not perfect, and I believe, in several respects, Dr. Silberman's formula is more refined and is remedial for PRMSA, as well as the Port, since PRMSA, unlike the Port Authority, is a direct payor under the current formula. Nevertheless, I believe his formulas are certainly fairer than the current formula because they would substantially ameliorate the competitive handicap which the Port is facing on account of the current formula. Furthermore, as he notes, unlike the current formula, they would bring the payments of those who use labor in line with their responsibility for port labor dislocation and in line with their current utilization of labor.

But for the existence of Dr. Silberman's alternative formula, which, with modifications to eliminate certain excessive features, I would recommend Mr. Donovan's formula (third alternative) with some modifications. Furthermore, in view of the Port Authority's suggestion that instead of ordering

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The Commission stubbornly insisted on wearing its blinders to judge the available evidence in this case.

The court commented on the use of hearsay evidence in administrative proceedings, calling it not "dispositive" but "suitable and appropriate for inclusion in the context of administrative proceedings and decision-making." *Id.* Later, the court also criticized the Commission for refusing to consider hearsay documentary evidence (letters from shippers) stating that "[t]he Commission displayed an unfortunate, capricious reluctance to assimilate the proffered evidence tending to show detrimental impact on the commerce in waste-paper." 658 F.2d at 825 n. 46.

[32] See findings of facts nos. 42–44, above.

modification of the current agreement, the Commission could suspend such an order for 60 days to allow the parties to settle on a new formula, I refrain from recommending implementation of Mr. Donovan's alternative formula, though recognizing its merits.[33]

Credibility of NYSA's Witnesses

In addition to my findings and conclusions regarding the evidence presented by the Port Authority and NYSA's defenses, I owe some explanation as to the reasons why I find the Port Authority's (and later, PRMSA's) evidence more credible and persuasive than NYSA's. Not only do I find NYSA's technical arguments attacking their own officials' admissions as "hearsay" and their impossibly difficult standard of proof to which they wish to hold the Port Authority untenable but I find that, with all due regard to the eminent positions they hold in industry and in the consulting-firm world, NYSA' witnesses were unduly rigid in adhering to the defense of their problematic formula both during cross-examination and in their written testimony. Certainly no formula can be so wonderful that reasonable concessions cannot be made on cross-examination or when reasonable criticisms are made. However, these witnesses made grudgingly few concessions. Furthermore, the witnesses defending the formula, whose companies enjoy special privileges like Sea-Land with its relay service or United States Lines with its domestic cargoes or McAllister with its "excepted" barges, understandably steadfastly defended the status quo even though they benefit substantially at the expense of the other container lines for these privileges. I do not blame them of course, for adhering to the best interests of their companies, but that does not mean that I have to give as much weight to their testimony as I do to other evidence, especially to parties' evidence against their own interests, such as the admissions of the eleven carrier officials or the carriers' cost studies. Finally, as to the NYSA's expert witness, Mr. Michael L. Sclar, both the Port Authority and PRMSA, through cross-examination and demonstration, have shown that Mr. Sclar has offered inconsistent testimony in a previous Commission proceeding involving an assessment agreement on the West Coast in which he seemed to be attacking the very concepts of the tonnage formula which he here defends. I am not seeking to attack the professional reputation of Mr. Sclar and recognize

[33] The Port Authority initially did not recommend any alternative formula but rather suggested that the parties carefully consider alternatives, admitting that there was no simple solution. (Port Authority r. br. at 31.) Sea-Land had seemed to recognize the existence of problems and suggested extensive negotiations. (*Id.*) However, NYSA took a strong position of resistance and criticized the Port for not presenting an alternative formula, which accounts for Mr. Donovan's proposals. However, the Port Authority is still apparently holding out the olive branch and seems willing to seek an accommodation with NYSA. Why then do not the parties and NYSA which, as I mentioned, announced a "plan" in the *Journal of Commerce*, talk to each other and see if any settlement can be reached well before the February 27 deadline imposed on the Commission. Since the one-year deadline on the Commission seems mandatory under the MLAA, it does not seem feasible for the Commission to issue a decision on February 27, 1985, which would postpone its decision for 60 days. See Sen. Rep. to the MLAA, cited above, at 11, requiring strict adherence to the one-year deadline for Commission decisions ("the time requirements for filing and decision shall be strictly adhered to.")

that he has appeared as an expert witness in various proceedings, not without reason, and is with a reputable consulting firm, Temple, Barker, and Sloane. However, both the Port Authority and PRMSA have, in my opinion, utilized the adversary process to show that, expert or no expert, this witness's credibility in this proceeding has been undermined to such an extent that I can give very little weight to his opinions or conclusions.

For a description of the many ways in which both the Port Authority and PRMSA have demonstrated Mr. Sclar's previous inconsistent statements, his peculiar methodologies and curious reasonings, constricted definitions of cargo "diversion," etc., see the discussion with record citations in the briefs of the Port Authority and of PRMSA (Port Authority op. br. at 81–87; r. br. at 19–29; PRMSA op. br. at 65–71.) A detailed discussion of every point would be unduly excessive and unnecessary. However, some of the highlights are the following: Mr. Sclar's ignoring costs per unit basis when comparing total costs at New York with other ports; his exceedingly narrow definition of "diversion" to such an extent that only local "captive" cargo in New York's backyard would he ever consider as being losable to any other port; his projections as fact although he later testified that the projections did not occur as anticipated; his indication that data were not available for years prior to 1972 but later statement that foreign container cargoes increased from nothing in 1966 to 7.2 million tons in 1983; his change in mission from investigating whether the current formula was appropriate compared to other possible models to all-out defender of the status quo; the inscrutability of much of his reasoning, which even NYSA's witness Scioscia admitted he couldn't understand even as to a relatively simple portion; his advocacy of increased assessments on any employer who introduces efficient devices, thereby penalizing any innovative employer in areas not related to the institution of containerization.

Certainly, a factor which undermines Mr. Sclar's credibility significantly is the inconsistent testimony which he gave in a previous Commission proceeding, involving an assessment formula on the West Coast. (*Standard Fruit and Steamship Co.* v. *PMA*, 20 SRR 909 (ALJ 1981) (settlement providing for mixed man-hour/tonnage formula to be later replaced by man-hour system).) Both the Port Authority and PRMSA cite paragraph after paragraph of inconsistencies between Mr. Sclar's testimony on the West Coast and that given in this proceeding. Whereas Mr. Sclar, testifying for a client with man-hour and mixed man-hour/tonnage assessments on the West Coast, advocated great reluctance in departing from a man-hour basis to a tonnage basis during times of declining man-hours because of a "substantial overkill potential," he fully supports the tonnage formula in New York although these "overkill" potentials have been pointed out by PRMSA in some detail. Furthermore, although now advocating a wholly tonnage-based formula in New York as one that fairly allocates fringe benefit costs among high- and low-productivity carriers, on the West Coast Mr. Sclar testified that a tonnage formula results in "subsidization of low

productivity operators because low productivity operators will not pay labor costs in proportion to their use of the labor." (Ex. 48 at 13, cited in PRMSA op. br. at 71.) Also, Mr. Sclar, on the West Coast, resisted the idea of switching the formula out there from man-hours to tonnage assessments, stating that such a switch "does not modify the current man-hour assessments in a rational manner" and further testified on the West Coast against such a switch to a tonnage basis because operators who were employing large amounts of labor relative to their tonnage "would be relieved of this cost by higher productivity operators who have reduced costs and increased efficiency usually by large capital expenditures." (Ex. 48 at 29, cited in PRMSA op. br. at 71.) Mr. Sclar, on the West Coast, furthermore, challenged the idea that employee benefits should be paid according to revenues derived by tons, stating that "[w]e can find no reasons why labor costs, direct or indirect, for an industry section should be determined and paid on the basis of revenue earned by that sector, particularly since the determination of those costs in this fashion has no relationship to labor utilization within the sector, and obviously subsidizes the labor costs of some sectors." (Ex. 48, App. 6, pp. IV–8 through IV–9, cited by Port Authority op. br. at 84.)

It is not necessary to go on with further examples which are provided by complainants. Even if there are different conditions on the West Coast and factual distinctions, there are so many statements expressing basic principles opposing tonnage assessments in Mr. Sclar's West Coast testimony, which are apparently overridden in Mr. Sclar's testimony in this proceeding, that, at the very least, one must scratch one's head when considering whether to follow the advice of Mr. Sclar on the East Coast where he fully approves tonnage assessments.

NYSA's Motion to Strike Exhibit 48

Respondents NYSA et al. served a motion to strike Exhibit 48 or, in the alternative, to reopen the hearing to afford Mr. Sclar an opportunity to explain or deny his prior statements contained in that exhibit. This motion was served on October 3, 1984, which is 35 days after the close of the hearing (August 29). Respondents argue that the complainants offered Mr. Sclar's prior testimony in another Commission proceeding, which is contained in Exhibit 48, without any attempt to establish its admissibility and without any indication of the portions of the testimony upon which complainants intended to rely. NYSA contends that Mr. Sclar was therefore denied his right to explain the earlier testimony, and NYSA cites much case authority holding that the party attempting to use a prior statement of a witness to impeach the witness must establish that the prior statement is in fact inconsistent with the witness's present testimony, must establish a "foundation," and must give the witness an opportunity to explain or deny the prior statement. Finally, NYSA complains that exhibit 48 is not admissible because complainants had ample opportunity to extract pertinent

portions of the lengthy testimony in advance of the hearing and criticize it in their earlier written cases.

Both complainants strongly oppose the motion. They also furnish ample case authority holding that they did nothing improper. They contend that the testimony in question (Ex. 48) was referred to in Mr. Scalr's written opening testimony (Ex. 29, pp. 1–2), that he identified Exhibit 48 as his testimony in the previous case, and that he was afforded an opportunity to explain or deny it as Federal Rule 613 requires, but that his counsel, after specific advice from the presiding judge, neither asked for a recess to confer with Mr. Sclar, nor sought to conduct redirect examination despite being offered a recess and having a four-day interlude before the hearing was to resume and despite being advised that filing a motion long after the hearing, seeking to reopen the hearing under a tight schedule, while the parties were writing post-hearing briefs, should not be attempted. Furthermore, the Port Authority argues, it is enough if the prior testimony taken as a whole shows inconsistency with the present testimony if the prior testimony is to be admitted for purposes of impeachment, and the Port Authority contends that the prior testimony is, as a whole, inconsistent with Mr. Sclar's present testimony.

Complainant PRMSA opposes NYSA's motion on similar grounds. PRMSA contends that it co-sponsored admission of Exhibit 48 for the purpose of impeaching Mr. Sclar's credibility because Exhibit 48 consists of prior inconsistent testimony, that Mr. Sclar referred to this previous testimony several times, even using it as a means to attack conclusions reached by PRMSA's expert witness, that counsel for NYSA could have requested time to prepare to conduct redirect examination but did not avail himself of that opportunity even when invited to do so by the presiding judge, that the entire testimony was essentially inconsistent with Mr. Sclar's present testimony, not merely portions of it, and that, in the last analysis, counsel for NYSA should have been better prepared but in fact admitted that he had not even read the previous testimony of his expert witness, which that witness had referred to several times in his own written testimony in this proceeding.

The facts of the situation here, in my opinion, show that neither Federal Rule 613 nor the spirit of that rule nor the principles regarding fair hearings have been violated. What happened in point of fact is that on Thursday, August 23, 1984, in mid-afternoon, counsel for the Port authority finished cross-examining Mr. Sclar. At the conclusion of the cross-examination, counsel for the Port Authority showed Mr. Sclar a copy of his testimony in the previous Commission proceeding. Mr. Sclar identified it. (Tr. 595–596.) Port Authority counsel, joined by counsel for PRMSA, moved its admission into evidence without further questions. Counsel for NYSA stated that he had not had an opportunity to review the exhibit, that he questioned the relevance of it, and might move to strike it. (Tr. 597.) I advised counsel that if he wished to file such a motion, he ought to do so timely

because if it were denied, it would be too late to return to a hearing to allow further questioning of Mr. Sclar in the midst of the hectic post-hearing brief-writing period. (Tr. 600.) During subsequent discussion, it became clear that the exhibit was being offered not to prove any facts stated therein but for the purpose of impeaching Mr. Sclar's credibility. Counsel for NYSA, however, stated that he had been surprised and didn't know what the inconsistent statement in the exhibit were supposed to be, and that the matter should have been presented by complainants earlier so that he could have prepared for it, and not by way of cross-examination at the last minute. I advised counsel that there have been cases in which an expert witness has been shown previously inconsistent testimony by counsel trying to impeach the witness's credibility, and the usual result is that the witness's own counsel try to rehabilitate the witness on redirect examination. Nevertheless, the previous testimony is admissible for impeachment purposes. (Tr. 604–605.) The conclusion to this scenario was that NYSA's counsel decided not to conduct redirect examination.

All that the applicable rules and principles of fair hearing require is a fair opportunity for a party to meet evidence adverse to the party's interest in the most appropriate fashion. See *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 140 (1965). Adverse evidence can be countered either by rebuttal evidence, cross-examination or redirect examination, or argument. In this case, despite the fact that Mr. Sclar referred to his previous testimony in his own written testimony (Ex. 29) in support of his qualifications and even to attack PRMSA's case, his counsel apparently had not familiarized himself with that testimony to determine if there could be anything damaging in it which opposing counsel might try to use in cross-examination. Having been alerted to the fact that opposing counsel were using it for impeachment purposes. NYSA's counsel could have accepted the specific suggestions made by myself and counsel for PRMSA that he conduct redirect examination and, as PRMSA's counsel stated, that if he needed time to prepare such examination, he should be granted it and "if there is a necessity to do so . . . then we all have to come back here and do that." (Tr. 599.) As the Port Authority notes, however, there was time for NYSA counsel to prepare for redirect. Cross-examination of Mr. Sclar concluded prior to 3 p.m. on Thursday, August 23. No hearing was scheduled for Friday, and the hearing did not resume until Tuesday of the following week. If NYSA counsel was not familiar with his witness's previous testimony nor with any inconsistencies in that testimony, certainly counsel could have conferred with his witness during the four-day interlude or even the same day and thereupon recall him for redirect examination. Experienced trial counsel certainly must be aware of the fact that, as one authority states:

> The first, and probably the most effective and most frequently employed [line of attack upon the credibility of a witness] is an attack by proof that the witness on a previous occasion has

> made statements inconsistent with his present testimony. *McCormick on Evidence* (3rd Ed. 1984), sec. 33, p. 72.

NYSA counsel sponsored this witness, who stated that he had testified previously in a Commission proceeding in his own written testimony (Ex. 29). Therefore, it is not unreasonable to assume that opposing counsel would seek to obtain a copy of that testimony to see if there were any inconsistent statements, and that the witness's own counsel would have spoken with the witness to ascertain whether there was anything damaging in that previous testimony so that if the blow fell, counsel would be prepared to conduct redirect examination for the purpose of rehabilitating the witness. As the above quoted authority also states:

> The reply on redirect may take the form of explanation, avoidance, or qualification of the new substantive facts or matters of impeachment elicited by the cross-examiner. *McCormick*, cited above, at sec. 32, p. 70.

However, counsel for NYSA (who conceded that he had never read the testimony in question) contends that opposing counsel should have identified portions of the testimony that they considered inconsistent so that the witness would have had a fair opportunity to explain or deny. Complainants, however, state that they believe the entire testimony to be riddled with inconsistencies and that, accordingly, it would serve no purpose to go over every line and identify it as the portion they wished to use to impeach. Even if complainants' counsel should have tried to specify page after page of the 50-page document, this does not explain the witness's counsel's unpreparedness nor would it deprive him of the opportunity of conferring with the witness, whose testimony it was, to find out from the witness what might be damaging in the testimony and how to explain, deny, or qualify it. Then, NYSA counsel could have asked Mr. Sclar to return on the same day or on Friday or the following Monday or Tuesday if NYSA counsel needed the time because of his own unfamiliarity with the previous statements of Mr. Sclar. Indeed, counsel for PRMSA specifically agreed on the record to come back later if necessary to give NYSA counsel time to prepare. Thus, Mr. Sclar's counsel was given the opportunity to question his witness about the inconsistent statements, which Rule 613 and fair procedure require.[34]

[34] According to the authorities, "the requirements of [Rule 613] are met if the witness has an opportunity to explain after the contents of the statement are made known to the jury." 3 Weinstein & Berger, *Weinstein's Evidence*, sec. 613[04], pp. 613–15 and 613–16. The rule does not require the impeaching party to afford the witness the opportunity to explain or deny. The witness must only be given such an opportunity, and the impeaching party does not usually recall the witness to rehabilitate the witness. 3 Weinstein & Berger, cited above, at p. 613–24. Rule 613 does not even require that the cross-examiner display or disclose the previous statement to the witness before questioning him about it, only that he must show it to opposing counsel on request. 3 Louisell & Mueller, *Federal Evidence*, sec. 357, p. 558. "Thus, opposing counsel may pursue the matter on redirect and so bring to light any innocent explanation which the witness may have

Continued

What happened, however, was that NYSA and Mr. Sclar's counsel had not read or apparently familiarized himself with the previous testimony of Mr. Sclar, although Mr. Sclar had specifically referred to it as proof of his expert qualifications. True, as NYSA counsel suggests, complainants could have attacked Mr. Sclar's previous testimony in complainants' own written rebuttal testimony, and Mr. Sclar could have replied in his written surrebuttal testimony under the established procedure. If failure of complainants to follow that procedure meant that NYSA counsel would never have had an opportunity to seek to deny or explain the previous testimony, then NYSA counsel could rightfully complain that Mr. Sclar and NYSA were unfairly treated and prejudiced. However, the parties were also allowed to designate witnesses for cross-examination, and Mr. Sclar was so designated. Therefore, his counsel was aware that he would have the opportunity of redirect examination of Mr. Sclar and, since the purpose of cross-examination is to seek to undermine a witness' credibility, one would think that at least by the time of the designation, his counsel would have thought it prudent to ask Mr. Sclar whether there was anything damaging in the previous testimony which Mr. Sclar himself cited, and, if so, to prepare for redirect examination at the conclusion of the cross-examination. For some reason, NYSA counsel did not do this. Instead, he claims surprise and asks that the previous testimony be stricken or that, at this impossibly late date, he now be allowed to conduct redirect examination.

I conclude, therefore, that NYSA counsel was given a fair opportunity to confer with his witness and conduct redirect examination well before the hearings closed but expressly declined to avail himself of such opportunity. The problem here appears not to be surprise but lack of preparedness and unwillingness to conduct redirect examination, for which counsel cannot blame complainants. NYSA's motion is therefore denied.[35]

Findings as to PRMSA's Case

In the following sections I find and conclude that PRMSA has shown that the current tonnage assessment formula is unfair and unjustly discriminatory as between carriers and must be modified, as provided by applicable law. The bottom line to PRMSA's case is that all containerized carriers benefited more or less the same from the advent of containerization and

. . ." *Id.* In one case, impeaching counsel introduced over 60 apparently multi-page documents without specifying the pertinent portions. The court ordered impeaching counsel to specify the portions and allowed the witness's counsel 15 days to ask to recall the witness for redirect examination. The present proceeding involves one document, albeit 50 pages (with a lengthy report that respondents' counsel, not complainants' counsel furnished), which document the witness had cited and obviously remembered. ("It's very difficult to forget that docket," stated Mr. Sclar, in identifying the previous testimony (Tr. 595).) The 60-document case was *U.S.* v. *IBM*, 432 F. Supp. 138 (S.D.N.Y. 1977), and the ruling was made long before the trial was to conclude.

[35] Of course, another way to rehabilitate a witness whose credibility has been damaged on cross-examination is by argument later on brief. NYSA has availed itself of that opportunity, arguing that Mr. Sclar's prior testimony was not really inconsistent and dealt with different factual circumstances. That is the type of rehabilitation usually found on redirect examination. (See NYSA r. br. at 6–11.)

paid compensation in the form of the GAI program and other ways to the ILA because of the drastic curtailment of work opportunities stemming from the decision to load and unload ships using containers. However, not all containerized carriers are bearing an equal or fair burden and a number of facts showing vast disparities in payments among certain containerized carriers illustrates this fact.

The reasons for the unfairness of the formula and the consequent unequal allocation of burdens among the containerized carriers are several. First, the flat tonnage-type formula which assesses all types of fringe benefit costs, whether they are related to men currently employed or the other type of costs which are related to men displaced from work by containerization, is conceptually unsound and illogical since it makes carriers pay more money to find fringe benefits even if they use less labor for direct-type costs akin to wages. This blunderbuss tonnage formula, not used at any other port in the United States to fund all fringe benefits, not only imposes responsibility on carriers for direct current-type fringe costs where there is no logical nexus but it penalizes such carriers who effectuate efficiencies in their non-vessel loading/unloading activities. In other words, if a carrier operates at a terminal which has reduced the need for handling empty containers, stuffing and stripping containers, or for maintenance by utilizing innovative cost-saving techniques, such carrier gets no credit for such innovations because it must still pay under a tonnage formula toward the extra labor costs of another carrier who has not introduced innovations. Thus, a carrier who ultimately moves more tons per hours of labor used because of internal terminal efficiencies pays more in assessments even for the type of costs which are not the industry-wide responsibility such as GAI, for which all containerized carriers properly share responsibility. Such a formula reduces any incentive to innovate in non-vessel loading/unloading activities.

A second problem with the current assessment formula at New York is that it shows great favoritism to a certain few carriers and activities and, because of such favoritism, those carriers pay little or even nothing towards their own costs or towards industry-wide costs. Such failure to make a fair contribution by such carriers casts burdens on other carriers, especially those like PRMSA, which has become very efficient at its own terminal, and which serves an economically underdeveloped area. The favoritism which PRMSA shows exists for three carriers who operate in domestic trades and rehandle or transship numerous containers. These carriers are "excepted" from paying under the tonnage formula, i.e., they (or their terminal operator) pay only through the much lower man-hour portion of the formula which does not even meet current direct-type labor costs. This favored treatment to the favored few results in their not contributing many millions of dollars to the fringe benefit package although two of the favored three are substantial containerized carriers who benefited by containerization as much as any other carrier. The other favored treatment

under the formula goes to carriers engaging in moving empty containers, stuffing and stripping, and in maintenance work. These carriers not only do not pay under the tonnage formula. They do not even pay under the "excepted" man-hour portion of the current formula. I other words, they pay absolutely nothing toward fringe benefit costs. Such total exemption also results in considerable savings to the few carriers involved and throws the cost burdens on other carriers who do not operate in the same way or to the same degree with empty containers and stuffing and stripping.

To remove these inequities and reallocate the cost burdens more evenly, PRMSA has presented an alternative formula supported by the testimony of an impressive expert witness who relies upon much of NYSA's own data. With some exceptions, I find the formula to be well justified and strongly urge its adoption. My discussion and findings and explanations follow.

Unfairness of the Current Tonnage Formula

In developing its case to prove these assertions by a preponderance of credible evidence, PRMSA has shown a number of amazing facts which illustrate how unfair the current tonnage formula has been operating and how burdensome it has become to containerized operators, especially because of the enormous special privileges shown to three carriers who operate domestic and transshipment services. It appears perhaps that until the record became assembled in this proceeding, no one was really in a position to understand the magnitude of the special privileges nor the extent to which they burden other carriers. However, now that the facts are in, PRMSA registers extreme indignation at the extent of the disparity between what PRMSA has had to pay under the formula and what other preferred carriers have not had to pay, especially when PRMSA serves a trade which is admittedly economically underdeveloped. It is perhaps understandable that PRMSA, upon now learning that in 1982–1983, it paid an average of $272 per container for fringe benefits under the tonnage formula whereas another major carrier paid only $141 per container and another only $168 per container, and these other two carriers were the prime beneficiaries of the special exception for domestic and transshipped cargoes, is indignant. It is not my job, however, to determine cases on the basis of emotion such as that shown by PRMSA which states that "NYSA behaves as a super-power, favoring some members and penalizing others, carrying on its work in secret * * *" (PRMSA r. br. at 5.) I attribute this statement to PRMSA's emotional reaction to the evidence it has adduced. It is my job and that of the Commission, as charged by the Congress in the MLAA, to find out whether the facts do indeed show that the allocation of cost burdens among carriers at New York, who derived more or less the same benefit from containerization initially, is so egregiously out of line that it is unfair and unjustly discriminatory among carriers. I believe the evidence shows that in fact the allocation has failed to distribute the burdens fairly

both because of the continued insistence on utilizing a flat tonnage formula regardless of type of fringe cost and because of enormous special privileges shown to a few carriers and a few operations.

Some of the concepts which PRMSA has shown by the evidence it has adduced are perhaps not easy to comprehend on first reading, but some of the evidence it has also adduced from the records of NYSA members regarding favoritism to certain carriers is rather striking. In order to present my findings and conclusions as to PRMSA's case in the clearest and briefest manner possible, I present my findings and conclusions so that the occasionally startling conclusions and the supporting findings of fact can be found close to one another. Regrettably, although I would have wished to avoid doing so, I find that it is not possible to conceal certain data about certain carriers which was obtained under confidential terms. I believe that even if I attempted to do so, it would become so obvious which carriers were involved that the concealment of names would become meaningless. Also, unless these facts are made known, one might not be able to understand my basic conclusions, namely, that the current formula is terribly unfair as it allocates burdens among the containerized sector of the industry at New York.[36]

To make its point about this unfair distribution of burdens among the containerized carriers under the current tonnage formula at New York, PRMSA points to five somewhat amazing facts that the evidence shows: [37] (1) that in contract year 1982–1983, PRMSA paid $16.1 million under the formula and moved 59,142 containers, an average of $272 per container. However, another carrier moving a third more carriers than PRMSA paid an average of only $141 per container, and still a bigger carrier, moving more than twice the number of containers as PRMSA, paid an average of only $168 per container. Significantly, furthermore, these are two of the carriers enjoying excepted treatment for domestic and transshipped operations; (2) that PRMSA employed 2.5 percent of the NYSA–ILA man-hours in the Port, but paid 8.5 percent of the total NYSA–ILA tonnage and man-hour assessment (even though PRMSA has reduced its non-vessel loading activities at its terminal through internal efficiencies or otherwise, which internal activities are not connected with its initial containerization years ago); (3) that the special treatment for domestic and transshipped operations accorded to only three carriers resulted in their avoiding paying

[36] Rule 167, 46 CFR 502.167, specifically authorizes me or the Commission to use confidential information "if they deem it necessary to a correct decision in this proceeding." As explained, I deem it necessary to use the evidence even if identities and data are revealed, so that my decision can be properly understood, albeit I would have preferred not to have had to reveal particular carrier information which was furnished in confidence. I do add, however, that I am not finding that NYSA or the carriers involved have deliberately intended to harm anyone or that the carriers operated in any way other than what they thought was perfectly legal. As I mention in my decision, it appears that all the facts have been assembled for the first time in one place, and the unfair effects of the current agreement can be quantified for the first time. What would be wrong, in my opinion, is to continue the present unfairness now that all the parties can see the effects in detail.

[37] PRMSA op. br. at 5–7.

some $20 million dollars that they would have paid under the normal tonnage assessment applicable to virtually all other containerized carriers; (4) that the current formula assesses certain activities like stuffing and stripping and handling of empty containers absolutely nothing, not even the man-hour assessment, although carriers employ ILA labor in such activities, the result being that carriers like PMRSA which have reduced such activities, must pay the costs of other carriers, who have greater needs for such labor activities, under the tonnage formula; and (5) during contract year 1982–1983, when comparing its total payments under the current formula to man-hours used, PRMSA shows that it paid an average of $50.74 per man-hour to fund fringe benefits whereas the direct wage rate was only $14 per man-hour.

The above salient facts illustrate PRMSA's main theme, that burdens among the containerized carriers are not apportioned fairly in relation to the benefits which they all received, more or less equally, from containerization.

They also illustrate rather dramatically, as PRMSA argues, that the tonnage formula throws undue burdens on some carriers who must pick up the fringe-benefit costs of currently employed labor (Type I costs) and further aggravates the situation by relieving a few carriers of any share at all in the tonnage portion of the formula and certain other carriers of any share at all under either the tonnage or the man-hour portion.

PRMSA's case as to the unfair effects of the current tonnage formula with its built-in favoritisms and special privileges rests largely on the evidence of Dr. Silberman, its expert witness. (Exs. 41 and 46.) In turn, Dr. Silberman utilized data obtained in large measure from NYSA and its members. Dr. Silberman, as is usually the case with expert witnesses who testify before the Commission, has an impressive background. He is a consulting economist with a B.S. in Accounting (summa cum laude) from New York University, and a Ph.D. in Industrial Economics, from the Massachusetts Institute of Technology. He has had extensive teaching experience, has published in the professional literature, has testified before this Commission and other agencies, and has devoted his research efforts in recent years to the study of transportation economics and finance. (Ex. 41 at 1–2.) The data which he was furnished seem virtually to offer a prima facie case that the current tonnage formula is not operating fairly as among the containerized carrier sector of the industry at New York. However, his analyses, recommendations, and reasoning I find, for the most part, persuasive and certainly more than sufficient on which to base my ultimate findings and conclusions on a "preponderance of the evidence" standard of proof and sometimes even if the standard were "clear and convincing evidence" that respondents erroneously contend it to be. PRMSA's case, then, can be set forth in the following manner based upon Dr. Silberman's testimony, reasoning, and the underlying data which he obtained. The case is as follows:

The current formula, unlike the usual formulas found in other industries (and indeed among virtually all other ports in the United States) departs from the principle that each employer should contribute so as to pay those costs associated with its own direct employment of labor. (This conclusion was shared by the Port Authority's expert witness, Mr. Donovan.) A combination man-hour/tonnage formula, which Dr. Silberman and with some variation (man-hour/container formula) Mr. Donovan also strongly recommends, on the other hand, allocates to each employer those fringe benefit costs attributable to the employer's use of labor and then splits the remaining industry-wide costs (which Dr. Silberman finds to be 67 percent of the total) among all carriers on the basis of tonnage. Thus, the more labor that an employer hires, the greater its responsibility for labor costs, as is clearly seen in the case of direct wages. By relating direct hiring costs to the hours of employment, in contrast to the tonnage method under the current formula, each employer pays for what he hires and uses and does not expect another employer to pick up his share of direct costs merely because the other employer handles more tons and consequently earns more revenue.

PRMSA's Proposed Alternative Formula

PRMSA's proposed alternative formula, therefore, would fund certain costs, related more to wages and to fringe-benefit costs of labor currently employed, by means of man-hours. The remaining costs, which are by far the larger portion of the total package, relate to dislocation of labor because of containerization, i.e., to men who are not working and are drawing GAI payments and related benefits. These are industry-wide obligations which everyone acknowledges, including PRMSA, and the Commission long ago found, in *Agreement No. T–2336,* cited above, 15 F.M.C. 259 (1972). These are shared by containerized carriers who caused the problem and derived the benefits of reducing the use of labor in loading and unloading vessels by the proportion of tons each such carrier moves through New York.

As shown by Dr. Silberman, the direct current-labor costs, known as Type I costs, are either substitutes for direct wages or are deferred compensation. These types of costs are the costs of vacations, holidays, health and welfare benefits for currently employed men, considered as substitutes for direct wage compensation, and pension benefits earned by active employees which are forms of deferred compensation. The second (Type II) costs are the Guaranteed Annual Income (GAI) program and the portion of vacation, holiday, pension, welfare, and clinic attributable to the GAI program. This, then, is the essential breakdown of the Silberman formula. However, as will be seen, he would give protection and different treatment to breakbulk cargo (as would Mr. Donovan), upon which he would place a cap as to contributions, would totally exempt maintenance activities, would continue existing excepted treatment on passenger vessels, bulk cargo,

lumber, and newsprint, which were granted long ago (see *Agreement No. T–2336,* cited above) would terminate all other special privileges which are not justified (domestic, transshipped, empty containers, stuffing and stripping activities) and, finally, would grant the Puerto Rican trade a 25 percent discount from the normal tonnage rate of assessment. In the main, I find his formula would eliminate the inequities and unfair allocations shown to exist under the current tonnage formula and with certain exceptions (the 25 percent discount and the refusal to continue special treatment for barge service between New York and Boston), I strongly urge its adoption.[38]

By dividing types of costs between those associated with currently employed men and those associated with men displaced by containerization, Dr. Silberman's formula offsets the unfairness generally of shifting cost burdens to containerized carriers regardless of their responsibility for the type of costs involved. In addition, it removes the penalty imposed on carriers who create efficiencies in non-vessel loading or unloading activities at their terminals, i.e., maintenance, stuffing and stripping, movement of empty containers. PRMSA, which has lowered its handling of empty containers to 35 percent of all its containers compared to 40.5 percent for the Port as a whole, has lowered its stuffing and stripping of containers to 4.7 percent of its total containers compared to 13.5 percent for the Port as a whole, and who does not use ILA deep-sea labor for maintenance work at all (employing ILA "Metro" labor under a different contract), enjoys no savings for all of this under the tonnage formula but must pay a full tonnage share although these efficiencies at its terminal do not relate to the institution of containerization years ago but to the way PRMSA organizes its terminal, non-vessel loading/unloading operations. As PRMSA argues, why should any carrier attempt to improve its terminal efficiencies if, under the current tonnage formula, such improvements are taxed away in the form of tonnage assessments which help other carriers who, for some reason, do not organize their terminal operations so efficiently or who prefer to position vast numbers of empty containers coming via minibridge from Far East countries for the carriers' own convenience in an unbalanced trade, and who are rewarded by paying absolutely nothing under the current formula toward the ILA fringe benefit costs even though ILA men handle the empties?

The Current Formula's Tax on Efficiencies

The results of the tonnage formula, as noted earlier, is that PRMSA which handled 8.5 percent of the total volume subject to the tonnage assessment, used only 2.5 percent of total deep-sea man-hours (other than

[38] If it is not clear from Dr. Silberman's testimony as to the currently granted special cases which I discussed in the findings of fact in the Port Authority's case (FF No. 14) regarding special tonnage definitions or other special treatment for bananas, coffee, cocoa, steel, refined bagged sugar, perishable fruit, etc., I find that such treatment should be continued. Cases for such treatment were made to the NYSA–ILA Contract Board, and I have seen no evidence showing that any of these needy commodities should lose their protected treatment.

those related to passenger vessels) in the Port. This comes to only .16 man-hours per assessment ton for PRMSA compared to .54 man-hours per assessment ton for the Port as a whole. (See PRMSA op. br. at 41–42; 165; Ex. 41.) PRMSA does not object to paying its fair share under the tonnage portion of its proposed formula for the costs of GAI-related benefits stemming from the original institution of containerization so many years ago, for which ILA bargained for a compensating GAI program. It does object, however, to having to pay for someone else's greater need for terminal-type, non-vessel loading or unloading labor such as handling empties or stuffing and stripping (which pay absolutely nothing under the current formula), which PRMSA is perforce paying under the current tonnage formula. PRMSA and Dr. Silberman readily acknowledge that the industry-wide GAI program is properly funded by tonnage assessments because such assessments properly attribute the greater responsibility to those carriers who have benefited the most form the institution of containerization. However, extending the tonnage assessment beyond Type II industry-wide costs to Type I direct, costs resulting from currently employed men, penalizes more efficient carriers in areas in which the costs are properly those of the hiring employer as much are those of wages, for example. By taxing away any internal improvements in efficiencies in non-vessel loading/unloading activities, PRMSA correctly argues, in my opinion, that the tonnage tax discourages such improvements to the ultimate detriment of the shipping public.[39]

The Argument That All Costs and Labor Are Industry-Wide

At this point, however, it would be helpful to discuss an NYSA defense which Hearing Counsel readily accepts but which I find unconvincing, namely, that ILA men are industry employees and that all fringe benefits should accordingly be funded by tons on an industry-wide basis. This is another way of saying that costs of currently employed ILA men (Type I) are no different from costs of men displaced by containerization (Type II) or that once any carrier has containerized, it is forever reasonable for any change in its operations which reduces hours of labor employed. (For example, suppose a carrier operating its terminal discovered a means to protect containers or its facilities from wear and tear, and consequently used fewer hours of labor for maintenance. Under the NYSA theory, such carrier should pay under a tonnage formula because it has reduced the need for labor in the exact same way that it reduced its needs for labor years ago by loading and unloading its vessels in containers, for which latter reduction in labor, the containerized carrier has long ago agreed to fund a GAI program.)

[39] As I discussed earlier, furthermore, even Mr. Sclar, NYSA's expert witness, when testifying on the West Coast against shifting to a tonnage assessment, argued that such a shift resulted in "potential overkill" and caused more productive operators to subsidize less productive operators. (See quotations from Ex. 48, cited *in PRMSA op.* br. at 70–71.)

According to NYSA's respected witness, Mr. O'Neill, however, ILA men should be considered to be industry men because they work for a variety of employers and shift among industry members as needed. (Ex. 30 at 3–9.) Furthermore, since ILA men accrue fringe benefits by working 700 hours or obtaining equivalent GAI credit hours, they work for the entire industry, and all their fringe benefits are industry-wide benefits. If this were really the case, then why doesn't the industry pay each longshoremen's direct wages (currently $15 per hour straight time) on a tonnage basis regardless of how few hours of labor any direct employer utilizes? No carrier has suggested such nonsense. However, the extension of direct wages, i.e., Type I costs, which are either substitutes for wages (vacations, holidays, health, welfare) or deferred compensation for current employees (pensions), it is now argued by NYSA, (with the apparent agreement of Hearing Counsel), are industry-wide obligations to be funded not by the hours each man is employed but by tons carried by containerized carriers regardless of hours of work utilized by each carrier. Furthermore, as PRMSA contends, if a carrier charters a ship on a short term basis or uses a towing service, does the carrier using the short-term ship or towing service pay the ship or tug on the basis of the hiring carrier's tons carried, i.e., is the chartered ship or towing service also to be considered as industry's ships for which everyone must contribute even if having little or no use for the chartered ship or towing service? (PRMSA op. br. at 64.) Finally, as Mr. O'Neill points out, the ILA man is an industry man because he becomes eligible after working 700 hours for more than one employer. However, because an employee qualifies under an accepted professional rule, why does this mean that the entire profession must pool its revenue or volume of sales to pay the professional regardless of whom he works for? In other words, if a college professor earns his degrees by studying and teaching at various colleges, when he finally lands at one university, do all the colleges and universities pool their earnings and pay his fringe benefits? In short, the rules for eligibility are not necessarily relevant to the rules for determining how to apportion responsibility for labor costs.

The Formula's Favoritism to Certain Carriers

As noted above, PRMSA attacks the unfairness of the current tonnage formula as it affects carriers within the containerized sector not merely because the tonnage formula shifts costs unduly and penalized containerized carriers who manage to effectuate internal, non-vessel loading/unloading economies. More specifically, PRMSA attacks two categories of special privilege under the current formula. The formula category relates to domestic cargoes, rehandled and transshipped cargoes, for which the current formula grants "excepted" treatment, i.e., they are excepted from any payment under the tonnage formula but pay under a much lower man-hour rate (currently $5.50 per man-hour).

The second category of special privilege relates to handling of empty containers, stuffing and stripping, and maintenance, for which carriers pay absolutely nothing toward fringe benefits, not under the man-hour basis nor under the tonnage formula, in other words, a total free ride. PRMSA's evidence shows that the domestic and transshipped activity is substantial and receives substantial monetary subsidies which are cast onto all other containerized operators, and, to a lesser extent, so do the carriers positioning empty containers and engaging in stuffing and stripping activities at their terminals received subsidies. The facts in support of these contentions are rather amazing.

Much as I would have preferred refraining from disclosing identities and data pertaining to any individual carrier's operations, I find that the following facts would obviously disclose the identity of the carriers involved and, furthermore, since the number of carriers enjoying the enormous privileges are only three, as soon as I described the nature of their operations, anyone would quickly understand who they were. I mention, however, that these special privileges and benefits, at least for the domestic services, were granted long ago in *Agreement No. T–2336,* cited above, at a time when these services had not ripened into the substantial operations they are today, and no one had focused on them. Domestic trades, i.e., within the Continental United States, were considered to be marginal because of inland competition, and it was feared that assessing them under the normal tonnage formula would jeopardize their continued movement through New York. However, in 1984, the facts are now in the record to see, and they show that conditions have changed considerably so that continued favoritism for such services cannot withstand scrutiny. I do not blame NYSA or anyone for the many years of favoritism shown to these operations and to the few carriers since it was thought that these domestic operations should be handled with special care. However, as PRMSA has now shown, it appears that three carriers enjoyed a benefit of some $20 million in 1982–1983 which of needs has to be passed onto other containerized carriers and that PRMSA picked up over $3 million in additional payments to make up for these privileges enjoyed by the few carriers involved.

First, as to the transshipped or rehandled cargoes, the record shows that only three carriers participated in these operations and enjoyed the substantial savings in assessments by being excepted from the tonnage assessment. The three carriers are Sea-Land Service, Inc., United States Lines, and the McAllister barge service. These three moved approximately 84,000 transshipped or rehandled containers in 1982–1983. Sea-Land moved 57 percent, U.S.L. moved 23 percent, and McAllister, 20 percent. (PRMSA reported no such containers and only 78.4 excepted man-hours of all kinds.) (PRMSA op. br. at 73.) All together, they paid less than $3,068,089 to the fringe benefit funds in 1982–1983, which figure is the total man-hour assessment raised from all excepted cargoes. (PRMSA op. br. 74, citing Ex. 41 at 31.) These 84,000 containers granted "excepted" treatment,

i.e., free from the tonnage assessment but not the man-hour assessment) comprised 12 percent of the containers which were subject to the tonnage assessments in 1982–1983. (Ex. 46 at 13.) To obtain some idea of how much a savings it was to Sea-Land and U.S.L. not to have to pay under the tonnage assessment and why PRMSA is upset, consider how much per container the two carriers paid in 1982–1983 under this favored treatment. Dividing total payments by containers, Sea-Land paid an average of $23 per container. For U.S.L., the figure is $13.05 per container. (See container and payment data set forth in PRMSA op. br. at 73–74, and record citations to the data.) What does the reader then think was the reaction of PRMSA, which in 1982–1983 paid an average of $272 per container ($16.1 million divided by 59,142 containers)? (PRMSA op. br. at 166 and record citations therein.) PRMSA noted that the burdens allocated to the containerized carriers were in this instance somewhat uneven. PRMSA further points out that had Sea-Land and U.S.L. paid under the tonnage formula, Sea-Land would have paid something like $11.3 million instead of $1 million. U.S.L. would have paid $4.6 million instead of $252,995, which it actually paid. (PRMSA op. br. at 74 and footnotes showing how these estimated figures were derived; note that the $8.20 per ton figure is an average between $7.50 and $8.90 to account for the mid-year increase in the assessment rate.) Thus, PRMSA notes that Sea-Land and U.S.L. did not have to pay some $14 million, being excepted from the tonnage formula, and that, furthermore, as also in the case of domestic cargoes, U.S.L. does not actually pay under the $5.50 per man-hour rate but under a formula which approximates that rate. Under Dr. Silberman's alternative formula, which would reduce the tonnage rate of assessment from $8.90 per ton to $5.90 per ton, PRMSA states that Sea-Land would have had to pay $8.3 million more for its transshipment operations and U.S.L., $3.5 million. PRMSA states that these figures show the degree to which Sea-Land and U.S.L. have been favored in their transshipment operations.

The third carrier enjoying a special privilege is a non-member of NYSA, the McAllister barge service, which operates barges between New York and Boston/Providence. PRMSA shows that this carrier lives off the exception granted to it by NYSA–ILA and also urges removal of this special treatment. As I discuss later, however, I can distinguish between McAllister and Sea-Land/U.S.L. and find offsetting considerations which, in my opinion, warrant continuation of the special treatment for the barge service.

The Justification for Special Treatment

PRMSA contends that every containerized carrier obtained more or less the same benefits from containerization and should therefore share the cost burdens of funding the compensating labor benefits (GAI) equally absent compelling reasons justifying special treatment. Hence, PRMSA argues that the Sea-Land relay operations and the U.S.L. rehandling or transshipment operations have been granted extraordinary favoritism without jus-

tification. Furthermore, not only did those carriers enjoy huge monetary benefits under the "excepted" basis, PRMSA's evidence shows that they did not even pay their own direct Type I costs in 1982–1983, which, according to Dr. Silberman, would have required them to pay at least $6.35 per man-hour instead of the $5.50 provided in the formula. Therefore, other carriers must have contributed toward Sea-Land's and U.S.L.'s direct, Type I costs. (PRMSA op. br. at 76.) No one supports the idea that some other party should pay a part of a first party's direct costs or the costs of fringe benefits associated with the labor that the first party employs. Mr. Scioscia of U.S.L. agreed with such principle, as PRMSA notes. (PRMSA op. br. at 76 n. 41, citing Tr. 808.) What, then, is the justification for such favoritism?

Sea-Land, U.S.L., and McAllister offer evidence in defense of their special treatment to the effect that without such treatment they might leave New York and thereby aggravate the fringe benefit cost situation by removing work opportunities from the Port. A carefully examination of the Sea-Land and U.S.L. defenses shows that such developments are unlikely.

Sea-Land's witness, Mr. Sutherland, testified candidly in the interests of his company. He had submitted written testimony stating that Sea-Land would be forced to "seriously consider" discontinuing its relay operations in New York if a tonnage assessment were to be imposed. (Ex. 30, his testimony, at 2.) Mr. Sutherland, as PRMSA points out, never stated that it *would* discontinue the relay operation, only that it would "seriously consider" doing so. (PRMSA op. br. at 81–82.) However, Mr. Sutherland testified that Sea-Land would also consider a new relay system even if the assessment were raised from $5.50 to $5.55 per man-hour. (Tr. 725–726.) However, Sea-Land has such a well-established relay system which depends upon the present use of ports and terminals in a certain configuration that a shift of relay operations from New York would require major modifications in Sea-Land's operations. Such modifications do not appear likely to occur merely because Sea-Land would have to pay $6.00 or so per ton in assessments at New York.

The facts show that because of the way Sea-Land operates its European and Central American/Caribbean services and the way it calls at ports in its various services with its oceangoing ships, there is no port north of Florida at which Sea-Land could interchange cargoes between any European and Central American/Caribbean service other than the Port of New York, and to avoid New York, Sea-Land would have to make significant changes in its vessel deployment. (PRMSA op. br. at 82–83, citing numerous record references.) This is shown by detailed operational facts about Sea-Land's present services, which facts show that only the Port of New York (through Elizabeth, New Jersey) and Portsmouth, Virginia are served with its line-haul vessels in the North Atlantic, which call at certain South Atlantic ports down to Jacksonville. Sea-Land operates two European services out of Elizabeth as well as its service to Puerto Rico, and calls

at certain South Atlantic ports for one service or the other. (PRMSA op. br. at 82–83 and numerous record citations to Mr. Sutherland's testimony.) To operate these various services, Sea-Land uses Elizabeth as by far its major calling port, utilizing vessels with far more capacity than those calling at Portsmouth, which originate relatively little cargo. Furthermore, its feeder services between Baltimore, Boston, and New York do not stop at Portsmouth because they must connect with the three oceangoing vessels which serve Elizabeth. Sea-Land has an exclusive-use terminal facility in Elizabeth with space and capacity which dwarfs Portsmouth, and Sea-Land advertises its Elizabeth facility as one of its world-wide "principal terminal facilities" in its stock-offering prospectus. To leave New York would require Sea-Land to make major modifications in order to carry on its two European services as well as its Central American/Caribbean service, which the facilities at Elizabeth are capable of handling. Such a change would require Sea-Land to obtain new facilities other than Portsmouth and a substantial rearrangement of its line-haul oceangoing ships and some way to maintain its connections for its Boston or Baltimore relay service. There is, furthermore, no testimony given by Sea-Land that particular cargoes handled in the relay services would be lost to Sea-Land if Sea-Land had to pick up its $6 per ton or so share of GAI-related costs at New York.

As I mentioned earlier in this decision, the Commission is entitled to make certain common-sense inferences from the facts even if there is no concrete evidence as to what might happen. The common-sense inference here is that it is not very likely that Sea-Land would abandon or substantially reduce its use of its vast Elizabeth facilities merely because of a tonnage assessment. The preponderance of the evidence, in other words, indicates that Sea-Land would remain in New York and attempt to maintain its present configuration, relays, and service patterns to the fullest extent possible. (As I mention later, however, the assessment agreement maintains a Contract Board to hear requests regarding particular hardship commodities. Although there is no evidence of any such commodity that needs special treatment to continue under the Sea-Land relay system via New York, the mechanism is there.)

As to United States Lines, there is no credible evidence from which I can infer that if U.S.L. pays its share of industry-wide obligations at New York under Dr. Silberman's reduced tonnage assessment formula, it would cause a significant change in U.S.L.'s operations from New York. The U.S.L. witness, Mr. Scioscia, appears not to have understood accurately the impact of the Silberman formula which would have added approximately $3.5 million in contributions in 1982–83, not $14.5 million which he believed. (PRMSA op. br. at 85–86, and record citations therein.) On cross-examination, Mr. Scioscia, who is U.S.L.'s Executive Vice President, Pacific Service, appeared not to be too familiar with U.S.L.'s East Coast feeder services and knew virtually nothing about possible plans to redeploy U.S.L. vessels in its feeder services, which plans are formulated at a higher com-

pany level. (PRMSA op. br. at 87, and record citations therein.) U.S.L. is in the process of implementing a new eastbound round-the-world service with 12 new huge ECON vessels which will call at only Savannah and New York. On cross-examination, Mr. Scioscia acknowledged that the use of New York by the ECON vessels was not threatened by proposed assessment adjustments. (Tr. 792–793; 797, cited by PRMSA, op. br. at 88.) U.S.L. has also changed some of its transshipment operations as a result of its new ECON service and has changed other operations for reasons unrelated to this proceeding. U.S.L. also has transshipment operations between Europe and South America and Africa which are unlikely to be changed since New York is the only port at which the relevant services cross. Evidence of record also strongly indicates that U.S.L. would not leave New York for Savannah and transship using the new ECON class ships at Savannah because of inland drayage costs and disruption to shipment schedules. Therefore, any significant change in the U.S.L. transshipment operations appears to be unlikely even if U.S.L. were called upon to pay its share of assessments under Dr. Silberman's man-hour/tonnage formula. However, as PRMSA notes, even if two-thirds of U.S.L.'s transshipped or rehandled containers left New York as a result of the Silberman formula, the net result would be that the U.S.L. contribution would be over one and one-half times the increase in GAI caused by the lost hours. (PRMSA op. br. at 90.) The appeal mechanism as to any particular hardship commodity would still remain, as mentioned earlier, although there is no evidence that any particular commodity moving via a U.S.L. transshipment service would be lost to New York if U.S.L. were to pay its share under the Silberman formula.

The other type of cargoes granted favoritism under the current formula by which they are assessed only under the man-hour basis and are "excepted" from the normal tonnage assessment is domestic cargoes, meaning cargoes moving between ports within the continental United States (thereby excluding Puerto Rico). This domestic exception was one of the original exceptions in the previous mixed man-hour tonnage formula approved by the Commission in *Agreement No. T–2336*, cited above, in 1970, which formula was abandoned in favor of the full tonnage basis (with the various special assessments discussed), which formula is currently in use.

Whatever was believed about the relative size of the domestic trades in 1970, the record here shows that it is substantial. In contract year 1982–1983, 20,056 containers moved through New York in the domestic trade, of which almost all were moved by U.S.L. (19,500). It is estimated that the number of tons in this trade carried by U.S.L. was over half a million in the contract year. Under the man-hour "excepted" rate of the current formula, U.S.L. which paid under a formula which approximated the $5.50 per man-hour rate, U.S.L. contributed $195,000 to the total package of labor fringe benefit obligations, i.e., an average of $10 per container. This is contrasted with PRMSA's contribution of $272 per container on

the average. As mentioned earlier, according to Dr. Silberman, payments at $5.50 per man-hour do not even meet costs of fringe benefits associated with current utilization of labor (i.e., Type I costs), must less make any contribution toward the industry-wide GAI-type costs caused by displacement of labor by containerization. Thus, as PRMSA argues, the formula requires other carriers to pay for a share of U.S.L.'s direct-type labor costs and for U.S.L.'s share of funding the industry-wide costs as well. (PRMSA op. br. at 100, citing Ex. 41 and 32.)[40] PRMSA estimates that U.S.L. would have had to pay $4.6 million under the regular tonnage formula in 1982–1983. (PRMSA op. br. at 100). Under the Silberman formula, this would have been about $3.3 million. (PRMSA op. br. at 86 n. 47.)

This special treatment granted U.S.L.'s domestic cargoes is defended by NYSA and U.S.L. in several ways. The obvious first defense is that the cargoes are subject to diversion via inland carriers (truck or rail). U.S.L. also defends against having to pay under the tonnage formula because of the financial impact on the service. However, there is considerable examination of these defenses on the record, and they do not emerge intact after such examination. The original written testimony of the U.S.L. witness seemed rather ominous, indicating a serious possibility that U.S.L. might abandon New York or otherwise curtail its domestic service if asked to pay the tonnage assessment rate. On cross-examination, however, many of these omens evaporated, and the evidence failed to show that the U.S.L. domestic service was instituted in reliance on the "excepted" treatment at New York or that U.S.L. would delete New York as a port of call with its new ECON vessels or that is might abandon its all-water Far East service. (PRMSA op. br. at 101–102, and record citations therein.) As PRMSA notes, what was left were allegations that U.S.L. might cease moving intercoastal cargoes, might reduce its Far East service, or might divert New York intercoastal cargo to Baltimore. However, there is evidence which significantly undermines these allegations. This evidence is described in detail in PRMSA's op. br. at 103–111, with ample citations to the record. The main points are as follows.

U.S.L. operates its intercoastal service as part of its larger all-water service between the Far East and the East Coast, and that service is operating at full capacity throughout the year. Indeed, during peak seasons U.S.L. has been unable to satisfy the demand for eastbound intercoastal space and has even had to turn away business offered by canned goods shippers.

[40] This proceeding involves the lawfulness of the current assessment formula and how it should be modified if shown to be unfair and discriminatory. It appears, however, that for practical reasons related to difficulty in determining some man-hours spent in repositioning containers, U.S.L. pays under a formula which is not quite the same thing as the $5.50 per man-hour rate. For its domestic trade, the formula works out to an average of $5.00 per ton; for its overall "excepted" services, i.e., transshipped as well as domestic, the average worked out to something lower. (See PRMSA op. br. at 77 and 101 n. 56, and record citations shown.) PRMSA calls the use of the U.S.L. formula a "special bonus" or "a favoritism piled on top of a favoritism." *Id.*

U.S.L.'s new ECON vessels will supplement the Far East service and when the first ECON vessel arrived in New York in late July 1984 it was entirely filled so that the U.S.L. chairman and president was reported to have stated that more cargo could not have been placed aboard the ship even with the shoehorn. To prepare for its new ECON vessels in New York, U.S.L. has invested in extensive terminal improvements. The U.S.L. witness acknowledged that the Far East ECON service would not be threatened by assessment adjustments at New York. (Tr. 389–93; 797). It was also acknowledged that even if most of the domestic containers carried during the 1982–1983 contract year by U.S.L. as part of its eastbound Far East service became unavailable, it would be reasonable to expect that U.S.L. could replace those cargoes with additional cargoes from the Far East. Further evidence indicates that the domestic cargoes are essentially an incremental by-product of the U.S.L. Far East service. There is conflicting testimony about how much volume such cargoes comprise compared to the total carried in the Far East vessels. However, there is no conflict that revenue per container for the intercoastal cargoes is much lower than that for the Far East to West or East Coasts. (The exact figures are confidential but can be seen in the confidential portion of the record.) Examination of estimated revenues earned on the various trades strongly indicates that the U.S.L. domestic service, as PRMSA calls it, as far as revenue is concerned, "represents the tail and not the dog which wags it." (PRMSA op. br. at 107.)

What the above seems to indicate is that U.S.L.'s Far East vessels would make their sailings under any circumstance and that the domestic, intercoastal cargoes are what is known as "incremental" or "added traffic." In rate case parlance, incremental traffic is often priced below fully distributed costs, the theory being that if such cargo meets direct handling costs and contributes to indirect overhead-type costs, it is worth carrying. If so, then rates could be lowered to meet possible inland competition so long as they still met the direct-type costs of handling the cargo (Ex. 41 at 37). There is no reliable evidence showing that inland competition would require U.S.L. to reduce its domestic rates below direct costs if U.S.L. became subject to the tonnage assessment at New York. (A somewhat questionable cost study on a per-container profitability basis using fully allocated rather than marginal costs was done by U.S.L. but was not even introduced by U.S.L. It has so many flaws and misunderstandings of the Silberman formula that I cannot rely on it. These flaws are detailed in PRMSA's op. br. at 108–110.)

There is other evidence, furthermore, which seriously undermines U.S.L.'s allegations. This evidence shows that at least for one major customer, U.S.L. already employs incremental pricing per container and that U.S.L. has increased its domestic rates at least once recently, which rate increase its shippers apparently absorbed. (Ex. 58; Tr. 816–817; 818–820; Ex. 60.) Moreover, there is evidence that certain domestic shippers of U.S.L. prefer

the U.S.L. service over that of inland carriers because the water service offers greater security from pilferage and breakage. This would tend to shield U.S.L. from inland rate competition. Diversion to Baltimore seems unlikely since U.S.L.'s vessels already call at Baltimore, yet foreign cargoes continue to New York on these vessels and pay the full tonnage assessment. This indicates that it is still cheaper to carry to New York on those cargoes than to discharge at Baltimore and pay inland drayage from Baltimore. Furthermore, major receivers of U.S.L.'s domestic cargoes are located in the New York city area. It is estimated that under the Silberman formula, U.S.L. would typically pay $183.80 per container at New York whereas drayage from Baltimore would approximate $400 per container. Finally, even if application of the Silberman tonnage formula were to occur, and 75 percent of U.S.L.'s domestic containers ceased to move through New York, PRMSA estimates that there would still be a net increase in contribution to the NYSA–ILA fringe benefit program, something close to twice the increase in GAI that would occur. (PRMSA op. br. at 111–112.)

Comparison With PRMSA's Evidence of Diversion

The above discussion does, however, indicate an interesting paradox. The emphasis of this case is on the current tonnage formula and how it affects the Port of New York and PRMSA, whether it fairly allocates cost burdens, etc. NYSA and the ILA are properly concerned over the loss of cargo to other ports, as the record indicates, and, indeed, the joint NYSA–ILA Contract Board is charged with the duty of protecting marginal cargoes from diversion to other ports. However, when Sea-Land and U.S.L. argue that they might divert to other ports or would seriously consider doing so if they lost their special "expected" treatment for transshipped, rehandled, or domestic cargoes, NYSA defends them and will not alter its current formula. However, when PRMSA presents a virtual "smoking gun" showing diversion in fact to a non-ILA carrier operating out of the Philadelphia area, complete with names and locations of shippers even in New York's backyard, NYSA rejects the evidence and finds all sorts of reasons not to believe that its tonnage formula has anything to do with the diversion. Thus, PRMSA has shown a list of 40 shippers from New York's backyard who have switched their business wholly or partly to the non-ILA carrier in Pennsauken, New Jersey. (PRMSA op. br. at 94, citing Ex. 45 at Ex. BC–4.) Even NYSA's witness, Mr. Sclar, who defined "diversion" to an extremely narrow degree, admitted that cargo to and from Brooklyn which moved via a port other than New York, would be "diverted" cargo. But PRMSA showed four examples of shippers located in Brooklyn who switched from PRMSA to the carrier in Pennsauken, New Jersey, which is in the Philadelphia area. (PRMSA op. br. at 95 n. 52, and record citations therein.)

PRMSA's case, as I have discussed, is based on the gross disparity in burdens among carriers which result from the current tonnage formula

and not essentially on diversion of cargo. (The Port Authority's case, on the other hand, is based primarily on loss of cargo to other ports caused by the competitive handicap of a $200–300 per-container differential at New York resulting from the current formula.) There are other reasons why shippers might choose different carriers, and it is not possible to show that every ton of cargo that moves via one carrier rather than another does so solely because of the tonnage formula. However, PRMSA's evidence of the diversion of business to Pennsauken comes as close to a "smoking gun" as one could expect in proceedings like this.[41] Certainly it is more probable than not that the current formula is significantly responsible (albeit not perhaps solely responsible) for PRMSA's loss of business to the non-ILA carrier. Yet NYSA's last answer to this evidence is to tell PRMSA to go sue the other carrier. (See NYSA r. br. at 15.)

The Exemptions for Empty Containers, Stuffing and Stripping, and Maintenance Activities

The other major category of special treatment under the current formula relates to three activities, namely, the handling of empty containers, the stuffing and stripping of cargo into and out of containers, and maintenance activities. Unlike the previous category, which paid under the "excepted" man-hour basis, these three activities pay absolutely nothing under the current formula, i.e., under either the "excepted" man-hour basis or the normal tonnage rate. Thus, all other carriers paying under the current formula must pick up not only the share these activities would pay toward the industry-wide Type II obligations but the currently employed Type I costs as well in their totality. Such a free ride, it would seem, warrants compelling justification. Yet, except for the maintenance activity, there is little or none. (Indeed, as noted earlier, even NYSA's Mr. Barbera, a terminal operator, questioned why empty containers and LCL cargoes paid nothing under the correct formula.) Furthermore, in the case of stuffing and stripping, NYSA cannot rely upon the defense of possible loss of this activity if it pays something under the formula because the activity is mandated by the 50-mile Rules on Containers which are in effect, albeit under challenge in a separate Commission proceeding, Docket No. 81–11.

For the handling of empty containers and for stuffing and stripping, PRMSA is asking only that they pay under the "excepted" man-hour basis but under Dr. Silberman's calculations, so that they would at least meet their own direct costs of funding fringe benefits of currently employed longshoremen. PRMSA would retain the total exemption for maintenance activities because of the substantial likelihood that any payment for that

[41] For a complete discussion of the evidence showing the connection with the tonnage formula and the diversion to Pennsauken, see PRMSA op. br. at 90–99, and record citations therein; 112–113. I find that PRMSA has made out a case of diversion and that the tonnage formula is a strong contributing factor.

activity would lead to utilization of non-ILA deep-sea labor and consequently aggravate the funding situation.

According to data obtained by PRMSA, there were 283,487 empty containers which moved through New York during contract year 1982–1983. (PRMSA op. br. at 113, and record citations therein.) They, according to those data, accounted for 26 percent of the total number of containers which moved through the port during that time. The presence of so many empty containers is explainable when one considers the Port Authority's case, in which the Port Authority, by the way, also urges an end to these special privileges, without worrying that such treatment may divert cargoes from the Port. The problem seems to be, to some extent, that a minibridge carrier moves loaded containers from the Far East through West Coast ports, discharges the cargo somewhere inland, then moves the empty containers to New York to be loaded onto what could be the same ships for subsequent carriage back to the Far East. Evidently the Far East trade is imbalanced with not enough cargo to fill all the containers returning to the Far East. Freeing such empties from any assessment obviously encourages any such carrier to position its containers in such a way as to move the empties through New York rather than through any other U.S. port which would require a payment under a man-hour formula. But, as PRMSA notes, handling these empty containers requires ILA labor and results in costs to fund the fringe benefits attributable to every hour of labor hired to handle the empties. Therefore, PRMSA argues, why should everyone else pay for the peculiarities of an imbalanced trade and for a carrier's direct, Type I costs? I see no evidence justifying this free ride and agree with PRMSA and Dr. Silberman that it should be terminated.

Stuffing and stripping activities are rather substantial. Approximately 1,139,784 man-hours were utilized for stuffing and stripping in contract year 1982–1983, about 9 percent of total man-hours. (PRMSA op. br. at 115, and record citations therein.) The activity also accrues fringe-benefit costs for every man-hour utilized. It is estimated by Dr. Silberman that these direct costs amounted to over $7.2 million, all of which was thrown onto the backs of the other carriers paying under the tonnage formula. Furthermore, as PRMSA argues, it does no good for a carrier to reduce the need to stuff and strip at the terminal because, under the tonnage formula, such carrier pays according to the volume of tons loaded or unloaded on vessels, and, furthermore, those carriers doing more stuffing and stripping enjoy a subsidy from those doing less. (PRMSA op. br. at 116.)

The justifications offered by NYSA for this free ride are the opinions of Mr. Sclar, which I find to be inscrutable and consistent with my earlier observations that I can give that witness's opinions little weight. As PRMSA notes (PRMSA op. br. at 116–117) Mr. Sclar states that the labor costs associated with the stuffing and stripping are covered by the current formula. So are all fringe benefit costs but that does not answer the question as

to why should the free ride on the activity cause everyone else to pay for it. Mr. Sclar then suggests that making this activity pay even under the lower man-hour basis would not be justified because the hours of labor spent on the activity benefit the whole port by reducing GAI costs. So they do, but they would continue to do that unless the activity would cease as a result of having to pay the lower man-hour rate. There is, however, not only no evidence that paying such a rate would terminate such activity but, as I noted earlier, the activity will continue anyway because it is required under the Rules on Containers. I therefore see no valid reason to continue the free ride on stuffing and stripping and agree with PRMSA (and the Port Authority, and probably NYSA's own Mr. Barbera) that the free ride should come to an end.

As to maintenance activities, PRMSA was faced with a dilemma as to the position to take. Like stuffing and stripping, this activity comprised slightly over 1 million man-hours in 1982–1983, approximately 9 percent of total man-hours at the Port during that time. (PRMSA op. br. at 117, citing Ex. 41.) This activity also resulted in direct Type I fringe benefit costs amounting to approximately $6.9 million in 1982–1983, under Dr. Silberman's calculations. This free ride would require all other carriers to pick up these costs. Since PRMSA does not use ILA deep-sea labor for maintenance, it would not harm PRMSA to argue that the other carriers using ILA deep-sea labor for maintenance work should pay under the man-hour rate. However, here, as in other examples of a statesmanlike position, PRMSA and Dr. Silberman recognize the obvious fact that with the immediate presence in New York of a different labor force not under the ILA deep-sea contract, every carrier or terminal operator would shift to the other labor force (ILA "Metro") which is readily available, at New York, and that this shift would increase GAI costs. This is what PRMSA calls "overriding considerations which justify departing from the general rule." (PRMSA op. br. at 118–119.) (The same alternative labor force, it should be noted, is not available for stuffing and stripping, which require ILA deep-sea labor.) Therefore, even though continuing the free ride means that PRMSA's tonnage assessment increases like everyone else's, PRMSA and Dr. Silberman would leave it untouched.[42] As I have noted, PRMSA and Dr. Silberman also take this statesmanlike position for the good of the Port in another area, namely, by placing a cap on the contribution which breakbulk cargoes should pay at New York in order to preserve the intensive use of labor by such breakbulk operators and thereby help maintain hours of labor at the Port to the benefit of all, even though such a cap places a burden on other carriers paying under the normal tonnage rate. (PRMSA op. br. at 199–122.)

[42] The Port Authority's witness, Mr. Donovan, would, however, assess maintenance under the man-hour portion of his proposed formula. (Ex. 31.)

The McAllister Barge Exception

The other carrier of the first type which receives favored treatment under the current formula (i.e., transshipped/rehandled, domestic) is McAllister Brothers, Inc., which operates barges between New York and Boston/Providence. The favored treatment which McAllister receives is that it is assessed under the man-hour "excepted" rate of $5.50 per man-hour, which is what Sea-Land paid and what U.S.L. approximately paid under its own calculations. Thus, McAllister enjoys no free ride as do the empty containers, stuffing and stripping, and maintenance activities just discussed. However, at $5.50 per man-hour, other containerized carriers pay for its share of the GAI-related costs and some of McAllister's own direct Type I costs, under Dr. Silberman's calculations. PRMSA urges that the special treatment for McAllister terminate and that McAllister pay the normal tonnage assessment under the reduced Silberman rate. (PRMSA op. br. at 77–81.)

PRMSA concedes that the impact on McAllister of removing its excepted treatment "would be substantial." (PRMSA op. br. at 78.) However, PRMSA argues that the McAllister barge service is entirely a creature of this "excepted" treatment and exists solely because of the "exception" and its ability to avoid the tonnage assessment completely. Thus, PRMSA and all other carriers paying under the tonnage assessment are bearing the cost of keeping this barge service alive. Mr. Mullally, McAllister's witness, freely acknowledged that if the formula is changed to require McAllister to pay the tonnage assessment, "all of the Boston/Providence container traffic would be diverted to competing truck transport." (Ex. 30, his testimony at 4.)

McAllister transported more than 17,400 containers between New York and Boston/Providence during 1982–1983. (*Id.* at 3.) Mr. Mullally estimates at least 100,690 man-hours he employs at New York that would be lost if his business at New York terminates. (Ex. 36, his surrebuttal testimony at 3.) Almost half (47.5 percent) of all the containers handled at Boston in 1983 were transshipped via New York, and Massport strongly urges protection and special treatment for this operation. (See Port Authority op. br. at 60–61, and record citations; also Massport's op. br.) Indeed, Massport actively advertises and encourages carriers serving New York to avoid the NYSA tonnage assessment by shifting from truck to barge. (Ex. 44 at Ex. FP–1.)

PRMSA argues that even if man-hours on the barges were lost, they would be made up to some extent by truck-related man-hours, as Mr. Mullally himself conceded. PRMSA presents the argument that even if those hours are lost by McAllister, if 20,000 containers would still move to or from Boston via truck, that would produce over $3.4 million in contributions to the fringe benefit funds which would far offset the increase in GAI. (PRMSA op. br. at 80.)

Although PRMSA is willing to forego any assessment on maintenance activities for the good of the Port and recommends placing a cap on assessments of breakbulk cargoes also for the general good of the Port, although this means that the containerized carriers as a whole must pick up someone else's shares (in the case of maintenance, some $6.9 million) PRMSA objects to having the industry subsidize the barge service. Although PRMSA's evidence and logic is, for the most part, appealing, I cannot find under a standard of fairness and unjust discrimination that killing McAllister is the right thing to do.

The death of McAllister's service at New York may, to some extent or other, be made up by truck-related service, and the Port of New York may thereby not suffer a net loss if the barge service terminates. (The possibility of McAllister's relocating to Halifax was suggested by Mr. Sclar but Mr. Mullally, whose business it is, testified to no such thing.) It seems to me that we are not merely talking about the survival of the McAllister company or service, but the interests of the Port of Boston and Providence and possibly shippers as well. The MLAA asks the Commission to protect the interests of "carriers, shippers or ports." Shifting McAllister from the man-hour payments to the tonnage payments under the formula would admittedly have a lethal effect on McAllister since the containers would move more cheaply by truck to and from Boston. Thus, we would wave goodbye to the carrier, McAllister. Second, since 47.5 percent of the Boston containers handled by longshoremen at Boston are transshipped via New York, the death of McAllister's service and consequent shift to trucks would eliminate substantial work for the Boston longshoremen. Therefore, another port suffers. Third, though there is no shipper testimony, the routing via barge through New York offers Boston-area shippers an alternative service, which would disappear. Therefore, shippers would lose something. True, one can argue, as may PRMSA, that private industry at New York, which has its own costs and problems, ought not to be called upon to subsidize McAllister or the Port of Boston, and there is no evidence on this record that any New England shippers are asking for a choice between truck and water service through Boston. However, McAllister is not Sea-Land nor U.S.L. but a single-operation carrier. Furthermore, if McAllister pays under the man-hour segment of Dr. Silberman's proposed formula, at least no other carrier would have to pick up any share of McAllister's direct Type I costs.

I would call the decision to save McAllister one reached on the basis of what PRMSA calls "overriding considerations which justify departing from the general rule," which PRMSA cited in support of its recommendation that the industry carry some $6.9 million to subsidize direct Type I costs of maintenance labor. In trying to make the current formula more equitable among carriers and eliminate unjustified special treatment and free rides, I do not believe it is also necessary to kill a carrier, which it seems rather obvious from Mr. Mullally's testimony, would happen at

New York unless McAllister can pay under the lower man-hour "excepted" rate.[43]

Special Discount for the Puerto Rican Trade

After presenting formidable evidence and arguments in support of its proposed alternative formula, which would abandon the current tonnage formula with virtually all of its special privileges, favoritisms, and free rides and would allocate cost burdens more even-handedly among the containerized carriers, PRMSA requests another feature, namely, a 25 percent reduction from the tonnage rate applicable to carriers serving the Puerto Rican trade. To justify such a special discount, PRMSA cites undisputed evidence of the island's economic difficulties, the fact that it is an American trade subject to certain infirmities, and numerous cases in which the Commission has shown concern for the Puerto Rican economy. (PRMSA op. br. at 122–140.) I find PRMSA's efforts to persuade to be effortful and do not agree that the 25 percent discount is proper.

There is no dispute as to the underdeveloped nature of the Puerto Rican economy, and the evidence in this proceeding illustrates the problems of that economy rather vividly. (See PRMSA Op. br. at 122–127.) The island is dependent on maritime trade, being over 1,000 miles from the nearest mainland U.S. seaport. It is densely populated (3.3 million people in an area of 3,459 square miles). Its citizens are American citizens. It has extremely limited natural resources and must depend upon imports to satisfy its people's need for food and other necessities of life. Indeed, the sum of the value of the island's imports and exports has exceeded its gross product during each of the last ten years. PRMSA was itself established because of the island's need for a reliable, economical maritime transportation system and is required to provide an efficient transportation service at the lowest possible cost. Increases in maritime transportation costs serve to raise prices of food and raw materials needed to run Puerto Rico industries.

The per capita income of Puerto Rico in 1982–1983 was $3,900, only 37 percent of the United States average of $10,517, and in 1981, was only about one-half that of the mainland state with the lowest per capita income. Unemployment for March 1984 was 21.9 percent, nearly triple the 7.8 percent figure for the United States. Unemployment benefits provided by the Puerto Rican government are minimal and, as PRMSA notes, are

[43] There is a minor complication which accompanies giving McAllister's barges special treatment for the carrier's sake as well as that of Boston/Providence or shippers who might wish to retain a choice between truck service and water service through the Port of Boston or Providence. That is that other carriers besides McAllister might be handling some of the 47.5 percent of the Boston containers transshipped in New York. Unless these other operations are granted similar treatment, there would be an unfair discrimination favoring McAllister. Therefore, other transshipment operations competing with McAllister (and it does not appear from the record that they are substantial) would have to be accorded similar treatment. Opponents of the McAllister special treatment will, of course, attack my decision and can cite this additional exception as ammunition. However, I still do not believe that McAllister Brothers, Inc. should die or that Massport's pleas in McAllister's behalf should be turned away.

far below the GAI benefits provided under the current NYSA–ILA labor contract. The Puerto Rican economy suffered setbacks in recent years, i.e., a recession in 1975 and decrease in federal assistance since 1981. However, the Puerto Rican government implements programs seeking to restore economic growth and it was predicted that such growth would resume in the 1983–1984 fiscal year. Among the programs are the encouragement of service and high technology industries, which require that Puerto Rico have a satisfactory maritime transportation network at low costs so as to make Puerto Rico a center for exports.

Puerto Rico is considered to be part of the United States for purposes of federal shipping laws, therefore ships serving the trade must be American-flag and mainly crewed by American citizens. These factors result in higher operating costs. Labor costs are also higher than those in foreign trades, the Puerto Rican trade served by the ILA or other American unions at both ends. The current assessment formula, furthermore, does not grant the Puerto Rican trade the "excepted" treatment granted to domestic, intercoastal trades. The impact on PRMSA is significant. PRMSA pays (through PRMMI) close to $300 per loaded container under the current formula and during the 1982–1983 contract year, 13.1 percent of PRMSA's revenues from cargo passing through the Port of New York were consumed by the NYSA assessment. It is Dr. Silberman's opinion that the high costs of this agreement place burdens on essential foodstuffs and on capital goods needed for Puerto Rican industry.

In consideration of all of the above, PRMSA's expert witness, Dr. Silberman, recommends a 25 percent discount off the normal tonnage rate under his proposed formula. Such a reduction, according to Dr. Silberman, would have saved PRMSA $2.8 million in contract year 1982–1983. He concedes, however, that "I recognize that the 25 percent figure has its basis in my judgment, rather than in a quantitative analysis of the precise discount required." (Ex. 465 at 28.) But he goes on to state that "in my judgment, some reduction in assessment, beyond that needed to achieve equality among carriers, is required on account of the trade's special situation." (*Id.*)

As mentioned, PRMSA puts forth much case law and argument to the effect that the Commission has recognized the special needs of the Puerto Rican economy in past cases and points to the different treatment accorded the Puerto Rican trade from that granted domestic, intercoastal trades under the subject formula on the purported basis that such trades had been declining and needed protection, the situation which PRMSA argues applies precisely to the Puerto Rican trade.

Respondents strongly oppose this 25 percent reduction in addition to opposing the Silberman formula. They question why did not PRMSA simply ask for a discount in the first place instead of creating a new formula which would affect so many other parties. NYSA contends, furthermore, that the economic problems of Puerto Rico cannot be attributed to the Port of New York or any other port. Moreover, argues NYSA, the public

interest standard has been removed from the MLAA, and the special consideration given to the Puerto Rican trade by the Commission in the Commission's 1970 decision (*Agreement No. T–2336*, cited above) was designed only to protect Puerto Rican interests from too abrupt a change-over from the previous man-hour formula to tonnage assessments. Moreover, NYSA contends, it is not shown that any cost break to PRMSA will directly flow to the consuming public in Puerto Rico, considering PRMSA's negative financial situation. Finally, NYSA points out that PRMSA has raised its freight rates by about 70 percent since February 1981 while the tonnage assessment rate rose by 52 percent. (NYSA r. br. at 26–27, and record citations therein.)

I find that on this particular question, PRMSA has not tipped the scales in favor of its proposed 25 percent discount. First, as is obvious, the figure is a judgment figure based upon the opinion of Dr. Silberman who concedes that "reasonable men will differ as to what that discount number ought to be . . ." (Ex. 46 at 28.) But it is not merely that the figure is not supported by something more objective or concrete than the witnesses' judgment that leads me to conclude that a special discount is not warranted on this record. There are other factors. Thus, I note that if PRMSA succeeds in this case by obtaining an order modifying the current formula to conform to Dr. Silberman's proposed alternative, even without the 25 percent discount or the suggested increased assessment on McAllister's barges, PRMSA stands to benefit substantially. Furthermore, it is entitled to considerable credit adjustments for the period between the filing of the complaint and the Commission's decision, as the MLAA provides. In other words, one of the best things that PRMSA can do for the people of Puerto Rico is to rid itself of the current unfair formula and obtain the monetary adjustments which will flow from a favorable decision. In previous cases cited by the Commission, PRMSA notes that the Commission considered the needy Puerto Rican economy and exercised some discretion when deciding the cases to help that economy. In this case, the evidence shows that certain carriers are enjoying unjustified "excepted" treatment in the domestic and transshipment areas and others are paying nothing for handling empties and stuffing and stripping. Although PRMSA has shown that all containerized carriers would benefit by termination of these unjustified special privileges, the particular infirmities which PRMSA shows to exist in its trades are factors which indicate that a carrier like PRMSA may well need the relief more than the others. Thus, to some extent, the economic problems of Puerto Rico have not been forgotten. However, there are still other reasons why I do not believe that a further discount is warranted.

PRMSA relies on the previous Commission decision modifying the 1969–1971 assessment agreement in *Agreement No. T–2336*, cited above, as well as on a number of rate cases. However, as NYSA points out, the reasons for modifying that agreement had to do with the fact that the drastic shift to a partial tonnage formula resulted in harsh and sudden cost increases.

It was for that reason as well as for the reason that the Puerto Rican carriers had not been responsible for certain fringe-benefit cost increases that the Commission relieved the Puerto Rican carriers of certain costs, although admittedly the Commission did consider the state of the Puerto Rican economy. See *NYSA* v. *F.M.C.*, 571 F. 2d 1231, 1240 (D.C. Cir. 1978) (''[The Commission's] first-period concessions to the Puerto Rican interests were based on the need to protect the ocean-cargo-dependent economy of Puerto Rico from too abrupt a change-over from man-hour to tonnage assessments.''); *Agreement No. T–2336,* cited above, 15 F.M.C. at 265, 272, aff'd, *TTT* v. *F.M.C.*, 492 F. 2d 617, 627–628 (D.C. Cir. 1974). In the present case, the problem is not to cushion Puerto Rican carriers from the effects of a sudden increase in costs resulting from a change-over to a new formula but to relieve them from the unequal burdens caused by an unfair formula. Furthermore, the MLAA specifically limits the relief to disapproval or change in the agreement and prospective adjustments only, has deleted the ''public interest'' standard from section 15 as it existed under the previous case, and now specifies ''carriers, shippers, and ports'' as the parties to be protected.

Nor do I find that the citations to rate cases are all that helpful to PRMSA's cause. True, in such cases the Commission reiterated the policy that ocean rates to Puerto Rico should be maintained at the lowest possible levels because of the island's dependence on maritime trade, etc. (See cases cited in PRMSA's op. br. at 134–135, and in NYSA r. br. at 26.) But this is not a rate case and we are not simply dealing with carriers' seeking profits and proper ratemaking principles. For example, the leading case cited by PRMSA, namely, *Baltimore & O. R.R.* v. *United States,* 345 U.S. 146 (1953), is a rate case in which the Supreme Court held that a carrier could be required to impose rates that were less than fully compensatory for certain services when such rates would serve the public interest and when the company as a whole was in a profit position. As mentioned, the MLAA no longer contains a ''public interest'' standard but even if it is still in the statute implicitly in the ''unjustly discriminatory and unfair'' standard under which this case is being decided, the NYSA or the NYSA–ILA fund is not quite the same thing as a carrier with an overall profitable service. In fact, as this record shows, and as the Commission knows from previous experience with NYSA in assessment cases, the joint fund from time to time runs a deficit, necessitating borrowing or increases in the assessment rates and the NYSA is a non-profit corporation. The formula can and should be modified to remove the unfair burdens among carriers, including the great burden on PRMSA. However, that is not the same thing as finding that the NYSA–ILA fringe benefit fund is a profit-making carrier that can, in the public interest be called upon to reduce ''rates'' to help a depressed economy in the public interest. In other words, in this instance, I question how far the Commission can order the NYSA and ILA to become participants in the Puerto Rican

economic recovery programs other than by being ordered to follow a fair formula and give PRMSA the prospective adjustments to which it is entitled by law. It should be noted, furthermore, that even in the 1970 decision relieving the Puerto Rican carriers of responsibility for certain fringe benefit costs, the Commission gave those carriers no discount from the tonnage assessment rate for the industry-wide GAI obligations. In other words, PRMSA wants a discount from the tonnage portion of its proposed formula, which tonnage portion is supposed to fund the GAI-type industry-wide obligations. However, notwithstanding the Commission's concern for the Puerto Rican economy, it found that the Puerto Rican carriers should pay the tonnage portion at the normal rate for the GAI costs. *Agreement No. T–2336,* cited above, 15 F.M.C. at 270–272. Not only that, but the Commission, after specifically considering the serious economic problems affecting Puerto Rico in that case, nevertheless found that the Puerto Rican carriers would have to bear about $4.5 million more in assessment costs even under the compromise formula which the Commission had adopted as a means to relieve the Puerto Rican carriers from abrupt, excessive cost increases. 15 F.M.C. at 272–273. Finally, the Commission observed, somewhat as NYSA does in this case, that the Puerto Rican carriers in that 1970 case had themselves instituted bunker surcharges and were seeking rate increases of 18 and 28 percent in other Commission proceedings but were arguing in those other proceedings that such rate increases would not harm the Commonwealth's economy. 15 F.M.C. at 273. In the present case, as NYSA points out, PRMSA itself felt the need for more revenue and therefore increased its rates some 70 percent compounded since February 1981, compared to the 52 percent increase in the tonnage assessment at New York in the same time period. (NYSA r. br. at 26–27.) Furthermore, as regards PRMSA's more recent rate increase in early 1984 (13.5 percent), which was under investigation by the I.C.C., PRMSA answered a protest to the increase by stating that "[T]he claim that a rate increase will harm the Puerto Rican economy is a boilerplate argument of the Mfrs. Assn., an argument heard each time a rate increase is at issue, regardless of the status of the Puerto Rican economy." (I.C.C. Suspension Board Case No. 71131, Reply of PRMSA to Protests, January 9, 1984, pp. 8–9; Ex. 19, Att. C, pp. 101–102.) In refuting the argument that its rate increases would have a detrimental impact on the economy of Puerto Rico, PRMSA further states that "the credibility of this argument is doubtful," citing newsletters which failed to mention increased shipping rates as one of the factors adversely affecting the Puerto Rican economy. (Ex. 19, Att. C, p. 101.) (PRMSA went on to state that it would suffer a net loss even with its rate increase but that such increase was necessary to ensure efficient and high-quality shipping service. *Id.*, at 102.)

In the present proceeding, however, PRMSA is arguing that a further 25 percent discount in addition to the other cost reductions which it would derive if its proposed formula were adopted, is necessary to help the Puerto

Rican economy. But in this case we are not talking about PRMSA's having to pay new, increased costs. Rather the question is whether PRMSA should have received another $2.8 million in credits if the 25 percent discount had been in effect rather than only $3.5 million in credits under the Silberman formula (unadjusted) without such discount. PRMSA op. br. at 166–167.

I therefore conclude that modification of the current formula as Dr. Silberman recommends (absent the 25 percent discount and certain other features discussed above) plus the granting of credit adjustments as the applicable law provides, compensates PRMSA fairly, but that further relief in the form of a special 25 percent discount is excessive and untenable.[44]

Technical Accounting Disputes

The disputes between NYSA and PRMSA do not relate merely to conceptual or theoretical differences between the tonnage formula advocated and currently used by NYSA and the man-hour/tonnage formula advocated by PRMSA. NYSA appears to understand the theoretical difference between Type I costs associated with currently employed men and Type II costs which are industry-wide obligations and are related to men not working because of the advent of containerization. (Of course, NYSA argues that all costs are Type II and are industry-wide, as I have discussed earlier.) However, even if NYSA were to accept the Silberman-type formula, NYSA differs with PRMSA's calculations as to exactly how much of certain costs should fall under Type I and how much under Type II. In each instance, furthermore, where there is a disagreement, NYSA's calculations result in a greater amount of the package falling under the Type II category, i.e., where it would be funded by tons rather than by man-hours. It would be tempting to leave much of this technical area to the post-decision implementation procedure because it involves, to some extent, narrow arguments between specialists in fringe-benefit accounting. However, since the amount of credits which PRMSA should receive from the filing of its complaint on February 27, 1984, to the date of decision, as the MLAA provides, depends upon proper accounting methodology and if the Silberman formula is adopted, future assessments will likewise rely upon these methodologies,

[44] PRMSA also argues that it has shown an appreciable decline in traffic and diversion to other Atlantic coast ports, and that this factor was considered by the Commission in *Agreement No. T–2336*, cited above, as a reason to grant domestic trades "excepted" treatment. (PRMSA op. br. at 139.) There has indeed been a serious decline in loaded containers moved through New York by PRMSA from 87,715 in fiscal 1979 to 63,715 in fiscal 1983, a decline of 27.4 percent. (Ex. 41 at 41.) Par of this decline was caused by recession in the Puerto Rican economy, but part appears to reflect the losses to the non-ILA carrier at Pennsauken. (Ex. 41 at 41–42.) The reduction in assessment costs per container resulting from the Silberman formula from nearly $300 to under $200 (unadjusted by my recommended changes) should help PRMSA vis-a-vis the non-ILA competitor as well as the prospective credits. However, NYSA–ILA Contract Board is supposed to be concerned about losses of cargo from New York under the agreement's terms. If this diversion continues and the Board continues to refuse any relief, it is conceivable that PRMSA may be filing another complaint after the new assessment agreement is filed in 1986.

some decisions are necessary prior to the time of implementation under the post-decision procedure outlined later.

The nature of the disputes are set forth in some detail in PRMSA's op. br. at 141–164, to which there is virtually no reply in NYSA's reply brief. They relate to five areas: The holiday fund, vacations, welfare and clinic, pensions, and administrative costs.[45] Although these areas, to some extent, seem highly technical, on close examination, the arguments are seen to rest upon determinations as to credibility, i.e., on whom to believe and on who is the more persuasive. As discussed earlier, to a considerable extent, I find that Dr. Silberman, who, as I mentioned, among other things, has earned a B.S. in Accounting, summa cum laude, is the more persuasive, and that Mr. Sclar is less so.[46] Also certain other NYSA witnesses I found not so responsive or persuasive in certain areas.

Dr. Silberman has already allocated 67 percent of the total cost package to Type II to be funded by tons, as compared to Mr. Donovan of the Port Authority, who allocated only certain GAI costs (34 percent of the total) to Type II. This, by itself, firms up Dr. Silberman's credibility since it is not in the best interest of a containerized and highly productive carrier like PRMSA to urge more costs to be funded by tons rather than by man-hours. However, there are other reasons why I find PRMSA's evidence and reasoning to be the more persuasive.

First, as to the calculations of holiday payments, NYSA apparently does not dispute Dr. Silberman's conclusion that holiday payments received by currently employed men fall under Type I whereas such payments received by GAI recipients fall under Type II. But NYSA contends that Dr. Silberman failed to include some $5 million of holiday payments received by GAI recipients. Dr. Silberman did not include this amount under Type II because NYSA's own financial statement, which clearly showed payments for GAI recipients for other benefits, showed no similar payments for holidays. The logical conclusion was that the amount shown by the auditors for holiday pay did not include holiday pay for GAI but, instead, holiday

[45] NYSA and PRMSA have also disagreed about breakbulk productivity figures. NYSA contends that Dr. Silberman understated breakbulk productivity and overstated breakbulk hours utilized in 1982–1983, and that this error increased the allocation of Type I costs to breakbulk cargoes, thereby causing Dr. Silberman to recommend a cap on those cargoes, any deficit from their contribution being made up by the containerized carriers as a Type II industry-wide obligation. Under the current formula, NYSA contends, breakbulk cargoes would already pay their share under the tonnage formula. (NYSA op. br. at 85.) However, once again there appears to be a credibility problem. As PRMSA points out (PRMSA r. br. at 29 n. 14), Dr. Silberman had been criticized for using a lower productivity figure of .46 assessment tons per man-hour, which Mr. Sclar himself had used in earlier testimony, and then Dr. Silberman changed to a figure of .66, which Mr. Sclar later used himself. Therefore NYSA ends up trying to impeach its own witness. Moreover, NYSA attacked Dr. Silberman for allegedly overstating breakbulk hours because of his use of the .66 figure, but in fact his estimate is actually slightly lower than NYSA's own proposed figure (3,618,286 hours compared to 3,687,858 urged by NYSA).

[46] I find Dr. Silberman's rebuttal testimony (Ex. 46) to be very well explained and more persuasive on these accounting and methodology issues than the testimony of NYSA's witnesses. His testimony is all the more impressive because he had to obtain data from NYSA's records and work papers and often made concessions or found discrepancies in the NYSA papers which NYSA does not acknowledge. Dr. Silberman is a very impressive, highly qualified expert witness, who writes lucidly and cogently.

payments to GAI recipients were included in the GAI Fund account. Mr. Fier, the NYSA–ILA Treasurer, attempted to rebut Dr. Silberman's conclusion by showing that funds were disbursed from the Vacation and Holiday Fund for GAI recipients. But this rebuttal is unpersuasive because there were also separate disbursements form the Vacation and Holiday Fund for Vacation payments, yet the NYSA Financial Statement shows vacation payments attributable to GAI hours in the GAI fund, not the Vacation and Holiday Fund. In other words, funds were sometimes disbursed in a manner different from the way in which they were carried in the accounts. What is probably a more simple answer to the issue, however, is the fact that if Dr. Silberman was wrong in including holiday payments to GAI recipients in the GAI Fund account rather than in the Vacation and Holiday Fund, NYSA, which has access to its own auditors, could have put in the relevant evidence. Mr. Fier, however, had not communicated with the auditors prior to testifying. Under such circumstances, I am entitled to draw inferences against the position of NYSA. See *Insterstate Circuit* v. *United States,* 306 U.S. 208 226 (1939). Such inference is even more compelling considering the fact that Mr. Fier was asked six times by PRMSA's counsel and twice by myself how he could conclude that disbursements form the Vacation and Holiday Fund meant that the NYSA's auditors accounted for them in the same way, but did not provide a responsive answer, as PRMSA correctly notes. (PRMSA op. br. at 146–147, and record citations therein.)

As to vacation payments NYSA argues that Dr. Silberman should have allocated another $6.5 million to the Type II category. This argument depends on the testimony of Mr. Sclar that the fifth and sixth weeks of vacations should be treated like industry-wide Type II costs and obligations. Mr. Sclar reasons that one of these weeks is attributable to containerization and the other to the fact that the present imbalance of labor compared to available work results in the hiring of more senior men with longer vacation benefits. This position contrasts with NYSA's position that holiday payments as to currently employed men are all Type I expenses. In other words, in this case, NYSA argues that the first four weeks of vacation for currently employed men are Type I costs but the next two weeks are Type II and therefore become industry-wide obligations to fund.

From the outset, the argument that vacation costs attributable to currently employed men, which are essentially substituted for direct wages, should in part be the responsibility of someone who is not currently employing the longshoremen defies logic. Because of the imbalance of labor compared to work opportunities at New York, 86 percent of the workforce are senior workers with maximum vacation benefits. (Ex 46 at 19.) Each hiring employer derives the benefits of such senior men's skills and experience and ultimately derives profits from the use of such labor at the employer's facilities. Having hired senior workers, the employer ought logically to

be responsible for paying the full value of that worker's services and the costs that go with those services, namely, fringe benefits including six weeks' paid vacations. There may be some superficial appeal to Mr. Sclar's argument that containerization has resulted in a shrunken, active workforce consisting mainly of senior men to whom the available work must first be given. But vacations are still merely other forms of direct compensation as are paid holidays, which Mr. Sclar agrees as being entirely Type I costs insofar as currently employed men are concerned, yet ILA workers receive more paid holidays now than they did before containerization. Finally, once again Mr. Sclar appears to have taken a different position when he testified on the West Coast. There he did not contend that an increase in vacation benefits due to containerization should be treated as past or transition costs, i.e., as industry-wide Type II costs. (PRMSA op. br. at 149 n. 76, and record citations therein.) I therefore agree that for 1982–1983, the more persuasive evidence is that Vacation and Holiday Fund payments received by GAI recipients are industry-wide expenses and amounted to $10.7 million, and that Vacation and Holiday Fund payments received by currently employed ILA workers are direct labor costs, and in 1982–1983, amounted to $38.5 million. (PRMSA op. br. at 150–151.)

As to the Welfare and Clinic Fund, NYSA and PRMSA disagree on the calculations. NYSA would place $19.7 million of these costs into Type II and $13.3 million into Type I. Dr. Silberman would place $16.6 million into Type II and $16.4 million into Type I. (PRMSA op. br. at 151 and 152 and record citations therein.) Here PRMSA and NYSA agree on the principle that welfare and clinic costs attributable to retirees and their dependents plus the portion of these costs attributable to retirees and their dependents plus the portion of these costs attributable to GAI recipients should fall under Type II costs. Therefore, Dr. Silberman accepts NYSA's witness O'Neill's theory. However, Mr. O'Neill calculates the Type II figure by adding a proportion of welfare and clinic benefits to total welfare and clinic contributions made on behalf of GAI recipients to arrive at his Type II figure. (PRMSA op. br. at 151, and record citations.) Dr. Silberman criticizes this methodology. He would not add contributions and benefits to arrive at the final figure. Contributions and benefits are not the same thing. No contributions to the Welfare and Clinic Fund are made on behalf of retirees and dependents eligible to receive fund benefits. Instead, their benefits are funded through the contributions made on behalf of all active ILA men, both those currently employed and those on GAI. Dr. Silberman has unscrambled the mix by taking the percentage of hours of non-pensioners attributable to GAI (27 percent, which is the same percentage derived by Mr. O'Neill) and multiplying it against the value of welfare and clinic benefits received by non-pensioners. (PRMSA op. br. at 152; Ex. 46 at 22–23.) The product of this multiplication gave Dr. Silberman the amount of costs attributable to non-pensioners, which was

then added to the amount of costs attributable to pensioners. (Ex. 46 at 22, 23.) The total figure amounts to $16,622,515, which are those welfare and clinic fund expenses attributable to benefits received by still active men (albeit on GAI) and to benefits and those expenses which are attributable to retirees. (See table on Ex. 46 at 22, 23.) All of this package falls into Type II as an industry-wide obligation to get funded by tons. I find Dr. Silberman's methodology to be sound and more persuasive than that employed by Mr. O'Neill and accept Dr. Silberman's corrections to Mr. O'Neill's figure, which would reduce the allocation to Type II costs made by Mr. O'Neill by $3.1 million.

The Pension Liability Allocation Problem

This particular problem involves an extremely narrow, technical dispute concerning allocation of the amount of pension contributions between Type I and Type II. The incredibly complex subject matter involved in this narrow dispute is described in detail in PRMSA's op. br. at 153–160. The parties apparently agree that the pension fund consists of obligations to retirees and to currently enrolled employees. However, the portion of the fund attributable to the financing of pensions of retirees is apparently not now completely funded. There is apparent theoretical agreement as to allocation of portions of the fund between Type I and Type II costs, e.g., Type II costs include contributions applied to funding the unfunded liability attributable to pensioners and GAI recipients. Also, there is agreement apparently in theory that a portion of pension contributions can be attributed to funding the benefits that will be received by current workers. (PRMSA op. br. at 153.) There is, however, disagreement as to what method to use in calculating the amount of pension contributions that are applied to funding the portion of the plan's unfunded liability attributable to the pensioners. (*Id.*, at 153–154.)

It is interesting to note that PRMSA's expert witness, Mr. LoCicero, and NYSA's expert witness, Mr. Camisa, do not disagree that this portion of the pension fund can be allocated between Type I and Type II, i.e., between current employees and pensioners. They disagree, however, on the method of allocation.[47] After completing their calculations under their different methodologies, Mr. LoCicero calculates $19.5 million for Type I and $30.2 million for Type II. (PRMSA op. br. at 156, and record citations therein.) Mr. Camisa, however, calculates $13.4 million for Type I and $36.4 million for Type II. (Ex. 36 at 8–9.) Under the latter's calculation, therefore, the containerized carriers would pick up another $6 million in costs of funding pensions which would be treated as industry-wide

[47] Although NYSA's expert, Mr. Camisa states that there are several methods of allocation, NYSA's expert witness, Mr. Sclar, states that there is no acceptable method. (PRMSA op. br. at 158 n. 85.) Thus, Mr. Sclar, who has been shown to have testified in support of a different man-hour formula on the West Coast, and has used a productivity figure for breakbulk cargoes which NYSA itself attempted to discredit as being too low, now finds that the NYSA's own witness does not agree with his statement about the lack of a method of allocation.

obligations under the tonnage portion of Dr. Silberman's formula. (It is interesting to note that Dr. Silberman accepts Mr. LoCicero's calculations of $30.2 million to be allocated to Type II, which is an upward revision from Dr. Silberman's earlier estimates, made when he had not had access to underlying documents of over $6 million. See Ex. 46 at 21.)

Detailed explanations of Mr. LoCicero's methodology are set forth in PRMSA's op. br. at 154–156, and are based upon that witness's testimony (Exs. 43; 47). Mr. LoCicero, who is an enrolled actuary employed by George B. Buck Consulting Actuaries, has set forth a very careful methodology step by step to arrive at his ultimate figures. He further states that his methodology follows generally accepted actuarial principles. Mr. LoCicero is, furthermore, a member of the American Academy of Actuaries and the American Society of Pension Actuaries and is the Chairman of the American Academy of Actuaries Committee on Multiemployer Pension Plans. (Ex. 43 at 2.)

Kenneth P. Camisa, NYSA's expert witness, is a Senior Vice President of the Martin E. Segal Company, which serves as consultant and actuary to more multiemployer benefit plans covering more employees than any consulting firm in the United States. The Segal firm advises over 75 negotiated multiemployer plans, including the NYSA–ILA plan in New York. (Ex. 36, Att. A at 1–2.)

These two experts are obviously high-level professional persons in their technical fields. Between the two of them they show that there are at least four different methods of allocating the subject pension fund into Type I and type II. There is a technical disagreement in that Mr. Camisa disagrees that in making the calculations, all plan assets should be first assigned to existing pensioners. Mr. Camisa states that such assignment would be proper in the case of terminating plans, not existing plans, such as the present one. Mr. LoCicero disagrees, giving three examples but also conceding that there are no statutory rules or actuarial requirements which require his assignment. (Ex. 47 at 3–4.) This technical discussion could go on and on but would not help resolve the ultimate question, namely, how much of the contributions to the total pension plan should be assigned to Type II. Both experts are impressive and equally persuasive and perhaps this record could have benefited either by an independent "court-appointed" expert or by cross-examination, although with men of this calibre and testimony of this type, which is not based on sense impressions or reputations, there is little assurance that cross-examination would be of much assistance. To resolve this dilemma, I must use different reasoning and evidence.

As Mr. LoCicero states, "[t]hese questions have no precise right and wrong answers." (Ex. 47 at 9.) As mentioned above, there are at least four methodologies that could be used. If I were to decide the issue on a "substantial evidence" basis, I could find for Mr. LoCicero because, although Mr. Camisa questions the propriety of his technique in assigning

all the pension fund's assets first to the pensioner group and then comparing the remaining unfunded liabilities, Mr. LoCicero defends the technique, giving three examples. Thus, reasonable persons could differ. But the "substantial evidence" standard is for reviewing courts, not for finders of fact like myself. As I discussed, I must use the preponderance of the evidence test and the burden is on complainants to persuade. Here, the quality of both witnesses is so good and their testimony so persuasive that the preponderance in my opinion does not shift to complainants. However, there are other bases for choosing the methodology to follow.

It appears that Mr. LoCicero would allocate $30.2 million of pension funds into Type II and that Mr. Camisa would allocate $36.4 million, as I have mentioned. Mr. Camisa, however, states that using different, acceptable methodologies, the amount allocable to Type II could range from $36 million to $49 million. (Ex. 36, Att. A, at 10.) Mr. LoCicero, on the other hand, testifies that he was conservative and could have derived a figure lower than his $30.2 million. (PRMSA op. br. at 156 n. 83.) Therefore, there is a range of something below $30.2 million to about $49.8 million, which could be allocated to Type II. As noted earlier, it is in the interests of PRMSA to keep that figure as low as possible and in the interests of NYSA to keep it as high as possible since, being in Type II, it would continue to be funded by tons, as are all the benefit plans under the current formula. Since this is so, and since virtually every other NYSA witness yielded nothing toward Dr. Silberman's formula, any concession by any NYSA witness is tantamount to a significant statement against interest. If Mr. Camisa concedes that under one acceptable methodology as little as $36 million can be allocated into Type II, this is quite a concession indeed and reflects the integrity of Mr. Camisa (as did Mr. LoCicero's use of a methodology which tended to raise his figure to $30.2 million). I am impressed by Mr. Camisa's honest willingness to acknowledge that one methodology could allocate as little as $36 million to Type II and recommend the use of that methodology.

I have additional reasons why I recommend adoption of the $36 million figure and its methodology. First, by raising the Type II costs by $6 million from Mr. LoCicero's $30.2 million figure, this causes less disruption to the status quo, which will be changed inevitably anyway with the adoption of Dr. Silberman's formula but justifiably so (and without any jeopardizing of the requirement that all funds must be fully financed). The addition of $6 million to Mr. LoCicero's figure, which will go into Type II, means that if NYSA's predictions of something like 22.2 million assessable tons is realized for 1983–1984 (NYSA op. br. at 58), adding another $6 million averages out to about 27 cents per ton. With the addition of domestic, intercoastal and transshipped tons, which would no longer be excepted from the tonnage assessment under Dr. Silberman's formula, this would add more assessable tons and help bring the average cost per ton down possibly to 25 cents or so. For contract year 1982–1983 this would have

increased the tonnage assessment under Dr. Silberman's formula from $5.90 per ton to $6.15 or so. (Because of this statutory time period, it is obviously impossible, furthermore, to determine the credit adjustment amounts and other means to implement such adjustments on the day of the Commission's decision when the underlying data have not yet even been assembled.) A slight increase in the tonnage assessment by 25 cents or so to something like $6 or so is still better than paying $8.90 per ton, as under the current formula. This adjustment obviously would reduce the amount of PRMSA's credits because it would raise PRMSA's per ton assessment by this slight amount over the PRMSA assessment calculated under the LoCicero allocation. However, there must be some room for concessions in this proceeding on both sides, and under this decision PRMSA would achieve a number of changes to its benefit as would other containerized carriers.

Finally, to justify a middle ground in selecting Mr. Camisa's $36 million figure, I note some peculiar facts about the present situation in New York, namely, that the pension fund as a whole seems to be running a deficit, that there are more pension beneficiaries than employees actively working or available for work in the industry (12,676 pension beneficiaries compared to only 9,565 workers in active status as of December 31, 1982), that this situation must, to some extent, be attributable to containerization and consequent incentives to men to retire. (Ex. 36, Att. A, at 3, 5–6.) Therefore, raising the Type II industry-wide portion of the pension plan costs from Mr. LoCicero's $30.2 million to Mr. Camisa's $36.3 million does not seem so unreasonable.

Accordingly, I recommend the middle ground $36.3 million figure and Mr. Camisa's methodology by which it was derived.

Allocation of NYSA's Administrative Costs

Finally, there is a need to calculate NYSA's administrative expenses by proper methodology. The NYSA assessment, it must be noted, funds not only the ILA's fringe benefits under the collective bargaining agreement but also funds administrative expenses. Dr. Silberman would allocate these expenses into the Type I–Type II categories in the same proportion as he would allocate the fringe benefit costs. In other words, if 40 percent of fringe benefit costs were found to be Type I and 60 percent to be Type II, the administrative expenses would be allocated to Type I and Type II as 40 percent and 60 percent, respectively. The method seems sound, has not been opposed by NYSA, and should be employed.

There is a final problem, however. That relates to the fact that, as the evidence shows, NYSA administers not only the NYSA–ILA collective bargaining agreement but another union labor agreement as well (Port Policy and Guards Union (PPGU)). (PRMSA op. br. at 161, and record citation therein.) PRMSA contends that the payors under the ILA assessment agreement ought not to fund administrative expenses attributable to an entirely different union's contract. NYSA offers no justification to its present prac-

tice. Dr. Silberman estimated $7 million in administrative expenses as allocable to the NYSA–ILA labor contract, which amount is the substantial majority of total administrative expenses. Absent any better evidence from NYSA, I must conclude that Dr. Silberman's estimate is reasonable. As PRMSA states, however, in future years, the NYSA should be required to account for administrative expenses attributable to the ILA contract separately from those attributable to non–ILA contracts. (PRMSA op. br. at 162.)

Overview of the Silberman Formula

During preceding discussions I have indicated that I believe that Dr. Silberman's formula is well considered and supportable with some exceptions (the McAllister barge treatment, the special 25 percent discount for the Puerto Rican trade). I strongly urged its adoption.[48] In this section I give a brief summary of certain strong points which I have mentioned but emphasize now to illustrate further the merits of the formula. Furthermore, I refer, when appropriate, to Mr. Donovan's formula which has some similarities but certain deficiencies and is not so refined and supportable as that of Dr. Silberman. Again, I refer the reader to the table in the appendix which shows the NYSA, Silberman, and Donovan formulas and how they vary from each other. (A good discussion is also found in PRMSA's op. br. at 23–35.)

I do not wish to repeat in detail the features of the Silberman formula, i.e., the recognition of the difference between Type I costs, which are related to currently working men and to man-hours and the Type II costs (GAI-related), which are related to labor costs of men not working because of the advent of containerization. Mr. Donovan also makes a somewhat similar distinction although not so refined and appears to understate the industry-wide portion of the fringe benefit costs (GAI-related) seriously.

What is impressive about the Silberman formula, aside from its conceptual logic, are certain admissions against interest. For example, unlike Mr. Donovan, Dr. Silberman finds that 67 percent of the total package to be funded is Type II (GAI-related) costs which are industry-wide obligations to be

[48] Literally the last defense against PRMSA and the Silberman formula by the NYSA is the contention that on an overall average total labor costs per ton, PRMSA's labor costs are actually lower than Sea-Land's and several other carriers. The calculations show, for example, that PRMSA's total labor costs per ton average out to something less than Sea-Land and two other carriers and a little more than U.S.L. (NYSA r. br. at 28–29.) (The exact numbers are confidential but can be found in the confidential portion of the NYSA r. br.) This is supposed to mean that PRMSA is not suffering discrimination at all. What is readily apparent from this last-ditch defense, however, is that NYSA is throwing in all labor costs, not just fringe benefit costs. But this case deals with the question whether PRMSA is paying an unfair share or suffering an unfair burden as to fringe benefit costs under the assessment agreement. Costs of direct wages and container royalty payments are irrelevant. When these irrelevant portions of NYSA's calculations are extracted, leaving the relevant factors, we are back where we started. That is, as NYSA's table shows, if total assessment under the current formula are divided by total tons, this shows that PRMSA paid $8.18 per ton whereas Sea-Land paid only $5.55 per ton and U.S.L., $4.71 per ton. Two other lines, both foreign flag, are slightly higher than PRMSA at $8.22 and $8.25 per ton. This, it appears that NYSA has unwittingly put in evidence supporting PRMSA's case.

funded on the tonnage basis. In contrast, Mr. Donovan finds only 34 percent of total costs to be Type II. The more that costs are allocated under the Type II category to be paid by tons, the greater the contributions by PRMSA as well as by other containerized carriers. It would therefore have been to PRMSA's advantage and Dr. Silberman found that only 34 percent of the package was Type II and therefore allowed PRMSA to pay for 66 percent of the total package on the man-hour basis. Nevertheless, Dr. Silberman analyzed the situation and data and did what he thought was correct.

Another example of Dr. Silberman's statesmanlike analysis is the fact that under his formula, there would be a cap on the contribution of breakbulk cargoes so that such cargoes would not have to pay more *in toto* than what they actually paid under the 1982–1983 contract year. (PRMSA op. br. at 25 and 26; Ex. 41 at 35–36.) If this cap results in breakbulk cargoes not paying their full actual Type I costs under the Silberman formula, the deficit is made up by all containerized carriers paying under the tonnage portion of the formula, which deficit is treated as a Type II cost. Thus, PRMSA is willing to help subsidize the needy breakbulk operators who utilize relatively more man-hours of labor and are consequently needed to help keep down the GAI costs. As breakbulk carriers gradually shift to containerization, they would have to make their tonnage contribution toward Type II (GAI-related) costs but that is how it should be since the change to containerization is responsible for the GAI costs and the newly containerized carrier enjoys the benefits of containerization and should bear its share of the costs of displaced labor.

Another admission against interest is Dr. Silberman's willingness to allow maintenance activities to continue their free ride. This activity, as discussed, is substantial and it would have been to PRMSA's benefit to have carriers utilizing ILA deep-sea maintenance labor to pay at least their direct Type I costs since PRMSA does not use such labor. However, PRMSA offers to continue picking up the costs of other carriers' use of such labor for the good of the entire fund. That is because if the activity had to pay even under the lower man-hour basis, it would undoubtedly shift to non-ILA deep-sea labor, i.e., to ILA "Metro" labor, which is readily available and is under a different labor contract. Such a shift would aggravate GAI costs. I note that Mr. Donovan for the Port Authority would assess maintenance under the man-hour portion of his formula, however.

I have disagreed with Dr. Silberman and PRMSA in their efforts to obtain a special 25 percent discount for the Puerto Rican trade and their argument that the McAllister barge service should pay the full tonnage rate under their formula, as I have discussed earlier. These particular changes in Dr. Silberman's formula should temper the features which I cannot find to be supportable on a preponderance of the evidence.

The major objection to the Silberman formula will undoubtedly come from the special-privilege carriers who enjoy the rather enormous benefits

of not having to pay substantial money as their share of GAI-related costs under the tonnage portion of the Silberman formula. Both Sea-Land and U.S.L. have objected to any change in the status quo for their domestic and relay operations which the evidence shows are not hardship cases. Should any particular commodity show that it were a hardship case, the present machinery of the joint NYSA–ILA Contract Board is supposed to function (although it seems not to have functioned perfectly with respect to PRMSA's case of diversion from New York to Pennsauken, New Jersey).

However, the MLAA has intended that the Commission have "broad discretion . . . to fashion appropriate remedies for unfair or discriminatory assessments." Sen. Rep. to the MLAA, cited above, at 14. if necessary to cushion the increases that Sea-Land, U.S.L. or any other unjustifiably favored carrier should now bear toward the industry-wide obligations by paying their fair share under the tonnage portion of the Silberman formula, the Commission can consider means to spread the payments over time or otherwise cushion the transition, similar to the offers it made to NYSA as to how NYSA was to give credits to carriers as a result of the decision in *Agreement No. T–2336,* cited above. See *Agreement No. T–2336,* 19 F.M.C. 248, 263 (1976), aff'd *NYSA* v. *F.M.C.,* 571 F. 2d 1231 (D.C. Cir. 1978) (partial payments, spread payments over time). Arguments could be made that the special-privilege carriers have been enjoying substantial savings by not paying their share toward GAI-related costs under the tonnage formula in the past and should not be given further consideration. However, rather than abandon the changes in the formula necessary to distribute burdens evenly, because of outcries from carriers who object to sudden increases in costs, the Commission can adopt the Silberman formula and fashion an appropriate remedy, easing the transition if necessary.

Implementation of the Remedies

PRMSA suggests a post-decision procedure by which NYSA can implement a decision to grant PRMSA credit adjustments (and also to compute reparations which the law does not allow in cases of this type, as I have discussed). PRMSA op. br. at 174–175. Under this plan, NYSA would be directed to submit to the Commission within 30 days of the Commission's decision a plan outlining all steps necessary to implement the PRMSA assessment proposal. PRMSA could object within 15 days and then attempt to resolve differences, leaving unresolved disputes to be submitted to the Commission. As to the assessment adjustments, PRMSA wants NYSA to appoint an independent certified public accountant to conduct an audit and to report its findings to the Commission within 60 days of the Commission's decision. PRMSA would audit the NYSA auditor's findings within 40 days, submit objections, and the parties would be allowed 20 more days to try to resolve their disputes. Unresolved matters would be submitted to the Commission for resolution.

As I have mentioned, the Commission has statutory authority to "fashion appropriate remedies." The Commission has some experience in fashioning remedies and procedures as seen from the proceedings following the decision in *Agreement No. T–2336,* cited above, which unfortunately took time to complete because of continual appeals by the NYSA, all of which were rejected by the courts. The above procedure seems reasonable and somewhat similar to procedures used by the Commission in reparation cases when the record does not quantify the exact amount of reparation. See Rule 252, 46 CFR 502.252. But see also the procedure established by the Commission in *Agreement No. T–2336,* cited above, 19 F.M.C. at 265.

In one matter of substance, however, I do not agree with PRMSA. That is the matter of interest which PRMSA is seeking in addition to adjustments (and the unauthorized reparation). In *Agreement No. T–2336,* cited above, the Commission did not award interest to the carrier group which obtained adjustments from the NYSA. This decision was affirmed. *NYSA* v. *F.M.C.,* 571 F. 2d 1231 (D.C. Cir. 1978). The Commission held that the decision to award interest was discretionary but that the equities of the situation did not warrant such an award. Thus, although the claiming carrier group had been deprived of the use of its funds because of previous overpayments under the assessment formula, it was not clear for some time exactly how much the overpayment was, NYSA had not delayed the proceeding unfairly nor had NYSA engaged in any conduct which it should have known was improper at the time, nor had it withheld assessment payments from the fund. 19 F.M.C. at 261.

In the present case, under the most pressing time constraints, NYSA has furnished considerable data and has worked hard, as have all other parties, to meet the tight deadlines imposed by law, and its counsel have been invariably courteous. It fully believes that its formula was and is lawful, and, as I have noted, this is probably the first time that a complete factual record has been assembled in one place so that everyone can see the unfair effects of the formula. There is some indication that PRMSA might have been given the runaround in its last request for relief before the filing of its complaint, and it is questionable whether the Contract Board has been entirely fair to PRMSA, which has shown cases of diversion to a non-ILA carrier. There is also a curious advertisement about an NYSA "plan" to reduce assessments which has not been revealed, and, if it is any good and would help lead to a settlement, should probably have been made public. However, all of these facts, in my opinion, do not justify imposition of interest liability on NYSA. I therefore would not award interest for reasons similar to those expressed by the Commission in *Agreement No. T–2336,* cited above.

ULTIMATE CONCLUSIONS

Two parties, the Port Authority of New York and New Jersey, and PRMSA, the leading Puerto Rican carrier, complain that the current tonnage

assessment formula in use at the Port of New York is unjustly discriminatory and unfair and ask that it be modified, and, as to PRMSA, that PRMSA be granted credit adjustments provided by the applicable law. Respondents NYSA *et al.*, as well as other parties representing competing ports and Hearing Counsel, oppose any relief but would leave everything up to the parties to resolve on their own. NYSA furthermore raises a number of legal defenses, almost all of which have no merit, which defenses would not allow the Commission even to consider the complaints on their merits. Even if the merits are considered, NYSA argues impossibly difficult standards of proof which the Congress rejected when it enacted the MLAA.

Contrary to respondents' and other parties' contentions, the extensive evidence developed by the Port Authority and by PRMSA shows certainly by a preponderance of the evidence and probably, in many respects, even by a clear and convincing standard even though that stricter standard is not required, that the Port Authority suffers a handicap because of a $200–300 differential assessment on loaded containers moving through New York which all competing ports, which are not under the unique New York tonnage formula, do not have to bear. This handicaps the Port of New York in its efforts to attract and maintain containerized cargoes mainly from Midwest destinations and origin points but also other regions. The evidence of this handicap is shown, among other ways, by admissions of at least 11 of respondent carriers' officials and by respondent carriers' own cost studies, one of which bore the notation: "The killer is NYSA assessment of $7.50/ton compared to: Baltimore $8.10/Manhour; Portsmouth $10.55/Manhour." Of course, the tonnage rate has since increased to $8.90 per ton. Although now denying that such a large differential at New York exists, at least one important official of a respondent terminal operator, conceded to a New York State legislative committee hearing that such a differential up to about $250 existed.

In addition to the foregoing admissions, data accumulated from the Maritime Administration and other sources show that the Port of New York has been stagnating and has declined in its share of containerized cargo in the North Atlantic from 69 percent in 1972 to 56 percent in 1982. Such declines are not explainable simply in terms of other ports' catching up to New York in containerizing their facilities.

Other evidence presented by two expert witnesses shows that this differential, which handicaps New York competitively, does not have to exist merely because New York's underlying fringe-benefit labor costs are higher than those at other ports, which admittedly they are. The differential is to a large extent the result of the peculiar tonnage formula which no other port employs and two alternative combined man-hour/tonnage or man-hour/container type formulas presented by two expert witnesses, among other evidence, show that the underlying costs do not have to result in such a huge differential.

Finally, it should be noted that the Port is not claiming that Midwest or any other containerized cargo is "naturally tributary" to New York or that New York is fundamentally entitled to such cargo to the exclusion or detriment of Baltimore, the major port competing with New York, or that NYSA is deliberately attempting to handicap New York by employing some type of harmful device. Nor is the Port asking for or entitled to monetary adjustments. All that the Port wants is to have a formula at New York which will get the competitive handicap off its back and enable it to compete fairly with Baltimore and other ports. The current tonnage formula, as the evidence shows, does not enable the Port to do that and therefore it is "unjustly discriminatory and unfair as between ports," as the MLAA states and should be modified to give the Port relief.

Congress specifically entrusted the Commission with the responsibility to ensure that there would be equal treatment of localities and that there would be no abuses caused by concerted activity of carriers and others and restored jurisdiction to the Commission in response to pleas of parties worried about not having any protection under shipping law. See Sen. Rep. to the MLAA, cited above, at 10. On this record and in view of such a legislative mandate, I do not believe that the Port Authority can be turned away without relief.

Similarly, on the record developed by PRMSA, I do not believe that the carrier can be turned away without relief. PRMSA's case, unlike the Port Authority's, is based essentially on the fact that the unique tonnage formula in New York unfairly distributes burdens among containerized carriers in comparison with the benefits which they all received when first containerizing. PRMSA's evidence shows that the current tonnage formula totally fails to distinguish between the type of fringe benefit costs attributable to displacement of work caused by containerization and the type of costs attributable to labor currently employed. Such a flat tonnage formula not only shoves all costs onto containerized carriers for their general responsibility in displacing labor and increasing GAI-type costs but also for introducing efficiencies in non-vessel loading/unloading functions which represent current improvements in terminal efficiencies. Such a formula, therefore, taxes efficiencies and terminal productivity, reduces incentives to introduce such efficiencies, and causes more efficient carriers to pick up some of the costs of the less efficient carriers. Moreover, the evidence developed by PRMSA shows enormous favoritisms to a certain few carriers who pay no tonnage assessment on domestic, intercoastal cargoes or transshipped cargoes and favoritisms to a few carriers who pay absolutely nothing though hiring labor for handling empty containers and stuffing and stripping containers at their terminals. These enormous special privileges help to create a startling situation in which the evidence shows PRMSA paid an average of $272 per loaded container in tonnage assessments under the current formula whereas another major containerized line paid only $141 per container and still another, only $168 per container, those other carriers also

being the prime beneficiaries of the special treatment for domestic and transshipped cargoes. Other evidence shows that on those favored cargoes, the payments per container by one carrier averaged only $23 and for the other, only $13.05 per container, again compared to PRMSA's average of $272 per loaded container. On some domestic cargoes, it was even shown that one carrier paid an average of only $10 per container.

The disparities are enormous and the justifications for them ought accordingly be persuasive but extensive examination of such justifications shows that they are not persuasive and that they rest mainly on speculation and self-serving predictions of adverse consequences if the special privileges are terminated. In some cases, however, such as the total free ride for handling empty containers and for stuffing and stripping containers, which free ride burdens everybody else even with the direct-type costs of hiring labor, the justification is virtually non-existent.

To remedy these gross disparities, PRMSA has presented a well-explained alternative combined man-hour/tonnage formula supported by an impressive expert witness. This formula would relate direct currently-employed type fringe benefit costs with man-hours and non-employed GAI-type costs, which are industry-wide obligations, with tonnage assessments. It would also, for the most part, eliminate unjustified special privileges and free rides. In certain instances, furthermore, it goes against PRMSA's own interest, for example, when it allocates fully 67 percent of industry-wide costs to the tonnage portion of the formula, when it puts a cap on breakbulk cargo payments for the good of the Port, and when it recommends retention of the free ride for maintenance labor because of the clear danger that taxing that activity would result in diversion to non-ILA deep-sea labor and consequent aggravation of the GAI costs. PRMSA does overreach in seeking a further special 25 percent discount for the Puerto Rican trade and is unduly harsh on a barge carrier upon whom other interests depend and also seeks retroactive reparation which the law does not provide in this type of case. However, the formula it proposes is otherwise supportable and far more fair than the current tonnage formula which is riddled with unjustified favoritisms and exceptions which burden everyone else trying to fund the fringe benefits fully.

As with the Port Authority, PRMSA has presented a persuasive case. The Commission was given the specific responsibility by the Congress to protect carriers and others against abuses and to strive to ensure fair and equal treatment, as shown by the legislative history to the MLAA. In view of that fact and the persuasive evidence developed, I do not believe that PRMSA can be turned away without relief.

(S) NORMAN D. KLINE
Administrative Law Judge

APPENDIX

TABLE 1.—A COMPARISON OF THE ASSESSMENT FORMULAS

Types of Assessments and Benefits Funded	*NYSA*	*SILBERMAN (PRMSA)*	*Donovan (Port Authority)*
	1. Tonnage—Funds almost all fringe benefits	1. Tonnage-Funds GAI, GAI-related fringes, other "industry-wide" obligations	1. Container-Funds GAI, GAI holiday, and GAI vacation costs.
	2. *Man-hour—For "excepted cargoes"* only	2. *Man-hour—Funds fringes associated* with currently employed workers	2. *Man-hour-Fund—Funds* all other fringe benefit costs.
Basis for Assessment for:			
General Containerized Cargo	Tonnage	Man-hour/Tonnage	Man-hour/Container.
Transhipped/Rehandled	Man-hour	Man-hour/Tonnage	Man-hour/Container.[1]
Domestic	Man-hour	Man-hour/Tonnage	Man-hour/Container.[1]
Breakbulk	Tonnage	Reduced *man-hour*	Man-*hour*.
Empty Containers	None	Man-hour	Man-hour/Container.[2]
Stuffing & Stripping	None	Man-hour	Man-hour.
Maintenance	None	None	Man-hour.
Puerto Rico Trade	Tonnage	Man-hour/Reduced tonnage	Man-hour/Container.
Formula as Applied to Assessment Rates for Contract Year 1982–83	Regular: $8.90/ton Excepted: $5.50/man-hour	Tonnage: $5.90/ton Man-hour: $6.35.man-hour[4]	Container: $64/container[3] Man-hour: $11.64/man-hour[5].

[1] Reduced man-hour/Container under alternatives 2, 3.
[2] Man-hour/Reduced container under alternative 3.
[3] Under alternative 3, full containers assessed $77, empty and stuffed and stripped assessed $38.
[4] $5.41/hour for breakbulk.
[5] $11.94/hour under alternatives 2, 3.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION

ORDER

February 27, 1985

The Federal Maritime Commission, having this date made and entered of record a Report in the above matter, which Report is hereby referred to and made a part hereof;

THEREFORE, IT IS ORDERED, That the whole tonnage assessment formula contained in NYSA–ILA Agreement No. LM–86 is found to be "unfair" and "unjustly discriminatory" under the Maritime Labor Agreement Act of 1980 to the extent indicated herein, and on this date modified to remove such unfairness and unjust discrimination.

IT IS FURTHER ORDERED, That within 61 days of service of this order, NYSA and ILA shall file with the Commission a modified agreement which: (1) embodies the man-hour tonnage formula here prescribed; and (2) removes the "expected" treatment for domestic and transshipped cargoes to the extent here required; and

IT IS FURTHER ORDERED, That within such 61 day period Respondents shall file with the Commission a statement describing the means of "phasing out" the man-hour assessment and "phasing in" the man-hour/tonnage assessment herein prescribed for transshipped/rehandled cargoes; and

IT IS FURTHER ORDERED, That within such 61 day period Respondents shall further file any requests for "phasing out/phasing in" beyond September 30, 1986 up to and including September 30, 1987, together

with supporting data based on commitments, capital expenditures, or operational difficulties; and

IT IS FURTHER ORDERED, That within such 61 day period assessment adjustments shall be made in favor of PRMSA/PRMMI in the manner prescribed herein, and Respondents shall file with the Commission a statement of the adjustments so made; and

IT IS FURTHER ORDERED, That to the extent the adjustments in favor of PRMSA/PRMMI described in the preceding paragraph cannot be made until after the date of this Order, additional adjustments shall be made to insure that PRMSA/PRMMI receives credits for any portion of the period between February 27 and April 29 during which it may have been assessed at the rate applicable under the formula here modified.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 550 AND 580]

DOCKET NO. 84–35

ELECTRONIC FILING OF TARIFFS BY COMMON CARRIERS IN THE FOREIGN AND DOMESTIC OFFSHORE COMMERCE OF THE UNITED STATES

March 14, 1985

ACTION: Final Rules.

SUMMARY: The Commission amends its domestic offshore and foreign commerce tariff filing rules by permitting the electronic receipt of filings outside of the Commission's offices subject to certain stated conditions.

DATES: Effective April 18, 1985.

SUPPLEMENTARY INFORMATION:

On October 18, 1984, the Federal Maritime Commission (Commission) issued a notice of proposed rulemaking in Docket No. 84–35—*Electronic Filing of Tariffs By Common Carriers in the Foreign and Domestic Offshore Commerce of the United States,* to amend certain domestic offshore and foreign commerce tariff filing rules (46 CFR Parts 550 and 580) in order to allow electronic tariff filings to be received on terminals located in the same building as the Commission's offices subject to certain stated conditions (49 FR 40940, Oct. 18, 1984). Interested parties were invited to file comments by November 19, 1984.

Comments on the proposed rule were received from the Inter-American Freight Conference, the Journal of Commerce, Sumner Tariff Service, Inc., Transax Data Corporation and Distribution-Publications, Inc.

The Inter-American Freight Conference (IAFC) * asserts that under section 8(a)(1) of the Shipping Act of 1984, 46 U.S.C. app. 1707(a)(1), ("the Act"), a tariff is not on "file" with the Commission when it is electronically transmitted to an off-premises terminal because a filing must be physically delivered to the Commission or deposited with a proper Commission employee. The Commission does not agree. Strictly ministerial functions may be validly delegated to private parties without express authorization in the Commission's enabling statute. *Tabor* v. *Joint Bd. for Enrollment of Actuaries,* 566 F.2d 705 (D.C. Cir. 1977). Nothing in section 8 of the Act prohibits such a delegation. Accordingly, the Commission is modifying its proposed rule to clarify that it is delegating authority to receive

* By letter December 27, 1984, Delta Steamship Lines, Inc., a member of IAFC advised that it disassociated itself from the IAFC comments.

tariffs to the operators of data processing terminals specially designated for this function pursuant to the provisions of the rule. Moreover, the rule is further amended to require prompt physical transmission of filed tariff pages to the Commission. These provisions will both clarify the Commission's authority on this matter and protect the legitimate concerns of all affected interests.

Sumner Tariff Service, Inc. (Sumner), commented that the proposed rule did not address the question of the physical receipt of electronic filings by the Commission's staff and suggests that a "deadline" for such physical receipt should be established in the Final Rule. Distribution-Publications, Inc. also believes that the Commission should establish a specific cut-off time for actual receipt of the printed pages. Transax Data Corporation (Transax) recommends that the Commission allow electronic filing services to physically deliver tariff pages to the Commission before noon of the next business day following receipt of the terminals.

The proposed rule is revised to specify a deadline for the physical receipt by the Commission of pages from electronic filing services. Although Transax's concerns for a noon deadline have been considered, we have set the cut-off time at 9:00 a.m. on the next business day following the receipt of electronic tariff filings on the receiving machine. This deadline is imposed so that the public can access the previous days filings as soon as possible. Any extended delay, including only a few additional hours could result in interested parties being deprived of necessary tariff information for an additional day. Further, the 9:00 a.m. deadline will provide administrative processing of electronic filings in the same manner as tariff filings received from tariff filers which use the Commission's around-the-clock tariff mail drop located in the lobby of the Commission's Washington, D.C. offices.

Transax also suggests that the Commission recognize the date that pages are received on "disk," rather than by the printing device, as the official filing date. The Commission's present policy is to accept for official filing purposes the time and date that pages are received on "disk". This policy will be continued on the final rule with the further prohibition that no alteration of material filed on the desk shall be allowed. Once material is filed on the disk it must be printed without alteration.

Finally, Transax urges that the commercial entity operating the receiving terminals be identified by a registration number, an alpha-numeric code identifying the commercial entity receiving the tariff filing and the specific work station. It further recommends that this number should be unique to the commercial entity and the location of the work station rather than a number unique to a specific piece of hardware.

It is neither beneficial nor necessary for the registration number of each electronic tariff filing to identify the commercial entity by an alpha-numeric code. The unique machine registration number should be sufficient to identify the commercial entity receiving the filing.

The unique machine registration number would appear to be the best method of controlling the integrity of the electronic tariff filing system. Moreover, this method will provide surveillance over the actual hardware that will be used to receive the filings. We perceive no undue burden either to the Commission or to the commercial entities to register hardware changes, additions or replacements as they may occur.

Sumner suggests that the time, date and terminal identification be permitted to be published at the top or bottom of the tariff page. Sumner claims that some of the filings currently accepted by the Commission have this information printed at the top of the page and to change the machines to print this information on the bottom would require expensive reprogramming. This comment has merit and, accordingly, the final rule allows the terminal identification number to be printed at the top *or* bottom of the tariff page.

The final rule also contains various organization changes for the purpose of clarity. The rule moves the formerly applicable electronic filing provisions from the definition sections 550.2(i) and 580.2(w) to 550.3(e) and 580.3(a)(2), respectively.

This rule contains no substantial information requirements or requests different than those already present in Part 580 for which O.M.B. approval has been obtained.

The Commission has determined that this final rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that this final rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in 46 CFR Parts 550 and 580

Maritime carriers, Rates and fares, Reporting and recordkeeping requirements.

Therefore, pursuant to 5 U.S.C. 553; secs. 8, 9 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707, 1708, and 1716); secs. 18(a) and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817(a) and 841(a); and sec. 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844) the Federal Maritime Commission amends Parts 550 and 580 of Title 46 of the Code of Federal Regulations as follows:

PART 550—[AMENDED]

1. The authority citation for Part 550 is revised to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 812, 814, 815, 817(a), 820, 833a, 841a and 843–847.

2. Revise paragraph (i) of § 550.2 to read as follows:

§ 550.2 Definitions.

* * * * *

(i) *"File, Filing (of Tariff Matter)"* means the actual receipt by the Federal Maritime Commission at its offices in Washington, D.C., including those received by electronic transmission. Electronic filings are those transmitted through the use of commercial data processing terminals and conforming to all the regulations applicable to permanent tariff filings. The data processing receiving terminal(s) are located within the same building as the Commission's Washington, D.C. offices.

* * * * *

3. Revise paragraph (e) of § 550.3 to read as follows:

§ 550.3 Filing of tariffs; general.

* * * * *

(e)(1) Tariff matter will be received by the Commission at its Washington, D.C. offices on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time stamped at a tariff mail drop in the lobby of the Commission's Washington, D.C. offices.

(2)(i) Terminals receiving electronic filings must imprint the date and time received on the top or bottom of each page as well as imprinting a unique machine registration number.

(ii) The unique machine registration number must be registered with the Director, Bureau of Tariffs. Owner/operators of such registered machines must obtain certification from the Director as having delegated authority to receive tariff matter on behalf of the Commission.

(iii) Information received and stored on a "disk" must be filed without alteration. All electronically filed tariff pages including those received and stored on a "disk" must be delivered to the Commission's Tariff Library before 9:00 a.m. the next successive business day following receipt on the receiving machine.

* * * * *

PART 580—[AMENDED]

4. The authority citation to Part 580 is revised to read:

Authority: 5 U.S.C. 553; 1702–1705, 1707–1709, 1712, 1714–1716 and 1718.

5. Revise paragraph (w) of § 580.2 to read as follows:

§ 580.2 Definitions.

* * * * *

(w) *Tariff filing, electronic* means the transmission of tariff filings to the Commission through the use of commercial data processing terminals. The data processing receiving terminal(s) are located within the same building as the Commission's Washington, D.C. offices.

6. Revise paragraph (a)(2) of § 580.3 and add paragraph (a)(3) to § 580.3 to read as follows:

§ 580.3 Filing of tariffs; general.

(a)(1) * * *

(2) The Commission will receive tariff filings on an around-the-clock basis. Receipt of tariff filings during other than normal business hours will be time-stamped at a tariff mail drop located in the lobby of the Commission's Washington, D.C. offices.

(3)(i) Electronic tariff filings transmitted to the Commission by electronic modes will be receipted by a date/time device on the receiving machine which will imprint the date and time on the top or bottom of each received tariff page. The receiving machine will also imprint a unique registration number which must be registered with the Director, Bureau of Tariffs. Owner/operators of registered receiving machines must obtain certification from the Director as having delegated authority to receive tariff matter on behalf of the Commission.

(ii) Tariff material filed electronically must conform to all the regulations of this part applicable to permanent tariff filings, except as follows:

(A) Electronically filed tariff pages received from data processing terminals may be used for filing with the Commission;

(B) Information received and stored on a "disk" must be printed and filed without alteration;

(C) All electronically filed tariff pages including those received and stored on a "disk" must be delivered to the Commission's Tariff Library before 9:00 a.m. The next successive business day following receipt on the receiving machine; and

(D) Electronically filed tariff matter shall be accompanied by an electronically filed letter of transmittal.

* * * * *

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32
KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

ORDER OF REMAND

March 28, 1985

This proceeding was instituted by the complaint of Kuehne & Nagel, Inc. (K&N or Complainant) against Barber Blue Sea Line (BBS) and Nedlloyd Lines (Nedlloyd) seeking reparations for alleged overcharges on four shipments of rock crushing plants and accessories from Baltimore to Damman, Saudi Arabia, in violation of section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §817(b)(3)). Administrative Law Judge Seymour Glanzer found in favor of Complainant and awarded reparations in the amount of $12,334.54. The case comes before us on Respondents' Exceptions to the Initial Decision.

BACKGROUND

K&N, acting as the freight forwarder and agent for the purchaser/consignee, made four shipments of rock crushing and conveying plants and accessories from Baltimore to Saudi Arabia from August to November, 1981. Each shipment was described on the bills of lading as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF Portable Primary Crushing Plant with Vibrating Grizzly Feeder and Accessories)." Each of the shipments consisted of two or four large, vehicle-like, or "ro-ro," pieces and numerous small boxes, crates, bundles, skids, cases and pieces. The bills of lading listed Barber Greene, manufacturer of the rock crushing equipment, as shipper. The freight, however, was prepaid by Complainant as agent for the consignee.[1]

The tariff of the "8900" Rate Agreement, to which Respondents are parties in the trade, reflected the following provisions effective at the time of shipment:

[1] Respondents originally contested K&N's standing to seek reparations on ground that it was not the party injured by the violation alleged. *See* Respondents' Motion For Summary Judgment, 4 and Respondents' Proposed Finding of Fact and Conclusions of Law, 8. This issue was resolved, however, with the filing of an assignment of the claim from the consignee by Complainant at the behest of the Presiding Officer with the acquiescence of Respondents. *See* Initial Decision, 4.

Commodity Description & Packing	Rate Basis	Rate
Item 765:		
MACHINES AND MACHINERY PARTS THEREOF, N.O.C., (NOT AGRICULTURAL OR ROAD-BUILDING)		
* * * * *		
Rock Crushing Plant—(If Mobile, See Item 1255)	W/M	131.25
* * * * *		
Item 1255 of the tariff provided:		
Vehicles, Specially Equipped (UNBOXED), Incl.:	W/M	122.25
* * * * *		
Mobile Rock Crushing Plants		
* * * * *		

Units exceeding 60 gross tons in weight per piece or package apply to the "8900" Lines.

In addition, Rule 2(H) of the tariff read:

2. *APPLICATION OF RATE—*

> (H) Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles when so described on ocean bills of lading, except where specific rates are provided herein for such parts.

Although the non-ro-ro components made up by far the greater proportion of the items in each shipment on a numerical basis, the ro-ro pieces accounted for a majority proportion of three of the four shipments by volume as well as by weight, and were a majority proportion of the fourth shipment by weight.

The ro-ro pieces of the rock crushing plants were rated under Item 1255 at $122.25 W/M and the remaining packages and pieces were rated under Item 765 at $131.25 W/M. Complainant sought to have the entire shipment rated at the lower rate under Item 1255, alleging that all of the shipments consisted entirely of mobile rock crushing plants and their associated parts and accessories.

No evidentiary hearing was held. The parties submitted a stipulation of facts. Respondents filed a Motion for Summary Judgment, accompanied by two affidavits and several exhibits, and Complainant filed a Cross-Motion for Summary Judgment with an affidavit and exhibits. The Presiding Officer found, however, that the material facts remained in dispute and refused to resolve the matter on the basis of the cross motions. The parties agreed to submit the matter for decision on the basis of the existing record supplemented by proposed findings of fact and briefs with supporting

exhibits. These exhibits, however, consisted entirely of material previously submitted.

The Initial Decision granted Complainant's request for reparations, finding that Respondents had violated section 18(b)(3) of the 1916 Act by applying the wrong rate under the tariff to part of each of the four shipments in issue. Peripheral issues of standing and a statute of limitations defense were disposed of in favor of Complainant on grounds that a complaint timely filed may be perfected by a later executed assignment of the claim to the filing party, citing *Rohm & Haas Co.* v. *Italian Line*, 21 SRR 213 (1981) and *Interconex, Inc.* v. *Federal Maritime Commission*, 572 F2d 27 (2nd Cir., 1977).

The Presiding Officer similarly disposed of Respondents' affirmative defense of estoppel by reason of Complainant's alleged agreement in advance to the tariff interpretation pursued by Respondents, on grounds that the evidence of the alleged agreement—a letter from one of the Respondents to Kuehne and Nagel, and statements by Respondents' affiants—was insufficient to prove Complainant's acquiescence in the stated tariff interpretation.

Relying upon Tariff Rule 2(H), under which parts of an article are to be moved under the same commodity description and rate as the article of which they are components, the Presiding Officer found in favor of Complainant on the major issue of interpretation of the tariff items in issue, reasoning that the commodity description in Item 1255 should apply to the entire shipment "if more than half of a shipment, measured by weight or volume, consists of vehicles * * *" (I.D. 20).

Respondents except to the Presiding Officer's conclusion that their application of the tariff provisions in question was inconsistent with the clear language of the tariff itself. Respondents argue that Item 1255 must be read as referring only to "vehicular parts of plants, not entire plants" because it is stated as "Vehicles, Specially Equipped (UNBOXED), Incl[uding] * * * mobile rock crushing plants." Respondents assert that there is "no such thing" as a completely mobile rock crushing plant, and therefore an "entire" plant could never be considered a vehicle. They maintain that the non-ro-ro pieces which constituted a majority of the packages shipped, should be, and were, rated as parts of a stationary plant under Item 765.

Respondents also argue that their interpretation of the tariff is supported by the lower cost of loading and unloading ro-ro cargo, and by custom and usage and agreement among the parties. In affidavits submitted with their Motion for Summary Judgment, employees of both lines averred that they had discussed the application of rates to similar shipments with employees of both the Complainant and the consignee. Respondents note that complainant has stated only that it was "not aware of any agreement covering the freight rate assessed" without further contesting the statements contained in Respondents' affidavits that the two lines' "rating policies * * * were understood and agreed to by all parties." (Affidavits of Edward

L. McCabe, 2, and Carmine Disclafani, 4, attached to Respondents' Motion For Summary Judgment). In addition, the failure of Complainant or the shipper to respond to an October 29, 1980 letter from a Nedlloyd sales representative setting forth Nedlloyd's rating policy for a rock crushing and conveying plant booked on a Nedlloyd vessel is cited as evidence consistent with both the unrebutted affidavits and customary business practices. Respondents thus contend that a mutual interpretation of the tariff existed which precludes Complainant's assertion of improper application of the rates.

Finally, Respondents fault the Presiding Officer's analysis of the proportion of the shipment to be considered as governing which commodity description it fits. The Presiding Officer used weight and volume in determining that the rock crushing plants were mobile because the ro-ro pieces constituted a greater proportion of each shipment. Respondents urge that the more appropriate factor in such a judgment is the proportion of the non-ro-ro pieces to overall number of packages in each shipment.

Complainant in its Reply to the Exceptions argues that the Presiding Officer correctly found that Respondents misapplied the higher tariff rate for stationary rock crushing plants to the non-ro-ro portions of the four shipments. Complainant points to the clear language of Tariff Rule 2(H), and Respondents' failure to mention that Rule until the last substantive paragraph of their brief, as support for its contention that the no-ro-ro items were misrated.

As evidence of the mobile nature of the rock crushing plants, Complainant cites the manufacturer's brochures and the bills of lading which describe the shipments as "portable" rock crushing plants. Complainant argues that the comparative weight and volume of the few major ro-ro pieces vis-a-vis the numerous smaller components of the plants are the distinguishing feature of mobile rock crushing plants.

In response to the argument that Respondents' tariff interpretation is rooted in agreement or "custom and usage," Complainant argues that neither prior notification of Respondents' incorrect application of their tariff nor a shipper's acquiescence in such an incorrect application can vary the clear terms of a tariff. Complainant also points to inconsistent action by BBS, *i.e.*, a 1982 shipment on which all of the component parts of a rock crushing and conveying plant (identical in description to those at issue herein) were freighted at the then-effective rate for mobile rock crushing plants. (Reply to Exceptions, 11, Exhibits B and C. Those exhibits also appear in the record as attachments to Complainant's Answer to Respondents' Motion For Summary Judgment and Complainant's Cross Motion For Summary Judgment).

DISCUSSION

For the most part, Respondent's Exceptions are re-arguments of points made below and addressed in the initial Decision.

The argument that Complainant is estopped from bringing the present action by its prior agreement to the Respondents' tariff interpretation was rejected by the Presiding Officer on evidentiary grounds. We agree with the Presiding Officer that the evidence is insufficient to show Complainant's acquiescence in Respondents' tariff application. We would also point out that while such evidence may be used to adduce the precise nature of the commodity shipped or the meaning of the tariff, it may not be used to *estop* a party from raising such an issue. The only rate which may be lawfully charged under Respondents' tariff is the correct rate, and a shipper's agreement to application of any other rate cannot immunize a carrier from violation of section 18(b)(3) or justify its application of a different rate. *Louisville and Nashville R.R.* v. *Maxwell,* 237 U.S. 94 (1914), *United States* v. *Pan American Mail Line, Inc.* 359 F.Supp. 728 (S.D. N.Y. 1972); *Kansas Southern Ry.* v. *Carl,* 227 U.S. 639 (1913).

Respondents on exceptions reiterate their contention that the reference in tariff Item 1255 to specially equipped vehicles, unboxed, makes their vehicular nature the major characteristic of commodities covered, and therefore only those portions of the named examples which are actually vehicles come within the commodity description. This argument is not compelling. As the Presiding Officer noted, tariff Item 1255 does not limit applicability to the ro-ro portions of the named items. To the contrary, the tariff item contemplates inclusion of "pieces" or packages" of the named units (which are to be carried under the Item 1255 rate unless they individually exceed 60 gross tons in weight, in which case shippers are directed to "apply to the '8900' Lines").

The Presiding Officer's reading of tariff Rule 2(H) in conjunction with Items 1255 and 765 as requiring the application of a single rate to the entire shipment appears correct. The record evidence is insufficient to convince us, however, whether the rate to be applied to each of the shipments in its entirety should be the higher rate under tariff Item 765 for stationary rock crushing plants, or the lower rate under tariff Item 1255 for vehicular, mobile plants.

Tariff Items 765 and 1255 clearly contemplate the existence of "mobile" rock crushing plants. Item 765 contains a proviso within its commodity description for rock crushing plants specifically referring shippers of such plants "*If mobile*" to Item 1255 which lists "mobile rock crushing plants" among other commodities. (Emphasis supplied). The Presiding Officer ruled that each of the rock crushing plants as a unit should be considered mobile for purposes of classification under the tariff based upon the preponderance of the mobile or ro-ro pieces as a proportion of each shipment measured by weight or volume. The problem with this resolution is not, as Respondents contend, that it utilizes the wrong yardstick, weight and volume, rather than number of pieces per shipment. Weight and volume are the traditional yardsticks for determining total transportation charges. They are not however, ordinarily useful determinants of the nature of the commodity shipped

for purposes of finding the applicable rate. The Presiding Officer appears to have accepted the preponderance of the ro-ro pieces in each shipment as an indication of the mobile nature of the rock crushing plants shipped, and therefore concluded that these plants were sufficiently mobile to fit within the tariff description of mobile rock crushing plants.

The question, however, which remains unresolved in our opinion is whether these rock crushing plants may, in common parlance, be considered "mobile," consistent with the usual sense of that word as reflected by the other "mobile" units listed under tariff Item 1255.[2] We find the evidence as to the nature of the commodity actually shipped insufficient to resolve this question.[3] While the Presiding Officer himself expressed some reservations as to the sufficiency of the record in declining to dispose of the case on the basis of the parties' cross Motions for Summary Judgment, the parties' subsequent filings of a Stipulation of Facts, proposed findings of facts, briefs and supporting exhibits added nothing new to the record. We therefore remand the case to the Presiding Officer for further hearing on the question of whether the portable rock crushing plants here at issue may generally be considered "mobile" rock crushing plants. Without binding the Presiding Officer in structuring a further hearing, we note that the characterization or classification of such plants within the industries which produce and use them may be the most material evidence to the question at issue here.[4]

THEREFORE, IT IS ORDERED, That this proceeding is remanded to the Presiding Officer for the purpose of determining whether the rock crushing plants at issue herein may be considered mobile rock crushing plants within the meaning of tariff Item 1255; and

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[2] Tariff Item 1255 applies, inter alia, to: aircraft servicing trucks; airfield vacuum cleaners; audio-visual aid units; automobile and scrap metal crushing machinery—mobile; batching plants, asphalt or cement; communication repair trucks; conveyor trucks; crash trucks; fire engines; fork lifts, pickup and Warehouse, N.O.S.; hoists or lifts, telescoping (not truck mounted); machine shop trucks; meteorological instrument equipped trucks; mobile asphalt mixing plants; mobile cafeterias and kitchens; mobile health clinic; mobile laboratories; mobile motion picture units; mobile rock crushing plants; platforms, aerial work; radar trucks; radio trucks; rigs, drilling truck/trailer mounted; road sweeping vehicles; seismograph instrument equipped trucks; sewer cleaning trucks; soil testing laboratory; vacuum tank trucks; vibratory compactors; and welding trucks.

[3] The evidence of record consists of the following:

> Both the bill of lading description and the manufacturers brochure describe the rock crushing plants as "portable." The brochures refer to their "excellent mobility." *See, e.g.* Barber Green Bulletin 423, "Telsmith Portable Crushing Plants—up to 280 tph" which describes the unit as follows, at p. 2:
>
> "*Excellent Mobility*
>
> All plant components come equipped with running gear. Except for the crushers, all motors are factory-wired to a plug and receptacle on the chassis. The control trailer—standard with the 3 stage plant—is also wired with plug and receptacle. Just plug in and you're ready to crush."
>
> Exhibit C to Respondents' Proposed Findings of Fact and Conclusions of Law.

[4] It would be particularly helpful to learn, for example, whether there exist mobile rock-crushing vehicles such as might be used for tunnels or road construction, that are self-propelled and to which tariff Item 1255 would clearly apply, as distinguished from the equipment which constitutes the shipments in issue.

IT IS FURTHER ORDERED, That the Initial Decision is adopted to the extent not inconsistent with this Order and vacated in all other respects.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32
KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

Respondents overcharged Complainant on four shipments in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3). Reparation with interest awarded.

Paul S. Aufrichtig and *Bruce L. Stein* for Kuehne and Nagel, Inc., Complainant.

Marc J. Fink and *Kelly A. Knight* for Barber Blue Sea Line and Nedlloyd Lines, Respondents.

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

Partially Adopted March 28, 1985

This is a complaint proceeding filed pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821. Treating the complaint as having been amended [2] and as having been conformed to the proof, it alleges that the Respondents,[3] common carriers by water in foreign commerce and members of Eighty Nine Hundred Rate Agreement charged, demanded, collected and received greater compensation for the transportation of property than the rates and charges specified in that Rate Agreement's tariff on file with the Commission and duly published and in effect at the time in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3), in connection with four shipments of rock crushing and conveying plants and accessories transported from Baltimore, Maryland, to Damman, Saudi Arabia.

BACKGROUND OF THE PROCEEDING

The complaint was filed July 28, 1983, by Kuehne and Nagel, Inc. In it Kuehne and Nagel claimed standing as an aggrieved party entitled

[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 amendment was made informally in a letter dated October 25, 1983. In that letter, counsel for Complainant advised counsel for Respondents that Complainant had written its claim for overcharges with respect to a shipment of "batching plants" carried by Respondent, Nedlloyd Lines, on August 19, 1981, from New Orleans, Louisiana, to Damman, Saudi Arabia.

[3] The complaint named the first of the two Respondents "Barber Steamship Lines, Inc., as Agents for Barber Blue Sea Line." The caption of the proceeding was changed to its present style by order of September 27, 1983. In keeping with the usage employed by the parties in their Stipulation of Facts, *infra*, Barber will be referred to hereafter as BBS.

to reparation by virtue of having paid the freight for the four shipments, as agents for the consignee, E. A. Juffali and Bros. Jeddah, Saudi Arabia. For present purposes, the following are the pertinent details of the four shipments:

Date (Bill of Lading)	Respondent	Amount of Claimed Overcharge
(1) August 9, 1981	BBS	$11,448.65
(2) August 9, 1981	BBS	2,285.80
(3) November 21, 1981	Nedlloyd	2,287.66
(4) November 21, 1981	Nedlloyd	2,312.43

The answer, filed August 31, 1983, denied that there were any overcharges, affirmatively contested Complainant's standing to sue and affirmatively invoked the statute of limitations as a bar to suit. A third affirmative defense alleged that Complainant and the consignee were estopped from alleging the overcharge claims because "they agreed in advance of shipment that the now disputed charges were correctly assessed."

After a prehearing conference was held, Respondents moved for summary judgment. Complainant's answer to the motion contained a cross motion for summary judgment.[4] Respondents' motion was not granted because factual issues remained in dispute, but no written ruling was necessary because, at a further prehearing conference, it was decided that the case would be disposed of by an initial decision based upon a factual record consisting of: (1) a Stipulation of Facts agreed to by counsel for both sides and filed with the Commission on April 24, 1984; (2) Exhibits attached to the separate proposed findings of fact to be submitted by the opposing parties or exhibits otherwise in the record and incorporated by reference in those proposed findings.[5]

Subsequent to the filing of the stipulated and proposed findings of fact, I asked Complainant's counsel if Complainant could obtain an assignment from the consignee of any claims the latter might have against the Respondents arising from the four shipments underlying the complaint.[6] On June 8, 1984, Complainant's counsel furnished a telex of such assignment, dated June 7, 1984. By telephone, counsel for Respondents advised me, in effect, that Respondents would not object to a finding that a valid assignment had been made, but that Respondents continued to assert the affirmative defense of the statute of limitations.

[4] The cross motion was not timely. See Notice of Further Prehearing Conference served January 9, 1984, ordering Respondents not to respond to the cross motion. Nevertheless, as indicated at a subsequent prehearing conference, the arguments made in the cross motion will be considered here.

[5] See, also, Procedural Order, served April 30, 1984. The Respondents' Proposed Findings, etc., were filed May 15, 1984. Complainant's Proposed Findings, etc., were received by me on May 18, 1984.

[6] Respondents' counsel was advised of this telephone conversation with Complainant's counsel and informed me that Respondents did not object to what I was doing.

FACTS

In addition to those matters appearing in the Stipulation of Facts, my findings of fact will include those portions of the proposed findings specifically set forth, *infra*. Any proposed findings not included are rejected. Nevertheless, for convenience, some findings of fact appear under headings of this decision other than *Facts*.

THE STIPULATION OF FACTS

The following is the Stipulation of Facts entered into by counsel for the parties:

1. The Complainant challenges the tariff classification which Respondents have applied to four (4) shipments of rock crushing and conveying plants and accessories from Baltimore to Saudi Arabia during the period August—November 1981.

2. For each of these shipments Kuehne and Nagel, Inc.[7] acted as agents for the consignee E.A. Juffali and Bros., Jeddah, Saudi Arabia and paid the freight for the shipments. Respondents have contested the standing of the Complainant to bring this action.

3. The Respondents named above are common carriers by water engaged in transportation of cargo between U.S. ports and Middle East ports and as such are subject to the provisions of the Shipping Act of 1916, as amended.

4. Under BL[8] No. 143944028/81 (Shipment 1) Barber Blue Sea Line (hereafter "BBS") carried from Baltimore to Saudi Arabia a shipment described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 3646 PP–VGF Portable Primary Plant with Vibrating Grizzly Feeder and Accessories)." More specifically, this shipment consisted of 66 packages; 4 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 66 packages weighed 462,190 lbs. and encompassed a volume of 38,825.8 CFT.[9] The ro-ro pieces accounted for 36% by weight and 53% by volume of this shipment.

5. Under BL No. 143943067/81 (Shipment 2) BBS carried from Baltimore to Saudi Arabia a shipment, described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF Portable Primary Crushing Plant with Vibrating Grizzly Feeder and Accessories)". More specifically, this shipment consisted of 46 packages; 2 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 46 packages weighed a

[7] Kuehne and Nagel is a licensed freight forwarder.

[8] All Bills of Lading involved in this proceeding designate Barber Greene as the shipper.

[9] As the weight and measurement figures indicate, the Barber Greene Telsmith Model 3646 is massive. Its portable primary unit weighs about 159,000 pounds and measures about 50 feet long, 23½ feet high and 14½ feet wide. The plant includes one 50-foot, several 60-foot, and one 70-foot conveyers.

total of 239,010 lbs. and encompassed a volume of 17,383.1 CFT.[10] The ro-ro pieces accounted for 52% by weight and 52% by volume of this shipment.

6. Under BL. No. 141947032/81 (Shipment 3) Nedlloyd Lines (hereafter "Nedlloyd") carried from Baltimore to Saudi Arabia a shipment, described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF/DD Portable Primary Plant with Vibrating Grizzly Feeder and Accessories)." More specifically, this shipment consisted of 46 packages; 2 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 46 packages weighed a total of 239,060 lbs. and encompassed a volume of 17,246.2 CFT. The ro-ro pieces accounted for 52% by weight and 52% by volume of this shipment.

7. Under BL. No. 141947029/81 (Shipment 4) Nedlloyd carried from Baltimore to Saudi Arabia a shipment, described on the face of the bill of lading, as a "rock crushing and conveying plant (Telsmith 2540 PP–VGF/DD Portable Primary Plant with Vibrating Grizzly Feeder and Accessories)." More specifically, this shipment consisted of 46 packages; 2 of these packages were ro-ro pieces, whereas the remainder were in boxes, crates, etc., and were thus non-ro-ro pieces. Together, these 46 packages weighed a total of 239,760 lbs. and encompassed a volume of 17,355.8 CFT. The ro-ro pieces accounted for 52% by weight and 52% by volume of this shipment.

8. A rate of $122.25 W/M was applied to the ro-ro pieces in these shipments. This rate is contained in item 1255 of the 8900 Rate Agreement Freight Tariff No. 8, FMC No. 8 ("tariff"),[11] and applies to "Vehicles, Specially Equipped (UNBOXED), Inc.: . . . Mobile Rock Crushing Plants." A rate of $131.25 W/M was applied to the non-mobile, i.e. the non-ro-ro pieces. This rate is contained in item 765 of the tariff and applies to "MACHINES AND MACHINERY AND PARTS THEREOF, N.O.S. (NOT AGRICULTURAL OR ROAD BUILDING) . . . Rock Crushing Plants—(If Mobile See Item 1255)."

9. Complainant contends that the ro-ro pieces are the basic components of the rock crushing plants and that the non-ro-ro pieces are parts of the plants and should have been rated at the lower $122.25 rate. BBS and Nedlloyd, on the other hand, maintain that the rock crushing plants are not mobile units since the plants themselves are incapable of moving on wheels and thus do not qualify for the lower rate in item 1255 which is reserved for specially equipped unboxed vehicles.[12] Accordingly, Re-

[10] Although not as large as Model 3646, Barber Greene Telsmith Model No. 2450 is big. Its portable primary unit weighs 88,000 pounds and measures about 50 feet long, 21½ feet high, and 14¼ feet wide. The plant includes several 50- and one 60-foot conveyers.

[11] Under Rule 9 of the tariff, Kuehne and Nagel was entitled to freight forwarder compensation for services provided to a member line of the Rate Agreement.

[12] Respondents urge that the rock crushing plants cannot be moved without being completely disassembled. See Respondents' Motion for Summary Judgment, p. 7; Appendix B to Respondents' Motion for Summary

spondents believe that the rate of $131.25 is applicable to all pieces except for those mobile ro-ro pieces which qualify for the lower $122.25 rate provided for in item 765 of the tariff. Respondents contend such rating is consistent with tariff items 765 and 1255 and with Rule 2(H) which provides that "Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles when so described on ocean bills of lading, except where specific rates are provided herein for such parts." Complainant contends that the ro-ro pieces are the main part of the plant. Complainant also contends that the plants should be rated at the $122.25 rate for mobile rock crushing plants and that the non-ro-ro parts should, according to Rule 2(H), be rated at the same rate.[13]

10. The total charges for shipment No. 1 were $161,171.42. Complainant believes that the freight should have been $149,722.77. It therefore seeks a refund of the difference of $11,448.65. As noted, BBS maintains that it charged the correct rate and that no refund is owing.

11. The total charges for shipment No. 2 were $69,318.99. Complainant believes that the freight should have been $67,033.19. It therefore seeks a refund of the difference, $2,285.80. As noted, BBS maintains that it charged the correct rate and that no refund is owing.

12. The total charges for shipment No. 3 were $68,792.56. Complainant believes that the freight should have been $66,504.90. It therefore seeks a refund of the difference, $2,287.66. As noted, Nedlloyd maintains that it charged the correct rate and that no refund is owing.

13. The total charges for shipment No. 4 were $69,241.51. Complainant believes that the freight should have been $66,929.08. It therefore seeks

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Judgment, paras. 6, 12. In accordance with the terms of the Procedural Order of April 30, 1984, *supra*, Appendix B was received in evidence without objection from Complainant. There is, of course, a difference between evidence being adduced and evidence satisfying the burden of persuasion. Appendix B is an affidavit of Nedlloyd's Assistant Manager for Pricing and Manager of Conferences. The affiant states that, "it is clear that, after assembly, none of these plants could be moved without being completely disassembled." While it is probably true that the plant would require some disassembly before it could be moved, it is not "clear" from any exhibit that it would have to be "completely disassembled" to be moved. It is evident that the plant was not "completely disassembled" when it was moved aboard Respondents' vessels. Consequently, I do not find that the statement of the affiant reflects the facts of record or meets the burden of persuasion. Moreover, I can perceive of no relevancy to the statement. The issue is not whether the plant can be moved when assembled. The issue is whether the *plant* was "mobile" when shipped. *Webster's Third New International Dictionary of the English Language Unabridged*, G & C Merriam Company, 1967, p. 1450, offers many definitions of the word "mobile." One is "vehicle." Another meaning is "capable of moving or being moved about readily."

[13] Appendix B, previously described, and Appendix A, an affidavit of a BBS official, attached to the Respondents' Motion for Summary Judgment, state, among other things, that the lower rate was intended to pass on to the shipper some of the cost savings realized by the carrier in loading ro-ro equipment, thus implying that it costs more to load boxed shipments or boxed parts or accessories of ro-ro equipment. These statements standing alone (and there is no other probative evidence) do not justify a finding that it costs less to load and unload ro-ro equipment. It may be true, in many instances, that it costs less to handle ro-ro shipments than non-ro-ro shipments, but that lower cost depends upon many factors affecting costs and this record is barren of any evidence of those factors. I find that those statements are merely conclusory and are unsupported by the evidence.

a refund of the difference, $2,312.43. As noted, Nedlloyd maintains that it charged the correct rate and that no refund is owing.

THE APPLICABLE TARIFF PROVISIONS

At the time the shipments were made, the following tariff provisions were in effect.

Item No. 765, at tariff page 120, read:

Commodity Description & Packaging	Rate Basis	Rate
Machines and Machinery and Parts Thereof, N.O.S. (Not Agricultural or Road Building):		
Rock Crushing Plants—(If Mobile, See Item 1255)	W/M	131.25

Item No. 1255, at tariff page 149, read, as pertinent:

Commodity Description & Packaging	Rate Basis	Rate
Vehicles, Specially Equipped (UNBOXED), Incl.:		
Aircraft Servicing Trucks)		
Airfield Vacuum Cleaners)		
Audio-Visual Aid Units)		
Automobile and Scrap Metal Crushing Machinery—Mobile)		
Batching Plants, Asphalt or Cement)		
Communication Repair Trucks)		
Conveyor Trucks)		
Crash Trucks)		
Fire Engines)		
Fork Lifts, Pickup and Warehouse, N.O.S. (Also see Item 1240))		
Hoists, or Lifts, Telescoping (Not truck Mounted))		
Machine Shop Trucks)		
Meterological Instrument Equipped Trucks)		
Mobile Asphalt Mixing Plants)		
Mobile Cafeterias and Kitchens)	W/M	122.25
Mobile Health Clinic)		
Mobile Laboratories)		
Mobile Motion Picture Units)		
Mobile Rock Crushing Plants)		
Platforms, Aerial Work)		
Radar Trucks)		
Radio Trucks)		
Rigs, Drilling Truck/Trailer Mounted)		

Commodity Description & Packaging	Rate Basis	Rate
Road Sweeping Vehicles)		
Seismograph Instrument Equipped Trucks)		
Sewer Cleaning Trucks)		
Soil Testing Laboratory)		
Vacuum Tank Trucks)		
Vibratory Compactors—Eff. thru 8/20/81)	(A)	
Welding Trucks)		

Units exceeding 60 gross tons in weight per piece or packages—Apply to the "8900" LINES [14]

Rule 2(H) at page 10 read:

RULES AND REGULATIONS

2. *Application of Rates—*

(H) Whenever rates are provided for an article named herein, the same rate will also be applicable on named parts of such articles when so described on ocean bills of landing, except where specific rates are provided, herein for such parts.

DISCUSSION AND CONCLUSIONS

I: Affirmative Defenses

It will be helpful to examine the affirmative defenses before proceeding to the section 18(b)(3) (or tariff overcharge) issue.

A: Standing and Statute of Limitations

The affirmative defenses of lack of standing and running of the statute of limitations are related and may be examined together, even though standing may no longer be in issue by virtue of Respondents' offering no objection to the validity of the assignment which took place in June 1984.

[14] It is noted that the primary unit of Telsmith Model 3646 weighs in excess of 60 tons, but the Respondents do not defend on this basis. Under these circumstances, it may be assumed that the tariff procedures were complied with.

Section 22(a) of the Shipping Act, 1916, 46 U.S.C. 821(a),[15] limits the filing of a complaint for reparation to a period of not more than two years from the time a cause of action accrues.[16]

It is not necessary to engage in a prolonged discussion of the twin affirmative defenses asserted by Respondent in the fact situation presented, for it is now well settled that if a complaint is filed within two years of accrual of a claim, relief by way of reparation will not be denied merely because a complainant did not perfect its claim by the time the complaint was filed. In enunciating this principle, the Commission held that if a complaint was otherwise timely filed, proof of an assignment of the claim to the complainant after the two-year period had run satisfied the complainant's burden of establishing it was the person that suffered injury.[17] See *Rohm & Haas Co.* v. *Italian Line,* 24 F.M.C. 429 (1981); *Interconex, Inc.* v. *Federal Maritime Commission,* 572 F.2d 27 (2 Cir. 1977).

On the authority of *Rohm & Haas Co.* v. *Italian Line, supra,* the affirmative defenses alleging lack of standing to sue and alleging the bar of the statutory limitations are dismissed.

B: Estoppel By Agreement

It is not necessary to decide whether the defense of estoppel by agreement is an available defense to causes of action alleging overcharges, because the existence of that agreement is denied by Complainant and, in the face of that denial, there simply is no proof that either Kuehne and Nagel or Juffali "agreed in advance of shipment that the now disputed charges were correctly assessed."

Presumably, the evidentiary matter relied upon by Respondents to support this affirmative defense are the following statements which appear in affidavits attached to this motion for summary judgment.

Paragraph 7 of the affidavit of a BBS vice-president states:

> The shipments involved here are part of a long series of similar shipments beginning in 1979 or 1980. Prior to and during such series of shipments, I discussed the subject charges with Kuehne & Nagel personnel in New York and Juffali & Bros personnel

[15] As pertinent, section 22(a) provides:
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, . . . caused thereby. . . . The board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

[16] By Notice, "Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984," served May 15, 1984, 49 *Fed. Reg.* 21,798 (May 23, 1984), the Commission stated that determination of the applicability of the Shipping Act of 1984 in cases pending before the agency on June 18, 1984, the effective date of the 1984 Act, would be made on a case-by-case basis. In light of the decision reached herein, it is not necessary to determine the applicability of section 11 of the 1984 Act, which provides for a three-year statute of limitations, to this proceeding. See section 11 of the Shipping Act, 1984, 46 U.S.C. app. 1710(g).

[17] Of course, there must also be proof of a violation of the Shipping Act.

in Saudi Arabia. BBS's rating policies as reflected and explained in the accompanying Motion for Summary Judgment were understood and agreed to by all parties.

Paragraphs 15 and 16 of the affidavit of Nedlloyd's assistant manager for pricing and manager of conference state:

> In further support of our position, I would point out that, the shipments involved here are part of a long series of similar shipments beginning in 1979 or 1980. Prior to and during such series of shipments, I discussed the subject charges with employees of both Juffali and Bros. and Kuehne and Nagel by telephone, telex, and letter. Nedlloyd's rating policies as reflected and explained in the accompanying Motion For Summary judgment were understood and agreed to by all parties.
>
> Since these shipments began, Nedlloyd has always made clear that ro-ro components of stationary batching and rock crushing plants would be rated under the lower rate received for mobile plants, but that other pieces of such stationary plants would be rated at the higher rate reserved for stationary plants. A letter from Nedlloyd to Kuehne & Nagel reflecting Nedlloyd policy on this subject is attached.

The referenced letter from a Nedlloyd sales representative to a named, but otherwise unidentified Kuehne and Nagel employee [18] reads in pertinent part:

> RE: "NEDLLOYD ROUEN" VOYAGE 0129 BALTIMORE/DAMMAM–ONE TELSMITH 3646 PP–VGF ROCK CRUSHING AND CONVEYING PLANT.
>
> We are writing in reference to your recent booking of this Rock Crushing and Conveying Plant on the Nedlloyd Rouen voyage 0129.
>
> To reiterate on what was quoted to you, the following rates will apply on this shipment:
>
> | | |
> |---|---|
> | All Rolling Stock Pieces | $116.25 W/M |
> | All Break Bulk Pieces | $125.00 W/M |
>
> Break Bulk Pieces are subject to heavy lift charges where applicable. Rock Crushing and Conveying Plant must be shown on the Bill of Lading in order for these rates to apply.
>
> These rates are subject to the Bunker Surcharge and War Risk Surcharges in effect at the time of shipment.
>
> We trust all of the above will satisfy your requirements. Should you have any further questions, please feel free to call us at 212/432–9150.

[18] All that the record shows is that she is the notary public before whom the complaint was verified.

It is apparent that all that those affidavits and the letter establish is that, a letter, dated October 29, 1980, was sent from Nedlloyd to Kuehne and Nagel setting forth Nedlloyd's quotation for the Telsmith Model 3646 rock crushing plant. It does not manifest Kuehne and Nagel's agreement or, even, acquiescence, that the quoted rates were the rates published in the governing tariff. Inasmuch as the burden of proof is on the party alleging an affirmative defense and the Respondents have failed to meet that burden, the affirmative defense of estoppel by agreement must be dismissed.

In apparent recognition that their affirmative defense is unfounded and unsound, in their proposed findings of fact, Respondents do not seek a finding that an agreement existed and, in their motion for summary judgment, Respondents make no argument in support of this defense. But they do not entirely abandon their defense. Instead, they alter it and call it "custom and usage." Thus, they claim that the cited passages from the affidavits and the letter are evidence of custom and usage, which they assert are useful and reliable factors to be considered in determining the meaning of a tariff item.

In *Allied Chemical S.A.* v. *Farrell Lines, Inc.*, 23 F.M.C. 381, 401 (I.D. 1980), adopted 23 F.M.C. 375 (1980), the Commission did state that custom and usage were useful and reliable tools for interpreting a tariff, but the Commission also stressed that custom and usage, as an aid to interpretation, come into play only when certain conditions are satisfied. First, custom and usage cannot vary the terms of a tariff. Second, there must be evidence that carrier and shipper both accorded the same meaning to the tariff provision. This is the way the Commission put it:

> Custom and usage cannot vary the terms of a tariff. But, custom and usage, as demonstrated by the actions of carriers and shippers, are useful and reliable factors to be considered in determining the meaning of a tariff item.

For present purposes, it is not necessary to examine the first condition, because the second condition has not been met. Respondents have made no showing of mutuality of tariff interpretation nor any showing of acquiescence by the shipper interests in the "interpretation" provided by Nedlloyd. In this respect it must be noted, also, that there is no evidence of record showing a course of conduct dating back to shipments made in 1979, despite the statements to that effect in the affidavits. The only evidence of record which shows when the rock crushing plant shipments might have begun is the Nedlloyd letter of October 29, 1980, but that letter relates to a single booking and cannot be considered as persuasive evidence of mutuality of tariff interpretation. Neither does the letter constitute proof that the shipment contemplated by the booking took place.[19]

[19] This finding should not be misunderstood. I do not find that Kuehne and Nagel/Juffali did not ship rock crushing plants under the 8900 Rate Agreement tariff until the fall of 1981. I merely find that the record

Accordingly, whether it is intended as an adjunct to the estoppel defense or merely as an aid to tariff construction, the custom and usage argument must be rejected.

II: THE 18(b)(3) ISSUE

The contentions of the two sides to the dispute with respect to the tariff overcharge issue appear in Paragraph No. 9 of their Stipulation of Facts, *supra*, and will not be repeated here except when required for clarity.

This much is clear about the facts which bear on the question. Sometime in the fall of 1980, the Complainant booked a shipment of a Telsmith 3646 Rock Crushing Plant aboard a Nedlloyd vessel. When that shipment was booked, Nedlloyd quoted a rate of $116.25 W/M on all rolling stock pieces and a rate of $125.00 W/M on all break bulk pieces. Official notice may be taken that on October 29, 1980, the following rates appeared in the tariff: [20]

Item No. 765[21]—$125.00 W/M
Item No. 1255[22]—$116.25 W/M

It is manifest, then, neither in 1980, when the letter was sent, nor in 1981, when the shipments took place, was there any tariff commodity description for rock crushing plants which included the terminology "rolling stock pieces" or "break bulk pieces." Thus, rather than providing an aid to construction of the tariff provisions, the letter introduces elements dehors the tariff and, as will be seen, at variance with the terms of the tariff.

While it may be possible, armed with the October 29, 1980, letter, to reach the conclusion that Respondents intended the tariff to mean what was represented in the letter, the tariff, as published, is not susceptible of being accorded that construction. The tariff plainly provides for the application of the Item No. 1255 rates to each of the four shipments of rock crushing plants, in their entirety. An explanation follows.

By way of introduction, it should be noted that there is no dispute that the Item No. 765 rate applies to all non-mobile rock crushing *plants*.

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does not establish that they made shipments before that date. Neither do I find that shipments, if any, made before the fall of 1981 were rated any differently by the carriers than were these shipments. I find only that there is no evidence of probative value in the record before me to warrant a finding that these four shipments "are part of a long series of similar shipments beginning in 1979 or 1980."

[20] Prior to the writing of this decision, Respondents were orally advised that I would take official notice of the effective tariff provisions at the time of the October 29, 1980, letter. Respondents agreed that the tariff provisions cited, *infra*, were in effect at that time. See section 7(d) of the Administrative Procedure Act, 5 U.S.C. 556(e) and Rule 226(a) of the Commissions' Rules of Practice and Procedure, 46 CFR 502.226(a), authorizing the taking of official notice of a material fact not in the record.

[21] The tariff description for Item No. 765, at 8th rev. p. 121, effective September 29, 1980, was nearly identical to the one shown in the text under the heading "The Applicable Tariff Provisions," *supra*.

[22] The tariff description for Item No. 1255, at 16th rev. p. 147, effective October 27, 1980, differs from the one shown in the text, *supra*, by the absence of the word "(UNBOXED)" following the words "Vehicles, Specially Equipped."

The underpinning of Respondents' overcharge defense lies in the belief that the commodity description set forth in Item No. 1255 is applicable only to unboxed vehicles, i.e., ro-ro pieces. They put it this way—"Therefore, mobile rock crushing plants that are in the form of *unboxed vehicles* get a lower rate than such plants would otherwise obtain."[23] From this base, they urge that because the ro-ro pieces, "Whether by weight or volume," amounted to "less than 54% of each shipment,"[24] the remaining percentage, consisting of boxes, crates and skids were properly rated under Item No. 755.

Respondents' argument assumes that there may be a minimum percentage of vehicle weight or volume which might allow the remainder (boxes, skis and crates) to carry the vehicle rate. Of course, the tariff provides no minimum, nor do Respondents suggest what that minimum might be. Under the circumstances, it is fair to construe the commodity description in Item No. 1255 to mean that if more than half of a shipment, measured by weight or volume, consists of vehicles, that commodity description fits the shipment. Respondents attempt two separate approaches to fill the gap between premise and conclusion. First, they posit that after assembly, the plants could not be moved without being completely disassembled.[25] They follow this statement with the curious assertion that it would be reasonable for them to argue, therefore, that even the ro-ro pieces would not qualify for the vehicle rates by virtue of the fact that since the plants are not mobile, the vehicles could not be components of a mobile plant, but, instead should be viewed as components of a stationary plant. Seemingly recognizing that this approach might jeopardize the manner in which they actually rated the bills of lading, Respondents resolve their quandary by saying that they gave the shipper the "benefit of the doubt" and classified the *"ro-ro pieces only"* under the rates for mobile plants.

However, the facts upon which Respondents rely for their "benefit of the doubt" argument and the facts upon which they attempt to support their estoppel/custom and usage defense collide head on. Given the documentary nature of the evidence underlying the custom and usage defense, the "benefit of the doubt" argument and the "facts" implied by that argument are determined to be devoid of credibility.

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[23] Respondents' Motion For Summary Judgment, p. 6.

[24] See Stipulation of Facts, Nos. 4 through 7, inclusive, *supra.* Summarized, those Facts disclose the following with respect to weight and measurement percentages:

Shipment	Ro-Ro Weight %	Ro-Ro Volume %
No. 1	36	53
No. 2	52	52
No. 3	52	52
No. 4	52	52

[25] See n. 12, *supra,* rejecting a finding to this effect.

Second, Respondents urge an equally fanciful conclusion bottomed on their cost saving hypothesis.[26] They say that the lower Item No. 1255 rate, which applies only to unboxed vehicles, was "intended"[27] to pass on the savings from less costly handling to the shipper. (One may observe that this argument is also at loggerheads with the "benefit of the doubt" argument.) Overlooking their admission that the non-ro-ro portions consisted of components other than boxes, they complete their point by saying, "Thus, even if the non-ro-ro pieces in issue were vehicles or parts of vehicles (and they are not), most would not qualify for the lower rate because they are not unboxed."[28] Even if the cost savings basis for this argument had not been rejected, I can perceive scant merit to the logic of this argument, for in addition to being without evidentiary support, it overlooks the unambiguous language of the tariff.

It is evident that if the tariff writers wanted to limit the application of the Item No. 1255 rate to only those parts of rock crushing plants which were unboxed (ro-ro) vehicles, they were not without the means to do so. Yet they did not. They did not make the rate applicable only to ro-ro *parts of* "Mobile Rock Crushing Plants." They did make the lower rate applicable to *entire* "Mobile Rock Crushing Plants," whether or not some components were non-ro-ro. One does not have to go beyond the commodity and packaging provisions of Item No. 1255 for confirmation that the parts rule of the tariff, Rule 2, Application of Rates, *supra*, is to be applied to non-ro-ro component parts of mobile rock crushing plants for those provisions specifically identify "*pieces* or *packages*" as units of "Mobile Rock Crushing Plants."

Summarizing, the commodity description did not limit the lower rates under Item No. 1255 to: "Vehicles, Specially Equipped (UNBOXED), Incl. Mobile, Rock Crushing Plants, ro-ro pieces only." There are no such words of limitation in the tariff. To the contrary, as if the unconditional language "Mobile Rock Crushing Plants" were not sufficient to allow for the inclusion of non-ro-ro parts, Item No. 1255 expressly denominates pieces and packages as units within the scope of that Item. A package is, after all,

[26] See n. 13, *supra*, for rejection of the cost saving contention.

[27] Respondents' Motion For Summary Judgment, p. 7.

[28] *Id.* In using the word "most" to describe the quantity of "not unboxed" components, Respondents treat themselves generously. However, their proposed findings do not attempt to show the breakdown by number, weight or volume of the components. An examination of the bills of lading and riders thereto show the following numbers of non-ro-ro pieces in each shipment.

Shipment	Boxes	Skids	Crates	Bundles	Cases	Pieces
No. 1	6	9	2	4	9	32
No. 2	6	1	2	3	7	25
No. 3	6	3	2	3	7	23
No. 4	5	1	3	3	7	25

It should be noted that Respondents make no claim that skids, crates, bundles, cases and pieces do not meet the definition of "unboxed."

a commodity in a container or wrapping of some sort.[29] Moreover, even if the package provision did not appear in Item No. 1255, the non-ro-ro pieces, skids, crates, bundles, etc., clearly qualify for the rate shown for that Item under Rule 2 because they are *parts* of "Mobile Rock Crushing Plants."[30]

The lesson to be learned from this exercise is that a tariff must be given the plain meaning of the language which appears within the four corners of the tariff pages. The language of this tariff is quite clear. The only element which detracts from that clarity and which, at best (treating that element most favorably to Respondents), introduces an ambiguity, is the Nedlloyd letter of October 29, 1984. However, extrinsic evidence may not be used to vary the plain meaning of the terms of a tariff nor will an ambiguity be resolved in favor of the tariff publisher. See *West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. 420, 451 (1980), Rejection of Petition [For Reconsideration], 22 F.M.C. 560 (1980), aff'd mem. sub nom. *West Gulf Maritime Association* v. *Federal Maritime Commission*, 652 F.2d 197 (D.C. Cir (1981)), cert. denied 454 U.S. 893 (1981). Accordingly, I find that Complainant was overcharged for each of the shipments in violation of section 18(b)(3).[31]

ORDER

It is ordered that Barber Blue Sea Line make reparation to Kuehne and Nagel, Inc., in the amount of $13,734.45, together with interest thereon, said interest to be computed in accordance with Rule 253 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.253.

It is further ordered that Nedlloyd Lines make reparation to Kuehne and Nagel, Inc., in the amount of $4,600.09, together with interest thereon, said interest to be computed in accordance with Rule 253 of the Commission's Rules of Practice and Procedure, 46 CFR 502.253.

(S) SEYMOUR GLANZER
Administrative Law Judge

[29] See *Webster's Third New International Dictionary of the English Language Unabridged, supra,* at pp. 1617–1618.

[30] Respondents would apply Rule 2 to their arguments in this way. Bearing in mind that Rule 2 allows parts to take the same rate as the article (the commodity described in the tariff), they urge that the non-ro-ro parts of the rock crushing plants must be viewed as stationary rock crushing plants, thus taking the specific rate provided in Item 765. They do not explain, however, how component parts of a mobile plant can, without more, become parts of a stationary plant.

[31] There is no cause to independently examine the substantive applicability of the Shipping Act, 1984, 46 U.S.C. app. 1701, to this proceeding beyond the statement which appears in this note, inasmuch as the provisions of sections 18(b)(3) and 22 of the Shipping Act, 1916, which bear upon the subject matter of this case have not been substantively altered by the comparable provisions in the new statute—sections 10(b)(1) and 11, 46 U.S.C. app. 1709(b)(1) and 1710. N.B. Attorneys' fees were not requested in the complaint, nor subsequently. See Notice cited in n. 16, *supra.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–21

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES—SERVICE CONTRACTS AND TIME/VOLUME CONTRACTS

DOCKET NO. 84–23

FILING OF TARIFFS AND DUAL RATE CONTRACT SYSTEMS IN THE FOREIGN COMMERCE OF THE UNITED STATES

DOCKET NO. 84–26

RULES GOVERNING AGREEMENTS BY OCEAN COMMON CARRIERS AND OTHER PERSONS SUBJECT TO THE SHIPPING ACT OF 1984

ORDER DENYING PETITIONS FOR RECONSIDERATION

APRIL 5, 1985

On November 15, 1984, the Federal Maritime Commission published Final Rules in the above-captioned proceedings which implemented various provisions of the Shipping Act of 1984 (46 U.S.C. app. §§ 1701–1720) (the Act or the 1984 Act). 49 *Fed. Reg.* 45320–45396. These Final Rules became effective on December 15, 1984.

Subsequent to the publication of the Final Rules, the Commission received pleadings, including petitions for reconsideration and replies thereto, which seek modifications of certain aspects of the Final Rules. A group of conferences serving the Mediterranean, Australian and New Zealand trades filed petitions for reconsideration in Docket Nos. 84–21, 84–23, and 84–26.[1] A group of conferences serving the North Atlantic trades filed petitions for rulemaking, or alternatively, replies in support of the Mediterranean Conferences' petitions, in Docket Nos. 84–21, 84–23, and 84–26.[2] A group

[1] The conferences, which are hereinafter collectively referred to as "the Mediterranean Conferences", are: Australia/Eastern U.S.A. Freight Conference; Greece/U.S. Atlantic Rate Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Med-Gulf Conference; Mediterranean-North Pacific Coast Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; and West Coast of Italy, Sicilian and Adriatic Ports North Atlantic Range Conference.

[2] The conferences, which are hereinafter collectively referred to as "the U.S.-European Carrier Associations", are: North Europe-U.S. Gulf Freight Association; Gulf-European Freight Association; North Europe-U.S. Atlantic Conference; U.S. Atlantic-North Europe Conference; and Pan-Atlantic Carrier Trade Agreement.

Continued

of conferences serving the transpacific trades filed a reply in support of the Mediterranean Conferences' petitions in Docket Nos. 84–21 and 84–23.[3] And the North Europe-U.S. Pacific Freight Conference (NEUSPFC) filed a reply in support of the U.S.-European Carrier Associations' petition in Docket No. 84–26.[4]

One issue raised in the Petitions regarding conference membership is currently being addressed in a recently inaugurated rulemaking proceeding.[5] The proposed rule would, among other things, allow conference membership changes to become effective upon filing, and would essentially provide the relief requested by the Petitions on this issue. In fact, one of the petitioning conferences acknowledges that final adoption of the proposed rule in Docket No. 85–4 will render the conference membership issue moot.

It is the intention of the Commission to take this same approach to another issue raised in the Petitions and to inaugurate a future rulemaking on service contracts which will address the question of whether the Shipping Act of 1984 allows a service contract to be stated in terms of a fixed portion or percentage of the total quantity of the commodity described in the contract. The Commission believes that such a separate proceeding will offer a better vehicle for the consideration of this issue in light of the overall objectives and policies of the 1984 Act. This future rulemaking will also provide an opportunity for further public comment on this specifically defined question.

The requested relief from the quarterly index of documents requirement will not be granted at this time, but the rule may be reconsidered at a future date based on the Commission's experience under the rule. The document index rule requires conferences and rate agreements to maintain an index of twelve specific categories of documents and to file this index with the Commission on a quarterly basis.[6] The Petitions have urged the Commission to withdraw the index rule or to suspend its effectiveness until the completion of further rulemaking, essentially on the grounds that it is an unreasonable and unnecessary burden. In denying the requested relief at this time, the Commission is directing the staff to review the index filings for the first quarter of 1985 in order to determine the extent to which such filings may be an undue burden on the industry, and to evaluate the regulatory utility of such indices. The Commission will review the staff's report concerning the indices filed for the first quarter of 1985,

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The Office of the Secretary advised filing counsel by letters dated February 20, 1985 and March 7, 1985 that the pleadings submitted on behalf of the U.S.-European Carrier Associations would be treated as replies in support of the Mediterranean Conferences' Petitions.

[3] The conferences, which are hereinafter collectively referred to as "the Transpacific Conferences", are: Trans-Pacific Freight Conference of Japan/Korea; and Japan/Korea-Atlantic and Gulf Freight Conference.

[4] All of these pleadings are hereinafter collectively referred to as "the Petitions".

[5] *See* Docket No. 85–4, *Miscellaneous Modifications to Existing Agreements—Exemption* (50 *Fed. Reg.* 5401–5402, February 8, 1985).

[6] *See* 46 C.F.R. §572.704. The first quarterly reports for the period January 1, 1985 to March 31, 1985 are to be submitted on or before April 30, 1985.

and based upon this experience, will at that time determine whether to rescind or modify the index requirement.

Finally, the Commission has determined not to withdraw its statement that loyalty contracts would appear to be subject to both the Shipping Act of 1984 and the federal antitrust laws. The Commission's statement was made in response to a comment which suggested that the use of a loyalty contract is an activity which enjoys antitrust immunity under section 7 of the 1984 Act (46 U.S.C. app. § 1706). The statement was not "volunteered" by the Commission as is suggested in the Petitions. Nor is the statement an "advisory opinion" as is suggested in the Petitions. Nor is the statement intended to assert or imply that the Commission has any jurisdiction over the antitrust laws. The statement is merely a response to a comment and an explanation of the action taken by the Commission in issuing its Final Rules. This statement remains the Commission's view of section 7 of the Act and the Commission does not see any need to further address this question in a future rulemaking.

Accordingly, the Commission has determined to deny the Petitions. In the case of the service contract and quarterly index issues, this denial is without deciding the ultimate merits of the various arguments presented in the Petitions.

THEREFORE, IT IS ORDERED, That the Petitions filed on behalf of the Mediterranean Conferences in Docket Nos. 84–21, 84–23, and 84–26; the Petitions filed on behalf of the U.S.-European Carrier Associations in Docket Nos. 84–21, 84–23 and 84–26; the Petitions filed on behalf of the Transpacific Conferences in Docket Nos. 84–21 and 84–23; and the Petition filed on behalf of the North Europe-U.S. Pacific Freight Conference are denied.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 580]

DOCKET NO. 84–27

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; CO-LOADING PRACTICES BY NVOCCS

April 10, 1985

ACTION: Final rule.

SUMMARY: This Final Rule addresses the practices of Non-Vessel-Operating Common Carriers (NVOCCs) combining cargo, usually for the purpose of attaining full container loads, such practices being commonly known as co-loading. The rule requires each NVOCC to describe in its tariffs the undertaking to offer or perform co-loading. Further, the Rule requires that NVOCCs give actual notice to a shipper that its cargo has been co-loaded and of the identity of the other NVOCC(s) involved in the co-loading. Special rates published by one NVOCC for the exclusive use of other, co-loading NVOCCs will be prohibited.

DATES: Effective May 15, 1985.

SUPPLEMENTARY INFORMATION:

The Commission initiated this rulemaking proceeding by publication of a Notice of Proposed Rulemaking in the *Federal Register* on July 25, 1984, 49 FR 29980. The Commission received 15 comments on the Proposed Rule. Commenting parties or groups of parties are: (1) 3-Way Ocean; (2) Airport Brokers Corporation; (3) John v. Carr & Son, Inc.; (4) F.X. Coughlin Co.; (5) Greene Companies International Inc.; (6) Hemisphere Forwarding, Inc.; (7) F.W. Myers & Co., Inc.; (8) New England Groupage; (9) Reardon Export, Inc.; (10) Associated Latin American Freight Conferences; Atlantic & Gulf/West Coast of South America Conference; East Coast Colombia Conference; South Atlantic & Gulf/Guatemala, El Salvador & Honduras Rate Agreement; South Atlantic & Gulf/Panama & Costa Rica Rate Agreement; United States Atlantic & Gulf/Ecuador Freight Conference; United States Atlantic & Gulf/Jamaica and Hispaniola Steamship Freight Association; United States Atlantic & Gulf/Southeastern Caribbean Conference; United States Atlantic & Gulf/Venezuela Freight Association; United States Florida/Ecuador Steamship Conference; West Coast of South America Northbound Conference; (11) 8900 Lines; Greece/U.S. Atlantic

Agreement; Iberian/U.S. North Atlantic Westbound Freight Conference; Italy, South France, South Spain, Portugal/U.S. Gulf and the Island of Puerto Rico Conference; Marseilles/North Atlantic U.S.A. Freight Conference; Mediterranean-North Pacific Coast Freight Conference; U.S. Atlantic & Gulf/Australia-New Zealand Conference; West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range Conference; (12) Japan/Korea-Atlantic and Gulf Freight Conference; New York Freight Bureau; Philippines North America Conference; Trans Pacific Freight Conference (Hong Kong); Trans Pacific Freight Conference of Japan/Korea; (13) Council of European & Japanese National Shipowners' Associations; (14) International Association of NVOCCs; and (15) National Customs Brokers and Forwarders Association of America, Inc.

In general, the commenters' views were as follows:

Individual NVOCC's Comments

New England Groupage (New England) supports the Proposed Rule without any changes. New England states that the abuses of co-loading greatly exceed any benefit that the shipping public might derive from the practice.

Three other commenters, 3-Way Ocean (3-Way), John V. Carr & Son, Inc. (Carr), and F.X. Coughlin Co. (Coughlin), support the Commission's Proposed Rule, in part. These commenters essentially object to the documentation requirements and the prohibition of special co-loading rates. Further details of these and other commenters' views are outlined herein under the various sub-parts of the Proposed Rule.

The five other commenting NVOCCs, Airport Brokers Corporation (Airport), Greene Companies International, Inc. (Greene), Hemisphere Forwarding, Inc. (Hemisphere), F.W. Myers & Co., Inc. (Myers) and Reardon Export, Inc. (Reardon) do not support the Proposed Rule, because in their opinion co-loading does not require special treatment with a special tariff filing rule. Hemisphere urges the Commission to enter into an investigation prior to pursuing a final rule which might result from the instant rulemaking procedure. Hemisphere, Airport, Greene, Myers and Reardon are of the opinion that the public is aware of the liability and responsibilities inherent in co-loading and that the present tariffs and rate structures of the NVOCCs and the VOCCs accommodate the economics and efficiencies of co-loading. Further, Greene is of the opinion that the Commission lacks jurisdiction in the matter of co-loading agreements.

Conferences' Comments

The Conferences support the Commission's effort to promulgate a rule covering co-loading. The Conferences, however, would modify the rule to provide: (1) additional documentation requirements which would require NVOCCs to notify the shipper prior to booking of the fact that the shipper's cargo would be co-loaded; (2) a restriction to allow co-loading only for

LCL shipments; and (3) a clarification of the rule as it relates to NVOCCs' co-loading activities which involve agreements.

Transportation Organizations' Comments

The Council of European & Japanese National Shipowners' Associations (CENSA) support the Proposed Rule, but suggest that the Commission review and clarify its jurisdiction in any circumstance where an NVOCC also acts as an ocean freight forwarder or undertakes other activities in connection with export or import shipments.

The International Association of NVOCCs (IANVOCCs) shares Greene's views with respect to the Commission's jurisdiction over NVOCC agreement matters. The IANVOCCs supports the Proposed Rule in principle, but urges that the Commission delete any reference in the rulemaking that suggests that NVOCCs can avoid their responsibility in publishing tariff information concerning co-loading by merely mentioning that such an activity is performed under the terms of an agreement.

Lastly, the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) is of the opinion that the Proposed Rule will impede lawful NVOCC activities which are regarded as beneficial to U.S. exports and thus requests that the Commission grant its request for oral argument in order to develop further details in this rulemaking. Briefly, NCBFAA states that the proposed requirements relating to the explanation of liability in both the tariff and in shipment documentation in section 580.17(b)(3) and the proposed prohibition of special co-loading rates in section 580.17(d) are burdensome to the NVOCCs, harmful to the shipping public, and will curtail viability of the forwarder/NVOCC.

Comments directed to specific portions of the proposed rule are discussed below:

Section 580.17 Special Rules and Regulations Applicable to Co-loading Activities of Non-Vessel-Operating Common Carriers (NVOCCs)

(a) *Definition*

> For the purposes of this section, "Co-loading" means the combining of cargo by two or more NVOCCs for tendering to an ocean carrier under the name of only one of the NVOCCs.

The National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) suggests that where the term "ocean carrier" appears in section 580.17(a) it should be amended to state "ocean *common* carrier" to be consistent with the statutory term and definition. We will not adopt this suggestion because it would unnecessarily narrow the scope of the regulations. An NVOCC is a common carrier regardless of whether the cargo it handles is ultimately transported by an ocean common carrier or by some other type of ocean carrier, such as a contract or tramp

carrier.[1] The ability to co-load and the necessity for notice to and equal treatment of shippers are unaffected by the NVOCC's choice of underlying vessel operator.

Greene states that the definition ignores the important distinctions between co-loading by agreement and co-loading through published tariffs. While there may be important distinctions between these two types of co-loading arrangements, the definition is not the place in which these distinctions need be reflected. We believe that co-loading by either type of arrangement does and should meet the definition set forth in the Rule. As indicated below, the substantive requirements of this Rule are made applicable only to those co-loading arrangements where a shipper/carrier relationship exists between the tendering and receiving NVOCCs, regardless of the existence of an agreement.

The Associated Latin American Freight Conferences, *et al.* (ALAFC) suggest that the words "in the import or export foreign commerce of the United States" be added to the definition of co-loading to make it clear that these regulations apply equally to foreign-based NVOCCs operating in U.S. import trades. It was the intent of the Commission to apply these rules to all NVOCCs subject to the Shipping Act of 1984 and we will, therefore, adopt ALAFC's suggestion in the interest of clarity.

The U.S. Atlantic & Gulf/Australia-New Zealand Conference, *et al.* (AGANZ) suggest that the definition be amended to delete the words "under the name of only one of the NVOCCs." Their concern is that the regulations would arguably not apply if cargoes are tendered to an ocean common carrier under the name of more than one NVOCC. The Commission is unaware of present co-loading arrangements by which cargo is tendered to an ocean common carrier under the name of more than one NVOCC. However, the possibility would appear to exist as suggested by AGANZ and, if so, could circumvent the intent of the Rule. Therefore, we will adjust the definition to accommodate AGANZ's concern, but will leave intact the concept that the cargo must be tendered to the ocean carrier in the name of one (or more) of the NVOCCs involved in the co-loading. To delete the phrase completely would broaden the scope of the regulations and could arguably encompass activities beyond the Commission's jurisdiction, such as those of shippers' agents, freight brokers, etc. One or more of the NVOCCs involved in the co-loading must be named as the shipper on the ocean carrier's bill of lading.

[1] The definition of NVOCC found in section 3(17) of the Shipping Act of 1984 (46 U.S.C. App; 1702(17)) states that an NVOCC is a shipper in its relationship with an *ocean common carrier*. We view this language as a clarification of the relationship between an NVOCC and the only type of ocean carrier that is regulated by the 1984 Act when the NVOCC tenders cargo to that type of carrier. We do not believe that Congress intended, by that language, to limit regulation of NVOCCs to only those which tender cargo to *ocean common carriers*. The activities of the NVOCC which are sought to be regulated—i.e., its holding out to the public as a common carrier—are not affected by the type of vessel operating carrier to which the NVOCC chooses to tender the cargo.

Section 580.17(b)(1)

(a) *Filing Requirements*
(1) All tariffs filed by an NVOCC shall contain a rule which describes its co-loading activities. If co-loading is accomplished pursuant to the terms of an agreement between or among NVOCCs, it is only necessary to note the existence of such agreement in each of the applicable NVOCC tariffs. If a co-loading service is not offered or performed by an NVOCC, its tariffs shall contain a rule which states that co-loading is "not offered or performed" by the publishing carrier.

Greene argues that the Commission lacks jurisdiction to promulgate regulations which require information concerning the implementation of private co-loading agreements and that none of the proposed sections of the Rule effectively deal with co-loading when offered or performed pursuant to an agreement between NVOCCs.

The IANVOCCs shares the same view as Greene with respect to the Commission's jurisdiction over NVOCC agreement matters. The IANVOCCs, however, supports the Commission's proposed rule in principle, and suggests that the Commission delete any reference in the rulemaking which infers that NVOCCs can avoid their responsibility in publishing tariff information concerning co-loading by merely mentioning that such an activity is performed under an agreement.

ALAFC are of the opinion that NVOCCs should be required to append any agreement it has executed on co-loading to its tariff so that shippers are made aware of any arrangements between NVOCCs.

AGANZ and the Transpacific Freight Conference of Japan/Korea *et al.* (Trans-Pac) suggest that section 580.17 be amended to accommodate co-loading activities which are implemented through an agreement. It is AGANZ's and Trans-Pac's opinion that agreement matters relating to co-loading must be viewed as a "practice" subject to tariff-filing requirements.

AGANZ further suggests that a distinction should be drawn between co-loading agreements which do not involve the furnishing of common carrier services and co-loading agreements which do involve the furnishing of common carrier services by the receiving NVOCC to the tendering NVOCC. In the latter case, AGANZ argues that the tariffs of the receiving NVOCC should be required to reflect the terms of the arrangement, regardless of the existence of an agreement.

AGANZ also comments that co-loading agreements could be required to be filed under the Shipping Act of 1984 when an NVOCC party to such an agreement is otherwise subject to agreement-filing requirements of either the 1984 Act or the Shipping Act, 1916. Attention is called to the Commission's Notice of Proposed Rulemaking of August 29, 1984 (49 FR 34253) in which the Commission announced an opinion that section 15 of the 1916 Act continued to apply to agreements between freight forwarders.

This last suggestion is one that is beyond the scope of this rulemaking proceeding and one that we believe addresses an unlikely situation. Since AGANZ filed its comments, Congress has acted to remove agreements among freight forwarders from the filing and approval requirements of the Shipping Act, 1916 (H.R. 5833, Pub. L. No. 98–595, 98 Stat. 3130 (1984). See 49 FR 46174, November 23, 1984. The only two entities now required to file agreements with the Commission relating to foreign commerce are ocean common carriers and marine terminal operators, neither of which is a typical affiliate of an NVOCC. Should such a situation arise in which ocean common carriers or marine terminal operators enter into an NVOCC co-loading agreement, we would address that situation on an *ad hoc* basis.

The general subject of co-loading performed pursuant to the terms of an agreement requires some clarification. As we said in the Notice of Proposed Rulemaking (p. 4 note 1), we express no opinion on the relationship that may be created between two or more NVOCCs by the terms of a private agreement. However, we agree with the comments that suggest that all shipper/carrier relationships between two or more NVOCCs should be reflected in appropriate NVOCC tariffs regardless of the existence of a separate agreement. Section 8 of the Shipping Act of 1984 is very explicit in its requirement that each common carrier file:

> "tariffs showing all its rates, charges, classifications, rules, and practices between all points or points on its own route and on any through transportation route that has been established."

Complementing the filing requirement of section 8 are the prohibitions of section 10(b) of the act.

> "(b) Common Carriers.—No common carrier, either alone or in conjunction with any other person, directly or indirectly may—
>
> (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts; [or] . . .
>
> (3) extend or deny to any person any privilege, concession, equipment, or facility except in accordance with its tariffs or service contracts; . . ."

As long ago as 1935, the Commission's predecessor, the United States Shipping Board Bureau recognized that,

> "The law prohibits special arrangements between shippers and carriers unless the terms thereof are fully disclosed in the tariff."[2]

[2] *Intercoastal Investigation, 1935*, 1 USSBB 400, 416 (1935) While that case was decided under the Intercoastal Shipping Act, 1933, (46 U.S.C. app. 843 *et seq.*) the tariff filing and adherence provisions of that Act are virtually identical to those now contained in the Shipping Act of 1984, with the exception of the

Continued

The important question pertinent to this proceeding is whether a shipper/carrier relationship exists between the NVOCCs in a co-loading arrangement. If it does, the statute requires that the "carrier" party to that arrangement include all of the applicable rates, charges, concessions, privileges etc. in its tariffs. The rate in the effective tariff affords the only legal basis upon which freight charges may be collected, any agreement to the contrary notwithstanding.[3]

A shipper/carrier relationship is established in a co-loading arrangement when the receiving NVOCC issues a bill of lading to the tendering NVOCC for the transportation of the co-loaded cargo. In such instances, the tendering NVOCC looks to the receiving NVOCC in the event of loss or damage to the co-loaded cargo, and the tendering NVOCC has no privity of contract or other type of direct relationship with the ocean carrier or other carrier which forms the next link in the transportation chain.

In contrast, one example of a carrier/carrier relationship would appear to be where two NVOCCs hold themselves out jointly to the shipping public to co-load and transport cargo. In such cases, we would expect that a joint or common bill of lading would be issued to the originating shipper and that the cargo would be tendered to the ocean carrier in the names of both co-loading NVOCCs. Other types of carrier/carrier relationships may be created by co-loading agreements and are not meant to be excluded by this example.

We have clarified section 580.17(b)(1) to distinguish between co-loading agreements which create a shipper/carrier relationship and those which create a carrier/carrier relationship. The issuance of a bill of lading by the receiving NVOCC to the tendering NVOCC will create a presumption that a shipper/carrier relationship exists. In neither case are we suggesting that the agreement itself must be filed with the Commission, nor are we asserting any other type of jurisdiction over the agreement *per se*. We are only taking the position that a common carrier's tariff must include all of the terms and conditions of its offering to the shipping public and that this fundamental principle cannot be circumvented or avoided by a private agreement.

A final comment on section 580.17(b)(1) is made by Trans-Pac, who suggests that NVOCCs should be restricted to co-loading only less-than-containerload (LCL) cargo. Trans-Pac states that the Commission and NVOCCs have relied upon LCL service as justification for the activity and it should, therefore, be so restricted.

The Commission will not adopt this suggestion. The fact that co-loading of LCL cargo is more prevalent and more likely than co-loading of full container loads is no reason to prevent the latter. The concern that Trans-Pac expresses over possible delay and unnecessary expense to shippers and consignees is one that the market should be able to control given

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new provisions for Service Contracts contained in the 1984 Act. Since only *ocean* common carriers, and not NVOCCs may offer such contracts, this difference has no relevance to the instant proceeding.

[3] *C.W. Spence* v. *Pacific-Atlantic S.S. Co.* 1 USSBB 624, 626 (1936).

the notice that these rules will require concerning the co-loading activities of NVOCCs.

Section 580.17(b)(2)

> In the event an NVOCC tenders cargo to another NVOCC for co-loading, its tariffs shall provide a clear explanation of its liability to the shipper and its responsibility to pay any other common carrier's rates and charges necessary in order to transport the shipper's cargo to its destination.

Hemisphere is of the opinion that NVOCC tariffs are clear and definite with respect to the liability of NVOCCs participating in co-loading activities. If that is true, then this part of the rule presents no additional burden or imposition upon the NVOCC industry.

However, the Commission's concern here is that confusion may exist in the minds of both shippers and NVOCCs in a situation where there is a failure of performance or damage to the cargo at some intermediate step in the transportation network. We want the initial NVOCC to make it absolutely clear to its shippers that it will live up to its obligations as a common carrier regardless of lower liability limits by subsequent NVOCCs, lack of privity with the ocean carrier, the absence of its own employees or facilities at particular destinations, or a myriad of other problems which may arise when cargo is co-loaded.

Section 580.17(c) Documentation Requirements

> NVOCCs which tender cargo to another NVOCC for co-loading shall notify each shipper of such action by annotating each applicable bill of lading with: (a) a summary statement of its liability and its responsibility to pay any other rates and charges necessary to transport the cargo to its destination; and (b) the identity of any other NVOCC with which its shipment has been co-loaded.

3-Way states that the requirements of the proposed rule relative to documentation, i.e., to provide a "summary statement of liability" and the "identity of any other NVOCC with which its shipment has been co-loaded", is redundant and ineffective. 3-Way is of the opinion that NVOCCs' tariffs already contain provisions setting forth liability.

3-Way does not support the "identity" requirement unless the "other" co-loading NVOCCs liability is also stated. 3-Way further states that if there is any justification for the "identity" requirement it should be expanded to include the identification of the VOCC.

3-Way contends that the question is not one of identity, but one of demonstrating the capability of liability. 3-Way's answer is that capability probably means licensing and bonding.

Carr objects to the proposed requirement to identify the name of the "other" NVOCC on the bill of lading because it could compromise its relationship with the shipper. According to Carr, NVOCCs not only co-

load because of short freight commitments (less-than-containerload) but also because of overflow conditions.

Coughlin supports 3-Way's views that the separate documentation requirements are unnecessary so long as liability requirements are clearly set forth in the tariff.

Greene argues that the documentation requirements are burdensome.

Reardon is of the opinion that "the liability issue is really between the NVOCC and the ocean carrier with the responsibility being passed up to the master loader and the steamship company."

The NCBFAA is of the opinion that it is unnecessary to require NVOCCs to state separately their liability and responsibility to pay any other NVOCCs charges. First, NCBFAA states that the NVOCC's liability is already provided in its specimen bill of lading regardless of co-loading and that it is common knowledge that a shipper is not responsible for any charges beyond those charged by the NVOCC which receives its cargo. NCBFAA alleges that the Commission's proposed rule is unnecessary and discriminatory in that there are situations involving the handling and custody of cargo by VOCCs which are analogous to co-loading which are not subject to special tariff filing requirements, e.g., an intermodal movement wherein a VOCC uses an inland carrier to whom a portion of the through rate is due.

ALAFC suggests that the Commission require the NVOCC which engages in co-loading to advise the shipper in writing of such fact prior to booking cargo. ALAFC has provided suggested language to accommodate the added requirement.

In view of these comments, the Commission is deleting the requirement for annotating each applicable bill of lading with a summary statement of the NVOCC's liability and responsibility to pay any other rates and charges necessary to transport the cargo to its destination. We are persuaded that the inclusion of such information in the NVOCC's tariffs and specimen bill of lading will be sufficient to avoid possible confusion over liability and the responsibility for payment of transportation charges.

However, we will continue the requirement that an NVOCC provide a shipper with notification of the identity of other NVOCCs with which the shipper's cargo has been co-loaded. We view this notice as an essential ingredient of our goal of ensuring that the shipping public is fully aware of an NVOCC's co-loading activities.

A shipper which tenders cargo to an NVOCC does so with the clear understanding that the cargo will, in turn, be tendered to a vessel-operating carrier. Many shippers would be surprised, however, to learn that their cargo had been tendered to another NVOCC for co-loading. If this is the type of service offered by an NVOCC, then shippers have a right to know that fact. They can then make an intelligent choice of the type of service they prefer.

We believe that the method we have chosen for identifying other NVOCCs—annotating the bill of lading—is straightforward and of minimal burden to the industry. Because of this, we are rejecting the suggestion of ALAFC that the NVOCC should notify the shipper in writing prior to booking the cargo. This requirement would appear to be not only more burdensome but also unrealistic in that a decision to co-load cargo may not be made prior to its booking.

§ 580.17(d)

(d) *Co-Loading Rate Application*

> No NVOCC tariff shall contain special co-loading rates for the exclusive use of other NVOCCs. If cargo is accepted by an NVOCC from another NVOCC which tenders that cargo in the capacity of a shipper, it must be rated and carried under tariff provisions which are available to the general public.

3-Way states that the Commission has apparently considered the status of NVOCCs as "shippers" only, rather than as shippers/carriers since it has proposed to prohibit any special rates which apply for the account of another NVOCC. 3-Way questions why the prohibition for NVOCCs to publish special rates for the account of other NVOCCs does not apply in the instance of VOCCs which publish rates to apply only for the account of NVOCCs. 3-Way is of the opinion that NVOCCs are a distinct "class of shipper" because they are also a common carrier. According to 3-Way, without the Commission's recognition of the above distinction (which would permit special co-loading rates between NVOCCs), the economic incentive to the NVOCCs to co-load and the advantages of co-loading services will be lost.

Airport supports 3-Way's position that the Commission should recognize NVOCCs as a distinct class of shippers for the purpose of allowing special co-loading rates which are applicable only for the account of another NVOCC. Airport is of the opinion that the proposed rule will result in NVOCCs: (1) holding shipments for consolidations until they build a volume large enough to fill a container; (2) going out of business; and/or (3) diverting cargo through the unregulated Canadian/Mexican ports. Airport views the proposed rules as discriminatory when "other" entities are permitted to "pool" cargoes. Airport describes the operation of an Export Trading Company and the Japanese space charter arrangement as being analogous to co-loading.

Airport maintains that special rates are justified since co-loading eliminates sales calls, extraordinary assistance in setting up shipments and documents, credit checks, rate quotes for shipments that might never be shipped and various other services that require the publication of higher rates to general shippers.

Hemisphere argues that no discrimination is involved in the practice of NVOCCs co-loading or in the application of the rates for such services.

Hemisphere indicates that the only instruction received by NVOCCs from shippers is to obtain the most economical and expedient manner of handling their shipments that is available. Further, Hemisphere states inasmuch as NVOCCs are not a major force in all trading areas, the publication of special rates by NVOCCs which are restricted to other NVOCCs is beneficial to the shipping public by allowing NVOCCs as a group of shippers/carriers to take advantage of full containerload rates offered by VOCCs.

Myers sets forth the same views as 3-Way, Airport and Hemisphere in attempting to justify the continuation of special co-loading rates among NVOCCs. Additionally, Myers suggests that NVOCCs and other shippers are not similarly situated, and is of the opinion that the elimination of co-loading rates would create discrimination in favor of large and specialized NVOCCs which would enjoy VOCC Freight-All-Kinds (FAK) rates exclusively.

Carr, Couglin, Greene, Reardon and NCBFAA share the views of 3-Way, Airport, Hemisphere and Myers in the matter of the Commission's proposed rule prohibiting special rates.

The ALAFC, AGANZ, Trans-Pac, and CENSA support the Commission's rule prohibiting special rates. ALAFC suggests that the Commission's analysis was not comprehensive enough to conclude that co-loading was beneficial to the shipping public. ALAFC suggests that co-loading and the special tariff rates only benefit the NVOCCs and not the actual shippers using NVOCCs which co-load.

The suggestion that NVOCCs and other shippers are not "similarly situated", or that NVOCCs are a "distinct class of shippers" is one that must be supported by transportation factors. The fact that they can all be identified as NVOCCs or that they are also carriers is not sufficient. It is well settled that the identity of a shipper is not a legitimate transportation factor.[4]

The fact that NVOCCs have a carrier alter-ego is irrelevant to their status as shippers when tendering cargo to another carrier. They are acting solely as shippers in that capacity and the question to be resolved here is whether their shipments can be distinguished from those of other shippers of like commodities.

Some effort is made in the comments to distinguish between NVOCC shipments and those tendered by other shippers. One suggestion is that the greater volume of the shipments received from other NVOCCs warrants lower rates. If that is the case, volume discounts could certainly accommodate the cargo and would not suffer from the infirmity of being offered only to certain shippers on the basis of their identity.

Another suggested distinction is alleged savings in costs of sales, customer service, documentation etc. inherent in shipments from other NVOCCs.

[4] *I.C.C. v Delaware, Lackawanna v. Western Railroad Co.* 220 U.S. 235, 252 (1911); *I.C.C. v United States*, 289 U.S. 385 (1933); *Mitchell v. United States*, 313 U.S. 80, 94 (1941).

While cost savings could certainly warrant a difference in rates, very few specifics are offered which could be identified solely with NVOCC co-loaded cargo. For example, it would appear that cargo tendered by a freight forwarder would entail savings in sales, services and documentation similar to those alleged to be realized in connection with NVOCC co-loaded cargo.

Several of the commenters also suggest that special co-loading rates for NVOCCs should not be prohibited because some VOCCs offer special FAK rates for consolidated cargo tendered by NVOCCs, consolidators and freight forwarders. We do not find this argument persuasive. Any VOCC rates which are limited would be evaluated on the same principles discussed in connection with this rule. Without focusing specifically on the VOCC rates to which the commenters made reference, we cannot make any judgment as to whether any such rates may be justified on the basis of transportation characteristics. At the very least, it seems clear that the VOCC tariff description referred to in these comments is not identical to the special NVOCC co-loading rates addressed in this rule.

The Commission is not attempting to prohibit legitimate discounts which may apply to NVOCC co-loaded cargo. However, on the basis of the comments herein, we are still not persuaded that co-loaded cargo tendered by NVOCCs is sufficiently distinct in and of itself to warrant a rate based solely upon the fact that the cargo is tendered by an NVOCC.

There are numerous other, legitimate, means of offering discounts to this type of cargo, so long as the same rates would apply to any other shippers of the same type of cargo. For example, FAK rates, time/volume rates, and consolidated cargo rates are all conventional ratemaking devices which could be used to offer reduced rates to other NVOCCs without the stigma of excluding other shippers of like commodities.

Our intent in this rule is not to eliminate or to discourage co-loading activity, but rather to raise the level of shipper awareness of this activity and to ensure that it is not being used as a device for unjust preference, prejudice or discrimination among shippers. To that end, this rule is being added to 46 CFR Part 580.

Inasmuch as NVOCCs will be required to describe co-loading activities in each of their tariffs, the Commission is amending its tariff filing regulations so that such information will appear in a uniform location. Paragraph 5(d)(14) of Part 580, (presently listed as "Reserved") will, therefore, be assigned to the subject rule and shall be captioned "Special Rules and Regulations applicable to co-loading activities of Non-Vessel-Operating Common Carriers (NVOCCs)."

Oral argument has been requested by NCBFAA. The Commission has determined to deny this request because it believes that the issues have been duly considered in this proceeding. NCBFAA has had the same opportunity as other commenters to argue its position and it has, in fact, done so eloquently in its comments. No other commenter has either filed a similar request or indicated support for the request of NCBFAA.

The Commission has determined that this final rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individuals industries, Federal, State or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with Foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units or small governmental jurisdictions.

Collection of Information requirements contained in this regulation have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 96–511) and have been assigned control number 3072.0046.

List of subjects in 46 CFR Part 580:

Cargo; Cargo vessels; Exports; Harbors; Imports; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements; Water carriers; Water transportation.

Therefore, pursuant to 5 U.S.C. 553 and sections 8 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1707 and 1716) the Federal Maritime Commission is amending Title 46 CFR Part 580 as follows:

1. The authority citation to Part 580 continues to read:

> Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702–1705, 1707, 1709, 1712, 1714–1716 and 1718.

2. Section 580.5 is amended by adding paragraph (d)(14) to read as follows:

§ 580.5 Tariff contents.

(d) * * * * * * * * *

(14) *Special Rules and Regulations Applicable to Co-loading Activities of Non-Vessel-Operating Common Carriers (NVOCCs)*

(i) *Definition.* For the purpose of this section, "Co-loading" means the combining of cargo, in the import or export foreign commerce of the United States, by two or more NVOCCs for tendering to an ocean carrier under the name of one or more of the NVOCCs.

(ii) *Filing Requirements.*

(A)(*1*) All tariffs filed by an NVOCC shall contain a rule which describes its co-loading activities.

(*2*) If co-loading is accomplished pursuant to the terms of an agreement which establishes a carrier-to-carrier relationship between or among NVOCCs, it is only necessary to note the existence of such agreement in each of the applicable NVOCC tariffs. But, if two or more NVOCCs enter into a co-loading agreement which establishes a shipper/carrier relationship between or among the NVOCCs, the co-loading activities must be described in a tariff rule pursuant to paragraph (d)(14)(ii)(A)(*1*) of this section.

(*3*) A shipper/carrier relationship shall be presumed to exist where the receiving NVOCC issues a bill of lading to the tendering NVOCC for carriage of the co-loaded cargo.

(*4*) If a co-loading service is not offered or performed by an NVOCC, its tariffs shall contain a rule which states that co-loading is "not offered or performed" by the publishing carrier.

(B) In the event an NVOCC tenders cargo to another NVOCC for co-loading, its tariffs shall provide a clear explanation of its liability to the shipper and its responsibility to pay any other common carrier's rates and charges necessary in order to transport the shipper's cargo to its destination.

(iii) *Documentation Requirements.* NVOCCs which tender cargo to another NVOCC for co-loading shall notify each shipper of such action by annotating each applicable bill of lading with the identity of any other NVOCC with which its shipment has been co-loaded.

(iv) *Co-Loading Rates Application.* No NVOCC tariff shall contain special co-loading rates for the exclusive use of other NVOCCs. If cargo is accepted by an NVOCC from another NVOCC which tenders that cargo in the capacity of a shipper, it must be rated and carried under tariff provisions which are available to all shipments with similar transportation characteristics.

* * * * *

3. § 580.91 is amended by adding the following to the Table at the end:

§ 580.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

* * * * *

580.5(d)(14)	3072–0046

* * * * *

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–4
WARNER LAMBERT COMPANY

v.

THE EGYPTIAN NATIONAL LINE

NOTICE

April 17, 1985

Notice is given that no appeal has been taken to the March 12, 1985, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–4
WARNER LAMBERT COMPANY

v.

THE EGYPTIAN NATIONAL LINE

DISMISSAL OF COMPLAINT

Finalized April 17, 1985

The respondent has moved for dismissal of this complaint and continues to press its motion, on the grounds that the complainant has failed to meet its burden of proof that the complaint is not barred by the applicable statute of limitations.

By ruling served March 28, 1984, a preliminary ruling was made denying the motion to dismiss, on the grounds that for the purposes of resolving a motion to dismiss prior to any hearing, stipulation of facts, or final resolution of the facts, it was appropriate to base the ruling on the alleged facts stated by the non-moving party. The preliminary ruling was made without prejudice to renewal of the motion to dismiss at a later date.

A prehearing conference was held on June 18, 1984, at which the parties agreed that certain facts should be discovered all relating to the statute of limitations, and that a ruling on the statute should be made, prior to any hearing on the merits of the complaint.

By its motion to dismiss dated August 15, 1984, received August 17, 1984, the respondent moved for dismissal of the complaint. One of the attachments to the motion was a stipulation of facts signed by attorneys for both parties.

By ruling served September 18, 1984, by the Administrative Law Judge, further information was required. It was pointed out that the complaint was filed on February 1, 1984; that the check in payment of the transportation charges in issue herein was dated December 31, 1981; that the stipulation of facts stated that the check was received by Uiterwyk Corporation as agent for the respondent Egyptian National Lines *in no event later than February 1, 1982*; and that the check was received by Egyptian National Lines sometime after the issuance of the check, i.e., December 31, 1981, and *on or before the date the check was deposited in Manufacturers Hanover Trust Company, i.e., February 1, 1982,* (emphasis supplied).

It was ruled that the stipulation of "in no event later than February 1, 1982," was imprecise. Further information was requested as to the precise date the check was received by Uiterwyk, and whether Egyptian

National Lines (the principal and not its agent) ever physically received the check, or constructively received it through its agent.

A copy of the check itself on its back shows that it was endorsed and deposited by Uiterwyk Corporation as agent for Egyptian National Lines.

The parties asked and were given certain extensions of the times to submit clarifying data. Respondent pointed out that its former agent, Uiterwyk Corporation, was in bankruptcy, and that it was difficult if not impossible to obtain clarifying information from Uiterwyk. Respondent insisted that complainant had the burden of proof to show that its complaint was commenced timely.

Accordingly, respondent demanded that the complainant search its records and those of its freight forwarder, who was able after some prompting to present the original check in issue. Respondent also promised to continue its efforts with Uiterwyk. The last advice from the parties was that each felt the other had the burden of producing any more clarifying information, and each party asks final judgment in its favor on the issue of the statute of limitations.

Under the above circumstances I conclude that the critical facts are as follows:

This complaint was filed on February 1, 1984, alleging overcharges of $12,367.30 on certain cargo shipped from New York, New York, to Alexandria, Egypt, "Freight to be Prepaid," bill of lading dated December 30, 1981. A check for $18,704.92 dated December 31, 1981, in payment of the freight charges for this cargo was made out to the order of the respondent, by Export-Import Services, Inc., as forwarding agent for the complainant-shipper/exporter.

Presumably, the said check was mailed or delivered on or after December 31, 1981. In the normal course of business, this may have been on December 31, 1981, or on the next business day after the January, 1982, holiday. Whether or not this check was mailed or delivered promptly the record does not show. In this situation, the burden of proof properly is on the complainant because through its forwarder, Export-Import Services, the complainant was in the best position to obtain proof of the mailing or delivery date of the said check dated December 31, 1981.

The endorsement(s) on the back of the check (copy submitted as evidence as attachment to the motion to dismiss) are not clear except for a stamp marked "Paid" February 2, 1982. The check was drawn on the Chemical Bank and was endorsed on the back pay to the order of Manufacturers Trust Co. Any interbank endorsements on the back of the check are not clear, but it is conceded by the parties that the February 2, 1982, date is the one when the Chemical Bank stamped the check as paid.

The invoice, attachment C to the motion to dismiss, shows that Export-Import Services, Inc., billed the complainant (Warner Lambert) on December 31, 1981, for the ocean freight charges of $18,704.92, plus certain other

of its charges for messenger fees, forwarding fees, consular fees, consular forms, certificate of origin, etc., a total of $18,911.92.

Exhibit D, attached to the motion to dismiss, shows that Warner Lambert satisfied the invoice for $18,911.92 on or before January 19, 1982, as shown by a daily statement dated January 19, 1982, from the First National Bank of Boston to Warner Lambert.

Presumably the check for $18,704.92 in payment to respondent for the freight charges was received by respondent's agent, Uiterwyk, on or after December 31, 1981, and on or before February 1, 1982, when it was deposited. The stipulation of facts states that the Chemical Bank stamped the February 2, 1982 on the back of the check when it paid the check, and that the stamp dated February 1, 1982, showing the date of deposit in Manufacturers Hanover Trust Company, was obliterated on the copies of the check which are of record, but apparently was visible to counsel for the parties who saw the original check.

Since the check admittedly and as agreed by the parties was deposited on February 1, 1982, where was it between December 31, 1981, when it was drawn, and when it was deposited?

When was the check received by the respondent or by respondent's agent? Of necessity, it was so received on or before February 1, 1982. But, this is still imprecise for the purposes of deciding the issue of the statute of limitations.

The computation of time under the statute begins on the date following the date on which the cause of action accrued, Rule 101 of the Commission's Rules of Practice and Procedure, 46 CFR 502.101. Under the two-year statute of the Shipping Act, 1916 (the Act), if the cause of action accrued on February 1, 1982, the two-year period began on February 2, 1982, and ended on February 1, 1984.

The question remains when did the act, event, or default in issue, that is, the cause of action accrue herein.

If the cause of action accrued on February 1, 1982, then the complaint was filed timely. But, if the cause of action accrued prior to February 1, 1982, then the complaint is barred.

The stipulation that Uiterwyk received the check in issue from Warner Lambert or from its agent freight forwarder no later than February 1, 1982, does not satisfy the law.

Jurisdiction of the Federal Maritime Commission cannot be presumed or assumed. Rather, there must be a definite showing of jurisdiction. Regardless of who has the burden of showing jurisdiction, no one in this proceeding has shown jurisdiction definitely. The check in issue was received on a date certain, but that date has not been shown. It follows that jurisdiction has not been shown.

It is ultimately concluded and found that it has not been shown that the Federal Maritime Commission has jurisdiction to rule on the issues in this complaint.

Under section 22 of the Act, complaints must be filed within 2 years from the time the cause of action accrues to vest jurisdiction in the Commission. As a general rule, when jurisdiction is conferred by statute *every act necessary to such jurisdiction must affirmatively appear.* (Emphasis supplied.) 1 U.S.M.C. 794 (795, 796, 797).

In the present case, it does not affirmatively appear when the cause of action accrued, and so it is not shown that the complaint was filed within 2 years from the time the cause of action accrued.

The motion to dismiss for lack of jurisdiction is granted. The complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 85–4

MISCELLANEOUS MODIFICATION TO EXISTING AGEEMENTS—EXEMPTION

April 24, 1985

ACTION: Final Rule.

SUMMARY: This Rule sets forth the approach the Commission will take under the Shipping Act of 1984 with regard to modifications to existing agreements which provide for cancellations of agreements and reflect changes in conference membership, officials of agreements, and neutral body authority and procedures. Copies of these modifications shall be submitted to the Commission for information purposes in the proper format but are otherwise exempt from the Information Form, notice and waiting period requirements of the rules.

EFFECTIVE DATE: April 29, 1985.

SUPPLEMENTARY INFORMATION:

In order to fulfill an obligation of the Commission as stated in its Final Rule in Dockets Nos. 85–26 and 84–32, *Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984*, 49 FR 45320 (November 15, 1984), the rule proposed in this proceeding would exempt modifications to existing agreements, which provide for cancellations of agreements and reflect changes in conference membership, officials of agreements, and neutral body authority and procedures, from the waiting period requirements of section 6 of the Shipping Act of 1984 (46 U.S.C. app. 1705), and allow them to become effective upon filing.

The Proposed Rule was published in the FEDERAL REGISTER on February 8, 1985 (50 FR 5401) with comments due on March 11, 1985. Comments were received from: (1) the Trans-Pacific Freight Conference of Japan/Korea, the Japan/Korea-Atlantic and Gulf Freight Conference, the Trans-Pacific Freight Conference (Hong Kong) and the New York Freight Bureau (collectively); (2) the North Europe-U.S. Pacific Freight Conference; (3) the Mediterranean/U.S.A. Freight Conference, the North Atlantic/Mediterranean Freight Conference, the U.S. Atlantic and Gulf/Australia-New Zealand Conference, and the U.S. Atlantic Ports/Italy, France and Spain Freight Conference (collectively); (4) the Atlantic and Gulf/West Coast of South

America Conference, the West Coast of South America Northbound Conference, the United States Atlantic and Gulf/Colombia Conference, the United States Atlantic and Gulf/Venezuela Conference and the United States Atlantic and Gulf/Ecuador Freight Conference (collectively); (5) the Philippines-North America Conference; and (6) the North Europe-U.S. Gulf Freight Association, the Gulf-European Freight Association, the North Europe-U.S. Atlantic Conference, the U.S. Atlantic-North Europe Conference, the Pan-Atlantic Carrier Trade Agreement and the Trans-Atlantic American Flag Liner Operators Agreement (collectively).

All of the conferences, with the exception of the five South American conferences, fully support the Rule and urge the Commission to adopt it as proposed.

The five South American conferences recommended that the Commission modify its rule with respect to agreement cancellations and changes in membership to allow these to become effective upon receipt of a letter from the agreement chairman (or whatever title is afforded the senior official of the agreement) or agreement counsel, provided that the modification is subsequently received by the Commission within 30 days of receipt of the letter. The reason given by the conferences was that there exists a pre-submission delay occasioned by the need to collect the signatures to such modifications from parties whose corporate offices are located in cities or countries other than the location of the conference office.

This suggested change cannot be accommodated. Adequate notice of an agreement cancellation or change in membership would not be assured by such proposal because the Commission and the public could be uncertain of the effectiveness of such changes for as long as 30 days after notice is received. This could seriously compromise the Commission's surveillance responsibilities and contribute to possible abuse and manipulation of events in regard to a conference member's status, rights and responsibilities under the law.

For the reasons stated in the Notice of Proposed Rulemaking, the Commission remains of the opinion that the proposed exemption will not substantially impair effective regulation by the Commission, be unjustly discriminatory, result in substantial reduction in competition, or be detrimental to commerce within the meaning of section 16 of the Act. Accordingly, the proposed rule is adopted as final without change.

The Commission has determined that this Rule is not a "major rule" as defined in Executive Order 12291 dated February 17, 1981, because it will not result in:

(1) An annual effect on the economy of $100 million or more;

(2) A major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, et seq.) that this rule will not have a significant economic impact on a substantial number of small entities including small businesses, small organizational units and small governmental jurisdictions.

The Commission has determined that this rule is excepted from the 30-day effective date requirement of 5 U.S.C. 553 because it grants an exemption and relieves a restriction from existing requirements.

List of Subjects in 46 CFR Part 572.

Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and recordkeeping requirements.

Therefore, in order to exempt these agreements from the waiting period requirements of section 6 of the Act, and allow them to become effective upon filing, the Commission, pursuant to section 4 of the Administrative Procedure Act (5 U.S.C. 553) and sections 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1715, 1716), hereby amends Parts 572 of Title 46 of the Code of Federal Regulations as follows:

1. The authority citation is revised to read:

Authority: 5 U.S.C. 553, 46 U.S.C. app. 1701–1707, 1709–1710, 1712 and 1714–1717.

2. A new § 572.307 is added to read as follows:

§ 572.307 Miscellaneous Modifications to Agreements—Exemptions.

(a) Each of the following types of modifications to agreements is exempt from the Information Form, notice and waiting period requirements of the Act and of this part provided that such modifications are filed for informational purposes in the proper format:

(1) Any modification which cancels an effective agreement.

(1) Any modification to the following designated agreement articles:

(i) *Article 3—Parties to the agreement (limited to conference agreements).*

(ii) *Article 6—Officials of the agreement and delegations of authority.*

(iii) *Article 10—Neutral body policing (limited to the description of neutral body authority and procedures related thereto).*

(b) Any modification exempt under paragraph (a) is effective upon filing.

3. § 572.605 *Requests for Expedited Approval* is amended by the removal of paragraph (c).

By the Commission.

(S) BRUCE A. DOMBROSWKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–9
INGERSOLL RAND COMPANY

v.

MAERSK LINE

NOTICE

MAY 2, 1985

Notice is given that no exceptions were filed to the March 26, 1985, 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
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–9
INGERSOLL RAND COMPANY
v.
MAERSK LINE

Proper rate applied to shipment of air compressors. Reparation denied and complaint dismissed.

Frank J. Hathaway from complainant Ingersoll Rand Company.
Marc J. Fink and *Karen S. Ostrow* for respondent Maersk Line.

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

Finalized May 2, 1985

Complainant, Ingersoll Rand Company (Rand), charges Maersk Line with the improper application of its tariff to a shipment of air compressors on wheels from Newport News, Virginia, to Singapore, Malaya. Maersk, a member of the Conference, rated the shipment at $140.00 W/M under Item 1446, 44th Revised Page 180 of the Atlantic and Gulf-Singapore, Malaya and Thailand Conference Freight Tariff No. 16, FMC No. 6. Forty-fourth Revised Page No. 180 reads in relevant part:

SPECIAL RATES EXPIRING MARCH 31, 1983
Machinery: Air Compressors and air Dryers—C W/M $140.00
Machinery: Air Compressors
To Singapore Only: C—$321.00 W
In CY/CY containers only subject to a minimum of 14 revenue tons per container.

Rand says that Maersk should have charged the $321.00 rate even though its air compressors were not in CY/CY containers. In Rand's view the language quoted above does not limit the $321.00 rate to only those shipments moving in CY/CY containers. In order to reach this conclusion Rand goes back to 42nd Revised Page 180 which reads in pertinent part:

Machinery: Air Compressors
Singapore Only—C $321.00 W

[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).

> If in a CY/CY container minimum of 14 Revenue tons per container would apply.

Rand next points out that when the Conference published 43rd Revised Page 180, the critical language was changed to its present form, "In CY/CY containers only subject to a minimum of 14 revenue tons per container." This change according to Rand made the provision "unclear" and "subject to numerous interpretations" because of the (R) reduction symbol which accompanies the change and the "lack of punctuation." As an example Maersk offers:

> . . . for example: (1) 42nd R.P. 180 "If in a CY/CY container" this would have application on a non-containerized cargo without a minimum weight application and (2) 43rd R.P. 180—"In CY/CY container . . . bearing an (R) symbol." If the charge effective on October 1, 1983 on 43rd Revised Page was intended to restrict the item to CY/CY containers only, the item should have had an increase symbol because the $140.00 W/M would apply on a measurement basis on non-containerized cargo. If the entry on 42nd R.P. 180 was interpreted to only apply in CY/CY containers and the item was opened on 43rd Revised Page 180 to include non-containerized, it would have an (R) reduction symbol.

Whatever merit may be found in this reasoning by the complainant, as an exercise in logic, it is without relevance to the question presented here. The all important (R) appeared on *43rd* Revised Page 180. The shipment on which Rand seeks reparation moved under *44th* Revised Page 180. There is no (R) reduction symbol on 44th Revised Page 180. The time to raise the argument now made by Rand has passed. The question of the proper interpretation of 43rd Revised Page 180 should have been made when that page was in effect. Probably Rand made no shipments during that period.

As for the lack of punctuation, grammar purists might place a comma between "only" and "subject" so that sentence would read "In CY/CY containers only, subject to a minimum of 14 revenue tons per container." But with or without the comma the meaning of the provision is clear. To try, as Rand does, to read the provision as if it said "when in CY/CY containers shipments are subject to a minimum of 14 revenue tons per container and that [the] provision has application to non-containerized cargo" strains the natural interpretation of the provision and the plain meaning of the words.

Complainant's request for reparation is denied and the complaint is dismissed.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 580]

DOCKET NO. 84–27

PUBLISHING AND FILING TARIFFS BY COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES; CO-LOADING PRACTICES BY NVOCCS

May 9, 1985

ACTION: Deferral of Effective Date of Final Rule.

SUMMARY: Due to the uncertainty expressed by various segments of the affected industry as to the application of the final rule issued in this proceeding, the effective date of the final rule is being deferred for 90 days.

DATE: Final Rule effective August 13, 1985.

SUPPLEMENTARY INFORMATION:

By Notice published in the Federal Register on April 15, 1985 (50 FR 14704–14710), the Commission issued a Final Rule in this proceeding with a scheduled effective date of May 15, 1985. Since the publication of this final rule, numerous non-vessel-operating common carriers (NVOCCs) and representatives of the NVOCC industry have written or contacted the Commission indicating uncertainty as to the application of certain aspects of the rule to the various types of NVOCC operations. Particular concern was expressed over the meaning of a carrier-to-carrier relationship and the requirement for bills of lading to identify any other NVOCC involved in a co-loaded shipment. Several parties have requested postponement of the effective date of the final rule, and given the apparent uncertainty on the part of certain portions of the affected industry, the Commission believes a deferral is warranted. Accordingly, the effective date of the final rule in this proceeding is being hereby postponed until August 13, 1985. During the deferral period, the Commission staff will further review the entire situation and make an appropriate recommendation to the Commission as to the final disposition of this matter.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1191

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE BENEFIT OF WILHELM SCHLEEF GMBH & CO. KG.

Initial Decision of Administrative Law Judge reversed.

Application to waive collection of $18,481.19 of freight charges granted.

Joey J. Radabaugh and *R.J. Finnan* for applicant Lykes Bros. Steamship Co., Inc.

REPORT AND ORDER

May 10, 1985

By the Commission: (Alan Green, Jr., *Chairman*; James J. Carey, *Vice Chairman*; Thomas F. Moakley, Edward J. Philbin and Robert Setrakian, *Commissioners*).

Lykes Bros. Steamship Co., Inc. excepts to the Initial Decision of Administrative Law Judge Seymour Glanzer denying it permission to waive collection from Wilhelm Schleef GMBH & Co. KG. of a portion of the freight charges assessed on a shipment of "dried flowers, parts of dried flowers, decorative wood, used for ornamentation," which moved from Cucamonga, California, to Hamburg, Federal Republic of Germany.[1]

Lykes asks that the Initial Decision be set aside and the case remanded to the Presiding Officer for further proceedings.

BACKGROUND

By application filed pursuant to section 18(b)(3) of the Shipping Act, 1916 (the Act), (46 U.S.C. §817(c)(3)), Lykes requested permission to waive collection of $18,481.19 of the $21,231.19 in freight charges assessed on a shipment described in the bill of lading as "DRIED FLOWERS, PARTS OF DRIED FLOWERS, DECORATIVE WOOD, USED FOR ORNAMENTATION."[2]

The application indicates that on November 29, 1983, Lykes' Seabee Department requested the Pricing Division to file a rate of $2,750 per 40 foot container to cover a shipment of dried flowers from California terminals to Hamburg. A commodity rate of $2,750.00 for "Flowers, Dried" was filed in Lykes' Eastbound Pacific Coast to Europe Joint Container Freight Tariff No. 2, FMC No. 145, to take effect December 1, 1983.[3]

[1] Lykes' Exceptions are in the form of a letter addressed to the Secretary, which for the expeditious resolution of this matter is treated as formally filed. Rules of Practice and Procedure, 46 CFR 502.10.

[2] The bill of lading lists 262 cartons, 4 bundles and 83 loose pieces.

[3] 1st Rev. Page 122, effective 12/1/83.

The shipment was delivered to the inland carrier which issued the bill of lading dated December 2, 1983. When Lykes' Seabee Department became aware of the discrepancy between the commodity description in the tariff and the description of the shipment in the bill of lading, it requested the Pricing Division to revise the tariff to include "and/or Decorative Wood Used For Ornamentation" in the commodity description and to set forth a thirty-day expiration date for the rate. A second revision to the tariff, effective December 13, 1983, added the expiration notice but made no changes in the commodity description. The vessel upon which the shipment was loaded sailed on December 14, 1983. Subsequently, a third revision, effective December 15, 1983, included the $2,750.00 rate, the description "Flowers, Dried, and/or Decorative Wood used for Ornamentation" and the expiration date.

Thereafter, in the belief that the incomplete tariff commodity description in effect on the date of shipment subjected the cargo to the Cargo N.O.S. rate of $296.00 W/M, Lykes applied for permission to waive collection of $18,481.19, which represents the difference between the $2,750.00 lump sum per container rate promised the shipper and freight charges of $21,231.19, computed on the basis of the $296.00 Cargo N.O.S. rate.

The Presiding Officer denied the application on the ground that there was no error in the tariff within the meaning of section 18(b)(3) of the Act because Lykes' intent to publish a rate for the expanded commodity description was formed "some time after the shipment began." [4]

Lykes maintains on exception that under Rule 2 L of its tariff the commodity description as originally filed adequately covered the shipment and made the negotiated rate applicable.[5] Lykes' argument is that dried flowers and similar decorative items are often shipped together "and have historically been accorded the same rates and basis for parts and accompanying items as the generic item." Finally, Lykes refers to "the procedural breakdowns, misinformation, incomplete filing procedures" which took place in the filing of the $2,750.00 rate, none of which were attributable to the shipper.

DISCUSSION

The Presiding Officer's denial of the waiver rests on the premise that Lykes had agreed to and promised the shipper a lump sum per-container rate for dried flowers only and that the decision to extend the rate to

[4] Section 18(b)(3) provides that the Commission may grant a refund or waiver "where it appears that there is an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff and that such refund or waiver will not result in discrimination among shippers . . ." 46 U.S.C. 817(b)(3).

Date of shipment for special docket applications has been defined by the Commission to mean the date of sailing of the vessel from the port at which the cargo was loaded. Rules of Practice and Procedure, 46 CFR § 502.92(a)(3).

[5] Rule 2 L. provides: "Wherever rates are provided for articles, the same basis will also be applicable on parts of such articles where so described in the Ocean Bill of Lading, except where specific rates are provided for such parts."

include decorative wood was reached only after delivery of the cargo to the inland carrier. In refusing relief, the Presiding Officer relied on *Munoz y Cabrero* v. *Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977). In that case Sea-Land had failed to timely file a $44.00 rate promised the shipper. Before applying for a waiver, Sea-Land mistakenly published a $40.00 rate in lieu of the $44.00 rate it intended to file. The Commission held it had no authority to grant a waiver upon a rate the carrier never intended to file.[6]

Here, Lykes' request for the tariff revision contains an annotation asking that the commodity description be amended in accord with the description in the bill of lading. Were the Commission to agree that only at that time Lykes formed the intent to publish the expanded commodity description, the strict construction of the statute applied in the *Munoz* case would support adoption of the Initial Decision.

It should be noted, however, that two of Lykes' offices participated in the publication of the lump sum rate: the Pricing Division which filed the rate and the Seabee Department which requested the filing. As mentioned, when specifically requested to revise the tariff by adding decorative wood to the commodity description and to set forth a thirty-day expiration date, the Pricing Division only added the expiration notice leaving the description "Flowers, Dried" unchanged. This indicates a misunderstanding between Lykes' two offices on the matter of the publication of the lump sum rate and evidences a clerical or administrative error in filing by the Pricing Division in the second revision of page 122 of the tariff.[7] This in turn raises the inference of a similar error in the tariff published on December 1, 1983.

There is also no reason to believe that the shipper who accurately described the contents of the house-to-house container in the bill of lading, withheld that information from the carrier when negotiating the rate. Moreover, the promptness with which Lykes moved to amend the tariff clearly suggests that when it agreed to the $2,750 lump sum per container rate for this particular shipment which otherwise would be subject to the payment of $21,231.19 in freight charges, Lykes had from the beginning the intent to publish a commodity description which properly identified the cargo and covered the entire shipment. The failure to do so in the first instance can be said to result from the misunderstanding between Lykes' Seabee Department and its Pricing Division.

The Commission therefore finds that the rate filed by the Pricing Division did not reflect the rate Lykes from the outset intended to file for this shipment and that there was an error of an administrative nature in the tariff as contemplated in section 18(b)(3) of the Act.

[6] As distinguished from the *Munoz* case, before applying for a waiver, Lykes here had on file with the Commission the $2,750 rate agreed upon with the shipper.

[7] 2nd Rev. Page 122, effective December 13, 1983.

Consequently, the Initial Decision of the Presiding Officer is reversed and Lykes is granted permission to waive collection of the amount of $18,481.19 of the freight charges assessed the consignee Wilhelm Schleef GMBH & Co. KG. In so deciding, it is unnecessary to rule whether under the holding in *Nepera Chemical Inc.* v. *Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981), the absence of a specific reference to decorative wood in the tariff would preclude the application of the lump sum rate to the shipment.[8]

THEREFORE, IT IS ORDERED, That the Initial Decision denying the application is reversed; and

IT IS FURTHER ORDERED, That pursuant to section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. § 817(b)(3)), Lykes Bros. Steamship Co., Inc., is granted permission to waive collection of $18,481.19 of the $21,231.19 freight charges assessed the consignee Wilhelm Schleef GMBH & Co. KG; and

IT IS FURTHER ORDERED, That Lykes Bros. Steamship Co., Inc., shall published within thirty (30) days from the service of this Report and Order the following notice in an appropriate place in its tariff:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1191, that effective December 1, 1983, and continuing through December 14, 1983, inclusive, the rate on "Flowers, Dried, and/or Decorative wood used for ornamentation" is $2,750.00 per 40 ft. container. This notice is effective for purposes of refund or waiver of freight charges on any shipment of the goods described which may have been shipped during the specified time.

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

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[8] In *Nepera Chemical Inc.* v. *Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981), the Commission, following the holding in *Munoz, supra*, had denied the waiver request because the rate on which the waiver was to be based was different from the rate the carrier had promised the shipper.

The difference amounted to $91.25. The denial of the waiver meant an increase of $42,569.90 in transportation costs. On appeal, the court reversed, noting the absence of any language either in the statute or in the legislative history of section 18(b)(3) that required precise equivalence between the published and the intended rate. The court also emphasized the remedial purpose of the statute and insisted on the need for a reasonable construction to achieve that purpose.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1220
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

SPECIAL DOCKET NO. 1225
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

ORDER CONDITIONALLY ADOPTING INITIAL DECISIONS

May 10, 1985

The Commission determined to review the Initial Decisions issued on December 31, 1984 in Special Docket No. 1220 and on January 8, 1985 in Special Docket No. 1225 by Administrative Law Judge Charles E. Morgan (Presiding Officer). Though they were not consolidated, the proceedings involve the same parties and essential facts and present identical issues of law.[1]

For the reasons set forth below, the Commission hereby adopts the Initial Decisions subject to the meeting of certain conditions by Hapag-Lloyd. In reaching that result, we have concluded that we will no longer impose on special docket applications involving intermodal cargo movements the requirement first articulated in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), that the ocean carrier must prove that it actually provided the inland service originally intended in strict accordance with the terms and conditions of its tariffs.

BACKGROUND

Hapag-Lloyd seeks the Commission's permission, pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), and Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR § 502.92(a), to waive certain freight charges. The charges apply to a total of 28 shipments of automobile parts from inland points in Michigan, via railroad to Baltimore or New York, to various ports in Europe and then to European inland destinations. The earliest shipment was dated February 18, 1984 and the last was dated August 2, 1984. The shipments were

[1] The Initial Decision in Special Docket No. 1220 explains (p. 1, n. 2) that Special Docket No. 1225 was necessary to cover certain rates for which new corrective tariffs had not yet been filed as of the filing date commencing Special Docket No. 1220.

consigned to various subsidiaries or affiliates of General Motors. The consignees were to be responsible for the payment of all freight charges, except that General Motors was responsible for payment of the terminal handling charges at the United States exit ports.

In 1983, Hapag-Lloyd offered independent intermodal rates in connection with its service from East Coast ports of the United States to countries in Northern Europe. On August 5, 1983, General Motors requested Hapag-Lloyd to quote intermodal rates on various shipments of auto parts. By letter dated September 16, 1983, Hapag-Lloyd quoted competitive rates over the requested routings, which General Motors accepted on October 24. On November 18, Hapag-Lloyd supplemented its rate offerings and made clear its intention to offer these rates for the period from November 1, 1983 through October 31, 1984. Of those rates, there are a total of nine involved in these two proceedings, seven in Special Docket No. 1220 and two in Special Docket No. 1225.

On Friday, December 9, 1983, the Commission granted authority to the North Atlantic/Continental Freight Conference (NACFC), of which Hapag-Lloyd was a member, to offer intermodal rates. The Conference met the next day, Saturday, December 10, and scheduled another meeting for Sunday, December 11, to discuss intermodal rates to be charged. The decision was made to require all member lines to submit to the Conference at the December 11 meeting any rate commitments they had with customers.

When the NACFC met on December 11, Hapag-Lloyd had prepared a list of its intermodal rate commitments, including those with General Motors. The list was compiled hurriedly by the carrier in Hamburg, West Germany, and sent by telex to the Conference meeting. Due to clerical oversight, the nine rates here in issue were omitted from the telex.

NACFC implemented its intermodal authority by filing rates to become effective February 1, 1984, at which time all intermodal rates published by individual members (including Hapag-Lloyd) were canceled. Because Hapag-Lloyd had failed to present the nine rates at the December 11, 1983 meeting, they were not reflected in the NACFC tariff. As a result, the 28 shipments here in issue incurred higher freight costs involving a combination of certain NACFC port-to-port rates, terminal handling charges at U.S. ports, U.S. inland charges and container service charges and inland carriage charges in Europe. However, Hapag-Lloyd charged and collected amounts based on the lower intermodal single factor through rates it had intended to apply to these shipments. It seeks the Commission's permission to waive collection of the difference between those rates and the combined charges listed above. The total amount for which waiver is sought is approximately $277,000.

DISCUSSION

In his Initial Decisions, the Presiding Officer found that the statutory requirements of section 8(e) of the Shipping Act of 1984 had been met[2] and granted Hapag-Lloyd's applications. However, these proceedings raise several issues not specifically addressed by the Presiding Officer.

The primary issue is whether Hapag-Lloyd should be required to prove as part of its special docket application that it actually arranged and paid for the inland service necessary to move the shipments from Michigan to New York or Baltimore. In *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), which was brought under section 8(e)'s predecessor, section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. §817(b)(3), the administrative law judge found that due to the carrier's failure to file an amendment to its intermodal tariff reflecting an agreed rate, the cargo moved under a conference port-to-port rate, and that the shipper arranged and paid for the inland movement. Nevertheless, the administrative law judge granted the carrier's application to refund part of the ocean freight charges to the shipper. The Commission reversed, stating:

> A threshold question in considering a request for relief under Section 18(b)(3) is whether the carrier performed the service for which it seeks permission to apply a rate not on file in its tariff at the time of shipment.
>
> In this instance, while Lykes had apparently agreed to move the shipment from Leghorn [Italy] to Dallas, its failure to perform that service is fatal to the instant application. Lykes' port-to-port bill of lading issued under the Conference tariff provided for delivery of the cargo to the shipper at Houston to the exclusion of any further land transportation. TTJ, and not Lykes, arranged and paid for the carriage by motor carrier to Dallas. Consequently, Lykes did not perform the transportation service contemplated in its agreement with TTJ and for which it now asks permission to apply a special rate.
>
> Furthermore, the tariff which Lykes seeks to apply is joint ICC/FMC in which certain rail and motor carriers have agreed to participate, at rates or "divisions" which are set forth in the tariff. None of those rail or motor carriers participated in this movement. Thus, the conclusion reached by the Presiding Officer, that a refund here will not affect the land portion of through rate, has no meaning in this case. The rail and motor divisions of the through rate have not and cannot be paid because the service was not performed.

[2] He found that there was a clerical or administrative error in failing to file a new tariff; that NACFC filed corrective tariffs, effective August 7 and August 23, 1984, setting forth the intended rates; that the applications were timely filed; and that granting the waivers would not result in discrimination among shippers, ports or carriers.

> As a remedial statute Section 18(b)(3) needs to be liberally construed. The Commission, however, may exercise its discretionary powers only within the limits permitted by statute. In this instance, Lykes filed a tariff covering a service it had not performed and then applied for permission to refund a portion of the charges collected not under its own tariff, but under the Conference's tariff. Moreover, the tariff sought to be applied to this shipment reflects a service that would clearly contradict the terms of the bill of lading under which this cargo moved.

21 S.R.R. at 115 (footnotes omitted).

The principles stated above were followed more recently in *Application of Trans Freight Lines, Inc. for the Benefit of B.N.P. Distributing Co., Inc.*, 22 S.R.R. 475 (administratively final Dec. 16, 1983). In that case, Trans Freight Lines, Inc. (TFL) negotiated an intermodal rate for two shipments of wine from France through New York City and then to Syosset, New York, but failed to file that rate prior to the shipments. Furthermore, TFL rated and carried the shipments under its port-to-port tariff rather than under a general intermodal tariff that it had on file and in effect. TFL explained that it did this deliberately because the port-to-port rate was substantially lower than the intermodal general cargo N.O.S. rate. *See* 22 S.R.R. at 477. When the cargo arrived at New York, it was carried to Syosset by a motor carrier that was listed as a participating carrier in TFL's intermodal tariff. However, the importer, rather than TFL, paid the motor carrier for the inland movement and also paid TFL under the bills of lading rated according to TFL's port-to-port tariff. TFL sought permission to refund to the importer the difference between the total charges paid by him and the lower single factor intermodal rate that had been negotiated.

The administrative law judge denied the application on the ground that he was bound by the Commission's decision in *Texas Turbo Jet.* He found that there were some factual distinctions between the two cases, particularly that the motor carrier was a participant in TFL's tariff. Nevertheless, he concluded that "[i]n both cases, the carriers did not provide the intermodal service, instead providing a port-to-port service under a port-to-port tariff and under a port-to-port bill of lading. . . ." 22 S.R.R. at 477. He noted that TFL's motives in deciding to charge the lower port-to-port rate may have been commendable, but that it easily could have performed the intermodal service under its general intermodal tariff, collected only the negotiated rate, filed that rate promptly thereafter and sought permission from the FMC to waive the additional freight due under the general N.O.S. rate.

Section 8(e) of the 1984 Act is identical in substance to the special docket provisions of section 18(b)(3) of the 1916 Act, and Hapag-Lloyd's applications and supporting material (including the bills of lading) do not clearly demonstrate whether the carrier assumed responsibility for moving

the cargo from its origin points in Michigan to the U.S. ports of export. Thus, the *Texas Turbo Jet* principles could be applied fully to the instant cases.

However, these cases also present the Commission with an opportunity to reconsider *Texas Turbo Jet.* The practical effect of that decision is to require a carrier, such as Lykes in *Texas Turbo Jet,* which has negotiated an intermodal service with a shipper, but failed through clerical error to file a tariff covering that service prior to shipment, and which can comply with the jurisdictional requirements of the special docket procedure specified by the statute, to comply with an additional requirement of providing the full service without a tariff as a condition precedent to filing a special docket application for the benefit of its shippper. This non-statutory requirement places the carrier in the position of possibly violating the prohibition in section 8 of the 1984 Act against providing service without a tariff, particularly where, as in *Texas Turbo Jet,* the intended service is entirely new. If the carrier chooses not to incur such legal jeopardy, the innocent shipper who has been harmed by the carrier's error must, according to *Texas Turbo Jet,* be denied relief.

The carrier's dilemma may only be escaped if it happens to have on file and in effect at the time of shipment a general intermodal tariff (which generally requires higher rates than specific commodity tariffs) covering the desired inland origin or destination, as TFL did in the *B.N.P. Distributing* case, and if the cargo in fact moves under that tariff and via a motor or rail carrier named in that tariff. Even in that situation, there is nothing that requires the carrier to do as the administrative law judge suggested in *B.N.P. Distributing, i.e.,* collect only the agreed-upon rate and apply for a waiver.[3] On the contrary, the rule of *Texas Turbo Jet* may give a carrier in such circumstances a rationale for forcing the shipper to incur higher initial costs, and giving itself use of the shipper's money, by applying its N.O.S. intermodal rate in full before seeking special docket relief. In any event, the approach suggested in *B.N.P. Distributing* results in relief to the shipper turning entirely on happenstance, *i.e.,* its carrier must have in effect an N.O.S. intermodal tariff that can and was used to move its cargo (albeit at a possibly much higher rate).

The additional requirement or condition imposed by *Texas Turbo Jet* on special docket applications involving intermodal movements is not required by the terms of either the 1916 Act or the 1984 Act. The Commission has concluded that the continued application of that case is inconsistent with our obligation to administer the special docket procedure liberally with the goal of effectuating the procedure's remedial purpose, which is to relieve shippers from the burdens of carrier mistake or negligence. *Nepera Chemical, Inc.* v. *FMC,* 662 F.2d 18 (D.C. Cir. 1981). *Texas Turbo Jet*

[3] It should be noted that in the instant proceedings, the accession of the NACFC tariff in February 1984 makes it unlikely that Hapag-Lloyd retained an intermodal tariff under which the shipments of automobile parts could have moved.

erects an artificial barrier to shipper relief on the basis of concerns that are purely theoretical. The special docket procedure cannot be permitted to become a subterfuge for rate discrimination or rebates. If the new policy announced herein is shown in the future to facilitate such malpractices, the Commission will take corrective measures. At present, however, any abuses that might result from a lifting of *Texas Turbo Jet's* restrictions are difficult to conceive and are far outweighed by the concrete harm to shippers caused by that decision.

With reference to the particular facts before the Commission in these proceedings, we recognize that if General Motors' consignees did in fact arrange and pay for the movement of their shipments from Michigan to New York or Baltimore, they did not receive the complete service for which Hapag-Lloyd now seeks to waive a portion of the freight charges. However, it is clear that all concerned parties understood what that service *should* have been and that Hapag-Lloyd at least performed the port-to-port portion of its original undertaking. Under such circumstances, there is no apparent basis for suspecting unlawful collusion among the parties.[4] It is beyond the Commission's powers to remedy any inconvenience or out-of-pocket expense that General Motors' consignees may have suffered as a result of Hapag-Lloyd's error. But we can at least ensure that the final cost to them of transporting these 28 shipments of automobile parts is what they had originally agreed to.

Because *Texas Turbo Jet* will not be applied to these cases, the result of the Initial Decisions can be affirmed. As discussed below, there are other flaws in the carrier's applications not addressed by the Initial Decisions. However, these flaws can be resolved without the necessity for a remand.

First, the applications fail to include NACFC (or, more precisely, NACFC's successor, the Atlantic North Europe Conference) as a party. The Commission's regulations at 46 CFR § 502.92(a)(1) require that where the intended rate was to be offered under the authority of a conference, the conference must join with the individual carrier as an "indispensable party" to the special docket application. *Part 502—Rules of Practice and Procedure,* 21 F.M.C. 340, 343 (1978). In cases such as these, where the administrative or clerical error was committed by a conference member rather than by the conference itself, the requirement still applies because the conference in effect has ratified the intended rate by publishing a corrective tariff under its auspices. *See D.F. Young, Inc.* v. *Compagnie Nationale Algerienne de Navigation,* 21 F.M.C. 730 (1979). Accordingly, Hapag-Lloyd will be given thirty days to correct its applications to include the Atlantic North Europe Conference. However, Hapag-Lloyd's original

[4] Hapag-Lloyd's applications state that it is not aware of any shipper's similarly situated to General Motors. In addition, the Initial Decisions require that "appropriate notice of this matter and of the details of this waiver" shall be published in both the Conference's port-to-port tariff and its intermodal tariff. These constitute additional safeguards against discrimination among shippers.

applications remain valid insofar as is necessary to satisfy the 180-day time limit imposed by section 8(e) of the Shipping Act.[5]

There is also an issue whether the applications can be granted on behalf of General Motors. General Motors apparently was responsible only for paying the U.S. terminal charges. The format for special docket applications prescribed by 46 CFR § 502.92(a)(5) requires that applications must be filed for the benefit of the person who paid or is responsible for paying the freight charges. No distinction is drawn by the statute or the regulations between refunds and waivers, as the Presiding Officer has done. If the Commission permitted waivers to be granted to persons not responsible for paying the ocean freight, the remedial purpose of the special docket procedure would be obscured and opportunities for malpractices could be facilitated. Accordingly, either the overseas consignees must be substituted for General Motors as beneficiaries of the applications, or General Motors must submit an affidavit through Hapag-Lloyd that it is acting as agent for the consignees. *See Buckley & Forstall, Inc.* v. *Gulf European Freight Association for Combi Line*, 20 F.M.C. 343, 347–48 (1977).[6]

THEREFORE, IT IS ORDERED, That the Initial Decisions are hereby affirmed on condition that, within thirty (30) days from the date of this order, (1) Hapag-Lloyd amends its special docket applications to include the Atlantic North Europe Conference as an applicant; and (2) Hapag-Lloyd further amends its applications to substitute the overseas consignees for General Motors as intended beneficiaries of the applications or, alternatively, General Motors submits an affidavit through Hapag-Lloyd that it is acting as agent for the consignees or is otherwise entitled to receive the benefits of the applications.

IT IS FURTHER ORDERED, That if the condition described in the first ordering paragraph are not met by the 31st day following this order, the Initial Decisions will be vacated and Hapag-Lloyd's applications will be rejected for failing to meet the requirements of the Commission's regulations.

By the Commission.[7]

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[5] Because the last shipment covered by these applications was dated August 2, 1984, new applications would be completely time-barred. Similar procedures designed to preserve timely but otherwise flawed applications have been employed in other cases. *E.g., Application of Atlantic Container Line for the Benefit of Clark, Int'l Marketing, S.A.*, 19 S.R.R. 1257 (Initial Decision, 1980).

[6] Although the consignees here are affiliates or subsidiaries of General Motors, the analysis remains the same. The consignees apparently are sufficiently separate from General Motors so that the contracts of sale provided that they pay nearly all the transportation charges on these shipments from their own accounts. That being the case, the consignees rather than General Motors should receive the benefit of any waiver. If the circumstances are different and General Motors and the consignees are actually integrated in all significant respects, General Motors should submit a statement to that effect.

[7] Commissioner Thomas F. Moakley dissents and will issue a separate opinion.

DISSENTING OPINION OF COMMISSIONER THOMAS F. MOAKLEY

The majority's decision in these special docket cases is a textbook example of result-oriented decisionmaking at its worst. It ignores the clear limits of the statute under which relief is sought and trods heavily upon a fundamental principle of transportation law. Moreover, it does so with conscious disregard for the facts pertinent to these cases and without consideration for the decision's broader ramifications on tariff integrity.

Hapag-Lloyd is seeking in both of these special docket applications, to apply intermodal rates for certain General Motors shipments which moved from the U.S. midwest to points in Europe. According to the applications, the carrier had agreed in October and November 1983 to reduced per-container rates on auto parts from points in Michigan to points in Europe at which various General Motors affiliates are located. At that time, Hapag-Lloyd was offering intermodal service under an independent tariff (FMC No. 210, ICC HLCU 210).[1]

On December 9, 1983, the Commission granted intermodal ratemaking authority to the North Atlantic/Continental Freight Conference (NACFC) of which Hapag-Lloyd was a member. On December 10 and 11, 1983, the members of the NACFC met to discuss implementation of their new intermodal authority. Member lines were required to submit any rate commitments they had with customers at the meeting of December 11. At that meeting, Hapag-Lloyd presented a list containing over 150 rates, including seventy-seven rates on auto parts but failed to list the nine rates which are the focus of these special docket applications. The NACFC published all seventy-seven of the auto parts rates as independent action rates for the account of Hapag-Lloyd only.

The new NACFC tariff was published on December 30, 1983 to become effective on February 1, 1984. Hapag-Lloyd's independent tariff (FMC No. 210) was simultaneously cancelled on February 1, 1984. Because the nine rates in question here had not been presented to the conference by Hapag-Lloyd, they were not reflected in the NACFC tariff.

Between February 18, 1984 and August 2, 1984, Hapag-Lloyd carried 28 shipments for General Motors consisting of some 152 containers of auto parts which are the subject of these two cases.

With the exception of the two shipments on August 2, 1984, each of the 28 shipments was somehow rated under one of the nine reduced intermodal rates, although none of those rates appeared in the NACFC tariff, which governed both the port-to-port and intermodal services of Hapag-Lloyd during that time. The tariff error was apparently not discovered

[1] While it is not clear from the applications here whether Hapag-Lloyd ever filed these rates in its independent tariff, a review of the Commission's tariff records indicates that the rates in question appeared on 2nd Revised Pages 25–A, 25–B and 25–C of that tariff, effective December 22, 1983. There is nothing in this record to indicate whether any cargo moved under those tariff rates prior to February 1, 1984.

until approximately July 26, 1984, at which time Hapag-Lloyd issued a "Manifest Corrector" for each of the affected shipments up to that date. These "Manifest Correctors" noted that the shipments should have been rated as port-to-port shipments under NACFC's port-to-port tariff in effect at that time, although it is not clear whether Hapag-Lloyd assumed responsibility for the through intermodal movement. The two shipments which took place on August 2 appear to have been rated from their inception as port-to-port shipments.[2]

On August 1, 1984 the NACFC filed, on behalf of Hapag-Lloyd, seven of the nine rates in question, to become effective August 7, 1984 (NACFC Intermodal Tariff FMC–10, ICC–NAC 300, Original Pages 518–A, 519–A and 520–B). On August 15, 1984 the conference filed the remaining two rates, to become effective August 23, 1984 (1st Revised Page 520–B). All of these rates were independent action rates, solely for use by Hapag-Lloyd.

Applications for waiver of the NACFC's *port-to-port* charges were dated August 2 and August 20, 1984 and received by the Commission on August 15 and August 23 respectively.[3] The Administrative Law Judge granted both applications although the NACFC had not joined Hapag-Lloyd in seeking relief[4] and the documentation accompanying the application did not indicate whether Hapag-Lloyd had performed the intermodal services which were allegedly intended.

Upon review, the majority of the Commission adopted the initial decision, on condition that the conference join in Hapag-Lloyd's application and that steps be taken to ensure that the waivers accrue to the persons responsible for paying the freight bills.[5]

With respect to the question of whether Hapag-Lloyd performed the intended intermodal service, the majority has concluded that that fact is irrelevant to special docket relief.

> "With reference to the particular facts before the Commission in these proceedings, we recognize that if General Motor's consignees did in fact arrange and pay for the movement of their shipments from Michigan to New York or Baltimore, they did not receive the complete service for which Hapag-Lloyd now seeks to waive a portion of the freight charges. However, it is clear that all concerned parties understood what that service *should* have been and that Hapag-Lloyd at least performed the port-

[2] Since these applications are only for waivers and not refunds, I can only assume that Hapag-Lloyd charged the lower intermodal rates for these shipments and not the rates set forth on the bills of lading.

[3] One of the numerous curiosities of these cases is the inclusion in the first application of bills of lading and other documents relating to shipments which apparently moved out of Baltimore on the same date that the application was signed.

[4] The requirement that a conference must join with an individual carrier as an "indispensable party" to a special docket application involving the conference's tariff is found in 46 CFR s. 502.92(a)(1).

[5] The applications were filed for the benefit of General Motors, the shipper, while the consignees in Europe were apparently responsible for the freight charges.

to-port portion of its original undertaking." (Majority Decision p. 10).

Section 8(e) of the Shipping Act of 1984 (46 U.S.C. app. s. 1707(e)) under which these special docket applications were filed, authorizes the Commission to permit a carrier or conference to refund or waive a portion of freight charges if

> "(1) there is an *error in a tariff of a clerical or administrative nature* or an error due to *inadvertence in failing to file a new tariff*. . ." (Emphasis supplied)

This section provides limited relief from the requirements found in sections 8 and 10 of the Act that a carrier may charge only those rates and charges appearing in its tariffs for the service performed. For example, section 10(b)(1) of the Act (46 U.S.C. app. s. 1709(b)(1) provides that no common carrier may

> "(1) charge, demand, collect or receive greater, less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts . . ."

This is not a unique or esoteric principle. In fact, the requirement that a common carrier can only charge that rate which is applicable to the service performed is so fundamental to transportation law that the majority's decision here may be the first instance, since passage of the Interstate Commerce Act in 1887, that a transportation regulatory agency has deliberately concluded the opposite.[6]

Moreover, the majority has not limited the effect of its decision to the facts of this case. The order specifically denounces, for *future* special docket cases, the holding of a 1981 decision which applied this fundamental principle in the context of a special docket proceeding.[7]

In order to discard the principle that a carrier must have performed the service for which it seeks to apply a rate, the majority has erected, and addressed at length, a rather flimsy straw man. The order suggests that, in some cases, the requirement for the carrier to perform the intended service will force the carrier to violate the Act by providing a service without a tariff on file prior to applying for special docket relief. This

[6] There are a plethora of cases which hold that a carrier may only charge the rate shown in its tariff for the service performed. See, e.g. *Louisville & N. R.R.* v. *Maxwell*, 237 U.S. 94, 59 L. Ed. 853 (1915); *Baldwin* v. *Scott County Milling Co.*, 307 U.S. 478, 83 L. Ed. 1409 (1939); *United States* v. *Associated Air Transport Inc. et al.*, 275 F. 2d 827 (5th Cir. 1960); *General Motors Corp.* v. *Denver & Rio Grande Western R.R. Co. et al.*, 340 I.C.C. 112, 116 (1970). The majority cites *none* in support of its holding to the contrary and it appears that there is no precedent for such a holding.

[7] Application of *Lykes Bros. Steamship Co. Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981). The impact of the majority's ruling on *previous* special docket cases which have followed the line of reasoning in *Texas Turbo Jet* is far from clear. Likewise, the majority order fails to address the rejection of this principle as it may impact on port-to-port shipments, where it would seem to have equal application.

is a fictitious problem. Section 8(e) was designed to permit a carrier to carry out its intentions and to correct the tariff error after the fact. It was *not* designed to permit the carrier and the Commission to *pretend* that the intended service was provided.[8]

Contrary to the majority's assertions, relief under section 8(e) in cases such as this, does not turn on the "happenstance" of having available a cargo NOS rate under which the cargo may be carried in the absence of the intended rate (Majority Decision, p.9). There is no impediment whatsoever to a carrier performing the intended service, then filing the intended rate and applying for special docket relief. The existence, or lack thereof, of a cargo NOS rate is totally irrelevant to this issue.[9]

Section 8(e), as quoted above, is designed to permit correction of administrative or clerical errors. It is clearly not broad enough to correct operational errors, if in fact one occurred here. It is not clear from the record whether Hapag-Lloyd performed the intermodal service for the shipments in question. It is embarassing and irresponsible to say that we don't care.

If Hapag-Lloyd performed the intermodal service for which it seeks to apply the intermodal rates in question here, relief can be granted without turning the statute on its head.[10] If Hapag-Lloyd performed only a port-to-port service, relief cannot be granted by this Commission because it is beyond our authority to do so.

By its own terms, relief can only be granted under section 8(e) where it will not result in discrimination among shippers, ports, or carriers. If Hapag-Lloyd performed only a port-to-port service for General Motors, application of something other than the port-to-port rate will clearly discriminate against other port-to-port shippers. The majority expresses confidence (Majority Decision, p.10, note 4) that appropriate notices in both the port-to-port tariff and the intermodal tariff of the NACFC will provide adequate safeguards against such discrimination. The decision fails to explain, however, which shippers might be entitled to take advantage of rates for which a service might not have been performed. Who is similarly situated? Will the reduced rates be made available to any conference port-to-port shipper who might have chosen an intermodal service had that shipper known about the "intended" rates? If so, will other conference lines be forced

[8] In addition to the legal obstacles discussed here, the application of a rate for a service that was not performed would normally raise serious factual questions with respect to the credibility of the carrier's intentions. The facts presented here serve to demonstrate this point. If Hapag-Lloyd's arrangement with General Motors was legitimate, it is difficult to believe that the carrier would have forced the shipper to make inland arrangements for 152 containers over a period of almost six months.

[9] However, since the majority deems the existence of a cargo NOS rate to be significant, it is worth noting that the NACFC tariff did contain such a rate applicable from points in Michigan to points in Europe during this time period (NACFC Intermodal Freight Tariff FMC–10, ICC–NAC 300, Original Page 333). The statement by the majority (p.9, note 3) that it is "unlikely that Hapag-Lloyd retained an intermodal tariff under which the shipments of automobile parts could have moved," is therefore confusing, at best.

[10] On May 28, 1985, the conditions set forth in the majority's decision were met, thus correcting the other two deficiencies in these special docket applications.

to provide a refund on the basis of intermodal rates filed solely for the account of Hapag-Lloyd?

In addition, if General Motors or the consignees arranged and paid for inland transportation, it is impossible at this point, contrary to the majority's suggestion (Majority Decision p. 11) to ensure that the cost to them of transporting these 28 shipments is that to which they had originally agreed. If Hapag-Lloyd has not paid the inland carriers their division of the through rate, collection and retention of that entire through rate will result in a windfall to the carrier and, in effect, double payment by the shipper or consignee for the inland transportation.[11]

The equitable result that the majority was seeking would probably have been achieved without any adverse side-effects had this case been remanded to the Administrative Law Judge for a finding as to whether Hapag-Lloyd performed an intermodal service for these shipments. As indicated earlier, it would be very difficult to believe that Hapag-Lloyd's arrangement with General Motors was legitimate if the carrier did not perform the through service.[12]

However, the more important point here is that the Commission is not vested with general, equitable powers. We are a creature of Congress, charged with administering only those statutes which Congress has entrusted to us. If a particular statute produce an inequitable result, that is a problem that must be addressed by Congress.[13] It cannot be corrected by distorting the statute to fit a particular set of facts, or by ignoring the statute entirely.

Section 8(e) is a remedial statute and we have been directed to administer its provisions liberally.[14] However, to suggest that the special docket procedure may be used to permit a carrier to correct any operational or service error, and thus to charge a rate for a service that was never performed and a rate that has never been reflected in any tariff for the service that *was* performed, is beyond any plausible interpretation of the words of that section.

Finally, this decision significantly undermines traditional arguments for the retention of statutes required the filing of and adherence to tariffs. If a carrier may retroactively file and apply a rate for a particular shipper,

[11] For a vivid demonstration of the complexities involved in trying to unravel this type of factual setting, see *Application of United States Lines (S.A.) Inc. (Formerly Moore McCormack Lines, Incorporated) for the Benefit of Miles Laboratories, Inc.*, Special Docket No. 1168, Initial Decision of Seymour Glanzer, Administrative Law Judge served March 20, 1985.

[12] Even if the facts demonstrate that Hapag-Lloyd performed only a port-to-port service for these shipments, there is still a strong possibility that the shipper could recover damages in an action for breach of contract brought in an appropriate court. One theory of such an action for which some precedent exists, is that the carrier failed to perform the service to which he agreed, thus necessitating higher charges under the applicable conference tariff. See *Southern Pacific Company* v. *Miller Abattoir Company* 454 F. 2d 357 (3rd Cir. 1972) and generally, cases discussed in 83 American Law Reports 245, 260–267 and in 88 American Law Reports 2d 1375–1395.

[13] See, e.g. *Laning—Harris Coal & Grain Co.* v. *St. Louis & S.F. R.R.*, 15 I.C.C. 37 (1909); *Moore Co.* v. *L. & N. R.R.* 210 I.C.C. 305 (1935); and *Baldwin* v. *Scott County Milling Co.*, supra, note 6.

[14] *Nepera Chemical Inc.* v. *FMC*, 662 F. 2d 18 (D.C. Cir. 1981)

where the service performed does not match the rate filed, the value of tariffs is certainly brought into question.

For all these reasons, I dissent from the majority's decision and sincerely hope that the Commission will take advantage of the earliest opportunity to reconsider these fundamental questions of transportation law.

Federal Maritime Commission

SPECIAL DOCKET NO. 1220
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

Application for permission to waive a total of $220,193.51 of the applicable freight charges, granted.

Initial Decision [1] of Charles E. Morgan, Administrative Law Judge

Partially Adopted May 10, 1985

By application filed August 15, 1984, as amended [2] by letter dated August 16, 1984, the applicant, Hapag-Lloyd, AG for the benefit of General Motors Corporation (GM), seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the Shipping Act, 1984 (the Act), to waive a total of about $220,193,51 of the applicable freight charges on 24 shipments, consisting of a total of 140 containers, of auto parts, from Romulus, Michigan, to Ruesselsheim, Germany, from Brighton, Michigan, to Antwerp, Belgium, from Romulus to Antwerp, from Dearborn, Michigan, to Rotterdam, The Netherlands, and from Romulus to Vienna, Austria, shipped during the period from February 18, 1984, through August 2, 1984.

The shipments moved intermodally, generally moving from Michigan via railroad to Baltimore or New York, thence via ocean carrier (Hapag-Lloyd) to the ports of Hamburg, Germany, or Antwerp, Belgium, or to Rotterdam, The Netherlands, and thence on carriage to the final destinations of Ruesselsheim, Antwerp, Rotterdam, or Vienna.

The shipments were consigned to various subsidiaries or affiliates of GM; namely, General Motors Austria Werke; Adam Opel, AG; General Motors Continental; General Motors Nederland B.V.; and General Motors Continental N.V.

The applicable rates and charges on the shipments herein are based on a combination of factors, including certain port-to-port rates of the North Atlantic Continental Freight Conference, Tariff No. FMC–9, in items numbers 732.0015.114 and 732.0030.000. In addition to these port-to-port rates, applicable charges include a terminal handling charge at U.S. ports, a container service charge on house-to-house containerized cargo payable

[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 amendment withdraws the request for relief with respect to the rate of $1,572 from Romulus to Ruesselsheim and the rate of $1,434 from Romulus to Bochum, since new corrective tariffs had not as yet then been filed. Special Docket No. 1225 covers these rates.

in Europe, as well as U.S. inland charges, and on carriage charges in Europe.

Inasmuch as the port-to-port tariff contained two separate rates on auto parts, one rate on a measured ton of 40 cubic feet, minimum 800 cubic feet per container, and the other rate on a weight ton of 2,240 pounds (on automobile parts, new for assembly), the calculation of the applicable port-to-port rates depends on the *lesser* cost of the measurement or weight basis.

Such applicable port-to-port rates from and to all destinations herein, were $117 per ton (W) prior to March 1, 1984, $129 per ton (W) after March 1, 1984, minimum 40,320 pounds per container; or $71 per ton (M) prior to March 1, 1984, $78 per ton (M) after March 1, 1984, minimum 800 cubic feet per container.

The consignees were responsible for the payment of all freight charges, except that the shipper (GM) was responsible for payment of the U.S. terminal handling charge, which was $4.50 per ton (M) or $7.50 per ton (W) depending upon how the cargo was rated.

Container service charges were 275 Belgian francs, or 19.5 Dutch florin (gulden), or 19 German marks, per 1,000 kilos. For the purposes of the waiver herein, the European container service charge was *estimated* at $100 American per container, even though the gross weights of the various containers varied.

Inasmuch as this is an application for waiver, rather than an application for refund, the precise amounts of the waivers on the shipments need not be determined. What will be authorized to be waived is the total amount of applicable charges in excess of charges which were paid, and which were based on the precise intermodal through single factor rates intended and agreed on herein.

Further, while the authorized waiver or waivers are sought on behalf of GM, in truth they are largely for the benefit of the consignees (affiliates or subsidiaries of GM) because the consignees were responsible for all the applicable freight and miscellaneous charges, except for the U.S. terminal handling charges.

Hapag-Lloyd has charged and collected amounts based on the sought intermodal rates only, and thus it is immaterial moneywise for whom the waivers may be authorized, because Hapag-Lloyd will not be authorized herein to make any refunds.

The sought bases of charges are based on the seven intended negotiated intermodal through one-factor rates as follows:

Origin	Destination	Rate
Romulus	Ruesselsheim	$1,772—40 ft. container.
Brighton	Antwerp	$1,448—40 ft. container.
Romulus	Antwerp	$1,401—40 ft. container.
Romulus	Antwerp	$1,301—20 ft. container.
Dearborn	Rotterdam	$1,431—40 ft. container.

Origin	Destination	Rate
Romulus	Vienna	$1,754—20 ft. container.
Romulus	Vienna	$2,037—40 ft. container.

In the early part of 1983, Hapag-Lloyd offered independent intermodal rates in its North Atlantic service from the East Coast of the United States to countries in Northern Europe, as published in Hapag-Lloyd Tariff FMC No. 210.

On Friday, December 9, 1983, the Federal Maritime Commission granted authority to the North Atlantic/Continental Freight Conference (NACFC) to offer intermodal rates. The conference met the next day, Saturday, December 10, 1983, and scheduled a meeting for Sunday, December 11, 1983, to discuss conference intermodal rates to be charged. The decision was made to require all member lines to submit to the conference at the December 11 meeting, any rate commitments the member lines had with customers.

NACFC implemented its intermodal authority by filing rates from inland U.S. points, to become effective February 1, 1984, at which time all of Hapag-Lloyd's individual intermodal tariff rates for its North Atlantic service were canceled (replaced by the NACFC intermodal tariff filing).

On August 5, 1983, GM had requested Hapag-Lloyd to quote GM intermodal rates on various shipments of auto parts. By letter dated September 16, 1983, Hapag-Lloyd had quoted GM competitive rates over the requested routings, which GM accepted on October 24, 1983. On November 18, 1983, Hapag-Lloyd supplemented its rate offerings, and made clear its intent to offer these rates to GM for the period November 1, 1983, through October 31, 1984.

When the NACFC met on December 11, 1983, Hapag-Lloyd, as a member line, had prepared a list of its intermodal rate commitments, including those with GM.

The list was compiled by Hapag-Lloyd hurriedly in Hamburg, and sent by telex to the conference meeting. Due to clerical oversight the seven rates here in issue inadvertently were omitted from the telex. This error was made in spite of Hapag-Lloyd's intention that these rates also would become part of the conference's intermodal tariff.

As a result of the 24 shipments here in issue involving 140 containers moved without any intermodal rates on file for Hapag-Lloyd.

Hapag-Lloyd states that granting the application will not result in discrimination among shippers, because all shipments will come under the rates proposed here and intended to have gone into effect months ago. Hapag-Lloyd is not aware of any shippers other than GM, which have utilized or will utilize the rates in issue.

The revised Appendix A to the application is the summary of the waivers requested, listing the vessel, sailing date, origin of shipment, final destination, the intermodal total freight charges as agreed and as paid, the total freight charges applicable on the port-to-port rate basis plus miscellaneous

charges, and the differences between the two totals or the amount sought to be waived.

The total sought to be waived as shown on revised Appendix A for 140 containers is $220,193.51.

Appendix B to the application shows the detailed calculations upon which the figures in revised Appendix A are based.

For example, the last part of Appendix B concerns the shipment dated August 2, 1984, of automobile parts to General Motors Continental N.V. at Antwerp, Belgium, from Romulus, Michigan, on the vessel, STUTTGART EXPRESS, at the applicable port-to-port rate of $78 per measurement ton, minimum 800 cubic feet, on 835 cubic feet, or $1,628.25, plus terminal handling charge of $4.50 per measurement ton or $93.93, plus U.S. inland charge of $598, plus on carriage European charge of $111, plus $100 European container service charge, or a grand total of $2,531.18.

The sought through single-factor intermodal rate, inclusive of all charges is $1,301 per 20 foot container. Thus, the waiver sought to be authorized on this shipment is $2,531.18 less $1301 or $1,230.18.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Hapag-Lloyd in failing to properly telex the conference (NACFC) to publish the seven agreed intended through intermodal single-factor rates on automobile parts herein, which caused higher freight charges to apply, based on port-to-port rates plus miscellaneous charges; that the intended agreed intermodal rates were made effective August 7, 1984, in NACFC Intermodal Tariff FMC–10, pages 520–B, 519–A, and 518–A, which was after the shipments herein moved, and prior to the filing of this application; that the application was timely filed; and that so far as the record shows, the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Hapag-Lloyd, is authorized to waive a total of approximately[3] $220,193.51 of the applicable freight charges on the shipments herein. Appropriate notices of this matter and of the details of the waiver shall be published in the pertinent tariffs of the conference, the port-to-port (FMC–9) and intermodal (FMC–10).

(S) CHARLES E. MORGAN
Administrative Law Judge

[3] As noted, the waivers are approximate because of approximations in dollars of the equivalent European money amounts of the European container service charges.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1225
APPLICATION OF HAPAG-LLOYD, AG FOR THE BENEFIT OF GENERAL MOTORS CORPORATION

Application for permission to waive $7,132.79 of the applicable freight charges, granted.

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

Partially Adopted May 10, 1985

By application filed August 23, 1984, the applicant, Hapag-Lloyd, AG, for the benefit of General Motors Corporation (GM), seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the Shipping Act, 1984 (the Act), to waive a total of about $7,132.79 of the applicable freight charges on four shipments, consisting of a total of six containers, of auto parts, from Romulus, Michigan, to Ruesselsheim and to Bochum, Germany, shipped during the period from February 25, 1984, through March 31, 1984 (bill of lading dates).

This application is a companion to the application in Special Docket No. 1220. Some differences between the two applications are the dates of filing and the dates corrected tariff matter were made effective. Generally, otherwise the circumstances of the two applications are the same or similar.

The shipments moved intermodally from Romulus via railroad to Baltimore or New York, thence via ocean carrier (Hapag-Lloyd), to the port of Antwerp, Belgium, and thence on carriage to the final destinations of Ruesselsheim and Bochum.

The shipments were consigned to Adam Opel A.G.

The applicable rates and charges on the shipments herein are based on a combination of factors, including certain port-to-port rates of the North Atlantic Continental Freight Conference, Tariff No. FMC–7, in items numbers 732.0015.114 and 732.0030.000. In addition to these port-to-port rates, applicable charges include a terminal handling charge at U.S. ports, a container service charge on house-to-house containerized cargo payable in Europe, as well as U.S. inland charges, and on carriage charges in Europe.

Inasmuch as the port-to-port tariff contained two separate rates on auto parts, one rate on a measured ton of 40 cubic feet, minimum 800-cubic feet per container, and the other rate on a weight ton of 2,240 pounds

[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).

(on automobile parts, new for assembly), the calculation of the applicable port-to-port rates depends on the *lesser* cost of the measurement or weight basis.

Such applicable port-to-port rates to both destinations herein were $117 per ton (W) prior to March 1, 1984, $129 per ton (W) after March 1, 1984, minimum 40,320 pounds per container; or $71 per ton (M) prior to March 1, 1984, $78 per ton (M) after March 1, 1984, minimum 300 cubic feet per container.

The consignee was responsible for the payment of all freight charges, except that the shipper (GM) was responsible for payment of the U.S. terminal handling charge, which was $4.50 per ton (M) or $7.50 per ton (W) depending upon how the cargo was freighted.

Container service charges were 275 Belgian francs per 1,000 kilos. For the purpose of the waiver herein, the European container service charge was estimated at $100 American per container, regardless of the gross weights of the containers, except for one container where the estimate was $80. (One of the lighter weight containers was estimated at $100.)

Inasmuch as this is an application for waiver, rather than an application for refund, the precise amounts of the waivers on the shipments need not be determined. What will be authorized to be waived is the total amount of the applicable charges in excess of charges which were paid, and which were based on the precise intermodal through single-factor rates intended and agreed on herein.

Further, while the authorized waiver or waivers are sought on behalf of GM, in truth they are largely for the benefit of the consignee, Adam-Opel A.G., which presumably is a subsidiary or affiliate. This is so, because the consignee was responsible for all of the applicable freight charges and miscellaneous charges, except for the U.S. terminal handling charges.

Hapag-Lloyd has charged and collected amounts based on the sought intermodal rates only, and thus it is immaterial moneywise for whom the waivers may be authorized, because Hapag-Lloyd will not be authorized herein to make any refunds.

The sought charges are based on the two intended negotiated intermodal through one-factor rates as follows:

Origin	Destination	Rate
Romulus	Ruesselsheim	$1,572—20 ft. container.
Romulus	Bochum	$1,434—20 ft. container.

As recited in Special Docket No. 1220, in the early part of 1983, Hapag-Lloyd offered independent intermodal rates in its North Atlantic service from the East Coast of the United States to countries in Northern Europe, as published in Hapag-Lloyd Tariff FMC No. 210.

On Friday, December 9, 1983, the Federal Maritime Commission granted authority to the North Atlantic/Continental Freight Conference (NACFC) to offer intermodal rates. The Conference met the next day, Saturday,

December 10, 1983, and scheduled a meeting for Sunday, December 11, 1983, to discuss Conference intermodal rates to be charged. The decision was made to require all member lines to submit to the Conference on the December 11 meeting, any commitments which the member lines had with customers.

NACFC implemented its intermodal authority by filing rates from inland U.S. points to become effective February 1, 1984, at which time all of Hapag-Lloyd's intermodal tariff rates for its North Atlantic service were canceled (replaced by the NACFC intermodal tariff filing).

On August 5, 1983, GM had requested Hapag-Lloyd to quote GM intermodal rates on various shipments of auto parts. By letter dated September 16, 1983, Hapag-Lloyd had quoted GM competitive rates over the requested routings, which GM accepted on October 24, 1983. On November 18, 1983, Hapag-Lloyd supplemented its rate offerings, and made clear its intent to offer those rates to GM for the period November 1, 1983 through October 31, 1984.

When the NACFC met on December 11, 1983, Hapag-Lloyd, as a member line, had prepared a list of its intermodal commitments, including those with GM.

The list was compiled by Hapag-Lloyd hurriedly in Hamburg, Germany, and sent by telex to the Conference meeting. Due to clerical oversight, the two rates here in issue inadvertently were omitted from the telex. Hapag-Lloyd's intention was that these two rates also would become part of the Conference's intermodal tariff.

As a result the four shipments, totalling six containers, here in issue moved without any intermodal rates on file for Hapag-Lloyd.

Hapag-Lloyd states that granting the application will not result in discrimination among shippers, because all shipments will come under the rates proposed here and intended to have gone into effect months ago. Hapag-Lloyd is not aware of any other shippers, other than GM, which have utilized or will utilize the rates in issue.

Appendix A to the application is the summary of the waivers requested, listing the vessel, sailing date, origin of shipment, final destination, the intermodal total freight charges as agreed and paid, the total freight charges applicable on the port-to-port rate basis plus miscellaneous charges, and the difference between the two totals or the amount sought to be waived.

Appendix B to the application shows the detailed calculations upon which the figures in Appendix A are based.

For example, the last part of Appendix B concerns the shipment of four containers from Romulus to Ruesselsheim. The last container listed was one containing 16,800 pounds made on the vessel DUESSELDORF EXPRESS, which sailed from Baltimore March 19, 1984, to Antwerp. The applicable port-to-port rate on this container was $78 per ton (M), minimum 800 cubic feet. Based on 843 cubic feet, this basic charge was $1,643.85. The terminal handling charge (U.S.) of $4.50 per ton (M) was

$94.84. The U.S. inland charge was $590, and the on-carriage European charge was $382. The European container service charge was estimated at $80 American. The total applicable charges as calculated for the container are $2,790.69.

The sought through single-factor intermodal rate, inclusive of all charges, is $1,572 per 20-foot container. Thus, the waiver sought to be authorized on this container is $2,790.69 less $1,572 or $1,218.69.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Hapag-Lloyd in failing to properly telex the Conference (NACFC) to publish the two agreed intended through intermodal single-factor rates on automobile parts herein, which caused higher freight charges to apply, based on port-to-port rates plus miscellaneous charges; that the intermodal intended agreed rates were made effective August 23, 1984, in NACFC Intermodal Tariff FMC–10, page 520–B, which was after the shipments herein moved, and prior to the filing of this application; that the application was timely filed; and that so far as the record shows, the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Hapag-Lloyd is authorized to waive a total of approximately[2] $7,132.79 of the applicable freight charges on the shipments herein. Appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariffs of the Conference, the port-to-port (FMC–9) and intermodal (FMC–10).

(S) CHARLES E. MORGAN
Administrative Law Judge

[2] As noted, the waivers are approximate because of approximations in dollars of the Belgian francs amounts of the European container service charges.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–34
SHIPPING CONDITIONS IN THE U.S./ARGENTINA TRADE

ORDER OF DISCONTINUANCE

May 13, 1985

This proceeding was instituted on the Petition of A/S Ivarans Rederi (Ivarans) for issuance of rules to meet alleged conditions unfavorable to shipping in the United States trades with Argentina, pursuant to section 19, Merchant Marine Act of 1920 (46 U.S.C. app. §876). Ivarans' Petition alleged that certain laws, decrees and actions of the government of Argentina and certain Argentine-flag carriers, particularly relating to Argentine government Resolution 619 which restricts the carriage of Argentine export cargoes to members of a northbound pooling agreement, had resulted in conditions unfavorable to shipping which would preclude Ivarans from competing for cargoes in the northbound trade. Ivarans is not currently a member of the northbound pooling agreement.

The Commission published notice of the Petition in the FEDERAL REGISTER inviting public comment. (49 FR 40097, October 12, 1984). The Commission also asked the Departments of State and Transportation to attempt to reach an informal resolution of the problem through government-to-government initiatives. In addition, Ivarans itself entered discussions with the government of Argentina, and requested that the Commission defer consideration of its Petition while it pursued such discussions.

The Commission has now been notified by the Departments of State and Transportation that they have received assurances from Argentine authorities that "they are not enforcing and do not intend to enforce" Resolution 619. Ivarans has likewise informed the Commission that it has received assurances directly from Dr. Casado Bianco, Argentine Undersecretary for Maritime and River Transport, that neither Resolution 619 or other measures, including necessary clearances and export licenses, will be used to prevent it from loading cargo in Argentina.

Based on these assurances, Ivarans informs the Commission by an April 26, 1985 letter from its counsel that it "is satisfied that the primary purpose of its Section 19 petition in regard to the northbound trade has been achieved," and requests that the Commission terminate this proceeding. Because Ivarans will have continued access to the northbound trade from Argentina to the U.S., and no further regulatory purpose would therefore be achieved by continuing this proceeding,

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

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82–1
CALIFORNIA CARTAGE COMPANY, INC.

v.

PACIFIC MARITIME ASSOCIATION

DOCKET NO. 82–10
CONTAINERFREIGHT TERMINALS COMPANY, ET AL.

v.

PACIFIC MARITIME ASSOCIATION

ORDER DENYING MOTION TO DISMISS AND REMANDING PROCEEDING

May 23, 1985

These consolidated proceedings are before the Commission on a Motion Addressed To The Commission Under The Shipping Act of 1984 To Dismiss The Proceeding (Motion to Dismiss) filed by Respondent, Pacific Maritime Association (PMA), and Intervenor, International Longshoremen & Warehousemen's Union (ILWU). Complainants, California Cartage Co., Inc., *et al.* (Cal Cartage),[1] have filed a Reply to the Motion To Dismiss and a Motion Addressed To The Commission For Expedited Consideration Of Their Case On The Merits (Motion for Expedition). Respondents have filed a Response to the Reply to the Motion to Dismiss and a Reply to the Motion For Expedition.

BACKGROUND

The complaints in these proceedings alleged that an assessment agreement, Agreement No. LM–81 (Agreement or LM–81), filed with the Commission by PMA on September 29, 1981, violates the substantive standards of the Maritime Labor Agreements Act (MLAA) (94 Stat. 1021), formerly codified in section 15, fifth paragraph of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §814). Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an Initial Decision on October 26, 1982, which held that LM–81 was not an "assessment agreement" as defined in the

[1] Cal Cartage is the Complainant in Docket No. 82–1. Complainants in Docket No. 82–10 are Containerfreight Terminals Company and Hawaiian Pacific Freight Forwarding.

MLAA and dismissed the proceeding for lack of jurisdiction. *California Cartage Co., et al* v. *Pacific Maritime Assoc.*, 21 SRR 1333 (1982). Exceptions to the Initial Decision were filed by all parties to the proceeding.

On exception, the Commission reversed the Presiding Officer's finding of lack of jurisdiction, holding that LM–81, in conjunction with a prior agreement, met the jurisdictional requirements of the MLAA. However, the Commission further found that Complainants lacked standing to file a complaint under the MLAA because they paid no assessments under the Agreement and generally were not within the protected "zone of interests."[2] The Commission accordingly dismissed the complaint. *California Cartage Co., et al.* v. *Pacific Maritime Assoc.*, 25 F.M.C. 596 (1983).

On Petition For Review, the U.S. Court of Appeals reversed the Commission's decision and remanded the case for further proceedings. *California Cartage Co.* v. *U.S.*, 721 F.2d 1199 (9th Cir. 1983), *cert. denied*, 1055 S.Ct. 110 (1984). The Court held that Complainants had standing to file a complaint under the "any person" standard of section 22 of the 1916 Act,[3] and that this standing had not been abrogated by the MLAA. The Court also found that Complainants could challenge LM–81 under the "detriment to commerce" standard contained in the MLAA.

Shortly after the Court's decision was issued, the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. §1701–1720) was enacted. That Act included several amendments to the MLAA provisions. As relevant here, the 1984 Act deleted the "detriment to commerce" standard applicable to assessment agreements and made the MLAA remedies and regulatory standards exclusive in MLAA complaint proceedings.[4] It is on the basis of these statutory changes that PMA and ILWU now seek dismissal of the remanded proceeding.

POSITIONS OF THE PARTIES

Repondents

The Motion to Dismiss requests an application of the 1984 Act in accordance with the Notice issued by the Commission addressing the status of pending agency proceedings at the time the 1984 Act went into effect.[5]

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[2] Complainants are off-dock container freight stations which do not utilize ILA labor for container handling. As such, they are not subject to assessments under the Agreement. Similarly, they are not "shippers, carriers or ports," the entities specifically mentioned in section 15, fifth paragraph, of the 1916 Act. After reviewing the 1916 Act and its legislative history the Commission determined that Congress did not intend that a negotiated labor agreement subject to the MLAA be challengable by complainants on the basis of its competitive effects.

[3] Section 22 (46 U.S.C. app. §821) provides in pertinent part:

> "Any person may file with the [Federal Maritime Commission] a sworn complaint setting forth any violation of this Act . . ."

[4] *See*, section 5(d) of the 1984 Act (46 U.S.C. app. §1704(d)) at footnote 7 *infra*.

[5] On May 15, 1984 the Commission issued a Notice in the *Federal Register* advising that proceedings pending at the time the 1984 Act went into effect would be decided under the 1984 Act and not under the 1916 Act. *Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission*, 49 *Fed. Reg.* 21798 (1984). The Notice further stated that exceptions to this policy would be considered under the general rule established in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974).

It is argued that no "manifest injustice" would result in an application of the new Act because no matured right, such as reparations, has accrued to Complainants under the 1916 Act and that any relief they would obtain would be prospective in effect, *i.e.*, disapproval or modification of LM–81. No statutory provision or legislative history of the 1984 Act is said to be contrary to this result because the savings provisions in the 1984 Act (section 20(e)(2)(A))[6] was made inapplicable to MLAA cases by operation of the assessment agreement provision (section 5(d)).[7] Respondents argue that section 5(d) indicates a retroactive application of the amended MLAA provisions and that the Commission's interpretation of the savings provisions (section 20(e)(2)) cannot operate to remove immunity retroactively, distinguish "assessment agreements" from other agreement cases under the 1916 Act, or apply to any cases other than pending suits for past damages for unapproved agreements.

It is further argued that an application of the substantive "assessment agreement" provisions of the 1984 Act requires dismissal of this proceeding. The "detriment to commerce" standard was intentionally omitted from the 1984 Act, and, therefore, allegedly removed the basis for the Complainants' standing to challenge LM–81. Respondents argue that Complainants are therefore precluded from arguing any other grounds now, including discrimination, because their cause of action was limited to a "detriment to commerce" theory by the decision of the Court of Appeals.

Finally, Respondents contend that Complainants cannot avail themselves of the "any person" standing standard of section 11(a)[8] of the 1984 Act because section 5(d) specifically excludes its application to assessment agreement cases. It is argued that this change from the 1916 Act close

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Bradley stands for the proposition that cases are to be determined according to the law as it exists at the time a final decision is issued unless applying a change in the law during a proceeding results in a "manifest injustice" to a party.

[6] Section 20(e)(2)(A) (46 U.S.C. app. §1719(e)(2)(A)) provides:

(2) This Act and the amendments made by it shall not affect any suit—(A) filed before the date of enactment of this Act . . ."

[7] Section 5(d) of the 1984 Act (46 U.S.C. app. §1704(d)) provides:

(d) ASSESSMENT AGREEMENTS.—Assessment agreements shall be filed with the Commission and become effective on filing. The Commission shall thereafter, upon complaint filed within 2 years of the date of the agreement, disapprove, cancel, or modify any such agreement, or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports. The Commission shall issue its final decision in any such proceeding within 1 year of the date of filing of the complaint. To the extent that an assessment or charge is found in the proceeding to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the unjust discrimination or unfairness for the period of time between the filing of the complaint and the final decision by means of assessment adjustments. These adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. Except for this subsection and section 7(a) of this Act, this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to assessment agreements.

[8] Section 11(a) (46 U.S.C. app. §1710(a)) provides:

"Any person may file with the Commission a sworn complaint alleging a violation of this Act, other than section 6(g), and may seek reparation for any injury caused to the complainant by that violation."

in time to the Court of Appeals decision evinces a clear intent to overrule the Court's decision. Respondents conclude that the Court's finding that the "any person" standard was an alternative basis for standing for Complainants is no longer relevant.

Complainants

Complainants argue that the savings provisions of the 1984 Act (section 20(e)(2)(A)) preserves its rights to prosecute its complaint to completion. It states that the Commission's interpretation of the savings provision in its May 15, 1984 Notice, which provides that this provision applies only to pending antitrust suits, should not apply here because this case is the only one that can ever challenge LM–81. Dismissal of this case allegedly could result in the final and unchallengeable approval of a potentially unlawful agreement. It is argued that the MLAA, as it read prior to the 1984 Act, must apply to conduct occurring before the Act became effective. Once Complainants have standing, they argue, all standards and remedies under the 1916 Act are available including disapproval of LM–81 and reparations.

Because the Court of Appeals ruled in their favor, Complainants also maintain that they retain their standing to sue even if the 1984 Act's substantive standards apply. However, Complainants further argue that it would be a "manifest injustice" to apply the 1984 Act because of its final antitrust immunization of LM–81 and the resulting deprivation of a remedy to non-participating third parties relying on Complainants' challenge here.

Alternatively, Complainants argue that they have standing under the 1984 as "any person" even if the "detriment to commerce" standard is now found to be inapplicable. They note that the Court of Appeals found the "any person" criteria is an alternative, and, accordingly, argue that they may challenge LM–81 under the MLAA or any other relevant provision of the 1984 Act. The "any person" standard of section 11(a) allegedly is carried forward in assessment agreement cases under the 1984 Act because section 5(d) does not limit standing and, therefore, Complainants may raise any violation of the 1984 Act. They urge that this result be permitted in light of the broad antitrust immunity provided by the 1984 Act. To do otherwise, they argue, deprives injured non-parties to such agreements of any forum to challenge them.

Finally, Complainants reason that the language of section 5(d) does not preclude the application of section 11(a) to assessment agreement cases because such a reading would render other critical provisions of the 1984 Act (such as discovery, rulemaking and the effective date) also inapplicable. The relevant language of section 5(d), according to Complainants, was only intended to apply to the substantive standards and procedural remedies stated in other sections of the 1984 Act.

DISCUSSION

The 1984 Act and its legislative history require a determination that Complainants have neither standing nor a cause of action to pursue in these proceedings under the 1984 Act. The "detriment to commerce" standard is not included in section 5(d) of the 1984 Act and the "any person" standing provision of section 11(a) is not applicable to assessment agreement cases. Accordingly, both the bases of standing and the substantive cause of action found available to Complainants by the Court of Appeals have been removed by the 1984 Act. The timing of this change and its legislative history[9] indicate an intention to overrule the Court's decision in this case, at least as it operates prospectively.

The savings provisions of section 20(e)(2)(A) have previously been interpreted by the Commission as having no application to pending administrative cases.[10] Complainants' standing and statutory cause of action therefore appears to be extinguished under the 1984 Act and their attempt to expand their case is now rejectable as a matter of the "law of the case" here.[11]

Under the *Bradley* rule,[12] however, an exception to the application of the 1984 Act to pending administrative cases is recognized where dismissal of a proceeding would result in "manifest injustice" to Complainants. One accepted method of making this determination is to ascertain whether any right or claim has matured or become vested under the 1916 Act that would be retroactively taken away from the Complainants by application of the 1984 Act.[13]

Section 15 of the 1916 Act contained two basic remedies with regard to MLAA complaint cases, disapproval or modification of the agreement and assessment adjustments. Neither of these remedies could now be afforded Complainants. First, if LM–81 were now found to be "detrimental to commerce" the Commission could not retroactively disapprove or modify the Agreement.[14] Additionally, the Commission could not prospectively disapprove or modify LM–81 because to do so would be to enter an order of future effect that is inconsistent with current law at the time the order is issued.[15] Therefore, even if Complainants' rights to have LM–81 disapproved or modified had theoretically "matured" on the basis of the record before the Commission under the 1916 Act, supervening legal considerations preclude that remedy now.

Second, a reading of section 15 of the 1916 Act indicates that assessment adjustments were only available to remedy unjust discrimination in assess-

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[9] *See*, H.R. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984).

[10] *See*, footnote 5.

[11] *See, California Cartage Co.* v. *U.S., supra*, 721 F.2d at 1205, 1206.

[12] *See*, footnote 5.

[13] *See, Indianapolis power & Light Co.* v. *I.C.C.*, 687 F.2d 1098 (7th Cir. 1982).

[14] *See, National Ass'n of Recycling Industries, Inc.* v. *American Mail Line, Ltd.*, 720 F.2d 618, 620 (9th Cir. 1983).

[15] *Ziffrion* v. *U.S.*, 318 U.S. 73 (1943); *See also, Sea-Land Service, Inc.* v. *I.C.C.*, 738 F.2d 1311, 1314–15 (D.C. Cir. 1984); *Central Freight Lines, Inc.* v. *U.S.*, 669 F.2d 1063, 1069 (5th Cir. 1982).

ment agreements.[16] Therefore, because the Court of Appeals has already found that Complainants could not advance such a cause of action,[17] this remedy at no time "vested" or "matured" with respect to their complaint.

However, the Court's analysis of the 1916 Act would appear to require that the Commission also examine section 22 to determine whether any potential right or remedy had accrued to Complainants that was not inconsistent with section 15.[18] The fundamental right to obtain reparations under section 22 of the 1916 Act, does not appear inconsistent with section 15 with regard to affording a remedy for an assessment agreement found to operate to the "detriment of commerce." Section 15 contains specific remedies for agreements found to be unlawfully discriminatory. While these displace the reparations authority of section 22 because they are "inconsistent" therewith, the same can not be said of reparations for an unlawful "detriment to commerce." Section 15 does not apply an express remedy for an assessment agreement found detrimental to commerce. Accordingly, reparations must be held to be a viable remedy for such unlawful agreements under the statutory scheme of the 1916 Act in this narrow context.

Finally, the Commission finds that complainants' "right" to a decision on the merits of their case and on their request for reparations had sufficiently "matured" or "vested" so as to preclude its dispossession by application of the 1984 Act. Although no decision on the merits was issued before the 1984 Act was passed, the record was complete, and "but for" a finding of no standing by the Commission, such a decision would have issued. Depriving Complainants of a decision on the merits and their potential reparations now as a result of a threshold decision on their standing to sue that has been overturned on appeal would appear to constitute "manifest injustice." An award of reparations for conduct that occurred prior to the effective date of the 1984 Act would not affect future conduct nor carry forward provisions of the 1916 Act that are inconsistent with the 1984 Act. Accordingly, the Commission will deny Respondents' Motion to Dismiss.

THEREFORE, IT IS ORDERED, That the Motion to Dismiss of Respondents, Pacific Maritime Association and International Longshoremen & Warehousemen's Union, is denied; and

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[16] Section 15, fifth paragraph, of the 1916 Act provides in pertinent part:

> To the extent that any assessment or charge is found in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers or ports, the Commission *shall remedy the unjust discrimination or unfairness* for the period of time between the filing of the complaint and the final decision *by means of assessment adjustments.* (emphasis added).

[17] *California Cartage Co.* v. *U.S., supra,* 721 F.2d at 1205.

[18] In this remanded proceeding, it is appropriate that the rights and remedies available to Complainants under the 1916 Act be determined according to the statutory construction methodology utilized by the Court of Appeals. *See, Rios—Phineda v. U.S. Dept. of Justice, (I.N.S.,* 720 F.2d 529 (8th Cir. 1983); *City of Cleveland, Ohio* v. *F.P.C.,* 561 F.2d 344 (D.C. Cir. 1977).

IT IS FURTHER ORDERED, That the Motion for Expedition of Complainants, California Cartage Company, Inc., *et al.*, is denied;[19] and

IT IS FURTHER ORDERED, That this proceeding is remanded to the presiding Administrative Law Judge for further proceedings consistent with this Order; and

IT IS FURTHER ORDERED, That the remanded proceeding shall be decided upon the present evidentiary record supplemented by any memoranda of law the parties may file on the remanded issue of whether Complainants are entitled to an award of reparations for injuries sustained by them as a result of a "detriment to commerce" caused by Agreement No. LM–81 from its implementation date until June 18, 1984, and, if so, in what amount; and

FINALLY, IT IS ORDERED, That an Initial Decision on Remand be issued within 120 days of the date of this Order.

By the Commission.

(S) BRUCE A. DOMBROSKI
Acting Secretary

[19] The Motion for Expedition argues that because this proceeding is now three years old and the MLAA provision requiring a final decision within one year of the filing of their complaints has been carried forward into the 1984 Act expedited consideration on the merits is appropriate in this remanded proceeding. Complainants request an abbreviated schedule for the issuance of an initial decision, exceptions, replies to exceptions and a final Commission decision. Respondents' Reply agrees that if their Motion to Dismiss is denied, the case should be given expedited consideration. Respondents suggest, however, that an initial decision be dispensed with and the Commission issue a final decision on the present record after allowing the parties to brief the "detriment to commerce" issue. Alternatively, Respondents state that if an initial decision is deemed necessary, it should be confined to only the "detriment to commerce" issue on the present record with the standard clearly defined in any Commission remand order. They further suggest that the inquiry be limited to the period of time between the filing of Agreement No. LM–81 and the date of the 1984 Act took effect.

Respondents' alternative procedure appears to be the most appropriate and has been adopted except to the extent it would preclude the presiding Administrative Law Judge from making a full determination of what constitutes a "detriment to commerce."

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–8
EAST COAST COLOMBIA CONFERENCE ET AL.

v.

AGROPECUARIA Y MARITIMA SANTA ROSA LTDA.

NOTICE

June 3, 1985

Notice is given that no appeal has been taken to the April 25, 1985, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–8

EAST COAST COLOMBIA CONFERENCE ET AL.

v.

AGROPECUARIA Y MARITIMA SANTA ROSA LTDA.

COMPLAINT DISMISSED WITH PREJUDICE

Finalized June 3, 1985

Complainants and respondent have filed a motion asking that the complaint be dismissed with prejudice. The reasons for the motion are explained below.

On January 31, 1983, complainants, a Conference and three of its member lines, filed a complaint alleging that respondent Agromar had violated sections 16 Second, 17, 18(b) (1) and (3) of the Shipping Act, 1916, by allegedly carrying cargo and doing other things without always having a tariff on file with the commission. As the case progressed and complainants obtained more information through the Commission's discovery processes, it appeared that complainants were alleging that Agromar had not only operated without a tariff from December 1980 through August 1981 between certain ports but that Agromar had also made unjustly discriminatory contracts and allowed shippers to pay freight at other than the rates on file during the period December 1980 through June 1982. Complainants also asked for money damages.

Agromar denied any wrongdoing and defended its contracts with shippers, contending that it is permissible to be a contract and common carrier at the same time. At worst, Agromar stated that it may have committed some technical violations without intending to violate law and that it corrected its mistakes and defective tariff filings. Alleged deviations from its tariff on certain shipments, however, were not explained by Agromar.

Rather than proceed into lengthy evidentiary hearings in an effort to litigate the various issues, in mid-July 1983, both complainants and respondent moved that the proceeding be stayed to allow them to consummate a settlement agreement which would require the assistance of the Commission, specifically, by means of a Commission-instituted investigation. (See Proceeding Stayed, July 21, 1983.) I granted the motion. *Id.* However, on February 10, 1984, the Commission declined to begin a formal investigation. Instead, the Commission referred the matter to the Bureau of Hearing Counsel with instructions to enter into informal negotiations leading to possible compromise under 46 CFR 505.4. Later, in April of 1984, com-

plainants furnished Hearing Counsel with materials which complainants believed to be relevant to their allegations of violations, as the Commission's February 10 Order permitted. (See Order cited, at 7.)

Because of the apparent inaction toward settlement between Hearing Counsel and Agromar, I issued rulings designed to precipitate some action either by way of settlement or by proceeding to hearing and a decision on the merits of the complaint. (See rulings served November 20, December 31, 1984, and February 8, 1985.) However, before it became necessary to lift the stay and proceed to hearing, Hearing Counsel and respondent Agromar completed their negotiations and executed two compromise agreements, dated October 29, 1984, and March 15, 1985. The two agreements appear to follow the standard form set forth in the Commission's regulations. (See Appendix A following 46 CFR 505.7). In brief, without admitting that it committed any of the alleged violations, Agromar agrees to pay the Commission the aggregate total of $12,500 in compromise of all civil penalties arising out of violations of sections 14 Fourth, 16 Second, 17, 18(b)(1) and 18(b)(3) of the Shipping Act, 1916, that were alleged to have occurred at various periods between December 1, 1980, and June 30, 1982. The agreements represent the Commission's and Agromar's desire to settle the matters in controversy and to avoid the delays and expenses which would accompany agency litigation concerning the penalty claims.

The above agreements have apparently persuaded complainants that further pursuit of their complaint into the same matters will be unnecessary. Accordingly, complainants, as well as respondent, are seeking to have their complaint dismissed with prejudice. Under the circumstances there is no doctrine of law which I am aware which would require private complainants to continue to litigate.

Accordingly, the motion is granted and the complaint is dismissed with prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32
KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

NOTICE

June 4, 1985

Notice is given that no appeal has been taken to the April 29, 1985, dismissal of the complaint in this proceeding and the time within which the Commission could determine to review has expired. No such determination has been made and accordingly, the dismissal has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–32
KUEHNE AND NAGEL, INC.

v.

BARBER BLUE SEA LINE AND NEDLLOYD LINES

SETTLEMENT APPROVED

Finalized June 4, 1985

This proceeding was remanded to me for further hearing by the Commission for the purpose of determining whether four shipments of rock crushing plants could be considered mobile rock crushing plants within the meaning of Item 1255 of the 8900 Rate Agreement Freight Tariff No. 8, FMC No. 8.

During the testimony of a witness, on respondents' case-in-chief at the hearing held on April 25, 1985, the parties determined that the case should be settled and they entered into stipulations on the record[1] whereby the respondents agreed to pay the complainant the sum of $18,334.54, the exact amount alleged to constitute the over-charges on the four shipments, and the complainant agreed to waive any entitlement to interest.[2] I indicated that the settlement appeared to be satisfactory to me but that final approval must await appropriate Commission action following the issuance of my written order of approval.

The background, facts and issues involved in this proceeding have been fully developed in my initial Decision of October 1, 1984, and the Order or Remand, served March 28, 1985, and will not be repeated except to the extent needed for clairity.

The complaint was filed on July 28, 1983. It alleged that there were four shipments of mobile rock crushing plants from Baltimore, Maryland, to Damman, Saudi Arabia, made in August and September, 1981; that Barber Blue Sea Line carried two of those shipments and overcharged complainant's assignor in the amount of $13,734.45 and the Nedlloyd Lines carried the other two shipments and overcharged complainant's assignor in the amount of $4,600.09, all in violation of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3).

[1] A written paraphrase of the stipulation was presented to me after the record of hearing was closed. The paraphrase was lodged with the Secretary for filing in the docket.

[2] A complainant may elect to waive interest on its claim. *Consolidated International Corporation* v. *Concordia Line*, 18 F.M.C. 180, 181–182, n.3 (1975).

The ro/ro portions of the shipments were rated as "mobile rock crushing plants" under Item 1255 of the aforesaid tariff while all other portions were rated as stationary "rock crushing plants" under Item 765 of that tariff. Item 1255 carried a rate of $122.25 W/M while Item 765 carried a higher rate of $131.25. Kuehne and Nagel argued that the entirety of four shipments should be rated as mobile plants. The respondents argued that, by giving the shipper the benefit of the doubt, the shipments were properly rated, partly as mobile and partly as stationary plants, rather than as stationary plants in their entirety. I found that the plants were mobile and should have been rated as Item 1255 shipments. The Commission found that there was insufficient evidence to determine which tariff item applied, but did confirm that all of the shipments must be rated under a single item of the tariff.

As indicated, while respondents' witness was testifying, it became manifest to them, for the first time, that an ambiguity in the 8900 Rate Agreement Tariff could be perceived and that a shipper might possibly rely on that ambiguity to conclude that only the Item 1255 rate was applicable.

Accordingly, and in order to avoid any further expenses of litigation, the parties agreed to the settlement and asked that it be approved.

DISCUSSION

In determining whether settlements should be approved, it is well settled that the law encourages settlements and that every presumption is indulged in that favors their correctness, fairness and validity. However, as an added ingredient in section 18(b)(3) cases, the Commission insists upon striking a balance between the policy favoring settlement against the possibility of discriminatory rating practices which might result if settlements are approved in the absence of a finding of violation. Thus, in such cases the Commission follows the policy that parties should have the opportunity to settle disputes, but to prevent abuse, it must be established that the settlement is a bona fide attempt to terminate the controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act. *Organic Chemicals* v. *Atlanttrafik Express Service,* 18 SRR 1536a (1979); *Ellenville Handle Works, Inc.* v. *Far Eastern Shipping Company,* 23 F.M.C. 708 (1981); *Celanese Corporation, Inc.* v. *The Prudential Steamship Company.* 23 F.M.C. 1 (1980).

Clearly this has been a vigorously contested proceeding. Following the service of the complaint and the answer, there were motions for summary judgment, a hearing on a stipulated record, exceptions to the initial decision and a partial oral hearing on remand. There existed a genuine dispute, which, absent a settlement, promised to involve a continuation of the evidentiary hearing, briefing and the filing of exceptions after another initial decision. The parties have carefully considered the potential expense of protracted litigation and the difficulties of sustaining the burden of persua-

sion and have decided to dispose of their differences in a rational and non-discriminatory manner.

I find that the settlement is a bona fide attempt by the parties to terminate the controversy and that it is not a device to obtain transportation at other than applicable rates and charges or otherwise circumvent the requirements of the Shipping Acts.

Accordingly, it is ordered that the settlement be approved. It is further ordered that within ten days after this order becomes final the parties furnish the Secretary with evidence that the settlement has been accomplished.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–6

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY

v.

NEW YORK SHIPPING ASSOCIATION, ET AL.

DOCKET NO. 84–8

PUERTO RICO MARITIME SHIPPING AUTHORITY AND PUERTO RICO MARINE MANAGEMENT, INC.

v.

NEW YORK SHIPPING ASSOCIATION, INC.

ORDER DISCONTINUING PROCEEDING

JUNE 5, 1985

On February 27, 1985, the Federal Maritime Commission (Commission or FMC) issued a Report and Adoption With Modifications of Initial Decision and an implementing Order (February Report and Order) in these proceedings. The Commission found that an assessment agreement (LM–86) used by the New York Shipping Association, Inc. (NYSA) and International Longshoremen's Association, AFL–CIO (ILA) to fund longshoremen's benefits was "unfair" and "unjustly discriminatory" under the Maritime Labor Agreements Act of 1980 (MLAA) (Pub. L. No. 96–325) and ordered the agreement modified to remove the unfairness and unjust discrimination. It also directed that assessment adjustments be made in favor of Puerto Rico Maritime Shipping Authority/Puerto Rico Marine Management, Inc. (PRMSA/PRMMI) to compensate PRMSA/PRMMI to the extent it was assessed under LM–86 rather than the modified assessment agreement the Commission prescribed.

On April 29, 1985, pursuant to the February Order, NYSA and ILA filed with the Commission a modified assessment agreement (April Assessment Agreement) and a statement of assessment adjustments (April Assessment Adjustments) to be granted PRMSA/PRMMI. NYSA and ILA also, as required in the February Report and Order, set forth the means of "phasing out" the "excepted" man-hour assessment treatment for trans-

shipped cargoes.[1] In addition, they sought an extension of time until July 1, 1985 for implementation of the April Assessment Agreement and for submission of applications to defer imposition of the man-hour/tonnage assessment on transshipped cargo beyond September 30, 1986. On April 29, 1985, Massachusetts Port Authority (Massport) sought an extension of the transition period for phasing out the "excepted" treatment for Boston transshipment cargoes from September 30, 1986 to September 30, 1987.

By order served May 13, 1985, the Commission extended until July 1, 1985 the time for filing requests for extensions of the "phasing out period" from any party and until July 31, 1985 the time for responses to such requests. By orders served May 13 and May 21, 1985, the Commission also extended until May 28, 1985 the time for replies to issues raised by the April Assessment Agreement, the petition for extension of the effective date of that Agreement to July 1, 1985, and the document entitled "PRMSA's Assessment Adjustment."

On May 22, 1985, NYSA/ILA submitted a new assessment agreement (May Assessment Agreement), made effective by its terms on July 1, 1985, which is appended to a "Settlement Agreement" joined in by all of the private parties engaged in the litigation in these proceedings.[2]

The Settlement Agreement is made "in consideration of the assessment adjustment to be provided to PRMSA and the mutual promises herein contained . . . ." It provides that "all assessment litigation before the FMC and the courts is hereby settled," and that "At such time as notice is received that the FMC deems the matters in issue in . . . [these proceedings] have been concluded by virtue of this Agreement," all court proceedings brought to challenge the Commission's actions herein will be terminated (Section 3(a)).[3]

In addition, the Settlement Agreement provides for an assessment adjustment credit in favor of PRMSA, pursuant to our February Report and Order, of $4,667,000 for the period February 27, 1984 through June 30, 1985 made available immediately upon execution of the Agreement (Section 1). The Settlement Agreement also provides for the adoption of the appended May Assessment Agreement, and guarantees the Puerto Rican trade

[1] Section 17 of the April Assessment Agreement provides for the deferral of the tonnage portion of the assessment on transshipped cargoes until September 30, 1986, one of the options permitted by the Commission. See February Report and Order, pages 88–89.

[2] The Settlement Agreement was signed by NYSA, ILA, PRMSA, PRMMI, The Port Authority of New York and New Jersey, the Maryland Port Administration (MPA), Massport, and Sea-Land Service, Inc. MPA, however, preserves its right to challenge before the Commission "any future competitive situation which results from this settlement agreement."

[3] The Settlement Agreement also states "The parties hereto waive and release any and all claims which they have asserted or may have asserted against each other or any other named party in connection with the aforementioned litigation relating to the assessment formula for the funding of the costs of longshore fringe benefits in the Port of New York and New Jersey." (Section 3(b)). * * * * "Each of the parties hereto agrees to take no action whatsoever to overturn or nullify this settlement and/or the annexed NYSA–ILA Assessment Agreement." (Section 5(c)).

of substantial preservation of the treatment accorded it therein during the 1983–1986 and 1986–1989 contract periods (Section 2).

Finally, the Settlement Agreement states that it "shall not be deemed an admission of liability by any party" nor "an expression of opinion by any party as to the correctness or legality of this agreement, of the annexed NYSA–ILA Assessment Agreement, of the NYSA–ILA Assessment Agreement No. LM–86 or the February 27, 1985 Report and Order of the Federal Maritime Commission in Docket Nos. 84–6 and 84–8." (Section 4).

The May Assessment Agreement, which revokes and replaces the April Assessment Agreement, provides for a tonnage assessment of $5.85 per assessment ton, and a man-hour assessment for "excepted" cargo of $5.50 per man-hour. Transshipped/relayed containers are assessed $25.00 for each loading or unloading from a vessel in the Port of New York/New Jersey. "House Containers" (*i.e.*, those not stuffed/stripped on the pier) are assessed a $65.00 rate, and empty containers a $40.00 rate. House Containers and Empty Containers in the Puerto Rican trade are assessed $15.00. "Pier containers" (*i.e.*, those stuffed/stripped on the piers), containers not consigned to the Port which are restowed on the same vessel, and house containers (including house containers in the Puerto Rican trade) which originate at or are destined to points in the continental United States (excluding Alaska) more than 260 highway miles from the center of the Port are not subject to a container unit assessment. The NYSA–ILA Contract Board is empowered to alter the assessment levels, to grant special assessment for specific cargoes, and to alleviate peculiar and isolated hardships for specific carriers, trades or commodities.

On May 23, 1985, PRMSA/PRMMI advised that in light of the May Assessment and Settlement Agreements, "no further comment from PRMSA and PRMMI is required in respect of these proceedings."

Because the May Assessment and Settlement Agreements supersede the April Assessment Agreement and Assessment Adjustments, we need not make detailed findings on whether or not the earlier documents complied with the February Report and Order in all respects. The Commission found LM–86 unlawful and ordered assessment adjustments made in favor of PRMSA/PRMMI. Such adjustments have been made "pursuant to the February 27, 1985 Report and Order of the Federal Maritime Commission," and PRMSA/PRMMI, NYSA, and ILA agree that the amount of assessment adjustments due PRMSA/PRMMI is $4,667,000. Assessment credits have already been extended in that amount against future assessments. Insofar as the future is concerned, the May Assessment Agreement, which replaces both LM–86 and the April Assessment Agreement, has been agreed to by all parties and fully resolves all outstanding differences as between them.

Prior to the MLAA, settlement agreements with respect to assessments for longshoremen's benefits required approval pursuant to section 15, Ship-

ping Act, 1916 (46 U.S.C. app. 814). *See e.g., New York Shipping Ass'n* v. *FMC*, 571 F.2d 1231, 1236–1237, 1239–1240 (D.C. Cir. 1978); *New York Shipping Ass'n* v. *FMC*, 628 F.2d 253, 255–257 (D.C. Cir. 1980). This is no longer the case. Under the MLAA, assessment agreements are not subject to an affirmative act of approval by the Commission, but become effective by operation of law and can only be challenged on private party complaint and not on the Commission's own motion. *See* S. Rep. No. 854, 96th Cong., 2nd Sess. 13–14 (1980); S. Rep. No. 3, 98th Cong., 1st Sess. 25 (1983); Shipping Act of 1984, section 5(d), 46 U.S.C. app. 1704(d).

The May Assessment Agreement is an assessment agreement within the meaning of the MLAA and will become effective by its terms by operation of law on July 1, 1985. Similarly, so much of the Settlement Agreement as provides for the continued differentiated assessment treatment for the Puerto Rican trade is an assessment agreement within the meaning of the MLAA, and became effective when filed with the Commission on May 22, 1983.[4]

THEREFORE, IT IS ORDERED, That all pending petitions, motions and requests with respect to the April 29th filings are dismissed as moot; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[4] Accordingly, the Commission need not and does not make any determination as to the merits of these Agreements.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–1
EXPORTRAN, INC.
v.
TEXAS GULF IBERIA NAVIGATION COMPANY, INCORPORATED

NOTICE

June 20, 1985

Notice is given that the time within which the Commission could determine to review the May 15, 1985, discontinuance of the complaint in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–1
EXPORTRAN, INC.

v.

TEXAS GULF IBERIA NAVIGATION COMPANY, INCORPORATED

COMPLAINANT'S MOTION TO WITHDRAW COMPLAINT GRANTED

Finalized June 20, 1985

On May 3, 1985, Exportran, Inc., the complainant in this proceeding, filed a Motion to Withdraw Complaint regarding this proceeding. The complaint seeks relief from Texas Gulf Iberia Navigation Co., Inc. ("TGIN") for violations of the Commission's General Order 4, and section 44 of the Shipping Act, 1916.

In support of its Motion the complainant states that:

> During the course of the proceeding, counsel and Exportran, through negotiations with the relevant parties, obtained the release of all goods and documents of title which had been withheld as the result of misrepresentations by TGIN which thereby moots the counts contained in Paragraph IV of the Complaint.

The complainant also states that an action including the same issues involved in this proceeding was recently concluded in the District Court for the District of Columbia, and that by final order entered on April 22, 1985, the judge awarded $31,885.00 to Exportran. Further, the complainant notes that TGIN has not been operational as a licensed freight forwarder since May 27, 1984, when its license was revoked for failure to maintain a bond.

It is clear from all of the above and the entire record that the issues raised in this proceeding are moot. Consequently, the complainant's Motion to Withdraw Complaint is hereby granted and the proceeding is discontinued.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1206
APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF PAGE & JONES, INC. AS AGENT FOR SONY MAGNETIC PRODUCTS, INC.
SPECIAL DOCKET NO. 1238
APPLICATION OF PACIFIC WESTBOUND CONFERENCE AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF TONE FORWARDING AS AGENT FOR MEARL CORPORATION

Application for permission in Special Docket No. 1206 to waive a portion of freight charges in the amount of $1,296.00 granted.

Application for permission in Special Docket No. 1238 to waive a portion of freight charges in the amount of $11,977.70 granted.

An application for waiver under section 18(b)(3) of the Shipping Act is appropriate where the application for waiver was filed within 180 days of the sailing date of the vessel even though the shipments were tendered to the carrier for inland movement more than 180 days prior to filing of application.

Claudia E. Stone for Sea-Land Service, Inc.

REPORT AND ORDER PARTIALLY ADOPTING INITIAL DECISIONS

June 26, 1985

By the Commission: (James J. Carey, *Vice Chairman;* Thomas F. Moakley, Edward J. Philbin and Robert Setrakian, *Commissioners*).

On January 18, 1985, Administrative Law Judge Seymour Glanzer (Presiding Officer) issued an Initial Decision (I.D.) in Special Docket No. 1206 denying Sea-Land Servicer, Inc.'s (Sea-Land) application submitted pursuant to section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. §817) to waive collection of certain freight charges on the ground that the 180-day limitation contained in section 18(b)(3) precluded the Commission from granting the relief requested.[1] Similarly, on February 13, 1985, the Presiding Officer issued an I.D. in Special Docket No. 1238 denying another Sea-Land application on the same ground. The proceedings are before the Commission upon Exceptions to the I.D.'s filed by Sea-Land.

BACKGROUND

A. Special Docket No. 1206

[1] In all material respects, section 8(e) of the Shipping Act of 1984 (46 U.S.C. app. §1707(e)) is the same as section 18(b)(3) of the 1916 Act.

On October 21, 1983, Sea-Land officials instructed Sea-Land's tariff publication office to file a reduced rate on magnetic tape, applicable to all Continental ports, of $130 per 2240 pounds, subject to a 40,320 pound minimum per container. Rule 3 of the applicable tariff (Sea-Land Tariff No. 417, FMC No. 280) provides that: "The rate or charges to be assessed are those in effect the day origin carrier receives the cargo." (1st Revised Page 14).

On January 13, 1984 Sea-Land received a shipment of magnetic tape from Sony Magnetic Products, Inc. at Dothan, Alabama for transportation via Jacksonville, Florida to Le Havre, France. A second shipment of magnetic tape was received by Sea-Land on February 13, 1984. From Dothan each shipment was carried to Jacksonville by motor carrier where it was placed aboard the Sea-Land vessel LEADER. The first shipment moved on voyage 71E which sailed for Rotterdam on January 15, 1984. The second was moved on voyage 72E which sailed on February 14, 1984. Through an error the $130 rate was not published in the applicable section of the tariff at the time the shipments were tendered to the motor carrier. As a result, the then applicable rate for magnetic tapes of $166 per 2240 pounds (subject to a 40,320 pound minimum per container) was assessed on the shipments.

On July 12, 1984, Sea-Land filed a special docket application on behalf of Sony Magnetic Products, Inc. to waive collection of a total of $1296 due on the two shipments. The Presiding Officer concluded that the second shipment met all the requirements of section 18(b)(3) of the 1916 Act, and granted permission to waive $648. However, the application as to the first shipment was denied by the Presiding Officer on the ground that the 180-day limitation in section 18(b)(3) precluded the Commission from authorizing a tariff notice making the reduced rate effective from January 13, 1984, a date more than 180 days prior to the filing of the application.[2]

B. Special Docket No. 1238

Upon the request of Sea-Land, a member of the Pacific Westbound Conference (PWC), PWC agreed to establish a Special Rate applicable to "paints and pigments" of $160 per ton of 1,000 kilos (subject to a minimum of 18.5 kilotons per 40-foot container or 17.5 kilotons per 35-foot container) covering intermodal transportation from East Coast ports through West Coast ports to the Far East. (PWC Westbound Intermodal Tariff No. PWC–708–A, FMC–20). Rule 3 of the tariff provides that: "For cargo received by the carrier at CY, CFS, the applicable rates and charges are those in effect on the date of such receipt." (13th Revised Page 34).

[2] Section 18(b)(3) provides, in relevant part: "* * * That application for refund or waiver must be filed with the Commission within one hundred and eighty days from the date of shipment.

On March 9, 1984 a shipment of paints and pigments shipped by Mearl Corporation was received by Sea-Land at its container yard at Elizabeth, New Jersey. From Elizabeth it was carried overland to Seattle where it was loaded on board the Sea-Land vessel PATROIT on March 23, 1984 for transportation to Kowloon, Hong Kong. Due to an error, the Special Rate omitted "pigments" at the time the shipment was tendered to Sea-Land at Elizabeth. On September 18, 1985 Sea-Land filed a special docket application on behalf of Tone Forwarding as agent for Mearl Corporation to waive collection of $11,977.70 due on the shipment described above. The Presiding Officer denied the application as untimely filed for the same reasons stated above in connection with Special Docket No. 1206.

DISCUSSION

Section 18(b)(3) requires that applications for refund or waiver of otherwise applicable freight charges "must be filed with the Commission within one hundred and eighty days from the date of shipment." The "date of shipment" is defined in Rule 92 of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)(3)) as "the date of sailing of the vessel from the port at which the cargo was loaded." In both Special Docket Nos. 1206 and 1238 the application was filed within 180 days *of the date the vessel sailed.* Thus, Sea-Land argues that it has complied with statue of limitation requirement of section 18(b)(3) as interpreted in Commission Rule 92.

The Presiding Officer acknowledges that the applications were filed within 180 days of the sailing date of the vessel. Nonetheless, he believes that relief is barred. He reasons in each instance that because the date of the carrier's receipt of the cargo is, by its own tariff, the date on which the rate for the assessment of charges became fixed, the Commission would have to authorize a tariff notice making the reduced rate effective from the date the cargo was received which is more than 180 days prior to the filing of the application. The Presiding Officer reads the Commission's decision in Special Docket No. 1102, *Application of United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association and Sea-land Service, Inc. for the Benefit of United Brands for Chiquita International Trading Co.*, 26 F.M.C. 605 (1984) as precluding such an authorization.[3]

The facts of Special Docket No. 1102 were as follows. Sea-Land sought permission to refund $6,181.50 in freight charges on 38 shipments of pineapples. The shipments departed Elizabeth, New Jersey on April 9, April 30, May 7, and May 14, 1983, for Haina, Dominican Republic. Only five of the 38 shipments, those departing on May 14, 1983, occurred within 180 days of the filing of the application for refund. The Commission

[3] But *see Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Caterpillar Overseas,* Special Docket No. 1229 (F.M.C., administratively final November 5, 1984) where, in a similar situation, the Administrative Law Judge authorized a notice making the reduced rate effective more than 180 days before the filing of the application.

refused to allow the "intended rate" to "relate back" beyond the 180 days prior to the filing of the application to a date when the rate "should have been filed." In reaching this conclusion, the Commission observed the "180 days is a precise term that is not amenable to a variety of interpretations." 27 F.M.C. at 136. It noted, however, that "while the Commission in other cases had calculated the 180 days liberally in order to grant relief to shippers, *e.g., Sea-Land Service, Inc. for the Benefit of G.F. Tujague, Inc.*, _____ F.M.C. _____, 22 S.R.R. 619 (1984), there is no dispute or uncertainty over that calculation here." 27 F.M.C. at 136.

In Special Docket No. 1102, the Commission counted the 180 days from the date the vessel sailed as required by Rule 92 of the Commission's Rules of Practice and Procedure. The application was denied as the shipments moving on voyages which sailed *more than* 180 days prior to the filing of the application. The shipments here moved on voyages which sailed *within* the 180 day period. Thus, there is a critical factual distinction between the subject applications and those at issue in Special Docket No. 1102. No party in Special Docket No. 1102 contended that the 180 days ran from the date the cargo was received for carriage by the carrier and the Commission did not address the issue. Accordingly, Special Docket No. 1102 is inapposite.

We conclude that nothing prevents the Commission from authorizing a reduced rate to be effective more than 180 days before the application was filed provided the application was filed within 180 days of the sailing date. Because the Presiding Officer found that the applications met all other conditions as set out in section 18(3), the Commission will approve the applications.

THEREFORE, IT IS ORDERED, That the Exceptions of Sea-Land Service, Inc. are granted; and

IT IS FURTHER ORDERED, That, except to the extent noted above, the Initial Decisions served in these proceedings are adopted by the Commission; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. shall waive collection of ocean freight charges, in the amount of $648.00 due it from Sony Magnetic Products, Inc. in connection with a shipment of Magnetic tape it transported from Dothan, Alabama, via Jacksonville, Florida, to LeHavre, France on January 16, 1984; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. shall waive collection of ocean freight charges, in the amount of $11,977.70 due it from Tone Forwarding as agent for Mearl Corporation in connection with a shipment of pigments it transported from Elizabeth, New Jersey via Seattle, Washington to Kowloon, Hong Kong on March 23, 1984; and

IT IS FURTHER ORDERED, That in connection with Special Docket No. 1206, Sea-Land Service, Inc. shall publish the following notice within

thirty (30) days from the service of this Report and Order and an appropriate place in its tariff:

> Notice is hereby given as required by the decision in Special Docket No. 1206, that effective January 13, 1984, and continuing through April 30, 1984, inclusive, the rate on "Magnetic Tape" is $130.00 per 2240 lbs. minimum 40,320 lbs. per container. This notice is effective for purposes of refund or waiver of freight charges on any shipment of the goods described which may have been shipped during the specified time; and

IT IS FURTHER ORDERED, That in connection with Special Docket No. 1238, Sea-Land Service, Inc. shall publish the following notice within thirty (30) days from the service of this Report and Order in an appropriate place in its tariff:

> Notice is hereby given as required by the decision in Special Docket No. 1238, that effective March 9, 1984 and continuing through April 25, 1984 inclusive, the rate on "Pigments" is $160 per ton of 1000 kilos, minimum 18.5 Kilotons per 40 foot container of 17.5 kilotons per 35 foot container. This notice is effective for purposes of refund or waiver of freight charges on any shipment of the goods described which may have been shipped during the specified time; and

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. shall furnish the Secretary with evidence of each waiver along with copies of the above-described tariff notices within five days of the date charges are waived; and

IT IS FURTHER ORDERED, That these proceedings are discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1206

APPLICATION OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF PAGE & JONES, INC. AS AGENT FOR SONY MAGNETIC PRODUCTS, INC.

Application to waive collection of portions of freight charges granted for one shipment, denied for another.

Frank A. Fleischer for applicant, Sea-Land Service, Inc.

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

Partially Adopted June 26, 1985

By application filed July 12, 1984, as supplemented, Sea-Land Service, Inc., seeks permission to waive collection of ocean freight charges in the respective amounts of $648.00, each, due it from Sony Magnetic Products, the shipper, in connection with two intermodal shipments of Magnetic Tape from Dothan, Alabama, via Jacksonville, Florida, to LeHavre, France.[2]

The shipments, weighing 38,883 pounds and 31,447 pounds, respectively, were loaded into containers by the shipper and were received by Sea-Land at Dothan on January 13, 1984, and February 13, 1984, respectively. From Dothan each shipment was taken to Jacksonville, by motor carrier, and loaded aboard the *Leader*, which sailed for Rotterdam on January 16, 1984 (V. 71E) and February 14, 1984 (V. 72E).

Sea-Land publishes an intermodal tariff from inland United States points via South Atlantic ports to points in Continental Europe and the United Kingdom. Until February 1, 1984, Intermodal Freight Tariff No. 417,[3] was in effect. On February 1, 1984, Tariff No. 417 was canceled and was replaced by Intermodal Freight Tariff No. 456.[4] As pertinent, Tariff No. 417 subdivided the destination ports by section. Section 2 of the tariff included ports located in Germany, The Netherlands and Belgium, while Section 3 included ports in France.[5] There was a rate for Magnetic Tape from Dothan to named ports in Section 2[6] and a rate to LeHavre

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

[2] In Europe, the shipments were transferred, at Rotterdam, The Netherlands, from the Sea-Land *Leader* (Voyages 71E and 72E) to the *Panarea* (Voyages 166S and 173S), which carried them to LeHavre.

[3] ICC SEAU 417, F.M.C. No. 280.

[4] ICC SEAU 456, F.M.C. No. 313.

[5] Tariff No. 417, 6th rev. p. 11, effective October 14, 1983.

[6] Id., p. 23–C.

in Section 3.[7] Rule No. 3 of Tariff No. 417, the so-called effective date of the rate rule, provided that, "The rate or charges to be assessed are those in effect the day origin carrier receives the cargo."[8]

On October 21, 1983, the responsible Sea-Land officials instructed Sea-Land's Tariff Publication office to file a reduced rate, applicable to all Continental ports, of $130 per 2,240 pounds (W), minimum 40,320 pounds per container.[9] Due to inadvertent clerical error, the reduced rate was published in Section 2 only.[10] The failure to publish in Section 3 left the rate to LeHavre at $166 (W), minimum 40,320 pounds per container.[11] The Magnetic Tape rates in effect when Tariff No. 417 was canceled were carried forward to Tariff No. 456. Thus, effective February 1, 1984, the rate to LeHavre remained at $166.[12]

The error was not discovered until both shipments had taken place. When it was discovered, it was corrected by publication of the $130 rate in Tariff No. 456.[13]

The invoices sent to the shipper were based on the applicable rate of $166. Intermodal freight charges at that rate amounted to $2,988.00 for each shipment.[14] Had the $130 rate been in effect, the charges would have been $2,340.00, each. The shipper (forwarder) paid the lesser amount for both shipments.[15]

The application states that Sea-Land will make any adjustment in freight forwarder compensation required and that approval of the application will have no effect on the intermodal division of revenue. Sea-Land states that there were no other shipments of the same or similar commodity during the relevant time period.

DISCUSSION

The first of the two shipments—the one which was received at Dothan on January 13, 1984, and sailed from Jacksonville on January 16, 1984—does not meet all the standards for approval under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3)[16] and the Commission rules implementing that statute, 46 CFR 502.92(a). The second shipment—the one which was received on February 13, 1984, and sailed the following day—does meet the criteria for approval.

[7] Id., p. 25–A–1.

[8] Id., 1st rev. p. 14.

[9] The $130 rate was scheduled to go into effect thirty days after a preliminary reduced rate of $114.70 was made effective.

[10] Tariff No. 417, 14th rev. p. 23–C.

[11] Thirteenth rev. R. 25–A–1.

[12] Tariff No. 456, 1st rev. p. 54. In Tariff No. 456, the rates to French ports appear in Section 2.

[13] Id. 2nd rev. p. 54, effective March 1, 1984.

[14] Other charges are not in issue.

[15] During negotiations in October, 1983, Sea-Land had agreed to the lower rate.

[16] In all material respects relevant to this application, section 8(e) of the Shipping Act, 1984, 46 U.S.C. app. 1707(e), is the same as section 18(b)(3) of the 1916 Act. Thus, the conclusion, which follows, would be the same under either Act.

The criteria are set forth in the four provisos of section 18(b)(3). Under the first proviso, it must appear that there was a qualifying error in failing to file a tariff provision and that the refund or waiver will not result in discrimination among shippers;[17] under the second proviso, it must be shown that the carrier filed a new tariff, setting forth the rate on which the waiver or refund is based, prior to filing the application; under the third proviso, the carrier must agree that if the application is granted, it will publish an appropriate tariff notice or take other steps, as required, which give notice of the rate on which the refund or waiver is based and that it will make additional refunds or waivers as prescribed; and under the fourth proviso, the application for refund or waiver must be filed within 180 days from the date of shipment.

Clearly, the second shipment meets all of the requirements of the four provisos: the failure to file the reduced rate in Section 3 of Tariff No. 417 was due to inadvertent error on the part of Sea-Land and, because there were no other shipments of the same or similar commodity during the relevant time period, approval of the application is not likely to result in discrimination among shippers,[18] and, in any event, the order, which follows, protects against discrimination; a corrective tariff setting forth the rate on which the waiver is based was timely filed before the application; under the regulation, 46 CFR 502.92(a), by filing the application, Sea-Land has agreed to take those steps which the Commission may require as a condition for granting relief; and the application was filed within 180 days of the date of shipment (sailing date).

The circumstances of the first shipment are more complex. At first glance it might appear that the requirements of the four provisos have been met, but on close analysis and with due deference to the Commission's decision in Special Docket No. 1102, *Application of United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association and Sea-Land Service, Inc. for the Benefit of United Brands for Chiquita International Trading Co.*, Order Denying Petition for Reconsideration, 22 SRR 1266 (1984), it becomes manifest that the standards for approval have not been fulfilled. The rationale follows.

It is evident that the application was filed on the 178th day after the date the *Leader* sailed from Jacksonville. It is also clear that the application was filed on the 181st day after the shipment was received at Dothan—the date of receipt being the date on which the rate for the assessment of charges became fixed pursuant to Rule 3 of Tariff No. 417. What all this means is that in order to grant relief, the Commission must not only authorize Sea-Land to publish a tariff notice making the $130 rate effective as of January 16, 1984, it must authorize a notice making the

[17] Under section 8(e) of the Shipping Act, 1984, it must also appear that the refund or waiver does not result in discrimination among ports or carriers.

[18] There is no indication that there could be any discrimination among carriers or ports.

rate effective as of January 13, 1984. The latter authorization is proscribed by the teaching of Special Docket No. 1102, *supra.*

In construing the 180 day jurisdictional requirement of section 18(b)(3), the Commission held that " 'the rate upon which such refund or waiver would be based'—180 days is a precise term that is not amenable to a variety of interpretations." Special Docket No. 1102, 22 SRR at 1267. Simply put, the Commission enunciated the principal that the 180 day deadline may not be extended, there being no support for any construction of the fourth proviso which would allow for a result, in any case, which evades or ignores the 180 days requirement. Id. In order for permission to be given for Sea-Land to waive collection of monies due for the shipment, it would be essential for the required tariff notice to be backdated 181 days to include the period beginning January 13, 1984, because of Rule 3. The precedent established by Special Docket No. 1102 cannot be disregarded. The precise problem presented here was addressed in the Appendix to Special Docket No. 1186, *Application of Pacific Westbound Conference and Mitsui O.S.K. Lines, Ltd. for the Benefit of Mitsubishi International Corp.*, 22 SRR 1290, 1297 (I.D. 1984), administratively final, December 7, 1984, and it was expressly indicated that relief could not be granted pursuant to the standard established by Special Docket No. 1102.[19]

CONCLUSION AND ORDER

The application for permission to waive collection of portions of freight charges is denied as to the shipment of Magnetic Tape which was received at Dothan, Alabama, on January 13, 1984, and is granted as to the shipment of Magnetic Tape which was received there on February 13, 1984. It is ordered:

1. Sea-Land Service, Inc., shall waive collection of ocean freight charges, in the amount of $648.00 due it from Sony Magnetic Products, Inc., in connection with a shipment of Magnetic Tape it transported from Dothan, Alabama, via Jacksonville, Florida, to LeHavre, France, on February 14, 1984.

2. Sea-Land Service, Inc. shall publish the following notice at page 54 of Sea-Land Service, Inc. Intermodal Freight Tariff No. 456, ICC SEAU 456 F.M.C. No. 313:

> Notice is hereby given as required by the decision in Special Docket No. 1206, that effective January 14, 1984, and continuing through April 30, 1984, inclusive, for purposes of refund or waiver: The rate shown at page 23–C of the tariff known as Sea-Land Service Inc. Intermodal Freight Tariff No. 417, ICC SEAU

[19] Cf. Special Docket No. 1195, *Application of Sea-Land Service, Inc. for the Benefit of Hansa-Pacific, Inc. and Whitworth Holdings Limited,* I.D. served January 7, 1985, p. 4, n. 8, holding that, where the effective date of the rate rule provided that the rate to be charged is the rate in effect on the date received *or the date in effect when the ship sails, whatever is lower,* the problem encountered here is not presented.

417 F.M.C. No. 280, for ITEM NO. 891.2050 MBF, Magnetic Tape, From Dothan, AL, Minimum 40,320 lbs. per container, to European Ports in Section 2 is $130.00 W. Such rate is subject to all other applicable rules, regulations, terms and conditions of the said rate and said tariff.

3. Sea-Land Service, Inc. shall take such measures as are necessary to collect the balance of freight charges due in connection with the shipment received at Dothan, Alabama, on January 13, 1984.

4. Sea-Land Service, Inc., shall determine whether an adjustment in brokerage or compensation due brokers or freight forwarders is required in the light of this decision and shall take such measures as are necessary to effectuate such adjustment.

5. The waiver and other provisions of this order shall be effectuated within thirty days of service of notice by the Commission authorizing the same and Sea-Land Service, Inc., shall within five days thereafter (a) notify the Commission of the date and manner of effectuation of the waiver and (b) file with the Commission affidavits of compliance with paragraphs 1, 2, 3, 4, and 5(a) of this order.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1238

APPLICATION OF PACIFIC WESTBOUND CONFERENCE AND SEA-LAND SERVICE, INC. FOR THE BENEFIT OF TONE FORWARDING AS AGENT FOR THE MEARL CORPORATION

Application to waive collection of portions of freight charges denied.

Theresa M. Nardi for applicant, Sea-Land Service, Inc.

Patricia Petzar for applicant, Pacific Westbound Conference.

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

Partially Adopted June 26, 1985

By application filed September 18, 1984, Sea-Land Service, Inc., seeks permission to waive collection of $11,977.70 of freight charges due it from Tone Forwarding as Agent for the Mearl Corporation, the shipper, in connection with an intermodal shipment of paints and pigments received by Sea-Land at its Elizabeth, New Jersey container yard (CY) on March 9, 1984, and carried overland to Seattle, Washington, where it was loaded aboard the Sea-Land *Patriot* which sailed from Seattle for Kowloon, Hong Kong, on March 23, 1984. Pacific Westbound Conference (PWC) joins in the application.

The cargo, consisting of paint, weighing 6,688 pound and measuring 215 cubic feet, and pigment, weighing 36,107 pounds and measuring 1819 cubic feet, was carried in a single 40′ container from origin to destination.

Sea-Land is a member of PWC and, as pertinent, participates in that Conference's tariff, PWC Westbound Intermodal Tariff No. PWC–708–A, FMC–20 (Tariff).

At Sea-Land's request, on February 15, 1984, PWC agreed to establish a Special Rate of $160.00 per ton of 1,000 kilos (W), minimum 18.5 kilotons per 40′ container or minimum 17.5 kilotons per 35′ container for both paints and pigments destined for Hong Kong. However, due to inadvertent clerical error, the Special Rate was published only for paints.[2] As a result, the applicable rate for pigments was $280.00 per cubic meter[3] plus a container handling charge of $5.00 W for paints and $5.00 M

[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] Tariff, 16th rev. p. 539, Item No. 474 0000 60, effective February 22, 1984.

[3] Id., 14th rev. p. 534, Item No. 472 0000 05. The pigment portion was erroneously rated at $210.00, but the concomitant billing error does not affect any calculations made in the disposition of this application.

for pigments.[4] At the applicable rates, the charges for the shipment amounted to $15,180.68.[5] Had the error not occurred, the charges would have amounted to $3,202.98.[6] The shipper paid $2,970.00. This means that the shipper still owes $232.98 for the shipment even at the lower rate, after allowance is made for the $11,977.70 to be waived.[7]

A corrected tariff reflecting PWC's February 15, 1984 determination was filed, effective April 25, 1984.[8]

The application states that there were no other shipments of the same or similar commodity during the relevant time period and that any necessary freight forwarder compensation adjustment will be made, upon approval.

DISCUSSION

The shipment does not meet all the standards for approval under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. 817(b)(3)[9] and the Commission rules implementing that statute, 46 CFR 502,92(a). The problem with this application is the same as the one encountered in Special Docket No. 1206, *Application of Sea-Land Service, Inc. for the Benefit of Page & Jones as Agent for Sony Magnetic Products, Inc.*, I.D. served January 18, 1985, and is governed by the same rationale.

The criteria are set forth in the four provisos of section 18(b)(3). Under the first proviso, it must appear that there was a qualifying error in failing to file a tariff provision and that the refund or waiver will not result in discrimination among shippers;[10] under the second proviso, it must be shown that the carrier filed a new tariff, setting forth the rate on which the waiver or refund is based, prior to filing the application; under the third proviso, the carrier must agree that if the application is granted, it will publish an appropriate tariff notice or take other steps, as required, which give notice of the rate on which the refund or waiver is based and that it will make additional refunds or waivers as prescribed; and under the fourth proviso, the application for refund or waiver must be filed within 180 days from the date of shipment.

The shipment seems to meet all of the requirements of the four provisos: the failure to file the special rate for Item No. 472 0000 05 was due to inadvertent error on the part of PWC and, because there were no other shipments of the same or similar commodity during the relevant time period,

[4] Id., p. 163, Rule No. 25.

[5] The breakdown is: Paints—$485.44; Pigments—$14,422.52; Container Charges—$272.72.

[6] The breakdown is: Paints—$485.44; Pigments—$2,620.48; Container Charges—$97.06 (based on a rate of $5.00 W for both paints and pigments). Under the tariff's mixing rule, ocean freight charges may be assessed proportionally on actual weight, 2nd rev. p. 172, Rule 35.

[7] The breakdown is: Ocean Freight—$11,802.04; Container Charge $175.66.

[8] Tariff, 15th rev. p. 534, Item No. 472 0000 25.

[9] In all material respects relevant to this application, section 8(e) of the Shipping Act, 1984, 46 U.S.C. App. 1707(e), is the same as section 18(b)(3) of the 1916 Act. Thus, the conclusion, which follows, would be the same under either Act.

[10] Under section 8(e) of the Shipping Act, 1984, it must also appear that the refund or waiver does not result in discrimination among ports or carriers.

approval of the application is not likely to result in discrimination among shippers,[11] and, in any event, were an order granting the application to issue, it would protect against discrimination among shippers; a corrective tariff setting forth the rate on which the waiver is based was timely filed before the application; under the regulation, 46 CFR 502.92(a), by filing the application, Sea-Land has agreed to take those steps which the Commission may require as a condition for granting relief; and the application was filed within 180 days of the date of shipment (sailing date).

Thus, it might appear that the requirements of the four provisos have been met. But on close analysis and with due deference to the Commission's decision in Special Docket No. 1102, *Application of United States Atlantic & Gulf-Jamaica and Hispaniola Steamship Freight Association and Sea-Land Service, Inc. for the Benefit of United Brands for Chiquita International Trading Co.*, it becomes manifest that the standards for approval have not been fulfilled. The rationale follows.

It is evident that the application was filed on the 179th day after the date the *Patriot* sailed from Seattle. It is also clear that the application was filed on the 193rd day after the shipment was received at Elizabeth—the date of receipt being the date on which the rate for the assessment of charges became fixed pursuant to Rule 3 of the Tariff.[12] What all this means is that in order to grant relief, the Commission must not only authorize PWC to publish a tariff notice making the pigment rate effective as of March 23, 1984, it must authorize a notice making the rate effective as of March 9, 1984. The latter authorization is proscribed by the teaching of Special Docket No. 1102, *supra*.

In construing the 180 day jurisdictional requirement of section 18(b)(3), the Commission held that "'the rate upon which such refund or waiver would be based'—180 days is a precise term that is not amenable to a variety of interpretations." Special Docket No. 1102, 22 SRR at 1267. Simply put, the Commission enunciated the principal that the 180 day deadline may not be extended, there being no support for any construction of the fourth proviso which would allow for a result, in any case, which evades or ignores the 180 days requirement. Id. In order for permission to be given for Sea-Land to waive collection of monies due for the shipment, it would be essential for the required tariff notice to be backdated 193 days to include the period beginning March 9, 1984, because of Rule 3. The precedent established by Special Docket No. 1102 cannot be disregarded. The precise problem presented here was addressed in the Appendix to Special Docket No. 1186, *Application of Pacific Westbound Conference and Mitsui O.S.K. Lines, Ltd. for the Benefit of Mitsubishi International Corp.*, 22 SRR 1290, 1297 (I.D. 1984), administratively final, December

[11] There is no indication that there could be any discrimination among carriers or ports.

[12] As pertinent, Rule No. 3 of the Tariff, the effective date of the rate rule, provides that, "For cargo received by the carrier at CY, CFS, the applicable rates and charges are those in effect on the *date of such receipt*." Tariff, 13th rev. p. 34.

7, 1984, and it was expressly indicated that relief could not be granted pursuant to the standard established by Special Docket No. 1102.

CONCLUSION AND ORDER

The application for permission to waive collection of portions of freight charges is denied. It is ordered:

1. Sea-Land Service, Inc., shall take such measures as are necessary to collect the balance of freight charges due in connection with the shipment of paints and pigments it carried from Elizabeth, New Jersey, via Seattle, Washington, to Kowloon, Hong Kong.

2. Sea-Land Service, Inc., shall determine whether an adjustment in brokerage or compensation due brokers or freight forwarders is required in the light of this decision and shall take such measures as are necessary to effectuate such adjustment.

3. This order shall be effectuated within thirty days of service of notice by the Commission authorizing the same and Sea-Land Service, Inc., shall within five days thereafter (a) notify the Commission of the date and manner of effectuation and (b) file with the Commission an affidavit of compliance with paragraphs 1, 2 and 3(a) of this order.

(S) SEYMOUR GLANZER
Administrative Law Judge

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