DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1987

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FEDERAL MARITIME COMMISSION

DOCKET NO. 84–7

TARIFF COMPLIANCE INTERNATIONAL (ACTING ON BEHALF OF A&A INTERNATIONAL, A DIVISION OF TANDY CORPORATION)

v.

KAWASAKI KISEN KAISHA, LTD. STEAMSHIP COMPANY

NOTICE

July 24, 1985

Notice is given that no appeal has been taken to the June 17, 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. 84-7

TARIFF COMPLIANCE INTERNATIONAL (ACTING ON BEHALF OF A&A INTERNATIONAL, A DIVISION OF TANDY CORPORATION)

v.

KAWASAKI KISEN KAISHA, LTD. STEAMSHIP COMPANY

SETTLEMENT APPROVED; COMPLAINT DISMISSED

Finalized July 24, 1985

PRELIMINARY FACTS

On February 16, 1984, Tariff Compliance International (acting on behalf of A&A International, a Division of Tandy Corporation) (TCI), filed a complaint against Kawasaki Kisen Kaisha, Ltd. (K-Line) alleging that K-Line subjected TCI to rates and charges greater than those specified in K-Lines' applicable tariff.[1] In its complaint TCI alleged that in addition to the violation of section 18(b)(3), Shipping Act, 1916, K-Line was also in violation of section 14, Fourth (c), since it subjected TCI to unjust and discriminatory treatment in the adjustment and settlement of claims. TCI sought reparations of $87,096.50 for the alleged overcharges.[2] TCI also made claim for interest and attorneys fees pursuant to 46 CFR 502.250 (1984), and section 11(g) of the Shipping Act, 1984. (46 U.S.C. app. § 1710(g).)

The overcharge claims involved are derived from 39 shipments (bills of lading), and involve 85 separate claims since more than one claim arises from one shipment or bill of lading. The commodities involved, as described by TCI, are:

1. Keyboards
2. Printing Mechanism Parts/Accessories
3. Joystick Control Assemblies
4. Programmable Calculators
5. Thermal Paper
6. Hand Held Electronic Games/Parts
7. Disk Drives

[1] Transpacific Freight Conference of Japan/Korea Tariff No. 36-FMC-7, and Agreement No. 10107, Tariff No. 2—FMC 3.

[2] The total amount claimed per arithmetical calculation of the specific claims in this docket were miscalculated in "Appendix A" of the complaint as $73,836.27.

8. Speaker Parts
9. Audio Cassette Tape Cases
10. Printing Mechanisms
11. Copy Machine Parts
12. Electric Telephone Directories
13. Public Address Systems (Megaphones)
14. Audio Goods
15. Container Maximum Rates

An Initial Decision (July 25, 1984) was originally issued denying TCI's claims because the complainant had failed to prove what was actually shipped and that there was not sufficient information upon which to establish the validity of the claim. The decision was reached without a hearing on the basis of the complaint and the parties' written submissions under the Commission's Shortened Procedure (46 CFR §502.187).[3] Upon consideration of Exceptions, Replies to the Exceptions, and the record, the Commission remanded the proceeding (Order of Remand, November 28, 1984), finding that the Shortened Procedure was inappropriate under the circumstances, and directing that an oral, evidentiary hearing be held, "on the issues identified in the Joint Prehearing Statement filed on May 21, 1984." In the Prehearing Statement the parties narrowed their dispute noting that as to some commodities the only issue was whether TCI had met its burden of proving that the commodities had actually been shipped, and as to the remaining commodities there was the additional issue of tariff interpretation and application. In the Prehearing Statement the parties also agreed that all allegations were in dispute regarding any violation of section 14, Fourth, of the Shipping Act, 1916, by K-Line by virtue of its requirements in the adjustment and settlement of freight claims.

The oral evidentiary hearing directed by the Commission was held on February 26 and 27, 1985. Numerous exhibits were presented, including demonstrations of the various products involved. Each side presented expert witnesses. The record was then closed and a briefing schedule was established. It was postponed so that settlement discussion could take place with the result that the parties have reached a basis of settlement for which they now seek approval.

Settlement Proposal

The parties have agreed to settle this controversy as follows, in pertinent part:

1. K-Line will pay TCI $65,000.00.

[3] The first Administrative Law Judge initially rejected the use of the Shortened Procedure, but later consented to its use.

2. TCI will withdraw its complaint and will not pursue any of the claims made before the Commission or in any other forum.
3. Neither party (including successors and assignees) will initiate any new claim relating to the shipments involved here, except to enforce the provisions of the settlement.
4. The settlement does not constitute an admission of liability or wrongdoing.

In requesting approval for the settlement agreement the parties emphasize that it is a bona fide commercial resolution of a genuine controversy.

Law and Conclusions

It is well established that settlements of administrative proceedings are favored by the Congress, the Courts and the administrative agencies themselves. Section 5(b)(1) of the Administrative Procedure Act, 5 U.S.C. 554(c)(1), provides:

> The agency shall give all interested parties opportunity for—
>
> (1) The submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceedings, and the public interest permit.

In *Pennsylvania Gas Water Co.* v. *Federal Power Commission,* 463 F.2d 1242, 1247 (D.C. Cir. 1972), the Court, noting its legislative history,[4] referred to the above provision "as being of the 'greatest importance' to the functioning of the administrative process" and stated:

> The whole purpose of the informal settlement provision is to eliminate the need for often costly and lengthy formal hearings in those cases where the parties are able to reach a result of their own which the appropriate agency finds compatible with the public interest.

[4] Senate Judiciary Comm., Administrative Procedure Act—Legislative History, S. Doc. No. 248, 79th Cong., 2d Sess. 203 (1945). In considering the settlement provision in S. 7, 79th Cong., 1st. Sess. (1945), which ultimately became Section 554(c) of the Administrative Procedure Act (see note 5, *supra*), the Senate Judiciary Committee stated:

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

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

Finally, the Commission has by rule encouraged settlements[5] and has often favorably looked upon them as a matter of policy.[6]

Over and above the legal justification for settlement, the record in this case demonstrates the desirability of a mutual, joint agreement in settlement of the issues. The record discloses there are numerous claims involved in this proceeding covering numerous commodities, tariff revisions and legal issues. There are questions as to whether or not certain commodities were shipped and whether or not the correct tariff rate was used regarding the shipments. The commodities themselves are, for the most part, computer and/or computer-type items which require technical expertise to even arrive at a proper description. Evidence of the difficulty encountered includes the voluminous documentary evidence which was presented. The complaint alone was accompanied by almost 500 pages of appendices, including catalogues, packing lists, bills of lading, invoices, tariff pages and other documents. In addition, some of the items themselves were brought into the courtroom. Despite all of the above the two experts could not agree as to what the items were, much less which tariff should apply.

In short, it is clear that if this case were to proceed to its conclusion it would involve a considerable amount of time and money. It would require briefs, another Initial Decision, Commission review of that decision, and possibly an appeal. Given the complexity of the tariff issues involved and the importance of the section 14, Fourth issue there is a strong likelihood of more prolonged litigation should this settlement agreement be rejected. For this reason we agree with the parties when they state that they believe the settlement to be "a rational, valid and fair resolution of the dispute . . . obviating the need for further extensive and expensive litigation of genuine disputes of fact and law."[7] In so stating we wish to clarify our conclusion insofar as it relates to the section 14, Fourth issue. Basically, the issue arises as a result of Rule 19 of the Trans-Pacific Freight Conference of Japan/Korea, which requires that before claims such as those involved here can be honored the claimant must supply commercial invoices, customs entry permits, import declarations, and other documents to the carrier. The complainant here argues that the rule is being applied by the Conference in a discriminatory fashion, and that in

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[5] Rule 91 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91, provides in pertinent part: "Where time, the nature of the proceeding, and the public interest permit, all interested parties shall have the opportunity for the submission and consideration of facts, argument, offers of settlement, or proposal of adjustment. . . .

[6] In furtherance of this policy, the Commission has authorized settlements of administrative proceedings on the basis of a compromised reparation payment absent admissions of findings of violation of the Shipping Act. *Foss Alaska Line Inc. Proposed General Rate Increase Between Seattle, Washington and Points in Western Alaska*, Docket No. 79–54 (1979); *Com-Co Paper Stock Corporation* v. *Pacific Coast-Australasian Tariff Bureau*, Docket No. 71–83 (1978); *Robinson Lumber Co., Inc.* v. *Delta Steamship Lines, Inc.*, Docket No. 75–22 (1978); *Old Ben Coal Co.* v. *Sea-Land Service, Inc.*, Docket No. 78–13 (1978); Organic Chemicals v. *Atlanttrafik Express Service*, Docket Nos. 78–2, 78–3 (1979).

[7] *Celanese Corporation* v. *The Prudential Steamship Company*, Docket No. 78–14, Settlement Approved; Complaint Dismissed (May 30, 1980) [20 SRR 27, 32].

any event, it was adopted by the Conference before the shipments involved here took place. In our view, this issue does not preclude settlement between these two parties, even though the issue it raises *may* ultimately prove to have a wider impact. The fact is that there are no other parties involved in this proceeding and conjecture as to the scope, propriety and effect of the Conference Rule 19, ought not to prevent a settlement reached by the parties to this proceeding.

In light of the above facts, the desirability of settlement as reflected in the law and the entire record it is held that the settlement agreement reached by the parties is in the public interest and is approved.[8] It is therefore:

Ordered that:

1. TCI claims arise from a genuine dispute as to tariff applications and commodity descriptions and the settlement agreement represents a fair and equitable settlement of that dispute.

2. No liability attaches to either party as a result of the manner in which TCI's cargo was rated.

3. Final approval of this settlement agreement does not constitute an admission of liability by either party.

4. Upon final approval of the settlement agreement the complaint in this proceeding is thereby dismissed and the proceeding discontinued.

5. Upon approval of the settlement agreement all parties, including A&A International will be bound by its terms.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[8] The settlement agreement is attached to this holding and is thereby incorporated in it.

BEFORE THE FEDERAL MARITIME COMMISSION

TARIFF COMPLIANCE INTERNATIONAL
(ACTING ON BEHALF OF A&A
INTERNATIONAL, A DIVISION OF TANDY
CORPORATION)
V. KAWASAKI KISEN KAISHA, LTD.

DOCKET NO. 84–7

AGREEMENT OF SETTLEMENT AND MUTUAL RELEASE

IT IS HEREBY AGREED, by and between the undersigned Tariff Compliance International (Acting on Behalf of A&A International, a Division of Tandy Corporation ["TCI"], Complainant in Commission Docket No. 84–7, and Kawasaki Kisen Kaisha, Ltd. ["K-Line"], Respondent in said Docket, that Docket No. 84–7 will be terminated by mutual accord on the terms and conditions hereinafter set forth and for the reasons stated in the accompanying Memorandum in Support of Settlement and Motion to Dismiss:

1. K-Line will pay to TCI the sum of Sixty-Five Thousand Dollars and No Cents ($65,000.00).

2. TCI will, in consideration of the action of K-Line described in paragraph "1" above, withdraw its Complaint in Commission Docket No. 84–7, and will not pursue at the Commission, in Court in any other forum the claims made by TCI relating to the specific shipments included in Docket No. 84–7, and the handling thereof by Respondents.

3. Neither TCI nor K-Line (including successors and assignees in interest of either such party) will initiate any new claim against the other party arising in connection with or in any way relating to the specific shipments included in Docket No. 84–7 and the handling thereof, except for enforcement of any provision of this Agreement of Settlement and Mutual Release; and TCI and K-Line each hereby releases the other from, without limitation, all sums of money, accounts, actions, suits, proceedings, claims, and demands whatsoever which either of them at any time had or has up to the date of this Agreement against the other for or by reason of any act, cause, matter, or thing arising from the transactions giving rise to Docket No. 84–7.

4. TCI represents that it has authority to act on behalf of A&A International, a Division of Tandy Corporation ("A&A") in this matter, and that execution of this Agreement and other documents in this proceeding by TCI is binding on A&A.

5. It is understood and agreed that this Agreement of Settlement and Mutual Release is in full accord and satisfaction of all disputed claims in Docket No. 84–7.

6. It is further understood and agreed that this Agreement of Settlement and Mutual Release is not, in any sense, an admission of liability by any party, or an admission of any violation of law by any party.

7. This Agreement of Settlement and Mutual Release will be submitted for approval to the U.S. Federal Maritime Commission, and will become effective and binding upon the parties when such final approval is obtained.

8. This Agreement of Settlement and Mutual Release constitutes the entire agreement between the parties relating to the claims in this Docket FMC 84-7.

9. In the event this Agreement of Settlement and Mutual Release is disapproved by the Federal Maritime Commission, or is approved on conditions which are unacceptable to either party, then this Agreement will be null and void *ab initio* and of no effect whatsoever for any purpose.

Dated: May 23, 1985

TARIFF COMPLIANCE INTERNATIONAL
(ACTING ON BEHALF OF A&A INTERNATIONAL,
A DIVISION OF TANDY CORPORATION]

BY: /S/______________________

KAWASAKI KISEN KAISHA, LTD.

BY: /S/______________________

FEDERAL MARITIME COMMISSION

[46 CFR 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

July 31, 1985

ACTION: Final Rule.

SUMMARY: On May 8, 1985, the Commission deferred the effective date of its Final Rule until August 13, 1985, in order to consider comments of certain NVOCCs. The Commission has decided to implement the Final Rule without any substantive change. However, the language of the Rule is modified to clarify that all NVOCCs are required to comply with these requirements whatever the type of co-loading relationship that exists between the participating parties. The Rule has also been modified to clarify that the name of any NVOCC with which a shipment has been co-loaded shall be shown on the face of the bill of lading in a clear and legible manner.

DATES: Effective September 5, 1985.

SUPPLEMENTARY INFORMATION:

The Final Rule governing co-loading practices of Non-Vessel-Operating Common Carriers (NVOCCs), originally scheduled to become effective on May 15, 1985, (*Federal Reqister* Notice 50–14704, April 15, 1985) was deferred until August 13, 1985, due to an uncertainty as to its application expressed by segments of the NVOCC industry. Questions were raised both with respect to the intended application of the Rule as it involves the co-loading of cargo under a carrier-to-carrier agreement and the documentation requirements.

The application of the Rule was alleged to be unclear in a situation where: (1) two or more NVOCCs co-load pursuant to the terms of a carrier-to-carrier agreement, and (2) the NVOCC with which the cargo is co-loaded does not issue a bill of lading or assume the liability and responsibility for the cargo as is customary in a shipper-carrier arrangement. The Commission believes that the Rule is clear as to its application in the described circumtances. However, to avoid any further possible misunderstanding, modifications of a non-substantive nature have been made

to the Final Rule. In the interest of clarity, the Rule has also been reorganized.

"Co-loading", which is defined in 46 CFR 580.5(d)(14)(i) as "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 NVOCCs", recognizes no exception for co-loading performed pursuant to an agreement between or among NVOCC's. Where a carrier-to-carrier agreement exists, the Rule would require the NVOCC which receives the cargo from the shipper to issue the shipper a bill of lading annotating thereon, for shipper informational purposes, the name of the NVOCC to which the cargo has been tendered (46 CFR 580.5(d)(14)(iii)). The publishing NVOCC's tariff need only relate that co-loading is performed subject to a carrier-to-carrier agreement (section 580.5(d)(14)(ii)(B)).

In response to inquiries received with respect to application of the documentation requirements, the Commission has revised section 580.5(d)(14)(iii) of its Final Rule as previously published, to clarify that this requirement is applicable to any NVOCC which co-loads under either a shipper-to-carrier or a carrier-to-carrier arrangement and to require additionally that the annotation revealing the name of any NVOCC with which cargo has been co-loaded be shown on the face of the bill of lading in a clear and legible manner. This clarification should satisfy those concerned with the manner in which the annotation is to be revealed on the bill of lading. It will also affirm that the annotation requirement is intended to apply in situations where the co-loading involves either a shipper-to-carrier or carrier-to-carrier relationship.

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.

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:

PART 580—[AMENDED]

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.* All tariffs filed by an NVOCC shall contain a rule describing its co-loading activities as follows:

(A) If an NVOCC does not tender cargo for co-loading, its tariff(s) shall so indicate.

(B) If two or more NVOCCs enter into an agreement which establishes a carrier-to-carrier relationship for the co-loading of cargo, then the existence of such agreement must be noted in each of the NVOCC's tariffs.

(C) If two NVOCCs enter into a co-loading arrangement which results in a shipper-to-carrier relationship, the tendering NVOCC shall describe in its tariff its co-loading practices and specify its responsibility to pay any charges for the transportation of the cargo. A shipper-to-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.

(iii) *Documentation Requirements.* NVOCCs which tender cargo to another NVOCC for co-loading whether under a shipper-to-carrier or carrier-to-carrier relationship shall annotate each applicable bill of lading with the identity of any other NVOCC to which the shipment has been tendered for co-loading. Such annotation shall be shown on the face of the bill of lading in a clear and legible manner.

(iv) *Co-Loading Rates.* No NVOCC shall offer 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 shippers.

* * * * *

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

[46 CFR PART 552]

DOCKET NO. 85–17

FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES

July 31, 1985

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its rules governing financial reports required of vessel operating common carriers in the domestic offshore waterborne commerce of the United States. This action is necessary to conform the reporting form (Form FMC–378) to the Uniform Financial Reporting Requirements (46 CFR Part 232) of the Maritime Administration, U.S. Department of Transportation. These requirements replaced the Uniform System of Accounts for Maritime Carriers (46 CFR Part 582) upon which the report form was previously based. Other minor reporting changes delete unnecessary information reporting requirements.

DATES: September 9, 1985.

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission is required to evaluate the reasonableness of rates in the domestic offshore trades filed by vessel operating common carriers. To provide for the orderly acquisition of the data essential to this evaluation, the Commission promulgated what is now 46 CFR Part 552. Self-propelled vessel operators report the required financial and operating data on FMC Form 378, "Statements of Financial and Operating Data". It has been the policy of the Commission to base these statements on the chart of accounts prescribed by the Maritime Administration, U.S. Department of Transportation (MARAD). It is the intention of the Commission to continue this policy. Therefore, because MARAD has recently revised its chart of accounts through the publication of Uniform Financial Reporting Requirements (46 CFR Part 232), the Commission is amending 46 CFR Part 552 (49 FR 42934) to conform its reporting form to the revised chart of accounts.

A proposed rule was published in the FEDERAL REGISTER on June 3, 1985 (50 FR 23318) with comments due on July 3, 1985. No comments were received.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 CFR 12193, February 27, 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.

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 numbers 3072–0008, 3072–0029 and 3072–0030.

List of Subjects in 46 CFR

Cargo vessels; Freight; Maritime carriers; Rates and fares; Reporting and recordkeeping requirements.

PART 552—[AMENDED]

Accordingly, pursuant to 5 U.S.C. 553; 46 U.S.C. app. 817(a), 820, 841a, 843, 844, 845a and 847, the proposed rule published in the FEDERAL REGISTER at 50 FR 23318 on June 3, 1985, is hereby adopted as final.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 552]

DOCKET NO. 85–17

FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES

ACTION: Proposed Rule and Request for Comments.

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission is required to evaluate the reasonableness of rates in the domestic offshore trades filed by vessel operating common carriers. To provide for the orderly acquisition of the data essential to this evaluation, the Commission promulgated what is now 46 CFR Part 552. Self propelled vessel operators report the required financial and operating data on FMC Form 378, "Statements of Financial and Operating Data." It has been the policy of the Commission to base these statements on the chart of accounts prescribed by the Maritime Administration, U.S. Department of Transportation (MARAD). It is the intention of the Commission to continue this policy. Therefore, because MARAD has recently revised its chart of accounts through the publication of Uniform Financial Reporting Requirements (46 CFR Part 232), the Commission is amending 46 CFR Part 552 (49 FR 42934) to conform its reporting form to the revised chart of accounts.

These amendments which do not result in any substantive modification of financial reporting requirements and reflect only new terminology are summarized as follows:

1. *Section 552.5 (o) and (p)*—the addition of new definitions, "voyage expense" and "voyage expense relationship" are new terms replacing "vessel operating expense" and "vessel operating expense relationship," respectively;

2. *Section 552.6(a)(2)*—substitution of MARAD's new designation "Uniform Financial Reporting Requirements" for the former designation, "Uniform System of Accounts for Maritime Carriers";

3. *Section 552.6(b)(4)(i)*—reflects the use of a combined schedule for self-propelled vessel operators (Form FMC–378) reporting assets and accumulated depreciation, and substitutes the term "voyage expense relationship" for "vessel operating expense relationship";

4. *Section 552.6(b)(5)*—reflects the new terminology used for "average voyage expense" definition;

5. *Section 552.6(b)(7)*—reflects the inclusion of other assets with "Investment in Other Property and Equipment"—Schedule A–V—for self-propelled vessel operators (Form FMC–378);

6. *Section 552.6(b) (9) and (10)*—reflects renumbering of schedules;

7. *Section 552.6(c)(2)*—reflects usage of new terminology in designating "voyage expense" accounts;

8. *Section 552.6(c)(4)*—reflects consolidation of line item accounts under "Administrative and General Expense" schedules.

In addition to the changes necessitated by the revision of MARAD's chart of accounts, other changes have been made amending or removing certain provisions of the regulations. These changes concern information which the Commission considers no longer necessary to the effective administration of its regulatory responsibilities, and which do not result in substantial changes in the calculations of Rate Base or Net Income of reporting carriers. They are summarized as follows:

1. *Section 552.4(c)*—cross referencing exhibits and schedules to underlying workpapers deleted as duplicative of 552.4(a);

2. *Section 552.6(a)(1)*—directors and stockholders need not be disclosed because it is irrelevant to the Commission's rate-of-return methodology;

3. *Section 552.6(b)(1)*—gross amounts for additions and deductions to vessel investment need not be disclosed because *pro rata* allocation for the reporting period is the relevant information from which gross amounts can be calculated if necessary;

4. *Section 552.6(b)(1)(ii)*—allocation of vessel costs to Other Cargo need not be disclosed because the allocation to the Trade is the relevant information from which Other Cargo can be calculated, if necessary;

5. *Section 552.6(b)(2)(i)*—depreciable life and residual value of vessels need not be disclosed because accumulated depreciation is the relevant information.

Finally, the citation of statutory authority is being revised to reflect only United States Code citations in accordance with required *Federal Register* format.

The Commission has determined that this proposed rule is not a "major rule" as defined in Executive Order 12291, 46 CFR 12193, February 27, 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 Vice Chairman of the Federal Maritime Commission certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizations and small governmental jurisdictions.

The primary economic impact of this rule would be on ocean common carriers which generally are not small entities. A secondary impact may

fall on shippers, some of whom may be small entities, but that impact is not considered to be significant.

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 numbers 3072–0008, 3072–0029 and 3072–0030.

THEREFORE, pursuant to 5 U.S.C. 553; secs. 18(a), 21 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817(a), 820, 841(a)); and secs. 1, 2, 3(a), 3(b), 4 and 9 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 843, 844, 845, 845(a) and 847), Part 552 of Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation for Part 552 is revised to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 817(a), 820, 841a, 843, 844, 845, 845a and 847.

2. Section 552.4(c) is removed.

3. Paragraphs (o) and (p) of Section 552.5 are amended to read as follows:

§ 552.5 Definitions.

* * * * *

(o) *"Voyage Expense"* means:

(1) For carriers required to file Form FMC–378: the total of Vessel Operating, Vessel Port Call and Cargo Handling Expenses less Other Shipping Operations Revenue.

(2) For carriers required to file Form FMC–377: the total of Direct Vessel and Other Shipping Operations Expenses, less Other Revenue.

(p) *"Voyage Expense Relationship"* means the ratio of total Trade Voyage Expense to total Company Voyage Expense.

* * * * *

4. Section 552.6 is amended by revising paragraphs 6(a), 6(b)(1), 6(b)(1)(ii), 6(b)(2)(i), 6(b)(4)(i), 6(b)(5), 6(b)(7), 6(b)(9) [Title only], 6(b)(10), 6(c)(2) and 6(c)(4) to read as follows:

§ 552.6 Forms.

(a) *General.*

(1) The submission required by this part shall be submitted in the prescribed format and shall include General Information regarding the carrier, as well as the following schedules as applicable:

Exhibit A—Rate Base and supporting schedules;
Exhibit B—Income Account and supporting schedules;
Exhibit C—Rate of Return and supporting schedules;
Exhibit D—Application for Waiver; and
Exhibit E—Initial Tariff Filing Supporting Data.

(2) statements containing the required exhibits and schedules, are described in paragraphs (b), (c), (d), (e) and (f) of this section and are available upon request from the Commission. The required General Information, schedules and exhibits are contained in forms FMC–377 and FMC–378. For carriers required to file form FMC–378, the statements are based on the *Uniform Financial Reporting Requirements* prescribed by the Maritime Administration, U.S. Department of Transportation. For carriers required to file Form FMC–377, the statements are based on the accounts prescribed by the Interstate Commerce Commission for Carriers by Inland and Coastal Waterways. The schedules contained in these statements are distinguished from those contained in the Form FMC–378 statements by the suffix "A" (e.g., Schedule A–IV(A)).

(b) *Rate Base (Exhibits A and A(A)).*

(1) *Investment in Vessels (Schedules A–I and A–I(A)).*

Each cargo vessel (excluding vessels chartered under leases which are not capitalized in accordance with § 552.6(b)(10)) employed in the Service for which a statement is filed shall be listed by name, showing the original cost to the carrier or to any related company, *plus* the cost of improvements, conversions, and alterations, *less* the cost of any deductions. All additions and deductions made during the period shall be shown on a *pro rata* basis, reflecting the number of days they were applicable during the period. The result of these computations shall be called Adjusted Cost.

(i) * * *

(ii) The total of the adjusted cost of all vessels employed in the Service during the period which has not been allocated to Other Services, as required in § 552.6(b)(1)(i)(B), shall be allocated to the Trade in the cargo-cube mile relationship.

(2) *Accumulated Depreciation—Vessels Schedule A–II and A–II(A)).*

(i) Each cargo vessel (excluding vessels chartered under leases which are not capitalized in accordance with § 552.6(b) (10)) employed in the Service shall be listed separately. For vessels owned the entire year, accumulated depreciation as of the beginning and the end of the year shall be reported and the arithmetic average computed. This amount shall be allocated to the Service and to the Trade in the same proportions as the cost of the vessel was allocated on Schedule A–I or A–I(A). If the depreciable life of any equipment installed on a vessel differs from the depreciation life of the vessel, the cost and the depreciation bases shall be set forth separately.

(ii) * * *

(iii) * * *

(3) * * *

(4) *Investment in Other Property and Equipment; Accumulated Depreciation Other Property and Equipment (Schedules A–IV and A–IV(A) and A–V(A)).*

(i) Actual investment, representing original cost to the carrier or to any related company, in other fixed assets employed in the Service shall be reported as of the beginning of the year. Accumulated depreciation for these assets shall be reported both as of the beginning and as of the end of the year. The arithmetic average of the two amounts shall also be shown and shall be the amount deducted from original cost in determining rate base. Additions and deductions during the period shall also be reported, and the carrier shall reports as though all such changes took place at midyear, except for those involving substantial sums, which shall be prorated on a daily basis. Allocation to the Trade shall be based upon the actual use of the specific asset or group of assets within the Trade. For those assets employed in a general capacity, such as office furniture and fixtures, the voyage expense relationship shall be employed for allocation purposes. The basis of allocation to the Trade shall be set forth and fully explained.

(ii) * * *

(5) *Working Capital (Schedule A–V).*

Working capital for vessel operators shall be determined as average voyage expense. Average voyage expense shall be calculated on the basis of the actual expenses of operating and maintaining the vessel(s) employed in the Service (excluding lay-up expenses) for a period represented by the average length of time of all voyages (excluding lay-up periods) during the period in which any cargo as carried in the Trade. Expenses for operating and maintaining the vessels employed in the Trade shall include: Vessel Operating Expense, Vessel Port Call Expense, Cargo Handling Expense, Administrative and General Expense and Interest Expense allocated to the Trade as provided in paragraphs (c)(2), (c)(4) and (5) of this section. For this purpose, if the average voyage, as determined above, is of less than 90 days duration, the expense of hull and machinery insurance and protection and indemnity insurance shall be determined to be 90 days, provided that such allowance for insurance expense shall not, in the aggregate, exceed the total actual insurance expense for the period.

(6) * * *

(7) *Investment in Other Assets (Schedule A–VII(A)); Accumulated Depreciation—Other Assets (Schedule A–VIII(A)).*

For carriers required to file Form FMC–377, any other assets claimed by the carrier as components of its rate base shall be set forth separately in a schedule. The basis of allocation to the Trade and computations of percentages employed shall be set forth and fully explained. Where other assets are subject to depreciation, the amount of accumulated depreciation to be subtracted from the original cost in determining the component of rate base shall be the arithmetic average of both the beginning and the end of the year. Capital Construction Funds and other special funds are specifically excluded from rate base. For carriers required to file Form

FMC-378, other assets, and the related accumulated depreciation, are to be included on Schedule A-IV.

(8) * * *

(9) *Capitalization of Interest During Construction (Schedules A-VII and A-IX(A)).*

(i) * * *

(ii) * * *

(iii) * * *

(iv) * * *

(10) *Capitalization of Leases (Schedules A-VIII and AX(A)).*

Leased assets which are capitalized on the carrier's books and which meet the AICPA guidelines for capitalization may also be included in rate base. Schedule A-VIII or A-X(A), "Capitalization of Leases," shall be submitted setting forth pertinent information relating to the lease and the details of the capitalization calculation. Allocations to the Trade shall follow the requirements of paragraphs (b)(l) and (b)(4) of this section.

(c) *Income Account (Exhibits B and B(A)).*

(1) * * *

(2) *Voyage Expense (Schedule B-II).*

A schedule of voyage expense shall be submitted for any period in which any cargo was carried in the Service. Allocations to the Trade shall be on the following basis:

(i) For all voyages in the Service, vessel expense shall be allocated to the Trade in the cargo-cube mile or cargo cube relationship, as appropriate. Should any of the elements of vessel expense be directly allocable to specific cargo, such direct allocations shall be made and explained.

(ii) Vessel port call and cargo handling expenses shall be assigned directly, to the extent possible, by ports at which incurred, to the Trade and Other Cargo, or otherwise allocated on the basis of cargo cube loaded and discharged at each port.

(iii) Other Shipping Operations Revenue shall be deducted from Vessel Operating Expense. Other Shipping Operations Revenue should be assigned directly, to the extent possible, or otherwise allocated on the basis of cargo cube loaded and discharged at each port. Any direct assignments shall be fully set forth and explained.

(3) * * *

(4) *Administrative and General Expense (Schedules B-III and B-III(A)).*

Administrative and general expenses (A&G) shall be allocated to the Trade using the voyage expense relationship. Direct assignments should be made where practical, particularly with respect to advertising expense related to the operation of passenger and combination vessels. Any direct assignment shall be set forth and explained. Charitable contributions shall not be allocated to the Trade. In those instances where a carrier is engaged in other business in addition to shipping, A&G should be allocated to each business in the ratio of total operating expenses for each business

(*less* A&G and income taxes) to total company operating expenses (*less* A&G and income taxes).

* * * * *

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 552]

DOCKET NO. 85–17

FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES

October 22, 1985

ACTION: Final rule; corrections.

SUMMARY: This document corrects administrative errors resulting in two incorrect citations in a final rule on financial reports of vessel operating common carriers in the domestic offshore trades that appeared at page 32068 in the *Federal Register* of Thursday, August 8, 1985 (50 FR 32068). This document also revises two corresponding references to the corrected citations which were not included in this rule making due to administrative oversight.

The following corrections are made in F.R. Doc. 85–18513 appearing on page 32068 in the issue of August 8, 1985:

1. On page 32069, on lines 4, 5 and 6 of column three: "(9) *Capitalization of Interest During Construction (Schedules A–VII and A–IX(A)).*" is corrected to read "(9) *Capitalization of Interest During Construction (Schedules A–VI and A–IX(A)).*" .,

2. On page 32069, on lines 8 and 9 of column three: "(10) *Capitalization of Lease (Schedules A–VIII and A–X(A))*" is corrected to read "(10) *Capitalization of Leases (Schedules A–VII and A–X(A))*".

3. Add the following amendatory item:

"5. In § 552.6, paragraphs (b)(9)(iii) and (b)(10) are revised to read as follows:

§ 552.6 Forms.

* * * * *

(b) * * *

(9) * * *

(iii) A detailed description of the interest calculations shall be submitted for each capital asset included in the rate base of the carrier in the first year of its inclusion. Such description shall be set forth on Schedule A–VI or A–IX(A), 'Capitalization of Interest During Construction'. Capitalized interest shall be included in the rate base when the asset is included in the rate base, in accordance with paragraph (b) of this section, and in the same allocable amounts as the asset. A schedule shall be provided each time a rate base statement is submitted, setting forth the year in

which an interest calculation statement was submitted for each asset which included capitalized construction interest in the rate base.

(iv) * * *

(10) *Capitalization of Leases (Schedules A–VII and A–X(A)).* Leased assets which are capitalized on the carrier's books and which meet the AICPA guidelines for capitalization may also be included in rate base. Schedule A–VII or A–X(A), 'Capitalization of Leases', shall be submitted setting forth pertinent information relating to the lease and the details of the capitalization schedule. Allocations to the Trade shall follow the requirements of paragraphs (b)(l) and (b)(4) of this section.

* * * * *

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–41

WILMINGTON STEVEDORES, INC.

v.

THE PORT OF WILMINGTON, DELAWARE

ORDER ADOPTING INITIAL DECISION

August 7, 1985

This proceeding was initiated by a complaint filed by Wilmington Stevedores, Inc. (WS or Complainant) against the Port of Wilmington, Delaware (the Port or Respondent) alleging that certain indemnity and exculpatory provisions of the Port's tariff are unjust, unreasonable, vague and indefinite, and therefore unlawful in violation of section 17 of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. 816).[1] Administrative Law Judge Charles E. Morgan issued an Initial Decision finding both provisions of the Port's tariff at issue to be unlawful, under section 17 of the Act, to the extent that they would relieve the Port of liability for its own negligence. The Port has filed Exceptions to the Initial Decision, to which WS and the Commission's Bureau of Hearing Counsel have replied.

BACKGROUND

The complaint in this proceeding arose out of court proceedings involving an accident in September, 1982 in which a Port crane leased by WS and operated by two Port-employed crane operators tumbled into the hold of a ship while unloading a cargo of steel coils. Both crane operators were killed in the accident. In a civil action against WS for recovery of damages for the death of the two crane operators, the Port, as a third-party defendant, raised as an affirmative defense the exculpatory and indemnity provisions of its tariff. The court proceedings were stayed pending a determination of the lawfulness of the Port's tariff provisions by the Federal Maritime Commission.

WS is the major user of Port equipment to perform stevedoring functions at the Port. The Port's tariff requires stevedores who use the Port to use the Port-owned cranes when they are available and suitable for the user's needs. For use with bulk or general cargo, the Port provides the

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[1] Complainant also alleged that the provisions were unlawful under section 18 of the 1916 Act, (46 U.S.C. app. §817). This portion of the complaint was dismissed by the Presiding Officer on grounds that the Respondent is not a common carrier by water and therefore not subject to section 18 of the 1916 Act. Complainant has not excepted to that ruling.

crane operators as well as the cranes.[2] Although the crane operators operate the cranes in response to hand signals from employees of the stevedoring company and according to a plan of loading/unloading determined by the stevedoring company, the stevedoring company does not hire, fire, discipline or train the crane operators and does not have the right to choose who among the ten or eleven Port-employed crane operators will be assigned to operate the cranes on any particular day. The stevedoring company can, however, request a change of operators. The crane operators are paid, hired, fired, trained, disciplined and assigned by the Port.

The Port's tariff contains rates and charges for the use of its cranes and crane operators. These rates and charges are established by the Port, without negotiation, so as to recover its direct costs and overhead and to be competitive with the rates at other ports in the area. The Port does not specifically consider the impact of the indemnity and exculpatory provisions of its tariff in setting its crane rental or other rates, and does not offer different crane rental rates based upon assumption or non assumption of liability by stevedores. The Port's tariff provides that neither the Port nor the city shall be liable for damages resulting from the use of leased equipment or from the acts or omissions of Port-furnished operators of such equipment, and that lessees of such equipment and labor shall indemnify the city from any such damages.[3]

The Presiding Officer found both provisions of the Port's tariff at issue to be unjust, unreasonable and unlawful, in violation of section 17 of the 1916 Act, to the extent that they would relieve the Port of liability for its own negligence. He rejected the Port's argument that the provisions did not relieve the Port of liability for its own negligence because the cranes and their operators were under the full control of the lessees during operation. The Presiding Officer explained that although the cranes and their operators "may be acting for a time under the complete direction and control of a stevedore . . .," the ultimate authority to exercise control remained with the Port (I.D. 17). The Presiding Officer noted that this

[2] For container operations, the Port requires stevedores to rent Port-owned cranes, but does not supply crane operators. The container cranes are operated by employees of the stevedoring companies. The difference in treatment arises from differences in labor jurisdiction of the two longshoremen's unions which work at the Port. (I.D. 5).

[3] The Port's tariff provisions relating to non-liability for damages provide:

Section II, Paragraph 14: Responsibility for Equipment and Labor

Neither the Port nor the City shall be liable for any damages resulting from the use of equipment leased or from activities or omissions of any operator and/or other labor furnished by the terminal on a time basis. All parties who lease any such equipment and/or use such an operator and/or other labor shall indemnify the terminal and the City against, and shall save them harmless from, any and all liability for loss, damage, expense, and cost resulting from the use of such equipment while 50 leased and/or from any act or omission on the part of such operator and/or other employee so furnished by the Terminal.

Section II, Paragraph 17: Non-Liability

Neither the Port nor the City shall be liable for loss or damage to any merchandise in or upon, or moving or being moved over, in, through, or under any wharf or other structure or property owned, controlled, or operated by the Port, resulting from any cause whatsoever.

conclusion was consistent with the Port's tariff, which did not specifically state that the crane operators would be under the exclusive direction and control of lessees of the cranes. In this respect, the Port's tariff provisions were found to differ from those held lawful in *West Gulf Maritime Association* v. *Port of Houston Authority,* 22 FMC 420 (1980) and to be more like the indemnity provisions held unlawful in *West Gulf Maritime Association* v. *The City of Galveston,* 22 FMC 101 (1970).[4]

DISCUSSION

In its Exceptions to the Initial Decision Respondent concedes that its tariff provisions for indemnity may not be applied in future, but argues that relief should be prospective only. The Port alleges that Complainant was aware of the existence of these tariff provisions, had provided itself with liability insurance to cover its assumed responsibilities and had never complained about the provisions. The Port contends that the Presiding Officer failed to address the tariff provisions' past effectiveness as "tariff defenses" and "the evidence" that private crane rental agreements identical to those entered into by WS, which shift liability for damages from lessors to lessees, are enforceable under Delaware state law.

We do not find the Port's Exceptions persuasive. The Initial Decision is well reasoned in its findings of fact and conclusions of law, which are consistent with Commission precedent.[5] Respondent's request that relief be prospective only would permit it to enforce, by asserting in its own defense, provisions which have been found unlawful under the 1916 Act. Such a result would be unwarranted.

Similarly, the Port's argument that past application of its tariff provisions should be permitted because those provisions are no more burdensome to stevedores than liability-shifting provisions contained in private crane rental agreements upheld by state courts is unavailing. As the Presiding Officer noted, the Port's tariff is not as explicit as the terms of such agreements nor is the Port's tariff a bargained-for agreement among the parities.[6]

THEREFORE, IT IS ORDERED, That Respondents' Exceptions are denied; and

[4] We note that the Port's tariff provisions also differ in this same respect from the provisions of various "rental agreement" forms provided by private crane rental companies from which WS has rented cranes. These "rental agreement" and "equipment tickets" forms, signed by only one party—the lessee—provide in specific terms that the crane and crane operators supplied are under the direct and sole supervision of lessee.

[5] *Central National Corp.* v. *Port of Houston Authority, 26 FMC 296, 298–299* (1984), 22 S.R.R. 795, 797; *West Gulf Maritime Association* v. *The City of Galveston, supra.*

[6] See footnote 4, *supra.*

IT IS FURTHER ORDERED, That the Initial Decision served in this proceeding is adopted and made a part hereof.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–41

WILMINGTON STEVEDORES, INC.

v.

THE PORT OF WILMINGTON, DELAWARE

Certain tariff provisions of the Port of Wilmington, Delaware, found unjust and unreasonable, per se, in violation of section 17 of the Shipping Act, 1916, as amended, insofar as such tariff provisions would relieve the Port of Wilmington from its own negligence.

Eugene L. Stewart, Terence P. Stewart, Mary E. Tuck and *Ronald M. Wisla* for the complainant, Wilmington Stevedores, Inc.

Jerome M. Capone for respondent, the Port of Wilmington, Delaware.

John Robert Ewers and *Stuart James* as Hearing Counsel.

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

Adopted August 7, 1985

GENERAL BACKGROUND

On September 27, 1982, the complainant, Wilmington Stevedores, Inc., was engaged in unloading a shipment of steel coils from the hold of the motor vessel *NOFNED THOR* at the Port of Wilmington, Delaware.

The complainant had rented a land-based crane provided by the Port of Wilmington, Delaware, the respondent. Two employees of the respondent, namely the crane operator and the crane oiler (crane maintenance man), were in the crane. It is customary for the crane operator to work for a time, and then shift jobs with the oiler, who then operates the crane, so that both the operator and the oiler are known as crane operators.

Shortly after the unloading operation began, the crane toppled into the hold of the *NORNED THOR,* killing the two crane operators, and causing property damage.

In a District Court of the United States, certain pretrial testimony of the president and of a supervisor of Wilmington Stevedores tended to show that the president had instructed his employees to load no more than 12 coils of steel to the crane on each lift, but that when the accident occurred 15 coils had been attached to the crane's hook by Wilmington

[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).

Stevedore's employees, as was evident when the coils later were taken out of the river at the Port of Wilmington.

A civil action was instituted in the United States District Court for the Eastern District of Pennsylvania to recover damages for the death of the two crane operators. Numerous lawsuits related to this tragic incident have been consolidated before the said Court.

The Port of Wilmington, is a third party defendant in the above lawsuit, and raised among its several defenses certain provisions of its General Tariff No. 21, FMC–T No. 7. In particular, the Port refers to two tariff provisions, section II, paragraph 14 (its so-called "indemnity" provision, and section II, paragraph 17 (its "exculpatory" provision.)

After the Port of Wilmington raised these tariff-provision defenses, the complainant filed the subject complaint with the Federal Maritime Commission. The civil litigation has been stayed so that the Commission may determine the lawfulness of the said tariff provisions at the port.

No judgment is made herein as to whether the crane operators were negligent or whether the stevedore's employees or any other persons were negligent. The issue of negligence is to be resolved in the suit in the District Court. The present initial decision relates only to whether the Port's tariff provisions are lawful.

THE COMPLAINT

By complaint served September 13, 1983, the complainant, Wilmington Stevedores, Inc., alleges that certain provisions of the tariff of the respondent, The Port of Wilmington, Delaware, are unjust, unreasonable, vague, indefinite, an therefore unlawful in violation of sections 17 and 18 of the Shipping Act, 1916 (the Act). The Commission is requested to find that these tariff provisions are unlawful, and to order the respondent to cease and desist from seeking to enforce these tariff provisions against the complainant in any way so as to make the complainant liable for the debts and obligations of others.

The Port of Wilmington insofar as it furnishes terminal facilities is an "other person" subject to the provisions of section 17 of the Act. The Port of Wilmington is not a common carrier by water, and therefore is not subject to the provisions of section 18 of the Act, which provisions relate only to common carriers by water. Accordingly, the complaint insofar as it relates to section 18 is dismissed. Further discussion herein relates to the allegation of violation of section 17.

THE FACTUAL SITUATION

Wilmington Stevedores (WS) is a stevedoring company, principally engaged in providing stevedoring and terminal services at the Port of Wilmington. WS is the busiest stevedore at the Port of Wilmington (PW).

The Port of Wilmington is located at the confluence of the Delaware and Christina Rivers, and is an instrumentality of the City of Wilmington,

Delaware (City). PW was set up to own, operate and maintain the port facilities. PW's main function is to provide a place where ships can dock, either to pick up or to discharge cargo. PW provides warehouse space for cargo moved through the Port.

Also located on the Delaware River, within 27 miles off the Port, are the Ports of Camden and Philadelphia, which are in direct competition with PW. Also the Port of Baltimore and the Port of New York are regional competitors. The closest competitor is the Port of Gloucester, New Jersey.

PW is the smallest of these competing ports in size and business. PW has 6 berths and 3 cranes. Philadelphia has 40 berths and 18 cranes. Baltimore has 50 berths and 25 cranes. The Ports of Camden and Gloucester together have 10 berths and 8 cranes.

The City owns three land-based cranes, one of which, the C–3 crane, is for handling containerized cargo, and cost $1,356,200. Funds for this crane were acquired through the issuance of general obligation bonds in 1980. The C–3 crane was purchased in 1982.

The C–1 crane, a crane handling cargo not in containers (referred to as bulk or general cargo by the parties), was purchased in 1962 for $234,000. The C–8 crane, also is one for handling cargo not in containers. It was purchased in 1959.

In order to recover the City's investment in the three cranes, PW requires the stevedores who use the Port to load or unload ships, to use city-owned cranes when they are available and suitable for the user's needs. City-owned cranes also are referred to as Port cranes.

If a Port crane is not available or is not suited for a user's particular need, the user is permitted to use a crane or cranes not owned by the City, and supplied by independent operators.

In situations where the cargo is not in containers, but is bulk or general cargo, the City provides not only the cranes but also the crane operators to the stevedoring company. However, where containerized cargo is being loaded or unloaded, the City's container crane is driven by an employee of the stevedoring company. The above distinction between who may operate the cranes arises from differences in labor jurisdiction among the two longshoremen's unions which work at the Port.

The PW or City cranes are maintained by the Port of Wilmington. PW holds itself out as providing qualified crane operators. PW has senior crane operators and utility crane operators. To qualify as a utility operator, a person must have completed a minimum of 60 working days of training. Such a working day is eight hours.

A stevedoring company does not have the right to choose which of the Port employed crane operators will operate a crane for the stevedore on a particular day.

PW is responsible for the hiring, firing, training, assigning, and discipline of the Port's crane operators. A stevedore, such as WS, does not have

the right to fire or discipline a City crane operator. The stevedore may request a change of operators.

The Port of Wilmington pays its crane operators, and in turn is reimbursed by a stevedoring company through the fees paid by the stevedore for the rental of the City's cranes along with their operators. WS is billed on an hourly basis, and charges include labor, equipment (crane) and overhead.

The complainant has used the Port's cranes since the complainant first began operations at the Port in 1978. About 75–80 percent of all Port crane rentals are made to the complainant. In other words, about 70–80 percent of the man hours that Port crane operators spend operating cranes are spent working on behalf of the complainant in furtherance of the complainant's business.

The Port of Wilmington is not, itself, in the business of loading and unloading cargo from ships which dock at its facilities.

Five stevedoring companies currently are working at the Port of Wilmington, but only two regularly do business there. One of these is WS.

The president of Wilmington Stevedores knows most of the Port's crane operators by name, and he knows them all by sight. There are about 10 or 11 Port crane operators. At times some crane operators are more efficient than others, with their productivity measured by time elapsed and tons loaded or unloaded. When WS has been dissatisfied with the performance of a city crane operator, generally in the past this dissatisfaction was because of the rate of productivity.

A stevedore's crew could vary in size from 15 people, to as much as 45 on a break-bulk vessel, or as much as 110 on a general cargo ship.

For stevedoring general cargo, a typical longshore crew would be 19 men. Twelve men would work in the hold of the ship, three would be deckmen who would give signals and operate the ship's winch or the ship's crane, and four men would be on the dock landing the cargo. In the case of export cargo, the latter four men would hook up the cargo.

In addition to the above stevedoring crew of 19 men, there is a checker with each gang. He tallies the cargo, both off, or on, the ship. If necessary, there is also a sorter, who sorts the cargo by the various bills of lading. Also there is a hatch foreman in charge of the longshore gang unit or crew. All of these men are employees of the stevedore, such as Wilmington Stevedores.

In addition, to the above 19 or so employees, there are two crane operators employed by Port or City of Wilmington. No other Port or City personnel are used in the stevedoring operation.

The training period for Wilmington Stevedore's crane operators is about 14 working days. These WS crane operators were trained by Port of Wilmington crane operators. This training was conducted on an idle container-

ship. WS considers that certain PW crane operators are better qualified than others to train new crane operators.

When not using PW container cranes, Wilmington Stevedores has from time to time rented land-based cranes, including crane operators, from independent crane owners, such as Active Crane Rentals, Inc., Robert Hawthorne, Inc., and the Marvin Group, Inc., all located in Wilmington, Del., or Philadelphia, Pa. Wilmington Stevedores also has rented a "floating rig" from the M.J. Rudolph Corporation to discharge salt from a ship. The mailing address of Rudolph is Staten Island, New York. The floating rig had to be towed to and from Wilmington.

The president of Wilmington Stevedores stated that the "Rental Agreement" form provided by Active Crane Rentals, Inc., and the "Equipment Ticket-Rental Agreement" form provided by Robert Hawthorne, Inc., are nothing other than acknowledgements of the number of hours worked and time of rental of the cranes and their crews. These "rental agreements" and "Equipment Ticket-Rental Agreements" are signed only by one party, that is, the president of Wilmington Stevedores, and he states that he did not read, and considers that he is not bound by, the fine print on these rental forms.

The Active Crane Rentals form above states in the fine print, in part, that the Active Crane Rentals (lessor) agrees to supply the crane and necessary personnel under the direct and sole supervision of the lessee, and that lessee agrees to hold lessor harmless for loss, damage and expense resulting from the operation of the crane, either bodily injury or property damage, and agrees to defend lessor from all suits, etc.

The Hawthorne form provides similarly for indemnification of lessor, including that lessor's employees are under lessee's exclusive jurisdiction, supervision and control, etc.

The costs of rental of cranes with their operators, as between the rental of City cranes, and cranes from independent companies are substantially the same, but no transportation costs are involved in the rental of City cranes, while some transportation costs, for transporting the cranes to and from the Port of Wilmington, are involved, or may be involved, in the rentals from independents.

The President of WS has found from his experience that outside (privately-owned) cranes are of equal efficiency to the cranes of the Port. At times, the outside cranes are more efficient than the Port's cranes, inasmuch as in the opinion of the President of WS, the privately owned and operated cranes do not break down as much.

In the typical case of loading or unloading of a ship at the Port of Wilmington, the deckmen (of the stevedore's crew) are responsible for giving operating signals to the City's crane operators. The deckmen are necessary because the crane operators often are unable to see into the holds of the ships in which they are working. The crane operators, at least at times, are totally reliant on the instructions of the deckmen. Even

in some instances where a crane operator may be able to see the cargo, his vantage point is not as good as that of the deckman, and the crane operator must still rely on the deckman's instructions.

The crane operator relies on, and obeys, the hand signal or other signal, given to him by the deckman. In the ordinary operation, the crane operator becomes part of the total stevedore procedure, usually functioning under the direction and control of the stevedore.

Before cargo operations begin on any ship, it is the common practice for the stevedore's president or other person in charge, to meet with his foremen, that is, with his ship superintendent, hatch foreman, and ship foreman, to discuss the upcoming stevedoring operation. The foremen are instructed on how to conduct the cargo operation. Neither the crane operators, nor any other PW-City employee, is consulted on how to conduct the loading or unloading operation.

The crane operators at the Port of Wilmington assist the stevedore in loading or unloading a ship in the manner decided by the stevedore. The stevedores provide the rigging which is used in the bundling of the cargo and hooking it onto the crane. Whether a City crane is supplied with a bucket or a hook, either of these is provided by the City.

When a ship is being loaded or unloaded at the PW by Wilmington Stevedores, no one other than the employees of Wilmington Stevedores gives any directions to the City's crane operators.

The President of Wilmington Stevedores states that there have been occasions when a City crane operator has refused to follow the signals of the deckman employed by WS. The one example given is that a deckman *may* direct the Port crane operator to put a bucket in a certain place, but the crane operator will not do what he is directed. Specific examples or occasions were not supplied.

The deckman's hand, or other, signals instruct the crane operator as to the disposition of the cargo, such as move it up or down, left or right, or when to close the bucket and when the bucket or hook is in position. The crane operator decides which lever in the crane's cab he will use to accomplish the instructions of the deckman. The Port of Wilmington's crane supervisor does not give the Port's crane operators instructions as to specific cargoes being loaded or unloaded. In other words, the PW supervisor does not interfere with the stevedore's operation.

The Port of Wilmington periodically issues tariffs which set out the terms under which the Port does business with Port users. The Port lists, among other things, the rates charged by the Port for its services, and certain indemnity and exculpatory provisions. The Port first filed a tariff with the Federal Maritime Commission in 1966. It contained indemnity and exculpatory provisions substantially identical to the corresponding provisions in the current Port tariff.

The Port has never offered a choice of crane rental rates in exchange for the assumption or non-assumption by stevedores, such as Wilmington

Stevedores, of the risks resulting from the enforcement of the indemnification and exculpatory clauses in the Port's tariff.

Wilmington Stevedores has not been permitted to negotiate or bargain with Port officials over the rates to be charged for the rental of the Port's cranes.

In fact the crane rental rates of the Port of Wilmington are set so as to recover its direct costs and overhead, and also to be competitive with rates of the competitors of the Port of Wilmington, such as the rates of the Port of Camden, Port of Philadelphia, and Port of Baltimore.

Wharfage, dockage, and crane rental rates for the Ports of Wilmington, Camden, Philadelphia, and Baltimore are competitive.

The existence of the tariff exculpatory clause is not a specific factor considered by the PW in setting tariff rates. However, to the extent that potential losses would be considered as overhead, and to the extent that the PW's liability for a particular loss might be limited by the existence of the exculpatory clause, the exculpatory clause may then have an effect on tariff rates of the PW.

Crane rental sales as of August 31, 1984, at Wilmington were:

Gantry Crane: $165 or $185 per hour.
Container Crane: $425 per hour, $325 per hour with hook, $325 per hour with bucket.

Crane rental rates at Camden were:

Gantry Crane: $161 per hour.
Container Crane: $432 per hour.

Crane rental rates at Baltimore were:

Gantry Crane: $120 per hour.
Container Crane: $475 per hour.

Crane rental rates at Philadelphia as of August 31, 1984, were included in the stevedoring rate.

The "indemnity" and "exculpatory" tariff provisions in issue herein are:

Section II, Paragraph 14: Responsibility for Equipment and Labor

> Neither the Port nor the City shall be liable for any damages resulting from the use of equipment leased or from activities or omissions of any operator and/or other labor furnished by the Terminal on a time basis. All parties who lease any such equipment and/or use such an operator and/or other labor shall indemnify the Terminal and the City against, and shall save them harmless from, any and all liability for loss, damage, expense, and cost resulting from the use of such equipment while so leased and/or from any act or omission on the part of such operator and/or other employee so furnished by the Terminal.

Section II, Paragraph 17: Non-Liability

> Neither the Port nor the City shall be liable for loss or damage to any merchandise in or upon, or moving or being moved over, in, through, or under any wharf or other structure or property owned, controlled, or operated by the Port, resulting from any cause whatsoever.

GENERAL DISCUSSION

The Port's tariff in its so-called indemnity provision, Paragraph 14, provides in part that neither the Port nor the City shall be liable for *any* damages resulting from the use of equipment leased or from activities or omissions of any operator and/or other *labor furnished by the Terminal on a time basis.* (Emphasis supplied.)

It is a well established principle that persons, such as the respondent Port, cannot by tariff provision relieve themselves of liability for their own negligence.

The question follows whether the Port's tariff provision above would relieve the Port from its own negligence. The Port interprets tariff Paragraph 14 as providing that the Port shall be held harmless from any liability arising out of the operation of its cranes. Complainant and Hearing Counsel disagree.

The respondent Port states that the fairness of its tariff provision can be judged only under the circumstances under which the Port cranes are leased.

Respondent insists that Paragraph 14 does not relieve the Port of responsibility for its own negligence during operation of the cranes, because any stevedore who leases a crane assumes full control over the crane and its operator during the operation of the crane, under the borrowed servant doctrine. The complainant and Hearing Counsel dispute the contention that the stevedore who leases a crane assumes full control over the crane and its operator.

The Port's cranes are rented by the hour, with the rental including both the cranes, and their operators when the stevedore does not provide operators. As seen, the stevedore provides the operators only for the container crane.

Depending upon the factual situations, certain Port tariff provisions, purporting to make the user of cranes liable for damages, have been found lawful and unlawful.

In Docket No. 74-15, *West Gulf Maritime Association* v. *Port of Houston Authority,* 22 F.M.C. 420 (1980), the Commission found that tariff items involving the liability of users for the negligence of crane operators were reasonable. The Commission added at page 422 that monopolistic conditions

which were present in the towing industry at the time of *Bisso*[2] and were crucial to the Court's decision, are not present with respect to the instant crane rental operations, and that Port users can and do obtain crane services other than from the ports.

In the *West Gulf* case, above, at page 441, the facts were, "Generally, the tariffs provide: that cranes rented from the ports will include a crane operator paid by the port although the port will charge the user for the operator's services; that, in engaging the operator and paying for his services, the port acts as the agent for the user; that, when using the port's crane, the operator will be under the direction and control of the user; that the operator is considered the servant of the user; that the port makes no warranties regarding the competency of the operator and the user must satisfy himself in this respect; and, that if the crane is negligently operated under the control and direction of the user, the user assumes full responsibility for the negligent operation, including the operator's negligence."

By contrast, in Docket No. 77–56, *West Gulf Maritime Association* v. *The City of Galveston,* 22 F.M.C. 101 (1979), the Commission found that an indemnification requirement in a terminal tariff which would relieve a port from liability for its own negligence is an unreasonable practice violative of section 17 of the Act.

In the case decided in 1979, next above, tariff item 98.1 provided in effect briefly, "Indemnity," each user shall indemnify and save harmless the City of Galveston from all claims, etc., occurring in connection with the use of any of the facilities of the Port of Galveston caused in whole or in part by any such user.

The Port pointed out that indemnification was required only where the user was at least partially responsible for damage, and not where the Port was solely responsible. It was contended by WGMA and Hearing Counsel that the tariff item would require indemnification even when the Port was primarily negligent in an accident and the user only slightly at fault. The Commission at page 103 stated that it is well established that exculpatory clauses are invalid as a matter of law in common carrier and public utility relationships.

In the present proceeding paragraph 14 is far different from the tariff provisions in the first-cited 1980 *West Gulf* case, above, wherein among other things, it was provided that the cranes and their operators would be under the direction and control of the users. Nothing is said in the present case, paragraph 14, about direction and control of the cranes and operators.

Returning to the wording of Paragraph 14 in the case now at issue, the tariff provides that neither the Port nor the City would be liable for *any* damages, regardless of who caused or was responsible for the damages.

[2] *Bisso* v. *Inland Waterways Corp.,* 349 U.S. 85 (1955).

While the Port of Wilmington assumes, or contends, that the tariff in referring to cranes or equipment leased on a time (hourly) basis means that the stevedore renting the crane has full control over the crane and its operator, the tariff in paragraph 14 does not so clearly state that the user has full control. Therefore, tariff paragraph 14 is unjust, unreasonable and unlawful in violation of section 17 of the Act insofar as it would relieve the Port or City for its own negligence.

Of course, another well established principle is that where a tariff is vague or uncertain, it must be construed against the maker of the tariff, in the present case against the PW.

The second part of tariff item paragraph 14, provides that all parties who lease equipment (cranes) and operators or other labor shall indemnify the City *from any and all liability* for loss, etc., while so leased and *from any act or omission* of the operator or other employee furnished by City.

Again, the provision next above would relieve the Port and City from its own negligence, and is therefore unlawful in violation of section 17 of the Act.

The so-called exculpatory tariff provision, paragraph 17, states that neither the Port nor the City shall be liable for loss or damage to merchandise in or upon, moving over, in, through, or under any structure or property owned, controlled, or operated by the Port, *resulting from any cause* whatsoever. Again, for the reasons above, this provision is unlawful insofar as it would relieve the Port or City from its own negligence.

Turning away from the tariff items, and turning to the matter of who actually controlled and directed the crane operators as an issue, there is the question of whether the actual practices at the Port of Wilmington constituted a "borrowed servant situation."

As seen above, once it has been concluded that the tariff provisions in issue are on their face unreasonable, it is unnecessary to go behind the terms of the tariff to determine their lawfulness. Nevertheless, since the parties have litigated the facts and law as to the borrowed servant issue, and as to other issues, some discussion relative to these other issues is deemed appropriate.

As the complainant points out, there is no quid pro quo to Wilmington Stevedores and to any other users of the Port's cranes and operators, for such users' assumption of the risk of loss or damage which may result from the negligence of the Port or its employees in the operation of the Port's cranes. For instance, there was no showing that the Port was not required to have certain liability insurance because the liability was clearly that of the Port's users.

Concerning one borrowed servant matter, the crane operators in issue here (not container crane operators), were paid, hired, and fired by the Port. They were trained by the Port, assigned to their particular jobs by the Port, and disciplined by the Port. On the other hand, these crane

operators depended upon and generally obeyed the signals given by employees of the stevedore in unloading or loading a ship.

It is concluded that in any one particular situation, the Port's crane operator may be acting for a time under the complete direction and control of a stevedore at the Port of Wilmington. But, the appropriate test in establishing who has control over the crane operators is not who actually exercised such control at the time, but who had the ultimate authority to exercise control over the crane operators. Again, we have to turn to the tariff's provisions. They do not state that the crane operators would be under the exclusive control and direction of the stevedore. Therefore, it follows that on any particular occasion, the Port Supervisor or other Port official would have the power to halt the actions of a crane operator employed by the Port, or otherwise to direct such crane operator's actions. And, it does not matter whether or not the Port's officials exercised such prerogatives, as long as they retained them. If the Port could not control its crane operators on any and all occasions, and if such crane operators were deemed to be under the exclusive control of a stevedore, then the Port's tariff should have so provided, but it did not.

ULTIMATE CONCLUSIONS AND FINDINGS

It is ultimately concluded and found that the Port of Wilmington's tariff provisions here in issue, paragraph 14 and paragraph 17, are unjust and unreasonable regulations, per se, relative to the receiving, handling and delivering of property in violation of section 17 of the Shipping Act, 1916, as amended, insofar as such tariff provisions are meant to relieve the Port of Wilmington for its own negligence.

No finding is here made, or is intended to be made, as to what party or parties were negligent in connection with the accident which occurred on or about September 27, 1982, involving the motor vessel *NORNED THOR*.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–9

BROES TRUCKING CO., INC.

v.

HOLT CARGO SYSTEMS, INC.

NOTICE

August 9, 1985

Notice is given that no appeal has been taken to the July 2, 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. 85–9

BROES TRUCKING COMPANY, INC.

v.

HOLT CARGO SYSTEMS, INC.

DISMISSAL OF COMPLAINT

Finalized August 9, 1985

By motion received June 10, 1985, the complainant and the respondent move for an order dismissing the complaint and discontinuing further proceedings herein, based upon an attached stipulation and settlement agreement dated June 3, 1985.

The stipulation and settlement agreement of the two parties herein, provides that the respondent make no further assessment of demurrage charges against the complainant with respect to any marine terminal facilities operated by respondent, provided however that if the respondent publishes individually or jointly a lawful tariff provision specifically allowing the assessment of demurrage charges against motor carriers, then such demurrage charges may be assessed. If such a tariff provision is filed with the Federal Maritime Commission, the respondent agrees to give 30 days prior written notice of said filing to the complainant. Respondent waives and rescinds all prior assessments of demurrage charges against the complainant and agrees not to attempt to collect such charges from complainant, by excluding complainant from respondent's terminal facilities or otherwise.

The complainant agrees not to prosecute further its complaint, and agrees to its dismissal.

In accordance with the general policy to approve settlements which are fair and equitable, and not contrary to the public interest, the settlement entered into by the parties is appeared, and the subject complaint is dismissed. The proceeding is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–8

IN THE MATTER OF THE INDEPENDENT ACTION PROVISIONS OF THE ATLANTIC AND GULF/WEST COAST OF SOUTH AMERICA CONFERENCE AGREEMENT

ORDER GRANTING PETITION FOR DECLARATORY ORDER

August 12, 1985

This proceeding was initiated following the filing of a Petition for Declaratory Order (Petition) by the Atlantic and Gulf/West Coast of South America Conference (Conference or Petitioner).[1] The Petitioner seeks a determination by the Commission that the Conference agreement lawfully precludes a member from taking independent action with respect to freight brokerage or freight forwarder compensation. Notice of the filing of the Petition was published in the *Federal Register* (50 *Fed. Reg.* 11246, March 20, 1985). Replies in support of the Petition were filed by the U.S.-European Carrier Associations (USECA)[2] and by the "8900" Lines and the U.S. Atlantic Gulf/Australia-New Zealand Conference "8900" Lines *et al.*). Replies in opposition to the Petition were filed by the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA), the San Francisco Customs Brokers & Freight Forwarders Association (SFCBFFA), and J.E. Lowden & Company (Lowden).

POSITIONS OF THE PARTIES

A. The Petition and Replies in Support

The Petition states that the Conference, relying on the advice of counsel, has concluded that a member does not have a right of independent action under the Conference agreement with respect to freight forwarder compensation.[3] Nevertheless, two Conference members have taken independent action regarding freight forwarder compensation and the Conference has published

[1] Lykes Bros. Steamship Co., Inc., a member of the Conference, did not join in the Petition.

[2] USECA is made up of North Europe-U.S. Gulf Freight Association (NEGFA), Gulf-European Freight Association (GEFA), North Europe-U.S. Atlantic Conference (NEAC), U.S. Atlantic-North Europe Conference (ANEC), and Pan-Atlantic Carrier Trade Agreement (PACT). Lykes Bros. Steamship Co., Inc., a member of NEGFA, GEFA, and PACT, did not participate in the USECA reply.

[3] The Petition seeks a declaratory order that the Conference agreement lawfully precludes independent action on both forwarder compensation and freight brokerage. The Petition notes that: "Often the terms 'brokerage' and 'freight forwarder compensation' are used interchangeably to describe the money paid by a carrier for securing cargo for a vessel." The Petition advances basically the same arguments with respect to both freight brokerage and forwarder compensation. The distinction between these types of payments is discussed below at pp. 13–15.

these actions in the Conference tariff. The Conference seeks a declaratory order to terminate this controversy among its members and to remove uncertainty with respect to future courses of conduct.

The Petition argues that neither freight forwarder compensation nor freight brokerage is a "rate or service item" within the meaning of the Shipping Act of 1984 (46 U.S.C. app. §§1701–1720) (the Act or the 1984 Act).[4] The Petition points out that the Commission has distinguished freight brokerage and forwarder compensation from rate making by requiring separate and distinct conference authority to collectively establish freight brokerage and forwarder compensation. The Petition maintains that, although forwarder compensation or freight brokerage may be an element in the rate making process, neither is in itself a "rate." Moreover, the Petition contends that neither forwarder compensation nor freight brokerage is a "service item" within the meaning of the Act because such payments are made by a carrier to an independent contractor, *i.e.* the forwarder or broker. The Petition maintains that the term "service item" is intended to apply only to a service provided by a carrier to a shipper or consignee. The Petition argues further that the specific reference to "rate or service item" in section 5(b)(8) qualifies the right of independent action and reflects a Congressional intent to exclude other items which may be required in tariffs. The mere fact that the level of forwarder compensation must be filed in a tariff allegedly does not make such payments subject to the mandatory independent action requirement, if they are not otherwise a "rate or service item" within the meaning of section 5(b)(8). The Petition notes that the legislative history indicates that the purpose of section 5(b)(8) was to strike a balance between the interests of conferences and shippers, not between conferences and freight forwarders. Finally, the Petition argues that, because the Act provides for forwarder compensation only in the export commerce of the United States, ". . . an anomalous situation would be created if conferences were mandated to provide for independent action in the U.S. export trades but would be free to operate otherwise in the U.S. import trade."

The "8900" Lines *et al.* support the position of the Petitioner. They argue that the term "rate or service item" is intended to refer to the rates or services offered by carriers to shippers. It is stated that the use of the term "rate" throughout the 1984 Act refers to costs charged by a common carrier to a shipper. Similarly, references to "service" in the 1984 Act are allegedly intended to mean service offered by a common carrier to a shipper, thereby excluding forwarder compensation. The "8900" Lines *et al.* contend that the independent action provision was initiated

[4] Section 5(b)(8) of the Act (46 U.S.C. app. §1704(b)(8)) states, in relevant part, that each conference agreement must:

"provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of this Act upon not more than 10 calendar days' notice to the conference . . . ."

and sponsored by shippers in the legislative process and was intended to benefit shippers, not forwarders and brokers.[5] Finally, the "8900" Lines *et al.* argue that granting the Petition would further the policy of the 1984 Act of minimizing government intervention by allowing each—conference to decide whether its members should have a right of independent action on forwarder compensation.

USECA adopts the arguments advanced in the Petition and adds further elaborations and contentions of its own. Relying on references to the term "rate" throughout the 1984 Act, USECA argues that forwarder compensation is not a "rate" within the meaning of section 5(b)(8). USECA states that the Act and its legislative history carefully distinguish a "rate" from forwarder compensation. USECA argues further that the term "service item" in section 5(b)(8) refers to the transportation service performed by a common carrier for a shipper and that the service provided by an ocean freight forwarder to a common carrier is not included within the term.

In addition to arguing that forwarder compensation is not a "rate or service item," USECA contends that brokerage, as distinguished from ocean freight forwarder compensation, is not "required to be filed in a tariff under section 8(a)" of the Act.[6] Furthermore, all matters relating to the level of freight forwarder compensation, and the terms and conditions of the payment thereof, in connection with U.S. foreign import commerce are allegedly excluded from section 5(b)(8).

B. Replies In Opposition

NCBFAA contends that the Petition fails to meet the procedural requirements for consideration of a declaratory order because: (1) the Petition fails to set forth a complete factual presentation; (2) the Petitioner is not seeking to remove uncertainty as to its own conduct which will allow it to act without peril; and (3) the Petition alleges violations of the Shipping Act.

NCBFAA takes the position that the mandatory right of independent action applies to freight forwarder compensation.[7] NCBFAA argues that

[5] The "8900" Lines *et al.* in their Reply use the phrase "forwarder compensation" to refer to both "freight forwarder compensation" and "freight brokerage". The 8900 Lines *et al.* state that: ". . . it is clear that the two terms were considered interchangable by the Congress when it passed the Act. In particular, section 10(c)(5) of the Act, which literally refers to 'compensation to an ocean freight forwarder' was described in the Conference Report as concerning the 'brokerage' paid to ocean freight forwarders. H.R. Rep. No. 600, 98th Cong., 2d Sess. 40 (1984).

[6] USECA notes that the Commission's regulations carefully distinguish between freight brokerage and freight forwarder compensation. USECA points out that neither the level of freight brokerage nor the terms and conditions applicable to the payment of freight brokerage are required to be filed in a tariff under section 8(a) of the Act. For this reason, USECA concludes that freight brokerage is completely outside the reach of the independent action provision of section 5(b)(8) of the Act.

[7] NCBFAA's reply does not address the question of whether independent action applies to freight brokerage as well. Lowden similarly argues only that independent action applies to freight forwarder compensation. SFCBFFA, on the other hand, views independent action as applicable to both freight brokerage and freight forwarder compensation.

section 5(b)(8) cannot be construed to exclude forwarder compensation as a "rate or service item" because to do so would remove the ability of a member line to compete with other conference members or with independent lines by taking independent action on compensation to forwarders.[8] NCBFAA argues that to interpret the term "service item" to mean a service provided by a carrier to a shipper or consignee would, in effect, amount to an amendment of the 1984 Act by an administrative interpretation. Further, NCBFAA argues that granting the Petition would expand conference antitrust immunity, a matter which NCBFAA states should be left to Congress. Finally, NCBFAA argues that the Petition should be denied because the Conference and some of its member lines have unlawfully effectuated an unfiled agreement.

Lowden argues that section 5(b)(8), providing for independent action on any "rate or service item" required to be filed in a tariff, and section 8(a)(1)(C),[9] requiring common carrier tariffs to state the level of ocean freight forwarder compensation, taken together, permit a member line to take independent action on freight forwarder compensation.

DISCUSSION

A. Petition's Compliance with Procedural Requirements

A threshold procedural question raised is whether the Petition meets the technical requirements of Rule 68 (Declaratory Orders and Fee) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.68). Rule 68(a)(2) states that a petition for declaratory order shall ". . . include a complete statement of the facts and grounds prompting the petition. . . ." NCBFAA argues that the Petition here fails to satisfy this requirement because it does not name the two Conference members taking independent action, does not state why they have taken independent action, and does not specify the extent of the independent action.[10]

The facts presented in the Petition are sufficient to meet the requirement of Rule 68(a)(2). A petition for declaratory order must contain a sufficiently complete statement of facts as are necessary to the resolution of the particular controversy. The absence of facts which are not relevant to the resolution of the controversy does not render a petition defective. Here,

[8] In opposing the Petition, the San Francisco Customs Brokers & Freight Forwarders Association states: "In allowing independent action on this matter competition will be offered and U.S. Exporters will more easily be able to trade in the International Market Pace [sic]."

[9] Section 8(a)(l)(C) (46 U.S.C. app. § 1707(a)(l)(C)) requires that tariffs shall:

"state the level of ocean freight forwarder compensation, if any, by a carrier or conference . . . ."

[10] NCBFAA cites as support for its position a Commission order denying an NCBFAA petition for declaratory order. *See National Customs Brokers and Forwarders Association—Petition For Declaratory Order And Other Relief*, Order Denying Petition, 21 S.R.R. 208 (November 6, 1981) ("Order Denying Petition"). The NCBFAA petition, however, had sought a determination that certain unnamed conferences had unlawfully prohibited the payment of brokerage on bunker and currency surcharges and had otherwise violated the Shipping Act, 1916. The NCBFAA petition had also sought a cease and desist order and had requested the Commission to institute civil penalty proceedings. Accordingly, the Commission held that the requirements of Rule 68 had not been met. The NCBFAA petition is clearly distinguishable from the Petition now before the Commission.

the identity of the Conference members taking independent action, their reasons for, and the extent of, such actions are not relevant to the issue presented in the Petition. That issue is primarily a question of law which depends upon the construction of section 5(b)(8) of the Act for its resolution. The facts which NCBFAA states are missing are simply not necessary to a determination of that issue.

Rule 68(b) states that declaratory order procedures ". . . shall be invoked solely for the purpose of obtaining declaratory rulings which will allow persons to Act without peril upon their own view." NCBFAA argues that the Petition does not meet this requirement because it is the two member lines taking independent action and not the Conference that are allegedly acting at their peril. According to NCBFAA, the Petitioner (*i.e.* the Conference) does not allege that it is acting at its own peril and therefore is not a proper petitioner.

NCBFAA's position is without merit. The Petition states that it seeks a declaratory order ". . . to terminate a controversy among its members and to remove uncertainty with respect to future courses of conduct." It is clear from the facts of the Petition that a controversy does exist among the members. If the Conference's interpretation of the 1984 Act is incorrect, then it would be acting contrary to the Act by prohibiting members from taking independent action on forwarder compensation. On the other hand, if the position of the two member lines is incorrect, then those members taking independent action would be acting contrary to the Act and in violation of their agreement. Clarification of this controversy will allow both the Conference and its members to act without peril. The Petition therefore meets the requirement of Rule 68(b) on this point.

Finally, with regard to the question of alleged statutory violations, Rule 68(b) states further that:

> "Controversies involving an allegation of violation by another person of statutes administered by the Commission, for which coercive rulings such as payment of reparation or cease and desist orders are sought, are not proper subjects of petitions under this section."

NCBFAA argues that the Petition runs afoul of this requirement by alleging a violation of the 1984 Act. The asserted violation is the fact that two members of the Conference have taken independent action on forwarder compensation.

NCBFAA's argument misconstrues this requirement of Rule 68(b). Rule 68(b) declares that controversies which allege a violation of Commission administered statutes *and which seek a coercive ruling* are not a proper subject of a petition for declaratory order. Most, if not all, petitions for declaratory order, by their very nature concern potential violations of law. In fact, as noted above, a potential legal peril must be demonstrated before the Commission will, under its Rules, even entertain a petition for declara-

tory order. Only those petitions which, in addition, seek coercive rulings are improper.

The Petition in this proceeding sets forth the controversy between the Conference and the two member taking independent action. Inasmuch as both sides in this controversy cannot simultaneously be correct, one of these positions may be determined to be inconsistent with the Act. But such a circumstance is inherent in a request for a declaratory ruling. Otherwise, the Conference would not be acting with peril. The critical point is that this Petition does not seek a coercive ruling such as the payment of reparation or a cease and desist order. The Petition, therefore, complies with this requirement of Rule 68(b).

Accordingly, the Commission concludes that the Petition is not procedurally deficient as alleged by NCBFAA and otherwise meets the requirements of Rule 68 governing declaratory orders. The Petition, therefore, may appropriately be considered on its merits.

B. Independent Action and Forwarder Compensation

The Petition asks that the Commission issue declaratory ruling that:

> "The basic agreement of the Atlantic and Gulf/West Coast of South America Conference, FMC Agr. No. 202–002744, as amended, precludes a member from taking independent action with respect to either freight brokerage or freight forwarder compensation."

At the time of the filing of the Petition, the independent action provision in the Conference agreement was that which had been adopted by the Conference pursuant to the Commission's amended interim agreements' rule.[11] The language of the Conference's original independent action provision essentially restated the language of section 5(b)(8) of the Act. Subsequent to the filing of the Petition, the Conference filed an amendment to the Conference agreement, which among other things, substituted a new independent action article for that which had been previously adopted.[12]

[11] On June 12, 1984 the Commission issued an amendment to the interim agreements' rule implementing the 1984 Act which, among other things, required conferences to adopt a mandatory provision providing for independent action. *See* Rules Governing Agreements By Ocean Common Carriers and Other Persons Subject To The Shipping Act of 1984, 46 C.F.R. §572.801(e)(1) (49 *Fed. Reg.* 24697, June 14, 1984). This mandatory provision provided, in relevant part, that:

> "(e) Independent Action. (1) Any party to this agreement may take independent action on any rate or service item required to be filed in a tariff pursuant to section 8(a) of the Shipping Act of 1984 (46 U.S.C. app. 1707(a)) upon [10 or such lesser period as the conference may elect] calendar days' notice to the conference."

[12] The amendment to the Conference agreement was filed pursuant to the Commission's final rule governing agreements issued on November 15, 1984. The final rule provided that conferences could develop their own independent action provisions in accordance with Commission regulations. *See* Rules Governing Agreements By Ocean Common Carriers And Other Persons Subject To The Shipping Act of 1984, 46 C.F.R. §§572.103(f), 572.502(a)(4) (49 *Fed. Reg.* 45320, November 15, 1984). Petitioner's amendment to its agreement was filed on February 11, 1985 and became effective on March 28, 1985. The text of Petitioner's currently effective independent action article, as relevant to this Petition, states:

Although the Petition seeks a ruling only with regard to the independent action article in its amended agreement, the fundamental issue raised by the Petition concerns the proper construction of section 5(b)(8) of the Act. The issue raised, therefore, is one of general concern to all conference agreements.

In addressing the Petition on its merits, it is necessary at the outset to distinguish between freight forwarder compensation and freight brokerage. The Shipping Act of 1984 defines "an ocean freight forwarder" as a person in the United States that:

> "(A) dispatches shipments from the United States via common carriers and books or otherwise arranges space for those shipments on behalf of shippers; and
>
> (B) processes the documentation or performs related activities incident to those shipments."

46 U.S.C. app. § 1702(19). Although the Act does not define "freight forwarder compensation," the Commission's regulations indicate that such compensation means payment by a common carrier to a freight forwarder who has:

> "(1) Engaged, booked, secured, reserved, or contracted directly with the carrier or its agent for space aboard a vessel or confirmed the availability of that space; and
>
> (2) Prepared and processed the ocean bill of lading, dock receipt, or other similar document with respect to shipment."

46 C.F.R. §§ 510.2(f), 510.23(c).

A freight broker, on the other hand, is distinct from an ocean freight forwarder. The 1984 Act does not define a freight broker. However, the Commission's regulations define an "ocean freight broker" as:

> "an entity which is engaged by a carrier to secure cargo for such carrier and/or to sell or offer for sale ocean transportation services and which holds itself out to the public as one who negotiates between shipper or consignee and carrier for the purchase, sale, conditions and terms of transportation."

46 C.F.R. § 510.2(m). The regulations further define the term "brokerage" as payment by common carrier to an ocean freight broker for the performance of services specified in section 510.2(m). The Act, together with the Commission's regulations, make clear that "ocean freight forwarder

"ARTICLE 13: INDEPENDENT ACTION
(a) Each Member shall have the right to take independent action with respect to any rate or service item authorized by this Conference and required to be published in any tariff of the Conference under § 8 of the Shipping Act of 1984. Any such Member may take independent action effective not earlier than ten (10) calendar days following notification, in writing or by telex, to the Conference Chairman specifying in detail that Member's action."

compensation'' and ''freight brokerage'' are different kinds of payments for different services.

Both the 1984 Act and the Commission's regulations require that tariffs state the level of ocean freight forwarder compensation, if any, paid by a carrier or conference. 46 U.S.C. app. § 1707(a)(1)(C) 46 C.F.R. § 580.5(d)(9). However, neither the Act nor the regulations contain any requirement that freight brokerage be included in a tariff. Because freight brokerage is not required to be filed in a tariff,[13] the independent action provision of section 5(b)(8) does not apply.[14] Inasmuch as freight brokerage is simply not addressed under the 1984 Act, there is nothing which would preclude a conference from allowing or prohibiting independent action with regard to the payment of freight brokerage.

The paramount issue raised by the Petition is whether freight forwarder compensation is a ''rate or service item'' within the meaning of section 5(b)(8) of the Act. We interpret the term ''rate or service items'' as a single concept which embraces two integrally related activities, namely the rates established or the transportation services provided by a common carrier to a shipper. Freight forwarder compensation, on the other hand, is the payment of a fee by a carrier to an independent contractor for forwarding services rendered by that independent contractor to the carrier.[15] Freight forwarder compensation, therefore, is not a ''rate or service item'' within the meaning of the Act. This conclusion is supported by an analysis of the language of the Act and its legislative history.

The 1984 Act does not define the term ''rate''. The Act, however, does define the term ''through rate'' as ''. . . the single amount charged by a common carrier in connection with through transportation.'' 46 U.S.C. app. § 1702(25). This definition of ''through rate'' supports the view that a rate is the charge levied by an ocean common carrier for the transportation service which it provides to a shipper.

Other references to the term ''rate'' in the 1984 Act further support the conclusion that a rate is a charge to a shipper by a carrier for the carrier's services. For example, section 8(d) (46 U.S.C. app. § 1707(d))

[13] Section 8(a)(1) (46 U.S.C. app. § 1707(a)(1)) states that:

''Except with regard to bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste, each common carrier and conference shall file with the Commission, and keep open to public inspection, tariffs showing all its rates, charges, classifications, rules, and practices between all points or ports on its own route and on any through transportation route that has been established. However, common carriers shall not be required to state separately or otherwise reveal in tariff filings the inland divisions of a through rate.

[14] It would appear that the reference in the Conference Report cited by the ''8900'' Lines *et al.* to ''brokerage'' paid to ocean freight forwarders is merely a casual use of the word and is not intended as a term of art. *See* footnote 5.

[15] Payment of forwarder compensation is analogous to the payment of fee by a carrier to a consolidator for its services to the carrier. In *Cancellation—Consolidation Allowance Rule*, 20 F.M.C. 858, 865-866 (1978), the Commission distinguished between such payments to consolidators and the rates charged to a shipper as follows: ''More accurately, these allowances represent a *fee* whose payment the carriers have jointly determined to be acceptable in return for a service performed by the consolidator. There is a critical difference between such a payment of compensation to the consolidator for service provided and a rate or charge assessed shipper/consignee for the carriage of cargo.''

speaks of increases or decreases in rates as changes in the cost to the shipper. Similarly, the reference to time-volume rates in section 8(b) (46 U.S.C. app. § 1707(b)) refers to rates charged by a carrier to a shipper. These and numerous other references to the term "rate" throughout the 1984 Act, taken in context, suggest that a rate is the price for which a common carrier sells its transportation service to shipper.[16] Forwarder compensation, on the other hand, is the amount which a common carrier *pays* to a forwarder for the forwarder's services. The two activities are clearly distinguishable.

In addition, section 8(a), the tariff filing provision, itself distinguishes between a "rate" and "freight forwarder compensation." Section 8(a)(1) requires that each common carrier and conference shall file tariffs ". . . showing all its rates, charges, classifications, rules, and practices . . . ." A separate provision of section 8(a), namely section 8(a)(1)(C), requires further that tariffs shall ". . . state the level of ocean freight forwarder compensation, if any, by a carrier or conference . . . ." If forwarder compensation were a "rate" within the meaning of the Act, it would already be covered by section 8(a)(1) and there would have been no need for section 8(a)(1)(C) requiring that tariffs state the level of forwarder compensation.

Nowhere in the 1984 Act or its legislative history is there any indication that forwarder compensation is a "rate" within the meaning of the Act generally or section 5(b)(8) in particular. On the other hand, the definition of "through rate", other references to the term "rate", and the separate provisions for filing rates and stating levels of forwarder compensation, all indicate that forwarder compensation is not a "rate" within the meaning of section 5(b)(8).

This interpretation of the 1984 Act and its legislative history is further supported by the historical development of the requirement that levels of forwarder compensation be stated in a tariff. Prior to the 1984 Act, there was no statutory requirement that levels of forwarder compensation be stated in a tariff. However, in 1966, pursuant to its authority under section 44(c) of the Shipping Act, 1916 to prescribe rules governing freight forwarders, the Commission issued regulations which, for the first time, required that levels of forwarder compensation be stated in a tariff. *See* Docket No. 66–31, *Part 510 Licensing of Independent Ocean Freight Forwarders* (131 *Fed. Reg.* 13650, October 22, 1966) (the 1966 Amendment). In issuing the 1966 Amendment, the Commission acknowledged that the level of forwarder compensation may affect a carrier's rates. The Commission did not, however, regard forwarder compensation as itself a rate because it expressly stated that forwarder compensation would not be subject to the 30-day notice period for any new or initial rate. *Id.* at 31 *Fed. Reg.*

[16] *See* e.g. the following references to the term "rate" or "rates": "certain rate" (section 3(21)); "rate schedule" (section 3(21)) "volume rate" (section 3(25 and 26)) etc.

13650–13651. Forwarder compensation was viewed as a distinct form of payment and, as such, not a "rate" subject to statutory notice requirements. The 1984 Act simply codifies the previous rule requirement that levels of forwarder compensation be published in a tariff. The mere fact that the level of forwarder compensation must be published in a tariff does not make it a "rate" within the meaning of section 5(b)(8) of the Act.

Finally, it should be noted that past Commission decisions distinguish between the general authority of a conference to fix rates and the specific authority to collectively establish the level of forwarder compensation. The Commission has held that the authority to fix the level of forwarder compensation (or freight brokerage) is not interstitial to a conference's basic ratemaking authority and that a separate, express statement of authority to do so is required.[17] This distinction in kinds of agreement authority recognizes that forwarder compensation (as well as freight brokerage) is not a rate within the meaning of the Act.

The same reasoning as applies to the consideration of whether forwarder compensation is a "rate item" leads to the conclusion that forwarder compensation is not a "service item" within the meaning of section 5(b)(8). Although the Act does not define the term "service item," it does define the term "service contract" as:

> "a contract between a shipper and an ocean carrier or conference in which the shipper makes a commitment to provide a certain minimum quantity of cargo over a fixed time period, and the ocean common carrier commits to a certain rate or rate schedule as well as a defined service level—such as, assured space, transit time, port rotation, or similar service features; the contract may also specify provisions in the event of nonperformance on the part of either party."

46 U.S.C. app. § 1702(21). The "service features" referred to in this definition represent service commitments by a carrier to a shipper. These include items such as assured space, transit time, and port rotation. All of these items are elements of the transportation service which a carrier provides to a shipper. The definition of "service contract," therefore, supports the proposition that the reference to "service" in section 5(b)(8) is intended to mean the transportation service provided by a carrier to a shipper.[18]

Additional support for the view that "service item" referred to in section 5(b)(8) is intended to be to "service" provided by a carrier to a shipper may be found in the origin and purpose of the independent action provision

[17] *See U.S. Pacific Coast/Australia, New Zealand, South Sea Islands Trade—Unapproved Agreements*, 13 F.M.C. 139, 143 (1969); Investigation, Practices, Etc. N. Atlantic Range Trade, 10 F.M.C. 95, 109 (1966); *Practices and Agreements of Common Carriers*, 7 F.M.C. 51, 57 (1962).

[18] This view is also consistent with the use of the term "service" in prior Commission decisions. For example, Commission cases involving independent action on intermodal rate have determined that a through rate incorporating an inland movement by truck is a *distinct* "service" from a through rate which incorporates an inland movement by rail.

of the 1984 Act.[19] The mandatory independent action provision was one of the features of the Act that originated in the shipper community. Moreover, the legislative history indicates that independent action was intended to balance the interests of carriers and shippers.[20] The statutory requirement for independent action was intended to function as a pro-competitive measure which would counterbalance the enhanced economic power of conferences in their dealings with shippers.[21] From this it appears that the mandatory right of independent action was intended to apply only to carrier service offerings to shippers.[22] Moreover, there is nothing in the legislative history of the 1984 Act which would support the proposition that ocean freight forwarders were intended beneficiaries of the mandatory independent action provision.

The fact that section 8(a)(1)(C) requires that the level of forwarder compensation be stated in a tariff, does not make forwarder compensation a "service item" to which the mandatory right of independent action applies, as argued by the opponents of the Petition. The apparent assumption in that argument is that everything required to be filed in a tariff is also required to be subject to independent action. As noted by Petitioner, however, such a principle could lead to absurd results which were never intended by Congress. More significantly, this argument does not directly address the question of whether forwarder compensation is a "service item" within the meaning of section 5(b)(8).

The various other arguments advanced in opposition to the Petition do not present any barrier to granting the requested ruling. Excluding forwarder compensation from the ambit of section 5(b)(8) does not, as argued by NCBFAA, amount to an amendment of the statute. Rather, it is a reasonable interpretation of the meaning of section 5(b)(8) in light of the overall purposes and objectives of the 1984 Act and its legislative history.

Nor is such an interpretation contrary to Congressional intent to promote competition by enabling conference members to compete with non-conference members with regard to forwarder compensation, as argued by NCBFAA. Other than a general statement from the legislative history that the Act is intended "to retain competitiveness", NCBFAA offers nothing from the legislative history which would support the notion that Congress

[19] Review of the origin and purpose of the independent action provision also supports the proposition that "forwarder compensation" is not "rate item" under section 5(b)(8).

[20] *See* S. Rep. No. 98–3, 98th Cong., 1st. Sess. 14 (1983): "A compromise agreement was reached by all U.S. flag carriers and major shipper representatives to seek clarifying modifications to several sections of S. 1593, principally regarding independent action, loyalty contracts, and service contracts."

[21] *See* H.R. 98–600, 98th Cong., 2nd Sess. 34 (1984). Forwarders, on the other hand, were protected from the collective exercise of economic power by section 10(c)(5) of the Act (46 U.S.C. app. § 1709(c)(5)) which prohibits a conference or group of common carriers from denying forwarder compensation or limiting it to less than a reasonable amount.

[22] *See* the remarks of Rep. Fish, 130 *Cong. Rec.* H. 1293 daily ed. March 6, 1984):

> "Independent action is the right of a conference carrier to charge a different rate, or institute a different service practice than that of the rest of the conference. This universal right of independent action is a major step forward, protecting the options of individual carriers and shippers alike."

intended that conference members should compete on forwarder compensation. In addition, the legislative history reflects a clear Congressional intent to strengthen conferences by allowing conferences a greater degree of commercial freedom.

Nor can the general principle that antitrust exemptions are to be narrowly construed be applied here, as suggested by NCBFAA, to defeat the Petition. Finally, there is no evidence to support NCBFAA's allegation that the Conference and some of its member lines have unlawfully effectuated an unfiled agreement to attempt to block two member line from acting independently on forwarder compensation.

CONCLUSION

We conclude, therefore, that neither brokerage nor freight forwarder compensation, the terms and conditions for the payment thereof, or the services provided in connection therewith, is a "rate or service item" within the meaning of section 5(b)(8). The Act, therefore, doe not provide for mandatory right of independent action with regard to forwarder compensation or freight brokerage.[23] Accordingly, the independent action provision in Petitioner's amended agreement is lawful under the Act.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order of the Atlantic and Gulf/West Coast of South America Conference Agreement is granted as indicated in this Order.

By the Commission.

(S) BRUCE A. DOMBROWKI
Acting Secretary

[23] Whether independent action would be allowed on forwarder compensation would be a matter to be decided by the individual conference. A conference could preclude independent action on forwarder compensation or it could voluntarily permit independent action on forwarder compensation, subject, of course, to an appropriate filing of agreement authority under section 5 (46 U.S.C. app. § 1704).

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 OF DISMISSAL [1]

August 15, 1985

Complainants, California Cartage Co., Inc., *et al.*[2] (Cal Cartage), have filed a Motion Addressed to the Commission for the Entry of Final Order (Motion), to which Respondent, Pacific Maritime Association (PMA), and Intervenor, International Longshoremen's & Warehousemen's Union (ILNU), have filed a Reply. The Motion seeks dismissal of the proceeding to allow Cal Cartage to appeal the Commission's prior determination that the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. § 1701–1720) applies to this case and precludes all but a limited reparation remedy to Complainants.

BACKGROUND

The complaints in these proceedings alleged that an assessment agreement to fund ILWU members' fringe benefits, 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

[1] To provide the parties with a single document intended to operate both as a reviewable final order and ultimate disposition herein, the Commission will incorporate the reasoning of its May 23, 1985 Order Denying Motion to Dismiss and Remanding Proceeding and also set forth the authority relied upon for dismissal of the proceeding. (27 F.M.C. 871)

[2] 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.

agreement'' as defined in the MLAA and dismissed the proceeding for lack of jurisdiction. *California Cartage Co., et al.* v. *Pacific Maritime Assoc.*, 21 S.R.R. 1333 (1982). Exceptions to the Initial Decision were filed by all parties to the proceeding.

On exceptions, 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 requirments of the MLAA. However, the Commission further found that Complainants lacked standing to file a complaint under the MLAA because they paid no ssessments under the Agreement and generally were not within the protected "zone of interests."[3] The Commission accordingly dismissed the complaints. *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 for the 9th Circuit 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,[4] 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 1984 Act 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.[5] These developments prompted PMA and ILWU to seek dismissal of the remanded proceeding.

The Commission denied the PMA/ILWU Motion to Dismiss on the basis that although the 1984 Act prospectively extinguished Complainants' standing and cause of action under the MLAA, it would not be applied retroactively so as to deprive them of an available remedy for unlawful injuries sustained prior to the effective date of the 1984 Act. The proceeding

[3] Complainants are off-dock container freight stations which do not utilize ILWU 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 persons in the position of complainants solely because of its competitive effects.

[4] 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. . . ."

[5] *See*, section 3(d) of the 1984 Act (46 4. S.C. app. § 1704(d)) at footnote 6, *infra*. In opposition to a *subsequent* PMA/ILWU Petition for a Writ of Certiorari, the Solicitor General noted the changes in the law and argued to the Supreme Court that "[b]ecause Congress has effectively overruled the court of appeals prospectively, the questions presented here are unlikely to arise in the future . . . Memorandum for the United States in Opposition at 4, *International Longshoremen's and Warehousemen's Union et al.* v. *United States of America*, No. 83-1960 (U.S. 1983, October Term). The Petition for a Writ of Certiorari was denied. 1055 S.Ct. 110.

was remanded to the Presiding Officer under an expedited briefing and decision schedule to determine whether a detriment to commerce has been shown on the record and whether Cal Cartage is entitled to reparations. *Order Denying Motion to Dismiss and Remanding Proceeding,* issued May 23, 1985 (May Order).

DISCUSSION

In its present Motion requesting issuance of a final order, Cal Cartage points out that the Commission's May Order essentially granted PMA/ILWU's Motion to Dismiss in all respects except for potential reparations from the date of filing of Agreement No. LM–81 to June 18, 1984. Cal Cartage notes that the Commission recognized only this limited remedy under the 1916 Act with respect to injuries suffered by Cal Cartage as a result of any detriment to commerce caused by LM–81; all other remedies have purportedly been denied. Cal Cartage advises, however, that it has already waived its right to reparations in this case and continues to do so. It therefore now seeks to obtain a final dismissal of the proceeding by the Commission with the expressed intention of appealing the Commission's May Order addressing the effects of the 1984 Act on this case.

PMA/ILWU in their Reply basically agree that Cal Cartage has already waived its rights to reparations in this proceeding and that the proceeding should be terminated. However, PMA/ILWU contend that no remedies are left available to Cal Cartage.

The Commission remains of the opinion that the 1984 Act and its legislative history mandate a finding in this proceeding 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[6] and the "any person" standing provision of section 11(a) of that Act[7] is not applicable to assessment agreement cases. Accordingly, both the basis of standing and the substantive cause

[6] 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 complaint 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."* *(emphasis added).*

[7] Section 11(a) of the 1984 Act (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."

of action found available to Complainants by the Court of Appeals have been removed by the 1984 Act. The timing of this change and the legislative history of the 1984 Act[8] indicate an intention to overrule the Court's decision at least as it operates prospectively.

The savings provisions of section 20(e)(2)(A) of the 1984 Act,[9] have previously been interpreted by the Commission as applying only to court actions and not applying to pending administrative cases.[10] To support that interpretation, the Commission cited H.R. Rep. No. 53, Part 1, 98th Cong., 1st Sess. 39 (1983). That portion of the legislative history contains the following discussion of the savings provisions:

> "Subsection (e) contains two savings provisions. One provides that service contracts entered into before the date of enactment may remain in full force and effect and are given until 15 months after enactment to comply with the requirements in this bill. This should permit sufficient time to meet all transitional requirements. *The other savings provision is intended to preserve the rights of parties to lawsuit that are filed before the date of enactment.* Since section 7(a)(7) of the bill makes the antitrust laws inapplicable to any agreement, modification, or cancellation that was approved by the Federal Maritime Commission under present law, there were some who thought this would adversely affect pending *lawsuits. The intent of this savings provision is to permit such suits to continue to conclusion* as if the legislation were never enacted." (emphasis added).

This discussion addressed section 19(e) of H.R. 1878, the House version of the 1984 Act. In the Conference Report on S. 47, the Senate accepted the House version of the savings provisions, enacted as section 20(e) of the 1984 Act, H.R. Rep. No. 600, *supra*, at 44.

There is additional support of the Commission's interpretation of section 20(e) contained in its May 15, 1984 Notice. An earlier version of the 1984 Act, S. 1460, contained the following provision which was not carried forward in any version of S. 47. That provision stated:

[8] *See*, H.R. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984).

[9] 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 * * *."

[10] 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) (May 15 Notice). The May 15 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 (1984). *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 "manifest injustice" to a party would result. In announcing the above policy, the May 15 Notice stated:

> "Section 20(e)(2) . . . which applies to *suits* with respect to claims arising out of conduct engaged in prior to the Act, . . . has no application to cases pending before the Commission. H.R: Rep. No. 53, 98th Cong., 1st Sess. 39 (1983).

> "Repeal of the laws set forth in subsection (a) of this section shall not affect any rights and duties that matured, penalties that were incurred or proceedings that were commenced before the date of enactment of this Act."

The use of the term "suit" in the 1984 Act as opposed to the term "proceeding" in S. 1460 supports the Commission's interpretation of section 20(e). This is further buttressed by the fact that the 1984 Act refers to complaints and investigations brought under section 11 as "proceedings" and not "suits." *See*, Section 11 (d) and (e) of the 1984 Act (46 U.S.C. app. 1710 (d) and (e)).

Finally, the term "suit" as it is commonly understood in legal usage encompasses not all "proceedings" but only court actions. Black's Law Dictionary defines "suit" as follows:

> "A generic term of comprehensive signification, referring to any *proceeding* by one person or persons against another or others in a *court of justice* in which the plaintiff pursues, *in such court*, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity." (emphasis added).

Black's Law Dictionary 1286 (5th ed. 1979). The case cited by *Black's* in support of the definition, *Kohl* v. *U.S.*, 91 U.S. 367, 375 (1875), cites an earlier opinion by Chief Justice Marshall, *Weston* v. *Charleston*, 2 Pet. 448 (1829), wherein it was stated:

> "[I]f a right is litigated in a court of justice, the *proceeding* by which the decision of the *court* is sought is a *suit*." (emphasis added).

Weston v. *Charleston*, 2 Pet. at 464.

Therefore, the legislative history of the 1984 Act, the use of the term in the statute and its commonly understood plain meaning, indicate that the scope of the "suits" preserved by section 20(e) is limited to court actions.

Finally, it should be noted that acceptance of Cal Cartage's interpretation of section 20(e) could lead to absurd results. Unlike the 1916 Act, the 1984 Act contains no "detriment to commerce" standard for assessment agreements, and the "any person" standing provision of section 11 was made inapplicable to MLAA complaint cases. As a result, under the 1984 Act no assessment agreement can be challenged as detrimental to commerce and no other MLAA complaint can be brought under the "any person" standing provision. Therefore, if Cal Cartage's interpretation is accepted LM–81 would be the only assessment agreement subject to the old standard and Cal Cartage the only party that could assert it. This would, in effect, result in a perpetuation of the 1916 Act assessment agreement standards against PMA/ILWU to the exclusive benefit of Cal Cartage. We do not

believe that Congress intended such a result. Complainants' standing and statutory cause of action therefore appears to be extinguished under the 1984 Act.

The *Bradley* rule,[11] does recognize an exception to the application of the 1984 Act to pending administrative cases 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 by application of the 1984 Act.[12]

Section 15 of the 1916 Act contains two basic remedies available in MLAA complaint cases, disapproval or modification of the agreement, and assessment adjustments. Neither of these remedies could now be afforded Complainants here. First, if LM-81 were now found to be "detrimental to commerce", the Commission could not retroactively disapprove or modify the Agreement.[13] 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.[14] 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, section 15 assessment adjustments were only available to remedy unjust discrimination in assessment agreements, not those found detrimental to commerce.[15] Therefore, because the Court of Appeals has already found that Complainants could not advance such a cause of action,[16] no assessment adjustment remedy "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 of the 1916 Act to determine whether any potential right or remedy had accrued to Complainants that was not inconsistent with section 15 of that Act.[17] Section 15 contains specific remedies for assessment agreements found to be unlawfully discriminatory which are inconsistent with and therefore displace the repara-

[11] *See*, footnote 10, *supra*.

[12] *See*, *Indianapolis Power & Light Co.* v. *I.C.C.*, 687 F.2d 1097th Cir. 1982).

[13] *See*, *National Ass'n of Recycling Industries, Inc.* v. *American Mail Line, Ltd.*, 720 F.2d 618, 620 (9th Cir. 1983).

[14] *Ziffrion* v. *U.S.*, 318 U.S. 73 (1943); *see also*, *SeaLand Service, Inc.* v. *I.C.C.*, 738 F.2d 1311, 1314-15 (D.C. Cir. 1984); *Central Freight Lines8 Inc.* v. *U.S.*, 669 F.2d 1063, 1069 (5th Cir. 1982).

[15] 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).

[16] *California Cartage Co.* v. *U.S.*, , *supra*, 721 F.2d at 1205.

[17] 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—Pineda* v. *U.S. Dept. of Justices, 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).

tions of section 22. However, the same cannot be said of reparations for an unlawful "detriment to commerce." Section 15 does not prescribe an express remedy for an assessment agreement found detrimental to commerce. Accordingly, reparations may 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 May Order held that Complainants' "right" to a decision on the merits of their case and on their original request for reparations had sufficiently "matured" or "vested" so as to preclude its dispossession by application of the 1984 Act.[18] 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 as a result of a threshold decision on their standing to sue that has been overturned on appeal would appear to have constituted "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.

An argument which Cal Cartage advances in its Motion, but which was not specifically discussed in the May Order, is that it may claim reparations "payable to Complainants' customers which have paid assessments pursuant to LM–81." The Commission did not address this argument in the May 23 Order because it was originally raised as part of Cal Cartage's discrimination claim which the Court of Appeals rejected. *California Cartage Co.* v. *U.S.*, *supra*, 721 F.2d at 1205. To the extent this argument would now have any validity it would appear to have to find support in the Court's statement that there is "nothing in the statute which restricts [Cal Cartage's] standing to enforce the [detriment to commerce] standard . . . . [of the Maritime Labor Agreements Act (MLAA)]." *Id.*[19]

It would appear, therefore, that Cal Cartage may now be arguing that because it has standing to enforce the MLAA "detriment to commerce" standard it can obtain injunctive-type relief against PMA to refund assessments to Cal Cartage customers as "reparations."[20] Complainants' attempt

[18] The Commission was aware of the potential waiver of reparations. However, it did not impute a continuing waiver of reparations. The intervening appeal and legislation combined with the Commission's interests in affording Cal Cartage the fullest reach of remedies provided by law militated against a finding of a continuing waiver.

[19] On this point the Court cited to *Fentron Industries* v. *National Shopmen Pension Fund*, 674 F.2d 1300, 1304 (9th Cir. 1982), which involved an employer charge that the actions of employee pension fund trustees with respect to employee pension claims violated federal law. The court found that the employer had standing to sue because it alleged injury in fact to its employer-employee relations and that such relations were within the statute's "zone of interests" even though employers were not specifically provided a right to sue under that statute.

[20] Cal Cartage also suggested to the Court of Appeals that Congress intended to preserve Commission jurisdiction to review assessment agreements as such under sections 16 and 17 of the 1916 Act (46 U.S.C. app. §§815 and 816) because of the provision in section 45 of the Act (46 U.S.C. app. §841(c)) added by the

Continued

to expand their case is now rejectable as a matter of the "law of the case" here because the Court of Appeals' decision barred any "discrimination" claim and limited Cal Cartage's standing to its "detriment to commerce" theory.[21] Moreover, under the circumstances, any claim by Cal Cartage for refunds to its *customers* constitutes "the assertion of third party rights condemned in *Fisher* v. *Tucson School District*, 625 F.2d 834, 837 (9th Cir. 1980)." *Fentron, supra* at 1304. The waiver of a remedy for its own direct injuries would appear to divest Cal Cartage of standing to claim a remedy for injuries to third parties. *Id.*

Additionally, because the MLAA does not provide for "detriment to commerce" reparations, Cal Cartage must necessarily be asserting this claim as a remedy, afforded by section 22 of the 1916 Act, that was not repealed or modified by section 15 of the 1916 Act in MLAA complaint cases. *See, California Cartage, supra*, 721 F.2d at 1205.[22] If this be so, then it would appear that agency case law on standing to claim reparations for third parties would also apply to such claim. Although the question has not previously arisen in MLAA cases, the Commission has consistently construed section 22 as not permitting parties who have not actually paid contested charges to claim them as reparations in the absence of a valid assignment of the claim from the paying party. *See e.g., Sanrio Inc.* v. *Maersk Line*, 19 S.R.R. 907 (1979) (and cases cited therein).

It should also be noted that the award of reparations in any particular case is a matter that lies within the discretionary powers of the Commission. *Consolo* v. *F.M.C.*, 383 U.S. 607 (1966). The record of this case is quite clear. Not a single party who actually paid the assessments required by LM–81 has filed a complaint or voiced any support for the Cal Cartage complaint in any manner. Cal Cartage has advanced no equitable argument in support of its claim on behalf of its customers other than its own competitive interests. The Commission has afforded it the opportunity to obtain reparations for its own injuries which it has rejected. Its claim on behalf of its customers would therefore appear to lack both legal and equitable merit.

MLAA, which states that the provisions of that Act shall not apply to maritime labor agreements "except to the extent that such provisions provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis . . . ." That argument is untenable. The general language of section 45 was obviously conditioned by the specific language of the fifth paragraph of section 15, which contained the Commission's only jurisdiction over assessment agreements. The fifth paragraph omitted the authority, contained in the second paragraph of section 15 and applicable to the other section 15 agreements, to disapprove assessment agreements if they are contrary to any other section of the 1916 Act. This treatment must be contrasted with the Commission's jurisdiction to review the implementation of agreements through "rates, charges, regulations, or practices . . . required to be set forth in a tariff" which are not exempt from any of "the provisions of this Act." In any event, the legislative history of the 1984 Act states that "*[u]nder existing law* and [the 1984 Act], the remedies and *regulatory standards* applicable to assessment agreements are intended to be exclusive . . . ." (emphasis added). H.R. Rep. No. 600, 98th Cong., 2d Sess. 30 (1984).

[21] *See, California Cartage Co.* v. *U.S., supra*, 721 F.2d at 1205, 1206.

[22] Cal Cartage cannot claim refunds to its customers as an assessment "credit" because that remedy is also restricted to discrimination claims under the MLAA. *See* section 5(d) of the 1984 Act (46 U.S.C. app. §1704(d)), reproduced at footnote 6, *supra*.

Accordingly, because the only remedy held open to Cal Cartage by the May Order was its right to reparations, its unequivocal rejection of this reparations remedy requires a dismissal of the proceeding.

THEREFORE, IT IS ORDERED, That the Motion Addressed to the Commission for the Entry of a Final Order filed by Complainants, California Cartage Company, Inc., *et al.* is granted; and

IT IS FURTHER ORDERED, That the complaints filed in this proceeding are dismissed and this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1168

APPLICATION OF UNITED STATES LINES (S.A.) INC. FOR THE BENEFIT OF MILES LABORATORIES, INC.

ORDER

August 30, 1985

The Commission determined to review the Initial Decision served on March 20, 1985 by Administrative Law Judge Seymour Glanzer (Presiding Officer). In partially denying the application of United States Lines (S.A.) Inc. (USL) to make adjustments to certain freight charges, 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), the Presiding Officer followed *Application of Lykes Bros. Steamship Co. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408, (1981) (*Texas Turbo Jet*). At the time the Initial Decision was issued, the Commission had voted in Special Dockets Nos. 1220 and 1225, *Application of Hapag-Lloyd, AG for the Benefit of General Motors Corporation (General Motors)*, to no longer impose on such applications involving intermodal cargo movements the requirement first enunciated in *Texas Turbo Jet* 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. However, the *General Motors* vote was taken in closed session and thus the Presiding Officer had no knowledge of it. The Order effectuating the Commission's decision subsequently was served May 10, 1985.[1]

BACKGROUND

USL seeks the Commission's permission to refund $22,520 of freight charges it collected from Miles Laboratories, Inc., the consignee, in connection with one shipment of annato seed and to waive collection of $189,000 of freight charges in connection with another shipment of the same commodity, which is used for coloring cheddar cheese and butter.

USL is a member of the South and East Africa/USA Conference. At all times pertinent to this proceeding, the Conference published a port-to-port rate for annato seed, from Mombasa, Kenya to New York.

On or about November 21, 1983, USL and Miles Laboratories reached an agreement on a special single-factor intermodal rate for two shipments of annato seed from Mombasa through New York to Madison, Wisconsin.

[1] 27 F.M.C. 848. Commissioner Moakley dissented. 27 F.M.C. 855.

Miles Laboratories was responsible for payment of all freight charges. USL planned to carry the cargo via an independent intermodal tariff from ports in South and East Africa to United States inland destination points that it had taken over from Moore McCormack Lines. This tariff included a New York to Madison routing using rail movement from New York to Chicago and then truck movement to Madison. However, due to the confusion and personnel turnover caused by USL's acquisition of Moore McCormack's service, the agreed-upon through rate was not published in USL's intermodal tariff. In addition, USL's agent in Mombasa failed to follow his instructions to apply an intermodal routing and rating to the shipments on the bills of lading.

The first shipment sailed from Mombasa on December 18, 1983. Because of the clerical errors described above, it was rated as a port-to-port movement under the Conference tariff. After transshipment at Durban, South Africa, it arrived in New York on February 9, 1984. USL personnel in New York noted that the bills of lading indicated a port-to-port movement and turned over responsibility for inland transportation to an agent of Miles Laboratories. The Agent engaged a motor carrier to transport the cargo, which totalled forty containers, to Madison. Miles Laboratories paid the motor carrier $43,740 for this service.

The second shipment started out much like the first but ended much differently. It sailed from Mombasa on January 24, 1984 and, after transshipment at Durban, arrived in New York on or about March 3. It too was rated and carried as a port-to-port movement under the Conference tariff. However, by the time the shipment arrived in New York, local USL officials had become aware of the agreement negotiated with Miles Laboratories in November 1983 and acted accordingly. Instead of allowing USL's responsibility to terminate at the port, they arranged for the cargo to be transported to Madison via Chicago by inland carriers named as participants in USL's intermodal tariff. USL then issued a corrected invoice to Miles Laboratories for the previously negotiated freight charges, which Miles paid.

With respect to the first shipment, USL seeks to refund $22,520 to Miles Laboratories. According to USL's application, this sum represents the difference between the payment actually made by Miles to USL for ocean freight and the ocean portion of the intermodal rate that Miles originally had agreed to pay.[2] In calculating this amount, USL estimated the inland portion of the agreed rate at $863 per container:

[2] Although it is not totally clear why USL requested authority to structure its refund in this manner, the carrier had been warned by the Presiding Officer of the *Texas Turbo Jet* problem. Thus, USL may have been trying to save its application with regard to the first shipment by asking only for permission to make a refund on the all-water movement.

(1) Payments made by Miles Laboratories:	
(a) to USL for ocean freight	$90,000.00
(b) for inland freight	43,740.00
Total transportation costs	$133,740.00
(2) (a) Transportation charges at agreed intermodal rate of $2,550.00 per container	$102,000.00
(b) Less allocation for inland portion at rate of $863.00 per container	−34,520.00
(c) Intermodal ocean portion charges derived by subtracting (2)(b) from (2)(a)	$67,480.00
(3)(a) Ocean charges paid	$90,000.00
(b) Less ocean portion of intermodal charges	−67,480.00
Refund Request	$22,520.00

With respect to the second shipment, USL seeks to waive collection of the difference between the agreed-upon intermodal charges of $51,000 that Miles Laboratories has paid and the most nearly applicable intermodal rate in effect at the time of shipment, which was a much higher N.O.S. rate.

DISCUSSION

The Presiding Officer found that USL's application met the statutory requirements for approval under section 8(e) of the Shipping Act of 1984, *i.e.*, he found that the failure to publish the agreed-upon rate was due to inadvertent error by USL, that USL filed a corrective tariff, effective February 1, 1984, setting forth the intended rate, that the application was timely filed and that there was no indication that granting the application would result in discrimination among shippers, ports or carriers. Accordingly, he granted the application insofar as the second shipment was concerned, stating that USL "provided the service in accordance with the Intermodal Tariff . . . ."[3]

[3] USL was able to meet part of its bargain with Miles Laboratories, by assuming responsibility for moving the second shipment from New York to Madison, only because the carrier happened to have on file and in effect at the time of shipment a general intermodal tariff covering the desired inland destination and actually moved the shipment via the inland carriers named in that tariff. These fortunate circumstances permit the carrier (and shipper) to escape *Texas Turbo Jet*, as was first noted in *Application of Trans Freight Lines, Inc. for the Benefit of B.N.P. Distributing Co., Inc.*, 22 S.R.R. 475 (1983). However, as the Commission discussed in *General Motors*, 27 F.M.C. 852, the same potential for unfairness and arbitrary regulation exists in these circumstances as in *Texas Turbo Jet*. For example, USL had a general intermodal tariff in place because it had taken over Moore McCormack's service. If USL instead had entered the trade on its own, it might well have had no tariff at all covering a New York-Madison inland routing. If that were the case, USL and Miles Laboratories would have found themselves in a precise replica of the *Texas Turbo Jet* fact pattern.

However, with regard to the first shipment, the Presiding Officer held that he was required by *Texas Turbo Jet* to deny the application because it was clear that USL could not meet the additional nonstatutory requirement placed on it by that decision, *i.e*, that it must have actually provided the intended inland service in accordance with the terms of its tariff. As discussed above, Miles Laboratories arranged and paid for the inland movement of the first shipment.

As previously stated, in *General Motors,* which was served subsequent to the Initial Decision the Commission announced that *Texas Turbo Jet* would no longer be followed. Accordingly, the Presiding Officer's denial of USL's application with regard to the first shipment, which was based solely on *Texas Turbo Jet,* will be reversed.

In *General Motors,* we noted that one of the flaws of *Texas Turbo Jet* is that it often caused relief to the innocent shipper to turn entirely on luck and happenstance. 27 F.M.C. 852. That is precisely the situation here. The only important difference between the first shipment and the second shipment is that by the time the second shipment arrived in New York, USL had realized the mistake it had made on the first shipment. If that had not occurred, presumably the second shipment would have been turned over to Miles Laboratories in New York, as the first one was, and *Texas Turbo Jet* would have required that Miles be denied relief on both shipments. That result would have cost Miles Laboratories over $45,000 in additional unwarranted freight costs.

Such arbitrary distinctions between shipments are not required by any sensible regulatory policy and are inconsistent with the Commission's obligation to administer the special docket procedure liberally, in order to achieve the procedure's remedial purpose of relieving shippers from the burdens of carrier mistake or negligence.[4] However, the sum of $22,520 that USL requests permission to refund to Miles Laboratories would still leave Miles in the position of suffering significant financial damage: under the November 1983 agreement, it should have paid $102,000 to transport the first shipment, while the requested refund would result in total costs

It should also be noted that even on the second shipment, USL did not provide the precise service it had agreed to. The bills of lading issued on the second shipment call for a port-to-port movement, terminating at New York. (Ex. 3 to USL's application). There is no indication that corrected bills of lading were issued. Strictly speaking, therefore, the service contracted for by USL, as evidenced by the bills of lading, was not an intermodal movement; more important, from the *Texas Turbo Jet* perspective, the eventual service USL actually provided on the second shipment was *not* in strict accordance with the terms and conditions of its intermodal tariff.

[4] Conceivably, Miles Laboratories might be able to recover its financial losses if this special docket application were denied under *Texas Turbo Jet* by bringing a court action for breach of contract. However, such a procedure, with its attendant costs and delay, may not be a satisfactory substitute for the relatively simple and economical special docket procedure. In any event, the Commission believes that the policy first announced in *General Motors* and followed here docs not represent an unlawful expansion of our authority under section 8(e) of the Shipping Act of 1984. Shippers should be turned away from this agency's procedures and advised to seek relief from the courts only if it is clear that the carrier's application fails to meet one of the specific jurisdictional requirements set forth in the statute and if no alternative administrative remedy is available, see *Application of Pacific Westbound Conference for the Benefit of Shintech,* 21 S.R.R. 1361, 1366 (ALJ), application withdrawn, 21 S.R.R. 1441 (1982). Neither situation is found to exist here.

to it of approximately $111,000 ($133,740 less $22,520). It is more consistent with the rationale and policy announced in *General Motors* to give USL permission to refund to Miles Laboratories the full difference of $31,740 between the costs it actually incurred and the costs it should have incurred.[5]

The failure of USL to file exceptions to the Initial Decision's denial of its application on the first shipment renders unlikely any possibility that the carrier's application is a subterfuge for an illegal arrangement between itself and Miles Laboratories. This conclusion is particularly strengthened by the fact that USL's representative previously had stated in a prehearing conference that he would not file exceptions in the event of such a denial.[6] Finally, an appropriate tariff notice of the granting in full of USL's application will prevent any discrimination among shippers.

THEREFORE, IT IS ORDERED, That the Initial Decision is hereby reversed to the extent that it denied the application by United States Lines (S.A.) Inc. to refund portions of freight charges in connection with a shipment of annato seed from Mombasa, Kenya on December 18, 1983;

IT IS FURTHER ORDERED, That United States Lines (S.A.) Inc. is hereby given permission to refund $31,740 in freight charges to Miles Laboratories, Inc. in connection with the above-described shipment;

IT IS FURTHER ORDERED, That the Initial Decision is otherwise adopted.

By the Commission.*

(S) BRUCE A. DOMBROWSKI
Acting Secretary

*Commissioner Thomas F. Moakley dissents and will issue a separate opinion.

[5] See n. 2, *supra*. Because the Presiding Officer believed himself bound by *Texas Turbo Jet*, he did not reach the question of the proper calculation of a refund on the first shipment.

[6] Prehearing Conference Tr. 56–57.

DISSENTING OPINION

Commissioner Moakley, dissenting.

The erosion of tariff law which the majority began in Special Docket Nos. 1220 and 1225[1] is greatly aggravated by its decision in this proceeding. Now it is not only irrelevant whether a carrier has performed the service for which it seeks to apply an intended rate, but it is also unnecessary and perhaps even unlawful for that carrier to collect the intended tariff rate. The majority's liberal notion of fairness to a particular shipper in a particular case has now caused it to distort beyond recognition those provisions of the 1984 Act which are designed to prevent unfairness and discrimination on a much broader scale.

The facts relating to the shipment in question are straightforward. The shipper, Bharat Industries, booked a shipment of annatto seed with United States Lines, S.A. CUSLSA), from Mombasa, Kenya to New York, N.Y. The shipment moved on a port-to-port bill of lading and was rated under the tariff of the South and East Africa/USA Conference of which USLSA was a member. The consignee, Miles laboratories, accepted the shipment from USLSA in New York and paid the charges pursuant to the bill of lading. Miles Laboratories then arranged and paid for inland transportation from New York to Madison, Wisconsin.

Complexities arise only when these simple facts are ignored in an effort to give Miles Laboratories the benefit of an intermodal rate it had earlier negotiated with USLSA for carriage of annatto seed from Mombasa to Madison. The errors that need to be overcome in order to afford this relief are not merely tariff or clerical errors that are correctable under section 8(e) of the Act. The major error here is that *USLSA did not carry the cargo from Mombasa to Madison. It carried the cargo from Mombasa to New York.* There is a rate on file which USLSA has agreed to charge for carriage from Mombasa to New York. It charged Miles Laboratories that rate and is obligated to charge every other shipper of the same commodity the same rate for service from Mombasa to New York.

This obligation to charge the tariff rate for the service performed is independent of the existence of other tariffs for different services.[2] In other words, it is irrelevant to the disposition of this case whether USLSA had a reduced rate on file in its tariff for carriage of annatto seed from Mombasa to Madison (or from Afghanistan to Alaska). Even if the intended

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[1] *Application of Hapag-Lloyd, AG for the Benefit of General Motors Corporation,* 27 F.M.C. 848, dissenting opinion at 27 F.M.C. 855.

[2] This proposition is self-evident when the rate or charge is one which must be filed in a tariff. In fact, I know of no instance in which the proposition has been challenged. Even in the area of terminal practices which do not have to be filed in tariffs. The Commission and the courts have consistently held that the charges rendered must be reasonably related to the services performed. *Volkswagenwerk Aktiengesellschaft* v. *FMC* 390 U.S. 261 (1968); *Baton Rouge Marine Contractors, Inc.* v. *Cargill, Inc.* 21 FMC 968 (1979); *The Port Authority of New York and New Jersey* v. *NYSA, et al.* and *Puerto Rico Maritime Shipping Authority, et al.* v. *NYSA* 27 F.M.C. 614 (1985).

rate had been filed,[3] it could not have been applied to a shipment which was tendered and carried to another destination for which a different rate applies. Ironically, therefore, had the carrier *not* erred in failing to file the intermodal rate, there would be no basis on which to argue that section 8(e) could afford the relief sought. Following this logic, the majority's decision seems to favor the proposition that a carrier can apply a rate for a service that was not performed, but only when that rate is *not* on file.

But the principle to be derived from the relief granted here is not quite that clear. The carrier is not obligated (or even permitted) to collect the intended and later filed tariff rate for service to Madison. Instead USLSA is directed to collect an amount which credits the shipper for its out-of-pocket costs for inland transportation from New York to Madison.

This may be an equitable result for the parties involved in this particular shipment but it removes all certainty as to the proper rate to be charged and invites discrimination among other shippers, carriers and ports, contrary to the statute we are seeking to administer. Moreover, it is inconsistent with the relief granted in *General Motors, supra,* which the majority purports to be following.[4]

The tariff under which this shipment was carried is a conference tariff. There were five members of the South and East Africa/USA Conference during the period that this shipment moved.[5] The record in this proceeding indicates that there was active competition for the carriage of annatto seed.[6]

In view of these facts, it is likely that there were other shipments of this commodity moving on other conference carriers during this period of time. The majority's decision makes it virtually impossible to ensure that other shippers pay the same rate for the same service. Are other shippers of annatto seed from Mombasa to New York entitled to a "rate" which is predicated upon service to Madison, Wisconsin, less the cost of inland transportation incurred by Miles Laboratories?

Most importantly, the majority's largesse is a serious assault on statutory tariff filing requirements. Under the precedent established here, neither other shippers nor other carriers have the knowledge necessary to compete fairly with the parties who are the beneficiaries of this private arrangement. It is particularly dangerous to undermine the importance of having tariffs on file at a time when the Commission is embarking on a major, and potentially expensive effort to automate tariff filing.

[3] As the ALJ points out (I.D., p3), it is not clear whether the agreement between Miles Laboratories and USLSA was made "subject to booking." If so, no cargo was ever booked for Madison and the carrier was under no obligation whatsoever to file the "intended" rate.

[4] In *General Motors*, the Commission permitted the carrier to collect the *intended intermodal rate* despite uncertainty as to whether the shipper had arranged and paid for the inland carriage.

[5] Official FMC agreement files. One member (Hellenic Lines) resigned on January 28, 1984 reducing this number to four.

[6] USLSA offered the lower intermodal rate to Miles Laboratories in order to match a reduced rate filed by Lykes Bros. Steamship Co., Inc. See Exhibit 1 to supplement to application filed June 4, 1984.

For these and the reasons set forth in my dissent to the majority's decision in *General Motors, supra,* I would adopt the ALJ's disposition of the instant application.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1168

APPLICATION OF UNITED STATES LINES (S.A.) INC. (FORMERLY MOORE MCCORMACK LINES, INCORPORATED) FOR THE BENEFIT OF MILES LABORATORIES, INC.

Application for permission (1) to refund a portion of freight charges for one shipment denied and (2) to waive collection of a portion of freight charges for a second shipment granted.

Arthur K. Forester for applicant, United States Lines (S.A.).

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

Partially Adopted August 30, 1985

By application filed April 18, 1984, and refiled May 31, 1984, United States Lines (S.A.) Inc. (formerly Moore McCormack Lines, Incorporated), hereafter "USL," seeks permission to refund $22,520 of freight charges it collected from Miles Laboratories, Inc., the consignee, in connection with one shipment of annato seed and to waive collection of $189,000 of freight charges in connection with another shipment of the same commodity.[2]

As explained, *infra,* the request to refund is denied and the request to waive collection is granted.

FACTS

General

USL is a member of the South and East Africa/USA Conference, hereafter "Conference,"[3] which publishes port to port rates from certain African ports, including Mombasa, Kenya, to United States Atlantic and Gulf ports, including New York in its North Bound Freight Tariff No. 5, F.M.C. No. 7, hereafter "Conference Tariff." At all times pertinent to this proceeding the Conference Tariff contained a special, all inclusive rate of $150.00 for "Seed, Annato, in bags" from Mombasa to New York.[4]

USL provides an intermodal service from ports in South and East Africa to United States inland destination points and publishes rates for this service

[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] In addition to the refiling, an on the record conference, to clarify some aspects of the application, was held on March 5, 1985.

[3] The Conference joined in the application.

[4] Conference Tariff, 7th rev. p. 212, effective November 3, 1983, Item No. 1780. The special rate expired February 29, 1984.

in its independent intermodal tariff, United States Lines (S.A.) Inc. Import Ocean/Motor Microbridge Freight Tariff 701, ICC USLU 701, FMC No. 79. This tariff became effective February 1, 1984, as a successor to Moore McCormack Lines, Incorporated Import Ocean/Motor Microbridge Freight Tariff 701, ICC MMLU 701, FMC No. 79. Hereafter, the term "Intermodal Tariff" will be used in reference to either or both of those tariffs.

About November 21, 1983, USL and the consignee reached an agreement calling for USL to publish an all inclusive rate of $2,550 per 20' containers[5] for two anticipated shipments of annato seed[6] from Mombasa to Madison, Wisconsin, in the Intermodal Tariff. It is not clear whether the agreement was made "subject to booking." It is apparent, however, that there was general confusion In USL's Chicago, Illinois, office, where the agreement was negotiated, resulting from USL's acquisition of Moore McCormack Lines and a concomitant turnover in personnel at that location. It is sufficient to note that due to that condition, the Chicago office failed to instruct the Cranford, New Jersey, pricing office to publish the agreed rate. When the shipment was booked by Bharat Industries, Ltd., the Kenyan shipper, USL's Mombasa agent, who was inexperienced in intermodal shipments, not only failed to notify the Chicago office of the booking, but, more important, he did not follow his instructions to apply an intermodal routing and rating to the shipments on the bills of lading The net effect of the various errors was that, when the two shipments sailed from Mombasa, the agreed rate was not in the Intermodal Tariff and the shipments were routed and rated as port to port movements under the Conference Tariff on the bills of lading issued at Mombasa. When the failure to publish the agreed rate was discovered, a corrective Tariff provision reflecting the agreed rate and routing information, was filed, effective June 6, 1984[7] although a tariff provision reflecting the agreed rate was made effective February 1, 1984.

The applicant states that there were no other shipments of the same or similar commodity during the relevant time period.

It is now appropriate to proceed from the general to the particular.

I. *Shipment No. 1*

The first of the two shipments was placed aboard the *American Robin* (V.8), a feeder vessel, which sailed from Mombasa on December 18, 1983, for Durban, South Africa. At Durban the shipment was transferred to the

[5] The agreement comprehended the substitution of 40' containers at the 20' container rate if the latter were not available.

[6] USL advises that annato seed is used for coloring cheddar cheese and butter.

[7] Intermodal Tariff, 15th rev. p. 37–A, Item No. 1150. An earlier correction which appeared on original page 37–A, effective February 1, 1984, inadvertently contained a non-substantive incorrect routing designation number. In addition, effective May 21, 1984, USL published an equipment substitution rule authorizing it to substitute 40' containers for 20' containers should there be a shortage of the latter at the origin container yard. *Id.*, 1st rev. p. 27, Rule 24.

American Ace (V.158) for carriage to New York. The shipment (on three bills of lading) weighed 600,000 kilos and was loaded into twenty-six 20' and fourteen 40' containers. The shipment was rated as a port to port movement under the Conference Tariff, which, at the time of shipment, was $150.00, all inclusive, per 1000 kilos.[8] At this rate port to port charges amounted to $90,900.00.

When the vessel arrived at New York, USL personnel "took their clue from the ocean bills of lading signifying a port to port move" and turned over responsibility for the inland portion to an agent of Miles Laboratories. The agent engaged a motor carrier, Atlantic Coast Express, to transport the forty containers to Madison. Miles Laboratories paid the motor carrier $43,740.00 for this service.

Had the inland portion been conducted as an intermodal movement with participating carriers listed in the Intermodal Tariff, the arrangements would have consisted of drayage from Howland Hook, USL's New York Terminal, to the Con Rail ramp in Elizabeth, New Jersey, at an estimated cost to USL of $85.00 per container; rail carriage from Elizabeth to Chicago, at an estimated cost to USL of $450.00 per container,[9] and motor carriage from Chicago to Madison, via Wisconsin Cartage (WICC) at a cost to USL of $328.00 per container pursuant to WICC's tariff. The sum of these allocated costs is $863.00 per container.

USL arrives at the figure of $22,500.00 as the amount to be refunded on the following mix of (1) charges at the agreed rate, (2) charges actually Incurred and paid by Miles Laboratories and (3) the allocation of charges, had an intermodal shipment taken place:[10]

(1) Payments made by Miles Laboratories to:	
(a) USL for ocean freight	$90,000.00
(b) Atlantic Coast Express for inland freight	43,740.00
Total transportation costs	$133,740.00
(2) (a) Transportation charges at agreed intermodal rate of $2,550.00 per container	$102,000.00
(b) Less allocation for inland portion at rate of $863.00 per container	−34,520.00
(c) Intermodal ocean portion charges: derived by subtracting (2)(b) from (2)(a)	$67,480.00
(3) (a) Ocean charges paid	$90,000.00
(b) Less ocean portion of intermodal charges	−67,480.00
Refund Request	$22,520.00

[8] See n. 4, *supra*.

[9] When Shipment No. 2 took place the cost was reduced to $400.00 per container. The estimated costs are those worked out by USL's in house specialists and are approximate, except for WICC.

[10] Exhibit No. 1, submitted at the conference.

II. *Shipment No. 2*

The second shipment started out much like the first but it ended much differently, as will be seen.

The shipment was loaded aboard the *American Robin* (V.9) which sailed from Mombasa for Durban on January 24, 1984. At Durban, there was a transfer to the *American Resolute* (V.20) which transported the shipment to New York. The shipment weighed 300,000 kilos and was loaded into twenty 20′ containers. It, too, was rated as a port to port movement under the Conference Tariff at the $150.00, all inclusive, per 1000 kilos rate then in effect.

However, by the time the *American Resolute* arrived in New York USL officials had become aware of the problem and reacted accordingly. Instead of allowing the ocean carrier's responsibility to terminate at the port USL implemented the agreement with Miles Laboratories by successfully completing arrangements for the intermodal movement with Con Rail and WICC in accordance with provisions of the Intermodal Tariff. Having provided the service in accordance with the Intermodal Tariff USL issued a corrected bill at the agreed intermodal rate. Miles Laboratories paid the $51,000.00 in accordance with the corrected invoice. The most nearly applicable intermodal charges at the rate in effect at time of shipment were $24O,000.OO.[11] USL seeks to waive collection of the difference between the applicable charges and the amount collected.

DISCUSSION AND CONCLUSIONS

I. *Shipment No. 2*

The application meets the criteria for approval under section 8(e) of the Shipping Act, 1984, 46 U.S.C. app. 17O7(e),[12] and the Commission's rules implementing that statute, 46 CFR 502.92(a).

The failure to publish the agreed rate was due to inadvertent errors on the part of USL. Because there were no shipments of the same or similar commodity during the relevant time period, approval of this application is not likely to result In discrimination among shippers. There is no indication that there would be any discrimination against carriers or ports. In any event, the order, which follows, protects against discrimination among shippers. A corrective tariff setting forth the rate upon which the waiver is based was timely filed before the application. By filing the application, USL has agreed to take those steps which the Commission may require as a condition for granting relief. The application was filed within 180 days of the shipment.

[11] Intermodal Tariff, 5th rev. P. 37, Item No. 1100, Cargo, N.O.S.

[12] 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.

II. *Shipment No. 1*

With respect to the first shipment, the application does not meet the criteria for approval of special docket applications[13] simply because USL did not provide the intermodal service contemplated by its agreement with Miles Laboratories. The service USL did provide—a port to port service—was governed by the provisions of the Conference Tariff. The charges paid to USL under the latter tariff were correct and must stand. This conclusion accords with the principle that performance must match promise (intent), established In Special Docket No. 771, *Application of Lykes Steamship Co., Inc. for the Benefit of Texas Turbo Jet, Inc.*, 24 F.M.C. 408 (1981), and consistently adhered to thereafter. See, e.g., Special Docket Ho. 1084, *Application of Trans Freight Lines, Inc. for the Benefit of B.N.P. Distributing Co., Inc. (Mau Cooperage), New York*, 22 SRR 475 (I.D. 1983), administratively final December 16, 1983.[14]

CONCLUSION AND ORDER

The application for permission to refund portions of freight charges collected by United States Lines (S.A.) Inc. in connection with a shipment of Annato Seed it transported from Mombasa, Kenya, to New York, New York, on December 18, 1983, is denied. The application to waive collection of portions of freight charges due United States Lines (S.A.) Inc., is granted. It is ordered:

1. United States Lines (S.A.) Inc. shall waive collection of freight charges due it from Miles Laboratories, Inc., in the amount of $189,000.00 in connection with a shipment of Annato Seed it transported from Mombasa, Kenya, to Madison, Wisconsin, on January 24, 1984.

2. United States Lines (S.A.) Inc. shall publish the following notice at pages 37 and 37–A of its Import Ocean/Motor Microbridge Freight Tariff 701, ICC USLU 701, FMC No. 79:

> Notice is hereby given as required by the decision in Special Docket No. 1168, that effective December 18, 1983, and continuing through June 5, 1984, for purposes of refund or waiver, the rate for Item No. 1150, ANNATO, SEED All Inclusive, origin group 4, Destination Madison, WI, PC 20, Route No. 451 is 2,550.00. Such rate is subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

3. United States Lines (S.A.) 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.

[13] See n. 12, *supra*.

[14] In the light of this conclusion, it will not be necessary to order that Rule 24, see n. 7, *supra*, be given retroactive effect.

4. The waiver shall be effectuated within thirty days of service of notice by the Commission authorizing the same and United States Lines (S.A.) 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 and 4(a) of this order.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–16

FAILURE OF LICENSED OCEAN FREIGHT FORWARDERS TO COMPLY WITH THE ANTI-REBATE CERTIFICATION FILING REQUIREMENT OF SECTION 15(b) OF THE SHIPPING ACT OF 1984 AND 46 C.F.R. § 510.25

NOTICE

November 28, 1985

Notice is given that the time within which the Commission could determine to review the October 10, 1985, discontinuance of 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. 85–16

FAILURE OF LICENSED OCEAN FREIGHT FORWARDERS TO COMPLY WITH ANTI-REBATE CERTIFICATION FILING REQUIREMENT OF SECTION 15(b) OF THE SHIPPING ACT OF 1984 AND 46 C.F.R. §510.25

PROCEEDING DISCONTINUED

Finalized November 28, 1985

As a result of my two previous rulings (August 27 and September 19, 1985) and the efforts of the Commission's Office of Freight Forwarders and Hearing Counsel, 71 of the original 74 respondent freight forwarders have complied with the requirement that they file anti-rebating certificates, have notified the above Office that they have ceased operating and wished to have their licenses cancelled, or have otherwise had their licenses revoked. Three respondent forwarders remained in the proceeding: Bekins Moving & Storage/Northwest Forwarders, of Seattle, Washington; John W. Newton, Jr., of Beaumont, Texas; and National Cargo Services, Inc. of Miami, Florida. Hearing Counsel was directed to contact these three and report on their status.

According to Hearing Counsel's status report submitted on October 4, 1985, Bekins/Northwest has now sent in the correct form and has complied with law, and John W. Newton, Jr., is no longer forwarding and has surrendered his license. These forwarders are therefore dismissed.

The situation with respect to National Cargo Services, Inc., is a little more complicated. It appeared originally that National Cargo did not receive service of the Commission's Order of Investigation and Hearing. (See Ruling of August 27, 1985, at 9.) This may be because their address shown in the Appendix to the Commission's Order was incorrect. However, the Office of Freight Forwarders has been in telephonic contact with National and has sent a letter dated August 27, 1985, in which National was advised of the need to file the proper certificate, a copy of which was enclosed. Receipt of this letter, which was sent to a new address, was acknowledged by an employee of National, Ms. Maria Guerra. Furthermore, the Office of Freight Forwarders has maintained telephonic contact with Ms. Guerra, who has advised that National is no longer in business and will request cancellation of the license. The Office of Freight Forwarders has also been advised by National's surety company that National's surety bond has been cancelled. Failure to maintain a valid surety bond is grounds for automatic revocation of a license. See 46 CFR 510.14(d); 510.16(a).

In view of the above situation, it is unnecessary to continue this proceeding to determine whether National will file an anti-rebating certificate and, if not, whether its license should be revoked. The cancellation of National's surety bond, as mentioned, will lead to automatic revocation of its license under the Commission's regulation, an action which can be taken by the Commission's Office of Freight Forwarders.

Accordingly, this proceeding is discontinued.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–38

ARIEL MARITIME GROUP, ET AL.

ORDER REMANDING PROCEEDING

December 16, 1985

This proceeding is before the Commission on Exceptions to the Initial Decision (I.D.) served on June 12, 1985 by Administrative Law Judge Joseph N. Ingolia (Presiding Officer). The I.D. concluded that Interlink Systems Incorporated d/b/a Interlink Lines (Interlink), a non-vessel-operating common carrier (NVOCC), had committed extensive violations of section 16, Initial Paragraph, and of section 18(b)(3) of the Shipping Act, 1916 (46 U.S.C. app. §§815, 817). The I.D. further concluded that Consolidated Commodities of America, Inc. (Consolidated), Merritt Enterprises d/b/a Cheerio International (Cheerio), both shippers, and Liberty Shipping International (Liberty), another NVOCC, also had violated section 16, Initial Paragraph. The Presiding Officer assessed substantial civil penalties for those violations.

The four respondents adversely affected by the I.D. filed Exceptions, to which the Commission's Bureau of Hearing Counsel replied.

For the reasons set forth below, the Commission has determined to remand this proceeding to the Presiding Officer for further development of the record and the issuance of a supplemental initial decision. We believe that the record has been developed adequately regarding the particular shipping transactions that gave rise to this investigation. However, the difficulty is that even if it is assumed that malpractices occurred resulting in violations of law, the record in its present state does not permit the Commission to conclude who properly should be held liable for any such violations. The remand ordered herein is intended to allow for obtainment of additional evidence regarding the nature, ownership, lines of authority and interrelationships of the respondents. The Commission also wishes the parties to brief certain legal issues that have been raised by the evidence developed thus far.

BACKGROUND

A. *The proceeding*

This proceeding was commenced by an Order of Investigation and Hearing served on December 14, 1984. The Order stated that Ariel Maritime Group, Inc. (Ariel), an agent for a number of vessel-operating carriers and NVOCC's, apparently had engaged in a series of malpractices designed

to obtain transportation at less than the rates required by law. The period of apparent violations was from September, 1981 through October, 1983.[1] According to the Order, Ariel had engaged in these malpractices in conjunction with Interlink, one of the NVOCC's apparently represented by Ariel.

The service provided by an NVOCC typically involves consolidation of several small shipments into a container load shipment. The NVOCC issues its bill of lading to the actual shipper/exporter; it thus acts as a carrier to shippers. The NVOCC then books the cargo with a vessel operating carrier, which issues its own bill of lading on the basis of information provided by the NVOCC; the NVOCC thus has the position of a shipper in relation to the vessel operator. By consolidating the cargo, the NVOCC is usually able to obtain a containerload rate from the ocean carrier and thus creates its profit margin.

The Order stated that one activity involving Ariel and Interlink concerned full containerload shipments of cellulose film and cigarette paper, which may have been misdescribed to the vessel-operating carrier as cellulose acetate and industrial wrapping paper, respectively, and thereby received an illegally reduced rate; also, the weight or cube of these shipments may have been underdeclared on occasion, to the same effect.

Another apparent malpractice described in the Order involved representations to the vessel-operating carriers that certain containerload shipments were to be transshipped in Europe. These representations qualified the shipments to move at lump sum rates pursuant to transshipment agreements. However, there were indications that the containers were never intended to be and were not transshipped. In addition, Interlink appeared to have assessed freight rates that were not filed in its tariffs.

Based on these allegations, the Order put at issue possible violations of sections 16, Initial Paragraph, and 18(b)(3) of the Shipping Act, 1916. Section 16, Initial Paragraph (46 U.S.C. app. § 815), provides:

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

Section 18(b)(3) (46 U.S.C. app. § 817) provides:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the

[1] Given those dates, the investigation was conducted under the Shipping Act, 1916 rather than the Shipping Act of 1984, which became law on June 18, 1984.

rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time.

The fact that an NVOCC acts as a carrier to actual shippers and as a shipper in relation to the vessel operator brings it within both section 16, which regulates shippers, forwarders and other non-carriers, and section 18, which regulates carriers. The Order named as respondents Ariel, Interlink, Consolidated, Cheerio, Liberty, a company named Joshua Dean & Co. and two other carriers, Oasis Express Line and Javelin Lines. In addition, certain individuals who appeared to be either the owners or operating officers of some of the corporate respondents were also named as respondents; these were Martyn Merritt, Tilak Sharma and Raymond Boudart. The Order included as issues whether, if violations were found, civil penalties should be assessed and cease and desist orders issued against the corporate or individual respondents.

Hearings were held in Washington, D.C. on April 17–19, 1985. Testimony was given by Emanuel Mingione, a Commission investigator, Martyn Merritt, one of the individual respondents, and Thomas Matthews, an employee of Ariel. Besides the transcript of those hearings, the bulk of the record consists of an investigative report and supporting documentation prepared by the Commission's Atlantic District office in New York.

B. *The Respondents*

1. *Ariel Maritime Group, Inc.*

Ariel is an Illinois corporation headquartered in New York City. It was incorporated on July 2, 1980.[2] As of August 1, 1980, its shareholders were as follows:

J.A. Mott	200 shares
Tilak Sharma	120 shares
Raymond Boudart	120 shares
Roy Brookes	200 shares
ASA Development Co.	1,360 shares

The directors and officers were as follows:

J.A. Mott	(President)
Tilak Sharma	(Secretary)
Roy Brookes	(Treasurer)
Arun Dutta	(Vice President)
Avinash Rohli	(Vice President)
Raymond Boudart	(Vice President)[3]

[2] Ex. TA, at 20.
[3] Ex. 2–C.

Two years later, as of August 1, 1982, there had been no change in the directors. The following officers were elected:[4]

J.A. Mott	(President)
Raymond Boudart	(Vice President)
Roy Brookes	(Treasurer)
Tilak Sharma	(Secretary)
Mary Anne Merritt	(Assistant Secretary)

Mary Anne Merritt is the wife of Martyn Merritt, one of the individual respondents.

By August 1, 1983, Martyn Merritt had taken over the Ariel stock formerly held by Roy Brookes, the shares now being distributed as follows:

Martyn Merritt	200 shares
J.A. Mott	200 shares
Tilak Sharma	120 shares
Raymond Boudart	120 shares
ASA Development Co.	1,360 shares[5]

Martyn Merritt had also become a director of Ariel, along with Sharma, Boudart and Mott. The officers were now as follows:

Martyn Merritt	(President)
Tilak Sharma	(Vice President)
Raymond Boudart	(Treasurer)
Mary Anne Merritt	(Secretary)[6]

Emanuel Mingione, the Commission investigator, testified that 60 percent of Ariel is owned by Charles, Klaus & Co.[7] This statement was based on a December 1983 Dun & Bradstreet report and was not corroborated by any other source.[8] Dun & Bradstreet reports were shown to be less than completely reliable.[9]

ASA Development Co., the apparent majority owner of Ariel, is owned by various individuals based in the United Kingdom and other locations.[10] Martyn Merritt testified that he has no ownership interest in ASA.[11] The record does not show whether Tilak Sharma or Raymond Boudart, the other individual respondents, own any part of ASA.

Ariel is an agent for a number of vessel-operating and non-vessel-operating carriers. In September 1980, Ariel entered into an agreement with Charles, Klaus & Co., under which Ariel was to act as agent for several

[4] Ex. 1-B.
[5] Ex. 1-A.
[6] Ex. 1.
[7] Ex. TA at 21.
[8] Ex. C-2; 18 April Tr. at 73-75.
[9] *Id.* at 76-77.
[10] 19 Apr. Tr. at 23.
[11] *Id.* at 24; 18 Apr. Tr. at 131.
[12] Ex. 30.

carriers that were divisions of Klaus, including respondents Javelin Line and Oasis Express Line.[12] Ariel also has acted as agent for carriers other than those related to Klaus, such as Tec Lines, Ltd., Deep Sea Shipping Ltd., Bernuth Lines and Matina Lines.[13] While the record is not completely clear, it appears that Martyn Merritt exercises operating control over day-to-day affairs at Ariel, although he is ultimately responsible to Ariel's owners at ASA Development Co.[14] Ariel has approximately 48 employees in its New York office.[15]

2. *Interlink Systems, Inc.*

Like Ariel, Interlink is an Illinois corporation. It was incorporated on February 6, 1980.[16] Interlink corporate minutes indicate that since the inception of the company, Martyn Merritt, Mary Anne Merritt, Raymond Boudart and Tilak Sharma have been the only directors and that Tilak Sharma has been President of the corporation and Martyn Merritt has been Vice President.[17] However, the ownership of the corporation is more fragmented. Martyn Merritt owns ten percent of the corporate stock and Sharma and Boudart each own six percent.[18] The remaining stock is owned by "eight or nine" individuals located in the U.S. and Europe; Martyn Merritt testified that none of those individuals own any interest in Aerial.[19]

The main business of Interlink is to act as an NVOCC for cargo moving from the United States to Europe. Interlink represents itself in New York but utilizes various agents throughout the U.S.[20] There is conflicting evidence in the record as to whether there is an agency relationship between Ariel and Interlink. Emanuel Mingione, the Commission investigator, testified that Tilak Sharma told him that Ariel did represent Interlink.[21] In addition, an Ariel advertising brochure can be read as indicating such a relationship.[22] However, Martyn Merritt testified that Ariel did not represent Interlink and attributed Sharma's statement to the latter's allegedly poor understanding of English.[23] Sharma himself did not testify and no direct documentary evidence of an agreement between Interlink and Ariel was introduced. In some cases, both Ariel and Interlink have the same agent for a particular area under separate and distinct contracts.[24]

There is a close operational relationship between Interlink and Ariel. Interlink shares space at Ariel's offices in New York, for which it pays

[12] Ex. 30.
[13] Ex. 5, 6, 8, 8B; 18 Apr. Tr. at 134.
[14] 19 Apr. Tr. at 88-89.
[15] *Id.* at 92.
[16] Ex. 27, 28
[17] Ex. 29.
[18] 18 Apr. Tr. at 147–48.
[19] *Id.* at 148, 154–55.
[20] Ex. 24.
[21] Ex. TA at 3; 17 Apr. Tr at 110.
[22] Ex. I-I.
[23] 18 Apr. Tr. at 145–46, 156–57.
[24] Id. at 152–54.

Ariel.[25] Interlink has only two employees of its own, who do essentially clerical work.[26] However, these two employees draw their salary from Ariel, which then bills Interlink.[27] Martyn Merritt testified that he is not compensated by Interlink nor, apparently, is Tilak Sharma or the other officers.[28] Sharma oversees the routine day-to-day operations of Interlink, but Martyn Merritt apparently makes the major decisions; he decided to share office space with Ariel and also signed an agency agreement on behalf of Interlink.[29]

On the other hand, Interlink maintains its own bank accounts, files its own tax returns and issues its own invoices, correspondence and statements.[30]

3. *Consolidated Commodities of America, Inc.*

Consolidated was originally incorporated in New York on April 6, 1977 under the name Container Lloyd (New York), Inc. An amendment filed by Tilak Sharma, identified as President of the corporation, changed the name to Consolidated on November 5, 1980. A certificate filed November 3, 1982, also by Sharma, identified him as registered agent for Consolidated.[31]

There is no information in the record regarding the ownership or present officers of Consolidated, except Martyn Merritt's statement that he owns no part of Consolidated, is not an officer and receives no salary from it.[32] It has the same office address and telephone number as Ariel.[33] Merritt also testified that Consolidated was shown as the "agent for shipper"on some bills of lading prepared by Interlink in order to act as a screen between the vessel operator and Interlink's true shipper customers, so that the vessel operator could not solicit Inter link's clients; Merritt characterized Consolidated as otherwise being a "non-entity."[34]

4. *Merritt Enterprises, Inc. d/b/a Cheerio International*

As its name indicates, Cheerio is the trade name of Merritt Enterprises, Inc. (MEI). MEI was incorporated in Illinois in 1976 and relocated to New York in 1981. Mary Anne Merritt is President and Martyn Merritt is Vice President, and the two own the company.[35] Cheerio operates from Ariel's offices. It advertises itself as a shipping consultant and travel agency. It appears that Cheerio was used for the same purpose as Consolidated,

[25] Id. at 149–50.
[26] 19 Apr. Tr. at 92–93.
[27] Id. at 92.
[28] Id.
[29] Id. at 90; 18 Apr. Tr. at 153.
[30] Ex. 18–22; 18 Apr. Tr. at 147–150.
[31] Ex TA at 22-23; 17 Apr. Tr. at 32-33.
[32] 19 Apr. Tr. at 97.
[33] Ex. TA at 23.
[34] 19 Apr. Tr. at 114.
[35] Ex. TA at 23; 19 Apr. Tr. at 97–98.

i.e., as a dummy "agent for shipper," with no real involvement in the shipments under investigation.[36]

5. *Liberty Shipping International*

The record is extremely sparse with regard to Liberty. It is an NVOCC.[37] Martyn Merritt testified that his wife, Mary Anne, owned "some shares" in the company, but was not more specific. He also stated that neither he nor his wife operated the company.[38] There is no indication whether Tilak Sharma or Raymond Boudart are involved in Liberty. FMC tariff records indicate that Thomas Matthews, an Ariel employee, is the U.S. filing agent for Liberty.

6. *Javelin Line Oasis Express Line*

As already stated, Javelin and Oasis are two of the carriers represented by Ariel. In fact, their tariffs on file with the Commission show that their U.S. mailing address is the same as Ariel's and that Mary Anne Merritt is their agent. As relevant to this proceeding, Oasis and Javelin provided NVOCC service from the U.S. to Europe and also were vessel operators from Europe to the Eastern Mediterranean and North Africa.[39] As part of the latter service, they handled cargo originating in the U.S. and transshipped at ports in Europe.

Javelin and Oasis are divisions of Charles, Klaus Co. Klaus is a Hong Kong-based enterprise that operates carrier services throughout the world.[40] As of December 31, 1980, all but one of Klaus's 4,000 shares were owned by respondent Joshua Dean & Co., Ltd.[41] The remaining share was held by a Mary Anne Pawlowski, who is apparently Mary Anne Merritt. Martyn Merritt testified that his wife received that share as a gift and has never realized a dividend or other remuneration from Klaus.[42] Merritt also testified that he owns no stock in Klaus, Dean, Oasis or Javelin.[43]

8. *Joshua, Dean & Co.*

As noted, as of December 31, 1980, Dean was apparently the owner of Klaus, which in turn operated Oasis and Javelin. Dean has a registered address on Grand Cayman Island, B.W.I. No other information on Dean could be obtained due to local business secrecy statutes.[44]

9. *Martyn Merritt; Remained Boudart; Tilak Sharma*

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[36] 18 Apr. Tr. at 14.

[37] Ex. TA at 19, Attachment E.

[38] 19 Apr. Tr. at 98-99.

[39] Ex. 9, 10; 18 Apr. Tr. at 135-37, 167-68. FMC tariff records show that Oasis and Javelin now provide vessel operator service in U.S. foreign trades.

[40] 18 Apr. Tr. at 136, 144–45; *see* Ex. 17.

[41] Ex. TA at 24; Ex. EE.

[42] 19 Apr. Tr. at 12-13.

[43] *Id.* at 12, 97, 99

[44] Ex. TA at 24–25.

Most of the information of record with regard to the three individual respondents has already been set forth above. On the present record, it appears that Martyn Merritt is the dominant figure of the three and that Sharma and, particularly, Boudart are minor functionaries by comparison. With regard to Merritt, it must also be noted that he had no apparent association with Ariel until August, 1982, when he became a special consultant to the company.[45] At some subsequent point, Merritt purchased 200 shares of Ariel stock and he was elected President of the Ariel Board of Directors on August 1, 1983. These dates become important when they are aligned with the beginning of the relationship between Ariel and Klaus, in September 1980, and with the period of alleged violations in this case, which is September 1981–October 1983. They show that according to the present record, Merritt was not associated with Ariel at the time of the execution of the Klaus agency agreement and he did not come into clear control at Ariel until nearly the end of the period of alleged violations.

C. *The Initial Decision*

The Presiding Officer summarized the evidence against the respondents in his findings of fact. He found that there were three basic malpractice schemes involved. In each scheme, an Interlink bill of lading would be issued to the actual shipper. That bill of lading would contain the correct description, weight and measurement of the shipment as shown on the export declaration and shipper's packing list.[46]

In the first scheme, the cargo then would be booked with the underlying vessel-operating carrier, but Interlink would not be shown as shipper. Instead, another entity would be listed on the second bill of lading as "agent for shipper." Consolidated was the name used, although one shipment was found using Joshua Dean.[47] The actual commodity description, weight and measurement of the shipment would be misdeclared in various combinations to the vessel-operating carrier. This would result in transportation being obtained for less than the lawfully applicable charges. Emanuel Mingione, the Commission investigator, documented 63 shipments where such misdeclarations occurred in connection with shipments of dehumidifiers, loudspeakers, stage equipment and, predominately, cellulose film and cigarette paper, during the period from October 20, 1981, through August 7, 1982.[48]

In the second scheme, the cargo was booked with the vessel-operating carrier under Interlink's name. The commodity description, weight and/or measurement again were misdeclared with resulting untariffed freight savings. Mingione documented 32 shipments where such misdeclarations

[45] Ex. I-B 18 Apr. Tr. at 130.

[46] Ex. TA at 14; *see* 18 Apr. Tr. at 35.

[47] Ex. TA, Attachment A. The Commission investigator testified that Ariel was also used in this manner, but subsequently said he had been mistaken; 18 Apr. Tr. at 5859.

[48] Ex. TA at 14–15, Attachment A.

occurred in connection with shipments of, predominately, cellulose film and cigarette paper, during the period from May 8, 1982 through October 18, 1983.[49]

In the third scheme, cargo actually destined for Europe instead was declared to the vessel-operating carriers as being destined for transshipment to countries outside of Europe. This misrepresentation permitted the cargo to get by unfair means special lump sum rates for transshipped cargo offered under connecting carrier agreements that Oasis and Javelin had with Dart Line and Trans Freight Line, two vessel-operating carriers providing service between the United States and Europe. For each shipment, an Interlink bill of lading had been issued to the actual exporter showing that the cargo was actually destined for Europe and was not to be transshipped. The Commission investigator documented 24 shipments involving false transshipments, during the period from September 14, 1981 through October 28, 1983. Oasis or Javelin was listed as "agent for shipper" on the vessel-operating carrier bill of lading.[50]

The Commission's investigator examined Interlink's tariff on file with the FMC to determine whether Interlink's shipper customers had been charged rates properly covered by that tariff. This examination showed that rates not set forth in Interlink's tariff had been charged on 62 separate shipments of loudspeakers, t-shirts, dessert preparations, wearing apparel, dehumidifiers and, predominately, cellulose film and cigarette paper, during the period from September 14, 1981 to June 11, 1982.[51] The non-tariffed rates actually charged were consistently applied on a regular basis over an extended period. For example, cellulose film was assessed an untariffed rate of $130.75 per long ton on 31 shipments during the period January 10 to June 11, 1982, while cigarette paper was assessed an untariffied rate of $85.75 per 40 cubic feet on 14 shipments during the period from January 22 to June 11, 1982.

The Presiding Officer also noted that the Commission's investigator had found seven shipments where Javelin, Oasis and Liberty NVOCC bills of lading were issued for cargo that was misdeclared to the vessel operator (as noted, Javelin and Oasis acted as NVOCC's in U.S. foreign commerce as well as vessel operators in foreign-to-foreign trades). In these shipments, the names of firms other than the NVOCC's again were listed on the vessel operator bills of lading as "agent for shipper." The names Consolidated, Cheerio, Dean and Interlink were used. These misdeclarations were made in connection with shipments of mining machinery, automatic teller machines, poultry equipment and cellulose film at sporadic intervals during the period from October 25, 1981 through April 24, 1983.[52]

[49] Ex. TA at 15, Attachment B.
[50] Ex. TA at 11–12, 16, Attachment D.
[51] Ex. TA at 17–19, Attachment C.
[52] Ex.TA at 19, Attachment E.

On the basis of this evidence, the Presiding Officer concluded that Interlink, Consolidated, Cheerio and Liberty had violated section 16, Initial Paragraph of the Shipping Act, 1916. He found that those four companies, led by Interlink, were responsible "over a long period of time for a deliberate and repetitious course of action" in which the vessel operator was paid one rate and the shipper charged a higher rate for the same shipment as a result of a misdeclaration (I.D. at 20). He held that this was a "deliberate scheme to obtain transportation at less than the tariff rates on Interlink's part . . ." (*id.*), hence finding the element of willfulness required by the statute. He based his similar holding with regard to Consolidated, Cheerio and Liberty on his belief that those three firms "were controlled and operated by the same people who used Interlink" (*id.*).

The Presiding Officer also held that Interlink violated section 18(b)(3) of the Shippinq Act, 1916, by failing to charge rates in accordance with its tariff. He noted that section 18(b)(3) does not require a finding of willfulness.

For these violations of the statute, the Presiding Officer assessed penalties of $200,000 against Interlink ($150,000 for the violations of section 16 and $50,000 for the violations of section 18), $50,000 against Consolidated and $5,000 against both Cheerio and Liberty. However, he declined to issue cease and desist orders against any of those four respondents, on the ground that in light of the facts established in the proceeding, such orders would be limited in scope and difficult to enforce. He stated that the penalties he assessed were severe and would accomplish more than cease and desist orders.

Finally, the Presiding Officer concluded that the record did not support findings of violations against any of the other respondents, *i.e.*, Ariel, Oasis, Javelin, Dean and the individuals Merritt, Sharma and Boudart. With respect to the individuals, he noted that the Commission's Order of Investigation and Hearing included as an issue whether cease and desist orders should be issued against them. However, he stated that such orders were not warranted "because the record in this case fails to establish which of them, or for that matter, if all of them took part in the violative conduct" (I.D. at 29–30).

D. *Positions of the Parties*

1. *Respondents*

In their Exceptions, Interlink, Consolidated, Cheerio, Dean and Liberty[53] attack the I.D. for both its style and substance. They argue that the Presiding Officer failed to articulate basic factual findings necessary to support his

[53] The Exceptions note (p. 2, n. 1) that the I.D. found no violations by Ariel, Charles, Klaus & Co. (the parent company of Oasis and Javelin) and the individual respondents, and state that "the instant pleading is filed only on behalf of the remaining respondents. . . ." No mention is made of Joshua Dean, but presumably the same statement would apply.

ultimate conclusions, and that the I.D. violated the provisions of the Administrative Procedure Act, 5 U.S.C. §51 *et seq.*, and the Commission's regulations by failing to refer properly to the record in support of the findings it did make. They take particular exception to the Presiding Officer's reference to the "entire record" in certain of his findings as potentially violative of procedural due process.

The primary substantive argument advanced by the respondents is that the different commodity descriptions used in most of the instances of misclassification (*i.e.*, cellulose acetate/cellulose film and cigarette paper/industrial wrapping paper) did not denote any true difference in commodity usage and, in any event, that Interlink did not know that the wrong description was being employed for vessel operator rating purposes. They contend that the Presiding Officer erroneously ignored testimony they had adduced that cellulose acetate is available in the form of film and that the wrapping paper being shipped would require further processing before it could become cigarette paper. Respondents argue that the vessel-operating carriers had filed both sets of terms for each commodity within the same tariff, thus creating an ambiguity. They further contend that Interlink personnel had checked with the vessel operators and made reasonable attempts to ascertain the most appropriate rating for the commodities involved. They state that the Presiding Officer erred by dismissing this testimony out of hand on the ground that it was self-serving and uncorroborated.

With respect to the instances of misdeclaration of weight, they contend that in some cases there was no misdeclaration and, in the others, if there were incorrect weights given to the vessel operator, the weight differential made no difference in the freight charges because of minimum weight rules. In sum, the respondents submit that the record does not support the conclusion that they knowingly and willfully obtained transportation at less than the rates required by law.

The respondents also argue that in finding violations by Consolidated, Cheerio and Liberty, the Presiding Officer failed to make findings of fact in support of that conclusion and instead wrongly relied on a presumption of common ownership among those companies. They stress that the record contains no evidence of actions by Cheerio, Consolidated and Liberty and state that, in fact, "these entities were just names used on Interlink shipments and these companies performed no functions in relation to the involved shipments" (Exceptions at 15). They contend that the Presiding Officer was inconsistent to find that Interlink misdescribed the shipments at issue and, at the same time, to hold that the passive entities of Consolidated, Cheerio and Liberty also violated section 16.

The respondents further state that the penalties assessed by the Presiding Officer are excessive and, if upheld, will put Interlink out of business. Finally, they contend that the Presiding Officer erred in finding that Interlink is controlled by Martyn Merritt, Sharma and Boudart and that Merritt has a "substantial ownership interest and/or a primary operating responsi-

bility in Cheerio, Liberty Shipping and Consolidated'' (I.D. at 12). They suggest that since, in their view, these findings had no effect on the I.D.'s ultimate conclusions, they simply be ''deleted'' by the Commission (Exceptions at 21).

2. *Hearing Counsel*

Hearing Counsel deny that there is any ambiguity in the vessel operators' tariff commodity descriptions. They contend that the record shows that cellulose film is but one form of cellulose acetate and that cellulose acetate is also available as ''lacquers, powder, pellet, or granules, rods, tubes or other extended forms and sheets,'' all of which are susceptible to separate tariff commodity classification (Reply at 2).[54] With respect to cigarette paper, Hearing Counsel state that if someone ''decides to use cigarette paper for another purpose, this does not create a tariff ambiguity which authorizes the shipper to misdeclare the shipment'' (*id.* at 3). They argue that there is clear evidence of a deliberate scheme on the part of Interlink and Liberty because their own bills of lading correctly described the cargo based on shipper packing lists, but they then declared to the vessel operators a completely different set of descriptions. Similarly, with respect to the misdeclarations of weight, the shipper would inform Interlink of the correct weight or cube for the cargo being shipped, as shown by the packing lists and export declarations.

Hearing Counsel emphasize that this case does not involve a normal NVOCC ''rate spread'' created by the service of consolidating several small shipments into a full containerload. They state that the shipments involved here were full containerloads of a single commodity when they were tendered to Interlink, and that Interlink then created an illegal rate spread by making false declarations to the ocean carrier.

Hearing Counsel note that the respondents made no attempt in their Exceptions to address the Presiding Officer's finding that they violated section 16 by falsely representing that 24 shipments were to be transshipped. They defend the I.D.'s findings with respect to Consolidated, Cheerio and Liberty by arguing that Consolidated and Cheerio were acting as agents of Interlink and, as such, clearly fall within the proscriptive reach of section 16,[55] and that Liberty acted as NVOCC on two misdeclared shipments. Finally, Hearing Counsel describe as appropriate the penalties assessed by the Presiding Officer.

Hearing Counsel make no comment on the I.D.'s conclusions that the record did not support findings against the other respondents and that cease and desist orders were not required.

[54] Ex. 23 at C–765; 18 Apr. Tr. at 48.

[55] The prohibitions of section 16 apply to, *inter alia*, ''any shipper, . . . or other person, or any . . . agent . . . thereof . . . .''

DISCUSSION

After reviewing the record, the I.D., the respondents' Exceptions and Hearing Counsel's Reply to Exceptions, the Commission has determined that we cannot reach at this juncture a final conclusion as to whether violations of law were committed by any of the respondents.[56] Ultimately, any findings of violations in this case must be based primarily on the shipping documents introduced into the record by Hearing Counsel through the testimony of Mr. Mingione. The Commission is satisfied that the positions of the parties as to the legal significance of those documents have been adequately set forth in the record and analyzed by the Presiding Officer. Although we do not reach the merits of those positions at this time, we see no need for the taking of further testimony or briefing regarding the substance of the documents. The arguments in the respondents' Exceptions and Hearing Counsel's Reply will be preserved for resolution at the appropriate time.

However, the Commission is not satisfied that the record adequately describes the corporate structures of some of the respondents, the relationship (if any) among them and the roles played by certain individuals. There simply are too many important questions that have been left unanswered. Some of these questions were identified by the Presiding Officer at the close of his Initial Decision. He cited them as the reason why he found no violations by Klaus, Oasis, Javelin, Dean and the individual respondents. Although the Commission renders no judgment now regarding that particular conclusion by the Presiding Officer, we have determined that, in light of the matters requiring further investigation, the best exercise of our discretion would be to reopen the record with regard to *all* respondents. At the close of the remand proceedings, the Presiding Officer will be in a position to reexamine his conclusions (including the possible imposition of penalties or cease and desist orders) with regard to each respondent, if the evidence requires.

The inadequacies and contradictions of the present record are illustrated best by Interlink. If it is assumed for purposes of analysis that the shipping documents do show a pattern of malpractices, the Presiding Officer's findings against that company appear justified at first glance. Interlink acted as NVOCC on most of the suspect shipments and it appeared to be the link in the shipping chain at which the correct description, weight, measurement or—in the case of the false transshipments—destination of each ship-

[56] Evidence was introduced into the record regarding previous administrative and court actions involving some of the respondents. Throughout the hearings, the respondents objected vigorously to the introduction into the record of that evidence, on the grounds that it was irrelevant and concerned persons not parties to this proceeding and that they had not had a fair opportunity to defend against it. In his Initial Decision, the Presiding Officer stated at the outset that in the absence of any supporting evidence of a prior course of conduct involving similar practices, he would not consider any of the evidence to which the respondents objected. The Commission agrees with this approach and we have and will accord no weight whatsoever to that evidence. To do otherwise could result in findings based on information that is not probative moreover, respondents' rights to procedural due process could be violated.

ment were altered. However, the record also shows that Interlink has only two employees who do clerical work and have no operational autonomy. There is no clear indication as to who is responsible for making policy decisions for the company.[57] Interlink seems to have no physical assets aside from its bank accounts, tax forms and correspondence stock. Thus the difficulty becomes clear. Assuming that the documents show that misrepresentations were made to the vessel-operating carriers, someone made a decision to make those misrepresentations—but no employee of Interlink has the authority to make such a decision. On this record, therefore, a finding against Interlink makes little sense, particularly in light of section 16's requirements of willfulness or conscious wrongdoing. Intent cannot be ascribed to a corporate entity that apparently lacks the ability to make any important decision. Section 18 does not require a finding of willfulness, but the documentary evidence here arguably shows a pattern of extended and consistent misrating that in turn implies guidance beyond the authority of two tariff clerks. Further investigation is necessary to determine exactly who was responsible for running Interlink during the period of record, a matter that obviously involves Interlink's relationship with Ariel.

The Presiding Officer's basis for finding that Consolidated, Cheerio and Liberty also violated section 16 raises a similar concern that, if there were violations, the responsibility lies somewhere else. He stated that Consolidated, Cheerio and Liberty violated section 16 because they were "controlled and operated by the same people who used Interlink." (I.D. at 20). As noted, the identity of the individuals "using" Interlink has not been established. But if such individuals were responsible for misrepresentations or other actions giving rise to violations of law, they should be held accountable rather than (or at least in addition to) corporate entities such as Consolidated and Cheerio, especially in light of Martyn Merritt's testimony that Consolidated and Cheerio were "nonentities" used to screen the vessel operators away from Interlink's shipper clients.[58] If that is so, it appears that someone had authority over the operations of all three companies.

It should be noted at this juncture that the record does not support the Presiding Officer's statement that Liberty was "controlled and operated by the same people who used Interlink." The only evidence regarding Liberty's ownership is that Mary Anne Merritt, Martyn's wife, owns some unspecified shares. Any findings against Liberty on this record would have to be based very narrowly on two shipments that may have been misdeclared.[59] Similar limited evidence exists regarding Oasis and Javelin, against which the Presiding Officer made no findings.[60] This evidence

[57] At one point during the evidentiary hearings, the Presiding Officer remarked accurately of Interlink: "It's a strange company, nobody knows who the boss is." 19 Apr. Tr. at 160.

[58] This testimony was used by respondents in their Exceptions as the reason why the Presiding Officer erred in finding that Consolidated, Cheerio and Liberty violated section 16.

[59] Ex. S-1, S-3, TA, Attachment E.

[60] Ex. TA, Attachment E; Ex. DD, CC, Z, AA, BB.

also raises questions about the relationship between Oasis, Javelin and Liberty, on the one hand, and Cheerio, Consolidated and Interlink, on the other, because the names of the latter three companies were again listed as "agents for shipper" on the vessel operator bills of lading. There may have been a symbiotic relationship between the two groups of companies, in which they would take turn using each other's names to facilitate deception of the vessel-operating carriers.

Perhaps even more important, there is an open question as to the role of Javelin and Oasis in the shipments that allegedly were falsely transshipped. To reiterate, the Presiding Officer found that on these shipments, an Interlink NVOCC bill of lading was issued to the actual shipper/exporter showing that the cargo was destined for Europe, *e.g.*, Belgium. The cargo was then misrepresented to Dart Line and Trans Freight Line, two vessel-operating carriers providing service between the United States and Europe, as being destined for transshipment to countries outside Europe, *e.g.*, Turkey. This misrepresentation permitted the cargo to get special lump sum rates for transshipped cargo offered under connecting carrier agreements that Dart and Trans Freight Line had with Oasis and Javelin in the latter's capacity as vessel operators in Mediterranean foreign-to-foreign trades. Once again, the "agent for shipper" practice was employed, but this time with Oasis and Javelin, rather than Consolidated or Cheerio, appearing on the Dart and Trans Freight Line bills of lading.[61] The record does not show why this was done, who directed that it be done and whether Oasis and Javelin knew about it.

A. *Factual Issues Requiring Further Investigation*

In order to give maximum guidance to the parties and the Presiding Officer, the Commission sets forth below specific questions that have been raised by the general issues discussed above and should be investigated. This list is meant to be illustrative rather than exhaustive, of course, because the answers to those questions may open up new areas of exploration. Although they have been categorized according to particular respondents, certain questions may apply with equal force to two or more respondents.

1. *Ariel*

J.A. Mott was president of Ariel from August, 1980 to August, 1983, which encompasses most of the period of apparent violations. After August, 1983, he retained his ownership interest of 200 shares. What does Mott know about the relationship of Ariel and Interlink during the period of record, the chain of command at Interlink, and the shipping transactions under investigation?

[61] As noted previously, the respondents did not except to the Presiding Officer's findings with regard to the false transshipments.

Mott may also have information with regard to the ownership, directors, officers and lines of business of ASA Development Co. during the period of record. To whom did Mott report at ASA? In this connection, we note that a representative of ASA attended the annual meetings of the Ariel shareholders.[62] That individual should be identified and, if possible, called to testify as to the nature and ownership of ASA and its relationship with Ariel. Specifically, what representation did ASA have on the Ariel board of directors? Why did the Ariel board shrink from six directors to four between August 1982 and August 1983? At some point during that same period, Martyn Merritt purchased 200 shares of Ariel formerly held by Roy Brookes and became a member of the board. When precisely did that happen? Is there any connection between Merritt's becoming a member of the board and the departure of Arun Dutta and Avinash Kohli? What does Brookes know about ASA and the day-to-day relationship between Ariel and Interlink?

Before he acquired Brookes's shares, Martyn Merritt was hired as a consultant by Ariel in August 1982. At the same time, his wife Mary Anne was elected assistant secretary of Ariel. This may indicate that the Merritts had a relationship with Ariel before August 1982. What does Mary Anne Merritt know about that and what were her duties at Ariel?

Finally, further information is necessary regarding the basis of the December 1983 Dun & Bradstreet report that 60 percent of Ariel was owned by Charles, Klaus & Co.

2. *Interlink*

Who are the other owners of Interlink, besides Martyn Merritt, Sharma and Boudart? What do they know about the issues in this case? In view of the ostensibly minor shares held by Merritt, Sharma and Boudart, why has there been no change in the directors and officers since 1980? Do any of the owners of Interlink (including Sharma and Boudart) have interest in Ariel or in ASA?

Is there an agency relationship between Ariel and Interlink? What is Sharma's knowledge on that question and on the day-to-day operations of Interlink? If Interlink realizes a net after-tax profit for a calendar year, how is that profit distributed to Interlink's owners (this has particular relevance to the unlawful freight savings allegedly realized by Interlink during the period of record)? What were Interlink's revenue results for 1981, 1982 and 1983? Who is responsible for maintaining Interlink's finances and preparing its tax returns?

What were the duties of the two Interlink employees during the period of record? Who supervised them? Who directed that the names of Consolidated, Cheerio, Dean, Oasis and Javelin be supplied to the vessel-operating carriers as "agents for shippers"? Who directed them to declare to the

[62] Ex. 1-A, 1-C, 2-A.

vessel operators that the shipments under investigation would be transshipped? Who was responsible for the untariffed rates assessed against certain shipments? What knowledge did they have of the alleged misdeclarations of weight, measurement or commodity on the shipments under investigation?

3. *Consolidated*

Who were the owners of Consolidated during the period of record? Who were its officers? Who were its directors? Did it have any assets of its own? Did it have any salaried employees? Was the use of Consolidated as "agent for shipper" in the Interlink shipments made known to Consolidated's officers and directors? Did Consolidated receive any benefit from that practice?

4. *Cheerio*

Did Martyn and Mary Anne Merritt, Cheerio's owners and officers, know that Cheerio was being used as "agent for shipper" in the Interlink shipments? Did Cheerio receive any benefit from that practice?

5. *Liberty*

Who were the owners of Liberty (besides Mary Ann Merritt) during the period of record? Who were its directors? Who were its officers? On the two 1983 Liberty NVOCC shipments where cargo may have been misdeclared, who directed that Interlink be listed as "agent for shipper" on the vessel operator bills of lading? Is there any significance in the fact that Thomas Matthews, an Ariel employee, is the U.S. filing agent for Liberty?

6. *Oasis and Javelin*

Is there any more recent information available on the ownership of Charles, Klaus & Co., the parent of Oasis and Javelin? Who were responsible for the day-to-day operations of Oasis and Javelin during the period of record? On the 1983 NVOCC shipments where cargo may have been misdeclared, who directed that the names of Consolidated, Cheerio and Joshua Dean (ostensibly the ultimate owner of Oasis and Javelin) be used as "agent for shipper" on the vessel operator bills of lading? Is there any significance in the fact that Mary Anne Merritt is the U.S. agent for Oasis and Javelin? Was the fact that Oasis and Javelin were used as "agent for shipper" in connection with the false transshipments known to them? Did they receive any benefit?

B. *Issues of Law*

In addition to further development of the factual record with regard to the issues discussed in this order, the Commission also wishes the parties to brief and the Presiding Officer to issue a supplemental initial

decision on certain issues of law. These include: whether the Commission has the authority to issue cease and desist orders forbidding violations of the Shipping Act of 1984 based on violations of the Shipping Act, 1916,[63] whether a cease and desist order can be issued against an individual even if no findings of violations of law are made against him and, depending on the information developed, whether separate incorporations can and should be pierced in the imposition of sanctions.

THEREFORE, IT IS ORDERED, That this proceeding is hereby remanded to the Presiding Officer for further development of the record and issuance of a supplemental initial decision as described above;

IT IS FURTHER ORDERED, That, pursuant to Rule 61 of the Commission's Rules of Practice and Procedure (46 C.F.R. §502.61), the supplemental initial decision of the Presiding Officer shall be issued by December 16, 1986 and the final decision of the Commission shall be issued by April 16, 1987.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[63] This issue was raised by respondents (*e.g.*, 17 Apr. Tr. 16) but not reached by the Presiding Officer.

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–44

STEVENS SHIPPING AND TERMINAL COMPANY V. SOUTH CAROLINA STATE PORTS AUTHORITY

ORDER ADOPTING INITIAL DECISION

December 27, 1985

This proceeding was initiated by the filing of a complaint by Stevens Shipping and Terminal Company (Stevens) alleging that certain items in the terminal tariff of the South Carolina State Ports Authority Ports Authority) violated sections 15 through 18 of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. § 814–817). Specifically, the complaint alleges that Items 5, 20, 25, 135 and 136 of the Ports Authority's tariff are unlawful because they require Stevens to indemnify the Ports Authority for the latter's own negligence and are being applied in an unjustly discriminatory manner against Stevens. The Commission's Bureau of Hearing Counsel intervened in the proceeding. An Initial Decision (I.D.) has been issued by Administrative Law Judge Norman D. Kline (Presiding Officer) finding that tariff Items 20, 25 and 135 violated section 17 of the 1916 Act.[1] Exceptions to the I.D. were filed by Stevens and the Ports Authority. Hearing Counsel and Stevens filed Replies to the Exceptions of the Ports Authority. The Ports Authority filed a Reply to the Exceptions of Stevens.

BACKGROUND

The controversy between Stevens and the Ports Authority arose out of an accident that occurred at the Charleston terminal on January 20, 1982. Stevens was loading locomotives aboard a vessel bound for Saudi Arabia utilizing a ganty crane and operator rented from the Ports Authority when the crane collapsed causing the loss of a locomotive. The consignee and its insurer filed suit in the U.S. District Court for the District of South Carolina, Charleston Division, against the ocean carrier, Stevens and the Ports Authority. The Ports Authority cross-claimed and filed a separate action against Stevens. The Ports Authority alleged that Stevens was the negligent party and that the terminal tariff held the Ports Authority harmless and required indemnification by Stevens. Stevens requested a stay of the proceedings to allow the Commission to determine the lawfulness of the

[1] The Presiding Officer found that section 17 of the 1916 Act was essentially reenacted as section 10(d)(1) of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. § 1709). Therefore, any violation of section 17 of the 1916 Act was deemed to also violate section 10(d)(1) of the 1984 Act. *See*, 28 F.M.C. 103, 105 at fn.4.

tariff's indemnification provisions. The Court granted the request. Stevens subsequently filed the complaint which initiated this proceeding.

At prehearing conferences convened by the Presiding Officer the scope of the proceeding was narrowed and the issues specified. Stevens relied upon sections 16 First and 17 of the 1916 Act (46 U.S.C. app. § 815 First and 816) as the basis of its complaint. The parties agreed that the lawfulness of Items 5, 20, 2S and 136 could be determined as a matter of law without an evidentiary hearing.[2] The questions of actual control of the crane operator under Item 135 and the discriminatory application of that Item were deemed to be factual issues requiring an evidentiary hearing.[3]

The Presiding Officer issued a preliminary ruling that: (1) Items 20 and 25 violated section 17 of the 1916 Act; (2) Item 136 was lawful on its face; and, (3) Item 5 was not unlawful, but could not be construed as imposing tariff items that were otherwise unlawful. The matter then went to hearing.

INITIAL DECISION

The Initial Decision issued subsequent to the evidentiary hearing found essentially as follows with respect to the lawfulness of the tariff items at issue:

Item No. 5 is not unlawful because it is merely declarative of existing law. However, tariff provisions of this kind cannot be utilized to enforce tariff provisions which are otherwise unlawful by imputing such an agreement to facilities users. Therefore, although Item 5 is not unlawful it adds nothing substantive to the tariff and does not prevent users seeking relief from the application of other unlawful provisions.

Items 20 and 25 are unlawful on their face. They attempt to exculpate the terminal operator from liability for its own negligence without affording users a concomitant benefit and attempt to impose liability on users without regard to fault. Such provisions are unreasonable under section 17 of the 1916 Act as it has been consistently construed by the Commission. The Ports Authority's argument that it does not apply the provisions in such a manner in actual practice does not alter the fact that the provisions, as published, are unreasonable.

Item 136 is not unlawful on its face. The provisions are construed as a warranty or assurance that the Ports Authority provides adequate cranes and competent operators. Such provisions are reasonable on their face. Whether the Ports Authority breached this obligation is a matter for the

[2] Item 5 imposed a rule that use of the facilities constituted an agreement to be bound by all terms of the tariff. 28 F.M.C. at 107. Item 20 required users to hold harmless and indemnify the Ports Authority for all losses. *Id.* at 109. Item 25 stated that vessel owners and their agents were responsible for all damages resulting from the use of port facilities. *Id.* Item 136 stated that the Ports Authority provided adequate cranes and qualified operators and required their use in preference to private cranes. 28 P.M.C. at 116.

[3] Tariff Item No. 135 purported to disclaim liability on the part of the Ports Authority for losses resulting from crane operations and placed the crane operator under the control of the renter. *Id.*

Court to determine. The further requirement that users must utilize Ports Authority cranes in preference to private facilities, the so-called "first-call" system, was not disputed. Its only relevance is with regard to Stevens' assertion that it did not select or control the crane and its operator. However, that factual issue does not affect the lawfulness of Item 136.

Item 135 is unlawful based on the evidentiary record. It does not comport with the actual practice of the Ports Authority. The Item provides that crane operators are so-called "borrowed servants" of the crane renter, that is, under the exclusive control of the renter, and that the Ports Authority has no liability for damages resulting from the use of the crane. The record indicates, however, that the Ports Authority does not relinquish the right to control its crane operators and in fact retains extensive control over crane operations and the operator. Therefore, they are not "borrowed servants" and remain employees of the Ports Authority during crane operations. It is an unreasonable practice under section 17 of the 1916 Act to impute the negligence of the Ports Authority's employees to users of facilities. Because Item 135 embodies this practice it is an unreasonable tariff provision in violation of section 17.

Stevens also alleged in its complaint that the Ports Authority practices under Item 135 were unjustly discriminatory in violation of section 16 First of the 1916 Act because the Ports Authority entered into separate agreements with ocean carriers and their agents which were contrary to Item 135. The Presiding Officer found it unnecessary to pass upon this discrimination claim because he had already found the provision to be unlawful. Furthermore, he noted that the subject agreements contained concomitant benefits to the ocean carriers and had been approved by the Commission under section 15 of the 1916 Act. The Presiding Officer also declined to direct specific amendments to Item 135 because the Commission has in such cases allowed a reasonable amount of time for the filing of amendments to terminal tariffs.

Finally, the Presiding Officer noted that the Ports Authority had amended Items 20 and 25 during the course of the proceeding. Hearing Counsel argued that the amendments were insufficient because they could be construed as exculpating the Ports Authority when it was partially at fault for losses. Stevens also objected to the amendments and sought a ruling that the amendments could not be applied retroactively to the suits pending in the District Court. The Presiding Officer found that it was unnecessary to pass upon the lawfulness of the amended tariff provisions because only the original tariff provisions are actually at issue in this proceeding and in the District Court proceedings.

He also found it unnecessary to issue a cease and desist order concerning the assertion of the unlawful tariff items in the District Court proceedings on the basis that the Court should be free to determine negligence issues in those proceedings under local law.

POSITIONS OF THE PARTIES

Ports Authority

The Ports Authority does not object to the finding of the Presiding Officer with respect to Items 20 and 25 of its tariff. The Ports Authority argues, however, that these amended Items are not ambiguous nor exculpatory. The Ports Authority also argues that it was proper for the Presiding Officer to allow the Ports Authority some time to fashion a workable revision of Item 135 and to refuse to restrict the Ports Authority's arguments in the District Court proceedings.

However, the Ports Authority does object to the findings concerning Item 135, specifically the finding that the Ports Authority could not require that the crane operators become the "borrowed servants" of the crane renters. The Ports Authority argues that this finding is unjustified and impractical, and requests oral argument.

Stevens

Stevens disagrees with the Ports Authority's characterization of the I.D. and argues that in finding Item 135 unlawful the I.D. did not prohibit transfer of control over crane operators. However, Stevens excepts to the Presiding Officer's failure to order the Ports Authority to amend Item 135.

Stevens also takes issue with the failure of the Presiding Officer to review the lawfulness of the amended tariff Items 20 and 25, published by the Ports Authority during the course of the proceeding. It contends that these amended provisions are also unlawful because they can be construed as exculpating the Ports Authority in all cases except those where the Ports Authority is found to be "solely" negligent and responsible for losses.

Finally, Stevens disagrees with the Presiding Officer's determination that it was unnecessary to order the Ports Authority to cease and desist from asserting the exculpatory provisions in the suits pending in District Court.

Hearing Counsel

Hearing Counsel supports the findings of the Presiding Officer and urges their adoption by the Commission. It argues that the I.D. fully comports with applicable precedent and is properly based on the weight of evidence in the record.

DISCUSSION

The findings of the I.D. with respect to the original tariff items challenged by Stevens are correct under applicable precedent and are fully supported by the evidence of record in this proceeding. Accordingly, and for reasons

more fully stated below, the Commission adopts the essential findings of the Initial Decision as the final decision in this proceeding.

Tariff Item No. 5 merely provides that users of terminal facilities are bound to the provisions of the terminal tariff. This is declarative of existing law and adds no validity to other tariff provisions which may otherwise be unlawful.[4]

Item No. 136 is a statement or warranty that the Ports Authority provides adequate cranes and competent operators. There is no apparent basis to find this provision unlawful. In fact, it appears to accrue to the benefit of users of the cranes to the extent it provides a contractual cause of action if the crane or its operator are deficient.

Items No. 20 and 25 are unlawful because they purport to exculpate the Ports Authority from its own negligence and impose liability on crane users without regard to fault. In several cases the Commission has found such provisions unlawful.[5]

Item No. 135 was properly found to operate in an unreasonable manner because it purports to transfer control over crane operations to stevedores when in fact the Ports Authority retains significant control over crane operations.[6] Contrary to the Ports Authority Exceptions, the I.D. did not prohibit a transfer of control over crane operators to stevedores; it was the variance between the tariff provision and actual practice that was found to be unreasonable. Under the facts of this case, Item No. 135 unlawfully attempts to exculpate the Ports Authority for the potential negligence of its employees, *i.e.*, crane operators, when operating within the scope of the terms of their employment. The Presiding Officer was correct, however, in not ordering specific amendments to Item No. 135 because the Ports Authority is entitled to choose between two basic methods of operation. It could either change its practices in providing crane operators and surrender total control over them to stevedores during lift operations or accept potential liability for their actions when operating cranes pursuant to Ports Authority directives.

The Presiding Officer was correct that it was not *strictly* necessary to pass upon the applicability and lawfulness of amended Items No. 20 and 25. However, in the interest of judicial economy and because the decision in this case will be used to assist the District Court in the consolidated cases pending before it, it appears appropriate to do so here.

The Commission therefore advises that under its regulations the amended items may not operate retroactively to affect those pending suits.[7] The

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[4] *West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. 420 (1980) *affirmed sub. nom*, *West Gulf Maritime Association* v. *Federal Maritime Commission*, 652 F.2d 197 (D.C. Cir. 1981).

[5] *See e.g.*, *United States Lines, Inc.* v. *Maryland Port Administration*, 20 S.R.R. 646 (1980); *West Gulf Maritime Association* v. *The City of Galveston*, 22 F.M.C. 101 (1979).

[6] *See*, 28 F.M.C. at 142–145.

[7] Changes in terminal tariffs must be filed on or before, not after, their effective date. 46 C.F.R. 515.4. In any event, the amendments to tariff Items 20 and 25 went into effect on November 1, 1984 and would appear to have no effect on the incident of January 20, 1982.

Commission also notes that amended Items No. 20 and 25 appear ambiguous and potentially unlawful, at least to the extent that they limit the Ports Authority liability to only those instances where it is *solely* at fault.[8] Case law is clear that ambiguous tariff provisions which may be read to exculpate the terminal operator in instances where it is partially at fault are also unlawful.[9]

However, it is not appropriate for the Commission *to order* the Ports Authority to cease and desist from asserting its tariff provisions as a defense in the pending District Court actions. These provisions may have relevance to the negligence issues before the District Court apart from their unlawfulness under the Shipping Act of 1984. *See, Wilmington Stevedores* v. *Port of Wilmington*, 22 S.R.R. at 1657. It is not only of questionable legality under the Commission's enabling statute, but would also appear to be a usurpation of the District Court's authority to determine the issues before it in the pending civil suits.

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

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision filed by Complainant, Stevens Shipping and Terminal Company, and Respondent, South Carolina State Ports Authority, are denied to the extent that they are inconsistent with this Order, and;

IT IS FURTHER ORDERED, That the request of the South Carolina State Ports Authority for oral argument is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[8] The critical language of the amendments appears at pages 85 and 86 of the Initial Decision.
[9] *Central National Corp.* v. *Port of Houston*, 26 F.M.C. 296 (1984).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–44

STEVENS SHIPPING AND TERMINAL COMPANY

v.

SOUTH CAROLINA STATE PORTS AUTHORITY

Complainant, a stevedore operating at the Port of Charleston, alleges that five provisions in respondent Ports Authority's terminal tariff are unreasonable in violation of section 17 of the Shipping Act, 1916, and that respondent has applied one provision in a discriminatory and prejudicial fashion, in violation of section 16 First of the 1916 Act. Respondent is applying the provisions in connection with two lawsuits in which respondent is seeking to hold complainant responsible for damages to a crane and locomotive resulting from an accident which occurred while the crane and its operator were rented by complainant from the respondent. It is held:

(1) Two of the tariff provisions regarding users' consent to the tariff and respondent's rental system are not unlawful on their face;

(2) Two provisions (Items 20 and 25) which, as originally worded, could impose liability on and require indemnification from users even if respondent Ports Authority were negligent, are unlawful on their face;

(3) One provision (Item 135) which purports to transfer control over Ports Authority crane operators to renting stevedores and disclaims Ports Authority liability is unlawful because, in fact and in law, the right to control the crane operator does not pass from the Ports Authority to the renting stevedore under the "borrowed-servant" doctrine;

(4) Complainant's allegations that respondent violated section 16 First are not supportable;

(5) Respondent is ordered to cease and desist from carrying on the unreasonable exculpatory-type practices embodied in the above tariff provisions, which practices and provisions are unreasonable, in violation of section 17 of the 1916 Act and section 10(d)(1) of the Shipping Act of 1984.

Francis J. Gorman, JoAnne Zawitoski, and *W. Jefferson Leath, Jr.* for complainant Stevens Shipping & Terminal Company.

William H. Vaughan, Jr., Patrick J. O'Connor, Thomas C. Zielinski, and *John L. Choate* for respondent South Carolina State Ports Authority.

Aaron Reese and *James S. Oneto* for Hearing Counsel.

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

Adopted December 27, 1985

The complaint, which initiated this proceeding, was filed and served on February 27, 1983, by complainant Stevens Shipping & Terminal Com-

[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).

pany (Stevens). Stevens, a stevedoring company engaged in stevedoring and terminal operations in the Port of Charleston, South Carolina, is challenging the lawfulness of several provisions contained in the tariff published by respondent South Carolina State Ports Authority (SCSPA or Ports Authority), an agency of the State of South Carolina which owns and operates terminal facilities in the Port of Charleston.

The filing of the complaint was an outgrowth of an accident which triggered two earlier lawsuits. Apparently, a railroad operated in Saudi Arabia purchased six locomotives and booked their shipment with an ocean carrier known as United Arab Shipping Company sometime in October of 1981. This carrier or its agent arranged to have the locomotives move through Charleston and to have Stevens load the locomotives onto the vessel sailing from that port. In order to perform this service, Stevens rented a gantry crane known as Unit No. 1575 from the Ports Authority who also furnished a crane operator or operators. Prior to loading the shipment, however, on January 20, 1982, the crane collapsed when handling the sixth and last locomotive.

As a result of the above accident, on January 20, 1983, the Arabian purchaser and consignee and its insurer brought suit in the U.S. District Court in Charleston against the ocean carrier, Stevens, and the Ports Authority seeking $1 million for damages to the locomotive[2]. The Ports Authority denied liability and raised a number of defenses, including Item 135 of its terminal tariff, which item disclaimed liability on the part of the Ports Authority and purported to place the crane operator under the control of the renter. In addition, the Ports Authority cross-claimed against Stevens, alleging that Stevens had taken control of the crane which had collapsed as a result of Stevens' operations and use of the Port Authority's facilities. The Ports Authority also asserted the "terms and conditions" of its tariff generally and specifically referred to Item 20 of that tariff, which item required users "to indemnify and save harmless the authority from and against all losses, claims, demands and suits for damages. . . ."

In addition to this first suit and cross-complaint, on February 3, 1983, the Ports Authority brought suit against Stevens in the same court, alleging that Stevens had taken control of the crane, the operator, and the operations and, through its negligence, had caused damage to the crane and to the Port Authority's facilities.[3] The Ports Authority again asserted the "terms and conditions" of its tariff generally and referred specifically to Item 20.

Because of the role played by the Ports Authority's tariff in both of the above lawsuits, Stevens asked the court to stay the two proceedings

[2] *Saudi Government Railways Organization and Red Sea Insurance Company* v. *United Arab Shipping Co. (S.A.G.), Stevens Shipping and Terminal Company, an South Carolina State Ports Authority*, Civil Action No. 83–176–8, United States District Court for the District of South Carolina Charleston Division.

[3] *South Carolina State Ports Authority* v. *Stevens Shipping & Terminal Company*, Civil Action No. 83–295–8.

to allow this Commission to consider the lawfulness of relevant portions of that tariff. The court responded by issuing orders on December 9, 1983. The court concluded:

> . . . that the Federal Maritime Commission has some experience and expertise in the field and this Court welcomes the Commission's advice on the validity of the disputed tariff provisions. Upon receipt of such advice, this Court will then decide the legal questions presented under the particular facts of this case, including any challenge to the validity of the Tariff then asserted.

Following issuance of the court's orders, Stevens filed its complaint in which it challenged various provisions of the Port Authority's tariff under the Shipping Act, 1916, which could be relied upon by the Ports Authority to impose liability on Stevens and which allegedly were being used by the Ports Authority to discriminate against Stevens. Stevens alleged that tariff Item 20 (the indemnity provision) and Item 135 (disclaimer of liability and passage of control to renters) and unspecified other tariff items violated sections 15 through 18 of the 1916 Act, 46 U.S.C. secs. 814–817, on their face and insofar as they were being applied so as to require Stevens to indemnify the Ports Authority for the latter's own negligence and as they were being applied in an unjustly discriminatory fashion against Stevens.[4] As relief, Stevens asked for an order that the tariff provisions in question were null and void and unenforceable on their face as applied to the facts in this case and for an order that the Ports Authority cease and desist in any way from acting in accordance with these tariff provisions or from seeking to enforce such provisions against Stevens and for such other orders as the Commission might deem necessary and proper.

During the course of prehearing discovery, Stevens specified the tariff items it was challenging. These were Items 5, 15, 20, 25, 135, 136, and 145. At a prehearing conference held on December 28, 1983, Stevens narrowed the list of items it was challenging to five, namely, Items 5, 20, 25, 135, and 136. Items 20 and 135 have already been identified. Item 5 referred to a rule that the user of the Ports Authority's facilities agreed to be bound by the tariff. Item 25 referred to a rule that vessel owners and agents would be responsible for all damage resulting from their use of the Ports Authority's facilities. Item 136 referred to the Ports Authority's holding out to provide adequate cranes and qualified operators

[4] During the course of the proceeding, Stevens narrowed its contentions and alleged that the tariff provisions it was challenging were violative of sections 16 First and 17 of the Shipping Act, 1916. That Act has in large measure been supplanted by the Shipping Act of 1984, P.L. 98–237, 98 Stat. 67, 46 U.S.C. app. secs. 1701–1720, effective June 18, 1984. The relevant portion of section 17 of the 1916 Act concerning just and reasonable regulations and practices by marine terminal operators was re-enacted in essentially the same language as section 10(d)(1), 46 U.S.C. app. sec. 1709. The relevant portion of section 16 First of the 1916 Act concerning undue or unreasonable preference or advantage etc. was re-enacted as sections 10(b)(11) and 10(b)(12) of the 1984 Act, 46 U.S.C. app. sec. 1709, and was made applicable to marine terminal operators by section 10(d)(3) of the 1984 Act. Therefore, my findings and conclusions are the same under either the 1916 or 1984 Acts.

and to the Ports Authority's practice of requiring users of its facilities to rent a Ports Authority crane if suitable and available in preference to a private crane.

A second prehearing conference was held on May 23, 1984. The purpose of that conference was to determine what kind of evidentiary record and hearing would be required to resolve the issues and to narrow the issues. It was determined that many of the issues could be resolved as matters of law, i.e., without the need for evidentiary support. In other words, they could be resolved by rulings in the nature of summary judgment because they did not involve factual disputes. Accordingly, the lawfulness of tariff Items 5, 20, 25, and 136 were determined in this manner. Tariff Item 135 purported to transfer control of the crane operator to the renting party, in this case, Stevens, and relieved the Ports Authority of liability for personal injury or property damage resulting from operation of the crane except that resulting from structural failure. This Item is known as the "borrowed-servant" provision. To determine the lawfulness of Item 135 under the Shipping Act, 1916, it was found to be necessary to develop an evidentiary record which would show whether the right to control the crane operator passed to Stevens or remained with the Ports Authority. The question of who possessed the right to control formed the essential factual dispute between the parties and became the central issue to be resolved on the basis of the evidentiary record developed at the hearing held in Charleston on January 21, 22, and 23, 1985.

The Lawfulness of Tariff Items 5, 20, 25, and 136

As discussed above, I found that the question of lawfulness of four of the contested items in the Ports Authority's tariff could be determined without the need for an extended evidentiary record. This is because the legality of the four items depended primarily upon principles of law and did not require resolution of factual disputes or evidence other than the text of the tariff provisions themselves. Under such circumstances, rulings in the nature of summary judgments are appropriate and save unnecessary time and expense. See discussion in *Mass. Port Authority* v. *United States Lines, Inc.*, 14 SRR 903 (ALJ 1974). Accordingly, I issued rulings as to four of the tariff provisions in the nature of summary judgments. See Preliminary Evaluations of Contested Tariff Items, June 5, 1984 (22 SRR 1030); Clarification of Rulings of Law, September 10, 1984. (Unreported.)

When issuing my rulings on June 5, 1984, I allowed the parties time to comment on them so that any corrections could be made prior to the hearing. Two comments were filed, one by the Ports Authority and one by Stevens. The Ports Authority asked me to clarify my ruling that the lawfulness of the one tariff Item that could not be decided without an evidentiary hearing (Item 135, the "borrowed-servant" provision) depended upon the right to control the crane operator, not the actual exercise of such control. Stevens asked me to specify that the two tariff items (20

and 25) which I found to be unlawful on their face, violatéd section 17 of the 1916 Act. I clarified both of my rulings in response to these comments in the second ruling, cited above. I further advised the parties that these rulings would be confirmed in my Initial Decision as to the tariff Items whose lawfulness had been determined in the rulings. Furthermore, because the rulings, in effect, constituted a partial Initial Decision as to some of the issues, and because the hearing had not yet commenced on the remaining issue, I relieved the parties of the need to file exceptions under Rule 227, 46 CFR 502.227. In that way, the parties' rights to file exceptions were not waived and they were permitted to file their exceptions to this Initial Decision as to all issues. See rulings of June 5, 1984, cited above, at 3.

For the convenience of the Commission and the parties, I set forth a discussion of my rulings disposing of the issues relating to four of the five contested tariff items in substantially the same form below. In brief, I found that Item 5 (user of Port facilities accepts all tariff regulations, charges, etc.), although not lawful, was only a reminder of the normal obligations regarding tariffs and could not impose obligations which were otherwise unlawful. I found Item 20 (users agree to indemnify Ports Authority) and Item 25 (vessels, owners, and agents are liable for damages) to be unlawful and in violation of section 17 of the 1916 Act because the items did not clearly rule out the use of such provisions by the Ports Authority to impose liability upon users of Ports Authority facilities even when the Ports Authority had been negligent. I concluded that these two items needed to be amended to make clear that the Ports Authority could not exculpate itself from the consequences of its own negligence. (As discussed below, these two Items were later amended by the Ports Authority.) I found Item 136(A) (Ports Authority holds itself out to provide adequate cranes and qualified operators and requires users to rent Ports Authority cranes if suitable and available) not to be unlawful on its face. The text of these rulings now follows in substantially the same form as they were originally issued and becomes part of this decision.

Item 5 of respondent's tariff states in pertinent part as follows:

> The use of Authority facilities constitutes an acceptance by the user of all charges, rules and regulations published in this tariff and the user agrees to pay all charges and be governed by all rules and regulations published in the tariff.

Complainant contends that it is unreasonable under section 17 of the Shipping Act, 1916, to bind users of Port Authority facilities to all provisions of the terminal tariff notwithstanding the possible unlawfulness of other provisions, for example, a tariff provision which would relieve the Ports Authority from liability for its own negligence. Respondent Ports Authority contends that this item is vital to the validity of the tariff and to the Commission's jurisdiction, for if users are not bound by the tariff,

then it is useless and futile to supervise the tariff. Hearing Counsel stated that this particular tariff provision is not unlawful but that it adds nothing to the state of existing law and cannot bind users of terminal facilities to unlawful provisions elsewhere in the tariff so as to preclude relief from such provisions.

Hearing Counsel have stated the law correctly in this matter. Thus, it is true that tariffs have the force and effect of law and that users of terminal facilities are normally bound to tariff rates and regulations. It is ancient law that carriers' tariffs have such force and effect, and the fact that here we are dealing with terminal tariffs required to be filed by Commission regulation (General Order 15, 46 CFR 515) would appear to mean that terminal tariffs are also accorded the force and effect of law. See, e.g., *Penna. R.R. Co.* v. *International Coal Co.*, 213 U.S. 184, 197 (1913); *Farr Co.* v. *Seatrain*, 20 F.M.C. 411, 414, 417 n. 8 (1978), and the cases cited therein; 13 C.J.S., Carriers, sec. 302, pp. 700–702 (carriers' tariffs have the force and effect of law); *State of Israel* v. *Metropolitan Dade County, Florida*, 431 F. 2d 925, 928 (5th Cir. 1970) (terminal tariff filed under Commission's regulation has the force of law).

Notwithstanding the general rule that tariffs have the force and effect of law and that users of tariff services are bound to pay the rates and observe tariff regulations, it has also long been the law that users of tariff services are not bound by provisions of tariffs that, although legally filed, are otherwise unlawful, but may seek appropriate relief from unlawful tariff provisions which have been filed. *E.I. Du Pont de Nemours and Co.* v. *Sea-Land Service, Inc.*, 22 F.M.C. 525, 534–536 (1980); *Valley Evaporating Co.* v. *Grace Line, Inc.*, 14 F.M.C. 16, 19–20 (1970) ("a rate may be legal in the sense that it is the regularly published rate and yet be unlawful if it violates other provisions of the act."); *Louisville & Nashville R.R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915) (shippers and carriers must abide by legally filed rate unless it is found by the Commission to be unreasonable); *Arizona Grocery* v. *Atchison Ry.*, 284 U.S. 370, 384 (1932) (shipper must pay tariff rate but can recover reparation if rate is unreasonable); *Chicago, M, St. P. & P.R. Co.* v. *Alouette Peat Products*, 253 F. 2d 449, 455 n. 5 (9th Cir. 1957) (although tariff must be adhered to, an inherently unlawful rate published therein may be corrected); *Cincinnati, N.O. & T.P. Ry. Co.* v. *Chesapeake & O. Ry. Co.*, 441 F. 2d 483, 488 (4th Cir. 1971); 13 C.J.S., Carriers, sec. 302, pp. 699–702.

The principle that a user of a tariff service may be relieved of tariff rules found to be unlawful under other provisions of law has been applied by the Commission in the context of marine terminal tariffs and, more particularly, to so-called "user" provisions in which the tariff would purport to bind the user to all rules and regulations in a tariff or constitute the user's consent to such rules and regulations. The Commission consistently holds such "use equals consent" provisions in terminal tariffs to have no independent validity and to add nothing to the tariff. See *West Gulf*

Maritime Association v. *Port of Houston Authority,* 22 F.M.C. 420, 421 (1980), affirmed, *West Gulf Maritime Association* v. *Federal Maritime Commission,* 652 F. 2d 197 (D.C. Cir. 1981) ("The 'use equals consent' provisions merely inform users of their responsibility and impose no disadvantage or unreasonable practice upon them. The Commission has previously found that 'consent' language adds no independent validity to provisions imposing liability."); *West Gulf Maritime Association* v. *Port of Houston Authority,* 21 F.M.C. 244, 247 (1978) (same); *Perry's Crane Service* v. *Port of Houston Authority,* 19 F.M.C. 548 (1977).[5]

Accordingly, I find that Item 5, although not unlawful, adds nothing to the tariff, merely reminding users of the normal obligation to abide by a tariff but not imposing on them obligations to be bound by tariff provisions that may be found to be unlawful or preclude them from seeking appropriate relief from any such unlawful provisions.

Items 20 and 25 of respondent's tariff state as follows:

> All users of Authority facilities agree to indemnify and save harmless the Authority from and against all losses, claims, demands and suits for damages, including death and personal injury, and including court costs and attorney fees, incident to or resulting from their operations on the property of the Authority and the use of its facilities. (Item 20).
>
> All vessels, their owners and agents, shall be held responsible for all damage resulting from their use of Authority facilities and the Authority shall reserve the right to repair or contract for repair such damage . . . (Item 25).

Complainant contends that these provisions violate sections 16 and 17 of the 1916 Act because they attempt to hold users of Port Authority facilities such as Stevens liable for damages even if the Ports Authority were at fault and caused the problem. Furthermore, complainant contends that respondent is placing Stevens at an undue disadvantage in violation of section 16 of the Act by attempting to impose liability on Stevens pursuant to Item 20 whereas respondent Ports Authority has entered into agreements with other users of respondent's facilities without attempting to invoke Item 20 against those other users. Complainant asks for a ruling that as a matter of law Item 20 (and apparently Item 25) are violative of Shipping Act standards because they do not make clear that the Ports Authority will not attempt to impose liability on users of the facilities in instances when the Ports Authority has been the negligent party.

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[5] In *Perry's Crane,* the Commission granted relief to a private crane operator from respondent's tariff provisions which were found to be unreasonable under section 17 of the Act notwithstanding respondent's argument, among many others, that complainant was bound by the tariff and had even signed an agreement to abide by the terms of the tariff. See 16 SRR 1459, 1468, 1479 (I.D., adopted in pertinent part by the Commission). See also *States Lines, Inc.* v. *Maryland Port Administration,* 23 F.M.C. 448, 460–461 (I.D., adopted by the Commission, 23 F.M.C. 441 (1980)) (use of facilities for many years does not amount to consent nor set up estoppel against complainants who allege unreasonableness of tariff provision.)

Respondent contends that it never attempts to use these tariff items to impose liability on users of its facilities when it is not the user but the Authority which has been negligent and has caused the damage. In other words, respondent contends that it has always been its policy and practice to impose responsibility on users of its facilities for damage caused by the users' negligence and that the Ports Authority never uses its tariff to exculpate itself from its own negligence. Furthermore, respondent contends that any separate agreements it may have with other users of its facilities such as carriers have been filed with and approved by the Commission pursuant to section 15 of the Act.

Hearing Counsel state that the Commission has consistently held that marine terminal tariffs, regulations, or practices that would exculpate the terminal from liability for its own negligence without conferring some offsetting benefit or would impose liability without regard to fault are unreasonable under section 17 of the Act. Therefore, if, in fact, respondent is doing such things, it would have to cease and desist. Even if, on the other hand, respondent were not carrying out such practices, the tariff provisions in question, which can be construed to permit such unreasonable practices, must be clarified by appropriate amendments.

Again, Hearing Counsel have correctly relied upon the state of law under the Shipping Act. The Commission has not disturbed traditional law of indemnity or local law permitting indemnity contracts under applicable standards wherever the elements justifying a particular indemnity provision can be shown absent peculiar Shipping Act considerations. However, in every instance in which a marine terminal operator has published tariff provisions virtually identical to those under attack here, as in Item 20 or Item 25 of respondent's tariff, the Commission finds them to be unreasonable because they do not clearly rule out the use of such tariff provisions by the terminal operator to impose liability upon users of terminal facilities even when the terminal operator has been negligent. Furthermore, the Commission holds such tariff language to be unlawful and requires corrective language with little or no evidentiary record since the language of the tariff provisions has been found to be objectionable and misleading without regard to actual practices. In other words, even if a terminal operator shows that in fact it does not, in practice, impose liability upon users when the terminal operator is itself at fault, the Commission nevertheless holds that the tariff provision is unreasonable and must be revised.

The most recent decision of the Commission in this regard is *Central National Corporation, Nantucket Navigation Inc., and T. Smith & Son (Texas) Inc.* v. *Port of Houston Authority*, 26 F.M.C. 296 (1984) (I.D., 26 F.M.C. 301). As is usual in cases of this type, in *Central National Corporation*, the Port Authority, which had been sued for damages to cargo, was attempting to assert indemnity provisions in its tariff against the other defendants in the court case, the vessel operator and stevedore. The Court stayed the case before it to permit the Commission to decide

whether the Port Authority's tariff provisions were valid under the Shipping Act. The Commission issued its decision on the basis of an extremely brief record which had been stipulated under the Commission's shortened procedure, 46 CFR 502.181 et seq., and consisted of only six numbered paragraphs which merely recited the identity of the parties, the fact that a lawsuit had commenced in a court which had stayed the case to permit the Commission to determine the validity of certain tariff provisions, recited the tariff provisions, and stated that a certain portion of damage claims had been resolved by payment of money to claimants when the Port Authority appeared to be responsible. (26 F.M.C. 301.)[6] The two provisions in question were as follows (26 F.M.C. at 297):

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

The Commission affirmed the presiding judge and found both these tariff provisions to be unlawful, stating that "[t]he language of the challenged tariff provisions is broad and can be read to apply to exculpate the Port even in situations in which damage may result from its own negligence." 26 F.M.C. at 297. Therefore, the provisions were unlawful "[t]o the extent that these provisions may be read to exculpate the Port from liability for its own negligence. . . ." 26 F.M.C. at 297.

Item (d) in the Houston tariff quoted above is virtually identical to Item 20 of respondent's terminal tariff in this case. In both, "users" of the "facilities agree to indemnify and save harmless" the port authority "from and against all losses, claims, demands and suits for damages . . . incident to or resulting from their operation(s) on the property of the (Port) Authority." Items 20 and (d) are, of course, indemnity provisions which are probably rather commonly employed not only in tariffs but in commercial affairs. However, without a showing that some special consideration was given to the user of the facility, these indemnity provisions

[6] In affirming the presiding judge who had found the tariff provisions in question to be unreasonable without regard to evidence showing actual practices under the provisions, the Commission found that the tariff language was objectionable without regard to evidence of actual practices. The Commission stated that the Port's "practices in implementation of the provisions cannot validate tariff provisions which are otherwise unlawful," and the fact that the Port's practices might not have comported with the tariff language "might well be taken as an indication of their [i.e., the tariff provisions'] unreasonableness." 26 F.M.C. at 299. Incidentally, although the Commission's decision does not state that the Port Authority was required to amend the objectionable tariff provisions, Hearing Counsel advised that the Commission has taken further administrative action to have the Port Authority file appropriate amended tariff provisions. See letter from the Commission's Secretary to Mr. G. E. Strange, General Manager, Houston Port Bureau, Inc., dated May 4, 1984.

have been found to be unreasonable and unlawful to the extent that they may be used to exculpate the indemnitee, i.e., the port authority, from liability for the indemnitee's own negligence. Furthermore, the very language employed has been found to be objectionable and to require clarification. Thus, in finding the language of paragraph (d) to be unreasonable, the Commission and presiding judge had cited *West Gulf Maritime Association* v. *The City of Galveston,* 22 F.M.C. 101 (1979). In the cited case, the Commission found another indemnity provision in the port's tariff to be unlawful and ordered it stricken from the port's tariff. The indemnity provision had also stated that the user of the facilities . . . shall indemnify and save harmless . . . [the port] from and against any and all claims, actions, damages, liability and expense . . . in connection with loss of life, bodily injury and damage to property . . . occurring in connection with the use of or arising from the use of any of the facilities . . . or arising from or incidental to such User's operations on the facilities. . . .'' 22 F.M.C. at 103.

In other cases in which it appeared from a mere reading of the terminal tariff that the terminal could seek to exculpate itself from liability for its own negligence, the Commission has found the tariff provision in question to be unreasonable and has ordered it stricken or amended to show that the tariff provision does not apply when the terminal operator has been the, negligent party. Thus, in *I. Charles Lucidi* v. *The Stockton Port District,* 22 F.M.C. 19 (1979), the Commission finalized a decision in which the port's tariff disclaiming the port's responsibility for any damage to freight on its facilities was found unlawful to the extent it would relieve the port from liability for damage caused in whole or in part by fault of the Port, and without a *quid pro quo* of any kind. 22 F.M.C. at 29. The Port was ordered to cease and desist from implementing the tariff provisions or, alternatively, was permitted an opportunity to amend the objectionable tariff provision ''as to clearly set forth that non-liability does not apply in the event that injury results from negligence by the Port.'' 22 F.M.C. at 29.

Finally, in *United States Lines, Inc.* v. *Maryland Port Administration,* 23 F.M.C. 441 (1980), adopting 23 F.M.C. 448, the Commission found three terminal tariff provisions unreasonable to the extent they would relieve the terminal of liability for the terminal's own negligence and ordered the respondent Port Administration to file amended tariff provisions. The first such tariff provision announced that the terminal operator accepted no responsibility for damages when it furnished equipment and operators to perform work for others. The second provision placed responsibility for any damage to property on all persons to whom berths and equipment had been assigned by the Port. The third provision stated that the terminal assumed no liability for claims, etc., resulting from use of cranes except if the crane were defective and the party renting the crane had not caused

the damage. 23 F.M.C. at 442.[7] The second of the three condemned tariff provisions was similar to Item 25 in the Port Authority's tariff in the present case. That provision in the Maryland terminal tariff held all persons who had been assigned berths "responsible and liable to the terminal operator for any damage occurring to such property during their tenancy, occupancy and/or use without regard to whom shall cause the damage." Item 25, as quoted above, would hold "all vessels, their owners and agents . . . responsible for all damage resulting from their use of Authority facilities. . . ." The only significant differences appear to be that the Maryland tariff extended responsibility to "all persons," not just "vessels, their owners and agents" and that the Maryland tariff specified that those persons would be liable regardless of who caused the damage. Although it could be argued that the present Ports Authority tariff provision in Item 25 does not specify that the vessels, etc. will be responsible regardless of who caused the damage, the decisions of the Commission cited indicate that a specific disclaimer of intention to impose liability on users when the terminal has been the negligent party is held to be necessary to eliminate any confusion or possibility that a terminal may seek to exculpate itself from the consequences of its own negligence.[8]

The second paragraph of section 17 of the 1916 Act (46 U.S.C. sec. 816) states:

> Every . . . other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

I conclude therefore that the language of Items 20 and 25 quoted earlier is invalid as being contrary to section 17 of the 1916 Act because it does not make clear that the Ports Authority will not attempt to impose liability on users of its facilities when the Ports Authority has been the negligent party. See *Central National Corporation et al.* v. *Port of Houston*

[7] The text of the three provisions is as follows:

> The Terminal Operator accepts no responsibility for damages or accidents occurring when its equipment and/or operator or employees are furnished to perform work for others. All persons to whom berths, wharves, transit sheds, mechanical equipment or other facilities have been assigned shall be responsible and liable to the terminal operator for any damage occurring to such property during their tenancy, occupancy and/or use without regard to whom shall cause the damage.
>
> The terminal assumes no liability for claims, losses, or expenses by reason of property damage, personal injury or death which may result from the use of the crane, except that caused by structural or mechanical failure and not occasioned by an act or omission on the part of the party renting the crane.

[8] Thus, although the Ports Authority contends that no amending language is necessary because the Authority does not use its tariff to exculpate itself from liability for its own negligence, the Commission has found that it is the language of the tariff provision which is critical and not unexpressed intentions. See *United States Lines, Inc.* v. *Maryland Port Administration*, cited above, 23 F.M.C. at 469–470.

Authority, cited above, 26 F.M.C. at 297; *West Gulf Maritime Association* v. *The City of Galveston*, cited above, 22 F.M.C. at 104; *I. Charles Lucidi* v. *The Stockton Port District*, cited above, 22 F.M.C. at 29; *United States Lines, Inc.* v. *Maryland Port Administration*, cited above, 23 F.M.C. at 442.

As mentioned earlier, after issuance of the above rulings, the Ports Authority amended Items 20 and 25, effective November 1, 1984. (Doc. Nos. 4, 99.) Hearing Counsel[9] still take issue with these Items even as amended. I will discuss the problem at a later time in this decision.

The final tariff provision[10] which Stevens is challenging under the 1916 Act is a portion of Item 136(A) which states that "The Authority, as owner and operator of its facilities, also holds itself out to provide adequate cranes and qualified operators for any stevedoring operations on its facilities" and also restricts use of private cranes by requiring users to use a Ports Authority crane if suitable and available in preference to a private crane, the so-called "priority" or "first-call" system. Stevens does not contend that it seeks to litigate the reasonableness of the "first-call" system as was done in *Perry's Crane Service* v. *Port of Houston Authority of Harris County, Texas*, 19 F.M.C. 548 (1977), in which, after some modifications, the "first-call" system was found to be lawful. Stevens contends that this provision, which would restrict access to private cranes in order to compel use of Ports Authority cranes and operators is unreasonable in conjunction with the alleged practice of the Ports Authority to relieve the Ports Authority from liability for its own negligence. Stevens also states that this provision establishes the obligation of the Ports Authority to furnish adequate cranes and qualified operators. Respondent states that this item is a reasonable means to protect the Port Authority's investment.

No one is disputing the "first-call" system, and it appears that Stevens is not asking that this tariff provision be found to be unlawful, standing alone, under the Shipping Act, 1916. No one challenges the statement that the Ports Authority holds itself out to provide adequate cranes and qualified crane operators and apparently Stevens wishes to show the Court that the Ports Authority furnished a defective crane and an unqualified operator, questions of fact which are not before the Commission. The provision would appear to have relevance insofar as it relates to Stevens' contentions that the Ports Authority retained control over the crane operation and the operator and that Stevens did not select the crane or the operator and had nothing to do with maintaining the crane or training the operator.

[9] The Commission's Bureau of Hearing Counsel had petitioned for leave to intervene stating their concern over the lawfulness of the contested tariff provisions as they affected all users of the Ports Authority's facilities. Hearing Counsel's petition was granted on November 16, 1983. See Intervention of Hearing Counsel Granted, that date.

[10] In the original rulings served June 5, 1984, I discussed tariff Item 135, the "borrowed-servant" provision before Item 136(A) and concluded that the lawfulness of that Item depended upon resolution of a factual question, namely, whether Stevens had acquired the right to control the crane operator. See rulings cited at 15–19; 22 SRR at 1036–1037.

If, as Stevens contends, Stevens had no control over the crane operator or the crane, did not select nor train the operator, etc., it would appear to be irrelevant whether access to private cranes was restricted by Item 136(A) since respondent Ports Authority would be attempting to impose liability on Stevens when control over the operation remained in the Ports Authority. If, on the other hand, it is found that Stevens did, in fact, control the crane operator and operation and therefore that the Ports Authority could impose responsibility for damages on Stevens, then it would appear that the various tariff provisions transferring liability to Stevens would pass muster under the Shipping Act, 1916, under the "borrowed-servant" doctrine.[11] In any event, there is nothing unlawful about Item 136(A), on its face, under the Shipping Act, 1916.

The Issues to be Decided on the Basis of the Evidentiary Record Developed at the Hearing

The only tariff Item which could not be evaluated under the Shipping Act, 1916, as a matter of law is Item 135, the so-called "borrowed-servant" provision. The pertinent paragraph of Item 135 states as follows:

> The rental charges for equipment requiring an operator include the operator and such equipment will not be rented without an operator. The operator will be under the control of the party renting the equipment and the Authority assumes no liability for personal injury or property damage resulting from the operation of the equipment except that resulting from structural failure.

By this provision the Ports Authority states that a crane operator employed by the Authority comes under the control of renters like Stevens and, therefore, the Authority is not responsible for accidents occurring while the crane operator is under such control. Such a provision is known as the "borrowed-servant" provision because of the doctrine of law which holds that an employee (called by the law the "servant") of a general employer may be "borrowed" by a special employer for a particular purpose in such a way that the general employer no longer is responsible for the negligence of the "borrowed" employee because the general employer has surrendered the right to control that employee during the performance of the particular job.

The issue to be determined on the basis of evidence adduced at the hearing, therefore, was whether the Ports Authority had failed to relinquish the right to control its crane operators to Stevens and, if so, whether its Item 135, which would transfer liability for damage resulting from

[11] The factual record in the proceeding before the Commission was devoted mainly to evidence of control over the crane operator and operation as between Stevens and the Ports Authority and will go into the question of who maintains the crane and trains and selects the operators only insofar as these matters relate to the ultimate question of control. Whether the Ports Authority furnished a defective crane or an unqualified operator and thereby breached its obligations under its tariff are questions for the Court to resolve.

operation of the crane (except for damage caused by structural failure of the crane) to Stevens, the crane renter, is an unjust and unreasonable regulation in violation of section 17 of the 1916 Act, 46 U.S.C. sec. 816.

A secondary issue raised by Stevens concerns its allegations that respondent Ports Authority had entered into a number of agreements with ocean carriers in which the Ports Authority did not impose a provision like Item 135 and did not disclaim liability. Stevens contends that this alleged practice gives preferential treatment to some stevedores and causes disadvantage to Stevens, in violation of section 16 First of the 1916 Act, 46 U.S.C. sec. 815.

Contentions of the Parties

Stevens contends that the evidentiary record shows that Stevens never acquired the right to control the crane operator furnished by the Ports Authority at the time of the accident which triggered two lawsuits. Stevens points to a number of factors which the courts consider when determining whether the "borrowed-servant" doctrine applies. Stevens contends that the evidence shows that the extent of Stevens' participation in the lift of the locomotive consisted essentially of the giving of signals by a longshore flagman to the Ports Authority's crane operator merely as assistance to the crane operator who was free to disregard the signals and to stop a lift if the operator felt it was unsafe. Stevens contends that it had no personnel on the scene who had any training in directing crane operators to make heavy lifts but that the Ports Authority did or should have had such personnel on the scene. Moreover, argues Stevens, the Ports Authority furnished both the crane and the crane operator, trained the operator and was responsible for maintenance of the crane, had sole authority to hire and fire crane operators and to discipline them, paid the operators, carried workmen's compensation on them, and had the power to substitute operators on any given shift. Furthermore, the duration of the services provided to Stevens by the Ports Authority was limited, i.e., only about half a day, and although the services advanced the work of Stevens, it also furthered the Authority's own business. Stevens also cites Ports Authority documents furnished to its crane operators as part of their training which emphasize the need for the crane operator to use his own judgment and to exercise care because of his responsibility to the Authority and to his fellow workers and another item in the Ports Authority's tariff (Item 35) which states that the Authority "reserves the right to control all services performed in connection with cargo moving over or through its facilities," such services including providing heavy lift cranes according to Item 55(c) of the Ports Authority's tariff. Stevens concludes by arguing that the Ports Authority is trying to eat its cake and have it too because it wants to maintain control over the operation of its cranes by having only its trained operators handle them but at the same time the Authority

does not want to assume any liability that nay be caused by the negligence of the operators.

The Ports Authority disputes virtually everything Stevens argues. The Authority contends that the control and right to control the crane operator passed to Stevens, that the operators were told to follow the instructions of Stevens, that no Authority supervisors were on the scene, that Stevens, not the Authority, arranged, planned, supervised and directed the operation, and that the Authority in no way interfered with the operation. The Authority argues that the "borrowed-servant" provision is good for a number of reasons. It avoids a split or division of control over an important and dangerous operation. It gives control to the party whose work is being performed and who is paid for the work, and it saves the parties costs and expenses, i.e., Stevens does not need to hire and train operators and the Authority's insurance costs are reduced if liability is transferred to Stevens. The Authority argues, furthermore, that Item 35 of its tariff, reserving the right to control services does not apply to the facts of this case because the service provided here was the rental of a crane and operator rather than a performance of a lifting service. (SCSPA Opening Brief at 13.) The Ports Authority argues, furthermore, that Stevens has admitted that the work performed was that of Stevens, not the Authority, and that Stevens is merely trying to free itself from responsibility for damages caused by the operation which was a Stevens operation although Stevens wants to use Ports Authority facilities and cranes. (SCSPA Reply Brief at 1.)

Hearing Counsel agree with Stevens that the Port Authority's crane operator did not become the "borrowed servant" of Stevens. Hearing Counsel contend that the facts do not show that the tests used by the Commission to determine whether a crane operator has become the "borrowed servant" have been satisfied. Thus, Hearing Counsel argue that stevedores at Charleston do not assume operational control over the Ports Authority's crane operators who retain independence, exercise their own judgment, and retain final responsibility as to whether a load shall be lifted. Second, stevedores cannot choose crane operators, who are selected for a job by the Ports Authority. Third, private crane-rental agreements between stevedores and private crane companies, which purport to transfer control over crane operators to stevedores, are negotiable and therefore not similar to the Ports Authority's tariff rentals. Finally, the crane operator is primarily employed in furthering the business of the Ports Authority, which is in the business of furnishing cranes with operators and seeks to make a profit like any private corporation. Hearing Counsel therefore conclude that tariff Item 135 is a provision that would exculpate the Ports Authority from liability for its own negligence without conferring on stevedores any offsetting benefits, a situation similar to an "adhesion" agreement which the Commis-

sion has previously found unlawful.[12] As mentioned earlier, moreover, Hearing Counsel (and Stevens, Reply Brief at 49) contend that the Ports Authority's amendments to tariff Items 20 and 25 (users agree to indemnify the Ports Authority, and vessels, owners, and agents are liable for damages) are not satisfactory because the amendments would, according to Hearing Counsel, exonerate the Ports Authority from liability when the Authority was partly responsible for injuries or damages. (Hearing Counsel Opening Brief at 20.)

Summary of the Facts

As noted, the hearing in this proceeding was devoted primarily to the question of the right to control the crane operator as between stevedores such as Stevens renting cranes and operators from the Authority under the latter's tariff and the Authority. It was not the purpose of the hearing or of this proceeding to usurp the function of the District Court with regard to the issues of negligence, causality, damages, or the like in connection with the two pending lawsuits in which Stevens and the Authority are involved as a result of the accident of January 20, 1982. The findings of fact which are summarized herein are, therefore, not intended to resolve the questions before the Court but merely to determine what is the status of the Authority's tariff Item 135 under the Shipping Act, 1916. The focus of this effort is therefore on the question of control as between Stevens and the Authority and not on whether a Stevens or an Authority employee was negligent when involved in the lifting of the sixth locomotive and the subsequent crash of the crane. To the extent that any findings herein may seem to imply that any particular party or its employee was negligent or otherwise involve the issues before the Court, such finding is not intended to affect the Court's findings. However, in order to provide a backdrop to the critical events surrounding the right-to-control issue, I provide some general background facts so that the operational events can be understood in context and may be helpful in reaching an enlightened decision. As the courts have recognized:

> Cases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation. *West Gulf Maritime Association* v. *Port of Houston Authority*, cited above, 22 F.M.C. at 454.

The factfinding task is complicated by the fact that the parties are proposing, in all, 372 separate findings of fact which are virtually all disputed

[12] An "adhesion" agreement is a contract in which a weaker party is, in effect, forced to acquiesce to unfavorable conditions because such party is unable to obtain the desired services elsewhere, and the supplier of the services is therefore in a much stronger bargaining position. See *Black's Law Dictionary* (Fifth Ed. 1979) at 38. Hearing Counsel contend that such a provision was held invalid by the Commission in *I. Charles Lucidi* v. *The Stockton Port District*, 22 F.M.C. 19 (1979). (Hearing Counsel Opening Brief at 19.)

to one degree or another. To eliminate unnecessary disputes over more remote background-type facts which are not critical in determining tariff issues under the Shipping Act, I have summarized such facts in broader outlines. When the really critical facts are discussed, however, concerning control over the crane operator under the "borrowed-servant" doctrine, the facts must necessarily be more specific. The following summary of the facts therefore includes both general, background facts and more specific facts, when necessary. In addition other specific facts are found and discussed in the legal discussion later in this decision when appropriate.

The Parties and Their Functions Generally

1. Stevens Shipping and Terminal Company (Stevens) is a stevedoring company, incorporated in the State of Georgia, with its principal place of business in Savannah and an office in Charleston. Stevens provides stevedoring services at the Port of Charleston, South Carolina, among which are the loading and unloading of seagoing vessels docked at Charleston's piers.

2. The South Carolina State Ports Authority is an agency of the State of South Carolina created by that State's Legislature in 1942. The SCSPA owns, operates and maintains the port facilities at the Port of Charleston, including Union Pier Terminal. At the Port of Charleston, the SCSPA provides a place where ships can dock, either to pick up or discharge cargo, as well as warehouse space for cargo moved through the Port. By state law, the SCSPA has general supervision over wharves, warehouses and terminal facilities.

3. The SCSPA constructed, maintains and operates four marine terminals in Charleston Harbor, each of which has large track-mounted cranes for use in loading and unloading vessels. At the Union Pier Terminal, which handles steel products and heavy-lift cargoes, the SCSPA has two land-based cranes, the Unit 1575 American Crane originally with a 125-ton capacity and a Colby Gantry Crane, both of which are rented out to stevedores from time to time. The American Crane runs up and down a track. It is a revolving crane that permits the crane operator in the cab to move the boom to a particular position from which he believes he can lift the cargo. In the cab are a weight indicator and a boom angle indicator. The weight indicator was not, however, in working order on January 20, 1982. The SCSPA purchased, modified when necessary, and maintains its cranes. In 1977 the American Crane's lifting capacity at the fifty or fifty-five foot radius was decreased from 125 to 106 tons.

4. Certification papers for each crane include information as to the capacity of the crane and are kept in the office of the SCSPA. The information is not currently circulated to stevedores but the Authority states that it is available to them. Charts showing the capacity of the cranes at various boom settings are in the crane office and in the cab of every crane.

Since January 20, 1982, such charts are also displayed outside of each crane.

5. Stevedore personnel are not normally permitted to go into cabs of the cranes. Some cranes in fact have signs limiting access to the cabs. It is possible, however, that on occasion certain stevedoring superintendents have entered the cabs. However, it is generally the practice that they are not permitted into the cabs. (See Stevens Reply Brief at 3 and Opening Brief at 7, proposed finding 13, and record references cited in these briefs.)

6. SCSPA operates all of the state terminals in Charleston. None of the private terminals is well equipped for heavy lifts. Substantially all of the heavy lifts for marine cargo loading and unloading are performed on SCSPA terminals. Private cranes are not permitted to be used at SCSPA's terminals in connection with heavy lifts.

How Heavy-Lift Shipments are Handled

7. SCSPA holds itself out as being able to handle heavy lifts, advertises its 400-ton monster crane, and employs crane foremen who have some expertise in heavy lifts. The SCSPA holds itself out as providing adequate cranes and qualified operators for stevedoring operations on its facilities. In December 1981, five locomotives were shipped through Charleston by General Motors at the Union Pier Terminal without mishap and Stevens performed the stevedoring work, loading the locomotives on a ship owned by the United Arab Shipping Corporation. The same practices were followed in connection with the shipment of these five locomotives, which weighed 55 short tons, as were followed in connection with the January 20, 1982, movement of six approximately 80-ton locomotives, except that the latter locomotives were not loaded on board the vessel at that time. Under the SCSPA tariff (Item 140(c)), the SCSPA furnished a "cargo control supervisor" to protect its interests and billed Stevens for this supervisor, whom the SCSPA describes as a "cargo checker" only.

8. The movement of the six locomotives at the Union Pier Terminal on January 20, 1982, ultimately led to the current litigation. The shipper of the locomotives, through its responsible employees, selected Charleston as the Port through which the six locomotives would move and notified GM's freight forwarder of its selection. Prior to this decision, the SCSPA's District Sales Manager in Chicago, a Mr. Jim Grady, had called on GM, presenting GM with printed materials about Charleston and advising GM of the SCSPA's cranes and capabilities. GM has used the Port of Charleston for the shipment of locomotives since 1974, finding the Port to offer certain advantages in rates and free storage charges.

9. The Berthing Division of SCSPA assigns a berth (and therefore the terminal) to a ship before the ship arrives at a dock. In addition, Jerry Franks, SCSPA's Manager of Heavy Lift Operations, usually talks with the parties involved in the shipment and with stevedores. He generally would inform stevedores as to the radius at which a particular crane could

handle a given load. In this shipment, Mr. Franks had discussions with Mr. Mayfield of Stevens relating to the forthcoming lifts of locomotives. (Tr. 316.) Mr. Franks advised Mr. Mayfield of the capacity of the crane to be used and where the locomotives would have to be pushed on the track well before lifting by the crane. (Tr. 317.) A stevedore may request a particular crane if suitable but the final authority on crane selection rests with Mr. Franks. (Tr. 353.)

10. Information regarding the weight of the locomotives came to Stevens on the Booking Notice sent to it by the carrier's agent and Stevens' parent company, Kerr Steamship Co. This information is compared to weight information which SCSPA received independently and recorded on its dock receipts. (Tr. 91–92.) Neither the SCSPA nor Stevens therefore weighed the cargo, and Stevens took the weight information on the dock receipt and recorded it on its load list. (Tr. 92–93.)

11. It is not the practice at Charleston to permit Stevens to bring private cranes to the Authority's terminals to make heavy lifts, although private cranes can be and are used at Charleston.[13]

12. The SCSPA furnishes crane operators and stevedores do not necessarily know which operators will be furnished in advance of the job.

13. SCSPA teaches the crane operators to prepare the crane for operation, to check visually the structural condition of the crane's operating mechanism and power units, to take preliminary action in starting power units, to check cranes for loose or broken parts, and clean the crane. The operators are also taught to refer to the load rating chart to determine safe working loads at various radii and to check the boom angle indicator before making a lift. There is generally good visibility from the cab of the crane which has windows.

14. Generally, in making lifts, the stevedore supplies everything below the hook of the crane such as the gear and rigging, and the SCSPA supplies everything above the hook of the crane. The stevedore is responsible for making sure that all rigging below the hook is in working order and is of the correct capacity for handling the particular weight to be lifted. The crane operator is "responsible for everything above the hook." (Tr. 461.)

15. When a heavy lift is made, the stevedore assembles all the rigging including spreader bars and wires, attaches the rigging to the cargo, and puts the rigging onto the hook of the crane. Then, normally the crane

[13] The Authority follows the first call or priority system at Charleston whereby if a crane is suitable, the renting stevedore must rent it from the Authority rather than from a private crane owner. Such a system has been found to be lawful (with certain modifications) at Houston. See *Perry's Crane Service* v. *Port of Houston*, cited above, 19 F.M.C. 548. The system is not being challenged here. To the extent that stevedores' freedom to rent cranes is somewhat restricted under the practice, however, the practice does have some bearing on the Authority's tariff items which purported to transfer liability to stevedores even if the Authority had been negligent. It tends to show that stevedores may have been in a weaker bargaining position when called upon to assume liabilities. Such factors are considered by courts in public-utility type cases to protect weaker parties. See *West Gulf Maritime Association* v. *Port of Houston*, cited above, 22 F.M.C. at 453; *I. Charles Lucidi* v. *The Stockton Port District*, cited above, 22 F.M.C. at 25, and cases cited therein.

operator will put sufficient tension on the wires of the rigging so that the stevedore can check to make sure that all of the rigging is properly in place and secured. When the stevedore determines that the rigging is satisfactory, he has the flagman, his longshoreman employee, signal the crane operator that the lift is ready to proceed. At that point the crane operator normally raises the load just off the deck of a ship or terminal pier and pauses in the lift. During that pause the stevedore assumes that the crane operator is checking the radius indicator and weight indicator in the cab of the crane. There is considerable testimony that the lift and pause routine is a part of the "system" and testimony that Mr. Messervy, the first crane operator on the job on January 20, 1982, followed the practice to check his instruments during the pause to make sure he was within radius. The Authority's own training documents suggest that crane operators should not comply with a flagman's signal until the operator judges that the lift is safe. (See record references cited in Stevens Reply Brief at 16–17.) If the lift is not safe, the crane operator will normally advise the stevedore and set the cargo back on the dock or pier. Normally when it is possible that a load might be out of radius, the crane operator will set his boom at a safe working margin and the stevedore will position the load underneath the hook of that boom. The stevedore assumes the operator is relying on his instruments in the cab of the crane. Normally, also, the crane operator brings the boom to a position where he wishes to lift and the stevedores bring the cargo beneath the hook of the boom. In most instances the crane operator will honk a horn to tell the stevedore when the cargo is properly positioned for the lift. The crane operator can communicate with the stevedores on the ground either by blowing his horn or by using the telephone in the cab of the crane which is hooked up to another telephone on the dock. The crane operator can also communicate with the stevedores by hand signals or by exchanging looks.

16. The flagman, a longshoreman hired by the stevedore, is a part of the 14-man longshoremen gang structure. The purpose of the flagman's signals is to assist the crane operator, particularly when the crane is being operated on the crane operator's blind side. A crane operator can disregard the flagman's signals when the lift is fully visible to the crane operator himself or if the crane operator deems the lift to be unsafe. Sometime the crane operator has picked up cargo without any signal from the flagman. The flagman will signal the crane operator which direction to move the crane and the crane operator will determine whether to swing or travel with the crane. When the crane is travelling, the whole structure is moving. When it is swinging, just the boom is moving.

The Shipment of January 20, 1982

17. On the morning of January 20, 1982, a meeting was held between Stevens employees and Tom Messervy, the first crane operator to work on the job in question. At this meeting, Stevens advised Mr. Messervy

of the weight of the locomotives and gave him information as to where the locomotives would be placed on the dock after lifting. Mr. Messervy and Mr. Johnson, the second crane operator, were brought to the job site by Mr. Wiggins, the SCSPA's crane foreman. Stevens was not notified in advance as to who the crane operators would be and did not know in advance that Mr. Johnson would later relieve Mr. Messervy. Stevens also did not know that the load indicator in the cab of the crane was not working on January 20, 1982.

18. On January 20, 1982, a representative from General Motors, Mr. George Stovicek, was at the pier to oversee the dismantling of the locomotives and their eventual loading on the *M/V Arafat.* Mr. Stovicek was working with almost everyone on the dock, showing longshoremen how to connect wires to lift the locomotives and how to disassemble the wheels from the locomotive car bodies.

19. When the locomotives came down to Union Pier Terminal on railroad spurs, they were moved to the track well where Stevens separated the locomotive car body from its wheel assemblies with the help of the crane operator by simply lifting the car body off the wheel assembly prior to the movement of the car bodies and wheel assemblies to positions on the piers before loading on the vessel. Stevens moved the locomotives into position for lifting by using a forklift truck. The locomotive bodies were to be placed on wooden pyramids prior to loading on ship. Before lifting the first locomotive, Mr. Leroy Grant, a longshoreman foreman employed by Stevens, had conversations with the crane operator, Mr. Messervy, who yelled down to Mr. Grant to tell him where to position the locomotive under the lead of the crane. (Ex. 14 at 36–37.) The practice was for Mr. Grant to put the first locomotive in the position the crane operator wanted. (Ex. 14 at 38.) Stevens also put down a stick or marker to mark the position so that the other locomotives could be moved to that location. (Tr. 135, 217, 236.) When the first lift was made, the crane operator, Mr. Messervy, paused while Mr. Holcombe, a Stevens employee, checked the rigging. After determining that the rigging was satisfactory, Mr. Holcombe told the flagman to signal the crane operator to lift the load. (Tr. 215.) The second locomotive was lifted from the same location as the first. Mr. Holcombe knew that the first locomotive had been in the radius of the crane because Mr. Messervy, the crane operator, had told him so. (Tr. 217–218.)

20. The third locomotive was not lifted from the same position as the first two. According to the deposition of Mr. Grant, Mr. Grant moved the third locomotive five or six feet back up the track at the crane operator's request because the crane operator felt that the locomotive was too close to be lifted. (Ex. 14 at 9–10.) A stick was also apparently placed at the new location. (Ex. 14 at 10.) According to Mr. Holcombe, the first five locomotives were lifted from positions where a stick was placed. (Tr. 236.) The sixth locomotive, however, was not lifted from the spot

where a stick was placed. (Tr. 135; 236.) Other testimony establishes that the locomotives were positioned at or pushed up to the crane operator's lead regardless of the location of the stick. (Tr. 262; 284–285; 292.)

21. Mr. Esau Johnson relieved Mr. Messervy after the fourth locomotive and some wheel assemblies had been lifted, at approximately 10:00 am. Mr. Johnson got his information as to the weight of the locomotives from Mr. Messervy. Mr. Johnson testified that he could not see the stick on the ground but that he had good visibility from the cab of the crane and could see everything that was going on on the ground. (Tr. 186–187.) (Mr. Messervy also remarked on the good visibility. Ex. 6 at 13.) The fifth locomotive was lifted without mishap. However, Stevens has trouble moving the sixth locomotive. Mr. Holcombe testified that he "got stuck with the lift truck" and "everybody was standing around waiting for me." (Tr. 244.) Mr. Holcombe, nevertheless, moved the sixth locomotive to the crane's hook and thought that the operator gave him a signal that it could be lifted from that position. (Tr. 225, 244–245.) Or, if not, Mr. Holcombe believed that if anything were wrong, the crane operator, Mr. Johnson, would have told him. (Tr. 245.) In any event, Stevens hooked up the locomotive and followed the usual procedure of taking up the strain as was done with the first five locomotives. (Tr. 225–226.) When the crane operator then commenced to lift the locomotive (presumably after the flagman's signal) and started to swing, the legs of the crane broke and the crane toppled over. (Tr. 226.)[14] Stevens determined after the accident that the sixth locomotive had been picked up outside a safe radius. (Tr. 240.) After the accident, the *Arafat* was instructed to go back to its ancherage and none of the locomotives was loaded on that vessel. Stevens billed the buyer of the locomotives, Saudi Government Railways, for the services it had performed in dismantling and moving the locomotives in preparation for the loading that did not take place.

The Hiring, Training, Assigning, etc. of SCSPA's Crane Operators

22. SCSPA hires and fires crane operators, assigns them, trains, disciplines, pays them, and provides for workmen's compensation, retirement and other standard benefits. Stevedores are not offered a choice of crane operators although if they ask for a particular operator and if that operator is available he may be assigned. However, Stevens has on occasion tried to order a particular crane operator by name without success. SCSPA assigns crane operators simply by looking at the overtime sheet. SCSPA, through its crane superintendents, can substitute one crane operator for another.

23. The SCSPA has crane operators normally work in two-hour shifts. SCSPA determines when the shifts will begin and end. When the SCSPA

[14] The flagman, Enoch Smiley, testified in his deposition that he did not give any instructions or signals to the crane operator to swing the crane or to travel with the crane after the last locomotive had been lifted, nor did he see anyone else give such instructions to the crane operator. (Ex. 13 at 19.)

changes crane operators, Stevens does not necessarily know that a change is being made. The crane operators themselves decide when they will switch off. When one crane operator is relieved by the second, the first is expected by SCSPA to remain near the crane and check the crane out. (Tr. 456–457.)

24. Stevedores in Charleston do not play any role in the disciplining of crane operators and do not have access to the SCSPA's records pertaining to the disciplining of crane operators following complaints by stevedores. If a complaint were made to the SCSPA about a crane operator, the SCSPA would be responsible for disciplining that operator. The SCSPA does not furnish work history of crane operators to stevedores. Stevens has no authority to discipline crane operators. If a crane operator reported to work in an intoxicated condition, Stevens would have to complain to the SCSPA, and it would be up to the SCSPA's superintendent to decide whether to let the crane operator stay or tell him to go home.

25. The SCSPA trains and determines the qualifications of crane operators. It has established a two-year on the job training program to train unskilled crane operators into skilled operators. SCSPA's crane foreman, Mr. Wiggins, tries to have meetings of the crane operators at least once a week to discuss such things as radius safety. SCSPA furnishes its crane operators with various written memoranda and guidelines. One such documents states that "each operator shall be held directly responsible for the safe operation of his equipment. Whenever there is any doubt as to safety, the operator shall have the authority to stop and refuse to handle loads until safety has been assured." (Doc. 28.) Another documents (Doc. 38) states:

A. Container-Gantry and mobile cranes are complex and powerful machines that require your complete control every moment.

B. You, as the man responsible for these operations under your direct control, are the crucial key to safe machine performance and everyone from your fellow worker to the Authority Director is depending on you.

Another document (Doc. 46) warns crane operators to disregard a flagman's signals under certain situations involving unsafe conditions. Another document (Doc. 35) tells crane operators that they must be familiar with crane capacities and be able to judge weights and radii in accordance with posted capacities. It also instructs that an operator "complies with signal after judging that lift is safely rigged and nature of lift will not damage or tip cranes; works with minimum of standard signals, using own judgment to determine the best procedures for conveying lift to desired location." Another document (Doc. 44) advises crane operators "when there are times of doubt, contact your foreman," referring to the SCSPA foreman, which is SCSPA's policy. Another document (Doc. 45) instructs the operators to check the load indicators to be sure they are working in the course of making "your daily check." SCSPA also recommends that its operators

verify the weight of the loads personally before making a particular lift, especially when they are handling a very high weight item. Mr. Johnson, for instance, was told by his foreman, Mr. Wiggins, that whenever he picks up a load that he's not sure of, he should refuse to continue with the lift even if signaled to do so by the flagman (Tr. 179) and he has been told by the SCSPA not to lift any loads out of radius. (Tr. 189.)

Additional SCSPA Responsibilities

26. SCSPA has control over the inspection and maintenance of cranes and undertakes to maintain and service the cranes and to keep them in good working condition. SCSPA follows the guidelines, rules and regulations laid down by the Federal OSHA. SCSPA inspects the cranes on a daily as well as a monthly basis and has established procedures whereby crane operators are expected to report a malfunction of the crane so that repairs can be made. Stevedores have no right to inspect and maintain SCSPA's cranes.

27. Stevens' personnel are not normally permitted into the cabs of cranes. (See finding No. 5 above.) Stevens personnel either have not been trained to operate the cranes at Union Pier Terminal or have never been up in the cab of any SCSPA crane. The load indicator and radius boom angle indicator are in the cabs of the cranes. After the January 20, 1982 accident, load capacity charts were placed on the outside of the cranes. However, prior to the accident, stevedores on the ground could not tell whether a particular lift was within the capacity of the crane. (Tr. 83; Ex. 11 at 65–66.) SCSPA did not routinely furnish information concerning the lifting capacities of the cranes. (Tr. 115–116; 350.) SCSPA maintains that it would have provided that information to stevedores upon request. However, the evidence indicates that it is the duty of the crane operator to make lifts within the radius of the crane, that the boom angle indicator is in the cab of the crane where stevedores do not go, and the stevedore assumes that the crane operator is relying upon the boom angle indicator. (Tr. 245.)

28. The tariff issued by SCSPA is not negotiated between Stevens and SCSPA and Stevens was not consulted as to whether tariff Item 135 would be acceptable to Stevens. SCSPA must charge its tariff rates unless there is a separate section 15-type agreement. Tariff users, however, may be notified of changes in tariff provisions before they go into effect. Stevens was not offered a lower hourly charge than would otherwise be applicable for the use of the SCSPA's cranes in return for accepting the "borrowed-servant" provision of Item 135 in the tariff. (Tr. 108–109.) (This does not mean that tariff rates have not been lower in the past.)

SCSPA's Insurance, Private Rental Agreements, and Agreements With Carriers

29. SCSPA carries seven insurance policies covering various of its activities. It is estimated by insurance underwriters that without Item 135 SCSPA's insurance premiums would increase by $234,416. (Ex. 19 at 49–51.) Incidentally, the insured value of the American crane is $1,081,000. (Ex. 15 at 31.)

30. It is not the practice to allow private cranes onto SCSPA's terminals to perform heavy-lift services. (See finding No. 11 above.) However, there are private crane rental agencies in the Port of Charleston from which stevedores can rent cranes if the SCSPA's cranes are not available. On occasion the SCSPA has also rented cranes from such private firms. Usually the written lease agreements provide for the crane operator to fall under the control of the renting stevedore or Ports Authority although one such private company's agreement does not so provide. Notwithstanding the written agreement between one such company named Limehouse and Stevens, on some occasions Stevens made claims against Limehouse for loss or damage caused by the negligence of the Limehouse crane operator and Limehouse paid the claims. Stevens also claims that it has understandings with one or more of the private crane companies that any accidents resulting from the negligence of the operator are not Steven's responsibility. (Tr. 130–131.

31. SCSPA has entered into eight agreements with seven ocean carriers between 1975 and 1983 in which, in return for guaranteed tonnages through Charleston, SCSPA assumes or shares liability or promises to indemnify the carrier or its agents in case of claims. (Docs. 73–80; Tr. 302–307.) These agreements were all approved by the Commission under section 15 of the Shipping Act, 1916. None of the agreements purports to place SCSPA crane operators under the control of the carriers or their agents. In most there are mutual indemnification provisions in which each party agrees to indemnify the other except when the other party is at fault. In two agreements (Docs. 74, 77) the parties agree to share liability in proportion to their respective faults. In another involving Moller Steamship Co., Inc., which has since expired (Doc. 79, terminated by Doc. 78 at 13) SCSPA agreed to indemnify Moller and its agents from loss and damage claims arising out of the negligence of an SCSPA crane operator but not if the losses were caused by the stevedore or his employees. (Doc. 79, para. V.) In another (Doc. 73) the carrier agrees to indemnify the SCSPA unless SCSPA is negligent. In each agreement the carrier agrees to pay tariff rates for crane rentals and for certain other services.

Applicable Principles of Law

As I stated in my rulings of June 5, 1984, a "borrowed-servant" provision in a marine terminal tariff is not per se unlawful. Rulings, cited

above, at 17; 22 SRR at 1036. Unlike tariff provisions such as Items 20 and 25 which, on their face, permitted the Ports Authority to impose liability on renters such as Stevens even if the Ports Authority had been negligent, a "borrowed-servant" provision like Item 135 merely transfers responsibility to a stevedore or user of the terminal facility who may, *in fact*, have assumed control over the crane operator. If such right to control has passed from the Ports Authority to the stevedore, the Commission has found such a tariff provision to be lawful under the 1916 Act. See *West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. 420, 452–454 (1980), reconsideration denied, 22 F.M.C. 560, affirmed without opinion, *West Gulf Maritime Association* v. *F.M.C.*, 652 F. 2d 197 (D.C. Cir. 1981). However, the *West Gulf* decision rests on detailed factual findings showing that at Texas ports, crane operators employed by the ports had come under the control of the stevedores and that the tariff provisions in question were not "illusory" and were "not imposed for the purpose of escaping liability for one's own negligence." 22 F.M.C. at 453.[15]

If, on the other hand, the right to control the crane operator never passed from the Ports Authority to Stevens, such operator never became a "borrowed servant" and the law maintains that liability for negligence of the operator remains with the operator's general employer, i.e., the Ports Authority. See, e.g., *Raymond Watson* v. *Lam Bert's Point Docks, Inc.*, 1985 A.M.C. 1102 (4th Cir. 1984); *Sea-Land Industries, Inc.* v. *General Ship Repair*, 530 F. Supp. 550 (D. Md. 1982); *Standard Oil Co.* v. *Anderson*, 212 U.S. 215 (1909); *Roderick* v. *Bugge*, 584 F. Supp. 625 (D. Mass. 1984); 53 American Jurisprudence 2d, Master and Servant, sec. 415.

When, as in this case, the parties dispute who had the right to control the crane operator as between the Ports Authority and Stevens, the matter is obviously a question of fact and when the evidence is conflicting, the issue must be resolved by the trier of fact. See *Sea-Land Industries, Inc.* v. *General Ship Repair*, cited above, 530 F. Supp. at 563; *Vance Trucking Company* v. *Canal Insurance Company*, 249 F. Supp. 33, 35 (D. S.C. 1966), affirmed, 395 F. 2d 391 (4th Cir.), cert. denied, 393 U.S. 845 (1968); 53 Am Jur 2d, cited above, at 426. As mentioned above, it is

[15] There were other distinctive features about the *West Gulf* case as well. Thus, unlike the present case, the stevedores (who were members of the West Gulf Maritime Association, complainants in the case) had agreed "that when a crane is rented the using stevedore has supervision and control of the crane and its operator and directs the operation of both because the crane operator cannot see into the hold of a ship and must rely upon directions given by a stevedore employee when operating the crane." 22 F.M.C. at 442 (footnote with record references omitted.) At least two court cases following Texas law had found that crane operators at Texas ports had become "borrowed servants" of stevedores. 22 F.M.C. at 452–453. Furthermore, the Commission found facts showing that control over the crane operators did pass to the stevedores at Texas ports, *that stevedores were free to select operators, and that there* was no evidence that the ports retained any operational control over the operators. 22 F.M.C. at 454; see also pp. 441–442. The Commission also found that the ports had not been overreaching and had not therefore driven "hard bargains" so as to invoke protections against port exculpatory clauses on behalf of stevedores. 22 F.M.C. at 453–454.

generally true that "[c]ases are not decided, nor the law appropriately understood, apart from an informed and particularized insight into the factual circumstances of the controversy under litigation." *West Gulf Maritime Association,* cited above, 22 F.M.C. at 454. It is particularly true in cases under the "borrowed-servant" doctrine which almost always involve difficult factual questions regarding control over the employee under this doctrine, which has been described as an "extraordinarily troublesome" area of the law. *Roadwork* v. *Bugge,* cited above, 584 F. Supp. at 628. Therefore, although the courts generally recite more or less the same "borrowed-servant" principles, different courts reach different results because of the different facts considered. For example, as I noted in my rulings of September 10, 1984, at 3–4, in three "borrowed-servant" cases, each of the three courts recited the same principle that the right to control the employee determined whose servant he was. However, the three courts reached different results.[16]

A typical statement of the "borrowed-servant" doctrine is contained in *Watson* v. *Lambert's Point Docks, Inc.,* 1985 A.M.C. 1102 (4th Cir. 1984), per curiam, (table citation, 732 F. 2d 132). In *Watson,* a case which involved a crane operator employed by a marine terminal who was engaged in unloading cargo from a ship and was receiving signals from the stevedore, the court stated the doctrine as follows (1985 A.M.C. at 1104–1105):

> The "borrowed servant doctrine," which is clearly established in admiralty and maritime law, see *Standard Oil* v. *Anderson,* 212 U.S. 215 (1909), provides that in some circumstances vicarious liability is shifted from one "employer" to another "employer." The Supreme Court has outlined the doctrine as follows:
>
> > "When one person puts his servant at the disposal and under the control of another for the performance of a particular service for the latter, the servant in respect of his acts in that service, is to be dealt with as the servant of the latter and not of the former."
>
> * * *
>
> The critical factor to be assessed in determining the "borrowed servant" status of a particular employee is the element of control; the court must decide which employer "has the power to control and direct the [servant] in the performance of [his] work." (Citations omitted.) [The] critical inquiry is whether

[16] Thus, in *Vance Trucking Company* v. *Canal Insurance Company,* cited above, 249 F. Supp. 33, the court found that the truck-driver employee was subject to control of both the borrowing and lending employer. In *Sea-Land Industries, Inc.* v. *General Ship Repair,* cited above, 530 F. Supp. 550, the court found that the electrician employee had not been "borrowed" by the terminal owner of cranes which the electrician had been repairing. In *Maynard* v. *Kenova Chemical Co.,* 626 F. 2d 359 (4th Cir. 1980), on the other hand, the court found that a laborer had become the "borrowed" employee of a chemical company while working on that company's premises because he had come under the complete control and direction of the chemical company.

> [the] employee "acted like a contractor . . . or whether he was assimilated into the temporary employer's team." The mere fact that an employer gives directional signals or operational information to a particular employee, however, does not imply that the requisite control exists, thereby transforming the employee into a "borrowed servant." In *Anderson*, the Supreme Court emphasized that an employee does not become a borrowed servant merely by receiving suggestions as to operational details; the distinction is between "orders" and informational signals that merely imply necessary cooperation. *Anderson*, 212 U.S. at 226–27.

There are variations in the way in which the doctrine is stated. For example, other courts emphasize that "the right to exercise control and supervision" over the employee is critical[17] and not whether such control was in fact exercised[18] However, the above quotation is fairly accurate in stating the doctrine in general terms.

The "borrowed-servant" doctrine is summarized rather well in 53 Am Jur 2d, Master and Servant, sec. 415. In pertinent part, that authority states:

> [I]n determining whether, in respect of a particular act, a servant in the general employment of one person, who has been loaned for the time being to another is the servant of the original employer or of the person to whom he has been loaned, the test is whether in the particular service which he is engaged to perform, the servant continues liable to the direction and control of his general employer or becomes subject to that of the person to whom he is lent—whether the latter is in control as proprietor so that he can at any time stop or continue the work and determine the way in which it is to be done, with reference not only to the result reached, but to the method of reaching it. (Footnote omitted.) The criterion is not whether the borrowing employer in fact exercises control, but whether he has the right to exercise it. (Footnote omitted.) . . . The mere fact that the general employer continued to pay the wages of the wrongdoer will not make him liable for the wrongful act where it appears that the person to whom he was lent controlled him entirely in regard to the work to be done. (Footnote omitted.) . . . [I]n other words, in order for the general employer to be relieved from liability for the negligent or wrongful acts of his employee, it must appear from the evidence that the relation of master and servant which existed between them has been suspended, and that a new like relation between such employee and the person for whom the special service is performed has been created and is in existence at the time of the act. (Footnote omitted.)

[17] *Maynard* v. *Kenova Chemical Co.*, cited above, 626 F. 2d at 362.

[18] *Vance Trucking Company* v. *Canal Insurance Company*, cited above, 249 . Supp. at 38.

> To escape liability, the original master must have resigned full control of the servant for the time being; it is not sufficient that the servant was partially under the control of another. If he does not surrender full control over the servant, he remains liable for the servant's negligence during the time such servant acts for the person to whom he is loaned. (Footnote omitted.)
>
> It has been held that the right of the general employer to discharge the servant or substitute another for him indicates a continuation of the general employment and that such a continuation is also indicated where the employee is using his general employer's machine or appliance. (Footnote omitted.)
>
> There is a presumption that a general employer is the sole employer, and the burden of proof as to a shift in liability to a special employer rests upon the general employer when he contends that there has been such a shift. (Footnote omitted.) Where one is in the business of renting out trucks, automobiles, cranes, or any other machine, and furnishes a driver or operator as part of the hiring, there is a factual presumption that the operator remains in the employ of his original master, since he is engaged in the very occupation for which he was originally employed. (Footnote omitted.)

In applying the above principles, the courts look to the record to see if certain facts are present. As Stevens points out in its opening brief (at 54), among these facts are the following: (1) who supplied the crane used by the operator? (2) who trained the crane operators? (3) who could hire and fire the crane operators? (4) who could discipline the crane operators? (5) who paid the crane operators? (6) who carried workmen's compensation insurance on the crane operators? (7) how long did the "new employment" of the operator last? (8) who had the power to substitute crane operators on any given shift? (9) for whose benefit was the work being done? and, as discussed earlier, (10) who had the power to control the crane operator? Such factors were considered in *Watson* v. *Lambert's Point Docks, Inc.*, cited above, 1985 A.M.C. at 1105; *Roderick* v. *Bugge,* cited above, 584 F. Supp. 625; *Standard Oil Co.* v. *Anderson,* 212 U.S. 215 (1939), and are set forth in the Restatement (Second) of Agency, sec. 227, American Law Institute (West Publishing Co. 1958).

The Restatement of Agency, sec. 227, cited above, has been quoted and considered by a number of the cased cited. See, e.g., *Watson* v. *Lambert's Point Docks, Inc.,* cited above, 1985 A.M.C. at 1105; *Roderick* v. *Bugge,* cited above, 584 F. Supp. at 628, 630; *Maynard* v. *Kenova Chemical Company,* cited above, 626 F. 2d at 361. The Restatement sets forth a number of factors which are valuable in determining whether a particular employee has become a "borrowed servant" of a second or special employer. The Restatement, sec. 227 states:

> A servant directed or permitted by his master to perform services for another may become the servant of such other in performing the services. He may become the other's servant as to some acts and not as to others.

Comment a to section 227 summarizes the central question in "borrowed-servant" cases by stating that "[t]he question is whether it is understood between him and his employers that he is to remain in the allegiance of the first as to a specific act, or is to be employed in the business of and subject to the direction of the temporary employer as to the details of such act. This is a question of fact in each case." To help decide this question of fact, the Restatement provides a number of critical considerations. Thus, in comment b to section 227, the Restatement provides that "in the absence of evidence to the contrary, there is an inference that the actor remains in his (i.e., the original employer's) general employment so long as, by the service rendered another, he is performing the business entrusted to him by the general employer. There is no inference that because the general employer has permitted a division of control, he has surrendered it."

In comment c to section 227, entitled "Factors to be considered," the Restatement sets forth additional factors as follows:

> Thus a continuation of the general employment is indicated by the fact that the general employer can properly substitute another servant at any time, that the time of the new employment is short, and that the lent servant has the skill of a specialist.
> A continuation of the general employment is also indicated in the operation of a machine where the general employer rents the machine and a servant to operate it, particularly if the instrumentality is of considerable value. Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interest of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an "intent to retain control over the instrumentality. A person who is not in such business and who, gratuitously or not, as a matter not within his general business enterprise, permits his servant and instrumentality to assist another, is more apt to intend to surrender control.

"Borrowed-servant" issues have arisen more specifically in the marine terminal context in situations in which crane operators employed by port authorities or terminal operators and "lent" to stevedores who were loading or unloading cargo have become involved in accidents injuring third persons. The courts have considered many of the principles and factors discussed

above in reaching their decisions. The majority of the decisions, it should be noted, hold that the crane operators did not become "borrowed servants" of the stevedores and that their original employers consequently remained liable for damages or injuries resulting from the negligence of the crane operators.

The oldest and leading case appears to be *Standard Oil Co.* v. *Anderson*, 212 U.S. 215 (1909). In that case a winchman in the general employ of a shipowner had been "lent" to a stevedore for the purpose of loading a ship with oil. The winchman operated a winch owned by the shipowner and followed signals given by employees of the stevedore who would signal the winchman when to hoist and lower the cargo. The winchman was hired and paid by the shipowner. In lowering cargo into the ship, the winchman negligently struck and injured an employee of the stevedore. The Court held that the winchman had not become the "borrowed servant" of the stevedore and that the winchman's general employer, the shipowner, was liable for his negligence.

The *Anderson* case continues to be quoted and followed in "borrowed servant" cases involving marine terminal and stevedoring activities. Therefore, a more careful examination of the facts and reasoning of the Court is warranted, which examination indicates a number of similarities with the present case.

The Court found that the winchman was hired and paid by the shipowner defendant who alone had the right to discharge him and that the stevedore paid the shipowner a certain rate for the hoisting. 212 U.S. at 219. The Court found, furthermore, that the stevedore's control over the winchman extended only over certain areas. Thus, the winchman's hours of labor conformed to the hours worked by the longshore labor. Because the winch and winchman were at a place where it was impossible to determine the proper time for hoisting and lowering cases of oil, the winchman "necessarily depended upon signals from others. These signals were given by an employee of the stevedore, called a gangman, who stood upon the deck of the ship and gave signals to hoist or lower by the blowing of a whistle which could be heard for a long distance." *Id.*

The Court further described the loading operation as between the stevedores and the winchman as follows (212 U.S. at 218):

> The plaintiff was employed as a longshoreman by . . . a master stevedore, who, under contract with the defendant [shipowner] was engaged in loading the ship . . . with oil. The plaintiff was working in the hold, where, without fault on his part, he was struck and injured by a draft or load of cases containing oil, which was unexpectedly lowered.
>
> The motive power was furnished by a steam winch and drum, and the hoisting and lowering were accomplished by means of a tackle, guy rope and hoisting rope. The tackle and ropes were furnished and rigged by the defendant [shipowner] and the winch and drum were owned by the defendant and placed on its dock,

> some fifty feet distant from the hatch. All the work of loading was done by employees of the stevedore, except the operation of the winch, which was done by a winchman in the general employ of the defendant.

The Court described briefly the "borrowed-servant" doctrine as follows (212 U.S. at 221):

> It sometimes happens that one wishes a certain work to be done for his benefit and neither has persons in his employ who can do it nor is willing to take such persons into his general service. He may then enter into an agreement with another. If that other furnishes him with men to do the work and places them under his exclusive control in the performance of it, those men become *pro hac vice* the servants of him to whom they are furnished. But, on the other hand, one may prefer to enter into an agreement with another that that other, for a consideration, shall himself perform the work through servants of his own selection, retaining the direction and control of them.

To determine whether the first or general employer remained liable for the negligence of the servant rather than the second or temporary employer, the Court stated that "[w]e must inquire whose is the work being performed, a question which is usually answered by ascertaining who has the power to control and direct the servants in the performance of their work. Here *we must carefully distinguish between authoritative direction and control, and mere suggestion as to details or the necessary cooperation*, where the work furnished is part of a larger undertaking." 212 U.S. at 221–222. (Emphasis added.)

Having discussed the "borrowed-servant" doctrine, the Court proceeded to find that the winchman had remained in the general employ of the shipowner although working with the stevedore's employees in the cargo-loading operation. The Court acknowledged that the winchman was paid by the shipowner and could be discharged by the shipowner but held that these facts "are not the ultimate facts, but only those more or less useful in determining whose is the work and whose is the power of control." 212 U.S. at 225. The Court found that the relation of the general employer, the shipowner, to the employee winchman had not been suspended in favor of a new master-servant relation between the stevedore and winchman. The Court noted that the defendant shipowner had preferred to do the hoisting work itself and had received an agreed compensation for it, that the power, the winch, and the winchman were its own, and that the defendant had furnished the work they did, not merely instrumentalities which performed that work. 212 U.S. at 225.

The Court was not impressed with the argument that the winchman obeyed signals of the stevedore's gangman when timing the raising and lowering of the cases of oil, a fact which, the shipowner had argued,

made the winchman the servant of the stevedore. The Court stated (212 U.S. at 226):

> But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters.

In reaching the above decision, the Court quoted the following language from a Massachusetts case involving the rental of a team of horses with wagon and driver (212 U.S. at 226):

> But the mere fact that a servant is sent to do work pointed out to him by a person who has made a bargain with his master does not make him that person's servant more than that is necessary to take him out of the relation established by the only contract which he has made and to make him a voluntary subject of a new sovereign—as the master sometimes was called in the old books.

The Court quoted additional language from the earlier Massachusetts decision which described how the "lent" driver had not become the servant of the "borrowing" employer who had merely pointed out to him the work which his general employer had undertaken to do. The Court quoted the following language about the "lent" driver (212 U.S. at 227):

> But the person who receives such orders [i.e., the "lent" driver] is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do.

Since the decision in the *Anderson* case, there have been a number of cases involving "borrowed-servant" issues and crane operators. Usually the courts have found that the operator did not become the borrowed servant of the stevedore or other person renting cranes. As the court stated in one of these cases, *Roderick* v. *Bugge*, cited above, 584 F. Supp. at 629–630:

> [I]t is noteworthy that the vast majority of courts evaluating the status of crane operators in analogous circumstances either have ruled that no borrowed servant relationship existed (case citations omitted) or have reversed directed verdicts that were premised on a finding that such a relationship necessarily existed.

In *Roderick* v. *Bugge*, the stevedore has leased a crane and its operator from an equipment rental company for the purpose of unloading bundles of steel from the hold of a vessel. A crew of longshoremen were discharging

the vessel under the direction of a stevedore. A signal man employed by the stevedore gave signals to the crane operator when to raise and lower the boom of the crane and other employees of the stevedore directed the crane operator as to where to place the cargo on the pier. 584 F. Supp. at 627. The accident occurred when the signal man, following instructions from the ship's officer, gave the crane operator a signal to lift a load which was improperly overloaded so that a steel beam in the load fell off, injuring plaintiff, an employee of the stevedore. The plaintiff sued the shipowner who in turn claimed indemnity and contribution from the equipment rental company. That company defended by claiming that the crane operator had become the "borrowed servant" of the stevedore.

The Court weighed the various factors described above and held that the crane operator had remained the employee of the equipment rental company and had not become the "borrowed servant" of the stevedore. The court noted that the crane was of considerable value and complexity, raising the inference that the equipment rental company expected its operator to protect its interests whenever they conflicted with the stevedore's. The court also noted that operation of the crane required the skill of a specialist and that the renting of cranes constituted the sole business of the equipment rental company. 584 F. Supp. at 628. The court noted other facts that seemed to indicate that the crane operator had fallen under the control of the stevedore. Thus, the rental fee included an hourly operator charge so that the stevedore indirectly paid the crane operator's wages. On the job site, the stevedore "directly controlled what work Shannon [the crane operator] was to perform and when and for the most part how to perform it. The stevedore dictated Shannon's hours of work, specified which hatch to work on, determined the order and size of the loads to be removed, and by the use of hand signals largely guided the actual operation of the crane." 584 F. Supp. at 628–629. Furthermore, the lease agreement between the stevedore and the crane rental company contained a provision which specifically placed the rented equipment and persons operating it "under lessee's exclusive jurisdiction, supervision and control. . . ." should be "11584" F. Supp. at 629. Nevertheless, the court, relying upon *Anderson* and similar decisions found that the crane operator had remained the servant of the equipment rental company. The court noted that the giving of signals did not constitute control over the operator and that the provisions of the lease did not determine whether control had passed from the equipment rental company, the general employer, to the stevedore. 584 F. Supp. at 629. The court found that, in fact, the crane operator had testified that he "regularly obeyed the hand signals" but that he "remained free to operate the crane in accordance with his own judgment when necessary." *Id.* As for the provisions of the lease purporting to transfer exclusive control over the crane operator to the stevedore, the court stated that "[a]s with any factual matter, the actual circumstances of the arrangement are

controlling rather than the parties' advance characterization of those circumstances.'' *Id.*

Other cases involving the renting of cranes and operators to stevedores have similarly held that the crane operators remained the employees of the crane owner and did not become ''borrowed servants'' of the stevedore although the stevedore's employees had given signals or directions to the crane operators. See, e.g., *Lopez* v. *Oldendorf*, 545 F. 2d 836 (2d Cir. 1976), cert. denied, 431 U.S. 938 (1977); *Ware Cia. de Navegacion Andes, S.A.*, 180 F. Supp. 939 (E.D. Va. 1960); see also *Parker* v. *Williams & Madjanik, Inc.*, 239 S.E. 2d 487 (S.C. 1977) (construction company leased crane and operator from equipment leasing company and, through its employees, gave hand signals to crane operators).

The most recent decision in the Fourth Circuit (which covers South Carolina) is *Watson* v. *Lambert's Point Docks, Inc.*, cited above, 1985 A.M.C. 1102. In *Watson*, a terminal operator in Norfolk, Virginia rented cranes along with operators to stevedores. The terminal hired and fired crane operators, trained them, and decided which operators would work which shifts. A stevedore rented a crane along with an operator from the terminal in order to unload a cargo of cocoa beans under a contract between the stevedore and the shipowner. Payment for the rental was governed by the terminal's tariff which provided that users of the terminal facilities had consented to the terms and conditions of the tariff. Among these terms and conditions were those specifying that the terminal assumed no liability for damage or injury claims except those caused by structural failure and not by an act of the renting party and a provision that the crane operators ''shall be under the sole supervision of the party renting the equipment.'' 1985 A.M.C. at 1103.

In the unloading operation, the decision as to how to rig the beans, some of which were in loose bags and others in slings to facilitate unloading, was made by the stevedore's employees. Sometimes the view of the crane operator was obstructed and he therefore relied upon signals of ''gangwaymen'' employed by the stevedore. During the operation on the ship, the crane operator negligently failed to clear some containers on the ship with the result that pallets fell and injured plaintiff, an employee of the stevedore. The terminal claimed that the crane operator had become the ''borrowed servant'' of the stevedore and, among other things, cited the terminal tariff provision purporting to vest ''sole supervision'' over the crane operator in the stevedore.

The court held that the crane operator had remained in the general employ of the terminal operator and had not become the ''borrowed servant'' of the stevedore. The court cited the *Anderson* decision, discussed above, and the Restatement of Agency, sec. 227, comment b, which states that absent evidence to the contrary, there is an inference that an employee remains in the general employment of a ''lending'' employer. The court noted that the terminal operator hired, fired, trained the operators, carried

workmen's compensation on them, and had the power to substitute operators on any given shift. 1985 A.M.C. at 1105. Nor did the court believe that the tariff provision purporting to transfer "sole supervision" over the crane operator to the stevedore was dispositive inasmuch as the facts showed that the terminal operator, not the stevedore, remained the employer of the operator. 1985 A.M.C. at 1106. Moreover, the court declined to find the tariff provision determinative, among other reasons, because the tariff provision "arguably . . . merely indicates that the lessee may supervise various operational details relating to the operator's use of the equipment." 1985 A.M.C. at 1106 n. 3.[19]

As I indicated earlier, although it appears that courts usually find that crane operators remain the employees of the terminal or crane owner, there are some cases going the other way on their facts. Thus, in *West Gulf Maritime Association* v. *Port of Houston Authority*, cited above, 22 F.M.C. 420, the Commission found that the practice at Texas ports was to transfer control over crane operators to renting stevedores but it is important to note that there was a specific factual finding that the stevedores themselves had agreed that such was the practice. 22 F.M.C. at 442. Furthermore, the Texas Supreme Court had found that under Texas law the practice at Galveston was that crane operators had become "borrowed servants" of stevedores. *Rorie* v. *The City of Galveston*, 471 S.W. 2d 789; 8 SRR 20,713 (Tex. 1971), cited in 22 F.M.C. at 452–453.[20]

Another case in which the court held that a crane operator had become the "borrowed servant" of the stevedore was *Finagrain Compagnie Commerciale Agricole* v. *Miller Compressing Co.*, 349 F. Supp. 288 (E.D. Wisc. 1972) decided under Wisconsin law. In *Finagrain*, the court found

[19] The Ports Authority argues that the *Watson* case was not intended to have precedential value, was a "summary per curiam decision which was not prepared with the usual care, research, and analysis which the Fourth Circuit Court puts into cases intended to be precedent," and merely shows that "the court will find ways to allow an individual suffering personal injury to recover regardless of what the tariff provided." (Ports Authority Reply Brief at 32.) The court's opinion was not published in the Federal Reporter, and the citation used above is to the American Maritime Cases. There is no support for the contention that an unpublished opinion of the court is not prepared with care or is totally without precedential value. The Fourth Circuit's own local rules specify that the Court does not publish an opinion unless it establishes a rule of law, involves a legal issue of continuing public interest, etc. Furthermore, although citation of unpublished opinions is disfavored, counsel may nevertheless cite them if counsel believes the decision to have precedential value and there is no suitable published opinion. *See Fourth Circuit Rules* 18(a), 18(d), 28 U.S.C.A.; Internal Operating Procedures 36.3, 36.5. As to helping an injured person recover for injury, there is no apparent reason why the court could not have applied the "borrowed-servant" doctrine, if the facts justified it, so that the injured plaintiff could have recovered from the stevedore rather than from the terminal operator.

[20] The Texas court conceded that determining whether hoist operators became "borrowed servants" was "*often a difficult question.*" 8 SRR at 20,715. However, the court found that the stevedore and port had expressly agreed that the stevedore would control the hoist operator, relying upon the port's tariff provision as evidence of such agreement. 8 SRR at 20,715–20,716. However, the court also found that there was no evidence that any port employee had exercised any control over the hoist operation or that the port had ever interfered with the stevedore's right to control the equipment and the operator. 8 SRR at 20,718. The court concluded that "the evidence in this case will not support the conclusion that, despite the provisions of the tariff, McPeters [the hoist operator] remained under the City's control in his operation of the hoist on the occasion in question . . . We thus have an agreement expressly vesting the right of control in Strachan [the stevedore], *and there is no evidence* that the City retained any right of control. In these circumstances the tariff is conclusive, and McPeters was the loaned employee of Strachan as a matter of law." *Id.*

that the crane operator employed generally by an equipment rental company had become the employee of a contractor stevedore who was loading a ship. The accident occurred when the crane operator, who had limited visibility of the ship, swung a load too low and hit a winch located next to the ship's hold. The court found that the crane operator reported to the job site and "received all his instructions, down to the most precise detail, from [the stevedore's] employees." 349 F. Supp. at 291. The court described how the stevedore's signal man "set the boom and the mark, thereby patterning the swing," signaled emergency stops when necessary and suggested modifications. The court concluded that the stevedore "had control over each individual swing, not just the general operation" and that the crane operator had become "assimilated into [the stevedore's crew for the duration of the operation, submitting entirely to [the stevedore's] direction." 349 F. Supp. at 292. The court applied a test used in a Wisconsin case, namely, whether the orders of the stevedore had the force of command rather than mere requests so that the crane operator had become assimilated into the stevedore's crew. *Id.*[21]

Application of the Principles of Law to the Facts in this Case

An examination of critical facts under the principles of law discussed above demonstrates that the Ports Authority does not relinquish the right of control over its cane operators and that consequently such operators do not become "borrowed servants" of renting stevedores.

It is undisputed that the Ports Authority furnishes the crane and operator and is solely responsible for inspection and maintenance of the crane. Indeed, the Ports Authority's very tariff (Item 136) is a holding out that "the Authority, as owner and operator of its facilities, also holds itself out to provide adequate cranes and qualified operators for any stevedoring operations on its facilities . . ." (Doc. No. 3, Item 136; Stevens Opening Brief at 67 and record references cited therein.) It is also undisputed that the Authority has exclusive responsibility for training the crane operators through classroom instruction and on-the-job training. Furthermore, the Authority gives unskilled operators a two-year training program and furnishes to its operators various written manuals, memoranda, and guidelines which emphasize the crane operator's duties to use care and exercise his own judgment in lifting operations which appear to be unsafe in any particular aspect. Among the documents furnished crane operators by the Authority is one entitled "30 Rules for Safe Crane Operation." Among other things this document states that "Container-Gantry and mobile cranes are complex and powerful machines that require your complete control every moment.

[21] The District Court's decision in *Watson* v. *Lambert's Point Docks, Inc.*, which the Fourth Circuit Court of Appeals had affirmed, discussed the *Finagrain* decision, but refused to follow it. The Court noted that there was a "significant difference in the amount of control exercised by the second employer in that case." *Watson* v. *Lambert's Point Docks, Inc.*, Civil Action No. 82-262-N, U.S. D. Ct. E. Dist. Va. Norfolk Div., slip opinion at 6.

. . . You, as the man responsible for those operations under your direct control, are the crucial key to safe machine performance and everyone from your fellow worker to the Authority Director is depending on you." (Doc. 38; Tr. 370.)

It is also undisputed that the Ports Authority could hire and fire crane operators, disciplined them, paid them, carried workmen's compensation on them, and had the power to substitute crane operators on any give shift. Stevens had no such powers. Indeed, if a crane operator reported drunk, Stevens had to complain to the Authority's crane superintendent or foreman who would decide whether to replace the crane operator. The record also discloses that Stevens had no authority to choose any particular operator, such selection being exclusively in the power of the Authority. Indeed, when a second crane operator (Mr. Esau Johnson) replaced the first operator (Mr. Messervy) on January 20, 1982, the date of the accident, Stevens did not even know that Mr. Johnson was in the cab nor did Stevens even know that Mr. Messervy would be working the first shift until Mr. Messervy appeared on the dock in the morning. (Tr. 263–264; Stevens Opening Brief at 70–71 and further record references cited therein.)

Crane operators and cranes were rented to Stevens for a short period of time, i.e., about half a day. (Steven's Opening Brief at 70 and record references cited therein.) In furnishing cranes and operators to Stevens, the Ports Authority was acting as a business renting cranes along with operators to stevedores under its tariff. However, it could be reasonably argued that the crane and its operator were advancing the work of Stevens by participating in the preparation of loading the locomotive aboard ship, as Stevens acknowledges. (Stevens Opening Brief at 71.) It could also be argued that the crane operator was furthering the business of the seller of the locomotives, General Motors, which had contracted to deliver the locomotive alongside the ship. (*Id.*)

The above facts indicate that crane operators remained in the general employ of the Ports Authority and did not become "borrowed servants" of the stevedore. *Watson* v. *Lambert's Point Docks, Inc.*, cited above, 1985 A.M.C. at 1105; *Roderick* v. *Bugge*, cited above, 584 F. Supp. at 628; Restatement of Agency, sec. 227, comment c, cited above; *Standard Oil Co.* v. *Anderson*, cited above, 212 U.S. at 219. The only fact which arguably might indicate that the crane operators had become "borrowed servants" of Stevens is the last one, namely, that, in a sense, the crane operators were advancing the work of Stevens as well as that of the Ports Authority. However, that fact alone does not convert crane operators into "borrowed servants" of the stevedore. See *Roderick* v. *Bugge*, cited above, 584 F. Supp. at 628; *Ware* v. *Cia. de Navigacion Andes*, cited above, 180 F. Supp. at 943. Indeed, even if control over the operator were divided between Stevens and the Authority as to the particular work being performed, such fact does not necessarily make the crane operator

into a "borrowed servant." See Restatement of Agency, sec. 227, comment b, cited above; *Dellums* v. *Powell*, 566 F. 2d 216, 222 (D.C. Cir. 1977).

In addition to the above facts which courts consider when determining if an employee has become a "borrowed servant" of another employer, there are other facts which, as I discussed above, are considered. See Restatement of Agency, sec. 227, comment c, cited above. There is an inference that an employee remains in the general employment of the first employer absent evidence to the contrary when the employee is performing work entrusted to him by his first employer. The fact that an employee may be a trained specialist and may be working with valuable equipment indicates that the first or general employer does not intend to relinquish the right to control the operator or the crane. As the Restatement of Agency, sec. 227, comment c, cited above, further states:

> Normally, the general employer expects the employee to protect his interests in the use of the instrumentality, and these may be opposed to the interest of the temporary employer. If the servant is expected only to give results called for by the temporary employer and to use the instrumentality as the servant would expect his general employer would desire, the original service continues. Upon this question, the fact that the general employer is in the business of renting machines and men is relevant, since in such case there is more likely to be an intent to retain control over the instrumentality.

The facts of record indicate that crane operators remain servants of the Ports-Authority under the above tests. Thus, as noted before, the Ports Authority is in the business of renting cranes with operators. It trains the operators who are handling valuable cranes and are expected to exercise care and independent judgment when necessary to ensure safe lifts. Indeed, the crane operators are, as we have seen, furnished with printed rules by the Ports Authority telling them that the cranes "are complex and powerful machines that require your complete control every moment" and further telling the operators that they are "the crucial key to safe machine performance and everyone from your fellow worker to the Authority Director is depending on you." Crane operators are instructed not to follow stevedores or their flagmen if there is a question of safety and to refuse to continue lifting an unsafe load. In case of dispute between the crane operator and a stevedore employee as to whether the crane can handle a particular lift, the crane operator will refuse to continue and will call his own, i.e., a Ports Authority foreman. Crane operators are trained specialists who have been given training by the Ports Authority, and they are expected to protect the interests of the Authority by refusing to continue an unsafe lift.

All of the above facts strongly indicate that crane operators at Charleston do not become "borrowed servants" of renting stevedores. However, as most courts recognize, the determining factor is the right to control the

operator, the work, and the manner in which it is performed. Such is also the law in South Carolina. *Parker* v. *Williams & Madjanik, Inc.*, 239 S.E. 2d 487, 489 (S.C. 1977) ("The test generally used . . . is whether the employee passes under the latter's [i.e., another employer's] right of control with regard not only to the work to be done but also to the manner of performing it."); see also *Vance Trucking Company* v. *Canal Insurance Company*, cited above, 249 F. Supp. at 38.

To determine whether Stevens had the right to control either of the two crane operators who worked on January 20, 1982, or whether it was the practice at Charleston for stevedores to be given the right to control crane operators employed by the Ports Authority under the Authority's tariff, it is necessary to consider some details about the lifting operation. The record shows that on January 20, 1982, a meeting was held in the morning between Stevens employees and Mr. Messervy, the first crane operator on the job. Mr. Messervy was given information as to the weight of the locomotives and as to where they would be placed on the dock after lifting. The weight of the locomotives was also stenciled on a wooden placard on the front of each locomotive. Stevens had no advance knowledge as to who the crane operators would be nor that Mr. Johnson was to replace Mr. Messervy during the course of the lifts. Mr. Bernard Funderburk, one of three Stevens supervisors, testified that he did not even know that Mr. Johnson was in the cab of the crane until after the accident had occurred. Another Stevens employee, Mr. Laddie Holcombe, however, saw Mr. Johnson in the cab of the crane when Mr. Holcombe was moving the last locomotive into position for lifting. Not one of Stevens' employees knew that the load indicator device in the cab of the crane was not working.

On January 20, 1982, a representative from the seller of the locomotives, General Motors, a Mr. George Stovicek, was at the pier to oversee the dismantling of the locomotives and their eventual loading on board the *M/V Arafat*. The locomotives came down to the Union Pier Terminal in Charleston on railroad spurs, were moved to the track well, where Stevens separated the locomotive body from its front and back wheel assemblies with the help of the crane operator by lifting the car body off the wheel assembly. After this was done, the car body was set down on a wooden pyramid provided by General Motors that Stevens had placed in position on the dock. The locomotives were moved into position on the dock by Stevens employees by using a forklift truck. Stevens rigged them for lifting by using two twelve-foot spreader bars.

Prior to the lift of the first locomotive, the longshoremen foreman, Mr. Leroy Grant, hired by Stevens, had conversations with the crane operator, in which the crane operator yelled down to Mr. Grant to tell him where he wanted the locomotives positioned under his lead. (Ex. 14 at 36–37.) It was common for crane operators to yell down to a longshoreman if the load was not in a proper position to lift or to advise the longshoreman that the load was too heavy for the crane to boom out any further. (Ex.

14 at 37–38.) On the date of the accident, Mr. Grant, as was the practice, put the first locomotive in the position the crane operator wanted it. (Ex. 14 at 38.) One of Stevens' longshoremen then placed a wooden stick to mark the spot where the first locomotive was lifted. The crane operator then positioned the boom of the crane over the locomotive and the stevedore's employee hooked the locomotive up to the crane's hook. When the first lift was made, the crane operator paused while Mr. Holcombe checked the rigging. After determining that the rigging was satisfactory, Mr. Holcombe told the stevedore's flagman to signal the crane operator to lift the load. (Tr. 215.) The second locomotive was also lifted from the same location as the first. Stevens' Mr. Holcombe knew that the first locomotive was within the radius of the crane because the first crane operator, Mr. Messervy, had told him so. (Tr. 217–218.)

While preparations were being made to pick up the third locomotive, the crane operator, Mr. Messervy, instructed Mr. Grant to move the locomotive five or six feet back up the track because the crane operator felt it was too close. Mr. Grant moved it with a fork lift truck. A stick was placed at the spot as a marker. Mr. Messervy lifted the third and fourth locomotives and was relieved by Mr. Johnson at approximately 10:00 a.m. Mr. Johnson had watched Mr. Messervy lift the fourth locomotive and some wheel assemblies. The fifth locomotive was lifted without incident. Mr. Holcombe moved the sixth locomotive up to where the crane's hook was positioned and believes that the crane operator gave him a signal indicating that he could stop pushing the locomotive any further or at least tacitly approved of the position of the locomotive. At the time of the sixth lift, the locomotive was not positioned where the marking stick was. Under normal procedure followed in this instance, the crane operator lifts the load slightly, the stevedore checks the rigging, and assumes the crane operator is checking his instruments in the cab, and then, through the flagman, signals the crane operator to resume the lift. It is therefore Stevens' personnel who have the lift stopped and signal the operator to resume. (Tr. 195.) Mr. Holcombe, the stevedore's employee, testified that he had had trouble moving the sixth locomotive from the track well to the crane's hook and was "slowing down the operation," and "everybody was standing around waiting for me. The boom was in, the crane was in position with the hook hanging over the rail bed. I pushed the locomotive up to where the hook was hanging I looked up that's when I realized Esau was the operator. So I'm not positive but he may have given me a signal like that's alright there. So the locomotive [was] right under where he had his hook hanging. He was standing right there watching me hook up the locomotive. If he had known anything would have been wrong I feel sure he would have told me." (Tr. 244–245.)

After the above procedure was followed, the crane operator resumed the lift "just high enough to clear the track well and started to swing. . . ." (Tr. 226.) There was a loud noise like a pistol shot, the wheel

assembly came apart, the crane's legs broke, and the entire crane fell over with the locomotive. (Tr. 226; 189.) After the accident, Stevens determined that the sixth locomotive was picked up outside a safe radius.

I find that the above facts do not show that the Ports Authority's right to control the crane operator passed to Stevens. The facts reveal rather that there were cooperation and coordination between the stevedore's personnel and the crane operator. Perhaps this conclusion is best summarized by one of the eye witnesses to the accident, Mr. Holcombe, a Stevens employee, who was involved in moving the sixth locomotive to the crane's hook. Mr. Holcombe commented on the procedure of lifting the load slightly to check the rigging and his communication with the crane operator by a "nod" of the head meaning that "everything's alright on my end." (Tr. 239.) "So evidentially (sic) everything's alright on his end if he goes ahead and makes the lift." (Tr. 239–240.) Furthermore, as between the stevedore, Mr. Holcombe, and the crane operator: "We just look at one another. We know what we're doing." (Tr. 240.)[22]

The above situation seems to resemble the description of the loading operation in *Standard Oil Co.* v. *Anderson*, cited above, 212 U.S. 215. It will be recalled that in that case a winchman in the general employ of a shipowner had been "lent" to a stevedore to load a ship with oil and had followed signals given by employees of the stevedore as to when to hoist and lower the cargo. In lowering cargo into the ship, the winchman had struck and injured an employee of the stevedore. The Court held that the winchman had not become the "borrowed servant" of the stevedore. The Court noted that the winchman had been hired and paid by the shipowner who alone had the right to discharge him. However, the critical area of the decision was that of control over the winchman. The Court found certain areas in which the stevedore necessarily had to exercise some control over the winchman in terms of hours of labor and guidance when the winchman's vision was blocked. The critical distinction made by the Court, however, was between authoritative direction and control in contrast to mere suggestions as to details or to necessary cooperation where the work furnished was part of a larger undertaking. 212 U.S. at 221–222. As I noted earlier, the Court merely held that the winchman

[22] The Ports Authority argues that Stevens had control over the unfortunate sixth lift and that the accident was caused by Stevens' signaling the lift from a position out of safe radius of the crane and beyond the safe marker placed by the stevedore. (SCSPA's Reply Brief at 21, 33.) SCSPA contends that Stevens was negligent in failing to exercise proper supervision and control at the time the crane collapsed and that the crane operator was merely following Stevens' instructions. (SCSPA's Reply Brief at 4, 27.) However, SCSPA also seems to acknowledge that its crane operator should have acted on his own judgment, stating that "[t]here is ample evidence that had the operator done as SCSPA taught him, the accident would not have occurred." (SCSPA's Reply Brief at 4.) It is not the purpose of this decision to determine whether Stevens or the SCSPA's crane operator or both were negligent, who was responsible for the accident, whether liability should be shared, or similar questions which appear to be matters for the court to determine. I am satisfied that the facts in this record display cooperation and coordination between Stevens' employees and crane operators and not subordination of the crane operator to the stevedore and that, accordingly, the crane operator did not become the "borrowed servant" of the stevedore.

and the stevedore were cooperating and coordinating their efforts, a situation which did not mean that the winchman had become subordinate to the stevedore so as to become the latter's "borrowed servant." The words used by the Court bear repeating as follows:

> But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. The giving of the signals under the circumstance of this case was not the giving of orders, but of information, and the obedience of those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters. 212 U.S. at 226.

As noted earlier, this reasoning was followed in the Fourth Circuit as recently as 1984. See *Watson* v. *Lambert's Point Docks, Inc.*, cited above, 1985 A.M.C. at 1105. ("In *Anderson,* the Supreme Court emphasized that an employee does not become a borrowed servant merely by receiving suggestions as to operational details; the distinction is between 'orders' and informational signals that merely imply necessary cooperation.")

It is also worth noting that the Court did not find the winchman to be the "borrowed servant" of the stevedore even when the winchman was directly involved in loading the cargo into the ship under the guidance of the stevedore's signal man and had to rely upon that man when the winchman's view was obstructed. Thus, it could be said that the winchman was doing the stevedore's work and was under the stevedore's operational control. In the present case, the accident occurred while one of the locomotives was being moved on the dock before loading on ship. (They were, incidentally, never loaded on the M/V *Arafat.*) Furthermore, there is evidence that the crane operators did not always follow the stevedore's flagman, had discretion to refuse to follow the flagman's signals in case of an unsafe load, could decide whether to swing or travel with the crane, could sometimes pick up cargo without any signal from a flagman, and had good visibility from the cab of the crane on the date of the accident. As noted earlier, furthermore, the Ports Authority furnishes its crane operators with instruction manuals and guidelines emphasizing that the cranes require the operators' "complete control every moment" and that "everyone from your fellow worker to the Authority is depending on you." (Doc. 38.) Also, the Authority furnishes its operators with additional written instructions stating that the crane operator "must be familiar with the capacities of the type of crane operated; must be able to judge weights and radii in accordance with posted capacities" and "complies with signal after judging that lift is safely rigged and nature of lift will not damage or tip cranes; works with minimum of standard signals, using own judgment to determine the best procedures for conveying lift to desired location." Finally, the Authority advises its crane operators in another written memo-

randum, "when there are times of doubt, contact your foreman," meaning a Ports Authority foreman.

The Ports Authority, however, argues that its crane operators became "borrowed servants" of Stevens. The Authority argues that Stevens planned the positioning operation, had its supervisory personnel on the dock, and was skilled and experienced in such operations. The Authority argues furthermore that its crane operators were "machine operators and not supervisors" (Ports Authority's Reply Brief at 9) and that they had instructions to follow the instructions of the stevedore who supervised the operation and was paid for it. In short, the Authority argues that "the crane operator was integrated into the stevedore's operation" and "played whatever role the stevedore asked him to play." (Ports Authority's Reply Brief at 16.) The Authority characterizes Stevens' and Hearing Counsel's contentions as the "super crane operator" argument. (Authority's Reply Brief at 8.) The Authority also argues that if its tariff Item 135 is found to be unreasonable, it would have to change its practice and its insurance costs would increase significantly. Furthermore, private rental agreements at Charleston have "borrowed-servant" provisions, and when the Authority itself rents cranes from private owners, it does so under "borrowed-servant" provisions, according to the Authority. There is some support in the record for these contentions but I find that they are outweighed by other evidence.

First of all, the argument which reduces the crane operator to a mere "machine operator" is inconsistent with evidence showing that the Ports Authority trains its operators and expects them *not to* be mere robots mindlessly following instructions of stevedores but to exercise "complete control at every moment." Furthermore, the Authority tells its operators in printed manuals how everyone "is depending on you."[23] It is inconceivable that the Authority would allow untrained operators to manipulate expensive cranes on Authority premises and not instruct them to exercise some independent judgment regardless of signals from stevedore employees which might jeopardize a crane, and, indeed, the evidence shows that crane operators do have some independent responsibility to check their instruments

[23] See especially Doc. No. 35, a Ports Authority Memorandum issued to its crane operators by Mr. D. Claude Baker, formerly Director of Operations and Manager of the Port's Heavy Lift Division, among other duties. Note the detailed description of the crane operator's "qualifications," "knowledge and skill," "judgment and initiative," "mental alertness," and "duties." For example, the crane operators are told that:

> A crane operator is placed in charge of a piece of equipment that costs many thousands of dollars and which has the potential of causing many more thousands of dollars in damage to cargo, facilities and equipment. Upon the skill of this man depends the life and safety of all men working in the vicinity. It is imperative, therefore, that the operator learn not only the technical skills that will enable him to operate the equipment, but he must also acquire an attitude of responsibility for seeing that the job is done safely.

After detailed description of the operator's required skills, the Memorandum states as to the operator's "judgment and initiative," such things as the following:

> . . . complies with signal after judging that lift is safely rigged and nature of lift will not damage or tip crane; works with minimum of standard signals, using own judgment to determine the best procedures for conveying lift to desired location. . . .

See also the testimony of Mr. Jerry Franks, the Ports Authority's Manager of Heavy Lift Operations, at Tr. 368–375, confirming the continuing validity of the above Memorandum.

and to refuse to lift loads when they deem the load unsafe.[24] This does not mean that the crane operator is not working with the stevedore's team. As the Supreme Court noted in *Anderson*, cited above, 212 U.S. at 226, "there must be cooperation and coordination, or there will be chaos." However, as the Court and other courts have noted, cooperation is not subordination.

The rejection of tariff Item 135 in its present form would, in effect, no longer allow the Authority to disclaim liability for personal injury or property damage resulting from operation of the crane on the invalid ground that the crane operator had become the "borrowed servant" of the stevedore. It would require the Authority to be responsible for the negligence of its crane operators. The Authority argues that such a result would be undesirable, would split control between stevedores and the Authority over stevedoring work, would increase the Authority's insurance costs, would require the Authority to provide supervisors for stevedoring work, or go into the stevedoring business itself, or could require stevedores to employ operators themselves full time at increased costs to the stevedores. (Ports Authority's Reply Brief at 21–22.) None of these arguments is particularly persuasive.

First, the short answer to the above arguments is that if, as the courts have usually held, the Ports Authority does not in fact transfer the right of control over its crane operators under the facts of this case, the law does not permit the Authority to disclaim liability for the actions of its crane operators.

Second, Item 135 already imposes liability on the Authority in case the Authority furnishes a defective crane, i.e., the Authority assumes liability for accidents resulting from structural failure of its cranes. In the future, however, under an amended Item 135, the Authority would also have to be liable for the negligence of its crane operators. Such an obligation is not so unusual. The record shows a number of agreements entered into between the Authority and ocean carriers and their agents in which the Authority assumes liability or agrees to indemnify the carriers or their agents whether the accident is caused by structural failure or negligence of a Ports Authority's crane operator. The Authority apparently knows how to operate a crane rental business, assume liability for the negligence of its crane operators, and receive compensation satisfactory to itself as shown by the various agreements.

Third, the fact that there might be split control between the stevedore and the Authority over a stevedoring operation involving the use of an

[24] The Ports Authority downplays this right of the crane operator to refuse to lift an unsafe load and argues that such right "does not destroy the stevedore's effective control of the crane operator." (Ports Authority Reply Brief at 14.) The Ports Authority acknowledges that its instruction "gives the operator the right to veto the command to lift" in special unsafe circumstances. (*Id.*) But this very right to veto is evidence that the Ports Authority did not surrender the right to control its crane operator to the stevedore. See *Dellums* v. *Powell*, cited above, 566 F. 2d at 222 (employees' veto authority over each other inconsistent with the "borrowed-servant" doctrine.)

Authority's crane is no great change in practice. As the record shows, there is, in effect, some split control right now between the stevedore and the crane operator who retains some independent discretion. As I have discussed, the crane operator is no mere robot mindlessly following instructions of the stevedore but a skilled specialist operating expensive equipment who is expected to exercise independent judgment when the need arises.

Finally, if the Authority now becomes liable for its crane operator's negligence and must pay increased insurance premiums by approximately 234,000, as the Authority estimates, this would become a cost of doing business as a renter of cranes with operators whom the Authority has trained to exercise skill and care and to protect the cranes from unsafe operations in the interests of the Authority. As with any other cost of doing business, the Authority may well deem it advisable to pass the cost along to the renting stevedores as part of the tariff charges for rentals and thereby spread the increased costs among all renters of cranes and operators. If, for some reason, the Authority wishes to absorb the cost increase, it would appear, as Stevens notes (Reply Brief at 48–49), that the Authority could absorb such a relatively small amount when one considers that the Authority seeks to make profits and during the first half of fiscal 1984 recorded a profit of $2.2 million. (Tr. 485; Doc. 62.)[25]

The Authority also argues that amendment of Item 135 might also require the Authority to increase its supervisory personnel over crane operations. However, as Stevens notes, besides Mr. Johnson, the Ports Authority had two personnel at the job site on January 20, 1982, Mr. Wiggins, the Crane Foreman, and Mr. Messervy, the first crane operator. The Authority's own document (Doc. 37 at 2) shows that its crane foreman has supervisory duties and there is evidence that the first crane operator could be expected to remain for a while to check out the crane and advise the relieving operator if he saw anything wrong. This does not mean that Mr. Wiggins remained at the site or that Mr. Messervy had supervisory responsibilities. However, they could be available if necessary, it would seem.

The Authority expresses concern that if it gives up the crane rental business, Stevens would have to employ operators and pay their expenses for five days a week although they may work only one day a week. (Tr. 129, 292; Ports Authority's Opening Brief at 10–11; 21.) However, Stevens' Assistant Vice President, Eugene Mayfield, testified that Stevens would "rather provide our own operators so we have some kind of control over our destiny" (Tr. 129) and if it is held that Stevens is liable for

[25] According to a news article in the Journal of Commerce for May 23, 1985, the Ports Authority has announced a new five-year contract with Evergreen Marine Corp. The Evergreen business is expected to generate an estimate $2.7 million in annual gross revenues, according to the article, citing the Authority's finance officer, Mr. Lawrence. The article also stated that the Authority's operating revenues are projected to reach $35.21 million in fiscal 1986, an increase of $2.37 million. Operating earnings were expected to drop to $2.08 million according the the preliminary fiscal 1986 budget. I do not vouch for the accuracy of the news article, of course, but only officially notice what the Ports Authority announces as its preliminary expectations. See 46 CFR 502.226(a).

damages arising out of the current accident, he indicated that Stevens would want to become more active in operating cranes themselves even if it meant paying operators' salaries and social security when they were not working the cranes. (*Id.*; see also Stevens Reply Brief at 47.)

Finally, there is some evidence concerning the rental of cranes and operators from private crane owners in Charleston. Both the Ports Authority and Stevens have had occasion to rent such cranes and operators. Most of the testimony and written evidence indicates that the lessees "borrow" the operators and assume liability although there is testimony by Stevens' Assistant Vice President, Mr. Mayfield, that a private crane owner named Limehouse has paid claims caused by negligence of Limehouse's crane operator contrary to the written provisions of the Limehouse lease agreement. (Tr. 130–131; 160–161; Doc. 71.) Apparently another private crane owner named Associated Industrial Construction Company does not require stevedores to sign provisions like tariff Item 135 transferring control over crane operators to the stevedores. However, the preponderance of the evidence on this question is that private crane owners insert "borrowed-servant" provisions into their agreements with the Ports Authority and others renting cranes from them, thereby transferring control to the lessee. (Tr. 325; 342–344.)

This case does not concern the question of the lawfulness of private crane rental agreements. Therefore it is not necessary to determine whether the prevailing practice is for stevedores or the Ports Authority to become the temporary employers of the private crane operators and for them to assume liability for the negligence of the operators. There is nothing unlawful about a "borrowed-servant" or an indemnification provision if, in fact, private parties freely agree to such provisions for valid consideration and a renter freely agrees to become the temporary employer and indemnifier of the crane owner. Whether in fact these parties follow the written provisions of their agreements in all cases is not clear. It should be noted, however, that the private crane owners are renting mobile cranes which leave their premises. This is a factor which tends to indicate that the lending employer would want to transfer the right to control the crane operator to the renter and not wish to be held responsible for something which the renter did in some other location. In any event, the issue in this case is whether in fact the right to control a Ports Authority crane operator passes to the stevedore when the stevedore rents cranes under the Ports Authority tariff, not under a privately negotiated contract. As noted earlier, even the Ports Authority sometimes retains liability when renting to certain carriers or their agents under agreements approved by the Commission under section 15 of the Shipping Act, 1916, 46 U.S.C. sec. 814. In other words, stevedores or the Ports Authority may negotiate special contracts in which they determine as between themselves and other parties who will control the crane operators and who will be responsible for third-party liability. Such agreements may or may not in fact resemble

what happens when the stevedore rents a crane and operator from the Ports Authority under the latter's tariff, which is not a negotiated agreement. (See *Rorie* v. *The City of Galveston*, cited above, 8 SRR at 20,716–20,717; *West Gulf Maritime Association* v. *Port of Houston Authority*, cited above, 22 F.M.C. at 452.); cf. *Aleutian Homes, Inc.* v. *Coastwise Line et al.*, 5 F.M.B. 602, 609 (1959) (tariff made and issued by carrier); *C.S.C. International* v. *Lykes Bros.*, 20 F.M.C. 551, 555 (1978).)

I conclude, therefore, that the Ports Authority's tariff Item 135 which purports to place crane operators under the control of renting stevedores and, accordingly, disclaims liability for any negligence of crane operators does not correspond to actual practices at the port of Charleston because in fact and in law the right to control crane operators does not pass to renting stevedores. Accordingly, tariff Item 135 is an unjust and unreasonable regulation and embodies a unjust and unreasonable practice in violation of section 17 of the 1916 Act, 46 U.S.C. sec. 816, as recodified in section 10(d)(1) of the 1984 Act, 46 U.S.C. app. sec. 1709.

Stevens' Contentions that SCSPA has Violated Section 16 of the 1916 Act

A secondary allegation Stevens makes is that the Ports Authority has given undue or unreasonable preferences and advantages to some stevedores and has subjected Stevens to undue or unreasonable prejudice and disadvantage, in violation of section 16 First of the 1916 Act, 46 U.S.C. sec. 815 (now sections 10(b)(11) and 10(b)(12) of the 1984 Act, 46 U.S.C. app. sec. 1709). The essence of this allegation is that the Ports Authority entered into agreements with ocean carriers and their agents which gave the carriers preferential crane and berth services and did not transfer control of crane operators or disclaim liability as did Item 135. On the contrary, under the agreements, the Ports Authority agreed to indemnify the carriers from all losses sustained as a result of the acts or omissions of the Ports Authority or its employees and in one agreement even specified that the Authority would indemnify the carrier or its agents, servants and employees in connection with the negligence of Ports Authority crane operators. Stevens argues that the Ports Authority is treating similarly situated stevedores differently since stevedores employed by one of the carriers which has executed an agreement with the Authority would be indemnified in case of an accident caused by an Authority crane operator while Stevens, on the contrary, would be held liable by the Authority under the same facts. (Stevens Opening Brief at 72–74.)

The SCSPA answers the above contentions by arguing that the agreements in question were all approved by the Commission under section 15 of the 1916 Act and are therefore reasonable and nondiscriminatory. Furthermore, there is nothing wrong with agreements which offer carriers an incentive to use the port of Charleston and the fact that under the agreements the Authority agrees to indemnify the carriers shows that the normal practice

at Charleston is for the renting stevedore to assume liability for the negligence of crane operators. (SCSPA Reply Brief at 28–29.)

Since I have already found that tariff Item 135 is unjust and unreasonable and in violation of section 17 of the 1916 Act (and section 10(d)(1) of the 1984 Act), it is not necessary to determine whether SCSPA has also violated section 16 First of the 1916 Act (or the corresponding provisions of sections 10(b)(11) and 10(b)(12) of the 1984 Act.) Under either section 16 or 17, SCSPA will be ordered to cease and desist from following unreasonable practices and tariff provisions. However, a few observations may be helpful because the subject agreements are, to a limited extent, involved in the section 17 issue insofar as they relate to the question of what is the normal practice at the port of Charleston.

I have described the agreements which Stevens cites previously. (See paragraph 31, Summary of Facts.) As discussed, in return for the carriers' guaranteeing tonnages through the port of Charleston, the Ports Authority assumes or shares liability with certain carriers or their agents or agrees to indemnify the carriers or their agents. However, the agreements usually contain some provision to the effect that the Ports Authority will not indemnify the carrier if the carrier or its agent is at fault or will only share liability in proportion to the respective faults of the parties. Stevens correctly notes that none of the agreements contains a provision like tariff Item 135 which would place SCSPA crane operators under the control of renting stevedores or carriers or disclaim liability for personal injury or property damage resulting from operations of the cranes except that resulting from structural failure.

Undoubtedly the carriers and their agents including stevedores (if they are "agents" of the carriers) are given more favorable treatment by the Authority in cases of accidents arising out of crane operations than are stevedores like Stevens who use the Authority's tariff services. However, as the Authority points out, the carriers have given something in consideration of these extra benefits, namely, guaranteed tonnages. Therefore, it could be argued that stevedores enjoying greater benefits in terms of the Authority's promise to indemnify may not be similarly situated with Stevens because the favored stevedores' principals, the carriers, have paid for the extra benefits. Although such stevedores might enjoy a preference or advantage, the question is whether such preference or advantage is "undue" or "unreasonable." As the Commission has held, all preferences and advantages are not unlawful. It is only those that are "undue" or "unreasonable" which are prohibited by the 1916 Act. See *Perry's Crane Service* v. *Port of Houston,* cited above, 19 F.M.C. at 551–552. It is significant that Stevens does not ask that the Ports Authority's agreements with the carriers be disapproved nor argue that they violate the law. (Stevens Opening Brief at 73.) Furthermore, as the Authority points out, it is not unlawful or unreasonable for a terminal operator to give special privileges or advantages to carriers under specially negotiated agreements which were approved under

section 15 of the 1916 Act. Indeed, one of the reasons why such agreements were subject to section 15 of the 1916 Act is that they departed from the normal tariff provisions or otherwise fixed rates or fares, gave special rates, accommodations or other special privileges or advantages, regulated volume of freight, etc. See, e.g., *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792, 796 (1964); *Terminal Lease Agreement at Long Beach, California*, 11 F.M.C. 12, 17–18 (1967). Therefore, it is not enough under section 16 to show that the Ports Authority applies tariff Item 135 to stevedores who have no special agreements approved under section 15 and does not apply Item 135 to carriers or their agents who have entered into such agreements which were approved by the Commission. However, since tariff Item 135 is otherwise unreasonable under section 17 of the 1916 Act, it is not necessary to explore further whether there is some other theory by which the evidence could show a violation of section 16.

The Amendments to Tariff Items 20 and 25

As discussed above, I ruled prior to the hearing that as a matter of law the SCSPA's tariff Items 20 (users of Ports Authority's facilities agree to indemnify the Authority) and 25 (vessels, owners, and agents liable for damages) violated section 17 because they did not clearly rule out the use of such provisions by the Ports Authority to impose liability upon users of Ports Authority facilities even when the Ports Authority had been negligent. As I mentioned previously, I preserved the parties' rights to file exceptions to those rulings, which rulings I incorporated into this Initial Decision. Furthermore, I permitted the parties to file comments to these initial rulings. Two parties did so, Stevens and SCSPA, but only Stevens commented on my rulings as to Items 20 and 25, requesting clarification to the effect that those items violated section 17 of the 1916 Act.

On September 20, 1984, SCSPA sent a draft of amendments to Items 20 and 25 to the parties, which amendments were to go into effect on November 1, 1984, some 42 days later. (Doc. 99.) No party commented. On the first day of the hearing, January 21, 1985, in Charleston, I remarked on the record that I believed that the problems with Items 20 and 25 had been corrected by the amendments "as far as I can tell now." (Tr. 22.) Again no one commented. However, in their opening brief filed on March 15, 1985, Hearing Counsel contend that the amendments are still unreasonable because they do *not* free users of Ports Authority facilities from liability when the Authority is partly responsible. (Hearing Counsel Opening Brief at 19–20.) Stevens agrees with Hearing Counsel, and, furthermore, asks for a clear ruling that amended Items 20 and 25 cannot be applied retroactively in the suits pending in court. SCSPA, however, argues that Hearing Counsel suggest no alternative language and that they overlook the fact that the amendments to the two items specify that users of its

facilities are relieved of liability for the "portion" of losses and claims caused solely by the Ports Authority.

Originally Item 20 read as follows:

> All users of Authority facilities agree to indemnify and save harmless the Authority from and against all losses, claims, demands and suits for damages, includins death and personal injury * * * incident to or resulting from their operations on the property of the Authority and the use of its facilities.

The Authority has added the following amending language:

> (A) This item is not to be construed as requiring any user to indemnify the Authority for that portion of such losses, et cetera, caused solely by the negligence of the Authority.

Originally Item 25 read as follows:

> All vessels, their owners and agents, shall be held responsible for all damage resulting from their use of Authority facilities * * *

The Authority has added the following amending language:

> (A) This Item is not to be construed as requiring any vessel, its owner and agent to indemnify the Authority for that portion of such losses, et cetera, caused solely by the negligence of the Authority.

I do not find it necessary to issue orders against SCSPA other than those reasonably related to findings that the tariff provisions were found to be unlawful as a matter of law or were unreasonable because they did not correspond to the situation at Charleston regarding the renting of cranes and operators. See *Wilmington Stevedores* v. *The Port of Wilmington*, 28 F.M.C. 24 (1985).

This case is before the Commission because, at the request of Stevens, the District Court stayed two lawsuits and asked for the Commission's advice as to the lawfulness of certain tariff provisions. The Court stated that it "welcomes the Commission's advice on the validity of the disputed tariff provisions," and "[u]pon receipt of such advice, this Court will then decide the legal questions presented under the particular facts of this case, including any challenge to the validity of the Tariff then asserted." (Court orders of December 9, 1983.) To assist the Court, the Commission can find that the exculpatory and indemnification provisions of the tariff which either would exculpate the SCSPA from liability for its own negligence or transfer liability to renting stevedores or other users of the Ports Authority's facilities or disclaim liability for the negligence of the Ports Authority's crane operators are, under the facts shown on this record, unreasonable, in violation of section 17 of the 1916 Act and section 10(d)(1) of the 1984 Act. Accordingly, the SCSPA should be and is ordered to

cease and desist from implementing such provisions and the practices which they embody. In that way the Court is left free to determine the questions as to who was negligent between Stevens and the SCSPA under applicable local law. It is therefore unnecessary to determine whether SCSPA's good-faith attempt to amend Items 20 and 25 is sufficient to show that SCSPA will not engage in the practice of imposing liability or demanding indemnity for claims resulting from the SCSPA's own negligence or that of its employees.[26] Nor is it necessary to determine whether the revised Items 20 and 25 can be used by SCSPA against Stevens in the two court cases since SCSPA is ordered not to carry on the unreasonable practice of imposing liability or indemnification provisions on Stevens for any conduct which is the responsibility of the Ports Authority. More specifically, the Ports Authority cannot hold Stevens responsible for the conduct of Ports Authority's crane operators merely because they are rented to Stevens along with cranes.

ULTIMATE CONCLUSIONS

Complainant, a stevedore operating at the Port of Charleston, alleges that five tariff provisions in respondent Ports Authority's marine terminal tariff are unreasonable in violation of section 17 of the Shipping Act, 1916, and that one of them is being used against Stevens in a discriminatory and prejudicial fashion, in violation of section 16 First of the 1916 Act. The critical tariff provisions are being asserted by the Ports Authority against Stevens, seeking indemnification or damages in connection with two lawsuits pending before the U.S. District Court in Charleston which arose out of an accident in which a Ports Authority crane and a locomotive which the crane was lifting were damaged while the crane and its operator were being rented by Stevens under the Ports Authority's tariff.

Of the five contested tariff provisions, the lawfulness of four was determined as a matter of law. Thus, Item 5 (user consents to tariff provisions) was not found to be unlawful but to be a harmless reminder of tariff users' obligations generally without binding legal effect otherwise. Item 20 (users agree to indemnify Ports Authority) and Item 25 (vessels, owners, and agents are liable for damages) were unreasonable in violation of section 17 of the 1916 Act and section 10(d)(1) of the Shipping Act of 1984

[26] As to the amendatory language to Items 20 and 25, it should be interpreted to mean that the Ports Authority would not impose liability on Stevens or expect indemnification for claims from Stevens or other renters for claims *to the extent that the Ports* Authority was responsible but would only expect Stevens to be responsible to the extent that Stevens or its employees was responsible. That apparently is what the SCSPA means by the word "portion" of losses. The language does not have to mean that the SCSPA is attempting to escape liability where it is only partly responsible, as Hearing Counsel fear. The Commission has already condemned such an interpretation. See *Central National Corporation et al.* v. *Port of Houston Authority*, cited above, 26 F.M.C. at 303. As to Item 135, which is unamended, the Commission can allow the SCSPA a reasonable time to file appropriate amendatory language to conform with its decision as was done following the decision in *Central National Corporation et al.* v. *Port of Houston Authority*, cited above 26 F.M.C. 296. See the letter dated May 4, 1984, from the Commission's Secretary to Mr. Strange, General Manager of Houston, in this regard.

because, under their language, prior to their amendment, the Ports Authority could use them to impose liability upon users of Ports Authority facilities or could demand indemnification even if the Ports Authority had been negligent. Under applicable principles of law, such exculpatory-type provisions in marine terminal tariffs are unreasonable on their face when, as in this case, the terminal which occupies a position of power in bargaining gives no special benefits or consideration to tariff users in return for imposing such liability and indemnification provisions on them. Items 20 and 25 have since been amended by the Ports Authority in an effort to eliminate their unlawful exculpatory effects. Item 136(A) (Ports Authority holds itself out to provide adequate cranes and qualified operators and requires users to rent its cranes if suitable and available is not unlawful on its face.

The evidentiary hearing centered on the question of the lawfulness of Item 135, the tariff provision which purports to transfer control of Ports Authority crane operators to renting stevedores and which furthermore disclaims Ports Authority liability for personal injury or property damage except that resulting from structural failure of the crane. This tariff provision would be lawful under the Shipping Act if, in fact and under relevant principles of law relating to the so-called "borrowed servant" doctrine, the renting stevedore such as Stevens acquired the right to control the crane operator. The evidence shows, however, that the Ports Authority hires, trains, disciplines and pays its crane operators, has the final authority on sending them to particular jobs and substituting them and, although they work closely with the stevedore's employees in moving cargo over the piers for the stevedores, they are expected to exercise independent judgment when the need arises and are not required to follow the signals or instructions of the stevedore's employees when to do so would be unsafe or would be contrary to the interests of the Ports Authority in protecting its cranes and facilities. As numerous court decisions make clear, such facts indicate only cooperation and coordination, not subordination of the crane operator to the stevedore, and, accordingly, the crane operator remains the employee of the Ports Authority which is responsible for his negligence. The fact that the Ports Authority might have to increase supervisory personnel or pay increased insurance premiums unless it allows stevedores to utilize their own operators cannot in law allow the Ports Authority to transfer liability to renting stevedores while the Ports Authority retains the ultimate right to control the crane operators.

Complainant's allegations that the Ports Authority has also violated section 16 First of the 1916 Act (which is now section 10(d)(1) of the 1984 Act) by preferring other carriers and their stevedores in respect to liability and indemnification agreements are of questionable validity. Those agreements were separately negotiated and approved by the Commission under section 15 of the 1916 Act. However, since Item 135, which is the provision involved, is unlawful for other reasons, it is not necessary to explore the allegations further.

SCSPA is ordered to cease and desist from carrying on the unreasonable practices embodied in the unmended Items 20 and 25 and in Item 135, namely, transferring responsibility and liability for loss and damage claims to renting stevedores in instances in which the Ports Authority or its employees are negligent or otherwise responsible for the loss or damage involved. The Ports Authority is also ordered to cease and desist from purporting to transfer the right to control its crane operator and from disclaiming responsibility for the actions of its crane operators under the current practice at Charleston with respect to the Ports Authority's tariff rental service. Such practices and Item 135 which embodies them are unreasonable, in violation of section 17 of the 1916 Act (and section 10(d)(1) of the 1984 Act).

The above findings and conclusions are designed to be responsive to the request of the U.S. District Court in Charleston which requested the advice of the Commission as to the lawfulness of the contested tariff provisions under shipping law. They are not intended to affect the issues of negligence and other issues before the Court in the two pending lawsuits. It is not therefore necessary to issue additional orders regarding further amendments to Items 20 and 25 or amendments to Item 135. However, the Commission may allow the Ports Authority a reasonable time following its decision to propose and file suitable corrective language to Item 135 or to Items 20 and 25 if there is still confusion.

NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–3

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL RATE INCREASE OF 2.5 PERCENT BETWEEN UNITED STATES PACIFIC COAST PORTS AND HAWAII PORTS

ORDER DISCONTINUING PROCEEDING

December 27, 1985

This proceeding was instituted by Order of Investigation and Hearing served January 24, 1985, to determine whether a 2.5 percent overall rate increase filed by Matson Navigation Company[1] to take effect January 1, 1985 is just and reasonable. On June 28, 1985 the Commission served a Notice in this proceeding that a final decision could not be issued within the statutory 180-day period as required by section 3 of the Intercoastal Shipping Act, 1933 (ISA) (46 U.S.C. app. § 845), and that accordingly, the rates under investigation herein were, for purposes of that section, deemed to be just and reasonable.[2]

Upon further consideration of this matter, the Commission has determined that the said determination of justness and reasonableness by operation of the limitation period of section 3 of the ISA precludes further consideration in this proceeding of the specific issues noted in the Order of Investigation and Hearing. The Commission has also determined that no regulatory purpose will be served by the consideration of other issues concerning the justness and reasonableness of the rates herein under investigation under any other statutory authority in this proceeding. Accordingly, the Commission will discontinue this proceeding.

This determination, however, is without prejudice to the right of any person to file a complaint pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. app. § 821).

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

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

[1] Supplement No. 1 to Matson Navigation Company's Tariff No. FMC-F No. 9, 10, 11 and 12 applicable to all commodities (except molassas in bulk) moving in the Pacific Coast/Hawaii trade.

[2] The Notice of June 28, 1985 disclosed that the Commission could not issue a final decision "due to a vacancy on the Commission and a series of divided votes by the remaining Commissioners . . . ." Section 102(d) of the Reorganization Plan No. 7 of 1961 (75 Stat. 840) requires the affirmative votes of three Commissioners to dispose of any matter before the Commission.

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–1

CARRIER INTERNATIONAL CORPORATION

v.

WATERMAN STEAMSHIP CORPORATION

ORDER PARTIALLY ADOPTING INITIAL DECISION

December 30, 1985

This proceeding was initiated by complaint filed by Carrier International Corporation (Complainant) against Waterman Steamship Corporation (Waterman or Respondent) for alleged overcharges of $13,565.27 on a shipment of air conditioning equipment from Savannah Georgia to Port Sudan, Sudan. Complainant alleged that Respondent had overcharged it the amount of reparations requested by collecting a port congestion surcharge which it had not reflected in its tariff, 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 Charles E. Morgan issued an Initial Decision finding that Respondent had violated section 18(b)(3) by charging a rate in excess of the tariff rate on file with the Commission, but awarding reparations in the amount of $6,750 only. Respondent filed Exceptions to the Initial Decision's award of reparations to which Complainant has replied.

BACKGROUND

Complainant's agent in Savannah, Mr. Phil Harris of John S. James Co., contacted Respondent's agent in that city, Mr. Ronald O. Walker of Street Brothers, Inc., in the fall of 1983 to request a rate quotation for a shipment of nine pieces of air conditioning machinery to Port Sudan. Walker contacted Mr. Jack Mandleur, Assistant Vice President of Waterman's Traffic Department in New York, who instructed him to quote a rate of $140 per ton (W/M) plus 30 percent port congestion surcharge inclusive of all other charges. Mandleur said he would file this rate in the tariff when the cargo was booked.

Walker conveyed this rate telephonically in due course to Harris, who booked the cargo through Walker on a Waterman vessel sailing around December 3, 1983. Harris also prepared a bill of lading reflecting the quoted rate. Walker informed Mandleur in New York that the cargo had been booked.

Mandleur sent a request to Waterman's Tariff Department requesting that the rate as quoted to Complainant be filed. The rate that ultimately

appeared in Waterman's Freight Tariff No. 18–D, FMC No. 161, on 38th revised page 106, effective December 1, 1983, was, however: "Air Conditioning Machinery, Savannah/Port Sudan, through December 31, 1983; $140 W/M All Inclusive." Thus, as published the rate failed to reflect the 30 percent port congestion surcharge quoted by Walker to Complainant's agent, requested from the Tariff Department by Mandleur, reflected by Complainant's agent on the bill of lading, and invoiced to and paid by Complainant. The error was discovered in the course of an audit of Complainant's freight bills five months after the shipment moved. The reparations now sought by Complainant are the amount of port congestion surcharge collected by Respondent.

The facts outlined above, as found in the Initial Decision, are undisputed. Nor is it disputed that the rate on file in Respondent's tariff on the date of shipment did not include the port congestion surcharge and its collection therefore constituted a violation of section 18(b)(3).[1] The parties disagree, however, as to the inferences to be drawn from the facts regarding the question of whether the rate Complainant expected to pay and Respondent expected to collect was a "negotiated" rate, the collection of which did not result in any injury to Complainant for which it may claim reparation.

INITIAL DECISION

While the Presiding Officer found that Respondent had violated section 18(b)(3) of the 1916 Act by collecting the unfiled port congestion surcharge, and noted that mere violation of the Act does not necessitate an award of reparations where there was no injury to Complainant, he was unable to find that the evidence before him clearly showed the rate to have been "negotiated." After considerable discussion of the facts regarding the booking of the cargo, the Presiding Officer found that Respondent had shown that it, at least, understood that it had negotiated an agreed rate. He concluded, however, that Complainant's evidence, to the contrary, rendered it unclear that the rate charged was a negotiated and agreed rate between the parties.

Citing *United States of America* v. *Columbia Steamship Company, Inc.*, 17 F.M.C. 8 (1973), relied upon by Respondent, the Presiding Officer noted that the Commission had found an award of reparations unwarranted where the carrier and the shipper had negotiated a rate which had been charged and paid but which, through an administrative error in amending the tariff, was higher than the rate actually filed. The Commission held that under these circumstances an award of reparations would amount to a windfall which the shipper neither anticipated nor bargained for.

[1] Section 18(b)(3) provides, in pertinent part, that no carrier "shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property . . . than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time . . ." This section of the 1916 Act, repealed and superseded by similar provisions of the Shipping Act of 1984 (46 U.S.C. app. § 1701 *et seq.*, 46 U.S.C. app. § 1709(b)(l)), remains applicable to causes of action arising, like the instant case, before passage of the 1984 Act.

The Presiding Officer determined that the shipment in this case was in fact overcharged in the amount of $13,565.27, but nevertheless concluded that "payment of this full amount would result at least in part in an unanticipated windfall to the complainant . . ." and therefore limited reparation to $6,750 without interest.

POSITION OF THE PARTIES

In its Exceptions to the Initial Decision, Respondent argues that the Presiding Officer erred in his assessment of the evidence concerning the activity of negotiation. Respondent contends that the evidence of the communications between agents for Complainant and Respondent, including Complainant's actions in booking the cargo at the rate quoted and paying the freight as invoiced, shows Complainant's acquiescence in the rate, which is therefore a "negotiated" rate within the meaning of *Columbia Steamship, supra.* Respondent argues that the significance of the term "negotiate" is not identified in the *Columbia Steamship* decision, but that the equitable principle underlying that decision—that reparation in these circumstances would constitute unjust enrichment—is equally applicable here.

Respondent further contends that the "negotiation" of the rate is shown, notwithstanding the somewhat equivocal statements made by Complainant's affiant, Harris, by the circumstances surrounding the booking of the cargo. Respondent points out that Harris' statement that the cargo was booked on November 16, 1983 is consonant with Respondent's booking memorandum which reflects the rate quoted as "$140 W/M plus 30% Port Congestion Surcharge, all inclusive," and the statement of Respondent's affiant Walker. The amendment of the tariff to reflect a special rate, rather than the higher N.O.S. rate which would otherwise apply, strongly suggests, it is argued, that the special rate was agreed upon by Harris and Walker around November 17, 1983.

Respondent also submits that Complainant has not shown that it was injured by Respondent and is therefore not entitled to recover reparations under section 22 of the 1916 Act, citing *Trane Co.* v. *South African Marine Corp.*, 19 F.M.C. 375 (I.D. 1976), and *Cargo Export Corporation* v. *Intermodal Container Service, Ltd.*, 25 F.M.C. 400 (I.D. 1982).

Complainant argues in Reply to the Exceptions that cases in which reparations are not awarded for a proven violation of section 18(b)(3) are rare exceptions and that Respondent has not shown that this case is such an exception. Complainant contends that there was no agreement on the freight rate reached here similar to that in the *Columbia Steamship* case, where both parties agreed to a rate which both expected to be subsequently filed in the tariff. Complainant notes that a clerical error there resulted in the filing of a rate lower than the negotiated rate, while here, Complainant's agent merely asked for and agreed to pay the tariff rate. His understanding that the rate quoted was already in the tariff is, Complainant argues, proof that the rate was not "negotiated" or bargained for,

as in *Columbia Steamship.* Similarly, booking of cargo and payment allegedly do not constitute evidence of a negotiated rate. Thus, Complainant submits that it should not be held to payment of a rate in violation of the published tariff rate based upon Waterman's "misquotation" of the tariff rate. Complainant therefore concludes that it is entitled to reparation of the full amount of the overcharges.

Finally, Complainant argues that, in any event, the port congestion surcharge billed and collected by Respondent was "unconscionable," as well as in violation of the tariff, because "the vessel arrived at Port Sudan and was able to unload its cargo within 16 hours of arrival."

DISCUSSION

The Presiding Officer's findings of fact and discussion of the applicable legal precedents are without error and are adopted to the extent that they are not inconsistent with our discussion *infra*. His finding that Respondent collected a rate in excess of the rate on file, in violation of section 18(b)(3) of the 1916 Act, is supported by the record. We also agree with his conclusion that the Commission may, within its discretion under section 22,[2] decline to award reparations when no injury has resulted from violation of the Act or when reparations would constitute a windfall to Complainant which was not anticipated and bargained for. However, his determination to award half the amount overcharged does not appear well founded and is therefore reversed.

The Presiding Officer erred by overstating the significance of the give and take of price negotiations in *Columbia Steamship, supra,* to the detriment of the equities weighed by the Commission in that case. The shipper in *Columbia Steamship* requested that the carrier quote a rate for trucks from the U.S. to Pusan, Korea, noting that it could not pay more than the existing conference rate. The Respondent, a non-conference carrier, replied that it would offer, and file if agreed to, a stated rate per vehicle which would be lower than the conference rate. The conversation was confirmed in writing. In filing the rate, however, a clerical error was made, transposing the rates for Group 1 and Group 2 ports, which resulted in the filing of a rate lower than that agreed to for the shipment in question.

In overturning the presiding officer's award of reparations in that case, the Commission found that "application of the negotiated rate was a foregone conclusion by both parties," as shown by "subsequent issuance of

[2] Section 22 of the 1916 Act (46 U.S.C. app. §821) provides, in relevant part

> "[t]hat any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby . . . . The board, if the complaint is filed within two years after the cause of action accrued, *may* direct the payment . . . of full reparation to the Complainant for the injury caused by such violation." (Emphasis added)

The use of the term "may" indicates that grant of reparations is within the Commission's discretion. *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 621 (1966).

respondent's bill of lading No. 1, and the payment by complainant of the negotiated rate without demurrer'' and by a five month delay in seeking repayment after an audit revealed the error. 17 F.M.C. at 9.

We find that similar factors apply here. In this case, Complainant's affiant, Phil Harris, states that he was not authorized to, and did not, ''negotiate'' a rate with Waterman. He states that he merely asked Waterman's agent, Ronald O. Walker, to quote him the rate which he assumed was the rate already on file. He thus further assumed that the rate later quoted to him, following Walker's conversation with Jack Mandleur, was already in the tariff. Nevertheless, it is undisputed that Harris, on behalf of Complainant, agreed to book the cargo at the rate quoted him.

Clearly, as in the *Columbia Steamship* case, the Complainant expected to pay and Respondent expected to collect the rate as quoted. Clearly, also, the rate as quoted was expected by Complainant and intended by Respondent to be the rate on file on the date of shipment. The factual difference in the cases arises from the understanding by the shipper in *Columbia Steamship* that the rate quoted had yet to be filed in the tariff, while the shipper in this case was without knowledge as to when the rate quoted had been or would be filed. This difference does not, however, affect the equities of the situation, which appear to be the same in both cases. In this case, as in *Columbia Steamship,* the error made in filing the tariff results in an unanticipated and unwarranted windfall to Complainant if reparations are awarded.

It further appears here that the rate quoted by Waterman was a ''negotiated'' rate, at least in the sense that Waterman made an offer to file a rate lower than the rate applicable in the existing tariff,[3] and, when the Complainant acquiesced in that rate, made a good faith effort to file the lower rate as quoted. The evidence here points to the creation of a new rate with all the earmarks of a ''negotiated'' rate: a specific commodity rate, where none had previously appeared; effective for only 30 days; and applying only between two named ports. Similar evidence was relied upon in *Columbia Steamship, supra,* where it was noted that the ''negotiated rate had no counterpart in any tariff of respondent on file with the Commission . . .'' 17 F.M.C. at 19.

Complainant does not allege that any other shipper was able to take advantage of the lower rate published in the tariff. It also appears that the freight rate was not an essential element in Complainant's choice of route and carrier: Harris says that Waterman was chosen because other carriers no longer called at Savannah, Complainant had previously used

[3] Respondent's statements that, in the absence of the special rate filed as a result of these transactions, a higher N.O.S. rate would have been applicable to this shipment, are made for the first time on Exceptions. They do not, however, raise new issues. These statements are, moreover, not disputed or objected to in Complainants Reply to Exceptions. In addition, it may be inferred from the undisputed evidence of record of the filing of the tariff amendment to be effective in less than 30 days that no such specific rate existed previously, and that in the absence of the new rate, a higher rate would apply.

Waterman's service to the area, and Waterman had a sailing date which was within the period required by the letter of credit.

It thus appears that the Presiding Officer in this case relied too heavily upon Complainant's stated ignorance of the existing tariff in finding that the rate was not clearly a "negotiated" rate. As the Presiding Officer correctly noted, the Commission's power to award reparations is discretionary. The purpose of reparations is to compensate Complainants for injury resulting from a violation of the Act, not to punish such violations. Civil penalties are provided, where warranted, for that purpose. Complainant's ignorance of the existing tariff, without any showing of actual injury, does not persuade us to require that Respondent refund more than $13,000 of freight monies based on a rate it quoted, charged, and intended to file in good faith.

In its Reply to Exceptions Complainant alleges for the first time in this proceeding that the vessel was able to unload its cargo within 16 hours of its arrival in Port Sudan and argues from this fact that Respondent's collection of a port congestion surcharge was, therefore, unconscionable. We find that these statements of fact and argument were improperly made after the close of the record and they have, therefore, not been considered on their merits.[4]

One final matter, related to the above, remains for disposition. Several pieces of correspondence were received after the filing of Exceptions and the Reply thereto. Counsel for Respondent, by letter, requested that the last portion of Complainant's Reply to Exceptions, dealing with the issue discussed in the last paragraph, be stricken because it allegedly raises for the first time an issue of fact and arguments which had not been presented to the Presiding Officer, without notice to Respondent or opportunity to reply. Counsel for Complainant also wrote the Commission challenging his opponent's letter, citing the Commission's Rules of Practice and Procedure at 46 CFR §502.227 as authority for the arguments mode on Reply to Exceptions, and asking that the letter from Respondent's counsel be stricken from the record.[5]

We find these letters to be communications filed without authority. The Commission's Rules of Practice and Procedure, at 46 CFR §502.227, provide for the filing of exceptions to an initial decision, and for a reply to any exceptions filed. No reply to a reply is permitted. The Secretary is instructed to return the letters to the senders.

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[4] *See* 46 CFR §§502.229 and 502.230.

[5] We note that Complainant's reliance on 46 C.F.R. 502.227 for authority to raise new issues in its Reply to Exceptions is misplaced. That rule provides, at 502.227(a)(5), in part, that upon review of an initial decision, "the Commission, except as it may limit the issues upon notice or by rule, will have all the powers which it would have in making the initial decision." This statement of the Commission's powers does not authorize a party to expand the issues in the proceeding at this stage or seek to supplement the record in contravention of 46 CFR §§ 502.229 and 502.230.

THEREFORE, IT IS ORDERED, That Respondent's Exceptions are granted;

IT IS FURTHER ORDERED, That the decision of the Presiding Officer in this proceeding awarding reparations of $6,750 to Complainant is reversed;

IT IS FURTHER ORDERED, That the Initial Decision of the Presiding Officer in this proceeding is otherwise adopted to the extent that it is not inconsistent with the discussion of the issues herein;

IT IS FURTHER ORDERED, That the Secretary return to Counsel for Respondent and Complainant unauthorized correspondence dated September 17, 1985 and September 30, 1985, respectively; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–1

CARRIER INTERNATIONAL CORPORATION

v.

WATERMAN STEAMSHIP CORPORATION

Complainant's shipment found to have been overcharged. An award of reparation found under the circumstances to be a matter of discretion of the Commission. And reparation awarded in part without interest.

Paul S. Aufrichtig and *Bruce Stern* for complainant.

George H. Hearn for respondent.

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

Partially Adopted December 30, 1985

By complaint received January 11, and served January 16, 1985, the complainant, Carrier International Corporation, alleges that the respondent, Waterman Steamship Corporation, collected overcharges on a shipment made by the complainant, in violation of section 18(b)(3) of the Shipping Act, 1916 (the Act).

The shipment in issue was made on December 7, 1983. It consisted of 12,919.3 cubic feet of air conditioning equipment, made from Savannah, Georgia, to Port Sudan, Sudan. The basic freight rate was $140 W/M, per ton of 2,248 pounds, or of 40 cubic feet, whichever produces the greater revenue. Based on 322.9825 tons (M), the freight charges were $45,217.55. In addition, the respondent collected a 30 percent congestion surcharge of $13,565.27.

The issue in this proceeding is the lawfulness of the surcharge. The complainant seeks an order directing the respondent to pay complainant the sum of $13,565.27 plus interest and costs.

Waterman Steamship Corporation's Freight Tariff No. 18–D, F.M.C. No. 161, provided rates from U.S. Atlantic and Gulf Ports to Red Sea and other points and ports. As shown in the 38th revised page 106, effective December 1, 1983, through December 31, 1983, there was a rate on air conditioning machinery from Savannah to Port Sudan of $140 per ton W/M, All Inclusive. This was the applicable rate on the shipment herein.

[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).

Five months after the shipment herein was made, the complainant's freight bills were audited. From this audit, it was ascertained by the auditor that the complainant was charged the congestion surcharge on the shipment in addition to the all-inclusive freight charges.

The respondent contends that the complaint was filed only as a result of the audit, and that in fact the complainant was charged the rate which complainant bargained for, and further that the complainant has paid the actual charges which complainant fully expected to pay for the transportation of its cargo.

The respondent further contends that due to an administrative error, the respondent "filed a rate that was not the rate that the parties negotiated and agreed to, consequently Complainant has not been actually injured thereby."

It is noted that this proceeding differs from many so-called special docket proceedings, under section 18(b)(3) of the Act. In the present case the administrative error, said to have been made by the respondent, resulted not in higher charges against the shipper as in the typical special docket proceeding, but in lower charges.

The respondent argues that reparation in this proceeding is not justified by the facts. The respondent relies mainly on the principal that a violation of section 18(b)(3), by charging and accepting payment of a rate other than the tariff rate on file, by itself does not necessarily mean that reparation will be awarded. The respondent cites *United States of America* v. *Columbia Steamship Company, Inc.,* 17 F.M.C. 8 (1973), wherein the Commission found that an award of reparation was not warranted, because it would amount to a windfall which the complainant neither anticipated nor bargained for. The facts in the *Columbia Steamship* case, above, were that the complainant and respondent therein had agreed upon a "*negotiated rate* at which complainant would ship the vehicles in question." *Emphasis supplied.* The negotiated rate was clearly intended by respondent (and expected by complainant) to be the rate filed with the Commission. The bill of lading listed the negotiated rate and the freight charges as negotiated were paid by the complainant. It was only pursuant to a freight bill audit six months after payment, that the tariff error was discovered. The Commission concluded in the *Columbia Steamship* case that the Commission's power to award reparation is discretionary and permissive, and the mere fact that a violation of the Act has been found does not in itself compel a grant of reparation.

The matter now in issue raises the question whether in the present proceeding there was a negotiated rate agreed upon between the present complainant and respondent. The answer is not clear cut.

The record contains five affidavits, two on behalf of respondent, and three for the complainant. The facts leading up to the shipment in issue herein are as follows. In the fall of 1983, Mr. Ronald Walker was manager of the office of Street Brothers, Inc., in Savannah. Street Brothers, Inc.,

was the agent in Savannah of Waterman. Mr. Walker in early November, 1983, telephoned Mr. Jack Mandleur, an Assistant Vice President in the Traffic Department of Waterman in New York City. Mr. Walker said that he had been requested by Mr. Phil Harris of John S. James Co., the complainant's agent in Savannah, to quote a rate on nine pieces of air conditioning machinery to Port Sudan.

Mr. Mandleur told Mr. Walker to quote $140 per ton (W/M) plus 30 percent port congestion surcharge inclusive of all other charges and surcharges. Mr. Mandleur also said that he would file such rate when the cargo was booked.

Later In November, 1983, Mr. Walker told Mr. Mandleur that the cargo was booked on a Waterman vessel. Mr. Mandleur then had his associate send a request for a tariff amendment to the tariff department of Waterman. Both Mr. Mandleur's note to his associate, and his associate's note to the tariff department cited the rate of $140 all-inclusive, plus 30 percent port congestion surcharge. As seen, in error the rate intended by respondent was not published in the tariff.

Mr. Walker generally confirms the facts stated by Mr. Mandleur. Also, Mr. Walker states that Mr. Harris agreed to the rate quoted, and booked the cargo in issue on Waterman's next vessel sailing from Savannah to Port Sudan. Mr. Walker invoiced the complainant for the full amount of the quoted, or agreed, rate of $140 plus 30 percent congestion surcharge, and complainant paid such full amount.

In addition Mr. Walker states that Mr. Harris "has confirmed the facts as I have related them here in regard to the rate which we agreed upon, but he says that he won't attest to them because he is still employed by Carrier's agent."

For the complainant, in his affidavit, Mr. Harris differs as to whether the rate of $140 per ton, plus 30 percent congestion surcharge, was a negotiated rate or was believed by him to be a rate already in the tariff.

On November 16, 1983, complainant requested Mr. Harris to obtain a booking to Port Sudan. Mr. Harris made the booking with Waterman through Waterman's Savannah agents, Street Brothers. Waterman was used because other steamship line services had stopped calling Savannah, because complainant had used Waterman on prior occasions into the Sudan area, and because Waterman had a vessel around December 3, 1983, which was within the validity of complainant's Letter of Credit.

After complainant's cargo arrived at the Port of Savannah, Mr. Harris called Street Brothers and asked for the ocean freight rate to Port Sudan. Street Brothers had to call Waterman in New York for the rate. Street Brothers then quoted to Mr. Harris the rate of $140 per ton (W/M), plus 30 percent port congestion surcharge.

Mr. Harris did not question the rate because had no authority to do so. He followed standard procedure by accepting the steamship Line's quote

as accurate, "since they were reading from their own tariff and our compan
does not have a copy of their tariff."

Mr. Harris freighted the Bill of Lading with the rate quoted by Stree
Brothers.

Mr. Harris insists that he did not at anytime attempt to negotiate th
rate, but merely accepted it as an accurate reading of the tariff. It wa
a large and valuable shipment, and ocean freight was not the issue, rathe
the main concern of the complainant was vessel availability, since if th
cargo were shipped after the letter of credit had expired, it would hav
resulted in the loss of substantial revenue to the complainant.

In the affidavit of Bruce L. Stein, for the complainant, Mr. Stein als
stresses that Mr. Harris merely agreed to pay the published tariff rate

From the above facts it is not absolutely clear that the rate of $14
plus 30 percent congestion surcharge was a negotiated and agreed rat
between the parties. Mr. Harris' affidavit is to the effect that he ha
no authority to negotiate a rate, that he did not negotiate a rate, bu
that he merely asked to be informed as to the published tariff rate.

On the other hand, the respondents dealt only with Mr. Harris, as agen
for the complainant, and the respondent believes that a rate was quote
to Mr. Harris, that it was accepted by him, and thus that there was a
agreed and negotiated rate.

As a general rule, the rate or rates published in tariffs must be charged
To do otherwise in the present proceeding, there must be substantial evi
dence, such as in the *Columbia Steamship* case, above, that there wa
an agreed rate and that to award reparation would have resulted in
windfall neither anticipated nor bargained for.

In the present proceeding, it is concluded and found that to award repara
tion of the full amount of $13,565.27 would result at least in part i
an unanticipated windfall to the complainants it is further concluded an
found that the record is not fully clear as to whether the rate of $14
per ton, plus 30 percent congestion surcharge was a negotiated rate. Re
spondent's evidence shows its understanding that there was a negotiate
agreed rate. Complainant's evidence is otherwise.

The Commission's authority to award reparation is discretionary. Th
amount of reparation to be awarded likewise is discretionary. Under th
circumstances, it is concluded and found that an award of reparation i
the amount of $6,750 is proper, and interest is not awarded.

In summation, it is concluded and found that the published tariff rat
was not charged on the shipment herein, and accordingly the shipmen
was overcharged in the amount of $13,565.27. Further, in the circumstance
herein, payment of this full amount would result at least in part in a
unanticipated windfall to the complainants Further, the Commission's author
ity to award reparation is discretionary, and it is determined that reparatio

in the amount of $6,750, without interest, is proper in this proceeding, and such amount is awarded to the complainant.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1343

APPLICATION OF OOCL–SEAPAC SERVICES, INC. FOR THE BENEFIT OF MINNESOTA MINING AND MANUFACTURING CO.

ORDER

January 9, 1986

Upon review on its own motion, the Commission has determined to adopt the Initial Decision of Administrative Law Judge Joseph N. Ingolia issued in this proceeding.

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge Joseph N. Ingolia served September 9, 1985 is adopted by the Commission; and

IT IS FURTHER ORDERED, That OOCL-Seapac Services, Inc. shall within 30 days from the date of service of this Order, waive charges and publish and file with the Commission a tariff notice as required by the Initial Decision and within five days thereafter furnish the Commission Secretary with evidence of waiver and a copy of the prescribed tariff notice; and

IT IS FINALLY ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1343

APPLICATION OF OOCL–SEAPAC SERVICES INC. FOR THE BENEFIT OF MINNESOTA MINING AND MANUFACTURING CO.

Application to waive freight charges of $5,998.40, granted.

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

Adopted January 9, 1986

This application[2] is for permission to waive $5,998.40 of freight charges arising out of one shipment of Office and Laboratory Supplies from Seattle, Washington, to Bangkok, Thailand.

The tariff involved in this proceeding is Orient Overseas Container Line Inc. (OOCL) Local and Overland Freight Tariff No. 631, FMC No. 147, from named Pacific Coast Ports to named Ports in the Far East. Prior to January 2, 1985, the tariff contained a Cargo NOS rate to Bangkok of $235.00 W/M for Not Dangerous or Hazardous Cargo, and a Cargo NOS rate of $372.00 W/M for dangerous or hazardous cargo.[3] On August 27, 1984, the Pricing Manager for Seapac Services Inc. (Seapac) which represents OOCL quoted 1985 rates for office and laboratory supplies moving from Seattle to Bangkok of $910.00 per 20 foot container plus TRC of $90.00, and $1,840.00 per 40 foot container plus TRC of $110.00. The rates were to be offered shippers on booking.[4]

On January 2, 1985, a booking was made by the shipper, Minnesota Mining and Manufacturing Co. (3M). However, the booking was not correlated with the earlier quoted 1985 rates and the correct tariff was mistakenly not on file when the shipment took place. The applicant now seeks permission to waive freight charges of $5,998.40, which is the difference between what was paid for this shipment (1,000.00),[5] and the amount which was due under the tariff on file on the date of shipment (6,998.40).[6] The applicant filed a corrected tariff containing the 1985 rate on January 18, 1985.[7]

[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 application was filed on July 12, 1985, and mailed on July 3, 1985, within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984.

[3] Application, 5th Rev. Page 93, effective September 28, 1984.

[4] Application, Affidavit of Joseph E. Harris.

[5] Application, Daily Freight Collection Report dated 2–6–85; Deposit Slip of Seapac dated 2–6–85.

[6] Application, Bill of Lading No. WXBKOlIT.

[7] Application, 4th Rev. Page 172.

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive collection of freight charges where it appears there was an error in a tariff of a clerical nature or an error due to inadvertence in failing to file a new tariff. Here, it is clear that human failure caused the new rates to remain unfiled, even though OOCL-Seapac intended that they go into effect. The error is the kind Congress sought to obviate in enacting section 8(e).

The application filed by OOCL conforms to the requirements of Rule 92(a), Special Docket Applications, Rules of Practice and Procedure, 46 CFR 502.92(a), and therefore, after consideration of the application, the exhibits attached to it and the entire record, it is held that:

1. There was an error of a clerical or administrative nature which resulted in the failure to have timely filed a tariff containing a rate on Office and Laboratory Supplies of $910.00 per 20 foot container plus TRC of $90.00, from Seattle, Washington, to Bangkok, Thailand, which rate would have been in effect had the error not been made.

2. The waiver will not result in discrimination among shippers[8] and there is no evidence that any carriers or ports would suffer discrimination should the application be granted.

3. Prior to applying for the waiver the applicant filed a new tariff which set forth the rate upon which the waiver should be based.

4. The application was filed within 180 days from the date of the shipment involved.

Wherefore, in view of the above, it is,

Ordered, that permission is granted OOCL to waive a portion of freight charges in the amount of $5,998.40, in favor of the shipper, Minnesota Mining and Manufacturing Co., and it is,

Further Ordered, that OOCL promptly publish in the pertinent tariff the following notice:

> Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1343, that effective January 2, 1985, and continuing through January 17, 1985, inclusive, the rate on Office and Laboratory Supplies is $910.00 per 20 foot container, plus TRC of $90.00, from named Pacific Coast Ports to Bangkok, Thailand, for purposes of waiver or refund of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[8] The application states:

No other shipments of subject commodity were made during the aforementioned time period via OOCL-Seapac Services, Inc.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–10

THE COCA-COLA EXPORT CORPORATION

v.

PERUVIAN AMAZON LINE

ORDER ADOPTING INITIAL DECISION

January 14, 1986

This proceeding was initiated by a complaint filed by Coca Cola Export Corporation (Coke or Complainant) against Peruvian Amazon Line (PAL or Respondent) for alleged overcharges of $9,824.52 on the shipment of 14,336 cases of canned sodas from Miami, Florida to Iquitos, Peru in violation of section 18(b)(3) of the Shipping Act, 1916 (1916 Act) (46 U.S.C. app. § 817(b)(3)). The case was tried by Chief Administrative Law Judge John E. Cograve (Presiding Officer) under the "shortened procedure" of Subpart R of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.181. In his Initial Decision on Remand, the Presiding Officer found that the shipment in question had been properly rated and, accordingly, denied reparations. Complainant has filed Exceptions to the Initial Decision, to which Respondent has replied.

BACKGROUND

Pursuant to a contract of sale for 14,336 cases of Coca Cola and Sprite, and a letter of credit which precluded "partial shipment," Coke booked space for the entire shipment with PAL and requested that eight containers be furnished. The containers were loaded by Coke at its Miami bottling plant with cartons of Coke on pallets and some loose cases.[1] PAL was not informed, either at the time of booking or shipment, that the greater portion of the cargo was palletized. The bill of lading was prepared by Coke and did not indicate that the cargo was on pallets.

PAL's tariff provided a rate of $120 W/M for "Canned Goods and Beverages Palletized" and a rate of $160 W/M for "Canned Goods and Beverages in Boxes." PAL rated the shipment at the higher rate, for cargo in boxes. Coke's complaint alleged that the lower rate for

[1] The cases of canned sodas are automatically palletized as they come off the plant's production lines.

"palletized" cargo should have applied and sought reparations in the amount of the difference between the two rates.[2]

In the first Initial Decision denying reparations, the Presiding Officer characterized the problem as ambiguity "created by the actions of the shipper, who first palletized at least part of the cargo and then placed those pallets inside a container (box)." The Presiding Officer thus equated the term "boxes" used in PAL's tariff with "containers." On consideration of the Exceptions, the Commission found that the Presiding Officer had erred in this respect and remanded the case for further hearing.

The Commission's Order, served January 24, 1985, specified two points on which further evidence was desirable: past dealings between Coke and PAL which might have led Coke to expect container service when no mention of such service was made in the tariff, and the manner in which Coke's overseas shipments are usually made. The Commission cited *Cummins* v. *United States Line*, 21 F.M.C. 944 (1979), in which evidence of post dealings between a shipper and carrier was found useful in resolving a question of tariff ambiguity.

On remand, the Presiding Officer asked the parties to submit the relevant documents on all shipments made by Coke with PAL for the calendar years 1983 and 1984, and to file memoranda of law with particular reference to *Cummins*. Complainant submitted a two-page Supplemental Memorandum in which it stated that the shipment in issue was the first and only shipment made by Coke under the PAL tariff at issue, and that any later shipments would be irrelevant because PAL's tariff was subsequently amended to reflect specific charges for container service. Coke also argued that *Cummins* is inapposite.

Respondent submitted an affidavit from its agent and supporting bills of lading illustrative of its past practice with respect to palletized cargoes, including canned sodas, showing that they moved at the lower rate, on pallets without containers. Like Coke, PAL's affidavit stated that there was no previous history of shipments by Coke on PAL.

INITIAL DECISION ON REMAND

In his Initial Decision on Remand, the Presiding Officer once again determined that it "is the Complainant's method of 'packing' the shipment that causes the problem here." He found that the shipment in issue was "not a palletized shipment in the generally accepted sense." Citing *Matson Navigation Company—Rates On Pallets*, 7 F.M.C. 771 (1964), he noted that rates for palletized cargo are generally based upon the loading and storage characteristics of loaded pallets. Thus, he concluded that Complainant had changed the nature of the shipment by placing the loaded pallets

[2] Coke originally sought to have the lower rate applied to the entire shipment but later conceded that the higher rate should apply to the portion of the shipment that moved as loose cartons within the containers.

into containers and had given up the right to the lower rate for palletized cargo.

POSITION OF THE PARTIES

On Exceptions, Complainant argues that *Cummins*, is inapposite to this case because this was the only transaction between the parties under these tariff provisions. Coke argues for a "strict interpretation" of the tariff, governed by the rule that what is actually shipped determines the rate to be applied, which in this case were "palletized" cartons of coke. The Presiding Officer is taken to task by Coke for what it characterizes as taking judicial notice of the "fact" of "whether pallets are or are not normally containerized." Coke further disputes the Presiding Officer's findings in this respect by noting its attorney's own recollection of viewing pallets being unloaded from containers, and enumerates the possible benefits of the practice. Coke concedes, however, that these notations are of "no evidentiary value in this present case . . . ."

In its Reply to the Exceptions, Respondent alleges that Coke may have violated the 1916 Act by its failure to disclose the "true nature of the way the cargo was packaged" which enabled it to obtain "something of value that other shippers who disclosed the nature of the packing would not have received." PAL further argues that the interpretation of the tariff sought by Coke would yield impractical and absurd results and is therefore to be avoided in favor of its own interpretation.

DISCUSSION

The Initial Decision on Remand reaches a common sense resolution of the dispute, which is supported both in fact and law. Accordingly, the Initial Decision is adopted by the Commission.

Coke's main argument in its Exceptions is new, not classic: that the Presiding Officer improperly took "judicial notice" of facts regarding normal carrier treatment of palletized cargo. The argument is, however, misdirected. This was not a disputed issue of material fact.

Coke has not argued nor sought to prove, in its initial case, on remand, or on exceptions, that it is normal industry practice, or normal practice for PAL, to ship palletized cargo in containers.[3] To the contrary, PAL repeatedly stated that it did not provide containers for palletized shipments, and these statements were not disputed by Coke. Nor does Coke argue that normal industry practice is other than as characterized by the Presiding Officer. Coke's "judicial notice" argument is really a complaint that the Presiding Officer did not limit himself strictly to the literal words of the tariff in interpreting it, but looked beyond it for evidence of past practice by the parties and the industry. This, however, is precisely what we in-

[3] At most, the anomalous footnote referencing counsel's observation of one instance of cargo packed in this manner being unloaded is offered as an argument that such packaging is not unique.

structed the Presiding Officer to do on remand. Moreover, although Coke objects to the Presiding Officer's conclusion regarding the "generally accepted sense" of what constitutes a palletized shipment, it offered no evidence of what its own past practice had been despite the additional opportunity and specific request that it do so.

On the question of whether PAL's rate' for "canned . . . beverages, palletized" should apply, the Presiding Officer looked to *Matson Navigation Co.*, in which the Commission noted "the principal advantages of handling ocean cargo in pallets . . . [which] exist when cargo is stowed in conventional holds. There would appear, however, to be minimal advantage to the ocean carrier in using pallets to carry cargo in containers." *Matson Navigation Co.*, supra, 7 F.M.C. at 772. The Presiding Officer's conclusion is consistent with this precedent.[4]

THEREFORE, IT IS ORDERED, That Complainant's Exceptions are denied; and

IT IS FURTHER ORDERED, That the Initial Decision on Remand served July 16, 1985 in this proceeding is adopted; and

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

By the Commission.[5]

BRUCE A. DOMBROWSKI
Acting Secretary

[4] Respondent's argument in its Reply to Exceptions that Coke's failure to reveal the shipment's packaging may have violated the 1916 Act appears to have been essentially an afterthought. It is unsupported by evidence of record and no Commission action is requested.

[5] Commissioner Thomas F. Moakley's dissenting opinion is attached.

Commissioner Moakley, dissenting

I would not adopt the Initial Decision on Remand in this proceeding because its conclusion requires a distortion of the tariff we are asked to interpret.

The shipment in question consisted of Coca Cola and Sprite, some on pallets and some loose, in boxes. The tariff in question contained only two possible rates at the time of shipment, one for "Canned Goods and Beverages Palletized", and another for "Canned Goods and Beverages in Boxes." The shipper seeks to apply the palletized rate to the palletized cargo and the boxed rate to the loose boxes.

The Initial Decision on Remand, adopted by the Commission majority, concludes that application of the palletized cargo rate to the palletized cargo would lead to absurd consequences. Instead, the rate for cargo in boxes is applied to the palletized cargo because that cargo, along with the loose boxes, was placed in containers.

No matter how fair this conclusion may seem to those who believe, as the Administrative Law Judge did, that, "Pallets are not normally containerized" (I.D. pp 5, 6), there was nothing in this carrier's tariff which would permit an additional, or different charge for palletized cargo when that cargo moved in containers. If that is unfair to the carrier, it is an unfairness of its own making since the carrier is the author of the tariff. More importantly, fairness is not a factor that may be used to override the clear and unambiguous terms of a tariff. As this Commission and the courts have stated on numerous occasions, "Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit a deviation from the rates, filed tariff." *Louisville & Nashville Ry.* v. *Maxwell* 237 U.S. 94 (1915); *United States of America* v. *Pan American Mail Line, Inc.*, 69 Civ. 2381, 1973 AMC 404 (SDNY, 1972); *Kraft Foods* v. *Moore McCormack Lines, Inc.* 17 F.M.C. 320, 323, note 4 (1974), rev'd. on other grounds 538 F. 2d 445 (1974); *Sun Company, Inc.* v. *Lykes Bros. Co., Inc.*, 20 F.M.C. 67, 70 (1977).

To depart from this principle creates a new element of uncertainty in the future application of tariff rates. I would require the carrier to charge the palletized cargo rate for palletized cargo.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–10

THE COCA-COLA EXPORT CORPORATION

v.

PERUVIAN AMAZON LINE

On remand cargo found properly rated. Reparation denied.

Frank J. Hathaway and *Donald J. Brunner* for complainants.

Herbert B. Ruskin, Ruskin & Gyory, for respondents.

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

ADOPTED January 14, 1986

In January of 1983, Industrial Traffic Consultants, Inc., (ITC), a self styled "Overcharge Claim Agent," located in Miami, Florida, filed a clain with respondent Peruvian Amazon Line. This claim alleged an overcharge by that carrier of $9,824.52 on a shipment of 14,336 cases of Coca Cola and Sprite.

Sometime prior to November of 1982, complainant Coca-Cola Expor Corporation, received an order for 14,336 cases of canned Coca-Cola anc Sprite from a customer in Peru. The order was secured by a letter o credit which, among other things, forbade partial shipments. In Novembe of 1982 the complainant booked the shipment with respondent and askec respondent to supply eight containers for loading the shipment. All the paperwork for the shipment was handled by complainant's main office in Atlanta, Georgia, but the actual shipment was made up in complainant's bottling plant in Miami. At the Miami plant the cases of Coca-Cola anc Sprite are, or can be, automatically palletized as they come off the produc tion line. Each of the eight containers was loaded with twelve pallets holding 120 cases each and 352 "loose" cases which were stacked arounc the pallets. The containers were sealed and taken to Dodge Island fo loading.

At the time of the booking, no mention was made to respondent tha the shipment or any part of it was to be palletized. The eight containers were loaded aboard respondent's ship, *Yacu Caspi*, at Dodge Island, Florida under a bill of lading which described the cargo as "Boxes of Coca-

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

Cola and Sprite in Cans." The bill of lading contained no reference to the fact that some of the "boxes" had been palletized. Since the containers had been sealed, the respondent's knowledge of their contents was based on the description in the bill of lading. Respondent would not have furnished containers for the palletized portion of the shipment had it known of the palletization.

Relying on the bill of lading, respondent rated the shipment under the commodity item "Canned Goods and Beverages in Boxes W/M $160.00" for total charge of $38,087.61 including surcharges, etc. Complainant paid the freight and it was apparently in the course of some sort of freight bill audit that ITC discovered the "discrepancy" and filed the claim for overcharge. The claim sought the difference between the rate of $120.00 W/M, the rate applicable to "Canned Goods and Beverages Palletized," and the $160.00 W/M rate assessed by respondent.

In a letter written on January 26, 1983, Harrington and Company, Inc. acknowledged the claim and said it was being investigated. On June 2, 1983, ITC, apparently having heard nothing from Harrington, announced by mailgram that if there was no word by June 10, 1983, it would "take appropriate legal steps with the Federal Maritime Commission." There followed some correspondence between ITC, the Commission staff and the respondent, the upshot of which was an offer by respondent to settle the claim at 50 percent. This offer was refused. The respondent ultimately denied the claim and this complaint was filed.

In my original decision I concluded that respondent had properly rated the shipment and denied complainant's claim for reparation. My conclusion was grounded on the unwarranted and erroneous assumption that the terms "box" and "container" were synonymous. However, as the Commission correctly points out and as my own re-examination of the record belatedly reveals, the two terms, whatever their synonymity in "street slang," represent two distinct and separate things in this record. My error, prompted this remand.

The question remaining, of course, is which of the two rates should apply. Quite literally both rates apply. The shipment actually consisted of eight containers each loaded with 12 pallets with 120 cases to each pallet and 352 cases loaded loose, or stacked around the pallets in the container. Under a literal application of the tariff, the palletized rate would apply to the cases of Coca-Cola and Sprite which had been palletized and the "in boxes" rate would apply to those cases stacked around the pallets. However, it is respondent's position that the entire shipment should be rated at the $160.00 "in boxes rate." I agree. Both sides argue the case as if it presented a straightforward problem in tariff interpretation to which the axioms of tariff law afford a solution.

The law of tariffs is satiated with such axioms. They cover the proper rules for interpreting tariffs, what to do when ambiguity rears its untidy head, the consequences of mistake or downright misrepresentation and even

the measure of damages. They are concise and to the point. They resist amendment and "interpretation" with admirable tenacity. Unfortunately, they also tend to take on a life of their own eventually crowding out the very reasons for their existence.

The literal application of the tariff here would, as already noted, result in applying the $120.00 rate to the cases of Coca-Cola and Sprite which were palletized and the $160.00 rate to those cases which were stacked loose in the containers. After all what was actually shipped determines the applicable rate rather than what is declared on the bill of lading. *Union Carbide Inter-America* v. *Norton Line*, 14 F.M.C. 262. In this instance, pallets of canned beverages and canned beverages in boxes were actually shipped. Moreover there is no ambiguity in the tariff so there is no need for extrinsic evidence. *Sacramento-Yolo Port District* v. *Fred F. Noonan Co., Inc.*, 9 F.M.C. 551. Thus, the fact that the whole shipment was containerized is, extrinsic and irrelevant. But the complainant did in fact palletize part of the shipment and then stuff the whole shipment into containers, seal those containers and tender them to the carrier under a bill of lading that described the contents as "boxes of Coca-Cola and Sprite in cans."

It is the complainant's method of "packing" the shipment that causes the problem here. The shipment as put together by complainant is neither fish nor fowl. It is not a palletized shipment in the generally accepted sense. A pallet is a wooden platform or bed upon which such comparatively small cargo units as cans or cartons are placed and held together for transportation as a unit. *Matson Navigation Co.—Rates on Pallets*, 7 F.M.C. 771 (1964). The pallet is a unit of itself. Once cargo is "palletized" it is ready to place aboard the ship. A rate for palletized cargo is based upon the loading and storage characteristics of loaded pallets. The $120.00 W/M rate was for "Canned Goods or Beverages, *Palletized*" not for canned goods or beverages "containerized." Respondent's $160.00 rate for "Canned Goods or Beverages in Boxes" is based "on the need that the non-palletized cases be placed in containers for the purpose of transportation." In other words, had the complainant delivered the 14,336 cases of Coke and Sprite to Dodge Island "loose", respondent would have placed them into containers and the $160.00 rate would have covered the added costs.

Here the complainant asked respondent for eight containers into which to load the shipment. The respondent assumed that the canned beverages were in boxes. The bill of lading said boxes and the complainant did not inform respondent that any of the cases of canned Coca-Cola or Sprite had been palletized. Respondent is primarily a breakbulk carrier with a breakbulk tariff. It supplies containers if requested to do so. When it does, respondent must itself lease the containers from others. Respondent quite properly assumes that the containers are needed because of the kind of cargo being shipped. Pallets are not normally containerized. The added

cost of the containers in this instance was defrayed by the higher "box" rate of $160.00.

Complainant benefited from the use of the containers by the added protection they furnished against "excessive handling, damage from exposure to the elements and loss from pilferage." Respondent on the other hand was faced with the increased space required for containers, the greater difficulty in loading them (as opposed to pallets) and an out-of-pocket expenditure $4,504.50 for leasing the containers.

Yet another axiom of tariff construction is that interpretations of a tariff should not lead to absurd consequences. *Trans Ocean Van Service* v. *U.S.*, 426 F. 2d 329. Certainly an interpretation that would allow a shipper to stuff a container with palletized cargo and thereby escape paying the box rate is absurd.

While it may be axiomatic that an unambiguous tariff eliminates the need for extrinsic evidence, the actual methodology of the cases reveals the almost constant resort to extrinsic evidence in deciding the proper interpretation to be given a tariff. *C.S.C. Inc.* v. *Lykes Bros. S.S. Co. Inc.*, 20 F.M.C. 552 (1978). Here that evidence demonstrates that complainant did not tender a palletized shipment as such a shipment is generally known in the industry. Instead, complainant tendered a "containerized" shipment which resulted in the respondent bearing unnecessary out-of-pocket costs which the assessment of the $160.00 box rate was intended to defray.

I view respondent's tariff as requiring the assessment of the $120.00 rate on shipments of Canned Goods & Beverages when those shipments are palletized, i.e, tendered to the carrier, not in containers, but on pallets. By placing the pallets in containers, the complainant changed the nature of the shipment and gave up his right to the palletized rate. In view of this the assessment of the $160.00 rate for Canned Goods and Beverages in Boxes was correct. Complainant's claim for reparation is denied.

(S) JOHN E. COGRAVE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1349

APPLICATION OF AUSTRALIA-NEW ZEALAND CONTAINER LINE FOR THE BENEFIT OF MEADOWSFREIGHT NEW ZEALAND LTD.

ORDER OF PARTIAL ADOPTION

January 16, 1986

This proceeding is before the Commission upon its determination to review the Initial Decision of Administrative Law Judge Seymour Glanzer (Presiding Officer) issued in this proceeding.

BACKGROUND

On January 2, 1985, Australia-New Zealand Container Line (ANZCL) and Meadowsfreight New Zealand Ltd. (Meadowsfreight) agreed to a reduced rate for the transportation of a container of personal effects, including a passenger vehicle, from California to New Zealand. The rate was published on February 7, 1985 but, due to error, it was filed in the Australian instead of the New Zealand column in the tariff. The shipment sailed on February 17, 1985; a corrective tariff was subsequently published on March 22, 1985 with an expiration date of April 21, 1985. On July 19, 1985, ANZCL filed an application for permission to waive collection of freight changes due it from Meadowsfreight.

The Presiding Officer in his Initial Decision granted the application and, in the tariff notice required to be published by ANZCL, made the conforming tariff effective retroactively to January 20, 1985. The issue on review is whether the Presiding Officer's selection of January 20, 1985 as the operative date in the tariff notice is correct.

DISCUSSION

Section 8(e) of the Shipping Act of 1984 (46 U.S.C. app. § 1707(e)) requires, as a condition for permitting a carrier to refund or waive collection of a portion of the freight charges, that the carrier agree to publish in its tariff "an appropriate notice" of the rate upon which the refund or waiver would be based. This allows additional refunds or waivers to be made "with respect to other shipments in the manner prescribed by the Commission" and thereby prevents discrimination among shippers, ports, or carriers. At issue here is the determination of the critical period of time during which the conforming tariff is made applicable at a date prior to its publication in the carrier's tariff.

In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation*, Special Docket No. 678, 19 S.R.R. 1407 (1980), the presiding administrative law judge made the effective date of the amended tariff relate back to the date of delivery of the cargo to the carrier. Upon review, the Commission disagreed and held that:

> For determining the effects of the grant of an application to refund on similarly situated shippers, *the critical time period commences on the day the tariff omitting the intended rate becomes effective or on the dav the intended lower rate would have become effective absent the mistake and terminates on the day before the effective date of the conforming tariff.* (Emphasis added.)

Idem, at 1408.

In the case under consideration the conforming tariff, filed after the shipment moved, is made to relate back to January 20, 1985. The Initial Decision does not state a ground or otherwise explain the reason for this action. In the absence of any clear basis for departing from established precedent and, without unduly restricting administrative law judges' discretion in fashioning the proper remedy, the adherence to a uniform standard for the issuance of tariff notices is desirable.[1] On the premise that a *bona fide* mistake has been recognized, the 1980 *Yamashita* decision offers a reasonable basis for determining the effective date of the conforming tariff, *i.e.*, the date the tariff omitting the intended rate becomes effective or the date the intended lower rate would have become effective absent the mistake.

In this instance, the record shows that, following an exchange of telephone conversations on January 2, 1985, a rate for the particular shipment was first published on February 7, 1985, but with the wrong destination. Following the rationale of *Yamashita supra*, the conforming tariff, filed March 22, 1985, should have been made effective February 7, 1985, the date the intended rate would have become effective, but for ANZCL's clerical error, rather than January 20, 1985, the date appearing in the Initial Decision's tariff notice.

THEREFORE IT IS ORDERED, That the tariff upon which the waiver is based is effective February 7, 1985 through March 21, 1985 and that the tariff notice required to be filed by ANZCL shall be amended to reflect these dates;

[1] While an agency is not forever bound by its previous decisions, it is required to articulate the reasons for a change in policy. *See Baton Rouge Marine Contractors, Inc. v. FMC*, 655 F.2d 1210 (D.C. Cir. 1981); *Baltimore & Annapolis R. Co. v. Washington Metropolitan Transit Area Comm'n*, 642 F.2d 1365 (D.C. Cir. 1980); *Greyhound Corp. v. ICC*, 551 F.2d 414 (D.C. Cir. 1977).

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission; and

IT IS FINALLY ORDERED, That this proceeding is discontinued.

By the Commission.

(S) BRUCE A. DOMBROWSKI
Acting Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1349

APPLICATION OF AUSTRALIA-NEW ZEALAND CONTAINER LINE FOR THE BENEFIT OF MEADOWSFREIGHT

Application to waive collection of portions of freight charges granted.

Edward T. McArdle for applicant Australia-New Zealand Container Line.

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

Partially Adopted January 16, 1986

By application filed July 19, 1985, Australia-New Zealand Container Line (ANZCL) [2] asks permission to waive collection of $3,543.08 of freight charges due it from Meadowsfreight New Zealand Ltd. in connection with a mixed shipment of household goods and an automobile in a 40' container carried by ANZCL from Long Beach, California, to Lyttleton, New Zealand, on the *Dunedin* which sailed on February 17, 1985. The shipment weighed 4082 kilos and measured 40.833 cubic meters.

ANZCL negotiated a rate for the upcoming shipment of $5,500.00 per 40 foot container, plus terminal charge, and issued instructions to publish that rate. However, due to an inadvertent error, the agreed rate was published in the Australian destination column, rather than the New Zealand destination column of ANZCL's tariff.

Thus, the applicable rate on February 17, 1985, was $5,280.00 per 40' container, plus $215 per cubic meter, subject to a discount of $15.00 W, plus handling charge. At this rate, charges amounted to $9,523.08. Effective March 22, 1985, a new tariff containing the intended rate was published. The shipper paid charges at the agreed rate. There were no other shipments of the same or similar commodity during the relevant time period and there is no indication of discrimination, or the likelihood thereof.

The application meets the criteria for approval under section 8(e) of the Shipping Act, 1984, 46 U.S.C. app. 1707(e), and the Commission's rules, 46 CFR 502.92(a).

The application is granted. ANZCL shall waive collection of $3,543.08 in connection with the above described shipment and shall publish the

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

[2] Shipping Corporation of New Zealand Limited does business as ANZCL.

following notice at pages 104, 178–A and 191 of Shipping Corporation of New Zealand Limited Ocean Freight Tariff No. 1, FMC No. 1:

> Notice is given, as required by the decision in Special Docket No. 1349, that effective January 20, 1985, and continuing through March 21, 1985, inclusive, for purposes of refund or waiver, the rate for Item No. 1763, Mixed Shipments of Household Goods and Personal Effects and a Passenger Automobile In 40 ft. CY/CY container to Group 2—New Zealand, Local is 55OO.OO. Such rate is subject to all other applicable rules, regulations, terms and conditions of the said rate and this tariff.

ANZCL shall make any necessary adjustment in brokerage or compensation to brokers or freight forwarders.

Within 30 days of service of notice of authorization from the Commission, ANZCL shall furnish the Secretary with evidence of waiver together with a copy of the prescribed tariff notice.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–15

AMERICAN PLANT FOOD CORPORATION

v.

PORT OF HARLINGEN AUTHORITY

NOTICE

January 24, 1986

Notice is given that no appeal has been taken to the December 19, 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. 85–15

AMERICAN PLANT FOOD CORPORATION

v.

PORT OF HARLINGEN AUTHORITY

MOTION TO DISMISS COMPLAINT GRANTED

Finalized January 24, 1986

By Stipulated Motion to Dismiss dated December 16, 1985, the Complainant in this proceeding, with the approval and consent of the Respondent, asked that the proceeding be dismissed.

In support of its motion, the Complainant states:

> In its complaint, APF stated that it had entered into an agreement with the Port in 1978 by which it leased certain acreage adjacent to a dock and purchased a warehouse located on the leased premises. In addition, the lease obligated APF to pay a minimum amount of wharfage fees each year, even if the specified minimum volumes were not actually shipped in or out of the Port. Since the assessed wharfage fees depended upon the Port's tariffs on file with the Commission, the controversy arose when the Port increased its tariffs on certain commodities in 1983.
>
> The 1983 amendment in the Port's tariff was the basis of APF's contentions that the new Port tariffs were discriminatory, unjust and unreasonable, that APF was entitled to reparations and that the Port should be enjoined from assessing charges to APF in the future based upon those tariff provisions. Thereafter, when APF filed its amended complaint, it also sought reparations on the theory that the Port had been overcharging APF for the previous two years by its use of an allegedly incorrect tariff provision.
>
> APF and the Port have now reached a full and complete settlement of these issues. The Port has agreed to repurchase the warehouse, terminate APF's lease obligation and relinquish any claim to the increased amount of tariff charges that would have been due under the 1983 tariff amendments had the Port prevailed in this controversy. APF has agreed to dismiss all of the pending litigation, both at the Commission and in the Texas state courts, and to relinquish its claims to any reparations, attorneys' fees and costs. Since APF will no longer have any presence at the Port of Harlingen after the settlement, the issue of the lawfulness

of the Port's tariffs and practices has become moot and there is no longer any controversy for the Commission to resolve.

In view of the above, it is,

Ordered, that this proceeding is hereby discontinued and the complaint is hereby dismissed and/or considered withdrawn.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–23

THE WEST INDIAN COMPANY LIMITED

v.

THE VIRGIN ISLANDS PORT AUTHORITY

NOTICE

February 4, 1986

Notice is given that no appeal has been taken to the December 31, 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) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–23

THE WEST INDIAN COMPANY LIMITED

v.

THE VIRGIN ISLANDS PORT AUTHORITY

DISMISSAL OF COMPLAINT

Finalized February 4, 1986

On December 17, 1985, the complainant in this proceeding filed a "Notice of Withdrawal of the Complaint," wherein it seeks to withdraw its complaint, with prejudice, but without costs or attorneys' fees to either party. The respondent has joined in the Motion. In addition, the parties have filed a settlement agreement with the Federal Maritime Commission.

In view of the above, it is hereby,

Ordered, that the complaint is dismissed and/or considered withdrawn, with prejudice,[1] and without costs or attorneys' fees to either party.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

[1] The "with prejudice" apparently is meant to apply if the settlement agreement is allowed to be implemented by the Commission. We assume that if the agreement cannot be implemented and the issues again arise, the complainant will be free to bring another complaint.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1345

APPLICATION OF GULF EUROPEAN FREIGHT ASSOCIATION AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF ARTHUR J. FRITZ & CO. AS AGENT FOR SDS BIOTECH CORPORATION

ORDER PARTIALLY ADOPTING INITIAL DECISION

February 6, 1986

The Commission determined to review the Initial Decision (I.D.) issued in this proceeding by Administrative Law Judge Norman D. Kline (Presiding Officer). The Presiding Officer denied the application filed by Sea-Land Corporation and the Gulf-European Freight Association (GEFA) on behalf of Sea-Land Service, Inc., for permission to waive collection of freight charges from SDS Biotech Corporation (Biotech), because he found that there was no clerical or administrative error directly related to tariff filing. However, he suggested that the Commission could grant relief to Biotech by treating the application as a petition for declaratory order.

BACKGROUND

Sea-Land sought the Commission's permission, pursuant to section 8(e) of the Shipping Act of 1984 (1984 Act) (46 U.S.C. app. § 1707) and Rule 92(a) of the Commission's Rules of Practice and Procedure (46 C.F.R. § 502.92(a)), to waive $1,034.21 in freight charges otherwise owed to it by Biotech. The charges apply to a shipment of pesticides from Houston, Texas to Rotterdam, the Netherlands, on December 28, 1984.

Sea-Land is a member of GEFA and participates in the Agreement's tariff setting freight rates for shipments from Houston and other U.S. Gulf ports to European ports in the Bordeaux/Ramburg range. In November 1984, the GEFA members decided to reduce their rate on pesticides from $100 per kilo ton to $90, effective January 1, 1985. The new rate was duly filed in GEFA's tariff.

On December 14, 1984, Biotech called Sea-Land and booked five container loads of pesticide for Rotterdam. Originally, the cargo was booked onto a vessel scheduled to sail on December 28, but when Biotech learned of the rate reduction scheduled for January 1, it changed its instructions and rebooked the cargo onto a vessel scheduled to sail on January 3, 1985. Nevertheless, Sea-Land's Operations Department placed the cargo on the earlier sailing, which meant that the cargo incurred the higher rate of $100 per kilo ton. A Sea-Land employee stated in an affidavit

that the mistake occurred because the Operations Department failed to note the booking instructions designating the later vessel.

Biotech paid freight charges calculated under the reduced rate of $90 per kilo ton, plus applicable wharfage and container handling charges. Sea-Land applied for permission to waive collection of the difference of $1,034.21 between the amount paid by Biotech and the amount due under the higher rate of $100 per kilo ton.

In his *Initial Decision*, the Presiding Officer noted that section 8(e) of the 1984 Act was enacted to relieve innocent shippers of financial hardship resulting from carrier error and should be interpreted broadly to effectuate that purpose. However, he denied Sea-Land's application because he found that Sea-Land did not commit a tariff-filing error of the type specified by that section. Rather, he found that Sea-Land, joined by GEFA, is asking, in effect, that a rate reduction, which was announced for and went into effect on January 1, 1985, be advanced in time to cover an earlier shipment in order to correct an operational error rather than a tariff-filing error. He distinguished three previous decisions granting applications involving a mistaken change in booking or sailing date on the ground that, in each case, the carrier intended to change its tariff rates prior to shipment and the mistake of the operations department prevented the carrier from carrying out its intention.[1] The Presiding Officer found that here Sea-Land did not promise to change its tariff before shipment; on the contrary, it advised Biotech that the tariff had already been changed, as of January 1, 1985, and that the shipper could take advantage of the change if it booked its cargo for the January 3 sailing rather than the December 28 sailing. Thus, the Presiding Officer explained, granting this application would not implement a carrier's promise made to the shipper during negotiations to change its tariff prior to shipment, but instead would implement a new intention formulated after the shipment to backdate a tariff change from January to December.

The Presiding Officer then proceeded, however, to consider whether Biotech should gain relief by another means. He posited that the mistake by Sea-Land's Operations Department constituted a breach of Sea-Land's contract with Biotech and required it to incur increased costs. He therefore suggested that the Commission treat Sea-Land's application as a petition for declaratory order that the rates properly applicable to Biotech's shipment were the lower January rates. The Presiding Officer believes that such an action would be consistent with the holdings of numerous courts and authorities that administrative agencies enjoy substantial flexibility in devising procedures and remedies. He concluded by denying Sea-Land's applica-

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[1] None of those cases are reported. They are: *Application of the Pacific Westbound Conference and Sea-Land Service, Inc. for the Benefit of Universal Freight Forwarders, Ltd. as Account for Cerro Sales Corporation*, Spec. No. 1218, F.M.C. administratively final Nov. 13, 1984; *Application of Sea-Land Service, Inc. for the Benefit of Vernante-Pennitalia, S.P.A.*, Spec. No. 1045, F.M.C. administratively final Aug. 8, 1983; *Application of Trans Freight Lines, Inc. for the Benefit of Georges Vatinel & Co., as Account for Lubrizol, France*, Spec. No. 967, F.M.C. administratively final Nov. 4, 1982.

tion, but also advising that Sea-Land is not required to seek recovery of the $1,034.21 otherwise owed to it by Biotech.

DISCUSSION

The Presiding Officer's conclusion that Sea-Land's application to waive collection of certain freight charges from Biotech should be denied is correct. While the Commission is obliged to administer the special docket procedure liberally in order to achieve its purpose, *Nepera Chemical, Inc.* v. *FMC*, 662 F.2d 18 (D.C. Cir. 1981), we must also act within the specified statutory limits. One of those limits is that the carrier must have committed "an error in a tariff of a clerical or administrative nature or an error due to inadvertence in failing to file a new tariff . . . ." 46 U.S.C. app. § 1707(e). The booking error committed in this case by Sea-Land's Operations Department was not related to Sea-Land's tariff. The tariff in effect at the time of shipment on December 28, 1984, correctly reflected Sea-Land's intentions. The Commission has held on several occasions that non-tariff mistakes by a carrier do not qualify for waiver/refund relief.[2] Because Sea-Land's application here fails to meet one of the jurisdictional requirements of section 8(e), the Commission is compelled to deny the application.

With regard to the Presiding Officer's suggestion that relief to Biotech still can be granted under an alternative declaratory order procedure, such a result would be *ultra vires* and without support in law. The Presiding Officer did not state what Shipping Act remedy he would have his suggested declaratory order confer on Biotech. As noted, he made a basic assumption that Sea-Land's mistake constituted a breach of its contract with Biotech. It seems clear that Biotech relied on Sea-Land's representation that the cargo would be shipped in January and then suffered some detriment when the cargo instead was shipped in December. Those facts indeed may create a cause of action for Biotech under contract or quasi-contract theories of law and nothing in this order should preclude such a remedy. However, the Commission has no authority to render a judgment on that matter and a declaratory order could not announce that Sea-Land was liable to Biotech for breach of contract.

The Presiding Officer also appeared to base his suggested remedy on a supposition that "the shipper might have a valid defense to any possible Sea-Land suit seeking recovery of the freight . . . [or] a separate claim against the carrier because of any disadvantage which Sea-Land's unilateral action may have caused . . . contrary to section 10(b)(11) of the Shipping

[2] *Farr Co.* v. *Seatrain Lines*, 20 F.M.C. 412, *Order on Reconsideration*, 20 F.M.C. 663 (1978), and cases cited therein. In *Farr*, the Commission held that where a carrier sales agent misreads a tariff and misquotes a rate to a shipper, who relies on the misquoted rate, such an error does not involve a mistake in the tariff and cannot justify special docket relief.

Act of 1984." (I.D. at 19).[3] To begin with, such speculation does not provide the complete statement of uncontested facts that is required to support declaratory orders. *Petitions for Declaratory Order*, 21 F.M.C. 830, 831 (1979).

Further, to the extent the Presiding Officer assumed a possible Biotech counterclaim for damages in response to a Sea-Land court action for freight charges or a possible violation by Sea-Land of section 10(b) of the 1984 Act as support for declaratory order relief, his theory is contrary to the provisions of Rule 68 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.68, which governs petitions for declaratory orders. Rule 68(b) states that such petitions must be "limited to matters involving conduct or activity regulated by the Commission under statutes administered by the Commission" and that "[c]ontroversies involving an allegation of violation by another person of statutes administered by the Commission . . . are not proper subjects of petitions under this section."

With respect to the status of Sea-Land's actions under the 1984 Act, it should also be noted that the Act's prohibition of unreasonable disadvantages or prejudices, which was carried forward from section 16 First of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. § 815, would require a showing here that another shipper competing with Biotech did not incur the detriment of the higher December rates.[4] The limited record now before the Commission contains no evidence of a favored shipper; on the contrary, Sea-Land's application recited that there were no other shipments during the relevant time period, as the Presiding Officer himself noted. I.D. at 2–3, n. 2.

The precedent relied upon by the Presiding Officer does not support his suggested result in this proceeding; in fact, it shows why that result is beyond the Commission's statutory powers. In *Application of Pacific Westbound Conference on Behalf of OOCL-Seapac Service for the Benefit of Shintech*, 21 S.R.R. 1361 (1982) (*Shintech*), the carrier had deleted certain rates from its tariff, which had the effect of increasing certain shippers' freight costs on unlawfully short notice. However, special docket relief was not available because the carrier had failed to meet the statutory requirement of filing a corrective tariff prior to filing its special docket application. After noting that fact, the administrative law judge invited the carrier to file a petition for declaratory order, which would settle the issue of which rates were lawfully applicable to the shipments involved. After withdrawing its special docket application, 21 S.R.R. 1441 (1982), the carrier filed the suggested petition, which was granted for the most part by the Commission. *Petition of Pacific Westbound Conference and OOCL-Seapac Service for Declaratory Order*, 25 F.M.C. 723 (1983).

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[3] In his latter statement, the Presiding Officer apparently meant to cite section 10(b)(12), which prohibits unreasonable prejudices or disadvantages, rather than section 10(b)(11), which prohibits unreasonable preferences or advantages (46 U.S.C. app. § 1709).

[4] *E.g., Assessment of Incheon Arbitrary*, 21 F.M.C. 522, 524–25 (1978).

However, both the administrative law judge's order in the *Shintech* special docket proceeding and the Commission's order on the subsequent petition for declaratory order turned on the fact that the carrier had violated, albeit inadvertently, section 18(b)(2) of the 1916 Act by increasing its rates on less than the statutory notice of 30 days. In describing how relief to the shipper might be granted via a petition for declaratory order, the administrative law judge stated:

> The question to be resolved under the declaratory order procedure would simply be whether shippers who had paid freight under [OOCL-Seapac's] previous per-container rates were required to pay additional freight under the higher per-ton rates which went into effect on February 1, 1982, on short notice contrary to the requirements of Section 18(b)(2) of the Act. 21 S.R.R. at 1366.

In his conclusion, the judge further stated:

> [B]ecause the record appears to show a possible short-notice rate increase in violation of Section 18(b)(2) of the Act, denial of the application does not necessarily deprive shippers of relief. *Id.* at 1368.

In granting the carrier's petition for declaratory order, the Commission concluded that:

> . . . Section 18(b)(2) proscribes short-notice rate changes . . . to the extent that they result in increased rates. Thus, OOCL's rate cancellations should be considered ineffective as to those shipments during the 30-day period for which there resulted a rate increase. 25 F.M.C. 725.

The Presiding Officer stated in the instant proceeding that the petition for declaratory order was used in *Shintech* to "terminate a state of uncertainty as to what rates should have applied to the shipments involved." I.D. at 16. More precisely, the petition there was useful and necessary to decide which rates were required by law. Because the Commission was able to determine that the lower rates were legally applicable, the shipper obtained relief. The same procedure has been used in disputes over which rates should apply to a particular commodity description. *In the Matter of Rates Applicable to Ocean Shipments via American President Lines*, 25 F.M.C. 687 (1982). However, in the case here, there is no dispute or uncertainty over which of Sea-Land's rates were legally applicable to Biotech's shipment of pesticide. The Presiding Officer acknowledged that "both the shipper and carrier understood perfectly well that if the shipment moved in December, it would pay the $100 rate . . . ." I.D. at 10. There is no basis for argument that application of the $100 rate would violate statutory notice provisions or misrate the cargo or create some other type of simple, technical issue of law susceptible to resolution through the declaratory order procedure. As noted above, if there is a

Shipping Act issue raised by the facts of record, it is not one that can be resolved in a declaratory order.

In sum, the only possible basis for the procedure suggested by the Presiding Officer is his concern that the shipper appears to have been injured unfairly. The Presiding Officer correctly stated that the Commission may be flexible in devising procedures and remedies appropriate to a particular case. However, the *sine qua non* of any Commission action is authority under the law. The Commission's waiver/refund authority under section 8(e) of the 1984 Act does not apply here and we have no power to act purely as a court of equity. That the shipper may have suffered detriment is unfortunate but, as the Commission has held before, does not create a remedy where none otherwise exists.[5] We therefore conclude that the Commission's special docket and declaratory order procedures do not apply to the facts of this case.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted to the extent it denies Sea-Land's application for permission to waive collection of $1,034.21 in freight charges from Biotech pursuant to section 8(e) of the Shipping Act of 1984; and

IT IS FURTHER ORDERED, That the Initial Decision is reversed to the extent it suggested that Sea-Land is legally excused from seeking recovery of the $1,034.21 in freight charges not paid by Biotech;

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

By the *Commission.*

(S) JOHN ROBERT EWERS
Secretary

[5] In our Order on Reconsideration in *Farr Co.* v. *Seatrain Lines*, *supra* n. 2, the Commission stated:

Although the shipper was induced by the promise of a lower rate to resume shipping from its Los Angeles facilities and, because of the carrier's misrepresentation, has to pay higher charges than anticipated, the fact remains that unless there is an error of the type contemplated in section 18(b)(3) which makes the tariff inapplicable, the rate in effect at the time of shipment is the only rate the carrier can charge and the shipper must pay. 20 F.M.C. at 665 (citation omitted).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1345

APPLICATION OF GULF EUROPEAN FREIGHT ASSOCIATION AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF ARTHUR J. FRITZ CO. AS AGENT FOR SDS BIOTECH CORPORATION

A shipper, being advised that Sea-Land's rate on pesticides was reduced to $90 per ton, effective January 1, 1985, elected to have the cargo booked and carried in January so as to enjoy the reduced rate. Despite the agreement between Sea-Land and the shipper to carry the cargo in January, Sea-Land's Operations Department inadvertently arranged to have the cargo loaded on a vessel sailing in December of 1984, at a time when the rate was $100 per ton. Sea-Land, believing that this mistake is a tariff error seeks permission to waive additional freight due under the $100 rate, an amount equal to $1,034.21. It is held:

(1) The special-docket law and procedure do not apply because the error was not a tariff-filing error, there being no promise by the carrier or agreement between carrier and shipper prior to the shipment to apply a reduced $90 rate to a December shipment and to file that rate for a December shipment. The element of intent prior to shipment is critical in such cases.

(2) The error in this case was an error separate from tariff-filing and related to Sea-Land's inadvertent departure from its contract with the shipper. Granting the application under special-docket procedure would therefore give effect to a promise by the carrier which had not been made prior to shipment and which had not been sought by the shipper before the shipment, namely, to charge the $90 rate to a December shipment and to change the tariff accordingly.

(3) Although special-docket relief is not appropriate, the Commission can grant relief to the shipper by treating the application as a request for relief in the form of a declaratory order.

John J. Brennan for applicant Sea-Land.

Clifford J. Smith for applicant Gulf European Freight Association.

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

Partially Adopted February 6, 1986

By application filed June 24, 1985, Sea-Land Corporation, on behalf of Sea-Land Service, Inc., and the Gulf European Freight Association seek permission for Sea-Land to waive $1,034.21 in freight charges in connection with a shipment of pesticides which Sea-Land carried from Houston, Texas, on a ship sailing out of Houston on December 28, 1984. The requested

[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).

waiver would benefit the shipper, SDS Biotech Corporation, of Painesville, Ohio.

The evidence submitted with the application shows that it was filed timely and that the new tariff setting forth the rate on which the waiver would be based was also on file prior to the time of filing the application, as required by section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e), the governing statute, and by the corresponding regulation of the Commission, Rule 92(a), 46 CFR 502.92(a). There is also no evidence that shippers, carriers, or ports would suffer discrimination if the application is granted.[2] However, I cannot find on this record that Sea-Land committed a tariff-filing error of the type contemplated by the governing law. I find rather that Sea-Land and the Association are asking that an intended rate reduction, which was announced for January 1, 1985, and went into effect at that time, be advanced in time to cover an earlier shipment, not because of a tariff-filing error but because someone in Sea-Land's Operations Department mistakenly arranged to have the cargo loaded on a ship sailing in December rather than on one sailing in January of 1985, as the shipper and Sea-Land had intended. Therefore, I conclude that the application cannot be granted. However, because the facts also show that the shipper would suffer harm through no fault of its own and because of what, in effect, was a Sea-Land breach of contract, I find that there is an alternative remedy for affording the shipper relief without extending the special-docket law beyond its intended purpose.

THE FACTS

Sea-Land is a member of the Gulf European Freight Association and participates in Freight Tariff No. 6 (FMC–17) for shipments applying from Houston, Texas, and other Gulf ports to Continental Europe in the Bordeaux/Hamburg range. At a November 1984 meeting of the Association, the members decided to reduce their rate on pesticides and weed killer chemicals from $100 per ton of 1,000 kilos to $90 per ton of 1,000 kilos. The new rate was to become effective on January 1, 1985. It was so filed.

On December 14, 1984, Ms. M. Mitchell, on behalf of the shipper, SDS Biotech, called Sea-Land and booked five container loads of the subject pesticides for Rotterdam. Originally, Ms. Mitchell booked the shipment for the vessel VENTURE sailing out of Houston in December but her preference was for the shipment to move on a voyage of the vessel PRODUCER sailing in early January if the European consignee did not object to later delivery. The shipper preferred the later sailing because of the knowledge that the rate was scheduled to drop to $90 per ton

[2] The application was filed on June 24, 1985, which is only 178 days after date of shipment (December 28, 1984). The new, corrective tariff had been filed to be effective January 1, 1985 as a result of the Association's and members' decision to file a reduced rate, which decision had been taken at a November 1984 meeting unrelated to the present application. Applicants show no other shipments during the relevant time period, and there is no evidence that any carrier or port would suffer discrimination if the application were to be granted.

as of January 1, 1985. Apparently the consignee did not object to later delivery because Ms. Mitchell called Sea-Land on December 17 and rebooked the cargo for the sailing of the PRODUCER on January 3, 1985. However, on December 27, 1984, Sea-Land's New Orleans Operations Department advanced the booking of the cargo to the earlier sailing of the VENTURE for December 28, 1984. As Sea-Land's Atlantic Sales Representative, Mr. Harry J. Shimko, states in his sworn affidavit, the Operations Department changed the booking "without the knowledge and consent of sales or pricing and contrary to the instructions of the shipper." (Affidavit of Harry J. Shimko, last paragraph.) The Operations Department took this action because of its failure to note the booking instructions designating the later vessel.

Because the cargo moved on the earlier vessel, which sailed from Houston on December 28, 1984, it became subject to the rate of $100 per ton, which was the effective rate at the time. The shipper paid freight under the later reduced rate of $90 per ton plus applicable wharfage and container handling charge. Under the applicable rate, additional freight of $1,034.21 would be due.[3] It is this amount which Sea-Land seeks permission to waive.

DISCUSSION AND CONCLUSIONS

There is no question but that the law under which this application was filed is remedial and that it should be interpreted broadly to effectuate its purposes. See, e.g., *Application of Distribution Services Ltd. for the Benefit of Target Stores*, 26 F.M.C. 125, 129 (I.D., F.M.C. Order, 26 F.M.C. 123, Dec. 14, 1983); *Nepera Chemical, Inc.* v. *Federal Maritime Commission*, 662 F.2d 18, 22 (D.C. Cir. 1981); *Application of Lykes Bros. to Benefit Texas Turbo Jet, Inc.*, 24 F.M.C. 408, 411 (1981); *D.F. Young, Inc.* v. *Cie. Nationale Algerienne de Navigation*, 21 F.M.C. 730, 731 (1979). P.L. 90–298, 82 Stat. 111, April 29, 1968, which amended section 18(b)(3) of the Shipping Act, 1916, and which has been essentially recodified as section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e), was enacted to relieve innocent shippers of financial hardship and inequities resulting from tariff-filing errors of carriers. *Farr Co.* v. *Seatrain*, 20 F.M.C. 411, 414 (1978), order on reconsideration, 20 F.M.C. 663 (1978). As the legislative history to P.L. 90–298 shows, however, not every error committed by a carrier would be corrected by the remedial legislation. Only certain types of clerical or administrative errors or errors caused by inadvertent failure to file a rate in a tariff would be remediable. *Farr Co.* v. *Seatrain*, cited above, 20 F.M.C. at 414–416. As the history shows, the classic type of error due to inadvertent failure to file involves a carrier's negotiating

[3] Base freight for the shipment, which weighed 103.421 kilo tons, under the tariff rate of $100 per kilo ton equals $10,342.10. Under the lower rate of $90 per kilo ton, which Sea-Land seeks to apply, base freight equals $9,307.89. Additional freight due under the higher rate is therefore $1,034.21 ($10,342.10 less $9,307.89).

a rate with a shipper but forgetting to file the rate in the tariff prior to shipment. Another type involves the carrier's publication of a rate with typographical errors causing a rate of $37 to be published as $73, as an example. *Farr Co.* v. *Seatrain*, at 415. An error of a type which does not relate to a mistake in the tariff does not qualify for relief. For example, if a "zealous carrier solicitor" misreads a tariff and misquotes a rate to the shipper who relies upon the misquoted rate, the carrier cannot later substitute the misquoted lower rate for the actual higher rate published in the tariff at the time of shipment. That is because the error which occurred did not involve a mistake in the tariff. The tariff in such a case was perfectly correct. The error was that of the carrier's agent who read it improperly, and the carrier had never agreed prior to the shipment to change its tariff. In such cases the Commission has denied special-docket applications. See *Farr Co.* v. *Seatrain*, at 416, and cases cited therein.

The common theme running through special-docket applications is the intent of the carrier to apply a lower rate to a shipment and to have the tariff reflect that intent. The critical element, however, is the timing of such an intent. The carrier must have developed the intent before the shipment moved, not after. If a carrier decides after a shipment moves that the shipper should have given a lower rate and tries to charge such a rate, there is little to distinguish such a practice from rebating which is strictly prohibited by law. The Commission, when seeking authority to grant special-docket relief, was fully aware of the danger to tariff law that could result if this critical element of pre-shipment intent was disregarded. See *Farr Co.* v. *Seatrain*, cited above, at 416 n. 6, and discussion at 416–417. The Commission has been careful not to give effect to agreements by carriers to reduce rates arising after shipments. See, e.g., *Munoz y Cabrero* v. *Sea-Land Service, Inc.*, 20 F.M.C. 152, 153 (1977) ("[I]t is clear that the 'new tariff' is expected to reflect a prior intended rate, not a rate agreed upon after the shipment."); *Application of Moore McCormack Lines, Inc. for the Benefit of Celanese Corp.*, 21 SRR 1106, 1109 (I.D., F.M.C. Notice of Finality, September 7, 1982) ("A bona fide mistake is established when it is shown that the tariff publisher formed the intent, prior to the date of shipment, to file a rate different than the one shown in the Tariff but did not do so because of inadvertent error."); *Application of Sea-Land Service, Inc. for the Benefit of Alimenta (USA), Inc.*, 22 F.M.C. 347 (1979) (Carrier cannot negotiate and intend a new rate to apply to a shipment after the shipment has commenced); *Application of Seawinds Limited for the Benefit of Red Spot Paint and Varnish Co., Inc.*, 22 SRR 517, 520 (I.D., F.M.C. Notice of Finality, January 10, 1984) (Carrier cannot negotiate new rate after the shipment). So careful is the Commission to ensure that a carrier not apply a new rate negotiated after a shipment has occurred that it has even denied relief to intermodal shipments when it has been shown that the new rate was negotiated while the containers

were moving overland to a port, in other words, the new rate was negotiated while the shipment was in progress. See *Application of Sea-Land Service, Inc. for the Benefit of Alimenta (USA), Inc.*, 22 F.M.C. 347 (Suppl. I.D., F.M.C. Notice of Finality, February 21, 1980).

It is clear from the preceding discussion that the Commission is authorized to grant special-docket relief only when bona fide tariff-filing errors have been shown to have occurred and that the granting of such relief gives effect to the intention of the carrier formed before shipment to apply a particular lower rate and, if the tariff did not reflect that intention, to change the tariff prior to shipment. Furthermore, when the tariff-filing error is of the inadvertent-failure-to-file-a-negotiated-rate type, granting such an application gives effect to the agreement and understanding of both the shipper and carrier that the carrier will change its tariff before the shipment commences. Clearly the remedial statute contemplated an understanding that the carrier promised the shipper not only to apply a lower rate but to file that rate in the tariff prior to the shipment in this type of error. Thus, in *Munoz y Cabrero* v. *Sea-Land Service, Inc.*, cited above, 20 F.M.C. at 152–153, the Commission described its limited authority as follows:

> The legislative history of the amendment to section 18(b) of the Shipping Act (Public Law 90–298) which gave the Commission authority to permit a carrier subject to its jurisdiction to make a voluntary refund or to waive the collection of a portion of the freight charges, clearly indicates that such waiver or refund was to be allowed where, as a result of a bona fide mistake, *the carrier failed to file an "intended rate."* Thus the House Report accompanying the Bill which ultimately added the refund/waiver authority to section 18(b) states:
>
> > Section 18(b) appears to prohibit the Commission from authorizing relief where, through bona fide mistake on the part of the carrier, the shipper is charged more than he understood the rate to be. For example, a carrier *after advising a shipper that he intends to file a reduced rate and thereafter fails to file the reduced rate* with the Federal Maritime Commission, must charge the shipper under the aforementioned circumstances the higher rates. (Emphasis added.) (Footnotes omitted.)[4]

It can be seen, therefore, that the remedial statute was not designed to correct the effects of a carrier's unilateral alteration of a booking contract which actually constitutes a breach of contract between the shipper and carrier. Thus, in the instant case, to permit Sea-Land to apply the $90

[4] The importance of a promise of a carrier not merely to charge a lower rate but to file such rate prior to shipment in the inadvertent-failure-to-file type error is shown elsewhere in the legislative history to Pub. L. 90–298. Thus, Chairman Harllee advised the Congress that the new law would be confined to "typographical error or a failure on the part of a carrier to submit a tariff which they (sic) intended to submit and promised the shipper they (sic) would submit . . . ." Hearings before the Subcommittee on Merchant marine and Fisheries, 90th Congr. St. Sess., August 15, 16, 1967, at 88.

rate to a December shipment at a time when the rate was $100 and when both parties had contemplated that the shipment would be carried in January, would effectuate a new agreement which was never entered into by the parties. Instead of the actual agreement between Sea-Land and the shipper that if the shipper booked and Sea-Land carried the shipment in January, the shipper would enjoy the rate of $90, the new agreement would be that if the shipper booked the shipment for January but Sea-Land mistakenly loaded it on a ship sailing in December, Sea-Land would file a new rate in its tariff, advancing the January rate reduction to December. Obviously Sea-Land never made such an agreement in advance of the shipment because it did not anticipate that its Operations Department would load the shipment on an earlier vessel. As in the case of a mere misreading of a tariff or a misquotation from the tariff (such as in *Farr Co.* v. *Seatrain*, cited above, 20 F.M.C. 411) the error is not in the tariff or in the tariff filing. On the contrary, the evidence is that as far as Sea-Land's tariff is concerned, Sea-Land and the Association did exactly what they had intended to do, namely, file a rate reduction for the subject pesticides, effective January 1, 1985. Furthermore, the evidence is that both the shipper and carrier understood perfectly well that if the shipment moved in December, it would be charged the $100 rate but that if it moved in January, it would be charged the $90 rate. As the record shows, the shipper took several days to obtain the consent of its consignee to a later delivery in order to enjoy the lower rate. If it had been Sea-Land's intent to charge the $90 rate in December or to file such a rate in December and the shipper understood that to be the case, why would the shipper have gone to the trouble of obtaining permission to ship the commodity at a later date in January? Moreover, as Sea-Land's agent, Mr. Shimko, candidly acknowledges, when Sea-Land's New Orleans Operations Department rebooked the shipment for a December sailing, it did so "without the knowledge and consent of sales or pricing and contrary to the instructions of the shipper." Thus, granting the application would carry out a non-agreement, not an agreement, something the special-docket law was not designed to do. The solution to the problem of giving relief to the innocent shipper lies in the nature of the carrier's action, a breach of contract, not in tariff error, and, as discussed below, relief ought to be granted under a proper legal theory, not by converting the special-docket law and procedure into panacea for any type of error a carrier might make.

Previous Decisions Involving a Change in Booking or Sailing Dates

In support of its application Sea-Land cites three decisions involving a change in vessel sailing or an advancement of cargo loading. In these cases applications for permission to refund or waive freight charges were granted. Sea-land characterizes the cases as "applications" which "involved the non-effectiveness of tariff provisions due to the sailing of the vessel,

or advancement of the cargo, prior to the effective date of the intended tariff provisions." (Application at 2.) Such a characterization alone suggests that special-docket relief was not the proper remedy because changes in sailing dates or cargo-loading dates are not tariff-filing errors. However, regardless of characterization, the cases bear scrutiny to determine whether their facts were indeed the same as or so similar to those of the instant case as to constitute binding precedent. I find significant distinguishing features to them, however.

The three cases are: SD 7218, *Application of the Pacific Westbound Conference and Sea-Land Service, Inc. for the benefit of Universal Freight Forwarders, Ltd. as Agent for Cerro Sales Corporation* (I.D. October 5, 1984, F.M.C. Notice of Finality, November 13, 1984); SD 1045, *Application of Sea-Land Service, Inc. for the Benefit of Vernante-Pennitalia, S.P.A.* (I.D. June 24, 1983, F.M.C. Notice of Finality, August 8, 1983); SD 967, *Application of Trans Freight Lines, Inc. for the Benefit of Georges Vatinel & Co., as Agent for Lubrizol, France* (I.D. September 29, 1982, F.M.C. Notice of Finality, November 4, 1982.)

In SD 1045, the carrier negotiated a rate on November 12, 1982, for a shipment of bricks and promised to file the negotiated rate to be effective on November 15, 1982, when it was expected the ship on which the bricks were to be loaded would sail. However, the ship departed unexpectedly early because of an operational decision of the carrier before the rate could be filed. In SD 1218, the carrier negotiated a rate on copper cathodes under the "open-rate" section of the conference tariff and agreed to file the rate on February 2, 1984, the date on which the carrier expected the vessel carrying the cargo to sail. However, its operations department advanced the sailing date to February 1, 1984, before the negotiated rate could be filed. In SD 967, the carrier agreed to file a new rate on additives for lubricating and fuel oil to be effective April 30, 1982, in order to meet the sailing of a vessel on May 4, 1982. However, the carrier's operations department arranged to load the cargo on another vessel sailing on April 27, 1982, before the negotiated rate had been filed.

In all of these cases the carriers promised shippers that they would file lower rates in order to meet particular sailing dates. It appears, however, that the important element of the carriers' promises was to give the shippers the lower rates and to change the carriers' tariffs prior to the shipments to reflect that intention. Granting those applications, therefore, carried out the carriers' pre-shipment intentions to change their tariffs so that the shippers could enjoy the lower rates. The anticipated dates of sailing which were inadvertently altered by the carriers' operations departments were important as target dates by which the carriers intended to change their tariffs. Had the carriers realized the possibility that their operations departments might have advanced the bookings, they undoubtedly would have planned to file the rates earlier to meet those sailing dates. In other words, the critical element of the carriers' promises to the shippers was to change

the tariff rates prior to shipment and the mistake of the operations departments prevented the carriers from carrying out these intentions.

In the instant case the nature of the carrier's promise is different. Here, Sea-Land did not promise to change its tariff before shipment. On the contrary, it apparently advised the shipper that the tariff had already been changed, as of January 1, 1985, and that the shipper could take advantage of the change if the shipper booked the cargo for January rather than December. It is only after the shipment has occurred that Sea-Land now wants to change its tariff. Thus, granting the application would not implement a carrier's promise to change its tariff made to the shipper prior to shipment during negotiations but would implement an intention formulated after the shipment to backdate a tariff change from January to December not because of any tariff-filing error but to correct the effects of an unfortunate decision of its Operations Department to change the vessel on which the cargo had been booked. It is commendable of Sea-Land to try to offset the harm which such decision caused the innocent shipper. However, the type of error involved is simply not a tariff-filing error, and it would not be appropriate to distort the special-docket law beyond the scope of its intended purposes merely because the ultimate objective, to relieve an innocent shipper, is a good one. Nothing in the three cases cited by Sea-Land, in which in each instance the carrier had promised to file a negotiated rate prior to the shipment in contrast to the present case, persuades me that special-docket relief is the appropriate remedy under the facts of this case.[5] The answer to the present problem, therefore, is to seek relief for the shipper under the proper legal theory, one which pertains to a carrier's breach of contract which occurred here and not to one which pertains to a carrier's tariff-filing error which did not occur.

Permitting the Waiver Under Alternative Theories

Sea-Land has presented the Commission with a set of undisputed facts which show that an innocent shipper, in reliance on Sea-land's advice that the shipper would enjoy a lower rate of $90 per ton on pesticides

[5] There are other features of the three decisions which undermine their precedential value in my opinion. First, none of them was reviewed by the Commission and consequently there is no definitive Commission determination of the question whether an operational decision of the type involved in them really constitutes a tariff-filing error. Second, in one of them, SD 1218, the presiding judge recognized that the type of error involved was "somewhat unusual" (I.D. at 2). Nevertheless he found a connection between the action of the operations department and the failure of the carrier to file the negotiated rate timely, namely, had the operations people notified the tariff-filing people of the change in sailing dates, the carrier would undoubtedly have advanced the filing date to cover the shipment. This illustrates that the carrier had intended to change its tariff prior to shipment and had promised the shipper that it would change its tariff rate. In the instant case the carrier had not represented to the shipper that it intended to change its tariff to cover a December shipment. Third, in each of the cases cited, the carrier, either individually or under an "open-rate" situation, had the authority to change its tariff rates. In the instant case the members of the Association had already voted in November to change their rate effective January, not December, and presumably Sea-Land, as a member, has also so voted. The shipper was also aware of the fact that the rate would not change until January. Thus, Sea-Land and the Association are seeking to go back on their pre-shipment intentions in order to offset the effects of a Sea-Land operational decision.

if the shipper booked the cargo for carriage in January, booked it for January. The shipper took the trouble of obtaining the consent of its consignee to delay the shipment until January to obtain the benefit of the lower rate which, by previous decision of Sea-Land and the Association, would go into effect in January. However, admittedly acting contrary to the agreement between Sea-Land and the shipper by which Sea-Land would carry the cargo on its vessel sailing in January, Sea-Land changed the booking and loaded the shipment on a vessel sailing in December. There is no evidence that Sea-Land intended to harm the shipper. Nevertheless, this decision taken independently by Sea-Land's Operations Department, constituted a breach of Sea-Land's contract with the shipper. Both the law and the equities, it would seem, cry out for relief. Unfortunately, as discussed above, the special-docket law applies to errors in tariffs and tariff-filing and not to independent breaches of contract.

The fact that a carrier, which is seeking to rectify the adverse effects of its own unfortunate actions, cannot obtain relief under a specialized procedure does not mean that no relief is available. In a previous special-docket case in which the special-docket procedure could not be used because of a fatal jurisdictional defect, the facts of the case nevertheless showed that relief was available under a different procedure and legal theory, which procedure and theory were ultimately employed. This was done in a manner consistent with the holdings of numerous courts and authorities to the effect that administrative agencies are supposed to be more flexible than courts of law in devising remedies. See discussion in Special Docket No. 958, *Application of Pacific Westbound Conference on Behalf of OOCL–SEAPAC Service for the Benefit of Shintech,* 21 SRR 1361, 1366 (ALJ), November 10, 1982; application withdrawn, 21 SRR 1441 (December 15, 1982). See also *United States Lines, Inc.* v. *Federal Maritime Commission,* 584 F.2d 519, 543 (D.C. Cir. 1978) (. . . "[T]he agency enjoys substantial flexibility in structuring its procedures in view of the issues which it must resolve."); *American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F.2d 624, 633 (D.C. Cir. 1966), cert. den. 385 U.S. 843 ("It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience.")

The facts in SD 958 showed that the shippers deserved some relief because the carrier had deleted certain rates, thereby increasing shippers' costs on unlawfully short notice. However, special-docket relief could not be granted because of the carrier's failure to file a new, corrective tariff prior to filing the application, as required by the special-docket law. The solution was to invite the carrier to file a petition for a declaratory order under Rule 68, 46 CFR 502.68, to terminate a state of uncertainty as to what rates should have been applied to the shipments involved. SD 958, cited above, 21 SRR at 1366. This remedy not only terminated the state of uncertainty but obviated the need for lawsuits in which the carrier

would have to sue to recover undercharges and shippers would counterclaim because of short-notice rate increases. *Id.* Instead, the entire problem was resolved by the Commission in a separate Rule 68 proceeding. See *Petition of Pacific Westbound Conference and OOCL–SEAPAC Service for Declaratory Order,* 25 F.M.C. 723 (1983).

As the discussion in SD 958 shows, the present case appears to be one in which relief in the nature of a declaratory order would be suitable. As in SD 958, an innocent shipper has suffered increased costs because of a carrier's mistaken action, special-docket relief is not applicable, and the process of resolving the situation would probably require a carrier's suit to recover undercharges and the shipper's counterclaim in order to resolve a state of uncertainty as to the proper freight. Furthermore, as in SD 958, "the critical facts can be explicitly stated, without the possibility that subsequent events will alter them," a factor which the Commission believes to facilitate declaratory orders. See *Rules of Practice and Procedure—Petitions for Declaratory Order,* 21 F.M.C. 830, 831 (1974). Other factors such as the need to relieve the parties of having to act at peril and in a state of legal uncertainty, which are traditional reasons to utilize declaratory-order procedures, exist in the present case. See discussion in SD 958, cited above, 21 SRR at 1366–67.

As noted above, administrative agencies learn to fashion procedures tailored to resolve peculiar problems expeditiously through experience. Experience has shown that a failed special docket may lead to a successful declaratory-order proceeding. See SD 958, cited above, and *Petition for Declaratory Order of Pacific Westbound Conference etc.,* cited above. However, in the earlier situation the Conference and carrier withdrew their application and filed a separate petition under Rule 68, 46 CFR 502.68. No reason appears why the Commission could not dispose of the uncertain situation in the present proceeding at one time simply by treating the proceeding as one in the nature of a request for a declaratory order. The relief requested by applicants, namely, to waive additional freight and to retain only freight under the $90 rate, as if Sea-Land had never breached its contract with the shipper, is the same. The facts are undisputed and the parties are on notice. There would appear to be no need for a separate proceeding unless, for some technical reason, Sea-Land desires to file a separate petition. Pleadings under the modern view are merely designed to give general notice and amendments to them are liberally permitted, especially by administrative agencies. *Interconex, Inc.* v. *F.M.C.,* 572 F.2d 27, 30 (2d Cir. 1978); *Pacific Coast European Conference—Limitation on Membership,* 5 F.M.B. 39, 42 n. 8 (1956) ("The most important characteristic of pleadings in the administrative process is their unimportance."). Cf. *Conley* v. *Gibson,* 355 U.S. 41, 47–48 (1957) (pleadings need only give fair notice). The Commission, like other administrative agencies, does not hold to rigid views in applying its rules of procedure and tries to apply its rules flexibly so as to do justice. See, e.g., *City of Portland*

v. *Pacific Westbound Conference*, 5 F.M.B. 118, 129 (1956) (Commission looks to the substance of pleadings, not forms, and is not bound by rules of pleadings and practice which govern courts of law); *Oakland Motor Car Co.* v. *Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 311 (1934) (same). An agency always has discretion to relax its procedural rules adopted for the orderly transaction of business when justice requires in any given case, absent substantial prejudice to parties. *American Farm Lines* v. *Black Ball Frt. Service*, 397 U.S. 532, 538–39 (1970); 4 Mezines, Stein, Gruff, *Administrative Law*, at 22–16, 17 n. 52. Cf. *Utd.-Buckingham Frt. Lines* v. *U.S.*, 288 F.Supp. 883, 886 (D. Neb. 1968) (rules of procedure should never be used to defeat or even modify justice).

Accordingly, on the facts as presented by applicants which show no tariff-filing error but do show that Sea-Land acted contrary to its agreement with the shipper, albeit inadvertently, and now wishes to offset the harm which such action caused, I conclude that Sea-Land ought not to recover the undercharge and ought to give the shipper the relief desired. I would do so not by involving the special-docket law, which applies only to tariff errors which did not occur here, but by recognizing that under applicable law the shipper might have a valid defense to any possible Sea-Land suit seeking recovery of the freight.[6] Alternatively, the shipper may even have a separate claim against the carrier because of any disadvantage which Sea-Land's unilateral action may have caused the shipper, contrary to section 10(b)(11) of the Shipping Act of 1984. All of these possible lawsuits would be rendered totally unnecessary, however, if the Commission were to issue an appropriate order settling the matter by treating the present application as a request for a declaratory order.

Accordingly, the application for special-docket relief is denied but Sea-Land is not required to seek recovery of the $1,034.21 in additional freight, which additional freight is due only because of Sea-Land's unfortunate action which was admittedly contrary to its agreement with the shipper.

(S) NORMAN D. KLINE
Administrative Law Judge

[6] For a discussion of possible defenses which a shipper might have against a suit to recover undercharges, see *Old Ben Coal Company* v. *Sea-Land Service, Inc.*, 21 F.M.C. 505, 517 n. 13 (1978). As the discussion cited indicates, sometimes a carrier may not recover full freight under its tariff if the carrier has itself violated a duty. See also discussion at 21 F.M.C. at 517.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1361

APPLICATION OF OOCL–SEAPAC SERVICES, INC FOR THE BENEFIT OF ASIAN FOOD INDUSTRIES (HK) LTD.

ORDER OF ADOPTION

February 6, 1986

The proceeding came before the Commission on Exceptions filed by OOCL-Seapac Services, Inc. (OOCL) to the Initial Decision of Administrative Law Judge Norman D. Kline (Presiding Officer), in which he denied OOCL's application, submitted pursuant to section 8(e) of the Shipping Act of 1984 (46 U.S.C. app. § 1707(e)), for permission to refund or waive collection from the consignee, Asian Food Industries (H.K.) Ltd. (Asian Food), of freight charges assessed on four shipments of "dry groceries" from Oakland, California to Hong Kong.

BACKGROUND

In March of 1985, OOCL quoted a "groceries" rate of $900 per 40-foot container to Asian Food in Hong Kong. However, OOCL intended, but inadvertently failed, to exempt the commodity from a general rate increase which became effective March 20, 1985. This rate increase raised the quoted rate from $900 to $1100. One of the shipments moved on April 5, 1985 and the other three on April 10, 1985. Asian Food paid freight at the $1100 rate on three of the shipments and the $900 rate on the fourth shipment.

Subsequently, on August 20, 1985, OOCL applied for permission to refund $600 of the charges collected and to waive $200 of the amount assessed on the fourth shipment. However, OOCL omitted, prior to filing its application, to publish in its tariff the rate upon which the refunds and waiver would be based. The Presiding Officer advised OOCL by letter and by telephone of the need to file a new tariff and refile its application by September 30, 1985, before the expiration of the 180 day statute of limitation of section 8(e) of the Act.[1] OOCL subsequently did publish

[1] Section 8(e) reads in part:

The *Commission may* . . . *permit* a common carrier . . . to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if—

* * *

(2) the common carrier . . . has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

Continued

the intended rate with an effective date of September 16, 1985, but the letter advising the Commission of the filing and referring to the application, although dated September 20, 1985 and postmarked October 9, 1985, was not received by the Commission until October 15, 1985.[2] The Presiding Officer in his Initial Decision found that both these dates are beyond the 180-day statutory limit on all the four shipments, and, on that basis, concluded that the application had been refiled too late. He accordingly denied OOCL's application for lack of jurisdiction.

DISCUSSION

In its Exceptions, OOCL expresses surprise at the late receipt of the letter at the Commission and suggests that the letter may have been lost in the U.S. mail. Although it acknowledges that refiling the application on October 9, 1985 might have been out of date, OOCL requests that the Commission

> ". . . overlook the fact that the amended application was received only a few days late for the later shipments and allow the filing of the new tariff page dated September 16, 1985, to cure the defect in the original application".[3]

OOCL refers to instances where the Commission allowed defective applications to relate back to the date of the original filing, even when the corrected application was filed outside the 180-day period and urges the Commission to reverse the Initial Decision.

However, the instances when a technically defective application, later corrected, was allowed to relate back to the date of the original filing[4] involved "technical" defects related either to a failure to properly explain the error in the tariff;[5] or to the rejection by the staff of a defective tariff, later refiled;[6] or to the lack of signature and notarization.[7] In all these cases, however, a new tariff had been filed prior to the filing of the original application.

* * *

(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

Rule 92(a)(3)(iii) (46 C.F.R. 502.92(a)(3)(iii)) of the Commission's Rules of Practice and Procedure defines "date of shipment" as meaning "the date of sailing of the vessel from the port at which cargo was loaded."

[2] Pursuant to Rule 502.92(a)(3)(i) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.92(a)(3)(i)) the application is filed when mailed.

[3] As mentioned, the first shipment moved on April 5, 1985; the other three shipments sailed on April 10, 1985.

[4] The cases were decided under section 18(b)(3) of the Shipping Act, 1916 whose provisions are reflected in section 8(e) of the Shipping Act of 1984.

[5] *Application of Distribution Services Ltd. for the Benefit of Target Stores*, Spec. No. 1059 (F.M.C. Dec. 14, 1983), *adopting* 26 F.M.C.125 (1983).

[6] *Application of Southern Pacific International, Inc. for the Benefit of General Motors Overseas Corp.*, Spec. No. 879 (F.M.C. administratively final June 11, 1982); 21 S.R.R. 833.

[7] *Messrs. Da Prato—Florence* v. *Med-Gulf Conference*, 13 F.M.C. 135 (1969).

Therefore, the only issue in this proceeding is whether the application was filed within the time limit prescribed in section 8(e)(4) of the Act.[8] The mailing envelope of the September 20 letter is postmarked October 9, 1985. In the absence of any proof to the contrary, the U.S. Postal Service stamp establishes the date of mailing and consequently the date of filing of the application which in this instance is October 9, 1985. That date is more than 180 days from April 10, 1985.[9]

Section 8(e) of the Act allows no discretion with regard to the time within which an application for refund or waiver must be filed.[10] After the expiration of the 180-day limit the Commission lacks authority to grant the remedy provided in section 8(e) of the Act. In this instance, in view of the late mailing of the September 20, 1985 letter, the Presiding Officer properly denied the application for lack of jurisdiction. OOCL'S Exceptions must consequently be denied.

THEREFORE, IT IS ORDERED, That the Exceptions of OOCL to the Initial Decision of Administrative Law Judge Norman D. Kline served on October 31, 1985, are denied; and

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

FINALLY IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

[8] The Presiding Officer found that OOCL's application would otherwise qualify for relief.

[9] Because of OOCL's failure to file a new tariff before applying for refunds and waiver, the first filing of the application on August 20, 1985 was a nullity. OOCL argues that the Commission should consider the date of filing of the new tariff, September 16, 1985, as the date of refiling of the application. The statute, however, *requires* the filing of a new tariff "prior to the filing of the application, that is the filing of two separate instruments which may not by their nature be merged into one. *See* section 8(e)(2) of the 1984 Act.

[10] *Application of U.S. Atlantic and Gulf Jamaica and Hispaniola S.S. Fr. Ass'n and Sea-Land Service, Inc. for the Benefit of United Brands*, Spec. No. 1102 (F.M.C. petition for reconsideration denied, Oct. 12, 1984), 22 S.R.R. 1266; *Application of Sea-Land Service, Inc. for the Benefit of Pack and Jones, Inc.*, Spec. Nos. 1206, 1238 (F.M.C. June 26, 1985), 23 S.R.R. 257, *partially adoting* 22 S.R.R. 1597 (Jan. 18, 1985) and 22 S.R.R. 1657 (Feb. 13, 1985).

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1361

APPLICATION OF OOCL–SEAPAC SERVICES, INC. FOR THE BENEFIT OF ASIAN FOOD INDUSTRIES (HK) LTD.

Application for permission to refund and waive portions of freight charges denied.

Applicant quoted a rate of $900 per 40-foot container on grocery items but inadvertently allowed that rate to increase to $1,100 in its tariff, thereby subjecting four shipments to $800 in additional freight in the aggregate.

Applicant failed to file the new tariff setting forth the quoted rate prior to filing its application. Such failure is a jurisdictional defect. Such defect could have been cured if applicant had filed the new tariff and followed it with a filing of an amended application within the 180-day period prescribed by law but, although filing the new tariff, applicant failed to file an amended application on time.

Jerome A. Clark and *Joseph E. Harris* for applicant.

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

Adopted February 6, 1986

This application was originally filed by OOCL-Seapac Services on August 20, 1985. (See certificate of date of mailing, application, p. 2.) Applicant carrier stated that in March 1985 it had quoted a rate for shipments of groceries to Hong Kong to the consignee in Hong Kong, insofar as relevant here, of $900 per 40-foot container, inclusive of terminal receiving charges. However, OOCL erroneously allowed its rate on the commodity to increase to 1,100 per 40-foot container, including terminal receiving charges, effective March 20, 1985, pursuant to a general rate increase because it had not noticed that it had quoted the rate at $900. The result of this error was that four shipments of grocery items, which sailed from Oakland, California, on April 3 and 10, 1985, became subject to the unintended higher rate of $1,100 which the consignee paid on three of the four shipments. OOCL therefore sought permission to refund $600 for three shipments ($200 per each) overpaid and waive collection of $200 on the fourth shipment on which the consignee had paid freight under the quoted but unfiled $900 rate.

[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 New-Tariff Filing Requirement

The application, having been filed on August 20, 1985, was filed only 139 days after the date of the earliest shipment (April 3, 1985). It did not appear that any discrimination among shippers, carriers, or ports would result if the application were to be granted, there being no other affected shipments. The application therefore appeared to qualify for relief under section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(e), and the Commission's regulation, 46 CFR 502.92(a). However, the application was defective in one critical respect. It did not show that the new, corrective tariff had been filed prior to the filing of the application. The law cited (section 8(e)(2) requires such a filing, stating as a condition for the granting of the application that it may be granted if:

> the common carrier or conference has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based.

The above requirement is considered to be jurisdictional and the Commission has invariably denied applications which fail to show that the new tariff has been timely filed. See, e.g., *Louis Furth Inc.* v. *Sea-Land,* 20 F.M.C. 186 (1977); *A. E. Staley Mfg. Co.* v. *Mamenic Line,* 20 F.M.C. 385 (1978); (same) 20 F.M.C. 642 (reconsideration denied); *Henry I. Daty, Inc.* v. *Pacific Westbound Conference,* 20 F.M.C. 390 (1978); *Application of Pacific Westbound Conference on Behalf of OOCL-Seapac Service for Shintech,* 21 SRR 1361, 1363–1364 (1982); *Application of U.S. Atlantic/North Europe Conference for SCM International, Ltd.,* 23 SRR 412, 414 (I.D., F.M.C. notice of finality, September 13, 1985).

The Commission has, of course, also held on numerous occasions that the law authorizing relief in these cases is remedial and is to be given a liberal interpretation in order to carry out its beneficial purposes. *Application of United States Lines (S.A.) for the Benefit of Miles Laboratories, Inc.,* 23 SRR 428, 431 (1985); *Application of Lykes Bros. to Benefit Texas Turbo Jet, Inc.,* 24 F.M.C. 408, 411 (1981); *D.F. Young, Inc.* v. *Cie. Nationale Algerienne de Navigation,* 21 F.M.C. 730, 731 (1979); see also *Nepera Chemical, Inc.* v. *Federal Maritime Commission,* 662 F.2d 18, 22 (D.C. Cir. 1981). In keeping with the spirit of this law, the Commission has relaxed technical requirements whenever possible and when no jurisdictional condition is involved. For example, although the law in question provides that the carrier applicant must file a "new tariff * * * that sets forth the rate on which the refund or waiver would be based" (section 8(e)(2)), the Commission has permitted carrier applicants to file new tariffs that varied substantially from earlier quoted but unfiled rates and that did not set forth the same rate on which refunds or waivers were based. Also, so long as the new tariff was effective at some time before the filing of the application, the Commission has not required that the new

tariff still be in effect at the time of the filing of the application.[2] Furthermore, if an application is filed timely originally but contains some technical defect and is sent back by the Commission's Secretary for correction, the Commission has granted such applications even if the application, after correction, is refiled more than 180 days after date of shipment.[3]

Notwithstanding the above examples of applications containing technical defects which have been allowed to be cured, the Commission has never gone so far as to grant an application when no new tariff in any form has been filed at all prior to the application, as the cases cited previously illustrate. On the contrary, the Commission has specifically stated as to the requirement that a new tariff be filed prior to the filing of the application:

> This requirement cannot be waived, and as much as the Commission might wish to grant relief in situations such as we have here, where the consequences of subsequent errors by the carrier fall upon the shipper, the Commission, whose jurisdiction is strictly limited by statute, has no power to grant the relief requested. *A.E. Staley Mfq. Co.* v. *Mamenic Line,* cited above, 20 F.M.C. at 643.

When an application is filed by a carrier which does not show that the new tariff has been filed, it is still possible sometimes to save the application from denial. Thus, if the application is filed within the 180-day period after date of shipment required by law (section 8(e)(4) of the Shipping Act of 1984), the carrier-applicant can file the new tariff and follow that filing with an amended or new application provided that the amended or new application is filed within the 180-day period. In other words, the jurisdictional deficiency can be corrected if the applicant acts in that fashion, and in past cases applicants have corrected such deficiencies by such a procedure. See, e.g., *Application of the East Asiatic Co., Ltd. for the Benefit of Black & Veatch International,* 20 SRR 1608, 1610–1611 (I.D., F.M.C. notice of finality, October 16, 1981).

[2] See *Application of Pacific Westbound Conference for Shintech,* cited above, 21 SRR at 1364 n. 3 (new tariff rate increased over quoted rate due to general rate increase or minor technical adjustment by carrier); SD No. 1081, *Application of Seawinds Limited for Pan International et al.* (I.D. January 18, 1984; F.M.C. notice of finality, February 28, 1984) (quoted rate of $900 "constructively" filed in new tariff as $820); SD No. 1288, *Application of U.S. Atlantic Ports/Italy Conference for Gyanenka SA* (I.D. January 30, 1985; F.M.C. notice of finality, March 8, 1985) (new tariff filed was $133 rate compared to intended rate of $115.50 because of intervening general rate increase); but cf. *Application of HapagLloyd AG for Windsor Industries,* 22 SRR 1579 (I.D.; F.M.C. notice of finality, February 6, 1985) (application denied; new tariff was $235 compared to intended rate of $220); *Application of U.S. Atlantic/North Europe Conference for SCM,* cited above, 23 SRR at 414–415) (new tariff of $143 compared to intended rate of $145 must actually go into effect at some time before application is filed.

[3] See *Application of Distribution Services Ltd. for the Benefit of Target Stores,* 26 F.M.C. 125 (I.D., F.M.C. notice of finality, December 4, 1983); *Application of Southern Pacific International, Inc. for the Benefit of General Motors Overseas Corp.,* 21 SRR 833 (I.D., F.M.C. notice of finality, June 11, 1982).

Applicant's Failure to File an Amended Application Timely

The present case is an example of one in which the above corrective procedure was applicable. OOCL's original application, as noted above, was not preceded by the filing of the new tariff but the application was filed on August 20, 1985, only 139 days after the date of the earliest shipment (April 3, 1985). Therefore, OOCL had 41 more days (i.e., until September 30, 1985) to file the new tariff and to file an amended application, which, by law, must follow the filing of the new tariff. Immediately upon assignment of the case to me, I wrote applicant's Pricing Analyst, Mr. Clark, who had filed the application, advising him of the situation and the need to file the new tariff and amended application by September 30. (See letter to Mr. Clark, dated August 30, 1985.) To give him more time and to prepare him for the letter which followed, I called Mr. Clark by telephone on the preceding day. (See letter cited at page one.) I advised him of the statutory requirements as to the filing of the new tariff and the 180-day period and of certain technical problems regarding OOCL's joining the tariff of a conference in the subject trade as they might affect the tariff-filing problem.

When the September 30 deadline passed and I heard nothing from applicant, I called applicant's Pricing Manager, Mr. Harris (Mr. Clark not being in the office that day) some time in early October. I was informed that a letter constituting an amended application had been prepared and was dated September 20, 1985 and that a new tariff had been filed by the conference before that date.[4] However, there was no record that such a letter had either been placed in the mail or received by the Commission. I therefore asked Mr. Harris to send a copy of the letter and a copy of the tariff page to the Commission's Secretary. Mr. Harris sent the letter and page on October 9, 1985. (See letter cited and envelope showing a postage date of October 9, 1985.)

Upon receipt of the September 20 letter, I telephoned Mr. Clark and advised him that it was necessary to furnish evidence that the letter had been placed in the mail by September 30 because of the statutory requirement that applications be filed within 180 days after shipment. Mr. Clark could not explain why a September 20 letter would not have been placed in the mail before September 30 and indicated that he would try to determine if there was any record of its having been mailed before that date. I followed the telephonic conversation with a confirming letter on October 22, 1985. In the letter I expressed sympathy with applicant's predicament in apparently failing to file the amended application on time and commended Mr. Clark for his honest admission that he could not furnish proof that the September 20 letter had been mailed on time. However, I gave Mr.

[4] The new tariff restoring the $900 rate for OOCL was filed by the Transpacific Westbound Rate Agreement (TWRA) whose tariff OOCL joined on May 1, 1985. See TWRA Tariff FMC No. 2, Revised Page 2983, effective September 16, 1985.

Clark additional time (until November 1) to try to locate evidence of timely mailing of the September 20 letter. I advised him that if he could not furnish such evidence, I would be bound by Commission precedent and law and would have to deny the application. However, I indicated that applicant had the right to file exceptions and ask the Commission to grant the application and suggested some matters that he might wish to bring to the Commission's attention in an attempt to overcome the late filing of the September 20 letter amending the original application. (See letter to Mr. Clark, dated October 22, 1985.)

On October 29, Mr. Clark telephoned and advised me that he could not furnish evidence showing that the September 20 letter had been placed in the mail before September 30, and that he would therefore exercise his right to file exceptions to the Initial Decision. The matter is therefore ripe for issuance of this Initial Decision.

Discussion and Conclusions

I regret that I can find no way in which to grant the application. The failure to file a new tariff prior to the application is a fatal jurisdictional defect as the many cases cited above consistently hold. As mentioned above, the defect can be cured if the applicant files the new tariff and follows that by filing an amended application within the 180-day period. However, it is not enough to file the new tariff only. The amended application has also to be filed before the 180-day period expires. The Commission has held that this 180-day requirement is also jurisdictional and that "180 days is a precise term that is not amenable to a variety of interpretations." (Footnote citation omitted.) *Application of U.S. Atlantic & Gulf-Jamaica Freight Association for Chiquita,* 22 SRR 1266, 1267 (1984). See also Special Docket No. 976, *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Condor Lines* (I.D. Dec. 27, 1982; F.M.C. notice of finality, January 28, 1983) in which the application was denied because it was filed 181 days after the date of shipment. Although the Commission has avoided technicalities and used liberal interpretations in order to grant applications whenever possible, as discussed earlier, it has never held that the 180-day requirement can be avoided. I am therefore prevented from finding that this application qualifies for approval.[5]

[5] One may argue that the Commission ought to overlook the fact that the amended application was filed only a few days late for the later shipments and that the Commission ought to allow the filing of the new tariff in September 16 to cure the defect in the original application. After all, in cases in which there are technical defects such as an incomplete explanation or absence of signatures in the original application, and the application, after correction, is later filed outside the 180-day period, the Commission relates the later filing back to the original filing, thus finding it to be timely. *Application of Southern Pacific International, Inc. for the Benefit of General Motors Overseas Corp.*, 21 SRR 833 (I.D., F.M.C. notice of finality, June 11, 1982); *Application of Distribution Services Ltd. for the Benefit of Target Stores*, 26 F.M.C. 125 (I.D., F.M.C. Order, 26 F.M.C. 123 (1983)). The problem, however, is that the law specifically requires that the application be filed *after* the new tariff, not before. Therefore, relating back the late-filed amended application to the date of the original application in this case would give effect to an application filed before the new tariff, contrary to the statute. Furthermore, the problem was not within the application form itself but with

Accordingly, the application is denied. OOCL may not refund $600 in connection with the three shipments on which OOCL charged the applicable tariff rate of $1,100 and must take steps to recover an undercharge of $200 on the one shipment on which OOCL charged the quoted rate of $900. OOCL shall report to the Commission on the action it has taken within the time period prescribed by the Commission if the Commission adopts or otherwise permits this Initial Decision to become effective.

(S) NORMAN D. KLINE
Administrative Law Judge

a requirement apart from the application. i.e., the filing of the new tariff. The only way in which the application could be granted in this case is if the filing of the new tariff (effective September 16, 1985), which fell within the 180-day period, were to be found to be a "constructive" filing of an amended application were held to relate back to the date of the new tariff. There is no precendent for such theories, however, in any previous Commission decision as far as I am aware.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1356

APPLICATION OF PHILIPPINES, MICRONESIA & ORIENT NAVIGATION CO. FOR THE BENEFIT OF HIMMEL INDUSTRIES

Deliberate decision not to file new tariff before shipment sailed is not the type of administrative or clerical error contemplated by section 8(e) of the Shipping Act of 1984.

The Initial Decision of the Presiding Officer is reversed and the application to waive collection of $15,665.58 in freight charges is denied.

De Wayne A. Lien for Philippines, Micronesia & Orient Navigation Co.

REPORT AND ORDER

February 12, 1986

BY THE COMMISSION: (EDWARD V. HICKEY, JR., *Chairman*; James J. Carey, *Vice Chairman*; Thomas F. Moakley, Francis J. Ivancie and Edward J. Philbin, *Commissioners*)

This proceeding is before the Commission upon its determination to review the Initial Decision issued by Administrative Law Judge Charles E. Morgan (Presiding Officer). That decision granted permission to Philippines, Micronesia & Orient Navigation Co. (PM&O), pursuant to section 8(e)(1), of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e)(1), to waive collection from Himmel Industries, Inc. (Himmel) of a portion of the freight charges applicable to three shipments of glycerine from Manila, Philippines, to United States West Coast ports.

BACKGROUND

On November 15, 1984, PM&O agreed, subject to booking, to file a reduced rate of $1,450 per 20-foot container applicable to industrial chemicals moving from Manila to U.S. Pacific Coast ports. On December 5, 1984, Himmel booked three 20-foot containers of glycerine on the M/V CONCORD V/34 which, according to PM&O, sailed from Manila on December 14, 1984. PM&O delayed filing the new rate until December 28, 1984, the date on which it received the confirmed or "on board" bills of lading in San Francisco. The application for waiver was filed June 12, 1985.

The Presiding Officer held that the application was filed within 180 days from the date of shipment and that the failure to timely file the

rate agreed upon was due to clerical inadvertence.[1] He accordingly granted the application.

DISCUSSION

The exchange of telexes between PM&O and its Manila agent shows that PM&O agreed to the $1,450 rate; that the rate was subject to booking; and that, on December 5, 1984, the shipper booked three containers of glycerine on PM&O's M/V CONCORD V/34.

Section 8(e)(1) of the Act authorizes refunds and waivers 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 . . . . 46 U.S.C. app. § 1707(e)(1).

PM&O admittedly "did not file the rate until its documentation department confirmed Bills of Lading shipments . . . ." PM&O Application at 2. In other words, filing was postponed until receipt in San Francisco of on board" bills of lading sent from Manila.[2] The delay in filing, therefore, appears to have resulted from a deliberate decision of PM&O to receive confirmation that Himmel's shipments had been placed aboard the M/V CONCORD V/34, rather than from "clerical inadvertence," as suggested in the application. Under these circumstances, no intent to amend the tariff before the vessel sailed could be attributed to PM&O and, consequently, no error can be found in the tariff in effect at the time of shipment which would support the grant of a waiver.[3]

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

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[1] Section 8(e) reads, in part:

> The *Commission may . . . permit* a common carrier . . . to refund a portion of freight charges collected from a shipper or to waive the collection of a portion of the charges from a shipper if—
>
> * * * * *
>
> (2) the common carrier . . . has, prior to filing an application for authority to make a refund, filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;
>
> * * * * *
>
> (4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

Rule 92(a)(3)(iii) of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.92(a)(3)(iii) define "date of shipments" as meaning "the date of sailing of the vessel from the port at which cargo was loaded."

[2] Two bills of lading issued in Manila, marked "Loaded on board December 13, 1984," are attached to the application.

[3] As noted above, the relevant bills of lading of record are marked "Loaded on board December 13, 1984." Lloyd's Voyage Record also shows a sailing date of December 13, 1984. Because the application for waiver was not filed until June 12, 1985, some doubt is raised as to whether the application was filed within 180 days from the date of shipment. However, the finding that section 8(e) of the Act does not apply to the facts renders any further inquiry unnecessary.

IT IS FURTHER ORDERED, That the Philippines, Micronesia & Orient Navigation Co. application for waiver of freight charges from Himmel Industries, Inc. in the amount of $15,665.58 is denied; and

IT IS FINALLY ORDERED, That this proceeding is discontinued.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–46

SOUTHEASTERN MARITIME COMPANY

v.

GEORGIA PORTS AUTHORITY

ORDER ADOPTING INITIAL DECISION

March 14, 1986

This proceeding was initiated by the filing of a complaint by Southeastern Maritime Company (SEMCO) alleging that the Georgia Ports Authority (GPA) terminal tariff violates section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. § 816, to the extent it: 1) attempts to exculpate GPA from responsibility for the negligence of its employees, and, 2) requires that GPA be made an additional named insured on liability policies covering stevedoring operations involving heavy lift equipment rented from GPA when no such requirement is reflected in the terminal tariff. The Commission's Bureau of Hearing Counsel intervened in the proceeding.

An Initial Decision (I.D.) has been issued by Administrative Law Judge Seymour Glanzer (Presiding Officer) finding that GPA has violated section 17 as alleged by SEMCO. Exceptions to the I.D. have been filed by GPA. SEMCO and Hearing Counsel have filed Replies to Exceptions.

BACKGROUND

The controversy between SEMCO and GPA arose out of an incident that occurred on April 19, 1981, at the GPA-operated terminal facility, Containerport, in Savannah, Georgia. A longshoreman employed by SEMCO, a stevedoring firm, was injured while loading a vessel, allegedly due to the negligent operation of a container crane by a GPA employee. The longshoreman filed suit in the state court against GPA and others. GPA filed a third party complaint against SEMCO for indemnification on the basis of the GPA tariff provision containing hold-harmless and indemnification clauses. The action was subsequently stayed by the court to allow the Federal Maritime Commission (FMC or Commission) to determine the validity of the GPA tariff provision. The longshoreman's claim was settled during the pendency of this proceeding but the GPA third party claim is still pending in state court.

INITIAL DECISION

The Initial Decision, issued subsequent to a hearing on the merits of the complaint, found essentially as follows with respect to the lawfulness of the tariff item and practices at issue.

Section IV of GPA's Equipment Rental Tariff No. 1–H[1] violates section 17 of the 1916 Act,[2] because it purports to exculpate GPA for its own negligence and to hold stevedores responsible for damages due to crane operations regardless of fault. Similarly, the practice of GPA in requiring stevedores using its facilities to obtain liability insurance and include GPA as a named insured is an unreasonable practice under section 17 because it is a requirement not set forth in the GPA tariff, and constitutes an extension of the exculpatory clauses of the tariff.

GPA's argument that the tariff provisions at issue are lawful because they are the result of arms-length bargaining is rejected. There is not sufficient equality of bargaining power between GPA and stevedores at the GPA facilities to render the minimal concessions,[3] granted by GPA in past negotiations over the tariff provision, a *quid pro quo* for the onerous burden that provision imposes on stevedores. This is just the kind of result frowned upon in Supreme Court and Commission cases where a public utility or equivalent uses its superior bargaining power to impose harsh terms and conditions on stevedores who are in need of a port's services. I.D. at 33.

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[1] GPA Equipment Rental Tariff No. 1–H, 2nd rev. p. 6, Section IV, Lessee Responsibility, provides:

When cranes, hoists, conveyors, lift trucks, tractors, and other equipment, including rigging supplied by Lessor, which are used in the moving or lifting of cargoes (hereinafter called "Leased Equipment") are rented or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.

Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse, and save harmless the Georgia Ports Authority and its employees against any and all loss or damage caused to or caused by said Leased Equipment, including any personal injury or death or property damage caused thereby, even though caused, occasioned, or contributed to by the negligence, sole or concurrent, of the Georgia Ports Authority or its employees; and should said Leased Equipment be damaged or destroyed while so leased (except when caused by natural perils such as windstorm, flood, fire, or earthquake, or by structural failure not resulting from operation of said equipment beyond its rated capacity), Lessee shall pay for all necessary repairs to or replacement of said equipment but shall not be responsible for damages resulting from loss of use.

It is incumbent upon the Lessee to make a thorough inspection and to satisfy himself as to the physical condition and capacity of the Leased Equipment, as well as the competency of the operator (including any operator supplied by Lessor with said equipment), there being no representations or warranties with reference to such matters.

[2] The Presiding Officer noted that section 10(d)(1) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(d)(1), is essentially a recodification of section 17 of the 1916 Act. I.D. at 2, n.2.

[3] As found by the Presiding Officer, "those concessions involve (l) a provision that the stevedore would not be liable for any down-time (loss of use) damages, (2) deletion of language which might be construed to make the stevedore liable for LHWCA benefits for the crane operator, (3) relieving the stevedore from liability for crane damage caused by 'force majeure' events, (4) relieving the stevedore from liability for damage to the crane caused by structural failure." I.D. at 17. The Presiding Officer also found "that none of these concessions would have been necessary absent the basic transfer of liability for negligence and the companion hold harmless and indemnification clauses." *Id.*

Crane operators are not borrowed servants of the stevedores because the stevedores, in practice, have little control over the operators in spite of the tariff provision language which imputes control of the crane to lessees. The stevedore has to accept the operator offered by GPA, and GPA retains total operational control over the cranes during the entire rental period because GPA, alone, decides who may operate the crane and the conditions which may give rise to operator removal and discipline. I.D. at 38.

Finally, the imposition by GPA of a requirement of insurance coverage by stevedores is a precondition of crane rentals and is required to be included in GPA's tariff. Moreover, the requirement is an extension of the exculpatory clauses in the tariff and is also an unreasonable practice. I.D. at 40.

GPA must cease and desist from the Shipping Act violations within 30 days of the date of a final decision in this proceeding. I.D. at 41.

POSITIONS OF THE PARTIES

GPA, in its Exceptions, argues that a borrowed servant relationship between the crane operator and SEMCO was created by virtue of the tariff and the underlying agreement with the stevedores utilizing GPA facilities.[4] This agreement is said to have been arrived at after arms-length bargaining with the stevedores who obtained sufficient concessions to justify the imposition of the hold-harmless and indemnification provisions. It is alleged that this *quid pro quo*, in connection with the actual practices of stevedore control of crane operations, lawfully creates a borrowed servant relationship. GPA therefore submits that the tariff is not exculpatory.

SEMCO supports the findings of the I.D. and urges their adoption. SEMCO maintains that stevedores do not, in fact, have effective control over crane operators at GPA facilities and that this variance between actual practice and the tariff is *per se* unreasonable under section 17. State law, which allows purely contractual imposition of "borrowed servant" liability, allegedly does not determine Shipping Act questions. SEMCO submits that the Presiding Officer correctly found that the negotiation sessions between GPA and stevedores did not result in sufficient consideration to stevedores to justify the imposition of the exculpatory tariff provision. The stevedores allegedly had no bargaining power and no choice but to accept this condition of GPA; there was no real *quid pro quo*.

Hearing Counsel also supports the findings of the I.D. and urges their adoption. It is argued that the facts surrounding crane rental practices at Containerport do not support GPA's assertion that a borrowed servant relationship was created. The tariff provisions that attempt to exculpate GPA

[4] A series of meetings was held in 1977 between GPA officials and regular port facility users, including SEMCO, to "renegotiate" the terms of the crane lessee responsibility clauses in GPA's tariff. *See*, I.D. at 13–19. No formal contract document resulted from those meetings.

from liability for its own negligence on this basis are therefore allegedly unreasonable and unlawful.

DISCUSSION

GPA's Exceptions to the Initial Decision are essentially rearguments of contentions already presented to the Presiding Officer and properly disposed of by him. The Initial Decision is supportable both in fact and in law. It will therefore be adopted by the Commission.

The I.D. accurately reflects Commission precedent and correctly concludes that GPA's exculpatory clauses violate section 17 of the 1916 Act. Although Commission case law generally holds that such exculpatory clauses, *i.e.*, those which purport to relieve a terminal operator for liability for its own negligence, are *per se* against public policy and therefore unreasonable,[5] the Presiding Officer here carefully evaluated all of the facts of record in reaching his determination. It is apparent here that crane operators at GPA facilities are, under no circumstances, under the effective control of stevedores.[6] Accordingly, a tariff provision, which states that they are and transfers liability on this basis, is violative of section 17.[7]

The weight of authority in this area of law also indicates that private negotiations between a port authority and stevedores cannot validate a tariff provision that transfers liability for crane operations on the basis of a "borrowed servant" fiction that does not reflect the actual practices at the terminal.[8] If agreements by stevedores to assume liability for crane operations are reflected in a tariff they must be *bona fide* and supported by sufficient consideration. A contract of adhesion cannot be cited to sustain the reasonableness of an exculpatory "borrowed servant" tariff provision.[9] Ample evidence supports the Presiding Officer's findings that the "negotiations" between GPA and SEMCO did not result in sufficient consideration flowing to the stevedores to support the challenged tariff provision.[10]

Finally, the Presiding Officer was also correct in finding that the untariffed insurance requirement imposed by GPA also violates section 17.[11] Indeed, GPA did not even take exception to this finding.

[5] *West Gulf Maritime Association* v. *The City of Galveston*, 22 F.M.C. 101, 103–4 (1979), *recon. denied*, 22 F.M.C. 401 (1980). While the Commission's decision in *I. Charles Lucidi d/b/a Lucidi Packing Co.* v. *Stockton Port District*, 22 F.M.C. 19 (1979), recognizes the possibility that, under certain circumstances, concessions by a port authority may justify exculpatory provisions in a port tariff, the facts of this case do not support its application here.

[6] *See*, I.D. at 19–25.

[7] *Stevens Shipping and Terminal Company* v. *South Carolina State Ports Authority*, 23 S.R.R. 684, 688 (1985).

[8] In *West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. 420, 422 n. 11 (1980), the Commission permitted such a transfer of liability on the bases that substantial benefits flowed to users of port cranes *and* that crane users had effective control over crane operations.

[9] *See, Bisso* v. *Inland Waterways Corp.*, 349 U.S. 85 (1955); *compare, West Gulf Maritime Association* v. *Port of Houston Authority*, 22 F.M.C. at 103.

[10] *See*, I.D at 13–19.

[11] *West Gulf Maritime Association* v. *The City of Galveston*, *supra*, 22 F.M.C. at 105.

THEREFORE, IT IS ORDERED, That the Exceptions to the Initial Decision filed by Respondent, Georgia Ports Authority, are denied, and;

FURTHER, IT IS ORDERED, That the Initial Decision issued in this proceeding is adopted, and made a part hereof, and;

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

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–46
SOUTHEASTERN MARITIME COMPANY

v.

GEORGIA PORTS AUTHORITY

The Port's practices under tariff provisions which purport to make Port employed crane operators the borrowed servants of stevedores and which seek to exculpate the port from liability for the negligence of those employees are unjust and unreasonable and in violation of section 17 of the Shipping Act, 1916.

Failure of the Port to include the named insured requirement in its tariff is a violation of section 17 of the Shipping Act, 1916. Also, the practice of requiring the stevedore to name the Port as an additional insured in liability policies is, on the facts presented, a violation of section 17.

John P. Meade, Lawrence G. Rosenthal, and *Edwin D. Robb, Jr.,* for Southeastern Maritime Company, complainant. George H. Chummily for

George H. Chamlee for Georgia Ports Authority, respondent.

John Robert Ewers and *Stuart James,* as Hearing Counsel.

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

On September 23, 1983, Southeastern Maritime Company (SEMCO), the complainant, filed a complaint pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. 821,[2] alleging violations of section 17 of the Shipping Act, 1916, 46 U.S.C. 816,[3] by Georgia Ports Authority (GPA), the respondent. The complainant requested that specified tariff matter published by GPA and particular practices engaged in by the respondent be found unlawful and that GPA be ordered to cease and desist from seeking to enforce those tariff provisions and from those practices. Reparation was not requested. GPA denied that either the tariff provisions or practices are unlawful.

THE PARTIES

SEMCO is a Georgia corporation and a subsidiary of Peeples Industries, Inc. Among other things, SECO is a stevedore, conducting operations in Savannah, Georgia, Charleston, South Carolina, and Jacksonville and Miami,

[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 pertinent provisions of section 22 of the 1916 Act have been retained, virtually intact, by provisions of sections 11 (a) and (b) of the Shipping Act, 1984, 46 U.S.C. app. 1710 (a) and (b).

[3] The pertinent provisions of section 17 of the 1916 Act appear in nearly identical form and substance in the provisions of section 10(d)(1) of the Shipping Act, 1984, 46 U.S.C. app. 1709(d)(1).

Florida. Peeples also controls East Coast Terminal Company (East Coast), a terminal operator with dock and warehouse facilities in Savannah.

GPA is a public corporation and instrumentality of the state of Georgia whose powers and authority are derived from the statute known as the "Georgia Ports Authority Act."[4] By that law it is empowered to develop and improve the harbors or seaports of Georgia for the handling of foreign, interstate and intrastate commerce and to foster and stimulate the shipment of freight through Georgia's ports.[5] In the exercise of those powers GPA is authorized to acquire and hold real and personal property and to do all those things necessary to carry out those powers[6] GPA is empowered to fix fees and charges for the use of its services and facilities.[7] GPA operates deep water terminal facilities at Savannah and Brunswick, Georgia. At the Savannah facility, GPA operates a container terminal called "Container port," which is equipped with six container cranes. The executive director of GPA acts as its general manager with the power usually attendant upon that position. The executive director is appointed by the members of GPA who, in turn, are appointed by the Governor.[8]

Hearing Counsel is an intervener in the proceeding.

There were 11 days of hearing. The record consists of about 1700 pages of transcript and 61 exhibits. Opening and answering briefs were submitted by all parties.

THE IMMEDIATE BACKGROUND

On April 19, 1981, Johnny Lee Hines, a longshoreman employed by SEMCO, was injured while the M/V ZIM TOKYO was being loaded by SEMCO at GPA's Containerport. On August 11, 1981, Hines filed a complaint against GPA and others in the Superior Court of Chatham County, Georgia,[9] alleging that he was struck by a container causing him to fall from a stack of containers to the dock below. He alleged that his injuries were caused by the negligence of the container crane operator, an employee of GPA. Invoking the Lessee Responsibility provisions of Section IV of its tariff, GPA filed a third-party complaint against SEMCO for indemnification. On June 14, 1983, the Superior Court action was stayed so that the Federal Maritime Commission could "rule on the validity of the [GPA's] hold harmless clause contained in its Terminal Tariff." Prior to issuing the stay, on July 1, 1983, the Superior Court, in an interim ruling, determined that the container crane operator "is not a borrowed servant and he is the employee of [GPA]."[10]

[4] Official Code of Georgia Annotated (O.C.G.A.) Vol. 40, Ch. 2, sec. 52-2-1 et seq.
[5] *Id.*, sec. 52-2-9 (16) and (18).
[6] *Id.*, sec. 52-2-9 (2), (3) and (10).
[7] *Id.*, sec. 5-2-31.
[8] *Id.*, sec. 5-2-5.
[9] Civil Action Nos. 17092-G, *Johnny Lee Hines v. The Atlantic Towing Company, et al.*
[10] Ex. 60.

(Hines' cause of action, including his wife's separate claim for loss of consortium, against GPA and Zim Lines, owner and operator of the ZIM TOKYO, was settled while this proceeding was being heard. Under that settlement: GPA paid Hines $320,000, directly, and paid Midland Insurance Company, SEMCO's Longshoreman's and Harbor Workers' Corporation Act (LHWCA) insurance carrier, $89,334.97 in satisfaction of Midland's subrogated lien for LHWCA benefits theretofore paid to Hines; Zim Lines paid Hines an additional $80,000. The settlement leaves standing GPA's third-party complaint against SEMCO. In memoranda requested by me and addressed to the specific issues whether the settlement has any effect upon the issues in this proceeding and whether the settlement is violative of GPA's tariff, all parties agree that the settlement does not affect this proceeding and that it does not contravene GPA's tariff. The cases cited in the memoranda support those conclusions. Accordingly, the fact of that settlement will not be addressed further herein.)

THE BROADER BACKGROUND

Since its inception in 1945, GPA has leased cranes with operators and since 1963 GPA has had a tariff provisional[11] under which stevedores were made responsible for supervision and control and for liability for the negligent acts of personnel furnished by GPA to operate equipment supplied by GPA.[12]

Effective May 31, 1973, GPA's rental tariff contained a provision which provided, in part, that the charge therefor "includes the crane operator(s) who shall be under the sole supervision of the party renting the crane" and further that "the Terminal assumes no responsibility for claims, losses, costs or expenses by reason of property damage, personal injury or death, which may result from use of its cranes, except that caused by structural failure."[13]

On September 20, 1976, in an unpublished opinion in *Bacon v. The Georgia Ports Authority,* CV 475–297, the United States District Court for the Southern District of Georgia, declared that the cited provision was insufficient to constitute an indemnity agreement under Georgia Law and indicated it would be inclined to dismiss a third-party complaint filed by GPA against a stevedore in a case involving an allegation of negligence on the part of a crane operator.[14] The court reasoned: [15]

> The tariff clause involved here is exculpatory rather than indemnificatory. Parties to indemnity agreements must say what they mean; courts will not say it for them. The tariff does not

[11] Tr. I–10.

[12] Among other things, container cranes, gantry cranes and transtainers (vehicles which position containers) are furnished by GPA with an operator. The complaint and evidence focus only on the cranes.

[13] GPA's Terminal Tariff, Sec. X, I–F, Item 1480A.

[14] The district court judge withheld decision on the motion until an evidentiary hearing was concluded.

[15] *Bacon v. The Georgia Ports Authority,* slip opinion, p. 7.

> contain a word about holding harmless or indemnifying the Terminal. To agree to hold one free from any claim or liability is only a waiver of the right to sue the other party for negligence in the performance of the contract. See *Rome Builders Supply, Inc. v. Rome Kraft Company,* 104 Ga. App. 488, 489.
>
> Exculpatory language in an equipment rental agreement which only says that lessor "assumes no responsibility for claims" etc. resulting from its operation should not be expanded by interpretation into a hold harmless agreement where indemnity is sought from lessee for loss arising from the claim against lessor by a third person injured through its negligence.

To overcome the *Bacon* opinion, GPA revised its tariff by publishing a new Lessee Responsibility clause effective December 15, 1976.[16] An indemnification and hold harmless provision entitled "Section IV, Lessee Responsibility," was incorporated at p. 6 of GPA's Equipment Rental Tariff No. 1–H, as follows:

> When cranes, hoists, conveyors, lift trucks, tractors and other equipment used in the moving or lifting of cargoes (hereinafter called "leased Equipment") are rented or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.
>
> Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse, and save harmless the Georgia Ports Authority and its employees against any and all loss or damage caused to or caused by said Leased Equipment, including any personal injury or death caused thereby, even though caused, occasioned, or contributed to by the negligence, sole or concurrent, of the Georgia Ports Authority or its employees; and should said Leased Equipment be damaged or destroyed while so leased, Lessee shall pay for all necessary repairs or replacement, and, if damaged, shall pay rental for such damaged Leased Equipment until same is returned to the Georgia Ports Authority in the same condition as received.
>
> It is hereby understood and agreed that in the event lessee rents Leased Equipment which is operated by an employee of the Georgia Ports Authority, such operator shall be under the

[16] The tariff provision ruled upon in Bacon had been revised even before the court ruled in that case. Effective October 1, 1975, the equipment leasing provision read:

> 2. Lessee assumes all responsibility for damages to equipment leased.
>
> 3. The operator or operators shall be under the sole supervision of the party renting the equipment. The facility assumes no liability for personal injury, death, or property damage except that resulting from structural failure of equipment, nor shall the facility be liable for consequential damages suffered by lessee or stevedore as a result of mechanical failure of any of the equipment leased herein, and lessee or stevedore, by leasing said equipment, does hereby waive and relinquish any claim for consequential damages against the facility as a result of mechanical failure.

Ex. 8, GPA Equipment Rental Tariff, Fourth Rev. P. 5, sec. II, Rules and Regulations.

> direction of the Lessee and the operator shall be considered as the agent or servant of the Lessee and Lessee shall be responsible for the acts of such operator during the time of rental or lease. It is incumbent upon the Lessee to make a thorough inspection and to satisfy himself as to the physical condition and capacity of the unit, as well as the competency of the operator, there being no representations or warranties with reference to such matters.

Section IV was issued by GPA and it became effective without any prior consultation with the stevedoring contractors who operated in Savannah.

Members of the Savannah Maritime Association (SMA), a trade organization of steamship agents and stevedores doing business in Savannah, questioned the validity of the 1976 tariff revision and after ensuing discussions between the stevedores and GPA [17] the tariff evolved into its present form, effective November 1, 1977. The Lessee Responsibility section currently provides: [18]

> When cranes, hoists, conveyors, lift trucks, tractors, and other equipment, including rigging supplied by Lessor, which are used in the moving or lifting of cargoes (hereinafter called "Leased Equipment") are rented or leased to others, it is expressly understood that such Leased Equipment will be operated under the direction and control of the Lessee, and the Lessee shall be responsible for the operation thereof and assume all risks for injuries or damages which may arise from or grow out of the use or operation of said Leased Equipment.
>
> Lessee, by acceptance of such Leased Equipment, agrees to fully protect, indemnify, reimburse, and save harmless the Georgia Ports Authority and its employees against any and all loss or damage caused to or caused by said Leased Equipment, including any personal injury or death or property damage caused thereby, even though caused, occasioned, or contributed to by the negligence, sole or concurrent, of the Georgia Ports Authority or its employees; and should said Leased Equipment be damaged or destroyed while so leased (except when caused by natural perils such as windstorm, flood, fire, or earthquake, or by structural failure not resulting from operation of said equipment beyond its rated capacity), Lessee shall pay for all necessary repairs to or replacement of said equipment but shall not be responsible for damages resulting from loss of use.
>
> It is incumbent upon the Lessee to make a thorough inspection and to satisfy himself as to the physical condition and capacity of the Leased Equipment, as well as the competency of the oper-

[17] There is disagreement whether the discussions involved the members of SMA in their individual capacities or qua SMA. GPA prefers the view that it was dealing with the organization. SEMCO insists that each stevedore spoke for itself. These events will be treated in greater detail, *infra*.

[18] GPA Equipment Rental Tariff No. 1–H, 2nd rev. p. 6, Section IV, Lessee Responsibility.

ator (including any operator supplied by Lessor with said equipment), there being no representations or warranties with reference to such matters.

THE STATUTE

As pertinent, section 17 of the Shipping Act, 1916, provides:

Every . . . other person subject to this act[*] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the [Commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

* A person, including a government instrumentality which operates terminal facilities is an "other person subject to this act." *West Gulf Maritime Association* v. *Port of Houston Authority*, 21 FMC 244, 259 (1978), aff'd without opinion sub nom., *West Gulf Maritime Ass'n* v. *F.M.C.*, 610 F.2d 1001 (D.C. Cir. 1979), cert. den'd, 449 U.S. 822 (1980) (WGMA 1). GPA, in its answer to the complaint admits that it is a terminal operator and that it is subject to the provisions of the Shipping Act, 1916, 46 U.S.C. 801 et seq. and the jurisdiction of the Commission.

POSITIONS OF THE PARTIES

SEMCO contends that GPA established, observes and enforces unjust and unreasonable regulations and practices relating to or connected with the receiving, handling, storing and delivery of property in violation of section 17 of the Shipping Act, 1916, by means of the Lessee Responsibility clauses of GPA's Tariff because those clauses exculpate GPA from responsibility for the negligence of GPA's employees and by means of a requirement, dehors the Tariff, that GPA be made an additional named assured on liability policies covering stevedoring operations involving heavy lift equipment (cranes) rented from GPA.

GPA contends that its Tariff is not exculpatory because, as implemented, the Lessee Responsibility Clauses' "hold harmless" provisions apply only to GPA crane operators while working as loaned servants under the direction and control of the stevedore. GPA also urges that the Lessee Responsibility clauses are not unjust in that they are the product of arms length bargaining and agreement with SMA and SEMCO. With respect to the additional named assured requirement, SEMCO alleged it was necessitated by the refusals, by SEMCO and another stevedore, to defend GPA under the Lessee Responsibility clauses in suits brought by longshoremen. Further, GPA asserts that the requirement was never made a condition precedent for renting a crane.

Hearing Counsel contends that GPA's practices do not create a borrowed servant situation, that the Lessee Responsibility clauses are exculpatory

and that GPA's actual practices are unjust and unreasonable in violation of section 17.

FACTS [19]

I. GENERAL

1. GPA is a public terminal operator. At Savannah, Georgia, GPA owns and operates the only dock facilities on the Georgia coast which are equipped with container handling cranes and modern container storage facilities. These container facilities are called "Containerport." The nearest comparable facilities to Containerport are located at Charleston, South Carolina, and Jacksonville, Florida.

2. Except for a requirement that GPA be named as an additional assured on lessee's liability policies, the terms and conditions under which GPA rents cranes to stevedores are established in tariffs published by GPA. There are no separate written rental agreements or leases. As noted, the Lessee Responsibility Section of GPA Equipment Rental Tariff No. 1–H sets forth certain terms and conditions applicable to the rental of gantry cranes and other cargo handling equipment, but not container cranes. The slack is picked up by GPA's Terminal Tariff 1–F, FMC–T8 and its "Container Rules and Charges." Item 1480 of the Container Rules, "Charge For Rental of Container Handling Cranes," sets the rates for container and gantry cranes and other specialized container handling equipment, but also incorporates by reference the cited Lessee Responsibility Section of the Equipment Rental Tariff. In addition, Item 1480 explicitly provides:

> The charges shown above include Operator(s) who shall be under the sole supervision of the party renting the equipment. [20]

3. The December 15, 1976, revision of the Lessee Responsibility Section was a quick response to the *Bacon* decision. GPA characterizes this revision as an attempt to eliminate exculpatory language and to replace it with a hold harmless and indemnity clause. This revision also included a more explicit borrowed servant clause than the tariff provision construed by the court in the *Bacon* case.

4. The 1976 revision also made the lessee responsible for structural failure for the first time and, also, for the first time, made lessees responsible for downtime and loss of use. It also imposed upon the lessee an obligation

[19] N.b. The use of this heading is not intended to be restrictive. Some findings of fact appear under other headings and may not be mentioned here, while others, for editorial reasons or for purposes of clarity or convenience, may be repeated here. Also, for convenience, the findings of fact will generally conform to the sequence of proposed findings submitted by GPA.

[20] The words after "Operator(s)" are deemed redundant inasmuch as the Lessee Responsibility Section is incorporated in the Container Rules. Indeed, by proposing a finding that "[Section IV] governs the equipment lessees responsibility to GPA for casualties involving the leased cranes which occur during the leasing term," GPA concedes the surplusage.

to hold GPA harmless for the negligence, sole or concurrent, of GPA's employees.

II. QUID PRO QUO

5. The question of the validity of the 1976 revision was submitted to SMA's attorneys, whose research revealed that the hold harmless features of the Tariff might be invalid. The attorneys reasoned that the situation involving the publication of the hold harmless clause was analogous to one found by the United States Court of Appeals for the 9th Circuit to be an example of imposition of a condition of duress by one who has superior bargaining power. The advisability of instituting an action for a declaratory judgment seeking removal of the hold harmless clause as opposed to awaiting a suit for damages to test the validity was considered but no course of action seems to have been decided upon at that time—late May, 1977.[21]

6. Thereafter, about July 1, 1977, there was a meeting between GPA officials and attorneys, on the one hand, and on the other, attorneys whose clients included SMA and a stevedore member of SMA, Strachan Shipping Company. Whether or not the attorneys formally represented SMA at that meeting is not clear, but, it is clear that this meeting led to a subsequent one on July 8, 1977.

7. The July 8, 1977, meeting was attended by the same GPA officials and attorneys who attended the July 1st. meeting.[22] Also present were two SEMCO executives, executives of other SMA members and the two attorneys described in No. 6, above.

8. The witnesses who attended the July 8th meeting and who testified differ in their recollection of the details. No minutes were kept during the meeting, but there exist two documents contemporaneous to that event. One is a set of handwritten notes kept by a GPA attorney. The other is a letter, dated July 11, 1977, from a Strachan executive to a superior confirming earlier oral advice about the discussions during the meeting. Basing its position on these documents, GPA seeks a finding that the meeting was an SMA and GPA meeting. It is clear that GPA so regarded the meeting at that time. It is equally clear that all the people on the other side of the table were influential members of SMA and that one of those people was the incumbent president. Nevertheless, SEMCO urges that there has been no showing that SMA was represented at that meeting by a formal group or committee holding delegated authority to bind the membership.

9. Placing its reliance on the two documents referred to in No. 8, *supra,* GPA posits that:

[21] Ex. 17.

[22] The GPA officials included the executive director and two senior staff members.

(a) GPA's goal[23] in the negotiations was obtaining SMA's approval or acceptance of the tariff clauses which "sought to transfer responsibility for the crane operator's negligence to the equipment lessee," and that SMA was prepared to accept those clauses provided they achieved certain concessions from GPA on other features of the tariff.

(b) SMA's primary goal in the negotiations was avoiding lessee responsibility for having to pay charges for a crane while it was inoperable following an accident during the rental term. A second goal was to avoid the potential for liability to the GPA crane operator for benefits under the LHWCA which might result from a determination that the crane operator would be considered the agent or servant of the stevedore during the lease term. A third goal was to avoid responsibility to GPA for physical damage to the crane by having GPA insure against such damage however caused.

(c) To satisfy their concerns and allow SMA to achieve their goals, GPA agreed to amend the Lessee Responsibility Section to state that the lessee "shall not be responsible for damages resulting from loss of use" (first goal). GPA satisfied SMA's second goal by deleting the following portion of the 1976 Lessee Responsibility Section:

> It is hereby understood and agreed that in the event lessee rents Leased Equipment which is operated by an employee of the [GPA], such operator shall be under the direction of the Lessee and the operator shall be considered as the agent or servant of the Lessee and Lessee shall be responsible for the acts of such operator during the time of rental or lease.

SMA's third goal was obtained by a compromise whereby GPA agreed to amend the tariff to relieve stevedores from the responsibility for damage to the crane caused by "force majeure." Also, as a result of the meeting, GPA amended the tariff to provide that the lessee would not be responsible for damage to the crane or its rigging resulting from structural failure not due to overloading.

10. After the July 8th meeting GPA redrafted the Lessee Responsibility Section. On September 2, 1977, the revised Section was presented to SMA at a meeting. The minutes of the meeting show that after the Strachan representative explained the revision to the members, a motion to accept the revision, with changes, was passed. SEMCO representatives were present. Thereafter, the current version of Section IV went into effect without further discussion or objection by SMA or any of its members.

11. GPA proposes that the various meetings held during the summer of 1977 be treated as negotiations between GPA and SMA and its members and that the final version of Section IV be treated as a bargain made by the participants. Indeed, GPA urges that material in the Strachan's representative's file shows that "the acceptance of third party liability result-

[23] GPA also relies on a letter written by an SMA attorney to SMA's president reporting on the July 1st meeting to support its position on this point.

ing from crane operator negligence was used as a bargaining chip by the SMA negotiators to achieve their own goals . . ., and that the revised Section IV was an acceptable compromise from SMA's standpoint."

12. It is not necessary to decide whether the meetings during the summer of 1977 were meetings of GPA and SMA, qua SMA, although the evidence shows that GPA had every reason to believe that it was talking to the leading members of SMA, individually, and to SMA as the representative of the stevedoring community of Savannah, if not, de jure, certainly de facto. The critical fact is not whether there was a formal SMA delegation attending the discussions. The overriding issue is whether there was bargaining back and forth among equals or whether one party to the negotiations, GPA, had the power to drive a hard bargain and exercised that power.

13. GPA's underlying purpose in seeking to transfer liability for operator negligence and to be held harmless and indemnified by the stevedores was its determination to avoid the expense and uncertainty of continued litigation over fixing legal liability for accidents occurring while the crane was under lease.[23] It was made clear to all those persons who, figuratively, sat across the table from GPA that these features of the Lessee Responsibility Section of the Tariff were non-negotiable.[24] They knew, in advance of the discussions, that GPA had the "only game in town"[25] and that GPA would not yield on the transfer of liability and hold harmless issue.

14. The fact that GPA would countenance no departure from those two features of Section IV—transfer of liability for the negligence of the GPA employed crane operator and the stevedores agreement to hold harmless and indemnify GPA for all loss or damage caused by the crane operator's negligence—gives perspective to the concessions made by GPA during the negotiations. As found,[26] those concessions involve (1) a provision that the stevedore would not be liable for any down time (loss of use) damages, (2) deletion of language which might be construed to make the stevedore liable for LHWCA benefits for the crane operator, (3) relieving the stevedore from liability for crane damage caused by "force majeure" events, (4) relieving the stevedore from liability for damage to the crane caused by structural failure. It is evident, however, that none of those concessions would have been necessary[27] absent the basic transfer of liability for negligence and the companion hold harmless and indemnification clauses. Simply put, the concessions merely ameliorated some of the potential additional burdens placed upon the stevedore by virtue of the transfer of liability for crane operator negligence. There is no credible evidence

[23] See, e.g., Tr. II–100.

[24] See, e.g., Ex. 54K, p. 3.

[25] Ex. 17.

[26] No. 9(c), *supra*.

[27] It would be idle to speculate whether, under Georgia law, a lessee could be made liable for damage caused by "force majeure" or structural defects. N.b., prior to the *Bacon* opinion, GPA's Tariff did not transfer liability for structural failure.

that the stevedores traded away the transfer of negligence and hold harmless and indemnification features of Section IV for the concessions made. The evidence does show that they took away whatever scraps[28] they could. It was "the best we are able to get, our bargaining position considered," the Strachan representative said to the President of SMA in his letter of October 7, 1977.[29]

It is also manifest that SEMCO and other stevedores, including the firm that employed the then president of SMA, went away from the meeting dissatisfied and determined to legally challenge the transfer of liability for negligence and hold harmless clauses when this need arose. Silently reserving their legal rights in these circumstances does not (despite GPA's suggestion that it does) constitute an unconscionable act, an ambush, or business ethics of the lowest order on the part of SEMCO.

I find, therefore, that the concessions do not represent a consideration given by GPA and accepted by the SMA (qua SMA or by its members, individually) for the clauses of Section IV which transfer liability for operator negligence and require crane users to hold harmless and indemnify GPA for damages caused by the crane operators negligence.

III. BORROWED SERVANT

15. A proposed finding submitted by GPA (No. 8) concerning an East coast Tariff provision is rejected as immaterial and irrelevant.[30]

16. The equipment rental practices of other east coast ports extending from Hampton Roads, Virginia, to Miami, Florida, vary. Some lease with operators, others do not. The nearest of those ports are Charleston and Jacksonville. At Charleston, operators are furnished with the cranes and Item 135 of Terminal Tariff 1–A, effective October 1, 1978,[31] as pertinent, states that "the operator will be under the control of the party renting the equipment and the Authority assumes no liability for personal injury or property damage resulting from operation of the equipment except that resulting from structural failure. At Jacksonville cranes are furnished without operators.

[28] Some of the concessions clearly were throwaways on the part of GPA, which had no real interest in their retention in the Tariff. E.g.—structural damage making the stevedore liable for accidents due to structural defects was not provided for in the *Bacon* Tariff. Moreover the Port of Charleston, GPA's major competitor leasing cranes with operators, did not at any pertinent time, make the stevedore liable for accidents due to structural defects. (GPA is extremely sensitive to tariff provisions of its competitors and reacts accordingly.)

[29] Ex. 54P.

[30] After the 1977 version of Section IV was published by GPA, East Coast followed suit by copying those provisions into its Tariff, with some variations which may have made the leasing provisions more stringent than GPA's. However, East Coast never did rent cranes. East Coast deleted the said tariff provisions shortly before the hearing began. The fact that an affiliate of the complainant used substantially identical tariff provisions to those of GPA does not make the GPA provisions valid. Neither does the deletion of those tariff provisions make GPA's tariff provisions invalid.

[31] Seventh Amended, p. 27–B.

17. The crane operators at Container Port are full-time GPA employees who are trained, hired and fired by GPA. They are assigned to particular jobs by GPA supervisors. Once on the job, to the extent that they receive or need any direction or orders to perform their tasks of loading or unloading, they take those orders from the stevedore. Thus, e.g.—the stevedore will give the operator the so-called "game plan" which informs the operator of the sequence of loading and unloading so that the operator can properly position the crane at the appropriate hold or dock location.

GPA currently employs 14 container operators who are available to operate the 6 container cranes. When an operator receives his assignment from GPA, he proceeds to the crane to prepare it for operation.[32] Sometimes, during the preparation or, even during operations, the operator is accompanied by an oiler.[33] If the crane is not already in position, the operator will move it along the berth to the point where he can start with the "game plan." The operator receives no directions or orders from the stevedore in moving the crane along the berth, or in bringing the crane to rest. However, GPA construes the lease period to begin after preparation of the crane is completed and it is this beginning which triggers Section IV. It is undisputed that the lease period ends when the stevedore releases the operator at the conclusion of the stevedoring operation. During the lease period, GPA gives no orders or directions to the operator, except in an emergency to avoid an accident.[34] The stevedore gives orders to the operator by radio, hand signal or flag signal. The stevedore does not tell the operator how to operate the equipment, because the stevedore does not know how to do that. The stevedore does tell the operator generally what it wants done and, particularly, what has to be done to accomplish the result.[35]

The operator of a container crane sits in a cab nearly directly above the spreader bar, a device which attaches to the container and holds it in place during the loading or unloading operations. A container crane operator, therefore, requires less direction from the stevedore than a gantry crane operator whose perspective, particularly into the hold of a vessel, is not as good.

As indicated, the crane operator may be directed as to what to do, but he cannot be told how to do it. In that respect he acts independently and outside the control of the stevedore. He may even ignore or violate the orders of the stevedore and thereby negligently cause an accident, but, as GPA construes Section IV, this would not absolve the stevedore from liability.

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[32] There may be variations, but the illustration in the text is typical.

[33] An oiler is an assistant and, sometimes, an apprentice operator. While not altogether clear, it seems the training of an operator takes place entirely during that person's employment as an oiler.

[34] There is no evidence of such emergency—or that such orders were given.

[35] An example of the particular would be telling the operator that the container needs to be moved so many feet to the right, left, forward, etc.

This curious paradox is illustrated by the testimony of GPA's Director of Operations which appears in the transcript of April 11, 1984. He was asked the following questions on direct examination by GPA's counsel and supplied the following answers at Tr. 26–28:

> Q. Now, I want to pursue that a little further though. Suppose I'm a stevedoring contractor, and I come to you and I say, "You've got a container crane operator named Joe Smith. I just don't like the guy and I don't want him working on my job." And what would your reaction be to that situation?
>
> A. In that case, the supervision, assistant superintendent, if he came to me and relayed through pier supervision, Pat Ward, or his superintendent, you know, "We've got a problem here with the stevedore and the crane operator fussing with each other. They don't like each other," you know, and really it doesn't have anything to do with the competency of the operator; it doesn't have anything to do with the confidence of the stevedore. They just don't like each other, and he takes that operator, you know, period. He doesn't have a choice. He'll eventually have to get along with him. That's our position.[36]
>
> Q. I'm a stevedoring contractor, and I come to you and I say, "You've got a container crane operator named Joe Smith, and he has not been following the orders that we give him. You know, he wants to do everything his own way, and he has been overruling some of our people on the job, and we object to him." What would be your reaction to that?
>
> A. We would immediately put him off the job. We had a case, an actual case, of that happening. A stevedore came to the supervision and said, "The man's not paying attention. He actually created a safety hazard because he was not following directions," and he actually hurt somebody. We pulled the man off, and we didn't put him back on that ship for some time. We went through a very in-depth retraining program, but that was a clear case where the stevedore was absolutely right. The man wasn't qualified; he shouldn't have been there, and they pulled him off the job.
>
> Q. Okay. Do you know how the man got on the job in the first place if he were not qualified?
>
> A. We, we trained him, and we thought he was qualified, and I think the technical qualifications were probably as good as any operator, but the mental attitude, listening to the stevedore, left something to be desired, and that was the problem with this operator. He did not listen to the stevedore like he should have.

[36] Two GPA witnesses testified that, sometimes, crane operators are not assigned to particular jobs if a stevedore objects. The circumstances under which those events may have occurred are not as plain and explicit as those in the cited testimony and must yield to the Director of Operations' authoritative answer.

> Technically he was—there was nothing wrong with him, from a technical standpoint or functioning on the crane. He just wouldn't listen to the stevedore.

On cross examination, Hearing Counsel asked a single question of the Director of Operations. The answer to that one question reveals the inequity of GPA's practices under the Lessee Responsibility provisions of the tariff. The following appears at Tr. 30:

> Q. In the situation that you testified to where the crane operator didn't listen to the directions of the stevedore, he wouldn't pay attention to the flagman's directions; if an accident had occurred because he refused to follow those directions, in your opinion, whose responsibility would that have been?
>
> A. The stevedore.

This matter of competency is a material element of GPA's practices. There is a fundamental contradiction between the plain words of Section IV and the construction sometimes given those words,[37] which goes beyond the Director of Operations' mere semantic distinction between "mental attitude" and "technical qualifications."[38] The Tariff provides that the stevedore must "satisfy himself as to . . . the competency of the operator (including any operator supplied by lessor with said equipment), there being no representations or warranties with reference to such matters." Not only do the responses of the Director of Operations subsume a warranty of competency, thus making the practice contrary to the Tariff, GPA's Assistant Executive Director testified explicitly that GPA represents and warrants that the operator is properly trained and that, to the extent the Tariff represents there is no warranty of competency, the Tariff does not conform to the facts.

By warranting competency and by giving the stevedore no choice in the selection of an operator, the stevedore is effectively placed in a Catch 22 situation. Although the tariff requires the stevedore to satisfy himself concerning operator competency, GPA allows the stevedore no such option. Rather, if he is not happy with an operator, he has the burden of disproving competency to GPA's satisfaction. As seen, this is no easy task. In the anecdote provided by the Director of Operations, that GPA official measurably avoided characterizing the crane operator, (who adamantly refused to follow the putative master's instructions and who not only was creating safety hazards, but had "actually hurt somebody") as incompetent. His only problem in the eyes of that official (and, therefore, GPA) was that

[37] E.g. The tariff would seem to relieve GPA of liability for negligence of *all* of its employees, other than operators furnished with equipment. The testimony establishes that the fixed construction of the Tariff by GPA would not make the stevedore liable for the negligence of any GPA employee other than an operator who accompanies the equipment.

[38] In the context of his responses, it is obvious that "technical qualification" is a euphemism for competency.

the operator's mental attitude left something to be desired. But, according to GPA, none of this absolves the stevedore from liability for the injuries caused by this operator, because he was "qualified."

Accordingly, I find that the evidence falls far short of showing that the performance of GPA matches the promise of the tariff. It is clear that the direction and control which the stevedore may or does exercise over the crane operator is superficial and minimal. He cannot reject an unsuitable operator[39] and must rely on GPA to discipline an insubordinate one. GPA has simply not relinquished any control over the crane operator and awareness of this fact pervades and dominates the ongoing triangular relationship of GPA, stevedore and operator. Although the stevedore may relay functional directions to the operator, the stevedore does not thereby become the operator's master for GPA has chosen to retain that role and not transfer it by deed as it has in print.

IV. NONSPECIFIC MATTERS GENERALLY BEARING ON QUID PRO QUO AND BORROWED AGENT

17. There was a great deal of testimony, concerning the impact of Section IV on insurance coverage, premiums, rates and liability. Those who testified, on both sides of the issue, had varying degrees of expertise. They also testified factually.[40] Predictably, GPA's witnesses minimized the additional premium expense encountered by SEMCO because of Section IV and one offered the view that the impact of insuring against crane operator negligence would be greater on GPA than on the stevedore because crane operations are higher risk than other portions of a terminal operator's activities and that such operations are lower risk than a stevedore's break bulk operations or operations using ship's gear instead of shore based cranes. SEMCO's witnesses urged that it, or any other stevedore, would experience substantial increases in insurance costs if its insurance carrier had to pay for a loss occasioned by crane operator negligence and that stevedores stood in jeopardy of being uninsurable if there were an exceptional single loss or repeated losses due to such causation. The facts that these witnesses testified to have greater significance than the hypotheses, assumptions and conclusions reached. It is a fact that SECO's comprehensive general liability insurance premiums are increasing because of Section IV. It is also a fact that if GPA did not include Section IV in its Tariff and did not thereby transfer liability for the negligence of crane operators, GPA could obtain insurance coverage and could pass that cost on to users of the cranes by way of appropriate tariff charges.

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[39] There is other evidence that stevedores pragmatically are inhibited from asking for a different operator than the one assigned to the job by GPA.

[40] Although SEMCO is the real party in interest in this proceeding, its legal fees are underwritten by its liability (and LHWCA) insurance carrier.

18. There have been only six monetarily significant crane related personal injury claims made by third parties over the last ten years and only two of those six involved container cranes. One of those two was the *Bacon* case ($151,000 settlement, approximately). The other was the Hines case ($410,000 settlement, approximately). Another (non-container crane) was settled for $55,000. Three others (non-container cranes) are still pending in court. There have been some claims made by GPA against crane users. Most were made under forerunners of current Section 1V. One claim, for about $15,000 is pending.

19. GPA proposes a finding of fact concerning SEMCO's contention that because GPA owns and controls the only container cranes in the Savannah port it is in a position to dictate onerous terms and conditions upon its captive customers.[41] The finding proposed by GPA is that no evidence has been introduced to show that GPA has carried on its business in this manner and that there is evidence to refute SEMCO's contention. Earlier, particularly at Nos. 11 through 14, inclusive, and No. 16, I found to the country.[42] Apparently, GPA places its support for its views that there was evidence to refute SEMCO's contention on testimony that GPA is highly sensitive to its competitive position in relation to other east coast ports and that GPA is aware that SEMCO and other Savannah stevedores also act as stevedores at competing ports and are in a position, therefore, to draw business away from GPA if dissatisfied with GPA's terminal services. It is true that GPA is sensitive to competition from other ports but there is no credible evidence to support a finding that SEMCO or other stevedores who serve Savannah have the ability to choose the port of call for any vessel.

20. There is insufficient evidence of the leasing practices of private lessors of cranes in the Savannah area upon which to make a finding whether or not their cranes are usually leased with operators and, if so leased, whether those operators are placed under the control of the user under the terms of the private lessors' lease agreements.

V. NAMED ASSURED REQUIREMENT

By way of introduction, it is noted that there is nothing in GPA's tariff, which requires lessees to name GPA as an additional insured on lessee's insurance policies.

[41] It should be noted that the fact that GPA is in a position to impose harsh terms and conditions upon its captive customers does not depend solely on the fact that only GPA can offer container cranes. GPA is a public utility for purposes of regulation by this Commission and, as such, may be presumed (or, at least, inferred) to be in a position to drive hard bargains. *West Gulf Maritime Association* v. *Port of Houston Authority,* 22 F.M.C. 420, 433 (198), aff'd without opinion sub nom., *West Gulf Maritime Ass'n* v. *F.M.C.,* 652 F.2d 197 (D.C. Cir. 1981), cert. den'd., 454 U.S. 893 (1981) (WGMA II) and cases cited therein.

[42] *Infra,* at No. 21, it will be seen that GPA again brought its unequal strength to bear upon the stevedores, generally, and SEMCO, in particular, in connection with its requirement that it be named an additional insured on crane users liability insurance policies.

21. After SEMCO refused to defend GPA in the *Hines* case, as requested by GPA under Section IV, case and after Strachan acted similarly in another case, on November 18, 1981, GPA sent letters to Savannah stevedores "requesting" that GPA be named as an additional insured on the following policies purchased by stevedores:

> 1. Comprehensive General Liability with minimum limits of $200/500 M Bodily Injury and $200 M Property Damage.
> 2. Stevedores Legal Liability with a minimum limit of $500 M. [Property Damage—3rd party]
> 3. Umbrella Liability where the primary limits do not attain the minimum limits required.[43]

The "request" was made in order to provide GPA with additional security for the financial obligations which GPA deemed the stevedores to have incurred under GPA's Crane Rental Tariff.[44]

All Savannah stevedores, except two, met GPA's demand. One of the two was SEMCO.[45] SEMCO and GPA discussed the matter over a period of time, without a satisfactory resolution to GPA. So, on June 14, 1982, GPA reinforced its "request." GPA advised SEMCO, by letter, that it was going to discontinue certain services in connection with equipment rentals until such time as SEMCO complied. The letter read:

> As discussed, effective June 16, 1982, the Georgia Ports Authority will discontinue providing other than required services or operations in connection with the rental of any of our heavy lift equipment until such time as you comply with our request to be added as a named insured to both your Comprehensive General and Stevedores Legal Liability policies regarding such rental.
> The discontinuation of such extra services will include but not be limited to the following:
>
> > Transporting longshoremen and/or equipment from the ground to the vessel and return by means of a spreader bar or any similar device attached to our cranes. [46]

Among the reasons SEMCO had not previously complied with GPA's request was the reluctance of SEMCO's comprehensive general liability insurance carrier to provide that kind of coverage. That reluctance was engendered by the fact that by naming GPA as an additional insured, SEMCO and its carrier would waive any right of subrogation against GPA for GPA's negligence.

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[43] Exs. 29 and 29A.

[44] *Id.*

[45] Until informed at the hearing, GPA believed all the others did as they were notified to do. SEACO was the other of the two and, as of the hearing, SEACO still had not obtained a policy naming GPA as an additional insured.

[46] Ex. 37.

The promise to discontinue the "extra service" was viewed as a serious threat by SEMCO, as GPA was aware it would be.[47] Because of the fear engendered by that threat, SEMCO implored its comprehensive general liability carrier to name GPA as an additional insured which that carrier ultimately, albeit reluctantly, did. However, when renewal of the policy came up, the carrier again refused to name GPA as an additional insured. This led to another letter, on June 3, 1983, in which GPA once more threatened to cut off "performing" the "extra service" it characterizes "special or hazardous."[48] It is fair to say that this notification induced a state of near panic, on the part of SEMCO and its insurance broker, because a containership was due to be unloaded in the next few days. SEMCO's broker once again was able to obtain a certificate, showing GPA as an additional named insured, which was hand delivered to GPA in time to work the ship. Since then, GPA rescinded the requirement that it be a named insured with respect to the legal liability policy because, substantively, it was not to GPA's legal advantage to continue to be so named on a third party property damage liability policy.

The practice of transferring longshoremen and their equipment from the ground to the ship and return is one of long standing, going back almost to the inception of Container Port in 1971. When the container cranes were first installed no one considered using the spreader bars for that purpose. But, as information trickled in from other container ports of that kind of use, the stevedores asked GPA to install a cage on top of the spreader bar to allow the longshoremen to ride safely. GPA initially asked for indemnification from the stevedores out of concern that someone might fall, but that concern disappeared long ago. There is no evidence that any longshoreman injury or any third party property damage was ever occasioned by longshoremen riding the spreader bar.[49]

Thus, it is clear that riding the spreader bar was neither special, hazardous, gratuitous, nor an extra service. Rather, it was something that stevedores, GPA and crane operators, by custom and usage, had come to regard as an authorized use of the crane under the terms of the tariff.

DISCUSSION AND CONCLUSIONS

As indicated by subheadings in the previous section, three primary issues are presented. Simply put, they are:

[47] A GPA employee testified that if longshoremen could not be transferred by spreader bar it would slow some stevedoring operations by as much as to 25 to 50 percent. GPA's Director of Operations discounts the belief that the "extra service" is a time saver of any significance but he was well aware that stevedores believe that a containership cannot be worked economically without using spreader bars to transfer longshoremen.

[48] Ex. 40. If the language of the letter is taken literally, it raises the question whether it constitutes an admission, by GPA, that the crane and the operator remain under the control of GPA while under lease.

[49] There was an incident in which a longshoreman was injured when a spreader bar dropped on him, but there was nothing to show a connection between that injury and *riding* a spreader bar.

1. Whether there was a quid pro quo for the exculpatory (indemnification) clauses of GPA's tariff.

2. Whether GPA's crane operators became the borrowed servants of the stevedores.

3. Whether it was reasonable for GPA to require stevedores to name GPA as an additional insured on liability policies.

As a useful guide to the discussion which follows it should be noted that the reasonableness of the tariff provisions and practices at issue turn on the particular facts presented and peculiar to the terminal industry. "Cases are not decided nor the law appropriately understood, apart from an informed and particular insight into the factual circumstances of the controversy under litigation." *WGMA II, supra*, 22 F.M.C. at 454.

I

QUID PRO QUO

It is well settled that exculpatory clauses in terminal tariffs—i.e., those provisions which seek to require a tariff user, such as a stevedore, to indemnify or hold a port harmless for loss or damage occasioned by the negligence, in whole or in part, of the port—are unjust and unreasonable and in violation of section 17 of the Shipping Act, 1916, as a matter of law. *West Gulf Maritime Association v. The City of Galveston*, 22 F.M.C. 101, 103–104 (1979), recon. den'd 22 F.M.C. 401 (1980).

It has been suggested, however that an exculpatory tariff provision might relieve a terminal operator from liability for its own negligence without violating section 17 if something of value is given by the port in return. Specifically, in *I. Charles Lucidi dba Lucidi Packing Co. v. Stockton Port District*, 22 F.M.C. 19, 29 (1979), it was said that, "To the extent that the provisions of [the tariff] would relieve the Port from damage for liability to property caused in whole or in part by fault of the Port, and without a *quid pro quo* of any kind, such provisions are unjust and unreasonable, in violation of section 17 of the Act."

It is by no means certain that the suggestion in *Lucidi, supra*, is embodied in the law. But, assuming, without deciding, that the giving of something of value by GPA to users may make an otherwise unjust provision just and reasonable, the discussion is not thereby exhausted. It becomes necessary to explain why exculpatory clauses in terminal tariffs are deemed unlawful in order to place "quid pro quo" in proper context.

The underpinning of the principle that exculpatory clauses in terminal tariffs are unlawful is the well established rule of law that a port is a public utility for purposes of Shipping Act regulation and recognition that public utilities are in a position to drive hard bargains and impose harsh terms on their customers. See n. 41, *supra*. See, also, *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955).

As found, Facts, Findings Nos. 5 through 14, inclusive, GPA took a hard and fast position at the outset of its "negotiations" with SMA and its members that the exculpatory provisions were non-negotiable and cast in concrete. Under those circumstances the slight concessions made by GPA appear to be just the kind of result frowned upon by the Supreme Court in *Bisso, supra*, and by the Commission in *Lucidi, supra*, and in *West Gulf Maritime Association v. The City of Galveston, supra*, where a public utility or equivalent uses its superior bargaining power to impose harsh terms and conditions on stevedores who are in need of a port's services.

Accordingly, I find that there was no quid pro quo for the exculpatory clause in GPA's tariff. However, this determination does not resolve the more basic issue of the validity of GPA's practices. This finding only means that GPA cannot absolve itself from liability for loss or damage due to its own negligence under the offending tariff provision. It does not decide whether, on the evidence presented, the negligence of the Port's crane operator reasonably may be attributed to the stevedore—i.e., whether the crane operator is the borrowed servant of the stevedore. I now turn to that issue.

II

BORROWED SERVANT

The question whether a borrowed servant relationship has been established in particular circumstances is not always easy to answer. Before proceeding with the exercise of providing that answer, it is appropriate to explain what is meant by a borrowed servant in this context. Briefly, the practice of transferring liability for employee negligence from the employer of that employee to another, who is the user of equipment operated by that employee, is known in the law as the borrowed servant doctrine. *WGMA II, supra*, 22 F.M.C. at 452.

A borrowed servant relationship may be created by contract; see, e.g., *Bowman v. Fuller*, 84 GA. App. 421 (1959), or by a tariff provision. *Rorie v. City of Galveston*, 471 S.W. 2d 789 (Tex. 1971), cert. den'd 405 U.S. 988 (1972); *WGMA II, supra*.[50]

However, it is not the tariff provision, standing alone, which is determinative of the borrowed servant issue and its legality under the Shipping Act. The examination is broader because it looks into the *practices* of the port. But this broader examination does not enlarge the issue, itself, which remains narrow. As was said in *WGMA II, supra*, 22 F.M.C. at

[50] It was noted, earlier, that, in the *Hines* case, the Superior Court issued an interlocutory ruling that the container crane operator was not the stevedore's borrowed servant, but the employee of GPA here urges that the ruling was made without consideration of the effect of the tariff on the 1977 negotiations. In view of the discussion which follows in the text it is unnecessary to address the issue of the effect of that ruling on this Commission.

452, "[t]he narrow issue presented is whether it is an unjust and unreasonable practice for ports [footnote omitted] to rent cranes together with crane operators in the employ of and paid by the port, to stevedores under tariff terms and conditions which require the stevedores to control and supervise the operators and to assume responsibility and liability for the negligent acts of the operators while the operations are under the stevedores supervision."

I started this section with the observation that it is not easy to answer the question whether a borrowed servant relationship has been established. One reason for this remark is that different fora have rendered what appear to be diametrically opposite conclusions in seemingly identical or similar fact situations. The common element in all of those cases is an equipment operator who receives signals or directions from the putative employer.

Thus, for one example, in *Standard Oil Company v. Anderson*, 212 U.S. 215 (1909), a winch operator who was hired and paid by a dock owner who sought to make the winchman the borrowed servant of the stevedore. The winchman depended upon the stevedore to give signals and directions for the proper operation of the equipment. The Supreme Court held that this was not enough to transfer control of the employee from one master to another. It reasoned, 212 U.S. at 225–227:

> The winchman was, undoubtedly, in the general employ of the defendant, who selected him paid his wages, and had the right to discharge him for incompetency, misconduct or any other reason. In order to relieve the defendant from the results of the legal relation of master and servant it must appear that that relation, for the time, had been suspended and a new like relation between the winchman and the stevedore had been created. The evidence in this case does not warrant the conclusion that this changed relation had come into existence. For reasons satisfactory to it the defendant preferred to do the work of hoisting itself, and received an agreed compensation for it. The power, the winch, the drum and the winchman were its own. It did not furnish them but furnished the work they did to the stevedore. That work was done by the defendant, for a price, as its own work, by and through its own instrumentalities and servant, under its own control.
>
> Much stress is laid upon the fact that the winchman obeyed the signals of the gangman, who represented the master stevedore, in timing the raising and lowering of the cases of oil. But when one large general work is undertaken by different persons, doing distinct parts of the same undertaking, there must be cooperation and coordination, or there will be chaos. The giving of the signals under the circumstances of this case was not the giving of orders, but of information, and the obedience to those signals showed cooperation rather than subordination, and is not enough to show that there has been a change of masters. . . . Of course in such cases the party who employs the contractor indicates the

> work to be done and in that sense controls the servant, as he would control the contractor, if he were present. But the person who receives such orders is not subject to the general orders of the party who gives them. He does his own business in his own way, and the orders which he receives simply point out to him the work which he or his master has undertaken to do. There is not that degree of intimacy and generality in the subjection of one to the other which is necessary in order to identify the two and to make the employer liable under the fiction that the act of the employed is his act.

For another example, most recently, the Court of Appeals for the Fourth Circuit reached the same conclusion in substantially similar circumstances to those which pertained in *Standard Oil Company v. Anderson*. In *Raymond Watson v. Lambert's Point Docks, Inc.*, 1985 AMC 1102 (4 Cir. 1984), the court did not find a sufficient basis for the transfer of vicarious liability from a terminal operator to a stevedore where the transfer was attempted to be accomplished under tariff provisions similar to those encountered here. Placing its reliance on *Standard Oil Company v. Anderson*, the court iterated, 1985 AMC at 1105:

> The mere fact that an employer gives directional signals and operational information to a particular employee, however, does not imply that the requisite control exists, thereby transferring the employee into a "borrowed servant."

Nevertheless, for another example, this Commission did find that a borrowed servant relationship was created in similar circumstances in *WGMA II, supra*. In *WGMA II*, however, there was much more than a tariff provision and the giving of signals and directions by the stevedore, not the least of which was the stevedore's admissions that they had supervision and control over the crane operator.[51] *WGMA II, supra*, 22 F.M.C. at 442. This was crucial to the decision, 22 F.M.C. at 452:

> Moreover, the arrangement under the tariff is not illusory and is not imposed for the purpose of escaping liability for one's own negligence. The crane operators do, in fact, come under the supervision and control of the stevedore and they operate the cranes only under the directions of a supervisory stevedore employee.

In this connection, the *WGMA II* initial decision stressed the following indicia of dominion and control by the stevedore, 22 F.M.C. at 454:

[51] It should be noted that among other factors considered in *WGMA II* were the absence of monopolistic conditions in the crane rental industry, 22 F.M.C. at 422; the financial benefits obtained by stevedores (e.g., lower insurance costs), 22 F.M.C. at 453. The evidence adduced here does not show the absence of monopolistic conditions or, with any degree of persuasiveness, that any financial benefits accrued to the stevedore. These are however, only some of the criteria which are considered, and as the discussion indicates, not the controlling criteria in this case.

> Here, the ports hold themselves out to provide cranes to stevedores and to have a pool of crane operators available to operate those cranes under the direction, control and supervision, of the stevedores. *Stevedores need not accept the operator offered by the port, but are free to choose from any qualified operator in the pool. It is not part of the ports' undertaking to operate cranes for stevedores or to retain any operational control over the cranes during the rental period. [Emphasis supplied.]*

It is readily apparent that in direct contrast to the conditions which prevailed in Texas, here the stevedore must accept the operator offered by the port and that the port retains total operational control over the cranes and their operators during the entire rental period because GPA, alone, decides who may operate the crane and the conditions which may give rise to operator removal and discipline. Facts, Findings Nos. 15 and 16, particularly the latter. See, also, n. 48, *supra*.

I find that GPA's practices do not conform to the provisions of its tariff and that there has been no effective nor valid transfer of supervision and control over crane operators from the port to the stevedore. The crane operators are not the borrowed servants of the stevedores.

III

NAMED ASSURED REQUIREMENT

Under authority of section 17 of the Act, Part 533 of the Commission's regulations, 46 CFR 533.1 et seq., sets forth rules and regulations for the filing of tariffs by persons engaged in carrying on the business of furnishing terminal facilities. Section 533.3, 46 CFR 533.3, requires terminal operators, such as GPA, to file and keep open to public inspection a schedule or tariff showing *all* its rates, charges, rules and regulations relating to or connected with the receiving, handling, storing or delivery of property at its terminal facilities.

Whether it was GPA's position from the outset, and continuing through the close of the hearing, that the named insured requirement—i.e., that SEMCO and other stevedores name GPA as an additional insured on liability policies—did not have to be published in the GPA tariff is not entirely certain. It is certain, however, that in its opening brief GPA concedes that the named insured requirement must be included in the Port's tariff. At p. 30 of that brief, GPA makes the concession, albeit somewhat elliptically, this way: "If it is GPA's intention to require users of its equipment to include GPA as an additional insured, then this requirement must be included in GPA's equipment tariff. 46 § CFR 533.3."

The matter of the named insured requirement cannot be dropped there, because, despite this concession which is tantamount to an admission of violation of section 17, GPA continues to urge that the requirement is

neither exculpatory nor unjust and unreasonable so long as it is not made a condition for leasing equipment.

This is the entire argument made by GPA (opening brief at pp. 29–30), "Towage contracts requiring that the barge owner name the tower as an additional assured, with a waiver of right of subrogation against the tower, have been upheld against the attack that such a provision is merely an indirect exculpatory clause and void as against public policy. *Dillingham Tug & Barge Corporation v. Collier Carbon & Chemical Corporation*, 707 F.2d 1086 (9th Cir. 1983); *Fluor Western, Inc. v. G & M Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971)."

Those cases do not provide any support to GPA's position in this proceeding. They do not hold, as GPA seems to suggest they do, that exculpatory clauses dictated by one having superior bargaining power are not void as against public policy. The Fifth Circuit decision, upon which the Ninth Circuit relied, explicitly points out that the monopolistic conditions in the towing industry which prevailed at the time the *Bisso* doctrine[52] was enunciated no longer exist. The Fifth Circuit, however, emphasized that "If Bisso does apply then *the clauses would be unenforceable* . . .," *Fluor Western, Inc. v. G & M Offshore Towing Co., supra*, 447 F.2d at 39. As found, GPA is a public utility; as a monopoly, it has the power to drive hard bargains, independent of its status as a public utility; and it has exercised that power to exculpate itself from its own negligence. The insistence that SEMCO and others name the port as an additional insured was designed to be and is merely an extended implementation of the exculpatory clauses of the tariff. See, e.g., pp. 10–11, supra.

GPA is wrong in saying that the named insured requirement is not a condition for leasing equipment. Manifestly, it was intended to alter the rights of users of the cranes. If a user who provided the coverage as required by GPA could transport longshoremen on the spreader bar and a user who did not provide that coverage could not lift longshoremen, then the conditions of equipment leasing were changed by this requirement.

Accordingly, I find that GPA's practice of requiring that it be named an additional insured on stevedore liability policies is a violation of section 17 of the Shipping Act, 1916.[53]

[52] The Supreme Court's decision in *Bisso v. Inland Waterways Corp., supra*, held that exculpatory provisions in towing contracts were unenforceable. Its decision was based on two public policy factors. "The Court wished to discourage negligence by making wrongdoers pay for damage they cause, and the Court also wished to protect those in need of services from being overreached by others who have the power to drive hard bargains. [Footnote omitted.]" *Dillingham Tug v. Collier Carbon Chemical Corp., supra*, 707 F.2d at *1089*.

[53] This conclusion should not be construed to mean that under no conceivable circumstances would a tariff provision, or other device appropriate to the circumstances, calling for a port to be named as an additional insured, be deemed unlawful.

ORDER

It is ordered that within 30 days after this decision becomes administratively final or is approved or adopted by the Commission, that the respondent, Georgia Ports Authority, cease and desist and thereafter refrain from the acts and practices found to be in violation of section 17 of the Shipping Act, 1916 (and, therefore, in violation of section 10(d)(l) of the Shipping Act, 1984—see n. 3, *supra*).

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–33

SECTION 19 INQUIRY, UNITED STATES/ARGENTINA AND UNITED STATES/BRAZIL TRADES

March 25, 1986

This proceeding was instituted by Order of Investigation (Order) served October 2, 1984, pursuant to section 19(1)(b) of the Merchant Marine Act of 1920, 46 U.S.C. app. § 876(1)(b),

> . . . for the purpose of (1) determining whether, in fact, conditions unfavorable to shipping exist in the foreign ocean borne trade between the United States and Argentina and/or between the United States and Brazil; and (2) if such conditions are found to exist, fashioning an appropriate remedy.

The Commission's Order cited informal complaints it had received of problems encountered in these trades by United States flag and third flag carriers, as well as shippers, and expressed concern that past proceedings involving approval of commercial pooling agreements may have been too limited in their focus.

The proceeding was assigned to an Administrative Law Judge, with authority to determine the type of hearing most appropriate to the Commission's purposes. Eleven parties participated in the proceeding: two United States flag carriers, five Brazilian or Argentine flag carriers, one third flag carrier, one trade organization of shippers, the Executive Agencies of the United States,[1] one conference of carriers and the Commission's Bureau of Hearing Counsel. These parties submitted voluminous statements of fact and rebuttal statements, opening briefs and memoranda of law. The filing of final briefs was, however, suspended by order of the Presiding Administrative Law Judge, in response to a request by the Executive Agencies filed on April 15, 1985.

At the same time, the Executive Agencies filed a Motion To Suspend The Proceeding (Motion) in its entirety. The Agencies argued that further proceedings by the Commission might be detrimental to their pursuit of U.S. foreign maritime policy in discussions concerning current bilateral agreements[2] with Brazil and Argentina.

[1] The "Executive Agencies" are the Departments of Transportation, Justice, State and Commerce and the United States Trade Representative.

[2] The U.S./Brazil "Memorandum of Consultation," originally entered into on March 7, 1970, and renewed in October 1983, was then due to expire on December 31, 1985. The U.S./Argentine "Memorandum of Understanding," dated March 31, 1978, is of unlimited duration. The Departments of State and Transportation

Continued

Upon consideration of the Executive Agencies' Motion and the Replies thereto, the Commission decided not to discontinue the proceeding at that time but rather to attempt to alter its form, making it less adversarial and more fact-finding in nature, in order to better meet its original objectives.[3] The Commission therefore issued a Notice of Intent to Restructure Proceeding (Notice) on June 19, 1985. The Notice invited the parties to the proceeding and others to comment on the proposed restructuring.[4] In an attempt to broaden the range of participants in the proceeding, the Notice, along with a letter from the Commission's Acting Secretary soliciting comments, was served on more than 130 shippers participating in these trades and carriers participating in the geographically proximate trades. The Notice was also published in the *Federal Register*, 50 Fed. Reg. 64047 (June 24, 1985), and served on all parties to the proceeding.

All but one of the existing parties to the proceeding filed comments in response to the Commission's Notice. Only the Executive Agencies, among the parties, did not comment. And despite the Commission's efforts to elicit public comment on this matter, responses to the Notice were filed by only two other persons.[5] One of those responses, from Chilean Line, a carrier in a geographically proximate trade, advises that it "does not desire or believe it would be useful to comment or participate" in the proceeding.

The only response from the shippers served with the Notice came from the Caterpillar Tractor Company which advises that transportation costs in these trades for earthmoving equipment had increased since 1981, while the company had been able to reduce its costs, again with respect to such equipment, in all other trades. Caterpillar also states that its costs to the East Coast of South America are considerably higher than its costs to the West Coast of South America, the Far East, and Europe. Caterpillar attributes the "disparity to the non-competitive ocean carrier environment created by the cargo reservation law on southbound cargoes." These policies also allegedly affect Caterpillar's northbound rates and sources for materials.

The responses from the existing parties generally comment unfavorably on the substance of the Commission' proposal, and some disparage the Commission's motivation and impartiality. Only one of the existing parties comments favorably on the proposal.

Companhia de Navegacao Maritima Netumar, a Brazilian flag carrier, terms the proposed restructuring "wasteful," stating that the record is com-

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have expressed their desire to renegotiate these "bilateral agreements" with the Governments of Brazil and Argentina.

[3] The Notice also discussed and rejected the contention of the Executive Agencies that the Commission is obliged to discontinue or postpone action under section 19(1)(b) based upon the direction of the Executive Agencies. *See* Notice of Intent to Restructure Proceeding, pages 7–10.

[4] The Executive Agencies' Motion to Suspend the Proceeding was held in abeyance pending the receipt of comments and further Commission action.

[5] Unrelated to the Notice or this proceeding, one letter from a shipper expressing dissatisfaction with carrier service and pricing in this trade, addressed to the writer's Congressman, was forwarded to the Commission for response.

plete, and taking issue with the Commission's "offhand statement" of the purpose of the proceeding which it views as prejudicially predetermined to find fault with Argentine and Brazilian government actions.

United States Lines, S.A. (USL) characterizes the proposed restructuring as "misguided," noting that the Commission appears to be "frustrated" that the proceeding has not shown the existence of unfavorable conditions and is mistakenly blaming the process. USL views the Commission as having suggested that it has sole power to conduct U.S. foreign policy in maritime relations as well as gratuitously advising the public that the President's foreign policy views would be given consideration. The language of the Notice, USL states, raises problems of prejudgment, suggesting that the Commission seeks to compile a record to support its conclusions. USL suggests that the proceeding be terminated.

The Argentine carriers, Empresa Lineas Maritimas Argentina, S.A. (ELMA) and A. Bottacchi, S.A. de Navegacion C.F.I.I. (Bottacchi), take issue with the Notice largely on grounds of legal theory. They object to the Commission's "strained interpretation" of its section 19(1)(b) regulations which in their view amounts to Commission deference to White House communications *only*, an interpretation which they characterize as without support in fact, law or the record.

ELMA and Bottacchi view the 1978 U.S.-Argentine Memorandum of Understanding as a binding obligation which implicitly delegates to the Maritime Administration, and through it to the Department of Transportation, the President's power to suspend or terminate section 19(1)(b) proceedings which they see as being accorded by the Commission's rules. These carriers also argue that the President has authority under section 19 (2) and (3), 46 U.S.C. app. § 876 (2) and (3), to suspend or terminate Commission proceedings or actions under section 19.[6] ELMA and Bottacchi further suggest that the Executive Agreements which exist in these trades are legally equivalent to treaties and may therefore supersede a federal statute, *i.e.*, section 19. In any event, these carriers see no need for more participants or facts in this proceeding, arguing that additions to the record would only be redundant and would provide "new irritants." They urge that the proceeding either be suspended or reactivated as is.

Companhia de Navegacao Lloyd Brasileiro (Lloyd Brasileiro) states that the record is complete and that the removal of sanctions as an issue would not affect the adversarial nature of the proceeding. The Brazilian carrier argues that U.S. shippers seek to blame ocean carriers for their inability to market their goods in Brazil, rather than the U.S. deficits, the value of the dollar, inflation, and other economic forces. The Commission's desire for participation by additional shippers and carriers is said

[6] The Commission discussed and rejected this argument in the Notice of Intent To Restructure the Proceeding, noting that the Presidential authority referred to in section 19 (2) and (3) addresses rules affecting shipping issued by other agencies, not those promulgated by the Commission under section 19(1)(b). *See* Notice of Intent to Restructure Proceeding, pages 8–9.

to be unsupported by any evidence that others want to be heard. The issues in the proceeding allegedly are not ones of "legislative facts" but are of specific, not general, applicability. Lloyd Brasileiro urges termination of the proceeding, however, because, "the Big Picture is too complicated" to be defined in this proceeding.

Hearing Counsel suggests that the proceeding be terminated as an adjudicatory proceeding, but be continued as a non-adjudicatory, fact-finding investigation under the Commission Rules of Practice and Procedure at 46 C.F.R. 5 502.281–291, after completion of the Executive Agencies' negotiations for new Executive Agreements in the trades.

The Chemical Manufacturer's Association (CME) supports the Commission's statement of its authority in the Notice and states its readiness to supply additional factual information for the record. CMA has no objection to the receipt of additional submissions from others, including present parties.

A.S. Ivarans Rederi, a third-flag carrier, states that it is unaware of what more it can do in this proceeding but is willing to cooperate with the Commission to the "fullest extent reasonable."

DISCUSSION

The response to the Commission's Notice of Intent to Restructure the Proceeding at best was disappointing. None of the comments constitute actively positive responses to the Commission's proposed restructuring of the proceeding.[7]

It is particularly noteworthy that the Executive Agencies, the Administration's policymakers in the area of international trade and commerce, failed to respond to the Notice. We also take notice of the fact that the Executive Branch has recently negotiated a one-year extension of the U.S./Brazil Memorandum of Consultation with the Government of Brazil. That Memorandum will now remain in effect until December 31, 1986.

Upon consideration of the response and comments to the Notice of Intent to Restructure Proceeding, in light of the regulatory objectives which prompted the initiation of this proceeding, as well as recent changes in circumstances, the Commission has decided to discontinue this proceeding.

The recent extension of the U.S./Brazil bilateral agreement, the Executive Agencies' apparent dissatisfaction with the existing proceeding, as evidenced by their Motion to Suspend the Proceeding, the unsupportive nature of the responses to the Commission's Notice, including the lack of response from the Executive Agencies, and the apparent lack of concern generated among shippers by the Commission's Notice all support termination. Finally,

[7] We are, moreover, concerned with the tone of some of the comments. The intemperate language of some commeners, and the disparaging speculation focused on the Commission's motivation rather than the substance of its proposal to restructure this proceeding, do not comport with the standards of professional conduct which the Commission has a right to expect of counsel who appear before it.

given the circumstances, continuation of the proceeding would not appear consistent with the efficient and effective use of Commission resources.

Termination of the proceeding is, of course, without prejudice to reinstitution, either by complaint or on the Commission's own motion, should future circumstances warrant. For this reason, a suspension of the proceeding, as requested by the Executive Agencies, would serve no purpose not better accommodated by discontinuance. Discontinuance should serve, however, to remove the Executive Agencies' concern that this proceeding would impede renegotiations of the existing bilateral arrangements with the Governments of Brazil and Argentina.

THEREFORE, IT IS ORDERED, That the Executive Agencies' Motion For Suspension of the Proceeding is denied; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–40

MEDAFRICA LINE S.P.A.

v.

AMERICAN WEST AFRICAN FREIGHT CONFERENCE AND ITS MEMBER LINES

NOTICE

March 26, 1986

Notice is given that no appeal has been taken to the February 18, 1986, 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) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 83–40

MEDAFRICA LINE, S.P.A.

v.

AMERICAN WEST AFRICAN FREIGHT CONFERENCE AND ITS MEMBER LINES

COMPLAINT DISMISSED WITH PREJUDICE

Finalized March 26, 1986

By motion filed February 10, 1986, Complainant, Medafrica Line, S.p.a. requests that the complaint it filed against the Respondent, American West African Freight Conference and fourteen named members of that Conference,[1] be dismissed with prejudice against reinstitution of the proceeding. Hearing Counsel is an Intervenor in the proceeding.

The complaint was filed September 7, 1983. As amended for the second time, the complaint alleged violation of sections 15 and 32(c) of the Shipping Act, 1916, 46 U.S.C. app. 814 and 831(c), and section 528.3(b) of the Commission's Regulations governing self-policing requirements for section 15 agreements, 46 CFR 528.3(b).

During the course of the proceeding, the Complainant was declared a bankrupt by an Italian Court in Genoa on October 24, 1984. This resulted in the issuance of an order suspending the procedural schedule of the case because, among other things, the authority of counsel for the Complainant to act for the Complainant was not clear. See, e.g. Order of November 14, 1984.

Ultimately, counsel for the Complainant received specific written instructions from the Trustee in Bankruptcy to reenter an appearance in the proceeding and to withdraw the complaint with prejudice. (A copy of those instructions is attached to the motion.) Counsel advises that the preconditions enumerated by the Trustee in the written instructions have been satisfied and that he is, therefore, authorized to reenter his appearance and file the instant motion.

Hearing Counsel does not oppose the motion. The Respondents consent to the granting of the motion.

[1] Societe Ivoirenne De Transport Marine was not named a Respondent in the complaint. It was added as a Respondent pursuant to the first amended complaint. The amended complaint deleted AFEA Line Limited which was named a Respondent in the complaint.

The motion is granted. The complaint is dismissed with prejudice against its reinstitution.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–13

MARCELLA SHIPPING COMPANY LTD.

NOTICE

March 26, 1986

Notice is given that no exceptions have been filed to the February 18, 1986, 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) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85–13
MARCELLA SHIPPING COMPANY LTD.

Respondent Marcella, a vessel-operating common carrier by water in the Florida-Bahamas trade, found to have violated section 18(b)(3) of the Shipping Act, 1916, by misrating 187 items on five voyages occurring between September and October 1980, and by misrating two shipments on one voyage in November 1983. Marcella also found to have violated section 18(b)(1) of the Act by operating seven voyages between July and October 1983 after its tariff had been cancelled by the Commission.

Marcella's defenses, namely, that it did not violate law intentionally, that it relied upon its agents, that it did not understand tariff law, that it was a struggling company serving a poor, third-world nation, are either unsupported by evidence or are relevant only with respect to the issue of penalties to be assessed.

The record does not contain much evidence relating to aggravating and mitigating factors on the question of penalties. However, it does show that Marcella acted with apparent indifference to and disregard of tariff law for a period of time and similarly toward the Commission's investigator, although on the last two voyages of record in November 1983, Marcella appears to have correctly rated all shipments. Moreover, Marcella presented no witnesses and no evidence of mitigating factors at the hearing.

To deter future violations and to encourage compliance with law without jeopardizing the continued existence of an apparently small carrier, Marcella is assessed $150,000 in penalties. However, if Marcella pays $20,000 over a four-month period, it may petition the Commission for remission of the balance in whole or in part provided that it furnishes reliable financial evidence showing inability to make further payments and other evidence of diligence. Marcella is also ordered to cease and desist from violating the relevant tariff provisions of the Shipping Act of 1984.

Robert V. Shea for respondent Marcella Shipping Company Ltd.

Aaron W. Reese and *Joseph B. Slunt* for Hearing Counsel.

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

Finalized March 26, 1986

The Commission began this proceeding by serving an Order of Investigation and Hearing on May 3, 1985, which charged respondent Marcella Shipping Company Ltd. (Marcella) with several violations of law. More specifically, the Commission stated that it had information indicating that at certain times during 1980 and 1983 Marcella, an ocean common carrier operating between ports in Florida and ports in the Caribbean, had charged rates other than those specified in its tariffs in violation of section 18(b)(3) of the Shipping Act, 1916 (formerly 46 U.S.C. sec. 817(b)(3)); and that

[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 certain voyages in 1983, Marcella had operated without having a tariff on file with the Commission, in violation of section 18(b)(1) of the Shipping Act, 1916 (formerly 46 U.S.C. sec. 817(b)(1)).[2] The Commission also stated that Marcella's owner and principal officer had been informed of the above information and about similar information regarding earlier voyages, that this person acknowledged some rate deviations which he attributed to Marcella's agent, that Marcella had apparently gone out of business for a while and had had its tariff canceled by the Commission, but that it had apparently resumed business and filed a tariff after having been warned about operating without a tariff on file, and certain other matters. After being warned that Marcella had possibly violated law, Marcella, through an attorney, in July 1984, made a general denial of the charges. The Commission's responsible personnel thereafter sent a claim letter to Marcella in September 1984, seeking the compromise civil penalties as authorized by section 32(e) of the 1916 Act (46 U.S.C. app. 831(e)) and the Commission's regulation, 46 CFR Part 505. Marcella failed to respond to the claim letter, and the Commission thereafter instituted this formal proceeding.

The record developed in this proceeding consists of the written testimony of the Commission's District Investigator, Mr. Donald H. Butler (Ex. 1), a series of workpapers and manifests showing how respondent Marcella rated shipments on 15 voyages occurring in 1980 and 1983 (Exs. 2–6), a letter from Marcella's attorney containing a general denial of violations of law (Ex. 7), and a copy of a notice of intent to cancel one of Marcella's tariffs (E. 8). The final exhibits consist of the Investigator's notes relating to tariff charges used in the investigator's workpapers and analyses and a copy of Marcella's tariff (FNC No. 2). These last two documents were offered into evidence by Hearing Counsel by motion after the oral hearing. They are admitted as Exhibits 9 and 10, respectively.

In addition to the documentary evidence described above, testimony of the District Investigator, Mr. Butler, was taken at an oral hearing held in Washington, D.C., on July 25, 1985. No other witnesses appeared at the hearing. Captain Eddins Taylor, Marcella's principal officer, did not attend the hearing but Marcella's counsel did attend.

Following the hearing, briefs were filed by Hearing Counsel and respondent Marcella on September 20, November 5, and November 22, 1985.

[2] At the time of the alleged violations, the operative laws were section 18(b)(1) and 18(b)(3) of the Shipping Act, 1916, which, at the time, were codified as 46 U.S.C. secs. 817(b)(1) and 817(b)(3). Effective June 18, 1984, these laws were repealed and superseded by sections 8(a)(1) and 10(b)(1) of the Shipping Act of 1984, 46 U.S.C. app. secs. 1707(a)(1) and 1709(b)(1). See section 20, P.L. 98–237, 90 Stat. 67. The penalty provisions in effect at the time of the violations ($5,000 per day) were found in section 18(b)(6) of the Shipping Act, 1916 (46 U.S.C. sec. 817(b)(6)). These provisions were repealed and re-enacted as section 13(a) of the 1984 Act, 46 U.S.C. app. sec. 1712(a). The Commission's authority to assess penalties is contained in section 32(e) of the Shipping Act, 1916, at the time codified as 46 U.S.C. sec. 831(e). This authority is now set forth in section 13(c) of the 1984 Act, 46 U.S.C. app. sec. 1712(c).

On January 17, 1986, when Chief Administrative Law Judge Cograve became unavailable, the proceeding was reassigned to the present presiding judge.

FINDINGS OF FACT

The facts proposed by Hearing Counsel in his opening brief showing violations of sections 18(b)(1) and 18(b)(3) of the 1916 Act at certain times in 1980 and 1983 are essentially undisputed. Respondent's defenses to the charges set forth in the Commission's Order are in the nature of legal and equitable arguments in mitigation of the offenses. Accordingly, the findings of fact set forth below are in accord with those proposed by Hearing Counsel. Later in this decision I will find additional facts which bear upon the question of the appropriate penalty to be assessed. The specific facts are as follows:

1. Marcella is an oceangoing common carrier operating in the foreign commerce of the United States between Miami, Florida, and the Bahamas.[3] It has a mailing address in Nassau, the Bahamas, but also receives its mail at a Miami address. Its principal officer is Captain Eddins Taylor. It is believed that the Taylor family owns the line.

2. Marcella first filed a tariff (FMC No. 1) with the Commission effective March 24, 1974. It has since filed three more tariffs (FMC Nos. 2, 3, and 4) effective March 6, 1979, April 3, 1981, and October 11, 1983.

3. Captain Taylor resides in the Bahamas but comes to Miami periodically. Marcella has retained at least three different agents located in Miami while it has been operating a service. The first agent was Habrew Maritime International, Inc., up to March 1981. The second agent was Bernuth Marine Shipping Company which succeeded Habrew. The third and current agent is Bahamas International Shipping which was Marcella's agent at least by August 1983.

4. The Commission's District Investigator, Mr. Donald H. Butler, developed facts concerning Marcella's operations. He obtained voyage files from Marcella's agent, Habrew, concerning voyages of one of the two ships which Marcella was operating, the M/V MARCELLA II, covering the period January 2, 1979 through October 29, 1980. Copies of manifests and bills of lading were obtained for M/V MARCELLA II voyages 207–211, 241–245, and 260–264. These fifteen voyages were taken as a representative sample of the 65 voyages involved during that time period and fell at the beginning, middle and end of the period. Only the last five voyages, Nos. 260–264, occurred within the five-year period of limitation prescribed by section 32(e) of the 1916 Act regarding the assessment of penalties. These voyages occurred between September 18, 1980 and October 29,

[3] Although Marcella's tariffs indicate that Marcella served ports in the Caribbean, the evidence adduced shows that the carrier served ports in the Bahamas from Miami, and there is no evidence in this record of actual voyages to ports other than those in the Bahamas.

1980, at a time when Marcella's tariff FMC No. 2 was on file with the Commission.

5. Analysis of the fifteen MARCELLA II voyage files shows that for 217 shipments carried on the first five voyages selected (Nos. 207–211), all 217 shipments were misrated. On 207 shipments Marcella charged an aggregate sum of $7,334.71 more than the rates and charges specified in its tariff. On the remaining 10 shipments, Marcella charged an aggregate sum of $4,470.30 less than the applicable rates and charges in the tariff.

6. On the remaining 10 voyages (Nos. 241–245; 260–264) a total of 410 shipments were carried. Out of that total, 408 shipments were misrated. Marcella charged an aggregate sum of $10,096.94 more than the rates and charges specified in its tariff on 201 shipments and undercharged an aggregate sum of $4,327.15 on 207 shipments.

7. For five voyages which are within the five-year period of limitation regarding assessment of penalties (Nos. 260–264) there were 189 items shipped. Marcella misrated all but two items. In the aggregate, Marcella overcharged by $2,500.34 and undercharged by $2,648.23 on these five voyages.[4]

8. Marcella's tariff was canceled by the Commission, effective July 5, 1983, as an inactive tariff. A new tariff (FMC No. 4) was filed effective October 11, 1983, as noted earlier. A review of Marcella's operation during the period from July 5, 193 to October 11, 1983, was undertaken to determine if Marcella had operated as a common carrier after its tariff had been canceled. It was found that Marcella operated seven voyages on two ships, the M/V MARCELLA II and the M/V MIRANDA, after its tariff had been canceled and before its new tariff went into effect. These seven voyages were as follows:

No.	Sailed	Vessel	Voyage
1.	7/29/83	M/V MARCELLA II	297
2.	8/17/83	M/V MIRANDA	15
3.	8/14/83	M/V MARCELLA II	298
4.	9/01/83	M/V MARCELLA II	299
5.	9/18/83	M/V MARCELLA III	300
6.	9/23/83	M/V MIRANDA	16
7.	10/04/83	M/V MARCELLA II	301

9. On these seven voyages, the bills of lading and manifests showed that a total of 181 shipments were carried during a period of 68 days between the sailing of the first and the seventh voyage. (Marcella had no tariff on file for a total of 97 days before its tariff No. 4 went into effect.)

[4] The data for the five voyages within the five-year period of limitation were derived by adding individual figures from the investigator's worksheets for those voyages as shown in Exhibit 4. Because there were several items per bill of lading, the number of items does not correspond to the number of bills of lading.

10. An analysis was performed on four voyages occurring after Marcella's tariff (FMC No. 4) went into effect on October 11, 1983.[5] On the first voyage (M/V MIRANDA voyage no. 17) sailing on October 22, 1983, Marcella carried only bulk feed on the entire ship. Because rates on bulk cargo need not be filed in carrier's tariffs under applicable law, it was not considered necessary to determine if Marcella had violated section 18(b)(1) of the 1916 Act as to that voyage.[6] However, on the three subsequent voyages, it was found that Marcella had misrated two shipments on one voyage (M/V MIRANDA voyage 18) out of a total of 64 shipments on all three voyages. No misratings were found on the last two voyages analyzed. On voyage 18, sailing November 9, 1983, the two shipments consisted of cases of beer which were undercharged an aggregate total of $3,508.04. The reason for the undercharge primarily was that Marcella rated the beer at $3.60 per hundredweight rather than $7.20 per hundredweight as the tariff provided. About 10 months after this sailing, effective September 13, 1984, Marcella filed the $3.60 rate.

11. During 1984 the Commission's investigator attempted to get in touch with Captain Taylor over many months without success until finally Captain Taylor was contacted at the offices of his attorney, Mr. Shea. However, Captain Taylor did not furnish any additional information as had been requested and as he had represented he would do. His attorney issued a letter, dated July 24, 1984, containing a general denial of any violations of law (Ex. 7). Thereafter a claim letter dated September 24, 1984, was sent to Marcella seeking to compromise civil penalties under the Commission's authority set forth in section 32(e) of the 1916 Act and the Commission's pertinent regulation, 46 CFR Part 505 (1983). Marcella did not respond to the claim letter.

DISCUSSION AND CONCLUSIONS

The record in this case clearly establishes violations of 18(b)(1) and 18(b)(3) by the respondent. Section 18(b)(1) provides in relevant part (46 U.S.C. sec. 817(b)(1)):

> Every common carrier by water in foreign commerce and every conference of such carriers shall file with the Commission and keep open to public inspection tariffs showing all the rates and charges of such carrier or conference of carriers for transportation to and from United States ports and foreign ports. . . .

[5] The four voyages were as follows:

Vessel	*Sailed*	*Voyage*
M/V MIRANDA	10/22/83	17
M/V MIRANDA	11/09/83	18
M/Y MARCELLA II	11/12/83	302
M/V MARCELLA II	11/26/83	303

[6] Section 18(b)(1) of the 1916 Act provided that the tariff-filing requirements "shall not be applicable to cargo loaded and carried without mark or count. . . ." 46 U.S.C. sec. 817(b)(1).

Section 18(b)(3) provides in relevant part (46 U.S.C. sec. 817(b)(3)):

> No common carrier by water in foreign commerce shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time. . . .

As the evidence, which is undisputed, clearly shows, on the voyages specified for investigation by the Commission's Order (Order at 4; Appendix A) on five voyages occurring between September 18 and October 29, 1980, Marcella misrated 187 items, overcharging an aggregate sum of $2,500.34 and undercharging an aggregate sum of $2,648.23. Such misrating continued a pattern that had begun on earlier voyages going back to January 2, 1979. All of these misratings occurred at a time when Marcella's agent in Miami was Habrew Maritime International, Inc. and occurred in violation of Marcella's tariffs on file with the Commission, first FMC No. 1 and then, effective March 6, 1979, FMC No. 2.

Several years later, in 1983, after Marcella's tariff had been refiled (as FMC No. 4) by its current agent, Bahamas International Shipping, effective October 11, 1983, Marcella misrated two shipments of beer on a voyage which sailed on November 9, 1983, undercharging the shipments an aggregate of $3,508.04.

Between the times of these violations of section 18(b)(3), during the period July 5, 1983 to October 11, 1983, when Marcella had no tariff on file with the Commission because the Commission had canceled its tariff (FMC No. 3) on July 5, 1983, Marcella nevertheless operated seven voyages over a 68-day period between July 29, 1983, and October 4, 1983. Marcella carried 181 shipments on these voyages.

Marcella's Defenses

That these violations occurred in fact is not disputed, as I have mentioned. However, Marcella raises several defenses which essentially are equitable in nature and, if relevant, bear upon the question of penalties rather than upon findings of violations. Thus, Marcella argues on brief that the manager of Marcella's agent at the time of the 1980 violations, Habrew Maritime International, acknowledged that a number of rates were charged that were not filed in Marcella's tariff. However, the manager stated that the misratings were not intentional and reflected Captain Taylor's lack of knowledge about tariff-filing law. (Marcella Reply brief at 2). Marcella proceeds to argue that although ignorance of the law is not an excuse, "[g]eneral principles of equity compel us to sympathize with Mr. Taylor's lack of knowledge of the tariff laws." (*Id.*) Furthermore, argues Marcella, Captain Taylor is not a U.S. citizen, he lives in the Bahamas, and it would be "harsh to expect him to know complicated U.S. maritime laws." (*Id.*)

Marcella also argues that it is unclear from the record as to whether Marcella's agent advised Captain Taylor about the seriousness of the tariff laws. It is argued not only that the violations were not intentional but that Marcella did what it did "for economic survival" in a trade that served the Bahamas, which is "a small struggling third world nation." (*Id.*, at 3.) Marcella asks, "Can one fault a company for attempting to stay afloat in an economic sea of uncertainty?" (*Id.*) Furthermore, it is argued that levying a stiff penalty against Marcella would "send a struggling company on its way to economic death." (*Id.*, at 4.) As to the violations of section 18(b)(1), when Marcella operated without a tariff on file, Marcella argues that Marcella had changed shipping agents, was not aware that its tariff had been canceled, and that Marcella should not be punished because the company believed in good faith that it was operating within the law. (*Id.*, at 5.) Finally, Marcella argues that there were problems in Marcella's receiving mail at its Bahamas address. (*Id.*)

The Lack of Need to Show Intent

Whatever the validity of these arguments, and for the most part, they are not supported by evidence in the record,[7] it is clear that their only relevance can be to the question of penalties. Neither section 18(b)(1) nor 18(b)(3) requires the element of intent before a finding of violation can be made. In other words, they are "absolute-liability" statutes in contrast to such laws as the former section 16, initial paragraph of the 1916 Act, 46 U.S.C. sec. 815, new section 10(a)(l) of the 1984 Act (46 U.S.C. app. sec. 1709(a)(1), which laws prohibit activity which is "knowing and willful." Statutes which do not qualify the activity by relating it to intent prohibit the activity regardless of intent or motivation.

The nature of section 18(b)(3) as an "absolute-liability" statute is shown in a number of critical cases. In an early one, *Louisville & Nashville Railroad Company* v. *Maxwell*, 237 U.S. 94, 97 (1915), the Supreme Court made clear that the corresponding tariff law in the Interstate Commerce Act demanded strict adherence and did not permit deviation for any reason. The Court stated:

> Under the Interstate Commerce Act, the rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. Shippers and travelers are charged with notice of it, and they as well as the carrier must abide by it, unless

[7] Captain Taylor, Marcella's principal officer, residing in the Bahamas, did not attend the hearing in Washington, D.C. His counsel, Mr. Shea, did attend, but, not having a witness, was mainly forced to make arguments and comments about the testimony of Mr. Butler, the Commission's investigator. Counsel represented that Captain Taylor was in the Bahamas at the time of the hearing on business but did not assert that Captain Taylor was unable to obtain transportation to the hearing. (See hearing transcript at 30–35.) Counsel asked that the hearing be continued. Hearing Counsel opposed the request because of the inconvenience to Mr. Butler, who had come from New Orleans and would have had to return to Washington. Judge Cograve denied the request (Tr. 34–35.)

> it is found by the Commission to be unreasonable. Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed. This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination.

The Commission has consistently followed the above principles enunciated by the Supreme Court when applying the shipping acts. See *Ocean Freight Consultants, Inc.* v. *the Bank Line Limited*, 9 F.M.C. 211, 214–215 (1966), which specifically cited the *Maxwell* case and more recent cases and found them applicable to section 18(b)(3). See also *Sun Co.* v. *Lykes Bros.*, 20 F.M.C. 68, 70 n. 8 (1977) ("Neither mistake, inadvertence, contrary intention of the parties, hardship nor principles of equity permit deviation from the rates, rules and regulations in the carrier's filed tariff.") See *Sanrio Company, Ltd.* v. *Maersk Line*, 23 F.M.C. 154, 195–196 (I.D. adopted by the Commission, 23 F.M.C. 150 (1980)) for a discussion of the many decisions of the Commission and courts following the *Maxwell* principles and establishing that tariffs have the force and effect of law which override private contracts. In *Sanrio*, furthermore, it was stated with respect to the carrier's duty to rate cargo it transports accurately (23 F.M.C. at 152):

> Once the carrier breaches this duty, section 18(b)(3), and analogous provisions of the Interstate Commerce Act, require the imposition of liability without fault. [Case citation omitted.] No other approach is consistent with the overriding statutory purpose of eliminating unjust discrimination between shippers. (Case citations omitted.)

Therefore, it is irrelevant for purposes of finding violations of section 18(b)(3) or section 18(b)(1), which similarly requires carriers to file tariffs without regard to their intent or motivation, whether the carrier did or did not intentionally violate the law or whether the carrier was ignorant of the law.[8] As Marcella concedes (Marcella Reply Brief at 2), "it has long been stated that ignorance of the law is no excuse." That is a true statement of the law and the Commission has recognized that honest mistakes or infrequent violations of section 18(b)(3) are not defenses to findings of violations but are rather pleas in mitigation. See *Rates, Hong Kong-United States Trade*, 11 F.M.C. 168, 178 (1967). Accordingly, I find that Marcella has violated both laws at the times indicated above and will consider Marcella's arguments as to intentions, lack of knowledge, etc.,

[8] Even if a finding of intentional violation of section 18(b)(1) or 18(b)(3) is necessary, respondent's pattern of conduct showing indifference to and disregard of the requirements of law is tantamount to "knowing and willful" behavior under administrative law. I will discuss this matter later in connection with the question of penalties.

when determining whether and in what amount penalties should be assessed.[9]

Marcella's Responsibility For Its Agents' Activities

A related argument to the above regarding Marcella's or Captain Taylor's purported lack of knowledge or intent to violate law are the ones suggesting that the violations were somehow more the responsibility of the Miami agents than they were of Marcella and Captain Taylor who resided in the Bahamas. These arguments can be given short shrift. Counsel for Marcella conceded at the hearing that Marcella would be responsible for violations of law even if the agents actually committed the violations. (Tr. 31.) At best the argument could only have some minimal relevance to the question of penalties. Neither the Commission nor the courts recognize a doctrine that a principal or a corporation can avoid liability under law for the wrongdoing of its agent acting within the scope of the agent's employment and authority. For example, in *Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17*, 7 F.M.C. 673 (1964), the Commission found that a carrier had unreasonably prejudiced and unjustly discriminated against shippers in violation of sections 16 and 17 of the 1916 Act because the carrier's agent in Djibouti, French Somaliland, had charged varying rates on the same coffee items to different shippers. The carrier had argued that it was not responsible and that its agent in Djibouti had engaged in unauthorized "criminal" conduct although the agent was authorized to quote rates that would meet the stiff competition. The Commission held that the law in question did not require a showing of unlawful intent. (7 F.M.C. at 675–676.) The Commission totally rejected the carrier's defense that it was the agent who was responsible, stating (7 F.M.C. at 676):

> To adopt respondent's position would do much to frustrate the objectives of the Shipping Act. Respondent necessarily performs its far-flung transportation business by utilizing agents to solicit and book cargo and attend to various other requirements of the

[9] Marcella also cites two Commission cases in support of its argument that intent should be an element in a section 18 violation. These cases are *Philippine Merchants Steamship Co., Inc.* v. *Cargill, Inc.*, 9 F.M.C. 55 (1965); and *Investigation of Certain Practices of Stockton Elevators*, 8 F.M.C. 181 (1964). Neither case involved section 18(b)(1) or 18(b)(3). *Philippine Merchants* involved sections 15, 16, and 17, and the Commission noted that certain provisions of section 16 of the 1916 Act, which specified "unjust device or means," required a finding that respondent had done something with knowledge that it was unlawful. 9 F.M.C. at 165. *Stockton Elevators* involved sections 16 and 17 of the 1916 Act and qualifying statutory language regarding "unjust" or "unreasonable" practices, and, to some extent, the purpose of the activity under investigation was considered as to the question of violation. See 8 F.M.C. at 199–201. However, the decision specifically noted that the practices there involved "were in no way related to tariff rates or charges and cannot be considered as involving rebating in any fashion." 8 F.M.C. at 201. Another case cited by Marcella is *National Van Lines Inc.* v. *U.S.*, 355 F.2d 326 (7th Cir. 1966). That case, however, involved interpretation of an ambiguous tariff and held that the tariff should be construed in a reasonable way so as to accord with the understanding of the affected parties and to avoid unnecessary, devastating punishment of the carriers which had created the tariff ambiguity by omitting a critical rule in filed tariffs. The present case involves misrating and operating without a tariff, and is not one involving a carrier's trying to interpret an ambiguous, filed tariff in a reasonable way.

> business. Under respondent's theory, however, it could immunize itself from the common carrier responsibilities placed upon it by the Act simply by disassociating itself from any of its agents' activities which are brought into question. This could take the form, as here, of a plea of ignorance of the agent's conduct and a claim that the carrier lacked any intent itself to violate the law. The Act does not permit of any such evasion. United States v. American Union Transport, Inc., 327 U.S. 437, 457 (1946). It is regulatory legislation which evinces a strong policy of protecting the public, and there is ample authority for the view that a principal is liable [for] his agent's violation of such a statute, including a violation which is a misdemeanor. (Footnote citation omitted.)

The Commission proceeded to find that the agent had acted within the scope of his authority and on respondent's behalf and that "[r]espondent therefore must clearly answer for the agent's action in this regard." (*Id.*) In addition, however, the Commission found that the respondent carrier was not free of fault. This was because it failed to exercise greater supervision over the agent. The fact that the agent was distantly located in Africa and there were problems in communicating with him was not found to be an excuse. Rather it was found to require respondent to exercise greater precaution as to its agent's conduct. (*Id.*) Similarly, the fact that the carrier and its agent were engaged in an unstable rate situation and were trying to meet keen competition was not found to excuse the violations.

The Commission has consistently followed the *Hellenic* doctrine and has imposed liability on principals for the acts of their agents, regardless of the principal's actual awareness of the agent's illegal act. Thus, in *Unapproved Section 15 Agreements—Spanish/Portuguese Trades,* 8 F.M.C. 596 (1965), respondent carriers were found to have violated section 15 of the 1916 Act by failing to file agreements. They had argued that the agreements "were entered into by foreign agents acting without authority, and uninformed as to the requirements of American law." 8 F.M.C. at 609. The Commission found no merit to the argument, stating (8 F.M.C. at 609):

> Respondents' delegation to agents of such considerable authority carries with it an obligation to thoroughly apprise their agents of the applicable law; for it is no less damaging to the public interest when the law is violated by design, or inadvertently; by an agent, acting on behalf of a principal, or by the principal itself. Sound enforcement of the Shipping Act of necessity demands that those subject to its terms be held to a strict standard of accountability for the acts of agents representing them. . . [W]e cannot allow a carrier to "immunize itself from the common carrier responsibilities placed upon it by the Act by disassociating itself from any of its agent's activities which are brought into

> question." Such responsibilities extend to liability of the principal for violations of law by his agent.

See also *Malpractices—Brazil/United States Trade*, 15 F.M.C. 55, 59 (1961) ("Shipping Act cannot be circumvented through the medium of an agent"); *Pickup and Delivery—Puerto Rico*, 16 F.M.C. 344, 350 (1973) ("Respondents cannot insulate themselves from the responsibility for the proper performance of the service by attempting to relieve themselves of accountability for their agents' acts.")

The Commission's decisions in the above cases are consistent with modern authority which holds corporations and principals liable for the misdeeds of their agents acting within the scope of the agents' authority, even to the extent of imposing punitive damages on the corporation or principal. See, e.g., *American Society of Mechanical Engineers, Inc.* v. *Hydrolevel Corporation*, 456 U.S. 556, 567–568; 574–576 (1982) (nonprofit association held liable under antitrust laws for violations of law committed by its agents acting with apparent authority even to the extent of being liable for punitive damages); *General Motors Acceptance Corporation* v. *Froelich*, 273 F.2d 92 (D.C. Cir. 1959) (corporation liable for punitive damages for the wrongful acts of its agents acting within scope of authority and corporation ratified or authorized the agents' conduct); *Dark* v. *United States*, 641 F.2d 805 (9th Cir. 1981) (principal liable for acts of agents acting within scope of their apparent authority even if principal not involved in the agents' acts); 3 Am Jur. 2d, Agency, sec. 267; 25 C.J.S., Damages, sec. 125(4) at 1156 (principal liable for punitive damages for acts of agents if principal failed to exercise due and reasonable care in retaining or employing agents). Prosser, *Law of Torts* (4th ed. 1971 at 12; (5th ed. 1984) at 13.[10]

The Question of Penalties

In addition to the issues of violations, the Commission's Order specified that it was to be determined "[w]hether, in the event Marcella is found to have violated Section 18(b)(1) and/or 18(b)(3) of the Shipping Act, 1916 . . . civil penalties should be assessed and, if so, the amount of such penalties." (Order at 4.) The record shows clearly that Marcella did violate these laws at certain times in 1980 and 1983, as discussed above. Therefore, it is necessary to determine the penalty issue.

Hearing Counsel argues that the maximum penalty for the violations is $370,000 ($30,000 for misratings on six voyages and $340,000 for oper-

[10] Many cases hold, furthermore, that principals are liable for the acts of their employees acting within the scope of their authority even if the principal had no awareness of the agent's act or even if the agent's acts were fraudulent. See, e.g., *United States* v. *Illinois Central Railroad*, 303 U.S. 239 (1938); *Curtis, Collins & Holbrook Co.* v. *United States*, 262 U.S. 215, 222–223 (1923); *Gleason* v. *Seaboard Air Line Railway Co.*, 278 U.S. 349 (1929).

ating without a tariff for a period of 68 days).[11] Hearing Counsel argues further that "a severe penalty should be imposed in order to reflect the grave nature of the violation" because "[t]he respondent obviously has never taken into consideration the serious nature of this violation. . . ." (H.C. Opening Brief at 8.) In his reply brief, Hearing Counsel further argues in favor of a "severe penalty" by pointing out "a serious disregard of tariff filing requirements by Marcella" and the further fact, in reply to Marcella's arguments regarding its alleged weak financial condition, that "Marcella did not even attempt to put evidence into the record as to its financial condition." (H.C. Reply Brief at 8.)

As discussed earlier, Marcella contends that it did not intentionally violate law, had relied upon agents, had difficulty receiving mail in the Bahamas, was attempting to survive in a difficult economic climate in a trade serving a small struggling third-world nation, and that punishment would destroy Marcella.

The current law regarding factors to be considered by the Commission when fixing penalties is section 13(c) of the Shipping Act of 1984 (46 U.S.C. app. sec. 1712(c)). That statute provides:

> In determining the amount of the penalty, the Commission shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the violator, the degree of culpability, history of prior offenses, ability to pay, and such other matters as justice may require.

The Commission's current regulation implementing the above law is 46 CFR 505.3(b) (1985). This regulation follows the statutory language but adds a factor for "deterrence and future compliance with the Commission's rules and regulations and the applicable statutes."

The previous regulation in effect under the 1916 Act and at the time of the violations was 46 CFR 505.1 (1983), originally promulgated in 1979. See *Collection, Compromise and Termination of Enforcement Claims*, 22 F.M.C. 238 (1979). That regulation did not limit the factors to be considered but did include factors set forth in another regulation (4 CFR Part 101–105). The regulation stated:

> [F]or the purpose of this part, the criteria for compromise, settlement, or assessment may include but need not be limited to, those which are set forth in 4 CFR Part 101–105.

[11] These calculations of maximum penalties may be conservative, as Hearing Counsel suggests (H.C. Opening Brief at 6–7). Section 18(b)(6) of the 1916 Act, the operative statute, provided for a maximum penalty of $5,000 "for each day such violation continues." If each misrated shipment is counted as a separate violation of section 18(b)(3) and there were 189 misrated shipments, as the record shows, then the maximum penalty would be $945,000. If the total period when Marcella had no effective tariff on file with the Commission were 97 days rather than the 68 days when they actually operated voyages, the maximum penalty would increase to $485,000 for the section 18(b)(1) violation. Total maximum penalties for all violations would increase to $1,430,000.

The regulation referred to by the Commission's previous regulation implements the Federal Claims Collection Act of 1966. The criteria set forth in that regulation (46 CFR 103) are such things as inability to pay, litigative possibilities, cost of collecting claims, deterrence, and aid to enforcement and to compel compliance. That regulation furthermore recognizes a distinction between "accidental or technical violations" which "may be dealt with less severely" in contrast to "willful and substantial violations." (46 CFR 103.5.)

I find little difference between the previous criteria and those currently in effect. The previous regulation was equally open ended regarding criteria. Furthermore, the previous reference to consideration of willful and substantial violations contrasted to those which are merely accidental or technical sets up a criterion which is similar to the current one regarding the gravity of the violation and the degree of culpability. Furthermore, in applying the previous regulation and criteria, the Commission has exercised flexibility and has recognized such factors as ability to pay, enforcement policy, degree of culpability, history of prior offenses, and presence of accidental or technical violations. See, e.g., *Midland Pacific Shipping Co., Inc.—Independent Ocean Freight Forwarder License*, 25 F.M.C. 715, 718 (1983), the Commissions statement (25 F.M.C. at 719) that "[t]he prescription of fair penalty amounts is not an exact science. There is a relatively broad range within which a reasonable penalty might lie." See also *Certified Corp. and Seaway Distribution Corp.—Possible Violations of Section 16, Initial Paragraph*, 24 F.M.C. 542, 544 (1982) ("In determining the amount of the penalty ultimately assessed, the Commission takes into account the particular circumstances of each case, including any mitigating factor, as well as the policy underlying the assessment of penalties generally."); cf. *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182, 187–188 (statute gave Secretary of Agriculture broad discretion to devise sanctions that in his judgment would deter violations and achieve the objectives of the statute.) I therefore will consider whatever factors are shown to exist in this case and conclude that such factors are essentially the same under either the previous or the current regulation so that my conclusions as to the amount of penalty would be the same under either regulation.[12]

The record clearly shows violations of section 18(b)(3) of the 1916 Act on six voyages, five sailing in 1980 and one in 1983. It also clearly shows violations of section 18(b)(1) of that Act on seven voyages in

[12] The Commission has stated that current law may be applied to proceedings brought under the 1916 Act unless manifest injustice would result or if there is a statutory directive or legislative history to the contrary. See *Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 22 SRR 976 (1984). The current regulation and law regarding criteria for determining the amount of penalties are not essentially different from the previous ones and, if applied, should not prejudice Marcella. The maximum amount of penalty ($5,000 per day of violation) has not changed either if the violation was not knowingly and willfully committed, in which case it rises to $25,000. Section 13(a), Shipping Act of 1984, 46 U.S.C. app. sec. 1712(a). I will not apply the new $25,000 maximum penalty provision however, as this may be unfair to Marcella. *Application of Shipping Act of 1984*, cited above, 22 SRR at 977.

1983 over a 68-day period. The maximum penalty for these violations, conservatively calculated, as noted above, is $370,000. Additional violations of section 18(b)(3) occurred earlier in 1980 on 10 voyages but those violations occurred outside the five-year period prior to May 3, 1985, when the Commission served its Order of Investigation and Hearing and consequently are not considered when determining the amount of penalty. See *Certified Corp. and Seaway Distribution Corp.*, cited above, 24 F.M.C. at 544.[13] However, the earlier voyages do show a pattern of conduct which continued into the relevant time period.

There is not much evidence in the record as to mitigating factors. However, the testimony of the Commission's District Investigator, Mr. Butler (Ex. 1), is enlightening. It reveals a pattern of Marcella's indifference and disregard of the requirements of law and of the Commission's informal investigatory efforts to ascertain wrongdoing and to terminate it. Such indifference and disregard has often been held to constitute "knowing and willful" conduct in administrative statutes containing those words. See, e.g., *Equality Plastics, Inc. et al.*, 17 F.M.C. 217, 226 (1973); *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954); *United States* v. *Ill. Central Ry.*, 303 U.S. 239, 242–243 (1938); *E. Allen Brown—Independent Ocean Freight Forwarder*, 22 F.M.C. 585, 595 n. 4 (1980); *Ariel Maritime Group*, 23 SRR 238, 247 (I.D., remanded for unrelated reasons, 23 SRR 610 (1985). A typical statement is that of the Supreme Court in *Ill. Central Ry.*, cited above, 303 U.S. at 243, that in administrative statutes a carrier may be acting "willfully" when the carrier "either intentionally disregards the statute or is plainly indifferent to its requirements." Another statement as to the phrase "knowingly and willfully" is that of the Commission in *Misclassification of Tissue Paper as Newsprint Paper*, cited above, 4 F.M.B. at 486, where the Commission stated:

> The phrase "knowingly and willfully" means purposely or obstinately, or is designed to describe a carrier who intentionally disregards the statute or is plainly indifferent to its requirements. We agree that a persistent failure to inform or even to attempt to inform himself by means of normal business resources might mean that a shipper or forwarder was acting knowingly and willfully in violation of the Act.

The testimony of the Commission's District Investigator, Mr. Butler, shows clearly and convincingly a pattern of indifference and disregard

[13] In the cited case, it was argued on exceptions to the Initial Decision that the presiding judge had erroneously considered numerous violations occurring outside the five-year period when determining the amount of penalty. The Commission did not specifically rule that those earlier violations were irrelevant for all purposes. However, the Commission reduced the amount of the penalty from the maximum of $20,000 determined by the Initial Decision for four violations to $10,000 in consideration of the fact that the respondent had made some restitution, the amount of underpayments was small, and respondent had gone out of business. 24 F.M.C. at 544.

of the requirements of law and a persistent failure to recognize that a carrier must adhere to filed rates in its tariff and must keep itself informed of legal requirements. Indeed, not only does Marcella not dispute the facts that Marcella conducted its business in the way it did but it cites its conduct as a defense. Thus, Marcella contends that Captain Taylor relied upon his Miami agents, lived in the Bahamas, was not aware of the requirements of tariff laws, had trouble receiving mail, etc. (Marcella's Reply Brief at 2, 4–5.) Instead of excusing the violations, however, it seems to me that these facts should have motivated Captain Taylor to inform himself about relevant laws, select qualified agents, and exercise some supervision over them. If Captain Taylor wished to operate a common-carrier service in the foreign commerce of the United States from his home in the Bahamas and gain the benefits of participation in that commerce, it seems that he should have bothered to learn about this country's laws and try to make sure that his company and its agents were complying with those laws.

Respondent's Pattern of Indifference

As mentioned above, the testimony of Mr. Butler shows continued indifference to law and to the Commission's informal investigation. Some of the highlights of the testimony are the following facts.

Mr. Butler's first contact with Marcella's first agent of record, Habrew, showed pen and ink changes on Marcella's tariff (FMC No. 1) suggesting that these notations were the rates charged rather than the printed rates. Habrew, moreover, had been acting as agent for at least five oceangoing common carriers and had been preparing manifests and bills of lading. Habrew's traffic manager admitted that as of early 1980 and before, Marcella had charged a number of rates which were not filed. He also stated that Captain Taylor visited Miami periodically and had instructed clerks that certain rates on particular voyages would be increased.

Habrew's traffic manager, Mr. Jovane, indicated that he would inform Captain Taylor of the informal investigation by Mr. Butler and ask him to contact Mr. Butler. However, Captain Taylor did not contact Mr. Butler even after Mr. Butler called Habrew several times. Mr. Butler learned that Marcella had terminated Habrew's employment as agent and had selected a new agent, Bernuth, in early 1981. In September 1981, Mr. Butler visited Bernuth's offices and found Captain Taylor there. Captain Taylor admitted that he was aware that some of the rates charged had not been filed by Habrew as he had instructed Habrew to do. Captain Taylor led Mr. Butler to believe that Captain Taylor would later confirm his statements by letter but no letter was received. Mr. Butler learned in November 1981 that Bernuth was no longer Marcella's agent. Mr. Butler also learned that Marcella had apparently ceased doing business during 1982 and possibly earlier and into 1983. On July 5, 1983, the Commission canceled Marcella's tariff (FMC No. 3) as an inactive tariff. However, it later appeared that

Marcella was operating even without a tariff on file and that Captain Taylor had appointed a new agent, Bahamas International, some time before August 1983. Captain Taylor was contacted through the Traffic Manager of Bahamas, Mr. Carlos Dovo. Captain Taylor stated that he had never been informed of the tariff cancellation and that he was using the canceled tariff in the operation of two vessels. He was advised of the requirements of section 18(b)(1) of the 1916 Act. He was again contacted in October 1983 and advised against further sailings until he filed a tariff. Captain Taylor expressed willingness to cooperate with the informal investigation and a new tariff (FMC No. 4) was filed effective October 11, 1983.

By letter dated October 5, 1983, Captain Taylor was again informed of the requirements of sections 18(b)(1) and 18(b)(3) of the 1916 Act and was asked to furnish copies of manifests and bills of lading for shipments occurring before and after July 5, 1983, the date of the cancellation of tariff FMC No. 3. The letter was sent, at Captain Taylor's request, via certified mail to Bahamas International Shipping, the agent in Miami. The letter was returned by the Postal Service as unclaimed.

Mr. Dovo, the Bahamas Traffic Manager, was again contacted in November 1983. He said that Bahamas had been having trouble receiving mail at their Miami street address and suggested that the latter be sent to Captain Taylor's Post Office Box in Miami. A second letter was mailed on November 11, 1983, requesting the same information. The return receipt was signed by Mr. Dovo. No response to the letter was received. On January 20, 1984, Mr. Butler called Captain Taylor who stated that he thought that Bahamas International had sent the requested material but that he would have the material sent as soon as possible, would meet with his attorney, and would send a letter to Mr. Butler as soon as possible.

On February 13, 1984, bills of lading and manifests were received for 11 Marcella voyages between July 15 and November 26, 1983. No materials relating to three voyages before July 5, which had been requested, were received.

On May 11, 1984, Captain Taylor was again contacted and asked about the requested information prior to July 5, 1983. Captain Taylor stated that Mr. Dovo was supposed to have taken care of the matter and had been "let go." Captain Taylor asked for another copy of the letter of request via express mail. A week later, on May 18, 1984, Captain Taylor was again contacted. He advised that he had not received the letter of request and asked that another copy be sent to his attorney, Mr. Shea.

On May 31, 1984, Mr. Shea called Mr. Butler, advising Mr. Butler that Captain Taylor and Marcella would cooperate in the investigation and would send the requested material after meeting with Captain Taylor. The material was not received, and Mr. Butler again contacted Mr. Shea on June 6, 1984, who advised that the documents requested would be sent later. On June 14, 1984, Mr. Shea contacted Mr. Butler and said that Captain Taylor would send a letter. No letter was received, and on July

9, 1984, Mr. Shea was again contacted. Mr. Shea stated that he had spoken with Captain Taylor who wanted to confer with his Bahamian attorney and Mr. Shea would send a letter.

On July 24, 1984, Captain Taylor was contacted at Mr. Shea's office. He stated that he thought Mr. Shea had already provided the requested materials and that he (Captain Taylor) would call back later that day. No call was received by Mr. Butler, but on July 30, 1984, Mr. Butler received a letter from Mr. Shea postmarked July 24, 1984, in which Marcella, through Mr. Shea, made a general denial of any violations of law. (See Ex. 7.)

A claim letter dated September 24, 1984, was sent to Marcella seeking to compromise civil penalties for violations of sections 18(b)(1) and 18(b)(3) of the 1916 Act. No response was received.

No matter how one views the above facts, they do not flatter Captain Taylor or Marcella. At best they show a casual attitude toward tariff law and toward Commission investigators. At worst they suggest intentional disregard and possibly even misrepresentation toward the Commission's investigator. Perhaps these naked facts read in the cold do not present the fairest picture of Captain Taylor's conduct and that Captain Taylor could have explained what he was doing in person so that a more accurate picture could emerge. However, although Marcella was given notice of hearing to be held on July 25, 1985, which notice was served on July 2, 1985, and although his counsel was informed that there would be a hearing at some time, at least as early as June 17, 1985,[14] Captain Taylor did not bother to come to the hearing, instead, remaining on one of the islands in the Bahamas purportedly on "business." (Tr. 33–35.) The Commission has considered cooperation by respondents and attempts by respondents to clean up wrongdoing after warnings to be mitigating factors in previous cases. The above facts related by the Commission's District Investigator at best show only slow and belated cooperation and efforts to clean up tariff violations over a long period of time together with a casual attitude toward applicable law and toward an informal investigation, replete with unexplained failures to respond and runarounds. If it is proper, when determining amount of penalty, to consider how to deter future violations by Marcella, enforcement policy, the degree of culpability, whether the violations were innocent or willful in the administrative-law sense, etc., which criteria applied under the previous regulation and apply under current law, then it is certainly proper to consider such behavior by Marcella and Captain Taylor and to fashion such a penalty so as to encourage persons who have exhibited continued disregard for law and a casual attitude over a period of time to exercise greater care and stimulate them to pay attention to the laws of the country whose commerce they are serving.

[14] See letter dated June 17, 1985, from Mr. Shea, addressed to Judge Cograve.

Factors in Mitigation

Having considered the above aggravating factors, I must also consider any factors in mitigation. Because Captain Taylor did not appear at the hearing and Marcella did not present any evidence as to its financial condition and ability to pay, it is difficult to weigh this particular factor. What I am left with is argument by counsel that Marcella serves a struggling, third-world nation and that harsh penalties would destroy the carrier. I can officially notice that the Bahamas are a small group of islands and are not a major nation. That does not tell me how healthy Marcella is in terms of its finances. The record shows that Marcella operated two motor vessels and seemed to confine itself to Miami and ports in the Bahamas. The manifests of the voyages shown in the record indicate a wide variety of goods which Marcella has carried to the Bahamas, including a relatively large number of automobiles and, occasionally, foodstuffs. The size of the overcharges and undercharges on the five voyages which fell within the five-year period of limitation is not large, being only two or three thousand dollars per voyage, although if all shipments of record are considered, the aggregates rise to $10,000 more or less. Relatively small dollar amounts of misratings have been considered by the Commission as a mitigating factor. See *Certified Corp. and Seaway Distribution Corp.*, cited above, 24 F.M.C. at 544.

After Marcella refiled its tariff effective October 11, 1983, the record shows it to have operated three voyages as to which tariff rates were required to be filed. On the first voyage, Marcella misrated two shipments. On the last two voyages of record in November 1983, Marcella rated all shipments correctly. This indicates that Marcella may at last be exercising greater care. Subsequent elimination of wrongdoing can be considered as a factor in mitigation.

The above discussion constitutes virtually all there is in the record regarding mitigating and aggravating factors, the rest being argument without supporting evidence. The matter of fashioning a suitable sanction and penalty is a fine art, especially when the record is so bare of detailed factual evidence as to the factors to be considered, especially ability to pay and other factors in mitigation. Evidence as to these factors could have been presented by Marcella at the hearing which Captain Taylor did not attend. Nevertheless, great care must be exercised by administrative agencies in fashioning an appropriate sanction which is just and feasible and will not unduly harm or jeopardize the existence of a wrongdoer who has shown signs of reforming. See discussion of these principles and cases cited in *E. Allen Brown—Independent Ocean Freight Forwarder*, cited above, 22 F.M.C. at 596–600; *Certified Corp. and Seaway Distribution Corp.*, cited above, 24 F.M.C. at 544; *Midland Pacific Shipping Co., Inc.*, cited above, 25 F.M.C. at 718–719.

In addition to the principles stated above, namely, that finding a just and reasonable penalty is a serious matter requiring great care and weighing

of factors, there is the principle that administrative agencies are expected to be flexible and to devise procedures which are suited to particular situations. See *American Airlines, Inc.* v. *Civil Aeronautics Board,* 359 F.2d 624, 633 (D.C. Cir. 1966), cert. den. 385 U.S. 843 ("It is part of the genius of the administrative process that its flexibility permits adoption of approaches subject to expeditious adjustment in the light of experience."); see also the discussion and cases cited in *Application of PWC for the Benefit of Shintech,* 21 SRR 1361, 1366 (I.D.; application withdrawn; proceeding terminated, 21 SRR 1441; F.M.C. notice of finality, January 24, 1983).

The Specific Penalty

I apply the principles discussed above to the present case as follows. In order not to jeopardize the continued existence of a service which operates two motor vessels to a small group of islands but to send a message of deterrence and rectify what has been a most casual attitude toward law, a stiff penalty should be assessed. I find that an amount of $150,000 would send such a message. However, because there could be a problem regarding ability to pay and changed circumstances since the time of the hearing, and there is no evidence since 1983 of violations, I find that Marcella should pay $20,000 of this amount within a four-month period, i.e., $5,000 per month. At the time of the fourth installment (at the end of the fourth month), if Marcella petitions the Commission asking that the balance of the penalty ($130,000) be remitted, i.e., forgiven, in whole or in part, and supports the petition with reliable evidence that it cannot continue to pay and, in addition, submits evidence of steps it has taken to ensure that violations will not recur, the Commission may remit the balance in whole or in part.[15] The four monthly payments of $5,000 each should be within the capacity of an active carrier and the continual payments should serve to remind Marcella of the reasons why a penalty was assessed and the need to be careful. On the other hand, should Marcella be able to present reliable financial evidence (e.g., verified financial statements) showing that it cannot continue to make payments based upon evidence of changed circumstances, which evidence had not been available at the time of the hearing and show other indications of diligence, it may be that the Commission will conclude that the balance of the penalty should be remitted, i.e., forgiven, in whole or in whatever

[15] Current law (section 13(c) of the 1984 Act, 46 U.S.C. app. sec. 1712(c)) specifies that "the Commission may compromise, modify, or remit, with or without conditions, any civil penalty." Previous law (section 32(e) of the 1916 Act, 46 U.S.C. sec. 831(e)) did not specify the authority to "modify" or "remit" a civil penalty but such authority was probably inherent in the power to assess because the power to decide inherently includes the power to reconsider. *Albertson* v. *F.C.C.,* 182 F.2d 397, 399 (D.C. Cir. 1959); 46 CFR 502.261. Even if previous law did not so specify, the Commission's statement as to the application of the 1984 Act to cases brought under the 1916 Act, cited above, 22 SRR 976, allows application of current law unless "manifest injustice" would result. Here, application of current law to allow a possible abatement of full penalties would not be unjust to Marcella.

portion the Commission deems appropriate. Such a procedure would enable the Commission to consider the factor of ability to pay, as to which the present record is not developed. Therefore, the message of deterrence and need for care will be sent to Marcella and the public while the possibility of undue hardship or termination of the service will be lessened. On the state of the record presently before me, I believe such a procedure would be reasonable and feasible and would allow for any change in circumstances. It is so ordered.

The Question as to a Cease and Desist Order

The remaining issue framed by the Commission's Order of Investigation and Hearing concerns the question "whether, in the event Marcella is found to have violated section 18(b)(1) and/or 18(b)(3) of the Shipping Act, 1916 . . . Marcella should be ordered to cease and desist from violating the provisions of the Shipping Act of 1984 (46 U.S.C. app. sec. 1701 *et seq.*)." (Order at 4.)

Because of the casual attitude that prevailed for so long in Marcella's operations regarding the need to follow a filed tariff and to make sure that its tariff was in effect, an order directing Marcella to cease and desist from continuing such practices is appropriate. Although Marcella appears to have rated all its shipments correctly as to the last two voyages of record, the previous pattern and persistent attitude of indifference to the tariff justifies an order to help ensure that the practices will not recur. See *Precious Metals Association, Inc. v. Commodity Future Trading Commission,* 620 F.2d 900, 912 (1st Cir. 1980) (cease and desist order justified if likelihood that offenses will continue absent the order and when record discloses persistent offenses).

Although the record certainly supports the issuance of a cease and desist order applicable to the type of violations which Marcella has been found to have committed, there is no record support for an unlimited order which would apply to all the provisions of the 1984 Act. For example, there is no evidence whatsoever that Marcella has ever planned or is planning to enter into agreements with other carriers without filing such agreements (sections 5(a) and 10(a)(2) of the 1984 Act) or has ever or is likely to retaliate against any shipper, employ a fighting ship, refuse to negotiate with a shipper's association, etc. (sections 10(b)(5), 10(b)(7), 10(b)(13) of the 1984 Act). An administrative agency is supposed to exercise care in fashioning a sanction which fits the nature of the offense and not to impose unduly harsh or extreme sanctions. See *Gilbertville Trucking Co. v. United States,* 371 U.S. 115, 130 (1962) (agency has heavy responsibility to tailor the remedy to the particular facts of each case so as to effectuate the remedial objects with as little injury as possible). I find no need or basis to issue an open-ended order applicable to numerous provisions of the 1984 Act which have nothing to do with the violations shown on this record. If Marcella or anyone else violates all those other provisions

of the 1984 Act, the Act contains sufficient remedies and penalties which the Commission may consider when appropriate. However, a cease and desist order relating solely to the relevant tariff-filing and tariff-compliance provisions of the 1984 Act would be warranted.

Accordingly, Marcella is ordered to cease and desist from violating sections 8(a)(1), 46 U.S.C. app. sec. 1707(a)(1); and section 10(b)(l), 46 U.S.C. app. sec. 1709(b)(1), relating to the requirement of tariff filing and tariff compliance, respectively.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–28

PETCHEM, INC.

v.

CANAVERAL PORT AUTHORITY, ET AL.

Port authority's denial of application by a tug operator for a non-exclusive franchise to provide tug service constituted furnishing of terminal facilities subject to the Commission's jurisdiction.

Port authority's actions not proven to be an unreasonable practice or unfairly prejudicial to complainant.

Michael V. Mattson, C. Jonathan Benner and *Charles L. Coleman, III*, for complainant Petchem, Inc.

Leon Stromire for respondent Canaveral Port Authority.

Robert T. Basseches and *Timothy K. Shuba* for respondents Port Canaveral Tailing, Inc., and Hvide Shipping, Inc.

Aaron W. Reese and *Alan Jacobson* for Bureau of Hearing Counsel, intervenor.

REPORT AND ORDER

March 28, 1986

BY THE COMMISSION: (EDWARD V. HICKEY, JR., *Chairman*; James J. Carey, *Vice Chairman*; Francis J. Ivancie and Edward J. Philbin, *Commissioners*; Thomas F. Moakley, *Commissioner*, concurring) *

This proceeding is before the Commission on Exceptions filed jointly by the Canaveral Port Authority, Port Canaveral Towing, Inc., a tug operator, and Port Canaveral Towing's corporate parent, Hvide Shipping, Inc. (Respondents) to the Initial Decision (I.D.) of Administrative Law Judge Joseph N. Ingolia (Presiding Officer), served on October 3, 1985. The I.D. found that the Canaveral Port Authority had violated sections 16 First and 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. §§815 and 816 (1982 ed.), and continued to violate sections 10(b)(11)–(12) and 10(d)(1) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. § 1709, by granting to Port Canaveral Towing (and Hvide) an exclusive franchise to provide tug and towing service for commercial cargo vessels at Port Canaveral, Florida, and by denying complainant Petchem, Inc., another tug operator, permission to provide competing service. The I.D. directed that the Port Authority "consider applications to perform [commercial] tug service on

* Commissioner Moakley's concurring opinion is attached.

an equal basis, under equal prerequisites and criteria so as not to unduly prefer or prejudice any provider of such service." I.D. at 40.

Petchem and the Commission's Bureau of Hearing Counsel filed Replies to Exceptions. The Commission heard oral argument on February 5, 1986.

BACKGROUND

On August 6, 1984, Petchem filed a complaint alleging that the Port Authority's denial of its application for a non-exclusive franchise to provide commercial tug and towing services at Port Canaveral was an unreasonable practice in violation of section 17 of the 1916 Act and also constituted an unjust prejudice against Petchem and an unjust preference in favor of Port Canaveral Towing and Hvide Shipping, which already held a franchise to provide commercial tug service, in violation of section 16 First of the 1916 Act.[1]

Although the complaint did not allege any violation of the Shipping Act of 1984, the Presiding Officer stated that later pleadings and filings by the parties broadened the scope of the complaint to include the companion sections of the 1984 Act, *i.e.*, sections 10(b)(11)–(12) and 10(d)(1).[2] Respondents indicated no objection to inclusion of these 1984 Act provisions in the proceeding.[3]

Petchem's complaint originally included a claim for reparations, but that subsequently was withdrawn. Hearing Counsel was granted leave to inter-

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[1] Section 16 of the 1916 Act provided in relevant part that:

> It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

46 U.S.C. § 815 (1982 ed.).

Section 17 provided in relevant part:

> Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

46 U.S.C. § 816 (1982 ed.).

[2] I.D. at 3, n. 2. Section 10(b) of the 1984 Act provides in relevant part:

> (b) COMMON CARRIERS.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—
>
> * * * * *
>
> (11) except for service contracts, make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever;
>
> (12) subject any particular person, locality, or description of traffic to an unreasonable refusal to deal or any undue or unreasonable prejudice or disadvantage in any respect whatsoever . . . .

46 U.S.C. app. § 1709.

These provisions are made applicable to marine terminal operators by section 10(d)(3), *id.*

Section 10(d)(1) provides:

> No common carrier, ocean freight forwarder, or marine terminal operator may fail to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with receiving, handling, storing, or delivering property.

Id.

[3] *See* Exceptions at 6, n. 3.

vene in the proceeding, in view of certain jurisdictional issues at bar. An extensive evidentiary record was developed, including four days of public hearings in May 1985.

A. *The Parties*

The Canaveral Port Authority was established in 1953 by the State of Florida to construct and operate a deep water port at Cape Canaveral. The Port Authority has tax and eminent domain powers and is governed by five elected commissioners, with day-to-day operations under the supervision of a port director.

Port Canaveral itself is located on the Atlantic Coast of Florida, close to the Kennedy Space Center at Cape Canaveral. Measured by either land area or cargo volume, the Port is very small. It consists of three adjacent basins and a dredged channel, approximately 200 feet wide, that connects the Port to the Intercoastal Waterway. The entire east basin of the Port and a majority of the land surrounding the middle basin is owned by the United States. This area was taken from the Port by eminent domain and is used to test the Trident submarine, for other military purposes and for the operation by the National Aeronautics and Space Administration of the Space Center. Historically, the military has been the largest user of the Port by a wide margin.[4]

The Port Authority owns the remainder of the Port, which has been developed for commercial activities. The Port's commercial facilities are located primarily along the main channel. They consist of four terminals for passenger cruise ships, two berths for oil tankers and barges and eleven berths for commercial cargo ships.[5] The Port contains no anchorages, ship repair, ship construction or drydock facilities. Commercial cargo movements at the Port are largely imports of petroleum products and cement, with some newsprint, scrap, fresh fruit, and lumber. The Port is also home to a large scallop fishing fleet.

From 1958 to 1983, all towing in the Port, both military and commercial, was performed by Hvide Shipping, Inc. (Hvide), through its wholly-owned subsidiary Port Canaveral Towing, Inc., formerly called Port Everglades Towing (for ease of identification, hereafter references to Hvide include Port Canaveral Towing and Port Everglades Towing).

Hvide performed tug and towing service for military vessels under a contract with the United States.[6] The military contract authorized Hvide to provide tug service for commercial vessels, so long as there was no interference with service to military vessels. However, at the beginning of each contract year, Hvide was required to negotiate with military representatives and arrive at joint projections of the added costs and revenues

[4] Ex. I-8 and IV-4 to Ex. R-8.

[5] May 6 Tr. 122.

[6] For much of this time, no one but Hvide could be found to bid on the military work, with the result that the contract was awarded to Hvide on the basis of a "sole-source" procurement. May 1 Tr. 41-42.

to Hvide of performing commercial tug service. The contract price of the military service then would be reduced by 100 percent of the estimated commercial revenue, less the estimated commercial costs (which apparently included an undefined profit factor).[7] If Hvide realized more commercial revenue than it and the military had estimated, it could keep that extra money.[8] Generally, the actual results were quite close to the original estimates. In Hvide's best year, 1983, it realized an extra profit of $40,000, while its worst year resulted in a shortfall of $15,000.[9]

Hvide performed commercial services at Port Canaveral under a series of exclusive franchise agreements between itself and the Port Authority. The Port Authority's charter from the State of Florida authorizes it to award franchises for the performance of commercial services at the Port.[10] The most recent agreement between Hvide and the Port Authority was executed on January 8, 1975, for a term of 10 years with automatic yearly renewals thereafter. The franchise may be terminated by either party on 60 days notice, and on 30 days notice in the event of a default. The agreement states in part:

> The party of the first part [the Port Authority], having determined that this Franchise is in the best interest of Port Canaveral, Florida, within the responsibility of the party of the first part, it is specifically understood and agreed that the party of the first part will not grant to another tug towing service a Franchise to carry on the aforementioned towing and fire-fighting service at Port Canaveral, Florida, without first having public hearings showing a convenience and necessity therefore as determined solely by party of the first part.[11]

In 1983, Hvide became ineligible to bid on the military contract because its total corporate revenues exceeded the Small Business Administration "set asides" ceiling upon which the contract was required to be bid. Competing against several other bidders, Petchem was awarded the military contract in November 1983. Petchem is a Connecticut corporation. From the time of its incorporation in 1978 until 1983, Petchem did a very modest business of marine consulting;[12] prior to the award of the military contract, Petchem had no experience in the tug business and it now performs no other work of any kind except the military service at Port Canaveral.[13]

Despite losing the military contract, Hvide remained at the Port to perform commercial tug and towing service because it believes that eventually there will be enough commercial business to allow it to make a profit. In Decem-

[7] May 6 Tr. 202–203, 220–225.
[8] May 7 Tr. 145.
[9] *Id.* at 145–47.
[10] Ex. P.R. I, Art. IV, §6, 7.
[11] Ex. C–25.
[12] In 1982, Petchem earned $12,140 and in 1983, it earned $14,701. May 1 Tr. 80.
[13] May 1 Tr. 80–81.

ber 1983, after Petchem had won the military contract but before it began providing service under that contract, Petchem applied to the Port Authority for a non-exclusive franchise to engage also in commercial service at Port Canaveral.[14] In accordance with the franchise provision quoted above, a Port Authority committee evaluated Petchem's request and issued a recommendation:

> Petchem has not shown that there is a clear case of convenience and necessity for the Canaveral Port Authority to issue an additional tug franchise, therefore none should be issued.
>
> Since it would be beneficial to both the commercial and military interests in Port Canaveral to have up to four (4) tugs available, when the tugs are not otherwise in use, the Canaveral Port Authority should encourage Port Canaveral Towing to make standing arrangements to sub-contract with Petchem for tug service needed in excess of Port Canaveral Towing's normal capability. We also recommend that the military encourage Petchem to make similar arrangements to sub-contract beyond Petchem's normal capability with Port Canaveral Towing.[15]

In February 1984, the Port Authority endorsed the committee's recommendation and denied Petchem's application. The division of tug business between Petchem and Hvide became as it remains today. In providing all military service, Petchem uses two relatively new twin-screw tugs of approximately 2100 horsepower each. Under the military contract, these two tugs must be available on 30 minutes notice, 24 hours a day, 7 days a week.[16] In 1984, its first year of operations under the military contract, Petchem realized a net profit of $231,000 on operating revenues of $1,894,000. Petchem has a good record of performance on the military tug work.[17]

Hvide, for its part, provides all commercial service at the Port. It uses two tugs that it formerly employed for both military and commercial work. Thus, there is now a total of four tugs providing day-to-day service at the Port. Hvide's tugs are older than Petchem's but have been extensively refitted. They use single-crew propulsion. Hvide also occasionally uses a third tug at the Port, but this tug is designed only for pushing against the side of a vessel in conjunction with the other tugs and is therefore

[14] Unlike Hvide's prior contract, Petchem's contract with the military did not include an authorization to perform commercial service at the Port. Such authorization had been included in the original solicitation, but was deleted in the pre-bidding process at Petchem's request. Petchem apparently was concerned that retaining such a provision would motivate Hvide to try to use one of its corporate subsidiaries to evade the "set asides" limits. May 1 Tr. 117–121.

[15] Ex. C–26 at 11–12.

[16] Petchem has a third, smaller tug but that is obligated to provide special barge service outside the scope of the ordinary military work and would not be available for commercial work at all. May 1 Tr. 60–61, 76–77.

[17] Ex. C–10 through C–13; May 1 Tr. 42–45.

limited in its uses.[18] In its presentation to the Port Authority in opposition to Petchem's application for a franchise, Hvide projected that it would lose $250,000 in 1984 in providing all commercial service at the Port.[19] It actually lost $473,000.[20] However, Hvide has not raised its commercial rates since it lost the military contract and offers some of the lowest rates on the East Coast.[21] Nevertheless, Petchem is prepared to charge even lower rates, in order to gain a competitive advantage against Hvide.[22]

B. *The Initial Decision*

The Presiding Officer was required to address certain threshold questions of jurisdiction raised by Respondents before he reached the merits of Petchem's complaint.[23] He held that because the Port serves carriers offering cruise transportation to passengers, it serves common carriers and therefore was an "other person" subject to the 1916 Act and is a "marine terminal operators" subject to the 1984 Act. He stated that in light of this holding, it was unnecessary for him to determine whether the Port is subject to the Commission's jurisdiction because it holds itself out to serve common carriers of cargo; however, he contended that there is considerable authority for jurisdiction on this basis as well. In response to Respondents' further argument that even if the Port is personally subject to the Commission's jurisdiction, the conduct at issue here involves tug and towing services beyond the reach of the Shipping Acts, the Presiding Officer relied on *A.P. St. Phil ID, Inc.* v. *Atlantic Land and Improvement Co.*, 13 F.M.C. 166 (1969), as authority for the proposition that where a terminal operator, through an exclusive franchise agreement, has made carrier access to its facilities dependent upon employment of a particular tug service, the furnishing of tug boat service is transformed into a terminal function subject to Commission jurisdiction. He rejected Respondents' arguments that more recent Commission decisions indicate that *St. Philip* should be repudiated or at least distinguished from this case.

On the merits of the complaint, the Presiding Officer found that the Port Authority violated sections 16 and 17 of the 1916 Act and sections 10(b) (11)–(12) and 10(d)(1) of the 1984 Act in selecting Hvide to provide commercial service exclusively and denying Petchem an opportunity to compete with Hvide.[24] He held that Petchem had met its initial evidentiary burden by proving the existence of the Port Authority's exclusive franchise arrangement with Hvide. He then cited the *St. Philip* decision, *supra*, for

[18] May 1 Tr. 111–112, 163–65; May 6 Tr. 210–211. A cruise line official testified that this specialized tug was quite satisfactory for his company's needs. May 6 Tr. 273.

[19] Ex. C–35; May 6 Tr. 95.

[20] May 6 Tr. 103.

[21] *Id.* at 205.

[22] Ex. C–19, C–20; May 1 Tr. 63–64.

[23] Respondents had raised similar issues in a Joint Motion for Dismissal by Summary Disposition, filed December 6, 1984. The Presiding Officer denied the Motion without prejudice on January 30, 1985.

[24] Although Hvide and Port Canaveral Towing were respondents in the proceeding, they could not be found to violate the Shipping Acts because they are not ocean common carriers or terminal operators.

the proposition that exclusive franchise arrangements are *prima facie* unjust and unreasonable and should be struck down unless justified by their proponents. The Presiding Officer summarized Respondents' case in support of Hvide's franchise and stated that even if one were to assume the validity of that case, the Port Authority's actions were still unreasonable and unjust because Hvide was favored over all other tug operators, not just Petchem.

The Presiding Officer cited evidence indicating that, contrary to its professed desire to have four tugs serving the Port, the Port Authority would have permitted Hvide to continue to provide all commercial work with its two (and occasionally three) tugs, even if it still had the military work. As to possible conflicts between military and commercial tug work, he noted that historically there had been no serious difficulties "and, until Petchem came onto the scene, neither the Port nor the military saw fit to complain." I.D. at 38. He concluded that Petchem must be allowed to perform commercial tug service at Port Canaveral on a non-exclusive basis, until such time as the Port properly establishes the need for an exclusive franchise agreement and holds competitive bidding.

DISCUSSION

A. *Jurisdiction*

Respondents continue to contend that the Commission lacks jurisdiction over Petchem's complaint because, in the first place, the Port is not a "marine terminal operator" under the 1984 Act or an "other person" under the 1916 Act. The 1916 Act defined "other person subject to [the Act]," in relevant part, as any person "carrying on the business of . . . furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water." 46 U.S.C. § 801 (1982 ed.). The 1984 Act defines "marine terminal operator" as "a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier." 46 U.S.C. app. § 1702(15).

The terms of those definitions make it necessary to refer also to the Acts' definitions of common carrier. The 1916 Act defined "common carrier by water in foreign commerce," in relevant part, as one "engaged in the transportation by water of passengers or property between the United States . . . and a foreign country . . . ." 46 U.S.C. § 801 (1982 ed.). The 1984 Act defines "common carriers" as:

> a person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that—
>
> (A) assumes responsibility for the transportation from the port or point of receipt the port or point of destination, and

> (B) utilizes, for all or part of that transportation, a vessel operating on the high seas or the Great Lakes between a port in the United States and a port in a foreign country.

46 U.S.C. app. § 1702(6).

Under either statute, our jurisdiction over Petchem's complaint ultimately must rest on findings that the Port Authority's control over tug services through its franchise system represented furnishing of "terminal facilities," and that such furnishing was in connection with common carrier service at the Port. Respondents argue that there is no common carrier service at the Port and, even if there is, the towing service in controversy here is not a marine terminal activity over which the Commission may exercise jurisdiction. We will discuss first the state of the record with respect to common carrier service at Port Canaveral, and the applicable case law.

(1) *Cargo Common Carriage*

Clearly, the common carrier requirements of the statutes would be met if common carriers of cargo were calling at the Port. However, all parties agree that no such carriers are calling at Port Canaveral at present. The petroleum products and other non-liner cargoes moving through the Port are shipped on tankers and barges. Petchem contends that cargo common carriers had served the Port in the past and that such past service, coupled with the Port's "holding out" in the hopes of attracting similar service in the future, creates Commission jurisdiction. However, the only evidence of record on past cargo common carriage at the Port shows merely that there has been none since 1980; there is no evidence as to precisely when there *was* cargo carriage.[25] Petchem argues that Port Canaveral was adjudicated to be a marine terminal operator subject to the 1916 Act in the Commission's 1974 decision in *Agreement No. T-2598.* However, our decision in that case indicates that no party, including the Port Authority itself, raised the issue of the Port's regulatory status and that the Commission consequently assumed that the Port was subject to our jurisdiction. 17 F.M.C. at 287, 293. It cannot be fairly said that the Port's status is *res judicata* as a result of *Agreement No. T-2598.* Also, our decision contains no findings of fact or other references to cargo common carrier service at the Port at that time.[26]

Consequently, the Commission cannot find that Shipping Act jurisdiction attaches to Port Canaveral by operation of present or past cargo common

[25] The deputy port director testified that no liner cargo carriers have called at the Port since he took his job in 1980. May 6 Tr. 4, 13. In its interrogatories to the Port Authority, Petchem asked it to state the number of common carriers (without distinguishing between cargo and passenger carriers) that had called at the Port in 1982 and 1983; the Port's answer was "unknown". Ex. C-1, C-2.

[26] Even if there had been such references, it is problematical at best whether 1974 cargo common carrier service could support a finding of jurisdiction in 1986, in the absence of evidence of service in the intervening years.

carriage. The Port clearly hopes to attract such service in the future[27] and, as Petchem emphasizes, the Port maintains a terminal tariff at the Commission that includes charges for servicing liner cargo carriers.[28] In his Initial Decision, the Presiding Officer indicated that he believed that such "holding out" to common carriers on the Port's part could, on its own, create Commission jurisdiction. Petchem supports the Presiding Officer's statement[29] although, as noted, Petchem attempts to strengthen its "holding out" arguments with references to alleged past cargo operations and the Commission's decision in *Agreement No. T–2598*. Respondents contend that the act of filing of a tariff does not create regulated status and that jurisdiction cannot rest on mere willingness to serve cargo common carriers if any should decide to call.

Although "holding out" is only tangential to our disposition of the jurisdiction issue, the Presiding Officer's statement and the parties' arguments make some discussion desirable. The leading case on the importance of "holding out" to Commission jurisdiction over a port is *Prudential Lines, Inc.* v. *Continental Grain Company,* 25 F.M.C. 203 (1982). The administrative law judge (ALJ) found that the operation by Continental Grain Company of a grain elevator at Norfolk, Virginia, constituted operation of a marine terminal facility subject to the 1916 Act. In so finding, the ALJ analyzed the authorities on Commission jurisdiction over terminal operators. He stated that the teaching of the more recent cases is that "holding out" is more important as a test of jurisdiction than such factors as the number of times that a common carrier's vessels called at the terminal, whether a vessel owned by a common carrier actually was operating in common carriage when it called at the terminal, or the effect of the terminal's activities on common carriage. 25 F.M.C. at 245. Thus, in reaching his ultimate conclusion, the ALJ relied heavily on the fact that Continental Grain had held out to the public by filing a terminal tariff with the Commission that covered common carriers' vessels. *Id.* at 247–249. He also noted that other grain companies wishing to remove their elevators from Commission regulation had done so by simply announcing in their tariffs that they did not serve common carriers. *Id.* at 249.

Petchem commends the ALJ's analysis and conclusion in *Continental Grain* as applicable to Port Canaveral's maintenance of its tariff and admitted solicitation of cargo carriers. However, Respondents correctly point out that the ALJ also expressly noted that Continental Grain's elevator had in fact served common carriers in the recent past. *Id.* at 247, 249. More important, the "holding out" aspect of *Continental Grain* was not addressed by the Commission in our subsequent decision on exceptions.

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[27] May 6 Tr. 13. The Port has made capital improvements in support of such efforts, including the construction of a ramp for "roll-on/roll-off" cargo. *Id.* at 61–62.

[28] *See* n. 22, *supra*, and accompanying text.

[29] Petchem Reply to Exceptions at 20, n. 7, 22.

Rather, in affirming as to jurisdiction, the Commission relied on the fact of actual service to common carriers. 25 F.M.C. at 204, 206.

Thus, *Continental Grain* does not establish that "holding out" by itself creates Commission jurisdiction over a terminal facility. If jurisdiction were to be found here over Port Canaveral on the basis of its tariff publication and solicitation of common carriers, an explicit extension of existing precedent would be required. Because we find below that the passenger operations at the Port are common carriage for Shipping Act purposes, it is unnecessary to establish any new standard of law with respect to "holding out" in this case.[30]

(2) *Passenger Operations*

The record establishes that there are basically two types of passenger service at Port Canaveral. Passenger vessels originating in Europe (including the QUEEN ELIZABETH II) call at the Port and disembark passengers for a visit to Disney World, a short bus ride away. When the passengers return, the vessels then sail on to other ports. The Port also is home for vessels offering voyages to the Bahamas.[31]

Respondents argue that these operations do not bring Port Canaveral within the Commission's jurisdiction because all of these vessels are engaged in round-trip, not one-way service. They contend that because the passengers' origin and destination are the same port (whether Port Canaveral or a foreign port), there is no true "transportation" in that the passengers' object is the pleasure of the cruise itself rather than migration from one point to another. They further construe the Shipping Acts as requiring that there must be transportation from a defined origin port and a different final destination port, one of which must be in the United States and the other in a foreign country.

In rejecting those arguments, the Presiding Officer stated that the definitions in both Shipping Acts of common carriers as vessel operators providing, *inter alia,* transportation of passengers "between the United States and a foreign country" is clear and covers both types of passenger service at Port Canaveral. He also referred to a dictionary definition of transportation that simply describes conveyance from one place to another. He stated:

> When ships go from the Port to the Bahamas or some other foreign country they provide transportation "between the United States and a foreign country" and it matters not that there is

[30] Respondents perceive a difference between the 1984 Act's definition of a regulated carrier, which expressly includes holding out, and the Act's definition of a regulated port, which refers to the furnishing of terminal facilities. 46 .S.C. app. 1702(6), (15). Respondents would require actual, contemporaneous "furnishing" in order for Commission jurisdiction to attach. Petchem counters that Respondents' reasoning would cause Commission jurisdiction to "wink on and off," depending on the presence of cargo carriers. Oral Argument Tr. at 47.

[31] Ex. C-3 through C-6; May 6 Tr. 25-26, 134-35. A cruise line offering "cruises to nowhere" formerly operated at the Port. May 6 Tr. 26.

> going to be additional transportation from the foreign country back to the Port. Indeed, in our view the return voyage is further "transportation" within the meaning of the Shipping Act.

I.D. at 22.

Hearing Counsel advance the same analysis in their Reply to Exceptions. Respondents counter that temporary stops at layover ports do not convert a unitary, round-trip voyage into a sequence of one-way services. They cite by analogy Shipping Act cases on cargo tariff filing that hold that a through movement on a single bill of lading should be viewed as one complete voyage.

There have been very few proceedings involving passenger transportation under either the 1916 Act or the 1984 Act. The Commission is essentially without guiding precedent as to whether the passenger vessel operations at Port Canaveral constitute common carriage.[32] Under such circumstances, the Presiding Officer cannot be faulted for relying on his own reading of the statutes and a standard definition of "transportation." Agencies and courts commonly resort to the same technique if no other help is available. *See generally United Parcel Service, Inc.* v. *United States Postal Service,* 455 F.Supp. 857 (E.D. Pa. 1978). In the absence of clear statutory guidance, "popular or received import of words furnishes the general rule for the interpretation of public laws." *Mercantile Bank & Trust Company* v. *United States,* 441 F.2d 364, 366 (8th Cir. 1971). Thus, the Commission reasonably may rely on its own common sense construal of the Shipping Acts.

In defining common carriers subject to the Commission's jurisdiction, both the 1916 Act and the 1984 Act plainly include carriers of passengers. With regard to the normative provisions involved in this proceeding, sections 16 First of the 1916 Act and 10(b) §(11)–(12) of the 1984 Act, which prohibit unreasonable preferences to or prejudices against any "person," clearly protect passengers. 46 U.S.C. §815 (1982 ed.); 46 U.S.C. app. §1709. Section 17, second paragraph, of the 1916 Act and section 10(d)(1) of the 1984 Act require just and reasonable practices regarding "receiving, handling, storing, or delivering property." 46 U.S.C. §816 (1982 ed.); 46 U.S.C. app. §1709. Although the applicability of these sections to passengers is less direct than that of sections 16 and 10(b), they can be read to protect the property of passengers as well as shippers.[33]

Respondents would have the Commission limit these provisions of the Shipping Acts to passengers purchasing one-way passage between the United

[32] The authorities offered by Respondents provide no assistance. Neither Customs Service, *T.D. 85–109,* 50 Fed. Reg. 26,981 (July 1, 1985) nor *Comp. Gen. OP. B–138816,* 38 Comp. Gen. 621 (1959), address whether a cruise between a U.S. port and a foreign port, with a return to the origin port, is "transportation" or common carriage for Shipping Act purposes. Both essentially were concerned with distinguishing (for purposes of other statutes) between foreign and domestic commerce, not between common carriage and non-common carriage.

[33] See 46 C.F.R. §515.6(b). *Compare Hepner* v. *P & O Steam Navigation Company,* 27 F.M.C. 563 (1984).

States and a foreign country, excluding from our regulation and protection passengers purchasing round-trip passage. However, Respondents do not point to any indication in the legislative histories of either the 1916 Act or the 1984 Act that Congress meant to draw, or even considered, any differences between one-way and round-trip passenger service.

The Shipping Acts' definitions of "common carrier" apply without difficulty to the cruise lines operating in and out of Port Canaveral. With particular reference to the 1984 Act's definition, 46 U.S.C. app. § 1702(6), these lines (1) hold themselves out to the general public; (2) to provide transportation by water; (3) to passengers; (4) between the United States and a foreign country; (5) for compensation; (6) using a vessel operating on the high seas; (7) between a port in the United States (*i.e.*, Port Canaveral) and a port in a foreign country (*e.g.*, the Bahamas or Europe). The statutes do not specify that to be a common carrier, a passenger operator must offer only one-way voyages or voyages in a particular direction, or that the passengers must disembark or remain in port, or that the passengers' motive must be something *other* than pleasure. To conclude that round-trip vacation cruises are not ocean common carriage would contradict the language of the statute.

As for the meaning of "transportation," a rule of statutory construction holds that if it is alleged that a term has both a common meaning and a more specialized commercial or trade meaning, the common meaning will prevail until the commercial or trade meaning is proved or a different legislative intent is established.[34] On this record, the Presiding Officer's conclusion that "transportation" as it is used in the Shipping Acts has the common meaning of conveyance of cargo or persons was entirely appropriate.

If the Commission accepted Respondents' arguments, the practical result would be that we would no longer have any meaningful regulatory jurisdiction over passenger carriers. True one-way passenger service—which Respondents term "*bona fide* passenger transportation" and concede is within our jurisdiction[35] may not exist at all today. It certainly existed when the 1916 Act was written; the waves of immigrants to the United States in the late nineteenth and early twentieth centuries traveled primarily on passenger ships. In the wake of the development of jet airplanes, however, passenger transportation is now almost exclusively round-trip pleasure cruises, even if only one leg of the "cruise" is on a vessel (as in the QUEEN ELIZABETH II—British Air packages).[36] In enacting the 1984 Act, Congress carried over into the new statute the 1916 Act's references to passengers. This requires the Commission to oversee the operations of all passenger vessel carriers who met the statutory definition. The course

[34] Sutherland Stat. Const. § 47.31 (4th ed.).

[35] Exceptions at 83.

[36] As Petchem states, "human beings (with such deplorable exceptions as slaves, convicts, and kamikazes) generally view transport of their persons as a round trip undertaking." (Reply to Exceptions at 23).

advocated by Respondents would amount to an abandonment of those responsibilities. We conclude that we have *in personam* jurisdiction over Port Canaveral by virtue of the passenger carriers calling there.

(3) *Tug Service as "Terminal Facilities"*

Respondents' alternate jurisdiction argument is that even if Port Canaveral is a regulated entity due to service to passenger common carriers, the Commission still lacks subject matter jurisdiction over Petchem's complaint, because the Port's decision regarding tug service did not involve the furnishing of "terminal facilities."

The Commission does not have jurisdiction to regulate tug services under ordinary circumstances. Respondents correctly state that the legislative history of the 1916 Act shows that Congress expressly intended to remove tug operators from the Act's coverage.[37] The 1984 Act did not change that. However, in *A.P. St. Philip, Inc.* v. *Atlantic Land and Improvement Co., supra,* the Commission established legal principles under which tug services in some circumstances can become Shipping Act terminal facilities. The resolution of this last issue turns on whether the *St. Philip* principles should control here.

St. Philip involved a dispute over tugboat service at a particular terminal facility in the Port of Tampa, Florida. The St. Philip company was a tugboat operator. Atlantic Land operated a phosphate elevator on the Port Tampa Canal that served ocean common carriers and was therefore a Shipping Act marine terminal, like the grain elevator in the *Continental Grain* case, *supra.* Atlantic Land entered into a contract with another tug operator, Tampa Towing, that gave Tampa Towing an exclusive right to provide tug service for vessels calling at the phosphate elevator. Despite this contract, St. Philip began to provide tug service as well. Tampa Towing brought a local court action that resulted in a permanent injunction against St. Philip from contracting with any vessel coming to or going from Atlantic Land's elevator. St. Philip then filed a complaint with the Commission, alleging violations by Atlantic Land and its corporate parent of the 1916 Act.

The administrative law judge had concluded in his initial decision that even though Atlantic Land and its parent were terminal operators subject to the Commission's jurisdiction, the tug service in dispute was not so subject because it concerned ". . . the operation of the vessels as distinguished from services related to the terminal." 13 F.M.C. at 171. The ALJ also found that there could not be a violation of section 17 of the 1916 Act because tug service did not concern the receiving, handling, transporting, storing or delivery of property. The Commission reversed, stating:

[37] *See United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 451–52 (1946).

> Normally, it is true that the selection of the tugboat operator is within the exclusive province of the carrier and that terminals themselves do not become involved in the actual docking and undocking of vessels or in the arrangements therefor. We would, therefore, ordinarily agree that tugboat service does not constitute a terminal function within the scope of section 17. Where, as here, however, the terminal operator has usurped the normal function of the carrier and made the very access to the terminal facilities dependent upon a commitment to Tampa Towing for tug service under the terms of an exclusive-right contract, the furnishing of tugboat service has, in effect, been transformed into a terminal function intimately related to the "receiving, handling, transporting, storing, or delivering of property."

Id. at 171–72.

As precedent for its conclusion in *St. Philip*, the Commission cited *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966). There terminal operators that maintained and operated lighters, a function usually not performed by a terminal, were directed to adopt just and reasonable lighter detention rules because:

> The assumption by the terminal operator of the carrier's traditional obligation of loading and unloading of necessity carries with it the responsibility for ensuring that just and reasonable rules govern the performance of the obligation.

9 F.M.C. at 514.

Despite the strong factual similarity between *St. Philip* and this case, Respondents contend that *St. Philip* is no longer a viable precedent on the issue of when the Commission may assert ancillary jurisdiction over normally non-Shipping Act activities such as tug service. They argue that certain Commission decisions subsequent to *St. Philip* have recognized that the Commission must consider whether such activities have a discernible effect on the competitive or commercial relationships to which the Shipping Acts are directed, and that the Port's refusal of a franchise to Petchem had no such effect. They also state that these later cases have established a dichotomy between a port's actions relating to "navigation" and those relating to terminal/cargo services. They place particular emphasis on *Bethlehem Steel Corp.* v. *Indiana Port Commission*, 21 F.M.C. 629 (1979), where the Commission held that it did not have jurisdiction over a port fee designed to recoup costs for constructing the harbor itself.

Respondents' analysis is incorrect. The essential facts of *Bethlehem Steel* should be distinguished from those of *St. Philip* and this case. The effect of a harbor construction fee on a ship's access to terminal facilities is far more remote and tangential than that of tug service. Moreover, two decisions more recent than *Bethlehem Steel* indicate that the theory articulated in *St. Philip* has continuing vitality. In *Louis Dreyfus Corp.* v.

Plaquemines Port, Harbor and Terminal District, 25 F.M.C. 59, (1982). the Commission stated:

> The statutory scheme contemplates regulation of any entity if it exercises sufficient control over terminal facilities to have a discernible effect on the commercial relationship between shippers and carriers involved in that link in transportation.

Id. at 1079.

The administrative law judge in *Plaquemines* had characterized *St. Philip* as establishing a "control theory" of Commission jurisdiction over terminal activities. *Id.* at 1077, n. 5. The Commission adopted this phrase and stated that "conditioning access to a port's private facilities upon the payment of a charge for governmental services reflects significant threshold control over terminal facilities." *Id.* at 1080. On the basis of this "control theory," the Commission concluded that it had both personal jurisdiction over the respondent Port District (which was a political subdivision of the State of Louisiana) and subject matter jurisdiction over the Port District's practice of assessing fees for certain vessel services based on cargo transactions. The Commission specifically held that it had subject matter jurisdiction under section 17 of the 1916 Act—now section 10(d)(1) of the 1984 Act—because the Port's practices had an underlying purpose relating to terminal operations and a more than incidental relationship to the handling of cargo. On this point, the Commission distinguished *Bethlehem Steel.*[38]

The second case is *Jacksonville Maritime Association* v. *City of Jacksonville,* 27 F.M.C. 149, (1984). There the Commission found that we had no jurisdiction to review a "user fee" charged to vessels anchored in storage. The rationale of the case is consistent with *St. Philip* and *Plaquemines.* The Commission reasoned that the fee did not apply to common carriers by water and, more important, found that there was "no evidence showing that Respondent used the ordinance as a means of controlling access to terminal facilities," 27 F.M.C. at 151, and that this factor distinguished the case from *Plaquemines. Id.*

The cases decided under the 1916 Act do not support Respondents' arguments that Port Canaveral's refusal to grant a tug franchise cannot have any discernible effect on the commerce regulated by the Commission. In *St. Philip),* the Commission focused on the potential effect of the exclusive tug contract on common carriers wishing to hire tug services and on the general shipping public that stood to benefit from competition. 13 F.M.C. at 172–73. In *Plaquemines,* the Commission stated that the port's "pervasive involvement in the business of common carriers, marine

[38] 25 F.M.C. at 67, n. 13 and accompanying text. Based on the language and holding of *Plaquemines,* it appears that the "navigation/terminal" distinction first stated in *Bethlehem Steel* would be more accurately referred to as "harbor maintenance/terminal." *See Indiana Port Commission* v. *FMC,* 521 F.2d 281, 285 (D.C. Cir. 1975). The ALJ in *St. Philip* had used a "vessel operation/terminal" dichotomy, 13 F.M.C. at 171, but was reversed.

terminals and the commerce of the United States'' conferred jurisdiction on the Commission. 25 F.M.C. at 67. It should also be noted that Respondents concentrate their arguments on possible discriminatory or anticompetitive effects, but that section 17 of the 1916 Act and section 10(d)(1) of the 1984 Act require ''just and reasonable'' practices, arguably a broader standard.[39]

There is no indication that Congress intended to alter the principles of those 1916 Act decisions by enacting the 1984 Act. The primary concern of Congress was to make more efficient and expeditious the Commission's handling of antitrust-exempt agreements among carriers. Congress did not express any desire to change the historical requirement that marine terminal operators be fair and reasonable in their behavior. The best evidence of this is the nearly verbatim transfer of the language of sections 16, First and 17 from the 1916 Act into section 10 of the 1984 Act. The Port Authority's exclusive franchise system for tug operations extends the Port's furnishing of terminal facilities from the pier onto the waters of the harbor. The Port's practice has an underlying purpose relating to terminal operations and a more than incidental relationship to the receiving and handling of property and cargo. For those reasons, the Commission has jurisdiction over the subject of Petchem's complaint.

B. *The Lawfulness of the Port's Actions Under the Shipping Acts*

At the outset, there is a dispute among the parties regarding the legal standard by which the Commission should determine the lawfulness of the Port Authority's denial of Petchem's franchise application. Petchem and Hearing Counsel contend that *St. Philip* and an earlier decision, *California Stevedore & Ballast Co.* v. *Stockton Port District,* 7 F.M.C. 75 (1962), should control our examination of the evidence of record. In those cases, we found unlawful exclusive arrangements between a terminal, on the one hand, and a tug company (*St. Philip*) and a stevedore (*Stockton*), on the other. In neither proceeding did the parties defending the arrangement make much of an effort to justify it on economic grounds, preferring instead to concentrate on challenging the Commission's jurisdiction. *St. Philip,* 13 F.M.C. at 173; *Stockton,* 7 F.M.C. at 81–84. Having found jurisdiction, the Commission stated in both cases that such arrangements are *prima facie* unreasonable and must be justified by their proponents. In the absence of convincing substantive justification, we concluded in each case that the arrangement was unreasonable and unlawful.

[39] A necessary implication of Respondents' arguments on this point is that Petchem lacks standing to bring a complaint before the Commission because, as a tug operator, it is not a member of a class protected by the Shipping Acts. In fact, Respondents expressly made such arguments before the Presiding Officer. *See* I.D. at 28–29 and Petchem's Reply to Exceptions at 36, n. 25. Respondents' position is contradicted by the broad terms of section 22 of the 1916 Act, 46 U.S.C. § 821 (1982 ed.), and section 11(a) of the 1984 Act, 46 U.S.C. app. § 1710, which permit any ''person'' to file a complaint alleging violations of the statute. '''Any person' means any person.'' *South Carolina Ports Authority* v. *Georgia Ports Authority,* _____ F.M.C _____, 22 S.R.R. 1111, 1117 (1984).

At the same time, however, the Commission explicitly recognized that in the proper circumstances such arrangements may be justified as necessary to advance economic efficiency or produce other benefits. In *Stockton,* the Commission stated:

> [W]e do not hold here that all monopolistic stevedoring agreements are necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost.

7 F.M.C. at 84 (footnote omitted).

That is consistent with the language of the Shipping Acts, which "[do] not forbid all preferential or prejudicial treatment; only that which is undue or unreasonable." *St. Philip,* 13 F.M.C. at 174.

These general principles are applicable to the instant proceeding. The exclusive arrangement between the Port Authority and Hvide is *prima facie* unreasonable because it is contrary to the general policies of the United States favoring competition, which fact obligates Respondents to justify the arrangement. *St. Philip,* 13 F.M.C. at 172–73. However, unlike *Stockton* and *St. Philip,* Respondents here have attempted to meet their burden by adducing extensive economic and business testimony in support of the arrangement. Consequently, the position of Petchem and Hearing Counsel is correct only to a limited degree. While the rationale of *St. Philip* and *Stockton* remain relevant to the merits of this case, the result of those cases does not control the Commission's decision. If we held otherwise, the effect would be to establish a rule that franchise agreements or other exclusive port arrangements are *per se* violative of the Shipping Acts, assuming only that they are within the Commission's jurisdiction (as discussed below, this in fact appears to be the essence of Petchem's position).

A contrasting example of a successful justification of an exclusive port franchise can be found in *Agreement No. T–2598,* 17 F.M.C. 286 (1974). This decision is heavily relied upon by Respondents, for reasons that will be obvious.

In *Agreement No. T–2598,* the Commission investigated whether an exclusive franchise agreement between the same Canaveral Port Authority and Eller and Company (Eller) to perform terminal operations at Port Canaveral (including stevedoring) was, *inter alia,* in violation of sections 16 and 17 of the 1916 Act. Another terminal company had sought the Port Authority's permission to perform terminal operations at the Port on a non-exclusive basis. The Port Authority refused to grant permission, for reasons strikingly similar to those advanced here in support of its actions with regard to Petchem. 17 F.M.C. at 289–90. The Port Authority's agreement with Eller stated, as does its agreement with Hvide, that it would not grant another terminal operation franchise unless it found that there was a "convenience and necessity" for such franchise. *Id.* at 290.

In determining whether the Port Authority's agreement with Eller met the standards of the 1916 Act, the Commission reviewed

> the validity and reasonableness of the decisions made by [the Port Authority] on which it based its adoption of an exclusive terminal operator concept and upon the effects of that adoption.

Id. at 295.

This established a two-part standard of review: whether the Port Authority's decision was reasonable at the time it was made and, even if so, whether it was still reasonable in light of its subsequent effects.

The complainants had contended that consistent cargo growth and forecasted future growth at the Port mandated the use of multiple terminal operators. The Port Authority and Eller maintained that it was unreasonable to reach that conclusion when Eller was handling all of the cargo with less than 70 percent of its capacity. The Commission stated:

> We conclude that respondents' position is the more realistic in light of the facts shown on record. Our conclusion here does not, however, ignore the future growth potential of the Port or the likelihood that at some future time the conclusion reached herein may no longer be valid. We are of the opinion, however, that any public interest involved at the Port in the future is amply protected by two separate procedures. Having determined Agreement No. T–2598 to be subject to section 15 of the Act, we have assumed continuing jurisdiction over that Agreement and its implementation. Any future abuse, which we do not foresee, could be corrected readily by our continuing supervision.
>
> Further, since the Agreement provides for termination without cause of Eller's favored position, we must assume that [the Port Authority], a public body charged with public trust, will honor that trust were future traffic to indicate a need for use of additional terminal operators. The Agreement permits, and [the Port Authority's] duty demands, that [the Port Authority] act in the best interest of the Port and the public. We cannot conclude that, should future increased traffic volume so require, [the Port Authority] would arbitrarily renege on its duties and responsibilities by disallowing additional terminal operators to work the Port.

Id. at 296.

The complainants had urged that increased competition necessarily would improve quality of service to Port Canaveral's customers. The Port Authority acceded to the general principle that competition is beneficial, but urged that such principles must be applied to an actual set of circumstances. The Port Authority claimed

> that on the basis of current traffic volume, the introduction of competing terminal operators would result in a winner-take-all battle for traffic which would not support two concurrent operators. This is urged to be so because multiple terminal operators would cause economic loss to one and, of those competing, the one least able to sustain losses would be forced out. . . . the quality

> of service to customers would suffer from neglect and rates would be increased to cushion impending losses. Avoidance of this sort of risk is urged as a legitimate concern of the Port Authority, in whom rests the duty and responsibility to maintain stable service capability at the Port.

Id. at 297.

The Commission stated:

> We find Respondents' argument persuasive. We are of the opinion that under such circumstances as currently prevail at Port Canaveral, the duly authorized Port Authority is the proper body to weigh and evaluate business risks related to that Port's efficiency in the first instance. It is not our function to gainsay the day-to-day economic decisions of this Port, nor would it be appropriate for us to do so. Given our continuing surveillance of the Agreement under which Port Canaveral and its operator must conduct their terminal operations, we see no danger in leaving the fiscal and business determinations in the first instance with the duly authorized Port Authority. Clearly, it is not the function of this agency to substitute its judgment for that of the Port. It is, however, our duty to direct appropriate changes upon finding that the Port's action or inaction based on its own judgment is contrary to the statutes we administer.

Id.

The Commission found that the Port Authority's judgment was reasonable when it was made and that there was insufficient evidence to conclude that that judgment subsequently was having unreasonable consequences. We therefore found no violation of section 16 or 17 of the 1916 Act.

The applicability of *Agreement No. T–2598* to the proceeding now before the Commission is clear. The Presiding Officer erred in failing to even mention the case in his Initial Decision, though it had been cited extensively by Respondents in their brief before him. Petchem contends that the decision is not relevant because it involved the Port's control of its own facilities and did not present a situation "wherein the terminal operator reached out to the normal affairs of vessel operation."[40] But the Commission already has held that it is precisely this extension by the Port of its terminal operations onto the waters of the harbor, through its tug franchise system, that gives us Shipping Act jurisdiction over Petchem's complaint. Having done so, the Commission must now apply the standards and policies derived from other proceedings involving traditional terminal operations to this case. *St. Philip,* the case so heavily relied upon by Petchem, does not advocate a harsher standard for non-traditional terminal activities; on the contrary, it applies the same Shipping Act standards to both classes

[40] Petchem Reply to Exceptions at 48. *See also* Oral Argument Tr. 33–34.

of operation by citing *Stockton Port District, supra,* which, like *Agreement No. T–2598,* involved stevedoring.

In sum, the appropriate standard for judging exclusive terminal arrangements under the Shipping Acts is a synthesis of the *St. Philip* and *Agreement No. T–2598* decisions. Such arrangements are generally undesirable and, in the absence of justification by their proponents, may be unlawful under the Shipping Acts. However, in certain circumstances, such arrangements may be necessary to provide adequate and consistent service to a port's carriers or shippers, to ensure attractive prices for such services and generally to advance the port's economic well-being. The burden of adducing evidence of such circumstances falls upon the port and the other parties to the exclusive arrangement, both because they are the arrangement's proponents and because evidence of that nature usually lies within their control. Nevertheless, the ultimate burden of proof in any Shipping Act challenge to an exclusive terminal arrangement or franchise rests with the party wishing to overturn the franchise. That elementary fact of administrative law and Commission procedure, 5 U.S.C. §556(d) and 46 C.F.R. §502.155, is particularly apposite here, where the challenge has arisen in a complaint proceeding brought by a person wishing to compete with the beneficiary of Port Canaveral's franchise. Petchem, that person, must prove by reliable, probative and substantial evidence, 5 U.S.C. §556(d), that it is unreasonable for the Port Authority to refuse a franchise to Petchem, based both on evidence regarding Petchem and also on a successful rebuttal of the justification for the franchise offered by Respondents.

In deciding this case, the Commission will scrutinize the circumstances obtaining in December 1983, when the Port Authority denied Petchem's application for a franchise, and also the situation at the Port during the period of record subsequent to that denial. This two-part standard of review, similar to that applied in *Agreement No. T–2598,* first requires us to examine the facts then before the Port Authority to determine whether the denial of a franchise to Petchem was so flawed from the outset that it should be struck down regardless of any *post hoc* developments. We then must also determine whether, even if the Port Authority acted reasonably at the time it denied Petchem's application, subsequent developments have overtaken that denial and rendered it unreasonable.

When Petchem applied to the Port Authority for a franchise in December 1983, the Port Authority was already in a situation entirely new to it. For the first time in the Port's thirty years of operation, the military tug contract had been split away from commercial work by operation of the Small Business Administration "set aside" requirements. Hvide had agreed to remain at the Port despite the loss of the military work, but it was projecting that it would incur substantial losses for the immediate future by being limited to commercial work. The Port Authority also knew that since 1980 both non-liner cargo business and passenger cruise business had been expanding at the Port, thus increasing the need for reliable com-

mercial tug service. The Authority's problem was to induce a tug operator to provide such service even though it would not be able to offer the incentive of military work, such work having already been awarded to Petchem. At least for the short term, a solution had been found as a result of Hvide's promise to stay on at the Port and the continuation of Hvide's franchise agreement.

Petchem's application for clearance to compete with Hvide for commercial business raised further complications. The application was initiated before Petchem had begun any work under the military contract. Petchem was a very small company and had never been in the tug business before. Petchem thus had no track record that the Port Authority—which under its charter from the State of Florida is required to grant franchises only in the best interests of the Port—could rely upon. No carriers serving the Port or other local maritime interests (such as stevedores) appeared at the franchise hearing in support of Petchem's application.[41] The Port Authority was aware that if Petchem did compete with Hvide, it inevitably would increase Hvide's losses; in contrast with Petchem's lack of industry support, a representative of Premier Cruise Lines, a major tug employer, appeared at the franchise hearing to oppose Petchem's application because it was concerned that Petchem, if awarded a franchise, would force out Hvide.[42] During the Port Authority's review of its application, Petchem made it clear that it would provide commercial service only with the tugs assigned to the military contract and that the availability of those tugs would be secondary to military requirements[43] (which, as stated above, mandate that Petchem's tugs be ready on 30 minutes notice at all times). Thus, even if Petchem eventually proved itself to be a competent tug operator, there was reason to question whether it would be equipped sufficiently to provide the reliable commercial service that the Port Authority is responsible for maintaining at the Port.[44]

Reduced to its essentials, the Port Authority's January 1984 denial of Petchem's application for a franchise represented a conclusion that the creation by the "set aside" program of a monopoly for Petchem over military work necessitated the creation of a balancing monopoly for Hvide over commercial work. By denying Petchem's application, the Port Authority gave Petchem some time to establish itself[45] and also gave itself some time to gain a better understanding of how the new division of military tug work from commercial work would affect Petchem, Hvide, Port Canaveral and the carriers and shippers using the Port.

[41] *See generally* Ex. C–26.

[42] *Id.* at 14.

[43] *Id.* at 4–6.

[44] During the evidentiary hearings before the Presiding Officer, Petchem's president for the first time made a highly tentative suggestion that Petchem might bring a new tug to Port Canaveral to provide commercial service. May 1 Tr. 73. Whatever the credibility of this testimony, it certainly was not before the Port Authority when it considered Petchem's application.

[45] May 6 Tr. 54.

On the basis of these facts, the Commission cannot conclude that the Port Authority's denial of Petchem's application was so unreasonable or unfair at the time it was made as to violate the Shipping Acts. The Presiding Officer contends that when the Port Authority received Petchem's application, it immediately should have opened up the commercial franchise to competitive bidding and that by failing to do so, the Authority unreasonably preferred Hvide over all other tug operators. Petchem goes further and attacks the very existence of the Port Authority's franchise system; although it never says so directly, Petchem appears to believe that the award of any exclusive commercial franchise to Hvide or anyone else would be unlawful *per se* and cannot be justified on any ground (as indicated above, Petchem's total reliance on *St. Philip* is consistent with this theory).[46] Petchem's expert witness advocated the same theoretical, free-market model in her testimony.[47]

The Presiding Officer's insistence on franchise bidding loses sight of several facts. First, no company besides Hvide and Petchem has ever approached the Port Authority regarding commercial service.[48] Second, this is a complaint proceeding in which Petchem is contending that *it*—not some general class of tug companies—suffered unfair prejudice. Third, at the time of its application, Petchem's credentials as a tug operator were unproven. The Port Authority had no reason to think that a competitive bidding process would produce anyone other than Petchem and Hvide and, in comparing Petchem with Hvide, it had substantial reasons to question Petchem's competence and readiness to perform commercial services in addition to its military obligations.

Petchem's position that the Port Authority should let the commercial market determine how many tug companies can survive in that market does not give recognition to the Port Authority's responsibility to promote reliable and *continuous* service at the Port and, for that reason, does not represent a persuasive alternative to the Authority's franchise system.[49] For example, if Petchem did in fact drive Hvide out of the Port but was unable to provide all needed commercial service by itself, there could

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[46] During the evidentiary hearings, Petchem argued that the Port Authority had no power to apply its "convenience and necessity standard to Petchem's application, and not that the Port Authority erroneously applied the standard. May 1 Tr. 22. In its Reply to Exceptions, Petchem termed the "convenience and necessity" standard as a discredited regulatory tool that unfairly was applied only to Petchem.

[47] Ex. C-31.

[48] May 6 Tr. 36–37. The Presiding Officer states that the other tug companies who applied for the military franchise were potential competitors for commercial work, but were discouraged by the franchise agreement between Hvide and the Port Authority. I.D. at 33–34, n. 14 and accompanying text. Assuming that such speculation is a valid grounds for decision, it is equally reasonable to speculate that those companies, being small businesses eligible to bid on the military contract, would be in no position to withstand—even for the short term—losses of the magnitude incurred by Hvide in providing commercial service and for that reason never approached the Port Authority.

[49] Petchem states:

> Petchem does not pretend to know whether the increasing tug market in the Port will support one, two, five or a dozen tug companies in the coming years. Neither does the FMC or [the Port Authority]. As far as the legal issues of this case are concerned, it simply does not matter.

Reply to Exceptions at 40.

be a significant lapse of time before another tug company appeared to replace Hvide, in view of the absence of any third companies so far. In such circumstances, the Port and its customers could suffer considerable detriment. As in *Agreement No. T–2598,* economic theorizing is useful only if it can be applied reasonably to the facts of the case. Petchem and its expert recognize that economic theory also holds that there are situations in which companies choose not to enter a market because they perceive it as small and unremunerative. In such situations, it may be necessary to permit a monopoly in order to induce investment in essential services.[50] The Port Authority acted reasonably in concluding that such a situation was before it and the Authority's use of its "convenience and necessity" standard was a reasonable implementation of the responsibilities placed on it by the State of Florida.[51] As in *Agreement No. T–2598,* the Commission's conclusion in this regard is partially based on appropriate deference to the Port Authority, an entity familiar with business circumstances at Port Canaveral and entitled to a presumption that it is concerned with public and not private interest.[52]

To complete the analysis, the Commission further finds that the evidence concerning developments at Port Canaveral during the period of record subsequent to the Port Authority's original denial of Petchem's application does not justify a conclusion that the Authority must now reverse itself and permit Petchem to compete with Hvide. Since obtaining the military contract, Petchem has compiled a good record of performance as a tug operator. However, in 1984 Petchem was required to call upon Hvide to assist it in docking military vessels as many as eight times.[53] In contrast, in 1981–1983, Hvide required more than two tugs to perform *both* military and commercial work only four times.[54] As the Port Authority predicted, the need for commercial tugs has been increasing at the Port. In 1983,

[50] Petchem Reply to Exceptions at 51. It is somewhat incongruous for Petchem to place such emphasis on the benefits of competition when it holds a protected market itself. We recognize that Petchem competed for the military franchise, but that competition itself was restricted. The small business "set aside" program represents at bottom a political judgment, not an economic one. The government has concluded that it is good social policy to encourage small businesses, even though economic efficiency may be sacrificed in the short run. Accordingly, large companies such as Hvide, which have been efficient and successful in the market and therefore have grown to their present size, are excluded from a certain amount of federal business. The Commission implies no criticism of the "set aside" program. We simply state that Petchem does not hold the moral high ground because it wishes to compete with Hvide. Given that the "set aside" program is the direct cause of the present application of the Port Authority's franchise system for commercial tug service, the franchise cannot be termed a *per se* unlawful deviation from economic orthodoxy. Further, we cannot agree with the statement of Petchem's expert that Petchem's advantage in holding the military contract was merely comparable to having financial "deep pockets." May 2 Tr. 159–60. Petchem obtained its advantage by government decree in part because it was small and had not yet achieved market success, whereas "deep pockets" are the result of market success.

[51] A previous application of the standard by the Port Authority was before the Commission in *Agreement No. T–2598.*

[52] Deference to decisions of local government authorities on matters such as port franchising also was extended by the Commission in *Agreement No. T–2880, et al.,* 19 F.M.C. 687, 700 (1977), and in *Agreement Nos. T–3310 and T–3311,* 23 F.M.C. 591, 595–596, (1981).

[53] May 1 Tr. 66–67, 114; May 7 Tr. 110–111.

[54] Ex. R–15.

there were 188 tug-assisted calls by commercial vessels; in 1984 there were 362. Through May 1985, the pace was exceeding 1984.[55] Nevertheless, Hvide has not been required to subcontract any commercial work to Petchem, although it has asked Petchem to "stand by" on occasion.[56] These facts indicate that the Port Authority's January 1984 conclusion that Petchem required some time to learn the tug business and the Port's peculiar requirements continued to apply throughout the period of record. Also, the $473,000 in losses incurred by Hvide in 1984 despite the increase in commercial tug business supports the conclusion that there is not yet enough such business to allow one operator to break even, let alone two.[57] Conversely, the lack of enough business to fully occupy Hvide removes any significant possibility that commercial carriers calling at the Port are being harmed by Hvide's franchise. As noted, no such carrier has expressed support for Petchem.

It also seems clear that, as Respondents contend, if Petchem did begin to solicit commercial business in competition with Hvide, it would derive a significant advantage from the fact that its fixed costs and some variable costs are covered by its military contract. Petchem would be in a position to set rates for commercial service at very low levels, requiring only that relatively minor variable costs for commercial movements and a negotiated rebate to the military be covered. Petchem could thus undercut Hvide's rates, which have to cover all costs. The proposed rates set forth in Petchem's tariff and the testimony of Petchem's president indicate that Petchem is indeed prepared to engage in a rate-cutting campaign against Hvide.[58] On these facts, the Port Authority cannot regard as mere bluff Hvide's statements that it will consider withdrawing from Port Canaveral if it must share commercial business with Petchem.[59] If that happened, the record indicates that Petchem would have its hands full with its military work and would not be able to provide adequate commercial service.

In sum, the Commission does not believe that Petchem has met its burden of proving that the Port Authority was or is unreasonable to refusing to allow it to compete with Hvide. In reaching this conclusion, however, we do not adopt all of Respondents' arguments. We do not accept their contention that Petchem cannot lawfully use its tugs for commercial purposes during the life of its military contract and *a fortiori* cannot suffer detriment under the Shipping Acts. Although it is true that Petchem's military contract did not contain an authorization for commercial work

[55] I.D. at 16.

[56] May 1 Tr. 61–62.

[57] Hvide's chief executive testified that he is "at ease" with losses of this magnitude and that he expected losses to continue for another three or four years. May 6 Tr. 207. During the proceedings, the parties disputed whether Hvide's losses were the result in part of accounting practices or inefficient operations. *See* I.D. at 35–36. Even if this is true, no one contends and it is impossible to find that Hvide should have realized a *profit* on its commercial work.

[58] *See* n. 22, *supra*, and accompanying text.

[59] May 6 Tr. 207–208, 227.

when it was first executed—*which gave the Port Authority another reason* to deny Petchem's franchise application when it was first filed—the military subsequently made it clear that it will permit Petchem to perform commercial work if it obtains a franchise.[60] The Commission is not the appropriate body to determine that that position is wrong as a matter of federal procurement law. Further, we do not necessarily agree with Respondents' defense of a protected market for Hvide on the ground that the Port now needs a total of four tugs (Petchem's two main tugs and Hvide's two tugs) due to increased potential for conflict between military and commercial vessels, particularly the cruise liners. The key is not the absolute number of tugs available in the Port, but rather the particular identity and circumstances of the companies running those tugs. The evidence shows that Petchem has all (and occasionally more) than it can handle with the military work, that there is therefore a need for the Port Authority to foster a separate tug operator for the commercial work, and that the most effective way of doing that is to grant Hvide exclusive rights for such work.

The preponderance of the evidence of record, together with the reasonable deference the Commission owes to the Port Authority as a body expert in matters peculiar to Port Canaveral, leads us to conclude that we should not disturb the present division of tug markets at the Port. It is always possible that changes at Port Canaveral, particularly continued growth, may alter the basis of this decision. Unlike *Agreement No. T–2598*, the Commission does not have continuing supervisory jurisdiction over the situation at the Port through a filed agreement.[61] However, other safeguards remain. The franchise agreement between the Port Authority and Hvide provides for termination without cause on 60 days' notice.[62] The Commission must assume that the Port Authority, a public body charged with a public trust, will discharge its duty and terminate the agreement in favor of non-exclusive franchises if it becomes clear that traffic levels at Port Canaveral have reached the level where more than one commercial tug operator is needed. If the Port Authority fails to meet its obligations, the Commission can entertain another complaint pursuant to section 11(a) of the Shipping Act of 1984 or initiate an investigation of its own under section 11(c). 46 U.S.C. app. § 1710.

We should also state that even if the Port Authority continues to believe that an exclusive franchise for commercial work is necessary, it should consider carefully whether periodic competitive bidding for that franchise would be beneficial. As Petchem continues to gain experience as a tug operator, it may arrive at a point where it more realistically could provide both commercial and military service with its tugs, perhaps at cheaper

[60] *E.g.*, Ex. C–15—C–17. On February 13, 1986, Petchem filed a "Motion to Reopen the Record for Purpose of Receiving Additional Evidence" on this point. Receipt of the proferred evidence is not necessary for the Commission's decision. The Motion therefore will be denied.

[61] 17 F.M.C. at 296. *See* Petchem's Reply to Exceptions at 48.

[62] We assume that the agreement remains in effect at this writing with the same renewal date of January 8.

rates than those charged by Hvide. Even if it was necessary for Petchem to purchase additional tugs in order to provide all needed service, it would be motivated to take more concrete steps toward such expansion if by doing so it might displace Hvide as the holder of the Port's franchise. Finally, if in fact there are any other tug operators interested in providing commercial service at Port Canaveral, an announcement of competitive bidding might bring them to the fore. However, these comments are advisory and should not be read to detract from the Commission's conclusion that Petchem has not proven that the Port Authority's preservation of an exclusive commercial market for Hvide during the period of record was violative of the Shipping Acts.

THEREFORE, IT IS ORDERED, That Petchem's "Motion to Reopen Record for Purpose of Receiving Additional Evidence," filed February 13, 1986, is hereby denied;

IT IS FURTHER ORDERED, That the Presiding Officer's Initial Decision is hereby affirmed to the extent it found Commission jurisdiction over Petchem's complaint;

IT IS FURTHER ORDERED, That the Initial Decision is otherwise hereby reversed;

IT IS FURTHER ORDERED, That this proceeding is hereby discontinued.

(S) JOHN ROBERT EWERS
Secretary

Commissioner Moakley, concurring.

I join in the majority in concluding that the complaint in this proceeding should be dismissed. I also concur in the majority's view of the merits of this complaint. However, I would not base the decision on the merits, but rather, on my belief that we have no jurisdiction over the subject matter at issue, the franchising of tug services.

It does not follow from the fact that the respondent Canaveral Port Authority[1] is a marine terminal operator that all of its activities are, therefore, subject to regulation under the Shipping Act of 1984 (1984 Act).[2] A marine terminal operator is defined as

> . . . a person engaged in the United States in the business of furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier. (46 U.S.C. app. 1702(15)).

As the majority indicates, Congress specifically excluded persons carrying on the business of *towing* from the coverage of the Shipping Act, 1916.[3] The 1984 Act did not change that coverage, and used the same terminology with respect to terminal operators.

The "control" theory enunciated by the majority broadens the scope of our jurisdiction far beyond the words of the statute. The breadth of this theory is evident from the language of the *Plaquemines*[4] decision quoted by the majority (p. 28).

> The statutory scheme contemplates regulation of *any entity* if it exercises *sufficient control* over terminal facilities to have a *discernible effect* on the commercial relationship between shippers and carriers involved in that link in transportation. (emphasis supplied)

I dissented from this jurisdictional expansion in *Plaquemines* where the majority claimed authority to regulate a local government's charges for police and fire protection. As evidenced by that decision, it is very difficult for the public to predict which port activities are and are not subject to FMC jurisdiction under the control theory.

The distinction between navigational and terminal services that the Commission articulated in the *Bethlehem Steel*[5] decision seems a logical interpretation of our authority over port functions and a proper narrowing of

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[1] There is no basis whatsoever for exercising jurisdiction over the other two respondents in this proceeding, Port Canaveral Towing, Inc., and Hvide Shipping, Inc. Neither is nor is even alleged to be a common carrier or a marine terminal operator as those terms are defined in section 3 of the shipping Act of 1984 (46 U.S.C. app. 1702) (Majority Order, p 12, note 24). Inexplicably, neither seems to have raised this issue.

[2] *Bethlehem Steel Corp.* v. *Indiana Port Commission*, 21 F.M.C. 629, 632 (1979).

[3] *See United States* v. *American Union Transport, Inc.*, 327 U.S. 437, 451–53 (1946).

[4] *Louis Dreyfus Corp.* v. *Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59, 65, 21 S.R.R. 1072, 1079 (1982).

[5] Note 2 *supra*.

the broad language of the *St. Philip*[6] case. Tug services fall neatly on the navigational side of such a dividing line and outside the scope of terminal services. I would dismiss this complaint for lack of jurisdiction over the respondent Port's activities with respect to the franchising of tug services.

[6] *A.P. St. Philip, Inc.* v. *Atlantic Land and Improvement Co.*, 13 F.M.C. 166 (1969).

FEDERAL MARITIME COMMISSION

DOCKET NO. 84–28

PETCHEM, INC.

v.

CANAVERAL PORT AUTHORITY, ET AL.

1. Where a Port maintains and operates a passenger ship facility used by common carriers by water and imposes dockage and wharfage charges on ships calling at the port it is a terminal operator within the meaning of the pertinent sections of the Shipping Act of 1916 and the Shipping Act of 1984 and is therefore subject to the jurisdiction of the Federal Maritime Commission, and further, where cruise ships operate on a round trip schedule between a United States port and a foreign port the transportation provided comes within the ambit of the word "transportation" as used in section 1 of the Shipping Act of 1916 and section 3(6) of the Shipping Act of 1984, and is transportation between the United States and a foreign country irregardless of the purpose of the transportation or the intent of the carrier in providing it or passengers in taking it.
2. Where an operator of a tug service files a complaint and alleges violations of sections 16 and 17 of the Shipping Act of 1916 and sections 10(b)12 and 10(d)(1) of the Shipping Act of 1984, such complainant is a "person" within the meaning of section 22 of the 1916 Act and section 11 of the 1984 Act and has standing to file the complaint and be a party to the proceeding.
3. Where a Port enters into an exclusive franchise agreement for tug and towing services with a particular provider without initially allowing any other provider an opportunity to be a party to such agreement; and where the Port conditions the future services of any other provider on its sustaining the burden of establishing a finding of "convenience and necessity" to the Port, such action by the Port restricts the commercial access of common carriers by water to one tug service and has transformed the furnishing of tug and towing services into a terminal function related to the receiving, handling, transporting, storing or delivering of property and or passengers and as such, the function is subject to the jurisdiction of the Federal Maritime Commission.
4. Where a Port enters into an exclusive franchise agreement for tug and towing services with a particular provider without initially allowing any other provider an opportunity to be a party to such agreement, and where the Port conditions the future services of any other provider on its sustaining the burden of establishing a finding of "convenience and necessity" to the Port, such actions are *prima facie* unjust and unreasonable both as to common carriers the Port serves and the general public.
5. Where the evidence indicates a Port has itself selected a particular provider to perform tug and towing services and has entered into an exclusive franchise agreement for the provider to render such services without even initially considering other providers, and where other providers are only allowed to provide services on a holding of "convenience and necessity" by the Port; and where the evidence indicates the Port did not have sufficient justification for its acts, the burden of overcoming the *prima facie* unjust and unreasonable conduct has not been met and the Port's actions violate sections 16 and 17 of the Shipping Act of 1916 and sections 10(b)(12) and 10(d)(l) of the Shipping Act of 1984.

Michael V. Mattson for complainant Petchem, Inc.

Leon Stromire for respondent Canaveral Port Authority.

Robert T. Basseches and *Timothy K. Shuba* for respondents Port Canaveral Towing, Inc., and Hvide Shipping, Inc.

Aaron W. Reese and *Alan Jacobson* for Hearing Counsel, intervenor.

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

Partially Adopted March 28, 1986

Background Information

This case began as the result of a complaint filed by Petchem, Inc. ("Petchem" or "complainant") on August 6, 1984. The complaint names as respondents, (1) the Canaveral Port Authority ("CPA" or "the Port Authority"), (2) Port Canaveral Towing, Inc. ("PCT"), and (3) Hvide Shipping, Inc. ("Hvide").

The complaint charges that Petchem applied for and was denied a non-exclusive franchise to perform commercial tug and towing services at Port Canaveral ("the Port"), and that such denial resulted in violations of sections 16 and 17, respectively, of the Shipping Act, 1916.[2] Further, the complaint originally included a claim for reparations which was subsequently withdrawn.[3] Hearing Counsel petitioned to intervene in the proceeding citing the need "that the Commission's interests are fully represented in all matters where the Commission's jurisdiction is challenged." Hearing Counsel's Petition to Intervene was granted.[4]

Proceedings on the complaint were initially delayed due to withdrawal of one of the co-counsel for the Port Authority, and the substitution of counsel for Hvide in late November of 1984. On December 6, 1984, the respondents filed a Joint Motion for Dismissal by Summary Disposition, raising issues of jurisdiction and standing, as well as issues going to the merits of the complaint. The Motion was denied without prejudice.[5] After extended discovery a hearing was conducted between May 1 and May 7, 1985. In latter portions of this brief the transcript of those hearings will be referred to as follows: May 1 hearing as Tr. I; May 2 hearing as Tr. II; May 6 hearing as Tr. III; and May 7 hearing as Tr. IV. Appropriate page numbers will be set down after each of the above references.

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

[2] While the complaint did not initially allege any violation of the Shipping Act of 1984, later pleadings and filings by the parties clearly broadened the scope of the complaint to include violation of the companion sections of the 1984 Act.

[3] Complainant's Notice of Dismissal of Count V of the Complaint, dated February 26, 1985.

[4] Petition of Hearing Counsel for Leave to Intervene, dated September 27, 1984. The Petition was unopposed and was granted by Order of November 15, 1984.

[5] See Order dated January 30, 1985.

Further, the exhibits which will later be referred to are designated as follows:

Complainant—C–1 (etc.)
Respondent PCT or Hvide—R–1 (etc.)
Respondent CPA—PR–1 (etc.)

Finally, after the record was closed in this proceeding, respondents filed a Joint Request for Leave to Respond to Complainant's list of Extra-Record Material and the complainant filed a Petition to Reopen to allow a report prepared by respondents' expert witness into the record. Both Motions are hereby granted.

Findings of Fact

1. The complainant, Petchem, is a Connecticut corporation whose business it is to provide towing services (Tr. I–34, 35).

2. The respondent, CPA, was established in 1953 by special act of the Florida legislature to construct and operate a deep water port at Cape Canaveral for public benefit. It is a body public and corporate with taxing and eminent domain power, governed by five elected commissioners, with day-to-day operations under the supervision of a professional management team headed by the Port Director (Ex. PR–1; Tr. III–7, 8).

3. The respondent, PCT, is a Florida corporation engaged in the business of providing tug and towing services. Its prior name was Port Everglades Towing, Inc. PCT is a wholly owned subsidiary of Hvide Corporation (Ex. C–23, No. 1–7).

4. The respondent, Hvide, was formed by Hans Hvide in the late 1950's, and is wholly owned by the Hvide family. Hvide has diverse and extensive interests in the maritime industry. There are at least eight companies who, like PCT, are subsidiaries of Hvide (Ex. R–12; Tr. III—246, 247).

5. PCT (as Port Everglades Towing, Inc.), began tug and towing services at the Port in 1958. At or about that time it entered into a franchise agreement with the Port whereby it had the exclusive right to perform commercial tug and towing services in the port. It has performed such services up to the present time. The latest franchise agreement was entered into in 1975. It provides in pertinent part:

> 1. Party of the first part hereby agrees to and does hereby grant to the party of the second part for a period of ten (10) years from the execution of this Agreement, as hereinafter provided, a franchise to provide vessel towing service at Port Canaveral, Brevard County, Florida, subject to the conditions and provisions of this Franchise Agreement; and party of the second part shall operate and maintain in such towing service at Port Canaveral, Florida, two (2) or more modern harbor tugboats equipped with fire fighting apparatus.

> 2. It is recognized that party of the first part has made and determined that the public convenience and necessity requires the services of party of the second part, who has made and provided such services in the past and currently seeks to provide such services in the future. Party of the second part, in consideration for the granting of this Franchise shall at all times abide by all rules and regulations of party of the first part, and shall provide, operate and maintain adequate, efficient and satisfactory tug assistance and fire-fighting service to meet all of the requirements in the operation of Port Canaveral, Florida, as determined by party of the first part.
>
> 3. Party of the first part hereby grants said Franchise to party of the second part for a period of ten (10) years from the execution of this Agreement, as hereinafter provided, and said Franchise shall continue from year to year thereafter until terminated by either party as herein provided. The party of the first part, having determined that this Franchise is in the best interest of Port Canaveral, Florida, within the responsibility of the party of the first part, it is specifically understood and agreed that the party of the first part will not grant to another tug towing service a Franchise to carry on the aforementioned towing and fire-fighting service at Port Canaveral, Florida, without first having public hearing showing a convenience and necessity therefore as determined solely by party of the first part.
>
> * * * * *
>
> 5. This Franchise may be terminated by either party giving to the other party at least sixty (60) days advance written notice of intent to terminate; and further, a default of the conditions and terms hereof remaining uncorrected after written notice for thirty (30) days likewise terminates this Agreement at the election of the non-defaulting party.

(Ex. C–25; Tr. III—191–193, 199–201.)

6. Within six months after PCT commenced commercial tug services at the Port the United States Navy decided to establish a base at the Port to be used to test nuclear submarines, as the home port for missile tracking ships, and for other associated military purposes. PCT was given an interim contract to perform docking and undocking services for all military vessels calling at the base. Thereafter, the military (Air Force) contract for tug services at the Port was competitively bid and PCT was always the successful bidder. In 1962, the contract was expanded to include missile retrieval operations on behalf of NASA. PCT was continually awarded the military (Air Force) contract until 1983. In 1983 PCT became ineligible to bid on the contract since it was bid as a small business set-aside with a revenue cap of ten million dollars (S10,000,000), and Hvide revenues had grown so that they exceeded the set-aside revenue criteria (Ex. R–20; Tr. III—204, 253–255).

7. The pertinent portions of the military contract with PCT were as follows:

> Furnish two tugboats, equipped with one or more pumps with a capacity of 1,000 gallons/minute and nozzle pressure of 125 psi for mobile marine fire-fighting to serve all Government-owned/chartered and sponsored (British submarine) vessels entering or leaving Port Canaveral. Tugs shall be a minimum of 1500 hp.
>
> * * * * *
>
> Harbor Tug Service.
>
> Responsible for assisting all U.S. Government-owned, sponsored, or chartered vessels entering or leaving Port Canaveral in docking and undocking.
>
> Responsible for assisting in missile recovery operations when such assistance does not interfere with docking or undocking operations. The area of performance is Port Canaveral and adjacent waters to a depth of 100 feet and frequency is continuous, with services of two tugboats available 24 hours a day, 7 days a week, except for two separate two-week periods during which one tugboat may be removed from service for annual overhaul. Private commercial operations of the Marine Contractor-furnished tugboats are authorized, but shall not conflict or interfere with the basic ETR requirements of this Statement of Work and shall be approved by the Navy Port Operations Office to assure that there will be no conflict between the specified ETR requirements and the tug service provided to others. Foreign flag vessels under charter to MSC are considered commercial vessels. Government-owned vessels utilizing Port Canaveral range from attack submarines to ships of approximately 17,000 gross displacement tons. All tugs that will handle the docking and undocking of submarines at Port Canaveral shall be equipped with sufficient fendering to prevent damage to the hulls of submarines.
>
> Provide a third tugboat of 2,000 horsepower with sufficient fendering to prevent damage to Ohio-class submarines. Services or charters provided under this paragraph shall be approved by the Contracting Officer and will be deemed added requirements in accordance with Section B, The Schedule. The area of performance is Port Canaveral and the frequency of performance is two 45-day periods in FY–81, four 45-day periods in FY–82, and two 45-day periods in FY–83.

(Ex. R–20.)

8. In 1983, Petchem was awarded the military contract from about 8 to 12 bidders to perform tug and towing services at the Port. The pertinent portions of that contract are as follows:

PERFORMANCE WORK STATEMENT

Scope. This Performance Work Statement (PWS) sets forth the requirements for marine utility and tug services at the Eastern Test Range (ETR). The contractor shall furnish two tugboats with a minimum of 1,500 horsepower (continuous) and 2,000 horsepower (intermittent). Personnel will be responsible for operating and repairing a Government furnished tug, barge, and LCU, performing underwater search and salvage operations; missile recovery; dock diving service; (diving up to 100 ft depth); harbor tug service; cable maintenance support; transporting fuel; and various other tasks.

* * * * *

Hours of Operation. Contractor services shall be available as shown below.

a. *Contractor Furnished Tugboats* 24 hours a day, seven days a week

b. *Government Furnished Tugboat, LCU, and Barge* 8 Hours a day, five days a week (on call 24 hours a day, seven days a week) Response Time: Crew must be on board and ready to sail four hours after Government Notification.

c. *Contractor Furnished Divers* 8 hours a day, five days a week (on call 24 hours a day, seven days a week) Response Time: Divers must be prepared to dive four hours after Government Notification.

* * * * *

Furnish two harbor tugboats. Furnish two harbor tugboats (including fuels and lubricants) each equipped with one or more pumps each with a capacity of 1,000 gallons/minute and nozzle pressure of 125 psi (including an injected foam capability) for mobile marine fire-fighting to serve all Government-owned/chartered and sponsored (British submarine) vessels entering or leaving Port Canaveral. Tugs shall be minimum of 1500 HP (continuous) and 2000 HP (intermittent). Tugs must be capable of accepting the fendering as specified in NAVSEA Dwg No. 5364513. A Bollard pull may be required to prove horsepower with the Government furnishing the Bollard and Dynamometer, and the contractor furnishing all other equipment.

Tug Service. Provide tug service, towing and/or special towing, and marine services to the Government utilizing Government-Furnished vessels, Marine Contractor-Furnished tugboats, chartered tugboats, chartered or special purpose vessels. Tugs shall be capable of responding (undocking) within 30 minutes of notification by Government personnel, if required. A list of government personnel authorized to request services will be provided to the contractor.

* * * * *

> Provide a third tugboat, equipped as per para. 3.3.1, on an "as required" basis for special operations. The area of performance is Port Canaveral and adjacent waters. A work request, Ref. General Provision, I.512, will be initiated by the Administrative Contracting Officer for these added requirements (CLIN's 0003, 0005, and 0007 applies.)

(Ex. C–9; Tr. I—37, 42.)

9. The reason the military contract between the Air Force and Petchem did not contain an express provision authorizing commercial work was that Petchem had requested that it be deleted in the pre-bidding process and the Air Force had complied with that request. Petchem's request was motivated by a desire to insure that neither Hvide nor a company controlled by Hvide was allowed to bid on the military contract (Exs. C–14, C–15, C–16, C–17; Tr. I—117–121).

10. Under PCT's military contract with the Air Force it performed commercial work at the Port. It had an agreement with the Air Force that they together would estimate the added cost of performing commercial tug service for the forthcoming year as well as the revenue resulting from such service and that the contract price of the military services would be reduced by one hundred percent (100%) of the estimated commercial revenue less the estimated commercial costs (plus a profit factor added to that estimated increase in cost) (Tr. III—202, 203; 221–225; IV—142–145).

11. Under Petchem's military contract with the Air Force the parties contemplated that if Petchem did commercial work at the Port they would enter into an arrangement similar to that described in paragraph (10) above, which would reduce the cost of the Air Force contract price by a certain percentage of the commercial revenues, less the commercial costs. However, since Petchem has failed to secure the Port's approval to do commercial work and legal action has ensued the Air Force has taken a "neutral" position regarding the commercial work until the dispute is settled (Exs. C–14 thru C–17, C–22).

12. In its first year of operation under the military contract Petchem reported a net profit of $230,777.06 on operating revenues of $1,893,505.84 (Exs. R–4; Tr. I—42, 45).

13. To perform the military contract Petchem has three twin screw tugs, all of which were built since 1978. Two tugs have approximately 2100 horsepower each and the third tug has substantially less power (Tr. I—35–38).

14. Two of Petchem's tugs are required to be available seven (7) days a week, twenty-four (24) hours a day on thirty (30)-minute notice to satisfy the military contract (Ex. C–9; Tr. I—38).

15. Petchem would require permission from the Air Force to use the three tugs in the commercial sector. However, Petchem is under no restraint

as to the employment of any additional tugs were it to add any tugs to its fleet (Exs. C–9, C–22; Tr. I—13).

16. PCT, during the time it did the Air Force work and at present, has two tugs stationed at the Port. They are single screw vessels (Tr. I—161–163, Tr. IV—101, 102, 161–163).

17. Both Petchem and PCT have a good record of performance at the Port (Exs. C–10 thru C–13; Tr. I—42–45; Exs. B–15, R–19; Tr. III—40, 180, 261; Tr. IV—53, 56).

18. On February 9, 1983, the Port Authority held a regular semimonthly meeting. The minutes of that meeting state that:

> Director Rowland read aloud a letter from the Eastern Space and Missile Center regarding the contract the Air Force has with Port Everglades Towing, Inc. which expires on September 30, 1983, and commented that during recent meetings with the Air Force representatives it had been suggested it would be in both our interests to terminate the exclusive tug boat franchise with Port Everglades Towing in the event another firm is awarded the Air Force contract. Since our franchise requires sixty (60) days notice, that we should consider modifying the franchise to provide that it would terminate automatically if another firm is awarded the Air Force contract for primary tug service in Port Canaveral, with the termination effective with the expiration of the Air Force contract. That we should notify Port Everglades Towing that we will consider this at our April meeting so that they will have ample time for input to the considerations.
>
> Commissioner McLouth offered a motion and moved its adoption that Port Everglades Towing be notified of our proposed modification of their franchise agreement, and that it will be considered at our April meeting. Motion seconded by Commissioner Newbern and unanimously carried.

Ex. C–34.)

On April 17, 1983, the Port Director wrote a letter to the Government contracting officer, as follows:

Ms. Kathy Guy
PMPA
Headquarters, Eastern Space & Missile Center
Patrick Air Force Base, Florida 32925

Dear Ms. Guy:

We have reviewed our Franchise Agreement with Port Everglades Towing in light of the fact that you are currently recompeting the Air Force Tug Contract.

Port Everglades Towing has served the commercial interests of the Port continuously since 1960 in a very efficient and economical manner, and we see no need to modify our Franchise Agreement at this time. Should

another towing company request a franchise, we will hold a public hearing to determine the convenience and necessity of granting such a franchise.

We do regret that the Air Force is competing this contract through a procedure which precludes Port Everglades Towing, whom we understand has performed very well over many years at reasonable rates, from bidding on the new contract, and hope that the Air Force will reconsider use of this procedure.

Sincerely,

CANAVERAL PORT AUTHORITY
/S/ CHARLES M. ROWLAND
Port Director

(Ex. C–29; Tr. III—80.)

20. On December 15, 1983, the Port Authority met. Mr. Anthony Savas, Petchem's President, appeared before the Port Authority and requested a non-exclusive franchise for towing and berthing services. The Port Authority then appointed a committee to gather information and to report to it at a public "hearing of convenience and necessity" (Ex. C–18; Tr. I—55).

21. On February 16, 1984, the Port Authority met and considered Petchem's request. It was denied. The pertinent minutes of the meeting are as follows:

> Chairman Buchanan opened the meeting to the scheduled public hearing of convenience and necessity concerning Petchem, Inc.'s request for a non-exclusive franchise for towing and ship berthing services.
>
> Petchem, Inc., represented by Whitney Bowles, addressed the Board regarding their request for a non-exclusive franchise for towing and ship berthing services.
>
> Mr. Hans Hvide, representing Port Canaveral Towing, addressed the Board in opposition to Petchem, Inc.'s request for a non-exclusive franchise for towing and ship berthing services at Port Canaveral.
>
> Port Director Rowland commented that at the last meeting a committee consisting of Commissioner Nisbet, Deputy Director Karpinski, Director of Operations McMann, Attorney Stromire and himself had been appointed to evaluate Petchem's request for a franchise to furnish commercial tugboat services for berthing ships at Port Canaveral. The Committee had met with representatives of Petchem, Port Everglades Towing, and other interested parties during the past month. They had considered the following issues of convenience and necessity before forming recommendations:
>
> > Is there presently sufficient commercial business to support more than one tug franchise in Port Canaveral?

> What would be the short and long range effects of granting or not granting a second commercial tug franchise on prices of tug services?
>
> How desirable is it to have up to four (4) tugs available for commercial and/or military ships who use Port Canaveral, and how can we best insure that four (4) tugs remain in Port Canaveral?
>
> After weighing these factors it is the recommendation of this committee that:
>
> Petchem has not shown that there is a clear case of convenience and necessity for the Canaveral Port Authority to issue an additional tug franchise, therefore none should be issued.
>
> Since it would be beneficial to both the commercial and military interests in Port Canaveral to have up to four (4) tugs available, when the tugs are not otherwise in use, the Canaveral Port Authority should encourage Port Canaveral Towing to make standing arrangements to sub-contract with Petchem for tug service needed in excess of Port Canaveral Towing's normal capability. We also recommend that the military encourage Petchem to make similar arrangements to sub-contract beyond Petchem's normal capability with Port Canaveral Towing.
>
> Both Petchem and Port Canaveral Towing were given an opportunity of rebuttal, as well as other interested parties, following the committee's recommendation.
>
> Commissioner McLouth offered a motion and moved its adoption that the Board accept the Committee recommendation and deny Petchem's request for a non-exclusive franchise for towing and ship berthing services. Motion seconded by Commissioner Nisbet and unanimously carried.

(Ex. C–18; Tr. III—52–54.)

22. At the time Petchem's application to do commercial work was being considered by the Port Authority, PCT presented the Authority with financial information indicating that it would operate the commercial towing business at a loss. PCT provided the Assistant Director of the Port Authority, who was on the committee considering Petchem's application, with a document showing estimated net losses of $245,687.00 on operating revenue of $475,000.00. The document contained depreciation expense of $35,572.00, and interest of $40,415.00, both of which were properly allocable to Hvide, since Hvide owned the tugs which it leased or chartered to PCT and borrowed the money giving rise to the interest expense (Ex. C–35; Tr. III—94–97).

23. The Port Authority was presented with a three year projection of earnings by PCT. The Authority had some questions regarding the allocation of overhead by Hvide to PCT and whether or not they "should have

gone against Hvide.'' PCT representatives responded by noting that ''how you allocate overhead from parent companies to subsidiaries is again an accounting game.'' (Tr. III—111–113).

24. The Port consists of a dredged channel with entry to the Atlantic Ocean, and three adjacent basins. The northeast quadrant, including the entire East basin and a majority of the land surrounding the middle basin, is owned by the United States. It was taken from the Port by eminent domain, and is used by the United States Navy to test the Trident submarine, for other military purposes, and for purposes related to the operation by NASA of the Cape Canaveral Space Center. The remainder of the Port area, including all water and the surrounding land area, is owned and developed by the Port. This includes the third, or West Turning Basin, which is in the process of construction and will not be operational until 1988 at the earliest (Ex. P.R. 2; Ex. R–8 pp I—1–2; Tr. III—14, 30).

25. The Port's commercial facilities, which are located primarily along the main channel, consist of four terminals for cruise ships (one of these is currently under construction), two berths for oil tankers and for oil barges, and several cargo piers on the north and south sides of the channel. At the current level of activity the existing cargo facilities at the Port are being utilized at close to their maximum capacity. In addition to the military and commercial facilities, the Port is home to a large scallop fishing fleet (Ex. R–8 pp I—1–2; Tr. III—16–18, 21, 31).

26. The Port contains no anchorages, nor are there any ship repair, ship construction or drydock facilities. There is a single entrance to the ocean so that only one ship can enter or exit the Port at a time (Ex. P.R. 2; Ex. R–8, pp IV—11; Tr. III—14–18).

27. The Port owns all the land and a number of terminal facilities, all of which are leased to private interests who operate the terminals. The Port does not itself operate any of the terminal facilities, and itself performs no warehousing, stevedoring or inventory control. It does perform the maintenance function at the passenger facilities and one of the cargo facilities. The Port's revenues are derived from lease payments and dockage and line handling charges to the vessels calling at the Port and wharf age and storage charges, and it directly or indirectly carries on the business of furnishing wharfage, dock, warehouse and other terminal facilities (Tr. III—22–24, 64, 65, 129, 130) (Exs. C–1 (No. 1), C–2 (No. 1), PR–1; Tr. I—17; Tr. III—22–24, 64, 65, 129–133).

28. Until 1980, the Port's level of business was stagnant. Since that time there has been an increase in cargo business and a significant increase in the passenger cruise business (Exs. C–31, C–32, C–33; R–8 Chapter I).

29. The commercial tug business has also been increasing at the Port. In 1983, there were 188 tug assisted vessel calls at the Port; in 1984 there were 362. The 1985 pace is exceeding 1984. In 1983, PCT had

gross revenues from commercial tug services of approximately $369,000.00; in 1984 such revenues increased to $607,000.00 (Ex. R–8, I–8, III–1).

30. The Port Authority furnishes wharfage, dock, warehouse and other terminal facilities in connection with common carriers by water (Exs. C–1(4), C–2 (No. 4), C–3 thru C–8; Tr. III—13, 25, 26, 61, 62, 135, 287, 288).

31. There are only two to four government-operated ports operating in the commercial sector in the continental United States which place any control whatsoever on the tug and towing services provided for the port. All of these ports are located in Florida (Tr. I—146–156; Tr. II—88; Tr. IV—196, 197).

32. Except for these two to four ports, the usual practice is for an owner/master to have the right to select his own services. Factors the owner/master would normally consider would be safety, economics, time and a balancing of the competition (Tr. I—158, 159).

33. Ports in the United States of a comparable size to or smaller than the Port have more than one tug company available to serve the port (Ex. C–21; Tr. I—150–156; Tr. II—6, 80–87).

34. The Port's own management considers its operations to be competitive with other Florida ports and ports along the east coast, all of whom have competition in the area of providing tug services (Ex. C–21; Tr. III—22).

35. The Port has held itself out to provide various terminal services to common carriers by water whether those carriers are engaged in the movement of cargo, which carriage the Port is seeking to develop, or are engaged in the transportation of passengers, which transportation has been moving through the Port in increasing numbers and which will continue to increase (Tr. III—11, 13, 22, 32, 123, 134, 135, 270, 280, 287).

36. The Port has made commercial access by common carriers by water to Port Canaveral terminal facilities dependent upon the exclusive use of PCT for tug and towing services (Entire Record).

Ultimate Findings of Fact

37. The Port holds itself out and provides terminal services to common carriers who provide transportation by water of passengers between the United States and a foreign country for compensation and who assume responsibility for that transportation from the port or point of receipt to the port or point of destination, and in so doing the Port's activities in providing such services fall within the ambit of certain provisions of the Shipping Act of 1916, and the Shipping Act of 1984, and come under the jurisdiction of the Federal Maritime Commission.

38. The complainant is a "person" within the meaning of section 22 of the Shipping Act of 1916 and section 11 of the Shipping Act of 1984, and has standing to file the complaint and be a party in this proceeding.

39. The actions of the Port in restricting commercial access of common carriers by water to one tug service by use of an exclusive franchise agreement has transformed the furnishing of tug and towing services into a terminal function related to the receiving, handling, transporting, storing or delivering of property and/or passengers, which function is subject to the jurisdiction of the Federal Maritime Commission.

40. The exclusive franchise agreement used by the Port in providing tug and towing services is *prima facie* unjust and unreasonable both as to the common carriers the Port serves and the general public.

41. The burden of sustaining the exclusive franchise agreement used by the Port for providing tug and towing services has not been met and the use of the agreement violates sections 16 and 17 of the Shipping Act of 1916 and sections 10(b)12 and 10(d)(11) of the Shipping Act of 1984.

Discussion and Conclusions

Jurisdiction

The respondents have raised the threshold question of jurisdiction in this proceeding. They argue that the Commission does not have jurisdiction because (1) the Port serves no common carriers by water and therefore is neither an "other person" under the 1916 Act nor a "marine terminal operator" under the 1984 Act, and because (2) even if the Port did serve common carriers by water, the conduct at issue in this proceeding relates to tug and towing services, which are beyond the scope of the Shipping Acts.

In support of its first premise that the Port does not serve common carriers by water the respondents properly note that there is no scheduled cargo vessel service at the Port. They then conclude that jurisdiction in the case cannot rest on cargo operations.

As to passenger operations the respondents argue that, "The central fact concerning passenger operations at Port Canaveral is that passenger ships calling the Port *are not engaged in one-way passenger service.*" (Emphasis supplied.) They then advance the premise that Shipping Act jurisdiction over the Port "turns on whether passenger ships engaged in round-trip cruises are performing common carrier transportation within the purview of the Act." They conclude that they are not. The basis of the conclusion is that "round-trip cruises such as those performed at Port Canaveral do not constitute 'transportation' as the term is used in either Shipping Act definition of common 'carrier'—because (i) a pleasure cruise to/from the same port is not really 'transportation' at all and (ii) even if deemed 'transportation,' it is not between the necessary category of points."

After carefully reading the arguments contained in the respondents' brief regarding jurisdiction (pages 75 through 89) we must reject them. The Shipping Act of 1984, at section (3)(6) defines a common carrier as:

> A person holding itself out to the general public to provide transportation by water of passengers or cargo between the United States and a foreign country for compensation that assumes responsibility for the transportation from the port or point of receipt to the port or point of destination, and utilizes, for all or part of that transportation, a vessel operating on the high seas, or the Great Lakes between a port in the United States and a port in a foreign country.

The 1916 Act at section 1 states:

> The term "common carrier by water in interstate commerce" means a common carrier engaged in the transportation by water of passengers or property on the high seas or the Great Lakes on regular routes from port to port between one State, Territory, District, or possession of the United States and any other State, Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

We believe the language of the statutes is plain and clear and does not beg or need any interpretation. There is no need to draw strained conclusions from other statutory areas to determine what it means. It states that if you are a person who provides transportation by water to the general public and the provisions of the rest of the statute apply to you, then you are a common carrier. It could hardly be set forth in any plainer terms. It does not differentiate between round trip and non-round trip transportation. It just says "transportation" which according to *The Random House College Dictionary*, Random House (1980) means, "to carry, move, or convey from one place to another." So here the reasoning and arguments contained in that portion of the respondents' brief (pages 81–83, 85–89), which seeks to interpret the meaning of the word "transportation" is hereby rejected. Reference to customs cases where the statute would prohibit foreign flag vessels from serving in the U.S. coastwise trade may be of interest by way of comparison but they have no place in the determination of this case. Questions involving the purpose or intent of the transportation may well be applicable under the customs laws, but they are irrelevant insofar as the Shipping Acts are concerned. Indeed, it is difficult to imagine how much chaos would ensue if the Commission had to inquire into the purpose and intent of the transportation provided or purchased every time the provisions of the Shipping Act were called into question.

Similarly, with respect to the respondents' argument that there is no transportation "between" defined points (page 83, et seq., of the respondents' brief) we must disagree with it and reject it. Respondents argue that the statute language "between the United States *and* a foreign country"

and who "assumes responsibility for the *transportation* from the *port or point of receipt* to the *port or point of destination* does not apply to the cruises using the Port because those cruises are round trip cruises which have the *same* port as their origin and destination. Though inventive, the argument is flawed because the statute[6] clearly covers transportation between a port in the United States and a foreign country or the reverse. Whether or not the transportation occurs during the course of a round-trip cruise is irrelevant. When ships go from the Port to the Bahamas or some other foreign country they provide transportation "between the United States and a foreign country" and it matters not that there is going to be additional transportation from the foreign country back to the Port. Indeed, in our view the return voyage is further "transportation" within the meaning of the Shipping Act. So here, we hold that the carriers conducting cruises to or from the Port to or from foreign countries, or to or from the Port to or from other ports in the United States are common carriers by water under the Shipping Acts and that the Port's activities regarding those common carriers comes under the jurisdiction of the Federal Maritime Commission.

It should be noted that because of the above holding we need not consider whether or not the Port was subject to the Commission's jurisdiction because it held itself out to service common carriers of cargo by water. However, there is considerable authority for the conclusion that the Commission does have jurisdiction on this basis.[7]

Finally, respecting jurisdiction, it should be noted that the respondents cite *Fall River Line Pier, Inc.* v. *International Trading Corp.*, 399 F.2d 413, 416 (1st Cir., 1968), at page 99 of their brief for the proposition that the common carriage must be "of sufficient consequence" in relation to contract carriage operations to justify the imposition of Commission regulation." First, the holding in the *Fall River* case was rejected by the Commission.[8] Secondly, the respondents at pages 98 and 99 of their brief aver that under the Shipping Act of 1984 the jurisdictional rules have changed and "Commission jurisdiction over a marine terminal requires that the common carrier operations be of sufficient magnitude, in relation to contract operations, to be deemed a substantial part of the port's 'business'." (Citing Docket Nos. 84–26 and 84–32.) We think the import of the Commission's language in the above dockets is misconstrued by the

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[6] The discussion and conclusions would be equally applicable to section 1 of the Shipping Act of 1916, although a foreign country is not involved.

[7] See *Prudential Lines, Inc.* v. *Continental Grain*, 21 SRR 133 et seq. (1982), which contains an excellent discussion of the subject and where an analogy is drawn between the holding out of common carriers citing *Tariff Filing Practices of Containership, Inc.*, 9 F.M.C. 56, 62 (1965), and *American Export-Isbrandtsen Lines, Inc.* v. *F.M.C.*, 444 F.2d 824, 831 (D.C. Cir. 1970). Compare also with *New Orleans Steamship Association* v. *Bunge Corp.*, 8 F.M.C. 687, 694 (1965); *Agreement No. T–2719*, 16 FM.C. 318, 321 (1973), where the Commission acknowledged it no longer had jurisdiction where party barred common carriers from calling at its facility.

[8] See *Prudential Lines, Inc., supra*, at 132, 152 et seq., for discussion of the issue and where the Commission rejected the "sufficient consequence" test the respondents advocate.

respondents. However, assuming *arguendo* they are correct, the record is clear that the cruise business at the Port, which we have held as a fact is common carriage, is a substantial part of the commercial business of the Port.

Another facet of the respondents' argument going to the Commission's jurisdiction is the assertion that even if the Port were a regulated terminal due to service to "common carriers," the Commission would still lack jurisdiction over the complaint "because towing services are not subject to the Shipping Act" (pp. 90–97 of respondents' brief). The respondents then argue that "even assuming *arguendo* that *St. Philip*[9] was correctly decided 16 years ago (a matter as to which we have substantial doubt given the above-noted explicit congressional decision to delete towing service from Shipping Act coverage), that case can in no way be considered to govern the present case." The respondents then allege that "by virtue of Commission decisions and congressional direction in the intervening sixteen years, *St. Philip* can no longer be deemed a viable precedent on the issue of when the commission may assert ancillary jurisdiction over non-Act services such as towing."

We would readily agree with the respondents' general premise that the Federal Maritime Commission does not have the authority or jurisdiction to regulate towing services, per se. Certainly, the Shipping Acts clearly indicate the absence of such jurisdiction. However, it is equally clear that where provisions of the Shipping Acts may have been violated, the Commission will take jurisdiction respecting those violations even if towing services are involved. Of course, *St. Philip, supra,* is a case directly in point. There, tug services were involved and, as here, there was an exclusive agreement for those services. In affirming its jurisdiction, the Commission stated:

> Where, as here, however, the terminal operator has usurped the normal function of the carrier and made the very access to the terminal facilities dependent upon a commitment to Tampa Towing for tug services under the terms of an exclusive right contract, the furnishing of tug boat service has, in effect, been transformed into a terminal function intimately related to the receiving, handling, transporting, storing or delivery of property.

The Commission's decision in *St. Philip* is an extension of a line of cases holding that even though the Commission does not have jurisdiction of stevedoring services, when a terminal operator grants a monopoly respecting stevedoring services the Commission does have jurisdiction to consider Shipping Act violations that may ensue. *California Stevedore and Ballast Company, et al.* v. *Stockton Port District, et al.*, 7 F.M.C. 75 (1962); *Greater Baton Rouge Port Commission and Cargill, Inc.* v. *Federal Maritime Commission,* 287 F.2d 86 (5th Cir. 1961), Agreement Nos. T–3310

[9] *A.P. St. Philip, Inc.* v. *Atlantic Land and Improvement Co.*, 13 F.M.C. 166; 11 SRR 309 (1969).

and T–3311, 25 F.M.C. 591 (1980). Compare *California Stevedore and Ballast Co.* v. *Stockton Elevators, Inc.*, 8 F.M.C. 97 (1964), where the Commission held a public terminal may not assess one stevedore a charge for rental of terminal provided equipment and not assess the charge against another stevedore.

In our view, not only has the Commission not overruled *St. Philip*, but it has consistently followed it over the years. We believe it is the law today and because it is we must hold that the Commission has jurisdiction over the Port's activities in this case. In so holding we would note that the respondents' basic argument seems to be that "unless there is a discernible effect on commercial/competitive relationships with the purview of the Shipping Act, the Commission may not entertain a complaint concerning a terminal operator's dealings with persons whose activities are not subject to the Act." We are at a loss to see where any of the cases cited by the respondent either implicitly or explicitly refute, overrule or rebut the *St. Philip* case or suggest that it is no longer the law. As to dealing with "persons whose activities are not subject to the Act," the respondents' argument assumes that the Port's activities are not subject to the Act because tug services are involved. We think the assumption is in error in the light of the holding in *St. Philip*.

Finally, regarding the receiving and handling of property, the respondents at page 96 of their brief state that, "there can be no jurisdiction in this case based on the provisions of Section 17 of the 1916 Act or Section 10(d)(1) of the 1984 Act." They cite *Bethlehem Steel Corp.* v. *Indiana Port Commission*, 21 F.M.C. 629, 632, 18 SRR 1485, 1490 (1979), for the proposition that in it, "the Commission has made it clear that 'receiving, handling, storing or delivering of property' as used in the acts, establishes a dichotomy between a port's actions relating to navigation and those relating to terminal/cargo service. *Only* the latter are covered." They then conclude that since tug and towing services are concerned with navigation, not handling cargo, they clearly fall on the navigation side of the statutory dichotomy and sections 17 and 10(d)(1) have no application to them. The *Bethlehem Steel* case was decided on its facts. It is consistent with the *St. Philip* case and in no way affects precedent set down in *St. Philip*. As to the dichotomy the respondents would have us apply we would submit that its application can only benefit the respondents, if as the respondent suggests, "the action at issue does not infringe on relationships to which the act is directed." Here, service to common carriers is involved in that the Port is compelling those carriers to use a particular tug service selected by the Port, not only that, the service has been selected without any opportunity for any other tug service to initially be a party to the exclusive agreement which was used. Further, competing tug services are denied any opportunity to compete unless they carry the burden of satisfying some vague test of "convenience and necessity." Lastly, the general public is affected by the Port's actions. To hold that "no competitive relationships

within the purview of the Shipping Act are affected" as the respondents' would have us do, is in error and we reject such a view. So, here, in summary, we hold that the fact that tug and towing services are involved does not deprive the Commission of jurisdiction over the respondents in this proceeding. We cannot equate the Port's actions as a terminal facility respecting tug service, with the Port's decision to "buy navigation buoys from A rather than B, to employ X rather than Y . . ., or to put Coke rather than Pepsi in its vending machines," as the respondents would have us do. Rather, we think tug services are so related to the Port's terminal function that the Commission's language in *St. Philip* is germane here. It said:

> Terminals . . . are engaged in the business of regularly supplying the public with a service which is of public consequence and need and which carries with it the duty to serve the public and treat all persons alike.

Standing

At page 100 of their brief the respondents argue that Petchem lacks standing to invoke the Commission's jurisdiction because it has in no way been injured by the actions of which it complains.[10] It avers that the record establishes that under its military contract Petchem could not perform commercial operations at Port Canaveral even if it were granted a franchise and that the Air Force contract cannot lawfully be modified to provide otherwise.

We cannot agree with the respondents. Petchem is engaged in the business of providing tug and towing services. Even if the Air Force contract were construed in the most unfavorable terms in regard to Petchem it does not indicate that Petchem *cannot* perform commercial services at the Port. There is no clause in the contract so providing. What the contract does do is earmark certain equipment for use in carrying out the terms of the contract on a priority basis. There is nothing to prevent Petchem from buying or leasing additional equipment to do commercial work for the Port or from forming a subsidiary to perform such work.

As to whether or not the Air Force contract can lawfully be modified or needs to be so modified to allow Petchem to do commercial work, the record does not support the respondents' contentions. First of all, the contractual relations between the Air Force and Petchem are such that, given the terms of their contract, they could mutually agree to allow Petchem to do commercial work and deduct the revenue from the Air Force's cost of its contract just as it did previously with the respondent, PCT. Indeed, the Air Force would be foolish not to do so as long as the commercial work did not interfere with its priorities. Secondly, if the

[10] The respondents raised this issue and discussed it at length in their joint Motion for Dismissal by Summary Disposition filed on December 6, 1984.

Air Force and Petchem made such an agreement there would be no need to "legally modify the agreement," since there is no prohibition on performing commercial work within it.

Finally, with respect to standing, section 22 of the Shipping Act, 1916, reads:

> SEC. 22. (a) That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water in interstate commerce, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. The board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the board satisfy the complaint or answer it in writing. If the complaint is not satisfied the board shall, except as otherwise provided in this Act, investigate it in such manner and by such means, and make such order as it deems proper. 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.
>
> (b) The board, upon its own motion, may in like manner and with the same powers, investigate any violation of this Act.[11]

Section 11 of the Shipping Act, 1984, states:

> SEC. 11. COMPLAINTS, INVESTIGATIONS, REPORTS, AND REPARATIONS.
>
> (a) FILING OF COMPLAINTS.—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.

The language of the above sections allows "any person" to file a sworn complaint alleging a violation of the Act. Actual harm to the complainant is not a prerequisite to a finding of violation under section 16, First, Shipping Act, 1916, and section 11, Shipping Act, 1984. In such cases, a finding of violation could result in the issuance of a cease and desist order.[12]

Here, then, we believe the record and the pertinent law establish that the complainant has standing to raise the issues now before us and we so hold.

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[11] Further, section 23 states:

> SEC. 23. Orders of the Commission relating to any violation of this Act or to any violation of any rule or regulation issued pursuant to this Act shall be made only after full hearing, and upon a sworn complaint or in proceedings instituted of its own motion.

[12] *Cargill* v. *Waterman Steamship Corp.*, 19 SRR 1017 (1979).

Violation of Section 16 (First) and Section 17, Shipping Act, 1916[13]

Section 16 of the Shipping Act, 1916, provides that:

> It shall be unlawful for any common carrier by water, or other person subject to this Chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person . . . or subject any particular person . . . to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

Section 17 of the Shipping Act, 1916, provides:

> Every such carrier and every other person subject to this Chapter shall establish, observe and enforce just and reasonable regulations and practices related to and connected with the receiving, handling, storing and delivery of property.

The basic facts in this proceeding are for the most part uncontroverted, are set forth in the proposed findings, and will not again be enumerated here. From them we must ascertain whether or not the Port violated sections 16 and 17 and the companion sections of the Shipping Acts. We have read the cases cited by the respondents in their brief (pp. 101–103) and while they may stand for "the statutory requirement" the respondents' espouse it is clear that each case must be decided on its own facts. Decisions relating to whether or not actions are "just" and "reasonable" are hardly objective guidelines susceptible of being correlated into some all-encompassing rule of law that will apply equally in all instances. For example, the respondents' "first critical element," as to violation of section 16 (First), is, "there must be a definite showing that the difference . . . complained of . . . actually operates to the real disadvantage of the complainant. What is meant by a "definite showing" or "actually operates" or the "real disadvantage?" The question, of course, begs explanation and amplification and as far as we are concerned the only "statutory requirement" we need follow is the application of the facts in this case to the statute itself.

Here, we must determine whether or not the Port violated the Shipping Acts. Given the record in this proceeding we are compelled to hold that it did. At the outset, we agree with respondents that initially the burden of proof is on the complainant to show that the respondents were guilty of the violations set forth in the complaint. That burden was readily met in the record when it was established that the Port, not only had granted an exclusive franchise to do the commercial tug work, but it had unilaterally

[13] The companion sections to sections 16 and 17 of the Shipping Act, 1916, are sections 10(b) 11–12 and 10(d)(1), respectively, of the Shipping Act of 1984.

designated the particular company who would be a party to the agreement to the exclusion of all other parties. As was stated in *St. Philip, supra,* such practice:

> Runs counter to the anti-monopoly tradition of the United States, upsets the long established method by which carriers pick their own stevedoring companies, deprives Complainants and other stevedoring companies of an opportunity to contract for stevedoring work on ships using elevator facilities, and opens the door to evils which are likely to accompany monopoly, such as poor service and excessive costs.
>
> Such a practice is *prima facie* unjust, not only to stevedoring companies seeking work, but to carriers they might serve and the general public which is entitled to have the benefit of competition among stevedoring companies serving ships carrying goods in which the public is interested as shipper or consumer; for this same reason, it is *prima facie* unreasonable.
>
> The principle announced in the *Stockton Port Case, supra,* applies with equal force to the situation where a vessel owner's right to select a tug boat operator is denied by exclusive contract. The arrangement before us now also eliminates competition and is *prima facie* unjust and unreasonable, not only to tug boat companies seeking to render service to vessels docking and undocking at the phosphate elevators, but also to the carriers that they might serve. Thus, unless justified, the arrangement must be struck down, and it is incumbent upon Respondents to furnish the justification. Moreover, as we stated in the *Stockton Port* case, however, "The burden of sustaining such practices as just and reasonable is a heavy one."

Once the *prima facie* unreasonableness of the Port's actions is established it is clear that the burden shifts to the respondents. *St. Philip, supra; Stockton Port, supra; Agreements 8225 and 8225–1,* 5 F.M.B. 648 (1959). As we have noted earlier we reject the respondents' argument that *St. Philip, supra,* either has been overruled or weakened by subsequent case law.

Whether or not the burden imposed on the respondents is a "heavy one," as Hearing Counsel and the complainant argue, or is an ordinary one, we believe that it has not been met by the respondents. The evidence in this case establishes that the Port's actions regarding commercial tug work at the Port was unduly preferential in favor of PCT, and was prejudiced not only against Petchem but against any other tug operator who may have wished to render such services at the Port. Further, the Port's actions were neither just or reasonable insofar as the receiving, handling, storing and delivery of property is concerned.

The record indicates that the Port denied Petchem's application because (1) there was not sufficient business to support more than one tug franchise;

(2) the short and long range effects of grant of a second franchise on the prices of tug services; and (3) the desirability of having four tugs available, two of which would be on "first call" to the Port. Even were one to recognize the factual validity of each of the above reasons we still would not consider the actions of the Port reasonable or just, *because what the Port did was to unduly and unreasonably prefer "PCT"* over all other tug services, not just over Petchem. Even assuming, *arguendo*, that only one commercial tug service was viable within the Port and that a franchise agreement was necessary—why did the Port not allow any tug service to become the franchise? Why did it select and foster PCT? Would not any other single franchise have satisfied the Port's objections to having more than one tug service or its concerns about the price of tug services? And could not the Port have ensured the availability of four tugs in the port—long before Petchem entered the picture—by simply providing in the commercial franchise agreement that the franchise would not be allowed to do the military work or would have to give first priority to the commercial work with at least one tug? The answer to these questions is that the Port preferred PCT. We do not doubt that the preference may have been the result of the long standing business relationship between Hvide, PCT and the Port, but that relationship is hardly enough reason to warrant the Port from excluding Petchem as well as all other tug services at the Port. No doubt respondents will assert that only Petchem and PCT were interested in providing commercial tug services and that therefore, no one else suffered any discrimination or injury. However, given the exclusive franchise agreement the Port had with PCT it is not difficult to see why other tug services might not apply for the commercial business.[14]

In addition to the above considerations there are other facts of record that cast doubt on reasonableness of the Port's actions in granting an exclusive franchise agreement to PCT, and in denying Petchem's application to do commercial tug work. The record shows that in 1983, the Port Director was advised by the military that PCT was not going to get the military work, since it could not satisfy the small business set aside, and that the Port ought to be considering another tug service. This would suggest that there was more military work in the Port than commercial work and that, in line with the Port's own arguments, the commercial work could hardly support one tug service. Rather than consider another tug service the Port Director wrote a letter to the military suggesting they ought to reconsider and allow PCT to bid on the military work. Not only that, the Port pointedly stated that any tug service receiving the military contract would still have to get approval of the Port to do the commercial work—a position contrary to the military's suggestion that the port ought to consider someone other than PCT, since PCT was not

[14] It should be noted that at least eight companies bid on the military contract in 1983, which indicates that there would be interest in the commercial tug work if the Port had not already unilaterally selected PCT.

eligible to bid on the military work. This action, of course, is completely inconsistent with the Port's desire to have four tugs available, two on first call to the Port for commercial work. There is little question but that if the military had granted the military tug work to PCT, it would still be doing the commercial work as well.

Further, the record raises serious questions in certain other areas regarding the Port's undue preference for PCT and the reasonableness of that preference. The evidence establishes that PCT is a subsidiary of Hvide, that they use Hvide tugs on a lease basis, that Hvide performs all the administrative functions and charges PCT a percentage of its overhead, that Hvide has borrowed substantial sums using the tugs leased to PCT as collateral and that when the Port was considering Petchem's application PCT supplied them with a financial statement wherein it erroneously listed depreciation and interest expense as being allocable to PCT. None of these facts, standing alone, warrants any holding that the Port's actions were unreasonable when it gave or continued PCT's exclusive franchise for tug services, even in the face of Petchem's application. However, the record contains more. It establishes that while PCT's financial statements may be prepared in accordance "with accepted accounting principles," those records are either too inadequate or obscure to allow one to assess the viability of PCT's financial operation at the Port. For example, when we look at Petchem's operating statement we see that Petchem made a net profit of $230,777.06 in the first year of operation under the military contract. When we try to compare that with the Hvide-PCT operating statements we are met with consolidated statements that even after careful analysis raise more questions than they answer. At best they indicate PCT is operating less efficiently than Petchem. For example, in 1982 PCT showed losses of $2,326.00 on total revenues of $2,196,588. In 1983 it showed income of $159,151 on total revenues of $2,318,015. For 1984, on commercial tug services based on projections from 1983 it projected a loss of ($245,687.00) on revenues of $475,000.00 (Ex. C–34).[15] Even the Port had problems with PCT's financial statement and questioned the allocation of overhead from Hvide to PCT (Tr. III–111, et seq.). The Assistant Port Director testified that they asked Hvide about the following:

> We had some sort of feelings that the overhead may have been artificially high to maybe open up to show a larger loss than they are actually going to suffer if any loss at all.

and Hvide responded:

> . . . perhaps they (Hvide) did but it can be justified, you know the questions of how you allocate overhead from parent companies is an accounting game.

[15] See Exhibit R–8 at Exhibit III–1 where PCT shows a loss of ($473,263) on revenues of $688,143.

As to the Port's consideration of the above, the record indicates the Port accepted what Hvide gave them. Its witness, in answering whether or not Hvide's (PCT) statements indicate the stability that can be relied upon over the years to handle the Port's towing business, stated:

> . . . looking at the data does not give me any indication of stability or not, knowing that, or at least having some idea of the corporate structure of the United States as well as have a lot of very expensive accountants to manipulate if you will the bottom line for income tax purposes. This may be just a paper drill, so again whether this shows stability I can only rely on past history.

All of the above discussion is presented to demonstrate the unreasonableness, the unjustness and prejudice that grew out of the Port's methods in first granting an exclusive franchise to a particular company, and then predicating any other company's right to compete on a holding of undefined "convenience and necessity." While the Port may not consider it necessary to review the accuracy and reasonableness of the financial statements and projections of PCT on the one hand, it cannot reasonably, it seems to us, deny another provider the right to compete because it might precipitate a "rate war" and "long range instability."

Another aspect of the record that militates against the respondents in this case is the evidence as to how tug services are provided at other ports. The complainant's witnesses testified about the competition in tug services at various ports and the respondents' witness rebutted the accuracy of that testimony noting that in practice many ports have only one viable tug service. While the record is somewhat unclear as to who is right and as to what tug service operates at what port it is clear that only one or two ports use a franchise agreement like the Port does here. More importantly, it is clear that even where a port is only serviced by one tug provider, there is no prohibition on other providers operating at the port. In essence, free economic considerations govern who the one provider will be, not some exclusive franchise agreement between the port involved and a particular provider.

Another point that needs to be noted is the considerable evidence in the record regarding the quality of the tug service, and the efficiency of the tugs used. We believe and have found that both PCT and Petchem have rendered satisfactory tug service at the Port, and that neither the military nor the Port had any reason to deny PCT or Petchem the right to provide tug service because of inadequacy of the service provided.

Finally, we would observe that the respondents' efforts to justify not only the granting of an exclusive franchise—but an exclusive franchise to PCT—is marred by the same defect that permeates the Port's actions from the outset. The entire process was, and is, viewed as a contest between PCT and Petchem when, in fact, the real issues in this case are whether or not an exclusive franchise agreement is warranted under the law, and

if so, whether or not the Port or any Governmental body can select one particular tug service as franchisee without allowing other competing tug companies to even compete for the franchise. The record here is devoid of any reason why the Port should be allowed to select and retain PCT over any other competitor. Arguments that the Port is small and unique are to no avail because there are many small ports having only one tug service which do not use exclusive franchise agreements. As to the combination of military and commercial tug work, historically there has been no serious difficulty with competing movements or priorities and, until Petchem came onto the scene, neither the Port nor the military saw fit to complain. We find it strange that suddenly as PCT lost the military contract the Port thinks four tugs would be better and would deny the military contractor the right to do commercial work and yet, even up to the present time has not seen fit to arrive at the obvious solution of providing that the commercial tug provider cannot do the military work.[16]

In summary, we believe the facts in this case establish that the Port violated sections 16 and 17, respectively, of the Shipping Act of 1916, and sections 10(b)11–12 and 10(d)(1), respectively, of the Shipping Act of 1984, in unilaterally selecting PCT to provide commercial tug services at the Port under an exclusive franchise agreement, where no other tug service was allowed to compete to become the franchisee either initially, when the agreement was first executed, or later when the agreement was reviewed from time to time. Further, the Port's denial of a non-exclusive agreement to perform tug services at the Port to Petchem, where Petchem was under the burden of satisfying a vague test of convenience and necessity, was a further violation of the aforementioned sections of the Shipping Acts.

In view of the above, we hold that based on the record of this proceeding and the particular facts of record that the use of the exclusive franchise agreement involved violates the Shipping Act insofar as it grants an exclusive right to PCT to perform commercial tug services at the Port to the exclusion of all other competitors, and insofar as it requires other tug services to sustain the burden of satisfying an undefined test of "convenience and necessity" in the face of a tug service already designated as franchisee. In essence, we direct that the Port must consider applications to perform commercial tug services at the Port on an equal basis, under equal prerequisites and criteria so as not to unduly prefer or prejudice

[16] It is interesting to note that after the record in this proceeding was closed, the respondents' expert witness who testified that the Port should not be obliged to rely for tug services for commercial activity on the tug operator under contract to the military at the Port due, among other reasons to potential conflicts in service, prepared a report dated August 7, 1985, which recommended that the Air Force give the military work to PCT on a tariff basis and in light of "the proposed tug fleet configuration, which includes three high powered tugs . . ." The record was opened to receive the Report and recommendation, which, while they may or may not contravene the witness's prior testimony, do raise the question of the "four tug" requirement in denying Petchem's application. Indeed, it raises a question as to how the Port would react to the recommendation or to a similar request on the part of Petchem.

any provider of such service. This holding, of course, does not mean that PCT is precluded from continuing to perform such services. Insofar as Petchem is concerned, this decision requires and it is Ordered that Petchem be allowed to perform tug services at the Port on a non-exclusive basis until such time as the Port properly establishes the need for an exclusive franchise agreement, affords competing tug companies the same opportunity to become the franchisee, conducts any hearings which may be necessary, and adopts the agreement.

(S) JOSEPH N. INGOLIA
Administrative Law Judge