

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.

⁴Senate 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 3, *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 settlements⁵ 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

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. Atlantrafik 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 Register* 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 circumstances. 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 report 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)(1) 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

FINANCIAL REPORTS OF VESSEL OPERATING COMMON CARRIERS BY WATER IN THE DOMESTIC OFFSHORE TRADES 21

(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)(1) 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

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

²For 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).

³The 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 parties.⁶

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

⁴We 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*.

⁶See 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 DECISION¹ 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, and 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

⁴Section 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 interchangeable 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. SFCBFAA, 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,

⁸In 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]."

⁹Section 8(a)(1)(C) (46 U.S.C. app. § 1707(a)(1)(C)) requires that tariffs shall:

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

¹⁰NCBFAA 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 for 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, does 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

¹To 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)

²Cal 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 requirements of the MLAA. However, the Commission further found that Complainants lacked standing to file a complaint under the MLAA because they paid no assessments under the Agreement and generally were not within the protected "zone of interests."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 challengeable 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 U.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 Act⁶ and the "any person" standing provision of section 11(a) of that Act⁷ 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 complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. *Except for this subsection and section 7(a) of this Act, this Act, the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, do not apply to assessment agreements.*" (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 Act⁸ 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 MCAA 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 *Ziffhion 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 Lines 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 Justice, I.N.S.*, 720 F.2d 529 (8th Cir. 1983); *City of Cleveland, Ohio v. F.P.C.*, 561 F.2d 344 (D.C. Cir. 1977).

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*.

CALIFORNIA CARTAGE COMPANY INC. V. PACIFIC MARITIME 61
ASSOCIATION

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
	<hr/>
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
	<hr/>
(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
	<hr/>
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 does 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 1225¹ 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. (USLSA), 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

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. N.Y.S.A., et al.* and *Puerto Rico Maritime Shipping Authority, et al. v. N.Y.S.A.* 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 uncertainly 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.

APPLICATION OF UNITED STATES LINES (S.A.) INC. FOR THE 69
BENEFIT OF MILES LABORATORIES, INC.

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 DECISION¹ 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 refiled, 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' containers⁵ for two anticipated shipments of annato seed⁶ 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, 1984⁷ 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

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

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

⁷Intermodal 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
	<hr/>
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
	<hr/>
(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
	<hr/>
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 \$240,000.00.¹¹ 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. 1707(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 applications¹³ 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 No. 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.

APPLICATION OF UNITED STATES LINES (S.A.) INC. FOR THE 75
BENEFIT OF MILES LABORATORIES, INC.

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

²Ex. TA, at 20.

³Ex. 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

⁴Ex. 1-B.

⁵Ex. 1-A.

⁶Ex. 1.

⁷Ex. TA at 21.

⁸Ex. C-2; 18 April Tr. at 73-75.

⁹*Id.* at 76-77.

¹⁰19 Apr. Tr. at 23.

¹¹*Id.* at 24; 18 Apr. Tr. at 131.

¹²Ex. 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 Ariel.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

¹²Ex. 30.

¹³Ex. 5, 6, 8, 8B; 18 Apr. Tr. at 134.

¹⁴19 Apr. Tr. at 88-89.

¹⁵*Id.* at 92.

¹⁶Ex. 27, 28

¹⁷Ex. 29.

¹⁸18 Apr. Tr. at 147-48.

¹⁹*Id.* at 148, 154-55.

²⁰Ex. 24.

²¹Ex. TA at 3; 17 Apr. Tr at 110.

²²Ex. I-1.

²³18 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 Interlink'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 transhipped 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*

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 untariffed 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 Shipping 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 Liberty⁵³ 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

⁵³The 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 transhipped. 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-

⁵⁶Evidence 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 transhipped. 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 transhipped 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?

⁶¹As 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

⁶²Ex. 1-A, 1-C, 2-A.

vessel operators that the shipments under investigation would be transhipped? 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

⁶³This 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 gantty 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

¹The 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

²Item 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.

³Tariff 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

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 DECISION¹ 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 locomotive². 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

⁴During 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, violated 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.

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 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

⁶In 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 Counsel⁹ still take issue with these Items even as amended. I will discuss the problem at a later time in this decision.

The final tariff provision¹⁰ 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

¹¹The 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 may 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

¹³The 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 anchorage 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

¹⁴The 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 document 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 document (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 critical¹⁷ and not whether such control was in fact exercised¹⁸ 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 cases 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

¹⁹The 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.

²⁰The 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 crane 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.

²¹The 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. (Stevens 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

²²The 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

²⁴The 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 to 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 an 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 SCSA 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 SCSA 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, including 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 unamended 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 Company¹ 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

¹Supplement 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.

²The 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)(1)), 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

²Section 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 Complainant's 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 made 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.

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 DECISION¹ 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.

¹This 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 company does not have a copy of their tariff."

Mr. Harris freighted the Bill of Lading with the rate quoted by Street Brothers.

Mr. Harris insists that he did not at anytime attempt to negotiate the rate, but merely accepted it as an accurate reading of the tariff. It was a large and valuable shipment, and ocean freight was not the issue, rather the main concern of the complainant was vessel availability, since if the cargo were shipped after the letter of credit had expired, it would have resulted in the loss of substantial revenue to the complainant.

In the affidavit of Bruce L. Stein, for the complainant, Mr. Stein also 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 \$140 plus 30 percent congestion surcharge was a negotiated and agreed rate between the parties. Mr. Harris' affidavit is to the effect that he had no authority to negotiate a rate, that he did not negotiate a rate, but 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 agent for the complainant, and the respondent believes that a rate was quoted to Mr. Harris, that it was accepted by him, and thus that there was an 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 evidence, such as in the *Columbia Steamship* case, above, that there was an agreed rate and that to award reparation would have resulted in a windfall neither anticipated nor bargained for.

In the present proceeding, it is concluded and found that to award reparation of the full amount of \$13,565.27 would result at least in part in an unanticipated windfall to the complainants it is further concluded and found that the record is not fully clear as to whether the rate of \$140 per ton, plus 30 percent congestion surcharge was a negotiated rate. Respondent's evidence shows its understanding that there was a negotiated agreed rate. Complainant's evidence is otherwise.

The Commission's authority to award reparation is discretionary. The amount of reparation to be awarded likewise is discretionary. Under the circumstances, it is concluded and found that an award of reparation in the amount of \$6,750 is proper, and interest is not awarded.

In summation, it is concluded and found that the published tariff rate was not charged on the shipment herein, and accordingly the shipmen was overcharged in the amount of \$13,565.27. Further, in the circumstances herein, payment of this full amount would result at least in part in an unanticipated windfall to the complainants. Further, the Commission's authority to award reparation is discretionary, and it is determined that reparation

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STEAMSHIP CORPORATION

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 DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Adopted January 9, 1986

This application² 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. WXBK01T.

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 shippers⁸ 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. Cogrove (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 past 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

²Coke 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-

³At 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 DECISION¹ 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 claim 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 Export Corporation, received an order for 14,336 cases of canned Coca-Cola and Sprite from a customer in Peru. The order was secured by a letter of credit which, among other things, forbade partial shipments. In November of 1982 the complainant booked the shipment with respondent and asked 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 and Sprite are, or can be, automatically palletized as they come off the production line. Each of the eight containers was loaded with twelve pallets holding 120 cases each and 352 "loose" cases which were stacked around the pallets. The containers were sealed and taken to Dodge Island for loading.

At the time of the booking, no mention was made to respondent that 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 Commission (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 charges 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 day 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;

¹While 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 DECISION¹ 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

¹This 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).

²Shipping 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 5500.00. 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

¹The "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-

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. Seatrail 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).

³In 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).

⁴E.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

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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

⁵In 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 DECISION¹ 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).

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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

²The 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

⁴The 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 Harlee 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

⁵There 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. 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 refiled 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 adopting* 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 rates 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 DECISION¹ 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 Mfg. Co. v. Mamenc 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.

⁴The 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

⁵One 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

APPLICATION OF OOCL-SEAPAC SERVICES, INC. FOR THE 217
BENEFIT OF ASIAN FOOD INDUSTRIES (HK) LTD.

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 precedent 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;

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-H¹ 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.

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 (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." 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

⁴A 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 Lucidl d/b/a Lucidl 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 DECISION¹ 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 Peoples 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 powers⁶ 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

⁴Official 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.

⁹Civil Action Nos. 17092-G, *Johnny Lee Hines v. The Atlantic Towing Company, et al.*

¹⁰Ex. 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 provisional¹¹ 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 GPA¹⁷ 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 I). 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.

FACTS¹⁹

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

¹⁹N.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.

²⁰The 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 goal²³ 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-

²³GPA 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 necessary²⁷ 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 scraps²⁸ 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 stevedores 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.

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.

³⁶Two 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 operator³⁹ 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.

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 IV. 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 contrary.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.

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* doctrine⁵² 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

⁵²The 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.

⁵³This 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)(1) 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 agreements² 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's 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-

have expressed their desire to renegotiate these "bilateral agreements" with the Governments of Brazil and Argentina.

³The 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.

⁴The Executive Agencies' Motion to Suspend the Proceeding was held in abeyance pending the receipt of comments and further Commission action.

⁵Unrelated 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 prejudice, 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

⁶The 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 unresponsive 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 commenters, 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 reinstatement, 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 reinstatement 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 Ivoirienne 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 reinstatement.

(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 DECISION¹ 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

¹This 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 (Ex. 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, 1983 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.)

⁴The 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:

<i>Vessel</i>	<i>Sailed</i>	<i>Voyage</i>
M/V MIRANDA	10/22/83	17
M/V MIRANDA	11/09/83	18
M/V 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)(1) 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 Cogrove 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 misrouted shipment is counted as a separate violation of section 18(b)(3) and there were 189 misrouted 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 Commission's 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

¹²The 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

¹³In 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)(1), 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-

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—

* * * * *

(1) 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;

(2) 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

¹⁴Unlike 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.

¹⁵Ex. C-26 at 11-12.

¹⁶Petchem 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.

¹⁷Ex. 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 future²⁷ 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 statement²⁹ 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.

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. 2S-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

³²The 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.

³³See 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 jurisdiction³⁵ 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

³⁸25 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

⁴⁰Petchem 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 requirements⁴³ (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 itself⁴⁵ 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

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 proffered 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 Authority¹ 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

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)(1) 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 DECISION¹ 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.

¹This 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).

²While 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.

³Complainant's Notice of Dismissal of Count V of the Complaint, dated February 26, 1985.

⁴Petition of Hearing Counsel for Leave to Intervene, dated September 27, 1984. The Petition was unopposed and was granted by Order of November 15, 1984.

⁵See 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 (\$10,000,000), 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 statute⁶ 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

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 F.M.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

¹⁰The 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.

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

¹³The 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

¹⁴It 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

¹⁶It 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

FEDERAL MARITIME COMMISSION

DOCKET NO. 84-36
SEATTLE CRESCENT CONTAINER SERVICE, INC.

v.

THE PORT OF SEATTLE

NOTICE

April 25, 1986

Notice is given that no appeal has been taken to the March 19, 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. 84-36

SEATTLE CRESCENT CONTAINER SERVICE, INC.

v.

THE PORT OF SEATTLE

COMPLAINT DISMISSED

Finalized April 25, 1986

By complaint filed October 9, 1984, as amended, Seattle Crescent Container Service, Inc., Complainant, alleged that The Port of Seattle, Respondent, was engaged in certain practices seeking to exculpate the Respondent from its own negligence in violation of section 17 of the Shipping Act, 1916 (46 U.S.C. app. 816), and section 10(d)(1) of the Shipping Act, 1984 (46 U.S.C. app. 1709(d)(1)). The Complainant asked that the practices be declared unjust and unreasonable and that a cease and desist order be issued. Costs and attorneys' fees were requested.

The matter proceeded to hearing in Seattle, Washington, but was recessed on October 10, 1985, to allow the parties to seek a fresh approach to a settlement.

By letter dated March 6, 1986, Complainant advises that the Complainant and Respondent have reached a settlement with respect to practices for the future and that it has withdrawn its complaint. A copy of the written agreement to govern future conduct is attached to the Notice of Withdrawal.¹

Neither the Respondent nor Hearing Counsel, an Intervenor in the proceeding, opposes the withdrawal.

Accordingly, the complaint is dismissed without prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

¹ Inasmuch as the agreement was filed March 13, 1986, with the Commission's Bureau of Agreements and Trade Monitoring under the provisions of section 5 of the Shipping Act, 1984 (46 U.S.C. app. 1704) it will not be attached to this order.

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 85-7

INDEPENDENT ACTION—NOTICE AND MEETING PROVISIONS IN CONFERENCE AGREEMENTS

April 25, 1986

ACTION: Final Rule.

SUMMARY: This revises the Commission's regulations governing the filing of agreements submitted to the Commission pursuant to the Shipping Act of 1984. The Final Rule requires conference agreements to: (1) establish a maximum notice period of not more than 10 days for member lines taking independent action; (2) provide for a single notice to the conference of a member line's independent action; and (3) state that a member line taking independent action is not required to attend a meeting, or to comply with other procedures, for the purpose of explaining, justifying or compromising a proposed independent action. The Final Rule also makes technical changes based on the comments received.

EFFECTIVE

DATE: May 30, 1986.

SUPPLEMENTARY INFORMATION:

I. PROCEEDING

This proceeding was initiated by a Notice of Proposed Rulemaking (Proposed Rule) published in the *Federal Register*, 50 FR 10810 (March 18, 1985), to revise "Part 572—Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984," 46 CFR Part 572, as it relates to conference independent action (IA) authority. The Proposed Rule would require conference agreements to establish a maximum notice period of not more than 10 days for member lines taking independent action, to provide for a single notice of independent action to the conference, and to state that a proponent of independent action is not required to attend a meeting, or to comply with other procedures, for the purpose of explaining, justifying or compromising a proposed independent action.

A total of 14 comments were received in response to the Commission's Notice of Proposed Rulemaking. The Proposed Rule was supported in comments filed by: (1) the Department of Justice (DOJ); (2) the Chemical

Manufacturers Association (CMA); (3) PPG Industries, Inc. (PPG); and (4) Brown-Forman Distillers Corporation (Brown-Forman).

Comments seeking clarification, modification, or withdrawal of the Proposed Rule were filed by: (1) the Transpacific Westbound Rate Agreement (TWRA); (2) the Philippines North America Conference (PNAC); (3) the Inter-American Freight Conference (IAFC); (4) the U.S.-Flag Far East Discussion Agreement (Agreement No. 10050); (5) the North Europe-U.S. Pacific Freight Conference, the Pacific/Australia-New Zealand Conference, and the Pacific Coast European Conference (NEUSPAC *et al.*); (6) the 8900 Lines and the U.S. Atlantic & Gulf Ports/Italy, France & Spain Freight Conference (8900 Lines *et al.*); (7) the Atlantic and Gulf/West Coast of South America Conference, the United States Atlantic and Gulf/Colombia Conference, the United States Atlantic and Gulf/Ecuador Conference, the United States Atlantic and Gulf/Venezuela Freight Association, the United States Atlantic and Gulf/Southeastern Caribbean Conference, and the United States Atlantic and Gulf/Hispaniola Steamship Freight Association (Latin American Conferences); (8) the Trans-Pacific Freight Conference of Japan/Korea, the Japan/Korea-Atlantic & Gulf Freight Conference, the Trans Pacific Freight Conference (Hong Kong), the New York Freight Bureau, and the Japan-Puerto Rico & Virgin Islands Freight Conference (Trans-Pacific Conferences); (9) the United States-European Carrier Associations (USECA) consisting of the North Europe-U.S. Gulf Freight Association, the Gulf-European Freight Association, the North Europe-U.S. Atlantic Conference, the U.S. Atlantic-North Europe Conference, the Pan-Atlantic Carrier Trade Agreement, and the Trans-Atlantic American Flag Liner Operators Agreement; and (10) Sea-Land Service, Inc. (Sea-Land).

II. COMMENTS AND DISCUSSION

A. *The Right of Independent Action*

Section 5(b)(8), 46 U.S.C. app. 1704(b)(8), of the Shipping Act of 1984 (the Act or the 1984 Act), 46 U.S.C. app. 1701-1720, states 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 that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

Before addressing the specific issues raised with regard to particular provisions of the Proposed Rule, it is necessary to address a number of general issues raised by the comments regarding the interpretation of section

5(b)(8) of the Act. One such issue concerns the proper role of independent action within the statutory scheme of the 1984 Act. A number of the conferences argue that collective ratemaking is the "normal" method for pricing ocean transportation services. It is asserted that in a well-functioning conference, differences over pricing will usually be resolved internally. Independent action is said to be a "safety valve," a "last resort," an "exception to the norm that will rarely be used. These comments generally conclude that the Proposed Rule would distort the statutory scheme by elevating independent action above collective action.

This position, however, ascribes too peripheral a role to the independent action provision of the Act. Independent action is not merely a safety valve to be used on rare occasions whenever pricing decisions cannot be resolved internally and a member is allowed to act independently rather than be forced to leave the conference. It is a central provision designed to balance those provisions of the Act which facilitate collective action.

The independent action provision was a key feature of the compromise that led to the passage of the 1984 Act. Moreover, the independent action provision was one of the shipper-sponsored provisions. The 1984 Act represents a legislative effort to balance the interests of carriers and shippers. In order to fulfill that Congressional purpose, it is necessary to ensure that the right of independent action is fully preserved and that no restrictions, other than those permitted by the statute, are placed on its exercise.

Rather than distorting the statutory scheme, the Proposed Rule would appear to be in harmony with the purpose of the 1984 Act. The independent action provision of the 1984 Act is the counterbalance to the enhanced economic power of conferences. Congress could not have spoken more clearly on this issue than it did in the Conference Report:

A critical factor enabling the Conferees to agree on a more narrowly drawn general standard is the inclusion in this bill of numerous other provisions which address the nation's interest in competition in the ocean common carrier industry. . . . Even more importantly, the bill includes other specific and major procompetitive reforms that will affect the operation of ocean carriers and conferences—notably a strong requirement of independent action with a limited notice period. . . .

H.R. Rep. No. 98-600, 98th Cong., 2d Sess. 33-34 (1984).

As the Conference Report makes clear, Congress intended independent action to be a procompetitive balance to the more narrowly drawn general standard. Moreover, it is clear that Congress was aware that it would "affect the operation of ocean carriers and conferences . . ." including pricing. Furthermore, there is nothing in the legislative history which indicates that independent action is merely a safety valve rarely to be used or only as a last resort. Although Congress continued to allow for collective ratemaking by conferences, it provided for a strong, effective right of IA in the clearest of terms. Preserving an unburdened right of IA is in

keeping with the Congressional purpose. Restricting, burdening, or making it more difficult to exercise independent action defeats the purpose of the Act and the legislative compromise that led to the Act's passage.

A number of conferences suggest further that the Proposed Rule is contrary to the Congressional purpose of continuing the conference system in order to address structural and competitive problems such as rate instability and overcapacity. While it is true that Congress did continue the conference system for such a purpose, this does not mean that independent action should be circumscribed or limited. Congress gave not only conferences but other types of carrier agreements the opportunity to deal with problems of overcapacity by providing for a relaxed general standard, expedited processing, and clear antitrust immunity. Restricting IA, however, is not a solution to the problem of overcapacity which is the fundamental cause of rate instability.

One conference comment argues that the Act's silence with regard to any other restrictions on independent action does not mean that all other conditions are *per se* unlawful. Another comment argues that section 5(b)(8) does not prohibit other provisions in agreements which might result in reducing the frequency of independent action. This same comment criticizes the Proposed Rule as an administrative rulemaking which impermissibly adds to the statutory requirements of section 5(b)(8).

These comments misconstrue the nature of the right of independent action. Independent action means that a member line may act independently, and not collectively, with regard to any rate or service item required to be filed in a tariff. In order to take such action, the member line may only be required to provide notice of up to 10 days to the conference. To argue that the Act's alleged silence permits other substantive requirements or conditions which would effectively add to the limited notice requirement, either as a precondition to or as a consequence of independent action, is contrary to the express language of the Act. Any condition, procedure or other mandatory requirement that in effect adds to the 10-day maximum notice requirement or places a mandatory burden on IA is, on its face, *per se* violative of section 5(b)(8).

The Proposed Rule does not add to the statutory requirements of section 5(b)(8). Its intent is merely to codify, by rulemaking, Commission policy concerning some of the conference-imposed conditions on the exercise of independent action which appear, on their face, to violate section 5(b)(8). These conference-imposed requirements specified in the Proposed Rule have been encountered in a number of agreement filings and have prompted negotiation with the parties to obtain their removal or modification. Continued case-by-case adjudication of such provisions, as suggested by one comment, is inappropriate, unnecessary, and an inefficient use of Commission resources. The Proposed Rule provides clear guidelines for conferences and avoids filings which otherwise would be rejected or require modification.

Finally, it should be noted that the Department of Justice believes that the Proposed Rule does not go far enough and that additional regulations are needed. DOJ urges the Commission to broaden the scope of this proceeding to include consideration of regulations requiring all conference agreements to expressly prohibit: (1) any form of collusion in connection with any carrier's right of independent action; (2) the erection of any artificial procedural barriers to any carrier's exercise of its right of independent action; and (3) all forms of conference or collective retaliation against carriers who exercise their right of independent action. DOJ acknowledges that consideration of its proposals would require continuation of this proceeding. Whatever the merits of these proposals, they are beyond the scope of this rulemaking. DOJ's proposals will, however, be given consideration in a future rulemaking proceeding on this subject.

B. Specific Provisions of the Proposed Rule

1. Section 572.502(a)(4) (i)—Right of Independent Action

Section 572.502(a)(4)(i) of the Proposed Rule incorporates the requirement of section 5(b)(8) of the Act that each conference agreement must provide for the right of independent action. The language of this paragraph is substantially the same as that of the existing rule which appears at 46 CFR 572.502(a)(4).

One comment contends that the language of this paragraph, which states "and shall otherwise be in conformance with section 5(b)(8) of the Act", is superfluous and should be deleted because the regulation already incorporates all of the requirements of section 5(b)(8) of the Act.

Section 572.502(a)(4)(i) paraphrases, but does not restate verbatim, the language of section 5(b)(8) of the Act. The language cited by the comment, therefore, assures that the rule is not interpreted as a delimitation of the statutory right of independent action. Moreover, it does not add any requirement which does not already exist in the Act itself. Therefore, this language shall be retained in the Final Rule.

The same comment proposes further that language be added to this paragraph which would provide expressly for notice to a section of a conference in lieu of notice to the conference itself where ratemaking is conducted on a sectional basis. If ratemaking authority resides exclusively within the particular sections of a conference and the business of agreeing on rates and publishing tariffs is done on a sectional basis, it would not appear to be inconsistent with the Act to allow for notice to the section since it, rather than the overall conference, is the ratemaking body. To that extent the comment has merit and shall be accommodated by adding a paragraph to the Final Rule which allows for notice to a ratemaking section in lieu of notice to the overall conference. As discussed more fully below, only a single notice to the section may be required.

2. Section 572.502(a)(4)(ii)—Notice Period

Section 572.502(a)(ii) of the Proposed Rule establishes a maximum notice period of 10 days which may either be required or permitted by the conference agreement. The Proposed Rule prohibits IA provisions which provide for a minimum notice period and leave open the possibility of voluntary notice in excess of 10 days. The effect of the Proposed Rule is, thus, to preclude an IA proponent from voluntarily providing more than 10 days' notice to the conference.

The Department of Justice fully supports this requirement of the Proposed Rule. DOJ contends that this rule regarding the notice period warrants adoption because it gives full effect to the literal meaning of section 5(b)(8) of the Act and because it would prevent conference members from becoming participants in implicit understandings in which carriers would voluntarily give more advance notice of independent action than was intended under section 5(b)(8).

CMA also supports this provision. CMA contends that the language and intent of the Act are to prohibit a conference from requiring a conference member to give more than 10 calendar days' notice. Moreover, according to CMA, the restriction on voluntary notice would still allow an IA proponent to informally discuss a proposed independent action prior to giving formal notice or to withdraw a proposed independent action prior to effectiveness and resubmit it at any time.

The conference/carrier comments unanimously oppose the Proposed Rule's prohibition of voluntary notice of independent action in excess of 10 days. The comments advance various arguments to support the position that an IA proponent should be permitted to voluntarily provide notice of more than 10 days.

First, some comments argue that the plain meaning of the language of the Act places a limit only upon the conference agreement and not on the action of an individual member. The only purpose of section 5(b)(8) of the Act allegedly is to prohibit a conference from imposing a greater notice period upon a member line. Some comments argue further that the language of the Act, which states that the inclusion of the IA item in the tariff for use by the member shall be "effective no later than 10 calendar days after receipt of the notice", does not impose any restriction on the member line. This language, it is argued, merely requires the conference to file the notice within 10 days of receipt. Some comments argue that filing and effectiveness of the tariff must be distinguished from the effective date of the IA rate as specified in the tariff. The language of the Act is said merely to require filing of the tariff within 10 days. This filing requirement allegedly cannot be converted into a limitation on a member's right to give voluntary notice of more than 10 days. Thus, it is contended that an IA proponent can specify an effective date of more than 10 days and that this does not conflict with the requirement that the conference file the tariff within 10 days. Finally, some comments

argue that the Proposed Rule would conflict with the minimum 30-day notice requirement of section 8(d) if the independent action rate is a new or increased rate.* The comments conclude that the Commission may not prevent, or compel a conference to prevent, a member line from independently and unilaterally giving more than 10 days' notice, cancelling IA whether effective or pending, or extending the effective date of a pending IA.

Second, some conference comments contend that the legislative history makes clear that Congress intended only to place a limit on the maximum number-of-days notice which a conference could require a member line to give. They argue that the legislative history speaks only in terms of the maximum notice that may be required, and does not prohibit additional voluntary notice. It is also argued that if Congress had intended to impose such a requirement, it would have established minimum and maximum time periods.

Third, conference comments argue that the policy of the Act favors allowing carriers the freedom to structure their own affairs. In keeping with this policy, member lines should be allowed to provide longer notice.

Fourth, conference comments argue that the prohibition on voluntary notice of more than 10 days is unworkable and unneeded. Several conferences point out that the Proposed Rule could be circumvented in various ways. A member considering independent action could: (1) announce an intended IA in advance of formal notice and discuss, withdraw or compromise it; (2) docket a rate proposal and give formal notice of IA only after the proposal is rejected by the conference; or (3) give notice of IA and then withdraw it prior to effectiveness and re-notice the IA. Another comment argues that a conference could completely disregard a notice given 11 days prior to the effective date under the Proposed Rule.

Fifth, some conference comments argue that there are positive benefits to be obtained from a rule which would allow voluntary notice of more than 10 days. It is argued that such voluntary notice would enhance communication among members which would in turn support collective ratemaking and thereby promote rate stability. It is also stated that such voluntary notice would enable conference members to meet outside competitors' rates well in advance and allow time to take a possible second IA to meet outside competition.

* Section 8(d), 46 U.S.C. app. 1707(d), provides:

No new or initial rate or change in an existing rate that results in an increased cost to the shipper may become effective earlier than 30 days after filing with the Commission. The Commission, for good cause, may allow such a new or initial rate or change to become effective in less than 30 days. A change in an existing rate that results in a decreased cost to the shipper may become effective upon publication and filing with the Commission.

The comments, in effect, argue that, if the Proposed Rule requires effectiveness of an IA rate within 10 days of filing, there would be a potential conflict with the 30-day notice requirement of section 8(d) in the case of new or increased rates.

Sixth, three conference comments contend that contract law permits a party that is required to give a specific notice to voluntarily give more notice than that required by the contract.

Seventh, one comment argues that the legal construction generally given to statutory provisions and agency rules requiring a notice period of a certain number of days supports voluntary additional notice. This comment argues that none of these statutes or rules prohibits the person bearing the notice burden from giving additional notice.

Eighth, two comments argue that the Proposed Rule is inconsistent with the Commission's previous interpretation of notice requirements made in the Final Rule issued in Docket No. 84-26, *Rules Governing Agreements By Ocean Common Carriers And Other Persons Subject To The Shipping Act of 1984*, 49 FR 45320 (November 15, 1984) 27 F.M.C. 430. There, the comments contend, the Commission recognized the right to give more than 10 days' notice by deleting an absolute 10-day limit from its interim rule.

A 10-day maximum notice requirement is consistent with section 5(b)(8) of the Act and shall be retained in the Final Rule. Section 5(b)(8) of the Act establishes the mechanism by which independent decisions regarding tariffed price or service items may be made within the structure of the conference system. Section 5(b)(8) sets forth statutory requirements regarding notice, waiting period, conference filing obligations and effectiveness of IA items. These requirements affect both the collective action of the conference and the individual action of a conference member taking IA. The language of section 5(b)(8) is clear. "Each conference agreement must—(8) provide that any member of the conference may take independent action. . . . upon not more than 10 calendar days' notice to the conference. . . ." This language requires each conference agreement to contain such a provision which establishes a maximum waiting period following notice of not more than 10 calendar days. The conference is then required to ". . . include the new rate or service item in its tariff for use by that member *effective* no later than 10 calendar days after receipt of the notice (emphasis added)." This language not only obligates the conference to file the IA item in the conference tariff after receiving notice, but further specifies when the IA item shall become *effective*. This limit applies both to the conference and the individual member taking IA. Neither the conference nor the IA proponent may set an effective date beyond 10 calendar days. The language of section 5(b)(8), when read in its entirety, establishes a clear, certain, and predictable mechanism governing independent action which includes a 10 calendar day limit on IA notice. Once formal notice of independent action has been given, the Act establishes a definite scheme for filing of the IA item in the conference tariff and effectiveness of the IA item.

The legislative history, to the extent that it addresses the question of notice, waiting period and effective date, is not inconsistent with and in

some instances supports the interpretation of section 5(b)(8) taken in the Final Rule. The Conference Report, for example, stated that:

The conferees agree that the notice period to be given to the conference before a member may take independent action cannot be more than ten calendar days. The House recedes from a provision that would have limited the notice period to 2 working days for independent action; the Senate recedes from a provision that would have limited independent action to certain trades and only when a loyalty contract is in effect.

H.R. Rep. No. 98-600, 98th Cong., 2d Sess. 29 (1984). Similarly, the House Committee on the Judiciary stated that the bill “. . . requires all conferences to permit independent action upon a maximum of ten days’ notice to the conference.” H.R. Rep. No. 98-53, Part 2, 98th Cong., 1st Sess. 30 (1983).

Moreover, as the legislative history acknowledges, the proper length of the waiting period was a matter of dispute:

The proper length of the waiting period has been a matter of some dispute. The chemical manufacturers advocate no waiting period, or a maximum of 48 hours; Sea-Land Industries argues that conferences need at least ten days; other carrier representatives believe a still longer period is necessary to allow conference members to meet before the rate takes effect. As approved by the Committee, the conference may shorten, but cannot lengthen, the ten-day notice period. While some carriers preferred a longer period, the Committee believes some concessions are warranted in the interest of a flexibility [sic] pricing mechanism that could significantly aid this nation’s export performance.

H.R. Rep. 98-53, Part 2, 98th Cong., 1st Sess. 27 (1983). The 10-day waiting period thus represents a compromise between shipper interests which had advocated no waiting period or 48-hour notice and some carrier interests which had advocated a longer waiting period. Moreover, a 10-day ceiling was imposed so that there would be more pricing flexibility for the benefit of U.S. shippers and exporters. A shorter waiting period before a rate or service item becomes effective also contributes to the stated intention to give U.S. shippers “. . . greater flexibility in meeting price competition from foreign shippers and to enable them to respond more quickly to market opportunities.” H.R. Rep. No. 98-53, Part 1, 98th Cong., 1st Sess. 31 (1983).

Although not directly addressing the question of voluntary notice, the extensive discussion in the legislative history of the appropriate period of notice would appear to have little value if a member line could voluntarily give more than 10 days’ notice. Similarly, the compromise between carrier and shipper interests would appear to be disturbed if carrier members could voluntarily provide more notice. As noted above, the Conference Report states that the Act provides for a “. . . strong requirement of

independent action with a *limited notice period* (emphasis added).” H.R. Rep. No. 98-600, 98th Cong., 2d Sess. 33-34 (1984). The Final Rule implements the intended purpose of section 5(b)(8) by assuring that shippers will have the benefit of IA rates that become effective within 10 days after notice. The Final Rule also reduces the potential danger that, by allowing voluntary notice in excess of 10 days, conference members might become participants in implicit understandings in which carriers would always “voluntarily” give more than 10 days’ advance notice of independent action.

The various objections raised by the conference comments do not warrant a change in this provision of the Proposed Rule. The alleged loopholes in the Proposed Rule which would allow effectively for longer periods of notice do not in any way undermine the purpose or value of a maximum 10-day requirement. The Proposed Rule was not intended to preclude advance discussions of possible independent actions or other rate actions or considerations that might be undertaken prior to formal notice. In fact, the availability of these procedures indicates that conference flexibility in considering IA proposals is not unduly impaired. Moreover, the Proposed Rule does not prevent an individual carrier that has given notice of IA from withdrawing the IA prior to its effectiveness. In this regard, the alleged positive benefits of allowing voluntary notice of more than 10 days (*i.e.* better communications, conference stability, etc.) still would be largely available under various pre-formal notice procedures. The Rule does ensure, however, that once formal notice is given, and unless withdrawn by the IA proponent, the filing of the tariff and effectiveness of the IA rate will occur in a predictable and certain manner.

Nor does the alleged inconsistency of the Proposed Rule with section 8(d) of the Act constitute a barrier to the issuance of a Final Rule precluding voluntary notice in excess of 10 days. The Final Rule has been harmonized with section 8(d) by expressly recognizing that new or increased rates are subject to the requirements of section 580.10(a)(2), 46 C.F.R. § 580.10(a)(2), of the Commission’s tariff rules. Presumably, such instances would be rare because the vast majority of independent actions are rate decreases. In this regard it should be noted that at one point H.R. 1878 expressly provided that independent action would apply only to an action “. . . that results in a decreased cost to a shipper” The accompanying Committee Report noted that: “Independent action must be limited to decreases in rates.” H.R. Rep. No. 98-53, Part 2, 98th Cong., 1st Sess. 30 (1983). Although this language did not remain in the legislation which became law, it would appear to be consistent with the Act to allow IA on any tariffed rate or service item, including rate increases, but to make IA’s which increase rates subject to tariff filing requirements. The approach also seems appropriate inasmuch as both section 5(b)(8) and section 8(d) are provisions of the Act which are intended to benefit shippers. The Final Rule reconciles the requirements of both provisions.

Neither the principles of contract law nor the construction given to notice periods in other statutes or agency rules are controlling in this instance. Section 5(b)(8) sets statutory limits on the waiting period before tariff filing and on rate effectiveness which apply both to the conference and the individual member.

Finally, the Proposed Rule is not inconsistent with the Commission's previous interpretation of notice requirements made in Docket No. 84-26, *Rules Governing Agreements by Ocean Common Carriers and Other Persons Subject To The Shipping Act of 1984*, 49 FR 45320 (November 15, 1984) 27 F.M.C. 430, as alleged in some comments. In that proceeding, the Commission ultimately deleted the model independent action provision which had been in effect in the interim rule issued under the 1984 Act. See 46 C.F.R. §572.801(e). The Commission retained unchanged §572.502(a)(4) which specified the content of the independent action article of conference agreements. In addressing the comments to §572.502(a)(4), the Commission stated:

Section 572.502(a)(4) requires that conference agreements specify its (sic) independent action procedures. Comment 34 proposes that this section be revised to permit: (1) independent action procedures which allow for the exercise of such action on less than 10 calendar days' notice; and (2) a conference member to independently elect to provide more than 10 calendar days' notice of its intention to exercise independent action.

Section 572.502(a)(4) tracks the language of section 5(b)(8) of the Act which, in relevant part, provides that conference agreement independent action provisions may not impose a notice period of ". . . more than 10 calendar days . . ." for the exercise of independent action. The revisions suggested by Comment 34 are unnecessary because their intended purpose is presently being served by section 572.502(a)(4). Therefore, no change to this section has been made.

49 FR 45335.

One comment relies upon this discussion as support for the contention that the Commission has previously interpreted section 5(b)(8) of the Act to allow for voluntary notice of more than 10 days. This reliance is misplaced. Certainly nothing in the present rule itself (§572.502(a)(4)) in any way interprets section 5(b)(8) as allowing for voluntary notice of more than 10 days. Moreover, the accompanying discussion referred to above was intended merely to indicate that further changes in §572.502(a)(4) were unnecessary inasmuch as conferences would be permitted to draft their own independent action provisions in accordance with section 5(b)(8) of the Act. The discussion did not expressly authorize voluntary notice of more than 10 days. To the extent that that discussion may have left any ambiguity on this issue, it is clarified by the Final Rule issued in this proceeding.

As indicated in the Notice of Proposed Rulemaking, section § 572.502(a)(4)(ii) is intended to address provisions in conference agreements which are stated in terms of a minimum period of notice to the conference. An example of such a provision would be one which states that a conference member may take independent action "upon not less than 10 calendar days' notice to the conference." Such a provision requires a minimum period of notice but leaves open the possibility that a member line taking independent action may voluntarily provide notice which exceeds the required minimum, including notice in excess of 10 days. Such conference provisions which only establish a minimum notice period are prohibited by the Final Rule. The Final Rule permits a conference to provide for a fixed period of notice not in excess of 10 calendar days, or a range of notice provided that the maximum permissible notice does not exceed 10 calendar days.

3. Section 572.502(a)(4)(iii)—Single Notice

Section 572.502(a)(4)(iii) of the Proposed Rule states that an IA proponent may only be required to give a single notice to a "conference official" or "designated representative." The proposed Rule would codify by rule the Commission's established policy with regard to multiple notice provisions. Although not expressly stated, this section does not preclude an IA proponent from voluntarily giving notice to the other parties to the agreement.

DOJ contends that this section of the Proposed Rule warrants adoption because it prohibits a procedural obstacle to independent action that is inconsistent with the statutory language which requires notice "to the conference." CMA supports this section and states that the statute allows only for single notice.

Relying on the statutory definition of the term "conference," 46 U.S.C. app. 1702(7), four conference comments argue that the individual members of the conference are "the conference" and that a requirement of notice to each member therefore is permissible.

Two comments contend that the Act does not prohibit a conference from requiring direct notice to each conference member, provided that the conference does not refuse to publish an independent action in a tariff or otherwise withhold the right of independent action if the member fails to notify other members as well as the conference secretariat. Another comment adds that a multiple notice requirement is permissible provided that the notice to all members does not extend the notice period.

Other comments contend that: (1) multiple notice imposes little if any burden on the IA proponent; (2) there is no evidence that multiple notice would deter IA; (3) many rate agreements operate without a secretariat and depend on the initiating party to communicate with all other participants; and (4) notice to all other members serves a legitimate commercial purpose by assuring that other members have a reasonable period of time to decide

whether to exercise follow-up IA. Finally, two comments submitted by carrier interests take the position that the Act does prohibit a conference from requiring a member to give more than one notice, but does not preclude a member from voluntarily doing so.

Section 5(b)(8) of the Act requires an IA proponent to provide notice "to the conference." The Act's definition of "conference," 46 U.S.C. app. 1702(7), states:

"conference" means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff; but the term does not include a joint service, consortium, pooling, sailing, or transshipment arrangement.

This definition does not support the argument advanced in several comments that the conference is merely the sum of its members and therefore notice to each member may be required. Rather the definition makes clear that the conference is itself a distinct entity, namely an "association of ocean common carriers." It is the single entity, i.e. "association," to whom notice must be given. Section 5(b)(8) provides that "the conference" will include the new rate or service item in its tariff. Normally this is accomplished by the conference office or secretariat. The filing of the IA tariff item is not the responsibility of the other member lines. If there is no central conference office, then one member could be designated to file the tariff.

Other comments contend that a conference may require multiple notice as long as this requirement does not prevent or delay the publication of the IA item in the conference tariff. Such an interpretation, in addition to again ignoring that the Act speaks in terms of notice "to the conference," also, as a practical matter, lays a heavy collateral burden on the taking of IA since failure to provide multiple notice still would constitute a breach of the agreement in the view of these comments. Finally, it should be noted that the Proposed Rule does not preclude voluntary notice to other conference members. Thus, the alleged benefits of multiple notice still might be available through voluntary notice to the other members.

Section 572.502(a)(4)(iii) also requires each conference agreement to indicate which conference official or single designated representative is to receive the IA notice. One comment suggests that this requirement be modified to allow the conference to designate an office rather than a particular person. Another comment recommends that, if this requirement is retained, it be modified to take into account conferences which conduct ratemaking by sections and to allow notice to the section.

These suggested changes may be accommodated without imposing any additional burden on the IA proponent and may facilitate the giving of IA notice. It is therefore appropriate to amend this section to allow a conference to designate a conference official, single designated representative, or conference office as the recipient of the IA notice. As discussed

above, a new paragraph allowing for notice to the ratemaking section in lieu of notice to the overall conference would address the concerns of such conferences where ratemaking is by section.

Finally, it should be noted that section 572.404 of the Commission's rules, 46 CFR 572.404, allows for a waiver of any of the requirements of section 572.502 upon a showing of good cause. A waiver of the single notice requirement might be available, for example, to a conference with no formal administrative structure for receiving notice or to a conference made up of only a few lines.

4. *Section 572.502(a)(4)(iv)—Mandatory Meetings, Etc.*

Section 572.502(a)(4)(iv) of the Proposed Rule prohibits a conference from requiring attendance at conference meetings, submission of information other than that necessary to accomplish tariff filing, or compliance with any other procedures for the purpose of explaining, justifying, or compromising the proposed independent action. This section would codify current Commission policy in this area.

DOJ supports this section of the Proposed Rule and argues that such meeting, informational, or procedural requirements should be prohibited because they encourage intimidation, harassment, and coercion of carriers who attempt to take IA. CMA argues that such mandatory requirements should be prohibited because the Act provides for independent action, not action that must be discussed and considered collectively.

Two conference comments argue that the Act does not prohibit a requirement of mandatory meetings. TWRA, for example, states: "It is permissible . . . to require . . . meetings and even to treat failure to comply as a breach, so long as the IA is published as noticed within 10 days." TWRA and PNAC argue that the conference also may require additional information or data so long as failure to comply cannot be used as a basis for refusing to publish a tariff. Another comment argues that the conference may require a statement of the reasons motivating or underlying the independent action. Finally, one comment argues that conferences should be permitted to require a "post-IA exercise" explanation of the IA.

Several other conferences express no objection to this paragraph provided that it is clarified that voluntary meetings, voluntary submission of additional information or data, and voluntary procedures to explain or justify independent action are not precluded.

The argument that mandatory requirements beyond notice to the conference may be imposed upon an IA proponent, provided that the conference fulfills its filing obligation, is without merit. Simply because a requirement is not made a pre-condition to filing IA does not alter the fact that it places an obligation on the IA proponent once the proponent takes IA. Mandatory requirements which are absolute preconditions to the taking of IA are, of course, more offensive. But whenever the taking of IA means that the proponent must meet some other requirement, sometimes even at risk of violating the conference agreement if not done, that provision

has gone beyond the permissible limits of section 5(b)(8) of the Act inasmuch as it may burden the use of independent action.

The Act merely requires an IA proponent to give notice. Once notice is given, the conference must carry out the ministerial task of tariff filing. An IA proponent has no other obligations under the Act. Any *mandatory* requirement beyond notice is impermissible. As some of the comments candidly acknowledge, failure to meet these conference-imposed mandatory requirements would be a breach of the agreement. Such a breach would presumably subject the IA proponent to penalties under the terms of the agreement, a circumstance which would clearly burden the taking of independent action. Therefore, any mandatory requirements, whether meetings, information, or procedures, appear to be prohibited under the Act. This prohibition is clarified by the Proposed Rule. Even post-IA *mandatory* explanations, although arguably less burdensome, are impermissible.

The Proposed Rule does not preclude *voluntary* attendance at meetings, submission of information, or observance of procedures. Such provisions do not, in themselves, burden the taking of independent action. There does not appear to be any reason at this time to prohibit IA proponents who wish to *voluntarily* accommodate the conference or its members from doing so.

5. Section 572.502(a)(4)(v)—Following IA

Section 572.502(a)(4)(v) of the Proposed Rule incorporates the requirement under the Act that the conference file the IA item in the conference tariff for use by the member. It also provides for following IA by other members who wish to adopt an IA item as their own.

Several comments seek clarifications of this provision. One suggests that the language of this provision be modified to account for conferences in which ratemaking is done by sections. A similar change has been considered in connection with earlier paragraphs of the Proposed Rule and shall be accommodated here through the paragraph which allows for notice to the section in such conferences.

Several comments suggest that the Final Rule expressly state that an IA proposal may be amended, postponed, or cancelled during the notice period and prior to its effectiveness. The Proposed Rule did not preclude such action by an IA proponent. Nor does the Final Rule.

Finally, one comment states that the Final Rule should protect follow-up independent action by providing that a following IA continues to remain in effect after the original IA is withdrawn prior to its effective date unless the conference is instructed otherwise. Whatever the merit of this comment, such a provision was not put-forth in the Proposed Rule and would appear to be beyond the scope of this rule making proceeding. In addition, this issue is currently being addressed in Commission Docket No. 86-3, *Modifications to the Trans-Pacific Freight Conference of Japan Agreement, et al.*

6. Section 572.502(a)(4)(vi)—Compliance

Section 572.502(a)(4)(vi) of the Proposed Rule provides for immediate compliance with a Final Rule by all new conferences and allows 90 days after effectiveness for compliance by other conferences.

One conference states that it needs 180 days to accomplish the changes which might be required by the Proposed Rule and requests that the rule allow that period of time for compliance.

It would appear that 90 days is not an unreasonable period of time in which to achieve compliance with the final Rule. Indeed, only one conference expressed any difficulty with this provision. Therefore, a change in this section is not deemed necessary.

7. Section 572.502(a)(4)(vii)—Rejection

Section 572.502(a)(4)(vii) provides that any agreement which does not comply with the requirements of this section shall be rejected pursuant to section 572.601.

One comment argues that this provision is inconsistent with paragraph (vi) and should be deleted. A number of other comments argue that this paragraph exceeds the Commission's rejection authority. These comments argue that the Commission can only reject an agreement because it fails to meet the express requirements of section 5(b) of the Act.

Section 5(b) states that each conference agreement *must, inter alia*, provide a member line the right of independent action on not more than 10 days' notice. The Proposed Rule would prohibit only those provisions which, on their face, fail to comply with one of the requirements a conference agreement filed pursuant to section 5 must meet if it is to be made effective under section 6 and granted antitrust immunity under section 7 of the Act. Accordingly, this appears to be a proper use of the Commission's rejection authority and shall be retained in the Final Rule.

8. Section 572.502(a)(4)(viii)—Ratemaking Section

Section 572.502(a)(4)(viii) provides that, if ratemaking is done by sections within a conference, any notice required by the Final Rule may be to the section involved. This is a new paragraph which accommodates a concern expressed in a conference comment as discussed above.

III. CONCLUSION

This Final Rule is intended to give full effect to section 5(b)(8) of the Act in accordance with the Act's guiding policies. The changes made in the Proposed Rule accommodate as fully as is consistent with the requirements of the Act certain concerns expressed in the comments. The key substantive provisions of the Proposed Rule, however, have been retained in the Final Rule.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193, Feb-

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

The collection of information requirements contained in this Final Rule have been approved by the Office of Management and Budget under provisions of the Paperwork Reduction Act of 1980 (P.L. 95-511) and have been assigned OMB Control Number 3072-0045.

List of Subjects in 46 CFR Part 572: Administrative practice and procedure; Antitrust; Contracts; Maritime carriers; Rates and fares; Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and auctions 5, 6 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1704, 1705, 1716), Part 572 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation for Part 572 continues to read as follows

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1701-1707, 1709, 1710, 1712, 1714-1717.

2. Paragraph (a)(4) of § 572.502 is revised to read: § 572.502 Organization of conference and interconference agreements.

(a) * * *

(4) *Article 13—Independent action.*

(i) Each conference agreement shall specify the independent action procedures of the conference which shall provide that any conference member may take independent action on any rate or service item required to be filed in a tariff under section 8(a) of the Act upon not more than 10 calendar days' notice to the conference and shall otherwise be in conformance with section 5(b)(8) of the Act.

(ii) Each conference agreement that provides for a period of notice for independent action shall establish a fixed or maximum period of notice to the conference. A conference agreement shall not require or permit a conference member to give more than 10 calendar days' notice to the conference, except that in the case of a new or increased rate the notice period shall conform to the requirements of § 580.10(a)(2).

(iii) Each conference agreement shall indicate the conference official, single designated representative, or conference office to which notice of independent action is to be provided. A conference agreement shall not

require notice of independent action to be given by the proposing member to the other parties to the agreement.

(iv) A conference agreement shall not require a member who proposes independent action to attend a conference meeting, to submit any further information other than that necessary to accomplish the filing of the independent tariff item, or to comply with any other procedure for the purpose of explaining, justifying, or compromising the proposed independent action.

(v) A conference agreement shall specify that any new rate or service item proposed by a member under independent action shall be included by the conference in its tariff for use by that member effective no later than 10 calendar days after receipt of the notice and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date.

(vi) All new conference agreements filed on or after the effective date of this section shall comply with the requirements of this section. All other conference agreements shall be modified to comply with the requirements of this section no later than 90 days from the effective date of this section.

(vii) Any new conference agreement or any modification to an existing conference agreement which does not comply with the requirements of this section shall be rejected pursuant to § 572.601 of this part.

(viii) If ratemaking is by sections within a conference, then any notice to the conference required by § 572.502(a)(4) may be made to the particular ratemaking section.

* * * * *

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-11

ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. GREAT
LAKES TRANSCARIBBEAN LINE

NOTICE

April 25, 1986

Notice is given that no exceptions were filed to the March 21, 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. 85-11

ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. GREAT LAKES TRANSCARIBBEAN LINE

Settlement of a proceeding to determine whether Respondents violated section 15 of the Shipping Act, 1916, and section 10 of the Shipping Act, 1984, by implementing an agreement prior to its lawful effective date, and, if so, to determine whether penalties should be assessed, approved. Each Respondent ordered to pay \$40,000 pursuant to terms of settlement agreement, as amended.

Hopewell H. Darnelle, III, for Respondents, Armada Great Lakes/East Africa Service, Ltd., and Great Lakes Transcaribbean Line.

Aaron W. Reese, Director, Bureau of Hearing Counsel, and *William D. Weiswasser* as Hearing Counsel.

INITIAL DECISION¹ OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Finalized April 25, 1986

This proceeding was instituted by Order of Investigation and Hearing ("Order"), served April 16, 1985, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. app. 821), and section II of the Shipping Act, 1984 (46 U.S.C. app. 1710), to determine whether the named Respondents, Armada Great Lakes/East Africa Service, Ltd. ("Armada East Africa") and Great Lakes Transcaribbean Line ("GLTL") violated section 15 of the Shipping Act, 1916 (46 U.S.C. app. 814), and section 10 of the Shipping Act, 1984 (46 U.S.C. app. 1709), by implementing Agreement No. 207-010640 prior to its "effective lawful date" and whether, in the event those Respondents "are found to have violated" those sections either or both should be assessed a penalty, and, if so, the appropriate level of such penalty. The order named Hearing Counsel as a party.

The matter is before me by way of the Respondents' Motion for Approval of Proposed Civil Penalty Settlement Agreements. The title is a misnomer, because it is not Hearing Counsel's policy or practice to enter into settlement agreements as the culmination of agreeably concluded settlement discussions. Instead, Hearing Counsel makes known its position by advising, in reply to what is more aptly described as a motion for approval of an offer of settlement, that they do not oppose the offer. Here, Hearing Counsel

¹This 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).

does not oppose these offers. They also urge that the offers satisfy the statutory and regulatory criteria for settlement.

It will be useful briefly to note the several apposite substantive, and procedural statutes and regulations in order to place the proposed settlement within the framework of the regulatory scheme.

I

THE REGULATORY SCHEME AND THE RELEVANT STATUTES

A. Substantive Provisions

The first issue to be determined in this proceeding is whether the Respondents violated the Shipping Acts of 1916 and 1984 "by implementing Agreement No. 207-010640 prior to its lawful effective date." The term "lawful effective date" needs amplification in order to pinpoint the differences in the requirements of the two cited Acts.

Under the provisions of section 15 of the 1916 Act, parties to a joint service agreement are required to submit such agreement for approval by the Commission. Section 15 expressly provides that, "before approval * * * it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement * * *". Thus, under the 1916 Act, the lawful effective date of the subject agreement would be the time fixed by the Commission in its approval. Naturally, if not submitted, an agreement cannot be approved.

Section 10(a)(2) of the 1984 Act (46 U.S.C. app. 1709(a)(2)) prohibits any person from operating "under an agreement required to be filed under section 5 of this Act that does not become effective under section 6 * * *". Section 5 (46 U.S.C. app. 1704) requires that any agreement described in section 4(a) of the 1984 Act (46 U.S.C. app. 1703(a)) be filed with the Commission. A joint service agreement lies within the purview of section 4(a). Pursuant to section 6 of the 1984 Act (46 U.S.C. app. 1705), agreements filed with the Commission, unless rejected, become "effective" within a statutorily fixed time set forth in section 6(c) (46 U.S.C. app. 1705(c)), but not less than 14 days after notice of the filing of the agreement is published in the *Federal Register*, as provided in section 6(e) (46 U.S.C. app. 1705(e)). However, the clock which is used to calculate the effective date of an agreement does not begin to tick, if that agreement is not filed. Thus, an agreement which is filed may have a lawful effective date not less than 14 days after its publication in the *Federal Register* (section 6(e))—or on the 45th day after filing, or on the 30th day after noticed in the *Federal Register*, whichever is later (section 6(c)). Of course, an agreement required to be filed, but which is not filed, cannot have a lawful effective date.

B. Penalty Provisions

The penalty for implementing an agreement subject to approval under section 15 of the 1916 Act is "not more than \$1,000 for each day such violation continues." Section 15, last paragraph.

Among other things, section 13 of the Shipping Act, 1984 (46 U.S.C. app. 1712), sets forth the penalties for violation of the 1984 Act. Under section 13(a) (46 U.S.C. app. 1712(a)) the amount of penalty for a violation of section, 10(a)(2) "may not exceed \$5,000" per violation unless the violation is "willfully and knowingly" committed, in which case the amount of civil penalty may not exceed \$25,000 for each violation. Section 13(a) also provides that "Each day of a continuing violation constitutes a separate offense."

C. Procedural Provisions

The second issue to be determined is whether any penalty should be assessed and the appropriate level of a penalty. This requirement implicitly invokes (1) the provisions of section 32 of the Shipping Act, 1916 (46 U.S.C. 831); (2) provisions of section 13 of the 1984 Act, other than those mentioned in I.B., *supra*; and (3) provisions of the Commission Regulations implementing these statutory provisions. The simple point made is that all of these provisions explicitly empower the Commission to settle civil penalties within the context of a formal assessment proceeding, as follows:

(1) As pertinent, section 32 of the 1916 Act provides:

(e) Notwithstanding any other provision of law, the Commission shall have authority to assess or compromise all civil penalties provided in this Act: *Provided, however*, That, in order to assess such penalties a formal proceeding under section 22 of this Act shall be commenced within five years from the date when the violation occurred.

(2) As pertinent, section 13(c) of the Shipping Act, 1984 (46 U.S.C. 1712(c)), provides:

ASSESSMENT PROCEDURES.— * * * the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. 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 may compromise, modify, or remit, with or without conditions, any civil penalty.

(3) As pertinent, the Commission's Regulations governing compromise, assessment, settlement and collection of penalties, 46 CFR Part 505, at 505.3, provide:

(a) *Procedure for assessment of penalty.* The Commission may assess a civil penalty only after notice and opportunity for a hearing under section 22 of the Shipping Act, 1916, or sections 11 and 13 of the Shipping Act of 1984. The proceeding, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in Part 502 of this Chapter.² All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.

(b) *Criteria for determining amount of penalty.* In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

II

THE REVISED OFFERS OF SETTLEMENT

The original offers of settlement were submitted on December 18, 1985. Following an informal conference, the Respondents filed revised offers on March 10, 1986. Copies of the original and revised offers are attached as Appendix A and Appendix B, respectively.

Under the revised proposals, each Respondent, individually, proffers to pay the amount of \$40,000 in full settlement of all penalty claims for any violations alleged in the Order. Although the Respondents do not deny having implemented Agreement No. 207-010640 before it became effective on October 20, 1984, or that such prior implementation constituted violations of the Shipping Acts, their proposals specifically provide that the settlements are not to be construed as admissions of any violations alleged in the Order. In the event, the alleged violations terminated on October 20, 1984, and Respondents represent that they will comply with regulations in the future.

As revised, the offers propose that the payment be made in accordance with the following program:

(A) Each Respondent shall establish an interest bearing escrow account in favor of the Commission and deposit the initial installment of monies due under the settlement in such account prior to submitting the revised

² Sections 502.91 and 502.94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91 and 502.94, authorize the submission and consideration of offers of settlement.

offer. Accordingly, each Respondent deposited \$10,000 into a segregated, interest bearing money market escrow account, in its counsel's name for the benefit of the Commission/Respondent at NS&T Bank, N.A., Washington, D.C., on February 11, 1986.

(B) Within 15 days after final approval of the settlement, all monies in said escrow accounts (including any additional deposits of installments, as provided in (C) below, and all accrued interest) shall be paid to the Commission. If the settlement is disapproved, all such monies shall be returned to the Respondents.

(C) The remaining \$30,000 shall be payable in accordance with the terms of a promissory note, attached to and made a part of the settlement, in the following installments:

1. Five Thousand (\$5,000) Dollars, plus interest, shall be paid on or before June 3, 1986;
2. Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before September 16, 1986; and
3. Fifteen Thousand (\$15,000) Dollars, plus interest, shall be paid on or before December 30, 1986.

In the event the Commission has not taken final action with respect to approval of the settlement by the date any installment is due, such installment, including interest, shall be paid into the escrow account.

III

FINDINGS

For the purpose of settlement the administrative record before me consists of the Motion, the proposed settlements and their attached promissory notes, as revised, Respondents' Memorandum of Points and Authorities in Support of Proposed Settlements (Memorandum) and Hearing Counsel's Reply to Respondents' Motion for Approval of Proposed Civil Penalty Settlement Agreements (Reply). For the same purpose, the evidentiary record consists of all parties' Joint Factual Stipulation and Stipulated Exhibits and the Affidavits of Detrich Moehle von Hoffmannswaldau and Jens-Erik Valentin. For editorial reasons or because of perceived irrelevancy or immateriality, some of the joint stipulations of fact have not been adopted.

By way of introduction to my findings I believe it will be helpful to expand on what was noted, earlier, about the Order and the Respondents' position with respect to the allegations of violations as well as some of the procedures which led up to the Motion.

Although one of the purposes of this proceeding is to determine whether violations were committed, the Order makes it clear that the issue of violation is not really in dispute and that the major issue to be decided is the amount of penalty.

The Order put it this way:

At no point has either [Respondent] denied implementing the agreement or that such implementation constitutes a violation. Because a satisfactory compromise of the subject claims could not be reached, the Commission has decided to institute this proceeding to determine and assess the appropriate penalty for the violation referred to above.

At a prehearing conference on May 29, 1985, Respondents reiterated that they did not deny implementing an agreement required to be filed under the Shipping Acts without appropriate sanction. Again they did not contest that such implementation violated section 15 of the 1916 Act and section 10 of the 1984 Act. They denied that any violation was intentional.

Thereafter the parties undertook extensive voluntary discovery efforts as to the nature and scope of Respondents' activities and various mitigating circumstances. After the completion of such discovery, the parties entered into settlement discussions. Respondents have fully cooperated with Hearing Counsel throughout the course of this case in developing an evidentiary record and have voluntarily made available all materials relating to the subject of this proceeding, including complete vessel manifests, representative bills of lading and detailed financial statements.

I find:

1. GLTL, formerly known as GK Great Lakes Transcaribbean Line GmbH, is a corporation organized and established under the laws of the Federal Republic of Germany. Since 1965 GLTL has operated a common carrier service only between U.S./Canadian Great Lakes ports and ports in the Caribbean Sea and on the West Coast of South America pursuant to tariffs filed with the Commission.

2. Armada East Africa is a corporation created under the laws of the Republic of Liberia on March 26, 1981, for the sole purpose of entering into a joint venture with Respondent GLTL to provide common carrier service between U.S. and Canadian ports on the Great Lakes and ports in South and East Africa. Armada East Africa neither owns nor operates vessels in any trade, and is a one-half owner only of the Armada/GLTL line joint service.

3. On April 24, 1981, Armada East Africa and GLTL entered into an agreement establishing a joint venture under the name of Armada/GLTL East Africa Service ("Armada/GLTL line") to operate a common carrier service between ports on the U.S. and Canadian Great Lakes and ports in South and East Africa. Armada East Africa and GLTL agreed to share equally in the expenditures, earnings, responsibilities and liabilities of the joint venture.

4. By Addendum No. 1, executed February 5, 1982, Armada East Africa and GLTL agreed, *inter alia*, to extend the joint venture agreement through March 31, 1983.

5. Armada East Africa and GLTL further agreed in Addendum No. 2, executed December 16, 1982, to expand the scope of the agreement to include service from U.S. Atlantic and Gulf ports, and to extend the term of the agreement as amended to March 31, 1984.

6. Neither the joint venture agreement nor either of the addenda thereto was filed with the Commission for approval under section 15 of the Shipping Act, 1916, prior to January 11, 1983.

7. Notwithstanding the foregoing, Armada and GLTL commenced to implement the agreement as of late April 1981, and Armada/GLTL line commenced service with its first sailing on May 21, 1981, from the port of Green Bay, with stops at Milwaukee, Chicago and Montreal, en route to ports in South and East Africa.

8. Armada/GLTL line is a vessel-operating common carrier which owns no vessels of its own. Since its inception in 1981 it has operated as a common carrier pursuant to tariffs on file with the Commission between ports in the U.S. and Canadian Great Lakes and ports in East and South Africa under the trade name of Armada/GLTL East Africa Service. In December 1982, the service was expanded to include U.S. Atlantic and Gulf Coast ports, and an appropriate tariff was filed with the Commission. Service from U.S. Gulf ports was suspended in June 1984 due to lack of profitability. The service continued to operate on a regular basis from the Great Lakes and U.S. Atlantic ports.

9. Since there is no westbound cargo available to the service from ports in East and South Africa, the service has operated eastbound only from the United States and is performed by vessels that are voyage or trip chartered on the free market and returned "off-hire" to the owner or chartered at the completion of the eastbound voyage.

10. All cargo of the service has been carried under bills of lading issued in the trade name of Armada/GLTL East Africa Service pursuant to the tariffs on file with the Commission. No cargo has been carried by the service under a bill of lading issued by any other carrier or agent of any such carrier.

11. In December 1982 the Commission's staff received information alleging that Armada East Africa and GLTL were operating a joint service in violation of section 15 of the Shipping Act, 1916.

12. After an informal investigation of these allegations the Commission's staff contacted Armada/GLTL and advised them to file the agreement.

13. The very next day—January 11, 1983—Respondents filed for approval of the agreement under section 15. A protest ensued.

14. On September 9, 1983, the Commission served an Order of Investigation directing initiation of an expedited proceeding (FMC Docket No. 83-39) to determine whether the agreement, which became known as Agreement No. 10464, was subject to the Commission's jurisdiction and the filing requirements of section 15.

15. Pursuant to the Commission's Order, an expedited evidentiary proceeding was conducted. On November 23, 1983, Administrative Law Judge Norman D. Kline issued his Initial Decision. Judge Kline concluded, *inter alia*, that Armada East Africa was a common carrier under the Shipping Act, 1916, and that Agreement No. 10464 was between two common carriers and subject to the Commission's jurisdiction.

16. By letter dated December 19, 1983, Respondents advised that they did not intend to file exceptions to Judge Kline's Initial Decision, and requested the Commission to authorize appropriate staff members to meet with Respondents and protestants to discuss any objections to the form of the agreement and the steps necessary to place the agreement in approvable form.

17. By letter dated February 3, 1984, the Commission's Bureau of Agreements and Trade Monitoring responded to Respondents' request to confer with the Commission staff and protestants concerning the form of Agreement No. 10464 as originally filed. This letter, which was in the nature of an informal staff advisory opinion and was not binding on the Commission, discussed the general principles governing the approvability of joint service agreements, and identified specific shortcomings in the terms of Agreement No. 10464. The staff advised Respondents to consider submitting an appropriate agreement, together with sufficient factual justification. The staff further advised Respondents "that, inasmuch as the Commission has determined the Agreement to be subject to its jurisdiction under Section 15 in Docket No. 83-39 . . . , any operations thereunder are illegal and at their own peril." The staff "requested that [Respondents] advise of their intentions no later than April 2, 1984." The staff's letter concluded as follows:

In view of the foregoing, the Proponents should consider submitting an agreement fashioned as they see fit—together with sufficient factual justification—for Commission approval pursuant to section 15, Shipping Act, 1916, in accordance with the rules set forth in 46 CFR 522, as amended. The Proponents are also advised that, inasmuch as the Commission has determined the Agreement to be subject to its jurisdiction under section 15 in Docket No. 83-39, Armada/GLTL East Africa Service (Agreement No. 10464), any operations thereunder are unlawful and at their own peril.

The foregoing is an informal staff advisory opinion which is not binding on the Commission or its ultimate disposition of this matter.

It is requested that the Proponents advise of their intentions no later than April 2, 1984.

18. By letter dated February 15, 1984, Respondents advised the Commission that "[t]he parties to the Agreement will comply promptly with the Commission's Section 15 policies and regulations."

19. Armada East Africa and GLTL thereafter entered into a new restated agreement, which was specifically designed to satisfy the concerns raised by the staff. This revised agreement was filed for the Commission's approval under section 15 by letter dated April 2, 1984.

20. By letter dated April 6, 1984, the Bureau of Agreements and Trade Monitoring notified Respondents that their revised agreement had been received and was being processed as a refiling of Agreement No. 10464 with the same agreement number. Notice of this filing was published in the *Federal Register* on April 19, 1984 (49 Fed. Reg. 15621).

21. One set of comments on the refiled agreement was submitted on behalf of the member lines of the United States/South and East Africa Conference which had protested the original agreement. Respondents did not reply to these comments.

22. By letter dated June 18, 1984, the Commission's Secretary's office notified Respondents that the Commission had determined on June 13, 1984, that Agreement No. 10464, as refiled, was not approvable under the Shipping Act, 1916, "due to substantial protests, insufficient justification and remaining technical problems." Pursuant to the Commission's policy concerning agreements filed under the Shipping Act, 1916, which could not be processed to completion prior to the June 18, 1984, effective date of the Shipping Act of 1984, Agreement No. 10464 was returned to the parties, without prejudice to refiling under the Shipping Act of 1984.

23. On June 20, 1984, Respondents telephoned the Bureau of Agreements and Trade Monitoring and "discussed the remaining technical problems." Respondents thereafter prepared a new proposed Joint Service Agreement in light of the staff's comments and the new Shipping Act of 1984. This draft was forwarded to the FMC staff for informal review by letter dated July 18, 1984.

24. The staff's subsequent comments were incorporated into a new, restated agreement which was executed by GLTL on August 30, 1984, and by Armada East Africa on September 4, 1984. This new agreement was filed with the Commission pursuant to the Shipping Act of 1984, along with the required completed Information Form, by letter dated September 5, 1984.

25. By letter dated September 11, 1984, the staff advised that the new agreement had been received and assigned Agreement No. 207-010640. Notice of the filing of this Agreement was published in the *Federal Register* on September 14, 1984 (49 Fed. Reg. 36163). No comments or protests were received by the Commission in response to this notice.

26. By letter dated September 27, 1984, the staff requested additional information and clarification regarding certain aspects of the agreement and service. The staff requested a prompt response in view of the extremely limited time frame established under the Shipping Act of 1984, and concluded by advising the parties that "to operate under this agreement prior to it becoming effective is unlawful and to do so is at their own peril."

27. Respondents responded to the staff's request for additional information and clarification by letter dated October 9, 1984.

28. By letter dated October 18, 1984, the Secretary's office notified Respondents that the Commission had reviewed Agreement No. 207-010640 and had determined to take no action to prevent or delay the Agreement from going into effect on the 45th day after filing, October 20, 1984.

29. Agreement No. 207-010640 became effective on October 20, 1984.

30. By letters dated September 26, 1984, the Bureau of Hearing Counsel notified respondents of a civil penalty claim against each of them "for apparent ongoing violation of section 15 of the Shipping Act, 1916, (46 U.S.C. § 814) and of section 10 of the Shipping Act of 1984 (46 U.S.C. § 1709) by implementing an agreement which has not been approved or has not gone into effect under applicable law." These letters stated that Respondents appeared to have been implementing a joint service agreement since April 1981, and that such implementation had continued subsequent to the decision in Docket No. 83-39 becoming final, notwithstanding the Commission staff's February 3, 1984, warning "that implementation of the parties' agreement was unlawful and at their peril."

31. Respondents timely responded to these notices, but were unable to negotiate a settlement of the civil penalty claims. As seen, the Commission therefore initiated the present proceeding.

32. As discussed in No. 7, *supra*, Respondents commenced implementation of their joint service agreement in April 1981. Thereafter Respondents continued to implement their agreement, as it was amended from time to time, continuously, to October 19, 1984.

33. At no time have Respondents attempted to conceal their operations in any way. To the contrary, Respondents openly and widely advertised their joint service, and filed the appropriate tariffs pertaining thereto with the Commission.

34. The Armada/GLTL line made a total of 44 voyages in U.S. foreign commerce from the inception of service in 1981 through October 19, 1984.

35. At the time the joint venture agreement was entered into and the Armada/GLTL line commenced service in the spring of 1981, there was no direct all water liner service between the Great Lakes and South and East Africa.

36. The Armada/GLTL line made the following number of sailings from the Great Lakes to ports in South and East Africa during the period from the commencement of service in April 1981 through October 19, 1984: in 1981, four sailings; in 1982, four sailings; in 1983, five sailings; and in 1984, nine sailings. There was one other sailing in 1984 before the St. Lawrence Seaway was opened. It originated at Halifax, N.S., and called at the Port of New York.

37. In the latter part of 1982, Norton, Lilly & Co., Inc., approached Armada/GLTL. Norton, Lilly previously had acted as agent for Cape Line, which in the past had operated a service from U.S. Atlantic and Gulf

ports to South and East Africa prior to going into bankruptcy. Norton, Lilly suggested that there was a need for additional direct all-water service to South and East Africa from U.S. Atlantic and Gulf coast ports, and proposed that Armada/GLTL line expand its operation to include such service.

38. Armada East Africa and GLTL subsequently agreed to amend their joint service agreement to include service from U.S. Atlantic and Gulf coast ports to South and East Africa. This was accomplished by means of Addendum No. 2 to the joint service agreement, executed December 16, 1982. Armada/GLTL line filed an appropriate tariff with the Commission, and began to advertise service from U.S. Atlantic and Gulf ports. Armada/GLTL line commenced the new service on February 28, 1983.

39. This service was operated with one sailing approximately every three weeks. Armada/GLTL line made a total of 13 voyages in this service in 1983, and an additional eight voyages in 1984 prior to suspending service from U.S. Gulf ports in June 1984.

40. Unlike the Great Lakes trade, the U.S. Atlantic and Gulf/South and East Africa trade was highly competitive with a number of competing carriers. Although able to attract cargoes, Armada/GLTL line was unable to achieve consistent profitability. Armada/GLTL line therefore suspended operations from U.S. Gulf ports in June 1984, and restructured its service to offer a combined service from the Great Lakes, Baltimore and New York.

41. This restructured operation allowed Armada/GLTL line to increase the frequency of its Great Lakes sailings. Armada/GLTL line made six sailings under the restructured service during the period from June through October 19, 1984.

42. Financial statements show that in 1984, and including revenues on cargoes carried from non-U.S. ports, the Armada/GLTL line made a net profit of \$197,548. Armada/GLTL line had a positive net worth as of the end of 1984. Armada/GLTL line sustained losses during the first six months of 1985, however, and had a negative net worth as of June 30, 1985.

43. The financial statement further shows that Armada East Africa had a positive net worth as of December 31, 1984. Allowing for allocation of Armada East Africa's 50 percent share of the joint service losses, this net worth figure was reduced, although still positive, as of June 30, 1985.

44. GLTL had a negative net worth as of the end of its fiscal year on March 31, 1985, and sustained operating losses for the six months through September 30, 1985, not including GLTL's 50 percent share of any profits/losses from the Armada/GLTL line.

45. As the only carrier providing direct all-water liner service between the Great Lakes and South and East Africa during the period from 1981 to the present, Armada/GLTL line has provided a needed service to the

shipping public. Support for its service is evidenced by letters to the Commission from members of the Great Lakes shipping community.

46. Armada/GLTL line's cargoes have consisted of government relief cargoes, primarily P.L. 480, Title II cargoes, private charitable organization relief cargoes, and a wide variety of commercial cargoes, as evidenced by vessel manifests and bills of lading.

47. During the period from January 1 to October 19, 1984, government relief cargoes constituted 81.0 percent of Armada/GLTL line's total tonnage and 78.5 percent of total revenue from U.S. Great Lakes ports. The cargoes carried from U.S. Atlantic and U.S. Gulf coast ports were entirely commercial.

48. In a letter to the St. Lawrence Seaway Development Corporation dated December 20, 1984, the U.S. Department of Agriculture ("USDA") noted problems incurred in Great Lakes P.L. 480, Title II, cargo liftings in 1984, and specifically cited Armada Lines and GLTL as "[s]teamship lines participating in a timely manner * * *."

49. In 1985 to date, the Great Lakes and St. Lawrence Seaway have suffered their worst year in more than 20 years. Cargoes out of the Great Lakes through the St. Lawrence Seaway were down about 25 percent from 1984 level prior to the recent closure of the Welland Canal.

50. This situation has been exacerbated by recent closings of the St. Lawrence Seaway, and resulting cargo diversions, including the closure of the Seaway for 24 days from October 14th until November 7, 1985, as the result of the collapse of a wall in the Welland Canal. As a result of the Welland Canal accident, the St. Lawrence Seaway Development Corp. recently reported that "shipments through the Seaway are about 38 percent down from last year."

51. USDA has recently diverted nearly 50,000 tons of P.L. 480, Title II cargoes away from the Great Lakes to other coastal ranges in order to utilize U.S. flag service available there to achieve U.S. flag cargo preference compliance. Moreover, USDA is proposing to change the Agency for International Development's current cargo preference policy against coastal range diversions.

52. A lawsuit challenging USDA's actions has been filed.

53. There have been no complaints to the Commission, other than those set forth herein, regarding the joint operation or conduct of the Armada/GLTL line service.

54. There have been no shipper complaints or prior FMC enforcement proceedings as to individual operations of GLTL or Armada East Africa.

IV

DISCUSSION

Hearing Counsel do not oppose the offers of settlement and acknowledge that the "offers satisfy the statutory and regulatory criteria for settlements."

I believe that Respondents' proposals are reasonable and meet well settled criteria for approval of offers of settlement in adjudicative penalty assessment proceedings and that approval is warranted. Generally, it appears that the amounts proffered fit well within a zone of reasonableness and that the "settlement is neither a coercive attempt to exact exorbitant punishment nor a profligate cession of 'public rights,' Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission, 442 U.S. 430, 450 (1977), to the alleged wrongdoer." *Far Eastern Shipping Company Possible Violation of Section 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916 (FESCO)*, 24 F.M.C. 991, 1013 (1982) (Initial Decision), administratively final May 7, 1982. Moreover, it appears that the amounts of the penalties are substantial and are likely to have a deterrent effect upon the Respondent and others under regulation.

A. The Criteria for Settlement

As seen, section 13(c) of the 1984 Act and section 505.3 of the Commission's regulations, which implements both section 13 of the 1984 Act and section 32 of the 1916 Act, explicitly set forth *criteria for assessment* of penalties, and while they do not directly address the *criteria for settlement* of penalties, I believe the latter are subsumed by the former. This is manifest from the history of the settlement process at the Commission.

Section 32(e) of the 1916 Act was enacted in 1977.³ The rules and regulations implementing section 32(e) were promulgated and published by the Commission in a predecessor version of 46 CFR 505, in 1979. Under those rules the "criteria for compromise, settlement or assessment" might "include but need not be limited to those which are set forth in 4 CFR Parts 101-105." The criteria in 4 CFR Parts 101-105 were government-wide standards established by the Comptroller General of the United States and the Attorney General of the United States under authority of section 3 of the Claims Collection Act of 1966, 31 U.S.C. 952. Those standards, particularly the standards enumerated in 4 CFR 103, were a part of the Commission's program for settlement and collection of civil penalties even before the authority to assess penalties was given the Commission pursuant to section 32(e). More to the point, it was held that those standards provided *criteria for both settlements and assessments*. "They continue to provide valuable assistance to the Commission as an aid in determining the amount of penalty in assessment proceedings and in determining whether to approve proposed settlements in assessment proceedings." *Eastern Forwarding International, Inc.—Independent Ocean Freight Forwarder Application—Possible Violations, Section 44, Shipping Act, 1916*, 23 F.M.C. 206, 213 (1980), Initial Decision, administratively final, September 8, 1980; *Behring International, Inc.—Independent Ocean*

³ P.L. 96-25, section 10, June 19, 1979.

Freight Forwarder License No. 910, 23 F.M.C. 973 (1981), Initial Decision, adopted June 30, 1981. The following summary of those standards was set out in *FESCO, supra, 24 F.M.C. at 1014*:

* * * settlement may be based upon a determination that the agency's "enforcement policy in terms of deterrence and securing compliance, both present and future, will be adequately served by acceptance of the sum to be agreed upon"; that "the amount accepted in compromise * * * may reflect an appropriate discount for the administrative and litigative costs of collection having regard for the time it will take to effect collection"; the value of settling claims on the basis of pragmatic litigative probabilities, i.e., the ability to prove a case for the full amount claimed either because of legal issues involved or a bona fide dispute as to facts; and that penalties may be settled "for one or for more than one of the reasons authorized in this part." [Footnotes omitted.]

I deem it unnecessary to go through a clause by clause comparison of the section 13(c) and section 505.3 assessment criteria with those settlement criteria cited in *FESCO, supra*, to show that for present purposes those criteria are substantially the same. It is enough to note that an analysis under all those standards, whether there be an assessment or settlement of penalties, is required in the interest of justice and consideration "of such other matters as justice may require" is exactly what section 13(c) and section 505.3 are about.⁴

B. Applying the Criteria to the Settlement

Hearing Counsel do not dispute that the enforcement policy of the Commission will be adequately served by acceptance of the sums agreed upon, thus signifying their acknowledgement that the offers are reasonable in the light of the magnitude of the offenses and the matters in mitigation.

It is important to recognize that the violations charged in the Order are not casual or technical infractions but offenses which have the potential to do serious damage to the regulatory scheme. It is safe to say that the two Respondents are now well aware that the implementation of agreements, required to be filed under the Shipping Acts of 1916 and 1984, prior to the time they may be put into effect lawfully, is a violation that goes to the "very heart" of regulation.⁵ They appreciate, too, that "it is no excuse for failure to file to contend that the violation was merely a 'technical' one or that respondents' motives were good . . . and that it is not necessary under [s]ection 15 to impart an evil motive."

⁴ In a recent initial decision, Administrative Law Judge Norman D. Kline enunciated conclusions similar to those expressed in the text, above, concerning assessment criteria under the old and new Shipping Acts. Docket No. 85-13, *Marcella Shipping Company Ltd.*, slip opinion at pp. 21-22 (I.D. served February 18, 1986).

⁵ Memorandum p. 10.

Prudential Lines v. Farrell Lines, 26 F.M.C. 496, 511 n. 6 (1984) (Initial Decision), administratively final, June 7, 1984. See also, discussion and cases cited on *mens rea* in *Jorge Reynoso Import and Export Co. Possible Violations of Section 44(a), Shipping Act, 1916*, 27 F.M.C. 596, 607-608, Initial Decision, administratively final, February 21, 1985.

Nevertheless, Respondents hasten to add that the prior implementation of their agreement was not done out of any wrongful intent or disregard for regulation. They submit that the evidentiary record warrants the conclusion that during some of the period when the implementation took place, they had formed the belief, albeit erroneously, that the operation could continue so long as they were actively cooperating with the staff in working towards approval of the agreement. Hearing Counsel does not dispute the accuracy of this summation. I find there is sufficient uncontradicted evidence to conclude that the Respondents did not deliberately undertake to violate the Shipping Acts.⁶

The Respondents never concealed their activities from the public or the staff. They published tariffs for the joint service and maintained those tariffs on file with the Commission. Prior to Judge Kline's Initial Decision in Docket No. 83-39 on November 23, 1983, Respondents may have misunderstood the regulatory requirements for filing of agreements. But, once those requirements were brought to their attention, Respondents did make the necessary filing for approval and thereafter cooperated with the staff, while retaining the mistaken understanding that the implementation of the agreement could continue as long as they engaged in such cooperative endeavors.

There is no evidence of noncompliance with any of the laws or regulations over which the Commission has jurisdiction on the part of either Respondent, other than the implementation of the joint service agreement prior to October 20, 1984. Moreover, in addition to cooperating with the staff prior to the institution of this proceeding, afterwards Respondents cooperated with Hearing Counsel in voluntarily providing documentation and records needed by Hearing Counsel for the preparation of this case. Undoubtedly, the latter cooperation, while monetarily expensive to Respondents, did result in lowering the overall costs of litigation and particularly the costs of Hearing Counsel. In this respect, it should be noted that by offering to settle for specified amounts Respondents have elected not to avail themselves of their rights to a plenary trial on the substantive merits and matters in mitigation.

Among those documents furnished to Hearing Counsel were financial statements showing the individual Respondent's profits and losses and net worth as of June 30, 1985 and September 30, 1985. Those financial state-

⁶The conclusion reached in this paragraph of the text should not be equated with a determination that the violations were not "willfully and knowingly" committed. Hearing Counsel has not contended that these were knowing and willful violations and I deem it unnecessary, in those circumstances, to address the conduct of the Respondents under the precise statutory standard of knowledge and willfulness.

ments, which show declining revenues and reduced net worth, tend to confirm the reasonableness of the amounts offered in settlement and provide justification for the method of payment over a stated period of time during calendar year 1985.⁷ The more realistic revised schedule and its built in safeguards of good faith deposits and escrowed payments, enhance the probability that the penalty claims not only will be collected, but that they will be collected at the least expense to the government.

V

CONCLUSION

It is evident that the settlement is equitable to both the Respondents and the Commission. It allocates the perceived need for punishment with the public's need for vindication of its rights in a reasonable manner. The statutory and regulatory standards for settlement of penalty claims have been met. I believe that the terms and conditions of the settlement reflect a proper balancing of the interests of the government and Respondents given the risks and uncertainties of trial and collection of potential penalties at the conclusion of a fully litigated proceeding.

VI

ORDER

It is ordered that the settlement agreements be approved. It is further ordered that the terms and conditions of the settlements are incorporated in this paragraph as if more fully set forth herein. It is further ordered that Exhibit SX-37 be filed by the Secretary of the Commission in a Confidential Section of Docket No. 85-11 and that said Exhibit be withheld from the general public.

(S) SEYMOUR GLANZER
Administrative Law Judge

⁷ Relevant financial statements were submitted as supplements to the Stipulated Exhibits. They will be marked Exhibit SX-37. Because the information contained therein is current and sensitive, Exhibit SX-37 will be treated confidentially.

APPENDIX A

(Part 1)

BEFORE THE FEDERAL MARITIME COMMISSION

In the Matter of:
ARMADA GREAT LAKES/EAST AFRICA
SERVICE, LTD. AND GREAT
LAKESTRANSCARIBBEAN LINE—ORDER OF
INVESTIGATION AND HEARING.

DOCKET NO. 85-11

PROPOSED SETTLEMENT OF CIVIL PENALTY

Respondent Armada Great Lakes/East Africa Service, Ltd. ("Armada East Africa") by its undersigned duly authorized corporate officer, respectfully submits this proposed Settlement Agreement to the presiding Administrative Law Judge for approval pursuant to Section 505.3 of the Commission's General Order 30, 46 C.F.R. §505.3, and for incorporation into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served April 12, 1985 ("Order"), the Commission instituted the present proceeding to determine whether Armada East Africa had violated Section 15 of the Shipping Act, 1916, 46 U.S.C. App. 814, and Section 10 of the Shipping Act of 1984, 46 U.S.C. App. 1709, and whereas the Order includes the issue of whether a civil penalty should be assessed for any such violations and, if so, the amount of such penalty; and

WHEREAS, the Order alleges that Armada East Africa may have violated Section 15 of the Shipping Act, 1916 and Section 10 of the Shipping Act of 1984 by implementing joint service Agreement No. 207-010640 prior to its becoming effective on October 20, 1984; and

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order, are desirous of settling expeditiously the issue of the appropriate amount to be paid by Armada East Africa in accordance with the terms and conditions of this Agreement; and

WHEREAS, Section 32(a) of the Shipping Act, 1916, 46 U.S.C. App. 831(e), and Section 13(c) of the Shipping Act of 1984, 46 U.S.C. App. 1712(c), authorize the Commission to assess or compromise civil penalty claims under the Shipping Act, 1916 and the Shipping Act of 1984 respectively; and

WHEREAS, Agreement No. 207-010640 became effective on October 20, 1984, and Armada East Africa has terminated the actions which formed the basis of the violation set forth in the Commission's Order and has indicated its willingness and intention to avoid similar actions by Armada East Africa or its officers, employees and agents in the future;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the Order and factual record submitted in this proceeding, the parties hereto agree as follows:

1. Armada East Africa agrees to pay a monetary amount of \$40,000, of which \$10,000 shall be payable within thirty (30) days following approval by the Commission of this proposed Settlement, and \$30,000 shall be payable according to terms of the Promissory Note attached hereto as Appendix I in the following installments:

Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before six (6) months following the due date of the initial \$10,000 payment,

Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before twelve (12) months following the due date of the initial \$10,000 payment and

Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before eighteen (18) months following the due date of the initial \$10,000 payment.

2. Upon approval of this Agreement by the Commission, this Agreement shall forever bar the commencement or institution of any assessment proceeding, civil action or other claim for recovery of civil penalties from Armada East Africa arising from or in any way related to the subject matter of this proceeding or the facts set forth and described in the Commission's Order and in the record in this proceeding.

3. This Agreement is entered into voluntarily by both parties, and no promises or representations have been made by either party other than the agreements and consideration herein expressed.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by Armada East Africa to the violations alleged in the Order.

IN WITNESS WHEREOF, the parties have executed this Agreement through their duly authorized representatives.

Of Counsel:

(S) Hopewell H. Darneille III

Bowman Conner Touhey &
Petrillo
A Professional Corporation
2828 Pennsylvania Avenue
Washington, D.C. 20007
(202) 965-7600

ARMADA GREAT LAKES/EAST
AFRICA SERVICE, LTD.

By:

(S) Jen-Erik Valentin
Corporate Secretary

14227 Fern Drive

Houston, Texas 77079
(713) 870-1133

FEDERAL MARITIME COMMISSION

By:

APPENDIX A

(Part 2)

BEFORE THE FEDERAL MARITIME COMMISSION

In the Matter of:

ARMADA GREAT LAKES/EAST AFRICA
SERVICE, LTD. AND GREAT LAKES
TRANSCARIBBEAN LINE—ORDER
OF INVESTIGATION AND HEARING.

DOCKET NO. 85-11

PROPOSED SETTLEMENT OF CIVIL PENALTY

Respondent Great Lakes Transcaribbean Line, GmbH ("GLTL"), by its attorney, respectfully submits this proposed Settlement Agreement to the presiding Administrative Law Judge for approval pursuant to Section 505.3 of the Commission's General Order 30, 46 C.F.R. § 505.3, and for incorporation into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served April 12, 1985 ("Order"), the Commission instituted the present proceeding to determine whether GLTL had violated Section 15 of the Shipping Act, 1916, 46 U.S.C. App. 814, and Section 10 of the Shipping Act of 1984, 46 U.S.C. App. 1709, and whereas the Order includes the issue of whether a civil penalty should be assessed for any such violations and, if so, the amount of such penalty; and

WHEREAS, the Order alleges that GLTL may have violated Section 15 of the Shipping Act, 1916 and Section 10 of the Shipping Act of 1984 by implementing joint service Agreement No. 207-010640 prior to its becoming effective on October 20, 1984; and

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order, are desirous of settling expeditiously the issue of the appropriate amount to be paid by GLTL in accordance with the terms and conditions of this Agreement; and

WHEREAS, Section 32(a) of the Shipping Act, 1916, 46 U.S.C. App. 831(e), and Section 13(c) of the Shipping Act of 1984, 46 U.S.C. App. 1712(c), authorize the Commission to assess or compromise civil penalty claims under the Shipping Act, 1916 and the Shipping Act of 1984 respectively; and

WHEREAS, Agreement No. 207-010640 became effective on October 20, 1984, and GLTL has terminated the actions which formed the basis of the violation set forth in the Commission's Order and has indicated its willingness and intention to avoid similar actions by GLTL or its officers, employees and agents in the future;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the Order and factual record submitted in this proceeding, the parties hereto agree as follows:

1. GLTL agrees to pay a monetary amount of \$40,000, of which \$10,000 shall be payable within thirty (30) days following approval by the Commission of this proposed Settlement, and \$30,000 shall be payable according to terms of the Promissory Note attached hereto as Appendix I in the following installments:

Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before six (6) months following the due date of the initial \$10,000 payment;

Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before twelve (12) months following the due date of the initial \$10,000 payment; and

Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before eighteen (18) months following the due date of the initial \$10,000 payment.

2. Upon approval of this Agreement by the Commission, this Agreement shall forever bar the commencement or institution of any assessment proceeding, civil action or other claim for recovery of civil penalties from GLTL arising from or in any way related to the subject matter of this proceeding or the facts set forth and described in the Commission's Order and in the record in this proceeding.

3. This Agreement is entered into voluntarily by both parties, and no promises or representations have been made by either party other than the agreements and consideration herein expressed.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by GLTL to the violations alleged in the Order.

ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. GREAT 377
LAKES TRANSCARIBBEAN LINE

5. The undersigned counsel for GLTL represents that he is properly authorized and empowered to execute this Agreement on behalf of GLTL and to fully bind GLTL to all the terms herein.

GREAT LAKES TRANSCARIBBEAN LINE, GmbH

By:

(S) Hopewell H. Darneille III

Bowman Conner Touhey & Petrillo

A Professional Corporation

2828 Pennsylvania Avenue, N.W.

Washington, D.C. 20007

(202) 965-7600

Attorney for Respondent Great

Lakes Transcaribbean Line, GmbH

FEDERAL MARITIME COMMISSION

By:

APPENDIX B

BEFORE THE FEDERAL MARITIME COMMISSION

ARMADA GREAT LAKES/EAST AFRICA
SERVICE
LTD. AND GREAT LAKES
TRANSCARIBBEAN LINE

DOCKET NO. 85-11

JOINT SUBMISSION PURSUANT TO JUDGE'S DIRECTION
AMENDING THE SETTLEMENT OFFERS OF DECEMBER 18, 1985
AND HEARING COUNSEL'S REPLY THERETO

Respondents Armada Great Lakes/East Africa Service, Ltd. ("Armada East Africa") and Great Lakes Transcaribbean Line, GmbH ("GLTL"), by their attorneys, and the Bureau of Hearing Counsel amend, respectively, Respondents' Proposed Settlements, filed December 18, 1985, and the Bureau's Reply thereto of the same date. This submission is filed jointly in accordance with the presiding Administrative Law Judge's orders to counsel during an informal conference held on January 29, 1986.

In accordance with the Administrative Law Judge's directions, Respondents hereby amend their above described settlement offers as follows, leaving them otherwise as originally filed:

1. Each Respondent has deposited an initial, good faith sum of \$10,000 into segregated, interest bearing money market escrow accounts in the name, respectively, of "Bowman Conner Touhey & Petrillo, A Professional Corporation FBO" The Federal Maritime Commission/Armada Great Lakes/East Africa Service Ltd., and "Bowman Connor Touhey & Petrillo, a Professional Corporation FBO The Federal Maritime Commission/Great Lakes Transcaribbean Line GMBH" at NS&T Bank, N.A., Washington, D.C. as of February 11, 1986. Upon the approval and acceptance of these Proposed Settlements by the Federal Maritime Commission, and within fifteen (15) days after service of a Final Order in this proceeding incorporating approval of the Proposed Settlements, the sum in such segregated accounts, including all accrued interest, shall be paid to the Federal Maritime Commission. In the event the Settlement offers are not accepted and approved by the Federal Maritime Commission, such sums with all accrued interest shall be returned to the respective Respondents.

2. The remaining \$30,000 per Respondent shall be payable in accordance with the terms of the Promissory Notes attached hereto as Appendices I and II in the following installments:

- a. Five Thousand (\$5,000) Dollars, plus interest, shall be paid on or before June 3, 1986, by each Respondent;

ARMADA GREAT LAKES/EAST AFRICA SERVICE, LTD. GREAT 379
LAKES TRANSCARIBBEAN LINE

b. Ten Thousand (\$10,000) Dollars, plus interest, shall be paid on or before September 16, 1986 by each Respondent; and

c. Fifteen Thousand (\$15,000) Dollars, plus interest, shall be paid on or before December 30, 1986 by each Respondent.

3. In the event the Commission has not taken final action to approve these Settlement offers by the date any installment is due, such installment, including interest, shall be paid into the segregated escrow accounts described in Paragraph 1 above, and shall be handled in accordance with the terms thereof.

4. The appended Promissory Notes provide that interest on subsequent installments will run from the service date of the Administrative Law Judge's Initial Decision approving the Proposed Settlements, and will be at a rate equal to the average weekly six-month U.S. Treasury Bill rates during the applicable period.

The installment payments have been structured with consideration to the seasonality of Great Lakes Shipping, and are scheduled to fall on Tuesdays so as to ease the transmittal of funds.

Hearing Counsel do not oppose approval of Respondents' Settlement offers, as originally filed and herein amended.

RESPECTFULLY SUBMITTED,

(S) HOPEWELL H. DARNEILLE III
BOWMAN CONNER TOUHEY & PETRILLO
A PROFESSIONAL CORPORATION
2828 PENNSYLVANIA AVENUE, N.W.
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Attorneys for Respondents
ARMADA GREAT LAKES/EAST AFRICA
SERVICE, LTD. AND GREAT LAKES
TRANSCARIBBEAN LINE, GMBH

(S) AARON W. REESE
Director, Bureau of Hearing Counsel

WILLIAM D. WEISWASSER
Hearing Counsel

BUREAU OF HEARING COUNSEL
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FEDERAL MARITIME COMMISSION

[46 CFR PART 552]

DOCKET NO. 86-8

FINANCIAL REPORTS OF TUG AND BARGE OPERATORS IN THE DOMESTIC OFFSHORE TRADES

May 1, 1986

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. Tug and barge operators have been completing the reporting form (Form FMC-377) based on the accounts prescribed by the Interstate Commerce Commission (ICC) for Carriers by Inland and Coastal Waterways. Since the ICC no longer requires reports from such carriers, it is necessary to define the terms used in the report form.

EFFECTIVE

DATE: June 9, 1986.

SUPPLEMENTARY INFORMATION:

The Federal Maritime Commission is required to evaluate the reasonableness of rates filed by vessel operating common carriers in the domestic offshore trades. To provide for the orderly acquisition of data essential to this evaluation, the Commission promulgated what is now 46 CFR Part 552. Tug and barge operators report the required financial and operating data on Form FMC-377, "Statements of Financial and Operating Data." It had been the policy of the Commission to base these statements on the accounts prescribed by the Interstate Commerce Commission (ICC) for Carriers by Inland and Coastal Waterways. The ICC no longer requires reports from such carriers. Consequently, Form FMC-377 will now contain a glossary.

A proposed rule was published in the *Federal Register* on February 26, 1986 (51 FR 6760) with comments due on March 28, 1986. No comments were received. Therefore, the Commission intends to adopt the rule as final.

The Commission has determined that this proposed rule is not a "major rule" as defined in Executive Order 12291, 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 in domestic or export markets.

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

The collection of information requirements contained in original Part 552 were approved by the Office of Management and Budget (OMB) under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and have been assigned control number 3072-0008. The amendments in this rulemaking are technical in nature and will not result in any substantive modification of the financial reporting requirements contained in the Commission's request for extension of clearance.

List of Subjects in 46 CFR Part 552: Cargo vessels; Freight; Maritime carriers; Rates and fares; Report and recordkeeping requirements; Uniform system of accounts.

Therefore, for the reasons set forth above, Part 552 of Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation to Part 552 continues to read:

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

2. Paragraph (o) of § 552.5 is revised 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 Transportation, Terminal and Traffic Expenses.

* * * * *

3. Section 552.6 is amended by removing paragraph (b)(7); revising paragraphs (a)(2), (b)(6), (b)(8), (b)(9)(iii), (b)(10), (c)(2), (c)(3), (c)(9); revising heading of paragraph (b)(4); and renumbering paragraphs (b)(8), (b)(9), (b)(10); as follows:

§ 552.6 Forms

(a) *General.*

(1) * * *

(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 definitions contained therein. 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)-(3) * * *

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

* * * * *

(5) * * *

(6) *Working Capital (Schedule A-V(A))*

Working capital for tug and barge operators shall be determined as the average monthly expense. Average monthly expense shall be equal to one-twelfth of the expense of the carrier during the relevant 12-month period, computed by adding Voyage Expense, Administrative and General Expense, Interest Expense, and Inactive Vessel Expense, each as allocated to the Trade, and dividing the total by 12.

[(7) Removed; paragraphs (b)(8)-(b)(10) are renumbered (b)(7)-(b)(9), respectively, and amended as follows:]

(7) *Property and Equipment of Related Companies.*

Property and equipment of related companies used by the filing carrier in the Trade shall be reported in accordance with paragraphs (b)(1), (b)(2) and (b)(4) of this section. The cost of such assets shall be that which is recorded on the books of the related company. Where such assets are included in the rate base, the profits or losses from intercompany transactions related to such assets are to be eliminated in accordance with paragraph (c)(11) of this section.

(8) *Capitalization of Interest During Construction (Schedules A-VI and A-VI(A)).*

(i)-(ii) * * *

(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-VI (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) The effects of the interest-during construction provisions shall be applicable to all work completed after December 31, 1977.

(9) *Capitalization of Leases (Schedules A-VIII and A-VII(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-VII(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)(1) and (b)(4) of this section.

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

(1) * * *

(2) *Voyage Expense (Schedule B-II).* This schedule shall be submitted by vessel operators for any period in which any cargo was carried in the Service. Allocations to the Trade shall be on the following basis:

(i)-(ii) * * *

(iii) Other Shipping Operations Revenue shall be deducted from Gross Voyage 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) *Voyage Expense (Schedule B-II(A)).* This schedule shall be submitted by tug and barge operators:

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

(ii) Terminal and traffic 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) Where multiple barge units are towed by a single tug, voyage expense shall be allocated on the basis of the cargo-cube relationship.

(4)-(8) * * *

(9) *Other Revenue or Expense (Schedules B-VIII and B-VII(A)).*

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(i) Any other elements of revenue or expense, wholly or partially applicable to the Trade, shall be fully explained by a schedule showing details of allocation.

(ii) Operating-differential subsidy refunds under section 605(a) of the Merchant Marine Act, 1936, shall not be allocated to the Trade.

* * * * *

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-12

APPLICATION OF THE LOYALTY CONTRACT PROVISIONS OF THE SHIPPING ACT OF 1984 TO A PROPOSED TARIFF RULE ON REFUNDS

ORDER DENYING PETITION

May 16, 1986

The Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic & Gulf Freight Conference (Petitioners or Conferences) have jointly filed a Petition for Declaratory Order requesting that the Commission declare that a proposed rule for tariff refunds is not a "loyalty contract" within the meaning of section 3(14)¹ and section 10(b)(9)² of the Shipping Act of 1984 (the Act or 1984 Act). In essence, the proposed rule would state that the Conferences would provide a prompt refund of no greater than 10 percent to any shipper which shipped all or a fixed percentage of its cargo with the Conferences during a period not to exceed four consecutive months. Shippers would not be required to ship any cargo on conference vessels for subsequent periods in order to qualify for a refund. However, if a shipper intended to use the rule, it would be required to give the Conferences advance notice and obtain a registration number.

Notice of filing of the Petition was published in the *Federal Register*, 50 Fed. Reg. 16347 (April 25, 1985), and comments in response were submitted by: (1) the "8900" Lines and the U.S. Atlantic & Gulf Ports/Italy, France & Spain Freight Conference (Mediterranean Conferences); (2) KKL (Kangaroo Line) Pty., Ltd. (Karlander); and (3) the Department of Justice (DOJ).

THE PETITION

The Conferences contend that section 3(14) of the 1984 Act addresses only arrangements by which carriers and shippers are mutually bound by enforceable contractual obligations, with the shipper obtaining a lower rate by agreeing to commit its cargo to a carrier or conference. They contend, however, that their tariff rule imposes no enforceable contractual obligations

¹ Section 3(14), 46 U.S.C. app. § 1702(14), defines "loyalty contract" as a contract with an ocean common carrier or conference, other than a service contract or contract based upon time-volume rates, by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference.

² Section 10(b)(9), 46 U.S.C. app. § 1709(b)(9), provides:
No common carrier, either alone or in conjunction with any other person, directly or indirectly, may . . . use a loyalty contract, except in conformity with the antitrust laws.

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on a shipper, because a shipper could elect at any time to use non-conference carriers without incurring a penalty. Petitioners further believe that their interpretation of section 3(14) is supported by Congress' treatment of loyalty arrangements under the Shipping Act, 1916, 46 U.S.C. app. §§801-842 (1916 Act). They maintain that the language used in section 14b of the 1916 Act³ evidenced a Congressional intent to regulate only those loyalty arrangements by which shippers were bound by means of an enforceable contract. They further note that the 1984 Act refers only to loyalty "contracts" and contend that it does not, therefore, encompass non-contractual, non-binding tariff rules. The Conferences also argue that the legislative history of the 1984 Act reveals a Congressional intent merely to deal with dual-rate contracts which had been in existence since 1961 and not prohibit tariff provisions such as theirs which allegedly do not compel shipper loyalty.

Petitioners suggest that the non-contractual nature of their tariff rule makes it very similar to time-volume rates which are permitted by section 8(b) of the 1984 Act.⁴ They contend that both are contained in tariffs, provide incentives to utilize carriers, require notification prior to use, and do not penalize failure to comply with the conditions of the tariff. They also contend that their rule is similar to their Volume Incentive Program, which the Commission has indicated may be implemented on a tariff basis. See 46 CFR §580.12(a). Lastly, the Conferences note that their proposed rule is similar to a "fidelity commission system" which a Commission administrative law judge previously found not to be a contract.⁵

REPLIES TO THE PETITION

The Mediterranean Conferences support the Petition and therefore urge that the Commission declare that the proposed rule for refunds is not a loyalty contract. They do request, however, that the Commission clarify that the amount of the refund to be paid to participating shippers and the duration of the program are matters which are within the discretion of any conference choosing to offer such a program.

Karlander opposes the Petition. It argues first that the Petition does not comply with the Commission's Rules of Practice and Procedure. Specifically, Karlander maintains that the Petition fails to "include a complete statement of the facts and grounds prompting the petition," as required by Rule 68, 46 CFR §502.68. Karlander contends that the Conferences'

³ Section 14b of the Shipping Act, 1916, 46 U.S.C. § 813a (repealed 1984), permitted, under certain specified conditions, the use of contracts granting lower rates to any shipper "who agrees to give all or any fixed portion of his patronage" to a carrier or conference.

⁴ Section 8(b), 46 U.S.C. app. § 1707(b), states:

Time-Volume Rates—Rates shown in tariff filed under subsection (a) may vary with the volume of cargo offered over a specified period of time.

⁵ *Japan-Atlantic & Gulf Freight Conference Fidelity Commission System*, Docket No. 908, 1 S.R.R. 451 (1961). The Conferences note, however, that this decision never became final because the tariff amendment was withdrawn by the subject conference and the case dismissed at its request.

Petition merely indicates general guidelines for a proposed tariff rule and does not provide specific tariff language.

Karlander also notes that issuance of a declaratory order is a matter of agency discretion and that many agencies have declined requests to issue declaratory orders. Karlander further contends that even if the Commission determines that the proposed tariff rule is not a loyalty contract, uncertainty would continue as to the lawfulness of the rule under other provisions of the 1984 Act. For example, Karlander questions whether the proposed refund system would involve a deferred rebate, as prohibited by section 10b(8) of the Act, 46 U.S.C. app. § 1709(b)(8).

Karlander argues that Petitioners' request for a declaratory order is nothing more than an attempt to obtain Commission sanction for an anticompetitive tying device not otherwise authorized by the 1984 Act. Karlander maintains, therefore, that even if the requested declaratory order were issued, it would not remove the legal uncertainty surrounding the proposal. Karlander further submits that the 1984 Act contemplates only two volume arrangements by which a shipper can be tied to a carrier—service contracts and time-volume rates. It concludes that the proposed tariff rule is neither.

DOJ contends that the term "loyalty contract," as used in the 1984 Act, encompasses any contractual arrangement which has the effect of tying a shipper to a particular carrier or conference, whether it be a unilateral or a bilateral contract. It notes that the traditional loyalty contract offered under the 1916 Act was a bilateral contract, *i.e.*, at the time it was entered into, prior to any shipments thereunder, enforceable contractual obligations were imposed on the shipper as well as on the carrier. DOJ argues, however, that the proposed tariff rule represents a unilateral contract in which a conference promises to provide a refund to a shipper in exchange for *performance* of certain specified conditions by the shipper (in this case, shipping all or a fixed portion of its cargo on conference vessels for a specified time period). DOJ contends that performance by the shipper is both acceptance of the conference's offer (as stated in its tariff offering) and the giving of consideration for the conference's promises to pay the refund. DOJ concludes by stating that the effect of the proposed tariff rule is the same as the effect of traditional loyalty contracts—to tie a shipper's patronage exclusively to a particular conference. Although the form of the proposed loyalty arrangement is unique, DOJ contends that it is nonetheless encompassed by the definition of loyalty contract in section 3(14) of the Act.

DISCUSSION

As an initial matter, we address Karlander's suggestion that the Petition may not comply fully with the Commission's requirements concerning petitions for declaratory orders, as set forth in Rule 68 of the Commission's Rules of Practice and Procedure. Specifically, Karlander claims that the Petition does not include "a complete statement of the facts and grounds

prompting the petition." Karlander's concern arises from the fact that the parameters of the proposed tariff rule are set out by the inclusion of general descriptive guidelines, rather than stating an actual tariff rule.

Karlander's concerns do not have merit. Petitioners are seeking an advance ruling from the Commission prior to initiating any activity. It is not unusual that at this point they have only a general description of their intentions and not a specific tariff rule. This description adequately informs the Commission of the nature of the proposed rule and provides sufficient detail upon which to consider the merits of the Petition.

Turning to the issue of whether the rule is or is not a "loyalty contract," we agree with Petitioners that the tariff refund scheme which they are proposing is not the type of loyalty arrangement contemplated by section 14b of the 1916 Act. However, the basic question remains whether the proposed rule is a loyalty contract under the 1984 Act. As defined by section 3(14) of the 1984 Act, a "loyalty contract" is "a contract with an ocean common carrier or conference . . . by which a shipper obtains lower rates by committing all or a fixed portion of its cargo to that carrier or conference." 46 U.S.C. app. §1702(14). It appears clear that under the proposed tariff rule, a shipper obtains a lower rate (after refund) by committing all or a fixed portion of its cargo to the Conferences. The only remaining issue, therefore, is whether a contract arises between a shipper and a carrier under the proposed arrangement. It would appear that one does, and, as a result, we cannot state definitively that the proposed arrangement is *not* a loyalty contract under the 1984 Act.

A "contract" has been defined as "[a]n agreement between two or more persons which creates an obligation to do or not to do a particular thing." Black's Law Dictionary 291-292 (5th ed. 1979). The essential elements of a contract are generally considered to be: (1) Competent parties; (2) proper subject matters (3) legal consideration; (4) mutuality of agreement; and (5) mutuality of obligation. 17 C.J.S. *Contracts* §1(2).

As a matter of classification, the law recognizes two kinds of contracts—bilateral contracts and unilateral contracts. A bilateral contract is one in which there are reciprocal promises; mutual obligations are present and the promise which one party makes is sufficient consideration for the promise which the other makes. 17 C.J.S. *Contracts* §8. The typical dual-rate contract formerly recognized under the 1916 Act is a classic example of a bilateral contract in which mutually enforceable contractual obligations were imposed on both the carrier (or conference) and the shipper at the time the agreement was executed.

A unilateral contract, on the other hand, arises from a promise by one party or an offer by that party to do a certain thing in the event the other party performs a certain act; the performance by the other party constitutes an acceptance of the offer and the contract then becomes executed and enforceable. 17 C.J.S. *Contracts* §8.

The Conferences' proposed tariff rule would appear to give rise to a unilateral contract. The Conferences promise to provide a refund in exchange for performance of specified conditions by the shipper (*i.e.*, shipping all or a fixed portion of its cargo on conference vessels for a specified period of time). Performance by the shipper of the conditions would appear to constitute acceptance of the Conferences' offer and the giving of legal consideration for the Conferences' promise to pay the refund. If the shipper meets the conditions, the offering conference is contractually bound to issue it a refund. If the shipper does not fully perform over the period specified, no contract arises and no rebate is earned.

The Conferences' contention that there must be mutuality of obligation between the carrier and the shipper at the time the shipper begins to ship in order to create a contractual relationship suggests an incorrect assessment of the law. Because a unilateral contract is not founded on mutual promises, but is one where there is a promise on one side and executed consideration (performance) on the other, the doctrine of mutuality of obligation is inapplicable to such contracts. 17 C.J.S. *Contracts* §100(1). What is essential is that the contract contain valid consideration. Here, the shipper's performance of the offering conference's conditions would appear to constitute valid consideration for the conference's promise to pay the refund.

The mere fact that a shipper who does not meet the conditions of the conference's offering does not incur a penalty (except that of paying the normal tariff rate), does not compel a different result. Although dual-rate contracts typically contained a penalty provision, that provision was not what brought them within the ambit of section 14b. There was no requirement that dual-rate contracts under section 14b of the 1916 Act contain a penalty provision and there is, of course, no such requirement in section 3(14) of the 1984 Act. It is not, therefore, a critical element in determining whether the instant arrangement falls within the definition of "loyalty contract" under the 1984 Act.⁶

Moreover, the legislative history of the 1984 Act suggests that the definition of "loyalty contract" was intended to be read expansively, encompassing arrangements having little anticompetitive effect as well as those that would clearly violate the antitrust laws. The provisions in the 1984 Act relating to loyalty contracts came about as the result of a compromise between the House Merchant Marine and Fisheries Committee and the House Judiciary Committee. This compromise was a radical departure from the regulatory scheme established by section 14b of the 1916 Act which had been carried forward in H.R. 1878, as reported out by the House

⁶ The lack of a penalty provision, the relatively short period of time during which the shipper must obligate a fixed portion of its cargo to the conference, and the size of the refund are all factors which may be relevant in determining whether use of the loyalty contract would conform to the antitrust laws as required by section 10(b)(9) of the 1984 Act. However, they do not assist in determining whether an arrangement is a "loyalty contract" in the first instance.

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Merchant Marine and Fisheries Committee. Section 14b of the 1916 Act specified mandatory provisions to be included in dual-rate contracts. Contracts which were in compliance with the requirements of section 14b enjoyed antitrust immunity. As reported out by the House Merchant Marine and Fisheries Committee, H.R. 1878 would have continued the requirements of section 14b, but expanded antitrust immunity to cover all loyalty contracts. The compromise did away with the specific requirements pertaining to loyalty contracts that existed under the 1916 Act and simply required that the use of loyalty contracts conform to the antitrust laws. Given this approach, it seems likely that Congress expected that carriers and conferences might develop non-traditional loyalty contracts which might or might not offend the antitrust laws.

The Conferences point out that the subject arrangement is similar to the Fidelity Commission System (FCS) which was the subject of *Japan Atlantic and Gulf Freight Conference Fidelity Commission System*, 1 S.R.R. 451 (1961) (*JAGFCS*). They rely on this decision in an attempt to demonstrate that the subject arrangement is not a loyalty contract. The FCS was a proposal designed to fill the void created when the Supreme Court struck down the conference's dual-rate system in *Federal Maritime Board v. Isbrandtsen*, 356 U.S. 481 (1958) (*Isbrandtsen*). An investigation and hearing was instituted by the Commission to determine whether the proposed FCS would violate the 1916 Act. Although the 1961 amendments to the 1916 Act rendered the case moot by legalizing dual-rate contracts before the Commission could issue a final decision, an initial decision had already issued in the case by an administrative law judge. He concluded that because the FCS did not depend upon the actions of the shipper in any successive period, it did not result in a deferred rebate. Nor was its anti-competitive effect found to be as great as the dual rates struck down in *Isbrandtsen*. It must be remembered, however, that the issue in that case was whether the FCS was lawful under section 14, Third of the Shipping Act, 1916.⁷ There was no issue as to whether the FCS was a "dual-rate contract" because prior to 1961 there was no reference to dual-rate contracts in the 1916 Act. Thus the initial decision findings in *JAGFCS* are of little value in determining whether the subject arrangement is a loyalty contract.

The Conferences have also suggested that their proposed tariff rule is very similar to time-volume rates which are permitted by section 8(b) of the 1984 Act.⁸ Both are contained in tariffs and both provide a refund or lower rate to a shipper who meets its requirements. However, the Con-

⁷ Section 14, Third, formerly 46 U.S.C. § 813, stated that no common carrier by water shall:

Retaliate against any shipper by refusing, or threatening to refuse, space accommodations when such are available, or resort to other discriminating or unfair methods, because such shipper has patronized any other carrier or has filed a complaint charging unfair treatment, or for any other reason.

⁸ Section 8(b), 46 U.S.C. app. § 1707b), states:

Time-Volume Rates—Rates shown in tariffs filed under subsection (a) may vary with the volume of cargo offered over a specified period of time.

ferences' argument appears to overlook critical distinction between the definitions of "loyalty contract" and "time-volume rates" appearing in the Shipping Act of 1984.

By definition, a loyalty contract contemplates a shipper tendering "all or a fixed portion" of its cargo to a carrier. On the other hand, a time-volume rate depends on "the volume of cargo tendered over a specified period of time." The proposed refund, like a loyalty contract, is dependent upon a shipper tendering all or a specified portion of its total traffic to the conference; its application does not depend on the volume of cargo tendered. For example, under the Conferences' proposed rule, two shippers could tender exactly the same number of containers to the offering conference and only one would be eligible for a refund. If the cargo tendered amounted to all or the fixed percentage of the shipper's total traffic specified in the tariff, a refund would be in order. The same volume, if it did not amount to all or a specified fixed percentage of the shipper's total traffic, would not qualify for refund. Because the application of the proposed refund is conditioned on the relationship of the amount of cargo tendered to the shipper's total traffic, and not just the amount of cargo tendered, it is not a time-volume rate, as section 8(b) of the 1984 Act would appear to contemplate that term.⁹ See also, *In the Matter of the Carriage of Military Cargo*, 10 F.M.C. 69, 77-78 (1966).

For reasons stated above, the Commission is unable to declare that Petitioners' proposed tariff rule is not a "loyalty contract" as that term is defined by section 3(14) of the Shipping Act of 1984.

THEREFORE, IT IS ORDERED, That the Petition for Declaratory Order submitted by the Trans-Pacific Freight Conference of Japan/Korea and the Japan/Korea-Atlantic Gulf Freight Conference is denied.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

⁹ Even accepting Petitioners' suggestion that time-volume rates give rise to a type of loyalty arrangement, this does not necessarily advance their position. "Contract[s] based on time-volume rates" have been expressly excluded from the definition of loyalty contract in section 3(14), whereas the arrangement proposed by Petitioners has not.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-2
ATLANTIC CARGO SERVICES, AB

v.

GULF EUROPEAN FREIGHT ASSOCIATION

NOTICE

June 3, 1986

Notice is given that no appeal has been taken to the April 21, 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. 86-2

ATLANTIC CARGO SERVICES, AB

v.

GULF EUROPEAN FREIGHT ASSOCIATION

COMPLAINT DISMISSED

Finalized June 3, 1986

Complainant has moved for an order dismissing its complaint without prejudice. Complainant states that it has resolved its dispute with respondent to its satisfaction and does not wish to prosecute its complaint at this time. Respondent does not object to the motion.

In view of the above situation, the motion is granted. As requested, costs are to be borne by the party incurring them.

It is ordered that the complaint be dismissed without prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-14

CARI CARGO INTERNATIONAL, INC. JORGE VILLENA AND SEA
TRADE SHIPPING

NOTICE

June 5, 1986

Notice is given that no exceptions were filed to the April 24, 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. 85-14

CARI-CARGO INTERNATIONAL, INC. JORGE VILLENA AND SEA TRADE SHIPPING

Respondent Jorge Villena found to have operated as a non-vessel operating common carrier between November 1983 and December 1985, sometimes in his personal capacity and other times in connection with respondent corporations, Cari-Cargo International, Inc., and Sea Trade Shipping. At various times during this period, respondents failed to charge rates specified in their tariffs, operated without a tariff, and underpaid vessel-operating carriers by means of cargo misdescriptions. These practices violated sections 18(b)(3) and 18(b)(1) and 16 Initial Paragraph of the Shipping Act, 1916, and corresponding provisions of the Shipping Act of 1984, sections 10(b)(1), 8(a)(1), and 10(a)(1), respectively.

Respondents' pattern of conduct by which they ignored their tariffs and misdescribed cargo tendered to vessel-operating carriers was deliberate and without regard to the requirements of law and continued even after Mr. Villena had been warned about the impropriety of such practices. Respondents' defenses, namely, that they had to meet competition, had intended to file their negotiated rates but had problems with their tariff publisher, are weak and unsubstantiated and, in any event, relevant only to the question of penalties.

To deter future violations of law and to encourage respondents to reform and comply with law without jeopardizing what may be relatively small businesses, respondents are assessed aggregate penalties of \$100,000 with provision for possible remission of a portion of this amount if respondents pay at least \$30,000 over a six-months' period and show evidence of reform and inability to continue to pay. Respondents are also ordered to cease and desist from continuing previous unlawful practices.

Jorge Villena for respondents

Aaron W. Reese and Alan J. Jacobson for Hearing Counsel.

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

Finalized June 5, 1986

The Commission began this proceeding on May 5, 1985, to determine originally whether respondents Cari-Cargo International, Inc. (Cari-Cargo), a non-vessel operating common carrier (NVO), and Mr. Jorge Villena, apparently Cari-Cargo's only officer and employee, had been operating without having a tariff on file with the Commission and without charging rates which may have been filed in such a tariff. If so, such conduct would violate sections 18(b)(1) and 18(b)(3) of the Shipping Act, 1916, and corresponding provisions of the Shipping Act of 1984, sections 8(a)(1)

¹This 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).

and 10(b)(1). During the course of prehearing discovery, the Commission's Hearing Counsel uncovered evidence showing that respondents may have been consolidating cargo and tendering it to vessel-operating carriers under incorrect descriptions in order to obtain transportation at lower rates that would apply under those carriers' tariffs. If so, such conduct would violate section 16, Initial Paragraph, of the 1916 Act and the corresponding provision of the 1984 Act, section 10(a)(1). Still later, Hearing Counsel obtained evidence which appeared to show that respondent Jorge Villena may have been operating a company known as Sea Trade Shipping without regard to a tariff which that company had filed with the Commission effective September 5, 1985. If so, Sea Trade and Mr. Villena would have violated section 1(b)(1) of the 1984 Act, and, if Mr. Villena and Sea Trade had been misdescribing cargo to underlying vessel-operating carriers, such conduct would have violated section 10(a)(1) of the 1984 Act.

In order to reach the full range of all possible activities of the type mentioned above which may have been conducted by Cari-Cargo, Mr. Villena, and Sea Trade Shipping at various times between 1983 and 1985, the Commission amended its original Order of Investigation, first on August 7, 1985, and, later, on January 22, 1986. As amended, the Order now requires an investigation into the questions whether Cari-Cargo, Mr. Villena, and Sea Trade Shipping operated without a tariff, charged rates other than the rates on file with the Commission if tariffs had been filed, and tendered cargo to underlying vessel-operating carriers under incorrect descriptions in order to obtain transportation at lower rates than would properly apply under those carriers' tariffs.

The evidentiary record was developed gradually over a period of time primarily by means of prehearing inspection and discovery of respondents' records and a deposition of respondent Villena. Because respondents either did not wish or were unable to obtain legal counsel, every effort was made during the record-developing phase of the proceeding to keep Mr. Villena advised of the Commission's procedures and of respondents' rights to respond to the evidence proffered by Hearing Counsel in whatever way necessary to protect respondents' interests. In order to keep respondents continually advised of their rights and of the significance of the procedures being followed by Hearing Counsel, three telephonic prehearing conferences were held (on September 11, November 4, 1985, and January 28, 1986). In addition to these conferences, I instructed Hearing Counsel to furnish respondents with written evidence which Hearing Counsel had obtained and would be tendering together with statements explaining the significance of the evidence. Whenever appropriate, respondents were given the opportunity of furnishing rebuttal evidence or comments and were advised that they could request an oral hearing if they deemed such a hearing necessary

to protect their interests.² However, at no time did respondents furnish any rebuttal evidence or written comments or make any requests for an oral hearing. Accordingly, Hearing Counsel tendered their entire case which consisted of evidence in written form, which evidence was admitted without objection of respondents, the record was closed, and a schedule for briefing was established. Hearing Counsel submitted their opening brief on March 21, 1986. Respondents submitted no answering brief.

FINDINGS OF FACT

The evidentiary record consists of the written direct testimony of the Commission's Miami District Investigator, Mr. Albert Posnick, with related worksheets; the deposition of Mr. Jorge Villena, Cari-Cargo's President and Sea Trade's general manager, with related documents (a Cari-Cargo tariff, bills of lading, dock receipts, export declarations, manifests); an affidavit of Roland E. Ramlow, a Commission Transportation Industry Analyst; a Sea Trade tariff; and 34 Sea Trade bills of lading together with related shipping documents. (See Evidentiary Record Closed, February 28, 1986, at 2.)

Although the types of violations committed by the three respondents, i.e., violating their tariffs, operating without a tariff, or underpaying underlying vessel-operating carriers, are simple and easy to grasp by their nature, the surrounding facts are rather complicated and difficult to follow. There are several reasons. First, Mr. Villena operated under three different corporate names at various times between March 1983 and December 1985, the period of time within which shipments were studied. Second, the Shipping Act of 1984 supplanted the Shipping Act, 1916, effective June 18, 1984, so that although the types of violations were the same, the relevant provisions of law were renumbered. Third, for a period of time between November 10, 1983 and April 17, 1984, Mr. Villena operated without a corporation having been formed although he had filed a tariff and issued bills of lading in a corporate name (Cari-Cargo International, Inc.). During this period of time, the facts showed that he either operated in his own name without a tariff, or, alternatively, he operated a tariff in the name of an unformed corporation and violated that tariff.

² See my rulings and instructions, May 13, August 22, September 12, November 5, 1985; January 24, January 30, 1986, February 28, 1986; letter dated December 9, 1985. As the Commission has noted, a fair hearing is one in which "the parties should have opportunity to meet in the appropriate fashion all facts that influence the disposition of the case." *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129, 140 (1965); see also *Agreement No. 9955-1*, 18 F.M.C. 426, 464-465 (1975) (no violation of due process if respondents had opportunity to learn of allegations prior to hearing and to meet evidence presented against them); *L.G. Balfour v. F.T.C.*, 442 F.2d 1, 19 (7th Cir. 1971) (party must have reasonable opportunity to know claims against it and meet them as the case unfolds); *Modification of Agreement 5700-4*, 10 F.M.C. 261 (1967) (opportunity must be afforded to all parties to submit evidence and argument to constitute "full hearings"); 2 Davis, *Administrative Law* (2d Ed. 1979) sec. 13.9 at 599-600 (party may submit written evidence without trial-type hearings); *Cellular Mobile Systems of Pennsylvania v. F.C.C.*, 782 F.2d 182, 197-199 (D.C. Cir. 1985) ("full hearing" can consist of written evidence without cross-examination).

The following findings of fact are intended to describe the violations of law while providing the factual background in the most understandable fashion possible considering the complications discussed. What the reader should bear in mind, however, notwithstanding the various complications, is that essentially, Mr. Jorge Villena operated, sometimes personally but most of the time under a corporation, in a consistent fashion. Specifically, either personally, or under a corporation, he operated an NVO business without a tariff, violated that tariff even when it was filed, and underpaid vessel-operating carriers to whom he tendered cargo by filling out bills of lading with false descriptions of the cargo.

1. Mr. Jorge Villena was born in Peru. He moved to this country and began working around 1979 or 1980. Some time thereafter he became a co-owner of an NVO known as Cari-Cargo Consolidators, Inc. This corporation, formed on September 13, 1982, was dissolved on November 10, 1983. It had filed a tariff with the Commission effective October 23, 1982.

2. Mr. Villena continued in the NVO business operating out of Miami, Florida, after the dissolution of Cari-Cargo Consolidators, Inc., in November 1983. For a time he operated without having formed a new corporation. However, on April 17, 1984, a corporation known as Cari-Cargo International, Inc. (Cari-Cargo), came into existence under Florida law. Mr. Villena was the president of this company. This company was in active business as an NVO during the major part of 1984 but appears to be inactive presently. According to its tariff and bills of lading issued, it operated from Miami to ports all over the world.

3. In December 1984, a corporation known as Sea Trade Shipping was formed. Mr. Villena is one employee of this corporation. The other is a stenographic receptionist. Sea Trade Shipping, according to its tariff and bills of lading issued, operates as an NVO to ports and points in Latin America and the Caribbean.

4. From November 11, 1983 through April 16, 1984, i.e., after dissolution of Cari-Cargo Consolidators, Inc., and before formation of Cari-Cargo International, Inc., Mr. Villena handled 86 shipments and issued bills of lading for them. During this period of time, a tariff was on file with the Commission in the name of Cari-Cargo International, Inc., although that corporation had not yet come into existence. This tariff was the same one that had been filed in the name of Cari-Cargo Consolidators, Inc. Effective March 16, 1983, the name on the title page of that tariff had been changed from Cari-Cargo Consolidators, Inc. to Cari-Cargo International, Inc.

5. Analysis of the 86 bills of lading shows that Mr. Villena rated and charged the shipments at rates and charges which differed significantly

from the rates and charges specified in the Cari-Cargo tariff on file at the time.³

6. The Commission's District Investigator, Mr. Albert Posnick, spoke with Mr. Villena on April 4, 1984. Mr. Villena admitted to Mr. Posnick that he had not been using the Cari-Cargo tariff to assess charges on Cari-Cargo bills of lading. He explained that when asked by a shipper for a rate, he first checked the rates of ocean carriers and tried to determine what his competitors charged. He then set his own rates for the shipment. This admission was corroborated by relevant shipping documents. Although Mr. Villena said that he would revise and use the Cari-Cargo tariff, he told Mr. Posnick, on July 10, 1984, that he had not changed his method of operation.

7. On June 25, 1985, Mr. Villena was deposed. He explained his method of operation as an NVO and again admitted that he had disregarded tariffs in determining his rates to shippers. Furthermore, while operating as Cari-Cargo, Mr. Villena paid freight forwarder compensation at three percent although the tariff had specified five percent. The matter of this discrepancy was brought to Mr. Villena's attention in March of 1984 by Mr. Posnick, but Mr. Villena did not thereafter change the tariff rate nor the amount of compensation he paid. In fact, through the series of meetings with Mr. Posnick beginning in March 1984, Mr. Villena continually acknowledged that he had not been changing his tariff to reflect the rates he had been charging when advised that he had not been following his tariff.

8. During the period from November 11, 1983 through April 16, 1984, when Mr. Villena was operating without a corporation having been formed, he filled out bills of lading issued by underlying vessel-operating common carriers, inserting false descriptions of the goods tendered to those carriers. He did this on six bills of lading during this period.⁴ Mr. Villena brought sets of shipping documents to his deposition which show how he misdescribed goods on underlying carriers' bills of lading. In a typical instance, Mr. Villena filled out a vessel-operating carrier's bill of lading by inserting the words "groceries and foodstuffs" in the space provided for cargo descriptions. The vessel-operating carrier thereupon rated the goods using that description according to the carrier's tariff. In truth, however, the goods tendered to that carrier were "used personal effects and household goods," and Mr. Villena's own bill of lading issued to his shipper customer

³ An analysis performed for the period March 1983 through February 1984 by Commission District Investigator Albert Posnick shows that on 90 bills of lading there were substantial differences between the rates and charges shown on the bills of lading and the Cari-Cargo tariff. From March 16, 1983 to November 10, 1983, the previous corporation, Cari-Cargo Consolidators, Inc., was still in existence although the name on its tariff had been changed to Cari-Cargo International, Inc., a corporation not yet legally formed. From November 10, 1983, through February 1984, therefore, Mr. Villena was not operating under an existing corporation.

⁴ There were actually seven bills of lading misdescribed by Mr. Villena in the record in 1983 and 1984. However, the first of them (Ex. 2, sub. ex. 5-1) is dated September 22, 1983, at a time when Cari-Cargo Consolidators, Inc., was still in existence. The remaining six all fell within the November 11, 1983 through April 16, 1984 time period.

in the name of Cari-Cargo shows the correct description. When asked why he described the cargo to the underlying carrier incorrectly, Mr. Villena replied that he was "taking advantage of the rate." He admitted that he misdescribed the foods in order to obtain a lower rate from the vessel-operating carrier. Mr. Villena followed this pattern at least 12 times, seven while he was operating without having formed the corporation, five times after the corporation (Cari-Cargo International, Inc.) had been formed. On eight of these instances of misdescription, the aggregate amount of freight by which Mr. Villena and Cari-Cargo underpaid the vessel-operating carriers was \$60,910.86, according to an analysis performed by Mr. Roland E. Ramlow of the Commission's Bureau of Tariffs.

9. As to the above 12 misdescribed bills of lading Mr. Villena customarily issued several of his own bills of lading in the name of Cari-Cargo (before and after Cari-Cargo was incorporated) for his shipper-customers per each misdescribed bill of lading of the underlying carrier. Mr. Villena acknowledged that these Cari-Cargo bills of lading were consistently not rated in accordance with the Cari-Cargo tariff.

10. After Cari-Cargo International, Inc., became incorporated on April 17, 1984, Cari-Cargo, through Mr. Villena, issued 22 bills of lading, the last one of record issued in August 1984. The shippers involved were not charged rates specified in the Cari-Cargo tariff. As mentioned, Cari-Cargo, through Mr. Villena, also misdescribed cargo on five underlying carriers' bills of lading during this time period.

11. As noted earlier, Sea Trade Shipping was incorporated in December 1984, and Mr. Villena is one of only two employees of the corporation. Sea Trade filed its tariff with the Commission, effective September 5, 1985. However, from February through August 1985, Sea Trade handled 20 shipments and issued bills of lading for each. Eleven of these bills of lading had been issued prior to June 25, 1985. However, at his deposition taken on June 25, 1985, Mr. Villena swore that as of that date, he had issued only one Sea Trade bill of lading.

12. Sea Trade issued 14 bills of lading for shipments handled after September 5, 1985, the effective date of its filed tariff. The first was dated September 9, 1985; the last, December 20, 1985. A comparison between the rates and charges on these 14 bills of lading and the rates specified in the Sea Trade tariff shows that Sea Trade, through Mr. Villena, charged other than the rates and charges shown in the tariff on each of the shipments. For example, the first bill of lading, dated September 9, 1985, shows cargo of "plastic toilet seats" moving to Brazil rated at \$260.00 W/M. There is no such rate in the tariff for this commodity, as described, moving to Brazil. Nor indeed is there a rate of \$260.00 W/M for any item in the entire tariff. Furthermore, the bill of lading shows a bunker surcharge of \$27.50 and a \$10.00 bill of lading charge but the tariff states that no bunker surcharge applies and specifies a bill of lading charge of only \$7.50.

13. The above pattern continued through all the 14 bills of lading issued by Sea Trade. For example, the next bill of lading in the series, dated September 13, 1985, shows cargo of "personal effects" moving from Miami to Chile. The cargo is rated at \$297.00 W/M and shows a bill of lading charge of \$10.00. However, the tariff shows a rate of \$255.00 W/M for personal effects moving from Miami to Chile and, as noted, a bill of lading charge of only \$7.50.

14. The pattern of ignoring tariff rates has characterized Mr. Villena's career whether operating as himself, Cari-Cargo International, or Sea Trade Shipping, from November 11, 1983, through December 1985. Indeed, the same pattern can be found as far back as March 1983 when a previous corporation, Cari-Cargo Consolidators, had been in existence.

DISCUSSION AND CONCLUSIONS

The issues presented in this investigation as to possible violations of law are whether the three named respondents, Cari-Cargo International, Inc. (Cari-Cargo), Mr. Jorge Villena, and Sea Trade Shipping committed three types of violations. More specifically, did these three respondents operate as a common carrier without filing their tariffs with the Commission, a violation of section 18(b)(1) of the 1916 Act, and section 8(a)(1) of the 1984 Act; did they charge rates other than those specified in tariffs that they may have filed with the Commission, a violation of section 18(b)(3) of the 1916 Act, and section 10(b)(1) of the 1984 Act; and finally, did they knowingly and willfully obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would be applicable by means of false billing, false classification, or any other unjust or unfair device or means, a violation of section 16, Initial Paragraph, of the 1916 Act, and section 10(a)(1) of the 1984 Act? The provisions of the 1984 Act are virtually identical to those of the 1916 Act with regard to these types of violations. The three relevant provisions of the 1984 Act, which became effective on June 18, 1984,⁵ are as follows:

Section 8(a)(1), 46 U.S.C. app. sec. 1707(a)(1), provides in relevant part:

. . . [E]ach common carrier . . . 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.

Section 10(b)(1), 46 U.S.C. app. sec. 1709(b)(1), provides in relevant part:

⁵ The Shipping Act of 1984 was enacted as P.L. 98-237, 98 Stat. 67, and became effective on June 18, 1984. See *Application of Shipping Act of 1984 to Formal Proceedings Pending Before Federal Maritime Commission on June 18, 1984*, 22 SRR 976 (1984); *Marcella Shipping Co., Ltd.*, 28 F.M.C. 259, 261 n.2 (I.D.; F.M.C. notice of finality, March 26 1986); section 21, P.L. 98-237 (46 U.S.C. app. sec. 1701).

No common carrier . . . may (1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs. . . .

Section 10(a)(1), 46 U.S.C. app. sec. 1709(a)(1), provides in relevant part:

No person may (1) knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, false measurement, or by any other unjust or unfair device or means obtain or attempt to obtain ocean transportation for property at less than the rates or charges that would otherwise be applicable.

Hearing Counsel summarize their contentions as follows (Opening Brief at 2-3):

Hearing Counsel's evidence, undisputed by Mr. Villena, consists of incontrovertible documentary evidence showing that Mr. Villena consistently operated as a non-vessel operating common carrier (NVO) without a tariff on file at the Commission, that when he did file a tariff, both as Cari-Cargo and Sea Trade, he ignored it, and as a shipper to underlying carriers he deliberately misdescribed cargo to receive lower freight rates. Further, as to his activities prior to June 25, 1985, Mr. Villena corroborates the documentary evidence by admitting and acknowledging the activities Hearing Counsel contend violate the Shipping Acts.

Not only does the undisputed evidence show that respondent Villena, at times acting in the name of Cari-Cargo and Sea Trade Shipping, did commit the above violations of law, contend Hearing Counsel, but "Mr.. Villena acted with complete disregard for the requirements of the Shipping Acts and later, after the requirements were brought to his attention, deliberately and repeatedly acted in violation of the Shipping Acts." (Opening Brief at 2.) Moreover, as to his activities as Sea Trade Shipping, "notwithstanding Mr. Villena's sworn statement on June 25, 1985 . . . that he had only issued one Sea Trade bill of lading as of that date, he had actually issued several." (Opening Brief at 3.)

I agree with Hearing Counsel. Although at times it is not always clear whether Mr. Villena was acting in his own capacity rather than in the capacity of one of the two corporations of which he was an employee or officer, what is clear and convincing is that from a period dating at least from March 1983 through December 1985, Mr. Villena was actively engaged in the business of an NVO and either filed no tariff or, if he did, ignored the tariff. Furthermore, Mr. Villena customarily misdescribed commodities on underlying vessel-operating common carriers' bills of lading for the purpose of obtaining transportation at less than the lawful charges provided in those carriers' tariffs. The record clearly reveals a consistent

pattern of operations by which Mr. Villena would quote rates to his shipper-customers attempting to keep those rates at a level which would be competitive with other NVOs and then reduce his own freight costs as a shipper vis-a-vis the vessel-operating carriers by misdescribing the commodities tendered to those carriers, in effect, cheating those carriers. Furthermore, even after Mr. Villena had been visited by a Commission investigator and had been warned about the impropriety of such conduct, he continued operating in the same fashion. Furthermore, when testifying under oath at his deposition held on June 25, 1985, Mr. Villena's statements as to the number of bills of lading he had issued in the name of Sea Trade Shipping were incorrect, mentioning only one instead of the eleven that he had in fact issued before that date.

Summary of Violations

From November 11, 1983, through April 16, 1984, when there was no NVO corporation in existence with which Mr. Villena was affiliated, Mr. Villena handled 86 shipments and issued bills of lading for them in the name of "Cari-Cargo International, Inc." At that time he had on file with the Commission a tariff in the name of "Cari-Cargo International, Inc.," although that corporation had not yet been legally formed. Mr. Villena assessed his shipper-customers' rates and charges other than those specified in the tariff then on file. These were violations of section 18(b)(3) of the 1916 Act, then in effect.⁶

During this same period of time, Mr. Villena filled out bills of lading of underlying vessel-operating carriers on six occasions by inserting false descriptions of the cargo he was tendering to these underlying carriers. This was done for the admitted purpose of obtaining lower rates than the rates that would have been applicable under the correct descriptions. These were violations of section 16 Initial Paragraph of the Shipping Act, 1916, then in effect.

⁶ It could be argued, alternatively, as Hearing Counsel note (Op. Br. at 15), that Mr. Villena violated section 18(b)(1) by operating without a tariff on these 86 occasions from November 11, 1983 through April 16, 1984, because the tariff on file was in the name of "Cari-Cargo International, Inc." and not "Jorge Villena." I find rather that Mr. Villena violated section 18(b)(3) by charging rates other than those specified in that tariff. This seems to conform better to the facts. First, a tariff was on file, although not in the name of Jorge Villena. Second, the bills of lading issued were issued in the name of "Cari-Cargo International, Inc." although that corporation had not yet been born. Therefore, in reality, Mr. Villena, who was incurring personal liability in these operations, was in effect doing business in the name of Cari-Cargo. Third, Mr. Villena knew that there was a tariff on file which he knew he was supposed to amend to conform to the rates he negotiated. Fourth, as his attorney advised him, prior to April 17, 1984, when Cari-Cargo was incorporated, Mr. Villena was incurring personal responsibility although using the name of the corporation. (Ex. 1, Attachment E.) As Florida and general law hold, persons promoting or operating for unformed corporations incur personal liability. See *Baker v. Bates-Street Shirt Co.*, 6 F.2d 854, 857 (1st Cir. 1925); *Ratner v. Central National Bank*, 414 So.2d 210 (Fla. App. D3 1982); 18 Am. Jur. 2d, Corporations, secs. 6, 120, 131, 251 (1985); 18A Am. Jur. 2d, Corporations, sec. 263 (1985); Annotation: 41 A.L.R.2d 477. I conclude therefore that Mr. Villena was operating personally as an NVO, using the Cari-Cargo name at that time. It is what a person actually does, not what he calls himself, that determines his status. See *Possible Violations of section 18(a) of the Shipping Act, 1916*, 19 F.M.C. 43, 52 (1975).

From April 17, 1984, when Cari-Cargo International, Inc., was formed under Florida law, through August 1984, Cari-Cargo, through Mr. Villena, handled 22 shipments and issued bills of lading for each of them. The rates and charges shown on the bills of lading and charged the shippers were not those specified in Cari-Cargo's tariff in effect at the time. Such practices violated section 18(b)(3) of the 1916 Act prior to June 18, 1984, and section 10(b)(1) of the 1984 Act on and after that date.

During this same time period, Cari-Cargo, through Mr. Villena, filled out five bills of lading of underlying vessel-operating carriers, inserting false descriptions of cargo for the purpose of obtaining transportation of the goods at rates lower than those that would be applicable under correct cargo descriptions. These practices constituted violations of section 16 Initial Paragraph of the 1916 Act prior to June 18, 1984, and of section 10(a)(1) of the 1984 Act after that date.

From February 28 through August 30, 1985, Sea Trade Shipping, through Mr. Villena, handled 20 shipments for which it issued bills of lading, although Sea Trade had not filed an effective tariff with the Commission until September 5, 1985. These practices were in violation of section 8(a)(1) of the 1984 Act.

From September 9, 1985 through December 20, 1985, Sea Trade Shipping, through Mr. Villena, handled 14 Shipments for which it issued bills of lading. The rates and charges shown on these bills of lading, which were assessed the shippers, were not the same as the rates and charges specified in the Sea Trade tariff. These practices were in violation of section 10(b)(1) of the Act.⁷

For easy reference the following table shows the above violations:

Table of Violations

Respondent	Type	When Occurred
Jorge Villena (using the name "Cari-Cargo International, Inc.")	Violated tariff (vs. sec. 18(b)(3), 1916 Act)	Nov. 11, 1983–April 16, 1984 (86 times)

⁷The record also discloses other violations of law and questionable practices. Between March and November 10, 1983, 42 bills of lading were misrated. At that time, Cari-Cargo Consolidators, Inc., was still in existence but the tariff on file and possibly the bills of lading showed the name "Cari-Cargo International, Inc." It may be that this earlier corporation (not named as a respondent) was operating without a tariff or that Mr. Villena was operating personally in the name of the, as yet, unformed corporation, Cari-Cargo International, Inc. The record also shows some discrepancies between Sea Trade Shipping bills of lading and underlying vessel-operating carriers' bills of lading, indicating possible misdescriptions of measurements or weights of cargo by Sea Trade, through Mr. Villena, between September 5, 1985 and December 1985, but the record is not fully developed on this point. Finally, the record shows that Mr. Villena had been paying freight forwarder compensation at five percent rather than the three percent specified in the Cari-Cargo tariff, at least between March 1983 and February 1984. Such practices would violate the Commission's regulation then in effect, 46 CFR 510.33(b) (1983). However, the Commission did not specify this matter as an issue to be determined in this proceeding.

Table of Violations—Continued

Respondent	Type	When Occurred
Same	Underpaid vessel-operating carriers by misdescriptions (vs. sec. 16 Initial Para., 1916 Act)	Nov. 11, 1983–April 16, 1984 (6 times)
Cari-Cargo International, Inc.	Violated tariff (vs. section 18(b)(3), 1916 Act; and section 10(b)(1), 1984 Act)	April 17, 1984–Aug. 1984 (22 times)
Same	Underpaid vessel-operating carriers by misdescriptions (vs. sec. 16 Initial Para., 1916 Act and sec. 10(a)(1), 1984 Act)	April 17, 1984–Aug. 1984 (5 times)
Sea Trade Shipping	Operated without tariff (vs. sec. 8(a)(1), 1984 Act)	Feb. 28, 1985–Aug. 30, 1985 (184 days; 20 shipments)
Same	Violated tariff (vs. sec. 10(b)(1), 1984 Act)	Sept. 9, 1985–Dec. 20, 1985 (14 times)

The Nature and Seriousness of the Violations

As discussed above, respondents Villena, Cari-Cargo, and Sea Trade Shipping have at various times between November 1983 and December 1985, violated various laws by operating without a tariff, by charging rates other than those specified in their tariffs, and by knowingly and willfully misdescribing cargo tendered by them to underlying vessel-operating carriers. The pattern of conduct described above appears to be the method by which Mr. Villena, sometimes personally and sometimes as employee or officer of Cari-Cargo and Sea Trade Shipping, chose to do business.

The Commission's Order of Investigation and Hearing, as amended, requires not only a determination of the question of violations of law but also whether respondents should be ordered to cease and desist from the above practices and whether penalties should be assessed. To determine those questions, it is helpful to consider preliminarily the nature of the offenses committed and their seriousness. Furthermore, perhaps respondents, who appear not to have considered that the laws they violated were sufficiently important to deter their unlawful conduct, can benefit from the following discussion if it will help them realize the purpose and importance of these laws.

Perhaps nothing is more important to effective protection of the shipping public and industry than the requirement that carriers file their tariffs and adhere to them strictly. Such were the requirements of sections 18(b)(1) and 18(b)(3) of the 1916 Act, as well as the requirements which Congress carried over into sections 8(a)(1) and 10(b)(1) of the 1984 Act. The enforcement of these laws goes to the very heart of the Commission's responsibilities, and the Commission and courts have long recognized the extreme importance of these laws. In *Ghiselli Bros. v. Micronesia Interocean Line*,

Inc., 13 F.M.C. 179 (1968), for example, the Commission stated (at 181-182):

The purpose of requiring the submission of tariff schedules under section 18(b) of the Shipping Act, 1916, and regulations promulgated pursuant thereto, is to secure uniformity and equality of treatment in rates and services to all shippers. Requiring the public establishment of tariff schedules prevents unjust discrimination and undue preferences. As the court explained [in a case interpreting a similar tariff law]: Carriers, being engaged in a public employment, must serve all members of the public on equal terms. This was the doctrine of the common law. It has been explicitly stated and strengthened by the successive acts to regulate commerce. *The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost.* Secret rates will inevitably become discriminating rates. (Emphasis added.)

See also *Puget Sound Tug & Barge Co. v. Alaska Freight Lines*, 7 F.M.C. 550, 559 (1963); *Intercoastal Investigation*, 1 U.S.S.B.B. 400, 421 (1935); *Filing of Freight Rates in U.S. Foreign Commerce*, 6 F.M.B. 396, 399-400 (1961).

So important is the requirement that common carriers must file their tariffs and strictly adhere to them that the courts have long held that tariffs have the force and effect of law and that departure from them is not permitted even if hardship results in some cases or the carrier intended no harm. Again, the reason for such a rule is that prevention of discrimination is the paramount consideration. See discussion and cases cited in *Farr Co. v. Seatrain*, 20 F.M.C. 411, 414, 417 n. 8 (1978); see also *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 364-365 (1965); *Matson Navigation Co. v. Capitol Co.*, 15 SRR 403, 408-409 (N.D. Cal. 1978). Therefore, sections 18(b)(1) and 18(b)(3) and corresponding provisions of the 1984 Act are violated even if the carrier acted without fault. See discussion in *Marcella Shipping Company Ltd.*, 28 F.M.C. 259, 266-268 (1984). Arguments as to good intentions, lack of knowledge, etc., however, may be considered when determining the question of penalties. *Marcella*, 28 F.M.C. at 267-268.⁸

⁸Of course, the severity of tariff-filing law has been lessened somewhat by the enactment of the "special-docket" law which authorizes the Commission to relieve carriers and shippers of the adverse effects of errors in tariffs. See *United States v. Columbia SS. Company*, 17 F.M.C. 8, 19-20 (1973); *Farr Co. v. Seatrain*, cited above, 20 F.M.C. at 414-415. Instead of negotiating rates with their shipper-customers and deliberately failing to file them in their tariffs, as these respondents did, they could, like law-abiding carriers, have at least made a good-faith attempt to file the negotiated rates in their tariffs and, if some error occurred, they could have applied for relief under the "special-docket" law. However, the record shows that these respondents never filed the negotiated rates nor made a really serious effort to do so, notwithstanding Mr. Villena's

Continued

The importance of section 16 Initial Paragraph of the 1916 Act and the corresponding provision of the 1984 Act (section 10(a)(1)) must also be emphasized. Those laws prohibit shippers or other persons from furnishing false information to carriers or otherwise deceiving them "knowingly and willfully" for the purpose of obtaining or attempting to obtain ocean transportation for property at less than the rates legally applicable.

These provisions of law were considered to be very important when they first were enacted as an amendment to the 1916 Act in 1936. The legislative history shows that the amendment was unanimously supported by every witness appearing before the congressional committee and was intended to protect both carriers and honest shippers from the deceptive practices of dishonest shippers. See *United States v. Peninsular and Occidental Steamship Co.*, 208 F.Supp. 957, 958-959 (S.D.N.Y. 1962); *Hohenberg Brothers Company v. F.M.C.*, 316 F.2d 381, 384-385 (D.C. Cir. 1963); H.R. Rep. 2598, 74th Cong., 2d Sess., at 2, 5. The present case presents an example of the type of shipper which the amendment to section 16 was intended to thwart, i.e., the shipper who misdescribes cargo and fills out false bills of lading, not only cheating the vessel-operating carrier but also honest shippers who may be competing with these respondents but who pay the legal rates for the goods they ship.

The Question of Penalties

The Commission's Order of Investigation and Hearing, as amended on January 22, 1986, requires a determination as to whether, if the three respondents violated the aforesaid provisions of law, "civil penalties should be assessed, and, if so, against whom and in what amount." (Order cited at 4.)

The current law regarding factors to be considered 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 quoted above 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 some of the violations of this case was 46 CFR 505.1 (1983), originally

letter of March 10, 1984, purporting to show a good-faith effort to comply with law. (Ex. 1, Attachment C.)

promulgated in 1979. Under that regulation, the Commission was entitled to consider such factors as inability to pay, litigative possibilities, cost of collecting claims, deterrence, and aid to enforcement and to compel compliance. The Commission could also consider whether the violation was "accidental or technical" which "may be dealt with less severely" in contrast to "willful and substantial violations." See discussion in *Marcella*, cited above, 28 F.M.C. at 271-272. There is essentially no difference between the previous criteria for determining penalties and those presently in effect. *Id.* However, in fixing the exact amount of penalties, the Commission, which is vested with considerable discretion in such matters, is required to exercise great care to ensure that the penalty is tailored to the particular facts of the case, considers any factors in mitigation as well as in aggravation, and does not impose unduly harsh or extreme sanctions while at the same time deters violations and achieves the objectives of the law. *Marcella*, 271-272; 278-280. Obviously, "[t]he prescription of fair penalty amounts is not an exact science," and "[t]here is a relatively broad range within which a reasonable penalty might lie." *Midland Pacific Shipping Co., Inc.—Independent Ocean Freight Forwarder License*, 25 F.M.C. 715, 719 (1983).

Hearing Counsel, on brief, have considered the evidence and have provided specific recommendations as to the amount of penalties to be assessed. (Opening Brief at 18-24.) After summarizing the particular violations committed by each respondent, Hearing Counsel estimate that the maximum amounts of penalties that could be assessed under a literal reading of applicable provisions of law are either \$965,000 or \$605,000 for respondent Jorge Villena; \$230,000 for respondent Cari-Cargo International, Inc.; and \$990,000 for respondent Sea Trade Shipping. (Opening Brief at 19-20.)⁹

Hearing Counsel contend that respondent Villena, acting sometimes as Cari-Cargo and other times as Sea Trade Shipping, rated shipments "with complete disregard for the lawful rate in the . . . tariff." (Opening Brief at 15.) Furthermore, they argue, "Mr. Villena spelled out quite clearly that he misdescribed cargo to underlying carriers with the express purpose of obtaining a less than proper freight rate." (Opening Brief at 17.) Moreover, state Hearing Counsel, "the record shows a pattern of deliberate and wanton conduct in violation of the Shipping Acts," and "this conduct continued even after the initiation of this proceeding." (Opening Brief at 22.) "Mr. Villena, though given every opportunity, offered no evidence

⁹Hearing Counsel thus estimate total maximum penalties for the three respondents to be either \$2,300,000 or \$1,825,000, depending upon whether Mr. Villena's operations prior to formation of Cari-Cargo International, Inc., were violations of section 18(b)(1) (operating without a tariff) or section 18(b)(3) of the 1916 Act (violating his tariff). These estimates are not precise. They include a seventh violation of section 16 of the 1916 Act which occurred before November 11, 1983, and a minor arithmetic error as to Cari-Cargo (22 violations times \$5,000 equals \$110,000, not \$105,000). However, they may even be substantially understated in connection with penalties under the 1984 Act. Hearing Counsel calculate penalties under that Act at the regular rate of \$5,000. However, if "willfully and knowingly committed," violations of the 1984 Act carry maximum penalties of \$25,000 for each violation. Section 13(a), 46 U.S.C. app. sec. 1712(a).

either in defense of his actions or in mitigation. The record developed by Hearing Counsel shows a pattern by Mr. Villena of complete disregard for the requirements of law." (Opening Brief at 21.) Not only did Mr. Villena know that he was disregarding the tariffs but he even continued to handle Sea Trade shipments after his deposition in June 1985 when there was no effective Sea Trade tariff on file with the Commission, and later, after an effective tariff was filed, he ignored the tariff. (Opening Brief, at 21.)

As Hearing Counsel point out, violations of the tariff-filing and tariff-adherence laws (sections 18(b)(1) and 18(b)(3) of the 1916 Act; sections 8(a)(1) and 10(b)(1) of the 1984 Act) may be committed without regard to intent. In other words, a carrier can violate those laws merely by operating without a tariff and by not adhering to its tariff regardless of its knowledge or reasons because these laws are "absolute liability" statutes. (Opening Brief at 11, citing *Marcella*, cited above, 28 F.M.C. 266-268.) Evidence of intent to violate by the carrier may, however, be relevant on the question of penalties. *Marcella*, cited above, at 267-268; 272.

As to the question of violations of law prohibiting shippers from misdescribing and thereby cheating carriers, evidence of knowledge and willfulness is relevant not only to the question of penalties but to the very violations themselves. That is because both section 16 Initial Paragraph of the 1916 Act and the corresponding provision of the 1984 Act (section 10(a)(1)) state that no person may "knowingly and willfully" use false billing, false classification, etc. The Commission has held that "knowingly and willfully" as used in these statutes can mean deliberately and purposefully or intentionally or can mean conduct which shows a continuing pattern of indifference to the requirements of law. See discussion and cases cited in *Marcella*, cited above, at 273-274; see also Opening Brief at 16-17. The Commission summarized the standard test in *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954), as follows:

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.

In *Equality Plastics, Inc. and Leading Forwarders, Inc.*, 17 F.M.C. 217, 226 (1973), the Commission stated that conduct which is "plainly indifferent" to requirements of law is equivalent to wanton disregard from which an inference can be drawn that the conduct was in fact purposeful and likened this interpretation to the standard of gross negligence. However, it is clear on this record that respondents' conduct was more than plainly indifferent. It was rather deliberate and purposeful, Mr. Villena admitting that he misdescribed goods which he tendered to underlying vessel-operating

carriers with the specific intention of "taking advantage" of lower rates. There is no doubt whatsoever that his conduct was "knowing and willful."¹⁰

Having summarized the evidence of record showing knowing and willful violations of law and estimating the amounts of maximum penalties that could be assessed under law, Hearing Counsel compare this case with analogous cases before recommending specific penalties. Hearing Counsel refer to three cases, *Marcella Shipping Company Ltd.*, cited above; *Certified Corp. and Seaway Distribution Corp.*, 24 F.M.C. 542 (1982); and *Ariel Maritime Group*, 23 SRR 237 (I.D., remanded, 23 SRR 610 (1985).) In *Marcella*, the respondent, a vessel-operating carrier, had operated without a tariff and had violated its tariff on a number of occasions over several months. Respondent was penalized in the amount of \$150,000 but provision was made for a total or partial remission of an amount over \$20,000 upon a showing of remedial action and inability to pay by the carrier. In *Certified Corp.*, respondent, an NVO-shipper, which had misrouted goods tendered to vessel-operating carriers in relatively small amounts on four occasions, was penalized \$10,000, one-half the statutory maximum. In *Ariel Maritime Group*, the presiding judge assessed four companies a total of \$260,000 for numerous violations of section 16 Initial Paragraph and section 18(b)(3) of the 1916 Act. The bulk of the penalty was assessed against one company in the amount of \$150,000 for violating section 16 and \$50,000 for violating section 18.

In the three cited cases, care was taken to ensure that the amount of the penalties would deter recurrence of violations of law but aggravating and mitigating factors were considered. In *Marcella*, the problem of the carrier's ability to pay was given much attention when fashioning the penalties because of concern that too severe a penalty might destroy the business of a relatively small carrier in a third-world trade.

As Hearing Counsel have noted, the above cited cases are too few to establish an easy reference for determining an appropriate penalty level. (H.C. Op. Br. at 22.) Moreover, agencies are not required to assess uniform penalties in every analogous case, although too drastic a departure from a pattern may constitute arbitrary and unfair action. See *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 186-188 (1973) (departure from uniformity in sanctions by an agency is not in itself ground for reversal); see also cases and discussion in 4 Davis, *Administrative Law Treatise* (2d Ed. 1983), sec. 20:11 at 40-43 (unevenness in assessing penalties is permissible but not excessive variance).

¹⁰The modern doctrine interpreting the phrase "knowingly and willfully" in administrative statutes stems from the Supreme Court's decision in *U.S. v. Illinois Central Railroad Co.*, 303 U.S. 239, 242-243 (1938). The Court there interpreted the phrase to mean intentional disregard or plain indifference to statutory requirements. This standard was repeated virtually verbatim by the Commission in *Misclassification of Tissue Paper*, cited above, 4 F.M.B. at 486. The Court held that the conduct had to be with knowledge and voluntary and not something done accidentally. For a similar holding under the Interstate Commerce Act, see *U.S. v. Joralemon Brothers, Inc.*, 174 F.Supp. 262, 263 (E.D.N.Y. 1959)

Having completed their contentions and analysis of analogous cases, Hearing Counsel conclude by recommending that respondent Jorge Villena be assessed \$50,000; respondent Cari-Cargo, \$25,000; and respondent Sea Trade Shipping, \$25,000. Hearing Counsel note, furthermore, that although respondents did not offer any evidence that they could not pay such sums, Hearing Counsel would support the procedure set forth in *Marcella* if ability to pay became an issue, namely, requiring initial payments and possibly remitting the balance in whole or in part on a proper showing of inability to pay and of diligence.

I find that Hearing Counsel's recommendations are appropriate in their amounts and as to allocations among the three respondents. The bulk of the violations appear to have been committed by Mr. Villena personally in terms of numbers of shipments shown on the record and even when his conduct could properly be attributed to that of the two corporations, he appears to be the sole initiator of the violative practices. His only defenses appear to be that he thought he had to compete in a difficult environment, that he had filed a tariff and had intended to make some effort to file his negotiated rates in the tariff but had problems with the tariff publisher. (See Ex. 1, Attachment C.) These, of course, are rather weak defenses, and the evidentiary support is thin although respondents were given every opportunity to furnish evidence on their behalf and were even offered the assistance of a Commission investigator to help them furnish evidence regarding their financial situation. (See rulings of November 5, 1985, at 2-3.) Moreover, the record shows that even after Mr. Villena was warned about the seriousness of his conduct, he continued to operate in the same way, and he was not truthful in his testimony as to the extent of his operations with Sea Trade.

As was the case with *Marcella*, cited above, when a respondent carrier does not mount an effective defense, claims financial difficulties, and appears not to be a sizeable operation, it is difficult to determine a fair and suitable penalty. In this case, as with *Marcella*, it is necessary to send a clear message to respondents because of their persistence in operating in an unlawful manner even after warnings. However, it is also necessary to be careful not to destroy a business by imposing a totally unrealistic financial burden on it. Fortunately, a procedure has been established in *Marcella* which enables the Commission, pursuant to its specific statutory authority, to send the message of deterrence while guarding against inadvertent destruction of a small, financially-limited business if it appears in fact that the Commission is dealing with such a business.

In the instant case, penalties aggregating \$100,000, allocated as described above among the three respondents, are far less than the statutory maxima, are considerably under those assessed in *Ariel Maritime Group* (\$260,000) and somewhat under the amount assessed in *Marcella* (\$150,000). However, *Marcella* was a vessel-operating carrier whereas respondents are NVOs whose assets are usually more limited. The amount of \$100,000 should

send the appropriate message of deterrence to the three respondents and emphasize the seriousness of the violations. However, to guard against inadvertent destruction of what may not be major businesses, payments can be made in installments of \$5,000 each month for 20 months, allocated in the same proportion among the three respondents (i.e., \$2,500 from respondent Villena; \$1,250 from each of the two corporate respondents). After six-months' payments, i.e., when \$30,000 in penalties have been paid, respondents may, as could Marcella, petition the Commission for remission of the balance in whole or in part on a showing based upon reliable financial evidence that they cannot continue to pay and that they have taken steps to ensure that violations will not recur. See *Marcella*, cited above, 28 F.M.C. 278-279.¹¹

The Question as to a Cease and Desist Order

The remaining issue framed by the Commission's Order of Investigation and Hearing, as amended, is whether a cease and desist order should issue against these respondents if they have been found to have violated the laws specified.

Hearing Counsel argue that a cease and desist order is appropriate when there is a likelihood that offenses will continue absent the order and when the record discloses persistent offenses. They also argue that the order should be tailored to the type of offenses that might be involved. (H.C. Opening Brief at 24.) They further contend that the record reveals both a persistent course of violative conduct as well as a likelihood that offenses will continue absent an order. They cite Mr. Villena's failure to conform his operations with law after warnings from Commission investigators and continued unlawful operations even during the pendency of this proceeding. (H.C. Opening Brief at 25.)

Hearing Counsel's contentions and concerns are amply supported in the record. Under applicable principles of law, a cease and desist order is eminently appropriate when, as in this case, respondents display a pattern of disregard for law so that the danger is obvious that they may resume unlawful activities unless orders are issued specifying that they cease and desist from certain conduct. See *Marcella*, cited above.

In this case, there is an obvious need to issue such an order, to impose realistic penalties, and to make sure that Mr. Villena understands how he is supposed to conduct the business of an NVO with respect to tariff-filing and adherence to both his own companies' tariffs and those of underlying vessel-operating carriers. As discussed above, there is no reason why an NVO cannot do business and seek to charge competitive rates while

¹¹In *Marcella*, the carrier was allowed to pay \$20,000 over the first four months before asking for remission of the balance in whole or in part. However, in this case there are three respondents, not one, and the respondents did more than operate without a tariff and violate their tariffs. They also cheated vessel-operating carriers.

complying with tariff-filing law. As seen from the numerous special-docket applications, and as discussed above, numerous carriers negotiate rates with their shipper-customers constantly with the intention of filing those rates in their tariffs, and if they make a tariff-filing error, relief is available. As the Commission has stated in *U.S. v. Columbia S.S. Company*, cited above, 17 F.M.C. at 19:

The Act does not prohibit agreements between shippers and carriers provided that, prior to shipment, a rate is filed in accordance with the agreement, which rate is available to all shippers.

Accordingly, respondents Cari-Cargo, Villena, and Sea Trade Shipping are ordered to cease and desist from violating sections 8(a)(1) and 10(b)(1) of the 1984 Act (46 U.S.C. app. secs. 1707(a)(1); 1709(b)(1)) relating to the requirement of tariff-filing and tariff-compliance, respectively; and respondents are further ordered to cease and desist from violating section 10(a)(1) of the 1984 Act (46 U.S.C. app. sec. 1709(a)(1)) relating to the prohibition against misdescribing goods or otherwise obtaining or attempting to obtain transportation of property at less than the applicable legal rates.

In this case, the record shows that Mr. Villena and his two companies did not bother to comply with law although feeble efforts in that direction were made from time to time by occasionally filing tariffs. However, even when tariffs were filed, and even after he had been warned against continuing his practices, he carried on business as usual by ignoring the tariffs and cheating underlying vessel-operating carriers. Furthermore, although he willingly testified about his activities at a deposition proceeding and furnished documents, Mr. Villena did nothing further in this proceeding, neither responding to procedural rulings nor filing anything in respondents' own defense. His conduct perfectly exemplifies the Commission's description of a carrier who "knowingly and willfully" violates law, i.e., who acts "purposely and obstinately" or who "intentionally disregards the statute or is plainly indifferent to its requirements." *Misclassification of Tissue Paper as Newsprint Paper*, cited above, 4 F.M.B. at 486.

The above penalties and the cease-and-desist order are carefully designed to ensure that Mr. Villena finally understands the seriousness of his conduct and understands that he must change his method of operation, and they provide an incentive for him to reform. Thus, as noted above, if he pays penalties amounting to at least \$30,000 over six months and shows that he has reformed and cannot afford further penalties, he may petition the Commission for appropriate relief. If he does not do these things and persists in his unlawful activities, the full weight of the \$100,000 penalty will fall, and if he violates the cease-and-desist order, he is subject to further orders of a U.S. District Court judge in enforcement proceedings. It is hoped that the present measures and this decision will serve as a sufficient incentive for reform and that Mr. Villena and the two corporate

respondents will, if they wish to continue in business, at last begin to conduct their businesses in a lawful manner.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1379

APPLICATION OF NIPPON YUSEN KAISHA FOR THE BENEFIT OF
GREAT LAKES CHEMICAL CORPORATION

ORDER OF PARTIAL ADOPTION

June 9, 1986

The Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued in this proceeding.

On May 13, 1985, Nippon Yusen Kaisha (NYK), a member of the Transpacific Westbound Rate Agreement (TWRA or Conference), notified the Conference of its intent to take independent action to establish reduced rates of \$1,060 per 20-foot container and \$1,240 per 40-foot container on "Flame Retardants." The rates were published in TWRA's tariff on May 21, 1985.

On June 7, 1985, LSY Line (LSY), also a Conference member, exercised independent action and further reduced those rates to \$990 per 20-foot container and \$1,125 per 40-foot container. The rates were published in TWRA's tariff on June 17, 1985. Subsequently, at NYK's request on June 18, 1985, TWRA added NYK to the list of carriers which offered the lower LSY rates. However, due to clerical error, TWRA failed to cancel NYK's original independent action so that NYK's \$1,060 and \$1,240 rates were still in effect when the shipments at issue moved. The error was later corrected in the tariff published by TWRA on September 17, 1985.

While the Initial Decision properly grants the application for refund, it erroneously establishes the effective date of the required corrective tariff as June 7, 1985, the date LSY, and not NYK, declared independent action. In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita)*, Spec. No. 678 (F.M.C. February 25, 1980), 19 S.R.R. 1407, recently followed in *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreight New Zealand Ltd.*, Spec. No. 1349 28 F.M.C. 183, the Commission established the effective date of the conforming tariff as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate would have become effective, absent the mistake. Accordingly, the effective date of the NYK conforming tariff should be June 18, 1985, the date the mistake upon which the application is based occurred. The notice required by the Initial Decision to be published by TWRA shall be amended accordingly.

APPLICATION OF NIPPON YUSEN KAISHA FOR THE BENEFIT 417
OF GREAT LAKES CHEMICAL CORPORATION

THEREFORE, IT IS ORDERED, That the Transpacific Westbound Rate Agreement promptly publish in the pertinent tariff the following notice, in lieu of the one ordered by the Presiding Officer:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1379, that effective June 18, 1985 and continuing through September 16, 1985, inclusive, the rate on Flame Retardants, additives or agents carried by Nippon Yusen Kaisha, from Gulf Ports and Points to Japan is \$990.00 per 20-foot container and \$1,125.00 per 40-foot container, for purposes of waiver or refund of freight charges, subject to all other applicable rates, regulations, terms and conditions of said rate and this tariff.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1379

APPLICATION OF NIPPON YUSEN KAISHA FOR THE BENEFIT OF GREAT LAKES CHEMICAL CORPORATION

Application to waive freight charges of \$3,225.00 granted.

INITIAL DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Partially Adopted June 9, 1986

This application² is for permission to waive \$3,225.00 of freight charges arising out of eleven shipments of Flame retardants, additives or agents from New Orleans, Louisiana, to Japan. Five shipments were to Tokyo, five to Kobe, and one to Nagoya.

The tariff involved in this proceeding is Transpacific Westbound Rate Agreement, (TWRA) Westbound Local and Intermodal Tariff FMC No. 2 from U.S. Ports and Points (In Rule 1-A) to Northeast Asia Base Ports in Japan, Korea, Taiwan, Hong Kong and P.R.C. (In Rule 1-B). On May 13, 1985, NYK chose to take independent action under the tariff by establishing a reduced rate on Flame Retardants (Item 38-0192) for New Orleans' cargo only going to Japan of \$1,060.00 per 20 foot container and \$1,240.00 per 40 foot container.³ On June 7, 1985, Y.S. Line, a fellow conference member declared independent action for a further reduction of the rate to \$990.00 per 20 foot container and \$1,125.00 per 40 foot container, but made the rate applicable from all U.S. Gulf Ports. As a result NYK was asked to meet this rate by the shipper, and agreed to do so. It issued a filing instruction to that effect which was relayed to TWRA and on June 18, 1985, NYK was added to the list of carriers offering the lower rate.⁴ However, due to clerical inadvertence the original NYK action establishing the \$1,060.00 and \$1,240.00 rates was not withdrawn so that they were in effect on the dates of shipment. As a result the applicant now seeks to waive the freight charges representing the difference between the rate on file and the negotiated rates. They are as follows:

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 by Nippon Yusen Kaisha (NYK) on October 23, 1985, well within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984. It was joined in by TWRA.

³ Application, Exhibits C, D. Exhibit C which is the tariff page shows an effective date of May 21, 1985, although the application on page 4 states that it is May 23, 1985. Whichever date is correct the resulting decision would be the same.

⁴ Application, Exhibit E.

APPLICATION OF NIPPON YUSEN KAISHA FOR THE BENEFIT 419
OF GREAT LAKES CHEMICAL CORPORATION

Shipment No.	B/L Ref- erence	Amount Paid	Amount Due
1	331-03300	\$2,250.00	\$2,480.00
2	331-03301	1,980.00	2,300.00
3	331-03321	2,970.00	3,450.00
4	331-03322	990.00	1,150.00
5	331-03323	990.00	1,150.00
6	331-03351	2,970.00	3,450.00
7	331-03407	2,970.00	3,450.00
8	331-03419	990.00	1,150.00
9	331-03427	1,125.00	1,240.00
10	331-03429	990.00	1,150.00
11	331-03464	2,970.00	3,450.00
		\$21,195.00	\$24,420.00
Amount to be waived			\$3,225.00

The applicant ultimately withdrew the initial independent action of May 13, 1985, and substituted the negotiated rate agreed to on June 7, 1985, effective September 17, 1985.⁵

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, the applicants failed to withdraw an independent action which prevented a new negotiated rate from going into effect. The mistake is the kind of clerical inadvertence Congress sought to obviate in enacting section 8(e).

The application filed by NYK 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 of \$990.00 per 20 foot container and \$1,125.00 per 40 foot container for Flame Retardant moving from New Orleans, Louisiana, to Japan, which rate would have been in effect had the error not been made.

2. The waiver will not result in discrimination among shippers⁶ and there is no evidence that any carrier or parties would suffer discrimination should the application be granted.

3. Prior to applying for the waiver the applicant filed a new tariff which sets forth the rate upon which the waiver should be based.

4. The application was filed within 180 days from the date of the shipments.

Wherefore, in view of the above, it is

⁵ Application, Exhibit C, 14th Rev. Pg. 802; Exhibit F.

⁶ The applicant states there were no other shipments of the same commodity during the period involved here.

Ordered, that permission is granted NYK to waive a portion of the freight charges in the amount of \$3,225.00 for the benefit of the shipper, Great Lakes Chemical Corp., which waiver will have no effect on the land portion of the intermodal movement, and it is,

Further Ordered, that NYK and TWRA promptly publish in the pertinent tariff, the following notice:

Notice is give as required by the decision of the Federal Maritime Commission in Special Docket 1379, that effective June 7, 1985 and continuing through September 16, 1985, inclusive, the rate on Flame Retardants, additives or agents, from Gulf Ports and Points to Japan is \$990.00 per 20 foot container and \$1,125.00 per 40 foot container, for purposes of waiver or refund of freight charges, subject to all other applicable rates, regulations, terms and conditions of said rate and this tariff.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1381

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE
BENEFIT OF EMBASSY OF TUNISIA, OFFICE OF DEFENSE
ATTACHE

ORDER OF PARTIAL ADOPTION

June 9, 1986

The Commission determined on its own motion to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served in this proceeding on March 17, 1986.

BACKGROUND

Lykes Bros. Steamship Co., Inc. (Lykes), a member of the Gulf/Mediterranean Ports Conference (GMPC or Conference), applied, pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. §1707(e),¹ for permission to waive collection from the Embassy of Tunisia of a portion of the freight charges applicable on two shipments of Class C Explosives carried from New Orleans, Louisiana to Bizerte, Tunisia.

On April 9, 1985 Lykes offered the Embassy of Tunisia a rate of \$385 per 40 cubic feet or 2240 pounds for Class C Explosives scheduled to be shipped on May 9, 1985. On May 3, 1985, Lykes asked GMPC to obtain from its members approval of the negotiated rate, but due to inadvertence the Conference staff failed to act timely on Lykes' request. As a result the rate was approved on May 10, 1985 and filed on May 14, 1985. The shipments sailed on May 9, 1985. The application for a waiver was filed with the Commission on November 5, 1985.

¹ Section 8(e) authorizes the Commission to permit refund or waiver relief 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 and the refund will not result in discrimination among shippers, ports, or carriers;
- (2) the common carrier or conference has, prior to filing an application . . . , filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;
- (3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and
- (4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

The Commission, by regulation, has defined date of shipment to mean
the date of sailing of the vessel from the port at which cargo was loaded.
46 C.F.R. §502.92(a)(3)(iii).

DISCUSSION

The Presiding Officer properly found that the application met all the requirements of section 8(e) of the 1984 Act and correctly granted Lykes permission to waive collection of a portion of the freight charges assessed at the tariff in effect at the time of shipment. The only matter at issue is the tariff notice required by section 8(a) (3) of the Act to be published in the carrier's tariff.

Section 8(e)(2) requires the filing of a "new" tariff (conforming tariff) showing the rate on which refund or waiver adjustments are to be made. The notice required by section 8(a)(3), in addition to setting forth the rate upon which the refund or waiver to the shipper for whose benefit the application was filed, also provides the basis for *additional* refunds or waivers to *other* shippers of the same commodity not covered by the application. Because the conforming tariff rate is to apply to shipments which sailed earlier, the effective date of the conforming tariff reflected in section 8(e)(3) must accordingly be established at a date prior to the date of filing with the Commission.

In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita)*, Spec. No. 678 (F.M.C. February 25, 1980), 19 S.R.R. 1407, recently followed in *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreight New Zealand Ltd.*, Spec. No. 1349 28 F.M.C. 183, the Commission established the effective date of the conforming tariff as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate, absent the mistake, would have become effective. When published in the carrier's tariff, the rate becomes the basis for the refunds and waivers contemplated in section 8(e)(3) on shipments which sailed during the period set forth in the notice required by that section.

In a separate Order served this date in *Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. as Agent for Pana-York Shipping Corporation/Frito Lay (Pana-York)*, Spec. No. 1412 (F.M.C. initial decision served March 5, 1986), 28 F.M.C. 427 (1986) the Commission has held that the 180-day statute of limitation in section 8(e)(4) applies to the refund and waiver adjustments contemplated in section 8(e)(3) as well as to the grant of refunds or waivers on the basis of the application. The Commission's decision qualifies the *Yamashita* standard accordingly. Therefore, the effective date of the conforming tariff, required by section 8(e)(2) and reflected in the tariff notice mandated by section 8(e)(3), is the date the error upon which the application is based was made, but in no event can exceed 180 days prior to the date the application is filed.

The tariff notice required by the Presiding Officer in this proceeding makes the effective date of the conforming tariff April 9, 1985, the date Lykes offered the rate to the Embassy of Tunisia. However, April 9 is 210 days before November 5, 1985, the date of filing of the application.

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR 423
THE BENEFIT OF EMBASSY OF TUNISIA

Consequently, based on our ruling in *Pana-York*, the earliest date the rate sought to be applied may become effective in this instance is May 9, 1985, the date the shipments at issue sailed from New Orleans. The tariff notice must be amended accordingly. The tariff notice must also be amended to limit it to carryings by Lykes so as not to bind the entire Conference membership.

THEREFORE, IT IS ORDERED, That, in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Gulf/Mediterranean Ports Conference promptly publish in its tariff the following notice:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1381, that effective May 9, 1985, and continuing through May 13, 1985, inclusive, the rate on Class C Explosives carried by Lykes Bros. Steamship Co., Inc. from U.S. Gulf of Mexico ports of loading from and including Brownsville, Texas to, but not including Key West, Florida, to the Tunisian Armed Forces Project in Bizerte, Tunisia, is \$385.00 W/M, 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.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1381

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR THE
BENEFIT OF EMBASSY OF TUNISIA, OFFICE OF DEFENSE
ATTACHE

Application to waive freight charges of \$594.95 granted.

INITIAL DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Partially Adopted June 9, 1986

This application² is for permission to waive \$594.95 of freight charges arising out of two shipments of Class C Explosives from New Orleans, Louisiana, to Bizerte, Tunisia, aboard a vessel owned by Lykes Bros. Steamship Co., Inc. (Lykes).

The tariff involved in this proceeding is the Gulf/Mediterranean Ports Conference (GMPC), Gulf Mediterranean Tariff No. 3 (FMC-18) from U.S. Gulf of Mexico ports of loading from and including Brownsville, Texas to, but not including Key West, Florida, to all Ports (except Israeli ports) served from Huelva, East to Gibraltar and on the Mediterranean Sea from Gibraltar to Port Said (including Adriatic, Black Sea and Gulf of Toronto ports) and from North African ports in Morocco (including Atlantic West Coast Moroccan ports) to Port Said, all inclusive. Prior to April 9, 1985, and for sometime thereafter the rate on Class C Explosives was \$458.00 W/M.³ On April 9, 1985, Lykes offered the Embassy of Tunisia, through the freight forwarder representing it a rate of \$385.00 per 40 cubic feet or 2,240 pounds for an upcoming shipment from New Orleans to Bizerte which was to sail on May 9, 1985. On May 3, 1985, Lykes asked the Conference to conduct a poll of members to secure approval of the negotiated rate. The Conference staff failed to timely process the request due to inadvertent error so that the rate was not approved until May 10, 1985, and was not made effective until May 14, 1985.⁴

The shipments involved here began on May 9, 1985. The applicant now seeks permission to waive the difference between the freight charges resulting from the rate then on file, \$458.00 W/M and the negotiated

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 which was filed by Lykes and joined in by the GMPC, was filed on November 5, 1985, within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984.

³ Application, Exhibit C-1.

⁴ Application, Exhibit D.

APPLICATION OF LYKES BROS. STEAMSHIP CO., INC. FOR 425
THE BENEFIT OF EMBASSY OF TUNISIA

rate of \$385.00, such difference being \$576.70 for the first shipment,⁵ and \$18.25 for the second shipment.⁶ The lower freight rates have already been paid.

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, the record indicates that the Conference staff through inadvertence simply failed to process Lykes' request for a new tariff in timely fashion. It is the kind of error Congress sought to obviate in enacting section 8(e).

The application filed by Lykes 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 of \$385.00 W/M on Class C Explosives moving from New Orleans, Louisiana to Bizerte, Tunisia, which rate would have been in effect had the error not been made.

2. The waiver will not result in discrimination among shippers,⁷ and there is no evidence that any carrier or ports would suffer discrimination should the application be granted.

3. Prior to applying for the waiver the applicant filed a new tariff which sets forth the rate upon which the waiver should be based.

4. The application was filed within 180 days from the date of the shipment.

Wherefore, in view of the above, it is

Ordered, that permission is granted Lykes, to waive a portion of freight charges in the total amount of \$594.95 for the benefit of the Embassy of Tunisia; and it is,

Further Ordered, that GMPC 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. 1381, that effective, April 9, 1985, and continuing through May 13, 1985, inclusive, the rate on Class C Explosives from U.S. Gulf of Mexico ports of loading from and including Brownsville, Texas to, but not including Key West, Florida, to the Tunisian Armed Forces Project in Bizerte, Tunisia, is \$385.00 W/M, for purposes of waiver or

⁵ Application, Exhibit A-1.

⁶ Application, Exhibit A-3.

⁷ The applicant states that there were no other shipments of the same commodity during the period involved here.

refund of freight charges, subject to all other applicable rules, regulations, terms and conditions of said rate and this tariff.

(S) JOHN N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1412

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF
SEA-LAND SERVICE, INC. FOR THE BENEFIT OF FORWARDING
SERVICES, INC. AS AGENT FOR PANAMA-YORK SHIPPING
CORPORATION/FRITO LAY

ORDER OF PARTIAL ADOPTION

June 9, 1986

The Commission determined to review the Initial Decision of Administrative Law Judge Norman D. Kline (Presiding Officer) issued in this proceeding.

BACKGROUND

Following negotiations with the shipper, Sea-Land Service, Inc., on July 18, 1985, published in its tariff a rate for potato chips applicable to Panama City, Panama. The rate included all additional charges.¹

On July 25, 1985, Sea-Land directed that effective August 24, 1985, the tariff be amended to delete the exemption from the additional charges. Due to error, the revised tariff was published with an effective date of July 26, 1985.² As a result, the two shipments of potato chips which sailed on August 17, 1985, from Elizabeth, New Jersey to Panama City, became subject to higher charges than intended.

Subsequently, by tariff published on August 22, 1985, Sea-Land reinstated the exemption from the additional tariff charges and on February 13, 1985 applied pursuant to section 8(e) of the Act, 46 U.S.C. app. §1707(e), for permission to waive collection of charges payable under the July 26, 1985 tariff.³

¹ Sea-Land Service, Inc. Tariff No. 466, FMC No. 323 3rd rev. page 82-A effective July 18, 1985.

² *Idem*, rev. page 82-A effective July 26, 1985. The increase became effective on less than 30-day notice as required by section 8(d) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. §1707(d).

³ Section 8(e) authorizes the Commission to permit refund or waiver relief 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 and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application . . . , filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

Continued

DISCUSSION

The Presiding Officer properly found that the application for waiver had been timely filed; that the tariff published on July 26, 1985 contained an error of the type contemplated in section 8(e) of the Act; and that the grant of the application would not result in discrimination among shippers, ports, or carriers. The only matter at issue here is the tariff notice required by section 8(a)(3) of the Act to be published in the carrier's tariff.

Section 8(e)(2) requires the filing of a new tariff (conforming tariff) showing the rate on which the refund or waiver will be based. The notice required by section 8(a)(3), in addition to setting forth the rate upon which the refund or waiver to the shipper for whose benefit the application was filed (application-shipper) will be based, also provides the basis for additional refunds or waivers to other shippers of the same commodity not covered by the application. In order to enable the carrier to make such additional refunds or waivers, the effective date of the "new" (or conforming) tariff, required by section 8(e)(2) of the Act, is made to relate back to a date prior to the date of filing with the Commission.

In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita)*, Spec. No. 678 (F.M.C. February 25, 1980), 19 S.R.R. 1407, recently followed in *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreight New Zealand Ltd.*, Spec. No. 1349, (F.M.C. January 16, 1986), 28 F.M.C. 183, the Commission established the effective date of the conforming tariff, required by section 8(e)(2) and reflected in the tariff notice prescribed by section 8(e)(3), as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate absent the mistake would have become effective.⁴ When published in the carrier's tariff, the rate becomes the basis for the refunds and waivers contemplated in section 8(e)(3) on shipments which sailed during the time period set forth in the notice.

In this instance, applying *Yamashita*, the effective date of the conforming tariff would be July 26, 1985, the date the mistake in filing occurred. However, because July 26 is 202 days from the date the application was filed, this raises the question, not directly addressed in *Yamashita*, of whether the 180-day statute of limitation embodied in section 8(e)(4) of the Act applies to refund and waiver adjustments on shipments of other shippers authorized by section 8(e)(3) of the Act.

Certain discussion in the Commission's decision in *Application of U.S. Atlantic & Gulf-Jamaica Freight Association and Sea-Land Service, Inc.*

(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

The Commission, by regulation, has defined date of shipment to mean the date of sailing of the vessel from the port at which cargo was loaded.

46 C.F.R. 502.92(a)(3)(iii).

⁴ 19 S.R.R. at 1408.

for the Benefit of United Brands-Chiquita (United Brands), Spec. No. 1102 (F.M.C. order denying petition for reconsideration October 12, 1984), 27 F.M.C. 135, although not necessary to the decision there, is relevant here. In holding that it lacked jurisdiction to grant relief to the application shipper on certain shipments occurring earlier than 180 days from the date of filing of the application, the Commission in United Brands rejected the argument that shippers other than the application-shipper might benefit from an extension of the deadline. The Commission explained that relief to other shippers:

. . . is actually dependent upon a favorable resolution of the legal issue, *i.e.*, that the Commission has the power to grant such an extension. However, the Commission has concluded that we have no such power.⁵

Although noting that the Commission's decision in *United Brands* "seems to hold that relief cannot be granted to any shipment occurring before the 180-day period and that a conforming tariff notice cannot be backdated to the dates enunciated in *Yamashita* . . . if such rates fall earlier than the 180-day period," the Presiding Officer nevertheless concludes that the detrimental effect the short notice rate increase might have had on other shippers of the same commodity warrants the extension of the effective date of the conforming tariff beyond the 180-day limit, to the day the mistake in filing occurred.⁶ We disagree.

In light of the right given the shipper to file its own application (a right subject to the 180-day limitation), it appears that the anti-discrimination provision in section 8(e)(1) was only intended to ensure that other shippers of the same commodity, whose shipments moved within 180 days from the date the application was filed, would receive the same treatment as the application-shipper.⁷ To interpret the statute otherwise could result in either extending to some shippers a relief which would have to be denied to the application-shipper or would allow the application-shipper to get indirectly a refund/waiver it could not obtain directly.

⁵ 27 F.M.C. 136.

⁶ This conclusion is somewhat surprising in view of the Presiding Officer's decisions in *Application of Gulf European Freight Association (as Successor to Gulf United Kingdom Conference) and Sea-Land Corporation on behalf of Sea-Land Service, Inc. for the Benefit of Griffin & Brand of McAllen, Inc.*, Spec. No. 1378 (F.M.C. initial decision served November 29, 1985), 23 S.R.R. 624, and *Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. for the Benefit of Catelli-Primo Ltd.*, Spec. No. 1383 (F.M.C. initial decision served December 13, 1985), 23 S.R.R. 626, adopted by separate orders issued this date. There, the Presiding Officer acknowledged the jurisdictional limitation imposed by section 8(e)(4) to the grant of additional refunds or waivers provided in section 8(e)(3) of the Act.

⁷ While the legislative history of the 1984 Act gives no particular guidance on this issue, the legislative history of section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. app. §817(b)(3), the predecessor to section 8(e), indicates that Congress intended to confine relief and ensure nondiscriminatory treatment to shippers who shipped within the 180-day period of limitation. As explained by then-Chairman Harlee and an industry spokesman, the 180-day period was intended to make "mandatory refunds applicable [to] all shippers for similar shipments made from the date of shipment until the date of application . . ." and would also "eliminate or minimize stale claims." See Hearing Before Senate Subcommittee on Merchant Marine and Fisheries, 90th Cong., St. Sess. on S. 1905 (November 20, 1967) at 7, 15.

Consideration also must be given to the rule that when a statute which creates a right unknown at common law contains a limitation of time, the expiration of that time extinguishes both the right and the remedy.⁸ Applied to section 8(e) of the Act, this means that after the expiration of the 180-day period, the Commission no longer has the authority to allow refunds or waivers whether they be granted on the application or based on the tariff notice issued thereunder.⁹

We therefore conclude that the 180-day limitation of section 8(e)(4) of the Act applies to any refund and waiver, be it granted on the application or under section 8(e)(3).¹⁰ Consequently, application of the *Yamashita* standard to the determination of the effective date of the conforming tariff must be limited accordingly.

The tariff notice required by the Presiding Officer in this proceeding makes the effective date of the conforming tariff July 26, 1985. However, July 26, 1985 is 202 days before February 13, 1986, the date of filing of the application. Consequently, the earliest date the rate sought to be applied may become effective in this instance, is August 17, 1985, which is 180 days prior to the application filing date and the date the shipment at issue sailed from Elizabeth, New Jersey. The tariff notice must be amended accordingly.

THEREFORE, IT IS ORDERED, That in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Gulf/Mediterranean Ports Conference promptly publish in its tariff the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1411, that effective August 17, 1985, and continuing through August 21, 1985, the rate on Potato Chips: Per 40' container, is \$2,050.00, inclusive of all additional charges, and applies to Panama City, R.P. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have been shipped during the specified period of time.

⁸ *U.S. v. Sudivant*, 529 F.2d 673, 675-676 (3rd Cir. 1976); *Kalmitch v. Bruna*, 553 F.2d 549, 553 (7th Cir. 1977); *M.S. Chambliss v. Coca-Cola Bottling Corp.*, 274 F.Supp. 401 (E.D. Te. 1967); *U.S. v. So. Pac. Co.*, 210 F.Supp. 760 (N.D. Pa. 1962). The Commission denied claims for reparation brought under section 22 of the Shipping Act, 1916, 46 U.S.C. app. § 821, on the same ground: *U.S. Borax & Chem. Corp. v. Pac. Coast European Conf.*, 11 F.M.C. 451, 471 (1968); *Aleutian Homes, Inc. v. Coastwise Line*, 5 F.M.C. 602, 612 (1959).

⁹ Section 8(e)(3) specifically addresses refunds or waivers to be made to unidentified shippers of "other shipments." Were an application filed for their benefit, it would be subject to the 180-day limit.

¹⁰ Unlike the specific 180-day provision in section 8(e)(4), the non-discrimination provision in section 8(e)(1) is expressed in generic terms. A principle of statutory construction is that a specific provision of law takes precedence over a general provision. See 2A Sutherland, *Statutory Construction*, § 46.05 (4th Ed. 1984).

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission; and
FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1412

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF SEA-LAND SERVICE, INC. FOR THE BENEFIT OF FORWARDING SERVICES, INC. AS AGENT FOR PANA-YORK SHIPPING CORPORATION/FRITO LAY

Application for permission to waive the sum of \$1,746.69 granted.

Applicant had intended to maintain a rate on potato chips inclusive of additional tariff charges, until August 24, 1985, but its tariff publishing department mistakenly changed the rate on same-day notice, July 26, increasing the rate by adding the additional tariff charges. The short-notice rate increase subjected a shipment to increased costs.

The conforming, remedial tariff notice is allowed to be backdated to an effective date when the error first appeared in the tariff although such date is more than 180 days before the application was filed. This type of notice was permitted in a previous Commission decision which, because it offset the effects of a short-notice rate increase, was not overruled by the Commission in a later decision interpreting the 180-day period of limitation.

John J. Brennan for applicant Sea-Land Corporation.

INITIAL DECISION¹ OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Partially Adopted June 9, 1986

By application filed February 13, 1986, Sea-Land Corporation on behalf of Sea-Land Service, Inc., seeks permission to waive \$1,746.69 in freight in connection with a shipment of potato chips which Sea-Land carried from Elizabeth, New Jersey, to Panama City, Panama, on a ship sailing from Elizabeth on August 17, 1985. The requested waiver would ultimately benefit the shipper, Frito Lay, through its agent, Pana-York Shipping Corporation.

Sea-Land's supporting evidence is thorough and complete. It shows that Sea-Land had intended to maintain a rate of \$2,050 per 40-foot container, inclusive of all additional tariff charges, for shipments of potato chips to Panama, through August 23, 1986. This rate had been filed effective July 18, 1985, after negotiations had been held with a shipper. However, on July 25, Sea-Land's Americas Pricing Department instructed Sea-Land's Tariff Publications Department in New Jersey to change the rate by deleting the provision that the rate included additional charges, which provision

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).

was contained in Note 3 in the tariff. The change was supposed to become effective on August 24, 1985, i.e., on 30 days' notice. However, the Tariff Publications Department mistakenly advanced the effective date from August 24 to July 26, 1985. This mistake not only caused a short-notice rate increase but subjected the shipment of potato chips sailing on August 17 to unintended increases in costs totaling \$1,746.69. Because the Shipper paid freight under the unincreased rate, Sea-Land now seeks permission to waive this additional amount.

The evidence shows that an error occurred in Sea-Land's tariff on July 26, 1985, when Sea-Land's tariff personnel mistakenly advanced a rate change which was supposed to become effective August 24. Such error is remediable 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). The evidence also shows, as required by that law, that the application and the new, corrective tariff were filed timely, and there is no evidence that discrimination among shippers, carriers, or ports would result if the application is granted.³

The Conforming Tariff Notice

When special-docket applications are granted, it is customary to order applicants to file "an appropriate notice" in the tariff showing the rate on which the requested refunds or waivers are based. See section 8(e)(3) of the 1984 Act, 46 U.S.C. app. sec. 1707(e)(3). That provision of law indicates that this tariff notice will inform the public and help ensure that other affected shipments will be treated the same way as may be appropriate. However, the law at present appears to be unsettled with regard to the fixing of the effective date of the conforming rate in the tariff notice.

In *Application of Yamashita-Shinnihon for Nissho-Iwai*, 19 SRR 1407 (1980), the Commission held that the critical time period which is to be used when determining the effects of the grant of an application on similarly situated shippers "commences on the day the tariff omitting the intended rate becomes effective or on the day the intended lower rate would have become effective absent the mistake and terminates on the day before the effective date of the conforming tariff." 19 SRR at 1408. The day the tariff omitting the intended rate became effective in *Yamashita-Shinnihon* was January 1, 1979. The date of sailing of the shipment involved

² There were five additional tariff charges that Sea-land had intended to include in the base rate but, because of the error, would be assessed against the shipment. These are: bunker surcharge, Panama handling, delivery charge, container charge, and documentation charge. Except for the documentation charge (\$12.00), they would all be assessed against 56.875 measurement tons, the dimension of the shipment. The five charges total \$1,746.69. (See Exhibit No. 5, page 1.)

³ The application was filed on February 13, 1986, which is 180 days after date of shipment (sailing), which was August 17, 1985. The new, corrective tariff was filed to be effective on August 22, 1985. The application states that no other shipments were involved and that applicant has no information or evidence as to whether a grant of the application would result in discrimination among ports or carriers.

in that case was April 17, 1979, which was 173 days before the filing of the application (October 5, 1979). (See I.D., 22 F.M.C. 675 (1980).) The Commission held that it was wrong to backdate the relief only to the date on the bill of lading (April 12, 1979) and instructed the carrier-applicant to determine whether there were any other shipments of the subject commodity going back to January 1, 1979, "to ensure that such refund will not result in discrimination. . . ." (19 SRR at 1408.)

The decision in *Yamashita-Shinnihon* suggests that it would be proper to backdate a conforming tariff notice to the date the error first appeared in a tariff even if that date occurred as long as 277 days before the application was filed. (January 1 falls 277 days before October 5.) However, in SD 1102, *Application of U.S. Atlantic & Gulf-Jamaica Freight Association and Sea-Land for Chiquita*, 26 F.M.C. 605 (1984), the Commission denied an application which had sought relief for shipments of the same beneficiary shipper, which shipments had occurred more than 180 days before the filing of the application. The Commission held that the 180-day requirement was "jurisdictional" and limited relief to five shipments out of a total of 38 because the remaining 33 shipments fell outside the 180-day period. (See 26 F.M.C. at 606, 607.) The Commission distinguished previous decisions which had apparently permitted relief to such early shipments which had been shipped by shippers other than the beneficiary for whom the applications were originally filed. Such "relation back" was done in those cases, according to the Commission, for the purpose of "preventing discrimination among shippers." (See 26 F.M.C. at 606.)

Although it may not have been clear from the first Commission decision in SD 1102 as to whether the Commission could grant relief to early shipments of other shippers as opposed to early time-barred shipments of the same shipper-beneficiary, in its decision on reconsideration (27 F.M.C. at 135) the Commission appeared to have slammed the door on all shipments occurring earlier than the 180-day period regardless of who shipped them. Thus, on reconsideration, the Commission addressed the possibility that relief could be granted for other shippers having time-barred shipments by stating as to such other shippers, that "the Commission has concluded that we have no such power." (27 F.M.C. at 136.) Furthermore, as to the previous decisions suggesting such power, the Commission stated that "[t]o the extent those decisions conflict in part with the result in this case, they are overruled." (*Id.*)

It appears, therefore, that although the decision in *Yamashita-Shinnihon* would authorize relief and a corresponding conforming tariff notice backdated to the date an error first appeared in a tariff or the date the intended rate would have appeared in the tariff but for the error, the later decision in SD 1102 seems to hold that relief cannot be granted to any shipment occurring before the 180-day period and that a conforming

tariff notice cannot be backdated to the dates enunciated in *Yamashita-Shinnihon* if such dates fall earlier than the 180-day period.

The present case raises the problem of how to deal with the apparent discrepancy between *Yamashita-Shinnihon* and SD 1102. In the present case, the application was filed on February 13, 1986. The date of shipment (sailing) was August 17, 1985, which is 180 days before the filing date. Therefore, the shipment qualifies for relief. However, if I were to apply the *Yamashita-Shinnihon* decision, I would backdate the effective date of the tariff notice to July 26, 1985, the day the tariff omitting the intended rate became effective. But this date is 202 days before the filing of the application, and if the tariff notice contains such an effective date, theoretically it could apply to shipments occurring before the 180-day time period. However, other facts in this case permit a solution to the above problem.

One of the decisions in which the Commission had allowed the intended rate to relate back more than 180 days prior to the filing of the application was *PWC for the Benefit of Minnesota Mining & Manufacturing Co.*, 21 SRR 793 (1982). However, as the Commission explained in SD 1102 (26 F.M.C. at 606), in *Minnesota Mining* the carrier-applicant had not only committed a tariff-filing error but had increased the rate without giving the 30-days' notice required by law.⁴ The tariff notice was therefore allowed to extend back to offset the effects of the short-notice rate increase although technically the application was granted only for shipments falling within the 180-day period. (*Id.*)

The present case presents exactly the same situation as in *Minnesota Mining*. As Sea-Land concedes, on July 26, 1985, its Tariff Publishing Department increased the rate on potato chips on same-day notice.⁵ Therefore, if the conforming tariff notice is related back to July 26, 1985, in accordance with the *Yamashita-Shinnihon* decision, it will also offset the effects of the short-notice rate increase as was done in *Minnesota Mining*. Therefore, even if, technically, relief could not be granted for time-barred shipments occurring between July 26 and August 17, 1985, under the special-docket law, relief could be granted and the tariff notice could be related back to July 26 in accordance with *Minnesota Mining*, which, because it is based on a short-notice rate increase as well as a tariff-filing error, is not inconsistent with the decision in SD 1102.

For the foregoing reasons, the tariff notice which Sea-Land will be ordered to file will relate back to July 26, 1985.

⁴Section 8(d) of the Shipping Act of 1984, 46 U.S.C. app. sec. 1707(d), provides that "No . . . change in an existing rate that results in an increased cost to the shipper may become effective earlier than 30 days after filing with the Commission." The Commission has held under corresponding provisions of the 1916 Act that if such a rate change has been filed, the new rate will not be effective for the first 30 days. See *Petition of PWC and OOCL-Seapac Service for Declaratory Order*, 25 F.M.C. 723, 724-725 (1983); *E.I. Du Pont v. Sea-Land Service, Inc.*, 22 F.M.C. 525, 535 n. 9 (1980).

⁵ See Affidavit of Lorraine Majewski, Supervisor of Tariff Typists, fourth paragraph.

Instructions to Applicant

The application is granted provided that Sea-Land complies with the following instructions:

1. Sea-Land shall publish the following notice in an appropriate place in its tariff:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1412, that effective July 26, 1985, and continuing through August 21, 1985, the rate on Potato Chips: Per 40' container, is \$2,050.00, inclusive of all additional charges, and applies to Panama City, R.P. This Notice is effective for purposes of refund or waiver of freight charges on any shipments of the commodity described which may have been shipped during the specified period of time.

2. Sea-Land shall waive the sum of \$1,746.69 for the ultimate benefit of the shipper, Frito Lay, shall file the above tariff notice, shall adjust freight forwarder compensation, if necessary, and shall notify the Commission of the action taken within the time period prescribed by the Commission in its notice terminating this proceeding.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-4

FOUR WINDS INTERNATIONAL, INC. APPLICATION FOR A
LICENSE AS AN OCEAN FREIGHT FORWARDER

NOTICE

June 16, 1986

Notice is given that the time within which the Commission could determine to review the May 9, 1986, dismissal in this proceeding 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. 86-4

FOUR WINDS INTERNATIONAL, INC. APPLICATION FOR A
LICENSE AS AN OCEAN FREIGHT FORWARDER

MOTION TO DISMISS GRANTED

Finalized June 16, 1986

This case arose as a result of an application for a license to act as an ocean freight forwarder by Four Winds International, Inc. (FWI), and the Commission's Order of Investigation and Hearing served on January 31, 1986. The Order states that:

The Commission is unable, on the existing record, to conclude that FWI has the requisite character to perform forwarding services (p. 3)

and that:

. . . a formal investigation and hearing is instituted to determine whether Four Winds International, Inc., possesses the necessary character to be licensed as an ocean freight forwarder.

By Motion dated April 22, 1986, FWI indicates it has withdrawn its application for an ocean freight forwarder license and asks that this proceeding be dismissed. Hearing Counsel supports the Motion.

Wherefore, it is,

Ordered, that since the question presented by the Commission's Order of Investigation and Hearing, served January 31, 1986, is now moot, this proceeding is hereby dismissed.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-10

VOLGA FORWARDERS SERVICE, INC.—APPLICATION FOR AN
OCEAN FREIGHT FORWARDER LICENSE

NOTICE

June 16, 1986

Notice is given that the time within which the Commission could determine to review the May 6, 1986, discontinuance of the investigation in this proceeding has expired. No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-10

VOLGA FORWARDERS SERVICE, INC.—APPLICATION FOR AN
OCEAN FREIGHT FORWARDER LICENSE

APPLICATION DISMISSED

Finalized June 16, 1986

By letter, dated April 29, 1986, counsel for Volga Forwarders Service, Inc., the applicant for an ocean freight forwarder license, gave formal notice that the application was withdrawn.

Accordingly, the application is ordered dismissed, without prejudice.

(S) SEYMOUR GLANZER
Administrative Law Judge

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NOS. 1526(I) THROUGH 1531(I)—

A & A INTERNATIONAL

v.

KAWASAKI KISEN KAISHA, LTD.

ORDER REMANDING PROCEEDING

June 17, 1986

These informal complaints, filed on October 24, 1984 under sections 10(b)(1)–(3) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. §§ 1709(b)(1)–(3), allege overcharges on shipments which moved while the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. §§ 801–842, was still applicable to transportation in the foreign commerce of the United States.¹

A & A International (A & A) claims \$55,000, plus attorneys' fees, from Kawasaki Kisen Kaisha, Ltd. (K Line) for alleged freight overcharges arising from 30 shipments² transported by K Line from Japan and Hong Kong to several United States West and East Coast ports. K Line bills of lading indicate that these shipments occurred between May 9 and December 1, 1983. On March 7, 1986, Donald F. Norris (Settlement Officer) issued an Initial Decision (I.D.) in which he concluded that the two-year limitation in section 22 of the 1916 Act, 46 U.S.C. § 821 (1983), *amended* by 46 U.S.C. app. § 821 (1984), rather than the three-year limitation in section 11(g) of the 1984 Act, 46 U.S.C. app. § 1710(g), was applicable to the claims. The Commission determined to review the Settlement Officer's decision.

DISCUSSION

Upon review, we have decided to reverse the Settlement Officer's conclusion that the two-year statute of limitations found in the 1916 Act bars recovery on any claim based on a cause of action which occurred more than two years prior to October 24, 1984, the date upon which the claims were filed. We therefore will remand the proceeding for a decision on the merits. In taking this action, we acknowledge that the issue of whether the three-year statute of limitations contained in the 1984 Act can be applied to conduct which occurred while the 1916 Act was still in effect is a complex one. The Settlement Officer's conclusion that a statute of

¹ The Shipping Act of 1984 was enacted on March 20, 1984 and became effective June 18, 1984.

² The shipments were "Armaton" electronic toys, computer keyboards, power supply devices, toner for copiers, and computer parts.

limitations which bars the right as well as the remedy can not be applied retrospectively finds support in a number of cases. On the other hand, there exists another line of cases which have, under similar circumstances, applied an increased statute of limitations retrospectively, upon a finding that it would not deny the parties due process or otherwise result in manifest injustice. Although the Commission, contrary to the Settlement Officer, believes that the latter precedent represents the better view, we commend the Settlement Officer on his thoughtful analysis of this difficult issue.

Before directly addressing the issue presented here, it is useful to focus on the nature and purpose of statutes of limitation. The Supreme Court's observations in *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 314 (1945), are particularly instructive:

Statutes of limitation find their justification in necessity and convenience rather than in logic. They represent expedients, rather than principles. They are practical and pragmatic devices to spare the courts from litigation of stale claims, and the citizen from being put to his defense after memories have faded, witnesses have died or disappeared, and evidence has been lost. *Order of Railroad Telegraphers v. Railway Express Agency*, 321 U.S. 342, 349. They are by definition arbitrary, and their operation does not discriminate between the just and the unjust claim, or the avoidable and unavoidable delay. They have come into the law not through the judicial process but through legislation. [Footnote omitted] They represent a public policy about the privilege to litigate. Their shelter has never been regarded as what now is called a "fundamental" right or what used to be called a "natural" right of the individual. He may, of course, have the protection of the policy while it exists, but the history of pleas of limitation shows them to be good only by legislative grace and to be subject to a relatively large degree of legislative control.

In the absence of a statutory directive or legislative history to the contrary,³ a newly enacted statute may be applied retrospectively to conduct occurring prior to enactment unless it would deny due process to the parties⁴ or would result in "manifest injustice". Whether retrospective application of a statute would result in "manifest injustices" depends on three factors: (1) the nature and identity of the parties, (2) the nature of the parties' rights, and (3) the impact of the change in the law on those rights. *Bradley v. Richmond School Board*, 416 U.S. 696 (1974).

In determining whether retrospective application of a lengthened statute of limitations would deny due process or would result in "manifest injus-

³ The legislative history of the 1984 Act contains no expression of congressional intent to apply the two-year limitation in the 1916 Act in foreign commerce after the effective date of the 1984 Act.

⁴ "The Fourteenth Amendment does not make an act of state legislation void merely because it has some retrospective operation. What it does forbid is taking of life, liberty or property without due process of law. Some rules of law probably could not be changed retroactively without hardship and oppression, and this whether wise or unwise in their origin." *Chase Securities Corp. v. Donaldson*, 325 U.S. 304, 315 (1945).

“tice”, courts have drawn a distinction between statutes of limitation that simply bar a remedy and those that bar the right as well as the remedy. For example, in *Campbell v. Holt*, 115 U.S. 620 (1885), the Supreme Court found that the repeal of a statute of limitations applying to personal debts arising from a contract did not deny due process to a debtor, even though it revived a remedy previously barred by the former statute of limitations. The Court reasoned that although the running of the former statute of limitations created a valid defense to a suit under a contract, it did nothing to destroy or change the nature and character of the debtor’s contractual obligations. In other words, the running of the statute of limitations did not give the debtor the “right” to avoid his obligation to pay under the contract. Thus, the removal of the statute of limitations defense, which the Court characterized as a “purely arbitrary creation of the law”, did not result in a denial of due process.

In *William Danzer Co. v. Gulf R.R.*, 268 U.S. 633 (1925), the Court addressed the issue of whether an amendment to the Interstate Commerce Act increasing the statute of limitations from two to three years could revive a cause of action for overcharges which had been extinguished by the running of the two-year period at the time of the amendment. Unlike the situation in *Holt*, “[o]n the expiration of the two-year period, it was as if liability had never existed.” *Danzer*, 268 U.S. at 636. The Court stated that the three-year period could not be applied retrospectively because it would deprive the carrier of its property without due process of law.

Shortly after *Danzer*, the Interstate Commerce Commission applied the new, longer statute of limitations to claims which were *not* barred by the previous statute of limitations. *J.G. Curtis Leather Company v. Pennsylvania Railroad Company*, 123 I.C.C. 1, 3 (1927); *Sturges Company v. Alabama & Vicksburg Railway Co.*, 107 I.C.C. 136, 140 (1926). In *Curtis* and *Sturges*, the former statute of limitations had not extinguished the cause of action at the time the period of limitation was lengthened. Thus, the defendant-carrier had no vested right to immunity and retrospective application of the longer statute of limitations did not deny the carrier due process.

The Settlement Officer’s decision under review here relies in large measure on the distinction between “substantive” and “procedural” statutes of limitation. Because the statutes of limitation in both section 22 of the 1916 Act and section 11(g) of the 1984 Act have been viewed by the Commission as limiting the right as well as the remedy, the Settlement Officer reasoned that these sections must be viewed as “substantive” rather than “procedural”. Following a line of cases holding that a statutory modification pertaining to matters of substance can not be given retrospective effect, he concluded that the three-year statute of limitations contained in the 1984 Act could not be applied to the subject claims.

However, the distinction between "substantive" or "procedural" statutes of limitation is only helpful to the extent it resolves the ultimate question—whether the parties have vested rights which would be prejudiced by the retrospective application of a lengthened statute of limitations. To look only to the form of the statute of limitations without examining the rights of the parties and how those rights would be prejudiced by retrospective application of the lengthened statute of limitations elevates form over substance.

We believe that a better analysis of the issue may be found in cases such as *Friel v. Cessna Aircraft Company*, 751 F.2d 1037 (9th Cir. 1985). That case was brought under the Death on the High Seas Act, 46 U.S.C. § 761, after the decedent was killed in an airplane accident which occurred on July 23, 1980. At the time of the incident, the Death on the High Seas Act contained a two-year statute of limitations. 46 U.S.C. § 763. The two-year statute of limitations was subsequently repealed on October 6, 1980 and replaced with a three-year statute of limitations. The decedent's personal representative brought the action on October 18, 1982, more than two years after the accident. The defendant argued that the action was barred by the two-year statute of limitations in effect at the time of the crash. The court disagreed, stating:

. . . . [I]t is clear that the considerations militating against retrospective application of a statute are not present in this case. The legislative change in no way alters the effect given to conduct before the change. No conduct on the part of either party would have differed if the statute had been in effect at the time of the fatal incident.

* * * * *

The two-year time bar was not yet complete and the action was viable when the limitation period was lengthened to three years. Moreover, defendants had acquired no vested right to immunity from suit for their alleged wrong under § 763 when the limitation period was lengthened.

Despite the "substantive" form of the limitations in both section 22 of the 1916 and section 11(g) of the 1984 Act, retrospective application of the three-year limitation will have no effect on the rights of the parties. Prior to the enactment of the 1984 Act, a claim for overcharges, such as the one here, was governed by section 18(b)(3) of the 1916 Act. Although the 1984 Act repealed section 18(b)(3), the language of section 18(b)(3) was brought forward with no substantive change in sections 10(b)(1)–(3) of the 1984 Act. Overcharges were unlawful under the 1916 Act and remain unlawful under the 1984 Act.

When the 1984 Act became effective and the limitation period was lengthened, Respondent K Line had acquired no vested right to immunity for its alleged wrong under section 18(b)(3). The 1984 Act did not create

a cause of action that previously did not exist; it simply continued a cause of action which existed under the 1916 Act. Thus the application of the 1984 Act to the subject shipments cannot be said to deny the parties due process or otherwise result in manifest injustice. Accordingly, we believe that the three-year period of limitation contained in section 11(g) of the 1984 Act should govern the subject claims.

THEREFORE, IT IS ORDERED, That the Initial Decision issued in this proceeding is reversed to the extent it concludes that the two-year period of limitation contained in section 22 of the Shipping Act, 1916, bars any of the subject claims; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Settlement Officer for a decision on the merits.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-24

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL
RATE INCREASE OF 2.5 PERCENT BETWEEN UNITED STATES
PACIFIC COAST PORTS AND HAWAII PORTS

ORDER PARTIALLY ADOPTING INITIAL DECISION

June 26, 1986

This proceeding is before the Federal Maritime Commission (Commission or FMC) on Exceptions to the Initial Decision (I.D.) served April 30, 1986. Upon review, the Commission finds and concludes that: (1) Matson Navigation Company, Inc.'s (Matson) proposed rate increase is unjust and unreasonable and ordered cancelled, and (2) Matson's current rates are unjust and unreasonable to the extent they produce a rate-of-return in excess of 11.50 percent. A 1.5 percent overall reduction in rates is ordered.

PROCEEDING

The Commission initiated this proceeding by Order of Investigation and Suspension served December 30, 1985 (December Order) to determine whether a 2.5 percent overall rate increase filed by Matson, effective January 1, 1986,¹ is just and reasonable within the meaning of section 3 of the Intercoastal Shipping Act, 1933 (ISA), 46 U.S.C. app. §845, and whether Matson's currently effective rates are just and reasonable within the meaning of section 18(a) of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. §817.

The December Order suspended the proposed rate increase until June 30, 1986, the 180-day limit on proceedings under the ISA, and specified that the following issues be determined in this proceeding:

1. Has Matson properly projected its revenues, expenses and rate base for 1986?
2. Has Matson properly allocated its revenues, expenses and rate base between its Commission and non-Commission regulated services for 1986?
3. Are the business and financial risks faced by Matson greater or less than those faced by an average U.S. corporation? If so, should Matson's rate-of-return be adjusted? and

¹ Supplement No. 1 to Tariff FMC-F No. 14, Supplement No. 1 and 1st Revised Page 138 to Tariff FMC-F No. 15, Supplement No. 1 and 2nd Revised Page 56 to Tariff FMC-F No. 16 and Supplement No. 1 to Tariff FMC-F No. 17.

4. Are the current trends in rates of return and interest rates such that Matson's rate-of-return should be adjusted?

The proceeding was assigned for public hearing before an Administrative Law Judge. Matson was named Respondent. The State of Hawaii, Department of Commerce and Consumer Affairs (Hawaii), which had protested Matson's proposed rate increase, and the Commission's Bureau of Hearing Counsel (Hearing Counsel) were also made parties to the proceeding. The Saibot Corporation d/b/a Tobias Christmas Trees (Tobias) intervened in the proceeding. Hearings were held March 10-14, 1986 at the Commission's offices in Washington, D.C. The record of this proceeding consists of extensive written and oral testimony, legal briefs and proposed findings submitted by all parties.

Presiding Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued an I.D. which held that the proposed rate increase was unjust and unreasonable but that Matson's current rates were just and reasonable. Exceptions to the I.D. were filed by Hearing Counsel, Hawaii and Tobias. Replies to Exceptions were filed by Matson.

THE INITIAL DECISION

After analyzing the record evidence submitted by the parties, the Presiding Officer found and concluded as follows:²

Matson's cargo and overall revenue forecasts for 1986 are reasonable. Matson's forecasts have been historically accurate and the other parties have not shown any reasonable basis to find them unreliable in this case. However, Matson has over-estimated both its expenses and rate base for 1986 by: (1) forecasting an average fuel cost of \$22 per barrel when the correct average per barrel forecast for 1986 should be \$15 per barrel; and, (2) including in its rate base the *Matsonia*, which was removed from service in 1981, was not approved for reconstruction until 1985, and will not reenter the Hawaii service in 1986.

Matson computed its working capital in accordance with Commission regulations when it excluded inter-island barge voyages from the required calculations. Also, it properly calculated the amortization allowance on the leased vessel *Lurline*. Matson has an effective ongoing cost reduction program and is run in a prudent and relatively efficient manner.

Matson has properly allocated revenues, expenses and rate base between FMC-regulated and non-FMC-regulated services. It followed the cargo-cube basis of allocation required by Commission regulations. While this has resulted in a shift of high rated cargo to non-regulated service which, in turn, has resulted in a higher proportion of expense allocated to FMC-regulated cargo, the other parties to the proceeding have not shown this

²The Presiding Officer also advised that the methodology issues specified by the Commission had to be decided on a sparse evidentiary record due to the time restraints imposed by the December Order. He suggested that the Commission may wish to remand the proceedings on these methodology issues as they apply to the reasonableness of Matson's present rates.

result to be so aberrational as to warrant a departure from the cargo-cube allocation method.

Matson is less, and not more, risky than the average U.S. corporation. Matson's "variability of earnings" statistical test of risk and an erosion of its market share due to increased competition indicate higher than average risk. However, Matson still dominates the Hawaii trade, is the "rate leader" among its competitors and has steadily increased its total trade revenues. Its recent earnings performance indicates that, at least in the near future, it is probably less and certainly no more risky than the average U.S. corporation. However, because the evidence does not establish to what degree Matson is less risky, no downward adjustment to its rate-of-return is warranted.

Both prevailing rates of return and interest rates have shown a downward current trend. Rates of return peaked in 1980 and have trended downward since that time. Interest rates are at their lowest level in eight years. However, there is insufficient evidence of record to quantify a downward adjustment and therefore none will be required.

The appropriate benchmark rate-of-return for 1986 is 11.56 percent. This is calculated by an examination of the mean rates of return on average total capital by *Value Line Investment Survey* for the 15-year period ending in 1984. This is one of the benchmark analyses proffered by Matson in accordance with the applicable Commission regulations, Part 552, Title 46, Code of Federal Regulations (G.O. 11). Hearing Counsel agrees with this methodology but would find an 11.5 percent benchmark using Bureau of Census *Quarterly Financial Reports* for the 5-year period ending in 1984 after an appropriate adjustment for embedded debt. Hawaii urges a departure from G.O. 11 but has failed to make a sufficient showing that G.O. 11 produces aberrational results to warrant such a departure.

After making appropriate adjustments for the elimination of the *Matsonia* from its rate base and employing an average fuel cost of \$15 per barrel, Matson's projected rate-of-return for 1986 is 12.19 percent without a rate increase. This is calculated by dividing the sum of projected total net income without a rate increase plus interest expense, \$28,074,000, by the rate base, \$230,276,000.

The difference between the unadjusted benchmark of 11.56 percent and Matson's adjusted projected rate-of-return without the rate increase of 12.19 percent is within the "zone of reasonableness." Accordingly, in light of the above findings, Matson's proposed rate increase would be unjust and unreasonable, but Matson's current rates are not unjust or unreasonable.

POSITIONS OF THE PARTIES

Hawaii

Hawaii agrees with the findings of the Presiding Officer in all major aspects and does not take specific exception to the I.D. Hawaii is in

accord with the determination that Matson's proposed rate increase is unjust and unreasonable.

Hawaii further believes, however, that Matson's current rates are also unjust and unreasonable. Accordingly, Hawaii supports the recommendation of the I.D. that the Commission remand the case to the Presiding Officer. However, it argues that, given the present record, the remand should take the form of a show cause proceeding placing the burden on Matson to prove its present rates just and reasonable. Specifically, Hawaii would have Matson show: (1) why inter-island barge movements should not be included in the computation of working capital; (2) why the capitalization of leased vessels that are refurbished by Matson should not be amortized beyond the lease term to the actual useful life of the asset; (3) why the Commission should not depart from the requirements of G.O. 11 in allocating revenues, expenses and rate base between FMC-regulated and Interstate Commerce Commission (ICC)-regulated service; and, (4) why downward adjustments to the benchmark rate-of-return should not be made in light of the Presiding Officer's findings of Matson's less than average risk and a declining cost of money.

Tobias

Tobias also agrees that the I.D. was correct in finding Matson's proposed rate increase unjust and unreasonable. However, it excepts to the failure of the Presiding Officer to make a downward adjustment to the benchmark rate-of-return on the basis of downward trends in average rate of return and the cost of money as well as Matson's relative risk. Alternatively, Tobias argues that the proceeding should be reopened on this issue.

Additionally, Tobias excepts to the findings that there is insufficient evidence of abuse of G.O. 11 methodologies by Matson to warrant departure from the established criteria in that regulation. Specifically, Tobias argues that Matson abused G.O. 11 requirements by: (1) improperly allocating revenues, expenses and rate base between FMC-regulated and non-FMC-regulated cargo; (2) including the *Matsonia* in the rate base; and (3) filing data allegedly inconsistent with the historical 1985 data filed in 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*, 23 S.R.R. 155, 171 (I.D. 1985). These alleged abuses are argued to be a manipulation of evidence that produces unfair and unreasonable results.

Finally, Tobias excepts to the finding that there exists a "zone of reasonableness" within which Matson's current rate-of-return falls. Tobias argues that there is no basis in the record to construct a "zone of reasonableness" beyond 11.56 percent and, accordingly, submits that it was error to find Matson's present rates just and reasonable.

Hearing Counsel

Hearing Counsel agrees with the Presiding Officer that Matson is not entitled to any upward adjustment to the benchmark rate-of-return based upon the record of this case. Hearing Counsel also supports the Presiding Officer's calculation of Matson's projected 1986 rate-of-return without a rate increase at 12.19 percent. Because Matson's rate-of-return exceeds both Hearing Counsel's proposed 11.5 percent benchmark and the Presiding Officer's finding of an 11.56 percent benchmark, Hearing Counsel concurs in the I.D.'s conclusion that no rate increase is justified.

However, Hearing Counsel contends that the Presiding Officer erred in adopting Matson's proposed 11.56 percent benchmark rate-of-return for 1986 because it is allegedly based upon a methodology previously considered and rejected by the Commission. Hearing Counsel submit that the proper benchmark is 11.50 percent, calculated in accordance with Commission precedent on point. Hearing Counsel also takes exception to the Presiding Officer's conclusion that the difference between the 11.56 percent unadjusted benchmark and Matson's projected 1986 rate-of-return of 12.19 percent is within a "zone of reasonableness." Accordingly, Hearing Counsel challenges the I.D.'s finding that Matson's current rates are just and reasonable. Hearing Counsel urges the Commission to adopt the 11.50 percent benchmark rate-of-return and to order Matson to roll back its current rates to achieve that level of profit.

Matson

Matson argues that because Hawaii did not file formal exceptions to the findings of the I.D., it has waived any right to request modifications to the Presiding Officer's conclusions. Matson further contends that, in any event, a remand to establish new G.O. 11 methodologies cannot be ordered in this case because: (1) the Commission must conclude this proceeding within the 180-day limit set by the ISA, and (2) the underlying determinations concerning the proposed rate increase are dispositive of and, therefore, *res judicata* as to the reasonableness of Matson's current rates. The only options allegedly available to Hawaii at this point are to initiate a separate complaint proceeding or to petition for a rulemaking. Matson states that, under either alternative, the burden of proof on the methodology issues would be on Hawaii, not Matson.

Matson further argues that no valid reason has been shown to require any downward adjustment to the benchmark rate-of-return established in the I.D. The record allegedly supports the findings that Matson followed G.O. 11 and that the results of its methodologies are not unfair or unreasonable.

Matson argues that the Presiding Officer was correct in finding an 11.56 percent benchmark and that the difference between this figure and Hearing Counsel's 11.50 percent figure is *de minimis*. Matson's use of a 15-year period, rather than Hearing Counsel's 5-year period, to calculate an average

rate-of-return of comparable U.S. corporations, is allegedly a more reliable methodology. Matson believes that a 5-year average is overly susceptible to unrepresentative variation due to aberrational years within that short period.

Matson supports the Presiding Officer's finding concerning a "zone of reasonableness" between 11.50 percent and 12.19 percent. Matson maintains that the 11.50 percent figure cannot be used as the "ceiling" on the "zone" because Matson was entitled to upward benchmark adjustments on the basis of comparative risk. Matson also argues that there is insufficient evidence to support a downward adjustment based upon declining average rates of return.

DISCUSSION

The Proposed Rate Increase

The Commission agrees with the Presiding Officer's finding that Matson's proposed rate increase has been proven to be unjust and unreasonable. Indeed, Matson did not file exceptions to the findings of the I.D. and all other parties unanimously support the I.D. The Commission therefore adopts this portion of the I.D.

Matson's Current Rates

The Presiding Officer's calculation of Matson's 12.19 percent projected rate-of-return for 1986 follows G.O. 11 methodology. Notwithstanding Tobias' Exceptions to the contrary, the evidence of record does not warrant a departure from the criteria established in that regulation. Accordingly, the Commission adopts the finding that 12.19 percent is the most accurate projection of Matson's rate-of-return for 1986.

The Presiding Officer's calculation of an 11.56 percent benchmark rate-of-return presents a more difficult issue. The gist of the Exceptions to the Presiding Officer's methodology is that the allowable benchmark for Matson should be reduced below 11.56 percent and that Matson's rates should be reduced by the Commission. The theories presented by Hawaii, Tobias and Hearing Counsel in their Exceptions are all conceptually creditable. However, only Hearing Counsel has produced substantial evidence of record that the Commission deems sufficiently precise and persuasive to warrant finding a benchmark below the 11.56 percent rate-of-return found by the Presiding Officer.

Hearing Counsel urges that Matson's rate-of-return be limited to 11.50 percent for 1986. In calculating a benchmark, the principal difference between Hearing Counsel's methodology and that apparently used by the Presiding Officer (in arriving at 11.6 percent) is the historical period used to determine the average rate-of-return for comparable U.S. businesses. The Presiding Officer apparently adopted Matson's approach which considered a 15-year period ending in 1984 utilizing data reported in *Value*

Line Investment Survey.³ Hearing Counsel urged the use of a five-year historical average ending in 1984 based upon the Bureau of Census *Quarterly Financial Reports*.⁴

Hearing Counsel's method is supported by the standards established by the Commission in *Sea-Land Service, Inc. et al.; Proposed General Rate Increase in the Puerto Rico and Virgin Islands Trades*, 24 F.M.C. 164 (FMC 1981), *aff'd sub nom., Puerto Rico Maritime Shipping Authority v. F.M.C.*, 678 F.2d 327, 21 S.R.R. 859 (D.C. Cir. 1982), *cert. denied*, 459 U.S. 906 (1982) (*Sea-Land*). As noted by the Presiding Officer when rejecting the methodology suggested by Hawaii, *Sea-Land* is the primary authority for resolving methodology disputes in ISA rate cases. We find no sufficient basis in the record to depart from the methodology established in *Sea-Land* for arriving at a benchmark rate-of-return. Not only has this methodology received judicial approval but it also has proven objective and reliable in application.⁵ Hearing Counsel's suggested 11.50 percent benchmark will therefore be adopted.

The Commission adopts the Presiding Officer's findings that no upward adjustment in the benchmark rate-of-return is justified to account for: (1) the relative business and financial risks faced by Matson; and (2) current trends in rates of return and the cost of money. Both findings are amply supported by the record. Indeed, neither finding was challenged by Matson in exceptions.

Having concluded that the appropriate benchmark rate-of-return is 11.50 percent, the Commission must disagree with the Presiding Officer's finding that Matson's 12.19 percent projected rate-of-return is within a "zone of reasonableness" between 11.50 percent and 12.19 percent. This conclusion is not explained in sufficient detail to allow determination as to how it was calculated and whether it is based upon "substantial evidence of record."⁶ On its face, the Presiding Officer's conclusion that Matson's 12.19 percent rate-of-return is within a "zone of reasonableness" appears to be inconsistent with his underlying findings that: (1) no upward adjustment to the benchmark rate-of-return is warranted in this case; and, (2) if better quantified on the record, downward adjustments would be warranted.

The Presiding Officer's reliance on a "zone of reasonableness" also suggests a misuse of the concept. The "zone of reasonableness," as that term has been defined by the Supreme Court, designates a decisional area of discretion between minimum non-confiscatory rates and the maximum

³I.D. 28 F.M.C. 459 at 495.

⁴I.D. at 496.

⁵Debate over the appropriate data base and time period for determining benchmark rate-of-return invariably consumes an inordinate portion of time in Commission rate cases. Accordingly, the Commission intends that, absent a showing of overriding considerations to the contrary, *Sea-Land* be followed on methodology issues in order to save time and resources in ISA rate cases. See, *Airmark Corp. v. F.A.A.*, 758 F.2d 683, 691-692 D.C. Cir. 1985).

⁶See I.D. at 497.

reasonable level of rates supportable by the record. *F.P.C. v. National Gas Pipeline Co.*, 315 U.S. 575, 585 (1942). In order to establish a "zone of reasonableness" it is necessary to define the upper limit of the "zone"—the maximum level of rates. It was the Commission's intention in promulgating G.O. 11 that the benchmark rate-of-return, adjusted according to the requirements of 46 C.F.R. § 552.6(d)(2)(ii), represents this upper limit. Because the purpose of this proceeding was to determine the *maximum* reasonable limit of Matson's rate increase and/or existing rates, there is no need to establish a "zone of reasonableness." The Commission's ultimate responsibility in this case is to establish Matson's maximum allowable rate-of-return. We find that maximum to be 11.50 percent in 1986. On this basis, we conclude that Matson must implement an overall rate reduction of 1.5 percent.⁷

It has been suggested that the Commission remand the proceeding to the Presiding Officer to take further evidence on certain methodology issues noted in the I.D. and specified by the Exceptions. Hawaii and Tobias argue that they should be given another opportunity to quantify downward adjustments to the benchmark rate-of-return based upon: (1) the relative risk faced by Matson; and (2) the current trends in rates of return and the cost of money. While the Commission appreciates the difficulty in resolving these issues in the 180 days allowed by the ISA, the Commission finds the present state of the record adequate to make a final decision. Accordingly, it will not order a remand of the proceeding. Further refinement of the record is *always* possible in a rate case. However, there is no suggestion that the parties have been deprived of their due process rights. Accordingly, the general public benefit in promptly disposing of this rate case outweighs the apparently marginal benefit to the record a remand would produce.

Similarly, the proceeding will not be remanded to explore modifications to G.O. 11. In the context of a particular proceeding the record must show clearly unreasonable or aberrational results in applying established methodology to warrant a departure from the regulation.⁸ In this case Matson generally followed the minimum requirements of G.O. 11. In those areas where novel issues were raised, there was not a sufficient showing of aberrational results or more appropriate alternatives to warrant the appli-

⁷ To achieve a return on rate base of 11.50 percent, Matson's net income after tax would have to be reduced to \$17,358,000. Based upon an imputed effective tax rate of 47.62 percent this computes to net income before taxes of \$33,139,000. This in turn requires a reduction of total revenue to \$198,939,000, a 1.505 percent revenue reduction. See Ex. PHC-2 (revised) at 5. The Commission recognizes that there does not exist a precise direct mathematical correlation between a percentage adjustment in Matson's freight rates and a percentage adjustment in its revenues. A slight differential exists due to Matson's rate structure and other income sources in the trade. See, Ex. R-3, "Test Year" at 11, Testimony at 7. However, the differential is smaller than one-tenth of one percent.

⁸ I.D. at 473-475.

cation of different methodologies.⁹ The Commission's experience with rate cases has shown that further proceedings on these issues in this case would be quite laborious and time-consuming and would not result in definitive and generally applicable solutions to these technical methodology problems.

A fairer and more appropriate method of reevaluating existing interpretations of G.O. 11 is by a separate rulemaking proceeding. This approach is also more compatible with the Congressional intent underlying the 1978 amendments to the ISA.¹⁰ G.O. 11 must serve as a set of guidelines for determining rate-of-return reasonableness that all interested parties may rely on in a rate proceeding.¹¹ While periodic review of the regulation is required under the statute,¹² it is more appropriate to do so in the context of an industry-wide rulemaking proceeding wherein all affected interests may participate, not just those parties involved in a particular case.¹³ The Commission is giving consideration to the initiation of a rulemaking proceeding on the issues noted by the Presiding Officer and on other selected G.O. 11 provisions.

Moreover, any benefit to ratepayers resulting from potential further downward adjustments in the benchmark rate-of-return or modifications to G.O. 11 methodology will largely be offset by the necessary delay in effecting any additional rate roll back resulting from the hearing and review process on remand.

The Commission therefore adopts the I.D. modified to the extent required by the Exceptions of Hearing Counsel, and orders Matson to roll back its rates 1.5 percent to produce a projected rate-of-return of 11.50 percent for 1986. This comports with the overall weight of evidence of record, Commission precedent and the Congressional sentiment that rate proceedings be decided with dispatch.

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

IT IS FURTHER ORDERED, That the Initial Decision is adopted to the extent it is consistent with this Order and is modified to the extent required by this Order; and

IT IS FURTHER ORDERED, That the Exceptions of the State of Hawaii and the Saibot Corporation are denied to the extent they are inconsistent with this Order; and

IT IS FURTHER ORDERED, That, within ten (10) days of the date of service of this Order, Matson Navigation Company, Inc. file immediately effective supplements to its Tariffs FMC-F Nos. 14, 15, 16 and 17:

⁹ See I.D. at 477-478 (computation of working capital), 484-486 (allocations between FMC-regulated and ICC-regulated service).

¹⁰ Pub. L. No. 95-475; 92 Stat. 1496 (1978).

¹¹ S. Rep. No. 1240, 95th Cong., 2d Sess. 13 (1978).

¹² See 46 U.S.C. app. 845(a).

¹³ See supra note 11.

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL 455
RATE INCREASE OF 2.5

1. cancelling the proposed 2.5 percent overall rate increase filed November 15, 1985 and any other proposed overall rate increase filed during the course of this proceeding; and
2. implementing a 1.5 percent overall reduction in rates; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.¹⁴

(S) JOHN ROBERT EWERS
Secretary

¹⁴Commissioner Thomas F. Moakley's concurring and dissenting opinion is attached.

Commissioner Moakley, concurring and dissenting

I concur in the majority's conclusion that Matson's proposed 2.5 percent rate increase is unjust and unreasonable. However, I believe it is equally unreasonable for the Commission to order the carrier to reduce its current rates because the projected rate of return is viewed as less than seven-tenths of one percent too high.

Ratemaking is not an exact science.¹ When the mosaic of reasonableness includes revenue and expense *projections*, *average* return on capital for other industries over time, *comparable* risks and current *trends*, a difference of seven-tenths of one percent in rate of return is an inappropriately fine line to draw.

The overriding principle in adjudicating the reasonableness of domestic offshore rates is that we reach a fair and reasonable result.² It is not the methodology employed, but the result reached which is controlling.³ Here, the majority would apply a methodology which is generally reasonable to reach a result which is not.

Matson is unquestionably an efficient carrier. In this very case, the majority adopts the following finding of the Administrative Law Judge:

Matson has an effective ongoing cost reduction program and is run in a prudent and relatively efficient manner.

(Majority order, p. 447)

Because of this, Matson's profitability has been increasing while its rates have remained remarkably stable, increasing by only 2.5 percent since 1982. A review of tariffs on file with the Commission will demonstrate that Matson's rates on most leading commodities are substantially lower than those available to shippers in the Atlantic Coast/Puerto Rico trade⁴ where the distance is roughly one-half of that to Hawaii.

To measure the reasonableness of rates, the Commission has chosen to focus primarily on the rate of return that those rates produce for a particular carrier. This traditional ratemaking standard has the advantage of being objective and fairly easy to apply, but could easily result in a finding that identical rates are reasonable for one carrier, but unreasonable for a more efficient competitor. The obviously undesirable side effects of rate of return methodology are recognized and accommodated by the Commission's rules which read, in pertinent part:

(b) The methodology employed in each case will depend on the nature of the relevant carrier's operations and financial structure.

¹ *Sea-Land Service Inc.—Increases in Rates in the U.S. Pacific Coast/Puerto Rico Trade* 15 F.M.C. 4, 9-10 (1971).

² 46 C.F.R. §551.1.

³ *Federal Power Commission v. Hope Natural Gas Co.* 320 U.S. 591, 602 (1944).

⁴ *Matson Navigation Co.*, Tariff FMC-F No. 15, Items 3000, 2066, 2000, 50, 55, 60, 1052, 2076, 115, 1196 and 1030; *Puerto Rico Maritime Shipping Authority*, Tariff FMC-F No. 9, Item 3960; *Sea-Land Service Inc.*, Tariff FMC-F No. 61, Item 1000.

In evaluating the reasonableness of a VOOC'S overall level of rates, the Commission will use return on rate base as its primary standard. *However, the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result.*

(c) In evaluating the reasonableness of a carrier's rates, the Commission may consider, in addition to the rate of return of the filing carrier, *the effect which approval or disapproval of the rates will have on other carriers in the Trade.*

(d) The Commission reserves to itself the right to employ other bases for allocation and calculation and *to consider other operational factors in any instance where it is deemed necessary to achieve a fair and reasonable result.* (emphasis supplied)⁵

As applied in this case, the rate of return methodology suffers from at least two additional shortcomings. First, the benchmark rate of return is constructed from a period of five years ending in 1984. Since then, the world has experienced a dramatic drop in the cost of oil, which is the primary reason for the significant increase in Matson's projected profitability for 1986. The earnings of the comparable companies (i.e. the benchmark rate of return) do not reflect this energy cost reduction and the consequent increase in profitability. In other words, if we could construct a benchmark rate of return for 1986, it would almost certainly be higher than 11.5 percent, reflecting the effect of oil cost reductions on the comparable companies. If we fail to account for this significant change on *both* sides of the comparison, we are not adhering to one critical element of the comparable earnings test as articulated in *Bluefield Waterworks and Improvement Co. v. Public Service Commission of West Virginia* 262 U.S. 679, 692 (1923). Under that standard, earnings should be permitted that are

equal to that generally being made *at the same time* and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties. (emphasis supplied)

Second, as argued by Matson the comparable earnings test has evolved into a formula for determining the *average* return for a wide spectrum of companies over a period of several years. Included in this average are extraordinarily good years and unusually bad ones, efficient companies and incompetent ones. This *average* is then used as a *maximum* allowable rate of return for the regulated carrier.

Obviously, if the carrier is never allowed to earn higher than the average return of other companies, the carrier's average return over time will necessarily be lower than that of the comparable companies, because of inevitable fluctuations in profitability over time. The record supports this syllo-

⁵ 46 C.F.R. s552.1.

gism by indicating that Matson's average rate of return for the period 1975-1984 was 9.48 percent while the average of the comparable industries was approximately 11.5 percent.⁶

In earlier Matson rate proceedings, the Commission implicitly recognized this flaw in the comparable earnings test by adjusting the benchmark rate of return upward to account for the increased risk of the regulated carrier. Without explanation, the majority has abandoned this approach and, instead adopted the Administrative Law Judge's finding that

Matson's risk is probably less and certainly no worse than equal to that of the average U.S. corporation.⁷ I.D. at 490

This conclusion ignores a very basic difference between a regulated carrier and the "average U.S. corporation. The latter is able to make up for bad years with extraordinarily profitable ones. The former is not.

I would adjust the benchmark rate of return upward by one percent to account for the increased risk inherent in a regulated carrier and find Matson's current rates just and reasonable.⁸

⁶ Exhibit R-7, schedule 8.

⁷ This finding rests in large part upon the testimony of Commission staff economists who also supported a one percent risk premium for Matson in earlier proceedings (e.g. Docket No. 85-3). Their change in position in this proceeding seem inexplicably to be linked to Matson's large market share, which everyone agrees has been steadily *shrinking* for the past decade. It is also noteworthy that the concept of market contestability, much discussed in international liner shipping, has not been injected into this type of domestic rate proceeding, where it would seem to have significant applicability.

⁸ In view of this position, it would be unnecessary to remand the proceeding to develop evidence on the appropriate adjustment to the benchmark rate of return to accommodate the dramatic drop in energy costs in 1985-1986.

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-24

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL RATE INCREASE OF 2.5 PERCENT BETWEEN UNITED STATES PACIFIC COAST PORTS AND HAWAII PORTS¹

It is held:

1. Where the Federal Maritime Commission issues a regulation containing methodology guidelines in compliance with a Congressional mandate to do so, and where the regulation within its terms provides the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result and that the Commission reserves to itself the right to employ other bases for allocation and calculation and to consider other factors in any instance where it is deemed necessary to achieve a fair and reasonable result, the Commission on a showing of unfairness or unreasonableness may depart from specific methodologies set forth in the regulation and may adopt any methodology that produces a fair and reasonable result without giving prior notice to carriers. Here, the record does not establish that the carrier's use of methodologies set forth in the regulation is unfair or unreasonable and those methodologies must be followed.
2. Matson, generally, properly projected its revenues, expenses and rate base for 1986. However, where a vessel, the *Matsonia*, was not used in the Trade since 1981 and would not be used in the test year 1986 ratepayers should not be required to pay for its use and it should be excluded from the rate base. Further, Matson's projected fuel costs of \$22 per barrel is overstated. Based on the evidence of record, the average price of fuel for Matson in 1986 is \$15 per barrel. Consideration of some of the evidence which was the result of recent, sudden and dramatic changes in the oil market was both necessary and warranted since it was bound to affect the estimate made by Matson.
3. Where a carrier expends monies to modify a vessel it originally leased for 25 years and amortizes the cost of the modification over the remaining life of the lease (16 years) in accordance with accepted accounting principles; and where the protestant does not establish that the vessel's useful life has been extended and that it will be available to be used in the Trade for a period longer than the remaining life of the lease, it is held the carrier's treatment of amortization is proper.
4. Where a carrier allocates expenses between its Commission and non-Commission regulated services using the cargo-cube method, which method was adopted in the Commission's regulation after in depth consideration of other methods, and where the evidence in the record fails to prove that the use of the cargo-cube method was unfair or unreasonable, the use of such method is not improper.
5. Where the evidence shows an increase in competition in the Trade, but where such increase is minimal and does not affect the carrier's dominant position in the Trade where it retains over a 70 percent share of the Trade and is the leading ratemaker, the carrier's business is not more risky than the majority of the Value Line (test) companies and no upward adjustment to the benchmark rate of return for current trends in relative risk is warranted. Further, in this case, where the regulation allows an adjustment for "current trends in relative risk," the use of a 15 year historical average

¹ Matson reduced its proposed rate increase to 1 percent after the proceeding began.

to determine the variability of past earnings as a measure of current trends in relative risk is questionable.

6. Based on the record in this proceeding where no party offers evidence in support of a specific adjustment, no adjustment to the benchmark rate of return is warranted for current trends in rates of return.
7. Where the Commission regulation provides for an adjustment to the benchmark rate of return for current trends in the cost of money (interest rates), and where the evidence of record clearly establishes a dramatic decline in interest rates, the carrier's use in this case of a 15 year period to establish an average interest rate from which it produces an upward adjustment has the effect of unduly distorting the "current trend" and no upward adjustment is warranted. Further, since no party recommended or presented evidence supporting a specific downward adjustment none can be made.
8. Based on the evidence of record the allowable rate of return is between 11.5 and 12.5 percent. Consequently, it is held that the 1 percent increase sought by Matson is excessive and that the present rates are not unfair or unreasonable.

David F. Anderson, Meredith N. Endsley and George D. Rives for Matson Navigation Company, respondent.

William W. Milks for the State of Hawaii, protestant.

Tobias E. Seaman for The Saibot Corporation, d/b/a Tobias Christmas Trees, intervenor.

Aaron W. Reese and Alan J. Jacobson, as Hearing Counsel.

INITIAL DECISION² OF JOSEPH N. INGOLIA, ADMINISTRATIVE LAW JUDGE

Partially Adopted June 26, 1986

This proceeding began as a result of the issuance of the Commission's Order of Investigation and Suspension, served on December 30, 1985. Generally, the Commission ordered:

That pursuant to the authority of sections 18(a) and 22 of the Shipping Act, 1916 (46 U.S.C. app. §§ 817 and 821) and sections 3 and 4 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. §§ 845 and 845a) an investigation is instituted to determine whether the rate increase of 2.5 percent is just and reasonable.³
and further:

That pursuant to sections 18(a) and 22 of the Shipping Act, 1916 (46 U.S.C. app. 817 and 821) an investigation is instituted to determine whether the rates stated in the above named Matson tariffs are just and reasonable without the proposed 2.5% rate increase.

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

³ On November 15, 1985, Matson Navigation Company, Inc. (Matson) filed amendments to its Tariffs, FMC-F Nos. 14, 15, 16 and 17 proposing an overall increase of 2.5 percent on all rates and charges moving in its Pacific Coast/Hawaii trade (except on household goods or personal effects), effective January 1, 1986.

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RATE INCREASE OF 2.5

The Commission Order notes that the State of Hawaii, through its Department of Commerce and Consumer Affairs had filed a protest urging the rejection or suspension and investigation of Matson's increase. It names the State of Hawaii as a party to the proceeding as well as Matson and the Bureau of Hearing Counsel. The Saibot Corporation (Tobias) is also a party.⁴

In addition to the general issues set forth above the Commission's Order requires:

That in determining the fair rate of return for Matson the following issues shall be addressed:⁵

1. Has Matson properly projected its revenues, expenses and rate base for 1986?

2. Has Matson properly allocated its revenues, expenses and rate base between its Commission and non-Commission regulated services for 1986?

3. Are the business and financial risks faced by Matson greater or less than those faced by an average U.S. corporation. If so should Matson's rate of return be adjusted? and

4. Are the current trends in rates of return and interest rates such that Matson's rate of return should be adjusted?

The Commission Order also requires that this Initial Decision be submitted by April 30, 1986, and indicates that the final decision of the Commission shall be issued by June 27, 1986.⁶ In addition, the Commission, pursuant to the authority of section 3 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 845), suspended the proposed 2.5 percent rate increase to June 30, 1986.⁷

Prior to the hearing in this proceeding the parties engaged in a series of settlement negotiations, none of which were successful. Also, prior to the hearing Matson indicated that it was cancelling 1.5 percent of its proposed 2.5 percent rate increase "based on the decline in the price

⁴After the issuance of the Commission's Order The Saibot Corporation d/b/a Tobias Christmas Trees filed a Petition to Intervene in this proceeding. The Petition (Motion) was granted by Order served on January 24, 1986.

⁵Public Law 95-475, which amends the Intercoastal Shipping Act of 1933, requires the Commission to set forth the specific issues involved. Section 3(a) of the 1933 Act states:

The Commission shall not order a hearing pursuant to this subsection . . . unless the Commission publishes in the FEDERAL REGISTER the reasons, in detail, why it considers such a hearing to be necessary and the specific issues to be resolved by such hearing.

See Sen. Report No. 95-1240, 95th Cong., 2d Sess., September 26, 1978, at 1-2, 13.

⁶Section 3(b) of the Intercoastal Shipping Act of 1933 generally requires that where a rate increase is requested and the Commission orders a hearing concerning the lawfulness of such rate, a final decision will be issued within 180 days of the time the rate first goes into effect or if suspended when the rate would otherwise have gone into effect.

⁷Commissioner Moakley concurred with the majority of the Commission that Matson's current rates should be investigated under section 18(a) of the Shipping Act, 1916 (46 U.S.C. app. § 817). However, he dissented with that portion of the Order which suspended Matson's 2.5 percent increase.

of bunker fuel."⁸ At the hearing the written direct testimony of various witnesses which had previously been submitted was placed into evidence as was written rebuttal. Various witnesses also testified on cross-examination and additional documentary evidence was entered into the record.

Findings of Fact

It should be noted at the outset that, despite repeated attempts to secure a comprehensive joint stipulation of facts from the parties, time strictures apparently prevented the presentation of such a stipulation. Instead, the record contains only a sketchy and relatively useless statement of certain facts which are agreed and fails to address the bulk of documentary evidence placed into the record, much less the factual oral testimony given. Indeed, even in the briefs, referenced findings of fact are not adequately set forth. As a result the facts enumerated below have been found without the aid a well-prepared stipulation may have given. In some rare instances the general nature of the fact found is based on overall consideration of the entire record rather than on one particular document or statement and in those instances complete specific record references may not be given. It should be noted that reference to documentary exhibits in this proceeding are as follows:

Party	Exhibit No.
Matson	R-1 et seq.
State of Hawaii	PH-1 et seq.
Tobias	PT-1 et seq.
Hearing Counsel	PHC-1 et seq.

1. The Respondent, Matson Navigation Company, Inc. (Matson), is a wholly-owned subsidiary of Alexander & Baldwin, Inc., a Honolulu based diversified company whose principal activities, other than ocean transportation, are agriculture, property development, trucking and storage. Matson is the sole owner of Matson Terminals, Inc., Matson Freight Agencies, Inc. (parent of Matson Agencies, Inc.), and Matson Services Company, Inc. (Ex. R-2, p. 2).

2. Matson has served in the United States Mainland/Hawaii trade since 1882. It presently provides ocean transportation between the Pacific Coast and Hawaii, and between those ports and ports in the Western Pacific Trust Territory and Johnston Island (Ex. R-2, p. 3).

3. Containers represent the largest cargo group handled by Matson. There are also non-container cargoes such as autos, molasses, and conventional cargo which does not fit into containers (Ex. R-2, p. 6 (Ex. IV)).

4. Container cargo moves westbound primarily from Oakland and Los Angeles, with considerably less from the Pacific Northwest. Molasses origi-

⁸ Matson filed Special Permission Application No. 278 with the Commission wherein it seeks to cancel 1.5 percent of the 2.5 percent overall rate increase. It was subsequently withdrawn.

nates in all of the islands and moves to all four West Coast ports as bulk liquid cargo. There is a directional imbalance in the Hawaiian Trade. The westbound containers and auto traffic are substantially greater than the eastbound traffic and the westbound trade cargoes are generally higher rated cargo. Approximately one-third of the westbound containers are returned loaded with eastbound cargo, one half of which consists of fresh or canned pineapple. Auto movement is greater westbound than eastbound. Molasses moves exclusively in an eastbound direction. Oversize conventional cargo moves predominantly in a westbound direction (Ex. R-2, pp. 6, 7; Exs. PH-5 through PH-7; Entire Record).

5. Matson's projected income expense and rate base figures are calculated using the period January 1, 1986 through December 31, 1986, as the Test Year for determining the reasonableness of Matson's proposed rate increase and existing rates (Ex. R-3, p. 4).

6. Matson's cargo forecast for 1986 is reasonable and is the basis for Matson's revenue projections for 1986 (Ex. R-1).

7. Matson's share of total revenues of General Order 11 reporting carriers in the U.S. Mainland/Hawaii trade has declined from 93 percent in 1975 to 71 percent in 1984 (Ex. R-1, p. 6).

8. Matson faces some competition from both regulated and unregulated carriers in the U.S. Mainland/Hawaii trade and indirect competition from liner and contract carrier services bringing cargo from foreign origins to Hawaii (Ex. R-1, p. 17).

9. Matson competes with barge service for bulk and other cargoes. This cargo constituted under 25 percent of Matson's westbound cargo movement (Ex. R-4, p. 4).

10. During 1986 Matson will utilize five specialized vessels and the inter-island barges for the carriage of cargoes in its U.S. Pacific Coast/Hawaii Trade. The five specialized vessels will operate with an 84 percent utilization of container slots and a 98 percent utilization of garage stall and "O" hatch space for autos (Ex. R-2 (Ex. 2)).

11. In computing its working capital as part of the rate base Matson used the voyages and voyage days as it is required to do by G.O. 11. It considered only its long-haul vessels and not inter-island barges in the computation (Ex. R-3, Test Year, p. 3).

12. The *Matsonia* has not been used in the Pacific Coast/Hawaii fleet since 1981. It was not withdrawn from the service for renovation or conversion. It entered the shipyard for reconstruction in 1986, but will not return to service in that year (Ex. R-2, p. 9; Ex. R-5, p. 17).

13. Matson leased the vessel, *Lurline*, in 1973 under a 25 year lease, renewable for 5 years, with an option to purchase at fair market value on termination of the lease. In 1982 it modified the vessel and amortized the modification costs as well as the initial cost over the remaining life of the lease in accordance with Financial Accounting Standards Board No. 13 (FASB) practice (Ex. R-5, p. 15).

14. Matson's ongoing cost reduction program in recent years has included a new consolidated terminal at Sea Island in Honolulu Harbor, a vessel full conservation program, vessel construction and reconstruction programs, vessel modifications to increase carrying capacity, replacement of aging aluminum with stainless steel containers and an improved container lashing system. Matson is operated in a prudent and relatively efficient manner (Ex. R-2, pp. 9, 10).

15. When Matson filed its 2.5 percent rate increase it was not required to file anything other than a certification that the Statements of Financial Data and Operating Data required by Part 552.2(f) were not necessary under General Order 11. It filed the certification initially. After the Order of Investigation and Suspension was issued, in the discovery phase of this proceeding, Matson did file some financial statements required by G.O. 11 in proposed general rate increases. In doing so Matson followed the G.O. 11 methodologies, and the year 1985 has been restated to show storedoor cargo as being under an ICC tariff throughout the year although such cargo was not removed from FMC tariffs until November of 1985 (Ex. R-3, pp. 15, 16; Entire Record).

16. Matson's original prediction for the average per barrel fuel forecast was \$22 per barrel. It later reduced its rate increase from 2.5 to 1 percent and lowered its forecast to \$18 per barrel. The correct average per barrel forecast for 1986 is \$15 per barrel (Ex. PHC-5; Exs. R-5, R-10).

17. Return on rate base is the primary standard the Commission uses in evaluating the reasonableness of a vessel operating common carrier's level of rates. Return on rate base is computed by dividing Trade net income plus interest expense by Trade rate base (46 CFR 552.1(b) and 552.6(d)(2)(i), respectively).

18. Adjusting for the elimination of the value of the *Matsonia* from rate base, and also adjusting for average fuel cost of 15 per barrel, the rate of return on rate base for the FMC regulated Hawaii trade will be 12.19 percent without a 1 percent increase (Ex. PHC-2 (revised), pp. 4, 5).

19. Matson's 1986 rate base for its Pacific Coast/Hawaii Trade is \$230,276,000, and Matson's 1986 total net income without a 1 percent increase is \$28,074,000 (Ex. PHC-2 (revised)).

20. General Order 11 requires that the reasonableness of a carrier's return on rate base will be based on a comparative analysis of the carrier's projected return on rate base with the return on total capital earned by comparable U.S. corporations (46 CFR 552.6(d)(2)(ii)).

21. Matson allocated its expenses between FMC-Trade and non-Trade movements on the bases of cargo-cube, as required by G.O. 11. The record establishes that the shifts of high rated westbound cargo from FMC to ICC tariffs does have the effect of placing more of the expense burden on FMC ratepayers than before (Ex. R-3, Test Year, p. 14).

22. The 15-year period ending in 1984 is an appropriate period for establishing the historic benchmark rate of return on total capital before adjustment for current trends in the cost of money, for risk and in rates of return. The benchmark rate of return is 11.56 percent (Ex. R-7, pp. 8-13, Sch. 1).

23. General Order 11 provides that, where appropriate, the benchmark rate of return may be adjusted for current trends in rates of return, the cost of money and relative risk (46 CFR 552.6(d)(2)(ii)).

24. Rates of return peaked in 1980 and have trended downward since that time (Ex. PHC-6, p. 18; Entire Record).

25. The levels of long-term and short-term interest rates have come down recently as has the level of inflation. Corporate triple A bonds have declined from a rate of 14 percent in 1981 to 9.29 percent on March 1, 1986. Present interest rates are at their lowest level in eight years. It is more reasonable to expect lower rather than higher interest rates in 1986 (Ex. PHC-6, pp. 18, 19; Tr. 239, 240, 558-590, 794, 795)

26. Matson's risk is below the average risk of the average U.S. corporation since Matson's share of the Trade is over 70 percent, since it is the leader in the Trade in setting rates and since its competition has had a minimal effect on Matson's relative position in the Trade and in the Hawaiian Service generally (Ex. PHC-6, pp. 11-16).

Ultimate Facts

27. General Order 11 establishes guidelines for the methodology to be used in determining what constitutes a fair and reasonable rate of return or profit. The regulation specifically gives the Commission the authority and discretion to depart from the methodology where it would lead to an unfair or unreasonable result, and the Commission may do so on a case by case basis without prior notice to the carrier. However, where, as here, the record fails to establish that the methodology used was unfair or unreasonable General Order 11 methodologies must be followed.

28. Matson's cargo forecasts are reasonable and may be used to estimate revenues in the Test Year, 1986.

29. The *Matsonia* should not be included in Matson's rate base since it was removed from service in 1981, Matson's Board of Directors did not approve reconstruction until February of 1985 and it will not reenter service in 1986, the Test Year.

30. The evidence of record does not establish that Matson's treatment of the *Lurline* lease is improper and therefore Matson may amortize the remaining charter hire payments as modified over the remaining term of the original lease.

31. The correct average cost of fuel per barrel for the Test Year 1986 is \$15 per barrel.

32. The evidence of record does not establish that Matson's use of cargo cube measurements to allocate expenses between FMC-Trade and

the non-Trade movements is unfair or unreasonable, and therefore Matson allocation is proper under General Order 11.

33. Matson is less and not more risky than the average U.S. corporation and no upward adjustment to the benchmark rate of return is warranted. Since the evidence fails to establish to what degree Matson is less risky no downward adjustment is warranted.

34. No adjustment to the benchmark rate of return for current trends in rates of return is warranted.

35. Interest rates are declining and the evidence does not support any upward adjustment to the benchmark rate of return for cost of money. Since the countervailing evidence does not establish the specific amount of the decline in the cost of money no downward adjustment for current trends is warranted.

36. The benchmark rate of return is 11.56 percent and on the basis of this record it should not be adjusted up or down for current trends. However, the difference between the benchmark rate and the rate Matson would realize after adjustment for the *Matsonia* and average fuel costs is, in our best judgment, within the zone of reasonableness and Matson's present rates are not unfair or unreasonable.

37. Matson's request for a 1 percent rate increase would, in our best judgment, be unfair and unreasonable and is therefore rejected.

Discussion, Findings, and Conclusions

As has previously been noted, the Commission generally has ordered that a determination be made as to whether or not Matson's tariffs are reasonable with or without the proposed 1 percent (formerly 2.5 percent) rate increase. It has set forth four specific issues that will be considered and discussed below. However, before moving to those specific issues it is important to enumerate the basic principles which govern determinations made in rate cases. The two leading cases were both decided by the Supreme Court of the United States. They are *Bluefield Waterworks and Improvement Company v. Public Service Commission of West Virginia*, 262 U.S. 679 (1923), and *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 91 (1944). In *Bluefield*, at page 692, the Court stated:

A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional rights to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the entity and should be adequate under efficient and economical management to maintain and support its credit

and enable it to raise the money necessary for the proper discharge of its public duties. A rate of return may be reasonable at one time and become too high or too low by changes affecting opportunity for investment, the money market and business conditions generally.

Later, in *Hope* the Court, at page 603, refined and enlarged the above test as follows:

The ratemaking process under the Act, i.e., the fixing of "just and reasonable rates" involves a balancing of the investor and consumer interests. . . . [T]he investor interest has a legitimate concern with the financial integrity of the company whose rates are being regulated. From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. . . . By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

A reading of the above language and of some legal commentators clearly indicates that the *Bluefield* and *Hope* cases actually set forth two tests for determining a fair rate of return.⁹ The commentators seem to disagree as to whether or not the "cost of capital" test or the "comparable earnings" test should be the primary legal standard.¹⁰ Given the above, one must answer the obvious question, i.e., did the Commission choose one test over the other, and if so, which test?

In Docket No. 78-46, *Financial Reports of Common Carriers by Water in the Domestic Offshore Trades*, 19 SRR 1283, the Commission revised General Order 11, effective March 28, 1980.¹¹ (46 CFR 552 et seq.). The order provides:

§ 552.1 Purpose

(a) The purpose of this part is to establish methodologies that the Federal Maritime Commission will utilize in evaluating the reasonableness of rates in the domestic off-shore trades filed by vessel operating common carriers (VOCC's) subject to the provisions of the Intercoastal Shipping Act, 1933. . . .

⁹ See Phillips, *The Economics of Regulation* (Richard D. Irwin Inc., 1965), p. 268; Locklin, *Economics of Transportation* (Richard D. Irwin Inc., 1972, 7th Ed.), p. 394.

¹⁰ See James C. Bonbright, *The Principles of Public Utility Rates* (Columbia University Press, 1981), p. 257, and Phillips, *supra*, who advocate "cost of capital" test; and Leventhal, *Vitality of the Comparable Earnings Standard for Regulation of Utilities in a Growth Economy*, 74 Yale Law Journal 989, 994-995 (1965); and Locklin, *supra*, who advocate the "comparable earnings" test.

¹¹ The background of the revision and its relationship to the enactment of P.L. 95-475 will be discussed in a latter portion of this decision.

(b) The methodology employed in each case will depend on the nature of the relevant carrier's operations and financial structure. *In evaluating the reasonableness of a VOCC's overall level of rates, the Commission will use return on rate base as its primary standard.* However, the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result. (Emphasis supplied.)

In considering the general principles applicable in rate cases it is well to remember that many of the determinations made are based on predictions and on subjective factors that militate against any great degree of precision, and the Supreme Court has long recognized a "zone of reasonableness." *Peruvian Air Base Rate Cases*, 390 U.S. 747 (1968). In *United Railways & Elec. Co. v. West*, 280 U.S. 234, 251 (1930), The Supreme Court stated:

What will constitute a fair return in a given case is not capable of exact mathematical demonstration.

and further,

It is a matter of more or less approximation about which conclusions may differ.

Perhaps, as a result of the Court's recognition that ratemaking is something less than an exact science, courts generally tend to give administrative bodies wide latitude and discretion in exercising their judgment. In *Market Street Ry. Co. v. Railroad Commission of California*, 324 U.S. 548 (1945), the Supreme Court (at page 559) justified the Railroad Commission's failure to follow expert testimony stating (at page 559):

It is contended that the Commission should draw conclusions from these facts only upon hearing testimony of experts as to the conclusions they would draw from the facts of record. Experts' judgments, however, would not bind the Commission. Their testimony would be in the nature of argument or opinion, and the weight to be given it would depend upon the Commission's estimate of the reasonableness of their conclusions and the force of their reasoning.

In *Bluefield, supra*, the Supreme Court, at page 692, stated:

What annual rate will constitute just compensation depends upon many circumstances and must be determined by the exercise of a fair and enlightened judgment, having regard to all relevant facts.

In *Idaho Power Co. v. Thompson*, 19 F.2d 547, 552 (D. Ida. 1927), the Court stated:

. . . where a factor in the problem involves prophesy (sic), or rests upon mere opinion evidence, the Commission was not, nor

are we, bound to accept absolutely and without qualification one or the other of two conflicting views, or the opinion of a single expert where but one testifies.

In *Association of American Publishers, Inc. v. U.S. Postal Service*, 485 F.2d 768, 773 (D.C. Cir., 1973), the District of Columbia Circuit Court of Appeals stated:

The appraisal of cost figures is itself a task for experts, since these costs involve many estimates and assumptions and, unlike a problem in calculus, cannot be proved right or wrong. They are, indeed, only guides to judgment. Their weight and significance require expert appraisal.

Finally, the last and, we think, the most important general principle to be applied in a rate case was succinctly set forth by the Commission itself in *Trailer Marine Transport Corporation—Proposed General Increase in Rates*, 22 F.M.C. 175, 198 n. 8 (1979). There the Commission stated:

Regardless of the specific issues stated in an order of investigation, *the ultimate issue in any proceeding involving a . . . increase in rates remains whether the increase is just and reasonable.* (Emphasis supplied.)¹²

Given the above principles it now remains for us to apply them in considering the specific issues raised by the Commission in its Order of Investigation and Suspension. Cutting across those issues is the recurring and overriding question of whether or not the guidelines set forth in G.O. 11 must be adhered to and to what extent. That question will now be considered.

Issue No. I—What is the purpose and effect of General Order 11 (46 CFR, Part 552 et seq.)?

Throughout the trial of this proceeding and in their briefs, Matson and the State of Hawaii with Tobias have engaged in a continuing argument as to the purpose and effect of G.O. 11. Generally, Matson avers that G.O. 11 must be strictly adhered to if rate cases are to be decided expeditiously as the Congress intended. It avers that, "Fairness to the Carrier Requires Adherence to the General Order 11 Guidelines," and that the Commission must give the carrier notice if it is going to change G.O. 11, citing *Boston Edison Co. v. F.P.C.*, 557 F.2d 845 (D.C. Cir. 1977), cert. denied, 343 U.S. 956 (1977), and *F.E.R.C. v. Triton Oil and Gas Corp.*, 750 F.2d 113, 116 (D.C. Cir. 1984). The State, on the other hand, with Tobias agreeing, argues that, while it does not contest the fact that

¹²While this case, unlike the present case, involved a "general rate increase," the statement applies equally to the proposed rate increase involved in this proceeding. We think the holding reflects the principles enunciated in *Hope, supra*, at page 602, that "Under the statutory standard of 'just and reasonable,' it is the result reached not the method employed which is controlling."

Congress intended to shorten the period of rate investigations to 180 days, and that the Commission was mandated by the Congress to "prescribe guidelines for the determination of what constitutes a just and reasonable rate of return or profit," it "disagrees with Matson on its interpretation of strict adherence to the prescribed rules regardless of the circumstances and conditions under which such rules are being applied." The State then argues the applicability or inapplicability of G.O. 11, as to specific issues, which will later be discussed.

In order to make any determination regarding the application of G.O. 11, it is necessary to know how it came into being, what it says, and what the Commission itself has said in case law decided after the general order was promulgated. Its origins are rooted in the amendment of the Intercoastal Shipping Act of 1933 by Public Law 95-475. In amending the 1933 Act Congress noted the P.L. 95-475 had two primary purposes. It stated (S.R. No. 95-1240, 95 Cong., 2nd Sess., p. 3331 (1978)):

The first [purpose] is to alter the power of the Federal Maritime Commission (FMC) to suspend general rate increases or decreases in the domestic offshore trades. This is intended to avoid unnecessary interruptions in rate increases or decreases which may be lawful; to provide for refunds if rate increases go into effect and are later found illegal; and to extend the suspension power in those cases where it is needed to protect legitimate interests of the shipping public.

The second [purpose] is to expedite the decisionmaking process of the FMC in its regulation of the domestic offshore trades. This will assure that the shipping public receives the benefit of prompt application of matters before the Commission, and that the participants will be spared the time and expense of participating in unnecessarily long and complex proceedings.

In the House Report (H.R. Rep. No. 95-474, 95th Cong., 1st. Sess. 10 (1977)) it was explained that the law requires the Commission to "promulgate methodology guidelines for determining an appropriate rate of return . . . ," and that "these guidelines should be given substantive effect and be followed rigidly in each rate proceeding."

The Intercoastal Shipping Act, as amended, in accordance with the Congressional purpose (page 2 of the Senate Report) requires:

. . . the Commission to periodically promulgate guidelines for the determination of reasonable rates of return, or profit, for common carriers subject to the 1933 Act;

and requires:

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. . . the Commission to explain in detail its reasons for instituting a hearing on rate changes in the domestic offshore trades, and publish such explanation in the Federal Register.¹³

After the enactment of P.L. 95-475, the Commission did undertake to publish what is now General Order 11. Before doing so it held a prolonged rulemaking proceeding in Docket No. 78-46 to "establish methodologies that the Commission intends to follow in evaluating rates in the domestic offshore trades filed by vessel operating common carriers, and to provide for orderly acquisition of data." *Financial Reports of Common Carriers by Water in the Domestic Offshore Trades*, 19 SRR 1283 (1980). A reading of the report attests to the broad scope of the rulemaking as well as to the detailed determinations made by the Commission. Some of the issues raised in this proceeding were raised in the rulemaking, albeit not on the same facts or in the same manner.¹⁴ As a result of the proceeding the Commission promulgated the present G.O. 11.

The pertinent provisions of G.O. 11 are as follows:

§ 552.1 Purpose.

(a) The purpose of this part is to establish methodologies that the Federal Maritime Commission will utilize in evaluating the reasonableness of rates in the domestic offshore trades filed by vessel operating common carriers (VOCCs) subject to the provisions of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 843, 844, 845, 845(a) and 847) and to provide for the orderly acquisition of data essential to this evaluation. Compliance is mandatory and failure to file the reports required under this part may result in denial of rate increases or rejection of tariff pages implementing rate changes or penalties of up to \$100 for each day of such default (46 U.S.C. app. 820(a)).

(b) The methodology employed in each case will depend on the nature of the relevant carrier's operations and financial structure. In evaluating the reasonableness of a VOCCs overall level of rates, the Commission will use return on rate base as its primary standard. However, the Commission may also employ other financial methodologies in order to achieve a fair and reasonable result.

(c) In evaluating the reasonableness of a carrier's rates, the Commission may consider, in addition to the rate of return of the filing carrier, the effect which approval or disapproval of the rates will have on other carriers in the Trade.

(d) The Commission reserves to itself the right to employ other bases for allocation and calculation and to consider other operational factors in any instance where it is deemed necessary to achieve a fair and reasonable result.

¹³ See section 3 of the Intercoastal Shipping Act for the complete text which sets forth specific requirements for dealing with rate increases, including hearings, suspensions, and time limitations.

¹⁴ These issues will be discussed in a latter portion of this decision.

§ 552.6 Forms.

* * * * *

(d) *Rate of return (Exhibits C and C(A))*—(1) *General.* All carriers are required to calculate rate of return on rate base. However, the Commission or individual carriers, at the Commission's discretion, may also employ fixed charges coverage and/or operating ratios.

(2) *Return on rate base.* (i) The return on rate base will be computed by *dividing* Trade net income plus interest expense by Trade rate base.

(ii) The reasonableness of a carrier's return on rate base will be based on a comparative analysis of the carrier's projected return on rate base with the rate of return on total capital earned by comparable U.S. corporations. This technique, the comparable earnings test, is based on analysis of the earnings of U.S. corporations over an extended period of time. From these time/series data, the average rate of return earned by U.S. corporations is computed, and, where appropriate, adjusted for current trends in rates of return, the cost of money and relative risk.

In addition to the above, G.O. 11 requires the filing of specific forms and data when there is a general rate increase (Part 552.2(f)(g)),¹⁵ sets forth how property and revenue is to be allocated (Part 52.2(j)), defines the meaning of "voyage," "service," "trade" and "cargo-cube" (Part 552.5), provides what should be included in the rate base including vessels, depreciation, working capital and capitalized interest and leases (Part 552.6(a)), deals with administrative and general expenses (Part 552.6(c)(4)), and with interest expense (Part 552.6(c)(5)), inactive vessel expense (Part 552.6(c)(6)), provisions for income tax (Part 552.6(c)(10)), and many other matters. They all generally relate to the items required on the forms that must be filed when a general rate increase is sought or items contained in the carrier's annual report.

Since the promulgation of G.O. 11,¹⁶ the Commission has decided several rate cases. Probably the most important of them is Docket No. 81-10, *Sea-Land Service, Inc., Trailer Marine Transport Corporation, Gulf Caribbean Marine Lines, Inc., and Puerto Rico Maritime Shipping Authority, Proposed General Rate Increases in the Puerto Rico and Virgin Islands Trades*, 24 F.M.C. 164 (1981), aff'd 678 F.2d 327 (D.C. Cir. 1982), herein-after called "*Sea-Land*." In *Sea-Land*, the Commission held that:

Under General Order 11, the fixed charges coverage ratio may be used as an alternative standard for measuring the reasonableness

¹⁵This case does not involve a general rate increase and all that is needed to avoid many of the filing requirements is a certification from the VOCC that the increase is not a general rate increase and that the financial and operating data required by Part 552(f) is not required.

¹⁶It should be noted that the Commission made some relatively minor changes to G.G. 11 in Docket No. 81-46.

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of proposed rates *only when the rate of return on rate base method produces an unreasonable result.* (Emphasis supplied.)

Further, in affirming the Commission, the United States Court of Appeals for the District of Columbia held that:

In reviewing rate-making decisions of administrative agencies, courts must take proper cognizance of both difficulty of task and expertise of agency performing it.

and that:

In reviewing general rate increase order of Federal Maritime Commission, Court of Appeals must determine whether Commission properly carried out its mandate from Congress to review carrier-filed rates for justness and reasonability.

and that:

[an] Order by Congress to administrative agency to consider matter expeditiously is not a mandate to be arbitrary, capricious, irrational or sloppy, but strict time frames within which to work may require agency to make its decision on record more slender than desired and may render acceptable terse explanation of reasoning.

and that:

When evidence of record does not fairly establish either proposition or its contrary, administrative agency is within its sound discretion in adhering to what is knowable and avoiding what is necessarily in domain of speculation.

and finally that:

[the] Court of Appeals will accept agency's interpretation of its own regulation so long as it does not do violence to language of regulation itself.

Given the above, it remains for us to clarify the application of G.O. 11 to this proceeding. We can readily agree with Matson that G.O. 11 guidelines were mandated by Congress and that adherence to them is required, especially in the filing of the various forms and documents that are required in general rate increases. However, that is quite different from the view that the guidelines themselves are mandatory in the sense that they can never be changed or must be followed blindly. Certainly, it would be a clear denial of due process to exclude evidence as inadmissible, as Matson requested at trial, because the evidence did not follow the specific format or methodology set forth in G.O. 11. It is clear from a reading of the general order itself that, "the Commission may also employ other methodologies *in order to achieve a fair and reasonable result*" (emphasis supplied), and that "The Commission reserves to itself

the right to employ other bases for allocation and calculation and to consider other operational factors in any instance *where it is deemed necessary to achieve a fair and reasonable result.*" This clear language comports with Congress' desire that "the Commission shall from time to time . . . review such regulations and make such amendments thereto as may be appropriate."

So here, we reject Matson's view that the guidelines are "mandatory," if that view means to imply that once a methodology, or report or adjustment is set forth in G.O. 11 it *must* be followed. Such a view would mean that the Commission could not react promptly to factual changes that they had neither considered nor contemplated when G.O. 11 was promulgated. The regulation itself says otherwise and the real test is whether or not adherence to G.O. 11 produces a fair and reasonable result. As to Matson's argument that it must be given notice of changes in the general order under the holding in the *Boston, supra*, case we also disagree. The facts in the *Boston* case and the application of the regulation, as well as the content of the regulation itself differ markedly from G.O. 11, which within its terms allows for the use of other standards. That is not to say that from a pragmatic point of view we disagree totally with Matson on this point. Where a material change is contemplated in G.O. 11, for example, in a reporting requirement, that is not the result of a claim of unfairness or unreasonableness on the part of a protestant, then it would seem that some kind of prior notice is essential, even if only to allow the carrier to comply. Such notice, however, is hardly a precondition to the use of alternative methodologies, as Matson suggests, where fairness and reasonableness dictate otherwise.

Turning to the State and Tobias and the assertion that G.O. 11 should not be considered a "precise and unflexible prescription which cannot be modified to produce a more reasonable and realistic result," we would agree with that premise. We would also agree that the language in *Sea-Land, supra*, at 24 F.M.C. 170, which states that "Adherence to G.O. 11 therefore is essential. Departures from this requirement cannot *generally* be permitted in rate proceedings" (emphasis supplied), must be read in the light of the facts and circumstances of that case. Further, the Commission's use of the word "generally," which Matson seems to ignore, suggests that where the result was unfair or unreasonable it would exercise its discretion and allow the use of other methodologies. Finally, as we have noted, we would certainly agree with Hawaii that due process requires consideration of evidence going to the validity and propriety of G.O. 11 methodologies in particular circumstances.

Once having said all of the above, however, the question that really arises is just how compelling must the evidence be before G.O. 11 methodologies and procedures are deemed unfair and unreasonable and need to be changed. In our view, in a rate case that evidence must be specific and clear and must not only identify what one claims to be unfair and

unreasonable but must suggest what is fair and reasonable so that the Commission may arrive at a fair and reasonable rate of return. Here, as will be seen as the specific issues are discussed, the State raises some G.O. 11 issues that cause concern—that cause one to question. However, framing an issue or proving the existence of a question is not enough. No specific viable alternatives are offered which are themselves shown to be fair and reasonable. We suspect the imposition of time limits may have prevented a fuller presentation of facts or competing methodologies and that, as Hearing Counsel points out, the issues may “deserve more attention than is possible given the time constraints of this proceeding.” Whatever the reason, we have generally found against the State and Tobias where questions of G.O. 11 methodology are concerned, not because we are always satisfied with Matson’s use of the methodology, but because the record does not clearly establish unfairness or unreasonableness and does not offer other methodologies which are fair and reasonable and which can be incorporated into a determination of a fair and reasonable rate of return.

Perhaps in recognition of the above, the State requests that the Commission initiate another G.O. 11 rulemaking proceeding. That request, of course, is one the Commission may grant in its discretion. However, since the Commission exhaustively considered the regulation in Docket No. 78-46, and since it has been held that the present G.O. 11 allows for the use of other methodologies and since this proceeding was conducted under severe time constraints which disadvantaged all the parties, the Commission may wish to consider the alternative of remanding the proceeding insofar as it relates to the reasonableness of the present rates, where no time limitation need to be set, so that the parties may be given a realistic opportunity to fully develop the facts and issues.¹⁷ Such an approach would avoid a prolonged and unnecessary repetition of all of the matters reviewed in Docket No. 78-46 and would allow for specific treatment of particular issues, such as the effect on FMC ratepayers when Matson shifts cargo movements to ICC tariffs and uses cargo cubes to allocate, the computation of voyage days where barge traffic to the Neighbor Islands is involved, and the validity of some of the adjustments made by the State’s expert.

Issue No. 2—Has Matson properly projected its revenues, expenses and rate base for 1986?

Projected Revenues

In determining whether or not Matson properly projected its revenues, expenses and rate base for 1986, it is necessary to consider several smaller

¹⁷The reasonableness of the present rates is an issue raised pursuant to the authority of sections 18(a) and 22, respectively, of the Shipping Act of 1916 (46 U.S.C. app. §§ 817 and 821), where the 180 day time limitation does not apply. No party has raised any issue regarding the application of G.O. 11 methodologies where these sections of the 1916 Act are involved.

collateral issues raised by the parties. The first involves Matson's projected revenues. In estimating its revenues for 1986 Matson made certain cargo forecasts. It presented its Manager, Cargo Forecasting and Sales Analysis, who testified (Ex. R-1, pp. 1-3; Tr. 22-25) that the forecast is made on the basis of customer contacts, the evaluation of the competitive situation, and an analysis of economic trends as well as a review of historical results and trends. He projected total revenues of \$286,494,000 in 1986, based on Matson's proposed rates, of which \$206,896,000 was allocated to the "Trade" (FMC tariffed movements). Hearing Counsel and Tobias did not seriously contest Matson's revenue projections or offer substitute data. The State of Hawaii, however, argues "that Matson's projected additional revenues (\$6,987,000) should be disallowed, and additional revenues based on a slightly more optimistic view of 1986 operations should be included (\$5,186,000) because of an estimated 2.4 percent growth in cargo in 1986 over 1985." (Exs. PH-2, PH-3). It seeks to justify its estimate of the 2.4 percent increase by noting, "(1) the lackluster performance of the national economy in 1985, (2) the particular problems associated with the airline strike in 1985, (3) the falling value of the dollar and (4) rapidly declining oil prices." (See Exs. PH-16 thru PH-21 for a more detailed discussion and explanation of the State's arguments as well as pp. 8-11 of its Reply Brief.)

Based on the evidence contained in this record it is held that Matson's cargo forecasts for 1986 are reasonable and should be used to estimate revenues for 1986. The forecasting method used by Matson has been reviewed and approved by the Commission since 1975.¹⁸ The forecasts themselves have been reasonably accurate. Actual results in the last three years have ranged from -.2 percent to +2.3 percent to plan for TFEU's, with an average variance of +.7 percent, and from -1 percent to +1.1 percent to plan for revenues, with an average variance of +.2 percent (Ex. R-4, p. 14). While the factors cited by the State may well occasion an increase in cargo growth and revenue, it is just as likely that countervailing events may prevent that growth. Rather than engage in pure conjecture as to what might or is likely to occur we prefer to adopt Matson's cargo and revenue projections based on their past history of reliability.

Rate Base

A second collateral issue raised by the parties is the validity of Matson's projected rate base for 1986. Matson presented a Statement of Financial and Operating Data for the test year 1986 (Ex. R-3 (Exhibit A)). Under 46 CFR 552.2(f), a carrier is required to file such a form when requesting

¹⁸ See Docket No. 79-55, *Matson Navigation Co.—Proposed Bunker Surcharge in the Hawaii Trade*, 22 F.M.C. 281, 297 (1979), *aff'd* by the Commission at 22 F.M.C. 276 (1979), for a discussion of Matson's forecasting method.

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a 3 percent or more general rate increase.¹⁹ In its statement of rate base Matson included working capital of \$7,759,000, which represented a computation of average voyage expenses allocated to the Trade (FMC tariffed movements). Matson's calculation of working capital considers only the voyage days and voyages of the long-haul vessels (Ex. R-5, p. 25). The State has recomputed the amount of working capital to be \$5,123,000, a reduction of \$2,636,000 from Matson's figure. It does so on the basis that Matson's calculations fail to include voyage terminations attributable to the inter-island barge service which was begun in 1985, and which provides distribution service to westbound cargo to Hawaii ports other than Honolulu as well as transporting molasses on their in-bound return trip from the outer islands. The State also notes that since December of 1985, the inter-island barges have been transporting various foreign and domestic origin cargo from Honolulu to the other Hawaii ports. The State complains that while Matson fails to include the barges' voyage terminations in the calculation of working capital it has included inter-island barge-related expenses in appropriate expense categories. Tobias agrees with the State while Hearing Counsel agrees with Matson's method of calculation.

Matson defends its calculation of working capital and the exclusion of the barge traffic in the computation of voyage days and the number of voyages stating, "They are not true voyages and they do not meet the criteria of a voyage per General Order 11, Section 552.5(a) which specifies that 'voyage' means a 'completed round-trip, from port of origin and return to port of origin.'" It argues that the barges "perform an extension of the voyages of the container ships that operate between the U.S. Pacific Coast and Hawaii." It also alleges that by excluding the barges it avoids "possible manipulation of the amount of working capital by selection of barge accounting periods considerably longer or shorter than the average voyage in the service."²⁰ In its reply brief, pp. 24-27, Matson describes how the "Neighbor Island Service" was performed either by a Matson self-propelled ship or through the use of outside (Young Brothers) barges prior to 1985. Now Matson tugs and barges perform such services. Matson admits that it added the expenses of the barge operations into the expenses of its long-haul ships although it did not add any additional voyages. It states that, "Since Matson is principally a self-propelled operator, we have followed the working capital provisions (in G.O. 11) applicable to such operators."

General Order 11 sets forth different methods for the calculation of working capital for vessel operators as opposed to tug and barge operators (46 CFR 552.6(b)(5) and (6)). In the case of vessel operators working

¹⁹ Since the increase requested here was originally for 2.5 percent and was then reduced to 1 percent Matson was not required to file the form and, in fact, did not do so at the time it requested the 2.5 percent increase.

²⁰ See Ex. R-5, p. 25.

capital is determined as average voyage expense. In the case of tug and barge operators working capital is determined as average monthly expense. Matson states that, "In its determination of working capital, Matson elected not to add barge voyages which could alter the result obtained in computing the working capital for its long-haul service." It asserts that, "In the absence of guidance from the Commission, Matson felt that the fairest position would be not to unduly disrupt the result achieved in the calculation for the long-haul ships by including the additional barge voyages."

It is clear that Matson's computation of working capital does not properly take into account the operation of its barge service to the Neighbor Islands. It is also clear that the State's suggested remedy is equally improper. Given the record made here we cannot determine or calculate what the proper methodology or adjustment should be, and therefore must allow Matson's methodology to stand.

Another element of the rate base issue is Matson's inclusion of the *Matsonia* in the rate base. The *Matsonia* was operated in the Hawaii service from 1973 until July of 1981. Since then it remained out of service until July of 1981. In February of 1985 Matson decided to reconstruct the vessel. It has been in the shipyard since January of 1986 and Matson does not expect it to reenter service until the second quarter of 1987.

General Order 11 (46 CFR 552.6(b)(1)(i)(A)) provides that:

For those cargo vessels employed exclusively in the service for the entire period, inclusive of normal periodic layups, the adjusted cost shall be included in the total to be allocated to the Trade. If a vessel is permanently withdrawn from the service during the period and laid-up pending disposition and that vessel has been employed exclusively in the service for the preceding 12 months, sixty days of the lay-up period may be assigned to the service. If a vessel is withdrawn from the service for renovation or conversion, and if the carrier certifies that the vessel has been employed exclusively in the service for the 12-month period immediately prior to withdrawal and will be employed exclusively in the service for a period of at least 12 months after the renovation or conversion is completed, the adjusted cost shall be included in the total to be allocated to the Trade.

Matson included the *Matsonia* in the rate base in the amount of \$13,973,000. (Ex. R-3, Schedules A-I and A-II). It states the *Matsonia* was placed in "reserve status because of cargo declines" and that throughout the period of its reserve status, "*Matsonia* performed a vital function for Matson by being available for reactivation in case another vessel failed or a surge in cargo created a shortage of capacity." It avers that keeping *Matsonia* in the rate base is "consistent with the over all purpose of General Order 11 to encourage a carrier to provide efficient services by

reducing operating costs through placing temporarily in reserve vessels not needed to meet current operations.”²¹

Hearing Counsel, the State and Tobias all argue that the *Matsonia* should be excluded from the rate base. They note that the *Matsonia* was not withdrawn from the service for renovation or conversion and that a decision was not made on reconstruction until 1985. Further, they argue that it is clear that the *Matsonia* will perform no service whatsoever in the Trade in 1986 and that current ratepayers should not bear the cost of the asset. Put another way, they assert that it would not be fair to current ratepayers to allow Matson a return on an asset idle since 1981.²²

Whether one does or does not apply the “used and useful” test advocated by Hearing Counsel and rejected by Matson, we believe the record in this case clearly warrants the elimination of the *Matsonia* from Matson’s rate base. It has been found as fact that the *Matsonia* was not withdrawn from the service for renovation or conversion and that it will not be used in the service during the test year 1986. That being so there is no reason why current ratepayers should pay Matson for use of the vessel.²³ As to Matson’s assertion that Hearing Counsel and the State “have gone outside the provisions of General Order 11, which does not include such a standard” [the “used and useful” standard], we think that as to this issue, as well as others that have been and will be later discussed regarding General Order 11, Matson treats the regulation as some kind of absolute, inexorable, all-encompassing set of rules when in fact they are guidelines, albeit stringent ones, whose purpose is to aid in the setting of a fair and reasonable rate of return. The fact that the regulation does not specifically address the issue in no way, of itself, detracts from the validity of the arguments made by the parties. The issue here, with or without consideration of any specific provision of General order 11, is whether or not ratepayers should pay for the *Matsonia* when, in fact, the *Matsonia* had not been in service since 1981 and would not be used in 1986. We think not and it is so held.

Expenses

A third collateral issue to the broader issue contained in the Commission’s Order of Investigation and Suspension is whether or not Matson properly projected its expenses for 1986. Two items of expense, i.e., (1) amounts included for escalation in its test year expenses, and (2) transfers to its affiliates of overhead and other expenses merit only brief discussion. As to the amounts collected for escalation in 1986, Matson’s Manager of

²¹ See pp. 22-24 of Matson’s Opening Brief and pp. 15-20 of its Reply Brief for a full discussion of its views.

²² See pp. 21-25 of Hearing Counsel’s Original Brief; pp. 5, 6 of Tobias’ Reply Brief; and Ex. PH-33 for the position of each of the parties.

²³ We think this result is in complete accord with G.O. 11, especially in view of the Commission’s statements contained in Docket No. 81-46, 24 F.M.C. 373, 378 (1981).

Financial Analysis presented oral and written testimony (Ex. R-3, pp. 7, 9; Ex. R-5, pp. 21, 22; Tr. 411) explaining those expenses claimed in the Income Statement (Ex. B to Ex. R-3). He explained the projections of wage increases under union contract offshore bargaining agreement cost of living clauses, projected increases in wharfage expenses and bargained for increases under ILWU labor agreements. The State did present some evidence alleging that the expenses were not substantiated (Ex. PH-31). Tobias agrees with the State and Hearing Counsel did not contest the expense projections. In its briefs the State offers little or no specific arguments related to Matson's projections. Given the evidence of record we cannot but conclude that the offshore wage increase projected by Matson is required pursuant to clauses in the labor agreements which adjust wages based on charges in the Consumer Price Index for Urban Wage Earners and Clerical Workers. Further, the escalation in vessel/voyage expenses represents increases in port charges, subsistence and stores of approximately 2.5 percent, which we think is reasonable. Finally, the increase in ILWU charges is based on commitments already included in current labor agreements for wage and benefit increases which have reasonably been estimated by the Pacific Maritime Association to amount to 5.5 percent and 5.2 percent for mainland and Hawaii labor. All of the labor agreement escalations represent estimates based on commitments for wage increases, not on forecasts of liabilities not yet committed (Tr. 495). It is held that amounts included by Matson for escalation of expenses in 1986 are reasonable and allowable.

As to Matson's transfer of its administrative and overhead expenses to its affiliates, it has allocated approximately \$2.5 million to reflect services which Matson allegedly provided to these companies. Hearing Counsel does not contest Matson's allocation. The State and Tobias while objecting to it, present little in the way of evidence or argument to warrant changing what Matson has done. Matson at pages 33 and 34 of its original brief presents argument supporting its position. We believe those arguments to be valid and hold that Matson's allocation of administrative and overhead expenses to its affiliates is proper.

Another facet of the expense issue is whether or not Matson's amortization of *Lurline* charter hire payments over the term of the original charter is appropriate. The State and Hawaii say it is not, while Hearing Counsel does not dispute Matson's treatment of the charter hire payments. According to the financial reports submitted by Matson it originally entered into a long-term lease agreement for the vessel *Lurline* running for 25 years. The original capitalized base cost of \$26,776,462.00 was amortized at an annual rate of \$1,071,058.00 until 1982 when Matson completed modifications costing \$41,559,270.00. The owner-lessor paid for most of the modification costs and the original lease term was not extended for the modified vessel. In 1982, 16 years remained on the original term of the lease. Matson has continued the same rate of amortization as to the original

cost and has amortized the modification costs each year in the amount of \$2,650,720.00, over the remaining life of the lease. Matson has an option to renew the lease for a total period of five years as well as an option to purchase the vessel at fair market value at the termination of the lease.

The State with Tobias would reduce the yearly amortization charge by extending the useful economic life of the vessel to not less than 25 years. It argues that while it concedes that Matson has capitalized *Lurline's* lease in accordance with Financial Accounting Standards Board Statement No. 13 (FASB), when a lease is capitalized under the criteria prescribed by the FASB, it is no longer a lease but is a purchase and its useful life must be determined as if it was a purchase rather than a lease. It states that it has chosen 25 years as the useful life as of the modification date and that "if Matson disagrees, then it behooves Matson to provide evidence for the record showing less than 25 years is more realistic." It urges that at issue is "simply the fairness and reasonableness of annual charges to the ratepayers and not the rules or practices which may be employed in the reporting of costs for tax and financial information purposes."²⁴ It notes that if Matson is allowed to treat the useful life of the modification as 16 years rather than 25, it will be unfair to ratepayers and points to the modification of the *Matsonia* at a cost exceeding that of the *Lurline* and that only 10 or 11 years will remain on the *Matsonia* lease when it resumes service. Finally, it states that Hawaii's solution is "offered only as an interim solution" and that "A longer term solution needs to be devised by the Commission."

Matson, on the other hand, argues that the State has not submitted any evidence to show that the remaining economic lives of the improvements are 25 years and that it has followed accepted accounting procedure. It alleges that the accounting rule "requiring the capitalization of only *known* lease payments and their amortization over only the *known* lease terms" makes sense and should be followed by the Commission. It cites the fact that the State's failure to capitalize the additional charter hire and purchase payments that Matson would have to make to retain *Lurline* for the additional nine year period, indicates the State's proposal is incomplete and unfair.

This issue is a troublesome one in that the decision regarding it results as much from the time strictures placed on the parties and the incompleteness of the evidentiary record as it does from the merits of the issue itself. It is clear to us that ratepayers should not be paying rates based on depreciation or amortization expenses which do not properly reflect the full term of the useful life of the asset's use in the Trade. That

²⁴ See pp. 15-17 of the State's Original Brief and pp. 15-18 of its Reply Brief for a more complete statement of its position including a discussion of how Matson's treatment under G.O. 11, notwithstanding the lease arrangement, recovers a full return and tax allowance as though the investment was funded on equity so that the return allowance exceeds the imputed interest cost embodied in the lease.

principle ought to be followed whether or not some tenet of "acceptable accounting practice" is involved.²⁵ However, where, as here, a capitalized lease is involved and the lease does not clearly establish how long the lessee is entitled to use the asset, as "modified," then questions do arise as to the proper period over which costs should be amortized. Here, the State has not established that the useful life of the *Lurline* as modified would be 25 years, much less that Matson will either continue leasing it for that period or would purchase it. Further, Matson is correct regarding the State's omission of the capitalization of the additional charter hire and purchase payments.

Given the present record we must hold in Matson's favor on this issue. In so doing it should be noted that the State's concerns are well-founded and that the impending modification of the *Matsonia*, where only 10 or 11 years remain on the lease, points up the need to closely monitor similar leases and their effect on ratepayers. Where it can be shown that extensive modifications are being made by Matson knowing that its use of the asset will extend beyond the stated terms of the capitalized lease, then the amortization should be spread over the term of its anticipated useful life.²⁶

The most obvious item of projected expense for 1986 which begs examination is Matson's projection of fuel costs for 1986. The Commission's Order of Investigation and Suspension refers to it in stating that, "The most critical issues concerning Matson's current rates are whether declining fuel costs increased Matson's rate of return beyond the return projected for 1985 and whether a decline in the current trend in interest rates lowered the maximum reasonable rate of return." After the proceeding began Matson itself reduced the 2.5 rate increase originally sought, "Because of the decline in the price it pays for bunker fuel." Originally, Matson projected its 1986 fuel expenses on the cost of bunker fuel on September 15, 1985, which was \$22 per barrel. It argues that "at the time of preparation of the plan [projection] and at the time of filing of the increase in [on] November 15, 1985, the projected fuel prices appeared reasonable estimates of likely fuel prices in 1986." (Ex. R-5, pp. 9-14.) It notes that since mid-January 1986, fuel prices sustained a dramatic decline resulting from the failure of OPEC oil ministers to reach an agreement on production. It states that it re-estimated its fuel costs for 1986 to be \$18 per barrel, taking into account "projections received from its fuel oil suppliers of estimated costs for the remainder of 1986 as well as Matson's method of accounting for fuel expenses and its higher costs for the first four months of the year."²⁷

²⁵ What is acceptable accounting practice for tax purposes may not be proper for rate-making purposes.

²⁶ It is difficult to imagine a bona-fide lease which limits the lessee's use of an asset to a period that does not allow the lessee to recover the cost of modifications it makes. When the recovery is realized from special accounting or tax treatment at the expense of ratepayers the facts at least ought to be known and considered in arriving at a fair and reasonable rate.

²⁷ See pp. 17-22 of Matson's Opening Brief for a complete discussion of its position.

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All of the other parties to this proceeding, i.e., Hearing Counsel, the State of Hawaii and Tobias, urge that a realistic estimate of the price Matson will pay in 1986 for fuel is \$15 per barrel. Hearing Counsel's expert testified (Exs. PHC-5), that he believed the average price per barrel will drop to \$13.52, and reached the \$15 figure, recognizing that forecasting is not an exact science.

A thorough examination of the testimony given in support of one position or another regarding fuel prices leads one inescapably to the conclusion that cost projections in this area are highly uncertain. Where there is a collapse in oil prices as Matson's own witness testifies (Exs. R-5, R-10) forecasts based on historical trends have even less validity than they did formerly. Stated in its most elemental terms, here, there is no disagreement among the parties that fuel prices have fallen far below \$22 per barrel since Matson's original estimate, however valid it may have been initially. The questions remaining are how much it will fall before stabilizing and when. The obvious answer to "when" is when OPEC is able to reach a solution. As to "how much," we already know it is well below even the \$15 per barrel.

Based on the evidence of record we hold that the average price of fuel in 1986 for Matson will be \$15 per barrel and that Matson's fuel expense figure of \$20,491,772.00 should be adjusted to reflect such a holding. As to Matson's arguments that the estimate does not take into account its actual costs in January and February of 1986 we believe that as a projection the \$15 figure does take those actual costs into account. Further, we agree with Hearing Counsel that "the use of Matson's fuel accounting system will require a downward adjustment in the fourth quarter average cost per barrel of fuel. This is caused by the fact that Matson's accounting reflects a several week lag between purchase and use of fuel, coupled with an expected upturn in fuel prices towards year's end, an upturn that will not be fully reflected in the Test Year using Matson's fuel accounting system."

We believe the Commission has considered the same type of situation in *Sea-Land, supra*, 24 F.M.C. 164 (1981). It held that because of dramatic changes in world oil markets, updated fuel cost projections should be included in the carrier's expense projections (24 F.M.C. pp. 180-186). It did so notwithstanding its determination that parties not be permitted to supplement their cases after the close of the record and after an Initial Decision is issued. The Circuit Court of Appeals for the District of Columbia in affirming the Commission's decision stated:²⁸

²⁸ During this proceeding Matson made continuing objection to evidence presented which related to current events that occurred after some "cut-off date" it felt appropriate. In our view when current events are so sudden and far-reaching that projections made are unreliable or seriously open to question, it not only is not error not to limit evidence relating to the current events, but it would be error to rule such evidence inadmissible.

. . . the agency is not required to blindfold itself, ignoring dramatic changes in circumstances which surface during the rate-making proceeding and are bound to effect [affect] the estimate. *Puerto Rico Maritime Shipping Authority v. Federal Maritime Commission*, 678 F.2d 327, 341 (D.C; Cir., 1982).

So here, it is held that the average full cost of fuel in 1986 will be \$15 per barrel.

Issue No. 3—Has Matson properly allocated its revenues, expenses and rate base between its Commission and non-Commission regulated services for 1986?

The primary question involved in this issue is whether or not Matson's allocation of expenses between the FMC Trade and the non-Trade movements on a cargo cube basis is proper. General Order 11 (46 CFR 552.6(c)(2)(i)) provides:

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.

All parties agree that Matson has allocated costs in accordance with G.O. 11. Hearing Counsel raises no question regarding the methodology. The State and Tobias, however, argue that it is flawed. The State in Exs. PH-1 through PH-11 and in its briefs make the argument that:

. . . Matson exercised its options late in 1985 to withdraw its FMC Tariff No. 14, and to replace it with its ICC Tariff No. 16. While the tariff filings had absolutely no operational consequences, Matson's "tariff shuffle" has two direct adverse impacts: (1) delaying the disclosure of Matson's extraordinary high earnings under FMC regulation for 1985, and, (2) creating a basis for a rate increase in 1986. . . .

The adverse consequences on the interests of the public due to Matson's "tariff shuffle" are simple: because Part 552 requires expense allocations on a "cargo-cube" or "cargo-cube-mile" basis, Matson's ICC-cargo (which is exclusively westbound) bears an inadequate assignment of the considerable costs of returning the Matson vessels and containers eastbound to their ICC points of origin; . . . Therefore, this Commission must depart—as its rules permit it to do—from the inequitable strictures of Part 552.

As Matson migrates more of its cargoes out from FMC regulation, FMC-regulated westbound and eastbound cargoes will be forced to bear an increasingly disproportionately large share of interest expense, vessel expense, and container handling expense.

In its arguments the State alleges that "Matson's recent shift of a significant volume of high-rated 'Storedoor' cargo from FMC tariffs to ICC tariffs significantly disrupts the historical directional balance of FMC-regulated Hawaii trade." It states that Storedoor cargo moves only in the westbound direction and that since the average revenue/unit of the Storedoor cargo is much greater than the cargo that remains under FMC tariffs, the rate structure is contorted, and the FMC revenue requirement/unit increase. The State asserts that by simply filing tariff sheets at the ICC, Matson removed nearly \$25 million in income from the FMC-regulated service (Ex. PH-6). It stresses that the average yield per cargo cube for all westbound shipments is \$1.00, that the ICC Storedoor, all-container cargo yields \$1.15 per cargo cube and the remaining FMC-trade cargo has a yield of \$.94 per cargo cube. It notes that total eastbound cargo has an average yield of \$.51 per cargo cube, or about one-half of westbound cargo, reflecting a different commodity mix and a long-standing rate structure, and points out that although there is no substantial difference between the yield of "other cargo" and FMC-trade cargo in the eastbound direction, the "other cargo" volume represents less than 6 percent of total eastbound cargo, as compared to 26 percent of the westbound movements. The State concludes that for both directions combined, the spread between the "other cargo" and trade is 35 percent—a yield of \$1.08 versus \$.80 per cargo cube and that "The Matson revenue/cost allocations produce a profit (i.e., Income Before Taxes) on a unit basis for "other cargo" which is nearly three times the profit per cargo cube for FMC trade—\$40.5 versus 13.5 (Ex. PH-6 (HAW-104, p. 5)). In order to correct the above imbalance the State has suggested, "Various Formulae Being Considered by Hawaii to More Accurately Separate (Allocate or Distribute) Costs Between Various Regulatory Jurisdictions (i.e., FMC and ICC) and Among Non-Regulated Activities." (Ex. PH-9 (HAW-105, p. 2)).²⁹

Matson defends its treatment of cost allocations by arguing that it has followed General Order 11 and that, in essence, the State would allocate costs on a revenue basis which is contrary to G.O. 11. It states that "It is a fundamental principle of cost accounting that costs be assigned or allocated to the factors that generate them. Voyage expenses are a function of the carriage of cargo. Revenues do not generate costs and there is no reason for costs to track revenues. . . . The State's cost allocation system would improperly protect eastbound rates from Hawaii to the mainland by making them to appear to be fully compensatory when they are not." Matson alleges further that "The real basis of the State's position is that it opposes deregulation under the Interstate Commerce Act, and is trying by cost manipulation to turn the clock back to the pre-deregulation era." It proceeds to point out how water carriers in Alaska and Puerto Rico trades have converted "the great bulk of their operations"

²⁹See pp. 20-22 of the State's Opening Brief and pp. 12-15 of its Reply Brief for additional discussion.

to ICC unregulated tariffs. Finally, Matson argues that the General Order 11 cargo cube method of allocating voyage expense is not unfair in this instance and that "It merely accomplishes what it was designed to do in calling attention to the fact that Matson's eastbound cargoes are not bearing their full share of the cost burden."

This particular issue is one of the most troublesome in the entire proceeding. Factually, there is no question that Matson followed the methodology set forth in G.O. 11. There is also no question that there always has been an imbalance between the eastbound and westbound cargoes. Not only that, a reading of Docket 78-46, *supra*, at 19 SRR 1296, 1297, indicates clearly that the Commission considered retaining the use of the revenue ton-mile relationship in allocating expenses between Trade and non-Trade cargo and rejected it. Instead the Commission chose the cargo cube basis noting that "the cost of providing service in a containership operation depends on the cost of providing space." In selecting the cargo cube method the Commission specifically rejected a suggestion to permit carriers to select their own method of allocation as contrary to the duty of the Commission to establish methodology guidelines under Public Law 95-475.

On the other side of the issue are the facts set forth by the State. They not only show an imbalance between the movement of the eastbound and westbound cargo, but they show that the imbalance is being magnified by the shifting of high rated westbound cargo from the Trade (FMC tariffed movements) to non-Trade (ICC tariffed movements). Of course, one cannot question Matson's right to shift the cargoes if it so desires, but it is clear that if the shift of cargo impacts on the ratepayers under the FMC tariffs unreasonably or unfairly, then the Commission may employ other fairer bases for allocation so as to achieve a fair and reasonable result.

After thoroughly reviewing the record in this case, we are constrained to hold that the use of cargo cube allocation by Matson was not unfair or unreasonable. In so holding, we hasten to note that the holding is based on the inadequacy of the record which was burdened by severe time constraints, and which fails to offer any alternative which is clearly more fair and reasonable, rather than on any finding that General Order 11, by its terms, compels such a result. As has been noted earlier, G.O. 11 is a methodology guideline, not a law. Strict adherence to each of its provisions is neither necessary nor proper where such adherence would achieve an unfair and unreasonable result. The record made here does not allow us to so conclude.

Issue No. 4—Are business and financial risks faced by Matson greater or less than those faced by an average U.S. corporation? If so, should Matson's rate of return be adjusted?

In measuring the business and financial risks of Matson its expert (Mr. Benderly) used the Variability in Past Earnings test. Matson asserts that

“Variability in past earnings is the oldest and most widely accepted measure of the general riskiness of a business. Past variability indicates the degree to which a company’s earnings are susceptible to inflation, recession, competition and other factors. . . . These factors affect the investor’s assessment of risk and the expected earnings level at which he is willing to invest in the enterprise.” (Ex. R-7, pp. 21, 22). For his analysis of Matson’s relative risk, its expert compared the variability in Matson’s rate of return on rate base and net income margin with the variability in return on average total capital and net income margin of all U.S. corporations as reported in *The Value Line Investment Survey* (Ex. R-7, pp. 24, 25).³⁰ He calculated for each company its coefficient of variation and its standard deviation of rates of return about a linear trend, divided by the absolute value of the mean for the 15-year period, 1968-1982, and the 10-year period, 1973-1982, and for both return on average total capital and net income margin. (Ex. R-7, Appendix D sets forth the matrices and mathematical formulas used to carry out the statistical analysis of risk measures described orally by Matson’s expert.³¹ He found that on the basis of the 15-year period Matson ranked in the sixth or seventh decile among the U.S. corporations, the first decile being the lowest risk and the tenth decile being the highest. For the 10-year period Matson’s expert concluded that Matson’s relative risk was somewhat below the average for the Value Line companies. In selecting the 15 or 10-year period the expert testified the 15-year period should be given more weight and provides a better indication of relative risk than does the 10-year period, because it encompasses more economic cycles, and because it is more comparable to Matson’s present situation where, according to the expert, competition is expected to increase. He concluded that the appropriate adjustment to the benchmark rate of return for relative risk was between .70 and 1.00 percentage points, and adopted the 1.00 percent figure (Ex. R-7, pp. 38, 40, 41).

The increased competition Matson’s expert refers to is Matson’s assertion that, (1) there is increased barge competition in the trade which has caused its Pacific Northwest cargo carriage to decline 26 percent from 1975 to 1987 (Ex. R-1, pp. 10-12), (2) two new barge lines entered the California-Honolulu service and the Seattle-Honolulu service in 1984 and 1985 (Ex. R-1, pp. 12, 13), (3) increasingly strong competition is being provided by United States Lines in carrying dry container and military cargo from California to Honolulu (Ex. R-1, p. 9), (4) substantial cargo has been lost to proprietary carriage (Ex. R-1, pp. 13, 14), (5) the share of total cargo moving to and from Hawaii that is carried by common carriers

³⁰ Although he had Matson data to 1984, data for comparison companies only was available through 1982.

³¹ Matson states that, “the validity of the statistical analysis is unchallenged on the record.” This indeed is true, but an examination of the six pages of Appendix D causes one to honestly question whether the absence of a challenge was due to a lack of understanding of the statistical model and the weighting process rather than on a disagreement with the conclusions the model purports to support.

and tramps in foreign trades is increasing (Ex. R-1, pp. 4, 5; Ex. R-4, p. 2), and (6) Matson's share of the westbound container and containerizable cargo in the Hawaii trade is substantially less than it was 10 years ago, declining from 93 percent to 79 percent, and (7) Matson faces the "risk of regulation" not faced by other Value Line companies which prevents it from realizing highly profitable returns but does not protect it from unreasonably low returns.

The State of Hawaii, Hearing Counsel and Tobias oppose any upward adjustment for risk to Matson's rate of return. The State argues that Matson's Trade operations are conducted in a protected environment in which Matson is the dominant carrier.³² It attacks Matson's expert saying his analysis does not represent the considerations which would be "those of an informed investor determining an appropriate cost of capital for the Matson Trade entity in an investment market setting" and points to his testimony that "an empirical foundation for the relationship is 'unknowable.'" The State asserts that "apart from Mr. Benderly's reliance on a fifteen year volatility analysis which is flawed b[y] the inclusion of a major strike in 1971, there is no disagreement among the parties that the recent experience provides no basis for an incremental relative risk adjustment." It concludes that no risk adjustment should be made to Matson's rate of return because of difficulties in "quantifying the reduction" even though it believes "It would be more appropriate to reduce the allowable rate of return." (pp. 34-36 of the State's Opening Brief).

Hearing Counsel's position was expressed in the expert testimony of Dr. Ellsworth. In analyzing Mr. Benderly's Variability of Earnings test Dr. Ellsworth used the analysis put forth in Docket No. 85-3, because he did not believe Benderly's use of different time periods vis-a-vis the Value Line companies (1982) and Matson (1984) was appropriate. In addition he concluded that the use of the 10-year period beginning in 1973 was more appropriate than use of the 15-year period beginning in 1968. (Ex. PHC-6, p. 11).

As to Matson's objective relative risks, Dr. Ellsworth relied in part on the testimony of Sandra Kusumoto's analysis of Matson's competitive situation (Ex. PHC-3). Ms. Kusumoto is an economist with the Commission's Office of Planning and International Affairs. Her testimony discusses Matson's current competitive situation. She concludes that Matson is the dominant carrier in both the U.S. Continent/Hawaii and Pacific Coast/Hawaii trades. She states that from 1978 to 1984 total trade revenues increased every year even though Matson's market share declined. She further states that, "because Matson controls a large share of the market, it acts as a dominant firm price leader. . . . Matson is the first to submit its price increase then followed by similar price increases by the smaller competi-

³² See Ex. PH-12 (Ex. HAW-107) for a full statement of the State's position on Matson's market share and on the nature of Matson's competition.

tors." She concluded that "while I recognize that Matson does face direct and indirect competition and has been losing market share, other evidence indicated that Matson's risk of operating in the West Coast/Hawaii trades is minimal." In addition to the above testimony Dr. Ellsworth also himself subjectively measured Matson's relative risk (Ex. PHC-6, pp. 14, 15) by evaluating Matson's market share, the nature of its competition, and the entrance and exit of Seatrain Lines into and out of the Trade before he concluded that Matson appears to be a less risky investment than the average corporation. His final recommendation was a neutral one which would adopt neither a positive nor negative risk factor.

Tobias in its Opening and Reply Briefs agrees with Hearing Counsel's analysis that Matson is less risky than the average U.S. corporation. However, he argues that a discount should be applied to the rate of return for the lesser risk. However, he does not indicate the amount of the discount. General Order 11 at section 552.6(d)(2)(ii) provides that:

The reasonableness of a carrier's return of rate base will be based on a comparative analysis of the carrier's projected return on rate base with the rate of return on total capital earned by comparable U.S. corporations. This technique, the comparable earnings test is based on an analysis of the earnings of U.S. corporations over an extended period of time. From these time/series data, the average rate of return earned by U.S. corporations is computed, and, where appropriate, adjusted for current trends in rates of return, the cost of money and relative risks.

The above regulation is, we think, both reasonable and clear. In adopting the comparison of the projected return on rate base the Commission specifically points out that the technique requires one to analyze earnings *over an extended period of time* to arrive at an average rate of return. However, with respect to adjustments to the average rate of return for relative risks the Commission specifically refers to *current trends*. It does not necessarily require some projection based on an analysis over a long period of time. Rather, we believe that the regulation requires a recognition of current circumstances or facts relating to risk and the acceptance of relevant evidence that would support a projection of relative risk during the test (1986) period. In this case it is the consideration of the actual competition Matson is facing now and is likely to face in the remainder of 1986 and of the projections made by Matson's and Hearing Counsel's experts. As to the actual competition Matson is facing, we believe the record establishes that there has been and will be an increase in the degree of competition. However, we believe and have found as fact that the increase is minimal and will not materially affect Matson's dominant position in the Trade. Matson retains over 70 percent of the Trade and is the leading ratemaker. Given those facts we have great difficulty in concluding as Matson would have us conclude, that they are in a worse competitive position or are more risky than the majority of Value Line companies, and indeed, one

would be more justified in finding that the opposite is true. As to the use of the variability in past earnings test, it has been used in previous rate cases. It may or may not be "the oldest and most widely accepted measure of the general riskiness of a business," as Matson suggests, but in terms of measuring and projecting "current trends," for 1986 in this case, we think that standing alone, it is a somewhat remote and tortuous test, based more on a complicated statistical exercise than on a pragmatic and significant evaluation of comparable factors affecting current trends in Matson's risks. Nevertheless, both Matson and Hearing Counsel use the variability of earnings test to arrive at their adjustment for risk and the other parties offer no real alternatives. Matson's expert predicts lesser risk on the basis of the 10-year period and more risk on the basis of the 15-year period. He would adopt the 15-year period, while Hearing Counsel would use the 10-year period.

The preponderance of the evidence presented here supports the result reached by Hearing Counsel which would use the 10-year period and would make no adjustment for risk in the benchmark rate of return. It is clear that Matson's risk is probably less and certainly no worse than equal to that of the average U.S. corporation. In balancing both subjective and objective considerations it is held that based on Matson's relatively stable earnings, its large market share and the absence of any new, significant container operator in the trade, Matson is no more risky than the average corporation used in arriving at the benchmark rate of return. Therefore, no adjustment for risk need be made in 1986 to the benchmark rate of return.

Issue No. 5—Are current trends in rate of return and interest rates such that Matson's rate of return should be adjusted?

A. Adjustment for current trends in rates of return

Insofar as one can determine from the record and from the briefs filed by the parties, Matson has not recommended any adjustment to the benchmark rate of return for current trends in rates of return and did not treat the issue in its initial brief. The State and Tobias both believe the benchmark rate of return ought to be adjusted downward for current trends in rates of return.³³ Hearing Counsel makes no adjustment but its expert testified that the trend is downward.³⁴ In its brief the State comments on the analyses of Matson's and Hearing Counsel's experts noting that it believes Hearing Counsel's model which uses Department of Commerce statistics rather than the Value Line Industrial composite, "produces the lowest rate of earnings averages in the most recent five year period because the use

³³ See pp. 30-34 of Matson's Opening Brief and pp. 8, 9 of Tobias' Reply Brief.

³⁴ See Ex. PHC-6, p. 18, and Chart 1 at p. 2.

of the quarterly data . . . affords a more sensitive reflection of current trends." It states that (p. 32 of its Opening Brief):

There is also substantial agreement among the three series that the average rate of earnings have been trending steadily and sharply downward since the late 1970's and early 1980's at a rate of approximately 6 percent per year, in line with the cresting and ebbing of the rate of inflation of the nation's economy. Justifiable provision for a continuing decline in the benchmark rate of return, advanced by three years to a moving average centered at 1986, would reduce the benchmark rate of return projected from the Benderly series to 9.08 percent in order to reflect an adjustment for "current trends in rate of return."

Matson, of course, disagrees with the State. In pp. 31-36 of its Reply Brief it urges rejection of the State's view because:

First, the reason the State's calculation shows a decline in the earned return on total capital is that in its most recent three year moving averages, it gives the return of the recession-influenced year of 1982 one third of the weight in the average. . . . As shown in the first column of Appendix E of the State Opening Brief, the actual return on total capital for manufacturing companies has trended upward since 1982. The return on total capital increased 9% between 1982 and 1983, and increased 14% between 1983 and 1984.

Second, an examination of the return on total capital data implied by the State's new proposed benchmark shows the unreasonable nature of the projection underlying its recommendation

The anomalous results of the State's exercise are obvious. Average return on total capital for the industrials is predicted to decline from 12.11% in 1984 to 7.82% in 1985, a one year decline of 35%. The projected returns then trend upward to 8.84% in 1986 and 10.37% in 1978, before dropping precipitously to 6.20% in 1988, a decline of 40%. Nothing in the 15-year history of return on total capital for industrials supports a prediction of any such pattern or level of return for the companies involved (See App. E., Col. 2, State Opening Brief). . . . This new suggested benchmark [9.08%], is 2.3 percentage points below the 11.4 benchmark adopted by its own witness (Tr. 738-39).

Third, the earned returns on total capital for manufacturing companies have been above the 9.08% level in every year since 1971 (Ex. R-7, Sch. 1). The State's newly suggested 9.08% benchmark is 1.87 percentage points below the 10.95% embedded cost of debt of industrial companies (Ex. R-9, p. 8). Clearly, under no stretch of the imagination can a return substantially lower than that earned by manufacturing companies in any of the last 15

years and below their embedded cost of debt serve as a reasonable benchmark for today.³⁵

After considering all of the above as well as other evidence and argument of record, it is held there need be no adjustment to the benchmark rate of return for current trends in rates of return. While, like Hearing Counsel, we believe rates of return are trending downward slightly, it is difficult to measure the extent of the trend—and certainly it cannot be done on the basis of the record made in this proceeding where both the State and Tobias fail to offer a viable specific adjustment. Consequently, it is held no adjustment need be made.

B. Adjustment for Current Trends in Interest Rates

In its opening brief Matson, at pp. 41–42, refers to the testimony and schedules introduced by its expert. (Ex. R–7, pp. 13–19, Sch. 2–6). It states:

The next step [in reaching a fair rate of return for 1986] is to adjust the average returns on total capital of the comparison upward if (1) the current cost of money, as indicated by interest rates, is higher than the average cost in the period over which the returns were averaged; or (2) money costs are expected to trend higher in the future (Ex. R–7, p. 13).

For the purpose of the first adjustment, the average interest rate in 1985 is compared with the average interest rate in the 10-year and 15-year periods. To make that comparison Mr. Benderly examined yields on corporate, utility and U.S. Treasury bonds over the period 1970–1984. He found the interest rates to be from 50–70 percentage points higher than the average for the 10-year period 1975–1984 and about 1.75 percentage points higher than the average for the 15-year period 1970–1984 (Ex. R–7, p. 15, Sch. 5, and 6). Therefore, he adjusted the 10-year benchmark of 12.26% to 12.76%, and the 15-year 11.56% benchmark to 13.31% (Ex. R–7, p. 16). In recognition of the fact that the increase in returns on total capital may not parallel the increase in interest rates on a one-for-one basis, he used 12.75% as the adjusted benchmark, this being at the bottom of the adjusted range of 12.76% to 13.31% (Ex. R–7, p. 16).

With respect to the second adjustment (for trend of money costs in the future), Mr. Benderly noted the prediction of 25 prominent economists, as reported in the *Wall Street Journal*, January 2, 1986, that rates on long-term Treasury bonds would increase from 9.27% at the end of 1985 to 9.76% by the end of 1986 (Ex. R–7, p. 17). As reported January 3, 1986, Treasury bond futures contracts for delivery in December 1986 and December 1987, respectively, have implied yields of 10.08% and 10.41%.

³⁵ Matson's response to the State does not clearly differentiate between adjustments to the benchmark for current trends in rates of return and the establishment of the benchmark rate of return, and its arguments may be applied to both facets of the rate of return.

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Thus both predictions and market action point to an upward trend in interest rates from their level at the end of 1985.

While Mr. Benderly stated that some weight should be given to these indications of future interest rates, he limited his adjustment for future trends to a minimum of zero and a maximum of 0.25, by adopting an adjusted benchmark range of 12.75%–13.00% (Ex. R-7, pp. 17–19).

Hearing Counsel, the State and Tobias all disagree with Matson's upward adjustment to the benchmark rate of return for current trends in the cost of money. Hearing Counsel recommends no adjustment, and so far as we can determine from the record, the State does not recommend any specific adjustment.³⁶ Hearing Counsel's position was presented through its experts, Dr. Ellsworth, and Mr. Blair. (Ex. PHC-4, pp. 8–19; Ex. PHC-6, pp. 16–24). Mr. Blair, a staff economist with the Commission's Office of Policy Planning, agreed with Mr. Benderly, that investors "have no *factual information* about the future and must make their decisions under conditions of uncertainty." He disagrees with Matson's reliance on the "Wall Street Journal poll." He states that:

Taking the average of 25 points of view is not in any way a true *consensus* since it involves neither *general agreement* nor a clear *majority opinion*. It is a mechanical summation of points of view that, unfortunately, weighs the views of each member of the group equally—whether or not all the views expressed are equally reasonable, and without regard for any member's previously demonstrated expertise.

He avers that:

Taking the *average* of a poll is *not* the way professional investors get the best available information on likely future interest rates. Either (1) limiting consideration to the sub-group of forecasters who have the better forecasting records, or (2) limiting consideration to those factors based on variable estimates which are most reasonable, provides superior sources of information on likely future interest rates.

He then proceeds to support the above premise by analyzing what was done in this case, and discusses other aspects of Mr. Benderly's analysis. He recommends that "the appropriate range per adjustment would be to *either make no adjustment for interest rates or to lower the benchmark slightly, perhaps a -0.25 adjustment.*" He finally, "because of the uncertainty in forecasting," recommends "no adjustment factor for future interest

³⁶The State speaks of "five adjustments, exclusive of current trends in the cost of money" (Opening Brief, p. 48), and directly objects to Mr. Benderly equating "the 'current cost of money' with current interest rates," however, we can find no specific recommendation for a discount for current trends in interest rates, to the benchmark rate of return.

rates." Dr. Ellsworth agrees and, as is noted in Hearing Counsel's Opening Brief, at pp. 15, 16:

Dr. Ellsworth concluded that the benchmark rate of return need not be adjusted either upward or downward because of trends in rates of return and interest rates. (PFF 20; Ex. PHC-6, p. 24) This conclusion is based, in part, on the fact that rates of return peaked in 1980 and have trended downward since that time (PFF 17), and the level of long and short term interest rates has also come down as has the level of inflation, which has come down significantly in the past several years. (PFF 18)

Though it is more reasonable to expect lower than higher interest rates in 1986 (PFF 19), economic forecasting is a hazardous business (Ex. PHC-6, p. 24), and it is appropriate to be conservative and refrain from making a negative adjustment for future trends (Ex. PHC-4, p. 19).

Finally, Tobias, in his Reply Brief at pp. 9-13, advocates a downward adjustment to the benchmark rates of return for current trends in the cost of money. He does not quantify the amount of the adjustment by making a specific recommendation. He notes that Mr. Benderly agrees that interest rates are going down (Tr. pp. 558-590), as did Mr. Hrabeta Tr. pp. 239, 240). He properly points to recent newspaper articles pointing to "the startling decline in interest rates" which "has taken them to their lowest level in eight years," and refers to the testimony of Dr. Ellsworth and Mr. Blair. Tobias concludes that "if the Commission is to assign a 'discount' to the benchmark rate of return for *current trends* in interest rates only once in a lifetime, this is that time."

Tobias, quite succinctly, has reached the heart of the issue. It seems almost inconceivable that, given the facts of record relating to the present level of interest rates the methodology of G.O. 11 respecting the allowance for current trends, and the term of the test period (1986), any justification could be found to adjust the benchmark rate of return upward for current trends in interest rates. We believe that in this case, the crucial facts relating to current trends in interest rate are, first, the present rates themselves and, second, the dramatic facts and circumstances precipitating the decline since the benchmark rate of return was determined. While it is also necessary to project what future interest rates will be throughout the remainder of the test period it is, here at least, invalid to go back over a long period of years to reach averages that, in effect, are used to present, not a current trend, but rather a long range 10 or 15 year average that actually negates the current trend adjustment. As to the "projections" made by the 25 *Wall Street Journal* economists and the arguments pro and con respecting their validity, we think that on the record presented in this case, the "projections" have about the same weight as an educated guess. The expert testimony in this proceeding leads one to the conclusion that the fall in interest rates and their level throughout 1986 involves

as much a political prognostication (Gramm-Rudman-Hollings, etc.) as it does an historical analysis, and in our view, exercise of the Commission's expertise and judgment is preferable to choosing to follow a pool of 25 economists, without knowing the precise factors leading to their conclusions and the various other factors, i.e., professional bias and affiliation, that may have influenced them.

So here, it is held that there should be no upward adjustment to the benchmark rate of return for current trends in interest rates. Unfortunately, the record before us does not contain sufficient probative evidence to allow us to discount the rate of return by any specific or reasonable percentage. Once again, we believe the state of the record might be more useful if the parties were not disadvantaged by the time constraints they were required to follow.

Issue No. 5—Rate of Return

The origin of all of the issues set forth in the Commission's Order of Investigation and Suspension is the determination and use of the benchmark rate of return. As has already been noted in G.O. 11, the Commission requires generally that:

In evaluating the reasonableness of a VOCC's overall level of rates, the Commission will use return on rate base as its primary standard. 46 CFR 522.2(b).

and that this involves:

. . . a comparative analysis of the carrier's projected return on rate base with the rate of return on total capital earned by comparable U.S. corporations. 46 CFR 52.6(d)(2)(ii).

Matson's expert first examined the mean rates of return earned on average total capital by *Value Line Investment Survey* manufacturing companies, which were 11.68%, 12.26% and 11.56%, respectively, for the 5-year, 10-year and 15-year periods ending in 1984 (Ex. R-7, p. 9, Sch. 1). He found that the 5-year period was atypical and rejected it and used the 10-year and 15-year average returns on total capital.³⁷ There is no question that in arriving at his averages Matson's expert complied with the provisions of G.O. 11, which he is required to do. His methodology has been used by Matson and accepted by the Commission in a continuing series of rate cases. After adjustments for the relative riskiness of Matson and U.S. corporations generally, recent trends of rates of return and interest rates,

³⁷The return on total capital formula is:

$$\text{Return on Total Capital} = \frac{\text{Net Income After Taxes \& Interest Charges On Long-Term Debt}}{\text{Stockholders' \& Long-Term Debt Equity}}$$

and after reducing the average price of fuel to \$18.00 per barrel, Matson contends that its fair rate of return is in the range of 13.75%–14%.

Hearing Counsel accepts and agrees with the G.O. 11 methodology used by Matson in arriving at a benchmark rate of return. However, instead of using the *Value Line Investment Survey* of manufacturing companies its expert used the Bureau of Census *Quarterly Financial Reports* (QFR). After making what he considered to be appropriate adjustments to arrive at Interest Charges on Long Term Debt (Embedded Debt), and using a 5-year, 1980–1984 average, he was able to calculate the rate of average return on total capital for manufacturing firms of 11.5 percent (Ex. PHC-6, p. 8). As we have already indicated, Hearing Counsel made no adjustment to the benchmark rate of return for current trends in rates of return, interest rates or relative risks.

As to the State, it relies on the testimony of its expert, Mr. Simat. Its basic objection on Matson's determination of benchmark rate of return is an attack on the methodology required by G.O. 11. It recognizes that the Commission "has opted to depart from the more traditional cost of capital approach" and "instead, has adopted the 'comparable earnings' approach." It attacks the use of that approach in regard to Matson because (1) "Matson's Trade entity has several unique attributes which are not present in the world of industrial companies . . .," (2) "the G.O. 11 methodology is unclear as to the treatment of historical data in the determination of a fair and reasonable rate of return for prospective ratemaking purposes." It concludes that, "it would be unwise to consider the G.O. 11 methodology as anything more than a general guideline, rather than a precise and unflexible prescription which cannot be modified to produce a more reasonable and realistic result."

As to Matson's fair and reasonable rate of return on rate base, the State asserts that the figure should be 8.35%.³⁸ It begins with a benchmark rate of return of 11.4% and proceeds to discount that figure as follows:

Adjustments For	Amount
Higher percentage debt	.375
Working capital allowance	.025
Income tax allowance	.2
Interest expense allowance	.2
Market book value ratio	2.25
Total adjustments	3.05

The State's arguments supporting the above discounts are set forth in its Opening Brief, pp. 22–46, and in the testimony and exhibits presented by its expert (Exs. PH-35 through PH-56). The arguments and supporting data are too lengthy to repeat in the body of this decision. However, they are discussed briefly below.

³⁸ In the "Conclusion" to its Opening Brief, the State asks for a rate of 9%.

Insofar as the State's position regarding the G.O. 11 return on rate base methodology is concerned, the issues raised by the State were considered in Docket No. 78-46. The Commission specifically rejected the rate of return on equity methodology and adopted use of rate of return on rate base. In doing so it noted that Hawaii supported the use of return on rate base, but wanted to use other alternative methods where warranted, as it does in this case. The Commission also specifically rejected the State's requests. In reaching the return on rate base method it is clear that the Commission exhaustively considered various alternatives it might use. While one may agree or disagree with its decision, it must defer to the propriety of that decision. For the State to prevail here it must show the return on rate base method is unfair and unreasonable when used by Matson in this proceeding. On the basis of the record before us, we cannot so hold.

As to the State's adjustments to the benchmark rate of return we would agree with Matson that the .375 downward adjustment for Matson's debt ratio contravenes G.O. 11 and the holding in the *Sea-Land* case which frowns on considerations of capital structure in determining rate of return on rate base, and that the State expert's analysis is flawed (Matson's Opening Brief, pp. 66, 67). With respect to the market/book value ratio adjustment of 2.25%, it is based on a cost of capital approach which has generally been rejected by the Commission in G.O. 11. Further, we believe the regression analysis used, which does not employ individual-company data, is too imprecise and inconclusive. Regarding the other adjustments to rate base for working capital allowance (.025), income tax allowance (.2) and interest expense allowance (.2), they all contravene the import of G.O. 11 and in the case of the income tax allowance would be opposite to decisions made by the Commission in Docket No. 78-46. There is little question that as to the income tax allowance Matson benefits from the treatment allowed and no question that Congress and the Commission thought the benefit appropriate.

As we have already noted, in order for us to set aside the methodology of G.O. 11 it is necessary that the record contain proof that its application is unfair and unreasonable. Here, we again can see the problems raised, but without a specific showing of unfairness or unreasonableness we cannot set aside G.O. 11 methodologies.

In light of the above we hold that Matson's fair and reasonable rate of return on rate base is between 11.5 and 12.19 percent and that given the prudent and relatively efficient manner in which Matson is operated (Finding of Fact 14) the present rates are not unfair or unreasonable. The proposed increase of 1 percent, however, is in our judgment unfair and unreasonable.

Miscellaneous

Throughout this proceeding miscellaneous issues have been raised and then abandoned. Some, however, remain in the briefs of the parties. While the record does not justify or require any detailed analysis, the following comments are appropriate. At page 11 of its Opening Brief and elsewhere, the State introduced the argument that the "I.C.C. Jurisdiction Over Matson's Tariff 2016 is Questionable" and recommends that the Commission order an investigation to "determine whether or not the Federal Maritime Commission retains jurisdiction over Tariff No. 2016." Apparently, it is arguing that the pickup service-zone arbitraries in Rule 750 disqualify Tariff 2016 as a "joint tariff" subject to ICC jurisdiction, because the individual commodity rates are for water carriage and the zone arbitraries apply uniformly to storedoor pickup service by motor carrier within the zones. We believe the rates in Matson Tariff No. 2016 are "joint" rates even though the tariff uses the format of commodity rates plus arbitraries for storedoor pickup in the several zones. Matson's joint motor/water rates were filed with the ICC pursuant to the Revised Interstate Commerce Act (49 U.S.C. 10203(a)(4)(A)), which reads:

A motor common carrier of property may establish through routes and joint rates and classifications applicable to them with other carriers of the same type, with rail and express carriers, and with common carriers, including those referred to in Subparagraph (D) of this paragraph.³⁹

The ICC accepted Tariff No. 2016 without question and absent any citation of statutory or case law to the contrary there is no basis for the FMC to question ICC's jurisdiction.

On pages 74 to 76 of its Opening Brief and pages 41 and 42 of its Reply Brief, Matson argues that "The Commission should administer The Comparable Earnings Standard With a Reasonable Amount of Flexibility," which "Requires an Analysis of Carrier Earnings Over Time." It points out that the earnings of individual, unregulated companies fluctuate between good years and bad years and that "the important point being that they have the opportunity to offset the bad years with the good years to achieve a reasonable average level of earnings over time." It argues that "A rigid single 'test year' public utility type of regulation is unfair to domestic offshore carriers because it deprives them of the opportunity to 'average out' the good and bad years."

In our view the present General Order 11 is quite generous insofar as setting rates of return is concerned. Not only does it allow the carrier to realize an average rate of return in comparison with other U.S. companies adjusted for current trends, but as this proceeding demonstrates, it allows

³⁹ Subparagraph (D) refers to water carriers subject to the Shipping Act, 1916, or the Intercoastal Shipping Act, 1933, and providing transportation of property between Alaska or Hawaii and the other 48 states.

for a highly favorable income tax allowance, working capital allowance and allocation factors. Further, there is nothing in the record to suggest that Matson is disadvantaged either in earnings or in the establishment of rates. Indeed, in this proceeding a backward look shows that with fuel cost at \$18 a barrel, when applied to the test year 1985 and if continued into 1986, everything else being equal, Matson would realize and retain an increase of 1.35 percent on its rate of return (Ex. PHC-7). As to allowing a carrier to even out good years against bad, we believe that approach would violate the Commission's holding in *Sea-Land, supra*, where it stated:

Allowing a carrier to achieve an unreasonably high rate of return to compensate it for its past shortfalls in earnings is impermissible rate regulation. This rule of law is not unfair to the carrier in light of the fact that confiscatory rates cannot be established on the basis of the carrier's past actual profits.

Generally, it is our view that if Matson wishes to object to G.O. 11 by comparing itself to public utilities or private U.S. corporations the comparison ought to be a full one and ought not to select isolated facts or circumstances that tend to distort the overall picture. For example, on the one hand it complains it is not a public utility with an exclusive franchise, and on the other, it cites the fact that it is regulated as a detrimental factor, ignoring the regulatory rules under which all public utilities must operate. It argues for a rate of return on capital equal to that of U.S. manufacturing companies (Value Line), and an ability to set off bad years against the good years, completely ignoring the adjustment for current trends which it is allowed and the favorable treatment of various items previously referred to which most U.S. manufacturing firms do not enjoy. In short, if Matson wishes to seek changes in G.O. 11 by comparing itself with other entities, it is, of course, free to do so. However, in our view the comparison ought to be a complete one weighing all advantages and disadvantages, not a kind of an administrative "grab-bag" that seeks piecemeal changes to the regulation.

Finally, we would again refer to the overall question of G.O. 11. We have already discussed the issues raised by the State and Tobias and they will not be reconsidered or repeated here. However, certain observations are appropriate regarding G.O. 11. First of all, in our view, given its history and its scope, the regulation represents a commendable and viable approach in dealing with rate matters, especially where general rate increases are concerned. It sensibly foresees the probable need for future changes within its terms and to this end the following comments are made.

This case does not involve a general rate increase. Under G.O. 11 the carrier is not required to file the reports required by Part 552.2(f), and it did not do so here when it initially filed its proposed 2.5 percent rate increase. This meant that neither the Commission nor any possible protestant had any idea as to the basis for the increase. Even after the Commission

issued its Order of Investigation and Suspension, the carrier did not file any supporting data. It was some time before any documents were filed in discovery and by that time the 180 day statutory period already was working to the detriment of the parties, and especially the protestants. Eventually, the carrier did place data in the record—much of it the same data that would have been required if a general rate increase has been proposed.

It is clear that both Congress and the Commission want rate cases to be handled expeditiously, and that they do not want every proposed rate increase to generate a full-blown rate proceeding. The fact that the regulation does not require detailed supporting data when the proposed increase is not a general rate increase supports this premise. We would respectfully suggest that in cases not involving a general rate increase the carrier be required to submit supporting data to all parties within 5 days of the service of the initiation of a proceeding. Further, that data should clearly set forth those specific adjustments to the carrier's most recently filed prior financial data which give rise to the proposed increase. In this manner not only would time strictures be less burdensome, but it would allow the Commission to specifically require prior financial data as a starting point, which in turn might obviate the need to begin each rate case anew, as though rate increases had never before been considered. For example, if oil prices increased dramatically causing a need to increase the rate of return, then a carrier seeking less than a general rate increase should not initially present a mass of statistical projections which may be basically unchanged. It ought to be able to refer to the last rate matter and the data involved and update it to reflect the reason for the proposed increase, i.e., the rise in fuel costs.

The last point to be made involves issues related to the reasonableness of a current rate of return litigated under section 18(a) of the Shipping Act, 1916. Cases arising under that section do not involve the time limitations contained in cases arising under the Intercoastal Shipping Act, 1933. Where, as here, the issues are many and far-reaching and the burden is on the protestant, the time limitations are inappropriate and their application may even raise questions of due process. Further, they inhibit a thorough development of facts and issues which the Commission may wish to consider. In such cases we would suggest that the proceeding be kept separate from proposed rate increase cases under the Intercoastal Shipping Act, 1933, where the burden is clearly on the carrier.

Finally, in this proceeding, an attempt has been made to cover fully all of the issues raised. However, the volume of the evidence coupled with the abbreviated time period involved does not allow for as complete a written decision as one would like. All testimony, facts and issues presented, however small and transient, have been considered in this proceeding. Where the decision does not refer to them it is because it was

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felt such reference was not important to the ultimate decision and because of the time strictures involved.

(S) JOSEPH N. INGOLIA,
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1415

APPLICATION OF OOCL-SEAPAC SERVICES, INC. FOR THE
BENEFIT OF KENG HUA PAPER PRODUCTS CO., INC., MANILA,
PHILIPPINES

ORDER OF PARTIAL ADOPTION

July 3, 1986

The Commission determined on its own motion to review the Initial Decision (I.D.) of Administrative Law Judge Seymour Glanzer served April 2, 1986 in this proceeding.

BACKGROUND

On October 30, 1985 OOCL-Seapac Services, Inc. (OOCL-Seapac), a member of the Transpacific Westbound Rate Agreement (TWRA) offered the shipper a rate subject to booking of \$1300 (\$1210.00 plus \$90.00 terminal receiving charges) per 20-foot container for an upcoming shipment of book binding machinery from New York, New York to Manila, Philippines. Booking occurred on November 25, 1985. Due to inadvertence the rate was not filed before the shipment sailed from New York on December 11, 1985. Subsequently, on January 17, 1986 TWRA filed the \$1300 rate in its tariff with an effective date of January 20, 1986, and on February 18, 1986, OOCL-Seapac applied pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(e) for permission to waive collection from the consignee Keng Hua Paper Products Co., Inc. of a portion of the freight charges payable at the rate in effect at the date of shipment.¹

The Presiding Officer found that the applications met all the requirements of section 8(e) of the Act and granted the waiver.² Under review is the

¹ OOCL-Seapac's application of January 14, 1986, referred to in the Initial Decision, was deficient in that it was filed before TWRA published the \$1300 rate in its tariff on January 17, 1986.

² Section 8(e) authorizes the Commission to permit refund or waiver relief 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 and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application , filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, and additional refunds or waivers as appropriate shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application; and

tariff notice required by the Initial Decision to be published in the carrier's tariff.

DISCUSSION

Section 8(e)(2) of the Act requires that prior to applying for refund or waiver the carrier publish a "new" tariff (conforming tariff) showing the rate on which the refund or waiver would be based. Because it is intended to apply to shipments which sailed earlier, the effective date of the conforming tariff must be established at a date prior to the date of filing with the Commission.

In this instance, the Presiding Officer established the effective date of the conforming tariff as October 30, 1985, the date OOCL-Seapac quoted the rate to the shipper. In the Presiding Officer's opinion:

there being no evidence that the rate was not intended to become effective, immediately, if the shipment was booked on that date.
(I.D. at 28 F.M.C. 505)

Filing of the rate was contingent, however, on booking. That the booking could conceivably have taken place as soon as OOCL-Seapac offered the rate to the shipper is irrelevant in light of the fact that booking in fact occurred on November 25, 1985 when the carrier's obligation to have the rate filed arose.

In *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corporation (Yamashita)*, 19 S.R.R. 1407 (1980) and *Application of Australia New Zealand Container Line for the Benefit of Meadowsfreight New Zealand Ltd.*, 28 F.M.C. 183 (1986) (Meadowsfreight New Zealand), the Commission established the effective date of the conforming tariff, as either: (1) the date the tariff omitting the intended rate becomes effective; or (2) the date the intended rate, absent the mistake, would have become effective. These decisions were recently followed in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of the Embassy of Tunisia*, Special Docket No. 1381, Order of Partial Adoption served June 9, 1986, 28 F.M.C. 421 where the Commission determined that the effective date of the conforming tariff is the date the error on which the application is based was made.

OOCL-Seapac's request for a waiver is based on the failure to file the intended rate when booking occurred on November 25, 1985. Thus, according to the decisions in *Yamashita*, *Meadowsfreight New Zealand*, and *Embassy of Tunisia*, *supra*, the effective date of the conforming tariff filed on January 17, 1986, should have been made to relate back to Novem-

(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment.

The Commission, by regulation, has defined date of shipment to mean the date of sailing of the vessel from the port at which cargo was loaded.
46 C.F.R. § 502.92(a)(3)(iii) (1985).

ber 25, 1985 when, absent the error, and according to the understanding between the parties, the rate would have been filed in TWRA's tariff. Furthermore, because it reflects OOCL-Seapac's independent action, application of the rate shall be limited to shipments carried by OOCL during the time specified in the tariff notice.

THEREFORE, IT IS ORDERED, That in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Transpacific Westbound Rate Agreement promptly publish in its tariff the following notice:

Notice is given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1415, that effective November 25, 1985, and continuing through January 19, inclusive, the rate for Used Book Binding Machinery AG—From Atlantic Ports PC 20 is \$1210.00. Such rate is subject to all applicable rules, regulations, terms and conditions of said rate and this tariff. This Notice is effective for purposes of refund or waiver of freight charge on any shipment carried by Orient Overseas Container Line during the specified period of time.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1415

APPLICATION OF OOCL-SEAPAC SERVICES, INC. FOR THE
BENEFIT OF KENG HUA PAPER PRODUCTS CO., INC., MANILA,
PHILIPPINES

Application to waive collection of portions of freight charges granted.

Donna M. Forminio for applicant OOCL Seapac Services, Inc.

Gerard H. Wollweber for applicant Transpacific Westbound Rate Agreement.

INITIAL DECISION ¹ OF SEYMOUR GLANZER, ADMINISTRATIVE
LAW JUDGE

Partially adopted July 3, 1986

By application filed January 14, 1986, OOCL-Seapac Service, Inc., asks permission to waive collection of \$511.94 of freight charges due it from Keng Hua Paper Products Co., Inc., Manila, Philippines, in connection with a shipment of used book binding machinery carried by it from New York, N.Y., to Manila, Philippines, aboard the *Oriental Diplomat* which sailed from New York on December 11, 1985. The shipment weighed 777 kilograms and measured 7.023 cubic meters. Transpacific Westbound Rate Agreement joins in the application.

On October 30, 1985, OOCL-Seapac quoted a rate of \$1300 (ocean freight \$1210 per 20' container plus an existing terminal receiving charge of \$90 per 20' container) for the upcoming shipment, subject to booking. The booking took place on November 25, 1985, but, due to inadvertent clerical error, the intended ocean freight rate was not published in the TWRA tariff as an independent rate as it should have been. Thus, at the time of shipment the applicable ocean freight rate was \$253 W/M and the applicable terminal receiving charge was \$5 M. At those rates, charges amounted to \$1,811.94. The shipper was billed at the applicable rates but was told to pay at the booked rates. When the error was discovered, a corrected tariff reflecting the intended ocean rate was filed, effective January 20, 1986. There were no other shipments of the same or similar commodity to the same destination during the relevant time period and

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).

there is no indication of discrimination, or the likelihood thereof. Nevertheless, the order, which follows, provides safeguards against discrimination.²

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. OOCL-Seapac shall waive collection of \$511.94 in connection with the above described shipment and TWRA shall publish the following notice at pages 1421 and 1426-A1 of its Tariff FMC No. 3:

Notice is given, as required by the decision in Special Docket No. 1415, that effective October 30, 1985, and continuing through January 19, 1986, inclusive, for purposes of refund or waiver, the rate for Item No. 84-0170 Book Binding Machinery AG—From Atlantic Ports PC 20 PHIL is 1210 00(2). (“(2)” means Applies on Used Machinery Only.) Such rate is subject to all applicable rules, regulations, terms and conditions of said rate and this tariff.

OOCL-Seapac shall make any necessary adjustment in brokerage of compensation to brokers or freight forwarders.

Within 30 days of service of notice of authorization from the Commission, OOCL-Seapac and TWRA shall furnish the Secretary with evidence of waiver and collection together with copies of the prescribed tariff notices.

(S) SEYMOUR GLANZER
Administrative Law Judge

²In addition to other safeguards, the notice to be published in the TWRA tariff protects against discrimination among shippers by making the rate effective as of the date the rate was quoted to the shipper, there being no evidence that the rate was not intended to become effective, immediately, if the shipment was booked on that date.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1421

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE
BENEFIT OF EVA GABOR INT'L.

ORDER OF PARTIAL ADOPTION

July 3, 1986

The Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served on April 3, 1986 in this proceeding.

American President Lines, Ltd. (APL) applied, pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. §1707(e), for permission to refund to the consignee, Eva Gabor International, a portion of the freight charges collected on eighteen shipments of wigs APL carried from Korea to Kansas City, Kansas and Missouri.

The Presiding Officer found that the application met all the requirements of section 8(e) of the Act and properly granted APL permission to refund \$838.74 of the charges collected. However, the tariff notice required by the Initial Decision to be published in the carrier's tariff makes the rate APL seeks to apply effective as of August 29, 1985, whereas the earliest date the rate can be made applicable is August 30, 1985 when APL's independent tariff went into effect.

THEREFORE, IT IS ORDERED, That, in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, American President Lines, Ltd. promptly publish in its tariff the following notice:

Notice is given as required by the Federal Maritime Commission in Special Docket No. 1421, that effective August 30, 1985, and through November 7, 1985, inclusive, the special rate on Wigs from Korea to Kansas City, Kansas, and Missouri is \$133 W/M, 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.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission.

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOHN ROBERT EWERS
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1421

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE
BENEFIT OF EVA GABOR INT'L.

Application to refund freight charges of \$838.74, granted.

INITIAL DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Partially Adopted July 3, 1986

This application² is for permission to refund \$838.74 of freight charges arising out of 18 shipments of Wigs, beginning on September 2, 1985, moving from Busan, Korea, to Kansas City, Missouri.

The tariff involved in this proceeding is American President Lines, Ltd. (APL), Korea Freight Tariff No. I.C.C. APLS 305, FMC No. 137, which covers movements from Ports in Korea to Ports and Points in the United States (the Ports are Ports and Points are listed in Rule 1 of the tariff).³

On July 23, 1985, Eva Gabor International (Gabor) applied to the Conference for a rate action on "wigs from Korea" moving to Kansas City, Missouri. By letter dated August 29, 1985, the Conference confirmed the establishment of a special rate of \$133 W/M on wigs to Kansas City, Kansas and Missouri, under Item No. 6595-01S.⁴ The Conference published the above rate in its tariff, effective August 29, 1985.⁵ However, effective August 30, 1985, APL published its own tariff APLS 305, F.M.C. No. 137, where the rate on wigs to Kansas City, Kansas and Missouri, under Item 6595 was listed as \$141 W/M, and the special \$133 W/M rate was inadvertently omitted.⁶ The error was corrected in APL's tariff, effective November 8, 1985, when the rate was re-established at the \$133 W/M level.⁷ Prior to the correction being made Gabor tendered eighteen (18) shipments which were rated, billed and paid at the \$141 W/M rate level.⁸ The applicant now seeks a refund of the difference between the payments

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 February 21, 1986, well within the statutory period set forth in section 8(e), Shipping Act, 1984. APL initially filed the application which was later joined in by TPFCJ/K.

³ The Trans-Pacific Freight Conference of Japan/Korea (TPFCJ/K) Eastbound Interior Point Intermodal Tariff No. 1, ICC TPC 33, FMC No. 8, is also factually pertinent, but is not involved in the error which was made.

⁴ Application, Exhibit A.

⁵ Application, Exhibit B.

⁶ Application, Exhibit C.

⁷ Application, Exhibit D.

⁸ Application, Appendix 2.

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR 509
THE BENEFIT OF EVA GABOR INT'L.

made of \$16,984.14 and the payments due under the \$133 W/M rate of \$16,145.40 or \$838.74.

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive or refund 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, APL simply forgot to include the negotiated special rate in its tariff. It is the kind of mistake Congress sought to obviate in enacting section 8(e).

The application of APL conforms to the requirements of Rule 92(a), Special Docket Application, 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 an APL tariff containing a rate of \$133 W/M on Wigs from Ports in Korea (see Rule 1) to Kansas City, Kansas and Missouri, which rate would have been in effect had the error not been made.

2. The refund will not result in discrimination among shippers,⁹ and there is no evidence that any carrier or ports would suffer discrimination should the application be granted.

3. Prior to applying for the refund the applicant filed a new tariff which sets forth the rate upon which the refund should be based.

4. The application was filed within 180 days from the date of the shipment.

Wherefore, in view of the above, it is,

Ordered, that permission is granted APL to refund a portion of freight charges in the amount of \$838.74 to the shipper, Eva Gabor, Int'l, which refund will have no effect on the land portion of the intermodal movement, and it is,

Further Ordered, that APL promptly publish in the pertinent tariff the following notice:

Notice is given as required by the Federal Maritime Commission in Special Docket No. 1421, that effective August 29, 1985, and through November 7, 1985, inclusive, the special rate on Wigs from Korea to Kansas City, Kansas, and Missouri is \$133 W/M, 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

⁹The applicant states that there were no other shipments of the same commodity during the time period involved here.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1354

APPLICATION OF U.S. ATLANTIC-NORTH EUROPE CONFERENCE FOR THE BENEFIT OF THE FORD MOTOR COMPANY

Application to refund \$4,400 in Arbitrary charges granted. Applicant found to have conformed to the requirements of section 8(e) by filing a new, correcting tariff prior to filing its application.

Harvey M. Flitter, A.E. Phair, and Anthony M. Ryan for U.S. Atlantic-North Europe Conference.

REPORT AND ORDER

July 9, 1986

BY THE COMMISSION: (EDWARD V. HICKEY JR., *Chairman*; JAMES V. CAREY, *Vice-Chairman*; FRANCIS J. IVANCIE, THOMAS F. MOAKLEY; AND EDWARD J. PHILBIN, *Commissioners*)

This proceeding is before the Commission on Exceptions filed by the U.S. Atlantic-North Europe Conference (ANEC or Conference) to the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer). The Presiding Officer denied ANEC's application, submitted pursuant to section 8(e) of the Shipping Act of 1984 (the Act), 46 U.S.C. app. § 1707(e), for permission to refund \$4,400 in freight charges to the Ford Motor Company, assessed on five shipments of "Straight or Mixed Containers of Empty Steel Racks and/or Transmissions" (Mixed Containers) transported from Louisville, Kentucky to Blanquefort, France.¹ The shipments, totaling eleven 20-foot containers, moved on vessels owned by Sea-Land Service, Inc., an ANEC member, and were rated pursuant to ANEC's Port to Port and Intermodal Tariff No. FMC 1, 2nd revised page 1566. ANEC filed its application on July 24, 1985.

¹ <i>Date of shipment</i>	<i>Bill of lading (freight bill number)</i>	<i>Total charges</i>
1/26/85	984816303	\$2,496.00
2/4/85	984816807	2,496.00
2/25/85	984931709	2,496.00
2/25/85	984931699	1,248.00
2/25/85	984931712	<u>4,992.00</u>
		\$13,728.00

BACKGROUND

On December 27, 1984, Sea-Land advised ANEC that it was taking independent action on Mixed Containers moving in 20-foot containers from Louisville, Kentucky to Blanquefort, France. Sea-Land informed ANEC that effective January 7, 1985 through June 30, 1985, its rate on that commodity would be \$848.00 and would include the Bordeaux Arbitrary of \$400.00 per container. After June 30, 1985, Sea-Land's rate would increase to \$903.00 per container but would still include the Bordeaux Arbitrary. On January 8, 1985, ANEC filed the above rates on Sea-Land's behalf but inadvertently failed to note that the Bordeaux Arbitrary was included in the rates. Accordingly, the Arbitrary was separately assessed against the five shipments in question.

On July 22, 1985, two days before it filed the application in this proceeding, ANEC, at Sea-Land's urging, filed a new tariff page in an attempt to conform to Sea-Land's independent action instructions. This filing, 3rd revised page 1566, provided for a rate of \$903.00 per container, including the Arbitrary, through June 30, 1986. The July 22nd filing did not, however, reflect the \$848.00 freight rate, including the Arbitrary, that Sea-Land intended to be applied to the five shipments in issue. The Presiding Officer denied ANEC's application on the ground that "at no time prior to the filing of the application did the Conference file a corrected tariff showing the \$848.00 per container rate including the Bordeaux Arbitrary". He found that the July 22nd filing was deficient because it did not precisely set forth the \$848.00 per 20-foot container rate that Sea-Land intends to apply to the shipments at issue.

EXCEPTIONS

ANEC argues that although its original application may have been unclear, if the application and the July 22nd tariff filing are "liberally viewed, and from a practical standpoint," the Commission could conclude that a correct tariff was filed prior to the application. In this regard, ANEC submits that it could not have filed the \$848.00 rate prior to filing the application because Sea-Land intended that rate to expire on June 30, 1985, well before ANEC discovered that it had failed to correct the January tariff filing. ANEC argues that the Commission should reverse the Presiding Officer's Initial Decision and grant the application because ANEC did correct that part of the original filing which was incorrect, *i.e.* the Arbitrary, prior to filing its application.

DISCUSSION

Section 8(e)(2) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e)(2), provides, as is here relevant, that the Commission may only permit a

carrier to refund a portion of freight charges collected from a shipper 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.²

ANEC argues that its July 22nd tariff filing, which included the Bordeaux Arbitrary as part of Sea Land's *then* effective freight rate of \$903.00 per 20-foot container, satisfied this requirement. The Commission agrees that ANEC's July 22nd filing satisfies the tariff filing requirement of section 8(e)(2), and will therefore reverse the Initial Decision and grant Sea-Land permission to refund \$4,400 to the Ford Motor Company.

As is pointed out on Exception, the error that occurred was the Conference's failure to file a tariff page indicating that the Arbitrary was included in the \$848.00 freight rate that Sea-Land had established for Mixed Containers for the period of January 7, 1985 through June 30, 1985. The \$848.00 rate was properly filed and assessed against the shipments here in issue. The Arbitrary was also assessed because the Conference's January 8th filing failed to note that the separately stated Arbitrary did not apply.³

On July 22, 1985, before it filed the application, ANEC did file a tariff page indicating that the Arbitrary charge does not apply to movements of Mixed Containers from Louisville, Kentucky to Blanquefort, France. This filing satisfies the Act's requirement that the applicant shall file a new tariff prior to filing its application that sets forth the rate basis which supports the refund. The July 22nd filing corrects that *part* of the original tariff filing that was in error and makes clear that the Arbitrary charge does not apply to shipments of Mixed Containers. Had this filing, which limits the Arbitrary's application, been effective at the time of the shipments here in issue, the shipper would not have been assessed \$4,400.00 in Arbitrary charges, the amount ANEC now seeks authority to refund.

ANEC's application for authority to make a refund is not, given the circumstances of this case, barred by the fact that the July 22nd filing sets forth an underlying freight rate different from that which was in effect at the time of shipment.⁴ In *Application of Pacific Westbound Con-*

² ANEC's compliance with the other requirements of section 8(e) is not in issue. The record demonstrates that the application was timely filed, *i.e.* within 180 days of shipment, that there was clerical oversight and that a refund will not result in discrimination among shippers.

³ At least two errors were committed in implementing Sea-Land's independent action with regard to "Mixed Containers". The Arbitrary was not included in the rate as Sea-Land requested, and the rate did not become effective on January 7, 1985 as also requested by Sea-Land in its telex of December 27, 1984 to ANEC. In addition, although Sea-Land notified ANEC on May 3, 1985 of the tariff filing error, ANEC did not file a correction until July 22, 1985. This series of errors regarding Sea-Land's independent action request is a matter of concern to the Commission.

⁴ The \$903.00 rate included in the July 22nd filing was originally published in ANEC's January 8th filing, to become effective on July 1, 1985.

ference on Behalf of Korea Marine Transport Co., Ltd. for the Benefit of Mitsui and Co. (U.S.A.) Line, Inc., 25 F.M.C. 350 (1982), and Application of Japan Line (U.S.A.) for the Benefit of Nomura (America Corp.), 22 F.M.C. 825 (1980), the applicant-carriers were granted authority to waive or refund portions of the applicable charges although their corrective tariffs reflected higher rates, due to intervening general rate increases, than the rates the carriers had negotiated with the shippers. In each of these cases, the Commission reasoned that the higher rate resulting from the rate increase included the rate that had not been filed due to error, and therefore the carrier should not be barred from making the refund. See also Application of Sea-Land Service, Inc. for the Benefit of Seviroli, Inc., 22 S.R.R. 789 (1984).

Sea-Land's intervening rate increase for Mixed Containers, which became effective before ANEC filed the tariff correction on July 22nd, made it impractical, if not impossible, for ANEC to then file the expired \$848.00 rate. Accordingly, the Commission finds that the July 22nd filing, which reflects Sea-Land's rate increase for Mixed Containers, does not act to bar special docket relief under section 8(e) of the Shipping Act of 1984.⁵

Accordingly, the Commission is granting ANEC's Exceptions, and is reversing the Presiding Officer's Initial decision and granting authority to refund \$4,400 Arbitrary charges that were collected on the shipments here at issue.

THEREFORE, IT IS ORDERED, That ANEC's Exceptions are granted, IT IS FURTHER ORDERED, That the Initial Decision in this decision is reversed,

IT IS FURTHER ORDERED, That Sea-Land is granted permission to refund \$4,400 to the Ford Motor Company, and

FINALLY, IT IS ORDERED, That ANEC shall promptly publish in the applicable tariff, on behalf of Sea-Land Service, the following notice:⁶

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1354 that effective January 25, 1985 through July 21, 1985 the underlying 20 foot per container freight rate on any shipments of "Straight or Mixed Containers of Empty Steel Racks and/or Transmissions" transported from Louisville, Kentucky to Blanquefort, France includes the Bordeaux Arbitrary. This Notice is effective for the purpose of refund or waiver of the Bordeaux Arbitrary charged on any

⁵ The special docket legislation was intended to prevent shippers from bearing the burden of carrier negligence and has been broadly construed to accomplish this congressional objective. *Nepera Chemical, Inc. v. Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981).

⁶ In Special Docket 1381—*Application of Lykes Bros. Steamship Co., Inc. for the Benefit of the Embassy of Tunisia*, Office of Defense Attache, 28 F.M.C. 421 (1986) the Commission determined that the effective date reflected in the tariff notice mandated by section 8(e)(3) of the Act may not exceed 180 days prior to the date the application was filed. Accordingly, the tariff notice set forth herein provides for an effective date of January 25, 1985.

shipments of the commodity described which may have been shipped during the specified period of time.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-21

RINKER MATERIALS CORPORATION

v.

PORT EVERGLADES AUTHORITY AND SEA-LAND SERVICE, INC.

NOTICE

July 11, 1986

Notice is given that no appeal has been taken to the June 4, 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) TONY P. KOMINOTH
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-21

RINKER MATERIALS CORPORATION

PORT EVERGLADES AUTHORITY AND SEA-LAND SERVICE, INC.

COMPLAINT DISMISSED

Finalized July 11, 1986

Complainant has filed a Notice of Withdrawal of Complaint with supporting material, explaining that complainant has reached an amicable resolution of its controversy with respondents and no longer wishes to continue this proceeding.

This case essentially concerned the alleged problems which complainant, an importer and manufacturer of cement, had been experiencing in having its vessels served by the respondent marine terminal operator and with complainant's desire to work out a plan by which complainant's vessels would be accommodated without undue delay. At the prehearing conference held on April 1, 1986, it appeared that a reasonable settlement could be achieved and that expensive litigation could and should thereby be avoided. The settlement which has been reached accords with the policy of the law and this Commission, which strongly encourages settlements and does not appear to require any further Commission attention.¹

Accordingly, the complaint is dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

¹The agreement to work in harmony with complainant to accommodate its ships, is one between an importer and a marine terminal operator and does not appear to require filing under section 4 or 5 of the Shipping Act of 1984, 46 U.S.C. app. sec. 1703, 1704. Furthermore, the issues settled do not concern issues involving improper rating under filed tariffs, in which event the settlement would require additional support and justification. See *Organic Chemicals v. Atlanttrafik Express Service* 18 SRR 1536a (1979).

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW
ORLEANS AND RYAN-WALSH STEVEDORING CO., INC.

ORDER ADOPTING INITIAL DECISION

July 23, 1986

On April 30, 1986, Chief Administrative Law Judge Charles E. Morgan (Presiding Officer) served an Initial Decision (I.D.) in this proceeding which: (1) dismissed the complaint against the Board of Commissioners of the Port of New Orleans (Dock Board) in light of the fact that the complaint of Kerr Steamship Company, Inc. (Kerr) against it had been voluntarily withdrawn with prejudice; and (2) dismissed Kerr's complaint against Ryan-Walsh Stevedoring Co., Inc. because there had been no showing that it violated the shipping statutes. Subsequently, an Exception was filed by the Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA), an intervener in this proceeding. ASBA excepts solely to the statement in the I.D. that "[n]o explanation . . . is required as to any reason for this withdrawal of complaint." ASBA submits that it would be in the public interest to ascertain the reasons for the withdrawal of the complaint and suggests that if it was the result of a settlement, the Commission may wish to review it and place any settlement agreement on the record. No replies to this Exception were submitted.

However, ASBA later filed a "Motion to Include Settlement Document in Record of this Proceeding, and Thereupon, Suggestion of Mootness as to Intervener's Exception" (Motion). The Motion noted that ASBA had received a settlement document titled "Receipt and Release Assignment and Subrogation" from counsel for the Dock Board and requested that the document be included in the record of this proceeding. The Commission's Bureau of Hearing Counsel filed a Reply to ASBA's Motion which requested that the Commission make the settlement agreement a part of the record and then discontinue the proceeding.

The Commission has determined to adopt the Initial Decision. The Commission concurs with the Presiding Officer that under the circumstances no explanation was required as to why Kerr voluntarily withdrew its complaint against the Dock Board. However, in light of the Dock Board's subsequent release of a settlement agreement to ASBA, with no apparent

restrictions on its dissemination, the Commission also agrees that no harm will ensue by making this settlement agreement a part of the record.

THEREFORE, IT IS ORDERED, That the Motion of the Association of Ship Brokers and Agents (U.S.A.), Inc. to include the "Receipt and Release Assignment and Subrogation" in the record of this proceeding is granted, and

IT IS FURTHER ORDERED, That the Initial Decision in this proceeding, served April 30, 1986, is adopted by the Commission.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-15

KERR STEAMSHIP COMPANY, INC.

v.

THE BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS AND RYAN-WALSH STEVEDORING CO., INC.

1. Complaint against Board of Commissioners of the Port of New Orleans withdrawn with prejudice. Complaint dismissed.
2. Complaint against Ryan-Walsh Stevedoring Co., Inc. dismissed because of no showing that this respondent violated the Shipping Acts.
3. In view of dismissal of complaint against Ryan-Walsh on the merits, it is unnecessary to decide whether Ryan-Walsh is a person subject to jurisdiction under the Shipping Acts, in the circumstances of this proceeding.

Eliot J. Halperin, Robert B. Acomb, Jr., and Donald L. King for the complainant, Kerr Steamship Company, Inc.

Edward J. Sheppard and Edward F. LeBreton III for respondent, The Board of Commissioners of the Port of New Orleans.

Thomas D. Wilcox for respondent, Ryan-Walsh Stevedoring Co., Inc.

Robert Eikel, for intervener, the West Gulf Maritime Association.

J. Alton Boyer for intervener, Association of Ship Brokers and Agents (U.S.A.), Inc.

Aaron W. Reese, Director, for the Bureau of Hearing Counsel.

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

Adopted July 23, 1986

On January 7, 1986, the complainant, Kerr Steamship Company, Inc. (Kerr), served notice of its "Withdrawal of Complaint in Part," insofar as it was directed against one respondent, The Board of Commissioners of the Port of New Orleans (the Board). This withdrawal was with prejudice to all issues raised in the complaint against the Board. No explanation was offered nor is required as to any reason for this withdrawal of complaint.

The other respondent herein is Ryan-Walsh Stevedoring Company, Inc., (Ryan-Walsh). The complaint insofar as it is against Ryan-Walsh was not withdrawn, and it remains to be decided 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).

The complaint against both respondents alleged violations of sections 16 and 17 of the Shipping Act, 1916 (the Act). The above provisions of the 1916 Act, respectively, are included in sections 10(d)(3) and of 10(d)(1) of the Shipping Act of 1984.

In brief, this complaint is about certain demurrage charges on a shipload of steel imported through the Port of New Orleans. This cargo was left on the docks of, or on the premises of, the Port of New Orleans beyond the free time allowed for pick-up of such cargo. The cargo's owners or their agent paid \$30,000 of the demurrage charges, but the remaining \$184,729.18 of the demurrage charges were not paid.

The Board sought to collect the remaining demurrage charges from Kerr, which had obtained the berth assignment, and was the husbanding agent, for the vessel which brought the cargo to New Orleans.

The history of this proceeding is that the complaint was filed with the Commission, a first prehearing conference was held, and later a motion was served by the complainant for leave to withdraw the complaint in its entirety and for its dismissal without prejudice, inasmuch as a suit had been filed by the Board against Kerr, Ryan-Walsh, and the owner-consignees of the cargo, in the United States District Court for the Eastern District of Louisiana, New Orleans Division.

The said motion to withdraw was granted by the Presiding Officer subject to the condition that any party might file a motion to reopen the proceeding, depending upon the outcome of the suit in the District Court, for the reason, among others, that there was no certainty that the District Court would settle all of the Shipping Act issues in the complaint.

The District Court rendered judgment in favor of the Board, and against Kerr. Kerr next appealed to the United States Court of Appeals for the Fifth Circuit, which granted Kerr's motion to stay further proceedings "pending administrative agency determination." Accordingly, the proceeding in No. 82-15 herein was reopened by the Presiding Officer on March 27, 1984.

The demurrage in issue herein arose from a complicated series of financial transactions. Intercontinental Metals Corporation (IMC) or Intercontinental Metals Trading Corporation (IMTC), North Carolina companies, bought steel from Metalimportexport, a Rumanian government corporation. Metalimportexport chartered the *Vidraru* and other vessels from NAVROM, another Rumanian government corporation, to transport cargoes of steel plate to the United States on a "free-out" basis.

Cardinal Shipping Corporation, as agent for IMC and IMTC, arranged for Ryan-Walsh to do the stevedoring in New Orleans. Based on expectations of 100,000 tons of steel to be imported through New Orleans Ryan-Walsh requested a first call on berth at the Governor Nicholls Street Wharf in New Orleans, which request was granted by the Board on April 1, 1981.

In 1982 both IMC and IMTC filed petitions in bankruptcy, staying all claims against them.

The import cargo herein was imported under so-called "free out" terms, meaning that the cargo owners, and not the vessel owner, were responsible for unloading the cargo from the ship. Ryan-Walsh was the stevedore for the cargo owners, and thus took the responsibility for unloading the cargo from the ship.

Kerr was not the agent for the cargo owners, but applied to the Board on behalf of the vessel owner for a berth assignment for the vessel. At the request of Ryan-Walsh, Kerr designated the Governor Nicholls Street Wharf as the place for berthing the ship.

Ryan-Walsh applied to the Board for a First Call on Berth Privilege at the Governor Nicholls Street Wharf to provide its stevedoring services for the cargo owners herein, and for "others." On April 1, 1981, the Board issued to Ryan-Walsh a Grant of First Call on Berth Privilege, which Ryan-Walsh accepted on April 15, 1981. The Board's tariff and all subsequent changes, etc. thereof were made a part of the said grant.

The vessel herein, the *Vidraru*, completed its discharge on April 30, 1981, and the free time allowance for maintaining the cargo on the docks expired May 15, 1981. Removal of the cargo from the docks began on June 3, 1981, and was completed in August, 1981.

The Board sent demurrage invoices to Kerr, which Kerr forwarded to Ryan-Walsh. Kerr notified Ryan-Walsh that since free time had expired and demurrage charges had not been paid, that no cargo should be released from the docks until all demurrage charges were paid. Ryan-Walsh forwarded these messages to the cargo-owners or their agent, Cardinal Shipping Corp. In turn, Cardinal instructed Ryan-Walsh to continue releasing the cargo. As a result all of the *Vidraru's* cargo herein was removed from the docks without all demurrage charges having been paid.

Cardinal, having received Kerr's notice to Ryan-Walsh not to release the cargo until all demurrage had been paid, responded directly to Kerr by telex on July 29, 1981:

SIR, WE HAVE RECEIVED A COPY OF YOUR TELEX WHICH WAS SENT TO RYAN WALSH. PLEASE NOTE WE HAVE BEEN AND STILL ARE NEGOTIATING WHARFAGE/DEMURRAGE ON THE ABOVE VESSEL WITH THE DOCK BOARD DIRECTLY. THUSLY WE ASSUME RESPONSIBILITY FOR SAID CHARGES AND WITH COPY OF THE TELEX TO RYAN WALSH ARE INSTRUCTING THEM TO RELEASE CARGO IN THE USUAL MANNER. YOU TOO REALIZE AS CHARGES ACCRUE DAILY AND WE ARE DOING OUR UTMOST TO MOVE THE CARGO OUT OF THE PORT AREA AS SOON AS POSSIBLE. HOPE THE ABOVE SUFFICES TO YOUR REQUIREMENTS. WE REMAIN.

Ryan-Walsh followed the instructions of Cardinal Shipping Corp. and released all of the cargo, although demurrage charges had not all been paid.

In its complaint Kerr had alleged that the Board's tariff provisions and the Board's actions in seeking to collect demurrage on such "free out" cargo from Kerr were unlawful, for the reason in part that Kerr was not the agent for the owner-consignee of the cargo, whose duty it was to pick up the cargo before the expiration of free time.

Kerr's complaint against Ryan-Walsh is that Ryan-Walsh, as an alleged terminal operator for the cargo and as stevedore for the unloading of the cargo, was the terminal agent for the cargo-owner. Kerr alleges further that Ryan-Walsh did not fulfill its alleged responsibility to pay or collect the inbound demurrage charges before releasing the cargo to the owner-consignee.

Kerr alleged that Ryan-Walsh had custody and control over the cargo when the demurrage accrued, and that in proceeding allegedly in concert with the Board in its efforts to collect the demurrage charges from Kerr, that Ryan-Walsh was in violation of the Act.

Specifically, Kerr alleges that in failing to enforce the Board's tariff rules applicable to Ryan-Walsh's terminal operations, and instead engaging in terminal practices to avoid collection and payment of the demurrage charges, Ryan-Walsh (a) granted itself an undue and unreasonable preference and advantage, and subjected Kerr to an unreasonable prejudice and disadvantage; and (b) established and enforced unjust and unreasonable practices relating to the receiving, handling, storing and delivering of property, in violation of sections 16 and 17 of the Act.

At the prehearing conference held for the reopened proceeding, a petition to intervene by The Association of Ship Brokers and Agents (U.S.A.), Inc. (ASBA), and a petition to intervene by the West Gulf Maritime Association, were granted. Both interveners represented that they did not wish to introduce factual matters, but would limit their participation to the filing of briefs. The Bureau of Hearing Counsel already had been permitted to intervene at the time of the first prehearing conference.

The legal positions of ASBA and of West Gulf Maritime Association relate mainly to the complaint against the Board rather than the complaint against Ryan-Walsh. ASBA cites many reasons why the Board's tariff provisions may be unlawful.

At the prehearing conference held on the reopened proceeding, also it was ruled that the facts of the case might be submitted in writing by all parties, if they were unable to stipulate the facts, inasmuch as the parties already had tried the matter orally in large part before the District Court.

Ryan-Walsh on brief stated that the facts in this proceeding had been stated accurately by the Presiding Officer in his ruling (order) served December 5, 1984; that the facts stated in the opening brief of Hearing

Counsel were sufficient to decide the real issue; and that the operative facts never had been in dispute. Kerr said the dispute related to legal conclusions drawn from the facts.

The Board owns and provides marine terminal facilities for the use of shipping interests. The Board is a landlord port, and does not itself conduct terminal operations. The Board assigns berths and assesses charges for the use of its facilities.

Ryan-Walsh's First Call on Berth Privilege granted by the Board, was inclusive of all equipment and appurtenances, as shown on page 2 of Attachment 2 to the statements of facts submitted on behalf of Kerr. The Governor Nicholls Street Wharf, as shown on said page 2 included various wharf and shed areas. It is located on the Mississippi River. FMC Agreement No. T-3967 between the Board and Ryan-Walsh, originally approved by the Commission June 21, 1981, relates to operations of Ryan Walsh at another location which is on the Mississippi River-Gulf Outlet, which is part of the Intracoastal Waterway system.

Some discussion of the complaint against the Board is deemed helpful in putting into perspective the complaint remaining against Ryan-Walsh.

As pointed out, by Hearing Counsel, as a general rule in order to hold a steamship agent (vessel agent) responsible for port charges of any nature, those port charges must be related to the vessel's use of the port. In other words, a principal (vessel) must be responsible for certain port charges, such as demurrage on outbound cargo or wharfage, for the principal's agent (vessel's agent) also to be held responsible for the same port charges.

On *inbound cargo* occupying terminal space after the expiration of the free time allowed for the pick up of that inbound cargo, the vessel (ocean carrier) no longer has any transportation obligation relative to such cargo.

Since the vessel (*Vidraru*) no longer had any transportation responsibility on the cargo in the present case after the expiration of free time for pick-up of the cargo, the vessel had no obligation to pay demurrage on this inbound cargo. Since the vessel had no obligation to pay demurrage, likewise its agent could have had no responsibility to pay such demurrage merely because of its agency relationship.

If the Board's tariff provisions holding vessel agents responsible (item 145-0) for demurrage charges due and payable before the cargo is removed from the public wharves, were deemed lawful, this is another question, but it need not be resolved here.

The responsibility for demurrage on inbound cargo is explained in *West Gulf Maritime Association v. Port of Houston Authority*, 22 F.M.C. 420 (1980), at page 439:

The difference in responsibility between inbound and outbound cargo is based upon the respective legal responsibilities for removal of the cargo from the terminal. On inbound cargo the responsibility for removal after the expiration of free time, is on the cargo interests.

The record herein does not disclose any proceeding in which it has been determined that demurrage on inbound cargo may be charged properly against vessel interests.

Although it does not have to be decided herein, a terminal practice, or a tariff provision holding vessel interests responsible for demurrage on inbound cargo would appear to be unreasonable and unlawful.

GENERAL DISCUSSION AND CONCLUSIONS

In the present case on the inbound cargo, the responsibility for the demurrage after the expiration of free time was primarily on the cargo owners (consignees), IMC and IMTC, and secondarily on their agent, Cardinal Shipping Corp.

There remains the question whether the stevedore, Ryan-Walsh, was responsible somehow for this demurrage. Ryan-Walsh had a contract to stevedore the cargo, that is, to unload it from the ship, but Cardinal Shipping gave orders to Ryan-Walsh as to the disposition of the cargo, and Ryan-Walsh acceded to Cardinal's instructions to release the cargo, whether or not the demurrage bill had been paid in full.

Ryan-Walsh had no contract or duty toward Kerr. The Board did not direct Ryan-Walsh to hold the cargo under the Board's tariff provisions until the demurrage was paid in full. Rather, the Board chose to negotiate with Cardinal, and to attempt to collect the demurrage from Kerr.

There is not a shred of specific evidence that the Board and Ryan Walsh acted in concert, with the intent to foist the payment of the demurrage charges on Kerr. Ryan-Walsh acted independently as it saw its duty to Cardinal.

The Board exercised what it believed was its option to collect the demurrage from Kerr. The Board chose not to exercise its option to impound the cargo.

Whether or not the cargo was released improperly to the cargo-owners or their agent before the payment of demurrage, is a matter apparently covered in part by the terms of the tariff of the Board.

The Board's tariff item 145-0 covered demurrage on inbound cargo, and provided in part:

At the option of the Superintendent of Docks, the cargo may be sent to warehouse storage for account of whom it may concern.

This tariff item also provided in part:

The owner, charterer and agent of the vessel discharging the cargo are responsible for the payment to the Board of the demurrage charges which are due and payable before the cargo incurring same is removed from the public wharves.

The Board by the above tariff provisions clearly showed its general intent to collect demurrage charges before the cargo was removed from the Board's premises. But, as seen, the Board did not exercise its option

to hold the cargo in warehouse storage. Rather, the Board was negotiating with Cardinal Shipping Corp., which stated on July 29, 1981, that "we have been and still are negotiating wharfage/demurrage on the above vessel with the Dock Board directly."

Ryan-Walsh was not a vessel agent, and under the Board's tariff concluded that it was not responsible for the payment, or the collection and remittance, to the Board of demurrage charges assessed by the Board's tariff.

The Board owned the terminal facility, and collected for its own account wharfage, dockage, and demurrage. Ryan-Walsh occupied the terminal facility, furnished the labor and experience to discharge the vessel, and to deliver or release the cargo to its owners. Ryan-Walsh had custody of the cargo while it remained in the terminal facility. Ryan-Walsh physically occupied the terminal facility and by virtue of that fact and the facts that Ryan-Walsh took custody and control of the cargo, Ryan-Walsh apparently acted as a terminal operator. The *Vidraru* was not a common carrier by water, but Ryan-Walsh's First Call on Berth Privilege specified that it would unload the cargo of the *Vidraru* and "others." If these others included or were to include common carriers by water, then it could be determined that Ryan-Walsh was providing terminal services in connection with common carriers by water.

Nevertheless, in view of the findings and conclusions herein as to the merits (whether or not Ryan-Walsh was in violation of the Shipping Acts), it is unnecessary to decide whether in the circumstances of this proceeding that Ryan-Walsh was an "other person" or terminal operator subject to our jurisdiction.

It is ultimately concluded and found:

1. The complaint against the Board of Commissioners of the Port of New Orleans has been withdrawn with prejudice. Said complaint is dismissed.

2. The complaint against Ryan-Walsh is without merit, because there has been no showing that Ryan-Walsh acted in concert with the Board of Commissioners of the Port of New Orleans in connection with the charging, collecting, or failure to collect demurrage, etc., and there has been no showing that Ryan-Walsh violated the Shipping Acts. The said complaint is dismissed.

3. In view of the dismissal of the complaint against Ryan-Walsh on the merits, it is unnecessary to decide whether Ryan-Walsh is a person or terminal operator subject to jurisdiction under the Shipping Acts, in the circumstances of this proceeding.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1353

APPLICATION OF COMPANIA CHILEANA DE NAVEGACION
INTEROCEANICA S.A. FOR THE BENEFIT OF GENERAL BOARD
CHURCH OF NAZARENE, KASH, INC. AND CALCO HAWAIIAN
MGT., INC.

ORDER OF REMAND

August 14, 1986

This proceeding is before the Commission on Exceptions filed by Compania Chilena de Navegacion Interoceanica S.A. (CCNI) to the Initial Decision (I.D.) of Chief Administrative Law Judge Charles E. Morgan (Presiding Officer). The Presiding Officer denied CCNI's application, submitted pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e), for permission to waive portions of the applicable freight charges on two shipments that moved from Los Angeles, California to certain Chilean ports. He also denied relief with regard to a third shipment on the basis that the "shipment was overcharged and no waiver is appropriate for it." CCNI excepts to the I.D. with regard to the first two shipments.

BACKGROUND

On June 7, 1985, CCNI sent certain correspondence from its home office in Valparaiso, Chile to its Los Angeles traffic manager advising him of "cargoes and quoted rates pertaining to three potential shippers." This correspondence was misrouted and was not received by the traffic manager until June 12, 1985, three days before CCNI's vessel on which the cargo was loaded, the *Asia Sun*, sailed.

CCNI's Los Angeles traffic manager had established a procedure "to avoid the mischance of publishing rates without transporting the intended cargo." That procedure required the traffic manager to receive documentation that the cargo was at the pier ready to be loaded before he would authorize CCNI's tariff publisher to file the rates quoted to him from the home office in Valparaiso, Chile. On the shipments here in issue, the traffic manager allegedly did not receive documentation that the cargo was ready to be loaded, until June 17, 1985, two days after the *Asia*

Sun sailed.¹ As a result, one of the quoted tariff rates was not published until June 20; the other was published on June 21, 1985.²

The Presiding Officer denied CCNI'S application on the ground that there was no error of a clerical or administrative nature. In so doing, he relied upon the Commission's recent decision in *Application of Philippines, Micronesia & Orient Navigation Co. for the Benefit of Himmel Industries, Inc.*, 28 F.M.C. 219 (1986). In *Himmel*, the Commission determined that there was no clerical or administrative error warranting the requested relief because the carrier's deliberate decision to withhold publishing the quoted rate until "on board bills of lading" were issued indicated that the carrier did not intend to publish the quoted rate until after the vessel had sailed. The Presiding Officer in the present proceeding determined that CCNI's procedure is similar enough to that considered in *Himmel* to warrant denying its application.

CCNI, in its Exceptions, argues that its procedures and the facts of this proceeding are distinguishable from *Himmel*. First, it points out that its tariff publication procedure only requires documentation that the cargo is ready for loading, while in *Himmel* the carrier required "on board bills of lading." Second, CCNI argues that the record supports a finding that there was clerical and administrative error. In this regard, CCNI notes that the ALJ acknowledged that the relevant documents were misrouted and that CCNI's procedure would not always result in the vessel sailing before the quoted rate is published. Finally, CCNI points out that the traffic manager is located at the point of loading and could authorize the quoted rates to be published, while in *Himmel*, the documents had to be sent over 3,000 miles before the rates could be published. CCNI, therefore, urges the Commission to reverse the Initial Decision and to allow it to waive a portion of the applicable freight charges.

DISCUSSION

Section 8(e) of the Shipping Act of 1984 provides, in relevant part, that the Commission may authorize a refund or waiver if:

[T]here 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).

¹ CCNI's application indicates that while the traffic manager became aware that the cargo was at the pier late on June 14, 1985, he was not able to verify the cargo status with the necessary documentation until after the vessel had sailed.

² On the first shipment, a 20-foot container containing a pick-up truck, CCNI negotiated a rate of \$3,100.00 and seeks to waive collection of \$2,045.08 in freight charges. On the second shipment, an empty refrigerated container on a chassis, CCNI negotiated a rate of \$3,500 and now seeks to waive \$34,673.67 in freight charges.

The quoted rate for the third, uncontested shipment was published on June 20, 1985. On this shipment, a 20-foot container containing waterbeds, CCNI negotiated and collected a flat rate of \$4,100.00. The Presiding Officer concluded that CCNI had, at the time of shipment, a rate which would have resulted in freight charges of \$3,743.50. He concluded, therefore, that the shipper had been overcharged in the amount of \$356.50. CCNI did not except to the Presiding Officer's findings with regard to this shipment.

In *Himmel*, the Commission held that there was no evidence of clerical error because the procedure there provided that the quoted rate would not be published until "on board bills of lading" were received at the home office in San Francisco, which was over 3,000 miles from the port of origin. CCNI argues that its tariff publishing procedure is distinguishable from that considered in *Himmel* and that the evidence of record, as well as the Presiding Officer's findings, demonstrates the required clerical or administrative error.

A basis may exist to distinguish CCNI's procedures. As is pointed out in CCNI's Exceptions, the procedure here at issue requires that the traffic manager receive certain documents indicating that the cargo is at the pier and ready for loading, as opposed to being loaded on the ship as in *Himmel*, before he could authorize the quoted rates to be published in CCNI's tariff. Moreover, the traffic manager is, as CCNI points out, physically located at the port of origin and could have immediately given such authorization if he had received the proper notification, unlike in *Himmel* where the tariff publishing authority was 3,000 miles distant.

In *Himmel*, the Commission denied the application because it was unlikely, if not impossible, under the procedure there in issue, that the quoted rate could have been published before the ship sailed. The cargo not only had to be loaded aboard the ship, but the "on board bill of lading" had to be transmitted over 3,000 miles to the carrier's home office to obtain authority to publish the quoted rate. In the present proceeding, the Presiding Officer stated that CCNI's procedures would not always result in the vessel sailing before the quoted rates were published. Although not conclusive, this may establish a basis to distinguish CCNI's procedures and support its claim of clerical error.

There are, however, certain evidentiary gaps concerning CCNI's tariff publishing procedures with respect to the shipments at issue that preclude a determination on the present record that those procedures are *in fact* distinguishable from those in *Himmel*. The evidence of record does not, for instance, fully describe nor include the correspondence sent from Valparaiso, Chile to the traffic manager in Los Angeles, nor does it include or describe the documentation which the traffic manager eventually received to inform him that the cargo was at the pier ready for loading. In addition, the record evidence does not fully describe the circumstances under which the traffic manager became aware, on the evening before the ship sailed, that the cargo may have been on the pier. See footnote 1, *supra*. The record also does not indicate when the cargo was actually delivered to the pier for loading, nor does it indicate when the quoted rates would have been published if the required documents had not been misrouted. Further development of the record to cure these deficiencies should shed further light on CCNI's claim of clerical or administrative error and whether, in the final analysis, the relief requested should be granted. Given the

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remedial purposes of the special docket legislation, a remand is warranted to consider these matters.³

THEREFORE, IT IS ORDERED, That the Presiding Officer's Initial Decision is vacated to the extent it denies CCNI's application for authority to waive the collection of \$3,045.08 and \$34,673.67 in freight charges for the shipments described herein.

IT IS FURTHER ORDERED, That CCNI's application is remanded to the Presiding Officer for further proceedings consistent with this opinion.

IT IS FURTHER ORDERED, That the Presiding Officer shall issue a Supplemental Decision.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

³The special docket legislation was intended to prevent shippers from bearing the burden of carrier negligence and has been broadly construed to accomplish this congressional objective. See *Nepera Chemical, Inc. v. Federal Maritime Commission*, 662 F.2d 18 (D.C. Cir. 1981).

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 510, 580, 582]

DOCKET NO. 86-19

ANTI-REBATING CERTIFICATION BY THOSE ENGAGED IN THE FOREIGN COMMERCE OF THE UNITED STATES

August 26, 1986

ACTION: Final rule.
SUMMARY: The Federal Maritime Commission amends its rules governing the filing of anti-rebating certificates in the foreign commerce of the United States. The purpose of the rule is to establish uniform application of anti-rebating rules with respect to ocean common carriers, non-vessel operating common carriers and freight forwarders, and provide that companies which function in more than one capacity need file only one anti-rebating certificate. The rule also specifies the time period covered by the anti-rebate certification and provides a uniform due date for submission of the certificate.

EFFECTIVE DATE: October 28, 1986.

SUPPLEMENTARY INFORMATION:

By Notice published in the *Federal Register* on May 15, 1986 (51 FR 17754), the Commission proposed to amend certain of its rules concerning the filing of anti-rebating certificates. The proposed amendment established a common due date of December 31 by which all certificates must be filed. The purpose of this revision was to eliminate any confusion resulting from the different filing dates facing certain regulated parties, and to clarify the period of validity of a certificate. The proposed amendments also required each common carrier to file a certificate with its initial tariff and each ocean freight forwarder to file its initial certificate with its license application, and specified the time period for which each certificate is valid.

Additionally, provisions were proposed to permit an individual firm to submit only one certificate when it functions in more than one capacity, i.e., both as a non-vessel operating common carrier and an ocean freight forwarder. The Commission also proposed to remove the tariff notification requirement contained in 46 CFR 582.3. That provision was deemed duplicative of that contained in 46 CFR 580.5(c), where it properly resides.

Comments on the proposed rule were received from three parties, Associated Container Transportation (Australia) Ltd. (ACT), the National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA) and Inter-

state International, Inc. (Interstate). All three generally supported the proposed rule.

ACT offered two suggestions. The first would include a provision with respect to joint services, providing that the joint service, rather than the individual parties, be held responsible for the certification. This suggestion has merit. The purpose of the anti-rebating certification is to aid in the enforcement of the prohibitions against rebating found in section 10 of the 1984 Act. Section 10(e), 46 U.S.C. app. 1709(e), states:

For purposes of this section [section 10], a joint venture or consortium of two or more common carriers *but operated as a single entity* shall be treated as a single common carrier, (emphasis added).

Because a joint service *operated as a single entity* would be treated as a single common carrier for purposes of any violation of section 10 involving rebates, it seems appropriate to treat such joint services as single carriers for purposes of the certification. Accordingly, we have incorporated this suggestion in the final rule (section 582.1(a)).

ACT also recommended that paragraphs (a) through (d) of proposed 46 CFR 582.2 be eliminated. ACT stated that the requirements contained therein were duplicative of material contained in Appendix A to Part 582, while using dissimilar language. We believe that the provisions in question are substantive and should remain in the body of the rule. However, the final rule, has been modified to make it more consistent with Appendix A to Part 582.

NCBFAA pointed out that the proposed rule failed to take into account the situation wherein an application for an ocean freight forwarder license is granted in a year subsequent to the year in which the application was filed. NCBFAA suggested that the certification filed with the application be valid for the remainder of the calendar year in which the license is granted. This recommendation has merit and has been adopted in the final rule (section 582.3(c)).

NCBFAA also noted that the proposed rule fails to distinguish between "applicants" and "licensed ocean freight forwarders," and offered certain changes to the proposed rule to take into account this distinction. The thrust of this comment is that applicants file the initial certificate, while licensed ocean freight forwarders must comply with the annual certification requirement. NCBFAA is correct and the final rule has been revised accordingly.

Interstate, which functions as both an ocean freight forwarder and a non-vessel operating common carrier, endorsed the provision that a single certificate would satisfy the annual filing requirement for companies or firms which function in more than one capacity.

The final rule also reflects certain non-substantive technical changes.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 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 the United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

The Chairman of the Federal Maritime Commission certifies that, although this rule may affect a substantial number of small entities, particularly small businesses, the economic impact is not considered to be significant.

The collection of information requirements contained in this rule have been submitted to the Office of Management and Budget (O.M.B.) for review under section 3504(h) of the Paperwork Reduction Act. 44 U.S.C. 3504(h). A copy of the request for O.M.B. review and supporting documentation may be obtained from the Commission's Secretary. Comments on the information collection aspects of this rule should be submitted to the Office of Information and Regulatory Affairs of O.M.B., Attention: Desk Officer for the Federal Maritime Commission. Collection of information requirements contained in original Parts 510, 580, and 582 were approved by the Office of Management and Budget under the provisions of the Paperwork Reduction Act of 1980 (Pub. L. 96-511) and assigned control numbers 3072-0009, 3072-0018 and 3072-0028.

List of Subjects

46 CFR Part 510

Exports, Freight forwarders, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Surety bonds.

46 CFR Part 580

Anti-trust, Cargo, Cargo vessels, Contracts, Exports, Harbors, Imports, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Water carriers, Water transportation.

46 CFR Part 582

Cargo, Cargo vessels, Exports, Foreign relations, Freight forwarders, Imports, Maritime carriers, Rates and fares, Reporting and recordkeeping requirements, Water carriers, Water transportation.

Therefore, for the reasons set forth above, Parts 510, 580, and 582 of Title 46, Code of Federal Regulations, are amended as follows:

PART 510—(AMENDED)

1. The Authority Citation to Part 510 is revised to read:

ANTI-REBATING CERTIFICATION BY THOSE ENGAGED IN THE 533
FOREIGN COMMERCE OF THE UNITED STATES

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 1702, 1707, 1709, 1710, 1712, 1714, 1716, and 1718.

2. Section 510.25 is revised to read as follows:

§ 510.25 Anti-rebate certifications.

(a) Every licensed ocean freight forwarder shall file an anti-rebating certificate on or before each December 31.

(b) Every applicant for an ocean freight forwarder license shall file an anti-rebating certificate with its license application. Such certificate shall be valid through December 31 of the year in which the license is granted.

(c) The anti-rebating certificate shall comply with the requirements of Part 582 of this title, and, except for a certificate filed with a license application, shall apply to the calendar year following the December 31 filing date.

PART 580—(AMENDED)

1. The Authority Citation to Part 580 is revised 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(c) (2) is revised to read as follows:

§ 580.5 Tariff contents.

* * * * *

(c) The body of the tariff shall contain the following:

(1) * * *

(2) (i) The full legal name of each participating common carrier, appropriately identified as a Non-Vessel-Operating Common Carrier or Vessel Operating Common Carrier and the address of its principal office. Where a joint service participates, the FMC number of the agreement authorizing the joint service shall also be shown.

(ii) An anti-rebate tariff provision to be effective upon filing which shall read substantially as follows (see Exhibit No. 2 to this part):

(Name of company) has a policy against the payment of any rebate by the company or by any officer, employee, or agent thereof, which payment would be unlawful under the United States Shipping Act of 1984. Such policy has been certified to the Federal Maritime Commission in accordance with the Shipping Act of 1984 and the regulations of the Commission set forth in 46 CFR 582.

(A) When the common carrier's tariff is a conference tariff, the common carrier shall ensure that the conference publishes the common carrier's anti-rebate tariff provision in the conference tariff.

(B) In addition to the anti-rebate tariff provision, an anti-rebating certificate shall be filed by every common carrier with its initial tariff, and on each succeeding December 31. The anti-rebating certificate shall comply

with the requirements of Part 582 of this title, and, except for a certificate filed with an initial tariff, shall be valid for the calendar year following the December 31 filing date.

PART 582—(AMENDED)

1. The Authority Citation to Part 582 is revised to read:

AUTHORITY: 5 U.S.C. 553; 46 U.S.C. APP. 1701, 1702, 1707, 1709, 1712, AND 1714-1716.

2. Section 582.1 is revised to read as follows:

§ 582.1 Scope.

(a) The requirements set forth in this part are binding upon every common carrier by water and ocean freight forwarder in the foreign commerce of the United States and, at the discretion of the Commission, will apply to any shipper, shippers' association, marine terminal operator, or broker. In the case of a joint service operated as a single entity, the joint service, rather than the participants, is responsible for the provisions of this part.

(b) Information obtained under this part will be used to maintain continuous surveillance over common carrier and ocean freight forwarder activities and to deter rebating practices. Failure to file the required certificate may result in a civil penalty of not more than \$5,000 for each day such violation continues.

3. Section 582.2 is revised to read as follows:

§ 582.2 Form of certification.

The Chief Executive Officer, *i.e.*, the most senior officer within the firm designated by the board of directors, owners, stockholders, or controlling body as responsible for the direction and management of the firm, of each common carrier and ocean freight forwarder and, when so ordered by the Commission, the Chief Executive Officer of any shipper, shippers' association, marine terminal operator, or broker, shall file with the Secretary, Federal Maritime Commission, a written certification, under oath, as prescribed in the format in Appendix A to this part, attesting:

(a) That it is the stated policy of the firm that the payment, solicitation or receipt by the firm of any rebate which is unlawful under the Shipping Act of 1984, is prohibited;

(b) That this policy was recently promulgated to each owner, officer, employee, and agent of the firm; and

(c) That the firm will fully cooperate with the Commission in any investigation of illegal rebating.

A description of the details of the measures instituted within the firm or otherwise to prohibit its involvement in the payment or receipt of illegal rebates shall be attached to the certification.

4. Section 582.3 is removed.

5. Section 582.4 is renumbered 582.3 and revised to read as follows:

§ 582.3 Reporting requirements.

ANTI-REBATING CERTIFICATION BY THOSE ENGAGED IN THE 535
FOREIGN COMMERCE OF THE UNITED STATES

(a) Every common carrier required by this part to file a written certification in the form prescribed by § 582.2, shall file such certification with its initial tariff and, thereafter, on or before December 31 of each year.

(b) Every licensed ocean freight forwarder, required by section 510.25 of this title to file a written certification in the form prescribed by section 582.2 of this part, shall file such certification on or before December 31 of each year. Every applicant for an ocean freight forwarder license shall file such certification with its license application.

(c) The certification required by this section shall be valid for the remainder of the calendar year following the initial filing of a tariff or granting of an ocean freight forwarder license and, thereafter, shall be valid for the calendar year following the December 31 filing date specified in 46 CFR §§ 510.25, 580.5(c)(2)(ii), and 582.3 (a) and (b).

(d) Every person other than a common carrier or ocean freight forwarder which is ordered by the Commission pursuant to § 582.2 to file a written certification shall file such certification in the manner prescribed by the Commission.

(e) In those instances in which a single firm operates in more than one capacity, such as both a non-vessel-operating common carrier and an ocean freight forwarder, a single certificate may be submitted to satisfy the annual reporting requirements of this section.

6. Appendix A to Part 582 is revised to read as follows:

APPENDIX A—CERTIFICATION OF POLICIES AND EFFORTS TO
COMBAT REBATING IN THE FOREIGN COMMERCE OF THE
UNITED STATES

46 CFR PART 582

I, _____ (Name of affiant) _____, state under oath that
I am the Chief Executive Officer _____ (state exact title) _____ of
_____ (Exact names of firm) _____, hereinafter referred to
as "The Firm", and that:

1. It is, and shall continue to be, the policy of The Firm to prohibit its participation in the payment, solicitation, or receipt of any rebate, directly or indirectly, which is unlawful under the provisions of the Shipping Act of 1984.
2. Each owner, officer, employee and agent of The Firm was notified or reminded of this policy on _____ (Date) _____.
3. The Firm affirms that it will cooperate fully with the Federal Maritime Commission in any investigation of suspected rebating in United States foreign trades.
4. Attached hereto is a description of the details of measures instituted, within the Firm or otherwise, to prohibit its involvement

FEDERAL MARITIME COMMISSION

in the payment or the receipt of illegal rebates in the foreign commerce of the United States.

The period covered by this Certification is from _____ (Date) to _____ (Date).

The Firm is a (check each block applicable):

- _____ Broker
 _____ Freight Forwarder (License No. _____)
 _____ Marine Terminal Operator
 _____ Non-Vessel-Operating Common Carrier
 _____ Shipper
 _____ Shippers' Association
 _____ Vessel Operating Common Carrier

(S) _____
 (Signature of affiant)

Subscribed to and sworn before me this _____ day of _____, 19_____.

(S) _____
 Notary Public

By the Commission.

(S) JOSEPH C. POLKING
 Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1395

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT
AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND
SERVICE, INC. FOR THE BENEFIT OF DARRELL J. SEKIN & CO.,
INC. AS AGENT FOR BRUCE INTERNATIONAL CORPORATION

ORDER OF REMAND

August 29, 1986

By Notice issued July 9, 1986, the Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served June 25, 1986, in which he granted Sea-Land Service, Inc. permission to refund and waive a portion of certain freight charges. Upon review, the Commission is remanding the matter to the Presiding Officer for further proceedings.

BACKGROUND

Sea-Land Service, Inc., a member of the Transpacific Westbound Rate Agreement (TWRA or Conference), had agreed with Bruce International Corporation (BIC) to a rate of \$2,090 per 40-foot container for the transportation of hardwood flooring from Nashville, Tennessee to Yokohama, Japan. On May 8, 1985, Sea-Land requested a majority telephone vote on the proposed rate. A few days later Sea-Land was erroneously advised that the rate had been adopted on May 13, 1985. Upon notification that the rate had been approved, BIC, on May 15, 1985, delivered one shipment of hardwood flooring to Sea-Land at Nashville for overland transportation to Long Beach, California where it was placed aboard a vessel for the movement to Yokohama.¹ The \$2,090 rate, agreed to between Sea-Land and BIC, was, pursuant to section 8 of the TWRA, published in the Conference's tariff on May 21, 1985.²

Subsequently, Sea-Land Corporation on behalf of Sea-Land Service, Inc. applied under section 8(e) of the Shipping Act of 1984, 46 U.S.C. §1707(e), and section 92(a) of the Commission's Rules of Practice and Procedure,

¹ The shipment sailed from Long Beach on May 27, 1985.

² Section 8 of the TWRA (FMC Agreement No. 202-010-689), as amended, reads in part:

If the Agreement does not adopt the proposed change, it shall, unless withdrawn, become effective ten (10) calendar days from the Manager's receipt of the original notice [in this instance Sea-Land's notice of May 8, 1985].

46 C.F.R. § 502.92(a),³ for permission to waive collection of \$32,130.31 and to refund \$10 of the freight charges applicable at the time of shipment.⁴ TWRA joined in the application. The Presiding Officer found that the application met the requirements of section 8(e) and granted the relief requested.

DISCUSSION

Section 8(e) provides that a carrier or conference subject to the Act may be allowed to refund or waive collection of a portion of freight charges if "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).

Sea-Land does not allege error in TWRA's tariff in effect on May 15, 1985. In view of TWRA's refusal to adopt the rate proposed by Sea-Land, the rate in effect on May 15, 1985, when BIC tendered its shipment, was the rate TWRA intended be applied to BIC's cargo.⁵ Accordingly, no inadvertent failure on the part of TWRA to file the \$2,090 per container rate before May 15, 1985 may be found on this record.

Nor does Sea-Land argue that the alleged erroneous advice in any manner affected its ability to obtain the filing of the intended rate under TWRA's independent action provisions. The thrust of Sea-Land's claim is that upon being informed that the Conference had adopted the proposed rate, it advised the shipper "that the rate was in effect and that cargo movement could commence." (Affidavit of Raymond T. Savoie Accompanying Application). As a consequence BIC tendered its shipment in reliance on Sea-Land's advice. This, as Sea-Land explains, caused higher charges than those intended and agreed upon to be assessed.⁶

The record is silent on who gave the erroneous advice and when. Also unknown is the timing of Sea-Land's negotiation of the \$2,090 rate with the shipper, a fact necessary to the determination of whether Sea-Land was in a position to implement the rate before the shipment moved.

Thus, the record as it now stands is inadequate to properly establish the basis for Sea-Land's claim for relief and the facts necessary to support the grant of the application for special docket relief.⁷ Consequently, the matter must be remanded to the Presiding Officer for the purpose of obtaining from Sea-Land additional information on the alleged tariff filing error.

³ The application was filed on November 8, 1985 (inadvertently shown as November 8, 1986 in the Notice of June 27, 1986).

⁴ Under TWRA Tariff—FMC No. 2, orig. p. 21, in effect on March 15, 1985, BIC's shipment was subject to a Cargo, N.O.S. rate of \$500 W/M, plus a \$5 RT container yard receiving charge. The \$10 refund results from an adjustment in container yard receiving charges collected by Sea-Land.

⁵ TWRA concurrence in the application is not taken to signify a change of position but rather indicates its consent to publish a tariff notice, if required.

⁶ Application at p. 4.

⁷ The Presiding Officer did, by letter dated December 31, 1985, ask Sea-Land to furnish an affidavit from the person who conveyed the incorrect information. The letter remains unanswered.

APPLICATION OF TWRA AND SEA-LAND FOR THE BENEFIT OF 539
BRUCE INTERNATIONAL CORP.

THEREFORE, IT IS ORDERED, That the Initial Decision served July 1, 1986 in this proceeding is vacated.

IT IS FURTHER ORDERED, That the application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. is remanded to the Presiding Officer for further proceedings consistent with this Order.

FINALLY, IT IS ORDERED, That the Presiding Officer shall issue a Supplemental Decision.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-21
AMTROL, INC.

v.

U.S. ATLANTIC-NORTH EUROPE CONFERENCE, ET AL.

NOTICE

September 4, 1986

Notice is given that no appeal has been taken to the August 1, 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-21
AMTROL, INC.

v.

U.S. ATLANTIC-NORTH EUROPE CONFERENCE, ET AL.

COMPLAINT DISMISSED

Finalized September 4, 1986

Complainant and respondents have filed a joint motion asking that the complaint be dismissed without prejudice. The parties explain that they have reached an amicable resolution of their controversy and therefore do not wish to litigate the issues raised in the complaint.

In its complaint served June 25, 1986, complainant, a manufacturer of steel expansion tanks, empty steel cylinders, and related products, alleged that respondent Conference and its member lines had unreasonably preferred and given advantage to competitors of the complainant and had subjected complainant to unreasonable prejudice and discriminatory rates in violation of section 10(b) of the Shipping Act of 1984. Essentially complainant alleged that the Conference published certain rates on empty steel cylinders, which included ancillary charges, from Columbus, Ohio, to ports in the United Kingdom and Continental Europe. Complainant alleged that these rates preferred competitors of complainant located in Columbus and that respondent had refused to amend its rates applicable to complainant's shipments by including the incidental charges and otherwise equalizing the rates, although agents of certain respondent carriers had agreed that the Conference's rate structure was preferential to complainant's competitors. Complainant alleged that it had lost sales and had suffered other injury and asked for reparations plus interest and costs and for an order that would remove the alleged preference and prejudice.

The policy of the law and the Commission, of course, favors settlements and presumes that they are fair and reasonable. See *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 512 (1978); *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 315 (1981). Furthermore, in this case, no answer to the complaint has been filed. In such circumstances, under the federal rules applicable in courts, which the Commission follows in the absence of a Commission rule, a complainant has the right to withdraw its complaint without the permission of the court. See F.R.C.P. 41(a)(1), 28 U.S.C.A.; *Companhia Siderurgica Nacional v. Lloyd Brasileiro*, 25 F.M.C. 655 (1983), and cases

cited therein; 9 Wright and Miller, *Federal Practice and Procedure*, Section 2363; see also *Gardiner v. A.H. Robins*, 747 F. 2d 1180, 1189 (8th Cir. 1984) (Rule 41 of the Federal Rules of Civil Procedure allows a lawsuit to be dismissed at any time by the consent of all parties without judicial approval in the normal case). See also *Roberts Steamship Agency, Inc. v. The Board of Commissioners of the Port of New Orleans and Atlantic and Gulf Stevedores, Inc.*, 21 F.M.C. 492 (1978) ("We recognize that in a complaint proceeding we cannot require the parties to litigate against their wishes . . .").

The parties have not furnished information as to the nature of the settlement or its details. However, this case does not involve allegations that respondents charged rates other than those specified in their tariff in violation of section 10(b)(1) of the Shipping Act of 1984 (formerly section 18(b)(3) of the Shipping Act, 1916), in which case particular justification would have been required. See *Organic Chemicals v. Atlantrafik Express Service*, 18 SRR 1536a (1979). Nor does this settlement between a shipper and respondent carriers appear to require filing under section 4 or 5 of the Shipping Act of 1984. *Old Ben*, cited above, at 512-513. Under such circumstances, there is nothing to prevent my granting the motion. Cf. *Kerr Steamship Company, Inc. v. The Board of Commissioners of the Port of New Orleans*, Docket No. 82-15, Order Adopting Initial Decision, July 23, 1986 28 F.M.C. 516 (no explanation required as to why complainant voluntarily withdrew its complaint; placing settlement agreement in the record permitted but not required).

Accordingly, the motion is granted. The complaint is dismissed without prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84-31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS
ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

NOTICE

September 12, 1986

Notice is given that no exceptions were filed to the August 5, 1986, initial decision, in part, 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.

Pursuant to the decision, Arctic Gulf Marine, Inc. will pay the sum of \$40,000, together with all accumulated interest since March 25, 1986, to the Federal Maritime Commission by September 19, 1986.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84-31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS
ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

Arctic Gulf Marine, Inc., a Respondent, ordered to pay a civil penalty in the amount of \$40,000 pursuant to terms of its offer to settle an assessment proceeding seeking to determine whether said Respondent violated section 2 of the Intercoastal Shipping Act, 1933, and section 15 of the Shipping Act, 1916.

Timothy S. O'Neill for Respondent, Arctic Gulf Marine, Inc.

Aaron W. Reese, Director, Bureau of Hearing Counsel, and *Charna Jaye Swedarsky* as Hearing Counsel.

INITIAL DECISION,¹ IN PART, OF SEYMOUR GLANZER,
ADMINISTRATIVE LAW JUDGE

Finalized September 12, 1986

This proceeding was instituted by Order of Investigation and Hearing ("Order"), served September 10, 1984, pursuant to section 22 of the Shipping Act, 1916 (46 U.S.C. app. 821) to determine, as pertinent, whether one of the named Respondents, Arctic Gulf Marine, Inc. ("AGM") violated section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. 844) (a) by charging a different compensation for the transportation of property than the rates filed with the Federal Maritime Commission and in effect; (b) by absorbing drayage charges without a tariff provision authorizing absorptions; and whether AGM, Peninsula Shipping Association, Inc. ("PSA") and/or Southbound Shippers, Inc. ("SSI"), the latter two also named as Respondents, entered into and carried out unfiled and unapproved preferential and cooperative working arrangements, and agreements granting special rates and accommodations, in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. app. 814); and if AGM is found to have violated either of those provisions, whether civil penalties should be assessed and, if so, the amount of such penalties.² Hearing Counsel became a party to the proceeding pursuant to Rule 42 of the Commission's Rules of Practice and Procedure, 46 CFR 502.42.

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 Order also contains provisions seeking to determine: whether PSA and/or SSI violated section 2 of the Intercoastal Shipping Act, 1933, by operating as a common carrier by water in the Seattle, Washington/Alaska trade without a tariff, containing a schedule of rates and charges, on file with the Commission; whether PSA and/or SSI violated section 15 of the Shipping Act, 1916; and whether civil penalties should be assessed against either of them, and, if so, the amount of such penalties.

Procedural Background

After the conclusion of extensive discovery procedures, an evidentiary hearing was held. It began on June 10, 1985, at Seattle, Washington, and was provisionally closed³ on August 16, 1985, at that location. In all, the hearing was conducted over a period of 18 days in Seattle and Anchorage, Alaska.

Hearing Counsel filed an opening brief on December 3, 1985. This filing initiated a request by AGM that it be permitted to file a petition for settlement instead of a response to Hearing Counsel's brief. The request was granted. On January 31, 1986, AGM's "Offer of Compromise and Settlement" was received by the Office of the Secretary and filed, together with another document entitled "Proposed Compromise Agreement." These filings triggered additional discussions between Hearing Counsel and AGM which culminated in the filing of a new "Offer of Settlement" by AGM on March 28, 1986, as a substitute for the one filed in January. On April 11, 1986, there was filed a supplemental document entitled "Proposed Settlement of Civil Penalty." Simultaneously, Hearing Counsel filed their reply to AGM's offer.

This initial decision will deal only with the proposed settlement, which Hearing Counsel endorse. A Separate initial decision with respect to PSA and SSI⁴ will be issued.

The Offer of Settlement

Without admitting that any violations of the cited statutes were committed by AGM, AGM offers to pay the sum of \$40,000, which already has been deposited in an interest bearing escrow account, within fifteen days of approval of the settlement by the Commission.

Substantive Provisions

Section 2 of the Intercoastal Shipping Act, 1933, provides in pertinent part:

That every common carrier by water in intercoastal commerce shall file with the Federal Maritime Commission and keep open to public inspection schedules showing all the rates, fares, and charges for or in connection with transportation . . . nor shall any common carrier by water in intercoastal commerce charge or demand or collect or receive a greater or less or different compensation for the transportation, of passengers or property or for any service in connection therewith than the rates, fares, and

³The hearing was formally closed by an order issued September 19, 1985.

⁴Hearing Counsel's status report, filed January 24, 1985, states that SSI was involuntarily dissolved as a corporation by the State of Alaska on November 16, 1984. SSI neither appeared in the proceeding nor defended against any allegations of violations.

or charges which are specified in its schedules filed with the Commission and duly posted and in effect at the time. . . .

At the time of the activities which are the subject of this proceeding, section 15 of the Shipping Act, 1916, provided, as pertinent:

Every common carrier by water . . . shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier . . . giving or receiving special rates, accommodations, or other special privileges or advantages; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . .

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission. . . .

Penalty Provisions

Section 2 of the Intercoastal Shipping Act, 1933, provides, as pertinent, "whoever violates any provision of this section shall be subject to a civil penalty of not more than \$1,000 for each day such violation continues.

Section 15 of the Shipping Act, 1916, provides, as pertinent, "whoever violates any provision of this section shall be subject to a civil penalty of not more than \$1,000 for each day such violation continues."

With respect to the section 2 violations, Hearing Counsel agree that fourteen alleged instances of misrating and one alleged instance of absorption constitute discrete violations of one day's duration, each. Thus, the maximum total penalty for these alleged violations of section 2 is \$15,000.

Insofar as the duration of the section 15 violations are concerned, there is some uncertainty; but AGM concedes that the maximum penalty which may be assessed upon findings of violations is \$240,000.

The Record

The record presented for consideration of the offer of settlement is comprised of the following:

(1) The evidentiary record, consisting of the transcript of testimony and exhibits received in evidence.

(2) Opening Brief of Hearing Counsel.

(3) AGM's March 28th Offer of Settlement.

(4) AGM's April 11th Proposed Settlement of Civil Penalty.

(5) Reply of Hearing Counsel to Offer of Settlement.

(6) A letter, dated May 22, 1986, from AGM's counsel to the Secretary of the Commission, with attachments, which attest that AGM was administratively dissolved by the State of Washington, on April 17, 1986.

FACTS⁵

1. AGM, was organized as a corporation in the State of Washington on or about January 20, 1982. Its charter authorized it to engage in the business of operating barges and other vessels for the transportation of freight. It was dissolved April 17, 1986.

2. PSA is an Alaskan corporation. It was incorporated November 22, 1971, as a non-profit association authorized to consolidate, transport and deliver proprietary goods of its members.

3. As seen, SSI is a dissolved Alaskan corporation.

4. AGM operated a barge service in the Seattle/Alaskan trade as a common carrier by water pursuant to its tariff FMC-F No. 1 which was filed February 18, 1982, and became effective March 1, 1982. AGM terminated its common carrier service when it canceled its tariff on December 3, 1982.

5. At the hearing, AGM stipulated it misrated fourteen freight bills for common carrier cargo transported by it during the period between April 23, 1982, and October 29, 1982. Ten of those shipments involved non-PSA cargo and resulted in undercharges of \$22,079.51. The other four involved PSA cargo and resulted in undercharges of \$185,652.50.

6. Prior to the hearing, Hearing Counsel alleged five instances of absorption of drayage charges without tariff authority on the part of AGM. Hearing Counsel have withdrawn allegations of violation concerning four of those five. With respect to the remaining shipment, AGM's invoice No. 8456 shows that it did absorb charges in the amount of \$11,529.00 for drayage services performed on July 6 and 7, 1982.

7. Hearing Counsel introduced a multiplicity of evidence to establish that PSA and SSI were non-vessel operating common carriers in the Seattle/Alaska trade. Each of them held out to the general public to provide a regular service port to port via barge. In addition to oral representations, PSA advertised its service in newspapers and other publications while SSI did the same in newspapers. Each did perform the service that was advertised. In the case of PSA, the common carrier service was provided to PSA members and non-members, for profit. Among other things, there is in evidence a letter, dated November 3, 1982, from counsel for SSI to the Interstate Commerce Commission, stating that SSI was operating as a non-vessel operating common carrier, under regulation by the Federal Maritime Commission, in port to port service, with no motor carrier service involved.

⁵ For the purposes of the offer of settlement and this decision, it may be assumed that PSA and SSI were non-vessel operating common carriers subject to the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933, albeit neither had an effective tariff on file with the Commission at the time the events, which are the subject of this proceeding, occurred. However, this assumption and any other findings contained herein with respect to PSA or SSI are without prejudice to what may be decided as to either of them by way of a separate decision.

8. Hearing Counsel introduced a massive amount of evidence to show an intricate linkage of interest, personnel and finances involving AGM, PSA and SSI. For example, PSA advanced funds and provided employees, office space and other services to AGM to enable AGM to initiate and carry on its barge service until operating revenues were produced.

9. On February 25, 1982, AGM and PSA entered into a space charter agreement for a four month term beginning March 15, 1982. Under the terms of the agreement,⁶ AGM agreed to provide whatever space PSA required for the carriage of goods to or from Valdez and other Alaska ports at a particular per container rate. For its part, PSA agreed to pay for a minimum of 200 units on AGM's first barge voyage, regardless of actual use. It was commonly known at the time the agreement was made that there would be a serious dearth of available vessel space in the trade during the life of the agreement. The right to use whatever space it required gave a special preferential advantage to PSA over other non-vessel operating common carriers and other shippers that AGM held itself out to serve under its tariff.

10. On June 15, 1982, AGM and PSA entered into a voyage charter agreement, for the remainder of the calendar year. The agreement involved southbound cargo from anchorage or Valdez to Seattle. Among other things, it provided that AGM would operate the vessels but not as a common carrier. PSA would charter all cargo space on the vessels and would assume all liability and responsibility for the cargo, including loading and unloading. AGM's compensation was not a flat fee, but was based on the amount of cargo, all of which was generated by SSI.

11. Hearing Counsel introduced ample evidence to show that the operational relationships between AGM, PSA and SSI, during the period from March 18, 1982 to December 3, 1982, constituted a cooperative working arrangement resulting in preferential and advantageous treatment for PSA and SSI. No copy of any agreement nor any copy of any memorandum reflecting the arrangements described above was ever filed with the Commission. Of course, none of the arrangements received Commission approval. It must be noted, however, that on May 13, 1982, approximately two months before termination of the space charter, a Commission employee was given a copy of that agreement by AGM, voluntarily.

12. The testimony of AGM's president indicates he sought to distance AGM from PSA as early as 1982. But it was a difficult task, complicated by the fact that a "consultant" who was a guiding force in PSA was also a stockholder/director of AGM.

13. On the first day of hearing AGM offered to settle the proceeding. The offer was not acceptable to Hearing Counsel and was deemed unsp-

⁶ The agreement was part of an arrangement which included oral understandings as well as one other written instrument.

ported and premature. Nevertheless, AGM was advised it was not precluded from renewing its efforts to settle when appropriate.

14. In making the instant offer, AGM has given up its right of argument in response to Hearing Counsel's opening brief, but AGM does proffer, generally, what its defenses would have been.

With respect to the substantive aspects of the misrated shipment, AGM would have contended the misratings were the result of rating clerks' errors and were not knowing or willful. With respect to penalties for the misrated shipments, AGM would assert, by way of mitigation, that it cooperated with the Commission's investigators before the formal proceeding was instituted by giving them full access to AGM documents on various occasions in 1982; that when requested, AGM furnished additional documents later in 1982 and in 1983; that after the Order was issued, AGM continued to cooperate with Hearing Counsel by allowing access to documents and otherwise; and that AGM sent corrected invoices for the shipments after the original invoices were reviewed by AGM's tariff service.⁷

Insofar as the drayage absorption instance is concerned, AGM would contend that the payment was made pursuant to a verbal amendment to its space charter agreement with PSA, which was believed by AGM to be a private contract of carriage not subject to Commission jurisdiction or approval.

With regard to the section 15 allegations, AGM points out that there are various areas of factual disputes between Hearing Counsel and AGM, but AGM stresses that the major thrust of its argument in brief would have been a denial that any agreement or arrangement it had with PSA was subject to section 15, as a matter of law. Its contentions would have consisted of the following: (1) that neither the space nor the voyage charter arrangements was preferential to PSA or to SSI; (2) that AGM believed PSA was a valid shippers association performing services for members only, and not as a common carrier; (3) that AGM had no actual knowledge SSI was a non-vessel owning common carrier, and AGM carried SSI cargo under the representation SSI was a member of PSA; (4) that AGM did not file either charter agreement as it believed they were private contracts of carriage; (5) that there is no evidence any employee or consultant of Penn Van, Inc., Transportation Accounting and Traffic Services, Inc., PSA, SSI, Consulting Traffic Services, R&R Northern, ODI, or ODI of Alaska, Inc.,⁸ who allegedly performed work for AGM, had actual knowledge that either PSA or SSI were common carriers, and that such knowledge could not be imputed to AGM as a matter of law; (6) that PSA's "consultant" was not an employee or officer of AGM; (7) that AGM was not incorporated solely for the purpose of serving PSA or SSI; (8) that the increased volume of cargo carried by AGM for PSA in 1982 was due to amendments to

⁷ AGM's efforts to collect met with no success.

⁸ There is extensive evidence linking these companies to PSA and its "consultant."

AGM's tariff to include "Freight All Kind" rates; and (9) that no evidentiary presumptions could be made against AGM for the failure of certain witnesses to appear or testify at the hearings.⁹

Discussion

AGM submits that its offer is reasonable, taking into consideration: the factual and legal disputes and, therefore, the uncertainty of the outcome; the factors in mitigation; and AGM's current financial condition. AGM stresses the latter position in that the amount offered is the most that could be collected from AGM were a penalty to have been imposed by way of assessment rather than settlement.

Hearing Counsel ". . . endorse AGM's offer of settlement. We believe that AGM's offer satisfies both the regulatory and statutory criteria for settlement."¹⁰ The statutory and regulatory criteria for settlement of penalties are the same as those for assessment of penalties. *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line*, 28 F.M.C. 355 368-369 (1986).

The statutory criteria are set forth in section 13(c) of the Shipping Act, 1984 (46 U.S.C. 1712(c)).¹¹ As pertinent, it provides:

Assessment Procedures.— . . . the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. 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 may compromise, modify, or remit, with or without conditions, any civil penalty.

The regulatory criteria is set forth in 46 CFR 505.3(b). It provides:

Criteria for determining amount of penalty. In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's

⁹Some witnesses, including the "consultant," could not be served with subpoenas to testify at the hearing although they were deposed pursuant to subpoena. Other subpoenaed witnesses claimed the protection of the Fifth Amendment to the Constitution.

¹⁰Reply of Hearing Counsel to Offer of Settlement, p. 1.

¹¹The Shipping Act, 1916, under which this proceeding was instituted, did not contain criteria for settlement or assessment. However, standards were promulgated by the Commission in rules implementing that statute. Generally, those rules incorporated government-wide criteria established by the Comptroller General of the United States and the Attorney General of the United States appearing in 4 CFR Parts 101-105. It has been said that the earlier criteria and those currently in force under section 13(c) of the 1984 Act and its implementing regulations, 46 CFR 505.3(b) are substantially the same. See discussion in *Armada Great Lakes/East African Service, Ltd.; Great Lakes Transcaribbean Line*, supra, 28 F.M.C. at 368-369.

degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

It is appropriate to note that a settlement may be justified by any one or more of the applicable criteria. *Far Eastern Shipping Company Possible Violation of Section 16, Second Paragraph, 18(b)(3) and 18(c) Shipping Act, 1916*, 24 F.M.C. 991, 1014 (1982).

Hearing Counsel agree with AGM that the latter's ability to pay and the Government's ability to collect is the dominant factor dictating settlement for the amount proffered. There is no dispute between them, based both on evidence in the record and post record submissions of AGM's financial statements to Hearing Counsel, that \$40,000 is the most that AGM could pay and that the Government could collect. There is no question about the accuracy of the statement, in the proposed settlement, that "AGM ceased operations as a common carrier in December 1982, went out of business in November 1984 as a private contract carrier, and is now awaiting final dissolution pending this agreement." It is a measure of AGM's good faith that it created the interest bearing escrow account in the Government's favor before it was dissolved by the State of Washington, thus insuring that the penalty will not only be collected, but that it will be collected at the least expense to the Government. See *Armada Great Lakes/East Africa Service Ltd.; Great Lakes Transcaribbean Line*, *supra*, 28 F.M.C. 370-271.

A sound argument is made by Hearing Counsel that there has been at least a prima facie showing that AGM engaged in a pattern of conduct culminating in violations of the Shipping Act, 1916, and the Intercoastal Shipping Act, 1933¹² and that such conduct, if left unpunished, could undermine the regulatory scheme established by the Congress for the shipping industry. It is clear, however, that given AGM's financial condition and its voluntary cooperation with the Commission, from its first contact with investigators through the hearing process, that the amount of \$40,000 vindicates the Government's position and should serve to foster deterrence by others in the future.

Conclusion

I find that the statutory and regulatory standards for settlement of a civil penalty have been satisfied. Under the circumstances presented, particularly the diminished finances of AGM, the settlement strikes a proper balance of the Government's interests and those of AGM.

¹²Hearing Counsel concedes there is a "good faith dispute between Hearing Counsel and AGM as to the law and facts of this case" (Reply, p.5, n. 2) with the exception of the misrating issue. As seen AGM admits the fact of misrating without admitting a violation.

Order

It is ordered that the offer of settlement be approved. It is further ordered that AGM pay the sum of \$40,000, together with all interest accumulated in an escrow account on deposit since March 25, 1986, within fifteen (15) days of final approval of the offer by the Commission. It is further ordered that the terms and conditions of the Proposed Settlement of Civil Penalty, a copy of which is attached as an appendix, hereto, are incorporated in this paragraph as if more fully set forth herein.¹³ It is further ordered that, if the offer is approved by the Commission, AGM shall not be bound by the principles of res judicata or collateral estoppel in connection with any findings affecting AGM which may be made in any subsequent decision in this proceeding.

(S) SEYMOUR GLANZER
Administrative Law Judge

¹³ N.B. the last "whereas" paragraph on p. 2 of the Proposed Settlement, indicates that AGM is awaiting final dissolution as a corporation. Subsequent thereto, as found, AGM was dissolved. Consequently that paragraph may be deemed amended.

APPENDIX

BEFORE THE FEDERAL MARITIME COMMISSION

Arctic Gulf Marine, Inc.
Peninsula Shippers Association, Inc.,
Southbound Shippers, Inc.

DOCKET NO. 84-31

PROPOSED SETTLEMENT OF CIVIL PENALTY

Respondent Arctic Gulf Marine, Inc., (AGM), by its attorney, respectfully, submits this proposed Settlement Agreement to the Presiding Administrative Law Judge for approval pursuant to Section 505.3, of the Commission's General Order 30, 46 C.F.R. 505.3, and for incorporation into the Final Order in this proceeding, if so approved.

WHEREAS, by Order of Investigation and Hearing served September 10, 1984, (Order), the Commission instituted this proceeding to determine, among other things, whether AGM had violated section 2 of the Intercoastal Shipping Act, 1933, (46 U.S.C. §844) and section 15 of the Shipping Act, 1916, (46 U.S.C. §814), and further, the Order includes the issue of whether a civil penalty should be assessed for any such violations and, if so, the amount of such penalty; and

WHEREAS, the Order alleges that AGM may have violated section 2 of the Intercoastal Shipping Act, 1933, by charging a different compensation for the transportation of property than the rates in its tariff on file and in effect with the Commission during the period April 23, 1982–October 29, 1982, and by absorbing drayage charges without a provision in its tariff during the period July 7, 1982–October 14, 1982; and

WHEREAS, the Order alleges that AGM may have violated section 15 of the Shipping Act, 1916, by carrying out an unfiled and unapproved preferential and cooperative working arrangement and agreement with Peninsula Shippers Association, Inc., and Southbound Shippers, Inc. during the period March 15, 1982–November 10, 1982; and

WHEREAS, the parties, in order to avoid the delays and expense which would be occasioned by further litigation of the issues specified in the Order, are desirous of expeditiously settling this matter in accordance with the terms and conditions of this Agreement, and

WHEREAS, Section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. §847, section 32(e) of the Shipping Act, 1916, 46 U.S.C. 831(e), section 32(e) of the Shipping Act, 1916, as amended, 46 U.S.A. App. 831(e), and Section 13(c) of the Shipping Act of 1984, 46 U.S.C. App. 1712(c), authorize the Commission to assess or compromise civil penalty claims arising from the alleged violations set forth above; and

WHEREAS AGM ceased operations as a common carrier in December, 1982, went out of business in November, 1984 as a private contract carrier,

and is now awaiting final dissolution as a corporation pending this agreement;

NOW, THEREFORE, in consideration of the premises set forth herein, and in compromise of all civil penalty claims arising from the conduct set forth in the Order and factual record submitted in this proceeding, the parties hereto agree as follows:

1. AGM agrees to pay a monetary amount of \$40,000 to the Federal Maritime Commission according to the terms and conditions set forth below:

AGM has deposited the good faith sum of \$40,000 into a segregated, interest bearing escrow account in the name of Bauer, Moynihan & Johnson and the Federal Maritime Commission at First Interstate Bank of Washington, N.A. as of March 25, 1986. Upon the approval and acceptance of this Proposed Settlement by the Federal Maritime Commission, and within fifteen (15) days after service of a Final Order in this proceeding incorporating approval of the Proposed Settlement, the sum in such segregated account, including all accrued interest shall be paid to the Federal Maritime Commission. In the event this settlement offer is not accepted and approved by the Federal Maritime Commission, such sums with all accrued interest shall be returned to AGM.

2. Upon approval of this Agreement by the Commission, this Agreement shall forever bar the commencement or institution of any assessment proceeding, civil action or other claim for recovery of civil penalties from AGM arising from or in any way related to the alleged violations set forth and described in the Commission's Order and in the record in this proceeding.

3. This Agreement is entered into voluntarily by both parties, and no promises or representations have been made by either party other than the agreements and consideration herein expressed.

4. It is expressly understood and agreed that this Agreement is not to be construed as an admission by AGM to the violations alleged in the Order.

5. The undersigned counsel for AGM represents that he is properly authorized and empowered to execute this Agreement on behalf of AGM and to fully bind AGM to all the terms herein.

ARCTIC GULF MARINE, INC.

BY: _____

TIMOTHY S. O'NEILL, BAUER, MOYNIHAN & JOHNSON, 247 FOURTH &
BLANCHARD BLDG., 2121 FOURTH AVENUE, SEATTLE, WASHINGTON
98121, (206) 443-3400

ATTORNEY FOR ARCTIC GULF MARINE, INC.

FEDERAL MARITIME COMMISSION.

BY: _____

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-2

NEW ORLEANS STEAMSHIP ASSOCIATION

v.

PLAQUEMINES PORT HARBOR AND TERMINAL DISTRICT
ORDER ADOPTING INITIAL DECISION

September 16, 1986

This proceeding was instituted by the filing of a complaint pursuant to section 22 of the Shipping Act, 1916, 46 U.S.C. app. §821 (1916 Act), by the New Orleans Steamship Association (NOSA),¹ against the Plaquemines Port, Harbor & Terminal District (Port).² The complaint alleges that the Port has published a tariff assessing fees for the use of terminal facilities which are unjust and unreasonable and unduly prejudicial in violation of sections 16, First and 17 of the 1916 Act, 46 U.S.C. app. §§ 815 and 816.³ Administrative Law Judge Joseph N. Ingolia (Presiding Officer) has issued an Initial Decision (I.D.) finding that the tariff is discriminatory in some respects but is otherwise lawful. Exceptions and Replies to Exceptions have been filed by both parties to the proceeding. The Commission heard oral argument.

BACKGROUND

The relevant attributes of the Port have been the subject of prior Commission proceedings, and have been reviewed and discussed in a prior case, *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982) (*Dreyfus*), as well as in the I.D. in this case. The Commission has reviewed the record and finds substantial evidence supporting the material factual findings of the Presiding Officer. Accordingly, they are adopted by the Commission. The following is a brief summary of those findings.

The Port consists of the first 100 miles of the Mississippi River from its mouth in the Gulf of Mexico and is coextensive with the Parish of Plaquemines in the State of Louisiana. The Port does not own or operate

¹ NOSA is a non-profit association of vessel owners, agents and stevedores.

² The Port is a local waterway authority coextensive with the Parish of Plaquemines, Louisiana situated at the mouth of the Mississippi River.

³ Specifically, the complaint alleges that: (1) the charges are an unconstitutional toll or duty on tonnage on a public waterway; (2) the charges are assessed in a discriminatory manner previously found unlawful by the Commission in a complaint proceeding; (3) the settlement of the prior case on appeal was unfair and discriminatory to non-parties; (4) vessel agents cannot be made liable for any Port assessments; and (5) a harbor fee cannot be imposed on vessel owners not responsible for the loading or unloading of cargo.

any facilities serving common carriers by water. Several private facilities are located within the Port serving, among others, common carriers by water. There is a large amount of commercial waterway traffic in and through the Port for which the Port maintains significant "necessary and essential, direct and indirect, port, harbor and marine services to port and harbor users and other persons located in proximity to and affected by such activities" ⁴ In 1977, the Port filed with the Commission a tariff which imposed fees: (1) on vessels docking or anchoring within the Port, the so-called Harbor Fee; and (2) on cargo loaded or unloaded at private facilities within the Port, the so-called Supplemental Harbor Fee. The tariff also contained a number of exceptions and certain liability and surety provisions.

In 1979, after some preliminary litigation in the United States District Court for the Eastern District of Louisiana ⁵ over the constitutionality of the tariff, Louis Dreyfus Corporation and other parties subject to the fees filed a complaint against the Port with the Commission. This complaint led to the above-referenced *Dreyfus* decision finding the tariff in violation of sections 16 and 17 of the Shipping Act, 1916. The Port filed an appeal with the U.S. Court of Appeals for the District of Columbia Circuit, but the case was settled before a decision was issued. Under the terms of the settlement the Port refunded 80% of the fees assessed the complainants. The Port then withdrew its appeal of the Commission's decision ⁶ and held public hearings concerning the redrafting of the contested tariff provisions.

A new tariff was published, effective May 21, 1982, superseding the 1977 tariff. The new tariff reduced the fee against cargo and eliminated or modified some of the exemptions found unlawful by the Commission. The liability/surety provisions, which had been upheld by the Commission, were also modified.

The fees collected pursuant to the tariff are utilized to maintain two patrol/rescue/fire vessels, manned by firefighting and medical personnel, along with certain shoreside support facilities and personnel, and a ferry equipped with some firefighting equipment. A helicopter, seaplane and another airplane are also utilized by the Port. Two additional river ferries are diverted to firefighting duties in extreme emergencies. There is a full-time Port staff. Additionally, a significant portion of the Parish government operating expenses is attributed to Port matters. In 1983, total Port expenses were \$1,242,168, consisting of \$1,002,385 in direct expenses and \$239,783 allocated from other Parish departments. In 1984, total Port expenses were

⁴ Preamble to Plaquemines Parish Port, Harbor and Terminal District Tariff; *quoted in*, I.D. (28 F.M.C. 573, at 577, 589).

⁵ *Louis Dreyfus Corporation v. Plaquemines Port, Harbor and Terminal District, et al.*, Civ. No. 78-860 (E.D. La. stayed Jan. 31, 1980).

⁶ The case was dismissed in response to a Consent Motion, pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure, *Plaquemines Port, Harbor and Terminal District v. F.M.C., et al.*, No. 82-1941 (D.C. Cir. May 17, 1983) (*per curiam*).

\$1,394,369, consisting of \$1,158,293 in direct expenses and \$236,076 allocated from other Parish departments.

The exemptions from the fees levied by the Port are: (1) all privately owned commercial wharves and docks; (2) commercial fishing vessels and crew boats; (3) supply boats for oil rigs; (4) all inbound inland barges; (5) the first 500 tons of cargo handled by a vessel; and (6) persons obtaining long-term permits at reduced rates. The Port also has an unwritten agreement with a major facility in the Parish, Electro-Coal Transfer Corporation, exempting incoming ocean barges from the fees.

DISCUSSION

The Exceptions to the Initial Decision and Replies to Exceptions address the major issues raised in the proceeding below, namely: (1) whether the Commission has jurisdiction over the Port; (2) whether the Port has the Constitutional authority to levy fees; (3) whether the settlement of the *Dreyfus* case on appeal resulted in unlawful discrimination; (4) whether vessel agents and other parties not in privity with the Port may be made liable for Port tariff fees; and (5) whether the Port's fees are unreasonable and discriminatory. For reasons stated below, the Commission finds that it has jurisdiction in this case and, except for certain exemptions, the Port's tariff is lawful under the Shipping Act of 1984, 46 U.S.C. app. §§ 1701-1720 (1984 Act).⁷

Jurisdiction

The threshold issue which must be addressed is whether the 1984 Act confers on the Commission jurisdiction over the Port and its tariff practices.

This issue of the Commission's jurisdiction over the activities in question under the 1916 Act was fully litigated and decided in the affirmative by the Commission in *Dreyfus*. As in *Dreyfus*, the Port argues that the Commission has no jurisdiction over its tariff because it does not own or operate physical "terminal facilities" and there is no evidence that it serves common carriers. The Port further contends that the *Dreyfus* decision is a nullity because the doctrines of *res judicata* and "collateral estoppel" do not apply to findings concerning the jurisdiction of administrative agencies.

NOSA argues that the Port is precluded from raising the issue of jurisdiction now due to the Port's failure to successfully appeal *Dreyfus*. NOSA also maintains that the Port is estopped from contesting jurisdiction because it conceded the issue in its answer to the NOSA complaint.

⁷ The Presiding Officer held that findings under the 1916 Act, as it applied prior to the enactment of the 1984 Act, also apply to the 1984 Act, "where it contains similar and relevant sections." I.D. at 618, n. 3. The Commission adopts this analysis, and, as discussed in more detail below, holds that in the context of this case references to violations of the former 1916 Act will be construed as violations of the appropriate corresponding sections of the 1984 Act. See, *infra*, notes 8, 10 and 11.

The Presiding Officer did not directly address whether *Dreyfus* is *res judicata* on the issue of jurisdiction because that issue was not raised below. His finding of jurisdiction was predicated on his view that *Dreyfus* is precedent on point.

The Commission is in fundamental agreement with the Presiding Officer's conclusions. However, because of the jurisdictional arguments raised on Exceptions, the Commission finds it necessary to supplement the I.D. on this issue.

In *Dreyfus* the Port was found to be an "other person" subject to the 1916 Act furnishing "terminal facilities" and, therefore, was found to be subject to the antidiscrimination standard of section 16, and the reasonableness standard of section 17.⁸ Although the language used in the 1984 Act differs in some respects from that of the 1916 Act, it establishes the same basic jurisdictional parameters with respect to marine terminals and the anti discrimination and reasonableness standards applicable to them. While section 1 of the 1916 act included a marine terminal operator in the definition of an "other person subject to this Act," the 1984 Act separately defines it in section 3(15) as, *inter alia*, a person "furnishing . . . other terminal facilities in connection with a common carrier."⁹ This is the same language the Commission relied upon in *Dreyfus* in finding jurisdiction over the Port.¹⁰ Similarly, section 10(d)(1) of the 1984 Act is, with reference to "marine terminal operators," a recodification of section 17 of the 1916 Act.¹¹ Likewise, section 10(b)(11) and section 10(b)(12) of the 1984 Act, made applicable to marine terminal operators by section 10(d)(3), essentially recodify the standards of section 16, First of the 1916 Act.¹²

⁸ *Dreyfus*, 25 F.M.C. at 65, 67.

⁹ Section 1 of the 1916 Act (formerly 46 U.S.C. 801) defined "other person" subject to the Act as meaning:

. . . any person not included in the term common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse or other terminal facilities in connection with a common carrier by water.

Section 3(15) of the 1984 Act, 46 U.S.C. app. 1702(15), defines "marine terminal operator" as:

. . . a person engaged in the United States in the business of furnishing wharf age, dock, warehouse, or other terminal facilities in connection with a common carrier.

¹⁰ See, *Dreyfus*, 25 F.M.C. at 65.

¹¹ Section 10(d)(1) of the 1984 Act, 46 U.S.C. app. 1709(d)(1), provides:

(1) 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.

Section 17 of the 1916 Act (formerly 46 U.S.C. 816) required in pertinent part:

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the board 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.

¹² Section 10(d)(3) of the 1984 Act, 46 U.S.C. app. 1709(d)(3), provides:

(3) The prohibitions in subsection (b) (11), (12), and (14) of this section apply to marine terminal operators.

Sections 10(b) (11) and (12) of the 1984 Act, 46 U.S.C. app. 1709(b) (11) and (12), provide:

Continued

Because, there is no substantial difference between the 1916 Act and the 1984 Act in the operative language relevant to the Commission's jurisdiction over the Port and the standards to be applied to determine the lawfulness of its practices, the findings in *Dreyfus* must be given application in this case.¹³ The precise legal question presented is whether the decision in *Dreyfus* operates as *res judicata*, "collateral estoppel"¹⁴ or merely *stare decisis*¹⁵ on the issue of jurisdiction.

This distinction is important because the contention by NOSA that *Dreyfus* is *res judicata* carries with it the argument that the jurisdictional findings in *Dreyfus* are binding in all forums where the issue is raised.¹⁶ Under this theory the Port could not challenge the findings of the Commission in *Dreyfus* at any stage of this proceeding¹⁷ in the absence of a showing of a material change in circumstances, an assertion the Port has not made.¹⁸

(b) COMMON CARRIERS.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

- * * * * *
- (1) 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.

Section 16, First of the 1916 Act (formerly 46 U.S.C. 815, First) states in pertinent part:

That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description 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. . . .

¹³ See, *United Shoe Workers of America, AFL-CIO v. Bedell*, 506 F.2d 174, 183 (D.C. Cir. 1974).

¹⁴ "Under *res judicata*, a final judgment on the merits bars further claims by parties or their privies on the same cause of action. *Montana v. United States*, 440 U.S., at 153; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326, n. 5 (1979). The Restatement of Judgments speaks of *res judicata* as 'claim preclusion' and of collateral estoppel as 'issue preclusion.' Restatement (Second) of Judgments § 27 (1982).

* * * * *

Offensive use of collateral estoppel occurs when a plaintiff seeks to foreclose a defendant from relitigating an issue the defendant has previously litigated unsuccessfully in another action against the same or a different party. Defensive use of collateral estoppel occurs when a defendant seeks to prevent a plaintiff from relitigating an issue the plaintiff has previously litigated unsuccessfully in another action against the same or a different party. *Parklane Hosiery, supra*, at 326, n.4."

United States v. Mendoza, 464 U.S. 154, 158-159, n. 3, 4 (1984); see also, Davis, Administrative Law Treatise, *Res Judicata*, §§ 21:5, 21:7 (2d. Ed. 1983).

¹⁵ *Stare decisis* has been defined as the "[d]octrine that, when a court has once laid down a principle of law as applicable to a certain state of facts, it will adhere to that principle, and apply it to all future cases, where facts are substantially the same; regardless of whether the parties and property are the same." Black's Law Dictionary 1261 (5th ed. 1979). This doctrine has been applied to administrative agencies, *Greater Boston Television Corp. v. F.C.C.*, 444 F.2d 841, 852 (D.C. Cir.), cert. denied 403 U.S. 923 (1971), and generally falls under the "arbitrary and capricious" review standard of the Administrative Procedure Act, 5 U.S.C. 706(2)(A).

¹⁶ Cf., *Federated Department Stores, Inc. v. Moitte*, 452 U.S. 394 (1981).

¹⁷ *Callanan Road Improvement Co. v. United States*, 345 U.S. 507, 512 (1953).

¹⁸ Cf., *Montana v. United States*, 440 U.S. 147, 157-162 (1979); *National Classification Committee v. United States*, 765 F.2d 164, 170 (D.C. Cir. 1985); see generally, Restatement (Second) of Judgments § 28 (1982). The Port has asserted on Exceptions that there is no evidence in this case that common carriers call at facilities under its control, an essential element of Commission jurisdiction. However, because this claim is in the nature of an affirmative defense to the application of *Dreyfus*, the burden of proof is on the Port, not NOSA. This is especially true in light of the Port's admission of jurisdiction in its answer and the fact that it never raised this issue during the course of the proceeding.

After considering applicable law in light of the record, we conclude that a limited application of the doctrine of collateral estoppel is appropriate here. Specifically, NOSA may assert offensive collateral estoppel against the Port at least as to the relitigation of the underlying jurisdictional facts found in *Dreyfus*. The Port has not presented any valid legal basis to deny the *Dreyfus* decision this limited collateral estoppel effect. However, although *Dreyfus* does not preclude relitigation of the purely legal aspects of the issue of jurisdiction in this proceeding, for reasons stated below, the statutory interpretation upon which the Commission based jurisdiction in *Dreyfus* is *stare decisi* and has continuing validity under the 1984 Act.

As a threshold matter, NOSA's argument that raising the jurisdiction issue at this time is barred by the Port's admission of jurisdiction in its answer to the complaint must be rejected. Jurisdictional issues may be raised at any phase of the adjudicative process because the question goes to the basic authority of the tribunal to entertain the case.¹⁹ Moreover, rules of pleading and practice are not as strictly applied to administrative proceedings as they are to court proceedings.²⁰ Therefore, the Commission concludes that the Port's admission of jurisdiction in its answer to NOSA's complaint does not estop it from now raising this issue.

Another argument that can be readily rejected is the assertion by the Port that *res judicata* and its corollary doctrine, collateral estoppel, do not apply to administrative proceedings. The Supreme Court has ruled that if the fundamental procedures applicable to the adjudicative process are followed, the doctrines apply to administrative determinations.²¹ There is no question that proper adjudicative procedures were followed in *Dreyfus* and that the Port, in fact, fully litigated the question and was afforded a full opportunity to appeal the decision.²² All the other elements of "issue preclusion" (or more precisely offensive collateral estoppel)²³ are also present in this proceeding.

However, to the extent the issue involves a purely legal determination, collateral estoppel may not be applied so as to preclude the Commission from reviewing the statutory basis of its jurisdiction over the Port. We could find no clear authority holding that the doctrine of collateral estoppel can be applied to an administrative finding of jurisdiction. The closest cases on this point state that an agency's determination of *facts* underlying

¹⁹ Cf., *Eisler v. Stritzler*, 535 F.2d 148, 151 (1st Cir. 1976) (and cases cited therein).

²⁰ See, *Citizens State Bank of Marshfield, Mo. v. Federal Deposit Insurance Corp.* 751 F.2d 209, 213 (8th Cir. 1984); *Aloha Airlines, Inc. v. C.A.B.*, 598 F.2d 250, 262 (D.C. Cir. 1979).

²¹ *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 422 (1966); see also, Restatement (Second) of Judgments §83 (1982).

²² See, *Dreyfus*, 25 F.M.C. at 63, 65; see also, *supra*, note 5.

²³ There is authority for the proposition that offensive collateral estoppel cannot be asserted by a plaintiff that could have joined in the prior proceeding. See, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 329-330 (1979). However, NOSA is challenging the Port's 1982 tariff, not its 1977 tariff. Moreover, NOSA's interests are not the same as those of the *Dreyfus* complainants. It is unlikely they could have joined in the 1979 case. See also, Restatement (Second) of Judgments §29(3), Reporter's Note, comment e (1982).

its conclusion that jurisdiction was *lacking* must be given effect in subsequent litigation.²⁴

The qualified language of the court decisions on this issue appear to limit the application of the doctrines of *res judicata* and collateral estoppel to factual determinations underlying administrative findings concerning jurisdiction. These doctrines do not apply to the unreviewed administrative determination of the ultimate legal issue of jurisdiction, thus preserving the court's role as the ultimate interpreter of an agency's jurisdiction under a statute. One of the fundamental objectives of *res judicata* and collateral estoppel is preserved, however, because substantial "repose" is afforded to resolutions of factual disputes between parties once litigated and decided.

It appears then that collateral estoppel may only apply to the factual findings underlying the prior jurisdictional determination involving the party against whom the prior decision is being asserted. Applied here, this means that "issue preclusion" extends only to the facts the Commission found to be sufficient to establish jurisdiction over the Port in *Dreyfus*. To escape these preclusive effects, the burden was on the Port to prove a significant change in circumstances which removes the factual basis of the Commission's previously found jurisdiction. No such change in circumstances was shown.

Furthermore, the Commission finds no legitimate reason to gainsay its jurisdiction as a matter of statutory interpretation. The same respondent is challenging the Commission's authority to decide the same alleged violations of law under the same jurisdictional facts under substantially identical statutory provisions. Therefore, the Commission reaffirms the jurisdictional finding in *Dreyfus*.

To reiterate those findings, the Port is a "marine terminal operator" subject to the 1984 Act, because its exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial cargo handling transactions, its assessment of selective cargo transfer fees, and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Further, the Port's practice of assessing, on the basis of cargo transactions, a fee for providing to vessels and cargo essential health, safety and security services constitutes the furnishing of "other terminal facilities" within the meaning of the 1984 Act.

The Port's Constitutional Authority To Levy Fees

NOSA argues that the tariff charges assessed by the Port are in violation of Article I, Section 10, Clause 3 of the United States Constitution because they are a prohibited "duty on tonnage."²⁵ Under this theory, because

²⁴ See, *Pacific Seafarers, Inc. v. Pacific Far East Line, Inc.*, 404 F.2d 804, 809 (D.C. Cir. 1968), cert. denied 393 U.S. 1093 (1969); *McCulloch Interstate Gas Corp. v. F.P.C.*, 536 F.2d 910, 913 (10th Cir. 1976).

²⁵ Article I, Section 10, Clause 3 of the U.S. Constitution provides: "No state shall, without the Consent of Congress, lay any Duty of Tonnage. . . ."

the Port tariff is unconstitutional, it is also "otherwise unlawful" and is therefore a violation of section 17 of the 1916 Act.

The Port maintains that allegations concerning the constitutionality of its tariff are beyond the decisional authority of the Commission. The Port further argues that, in any event, its charges are constitutional because they are levied as compensation for actual services rendered by the Port.

Although the Presiding Officer indicated that it was not strictly necessary to determine whether the Port's fees are constitutional, he nevertheless found that the tariff fees in question are not a toll charge in contravention of the United States Constitution. Rather, he found that those fees represent the establishment of regulations and practices related to or connected with the receiving, handling, or delivering of property; namely, they are fees to provide for the policing of the waterway so as to ensure the safety and facility of movement of vessels and cargo using it. I.D. at 618.

The Commission has no express statutory authority to determine the constitutionality of port tariffs promulgated pursuant to local enactments. Moreover, an administrative proceeding is considered to be a forum ill-suited to the resolution of constitutional claims.²⁶ Administrative agencies are entitled to refuse to pass on constitutional claims unless the law or facts applicable to a particular controversy compel such an action.²⁷

In certain circumstances the Commission may take into consideration constitutional limitations on its authority in deciding cases. Questions of "due process" and other constitutional standards often enter into Commission determinations.²⁸ However, it does not appear that these considerations apply in this case.

More importantly, as explained in the I.D.,²⁹ determining the issues of Commission jurisdiction and the lawfulness of the Port tariff under the Shipping Act does not require reaching the constitutional issue. Jurisdiction over the Port is based upon a finding that the Port is charging for providing "other terminal facilities." The Commission's enabling legislation allows it to evaluate such charges only under the Shipping Act's reasonableness and antidiscrimination standards. We find no legal directive in the statute or its legislative history to include within the scope of these standards constitutional considerations which are more appropriately the province of the courts. Because this case can be fully decided under the Shipping Act without reference to constitutional issues, the Commission declines to address the constitutionality of the Port's tariff charges.

²⁶ *Downen v. Warner*, 481 F.2d 42, 643 (9th Cir. 1973).

²⁷ See, *Motor and Equipment Manufacturers Assoc. v. E.P.A.*, 627 F.2d 1095, 1114-1115 (D.C. Cir. 1979). Indeed, the courts clearly encourage such a policy of abstention by administrative agencies. *Id.*

²⁸ See, e.g., *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, Motion to Compel Discovery Denied, 20 S.R.R. 489 (1980).

²⁹ I.D. at 616-618.

The Dreyfus Settlement

NOSA argues that the settlement between the Port and the complainants in *Dreyfus* was improper and unlawful because it was discriminatory. Because that settlement made no provision for other persons who paid charges under the provisions found to be unlawful by the Commission in *Dreyfus*, NOSA urges that the Port be ordered to make similar refunds to such other persons.

The Port submits that NOSA's arguments are unfounded in law and fact. The Port maintains that such settlements are favored at law and that NOSA has shown no injury to it resulting from the settlement.

The Presiding Officer found that public policy favors settlements of litigation and that the settlement of the *Dreyfus* case by the Port does not unjustly discriminate against others who are not parties or privy to the former proceeding and who are not identified in this proceeding as having suffered an injury, much less the amount of such injury.

The Presiding Officer was correct that it is the policy of the Commission to favor settlements of disputes rather than force litigation. Settlements are given a presumption of validity and are construed as a final termination of a controversy. However, the cases cited by the Presiding Officer that declare these policies involve settlements of Commission proceedings.³⁰ There is no Commission policy concerning the settlement of appeals from administrative decisions in cases where violations of the Shipping Act are found.

There is some merit to NOSA's argument that private settlements in the factual context of *Dreyfus* could be a subterfuge for unlawful discrimination. Unjust discrimination is a consideration when the Commission evaluates a proffered settlement agreement in a proceeding where the parties want to compromise contested tariff charges.³¹ However, the Commission is not always privy to the settlement agreements in complaint cases when they are appealed, and usually has no direct oversight authority over such settlements.³²

In any event, given the remedy NOSA has requested we need not decide whether the *Dreyfus* settlement violated the antidiscrimination provisions of the Shipping Act. NOSA specifically advises that it is not requesting reparations for the *Dreyfus* settlement. Rather, it wants the Commission to require the Port to give notice to all affected parties that similar refunds are available. The issue then is whether the Commission has the statutory authority to require the Port to refund money to persons not parties to *Dreyfus* that paid the assessments found unlawful in that case.

³⁰ I.D. at 616. *Levatino & Sons v. Prudential Grace Lines*, 18 F.M.C. 83 (1974) involved the settlement of a complaint case before the Commission. *Behring International, Inc.—Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973 (1981) involved the settlement of a civil penalty claim.

³¹ See, *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 513 (1978).

³² There is no allegation here that the settlement agreement in *Dreyfus* fell within the Commission's jurisdiction under former section 15 of the 1916 Act, formerly 46 U.S.C. § 814.

The Commission is without authority to order a general refund of illegally collected charges in a complaint case.³³ This is also not a proceeding under section 8(e) of the 1984 Act, 46 U.S.C. app. § 1707(e), where general notices of the availability of refunds can be directed.³⁴ Moreover, even if the *Dreyfus* appeal had gone to conclusion and the complainants there had obtained a full refund of the illegal charges, the question would remain as to whether the Commission has authority to order refunds to persons not party to that proceeding.

Because the Commission does not have the authority to order *general* refunds in complaint cases, the Presiding Officer was correct in finding that such relief could not be ordered in this proceeding. However, the Commission notes that, as a general matter, injured parties are free to file their own complaints and use favorable Commission decisions to their advantage.

Vessel Agent Liability

NOSA argues that vessel agents do not use port services and, therefore, cannot be made liable for charges under the tariff. It also contends that state agency law to the effect that an agent cannot be held liable for the debts of a disclosed principal protects them from such liability. The Port disagrees. It argues that this vessel agent liability issue was decided in its favor in *Dreyfus* and, therefore, NOSA is collaterally estopped from relitigating the issue in this case. Moreover, it submits that the rationale of *West Gulf Maritime Ass'n v. Port of Houston Authority*, 21 F.M.C. 244 (1978), *aff'd mem. sub nom. West Gulf Maritime Ass'n v. F.M.C.*, 610 F.2d 1001 (D.C. Cir. 1979), *cert. denied* 449 U.S. 822 (1980) (*WGMA I*) applies here and should be followed. The Presiding Officer concurred in the Port's position concerning the applicability of *WGMA I*.

The Port's imposition of liability on vessel agents for tariff charges was addressed in *Dreyfus*.³⁵ The Commission there determined that vessel agents could be held liable under the rationale of *WGMA I*, because they were deemed to be "users" of port services. However, NOSA was not a party in *Dreyfus* nor did it have privity of interests with the complainants in that case. Therefore, NOSA is not precluded from litigating the vessel agent liability issue.³⁶

The Commission has established a basic rule on liability provisions in terminal tariffs. Any person that is a "user" of a terminal facility may

³³ See section 11 of the 1984 Act, 46 U.S.C. app. § 1710. Compare, section 3(c)(2) of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. § 845(c)(2).

³⁴ Compare, section 8(e)(3) of the 1984 Act, 46 U.S.C. app. § 1707(e)(3).

³⁵ *Dreyfus*, 25 F.M.C. at 70.

³⁶ *Id.*; see, Restatement (Second) of Judgments §29; see also, *supra*, note 12. NOSA also correctly points out that the issue of vessel agent liability under the provisions of the tariff was not a major issue in *Dreyfus*. Indeed, the question of vessel agent *primary* liability for the Supplemental Harbor Fee was not even addressed in *Dreyfus* because that issue arises under a new provision in the Port's 1982 tariff.

be held liable for the tariff charges related to that use.³⁷ The rationale is that a terminal operator has the right to impose reasonable conditions on the use of its facilities to ensure the collection of tariff charges.³⁸ The term "user" includes those that indirectly, *i.e.*, as agents of direct users, utilize terminal facilities.

In *WGMA I*, the terminal operator had experienced significant difficulties, and resulting financial losses, in collecting fees from vessel owners and operators that maintained no permanent presence in the port. The vessel agents that profited from the use of the facilities by their principals would not pay nor aid in the collection of delinquent accounts, citing state agency law as holding them immune from liability for the charges. The terminal operator responded by inserting agent liability and surety provisions in its tariff.

The Commission upheld the provisions because, in the absence of evidence of overreaching or abuse, they were deemed to be a reasonable method of collecting fees lawfully due the terminal operators. Furthermore, in the absence of evidence of a monopoly on terminal facilities or other forms of duress, the agents by their course of conduct were held to have separately contracted with the terminal operator to be responsible for the fees owed by their principals. Also, the Commission found that vessel agents could protect themselves from losses by appropriate contractual arrangements with their principals. Holding vessel agents liable as sureties for port tariff charges incurred by their principals was therefore deemed to be a minimal imposition or burden on vessel agents in light of the financial benefit they received by conducting business at the terminal facility.³⁹

Applying *WGMA I* the critical question is whether, by doing business within the port, agents, either directly or indirectly, voluntarily use port facilities and derive a benefit substantial enough to justify the potential liability for the charges owed by their principals. *WGMA I*'s reasonableness standard is distinct from that enunciated in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968) (*Volkswagenwerk*).⁴⁰ Liability and surety provisions are not an apportion-

³⁷ *WGMA I*, 21 F.M.C. at 248.

³⁸ *Id.* at 249.

³⁹ *Id.* at 249-250; see also, *Harrington & Co. Inc. v. Georgia Ports Authority*, 23 S.R.R. 753 (1986) (rulings on motions for summary judgment), affirmed, *Harrington & Co., Inc. v. Georgia Ports Authority*, 23 S.R.R. 1276 (P.M.C. 1986).

⁴⁰ NOSA's Exceptions are ambiguous as to whether they are challenging the Presiding Officer's finding that *Volkswagenwerk* is not the appropriate test of reasonableness on this issue. See, NOSA's Exceptions at 21-22. In any event, it appears that the Presiding Officer was correct. The *Volkswagenwerk* test is applied in determining the reasonableness of terminal charges based upon a comparative cost/benefit analysis of concurrent users of a facility. "The proper inquiry under §17 [of the 1916 Act] is, in a word, whether the charge levied is reasonably related to the service rendered." 390 U.S. at 282. This is not the analysis of the issue proffered by NOSA. They assert that they receive no benefit from the Port services at issue, have no privity with the Port and therefore cannot be made liable for any of the charges. This argument does not apply the *Volkswagenwerk* test of reasonableness of a charge, but rather is an application of the rationale of the Commission in *WGMA I*, separately cited and argued by NOSA.

ment of charges and neither the costs of the provisions nor the benefits of indirect use of terminal facilities can be measured and compared against those costs incurred and benefits received by direct users of such facilities.⁴¹

The essential elements of *WGMA I* exist in this case. There is no indication in the record that vessel agents are under any duress to do business in the Port. Indeed, one of the largest port and terminal facility complexes in the nation, New Orleans, is immediately upstream from the Port. It is reasonable to assume, therefore, that vessel agents obtain sufficient economic benefits to justify locating their businesses in the Port. Vessel, cargo and private terminal interests, including agents, benefit economically from the safety and health services provided by the Port. Moreover, as in *WGMA I*, the agents have voluntarily engaged in a course of conduct by which they have agreed to the conditions imposed on their use of the Port and its terminal services. Vessel agents may protect themselves from losses through appropriate arrangements with their principals.

The only distinction between the situation here and that existing in *WGMA I* is the nature of the terminal facilities for which the charges are being imposed. The Port's services are not the direct cargo handling services involved in *WGMA I*. They are essential "supports" services provided all commerce in the Port. In this sense all "users" of Port services are "indirect." Therefore, the "privity" between the Port and vessel agents for services rendered the vessel and cargo interests may be somewhat more attenuated than in *WGMA I*.

However, the absence of direct privity between the Port and vessel agents would be significant only if it indicated a lack of "use" of Port terminal facilities and services by the agents. As stated above, the Commission finds that agents do "use" terminal support services as much as any other economic interest involved in the commercial cargo handling activities in the Port. Because the Port services have been found to be "other terminal facilities," "relating to or connected with receiving, handling, storing, or delivering property" for which a charge may be assessed under the Shipping Act, the Port tariff liability and surety provisions are held to be lawful and reasonable under the rationale of *WGMA I*, notwithstanding the absence of direct privity between vessel agents and the Port.⁴²

The Port's Fee Structure

The substantive issues in this case concern the lawfulness of the Port's Harbor Fee and Supplemental Harbor Fee under the Shipping Act. NOSA argues that the Port's services are primarily for the benefit of local residents,

⁴¹ See, *Harrington & Co., Inc. v. Georgia Ports Authority*, 23 S.R.R. at 767-771, *Harrington & Co., Inc. v. Georgia Ports Authority*, 23 S.R.R. at 1283.

⁴² The issue raised by NOSA's exception concerning liability for the Supplemental Harbor Fee when vessels operate under "FIO" charter contracts is similar to the vessel agent liability issue. ("FIO" cargo deliveries are made by vessels under charter where all costs of loading and unloading are for the account of a party other than the vessel owner.) See, NOSA's Exceptions at 26. Just as vessel agents receive an indirect benefit from the Port services rendered vessels, vessel owners derive an indirect benefit from the Port services rendered cargo interests in "FIO" cargo deliveries.

are not of a commercial marine nature, and therefore cannot be charged against oceangoing vessels. NOSA also contends that the Port has failed to justify the various exceptions which allegedly favor local interests, thereby invalidating the tariff under the antidiscrimination standards of the Shipping Act. The Port, on the other hand, argues that its fees are reasonably related to the costs it incurs in providing essential services to non-local commercial marine interests and that valid reasons exist for the exemptions it allows from the tariff fees.

The Presiding Officer concluded that while there exists a reasonable relationship between total Port costs and total assessment revenues, the Harbor Fee and Supplemental Harbor Fee⁴³ violate: (1) section 17 of the 1916 Act to the extent such fees do not bear a reasonable relationship to the comparative benefit obtained by the assessed parties in light of the benefits obtained by exempted parties from the services provided by the Port; and (2) violate section 16, First of the 1916 Act to the extent the various exceptions contained in the tariff relating to private terminals, supply boats, crew boats, fishing vessels, inland barges, as well as the five hundred ton and the permit/discount rate features are unjustified and therefore unjustly discriminatory.

The threshold challenge to the Presiding Officer's finding that the Port's fee structure is unlawfully discriminatory rests on the contention that the burden of proof was wrongly placed on the Port. The Port is correct in asserting that the ultimate burden of proof in a complaint proceeding is on the complainant.⁴⁴ However, this does not necessarily relieve the respondent from an evidentiary burden under all circumstances; that is, although the burden of proof ultimately lies with the complainant, the burden of "going forward" with evidence can shift to a respondent. This is common in many administrative proceedings, and was the case in *Dreyfus*.⁴⁵

The Presiding Officer cited *Dreyfus* in shifting the burden of going forward to the Port in this case. He found that NOSA had made a showing that the services for which the Port had assessed fees also accrued to the benefit of other classes of Port "users" that were exempted from the fees. Because these exemptions did not, on their face, relate to the nature of the cargo involved or other valid transportation factors, a *prima facie* case of discrimination was established and the burden of going forward shifted to the Port to explain or justify the differentiation in the treatment of Port "users." Evidence in support of the exemptions was proffered by the Port. NOSA then submitted rebuttal evidence. The Presiding Officer weighed all the evidence of record to determine whether NOSA had shown

⁴³ The Presiding Officer also held that the Supplemental Harbor Fee is not an improper charge against vessels.

⁴⁴ See, 46 C.F.R. 502.155.

⁴⁵ *Dreyfus* 25 F.M.C. at 68.

a violation of the Shipping Act by a preponderance of the evidence.⁴⁶ In so doing, the Presiding Officer did not unlawfully place the burden of proof on the Port.

NOSA's allegation that the allocation of Parish expenses to the Port's operations is unjustly discriminatory because it includes non-marine expenses is unfounded. Unlike *Dreyfus*, the Parish Council in this case carefully reviewed Parish and Port operations and expenses to isolate those costs incurred in providing services to Port users.⁴⁷ The "marine related" expenses it computed are reasonably related to the actual cost of services resulting from activities and operations within the Port's jurisdiction. The resulting revenue needs are more reasonable than in *Dreyfus* because they are limited to actual Port costs. This is reflected in the new tariff by a significant reduction in the basic tonnage charge on cargo and the elimination of the more egregious exemptions stated in the 1977 tariff. The Presiding Officer was correct in finding that the overall method of determining the costs that can be attributed to overall Port services was proper and reasonable.

The Presiding Officer was also correct in finding that certain exemptions were unlawful under the *Dreyfus* rationale. He held that the entities benefiting from the challenged exemptions derive substantial benefits from the Port services cited as the basis for the tariff charges but do not pay the otherwise applicable fees. He further held that evidence of record shows that there are no alternative revenues derived by the Port from these entities which would offset the fees forgiven by the tariff exemptions. Finally, he found that the exemptions are not required administratively.

The Port now reargues contentions advanced below in support of the exemptions. The Port's justifications for the marine terminal exemption are that such terminals pay *ad valorem* taxes, act as sureties for the vessel fees and have their own fire protection equipment. This is largely the same argument proffered and rejected in *Dreyfus* and correctly found insufficient by the Presiding Officer here. There does not appear to be any difference between the situation here and that existing in the *Dreyfus* case that would justify a different conclusion.⁴⁸ We therefore concur in the Presiding Officer's disposition of the marine terminal exemption.

The Commission also concurs in the Presiding Officer's findings concerning the "first 500 tons" exemption. While this exemption was not specifically found unlawful in *Dreyfus*, the Presiding Officer's holding that it is *prima facie* discrimination favoring local interests over non-local interests appears to be correct. The Port's argument, that this is a *de minimis* exemption that many ports recognize, is not meritorious. The Port's exemption amounts to a \$20.00 loss of revenue per shipment. The evidence that the Port proffered shows that most ports impose a \$20.00 *minimum*

⁴⁶ Cf. *Investigation of Ocean Rate Structures*, 12 F.M.C. 34, 57-59 (1968).

⁴⁷ I.D. 28 F.M.C. at 609-613.

⁴⁸ See, I.D. 28 F.M.C. at 620-622; *Dreyfus* 25 F.M.C. at 70.

charge, and that it is economically feasible to bill for these amounts. Therefore, the Presiding Officer's finding that the Port has failed to justify the exemption is upheld.

The Port has also failed to justify the small craft exemption. However, the Port tariff's definition of small craft has been altered from that considered in *Dreyfus*. In the *Dreyfus* tariff any vessel under 100 feet was exempt from the Harbor Fee. In the revised tariff only vessels that are not "commercial cargo vessels" are exempt. This has been construed by the Port to mean that commercial fishing vessels and crew boats are exempt but that the supply boats must pay the Harbor Fee. The Presiding Officer is correct that the Port has not satisfactorily justified this exemption and has failed to rebut NOSA's *prima facie* showing of discrimination. The assessment of some charge appears necessary.

However, it also appears that the allocable portion of Port service costs to small charter fishing vessels and crew boats is small. Therefore, a *de minimis* rule applying to certain of these vessels may be warranted. While it does not appear to be reasonable to exempt large commercial fishing vessels unloading tons of fish at the Port each day, small charter fishing vessels and crew boats whose "mother ship" pays the fees stated in the tariff may reasonably fall within a *de minimis* class. If the tariff could be clarified to differentiate between the "mosquito fleet," that might be exempted under a *de minimis* rule, and substantial commercial interests, that must bear some fee burden, a small craft exemption might be justified.⁴⁹ Nevertheless, given the present language of the tariff exemption and the construction of this language by the Port, the Presiding Officer's conclusion that it violates the *Dreyfus* standards is upheld.

The exemption from the Supplemental Harbor Fee for "inbound inland barges" was also correctly found to be improper by the Presiding Officer. Transshipped cargo that is unloaded from inbound inland barges and loaded onto vessels or barges departing the Port is subject to the Supplemental Harbor Fee. However, if the cargo is local cargo, *i.e.*, cargo that is unloaded from inland barges and stays in the Parish, it is totally exempted from the fee. The Port's justification is that it is inappropriate to require a towboat owner to apportion the fees on local inbound cargo, and financially impractical to alter the assessment system to cover these movements. However, the Port failed to support these allegations with any financial analysis and their expert admitted that no attempt was made to do so.⁵⁰ We therefore concur in the Presiding Officer's disallowance of the exemption.

The specialized treatment that the Electro-Coal Company facility has been accorded by the Port is also unjustified. By private agreement this facility pays the Supplemental Harbor Fee on movements of coal outbound from the Port but pays no fee on movements of phosphate inbound to

⁴⁹ At a minimum the Port must clarify the language of the tariff to indicate that supply boats are subject to the fees. See, *Dreyfus* 25 F.M.C. at 68.

⁵⁰ I.D. 28 F.M.C. at 627-630.

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the Port. The Port justifies this arrangement on the basis that the phosphate is transhipped to outbound barges and fees are assessed on that movement, fulfilling the *intent* of the tariff.⁵¹ Because the basic method of assessment of cargo is on inbound movements, specialized treatment by agreement not reflected in the tariff is unjustified and unlawful.⁵²

The final tariff provision found to be unjustly discriminatory relates to the permit system. Vessels purchasing long-term permits obtain a substantial "discount" on the usual Harbor Fee. This tariff provision is applicable only to vessels under 250 feet and the discounts range from 50% for a 30-day permit to 78% for a one-year permit. NOSA believes that this is unjustified favoritism towards local interests. The Presiding Officer agreed and found that the Port's "wholesale/retail" arguments are generalizations that are not supported by any cost/benefit analysis.⁵³

It would appear that the permit system discounts were arbitrarily set at levels that, on their face, appear to unfairly favor local interests. In any event, the Port has failed to rebut NOSA's evidence of *prima facie* discrimination with any substantial evidence showing the reasonableness of the discount levels. The Presiding Officer therefore correctly found the permit system to be unlawful.

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

IT IS FURTHER ORDERED, That the Exceptions to the Initial Decision filed by the New Orleans Steamship Association and Plaquemines Port, Harbor and Terminal District are granted to the extent indicated in this Order and denied in all other respects; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.⁵⁴

(S) JOSEPH C. POLKING
Secretary

⁵¹ The tariff states that outbound barges that can show that the cargo has already been assessed are exempt from paying any additional fees. I.D. 28 F.M.C. at 602.

⁵² See, *Dreyfus*, 25 F.M.C. at 68.

⁵³ I.D. 28 F.M.C. at 630-631.

⁵⁴ Commissioner Thomas F. Moakley's dissenting opinion is attached.

Commissioner Moakley, dissenting

For the second time in as many cases,¹ I disagree with the majority's assertion of both personal and subject matter jurisdiction over Plaquemines Port, Harbor and Terminal District's charges for police, health and fire protection.

Plaquemines did not meet the definition of "other person" subject to the Shipping Act, 1916, 46 U.S.C. app. § 801, and it fails to meet the definition of Marine Terminal Operator contained in section 3(15) of the Shipping Act of 1984, 46 U.S.C. app. § 1702(15). As the majority acknowledges, Plaquemines does not own or operate any facilities serving common carriers by water.² This should end the inquiry.

Moreover, a finding of personal jurisdiction does not mean that every activity of that regulated entity is subject to regulation. Therefore, assuming, *arguendo*, that the Port could meet the definition of Marine Terminal Operator, the Commission has no greater claim to regulate its police, health and fire protection services than we would have to regulate an amusement park operated by the Port.³

I also disagree with the majority's analysis of the impact of the 1984 Act on their theory of jurisdiction over Plaquemines. While I concur that the applicable definitions are substantially the same under the 1916 and 1984 Acts, neither definition on its face supports jurisdiction over an entity that provides no facilities. The majority recognized this dilemma in the *Dreyfus*⁴ decision and addressed it by focusing on the broad regulatory scheme of the 1916 Act.

In construing the scope of the Commission's jurisdiction under section 1, the Supreme Court has focused upon the integrity of the legislative scheme of the Shipping Act and has required a broad construction of its terms to effect its purposes. The statutory scheme contemplates *regulation of any entity* if it exercises *sufficient control* over terminal facilities to have a *discernible effect*

¹ See *Louis Dreyfus Corp. et al. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982), dissenting opinion of Vice Chairman Moakley.

² After reiterating the statutory definition of marine terminal operator, the Commission's regulations (46 CFR 515.6(b)) define the term "port terminal facilities" as,

"one or more structures comprising a terminal unit and include, but are not limited to wharves, warehouses, covered and/or open storage spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landings, and receiving stations, used for the transmission, care and convenience of cargo and/or passengers in the interchange of same between land and water carriers or between two water carriers." (emphasis supplied).

As broad as this definition is, Plaquemines furnishes none of these facilities in connection with a common carrier by water and is therefore not a marine terminal operator. The services that it performs are irrelevant to this determination of personal jurisdiction.

³ The Commission's regulations are also helpful in determining what type of terminal services the Commission believes it has authority to regulate. Definitions of terminal services set forth in 46 CFR § 515.6(d) include "Dockage", "Wharfage", "Free Time", "Wharf Demurrage", "Terminal Storage", "Handling", "Loading and Unloading", "Usage", "Checking" and "Heavy Lift". This rule was republished subsequent to the *Dreyfus* decision (note 1, *supra*) with no indication whatsoever that police, health and fire protection were to be considered terminal services.

⁴ Note 1, *supra*.

on the commercial relationship between shippers and carriers involved in that link in transportation. 25 F.M.C. 65 (footnote omitted, emphasis supplied).

The legislative scheme of the 1984 Act is virtually opposite to that of the 1916 Act in this respect. The broad regulatory thrust of the earlier statute has been replaced with clear guidance from the 98th Congress to minimize government intervention and regulatory costs. These very words are used in the statute's declaration of policy⁵ and in several places in the relevant legislative history.⁶ Perhaps the most specific reflection of Congressional intent to effect a major change in the legislative scheme is found in the following language from the report of the House Merchant Marine and Fisheries Committee on H.R., 1878, the House version of the bill which became the Shipping Act of 1984:

Specifically, H.R. 1878 accomplishes seven major purposes.

* * * * *

Seventh, the entire method of regulation is changed to minimize government involvement in shipping operations. H.R. Rep. No. 53, 98th Cong., 1st Sess. 3, 4 (1983).

To omit any mention of the statutory scheme of the 1984 Act in this decision after relying so heavily upon the statutory scheme of the 1916 Act in the *Dreyfus* decision is a curious approach for an impartial adjudicative body.

I would dismiss this complaint for lack of personal jurisdiction over the respondent and for lack of subject matter over the services in question.

⁵ 46 U.S.C. app. §1701.

⁶ E.g. S. Rep. No. 3, 98th Cong., 1st Sess. 1 (1983); H.R. Rep. No. 600, 98th Cong., 2d Sess. 27 (1984).

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-2

NEW ORLEANS STEAMSHIP ASSOCIATION

V.

PLAQUEMINES PORT, HARBOR & TERMINAL DISTRICT

1. Where the Plaquemines Port, Harbor and Terminal District is duly constituted by the laws of the State of Louisiana and where the Port has the exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial cargo-handling transactions, its assessment of selective cargo transfer fees and its control of access to private terminal facilities result in the fundamental control over the rates and practices of terminal facilities. Under such circumstances the Port is an "other person" and/or terminal operator subject to the Shipping Acts of 1916 and 1984. The Port's involvement in the business of common carriers, marine terminals and commerce of the United States confers on the Commission jurisdiction over the Port under the pertinent provisions of the Shipping Acts and subjects the Port's fees to scrutiny under those provisions.
2. Where the Port assesses a Harbor Fee and a Supplemental Harbor Fee for providing to vessels and cargo essential health, safety and security services, such acts constitute the furnishing of "other terminal facilities" within the meaning of the Shipping Acts of 1916 and 1984. The term "other terminal facilities" contemplates not only physical assets such as docks, wharves and warehouses, but also encompasses services rendered "in connection" with the marine terminal in "link" in transportation modes.
3. Where the Port established a Harbor Fee and a Supplemental Harbor Fee to defray the expense of providing various services insuring the safety and facility of the movement of vessels and cargo using it, the fees do not represent a "toll charge" which contravene provisions of the Constitution of the United States. Rather, the fees represent the establishment of regulations and practices related to or connected with the receiving, handling, or delivery of property which comes under the jurisdiction of the Federal Maritime Commission.
4. Where in a previous proceeding the Port entered into a settlement agreement with the litigating parties, the settlement agreement does not discriminate against other persons who were not parties in the prior proceeding and who are not identified in the instant proceeding. Further, where there has been no showing of any injury, much less the amount of injury, any adjudication in the proceeding regarding reparations from alleged unjust or undue discrimination is impossible.
5. Where the Port's tariff contains various exceptions and exemptions relating to beneficiaries of the Port's services such as private terminals, supply boats, crew boats, fishing vessels, and inland barges as well as a five hundred exemption and permit/discount rate features, which *prima facie* show that the charges do not bear a reasonable relationship to the comparative benefit obtained from Port services; where the respondent's primary witness testifies no attempt was made to correlate the charges made to users under the tariff to the benefits received by such users; and where the record fails to contain sufficient evidence to demonstrate that either other revenue considerations of the exempted classes are reasonably related to the fees forgiven or that such exemptions are required *administratively*, then the fees assessed in the tariff do not bear a reasonable relationship to the comparative benefit obtained by either the assessed or exempted parties from the services provided by the Port.

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6. Where the Port's tariff contains a provision holding agents primarily liable for tariff fees where there is no showing of hardship or injustice, and where the agent is a user of the Port, the provision is not unreasonable. A terminal operator can hold liable for tariff fees all direct and indirect users of its services.
7. Where the Port's tariff imposes a fee against the vessel, and where the complainant argues carrier-shipper contracts place the responsibility for payment of the fee on the shipper or consignee but does not furnish any further additional evidence as to why the carrier-shipper contract standing alone should prevent the imposition of the fee on the vessel, the Supplemental Harbor Fee assessed against the vessel is not improper.

Edward S. Bagley for complainant New Orleans Steamship Association.

Louis B. Porterie, Robert E. Fontenelle, Jr. and Edward J. Sheppard for respondent Plaquemines Port, Harbor & Terminal District.

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

Partially Adopted September 16, 1986

Findings of Fact

The parties in this proceeding each requested findings of fact in their briefs. The facts set forth below either are specifically uncontested facts taken from their proposed findings or are facts taken directly from the record. References to the complainant's Proposed Findings will be made as "C-PF" followed by a number designation, "C-PF 1," for example. References to the respondent's Proposed Findings will be preceded by an "R," such as "R-PF 1," for example. Also, it should be noted that references to the transcripts in this proceeding will be made by giving the date of the transcript followed by the page numbers of the transcript (Tr. 2/15/84, pp. 60-65, for example).

1. Complainant, New Orleans Steamship Association, is a non-profit association of owners, stevedores and agents of vessels which are common carriers by water in the foreign commerce of the United States calling at New Orleans, including some vessels that call at the Plaquemines Port, Harbor and Terminal District. (C-PF 138; R-PF 1)

2. Plaquemines Parish, which is comparable to county government in other states, was governed by a council of five at-large members until March of 1983, and since then by nine council members, each of whom is elected from a single member district. The council, as a whole, acts as a legislative body, while each individual council member also is the head of one or more executive departments of the Parish. (R-PF 2)

3. The Port district is a political subdivision of the State of Louisiana, geographically coextensive with Plaquemines Parish. The governing body

¹This 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).

for the Port is the same nine member council that governs the Parish. (R-PF 3)

4. Plaquemines Parish has a population of approximately 26,000 people and some 10,000 itinerant oil field workers temporarily reside in the Parish. The latter number includes those living on offshore oil platforms. (R-PF 4)

5. The geography of the Parish is unique. It is totally dominated by the Mississippi River. Ninety-four percent of Parish land lies outside the flood protection levees and is susceptible to tides from time to time. Virtually all of the Parish is below sea level so that habitation is possible only because of massive levees that exclude the waters of the Gulf of Mexico. Most points on dry land protected by the levees are no more than one or one-half miles from the river. There are only two highways running north and south, one on each side of the river. (R-PF 5, 7)

6. Plaquemines is peninsular into the Gulf of Mexico. It is the most southern parish in Louisiana and is divided in half by the river. Most of the Parish's industry and development is on the west bank of the river. The largest populated area is located at Belle Chasse on the northern portion of the west bank. (R-PF 6)

7. There are no bridges across the river in the Parish. The closest bridge is 14.7 miles north of the Parish boundary. The only public facilities within the Parish for cross-river traffic are two Parish owned ferries. One is at Belle Chasse, the other at Pointe-a-la-Hache. A third ferry is located at Belle Chasse for peak morning and evening traffic. (R-PF 8)

8. The Mississippi River has two navigable channels down river from Head of the Passes to the Gulf of Mexico, Southwest Pass and South Pass. Distances on the river are measured from the Head of the Passes. All mileage upriver from that point is designated as River Mile AHP, and all distances below that point are designated, BHP. The Parish extends upriver from Head of the Passes to Mile 81.6 AHP and downriver 20.2 miles BHP on the Southwest Pass and 13.5 miles BHP on South Pass. (R-PF 9)

9. Upriver from Head of Passes there are only two places where vessels can pass through flood protection levees, the Ostricia lock on the east bank at approximately Mile 25 AHP, and the Empire lock on the west bank at approximately Mile 29.5 AHP, with navigation depths of 10 feet. (R-PF 10)

10. The only other pass with any navigational significance is Tiger Pass at the south end of the west bank highway, with a 12 foot draft limitation that excludes oceangoing vessels, but not oil field supply and other small vessels. Overland truck service connects with offshore oil activities at Tiger Pass. There is no oceangoing vessel activity at Tiger Pass. (R.PF 11)

11. The Port of New Orleans is adjacent to and upriver from Plaquemines, extending 33.4 miles from Mile 81.6 AHP to Mile 115 AHP. The South Louisiana Port extends 53.0 miles upriver from New Orleans, from Mile

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115 AHP to Mile 168 AHP. At that point the Port of Baton Rouge begins and extends upriver to Mile 225 AHP. On the river north of Baton Rouge are numerous other ports such as Vicksburg, Memphis and St. Louis. (R-PF 12)

12. From the northern limits of the Port of Plaquemines through the most commonly used Southwest Pass, to the Gulf of Mexico, the Port extends a total distance of 102 miles. Every oceangoing vessel serving any port on the Mississippi River goes through the Plaquemines Port district twice; once going upriver and once going down river. (R-PF 13)

13. There are approximately 9,200 vessel arrivals and departures through the Port annually, for an average of one oceangoing cargo vessel approximately every hour. (R-PF 14)

14. The total tonnage of the ports within the lower Mississippi River (Gramercy, New Orleans, Baton Rouge, Destrehan and St. Rose) is 160 million tons. An additional 22 million tons is handled in the Port District for a total of 182 million tons passing through the Port District. (R-PF 15)

15. The Plaquemines Parish Council, as governing authority of the Port District, initially adopted Plaquemines Port, Harbor and Terminal District Tariff No. 1, effective September 1, 1977. The tariff provided in pertinent part that:

All vessels engaged in foreign, coastwise, or intercoastal and intra-coastal trade and certain cargoes, shall be assessed fees as provided in the Plaquemines Port, Harbor and Terminal District Tariff to assist in defraying necessary and essential, direct and indirect, port, harbor and marine services to port and harbor users and other persons located in proximity to and affected by such activities due to the unique geographic and environmental characteristics of the Plaquemines Parish Port, Harbor and Terminal District.* Such fees and charges are to be used for the expenses of the administration and maintenance of the port and harbor, including:

administering, regulating, and monitoring of the shipping traffic and handling of cargo in the harbor; supervising shipping of the Port with the view of preventing collisions and fires; policing the river and riverfront and all navigable waterways, as well as the banks, bature, and contiguous and adjacent areas affected by port, harbor, terminal, water, and marine activities; and emergency service to vessels in distress, including extinguishing fires in vessels and equipment and in cargo of those vessels; and providing all such services for cargo handled in and upon the areas of the Port's contiguous waterways and located in wharves and facilities upon the banks, batures, contiguous and adjacent areas in Port administered facilities;

without additional charge (except for the cost of supplies, materials, and equipment expended by the Plaquemines Port, Harbor and Terminal District in the performance of such services).

*(See Preamble to Plaquemines Parish Zoning Ordinance #142, hereinafter set out. Reference is also made to requirements of laws and regulations that require ever expanding Port, Harbor and marine services, regulations and inspections by such districts at local governmental levels, such as:

Rivers and Harbors Act	Ocean Dumping Act
National Environmental Policy Act	Safe Drinking Water Act
Clean Water Act	Noise Control Act
Clean Air Act	Occupational Safety and Hazards Act
Toxic Substances Control Act	Federal Pesticide Acts
Coastal Zone Management Acts—(Federal and State)	Energy Regulations
Solid Waste Disposal Act)	

SECTION I—DEFINITIONS

Subject	Definition
Inland Watercraft	Wherever used in this Tariff the term "Inland Watercraft" shall include all vessels, private and public, operated exclusively on the United States inland waterways, employed in any maritime service, task, venture, voyage, or mission, commercial or noncommercial, of a private or public nature.
Ship	Any self-propelled seagoing vessel.
Tugs and Towboats	Vessels which do not carry freight or passengers but are used to tow or push other vessels.
Vessel	Any ships, tugs, tows, towboats, packets, barges, lighters, or other watercrafts, self-propelled or non-self-propelled, any types of floating equipment, including work barges, offshore oil platforms, oil rigs, derricks, etc.
User	"User" shall be deemed to include and apply to any vessel or person using any District property, facility or equipment or to whom or for whom any service, work or labor is furnished, performed, done or made available by the District.

- Wharfage A charge against cargo, based on the number of tons received or discharged by vessels, as manifested, and passing or conveyed over, onto, or under wharves or between vessels (to or from barge, lighter, or water) when berthed at a public wharf or when moored adjacent to such wharf.
- Supplemental Harbor Fee That fee charged against cargo handled in mid-stream or at anchorage or at a privately owned wharf for other than the wharf owner.

SECTION II—GENERAL INFORMATION, RULES & REGULATIONS

- Governing Authority and Jurisdiction The Plaquemines Parish Commission Council is the governing authority of the Plaquemines Port, Harbor and Terminal District. The territorial limits of the District are coextensive with the Parish of Plaquemines Louisiana, as presently constituted. Louisiana Revised Statutes 34:1351-1365, as ratified by Article 6, Section 43 of the Louisiana Constitution of 1974, which is the legal authority for this District, is contained in Appendix I and is specifically made a part of this tariff.
- Application and Interpretation of Tariff and Amendments The rates, rules and regulations contained in this tariff shall apply equally to all users of the waterways and facilities and shall apply on all traffic on the waterways and facilities on the effective dates shown on this tariff or any amendments thereto.
- Amendments shall be issued to cover changes in this tariff, but this tariff is subject to change without notice.
- The Plaquemines Port, Harbor and Terminal District shall be the sole judge as to the interpretation of this tariff.

**Consent to Terms of Tar-
iff**

The use of the waterways and facilities under the jurisdiction of the Plaquemines Port, Harbor and Terminal District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified in this tariff and be governed by all rules and regulations herein contained. It is incumbent upon the Master of any vessel operating within the limits of Plaquemines Port, Harbor and Terminal District or others whose operations are affected by these rules and regulations, to familiarize themselves with these rules and regulations. Noncompliance, through ignorance, with these rules and regulations will not affect the liability of the Master or others, or the application of the penalties.

General Anchorages

The General Anchorages for the Plaquemines Port, Harbor and Terminal District are the following:

1. Fairway Anchorages

- A. South Pass Mississippi River Anchorage.
- B. Southwest Pass Mississippi River Anchorage.

- 2. Pilottown Anchorage 1.5-6.7 RDB.
- 3. Boothville Anchorage 12.2-18.5 RDB.
- 4. Ostrica Anchorage 23.5-24.4 RDB.
- 5. Port Sulphur Anchorage 37.5-39.7 LDB.
- 6. Deer Range Anchorage 53.5-54.5 LDB.
- 7. Alliance Anchorage 63.6-65.8 RDB.
- 8. Cedar Grove Anchorage 70.6-71.2 RDB.
- 9. August Anchorage 71.4-72.0 RDB.
- 10. Belle Chasse General Anchorage 73.6-75.2 RDB.
- 11. 12 Mile Point Anchorage 79.0-80.8 RDB.

The rules and regulations concerning the General Anchorages are prescribed by the U. S. Army, Corps Engineers, and their enforcement is a responsibility of the U.S. Coast Guard.

Vessels anchored in the river, except as below noted, shall be anchored in the above listed General Anchorages.

Laying Up of Vessels

Masters requiring anchor berths for the purpose of laying-up their vessels shall apply to the Director for permission to lay-up at the proposed berth or anchorage; such permission has no connection with property rights. No vessel, towboat, barge or raft may tie up or lay up alongside any property without first obtaining permission of the riparian owner or his lessee.

Penalties for Violation

(a) It shall be unlawful for any person, firm, or corporation to utilize or make use of the Plaque mines Port, Harbor and Terminal District or any of its facilities without paying to the District the proper toll, charge or fee therefore as fixed and specified in this tariff, or by designation otherwise, and every person, firm or corporation violating any provision of this order, respecting the payment of any toll, charge or fee shall be deemed guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred (\$500.00) Dollars, or by imprisonment in the Parish Jail, for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.

(b) It shall be unlawful for any person, firm or corporation to fail, refuse or neglect to comply with any of the provisions of the rules and regulations prescribed by this tariff or supplement thereto, or by designation otherwise, and any person, firm or corporation violating any of the provisions of these rules and regulations shall be guilty of a misdemeanor and upon conviction thereof shall be punishable by a fine of not more than Five Hundred (\$500.00) Dollars, or by imprisonment in the Parish Jail for a period of not more than thirty days, or by both such fine and imprisonment. The Court in its discretion may consider each day on which the violation occurs as a separate offense.

SECTION III

Charges which may be incurred by vessels:

Item 135 Harbor Fee Each vessel which docks, moors, or anchors within the District, including Lash and Seabee barges and movable oil rigs and platforms, shall be assessed a Harbor Fee, as provided herein, to assist in defraying the expense of the administration and maintenance of the Plaquemines Port, Harbor and Terminal District, including the supervision of the shipping of the District, with the view of preventing collisions and fires, policing the river and river front, rendering aid to vessels in distress, and to aid in extinguishing fires in vessels and equipment and in their cargoes aboard such vessels or upon wharves and other facilities in the District.

Fee Per Vessel

Vessels over 100 and under 250 feet in length—
\$100.00

Vessels 250 feet and over in length—\$150.00

This Harbor Fee is due for the first five days or any part thereof that the vessel remains within the District, and for each day or any part thereof over five days that the vessel remains within the District, the Harbor Fee due shall be one-fifth of the above stated Fee Per Vessel.

The payment of the Harbor Fee shall be the *primary obligation of the owner, agent, or user of the vessel*, but the owner of the facility handling or storing the cargo and the cargo owner whose cargo is loaded unto a vessel outbound from the Port District from any wharf, dock, facility, mooring facility, or anchorage within the Port District shall be liable *in solido as surety* for the payment of the Harbor fee due by the owner, agent or user of

the vessel unto which such cargo has been loaded; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner, agent, or user of the vessel against the owner, agent, or user of the vessel, who is primarily liable for all amounts paid by those responsible in solido but not primarily obligated. (See Item 145, Supplemental Harbor Fee and Item 165, Payment of Bills hereof.)

Item 136 Vessels
Exempt-
ed From
Harbor
Fee

(A) Vessels passing through the port which do not berth any wharf, anchor within the District, or in any way moor themselves within the District limits. Vessels stopped within the District for the sole purpose of changing pilots, or because of inclement weather remaining less than twelve hours within the limits of the District.

(B) Government vessels not engaged in carrying cargo, troops, or supplies.

(C) Private, non-commercial pleasure craft.

(D) Special permits, vessels over 100 ft. in length as set forth in Item 137.

Item 137 Special
Annual
Tem-
porary
Port Per-
mit Ves-
sels

Annual special permits will be issued by Plaquemines Parish Port Authority to every vessel over 100 ft. in length that is appraised for Ad Valorem taxes in the Parish of Plaquemines upon payment of the Parish taxes resulting from such Parish assessments. Special Permits will be issued by Plaquemines Parish Port Authority upon the payment of the following fees:

I

Vessels over 100 ft. to 200 ft. in length:

- a. For 30 days—\$100.00
- b. For 90 days—250.00
- c. For 180 days—450.00
- d. For 365 days—750.00

II

For non-self propelled Barges, lighters or other watercraft over 100 feet in length, and not more than 200 feet in length.

- a. For 30 days—\$50.00
- b. For 90 days—125.00

c. For 180 days—225.00

d. For 365 days—375.00

III

For non-self propelled barges, lighters or other watercraft over 200 feet in length and not more than 300 feet in length:

a. For 30 days—\$200.00

b. For 90 days—500.00

c. For 180 days—900.00

d. For 365 days—1,500.00

Such permits will exempt such vessels from payment of Harbor and Lay-Up Fees, as set out in Items 135, 136 and 140 hereof.

Item 140 Lay-Up
Fee

Any vessel, whether seaworthy or not, which docks, moors or anchors within the District, for a continuous period of more than five days for repairs, construction, "moth balling", drydocking or storage except one which is removed from the water by drydocking, shall after the first five days pay the following fees.

Fees Per Vessel

Vessels to 200 ft. in length—None.

Vessels 200 ft. and over in length—\$150.00 per day.

Item 145 Supple-
mental
Harbor
Fee

All cargo when first handled within the District in midstream or at anchorage shall be assessed, in addition to Items 135, 137, and 140, \$.10 per net ton or fraction thereof over 500 tons of the weight of cargo handled, provided that no cargo shall be assessed a Supplemental Harbor Fee more than one time.

The payment of Supplemental Harbor Fee shall be the *primary obligation of the owner of the cargo*, but the owners, the agents, or other users of the vessels and the owners of the facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated.

The cargo of the owner of a privately owned wharf shall be handled by the owner of the wharf without the payment of this fee to the District.

The Harbor Fee of Item 135 on any vessels involved in the handling of cargo subject to this Supplemental Harbor Fee shall be credited against this Supplemental Harbor Fee.

The cargo is assessed the Supplemental Harbor Fee when it is first handled within the District, but because of the exemption granted for cargo owned by the handling wharf owner, the reporting of cargoes should be made when the cargo leaves the wharf or facility, and the assessment calculation shall then be made since the joint ownership of the cargo and the wharf cannot be finally determined until the cargo leaves the wharf or facility. The Harbor Fee credit is given for the outbound vessels onto which the cargo is loaded from the wharf, and the reporting to the Port District as to cargoes, vessels, and ownership thereof is to be made at the instant before the cargo leaves the wharf or facility.

A Supplemental Harbor Fee shall be assessed for cargo not owned by the owner of the wharf or facility irrespective of the manner in which the cargo leaves the wharf or facility other than by vessel, for example by pipeline, rail, truck, etc., and therefore no Harbor Fee is assessed with such outbound cargo, there is no Harbor Fee to be credited against the Supplemental Harbor Fee.

All cargo handled by a privately owned wharf shall be deemed midstream unloading and shall be subject to the Supplemental Harbor Fee imposed above which includes midstream unloading.

(See Item 135 Harbor Fee and Item 165 Payment of Bills as to the responsibilities among the parties.)

Item 155 Wharfage Rates at Public Wharfs

The rate of wharfage on all commodities shall be \$.50 per net ton, or fraction thereof unloaded by and with the equipment furnished by the owner of cargo. The minimum wharfage for any shipment shall be \$5.00.

Item 160 Basis for Assessment of Wharfage Charge

All cargo or freight, shall be subject to the wharfage charge as follows:

1. When cargo or freight is placed onto public wharves, docks, landings, mooring facilities, or other structures for handling to or from vessels; or
2. When cargo is placed on the public wharves for outbound movement and is not subsequently loaded aboard a vessel, but is removed from the wharves.
3. When such cargo or freight is transferred over or under such wharves, docks, landings, mooring facilities, or other structures to or from vessels; or
4. When such cargo or freight is delivered to or received from vessels by other watercraft, or when transferred over the side of vessels directly to or from the water:

a. When said vessels are occupying berths at wharves, docks, landings, mooring facilities or other structures;

b. When said vessels are moored outside of other watercraft occupying berths at wharves, docks, landings, mooring facilities, or other structures.

Item 165 Payment of Bills All bills are due upon presentation by the District and failure to pay when presented shall place the name of the vessel, its owners and agents, or other user of the facilities, upon a Delinquent List, conditions of which are hereinafter defined.

The payment of Supplemental Harbor Fee shall be the *primary obligation of the owner of the cargo*, but the owners, the agents, or other users of the vessels and the owners of the facilities handling or storing such cargo shall be bound and responsible *in solido as surety* for the payment of such charges; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner of the cargo against the owner of the cargo, who is primarily liable, for all amounts paid by those responsible in solido but not primarily obligated. All other charges applicable to this Tariff shall be assessed to owners of the vessels, their agents, cargo owners, or owners of facilities in solido.

The responsibility for the Harbor Fee is as set out in Item 135 and the crediting of the Harbor Fee is as set out in Item 145.

Parties entering and using the Port District, so as to become liable for any Port District Fees whatsoever as provided in this Tariff, do by such entry and usage thereby contract to pay and are responsible for all Port District Fees whatsoever as provided for in this Tariff.

The Plaquemines Port, Harbor and Terminal District reserves the right to estimate and collect in advance all charges which may accrue against cargo owners, common carriers vessels, their owners and/or agents, or against cargo loaded or discharged by such vessels or other users of the facilities of the Plaquemines Port, Harbor and Terminal District, whose credit has not been properly established with the District or who are habitually on the Delinquent List. Use of the facilities may be denied until such advance payment or deposits are made.

The District reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agents or users of the facilities.

All cargo owners, common carriers, vessels, their owners and/or agents, and/or owners, assessors, or lessors of wharves or other users of the Port or facilities of the Plaquemines, Port, Harbor and Terminal District placed on the Delinquent List for reasons hereto stated shall be denied further use of the port or facilities by the District until all such reports have been filed and all charges thereon, together with any other charges due, shall have been paid.

Item 165a Interest

When any Tariff debtor fails to pay any charges or portion thereof due under the provisions of this Tariff within 30 days of the invoice date, there shall be added to the amount of charges due interest at the rate of one and one-half per centum (1½%) per month from the due date until paid. Such interest shall be an obligation to be collected and accounted for in the same manner as if it were part of the charges due and can be enforced in a separate action or in the same action for collection of the charges, and shall not be waived or remitted.

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PORT, HARBOR & TERMINAL DISTRICT

Item 165b Attorney's If any charges, penalties, or interest due under
 Fees this Tariff are referred to an attorney at law
 for collection, an additional charge for attor-
 ney's fees, in the amount of ten per centum
 (10%) of the charges, penalties, and interest
 due shall be paid by the Tariff debtor.

(R-PF 18; Ex. R-58)

16. As a result of a complaint brought by the Louis Dreyfus Corp, the Commission in affirming an Administrative Law Judge's Initial Decision found that the tariff described in paragraph (15) above, violated sections 16 and 17 of the Shipping Act, 1916. (R-PF 18; *Louis Dreyfus Corp. v. Plaquemines Port, Harbor and Terminal District*, 25 F.M.C. 59 (1982), affirming Initial Decision at 25 F.M.C. 73.)

17. After the issuance of the aforementioned Initial Decision (Docket No. 79-45), the Plaquemines Parish Commission Council held five open public hearings at which the question of appropriate port tariff charges was specifically addressed. Effective May 21, 1982, the Commission filed a new tariff which amended and superseded the 1977 tariff. (R-PF 19, 43; Ex. R-14)

18. The new tariff provides in pertinent part that:

PREAMBLE TO PLAQUEMINES PARISH PORT, HARBOR AND
TERMINAL DISTRICT TARIFF:

All vessels engaged in foreign, coastwise, or intercoastal and intra-coastal trade and certain cargoes, shall be assessed fees as provided in the Plaquemines Port, Harbor and Terminal District Tariff to assist in defraying necessary and essential, direct and indirect, port, harbor and marine services to port and harbor users and other persons located in proximity to and affected by such activities due to the unique geographic and environmental characteristics of the Plaquemines Parish Port, Harbor and Terminal District.* Such fees and charges are to be used for the expenses of the administration and maintenance of the port and harbor, including:

administering, regulating, and monitoring of the shipping traffic and handling of cargo in the harbor; supervising shipping of the Port with the view of preventing collisions and fires; policing the river and riverfront and all navigable waterways, as well as the banks, batture, and contiguous and adjacent areas affected by port, harbor, terminal, water, and marine activities; and emergency service to vessels in distress, including extinguishing fires in vessels and equipment and in cargo of those vessels; and providing all such services for cargo handled in and upon the areas of the Port's contiguous waterways and located in wharves and facilities upon the banks, battures, contiguous and adjacent areas in Port administered facilities;

without additional charges (except for the cost of supplies, materials, and equipment expended by the Plaquemines Port, Harbor and Terminal District in the performance of such services).

*(See Preamble to Plaquemines Parish Zoning Ordinance #142, hereinafter set out. Reference is also made to requirements of laws and regulations that require ever expending Port, Harbor and marine services, regulations and inspections by such districts at local governmental levels, such as:

Rivers and Harbors Act	Ocean Dumping Act
National Environmental Policy Act	Safe Drinking Water Act
Clean Water Act	Noise Control Act
Clean Air Act	Occupational Safety and Hazards Act
Toxic Substances Control Act	Federal Pesticide Acts
Coastal Zone Management Acts—Federal and State	Energy Regulations
Solid Waste Disposal Act)	

SECTION I—DEFINITIONS

Subject	Definition
Inland Watercraft	Wherever used in this Tariff the term "Inland Watercraft" shall include all vessels, private and public, operated exclusively on the United States inland waterways, employed in any maritime service, task, venture, voyage, or mission, commercial or non-commercial, of a private or public nature.
Ship	Any self-propelled seagoing vessel.
Tugs and Towboats	Vessels which do not carry freight or passengers but are used to tow or push other vessels.
Vessel	Any ships, tugs, tows, towboats, packets, barges, lighters, or other watercrafts, self-propelled or non-self-propelled, any types of floating equipment, including work barges, offshore oil platforms, oil rigs, derricks, etc.
User	"User" shall be deemed to include and apply to any vessel or person using any District property, facility or equipment or to whom or for whom any service, work or labor is furnished, performed, done or made available by the District.
Private Wharves	Those wharves that are not public wharves.

- Harbor Fee** All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District, to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including response to vessels in distress with the means available, and to aid in extinguishing fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and batters of the waterways of the District, and in the harbor, and upon the private wharves, docks, and immediately adjacent facilities connected thereto without any additional charge (except for the cost of supplies, material and equipment expended by the District in the performance of such services.)
- Supplemental Harbor Fee** A fee charged to supplement revenue necessary for the purposes herein set forth under "Harbor Fee" based on the weight of non-liquid cargo and on barrels of liquid cargo handled or transferred in midstream or when anchored at or moored to any dock, wharf, or mooring facility, or at a public wharf if, in the future, the District has any public wharves, which it does not now have.
- Conventional Barge** The term conventional barge, as referred to in Item 135—Harbor Fee, shall include inland (river) barges and shall also include LASH and SEABEE barges when not aboard the barge carrying vessel (mother vessel). However, when LASH and SEABEE barges are loaded and/or unloaded from the barge carrying vessel (mother vessel) within the Port District, the mother vessel shall be assessed fees as set forth in Item 135—Harbor Fee. The term conventional barge does not include ocean or seagoing barges.

SECTION II—GENERAL INFORMATION, RULES & REGULATIONS

- Item 5 **Governing Authority and Jurisdiction** The Plaquemines Parish Commission Council is the governing authority of the Plaquemines Port, Harbor and Terminal District. The territorial limits of the District are coextensive with the Parish of Plaquemines Louisiana, as presently constituted. Louisiana Revised Statutes 34:1351-1365, as ratified by Article 6, Section 43 of the Louisiana Constitution of 1974, which is the legal authority for this District, is contained in Appendix I and is specifically made a part of this tariff.
- Item 15 **Consent to Terms of Tariff** The use of the waterways and facilities under the jurisdiction of the Plaquemines Port, Harbor and Terminal District shall constitute a consent to the terms and conditions of this tariff, and evidences an agreement on the part of all vessels, their owners and agents, and other users of such waterways and facilities to pay all charges specified in this tariff and be governed by all rules and regulations herein contained. It is incumbent upon the Master of any vessel operating within the limits of Plaquemines Port, Harbor and Terminal District or others whose operations are affected by these rules and regulations, to familiarize themselves with these rules and regulations. Non-compliance, through ignorance, with these rules and regulations will not affect the liability of the Master or others, or the application of the penalties.
- Item 35 **Reporting-Arrivals and Departures Revised** The arrival and departure of all vessels engaged in Foreign, coastwise, and intercoastal trade which anchor within the Port District shall be immediately reported by telephone (504-682-0081, a 24-hour telephone service) by the agent of the vessel. A written report shall be rendered within five (5) days after departure from the Port District on reporting forms to be obtained from the District.

The arrival and departure of all vessels engaged in Foreign, coastwise, and intercoastal trade which dock at a private facility within the Port District shall be immediately reported by telephone (502-682-0081, a 24-hour telephone service) by the private facility. A written report shall be rendered within five (5) days after departure from the Port District on reporting forms to be obtained from the District.

The arrival and departure of all other vessels shall be reported by the private facility at which the vessel docks by written report rendered within five (5) days after departure of the vessel from the District on reporting forms to be obtained from the District.

All reportings shall be subject to the verification and inspection of the Director's agents and/or employees. If the arrival and departure are not reported by the party responsible therefor, the District shall have the right to obtain the information needed from the vessel owner, vessel agent, vessel master, cargo owner, or other user of the vessel.

It shall not be required to report the arrival and departure of any vessels that obtain temporary or annual permits/licenses pursuant to Item 135—Harbor Fee.

Item 36 Reporting
 of Load-
 ing and/
 or Un-
 loading
 of Ves-
 sels

The private facility from which cargo is either loaded and/or unloaded aboard a vessel shall render, within five (5) days after the departure of a vessel, a written report on reporting forms to be obtained from the District of the type and amount of cargo loaded and/or unloaded on or from the vessel.

Item 50 General
 Anchor-
 ages

The General Anchorages for the Plaquemines Port, Harbor and Terminal District are the following:

1. Fairway Anchorages
 - A. South Pass Mississippi River Anchorage.
 - B. Southwest Pass Mississippi River Anchorage.
2. Pilottown Anchorage 1.5-6.7 RDB.
3. Boothville Anchorage 12.2-18.5 RDB.
4. Ostricia Anchorage 23.5-24.4 RDB.

5. Port Sulphur Anchorage 37.5-39.7 LDB.
6. Deer Range Anchorage 53.5-54.5 LDB.
7. Alliance Anchorage 63.6-65.8 RDB.
8. Cedar Grove Anchorage 70.6-71.2 RDB.
9. Augusta Anchorage 71.4-72.0 RDB.
10. Belle Chasse General Anchorage 73.6-75.2 RDB.
11. 12 Mile Point Anchorage 79.0-80.8 RDB.

The rules and regulations concerning the General Anchorages are prescribed by the U.S. Army, Corps Engineers, and their enforcement is a responsibility of the U.S. Coast Guard.

Vessels anchored in the river, except as below noted, shall be anchored in the above listed General Anchorages.

Item 70 Laying-Up
 of Ves-
 sels

Masters requiring anchor berths for the purpose of laying-up their vessels shall apply to the Director for permission to lay-up at the proposed berth or anchorage; such permission has no connection with property rights. No vessel, tow-boat, barge or raft may tie up or lay up alongside any property without first obtaining permission of the riparian owner or his lessee.

Item 130 Penalties
 for Vio-
 lation

(A) It shall be unlawful for any person, firm, or corporation to utilize or make use of the District or any of its facilities without paying to the District the proper toll, charge, or fee therefor as fixed and specified in this Tariff, or without having established a mutually agreeable procedure for such payment to the District, and every person, firm, or corporation violating any provision of this order respecting the payment of any toll, charge, or fee shall be deemed to have violated the provisions of this Tariff and the Ordinances of this District and the laws of the State of Louisiana and of the United States.

(B) It shall be unlawful for any person, firm or corporation to fail, refuse, or neglect to comply with any of the provisions of the rules and regulations prescribed by this Tariff or supplement thereto, or by designation otherwise.

(C) The Plaquemines Port, Harbor and Terminal District shall have all the remedies for collection of any Tariff charges, or may seek to enforce any provision of the Tariff in any manner as provided by law. In connection herewith, note the provision of Item 165, providing for payment of bills.

SECTION III

Changes imposed by this section shall apply to the following areas:

1. The Mississippi River and its passes within Plaquemines Parish.
2. That portion of the Algiers Cut Off Canal (Intercostal Alternate Waterway) situated within Plaquemines Parish, being that portion lying between the Orleans-Plaquemines Parish line (at Donner Canal) westward along such Intracoastal Waterway to its intersection with the Barataria at the Jefferson-Plaquemines Parish line.
3. Empire Doullut Canal from the Mississippi River to the Gulf of Mexico.
4. Jump Basin, Tiger Pass, Grand Pass, and Baptiste Collette from the Mississippi River to the Gulf of Mexico.

Charges which may be incurred by vessels:

Item 135 Harbor Fee All commercial cargo vessels which dock, moor, or anchor within the District shall be assessed a Harbor Fee per each arrival within the geographical limits of the District to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation, including response to vessels in distress with the means available, and to aid in extinguishing fires on vessels and equipment and in the cargo aboard such vessels or upon the public wharves, public banks and batures of the waterways of the District, and in the harbor, and upon the private wharves, docks, and immediately adjacent facilities connected thereto, without any additional charge (except for the cost of supplies, material, and equipment expended by the District in the performance of such services).

Fee Per Commercial Cargo Vessel for Port
Entry and Usage

- Vessels under 100' in length—\$5.00 per day
- Vessels 100' and under 250' in length—\$10.00 per day
- Vessels 250' and under 500' in length—\$30.00 per day
- Vessels 500' and over in length—\$ 75.00 per day

Non-powered, conventional barges are exempt from this Harbor Fee Item and this Fee shall be calculated on tugboats, towboats, or push boats on the length of the powered vessel only.

In lieu of daily charges, vessels may obtain temporary or annual permits/ licenses upon payment of the following fees:

Vessels under 100' in length:

- a. For 30 days—\$75.00
- b. For 90 days—\$200.00
- c. For 180 days—\$300.00
- d. For 365 days—\$400.00

Vessels 100' and under 250' in length:

- a. For 30 days—\$150.00
- b. For 90 days—\$400.00
- c. For 180 days—\$600.00
- d. For 365 days—\$ 800.00

A vessel shall have thirty (30) days after its first entry into the District in which to obtain a temporary or annual permit/license. If the vessel does not obtain such a permit/license, it shall be assessed the daily fee.

Notice of this Item 13—Harbor Fee shall be given to each vessel arriving in the District by the facility and/or wharf owner. Notice shall be given either by giving the vessel a written copy of this Item 135—Harbor Fee or by posting notice that each vessel must contact the District's office upon arrival.

The address and telephone number of the District area:

Woodlawn Building, Route 1, Box 53A,
Braithwaite, Louisiana 70040, (504) 682-
0081.

Supplemental Harbor Fee

All commercial cargo vessels handling or transferring cargo in midstream or when anchored at or moored to any dock, wharf, or mooring facility, shall be assessed, in addition to the above, regular Harbor Fee, a Supplemental harbor Fee on non-liquid cargoes of Four (\$0.04) Cents per ton of 2000 pounds or fraction thereof over Five Hundred (500) tons, based on the weight of the cargo so handled or transferred, and a Supplemental harbor Fee on liquid cargoes of One-Half Cent ($\frac{1}{2}\text{¢}$) per barrel for each barrel over 4000 barrels of the cargo so handled or transferred.

Non-powered, conventional barges are exempt from this Supplemental Harbor Fee Item, as are tugboats, towboats, or push boats, which are assessed the Harbor Fee only as hereinabove stated. (See Supplemental Harbor Fee below).

Supplemental Harbor Fee for Tows Leaving the
Port District

All commercial cargo carrying barges in tows handling or transferring cargo in midstream or when anchored at or moored to any dock, wharf, or mooring facility, shall be assessed a Supplemental Harbor Fee on non-liquid cargo in all barges of such tow of Four (\$0.04) Cents per ton of 2000 pounds or fraction thereof over Five Hundred (500) tons, based on the weight of the cargo so handled or transferred, and there shall be a Supplemental Harbor Fee on liquid cargo in all barges of such tow of One-Half Cent ($\frac{1}{2}\text{¢}$) per barrel thereof over 4000 barrels. Both such Supplemental Harbor Fees are assessed against the towboat owner, operator and owner of the cargo that leaves a wharf or other facility within the Port District for a destination outside the Port District.

If such boat owner, operator, or person in charge of the towboat is able to show to the Port Manager with supporting paid tariff evidence that all such cargo has previously been the subject of a tariff charge when it entered the Port District aboard any vessel which paid a Supplemental Harbor Fee on such cargo, there shall not be a dual charge for such cargo and such towboat owner, operator and owner of the cargo shall be exempt from the payment of this Supplemental Harbor Fee.

This Tariff charge shall be based on the towboat or ship manifest or other shipping paper accompanying the tows leaving the Port District, and the towboat owner, operator, and owner of the cargo, as shown on the manifest or other shipping paper shall be jointly liable for the payment of such Supplemental Harbor Fee to the Port District.

(See Item 165—Payment of Bills as to joint liability for Harbor Fees and Supplemental Harbor Fees.)

Item 136 Vessels
 Exempt-
 ed From
 Harbor
 Fee

(A) Vessels passing through the port which do not berth at any wharf, anchor within the District, or in any way moor themselves within the District limits; vessels stopped within the District for the sole purpose of changing plots, or because of inclement weather, remaining less than twelve hours within the limits of the District.

(B) Government vessels not engaged in carrying cargo, troops, or supplies.

(C) Private non-commercial pleasure craft.

(D) Annual permits/licenses as set forth in Item 135.

Item 137 Special
 Annual
 or Tem-
 porary
 Port Per-
 mit Ves-
 sels

This Item is repealed in its entirety. However, any vessel having a valid permit in effect before the date of repeal of this Item shall not be assessed any Harbor Fees until the permit has expired.

The payment of the Harbor Fee and the Supplemental Harbor Fee shall be the *primary obligation of the owner, agent, or user of the vessel*, but the owner of the facility handling or storing the cargo and the cargo owner whose cargo is loaded and/or unloaded from any wharf, dock, facility, mooring facility, or anchorage within the District shall be liable *in solido as surety* for the payment of the Harbor Fee and the Supplemental Harbor Fee; subject, however, to the right of full subrogation and full recovery by those who have paid on behalf of the owner, agent, or user of the vessel, who is primarily liable for all amounts paid by those responsible in solido but not primarily obligated. All other charges applicable to this Tariff shall be assessed to owners of the vessels, their agents, cargo owners, or owners of facilities in solido.

Parties entering and using the District, so as to become liable for any District fees whatsoever as provided in this Tariff, do by such entry and usage thereby contract to pay and are responsible for all District fees whatsoever as provided for in this Tariff.

The District reserves the right to estimate and collect in advance all charges which may accrue against cargo owners, common carrier vessels, their owners and/or agents, or against cargo loaded or discharged by such vessels or other users of the facilities of the District, whose credit has not been properly established with the District or who are habitually on the Delinquent List. Use of the facilities may be denied until such advance payment or deposits are made.

The District reserves the right to apply any payment received against the oldest bills rendered against common carriers, vessels, their owners and/or agents or users of the facilities.

All cargo owners, common carriers, vessels, their owners and/or agents, and/or owners, lessors or lessees, of wharves or other users of the port or facilities of the District placed on the Delinquent List for reasons hereto stated shall be denied further use of the port or facilities by the District until all such reports have been filed and all charges thereon, together with any other charges due, shall have been paid.

The District shall pay Five (5%) Percent of all fees remitted directly to the District by an agent for a vessel or a dock, wharf, or mooring facility owner as compensation for such collection by said vessel agent or dock, wharf, or mooring facility owner.

Upon the execution of a written agreement by an agent for a vessel or a dock, wharf, or mooring facility owner relative to their collecting for the District tariffs owed by their principal or for vessels at their dock, wharf, or mooring facility, they may be relieved of their joint liability with the vessel owner.

Item 165A Interest

When any Tariff debtor fails to pay any charges or portion thereof due under the provisions of this Tariff within 30 days of the invoice date, there shall be added to the amount of charges due interest at the rate of one and one-half per centum (1½%) per month from the due date until paid. Such interest shall be an obligation to be collected and accounted for in the same manner as if it were part of the charges due and can be enforced in a separate action or in the same action for collection of the charges, and shall not be waived or remitted.

Item 165B Attorney's Fees

If any charges, penalties, or interest due under this Tariff are referred to an attorney at law for collection, an additional charge for attorney's fees, in the amount of Twenty (20%) Percent of the charges, penalties, and interest due shall be paid by the Tariff debtor.

19. The Port tariff assesses a two-factor fee against vessels. One a "Harbor Fee" and the other a "Supplemental Harbor Fee." (R-PF 22, 32; Ex. R-14)

20. Both the Harbor Fee and the Supplemental Harbor Fee apply to "commercial cargo vessels" which by definition in the tariff does not include pleasure craft, fishing boats, oyster boats or passenger vessels. (R-PF 23, 32; Ex. B-14)

21. Ninety-seven percent of the total number of ocean going vessels calling in the Port District remain for an average of three days. From June 1, 1983 through February 14, 1984, only 25 of 889 vessels entering the Port stayed in the Port District 14 days or more. (R-PF 27, 28)

22. Item 36 of the Tariff exempts certain categories of vessels from payment of the Harbor Fee. Included in the exemption are holders of annual permits/licenses as set forth in Item 135. (R-PF 31; Ex. R-14)

23. The Supplemental Harbor Fee as more fully set forth in the Tariff, places a fee of 4 cents per ton of 2000 pounds or fraction thereof over 500 tons based on the weight of the cargo handled or transferred. The Supplemental Harbor Fee for liquid cargoes is ½ cent per barrel for each barrel over 4000 barrels of cargo handled or transferred. (R-PF 35; Ex. R-14, Item 135)

24. The amount of coal, grain, phosphate, crude oil and refined petroleum products transferred to or from the vessel is the basis for the Supplemental Harbor Fee. (R-PF 35; Ex. R-14)

25. Prior to the adoption of the present tariff, the costs incurred by the Parish on account of the Port District Office, the marine radio operators, and the Port District rescue/patrol/fire vessels were directly allocated to the Port. A percentage of each department's costs was also allocated to the Port as follows:

<i>Department</i>	<i>Docket No. 83-2 (percent)</i>
Councilmen	5
Aviation	5
Fire Protection	20
Ferries	5
Safety Engineer	0
Ambulance	0
Itinerant Labor	0
Coroner	0
Health	0
Waterworks	0
Garbage	0
Sewerage	0
Purchasing	0
Internal Auditor	0
Data Processing	5
Accounting/Payroll	0

31. Examples of other incidents of the use of the patrol/rescue/fire vessels include medical evacuations on October 24, November 29, December 7 and 15 of 1983, of sick or injured seamen aboard ocean vessels; the removal of a mental patient on December 8, 1983; and the transport of prisoners taken from vessels. The patrol/rescue/fire vessels also have assisted vessels aground and have secured a runaway barge. (R-PF 55; Ex. R-3, pp. 6-12)

32. The Parish's fire fighting efforts, in addition to acquisition, manning, and operation of the patrol/rescue/fire vessels include:

- (a) execution of a fire fighting agreement with the United States Coast Guard;
- (b) formulation of a marine fire plan;
- (c) formulation of commitments from private facilities to provide assistance during emergencies;
- (d) acquisition of a bigger snorkel fire truck than would be needed for land fires, with additional snorkel length to reach the decks of large vessels;
- (e) refitting of the ferry *M/V LOUISIANA* as an auxiliary fire fighting vessel;
- (f) purchase of two land-based mobile marine pumping units;
- (g) purchase and stockpiling of foam to be used in fighting chemical and other fires.

(R-PF 56; Ex. R-35, pp. 14-15)

33. The ferry *M/V Louisiana* is outfitted with fire fighting capability at a cost of \$272,683.00. It is equipped with a 2000 GPM pump that draws river water for ejection through fire nozzles. Two fire nozzles are for water streams at the front and two combination nozzles are at the rear for foam. In addition there are eight to ten other nozzles that can be connected to various size pieces of fire equipment for using hoses, so the pumping capacity of the vessel itself can be channeled through hoses that are made of lightweight, modern materials and can be carried up into all parts of any vessel. Additionally, the decks of the *M/V Louisiana* are capable of taking aboard any piece of Parish fire equipment, including a snorkel truck able to position its nozzles as high as approximately 50 feet above the deck of the vessel. The *M/V Louisiana* also has two 1,000 gallon capacity foam tanks attached to the pumping station. (R-PF 62; Ex. R-15, pp. 5-6)

34. The Port District has also purchased and it maintains two mobile marine 2,000 GPM pumps, which can be towed on the highways running parallel to the river. Each pump has extra hose capacity; can be lifted by crane and placed on vehicles or vessels; can be hooked into the system of the ferry and be used along with fire trucks; and can be drawn from any water source to provide a waterborne firefighting capability. Mobile Marine Unit #1 is customarily assigned to and located on the east bank

of the Mississippi River at the Woodlawn fire station. Mobile Marine Unit #2 is customarily stationed at Belle Chasse on the west bank of the river. (R-PF 63; Ex. R-15, pp. 6-7)

35. An example of the coordinated use of landbased fire department equipment with the Port's marine firefighting equipment under the Parish's marine fire plan was tested in the case of the tug/barge fire at the Gulf-Alliance Refinery. (R-PF 64; Ex. R-3, pp. 6-8; Ex. R-8

36. Another example of the coordinated use of landbased Parish Fire Department facilities and marine facilities under the marine fire plan occurred in 1982, prior to the acquisition of the patrol/rescue/fire boats, in connection with a fire in the engine room of the *M/V Dubrovnik* at the Electro-Coal Transfer Facility. The vessel was tied to a private dock when the fire took place. She was cut loose from the dock, due to the combined efforts of landbased Mobile Marine Unit #1, the *M/V Louisiana* and a private vessel borrowed by the Port. The firemen of the Woodlawn and Belle Chasse fire departments boarded the *M/V Dubrovnik* and, along with the ship's crew, were able to extinguish the fire before the arrival of the *M/V Louisiana*. (R-PF 65; Ex. 3, pp. 8-9)

37. A further example of the type of problems handled by the Port involved the world's largest drilling rig, the *Rowan Gorilla I*. The rig was undergoing repairs in the Belle Chasse area in November 1983. Three ships were anchored close to the drilling rig and due to high winds and lack of current the ships swung around endangering themselves and the *Rowan Gorilla I*. The situation had the potential for a catastrophic accident involving in excess of 300 people aboard the vessels involved. After considerable pressure from the Port District office, all Crescent Pilots were notified by their president to maintain a safe distance from the *Rowan Gorilla I*. (R-PF 71; Ex. R-3, pp. 9-10)

38. The Port District staff consists of a Port Manager, a Chief Marine Inspector, three marine inspectors, four full-time and one part-time marine radio operator and five clerks. The marine communication system is manned 24 hours a day and it enables the Port to communicate with the patrol/rescue/fire boats and the marine inspector, as well as with the Parish ferries, seven volunteer fire departments, ambulances, and all Parish radio-equipped vehicles. The Port maintains a program of safety inspection. It spends most of the inspection time inspecting smaller vessels and little if any time inspecting docks and wharves. In 1983, 107 smaller, non-commercial vessels were inspected. (R-PF 68, 69, 70; Ex. R-35, pp. 2-4; Ex. R-3, pp. 4-5)

39. The Plaquemines Parish Commission Council is responsible for Port planning and development and overall supervision of the Port District. In 1983 the President of the Council spent at least 25 percent of his Parish time on Port matters. In 1984 the President, as well as two or three other council members spent 20-25 percent of their Parish time on Port matters. Taking the Commission as a whole, not less than five percent

of the aggregate time of all nine Commissioners will be dedicated to Port matters. (R-PF 73; Ex. R-55, p. 11; Ex. R-27, pp. 1-2; Ex. R-28, p. 2; Ex. R-57)

40. The Parish's ferries are an integral part of its transportation and fire fighting system. In addition to the fire fighting capability of the *M/V Louisiana*, two other vessels can be used to transport landbased fire equipment for use against fires on the water and to transfer such equipment from one bank of the river to another. The Port has allocated five percent of the budget of the Ferry Department to the Port District expenditure. (R-PF 74; Ex. R-55, p. 17)

41. Plaquemines Parish owns one Bell helicopter and two fixed-wing aircraft, one of which is a seaplane. In the event of marine casualty, the helicopter would locate the scene of the incident and coordinate marine rescue and fire fighting efforts. For example, in January of 1983, a collision occurred in the river near Venice, Louisiana, involving two vessels where four people were killed. The helicopter was used to direct search and rescue operations for survivors. (R-PF 75; Ex. R-33, pp. 4-5)

42. The Parish aircraft are also employed in aerial surveillance of vessels on the 102 miles of River within the Port District to locate any problems that may arise such as fires, collisions, runaway barges, congestion, and any illegal activities. The helicopter is also used to observe and determine sources of pollution along the river. Since July 1983, the Aviation Department's expenditures allocated to the Port District have been 5 percent. (R-PF 76, 77)

43. The Port District uses the Parish's Water Processing Department for invoicing tariff fees and compiling data, including a list of Port District users. The Port is invoiced by the Data Processing Department for computer time and data processing personnel time at the rate of an allocation of 5 percent. (R-PF 78; Ex. R-20)

44. The costs of Port District services for the calendar year 1983, as computed by the Port, total \$1,242,168.00. They are as follows:

TABLE I—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1983—Preliminary Expenditures

Port District staff salaries (5 full time employees and Port Manager, H.R. Benvenuti); Salaries of 4 marine inspectors; Attorney's fees; Office overhead; Maintenance and expenses of 5 automobiles; Dues of port associations and conferences. [\$554,698 minus \$30,000 for deck barge cost listed in Item 400] (See page 2 of Exhibit _____)

\$524,698.00

Operating costs of two 50 foot patrol/rescue vessels:

NEW ORLEANS STEAMSHIP ASSOCIATION V. PLAQUEMINES 607
 PORT, HARBOR & TERMINAL DISTRICT

Salaries of 6 captains, 6 deckhands, Maintenance; fuel costs; Materials and supplies; insurance premium for both vessels (See Page 2 of Exhibit _____)	\$300,643.00
Amortization for cost of two 50 foot vessels and radar equipment. (Total cost of \$633,040.71 divided by 10 year life expectance)	\$63,304.00
Amortization of cost of Deck Barge B-11 and improvements thereto, which is dock for AUTHORITY I vessel	
Cost of Barge	\$30,000
Cost of Improvements	14,870
(Total cost of \$44,870 divided by 10 year life expectancy)	\$4,487.00
Marine Radio Operators, 4 full-time and 1 part-time. (See Page 2 of Exhibit _____)	\$60,775.00
Life & Health Insurance for Port Employees	\$31,401.00
Retirement for Port Employees	\$17,077.00
	<hr/>
PORT DISTRICT	\$1,002,385.00
	<hr/>
OTHER PARISH DEPARTMENTS	\$1,242,168.00
	<hr/>

TABLE II—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1983—Preliminary Expenditures

Fire Protection:	
[\$598,167.00 (1983 preliminary expenditures)	
— 143,116.00 (cost of new equipment)	
\$455,051.00	
× 20%]	\$91,010.00
Amortization of new fire equipment	
[Total cost of \$143,116.00 divided by 20 year life expectancy	
× 20%]	\$1,431.00
Ferries	
[\$1,482,555.00 (1983 preliminary expenditures)	
× 5%]	\$74,128.00
Aviation	
[\$164,379.00 (1983 preliminary expenditures)	
× 5%]	\$8,219.00
Data Processing	
(1983 preliminary expenditures)	\$36,221.00
Councilmen	
[\$575,474.00 (1983 preliminary expenditures)	

× 5%]	\$28,774.00
<hr/>	
TOTAL OTHER DEPARTMENTS	\$239,783.00
(R-PF 79, 80, 81; Ex. R-35, pp. 9-10; Ex. R-55, p. 11, Ex. R-27, pp. 1-2; Ex. R-28, p. 2)	
45. The costs of Port District services for the calendar year 1984, as computed by the Port, total \$1,394,369.00. They are arrived at as follows:	
TABLE III—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT	
1984 Budget	
Port District staff salaries (5 full time employees and Port Manager, H.R. Benvenuti); Salaries of 4 marine inspectors; Attorney's fees; Office overhead; Maintenance and expenses of 5 automobiles; Dues of port associations and conferences. (See Page 1 of Exhibit _____)	\$483,960.00
Operating costs of two 50 foot patrol/rescue vessels: Salaries of 6 captains, 6 deckhands, Maintenance; fuel costs; Materials and Supplies; (See Page 2 of Exhibit _____)	\$406,650.00
Insurance premium for both vessels	\$81,253.00
Amortization for cost of two 50 foot vessels and radar equipment. (Total cost of \$633,040.71 divided by 10 year life expectancy)	\$63,304.00
Amortization of cost of Deck Barge B-11 and improvements thereto, which is dock for <i>AUTHORITY I</i> vessel	
Cost of Barge	\$30,000
Cost of Improvements	14,870
(Total cost of \$44,870 divided by 10 year life expectancy)	\$4,487.00
Marine Radio Operators, 4 full-time and 1 part-time. (See Page 3 of Exhibit _____)	\$70,160.00
Life & Health Insurance for Port Employees	\$31,401.00
Retirement for Port Employees	\$17,077.00
<hr/>	
PORT DISTRICT	\$1,158,293.00
<hr/>	
OTHER PARISH DEPARTMENTS	\$236,076.00
<hr/>	
	\$1,394,369.00

TABLE IV—PLAQUEMINES PORT, HARBOR AND TERMINAL DISTRICT

1984 Budget

Fire Protection:

\$1,268,960.00 (total 1984 budget) – \$751,264.00 (cost of new equipment) \$517,696.00 (1984 operating funds) × 20%	\$103,539.00
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Amortization of new fire equipment [Total cost of \$751,264.00 divided by 20 year life expectancy × 20%]	\$7,512.00
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Ferries [\$1,487,500.00 (total 1984 budget) × 5%]	\$74,375.00
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Aviation [\$187,500.00 (total 1984 budget) × 5%]	\$9,371.00
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Data Processing [\$355,342.00 (total 1984 budget) × 5%]	\$17,767.00
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Councilmen [\$470,241.00 (total 1984 budget) × 5%]	\$23,512.00
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TOTAL OTHER DEPARTMENTS	\$236,076.00
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(R–PF 82; Ex. R–35, pp. 14, 15.)

46. The terminal facilities along the river are privately owned. Under the tariffs involved here the wharves, docks and other waterside facilities are not assessed any charges by the Port District for the various services (fire-protection, rescue, etc.) rendered by it. (Ex. R–14.)

47. The private wharves and docks receive substantial benefits from the services provided by the Port. (Tr. 2/16/84, pp. 103, 133; Tr. 2/17/84, pp. 9, 10, 15; Tr. 2/21/84, pp. 150, 156, 157, 177.)

48. The companies owning the terminals pay Parish ad valorem taxes, and some provide their own land-based fire protection. There is no proof in the record that either the revenues derived from the ad valorem taxes or the benefit to the Parish from the land based fire protection are comparable to the fees that would otherwise be assessed the private wharves and docks under the tariff. (Entire Record.)

49. Commercial fishing vessels and crew boats do not pay any fees under the tariff, although they both are benefited by the services rendered by the Port. (Ex. R–14; Tr. 2/15/84, pp. 107, 108, 124, 139.)

50. Supply boats are benefited by the Port's services but the record is devoid of any evidence comparing the benefits received to any fees paid by such boats. (Entire Record.)

51. The record does not contain sufficient evidence to justify the 500 ton exemption contained in the Supplemental Harbor Fee. There is no factual comparison of relevant factors relating to the benefits derived from or the cost of Port services, nor is there any evidence as to the resultant economies in Port overhead expense. (Entire Record.)

52. Inland barges are not assessed any charge under the Supplemental Harbor Fee when they enter the Port. They are charged a fee on leaving the Port only if the cargo they are carrying has not previously been subject

to the tariff charge when it entered the Port. (Ex. R-14; Tr. 2/17/84; pp. 60, 61; Tr. 2/21/84, pp. 80-83.)

53. Despite the terms of the tariff which would charge a fee to oceangoing barges entering the Port, oceangoing barges carrying phosphate to the Electro-Coal Transfer Corporation private wharf were not charged a fee under an oral "agreement" between the Port and the company. (Ex. R-14; Tr. 2/21/84, pp. 106-119, 126-134, 163-166.)

54. The record does not contain any evidence indicating that there was any weighing of the benefit and comparable cost in relation to inland barges as opposed to such benefit and cost to other users, so as to justify the exemption of such barges. Further, there is no real evidence of administrative difficulty warranting the exemption. (Entire Record.)

55. The permit/discount feature of the tariff does favor local interests over non-local commercial cargo vessels. The evidence of record does not establish that the fees paid by the smaller vessels reasonably represents the benefit they receive from Port services when compared with other users. (Ex. R-14; Tr. 2/17/84, pp. 43, et seq.)

56. After the decision in the *Dreyfus* case the Port settled the case by offering the parties to the suit a reduction, remission or rebate of 80 percent of the Harbor Fees and Supplemental Harbor Fees. (R-PF 18.)

57. The Port tariff does assess a fee against Port users for providing to vessels and cargo essential health, safety and security services. (Ex. R-14.)

58. The Port does have primary responsibility for furnishing fire and rescue protection in the Port. While the Coast Guard has some general responsibility its resources are limited and it looks to this Port as well as other local ports to be primarily responsible. (Exs. R-38, 48, 49.)

Ultimate Findings of Fact

59. The Plaquemines Port, Harbor and Terminal District is a subdivision of the State of Louisiana and is an "other person" subject to the Shipping Acts of 1916 and 1984. The combination of the Port's exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial, cargo-handling transactions, its assessment of selective cargo transfer fees and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Such pervasive involvement in the business of common carriers, marine terminals and commerce of the United States confers on the Commission jurisdiction over the Port under the pertinent provisions of the Shipping Acts of 1916 and 1984 and subjects the Port's fees to scrutiny under those provisions.

60. The Port's practice of assessing, on the basis of cargo transactions, a fee for providing to vessels and cargo essential health, safety and security services constituted the furnishing of "other terminal facilities" within the meaning of the Shipping Acts of 1916 and 1984. The term "other terminal

facilities” contemplates not only physical assets such as docks, wharves and warehouses, but also encompasses services rendered “in connection” with the marine terminal “link” in transportation modes.

61. The settlement of the *Dreyfus* case by the Port does not unjustly discriminate against others who are not parties or privy to the former proceeding and who are not identifiable in this proceeding as having suffered any injury, much less the amount of such injury. Further, public policy favors the settlement of litigation.

62. The tariff fees in question are not a toll charge in contravention of the United States Constitution. Rather, those fees represent the establishment of regulations and practices related to or connected with the receiving, handling, or delivering of property; namely, they are fees to provide for the policing of the waterway so as to insure the safety and facility of movement of vessels and cargo using it.

63. The Harbor Fee and Supplemental Harbor Fee do not bear a reasonable relationship to the comparative benefit obtained by the assessed parties from the services provided by the Port and, further, the various exceptions contained in the tariff relating to private terminals, supply boats, crew boats, fishing vessels, inland barges, as well as the five hundred ton and the permit/discount rate features are unduly preferential and unjustly discriminatory. The record fails to contain sufficient evidence to either demonstrate that other revenue considerations of the exempted classes are reasonably related to the fees forgiven or that such exemptions are required administratively.

64. The surety provisions of the tariff relating to agents are not unreasonable. A terminal operator can hold liable for tariff fees all direct and indirect users of its services. All parties made sureties for the Port’s fees are either direct or indirect users of the Port’s services. Furthermore, there is no evidence that the Port has abused these liability provisions or that a hardship or injustice has resulted from their application.

65. The Supplemental Harbor Fee in this proceeding is not an improper charge against vessels because the evidence does not establish why the carrier-shipper contract should prevent the imposition of the fee on the vessel, either under the facts or the law.

Discussion and Conclusions

This case involves several issues and a voluminous record containing extensive oral testimony and documentary evidence. The issues as we understand them and as set forth in the briefs of the parties are discussed below. Those issues which are preliminary in nature will be disposed of first. Those dealing with the merits will then be dealt with in turn.

Issue No. 1—*The Louis Dreyfus Settlement*

On July 30, 1982, the Commission, in *Louis Dreyfus Corp. v. Plaquemines Port Harbor and Terminal District*, 25 F.M.C. 59 (1982), aff’d.

21 SRR 219, held that the tariff then on file (Exhibit R-58) was improper in that the Harbor Fees and Supplemental Harbor Fees were unlawful and were in violation of section 16, First, and section 17 of the Shipping Act, 1916. The Port has offered a reduction, remission or rebate of 80 percent of the Harbor Fees and Supplemental Harbor Fees to parties who were port users and were parties to the litigation. The complainant argues that:

The practice engaged in by the District in refunding, only to parties in litigation, the charges found by the Commission to be unlawful in the *Louis Dreyfus* case was patently discriminatory and requires that the Parish make such refunds as to all parties disadvantaged by its unlawful charges. [Complainant's Initial Brief, (pp. 28, 48)]

The complainant cites no facts indicating who the other parties might be nor does it cite any law in support of its assertion. Apparently, it is invoking section 22(a), Shipping Act, 1916, as a basis for reparations to the "other parties."

We believe the complainant's argument on this issue is without merit. Where, as in the *Dreyfus* case there was an open public settlement of a legitimate claim there is no basis for a finding that such a settlement unjustly discriminates against other parties not privy to the proceeding. *Levatino & Sons v. Prudential Grace Lines*, 18 F.M.C. 89, 112-114 (1973), adopted in relevant part at 18 F.M.C. 83 (1974). This is especially true in light of the public policy favoring the settlement of litigation. See *Behring International-Independent Ocean Freight Forwarder License No. 910*, 23 F.M.C. 973, 981-986 (1981), and the cases cited therein. Further, under section 22(a) reparations can only be awarded where actual injury can be shown to be caused by violation of the Shipping Act and where the amount of injury suffered can be proven. Here, the record is devoid of any such evidence so that even if one wanted to refund a portion of the tariff charges to other persons not parties to the *Dreyfus* action, this record would not allow him to do so. In short, even if there was discrimination as to "other parties," that discrimination is not properly at issue in this case nor is there any basis for relief in this proceeding.

Issue No. 2—Whether or Not the Charges Contained in the Tariff Are Unlawful Under the Constitution of the United States

At pages 35 through 40 of its Initial Brief and pages 1 through 13 of its Reply Brief the complainant argues that the charges imposed by the Port's tariff are prohibited by the Constitution of the United States which at 37 U.S.C. 10 states "all the navigable rivers and waters in the former Territories of Orleans and Louisiana shall be and forever remain public highways," and which at Art. I, §10, Clause 3, forbids any state to "lay any duty of tonnage" without the consent of Congress. The argument goes to the Commission's jurisdiction. It is surprising because it

is tantamount to arguing that the charges in the tariff cannot be collected by the Port as an "other person" establishing "just and reasonable regulations and practices related to or connected with the receiving, handling, storing or delivering of property" under section 17 of the Shipping Act, 1916. Coupled with the complainant's argument that the Port is a non-entity generally and provides no services it would mean that the Commission would have no jurisdiction over the Port and that it could not entertain the complaint or grant the relief sought by the complainant. In essence, were we to hold in favor of the complainant on this issue, we should dismiss the complaint and discontinue the proceeding.

However tempting and easy a solution the above alternative may be, we must disagree with the complainant on this issue. The old and long-standing Supreme Court cases the complainant cites do indeed forbid the imposition of a duty or tax which is measured by tonnage and the capacity of the vessel and which is in essence a contribution claimed for the privilege of arriving and departing from a port of the United States.² However, some of these same cases recognize, as does the complainant, that where actual services are rendered charges for those services are not forbidden even where specific benefit cannot be shown. As was stated in *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), a case cited by the complainant:

* * * the policing of a harbor so as to insure the safety and facility of movement of vessels using it differs from wharfage or other services which benefit only the particular vessels using them. It is not any the less a service beneficial to the appellant because its vessels have not been given any special assistance; and further:

* * * charges levied by state authority to defray the cost of regulation of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible. *Idem* p. 267.

See also *Huse v. Glover*, *supra*, and *Indiana Port Commission v. Bethlehem Steel Corp.*, 534 F.Supp. 858 (USDC, N.D. Ind. 1981).

The real jurisdictional issue in this proceeding, of course, is whether or not the Port is an "other person" who provides a service to the ocean commerce going through the Port. The complainant asserts in its briefs that the Port "renders nothing but its presence"; "is a non-existent entity providing no facility"; "does not provide the anchorages"; "has not in any manner constructed or improved the Mississippi River"; and is "only a paper entity." We cannot agree with those assertions. The record in

²*Huse v. Glover*, 119 U.S. 543 (1886); *Transportation Co. v. Parkerburg*, 107 U.S. 691 (1883); *Southern Steamship Co. v. The Masters and Wardens of the Port of New Orleans*, 73 U.S. (6 Wall.) 31 (1867); *Peete v. Morgan*, 86 U.S. (19 Wall.) 581 (1874); *Cannon v. New Orleans*, 87 U.S. (20 Wall.) 577 (1874); *Moran v. New Orleans*, 112 U.S. 69 (1884).

the proceeding establishes that the Port Authority was duly established by the State of Louisiana, that while it does not own the terminal and shoreside facilities, it controls and regulates them, and most importantly, that it does provide fire and safety protection for the Port by having available substantial amounts of fire-fighting equipment, personnel, communication, helicopter and other services that are used to service the Port and the vessels and facilities that use the Port. Further, contrary to the complainant's allegations, the facts indicate that the Coast Guard looks to the Port to provide the day to day fire protection and is far less able to provide timely fire protection than is the Port itself. All of the pertinent evidence, including the testimony of the Coast Guard Commandant, establishes those facts. Given them we must agree with the holding in *Dreyfus*, *supra*, where the Commission said:

* * * Local governmental authorities are not categorically exempted from the requirements of the Shipping Act, nor is there any court or Commission precedent requiring ownership of a facility in order to confer jurisdiction under Section 1 of the Act. Thus, the Plaquemines Port, Harbor and Terminal District, a subdivision of the State of Louisiana, is an "other person" subject to the 1916 Act. The combination of the Port's exclusive ability to provide essential health, safety and security services to vessel and cargo interests in commercial, cargo-handling transactions, its assessment of selective cargo transfer fees and its control of access to private terminal facilities results in fundamental control over the rates and practices of terminal facilities. Such pervasive involvement in the business of common carriers, marine terminals and the commerce of the United States confers on the Commission jurisdiction over the Port under Section 1 and subjects the Port's fees to scrutiny under the substantive provisions of the 1916 Act.

* * *

So here, we hold that the charges made under the tariff related to a service rendered by the Port and were not in the nature of toll charges. As such, they did not violate any provision of the Constitution of the United States or any other statute.

Issue No. 3—Whether or Not the Harbor Fee and Supplemental Harbor Fee Bear a Reasonable Relationship to the Comparative Benefit Obtained by the Assessed Parties From the Services Provided by the Port

If the charges collected under the tariff do not bear a reasonable relationship to the comparative benefit obtained by the assessed parties from the services provided by the Port then the tariff violates the Shipping Act of 1916³ and must be set aside. While a determination of this issue involves

³ While the Shipping Act of 1916 is referred to throughout this decision the holding also applies to the Shipping Act of 1984 where it contains similar and relevant sections.

a matching of the overall costs to the overall benefit, the fact that the overall costs justify the overall benefit is not dispositive of the issue. Rather as was stated in *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Commission*, 390 U.S. 261 (1968), at page 282:

The question under § 17 is not whether the petitioner has received some substantial benefit * * *, but whether the correlation of that benefit to the charges imposed is reasonable; and further,

The proper inquiry under § 17 is, in a word, whether the charge levied is reasonably related to the service rendered.

Here the complainant argues that "the alleged services are not a benefit for which charges may be imposed" and that oceangoing vessels should not "be required to pay for the fire and police protection and other services afforded by the Port." It argues further that the "district charges are unreasonable, unduly preferential, prejudicial and discriminatory." As to the latter argument it cites *Baton Rouge Marine Contractors Inc. v. Federal Maritime Commission*, 655 F.2d 1210 (C.A., D.C., 1981) and the language:

* * * if the challenger pays more than other parties pay, for fewer benefits than other parties receive, then the charge is unreasonable under § 17 * * * the FMC "failed to conduct any comparative analysis of the relative benefits insuring to the several users of the facility. This comparison * * * was at the heart of the Commission's earlier approach and is essential to a determination that 'the charge levied is reasonably related to the services rendered.'" Separate slip op. at 4, J.S. 182 (quoting from *Volkswagenwerk*, supra, at 282, 88 S.Ct. at 940-41). We agree that, at this juncture the Commission's order cannot stand given the absence of any "exposition of the relative benefits [of the automated gallery] to stevedores and, other segments of the distribution channel." Id. at 2, J.A. 180.

In our view, we think it clear from this record that the Port does furnish some services that benefit commercial cargo vessels and we reject the complainant's view that the services are not a benefit for which charges may be imposed. We also believe that the facts and evidence in this proceeding support the finding that the *overall* costs allocated to the various services are reasonable or at least are not unduly or unreasonably discriminatory. However, they should be allocated evenly and fairly to the recipients of those services. Stated differently the charges must be so allocated as to not unduly or unreasonably discriminate against one or more recipients so as to violate the pertinent provisions in the Shipping Acts.

Here the complainant avers that the charges⁴ are unduly discriminatory because:

⁴We have difficulty in some cases in ascertaining just what discrimination the complainant would have us find specifically as to the Harbor Fee vis-a-vis the Supplemental Harbor Fee.

- (1) "there is no contribution to the District by the wharves, docks or other waterfront facilities in the District,"
- (2) "supply boats are benefited but do not pay appropriate charges,"
- (3) "commercial fishing vessels are benefited but do not pay any charges,"
- (4) "launches used by vessels to carry crewmen back and forth between ship and shore are benefited and do not pay any charges,"
- (5) "the five hundred ton exemption is not reasonable,"
- (6) "inland barges transporting cargo into the District are not assessed a Supplemental Harbor Fee."
- (7) "The Permit/Vessel Length features of the tariff are unjustly discriminatory."

There is no factual dispute in this record as to what the tariff provides regarding the interests enumerated above. Certainly, the tariff does not exact the same fee from them as it does from "commercial cargo vessels." In this sense it discriminates. What we must decide is whether or not that discrimination is so unreasonable as to violate the Shipping Acts. In reaching our findings we should note that while the tariff involved here is patterned after the tariff involved in the *Dreyfus* case, the amounts involved are quite different and some provisions which were found to be improper in *Dreyfus* have either been changed or deleted entirely. For example, under the new tariff all commercial cargo vessels, including those under 100 feet, pay the Harbor Fee and there is no longer a free Harbor Fee Permit for vessels that pay ad valorem taxes. Further, the tariff here, unlike its predecessor, does not credit payment of either the Harbor Fee or the Supplemental Harbor Fee against the other fee. The new tariff does not provide for fines and criminal penalties for failure to pay tariff charges, nor does it provide that the Port District is the sole interpreter of the tariff provisions. Finally, the amounts of both the Harbor Fee and the Supplemental Harbor Fee have been changed, the latter being reduced from 10 to 4 cents per ton of 2000 pounds or fraction thereof, of 500 tons based on the weight of the cargo so handled or transferred.

All of the above, coupled with numerous other facts in the record⁵ convince us that the Port District and the commissioners who were responsible for its operation and management at least attempted to address the objectionable parts of the tariff before the Commission in *Dreyfus*. However, we must determine the viability of their actions, not on the basis of their good faith or good intentions, but rather on the basis of the provisions contained in the tariff now in effect.

⁵ For example, the cost and budget estimates of various Parish Departments allocated to the Port were drastically reduced. See Findings of Fact, Number R-48.

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As to the exclusion of the wharves and docks from the payment of fees under the tariff, both the Harbor Fee and Supplemental Harbor Fee have as their purpose the collection of fees:

to assist in defraying the expenses of the administration and maintenance of the port and harbor, including the supervision of the shipping of the port, with the view to preventing collisions and fires, * * * and to aid in extinguishing fires on vessels * * * and in the harbor, *and upon private wharves, docks, and immediately adjacent facilities connected thereto* * * * (Emphasis supplied.)

The language of the tariff as well as both the testamentary and documentary evidence clearly establishes that the private wharves and docks do and were meant to derive some benefit from the services provided by the Port.⁶ Yet, the tariff does not provide for the payment of any fees by the owners of the wharves or docks. The respondent seeks to justify the omission by asserting that, "The Landbased Marine Terminals are Not Substantial Beneficiaries of Port Services and Thus Should Not be Assessed a Portion of the Supplemental Harbor Fee." In support of its assertion the respondent notes that, "all of the privately-owned terminal facilities within the Port pay *ad valorem* taxes to the Parish" and that they "are therefore subsidizing the Port's firefighting costs," and that if they were required to "share in the payment of Harbor and/or Supplemental Harbor Fees, they would be saddled with a dual burden, i.e., the burden of paying indirectly through their *ad valorem* taxes to the Parish a portion of the Port District's safety costs, plus the burden of paying directly some share of the Harbor Fees and/or Supplemental Harbor Fees to the Port District." The respondent also submits that, "The terminals make an additional contribution to the Port District in that under the Tariff they are liable as sureties for the payment of the Harbor Fees and Supplemental Harbor Fees by vessels. In addition, they are committed, under the Marine Fire Plan, to provide support and facilities for the loading of land-based equipment upon privately-owned vessels assisting in marine firefighting." Finally, the respondent alleges that, "The record demonstrates * * * that the terminals are not materially dependent upon the Port's firefighting services for their protection" and "do not require marine rescue services." It describes the concrete and steel construction of the terminals and how "the marine portions of the terminals' facilities are substantially fireproof." It says that, "to the extent that any risk of fire at all may attach to the water-side terminal facilities, that risk is generated by the presence of a vessel loading or discharging cargo."

⁶The testimony of various witnesses, some of them offered by the respondent, refers to the private facilities as being part of the Port benefiting from its services. Further, the evidence regarding various catastrophes and emergencies clearly involve activities taking place on or near wharf facilities.

We believe that the record in this proceeding clearly establishes that the terminal and wharf facilities are an integral part of the Port District and that the services provided by the Port do benefit those facilities. We have already cited that portion of the tariff that specifically refers to the need to collect monies to service "private wharfs and docks." In addition, the respondent's own witnesses testified that these facilities were part of the Port or marine area and that they benefited from the services provided by the Port. Respondent's expert testified that wharfs were "related to marine problems" (Tr. 2/16/84, p. 103); and a Port Commissioner stated that, "I would say they were marine," when asked if the private docks were part of the marine or inland port of the parish (Tr. 2/16/84, p. 131) and that the services rendered by the Port "are of benefit to everyone * * * and not only the ships that use the harbor, but the facilities along the river, the privately owned facilities, wharves" (Tr. 2/16/84, p. 133); another of respondent's expert witnesses testified that, "If there were a fire in a waterfront—in a waterfront facility, I believe that it would be fought from the water * * * the marine fire fighting equipment and consequently, the shoreside terminal would benefit" (Tr. 2/17/84, pp. 9, 10), and further that, "By the term 'shipping community,' I mean primarily to be vessels that transit the waterway. But I would have to include the shoreside terminals as well"; (Tr. 2/17/84, p. 15); the Port Director when asked to define the port area stated as to the facilities along the river, "Definitely, those are part of the port * * * and certainly they are part of our regulatory requirements for application of certain safety standards. What I am saying * * * is * * * laws and regulations not only deal with the vessels but also the facilities that are located on its edge" (Tr. 2/21/84, p. 150), and that in fire and safety inspections, "at least equal effort is spent on inspection of facilities along the river as is spent in both the vessel categories" (Tr. 2/21/84, pp. 156, 157); and further in answer to the question, "How about the facilities along the waterfront? Are they part of your responsibility? The wharves and the docks?", the answer was, "I would say, yes, sir?" (Tr. 2/21/84, p. 177); another Port Commissioner in answer to the question, "Do you consider the private wharfs and dockages along the river are part of the Plaquemines Port?", stated, "Yes, sir, to the extent that they provide services to river transportation or transportation forms that use the river," (Tr. 2/24/84, p. 158).

In addition to the above, the record is replete with evidence that the services provided by the Port significantly benefit the private terminals. The various documents and testimony concerning certain emergencies and catastrophes at the Port⁷ indicate that disasters are just as likely to occur because of activities taking place on the wharves and docks as they are in other parts of the port. Indeed, considering the type of material being

⁷ These involve (1) the Gulf-Alliance Refinery Dock, (2) the International Marine Terminal Dock, and, (3) the Electro Coal Dock.

handled at the docks, i.e., liquid petroleum, sulfuric acid and chemicals, grain, butane gas, etc., the threat of explosion and fire is obvious.⁸

So here, we must reject the respondent's argument that, "the landbased marine terminals are not substantial beneficiaries of Port services." We believe they do benefit from Port services and that the failure to even consider the payment to be made by terminals under the tariff is unjustly discriminatory. (Tr. 2/17/85, p. 35) We also reject the view that the terminals "do not require marine rescue services" because "they provide their own fire protection" and because "the marine portions of the terminals' facilities are substantially fireproof." In our view, the fact is they are susceptible to catastrophic fires and/or explosions which might do extensive damage to life and property and the services provided by the Port which are available to the terminals are just as valuable to the terminals as to commercial cargo vessels.⁹

As to the argument relating to the payment of *ad valorem* taxes by the private terminals and their liability under the tariff as sureties and their commitment under the Parish's Marine Fire Plan, we do not agree with Respondent that these considerations should allow the terminals to pay nothing under the tariff in issue. The *ad valorem* taxes are what any business or citizen would pay and are quite small to begin with. They have nothing to do with the marine services involved here. As to the surety clause in the tariff there is no evidence in the record that the terminals paid anything as surety, and even if they had that fact alone would not excuse their obligation to pay for the Port services which benefited them. Finally, as to their willingness to provide emergency fire services, it is the duty of every Parish citizen and ought not be looked upon as a reason for exempting the terminals from paying their fair share under the tariff.

Surprisingly, the argument advanced here by the respondent is substantially the same position taken in the earlier *Dreyfus* case, and unlike the other objectionable provisions cited in *Dreyfus*, the Port did nothing in the new tariff regarding terminal facilities. In *Dreyfus* the Commission decided that:

A measurement of the reasonableness of the exemptions would be whether the other revenue considerations of the exempted classes are reasonably related to the fees forgiven. None of the exemptions appears to meet this standard. * * * there is no showing that the cargo protection costs saved through the expenditures of private wharf owners equals or exceeds the foregone revenue resulting from their exemption. Finally, there is no proof that

⁸ It is interesting to note that on November 13, 1985, an Exxon oil tank barge was simply "blowing out" gas fumes at the Gretna Machine & Iron Works, a private dock in the Port of New Orleans. It exploded killing one person, injuring others and doing substantial damage to the dock. While this accident did not occur in the Plaquemines Port, certainly it could have and is the kind of occurrence the Port's fire fighting and rescue service is meant to prevent or care for.

⁹ See Tr. 2/15/85; pp. 64, 98, 170; Tr. 2/21/85, p. 33.

the revenue derived from ad valorem taxes paid by the port users exempted from harbor fees are generally comparable to the fees that would otherwise be assessed these users. Indeed, the low ad valorem taxes and the admission by the Port that ad valorem revenues represent a small portion of Port revenues undermine the validity of the harbor fees exemption and support the complainants' allegation that the fees are a device whereby non-local interests subsidize the governmental services rendered Parish residents.

So too here, we hold that the Port similarly violated the Shipping Acts in its assessment of a harbor fee and supplemental harbor fee.

As to the complainant's argument that the tariff violates the Shipping Acts in that supply boats, fishing vessels and crew launches benefit from the Port services in question but do not pay any or adequate fees, we believe that these boats do derive some benefit from the services provided by the Port, albeit not as much as commercial cargo vessels or the private wharves and docks. Certainly, they can catch fire or explode or have a need for medical evacuation—any one of which could trigger the use of the Port's fire fighting or emergency equipment. The respondent alleges that they ought not to come under the tariff either because they do not use the main portion of the river, do not pose any real danger or because it would cost more to collect fees from them than the amount of the fees themselves.

In *Dreyfus, supra*, on similar facts the Commission decided that:

Because there is no differentiation as to the nature of the cargo or other transportation factors involved in the assessment of fees, a competitive or "triangular" relationship need not be proven to establish a violation of Section 16 First. The Port has treated different classes of persons and descriptions of traffic unequally in the imposition of its fees. Because the exemptions from the tariff fees create a situation where a minority of port users pay substantial fees to defray general port expenses while the majority of users pay little or nothing, Complainants have made a prima facie showing of undue preference and prejudice. This shifts the burden to the port to justify the exemptions which burden the port has failed to meet. (25 F.M.C. 59, 68)

Further on the Commission stated:

Complainants have also made a prima facie showing under Section 17 that charges do not bear a reasonable relationship to the comparative benefit obtained from the port services by the assessed parties. The charged parties have not received benefits from the Port's services proportionate to the costs allocated to them. Moreover, other users of the services obtain equal or greater benefits and have not been shown to have paid their allocable share of Port costs. The charges are not based upon the actual use of the Port services by the charged parties. Even if the "generalized benefit" concept advanced by the Port were acceptable it appears

that the exempted users obtain the same generalized benefit as the charged parties. Yet, as mentioned above, there is no evidence that these exempted classes have made other contributions to the operating costs of the Port that approved the level of fees that would have been paid under the Port tariff if an exemption were not granted. Moreover, the tariff is applicable only to users of the navigable waterways of the Port, although a large portion of "marine related" Parish expenses allocated to the Port arises from Parish services provided outside the navigable waterways. While there need not be a precise correlation between "marine related" costs allocated to the Port by the Parish and the classes of Port users assessed fees, they must be reasonably related. Here, there is a broad basis for determining "marine related" costs and a narrow class of Port users assessed those costs. (25 F.M.C. 59, 68-69)

We believe the above citations from *Dreyfus* are equally applicable in this case and that if fishing vessels, supply boats and crew launches are to be exempted under the tariff, the respondent has the burden to and must actually justify the exemptions, however reasonable one might otherwise assume them to be. Unfortunately, on the record made here, we cannot hold that the burden has been met. The testimony of the respondent's primary expert witness indicates that while she considered and made a determination as to the reasonableness of the overall costs and the overall fees under the tariff, she did not even consider the reasonableness of the allocation of the fees vis-a-vis one user against another. (Tr. 2/17/84, p. 31 et seq.) She mistakenly believed that supply boats and crew boats paid a fee, when, in fact, they do not. When asked if they benefited from Port services and should pay a fee she stated she was told that the administrative burden of assessing the vessels was greater than the worth of the assessment.

In considering this issue respondent would have us differentiate between the fishing boats, "oil rig service boats" and commercial cargo carrying vessels because, "The nature of the operation of these types of vessels and the Port services afforded them is different from that afforded to commercial cargo ships on the River," and because, "These considerations (those relating to the carrying of heavy industrial equipment versus the carrying of bananas as discussed in the Volkswagen *werk* case, *supra*) are precisely applicable to the distinction made in the tariff between commercial and cargo vessels on the one hand and fishing and oil rig service boats on the other. These categories of vessels and their respective demands for Port services are as different as heavy equipment and bananas." (Parenthesis supplied.) The respondent then states that, "It is noteworthy that NOSA, while condemning the exemption of fishing boats and smaller oil rig service boats has neither shown that it is harmed by these exemptions, nor has it suggested any more desirable 'alternative imperfect rule' than

the one the Tariff contains. The exemptions have, in summary, not been shown by substantial proof to be unjustly discriminatory.”

We believe the respondent's argument cannot be adopted. Certainly, we would readily agree that the commercial cargo vessels which pay fees under the tariff differ in appearance, size and use from fishing vessels, crew boats and supply boats. However, that consideration is not determinative of the issue. In its tariff the Port, in essence, imposes a fee to supply Port services, “with the view of preventing collisions and fires, policing the river and riverfront, providing services of all kinds as required for an orderly and safe port operation. . . .” As to the fishing boats, crew boats and supply boats there is no question but that the tariff anticipates and provides services to them if needed, especially in the area of fire prevention and rescue. The respondent's own witnesses describe how a substantial part of the Port's marine inspectors' activities involve inspection of the offshore supply vessels and crew boats (Tr. 2/15/84, pp. 107, 108, 134, 139), and how the Port helicopter is used to observe small vessels (Tr. 2/21/84, pp. 35, 36, 39, 43, 44, 45).¹⁰

Given the above we believe the real question as to the smaller vessels is what portion of the costs is allocable to the benefits they derive from Port services. That they differ in size, appearance and use from commercial cargo vessels is not of itself a controlling factor, but rather, how much more or less do they benefit. In light of all of the above, as well as the absence of any definitive evidence in the record that there was any weighing of benefits and fees regarding the fishing boats, crew boats and supply boats as against the commercial cargo vessels we must hold that the respondent has failed to sustain its burden of showing that the above named vessels reasonably should not be required to pay *some* reasonable fee under the tariff. In so doing we note that the respondent's attempt to place the burden on the complainant to come up with a “more desirable ‘alternate imperfect rule’” is invalid. As we have noted, under *Dreyfus*, the burden for justifying exemption is on the respondent and it is not necessary for the complainant to show harm or suggest alternatives for it to prevail.

As to the complainant's argument that the five hundred ton “exemption” used in the computation of the Supplemental Harbor Fee is unreasonable, once again we must deal with the fact that it is an exemption and that the burden is on the respondent to justify it. It argues that, “the exemption of vessels carrying less than 500 tons is supported by both the resulting economies in Port overhead expense and by the lesser risk of catastrophe presented by such vessels.” It also submits that, “the 500 ton exemption applies impartially to all vessels and all commodities. . . .”

¹⁰The helicopter pilot testified that any service he performed regarding fishing boats was charged to the “Commission Council” and not the Port Authority.

Once again, as with the supply boats and crew boats, it may well be that the action taken by the Port is reasonable, but the record does not contain enough evidence to allow us to hold that the respondent has sustained its burden. For example, it is true that the exemption applies impartially to all vessels and all commodities—but only as to those users who pay a fee under the tariff. It does not apply to users carrying less than 500 tons and as to them it is an exemption and is not “impartial.” Insofar as the argument of lesser risk of catastrophe it stands on the same footing as it did with respect to fishing boats, crew boats and supply boats. Vessels carrying less than 500 tons may well be a lesser risk than vessels carrying more, but certainly they benefit from the services provided by the Port and ought to pay for these services, unless the facts of record justify an exemption. In this proceeding that is not the case and the only remaining argument is “the resulting economies in Port overhead,” which have not been clearly established or identified in the record.

The complainant argues that the tariff violates the Shipping Act in that it unjustly discriminates by exempting inland barges transporting cargo into the District from being assessed under the Supplemental Harbor Fee. The fact is that under the tariff inland barges coming into the Port do not pay a Supplemental Harbor Fee. Such barges going out of the Port are liable for the Fee, only if “such cargo has (not) previously been the subject of a tariff charge when it entered the Port aboard any vessel which paid a Supplemental Harbor Fee on such cargo, (in which event) there shall not be a dual charge for such cargo and such towboat owner, operator and owner of the cargo shall be exempt from this payment of this Supplemental Harbor Fee.” (Parenthesis supplied.) Once again, because an exemption is involved, under the holding in *Dreyfus, supra*, the burden for justifying it is on the respondent. It argues that, “This treatment of barge traffic is not discriminatory, but instead is reasonable and justified by valid transportation considerations.” It describes how barge traffic coming into the Port consists mostly of coal and grain brought in from upriver, and how it would not be feasible to have the tug bringing in the barges to “calculate the amount of cargo in the Plaquemines-destined barges contained in the tow, and to locate and to pass on to the owner of each barge its pro rata share of Supplemental Harbor Fee.” It compares the incoming cargo to outgoing barge tows of phosphate and crude oil or petroleum products where it concludes that, “The towboat operator can without undue burden pass the Supplemental Harbor Fee on to the owner or charterer of the individual barges, or to the cargo owners.” The respondent also argues that charging all inbound and outbound vessels \$.02 per ton rather than the outbound vessels \$.04 per ton would greatly increase the Port’s overhead costs, “because it would have to collect twice as many payments as it now does,” because, “a charge of only \$.02 per ton against outbound seagoing ships would result in their paying less than a fair share of the Port’s costs, taking into consideration the fact that

the large vessels are the greater beneficiaries of the Port's safety efforts," and because, "if the Supplemental Harbor Fee were changed to assess \$.02 per ton for inbound *and* outbound vessels, half of the substantial Supplemental Harbor Fee revenues derived from vessels and barges carrying crude oil and refined products outbound from Plaquemines . . . would be lost to the Port."

While the respondent's arguments may have some validity we cannot sustain them on the basis of the record made here. As we have noted, the respondent's own expert witness testified she did not make any determination regarding the reasonableness of the allocation of the tariff fees as between various users and that she was told tonnage figures were not available for purposes of allocating the Supplemental Harbor Fee insofar as barges were concerned (Tr. 2/17/84, pp. 43, 44). Not only that, when questioned about inland barges the colloquy was as follows (Tr. 2/17/84, pp. 60, 61):

THE WITNESS: * * *

And the supplemental harbor fee was developed to be assessed against vessels on the basis of cargo loaded or discharged with the intent of ships that have a lot of cargo activity. A lot of tons loaded and discharged would bear a cost against that activity as opposed to a ship that had minimal cargo loading and discharge.

BY MR. BAGLEY:

Q. But on the other hand, if it is a barge being discharged by inbound cargo, you would have no assessment against the activity; is that correct?

A. If it's a barge being loaded—

Q. Being unloaded

A. —being discharged with inbound cargo, it is not charged a supplemental harbor fee.

Q. So that activity, using "activity" as the word, is not assessed; is that correct?

A. It's not assessed a supplemental harbor fee; yes.

Q. Can you—how would you justify the reasonableness if your going to assess activity—or one activity being so assessed and another identical activity not being assessed?

A. I understand the rationale for why the Port District constructed its tariff as it did. It is hard for me to understand the justification.

Q. And you can offer nothing other than the fact that they did it as they did; is that correct?

A. That is correct.

and further (Tr. 2/17/84, pp. 72-74):

Q. All right.

Let's take the volume of tonnage in Louisiana in grain and coal. This is all shipped in by barge and not by ship; is that correct?

A. I would think so, yes.

Q. And the shipment in bears no part of it? The shipment out bears all of the supplemental harbor fee?

A. The shipment in bears no harbor fee.

Q. The harbor fee is borne seven percent by [by] inland tugs and tows and ninety-three percent by ocean vessels?

A. The harbor fee is borne seven percent by tugs and tows according to my estimate, and probably something less than (than) ninety-three because we do have some supply boats in there.

Q. All right.

Now do you think there is something—do you [think] something closer to perfect than that can be achieved?

A. I don't know the answer to that question. I meant I'd have to look into [it] in detail. I would have to see what the records are and see how they actually go about the collection process.

I don't know the answer to that question.

Q. Well, would you not have first to start assessing tugs and tows? Would you not have to first start assessing supplemental harbor fees against inbound barges?

A. I'm sorry. State that again.

Q. In order to establish an approach to a balance, would you not have to begin assessing supplemental harbor fees against tugs and tows?

A. I assume you mean against—

Q. Inbound.

A. Yes, I think your correct.

Q. And this would be a more perfect assessment; would it not?

A. Considering that the fee is an assessment against the vessels on the basis of—assessment on the basis of cargo going in, I would agree that a more perfect situation would be to assess the inbound tugs and tows.

In addition to the above testimony, the Port Director, another of the respondent's witnesses, testified that he knew of no reason why the Port could not assess the tug that transports inland barges and their cargo "in just the same way that you assess the ship that brings the cargo in." (Tr. 2/21/84, pp. 80-83) Further, he testified that not only did inland barges not pay a Supplemental Harbor Fee when coming into the Port, but that sometime in 1983 the Port and the Electro-Coal Transfer Corporation (an owner of one of the private wharves) entered into an "agreement" whereby incoming oceangoing barges loaded with phosphate coming to Electro-Coal paid no Supplemental Harbor Fee, but that outgoing inland

barges loaded with coal going from Electro-Coal paid such a fee. The agreement seems to violate the clear language of the tariff. All of the testimony involving the "agreement" is unduly vague and beclouded but one thing is certain, its effect is to favor one user over another in contravention of the terms of the tariff. (Tr. 2/21/84, pp. 106-119, 126-134 [especially page 131], 163-166)¹¹

We think consideration of all of the above as well as other portions of the record leads to the conclusion that the exemption for inland barges from the Supplemental Harbor Fee is not justified in this record. Indeed, it is clear that intentional or not, the exemption has the effect of favoring local interests over non-local commercial vessels. In addition, we do not believe either the facts of record or the reasons advanced by the respondent warrant the exemption in favor of inland barges. The evidence not only fails to justify the exemption, but the testimony regarding Electro-Coal seems to indicate clearly that the Port allowed Electro-Coal to enlarge the exemption to oceangoing incoming vessels carrying phosphate in contravention of the tariff to the benefit of Electro-Coal and the detriment of other users.

So here, we think there is no valid reason to exempt incoming inland barges from the Supplemental Harbor Fee and their failure to pay a fee under the tariff while deriving benefit from Port services violates the Shipping Acts because it unjustly and unduly discriminates against other users.

Finally, the complainant argues that, "the permit vessel length" features of the tariff are unjustly discriminatory. In support of its argument the complainant notes that the permit feature of the tariff is "locally biased" because it applies only to commercial vessels under 250 feet in length but not those over 250 feet, which later category is comprised of oceangoing vessels. The permits are issued as follows:

Length of Permit	Discount (percent)
30 Days	50
90 Days	56
180 Days	66 $\frac{2}{3}$
365 Days	78

From the above the complainant argues that, "while some reduction would be justified, it is submitted that the discount of 78% accorded to a vessel obtaining an annual permit license is plainly excessive. . ." and further that, "this is precisely what is represented by the relationship of a 365 day license at a cost of 80 days occupancy without a license." The complainant concludes that, "Surely if the benefit for a year's occupancy is

¹¹ The testimony of the Manager, Administration of Electro-Coal, regarding the "agreement" is also pertinent and enlightening. (Tr. 4/24/84, pp. 68-89).

equivalent to only 80 days of the daily fee, the daily fee is not commensurate with the benefits accorded.”

The respondent argues that absent the permit virgule option “the imposition of the daily fee upon a vessel under 250 feet in length that is resident within the Parish would result in unreasonably burdensome charges upon such vessels. For example, a Plaquemines-based commercial cargo vessel between 100 to 250 feet in length would have to pay as much as \$3,650 annually at the daily rate of \$10.00. With an annual permit, it pays \$800. . . .” After citing overhead billing savings to the Port resulting from the on-time permit fee, the complainant concludes that, “It is reasonable that such vessels be permitted a reduction of the daily fee in the nature of a ‘wholesale’ discount. In contrast, vessels that enter the Port on only an occasional basis, should logically be subject to the fee on a ‘retail’ basis.”

At the outset it should be noted that the issue regarding permit/discount rates favoring local users is like the other issues raised involving the apportionment of the costs, based on whether or not the fees charged satisfy the requirements of the holding in *Volkswagenwerk*, that is, does the fee paid fairly and reasonably represent the benefit derived by the user. The issue is not properly whether there ought to be a “wholesale” or “retail” rate because the Port seeks to favor local interests, but rather whether the Port ought to establish such a dichotomy between the rates because the service to local interests warrants it vis-a-vis the service to oceangoing vessels. Here again, the record contains little evidence which would justify the “wholesale” rate set forth in the tariff for local interests and the “retail” rate set forth for oceangoing vessels. Certainly, one might reasonably assume that the smaller local vessels require lesser services than do the larger oceangoing vessels, but even where the assumption is made, one cannot, with the documentary or oral evidence of record, arrive at the discounts set forth in the tariff. As far as we can determine they are amounts chosen at random without any definitive, reasonable assessment as to benefits derived from Port services for the smaller local vessels as opposed to the larger oceangoing vessels. In short, the discounts are arrived at arbitrarily. As such they are discriminatory and violate the pertinent provisions of the Shipping Acts.

Issue No. 4—*Whether or Not the Port May Look to the Vessel Agents for Payment of Charges Imposed Under the Tariff*

The tariff involved here at item 165 provides in essence that the Harbor Fee and Supplemental Harbor Fee are the “primary obligation of the owner, agent or user of the vessel” (emphasis supplied). It states that, “Parties entering and using the District . . . do so by such entry and usage thereby contract to pay and are responsible for all District fees whatsoever as provided for in this tariff.” The tariff here (Ex. R-14) contains identical

of Section 17 of the Act because its tariff provisions hold liable for the debts of shippers and consignees of cargoes all parties who may have had contact with the debtors, including vessel owners, terminal operators and other 'users' of the vessel or facility.' In reversing the holding of the Initial Decision the Commission stated.

The Presiding Officer's holding that the surety provisions of the tariff are unreasonable will not be adopted. A terminal operator can hold liable for tariff fees all direct and indirect users of its services.²²

Given the Commission's holding in *Dreyfus, supra*, which considered the very same tariff language, we must follow the precedent established in that holding. So here, the tariff provision in issue does not violate section 17 of the Shipping Act, 1916, or the companion provision of the 1984 Act.

Issue No. 5—Whether or Not the Supplemental Harbor Fee is an Improper Charge Against Vessels

This issue, like the agency issue discussed above, would have us hold that the Supplemental Harbor Fee is improper because it imposes the fee on the vessel which has no contractual relationship with the Port. The complainant also seems to be arguing that the fee should not be collected from vessels because the shipper/carrier contract applicable to vessels calling at the Port typically specifies that cargo will be handled on F10 terms, i.e., that the cargo interests rather than the vessel will be responsible for cargo-handling costs. The complainant also makes much of the allegation that the Port cannot collect the Supplemental Harbor Fee from the vessel interest because of improper notice.

The complainant has presented no statutory or case law which would sustain its burden of showing that the assertion of the Supplemental Harbor Fee against the vessel interest rather than the shipper interest is in any way, standing alone, violative of the Shipping Acts. While it may or may not be unusual, and while the tariff may be objectionable on other grounds, we see no basis to sustain the complainant on this narrow issue.

Finally, it should be noted that throughout the testimony and in some portions of the pleadings and brief there are other arguments made which have not been discussed in this decision either because they have been presented in vague terms or have little or no bearing on the final outcome of the case. In summary, this decision holds that:

- (1) The Commission has jurisdiction in this proceeding.
- (2) The Port does provide certain services such as fire and safety protection, for which it may charge users a harbor Fee and a Supplemental Harbor Fee.

²² *West Gulf Maritime Asso. v. Port of Houston Authority*, 21 F.M.C. 244, 248, 18 SRR 783 (1978), aff'd *nem. sub. nom.*, *West Gulf Maritime Ass'n v. F.M.C.*, 610 F.2d 1001 (D.C. Cir. 1979) (Table), cert. denied, 449 U.S. 822 (1980).

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presented in vague terms or have little or no bearing on the final outcome of the case. In summary, this decision holds that:

- (1) The Commission has jurisdiction in this proceeding.
- (2) The Port does provide certain services such as fire and safety protection, for which it may charge users a harbor Fee and a Supplemental Harbor Fee.
- (3) The overall cost of those services is reasonable so that the total amount collected from users is justified.
- (4) The allocation of fees amongst users is unduly discriminatory in that various exemptions and exceptions are made which are prima facie violative of the Shipping Act, and which prima facie violation the evidence of record fails to overcome.

It is important to emphasize that the above holding recognizes the uniqueness of the Plaquemines Port. The parties have agreed that it is unique and the evidence itemizes the various differences between Plaquemines and other ports. Because it is unique, some of the comparisons made between Plaquemines and other ports is, in our opinion, of little value. For the same reason, we believe this Port and its Port Authority need to be especially careful in allocating costs amongst the various users of the Port. For example, in the testimony given in the case one of the Port Commissioners states that the Port may well assess higher costs for "marine-related services" rendered by the Port. We would be remiss if we did not caution that such a generalized approach is the cause of the problem in the first instance. There needs to be a clear and precise definition of "marine-related" services as they relate to the users under the tariff and a correlation of the benefit of the services to the cost to the users. The correlation cannot unduly or unjustly discriminate amongst the users whether or not they are local or non-local.

In view of the above, it is held that the assessments made by the tariff involved herein are unlawful under the Shipping Acts as set forth above, and that once the decision in this proceeding becomes final the Port will immediately cease and desist assessing the unlawful fees.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 83-11
PRUDENTIAL LINES, INC.

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE

September 24, 1986

Notice is given that no appeal has been taken to the August 22, 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

NO. 83-11

PRUDENTIAL LINES, INC.

v.

WATERMAN STEAMSHIP CORPORATION

COMPLAINT DISMISSED

Finalized September 24, 1986

Despite being afforded two opportunities to show that it wished to litigate its complaint, complainant Prudential Lines, Inc. has failed to take either opportunity although it had been advised that failure to show any interest in continuing its complaint case could lead to dismissal of the complaint. Consequently, as I explain below, I must presume that Prudential has lost interest in the case and must dismiss its complaint with prejudice for want of prosecution.

This case began with the filing of a complaint which was originally served on February 24, 1983, and, as amended, was served again on May 31, 1983. In the complaint, as amended, Prudential alleged that respondent Waterman Steamship Corporation had violated section 18(b)(1) of the Shipping Act, 1916, by loading cargo at North Atlantic ports in violation of an intermodal tariff which allegedly required Waterman to load cargo at South Atlantic ports and by issuing all-water bills of lading for such cargo instead of intermodal bills of lading. Prudential asked for damages and other relief. The case proceeded to an evidentiary hearing which concluded on December 2, 1983, and a post-hearing briefing schedule was established at the end of the hearing. However, because Waterman had filed a petition for reorganization under the Bankruptcy Code, the proceeding had to be stayed pending conclusion of the bankruptcy proceedings, as required by law. See 11 U.S.C. sec. 362(a)(1).

In the latter part of June of this year, the press reported that the bankruptcy proceedings were about to terminate with the approval of a reorganization plan, which approval would become final on June 30, 1986. See *Journal of Commerce*, issues of June 20 and 24, 1986; Order Confirming Second Amended Joint Plan of Reorganization, *In re Waterman Steamship Corp.*, Case No. 83B 11732, U.S. Bankruptcy Court for the S.D.N.Y., June 20, 1986. After seeing these public announcements of the termination of the bankruptcy proceedings, I wrote the parties to inquire as to whether they wished to resume litigation. See letter dated June 25, 1986. I instructed the parties to inform me by July 25 as to whether they desired to pursue

this case and further advised them that if I heard nothing, I would presume that Prudential had no desire to prosecute its complaint, in which event I would take steps to terminate the proceeding. See letter cited at 2.

Having received no response from either party, I next issued an Order to Show Cause on July 29, 1986. Although Prudential had failed to reply to my earlier letter and although I had specifically warned Prudential that such failure could lead to termination of this proceeding, I gave Prudential another opportunity to explain its apparent lack of interest in prosecuting its complaint. I took this step because the policy of the law is to hear cases on their merits and not to dispose of controversies summarily on account of technicalities. I cited numerous authorities for this principle. See Order to Show Cause at page 3. However, there is a limit to this policy, and if a complainant fails to prosecute its complaint, continually ignores rulings, or is otherwise guilty of unexcused dilatoriness in lengthy cases, dismissal of the complaint with prejudice is an accepted sanction. See *Link v. Wabash Railroad Co.*, 320 U.S. 626, 629-631 (1962); *Consolidated Express, Inc. v. Sea-Land Service, Inc., et al.*, 19 F.M.C. 722, 724 (1977); *Ace Machinery Co. v. Hapag-Lloyd A.G.*, 16 SRR 1531 (1976); *Dismissal for Failure to Prosecute*, 20 A.L.R. Fed 488 (1974); 9 Wright and Miller, *Federal Practice and Procedure*, sec. 2370; Federal Rule 41(b), 28 U.S.C.A.

Despite the above efforts to elicit a response from Prudential so that this case could proceed to conclusion in the normal way, Prudential has remained totally silent. Perhaps its silence can be explained by the fact that its counsel and Director of Traffic, who had been conducting the litigation, are no longer with the company or that the company is itself in the midst of bankruptcy proceedings. Whatever the reason, Prudential has failed to prosecute its complaint and has shown no interest in keeping the case alive. Moreover, I have no authority to order Prudential to litigate against its wishes. See *Roberts Steamship Agency, Inc. v. The Board of Commissioners of the Port of New Orleans and Atlantic and Gulf Stevedores, Inc.*, 21 F.M.C. 492 (1978).

In view of the above situation, there is no basis for me to retain this complaint on the docket and dismissal with prejudice is warranted. Accordingly, the complaint is dismissed with prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-2

AGREEMENT NO. 203-010633

ORDER OF DISCONTINUANCE

September 26, 1986

This proceeding was instituted on January 18, 1985 to determine whether Agreement No. 203-010633 (Agreement) between Flota Mercante Grancolombiana, S.A. and Andino Chemical Shipping Company (Proponents) was an agreement between ocean common carriers subject to section 4 of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. §1703. The Initial Decision concluded that Agreement No. 203-010633 was not an agreement among ocean common carriers and thus was not subject to sections 4, 5, 6 and 7 of the 1984 Act, 46 U.S.C. app. §§1703-6. Proponents challenged this conclusion in Exceptions to the Initial Decision, to which protestants to the Agreement replied.

By Petition filed September 5, 1986, all of the parties to this proceeding have now joined to request that the proceeding be terminated. The reason for the request is that P.L. 99-307, signed into law on May 19, 1986, removed "chemical parcel tanker[s]" from the definition of "common carrier" in section 3 of the 1984 Act, 46 U.S.C. app. §1702. Additionally, by letter of September 16, 1986, Proponents have advised that they wish to withdraw Agreement No. 203-010633 concurrently with the granting of the joint Petition.

Because P.L. 99-307 has left Proponents with no basis upon which to argue that the Agreement is subject to the 1984 Act, there no longer appears to be any reason for the Commission to review the Initial Decision.

THEREFORE, IT IS ORDERED, That the Joint Petition Of All Parties To Terminate Proceeding is granted.

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-3

MODIFICATIONS TO THE TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN AGREEMENT, THE JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE AGREEMENT, AND THE JAPAN-PUERTO RICO AND VIRGIN ISLANDS FREIGHT CONFERENCE AGREEMENT

A provision in the Conferences' agreements which prohibits the exercise of independent action on tariffed rate or service items during the pendency of service contract negotiations affecting those items is found to be contrary to section 5(b)(8) of the Shipping Act of 1984, and ordered to be deleted from the agreements.

A provision in the Conferences' agreements which withdraws any adopting independent action whenever the originating independent action is withdrawn prior to its effectiveness is found to be contrary to section 5(b)(8) of the Shipping Act of 1984, and ordered to be deleted from the agreements or modified to ensure that an adopting independent action stands on its own unless the adopting member line voluntarily advises otherwise.

Charles F. Warren, George A. Quadrino, and Benjamin K. Trogdon for the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-Puerto Rico and Virgin Islands Freight Conference.

Stanley O. Sher and Marc J. Fink for the Asia North America Eastbound Rate Agreement.

Robert A. Peavy for the U.S.-Flag Far East Discussion Agreement.

Douglass H. Ginsburg, Charles F. Rule, James R. Weiss, Craig W. Conrath, and Alan L. Silverstein for the U.S. Department of Justice.

Aaron W. Reese and William D. Weiswasser for the Bureau of Hearing Counsel.

REPORT AND ORDER

September 30, 1986

BY THE COMMISSION: (EDWARD V. HICKEY, JR., *Chairman*; JAMES J. CAREY, *Vice Chairman*; THOMAS F. MOAKLEY and EDWARD J. PHILBIN, *Commissioners*; FRANCIS J. IVANCIE, *Commissioner*, concurring in part and dissenting in part)*

PROCEEDING

The Commission instituted this proceeding by Order served January 22, 1986, directing the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-Puerto Rico and Virgin Islands Freight Conference (Conferences or Respondents) to show cause why certain provisions in their respective agreements dealing with a member

* Commissioner Ivancie's opinion concurring in part and dissenting in part is attached.

line's right of independent action (IA) should not be found to be contrary to section 5(b)(8) of the Shipping Act of 1984 (the Act or the 1984 Act), 46 U.S.C. app. § 1704b)(8). At issue are provisions in the respective agreements of the Conferences which: (1) prohibit the exercise of independent action on tariffed rate or service items during the pendency of service contract negotiations affecting those items; and (2) automatically withdraw any adopting independent action whenever the originating independent action is withdrawn prior to its effectiveness.

The Commission's Order to Show Cause named the Commission's Bureau of Hearing Counsel (Hearing Counsel) as a party in this proceeding and further directed any person having an interest and desire to intervene to file an appropriate petition pursuant to Rule 72 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.72.

Petitions for leave to intervene were timely filed by the Asia North America Eastbound Rate Agreement (ANERA), the U.S.-Flag Far East Discussion Agreement (Agreement 10050), and the United States Department of Justice (DOJ).¹ On April 1, 1986, these petitions for leave to intervene were granted. See "Order Granting Petitions for Leave to Intervene and Amending Order to Show Cause."

On March 27, 1986, the Conferences filed a memorandum of law (Conferences' Memorandum) and a statement of R. D. Grey, the Conferences' Chairman (Grey Statement), in support of the agreement provisions in question. ANERA filed a one-page document indicating that it had nothing further to add in support of the Conferences' position.

On April 28, 1986, Hearing Counsel filed a reply memorandum (Hearing Counsel Memorandum) together with an affidavit of Roland E. Ramlow, Jr. (Ramlow Affidavit). The Department of Justice filed a reply memorandum (DOJ Memorandum). Both Hearing Counsel and DOJ argue that the agreement provisions in question are unlawful.

On May 13, 1986, the Conferences filed a response to the memoranda of Hearing Counsel and DOJ (Conferences' Response) together with a supplemental supporting statement of R. D. Grey (Grey Supplemental Statement). Agreement 10050 filed a response to the DOJ Memorandum (Agreement 10050 Response).²

¹ On April 28, 1986, the United States Department of Transportation submitted a document styled "Comments Amicus Curiae of the United States Department of Transportation." The Commission declined to accept this document inasmuch as the submission failed to comply with the procedural schedule established in the Order to Show Cause and was submitted without obtaining the leave of the Commission. See "Order Granting Motion to Reject Comments Amicus Curiae of the United States Department of Transportation," served June 3, 1986.

² The Agreement 10050 Response urges the Commission to avoid the allegedly unnecessarily sweeping pronouncements advocated by DOJ and contends that the Interstate Commerce Commission (ICC) precedents cited by DOJ are not relevant to ocean shipping regulation.

BACKGROUND

At the time that this proceeding was instituted, Article 13(a) of the Conferences' agreements restricted the right of independent action during the pendency of service contract negotiations for an indefinite period of time. Subsequent to the initiation of this proceeding, on March 31, 1986, the Conferences filed amendments which modified Article 13(a) of their agreements by limiting the restriction on independent action to a maximum 30-day negotiation period. By Order served April 17, 1986, the Commission made these amendments part of the record in this proceeding. These amendments have since become effective.

Article 13(a) as amended and currently effective and as relevant to this proceeding provides as follows:

Independent action may not be taken by any member in the case of any matter, including a rate, charge, or service item, associated with negotiating or providing any service contract, including time-volume contract or other similar form of contractual arrangement covering the carriage of cargo in the trades as defined in this Agreement, provided that any member shall not be prevented from exercising independent action with immediate effect in connection with any negotiation which has continued for more than 30 consecutive calendar days. The term "negotiation" refers to the process of deliberations between the Conference and a shipper or shippers' association for the purpose of entering into a service contract pursuant to the authority contained in section 8(c) of the said Act. Any such negotiation shall be deemed to have commenced from the day either the Conference, shipper or shippers' association initiates a written request to the other to enter into a service contract, and to have terminated on the day the service contract is filed with the Commission. The date of commencement and the date of termination shall be promptly advised to the members by the Conference Chairman.

Article 13(b) of the Conferences' agreements provides that an adopting independent action is automatically withdrawn if the initiating independent action is withdrawn during the notice period. Article 13(b), as relevant to this proceeding, provides as follows:

If at any time during the notice period the member should elect to withdraw or modify its independent action, it shall advise the Chairman in writing and the Chairman shall not include the rate or service item in the Conference tariff or tariffs for that member and shall not so include it for any other member.

DISCUSSION

I. Prohibition on the exercise of independent action during service contract negotiations

The Conferences construe Article 13(a) to “. . . deny the exercise of independent action only upon a rate or service item which is the subject of an on-going contract negotiation up to a maximum period of 30 calendar days.” (Conferences’ Memorandum at p. 1). The Conferences explain that if it appears that a contract will not materialize and the contract negotiations are terminated in less than 30 days, then the restriction on independent action would correspondingly be terminated.

The Conferences state that they do not seek to prohibit their members from taking independent action on tariffed items for commodities which are also subject to an executed service contract. Nor do the Conferences argue that they may prohibit independent action on a tariff rate on a commodity shipped under a service contract for any shipper other than the shipper that is a party to the service contract. Rather, they contend that Article 13(a) allows the Conferences to prohibit independent action with respect to a shipper who has signed as a party to a service contract or when the conference is negotiating such a contract. (Conference’s Response at p. 13).³

The Conferences acknowledge that section 5(b)(8) of the Act requires all conference agreements to provide for a member’s right of independent action on any rate or service item required to be filed in a tariff. They note, however, that section 8(c) of the Act, 46 U.S.C. app. § 1707(c), authorizes conferences to enter into service contracts with shippers and that section 4(a)(7) of the Act, 46 U.S.C. app. § 1703(a)(7), allows conferences to regulate the use of service contracts by conference members. The Conferences assert that section 5(b)(8) is inconsistent with sections 8(c) and 4(a)(7). (Conferences’ Memorandum at p. 10). These allegedly inconsistent provisions, it is argued, must be harmonized in order to give maximum effect to each within the overall scheme of the 1984 Act. The Conferences therefore conclude that the Commission should interpret the

³The Conferences state that the purpose of this provision is to preserve their ability to negotiate viable service contracts. In enacting such provisions the Conferences sought to avoid “. . . a situation where a member could take advantage of its special knowledge and on the basis thereof, during the negotiation, tender more favorable rates, terms or conditions to the shipper with whom the negotiation is taking place, for the purpose of undermining the negotiations and capturing the cargo for itself by taking independent action on the commodity or commodities which are the subject of the negotiation.” (Grey Statement at p. 12). Two such instances are cited, both involving the Trans-Pacific Freight Conference of Japan (TPFCJ). In March of 1985 during TPFCJ negotiation on a one-year service contract for the carriage of engine assemblies, transaxles and transmissions, a conference member is said to have taken independent action and published time-volume rates on these commodities. The Conferences believe that TPFCJ lost this contract because of the independent action taken. (Grey Statement at pp. 14-15). In October of 1985, negotiation by TPFCJ on an all-water intermodal contract with a shipper of tires and tubes allegedly was disrupted by the independent action taken by a member during the negotiation period. The result was that the conference contract covered only 50,000 revenue tons instead of the proposed 130,000 revenue tons. (Grey Statement at pp. 15-16).

Act in such a way as to allow a restriction on independent action, such as that contained in Article 13(a), during service contract negotiations.

Hearing Counsel construes Article 13(a) as prohibiting “. . . independent action on existing conference tariff rates if a service contract is being negotiated for the commodities covered by those rates.” (Hearing Counsel Memorandum at p. 1). Similarly, the Department of Justice construes Article 13(a) as prohibiting a conference member “. . . from taking independent action on any rate or service item in a tariff that is associated with the conference’s negotiating or providing a service contract.” (DOJ Memorandum at p. 3).

Hearing Counsel argues that the two cited examples of alleged interference in TPFCJ service contract negotiations merely show that independent action was used by a member line to vigorously compete and that a shipper was able thereby to obtain more favorable terms. Hearing Counsel contends that these two examples do not show that the Conferences have suffered “insurmountable harm.” Hearing Counsel points out that during calendar year 1985 TPFCJ entered 186 service contracts and JAGFC entered 88 service contracts. (Ramlow Affidavit). Hearing Counsel concludes that the Conferences’ problem would seem to be substantially overstated.

Both Hearing Counsel and DOJ disagree with the Conferences’ assertion that the Act’s independent action and service contract provisions are “plainly inconsistent.” Hearing Counsel states that these provisions may be “in tension” but that this is part of the Act’s overall approach. DOJ states that there is no inherent conflict between these two features of the Act. DOJ points out that these provisions deal with two distinct concepts: service contracts and tariff rates. DOJ argues that these two means of providing service are fully consistent with one another. According to Hearing Counsel and DOJ, there is no need to resolve any alleged inconsistency.

DOJ also takes issue with what it describes as the “unwarranted premise” of the Conferences’ argument, namely that the Act permits a conference to prohibit its members from taking independent action on a tariff rate for commodities subject to an executed service contract. DOJ argues that this premise is wrong and that it cannot be extended to service contract negotiations.

Article 13(a) of the Conferences’ agreements restricts for a period of up to 30 days, a member’s right of independent action on a tariff rate or service item if such an item is the subject of service contract negotiation by the Conferences. The Conferences all but concede that such a restriction on a member’s right of independent action is not permitted by the language of section 5(b)(8). However, they argue against a literal reading of section 5(b)(8). They assert that there is a plain inconsistency between the independent action and service contract provisions of the Act. In order to fully preserve the Conferences’ ability to enter into service contracts, they argue that section 5(b)(8) should be interpreted to allow restrictions on IA during a 30-day negotiation period. Otherwise they contend that the

statutory scheme will be upset. The issue therefore is whether the independent action and service contract provisions of the Act are plainly inconsistent. If no such inconsistency exists, then the restriction on the right of independent action in Article 13(a) would appear, on its face, to be contrary to section 5(b)(8) of the Act.

The Shipping Act of 1984 continues a system of common carriage of cargo pursuant to publicly filed tariffs. Under this system of tariffed carriage, a common carrier or conference of carriers offers its transportation services to the shipping public at large. With the exception of certain specifically named commodities, section 8(a) of the Act requires that all rates, charges, conditions and other terms of such service be published in a tariff and filed with the Commission. An independent common carrier, of course, maintains its own individual tariff. Conferences of ocean common carriers, on the other hand, file a conference tariff which sets forth the rates, charges and other terms of service which have been collectively agreed upon.

The new feature under the 1984 Act in the system of tariffed service is the mandatory right of independent action. Section 5(b)(8) provides that a member of a conference retains a right to take independent action with respect to those collectively agreed to rate or service items that are required by section 8(a) to be filed in a tariff. Conference agreements must contain a provision which provides for such a right. A conference member may be required to give the conference notice of its independent action and to observe a waiting period of up to 10 days before the independent action becomes effective. No other conference-imposed restrictions on the exercise of the right of independent action on tariffed rate or service items are authorized by section 5(b)(8).

At the same time, the 1984 Act establishes for the first time a system of quasi-contract carriage of cargo. Section 8(c) authorizes service contracts between an ocean common carrier or a conference and a shipper or shippers' association. While the essential terms of a service contract must be made available to the general public in tariff format, a service contract is essentially a contract between carrier and shipper which involves mutual commitments by both parties and which is enforced as any other commercial contract by an action in an appropriate court.⁴

An independent ocean common carrier's section 8(c) authority to enter into service contracts is not restricted. When an ocean common carrier becomes a member of a conference, however, that section 8(c) authority becomes subject to conference control. Section 4(a)(7) authorizes a conference to regulate the use of service contracts by the conference and by its members. Conferences may agree to prohibit entirely the use of service contracts, to offer service contracts only by the conference or to allow individual conference members to offer their own service contracts.

⁴Service contracts are, of course, subject to certain statutory requirements as well as other conditions that the Commission may impose consistent with the statute.

Tariffed service and service contracts are distinct ways of providing ocean transportation services under the 1984 Act. Each has its own separate status under the Act. One does not take precedence over the other. There is nothing in the language of the Act which in any way supports the argument that there is an inconsistency between tariffed service by a conference subject to a mandatory right of independent action and service pursuant to a service contract which the conference may regulate.

The Conferences argue that maximum effect should be given to all provisions of the Act. The Conference's interpretation of the Act, however, would subordinate the right of independent action on tariffed items to the authority of a conference to regulate service contracts. There is simply no basis in the language of the statute for such a limitation of the right of independent action.

Because the language of the statute is clear, resort to legislative history is not necessary. Nevertheless an examination of the legislative history supports the interpretation of the Act given above. The legislative history indicates that the authority to enter into service contracts under section 8(c) and to regulate service contracts under section 4(a)(7) cannot be interpreted to allow restrictions on the right of independent action on tariffed items guaranteed by section 5(b)(8). The Conference Report states that:

The independent action section (5(b)(8)) of the bill requires that each conference provide for independent action on rates or service items required to be filed in a tariff under section 8(a) of the bill.

H.R. Rep. No. 600, 98th Cong., 2d Sess. 29 (1984). The Conference Report reiterates what is expressly stated in the statute, *i.e.*, that if an item is required by section 8(a) to be filed in a tariff, then a conference agreement must provide for independent action.

The Conference Report explains further that the reason why a mandatory right of independent action *on service contracts* is not required is because service contracts are not required by section 8(a) to be filed in a tariff:

Section 8(a) does not require that service contracts be filed in a tariff. Consequently, section 5(b)(8) does not require conferences to permit their members a right of independent action on service contracts.

Conference Report at p. 29. The Conference Report thus distinguishes between tariffed service and service contracts with respect to the right of independent action. Because service contracts are not required to be filed under section 8(a), a conference need not provide for a right of independent action *on service contracts*.

The Conference Report explains that although an ocean common carrier is authorized by section 8(c) to use service contracts, that section 8(c) authority may be circumscribed if the ocean common carrier is a member of a conference:

The conferees agree that section 8(c) of the bill, which authorizes the use of service contracts, cannot be read as undermining the authority of a conference to limit or prohibit a conference member's exercise of a right of independent action on service contracts.

Conference Report at p. 29. Thus it is the section 8(c) authority to enter into service contracts that cannot be used independently by a conference member to "undermine" the authority of the conference to limit or prohibit a conference member's use of service contracts. This passage from the Conference Report clarifies the interrelationship between the section 8(c) power to enter into service contracts and the section 4(a)(7) authority of conferences to regulate service contracts. A conference may regulate a member line's use of service contracts.⁵ However, a conference may not place restrictions not found in the Act on the exercise of independent action on *tariffed items*.

The Conferences therefore misread this passage from the legislative history when they rely on it as support for their position that the right of independent action on tariffed items may be restricted. The Conference Report, for example, states that:

. . . conference agreements must permit independent action on time-volume rates in section 8(b), since time-volume rates must be filed under section 8(a).

Conference Report at p. 29. This statement is most significant because it points out that time-volume rates, which bear some similarities to service contracts, are nevertheless subject to independent action because those rates must be filed under section 8(a).

The legislative history thus illuminates and supports the distinction between a mandatory right of independent action on tariffed rate or service items and the power to enter into service contracts subject to conference regulation and control. There is nothing in the legislative history that would support the view that independent action rights on tariffed items may be suspended for a period of time during which a conference is negotiating a service contract. To follow the interpretation of the Act advanced by the Conferences would be to subordinate independent action rights on

⁵The following passage from the Conference Report explains the authority which a conference has under section 4(a)(7) to regulate the use of service contracts:

The net result is that a member of a conference does not have a statutory right to enter into a service contract in violation of the conference agreement. Under section 4(a)(7), the conference agreement may prohibit its members from entering into service contracts or it may allow them to enter into a service contract subject to such conditions as the conference may establish. Thus, while a conference agreement is not required to provide each member a right of independent action on service contracts, neither is it prohibited from doing so.

Under the bill, a conference may enter into a service contract. If it does so, the individual members do not, under the bill, have a right of independent action to deviate from that service contract unless the conference agreement so provides.

Conference Report at pp. 29-30.

tariffed items to conference authority to enter into and regulate service contracts and would read into the Act a restriction on the right of independent action that is not supported by the language of the Act or its legislative history.

As construed by the Conferences, Article 13(a) of their agreements prohibits a member line from exercising independent action with respect to a shipper who has signed as a party to a service contract or when the conference is negotiating such a contract. Such a prohibition unlawfully restricts the right of a member line to take independent action on tariffed rate or service items at any time for any shipper. The limitation of the prohibition on IA to a 30-day negotiation period does not cure the unlawfulness of this provision. Accordingly, the Conferences will be required to delete this provision from their agreements.

II. *Withdrawal of adopting independent action*

Article 13(b) permits a member line to adopt an initiating member's independent action as its own with the same or a later effective date. Article 13(b) allows the initiating member, within the 10-day notice period, to withdraw its independent action, in whole or in part, with the effect of causing the automatic withdrawal of any adopting independent actions which may have been taken in response to the original filing. The Conferences explain that the purpose of this provision is to enable the originating member to retain full control over its own independent action as well as the other members' responses to that action.

The Conferences argue that the sole purpose of the adopting IA provision in section 5(b)(8) of the Act is to allow other members of a conference to remain competitive with the member initiating independent action. Allegedly, the withdrawal of adopting IA's has not created any problems for adopting carriers and the Conferences have not received any complaints from shippers regarding misreliance on an adopted IA rate or service item. The Conferences argue that cancellation of this prohibition would have an inhibiting effect on the taking of IA because once IA was taken the originator would be locked in if another member adopted that rate. (Grey Statement at pp. 19-23).

The Conferences submit that the "plain meaning" of section 5(b)(8) is that the existence and effectiveness of an adopting independent action is wholly dependent on the existence and effectiveness of the initiating independent action. An adopting action, it is argued, has no separate existence of its own and therefore ceases to exist when the originating IA is withdrawn.

The Conferences contend that the language of section 5(b)(8) supports this position. The Conferences state that " * * * there is no dispute [between the parties to this proceedings] over the meaning of the term 'adopt'

in section 5(b)(8).” (Conferences’ Response at pp. 7–8).⁶ They argue, however, that merely defining the term “adopt” does not establish the independence of adopting IA from that of the originating IA, as contended by Hearing Counsel and DOJ.

While denying any conclusive significance of the definition of the term “adopt,” the Conferences rely heavily on the language in section 5(b)(8) which states that an adopting IA may become effective “on or after * * * [the] effective date” of the originating independent action. They construe section 5(b)(8) to mean that if the originating IA is withdrawn prior to its effectiveness, then there is no “effective date” for the adopting IA. The Conferences state:

[Section 5(b)(8)] does not condition effectiveness of matching filings upon the date on which the original filing *could have become effective*. Nor does it measure effectiveness from the date the original *notice* of independent action is filed. Instead, the effectiveness of any matching action is tied directly to the ‘effective date’ of the originating carrier’s independent action. (Conferences’ Memorandum at pp. 14–15). (Emphasis in original).

The Conferences conclude that when an originating action is withdrawn, there is no “effective date” and therefore no date on which an adopting action may become effective.

The Conferences assert further that the legislative history “* * * reveals no intention by Congress to set out any separate rights for following carriers other than the right to meet the independent rate or service item of the originating carrier ‘on or after’ the effective date of the original action.” (Conferences’ Memorandum at p. 16). Moreover, the Conferences note that the right of adopting IA as provided for in the 1984 Act, is more restricted than in earlier bills introduced in the legislative process. They conclude that this evidences a Congressional intent to restrict adopting independent action.

The Conferences point out that various versions of H.R. 1878 adopted by the Merchant Marine and Fisheries Committee, by the Judiciary Committee and, jointly by both Committees, provided that once independent action was taken by one member, a conference was required to publish the new rate or service item “for use by any member.” Noting further that instead of this provision which called for a single publication in the conference tariff for use by all members, Congress adopted a provision which requires other members to submit filings that adopt the originating carrier’s filing, the Conferences argue that if any conclusion can be drawn from this legislative history, “* * * it is that placing increased burdens

⁶The Conferences accept either the Random House Dictionary definition, *i.e.*, “to make one’s own by selection or assent,” or the second meaning of “adopt” listed in Webster’s Third New International Dictionary of the English Language (Unabridged), G. & C. Meriam & Co., Springfield (1964) at p. 24, *i.e.*, “to take up or accept esp. as a practice or tenet often evolved by another.” (Conferences’ Response at p. 8)

on matching carriers and making specific reference to the effective date of the original action confirms Congress' intention not to permit matching actions to take effect in the absence of the effectiveness of the original filing." (Conferences' Response at p. 10).

Both Hearing Counsel and DOJ argue that an adopting independent action once taken has an identity apart from the initiating independent action and should not be automatically revoked when the original independent action is withdrawn.

Hearing Counsel and DOJ argue that the use of the term "adopt" in section 5(b)(8) supports their position that adopting IA is a separate and independent action in its own right. Hearing Counsel states that: "The language chosen by Congress compels the conclusion that a matching independent action is not dependent on the original action but, rather, is a separate thing with independent existence." (Hearing Counsel Memorandum at p. 5).⁷ DOJ states that: "When a member chooses to adopt an independent action, it becomes the adopter's own independent action. The Act itself recognizes this by using the word 'adopt' in section 5(b)(8), a word the dictionary meaning of which in this context is to 'make one's own by selection or assent.'" (DOJ Memorandum at p. 12).⁸

Hearing Counsel contends that the reference to the "effective date" does not support the Conferences' conclusion that adopting action is dependent upon the effectiveness of the original IA filing. Hearing Counsel explains the reference as follows: "The date of the original independent action simply determines when the following action comes into effect and there is nothing in the statute to indicate that the latter's effectiveness is intended to depend on the former's not having been withdrawn." (Hearing Counsel Memorandum at p. 5). Finally, Hearing Counsel argues that earlier versions of H.R. 1878 do not support the conclusion that adopting action is dependent on the originating IA.

Hearing counsel argues that the present text of Article 13(b) is unlawful but could be made lawful if it were modified to allow the adopting member line the option to continue or rescind its adopting action. DOJ also maintains that the adopting member line should be able to choose whether to retain or withdraw its adopting independent action.

Article 13(b) of the Conferences' agreements provides that when the initiator of independent action withdraws that action prior to its effective date, then the IA's of any other member lines that have adopted the original independent action are also automatically withdrawn. The issue in this proceeding is whether the adopting independent action provided for in section 5(b)(8) of the Act is fully equivalent to originating inde-

⁷ Hearing Counsel cites the first definition of "adopt" listed in Webster's Third New International Dictionary of the English Language: "to take by free choice into a close relationship previously not existing esp. by formal legal act."

⁸ The definition cited by DOJ is taken from the Random House Dictionary of the English Language, Unabridged Edition (1971).

pendent action or is subject to the control of the originating IA during the period prior to the effectiveness of the originating independent action.

Section 5(b)(8) provides in relevant part that:

Each conference agreement must—

(8) provide that any member of the conference may take independent action on any rate or service item required to be filed in a tariff . . . and that the conference will include the new rate or service item in its tariff for use by that member . . . and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date . . .

Section 5(b)(8) describes two circumstances in which a conference member may exercise its statutory right of independent action. A member line may initiate its own independent action by notice to the conference. The conference may require a waiting period of up to 10 calendar days before the independent action becomes effective at which time the conference is required to publish the item in its tariff for use by the member.

Section 5(b)(8) also provides that a member line may adopt the independent action of another. A member line exercising adopting IA must also notify the conference of its action. The adopting IA becomes effective on or after the effective date of the originating independent action.

The language of section 5(b)(8) supports the view that adopting independent action is not contingent upon originating independent action. The term "adopt" signifies an action whereby a following member line takes the action of the initiating member line and makes it its own without any connotation of its having been another's.⁹ The use of the term "adopt" therefore suggests that following IA has the same independent status as the originating IA and is not contingent on the continuing effectiveness of the originating IA.

The parties have conflicting interpretations of the significance of the phrase "on or after its effective date" in section 5(b)(8). The Conferences argue that this language means that a following IA can become effective only if the originating IA actually becomes effective. Hearing Counsel argues that the reference to "effective date" merely establishes the date on which following IA is to become effective.

⁹The parties appear not to dispute the meaning of the term "adopt" although they offer various definitions of the term such as "to take up or accept as a practice," or "to make one's own by selection or assent," or "to take by free choice . . ." The 12-volume Oxford English Dictionary lists seven definitions of the term "adopt." The relevant definitions are definition 4, "To take up (a practice, method, word, or idea) from some one else, and use it as one's own; to embrace, espouse," and definition 5, "To take (a course, etc.) as one's own without the idea of its having been another's, to choose for one's own practice." Oxford English Dictionary, Oxford University Press, London (1933), Vol. 1 at p. 124.

Black's Law Dictionary offers four definitions of the term "adopt." The relevant one would appear to be the first one listed, *i.e.*, "to accept, appropriate, choose, or select; to make that one's own (property or act) which was not so originally." Black's Law Dictionary, Revised Fourth Edition, West Publishing Co., St. Paul (1968) at p. 70.

The reference to "effective date" does not appear to be intended to be a restriction on the right of adopting independent action. Rather, it would appear to be merely the means of preserving the competitive parity of originating and following independent actions.

The legislative history relevant to adopting IA is sparse and subject to conflicting interpretations. Various versions of H.R. 1878 provided that an independent action would be published in the conference tariff "for use by any member." The fact that Congress ultimately required other member lines to indicate their "adoption" of the originating IA, however, does not necessarily support the position that a following IA may become effective only if the originating IA does.

Finally, there is the question regarding the fundamental purpose of adopting IA. While in many instances adopting IA may be taken for the purpose of maintaining competitive parity with the originating IA, there is nothing in the language of the Act or its legislative history which would indicate that maintaining competitive parity is the exclusive purpose of adopting IA. A member line adopting the IA rate originated by another may have many reasons for doing so. One of them might be that a potential shipper has expressed an interest in the rate. Whether or not a potential shipper may be relying on an anticipated rate, however, is not determinative. The key point is that there is no indication of any legislative intent to limit the right of adopting IA only to those situations where the following member line wishes to remain on the same competitive footing as the originating member line.

The decision to take adopting independent action is a unilateral action by a member line. There is nothing in the language of the Act or its legislative history which would indicate that such a unilateral decision was intended to be subject to the control of the originating member line prior to an item's effectiveness. The decision to retain or withdraw an adopting IA should also be considered the unilateral independent decision of the adopting member line. It would appear that the right of adopting independent action is a completely independent action that, if taken prior to the withdrawal of the originating IA, continues to exist regardless of the action of the initiating member. Such a decision may not be burdened by any procedure which deems or presumes an adopting action to be withdrawn and places an obligation on the adopting member line to reaffirm its action.

The exercise of adopting independent action should therefore be treated as having the same status and effect as the exercise of originating independent action, unless there is some basis for not doing so. The Conferences have the burden to come forward and show that such a basis exists. No basis for limiting the exercise of adopting independent action has been established in this proceeding. Inasmuch as the cited language in Article 13(b) of the Conferences' agreements has not been demonstrated to be in conformity to the requirements of section 5(b)(8) of the Act, this provi-

sion must be deleted or, alternatively, modified to ensure that an adopting action stands on its own unless the adopting line voluntarily and unilaterally advises otherwise.

The alternative to modify Article 13(b) would make this provision consistent with section 5(b)(8) inasmuch as it would preserve the adopting member line's option in such cases. The Conferences state that their agreements already provide for the withdrawal of initiating or adopting actions and contend that such a modification is "tantamount to a rejection of the challenged portion of Article 13(b)." (Conferences Response at p. 11). The preservation of such an option, however, is essential to maintaining the independence of adopting action. Moreover, the adopting member is the person who is fully aware of the circumstances and purpose for taking independent action. If the sole purpose of the adopting member is to preserve competitive parity with the originating member line, then the adopting member may elect not to maintain its action. On the other hand, if the adopting member line has a reason to maintain its action, it may elect to keep its adopting IA and thereby avoid the inefficiency of being required to refile its action as an originating independent action.

CONCLUSION

The Conferences have not demonstrated the lawfulness of the provision in Article 13(a) of their respective agreements which prohibits a member line from taking independent action during service contract negotiations. The Conferences therefore will be required to delete this provision from their agreements.

The Conferences also have not adequately demonstrated the lawfulness of the adopting IA provision in Article 13(b) of their agreements. The Conferences therefore will be required to delete the language in question from their agreements or to modify their agreements so as to ensure that the adopting action of a member line is maintained unless the adopting member voluntarily advises otherwise.

Finally, we note that the Order to Show Cause indicated that a final decision in this proceeding would be issued by September 24, 1986. This date has been slightly extended because the complexity of the issues in this proceeding has required additional time for analysis and resolution.

THEREFORE, IT IS ORDERED, Pursuant to section 11(c) of the Shipping Act of 1984, That the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-Puerto Rico and Virgin Islands Freight Conference, on or before the 60th day after the date of this Report and Order, shall each file an amendment with the Secretary which deletes the provision in Article 13(a) of their respective agreements prohibiting the exercise of independent action during service contract negotiations;

IT IS FURTHER ORDERED, That the Trans-Pacific Freight Conference of Japan, the Japan-Atlantic and Gulf Freight Conference, and the Japan-

Puerto Rico and Virgin Islands Freight Conference, on or before the 60th day after the date of this Report and Order, shall each file an amendment with the Secretary which deletes the provision in Article 13(b) of their respective agreements withdrawing an adopting independent action whenever the originating independent action is withdrawn prior to effectiveness or shall file an amendment which modifies Article 13(b) in accordance with this Report and Order;

IT IS FURTHER ORDERED, That if the amendments required by this order are not filed as required on or before the 60th day after the date of this Report and Order, then any agreement which does not fully comply shall be disapproved pursuant to section 11(c) by further order of the Commission; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

(S) JOSEPH C. POLKING
Secretary

Commissioner Ivancie, concurring in part and dissenting in part.

I fully concur in that portion of the Commission's Report and Order dealing with Article 13(a) of the conference agreements, which would restrict independent action on the subjects of ongoing service contract negotiations.

However, I am compelled to dissent from the second part of the decision, involving Article 13(b), which automatically withdraws adopting independent actions upon withdrawal of the originating independent action. I do not find Article 13(b) to violate section 5(b)(8) of the Shipping Act of 1984, and would not order its deletion from the conference agreements or its modification.

The majority's basic premise is that an adopting or following independent action "stands on its own" and by law cannot be presumed to be contingent upon an originating independent action. The language of the Shipping Act or its legislative history does not in my opinion dictate this conclusion. The very term "adopt" connotes that the action's relationship to the originating independent action is the critical aspect of the action.

The fundamental purpose of an adopting IA as I see it is to maintain parity with the originating IA. The majority argues that there may be "many reasons" behind a matching IA, such as "that a potential shipper has expressed an interest in the rate." (Report and Order, at 24). If this were the reason for a line's IA, however, it could and probably would file it as an *originating* IA, without needing to match or adopt another line's coincidentally identical rate action. The majority's decision, in declaring that matching IA's have an unattached life, seems to encourage a type of rate action which I do not believe was intended by the Shipping Act: a stand-on-its-own, non-contingent IA which is not subject to the notice period which section 5(b)(8) authorized the conferences to require for such IA's. The sole purpose of allowing adopting IA's to become effective on less than the conference's required notice period is to allow members to match other members' proposed rates in a timely fashion, not to provide an exception to the notice requirement so that a member line may satisfy a "potential shipper."

By choosing the "adopting" route, a member line is, in my opinion, notifying the conference that it wants to match the originating member's rate, *because of* the originating member's rate. Here, the conferences, which the members voluntarily join, have a rule stating that an adopting IA will be interpreted to be contingent on the effectiveness of the originating IA, and that it will be automatically withdrawn upon the pre-effective withdrawal of the originating IA. As all members are aware of this rule when they take their rate action, they have a choice of designating their IAs as original, non-contingent actions, using the required conference notice period, or as contingent, matching IA's, in which the effective date of the original may be matched irrespective of the conference's notice rule.

Such a system does no harm in my view to either the language or intent of the Shipping Act.

I find some minor consolation in the fact that the majority's decision states that the conference rule may be modified to give the adopting member line an option: the adopting IA will be presumed non-contingent (and therefore not automatically withdrawable by the conference), unless the line designates up front or indicates after the fact that its IA is contingent upon the effectiveness of the first IA. I could more easily support the presumption that an adopting IA is *contingent*, unless the member designates otherwise. The Commission Order unnecessarily imposes a burden on the individual member to affirmatively state what can already be reasonably inferred from its choice of the adopting procedure.

The language of section 5(b)(8) of the Act is less than explicit on the issue of the status of matching IAs, and the Act's legislative history is, as noted in the majority's decision, "sparse and subject to conflicting interpretations." (Report and Order at 23). I regret that rather than to allow the conferences to interpret and implement the statute in a reasonable way which appears to be working satisfactorily for them and their member lines, the Commission has opted for what I believe is an unnecessary, overly regulatory stance, unsupported by the statute and not responsive to any particular problems. The record contains no evidence of shipper complaints, and the proceeding attracted no industry comment which suggested there was disagreement with the conference rules. Within the conferences, there is no evidence that the will of member lines was being thwarted by the rule. The record, in fact, reflects the opposite. There are *no* apparent instances where, upon the conference's automatic withdrawal of adopting IAs, an adopting member line reestablished its rate by filing another independent action. (Statement of R.D. Grey, at 21.) This clearly indicates, I submit, that the conference rule is neither overreaching nor inaccurate in its presumption that matching IA's are for the purpose of meeting preceding IA's, and that the "domino"-type withdrawal of the former upon the withdrawal of the latter is the parties' actual intention.

The majority appears to be guided by a desire not to allow conferences to emasculate the mandatory independent action provisions of the Shipping Act. It is ironic that it is the majority's decision here that may well have an inhibiting effect. A member line may think twice about originating an IA now that its subsequent withdrawal is perhaps more likely, under the Commission's decision, to leave in place other "matching" rate actions, and with the benefit of reduced notice in the bargain.

I therefore respectfully dissent from that portion of the Commission's Report and Order which orders deletion or modification of the conferences' Article 13(b).

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-18

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE
AGREEMENT—POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF
1984

ORDER ADOPTING INITIAL DECISION

October 9, 1986

The Commission instituted this proceeding by Order of Investigation served on July 15, 1985. The Order called into question certain rate activities of the Transpacific Westbound Rate Agreement (TWRA or Agreement) lines in early 1985. The Commission set down for investigation issues raised under sections 10(a) (2)–(3) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. § 1709(a) (2)–(3), regarding the relationship between the TWRA lines' collective establishment and maintenance of minimum tariff and service contract rates, and the individual lines' right of independent action.

On August 29, 1986, Administrative Law Judge Seymour Glanzer issued an Initial Decision (I.D.).* The I.D. approves a settlement negotiated by the Bureau of Hearing Counsel and the carrier respondents, whereby the respondents will pay civil penalties totaling \$300,000 and also will take certain actions that are intended to compromise the issues involved in this investigation. Specifically, the respondents undertake to modify certain terms of the Agreement dealing with the relationship of independent action to minimum rates; to maintain a prescribed course of conduct that safeguards the members' right to take independent action from multi commodity minimum rates; to refrain for a stated period of time from establishing a minimum rate program, the purpose of which is revenue improvement or maintenance, if those rates are subject to a right of independent action; and to report to the Director, Bureau of Agreements and Trade Monitoring, any actions taken during that stated period that establish or modify minimum rates. No party filed exceptions to the I.D.

The Commission has determined to adopt the I.D. and approve the settlement negotiated by the parties. The terms of the settlement appear reasonable under the circumstances of this case. The parties have stipulated that the respondents' activities cited in the Order of Investigation are not continuing and in fact were terminated prior to the commencement of settlement

* Subsequent to issuing his I.D., Judge Glanzer became Director of the Bureau of Hearing Counsel. He has recused himself from any further participation in this proceeding.

discussions. It is therefore unnecessary to determine whether a cease and desist order should be issued against the respondents. Respondents have proposed to modify Article 5 of the TWRA to provide that any minimum rates adopted under the Agreement in the future shall remain subject to further adjustment or revocation under the Agreement's ratemaking processes, including its independent action provisions. This assures the integrity of independent action under the TWRA, and renders unnecessary any further investigation of whether the Agreement should be disapproved or modified because of possible violations by the member carriers of the independent action requirements of section 5 of the 1984 Act, 46 U.S.C. app. 1704.

As part of their offer of settlement, respondents also have committed not to establish any minimum rate programs designed to improve their revenues (with certain qualifications and exceptions). While this commitment strengthens the beneficial effects of the Agreement modification discussed above, the Commission notes that the commitment will expire on November 7, 1987. The basic legal issue in this investigation was whether an agreement among carriers to establish across-the-board minimum rates intended to improve revenues is inherently inconsistent with the free exercise of independent action and is therefore unlawful. While the Commission's approval of the settlement between the parties makes unnecessary a decision on this issue, a new attempt by the respondents to improve their revenues through broad minimums could revive the issue. The Commission therefore cautions the parties to the TWRA that any future minimum rate programs similar to those agreed to at Vancouver, B.C., in January 1985 will receive close scrutiny.

THEREFORE, IT IS ORDERED, That the Initial Decision is adopted; and

IT IS FURTHER ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

NO. 85-18

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE AGREEMENT—POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF 1984

Transpacific Westbound Rate Agreement, a Respondent, ordered to pay a civil penalty in the amount of \$300,000 (\$15,789.47 per Respondent member of that Agreement) and undertake other action pursuant to terms of an offer to settle an assessment proceeding seeking to determine whether said Respondents violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984.

H. Donald Harris, R. Frederic Fisher, John H. Riddle, Lawrence M. Minch and Harold E. Mesirow for Respondents Transpacific Westbound Rate Agreement, American President Lines, Ltd., The East Asiatic Company, Evergreen Marine Corp., Hanjin Container Lines, Ltd., Hapag-Lloyd Trans-Pacific Service, Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Korea Marine Transport Co., Inc., Lykes Bros. Steamship Co., Inc., Mitsui O.S.K. Lines, Ltd., A.P. Moller-Maersk Line, Neptune Orient Lines, Ltd., Nippon Yusen Kaisha, Ltd., Orient Overseas Container Line, Inc., Showa Line, Inc., United States Lines, Inc., Yamashita-Shinnihon Steamship Co., Ltd., and Zim Israel Navigation Co., Ltd.

Robert T. Basseches and David B. Cook for Respondent American President Lines, Ltd.

Stanley O. Sher and Marc J. Fink for Respondent A.P. Moller-Maersk Line.

Neal M. Mayer for Respondent Showa Line, Ltd.

Stuart R. Breidbart and Terry Spilsbury for Respondent Sea-Land Service, Inc.

Daniel W. Lenehan for Respondent United States Lines, Inc.

Jim J. Marquez, Rosalind A. Knapp, Diane R. Liff, Mary Bennett Reed, Michael B. Jennison, Robert J. Patton, Jr., and James P. Moore for the United States Department of Transportation, as amicus curiae.

Aaron W. Reese, Paul J. Kaller, and William D. Weiswasser as Hearing Counsel.

INITIAL DECISION¹ OF SEYMOUR GLANZER, ADMINISTRATIVE LAW JUDGE

Adopted October 9, 1986

This proceeding was instituted by Order of Investigation and Hearing (“Order”) served July 15, 1985, pursuant to section 11(c) of the Shipping Act of 1984, 46 U.S.C. app. § 1710, to determine whether the Transpacific Westbound Agreement (TWRA) and its member lines had engaged in certain

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).

activities in violation of sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984, 46 U.S.C. app. § 1709(a) (2) and (3). TWRA and its member lines were named Respondents. Appendix I, attached, is a list identifying each of the Respondents. The Bureau of Hearing Counsel was named a party to the proceeding. In particular the Order sought to determine whether the Respondents:

(1) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 (46 U.S.C. app. § 1709(a) (2) or (3)) by agreeing not to exercise independent action at levels below their minimum tariff rates, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984 (46 U.S.C. app. § 1704), or inconsistent with the independent action provisions of the Transpacific Westbound Rate Agreement as required by section 5(b)(8) of the Act (46 U.S.C. app. § 1704(b)(8));

(2) have violated section 10(a)(3) of the Shipping Act of 1984 by establishing and maintaining a program of minimum tariff rates in a manner inconsistent with the independent action provisions of the Transpacific Westbound Rate Agreement required by section 5(b)(8) of the Act;

(3) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 by agreeing on minimum rates applicable to service contracts between individual carriers, or combinations of carriers, and shippers, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984, or inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;

(4) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 by agreeing not to exercise independent action at levels below their minimum service contract rates, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984, or inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;

(5) have violated section 10(a)(3) of the Shipping Act of 1984 by maintaining a system of minimum service contract rates in a manner inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;

(6) have violated sections 10(a)(2) or 10(a)(3) of the Shipping Act of 1984 by agreeing not to negotiate or execute new or renewed service contracts for a period of time, which agreement was subject to the filing requirements of section 5 of the Shipping Act of 1984, or inconsistent with the service contract and independent action provisions of the Transpacific Westbound Rate Agreement;

The Order went on to provide that if any findings of violations are made, it should also be determined whether the Respondents:

- (1) should be assessed civil penalties and, if so, the amount of such penalties; and/or
- (2) should have their Transpacific Westbound Rate Agreement disapproved, cancelled or modified by the Commission; and/or
- (3) should be ordered to cease and desist from such activity;

The United States Department of Transportation was designated as an amicus curiae. See Summary of Proceedings, served April 10, 1986.

The Regulatory Scheme and the Relevant Statutes

I. THE SUBSTANTIVE PROVISIONS

Section 10 of the Shipping Act of 1984 is entitled "PROHIBITED ACTS." As pertinent, it provides:

(a) IN GENERAL—No person may—

* * * * *

(2) operate under an agreement required to be filed under section 5 of this Act that has not become effective under section 6, or that has been rejected, disapproved, or canceled; or

(3) operate under an agreement required to be filed under section 5 of this Act except in accordance with the terms of the agreement or any modifications made by the Commission to the agreement.

Section 5(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1704(c), requires that any agreement described in section 4(a) of the Shipping Act of 1984, 46 U.S.C. app. § 1703(a), be filed with the Commission. In addition, section 5(b) of that Act, 46 U.S.C. § 1704(b), prescribes certain mandatory provisions of conference agreements.

Section 4 of the Shipping Act of 1984 is entitled, "AGREEMENTS WITHIN SCOPE OF ACT." Section 4(a) applies to agreements by or among ocean common carriers to—

(1) discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service;

(2) pool or apportion traffic, revenues, earnings, or losses;

(3) allot ports or restrict or otherwise regulate the number and character of sailings between ports;

(4) limit or regulate the volume or character of cargo or passenger traffic to be carried;

(5) engage in exclusive, preferential, or cooperative working arrangements among themselves or with one or more marine terminal operators or non-vessel common carriers;

(6) control, regulate, or prevent competition in international ocean transportation; and

(7) regulate or prohibit their use of service contracts.

As pertinent, section 5(b) of the 1984 Act provides:

(b) CONFERENCE AGREEMENTS.—Each conference agreement must—

* * * * *

(8) 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 that the conference will include the new rate or service item in its tariff for use by that member, effective no later than 10 calendar days after receipt of the notice, and by any other member that notifies the conference that it elects to adopt the independent rate or service item on or after its effective date, in lieu of the existing conference tariff provision for that rate or service item.

Pursuant to section 6 of the 1984 Act (46 U.S.C. app. § 1705), agreements filed with the Commission, unless rejected, become "effective" within a statutorily fixed time set forth in section 6(c) (46 U.S.C. app. § 1705(c)), but not less than 14 days after notice of the filing of the agreement is published in the *Federal Register*, as provided in section 6(e) (46 U.S.C. app. § 1705(e)). However, the clock which is used to calculate the effective date of an agreement does not begin to tick, if that agreement is not filed. Thus, an agreement which is filed may have a lawful effective date not less than 14 days after its publication in the *Federal Register* (section 6(e))—or on the 45th day after filing, or on the 30th day after noticed in the *Federal Register*, whichever is later (section 6(c)). Of course, an agreement required to be filed, but which is not filed, cannot have a lawful effective date. See *Armada Great Lakes/East Africa Service, Ltd.; Great Lakes Transcaribbean Line*, 28 F.M.C. 355, 357 (1986) (*Armada*).

II. THE PENALTY PROVISIONS AND PROCEDURES

Section 13 of the Shipping Act of 1984, 46 U.S.C. app. § 1712, is entitled PENALTIES. Applicable penalty provisions for violations of sections 10(a)2 and 10(a)3 of the 1984 Act are set forth in section 13(a) of that Act, as follows:

(a) ASSESSMENT OF PENALTY.—Whoever violates a provision of this Act, a regulation issued thereunder, or a Commission order is liable to the United States for a civil penalty. The amount of the civil penalty, unless otherwise provided in this Act, may not exceed \$5,000 for each violation unless the violation was willfully and knowingly committed, in which case the amount of the civil penalty may not exceed \$25,000 for each violation. Each day of a continuing violation constitutes a separate offense.

Section 13(c) of the 1984 Act is entitled ASSESSMENT PROCEDURES. Among other things, it sets forth the criteria for determining the amount of a penalty to be imposed in an assessment proceeding. It provides, as pertinent:

(c) ASSESSMENT PROCEDURES. . . . the Commission may, after notice and an opportunity for hearing, assess each civil penalty provided for in this Act. 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 may compromise, modify, or remit, with or without conditions, any civil penalty.

The Commission's regulations which implement section 13 of the Shipping Act of 1984 appear at 46 CFR Part 505. As pertinent, 46 CFR 505.3 provides:

(a) *Procedure for assessment of penalty.* The Commission may assess a civil penalty only after notice and opportunity for a hearing under section 22 of the Shipping Act, 1916, or sections 11 and 13 of the Shipping Act of 1984. The proceeding, including settlement negotiations, shall be governed by the Commission's Rules of Practice and Procedure in Part 502 of this Chapter.² All settlements must be approved by the Presiding Officer. The full text of any settlement must be included in the final order of the Commission.

(b) *Criteria for determining amount of penalty.* In determining the amount of any penalties assessed, the Commission shall take into account the nature, circumstances, extent and gravity of the violation committed and the policies for deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires.

The statutory and regulatory criteria for settlement of penalties are the same as those for assessment of penalties. *Armada, supra*, 28 F.M.C. at 368.

The Offer of Settlement

The matter is before me on Respondents' Further Amended Offer of Settlement, a copy of which is attached as Appendix II. The relevant background to the offer is set forth in the Stipulation Respecting Proposed

² Sections 502.91 and 502.94 of the Commission's Rules of Practice and Procedure, 46 CFR 502.91 and 502.94, authorize the submission and consideration of offers of settlement.

Settlement entered into by the Respondents and Hearing Counsel. The offer, which Hearing Counsel support in its entirety, came about after extensive discovery and discussions. One of those discussions was conducted during a publicly noticed informal conference attended by the United States Department of Transportation as an amicus curiae. The Department of Transportation advises that it has no interest in addressing the Further Amended Offer of Settlement and it takes no position with regard to the proposed settlement.

The offer is made without any admission of violation of law by any Respondent. It calls for the payment of \$300,000 (\$15,789.47 per carrier Respondent) all of which is on deposit in a trust account in a bank in California, together with accumulated interest from August 13, 1986, August 14, 1986, or August 15, 1986 (depending upon the date when the monies were deposited), upon final approval of the settlement. Also, upon final approval, Respondents undertake: to modify certain terms of the TWRA agreement dealing with the relationship of independent action to minimum rates; to maintain a prescribed course of conduct not to surrender any member's right to take independent action to depart from multicommodity minimum rates; to refrain from establishing a minimum rate program whose purpose is revenue improvement or maintenance for a stated period of time if those rates are subject to a right of independent action; and to report to the Director, Bureau of Agreements and Trade Monitoring, any actions taken during that stated period which establish or modify minimum rates. Further details of the offer appear in the Discussion, *infra*.

The Record

The record presented for consideration of the offer of settlement is comprised of the following:

- (1) The Order of Investigation and Hearing (Order)
- (2) Further Amended Offer of Settlement
- (3) Response of Hearing Counsel to Respondent's Further Amended Offer of Settlement (Response)
- (4) Stipulation Respecting Proposed Settlement
- (5) Stipulation for Amendment to Order of Confidentiality
- (6) Letter from R. Frederic Fisher to me dated August 13, 1986
- (7) Letter from Hearing Counsel to me, dated August 18, 1986
- (8) Letter from the United States Department of Transportation to me, dated August 15, 1986
- (9) Telex Supplement to No. 6, above, dated August 15, 1986
- (10) Letter from Hearing Counsel to me, dated August 20, 1986.

Facts

The following is a verbatim restatement of the Stipulation Respecting Proposed Settlement submitted by Respondents and Hearing Counsel.

1. All statements in this Stipulation are made exclusively for use by the Administrative Law Judge and the Commission for consideration of the proposed settlement of this proceeding and are made without prejudice to and shall not be used by any party or person in this or any other proceeding or forum in the event the settlement agreed to by the parties should for any reason not receive final approval by the Commission by way of Commission order or administrative finality of an initial decision.

2. The parties agree that this proceeding be finally resolved by settlement of all issues and claims in the proceeding as provided in Respondents' Further Offer of Settlement.

3. The Transpacific Westbound Rate Agreement (TWRA) is a conference agreement as defined in the Commission's regulations. TWRA's jurisdiction covers the trade from United States and Canadian ports and points to ports and points in Asia. The TWRA Agreement was filed with the Commission, under the Shipping Act of 1984, on November 1, 1984, and became effective on January 4, 1985. At that time, TWRA consisted of 21 ocean common carriers operating in the westbound trade from the United States to the Far East. At present TWRA consists of 14 ocean common carriers in this trade. Respondents in this proceeding are TWRA, its 14 current members and 5 former members, all of whom attended an initial meeting of senior TWRA member executives on January 30-31, 1985.^{SN1} The Commission's Bureau of Hearing Counsel was designated a party by the Order of Investigation. The United States Department of Transportation has been permitted to participate as amicus curiae to comment concerning policy issues in the case and concerning its settlement.

4. TWRA's basic Agreement provides authority in Article 5(a) for its members to:

consider all aspects of transportation and service in the trade and to discuss, agree upon, establish, abolish or change all rates, charges, classifications, practices, terms, conditions, and rules and regulations applicable to transportation of cargo moving within the trade covered by this Agreement and applicable to services provided in connection therewith.

^{SN1} ("SN" indicates that these notes appear in the Stipulation Respecting Proposed Settlement.) Seawinds, Ltd. resigned from the TWRA prior to TWRA first meeting of senior executives on January 30-31, 1985. Barber Blue Sea Line resigned from TWRA prior to such meeting. Neither is a respondent in this proceeding. Subsequent to the January 30-31, 1985, meeting, EAC Lines TPS Service, Zim Israel Navigation Co., Evergreen Marine Corp., Hapag-Lloyd AG and Lykes Bros. Steamship Co. withdrew from TWRA. The following present members of TWRA are named as respondents in this proceeding: American President Lines, Hanjin Container Lines, Japan Line, Mitsui OSK Lines, Kawasaki Kisen Kaisha, Showa Line, Korea Marine Transport (now operated by Hyundai Merchant Marine), A.P. Moller-Maersk Line, Orient Overseas Container Line, Neptune Orient Lines, Sea-Land Service, United States Lines and Yamashita-Shinnihon Steamship Co. In addition, Evergreen Line, Hapag-Lloyd, Zim Israel and Lykes remain respondents in the proceeding.

This authority is also stated, in more specific terms, as including, but not limited to (as here relevant), "minimum rates," "service contracts" and to "relationships between" these subjects and other subjects listed.^{SN2} Such authority may be implemented by resolutions and decisions of TWRA which are "binding on the parties." (Article 17, TWRA Agreement) All such authority is "subject in all cases to the right of independent action set forth in Article 13" of the TWRA Agreement. Article 5(d) of the TWRA Agreement provides that "any party may enter into a service contract(s)" but must file the essential terms of such contracts with the Agreement Manager.

5. The TWRA replaced several predecessor conferences operating in portions of the present TWRA trade. The largest of these conferences was the Pacific Westbound Conference which had collapsed in 1984 and been dissolved. The collapse was preceded by rapidly declining rates in the TWRA trade. At the time of TWRA's formation, the TWRA members were operating under a large variety of individual carrier tariffs with diverse rates filed with the Commission.

6. Rate levels in the transpacific westbound trade had, as of January 1985, fallen to unusually low levels which the TWRA carriers regarded as unremunerative and which the carriers had advised the Commission were well below levels prevailing in 1979.^{SN3} A meeting of senior executives of the newly formed TWRA was held in Vancouver, B.C., on January 30-31, 1985. At that meeting the parties agreed by unanimous vote, accord-

^{SN2} Section 5(a) reads: "Subject in all cases to the right of independent action set forth in Article 13 of this Agreement, the Parties are authorized to consider all aspects of transportation and service in the trade and to discuss, agree upon, establish, abolish, or change all rates, charges, classifications, practices, terms, conditions, and rules and regulations applicable to transportation of cargo moving within the trade covered by this Agreement and applicable to services provided in connection therewith. Such authority includes, but is not limited to, the following subjects and relationships between or among them: Port-to-port rates (including all water routes to and from ports and/or places or points on inland waterways tributary to all said ports and ranges), overland rates, inland bridge rates, interior point intermodal rates, port area intermodal rates, proportional rates, through rates, the inland portion of through rates, joint rates, minimum rates, surcharges, arbitraries, volume rates, time/volume rates, project rates, freight-all-kind rates, volume incentive programs, loyalty arrangements conforming to the antitrust laws of the United States, fidelity commission systems, service contracts, consolidation, consolidation allowances, freight forwarder compensation, brokerage, the conditions determining such compensation or brokerage and the payment thereof, receiving, handling, storing and delivery of cargo, destination of base ports and points, pick-up and delivery charges, free time practices, detention, demurrage, container freight stations, port and inland container yards and container depots, terminals and other points of cargo receipt, vanning, devanning, equipment positioning, furnishing equipment to or leasing equipment from shippers/consignees/inland carriers/others, collection agents at designation, maintaining and distributing information and data and statistics and all other rules, regulations and matters ancillary to transportation of this Agreement, including rules regarding the time and currency in which payments hereunder shall be made, credit conditions, financial security arrangements, suspension and restoration of credit privileges, handling of delinquent accounts and interest thereon. The parties may in any manner discuss any rate or rule on which independent action has been taken, matters on which rates are 'open' with or without minimum requirements, and individual, group or Agreement service contracts."

^{SN3} The Order of Investigation states, in listing the objectives of the TWRA furnished to the Commission at the time the Agreement was filed, that one objective was "to stabilize rates in the westbound trades, which the parties [TWRA] characterized as having deteriorated to below-cost levels as a result of excess capacity." (Order of Investigation, p. 4)

ing to the minutes of that meeting filed with the Commission, to adopt, inter alia, the following measures:

(a) Voted to adopt and publish by April 15, 1985, a common agreement tariff to replace disparate individual tariffs and rates;

(b) Voted that "all tariffs [of] all member lines be amended to establish a minimum charge rule. This rule will provide minimums which will be observed on all cargo" effective March 6, 1985.^{SN4}

(c) Voted that effective January 31, 1985, "there shall be a minimum charge established for any new service contract or renewal of existing contracts entered into by any party, any combination of parties or the Agreement. Such minimums to remain in effect until changed or amended consistent with the Agreement's Revenue Recovery Program."

(d) Voted to adopt a general rate increase effective March 6, 1985.

7. Shipper reaction to the TWRA rate actions was negative and the Commission received complaints and inquiries commencing almost immediately after the January 30-31 meeting. (See Order of Investigation, p. 8) These complaints were most extensive in the case of shippers of the lowest rated commodities. Bringing rates on the lowest rated commodities up to the minima necessarily meant that these commodities experienced the largest percentage increases. (See Order of Investigation, p. 8) The complaints in some cases alleged a tacit understanding reached at the Vancouver meeting that TWRA members would not grant requests for independent action (or other rate action) below the minimums agreed. (Order of Investigation, pp. 8-9).

8. In response to the complaints the Commission asked TWRA, by telex of February 21, 1985, to postpone the increases pending further discussions with the Commission staff. Several of such meetings were held (Order of Investigation, p. 9), and TWRA postponed the rate increases until March 20, 1985. TWRA met again in Honolulu, Hawaii, on March 6-8 and thereafter informed the Commission that the full rate increases adopted by the Vancouver meeting as minimum rates would be deferred to June 20, 1985.^{SN5} As so reduced, the minimum rates became effective on March 20, 1985.

On March 12, 1985, the Commission issued an Order under section 15 of the 1984 Shipping Act to TWRA and its members to which TWRA responded.

9. On March 27, 1985, after the reduced minima had been in effect for six days, TWRA further reduced the minimum rates in question and

^{SN4} The minimum rates adopted ranged from \$750 (for a west coast 20' dry cargo container to North Asia) to \$5,000 (for refrigerated 40' containers moving from the east coast to South Asia). (See Order of Investigation, p. 7) These minima varied according to container size and type and with origin and destination. They did not vary according to the commodity shipped except insofar as particular commodities move in particular types of or size of containers.

^{SN5} The minimum on a 40 dry cargo container from west coast points to North Asia, for example, was reduced from \$1000 to \$800 per container. (Order of Investigation, p. 9)

postponed the balance of the increase.^{SN6} (Order of Investigation, p. 11.) Although future increases in the TWRA minimum rates were scheduled, they did not take effect. Also on March 27, 1985, TWRA amended its rate action as to individual member service contracts to treat the rates adopted as non-binding guidelines and to reduce the suggested service contract rates to the tariff minimum level. TWRA minutes also reflect that TWRA passed a resolution on March 27, 1985 for the purpose of refuting allegations that it had surrendered the right of independent action and resolved that "each member had an unqualified right to take independent action from all rates, including minima."

10. At a meeting in Hong Kong on June 6-7, 1985, TWRA exempted eight major moving low-rated commodities, which had been the subject of complaints from shippers, from the minimum rates. (Order of Investigation, pp. 11-12.)

11. On July 15, 1985, the Commission issued the present Order of Investigation.

12. Apart from the foregoing paragraphs Hearing Counsel and Respondents are in conflict on all issues and as to most of the central facts in this case of first impression under the 1984 Shipping Act.

13. The main point in dispute is whether, in adopting minimum rates applicable to all commodities, TWRA reached a tacit agreement, as set forth below, which was contrary to the basic TWRA agreement and/or to provisions of the Shipping Act, 1984. Specifically:

(a) Whether TWRA, at the January 30-31 Vancouver meeting, entered into a separate agreement, contrary to its basic approved agreement, to surrender the right of each TWRA member to take independent rate action as guaranteed to each carrier in the basic TWRA Agreement?

(b) Whether TWRA's adoption of across-the-board minimum rates in its tariffs is unlawful on the ground that such rates are inherently inconsistent with free exercise of the right of independent action required by section 5 of the 1984 Shipping Act to be set forth in all conference agreements?

(c) Whether TWRA was authorized under its basic agreement to adopt minimum rates on individual carrier service contracts? and

(d) Whether TWRA agreed at the Vancouver meeting that its members would not enter into individual service contracts?

14. If this matter were to proceed to hearing, Hearing Counsel assert that they would introduce documents which would prove the allegations made in the Commission's Order of Investigation; that this evidence would show that the TWRA members carried out certain unfiled agreements which violated section 10(a)2) of the shipping Act of 1984, and/or were contrary to the terms of the TWRA Agreement in violation of section 10(a)(3)

^{SN6}The minimum on a 40' dry cargo container moving from west coast ports to North Asia was reduced to \$700 effective March 27, 1985, and scheduled to increase to \$800 July 1 and to \$1000 on September 1, 1985. (Order of Investigation, p. 11)

of the Act; that they would produce witnesses whose testimony would demonstrate that TWRA members and their representatives acted in a manner consistent with their carrying out these agreements and that specifically, their evidence would demonstrate the following:

(a) On January 30 and 31, 1985, TWRA members met in Vancouver, British Columbia, and agreed to a "Revenue Stabilization program" which established a program of minimum tariff rates against which independent action or rate initiative would not be taken unless unanimously approved by the Agreement members. Hearing Counsel contend that this minimum rate program was inherently inconsistent with the independent action provisions of the TWRA Agreement and section 5(b)(8) of the Shipping Act of 1984 which requires those Agreement provisions, and that by operating under the unfiled agreement not to take independent action against the minimums the TWRA members violated section 10(a)(2) and/or section 10(a)(3) of the Act.

(b) At the Vancouver meeting, the TWRA carriers established a program of minimum rates for service contracts and agreed not to enter into service contracts for rates below those minimums or to exercise independent action against those minimum rate levels. The TWRA members also agreed not to enter into new or renewed service contracts for a period of 90 days and, for a period of time, in fact, did refuse to negotiate such contracts. Hearing Counsel believe these actions were inconsistent with the service contract and independent action provisions of the TWRA agreement and violated sections 10(a)(2) and/or 10(a)(3) of the Shipping Act of 1984.

(c) Finally, Hearing Counsel would assert that facts alleged by TWRA in defense of its position would be contradicted by evidence available to Hearing Counsel and that whatever commercial reasons TWRA might assert to explain its actions are not relevant to the issues set forth in the Order of Investigation.

15. TWRA denies that there was any agreement, explicit or tacit, among TWRA members to inhibit the right of independent action. TWRA asserts that at hearing, TWRA would show:

(a) That, whether taken separately or together, each of the factors relied upon by Hearing Counsel in alleging an unlawful agreement constitutes lawful, normal conduct under a conference agreement, that a conference's central function is to agree upon, establish and maintain common rates, and that TWRA's actions were authorized by the TWRA agreement and not prohibited by any decision, regulation or statutory provision;

(b) That to the extent that any of TWRA's members expressed resolve to adhere to or actually adhered to rates newly adopted by unanimous vote, without independent action therefrom, such activity does not constitute evidence of conduct prohibited by the Act; that deferral and reduction of the minima adopted from March 6, 1985, through June, 1985, made independent actions below the minima unnecessary for members; that in the absence of a common tariff and a common rate base, the use of

uniform minima was the only way to create a common conference rate level in the short term for most commodities that, without minimums the general rate increase would fail because it would exaggerate existing rate differentials between the members, that another reason for the minima was to adopt a consensus as to what rate was minimally necessary to assure that any given shipment covered out-of-pocket costs in transporting cargo plus some contribution to total costs;

(c) That minimum rates are used by other carriers and conferences and that they are wisely used in inland and ocean transportation and have been required and enforced by the ICC and this Commission in a number of domestic rate regulation cases particularly to avoid below cost rates; that nothing in the 1984 Act or in Commission regulations or decisions suggests that minimum rates are unlawful; that the Shipping Act requires only that a conference agreement guarantee to a carrier member its right of independent action and that even if broadly based minimum rates were to reduce the incentive for a carrier to exercise that right, the statute does not forbid such rates for that reason; that if there is to be new policy enunciated on these issues that is not stated in the statute, in regulations or existing decisions, it would be inequitable to apply it to TWRA in an enforcement case simultaneously with announcing such a new rule;

(d) That Article 5(a) of TWRA's agreement authorized both agreement on "service contracts" and on "relationships between or among" service contracts and rates, including "minimum rates";

(e) That there was no agreement by TWRA members that the members would not enter into individual service contracts.^{SN7}

16. All parties have proceeded with preparation of the case for hearing, including substantial discovery proceedings.

17. Hearings were scheduled to commence in December 1985 and extend into January 1986, but were deferred pending attempts by the parties to resolve the issues between them. The parties negotiated extensively in October and November, 1985 and submitted a settlement agreement. This agreement was withdrawn in January, 1986 and further negotiated to incorporate provisions (now set forth in paragraph 5 of the proposed Ordering paragraphs in TWRA's Further Offer of Settlement) respecting adoption by TWRA of broadly based minimum rates pending the possibility of the Commission issuing a guideline for the industry as to lawfulness of such rates.

18. The estimated time required to hear the case would be at least 4 to 6 weeks, with most hearings required, for the convenience of witnesses, to be held on the West Coast. Both Hearing Counsel and respondents

^{SN7} TWRA says that service contracts are not a rate or service item required to be subject to independent action. TWRA also says that in response to complaints it both drastically reduced the service contract minima and made them nonbinding and further that, to eliminate the dispute with the Commission as to the scope of TWRA's authority over individual member service contracts, it amended its basic agreement to state affirmatively that the conference could limit, prohibit or set mandatory standards on service contracts of its members. The Commission permitted this amendment to become effective.

(a number of whom are separately represented) are facing full-time and intense involvement in the case, at very substantial cost to the Commission and to respondents alike, in order to bring this case to hearing and conclusion. Commission personnel as well as many witnesses located throughout the world are expected to testify as witnesses.

19. Hearing Counsel make no claim that the conduct alleged to be unlawful is continuing, and, in the view of all the parties, the large expenses and disruption of the parties' other responsibilities is not warranted, in view of the settlement reached.

20. In the absence of the settlement, due to the large burdens that this case places upon Hearing Counsel, an additional delay in the scheduled proceedings would be requested by Hearing Counsel to allow further discovery and full preparation. As a consequence of the foregoing and other related factors, costs for both sides are mounting rapidly, will continue to grow and will be experienced through at least the balance of 1986 and well into 1987.

21. Hearing Counsel do not claim that Respondents were carrying out an unlawful agreement respecting independent action or service contracts at the time they commenced settlement negotiations in the fall of 1985 or that they are doing so at present. Accordingly, the parties agree that there would be no regulatory purpose served by the issuance of an order to cease and desist. In view of modifications of the TWRA agreement already made under the Settlement agreed to and in view of the provision in the settlement offered by Respondents, the Parties further agree that there is no need to consider other modifications to or cancellation of the TWRA agreement.

22. The settlement which Respondents propose is an integrated settlement reflecting basic elements which were intensively bargained; without these elements one or the other of the parties would not have been able to resolve their differences.

Discussion

Realistically, Respondents' offer of settlement is the culmination of extensive negotiations between Respondents and the Commission's Hearing Counsel. It reflects their agreement designed to reach a disposition of issues raised by the Order without going through costly trial and appellate litigation. The settlement seems to me to be a comprehensive retrospective and prospective resolution of those issues and encompasses much more than the payment of civil penalties, although the proffered payment is substantial. The proposal appears to be reasonable and to satisfy settled criteria for approval. I find that the monetary portion of the offer fits within a zone of reasonableness and that the overall settlement "is neither a coercive attempt to exact exorbitant punishment nor a cession of 'public rights,' *Atlas Roofing Co., Inc. v. Occupational Safety and Health Review Commission*, 442 U.S. 430, 450 (1977), to the alleged wrongdoer." *Far*

Eastern Shipping Company Possible Violation of Section 16, Second Paragraph, 18(b)(3) and 18(c), Shipping Act, 1916, 24 F.M.C. 992, 1013 (1982).

The first of Respondents' non-civil penalty undertakings requires it to modify Article 5 of their agreement and to file that modification within ten days after final approval of their offer. The modification clarifies the interplay of independent action and minimum rates adopted under that agreement and provides that any minimum rates which are subject to a right of independent action shall remain subject to further adjustment or, even, revocation, pursuant to normal ratemaking processes under the agreement. This modification is reinforced by the second of Respondents' commitments whereby they agree, for the future, not to enter any agreement to surrender any member's right to take independent action departing from any multicommodity minimum rates that are subject to a right of independent action. Hearing Counsel states that these provisions of the first numbered paragraph of Respondents' offer "assure that Respondents will not use minima to limit independent action . . ." and that the commitment in the second numbered paragraph "memorializes the absolute predominance of the right of independent action."³ I agree that numbered paragraphs 1 and 2 of the offer contain clear and reasonable statements assuring preeminence of independent action under the TWRA agreement.

The third numbered paragraph of the settlement recognizes that the service contract issue raised by the Order became moot by virtue of the filing of an amendment to the TWRA agreement which the Commission allowed to become effective,⁴ and, which eliminates any question about the scope of the Commission's authority over member's service contracts. The amendment accomplishes this result by inclusion of a provision permitting TWRA to limit, prohibit or set standards on service contracts.

The fourth numbered paragraph contains the offer to pay a civil penalty without admission of violation.

Under provisions of the fifth numbered paragraph, for a stated period of time, the Respondents commit not to establish any minimum rate program, the purpose of which is revenue improvement or maintenance. The term "minimum rate program" is defined to mean "a program which applies minimum rates to commodities that are subject to TWRA commodity, class or FAK rates set forth in TWRA tariffs." By notation, the proposal confirms the understanding of the parties that "Neither FAK⁵ nor class rates shall be construed as constituting minimum rates subject to this [provision]." Particular minimum rates or charges are exempted

³ Response, p. 3.

⁴ Hearing Counsel notes that, when this amendment became effective, "the Commission directed the staff to prepare a proposed rule which would assure uniform application of Commission policy regarding the degree to which conference agreement provisions will be required to specify the nature of any limitation imposed upon members' use of service contracts." Response, p. 4.

⁵ FAK rates apply either to multiple or to all commodities and tend to be used by non-vessel operating common carriers, shipper associations and other shippers of a range of commodities moving together.

from the minimum rate program restraints. These exceptions⁶ are: (a) minimum rates on commodities for which rates are not required by statute or by the TWRA Agreement to be subject to a right of independent action;⁷ (b) minimum charges or cargo quantity minima imposed to induce a direct vessel call at a port not ordinarily served by a TWRA member; (c) minimum charges required for issuance of a single bill of lading⁸ (d) per container minimum charges or minimum container capacity utilization rules where the shipper obtains exclusive use of the container for a cargo movement;⁹ or (e) establishment of minimum rates for a commodity or commodities whose rates have been declared "open".¹⁰ But this exemption from the prohibition shall not be construed to bar an individual member of TWRA from exercising its right of independent action against a floor beneath an open rated commodity. See paragraph 1 and 2 of the offer. The restraint will expire on November 7, 1987, or sooner, if, before then, in a proceeding of general applicability, the Commission determines that a minimum rate program, applicable to commodities that are also subject to separate commodity, class or FAK rates, established for the purpose of revenue maintenance or improvement, is lawful. Provision is also made for the elimination of any exemption which may in the future be found improper.

The sixth numbered paragraph calls for the filing of reports by TWRA with the appropriate Commission office to enable the Commission to monitor TWRA's use of minimum rates and charges.

The seventh numbered paragraph is procedural and provides for the return, to the producing party, of any material obtained pursuant to discovery in this proceeding.

⁶The Commission recognizes that "the use of minimum rates is a long standing commercial practice, usually designed to improve container utilization and deployment." Order, p. 24. The Order did not specifically identify, nor place in issue, any of the minima excepted from the restraint, presumably because the majority—save (a) dealing with a statutory exemption and (e) dealing with open rates—are associated with that practice and because it did not appear that there was any linkage between these minima and possible thwarting of independent action. However, inasmuch as the Commission has not determined the validity of the usage and practice under the Shipping Act of 1984, the inclusion of these exceptions in the order, which follows, should not be construed as a determination on the merits. On the other hand, no useful purpose would be served by excising the exceptions because the restraint, itself, is of limited duration and, because, as will be seen, *infra*, the order also provides that the exceptions must yield to applicable laws and regulations. The exception concerning open rates is examined separately, *infra*.

⁷Currently, under the TWRA agreement, rates for what would otherwise be statutorily exempt commodities pursuant to section 8(a)(1) of the Shipping Act, 1984, 46 U.S.C. app. § 1707(a)(1) are subject to a right of independent action.

⁸Minimum bill of lading charges are designed to recover carrier costs in the event shippers request multiple bills of lading covering small portions of a shipment.

⁹Minimum charges for exclusive use of a container are adopted to compensate a carrier for wasted container space. Typically, it is imposed upon small shipments taking a weight basis rate if the shipper insists on exclusive use of the container.

¹⁰Open rates occur when a conference decides not to publish a "conference" rate and allows each member to state its own rates. Commonly, a floor level or minimum is set in lieu of a conference rate. The practice of establishing a floor for open rates is acknowledged in the Commission's tariff rules. (See 46 CFR 580.6(m)(2)(ii).)

The eighth, and last numbered paragraph simply provides that the proceeding has come to rest upon approval of the settlement and that no further claims may be asserted against the Respondents for alleged violations arising out of the facts alleged in the Order.

The Stipulation contains a sufficient showing to establish that Hearing Counsel would be able to present a prima facie case of violations. But, it is equally clear from the Stipulation's numbered paragraphs 13 through 16, inclusive, that there is a wide rift between Hearing Counsel and the Respondents on factual and legal issues, which, if the case were to go to trial, would require weeks, if not months, of evidentiary hearing. The costs of litigation would not be limited to this event alone. It is also estimated that Hearing Counsel will require additional and lengthy discovery. One must include other preparations for trial by counsel for both sides in calculating costs. Further, there must be added the costs of appellate procedures, which, in this case of novel impression under the Shipping Act of 1984, seem inevitable, whichever side might prevail at the trial level. Given those probabilities, manifestly the potential litigation costs to the Respondents would exceed the offered payment by a considerable margin.¹¹ It is also evident that Hearing Counsel would be required to expend a great deal of time, resources and money to pursue this matter to a contested and successful conclusion.

Balancing those considerations against the alleged unlawful conduct, which if proved, would constitute serious and not merely technical violations, see, e.g. *Armada, supra*, 28 F.M.C. at 369-370, the penalty amount of \$300,000 does not appear inequitable. The fact that the principal is already on deposit with a bank in an interest bearing trust account, with accrued interest payable to the Government together with the principal upon approval, justifies the conclusion that the penalty not only will be collected, but that it will be collected at the least expense to the Government. Moreover, the substantial sum involved, given the nature, circumstances, extent and gravity of the alleged violations, permits the conclusion that the settlement is likely to have a long term deterrent effect on the Respondents and others subject to regulation.

With respect to the nature and circumstances of the alleged violations, Hearing Counsel confirm that the Respondents did not attempt to conceal the activities that resulted in this proceeding and that Respondents dealt responsibly and cooperatively with Commission staff personnel, even before the proceeding was instituted, by postponing the effective date of their rate actions and by modifying levels of minima in order to reduce the impact upon the shipping public. Hearing Counsel advise, too, that after the proceeding was commenced, Respondents continued to maintain a responsible and cooperative relationship during the adjudicatory process. As

¹¹ Given, too, the extensive preparation and bargaining mentioned in the record, it seems fair to speculate that Respondents' counsel fees to date may already exceed the monetary settlement.

to the extent of the alleged violations, Hearing Counsel assert that none of the alleged unlawful activities is ongoing and that any such conduct was terminated prior to the time that settlement negotiations began in the fall of 1985.

The interests of justice do not require any further modification of the TWRA agreement or the entry of a cease and desist order. It is clear that the service contract modification, which already has been permitted to become effective, and the proposed modification to paragraph 5, together with the other commitments incorporated in the offer and the order which follows, provide sufficient, mandatory safeguards for the future.

Conclusion

I find that the statutory and regulatory criteria for settlement of a civil penalty have been satisfied.¹²

Order

It is ordered that the settlement be approved.

It is further ordered:

1. That Respondents shall modify existing language in Article 5 of their Agreement with respect to the relationship of independent action to any minimum rates adopted by an amendment to Article 5(a), to be adopted by the parties and filed with the Commission no later than 10 days after the date that this Order becomes final. Such language shall be as follows:

Any minimum rates (other than minimum rates applicable to commodities that are not required by statute or this Agreement to be subject to a right of independent action) that are agreed upon or otherwise adopted by the Parties under this Agreement shall in all cases be subject to further adjustment or revocation under the normal ratemaking processes of the Agreement as set forth in this Article and in Article 8 and to the right of independent action set forth in Article 13.

2. That neither the Agreement nor its members will enter into any agreement to surrender any member's right to take independent action to depart from any multicommodity minimums adopted by the Agreement if rates on the commodity to which such minimums are applicable are required by statute or the Agreement to be subject to a right of independent action.

3. That issues as to the authority and the future conduct of Respondents respecting individual carrier service contracts have been mooted by their amendment to the TWRA Agreement filed by Respondents on October

¹²The discussion addressed the dominant criteria and touched on subordinate criteria developed in the record. It is appropriate to note, however, that a settlement may be justified by any one or more of the applicable criteria. *Far Eastern Shipping Company Possible Violations of Section 16, Second Paragraph, 18(b)(3) and 18(c) Shipping Act, 1916, supra*, 24 F.M.C. at 1014.

15, 1985, providing specific authority concerning individual TWRA members' service contracts which amendments became effective under section 6 of the Shipping Act of 1984.

4. That this Order shall become effective as to the Agreement and each Carrier Respondent upon satisfaction of their offer to pay to the Federal Maritime Commission, without admission of violation of law or liability, the sum of \$300,000 (\$15,789.47 per Carrier Respondent).

5. That, TWRA and its members will refrain from establishing any minimum rate program applicable to essentially all types of cargo handled subject to the TWRA Agreement, the purpose of which program is revenue improvement or maintenance. The term "essentially all types of cargo" does not necessarily mean 100% of the commodities named in the TWRA tariff(s). The term "minimum rate program" means a program which applies minimum rates to commodities that are subject to TWRA commodity, class or FAK rates set forth in TWRA tariffs.¹³ This prohibition is not applicable however, to: (a) minimum rates on commodities for which rates are not required by statute or by the TWRA Agreement to be subject to a right of independent action; (b) minimum charges or cargo quantity minima imposed to induce a direct vessel call at a port not ordinarily served by a TWRA member; (c) minimum charges required for issuance of a single bill of lading; (d) per container minimum charges or minimum container capacity utilization rules where the shipper obtains exclusive use of the container for a cargo movement; or (e) establishment of minimum rates for a commodity or commodities whose rates have been declared "open". The prohibition contained in this paragraph respecting adoption of a minimum rate program shall cease to apply on November 7, 1987, or any earlier date on which the Federal Maritime Commission has determined the lawfulness of such minimum rates. None of the alphabetized categories of rates above should be construed as overriding or limiting any other requirements of any current or future applicable laws or regulations.

6. That during the period that paragraph 5 is in effect, TWRA will report to the Director, Bureau of Agreements and Trade Monitoring, any and all TWRA actions taken during such period establishing or modifying any minimum rates and will provide applicable tariff references; provided, however, that no tariff matter described in paragraph 5(b) and established by independent action need be reported. Reports under this paragraph shall be filed no later than 14 calendar days after the date of the TWRA action establishing such rates.

7. That the Order of Confidentiality dated September 27, 1986, be further amended by adding a new paragraph thereto as follows:

As of the date this proceeding is terminated by an administrative final order, all written material (and all copies thereof)

¹³Neither FAK nor class rates shall be construed as constituting the minimum rates subject to this Order.

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE 671
AGREEMENT—POSSIBLE VIOLATIONS

produced pursuant to discovery in this proceeding or pursuant to or in connection with the Commission's Section 15 Order served March 12, 1985, that have not been offered into evidence in the proceeding shall be immediately returned to counsel for the parties which produced them by every person which has received copies thereof.

8. That, upon final approval of this Order, any assessment proceeding, civil action, or other claims for recovery of civil penalties or for other relief, in any way related to claims or alleged violations of the Shipping Act of 1984 by any Respondent, arising out of any matter referred to in the Commission's July 15, 1985, Order of Investigation in this proceeding shall be forever barred. No finding in this proceeding may be used by any person against any Respondent in any way in any other proceeding, in this or any other forum.

(S) SEYMOUR GLANZER
Administrative Law Judge

APPENDIX I

- Transpacific Westbound Rate Agreement, P.O. Box 800, Iselin, New Jersey 08830
- American President Lines, Ltd., 595 Market Street, Ste. 2175, San Francisco, California 94104
- The East Asiatic Company Ltd. A/S, Holbergsgade 2, DK-1099 Copenhagen K, Denmark
- Evergreen Marine Corp. (Taiwan) Ltd., 63, Sung Chiang Road, Taipei, Taiwan
- Hanjin Container Lines, Ltd., C.P.O. Box: 6289, Seoul, Korea
- Hapag-Lloyd AG, Postfach 10 26 26, Ballindamm 25, 2000 Hamburg 1, Federal Republic of Germany (West)
- Japan Line, Ltd., Tokusai Building, 1-1, Marunouchi 3-Chome, Chiyoda-ku, Tokyo 100 Japan
- Mitsui O.S.K. Lines, Ltd., 1-1, Toranomom 2-Chome, Minato-ku, Tokyo 105 Japan
- Kawasaki Kisen Kaisha, Ltd., Hibiya Central Building, 2-9, Nishi-Shinbashi 1-Chome, Minato-ku, Tokyo 105 Japan
- Nippon Yusen Kaisha, 3-2, Marunouchi 2-Chome, Chiyoda-ku, Tokyo, C.P.O. Box 1250, Tokyo 100-91 Japan
- Showa Line, Ltd., Hibiya Kobusai Building, 2-3, Uchisaiwaicho 2-Chome, Chiyoda-ku, Tokyo 100 Japan
- Korea Marine Transport Co., Ltd., 23rd Floor, KAL Building, 118, 2-ka, Namdaemoon-Ro, Chung-Ku, Seoul, Korea
- Lykes Bros. Steamship Co., Inc., Lykes Center, 300 Poydras Street, New Orleans, Louisiana 70130
- A.P. Moller-Maersk Line, 50, Esplanaden, DK-1098 Copenhagen K, Denmark
- Orient Overseas Container Line, c/o Seapac Services, Inc., 433 Hegenberger Road, Suite 200, Oakland, California 94621
- Neptune Orient Lines Ltd., 456 Alexandra Road, NOL Building, Singapore 0511, Republic of Singapore
- Sea-Land Service, Inc., 10 Parsonage Road, P. O. Box 800, Iselin, New Jersey 0830
- United States Lines, Inc., 27 Commerce Drive, Cranford, New Jersey 07016

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE 673
AGREEMENT—POSSIBLE VIOLATIONS

Yamashita-Shinnihon Steamship Co., Ltd., 1-1, Hitotsubashi 1-Chome,
Chiyoda-Ku, Tokyo 100, Japan

Zim Israel Navigation Company Ltd., Zim Container Service, One World
Trade Center, Suite 2969, New York, New York 10048

APPENDIX II
FEDERAL MARITIME COMMISSION

DOCKET NO. 85-18

MEMBER LINES OF THE TRANSPACIFIC WESTBOUND RATE
AGREEMENT—POSSIBLE VIOLATIONS OF THE SHIPPING ACT OF
1984

FURTHER AMENDED OFFER OF SETTLEMENT

WHEREAS, by its Order of July 15, 1985, the Federal Maritime Commission commenced an investigation as to whether certain actions of Respondents may have constituted violations of the Shipping Act of 1984; and

WHEREAS, Respondents believe and assert that their actions were fully and publicly disclosed and authorized by Article 5 and other provisions of their conference agreement, that their actions were in all respects within the scope thereof and otherwise lawful and believe that their position would be vindicated in this proceeding; and

WHEREAS, Respondents have nonetheless found that their legal expenses in the proceeding are escalating rapidly and that the proceeding is diverting substantial time and attention of Respondents' senior management; and

WHEREAS, in order to terminate their escalating legal expenses and diversion of management time and in settlement of issues raised by the first and second ordering paragraphs of the July 15, 1985 Order, Respondents are willing to consent (1) to file an amendment to their conference Agreement responsive to the concerns set forth in the July 15, 1985 Order, (2) to make certain undertakings as set forth herein concerning future operations under the conference Agreement, (3) not to adopt a program of minimum rates, as defined below, and applicable essentially to all commodities for a period ending no later than November 7, 1987, and (4) by a monetary payment, all on the specific condition that such amendment, undertakings and monetary settlement be without any admission of violation of law or liability of any kind or admission that any allegation or statement in the Order of Investigation is true; and

WHEREAS, this offer of settlement is conditioned upon a final Order disposing of the proceedings, as provided below, that states that any claims by the Commission for or based on violation of law or liability for penalties under the Shipping Act of 1984 as to any matter set forth in or arising out of the events described in the Order of July 15, 1985, are resolved without admission of liability or violation of law by any Respondent; and

WHEREAS, the Commission's Bureau of Hearing Counsel has advised Respondents that it will not oppose this offer of settlement and considers it reasonable;

NOW, THEREFORE, Respondents do make this offer of settlement.

1. That Respondents shall modify existing language in Article 5 of their Agreement with respect to the relationship of independent action to any minimum rates adopted by an amendment to Article 5(a), to be adopted by the parties and filed with the Commission no later than 10 days after the date that this Order becomes final. Such language shall be as follows:

Any minimum rates (other than minimum rates applicable to commodities that are not required by statute or this Agreement to be subject to a right of independent action) that are agreed upon or otherwise adopted by the Parties under this Agreement shall in all cases be subject to further adjustment or revocation under the normal rate making processes of the Agreement as set forth in this Article and in Article 8 and to the right of independent action set forth in Article 13.

2. That neither the Agreement nor its members will enter into any agreement to surrender any member's right to take independent action to depart from any multicommodity minimums adopted by the Agreement if rates on the commodity to which such minimums are applicable are required by statute or the Agreement to be subject to a right of independent action.

3. That issues as to the authority and the future conduct of Respondents respecting individual carrier service contracts have been mooted by their amendment to the TWRA Agreement filed by Respondents on October 15, 1985 providing specific authority concerning individual TWRA members' service contracts which amendments became effective under Section 6 of the Shipping Act of 1984.

4. That this Order shall become effective as to the Agreement and each Carrier Respondent upon satisfaction of their offer to pay to the Federal Maritime Commission, without admission of violation of law or liability, the sum of \$300,000 (\$15,789.47 per Carrier Respondent).

5. That, TWRA and its members will refrain from establishing any minimum rate program applicable to essentially all types of cargo handled subject to the TWRA Agreement, the purpose of which program is revenue improvement or maintenance. The term "essentially all types of cargo" does not necessarily mean 100% of the commodities named in the TWRA tariff(s). The term "minimum rate program" means a program which applies minimum rates to commodities that are subject to TWRA commodity, class or FAK rates set forth in TWRA tariffs.¹ This prohibition is not applicable however, to: (a) minimum rates on commodities for which rates are not required by statute or by the TWRA Agreement to be subject to a right of independent action; (b) minimum charges or cargo quantity minima imposed to induce a direct vessel call at a port not ordinarily served by a TWRA member; (c) minimum charges required for issuance of a single bill of lading; (d) per container minimum charges or minimum con-

¹ Neither FAK nor class rates shall be construed as constituting minimum rates subject to this Order.

tainer capacity utilization rules where the shipper obtains exclusive use of the container for a cargo movement; or (e) establishment of minimum rates for a commodity or commodities whose rates have been declared "open". The prohibition contained in this paragraph respecting adoption of a minimum rate program shall cease to apply on November 7, 1987 or any earlier date on which the Federal Maritime Commission has determined the lawfulness of such minimum rates. None of the alphabetized categories of rates above should be construed as overriding or limiting any other requirements of any current or future applicable laws or regulations.

6. That during the period that paragraph 5 is in effect, TWRA will report to the Director, Bureau of Agreements and Trade Monitoring, any and all TWRA actions taken during such period establishing or modifying any minimum rates and will provide applicable tariff references; provided, however, that no tariff matter described in paragraph 5(b) and established by independent action need be reported. Reports under this paragraph shall be filed no later than 14 calendar days after the date of the TWRA action establishing such rates.

7. That the Order of Confidentiality dated September 27, 1986 be further amended by adding a new paragraph thereto as follows:

As of the date this proceeding is terminated by an administratively final order, all written material (and all copies thereof) produced pursuant to discovery in this proceeding or pursuant to or in connection with the Commission's Section 15 Order served March 12, 1985 that have not been offered into evidence in the proceeding shall be immediately returned to counsel for the party which produced them by every person which has received copies thereof.

8. That, upon final approval of this Order, any assessment proceeding, civil action, or other claims for recovery of civil penalties or for other relief, in any way related to claims or alleged violations of the Shipping Act of 1984 by any Respondent, arising out of any matter referred to in the Commission's July 15, 1985 Order of Investigation in this proceeding shall be forever barred. No finding in this proceeding may be used by any person against any respondent in any way in any other proceeding, in this or any other forum.

Dated: 11 August, 1986.

(Identification and signatures of attorneys for the parties not included.)

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-11

“NEUTRAL CONTAINER RULE”—U.S. ATLANTIC-NORTH EUROPE
CONFERENCE

ORDER DISCONTINUING PROCEEDING

November 7, 1986

By Order of Investigation and Hearing served April 4, 1986 (April Order), the Commission initiated this proceeding to investigate the use of the neutral container system by the U.S. Atlantic-North Europe Conference (ANEC). Although the April Order addressed ANEC's prior use of the neutral container system, its primary focus was on the legality and effects of a tariff rule which ANEC had recently adopted.¹ ANEC was named respondent and several container leasing companies, shippers, and the Department of Justice were named protestants.²

In response to a motion filed by ANEC, the Commission, by Amended Order of Investigation and Hearing served June 6, 1986 (Amended Order), subsequently modified the April Order to include two additional issues. The first concerned whether any shipper may have violated the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. §§ 1701-1720, by taking advantage of the neutral container system and the second raised the issue of whether a container leasing company could be found in violation of the 1984 Act under such circumstances.

Several container leasing companies which were named protestants by the April Order (Protestants) have now filed a “Notice of Intention to Withdraw as Protestants and Motion to Terminate Investigation” (Notice and Motion).³ Replies to the Notice and Motion were filed by ANEC, the Minnesota Mining and Manufacturing Company (3M), the Pacific Coast European Conference and the Pacific/Australia-New Zealand Conference, the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference, and the Commission's Bureau of Hearing Counsel.

¹ Tariff Rule 21.J (Rule) states that after January 1, 1986:

[the] carrier will not accept responsibility for the payment of any charge, including but not limited to, rental/leasing, drop-off, termination or maintenance and repair charges, for or in connection with the use of any dry trailer/container not owned or leased (prior to its delivery to a shipper for loading) by the carrier or any affiliate thereof during its transit by water or by land.

² These protestants had previously participated in support of a petition for a show cause order against the Rule, which was denied by the Commission. See Order Denying Petition for Order to Show Cause, served February 18, 1986.

³ The Notice and Motion was filed on behalf of Interpool, Ltd.; ITEL Containers International Corporation; Nautilus Leasing Services, Inc.; Sea Containers America Inc.; Trans Ocean Leasing Corporation; and Transamerica ICS Inc.

By memorandum dated September 5, 1986, Chief Administrative Law Judge Charles E. Morgan transmitted the Notice and Motion to the Commission, with his recommendation that the proceeding be terminated.

POSITIONS OF THE PARTIES

Protestants contend that they cannot continue to participate in this proceeding because of heavy expenses and other attendant burdens. They expect that in response to their withdrawal as parties, the Commission will terminate the proceeding and return all parties to the *status quo ante*, at which point they could pursue other unspecified forms of relief. Protestants continue to maintain that ANEC's Tariff Rule 21.J, which was the impetus for this proceeding, is unlawful. However, they also contend that the costs of proving the Rule unlawful are not justified given current economic conditions.

ANEC has no objection to Protestants' dismissal from the proceeding and supports a concurrent termination of the proceeding. ANEC notes that it is unlikely that Protestants could be prevented from withdrawing from the proceeding, because they were not originally designated as "respondents." ANEC further notes that the Protestants have been the only parties opposing Rule 21.J in the instant proceeding,⁴ ANEC also contends that the expenses and burdens of this proceeding have been heavy on it as well, and will continue to be so if it must continue to defend its Rule.

ANEC notes that certain issues raised by the April Order relate to the lawfulness of Rule 21.J, but maintains that the Commission has already found the Rule to be *prima facie* lawful. As for the other issues, ANEC argues that they relate to pre-Rule 21.J conduct, and that implementation of Rule 21.J has righted any wrong which may have existed. In light of the non-participation of the leasing companies and the fact that the remaining issues are allegedly of little more than academic interest, ANEC believes the Commission should exercise its discretion and terminate the proceeding.

3M does not oppose granting the Notice and Motion. It notes, however, that doing so will leave unresolved the issue of the lawfulness of Rule 21.J. 3M also contends that the present procedural format is ill-suited to the needs of many of those adversely affected by the Rule, and suggests that it may be incumbent on the Commission to devise an alternative procedure to assess the Rule. At the very least, 3M suggests that the Commission should ". . . officially encourage the carrier conferences and their individual members to entertain proposals for modification of joint container rules and independent container practices"

⁴ ANEC points out that of the eight shippers also named as protestants in the Order of Investigation, three have been dismissed as parties at their request, and all but one of those remaining have ignored the proceeding. In addition, the Department of Justice, which was also named a protestant, indicated that it would not participate in the hearing stage of the proceeding.

The Trans-Pacific Freight Conference of Japan and the Japan-Atlantic and Gulf Freight Conference support the Notice and Motion. They also note 3M's suggestion that the proceeding might be carried on against the conferences, but oppose any such one-sided continuation. The Pacific Coast European Conference and the Pacific/Australia-New Zealand Conference simply note that they have no objection to termination of the proceeding.

In light of what it terms Protestants' "effective withdrawal" from this proceeding, Hearing Counsel likewise does not oppose termination of the proceeding. Hearing Counsel also contends that without Protestants' participation, any further investigation would be inefficient and more costly for the remaining parties, particularly ANEC. In addition, Hearing Counsel does not believe that termination will affect the rights of any other parties and contends that 3M is still free to file a complaint if it so desires. Hearing Counsel does note, however, that serious allegations of violations of the 1984 Act have been raised during the course of the proceeding. It suggests that the Commission may want to pursue them through another unstated procedural avenue.

DISCUSSION

Interpool, Ltd., a container leasing company, initially sought a show cause order against ANEC's implementation of Rule 21.J, a rule which would prohibit conference members from using neutral containers, except to the extent they were leased by a carrier prior to their delivery to a shipper. Although Interpool was not successful in that endeavor, the allegations raised during consideration of its petition did prompt the Commission to institute the instant proceeding pursuant to section 11(c) of the Shipping Act of 1984, 46 U.S.C. app. § 1710(c).

The April Order attempted to address these allegations in the context of the ANEC trade and set forth eight issues for consideration. ANEC was the only party named as a "respondent" and container leasing companies and others who had previously filed comments were named "protestants." Although a subsequent order modified the April Order to include two additional issues, the status of the parties remained unchanged. At that stage, the Commission did not believe that an adequate basis existed to make the particular container leasing companies respondents in this investigation. In fact, one of the additional issues raised by the Amended Order was whether a container leasing company could theoretically violate the 1984 Act under the circumstances presented. In any event, the Commission will honor the Protestants' request and permit them to withdraw as parties from this proceeding.

Given the fact that we will no longer have the Protestants' active participation in this proceeding, we must now decide whether it remains in our best interest to continue this proceeding. In this regard, we find it significant that all parties involved favor a termination of the proceeding. They contend that it would be inequitable to make ANEC defend its use

of the neutral container system and implementation of Rule 21.J, while at the same time allowing certain practices of the container leasing companies to escape full scrutiny. Some also point out the difficulties inherent in litigating the issues presented, if the leasing companies are not parties.

The Commission shares these concerns. Although it might be possible to continue the investigation without the active participation of the container leasing companies, it would be considerably more difficult to do so. Moreover, the resources which would be expended, both by the Commission and the remaining parties, would appear to militate against a continuation of the proceeding. Accordingly, the Commission has determined to discontinue this proceeding. While doing so, however, we note that we will informally investigate the matters complained of which formed the basis for this proceeding to ascertain whether regulatory issues of sufficient magnitude are present to warrant future action by the Commission.

One final matter needs to be addressed. 3M has suggested that the Commission should "officially encourage" ANEC to modify its rule concerning the use of neutral containers. This the Commission cannot do, especially in view of the fact that there has been no determination of the lawfulness *vel non* of ANEC's Rule 21.J and its neutral container practices. The Commission does note, however, that conference agreements must establish a procedure for promptly and fairly considering shippers' requests, 46 U.S.C. app. 1704(b)(7), and that 3M is certainly free to avail itself of such a procedure.

THEREFORE IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-49

REEFER EXPRESS LINES, PTY., LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER AND
COMPANY, INC. AND TAMPA PORT AUTHORITY

ORDER PARTIALLY ADOPTING INITIAL DECISION ON REMAND

November 14, 1986

This proceeding was initiated by the complaint of Reefer Express Lines, Pty., Ltd. (REL or Complainant) alleging that the charge for "warehouse checking" assessed against REL's vessels under the tariffs of the Tampa Port Authority (Port Authority), Uiterwyk Cold Storage Corporation (Uiterwyk), and Eller and Company (Eller)¹ (collectively referred to herein-after as Respondents) was an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. §816.

BACKGROUND

REL is a common carrier by water in the U.S. foreign commerce which serves the export trade from the Port of Tampa (Port) with refrigerated vessels. Uiterwyk was the operator of a cold storage terminal facility at the Port. Eller, through its wholly-owned subsidiary, Harborside Refrigerated Services, Inc. (Harborside), was the successor to Uiterwyk's operation at the Port. The Port Authority is a public body established by statute to prescribe rules, regulations and rates for the Port of Tampa.

The disputed charge is for warehouse checking, defined in the Port Authority's Tariff FMC No. 8, Item 285 as:

The employment of warehouse clerks and checkers, as differentiated from shipside clerks and checkers, in delivery of inbound cargo upon commencement of discharge of cargo and the end of the Free Time allowance; or, in receipt of outbound cargo from the beginning of the Free Time allowance until completion of the loading aboard vessel of the cargo. "Warehouse Checking" is assessed against the carrying vessel based on total inbound and outbound cargo manifest weight.²

¹ Uiterwyk, however, did not participate in this proceeding.

² After the complaint was filed and at REL's urging, the Port Authority's tariff was amended, effective October 1, 1982, to shift responsibility for the warehouse checking charge from the vessel in all cases to

Continued

Complainant charged that "warehouse checking" is in violation of section 17 of the 1916 Act because it is a charge for a service not actually performed, and the charge is not reflected in the Uiterwyk and Harborside tariffs, but is based on cross-referencing in those tariffs to the Port Authority's tariff. REL also alleged that the Port Authority's tariff represents an agreement among terminal operators which is not approved by the Commission in violation of section 15 of the 1916 Act.³

Hearings were held in 1983 before Chief Administrative Law Judge Charles E. Morgan (Presiding Officer) who issued an Initial Decision on March 7, 1984 27 F.M.C. 14 (1984 I.D.) finding that the physical activity of warehouse checking had been performed and was of some benefit to REL as well as the shipper; the charge for warehouse checking was not shown to be unjust and unreasonable; Uiterwyk's and Eller's practice of incorporating by reference in their tariffs the warehouse checking charge of the Port Authority was not unjust or unreasonable; and the Port Authority's tariff was not an unapproved agreement among terminal operators.

The 1984 I.D. also determined that warehouse checking is an actual service performed by terminal personnel, which consists of tallying cargo on receipt by the terminal from an overland carrier, and upon discharge from the cold storage facility to the vessel, and includes preparation of dock receipts and loading lists as well as acting as the interface of product/cargo information between the terminal and the vessel's stevedore so that the cargo can be delivered to the vessel for loading in an efficient and reasonable manner. (27 F.M.C. at 17-18.)⁴

That 1984 I.D. was adopted in part by the Commission and the case was remanded to the Presiding Officer for further hearings on several

the "party responsible for stevedoring charges," and to permit the party responsible for payment to request that warehouse checking not be performed. However, in the latter instance, the amended tariff provides that "the terminal operators will not be responsible for any overages and/or shortages." Port of Tampa Tariff FMC No. 8, Item 285. Since October, 1982, REL has requested that warehouse checking not be performed.

³Section 15, 46 U.S.C. 814 (1984), as applicable herein, provided in part that every agreement "fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential or cooperative working arrangement . . ." among "other persons subject to the Act," including those who provide warehouse or terminal services in connection with a "common carrier" by water, must be filed with the Commission for its approval. Any agreement not filed and approved by the Commission would be unlawful.

⁴Warehouse checking was described by Eller's witness Francis S. Cunningham, General Manager of Harborside, on cross examination as

"tallying upon receipt from trucks or railcars of cargo by mark or lot number, by count, at times by weight and condition before placement into the warehouse . . . to tallying, the checking of condition, marks, lot numbers upon presentation of that cargo to a stevedore for loading on board a vessel." (Transcript, 69).

REL's Director of Terminal Operations admitted in both his written direct testimony and at the hearing that he had seen warehouse employees, other than forklift operators, checking and tallying export cargo both upon arrival at the refrigerated terminal facility (Direct Testimony, 2, Transcript, 13) and discharge from the warehouse to the vessel (Transcript, 16).

issues which had been raised on Exceptions and Replies to Exceptions to the Initial Decision. 27 F.M.C. 5 (1084). The Commission sustained the Presiding Officer's findings that the physical activity of warehouse checking had been performed and was of benefit to the vessel. However, it noted that, having found the function to benefit the shipper as well, the 1984 I.D. made no attempt to allocate the charges between the cargo interests and vessel interests based upon benefits conferred.

REL's argument that its tariff provided "tackle-to-tackle" rates under which it would not be liable for services rendered to cargo before it was brought within reach of the ship's tackle was also considered, although the Commission noted that the record was not clear as to REL's practices and rates actually in effect for shipments through Tampa. The Commission therefore remanded the proceeding to the Presiding Officer to determine whether:

(1) any of the charges for warehouse checking in the Port Authority's tariff may lawfully be charged for the account of the vessel in light of REL's tariff provision for tackle-to-tackle rates and the Commission's prior decisions;

(2) if such charges may be assessed against the vessel, the charges should be allocated among the vessel and the shipper/consignee in proportion to the benefits conferred on each by the service, and whether any proportion of the costs should be borne by the terminal operator; and

(3) the amended Port Authority tariff definition of warehouse checking unlawfully exculpates the terminal operators from possible liability for their own negligence.

Another evidentiary hearing was held on remand, at which four witnesses were heard through written direct testimony and live cross-examination. The parties generally adhered to their original positions, REL insisting that it received no benefit from warehouse checking and performed its own checking function, and the Respondents maintaining that warehouse checking was performed on behalf of the vessel. No party supported allocation of the charges between cargo interests and vessel interests.

In his Initial Decision on Remand, served March 4, 1986, 28 F.M.C. 693 (1986 I.D.), the Presiding Officer again found the tariff provisions relating to warehouse checking and assessment of the charges therefor to be lawful, except as to the 1982 amendment to the tariff under which the "terminal operators will not be responsible for any overages and/or shortages" when it is requested that warehouse checking not be performed. He concluded that the tariff provision as revised in 1982 unlawfully exculpated terminal operators from liability arising from their own negligence.

The 1986 I.D. found that the warehouse checking function is actually performed twice, once upon receipt of the cargo for intake into the refrigerated storage facility and once for marshalling the cargo for loading on board the vessel. Warehouse checking was again found to benefit the vessel by permitting the segregation and orderly loading of cargo in a timely

manner necessary for refrigerated or frozen cargo in Tampa's climate and for vessel efficiency.

Alluding to evidence offered by the Port Authority, it was noted that charges for similar functions performed at other ports are assessed solely against vessel interests, and some terminal tariffs explicitly provide that any allocation of the charges between vessel and cargo must be made by the parties to the contract of affreightment.⁵ The latter practice, the Presiding Officer found, is consistent with the terminal practices found lawful by the Commission in *Terminal Rate Structure-Pacific Northwest Ports*, 5 F.M.B. 53 (1956), reconsidered at 5 F.M.B. 326 (1957).

The 1986 I.D. found the warehouse checking function to be appropriately assessed against the vessel because the carrier controls the flow of transportation through the terminal at Tampa, choosing the terminal and instructing the shipper as to where and when to deliver his cargo. The Presiding Officer noted that the REL tariff reflects a variety of tariff terms in addition to "tackle-to-tackle" rates—"Free In and Out," "Liner Terms," "Full Liner Terms" and "Liner In and Free Out." Although Respondents contend that, for most of the rates offered, these terms connote services beyond ship's tackle, which Complainant disputes, the Presiding Officer held that to be a matter of the contract of affreightment between the carrier and the shipper rather than the relationship between the carrier and the terminal operator. He took note that the terminal operator is not a party to, and is not made aware of, the contract of affreightment between shipper and carrier.

The 1986 I.D. further determined that a common carrier's responsibilities, regardless of its tariff terms and contracts of affreightment, include providing a safe and convenient place for the receiving of cargo from the shipper and the giving of a receipt for the cargo. These functions, the Presiding Officer explained, are performed by the terminal as the agent of the vessel, and are, of necessity, performed prior to the time the cargo is delivered to ship's tackle.⁶ The Presiding Officer concluded that the provision of a convenient and safe place to receive export refrigerated cargo required delivery to a refrigerated warehouse and included the function of warehouse checking.

Exceptions to the 1986 I.D. were filed by Complainant to which Respondents replied. The Commission heard oral argument.

DISCUSSION

On Exceptions, REL argues that terminal charges are appropriately to be assessed against the party which "controls" the cargo, which in this case is said to be the shipper, and that the determination of when "legal control" of the cargo passes from the shipper to the carrier is to be

⁵ See Initial Decision on Remand, 28 F.M.C. at 703, discussing the tariffs of the Port of Seattle; Port of Palm Beach; Georgia Ports Authority; Port of Portland, Oregon; and South Carolina State Ports Authority.

⁶ See *Terminal Rate Increases - Puget Sound Ports*, 3 U.S.M.C. 21, 23-4 (1948).

determined from the facts, in which a "dominant determinant" is the contract of affreightment. (Complainant's Exceptions and Brief at 5.) In this connection, it is alleged that the shipper elects the port and pier at which REL vessels call; all physical services to cargo, including movement from delivery at the warehouse into cold storage, are billed to and collected from the cargo owner; the dock receipt provided by the terminal is in the terminal's name; and the terminal moves cargo to shipside only upon written release from the owner. All of this is said to indicate the shipper's continuing control over the cargo until it reaches shipside or ship's "tackle." REL further contends that actions by the terminal, as well as the assessment of wharfage charges against cargo, are consistent with its own tackle-to-tackle rates which limit its assumption of responsibility for the cargo to receipt at the end of ship's tackle subject to its own count.

REL's insistence that the shipper retains control of the cargo until it is delivered by the terminal operator to a point of rest on the pier within reach of ship's tackle is neither borne out by the record nor otherwise dispositive of the issue of which party should bear the cost of warehouse checking. Although the shipper is asked to "release" the cargo, it is the carrier which determines when the cargo will be loaded and in what order it will be moved from the terminal. Moreover, it does not appear from the record that the shipper "chooses" the terminal from which its cargo will be picked up, as REL asserts. Although a shipper may "choose" to make its shipment from one port rather than another, once it has done so, it delivers its cargo to the terminal designated by the carrier.⁷ REL's own witness admitted on cross-examination that only in exceptional circumstances would an REL vessel call to pick up cargo from more than one terminal facility within a port. (Hearing Transcript, March 5, 1985, at 190.)

REL's main argument that the choice of party to be charged is unlawful in this case turns upon the type of service it allegedly offers. Thus, REL argues that its tariff sets forth "tackle-to-tackle" rates which limit the inception of its obligations to the point at which cargo is placed beneath ship's tackle. The cases, statutes and other authorities cited by REL for this proposition,⁸ however, appear to be irrelevant to the question of the

⁷ The Harborside facility operated by Eller's subsidiary is apparently the only refrigerated terminal in Tampa.

⁸ *E.g., Scrutton on Charter Parties and Bills of Lading*, Knauth, *Ocean Bills of Lading*. REL also argues that its own obligations to the cargo are limited to those defined by the Carriage of Goods By Sea Act, 46 U.S.C. § 1301, the Harter Act, 46 U.S.C. 190, and its contracts of affreightment. Cases cited by REL indicate that a carrier may limit its statutory liability for damage to cargo under those Acts by charter or affreightment contract terms which define its service as beginning or ending at end of tackle. The cases cited by Respondents, however, indicate that the carrier's statutory liability for damage to cargo continues to apply through delivery to a safe and convenient location. Respondents argue by analogy that the carrier's liability attaches at the point at which safe and convenient delivery of cargo to the carrier can be made. *See e.g., F.J. Walker, Ltd. v. The M.V. LEMONCORE*, 561 F.2d 1138 (5th Cir. 1977); *Philip Morris v. American*

Continued

lawfulness of the terminal operator's choice of party to be assessed for the function in question. The carrier's liability for damage to cargo under the Harter and Carriage of Goods by Sea (COGSA) Acts is not definitive of its common carrier service obligations under the Shipping Act, or the lawfulness of terminal operators' charges and tariffs. The common carrier's obligation to provide a safe and convenient place for the receipt and delivery of cargo under the Shipping Act cases is, nevertheless, consistent with the Harter Act, COGSA and cases thereunder cited by the parties.⁹

The issue of whether REL's "tackle-to-tackle" rates affected its liability for the warehouse checking charges was raised on Exceptions to the Initial Decision as a result of REL's reliance on Rule 2A of its tariff. The Commission's Order of Remand specifically directed the Presiding Officer and the parties to consider the effect of this provision on the facts of this case under prior Commission decisions.¹⁰

REL insists that its terms of service are "tackle-to-tackle" and other terms contained elsewhere in its tariff—"Liner Terms," "Full Liner Terms" and "Free In and Out"—mean the same with respect to its responsibility to the cargo. Eller takes issue with this assertion that "tackle-to-tackle" terms and "liner terms," as used in REL's tariff, are the same. The Port Authority points out that REL's assertedly "tackle-to-tackle" rates are so "except as otherwise provided"; the actual rates as published, however, carry terms which are "questionably tackle-to-tackle * * *" (Reply of Respondent, Tampa Port Authority to Complainant's Exception and Brief, 13.)

REL's tariff Rule 2A specifies that the rates are "tackle-to-tackle" "[e]xcept as otherwise provided."¹¹ As Respondents point out, only the 11 cargo NOS rates in REL's tariff do not "otherwise provide"; all of the remaining specific commodity rates provide other terms: Liner, Full Liner, etc. Moreover, these are the rates which apply in practice to most cargo which moves under the tariff. (See Transcript of Hearing, March 5, 1985, 186-188.) Thus, if the phrase "Except as otherwise provided" has any meaning, it appears that REL's "tackle-to-tackle" rates—and its arguments based thereon—are largely illusory.

The Port Authority argues that Complainant's claim that its responsibility for services to the cargo begins at the end of its tackle is based upon an incorrect definition of the "point of rest," and that the Presiding Officer correctly concluded that the appropriate point of rest to which a shipper

Shipping Co., 748 F.2d 563 (11th Cir. 1985); and *Tapco Nigeria, Ltd. v. M.V. WESTWIND*, 702 F.2d 1252 (5th Cir. 1983).

⁹Neither these authorities nor the Presiding Officer's decision prevents the carrier from passing through this expense to the shipper, either in the structure of its freight rates or by charging separately therefor.

¹⁰Although the Commission's Order of Remand suggested that the parties address the issue of the terms of service—common carriage or contract, tackle-to-tackle or otherwise—applicable to the shipments on which the disputed charges were incurred, it does not appear from the record herein that this was done. See Order of Remand, 14.

¹¹"Except as otherwise provided, rates named herein * * * are applicable from end of ships tackle at loading port and include only the on-shore cost or on-lighter cost of hooking sling load to ships gear."

must deliver its cargo in the case of refrigerated cargo is the entry to the refrigerated terminal at which the vessel will call. This point of rest, the Port Authority urges, is necessarily a function of the carrier's obligation under the Shipping Act and Commission case law to provide a safe and convenient place to receive cargo. Eller submits that a carrier's duties for the receipt of cargo are analogous to its duties for the delivery of cargo, as determined by the Carriage of Goods by Sea and Harter Acts, *supra*, and cited cases arising thereunder.

The Presiding Officer concluded that a common carrier's responsibilities under the 1916 Act, regardless of its tariff terms and contracts of affreightment, include providing a safe and convenient place for the receiving of cargo from the shipper and the giving of a receipt for the cargo. These functions are performed by the terminal as the agent of the vessel, and are, of necessity, performed prior to the time the cargo is delivered to ship's tackle, quoting *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, 23-4 (1948).¹² We agree with his conclusion that the nature of the transportation service offered—refrigerated service—and the cargo for which such service is offered—perishable commodities—require as a practical matter that the carrier provide for receipt of cargo at facilities at which its condition can be maintained during transfer from one party to another.

Because we find the Presiding Officer's reasoning valid with respect to the carrier's obligations to provide a place for delivery of refrigerated cargo, the issue of the effect of REL's tackle-to-tackle rates is irrelevant. Whether REL's tariff terms under specific rates shift the burden from one party to the other for the expense of the terminal's services does not affect the relationship between the terminal and the carrier; the terminal may charge the vessel for warehouse checking, and the carrier may itself collect it from the shipper.

The function of "warehouse checking" appears to be one of several checking functions performed by the terminal operator at the various "interface" points in the transportation process between shipper or inland carrier and physical possession of cargo by the ocean carrier. The Commission regulation which defines "checking" indicates that it may be a charge for the account of the cargo or the vessel or other person requesting the service.¹³ REL, upon whom the burden of proof rests in this case, has failed to establish that it is unlawful for Eller to assess the charge for warehouse checking at its Tampa facility against the vessel.

¹² "The carrier must furnish a convenient and safe place at which to receive cargo from a shipper. * * * If this can be done at end of ship's tackle * * * the contracts of carriage may be limited to such service. On the other hand, if such receipt * * * is impractical or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo * * * from where it can be received from the shipper. * * * The carrier cannot divest itself of this obligation by offering a service which is not prepared to perform." Emphasis supplied in the I.D. on Remand, 28 F.M.C. at 708.

¹³ 46 C.F.R. § 515.6(d)(9).

One final point needs be addressed. In remanding the case to the Presiding Officer, the Commission ordered him to consider whether the Port Authority tariff definition of warehouse checking as amended in 1982 unlawfully exculpates the terminal operators from possible liability for their own negligence. The Port Authority has since advised on brief that it has no objection to amending the tariff to indicate that the terminal operators' non-liability for shortages or overages would not apply where such shortages or overages resulted from the "sole negligence" of the terminal operator. In his 1986 I.D., the Presiding Officer concluded that the tariff provision as revised in 1982 did unlawfully exculpate terminal operators from liability arising from their own negligence, and that the revision proposed by the Port Authority would also be troublesome. He concluded, however, that substitution of the word "substantial" for "sole" in describing the limits of the terminal operators' putative liability would be acceptable. While we agree with his reasoning and his finding that the limitation of the terminal operators' liability to damages arising from its "sole negligence" is inappropriate, we do not find the alternative formulation any more acceptable.¹⁴ The Presiding Officer's resolution of this issue is therefore not adopted. The Port Authority's proposed formulation, without limitation or description of the degree of negligence for which it would ordinarily be liable would, we believe, be most appropriate.¹⁵

With the exception noted above, we find the findings and conclusions reached by the Presiding Officer in his Initial Decision on Remand to be proper and well-founded.

THEREFORE, IT IS ORDERED That, with the exception of the second paragraph of page 27, 28 F.M.C. at 709 (fifth full paragraph), the Initial Decision on Remand in Docket No. 82-49 is adopted; and

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

IT IS FURTHER ORDERED, That Docket No. 82-49 is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

¹⁴We also do not agree with the Presiding Officer's conclusion that the issue would necessarily be appropriately decided in some other forum. This portion of the Initial Decision on Remand will, therefore, also not be adopted.

¹⁵The Port Authority's tariff provision, as amended, would thus read:

"When warehouse checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages, except where such shortages and/or overages resulted from the negligence of the terminal operator."

FEDERAL MARITIME COMMISSION

DOCKET NO. 82-49

REEFER EXPRESS LINES PTY., LTD.

v.

UITERWYK COLD STORAGE CORPORATION, ELLER & COMPANY,
INC., AND TAMPA PORT AUTHORITY

On remand, found that:

1. The Tampa Port Authority's tariff providing for the assessment by the Port's terminals of charges for "warehouse checking" for the account of the vessel is lawful.
2. The above charges should not be allocated by the Port's terminals among the vessel and shipper/consignee in proportion to any benefits alleged to be conferred, inasmuch as such charges are the responsibility of the vessel in providing its transportation services, including the necessity to provide for a safe and convenient place to receive cargo and issue a receipt therefor; and the costs for the service of warehouse checking should not be borne in any proportion by the Port's terminals.
3. The Port Authority's tariff definition of warehouse checking unlawfully exculpates the Port's terminals, and should be amended.

Joseph A. Klausner and Josiah K. Adams for complainant, Reefer Express Lines Pty. Ltd.

David F. Pope for respondent, Eller & Company, Inc.

Harold E. Welch for respondent, Tampa Port Authority.

INITIAL DECISION¹ ON REMAND OF CHARLES E. MORGAN,
ADMINISTRATIVE LAW JUDGE

PARTIALLY ADOPTED NOVEMBER 14, 1986

BACKGROUND

This complaint in brief is about "warehouse checking" charges sought to be collected from the complainant on refrigerated cargoes such as frozen poultry, exported through a cold storage terminal at the Port of Tampa, Florida.

The complaint is somewhat broader in scope, insofar as it attacks the warehouse checking charges of the Tampa Port Authority which apply on imports as well as on exports, on non-refrigerated as well as on refrigerated cargoes, and at all terminals at the Port of Tampa. These terminals have their own tariffs, but generally the terms of the Port's tariff apply.

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).

Since February 1, 1966, the tariff issued by the Tampa Port Authority, one of the three respondents herein, has included items which define, and which also list the rates to be charged for, warehouse checking.

At the Port of Tampa only one terminal specializes in providing cold storage facilities (freezer and cooler rooms for cargoes). The evidence adduced relates largely to this one cold storage facility, to one ocean carrier (the complainant, Reefer Express Lines, or REL) and to this carrier's exports of refrigerated cargoes.

The complainant is concerned about the warehouse checking (W.C.) charges sought to be assessed by the one cold storage terminal. But, also it is noted that the W.C. charges have been assessed against REL at another terminal, Garrison Terminal, used by REL at the Port of Tampa. REL has not paid this assessment by Garrison, nor has REL paid the assessment by the cold storage terminal of the W.C. charges.

The other two respondents herein were and are the operators of the cold storage facility at Tampa. Respondent, Eller & Company, Inc., purchased this facility from respondent, Uiterwyk, in May, 1981. Eller operates the facility under the name of Harborside Refrigerated Services, Incorporated. REL regularly called, and on occasion still calls at, the Uiterwyk-Eller cold storage facility to load its export refrigerated cargoes. REL moved cargo in and out of Tampa both under charter and under tariff terms. At times REL acted as a common carrier, and at other times not. In any case REL issued bills of lading. REL's practice was not to provide the Uiterwyk-Eller cold storage terminal with copies of REL's contracts of carriage or with copies of its bills of lading.

This is a remanded proceeding. The Commission's Order of Remand disposed of a number of allegations originally made in the complaint.

Concerning the remaining remanded issues, the Commission specifically asks that determinations be made as to whether:

(1) any of the charges for warehouse checking in the Port Authority's tariff may lawfully be charged for the account of the vessel in the light of REL's tariff provision for tackle-to-tackle rates and the Commission's prior decisions;

(2) if such charges may be assessed against the vessel, whether the charges should be allocated among the vessel and the shipper/consignee in proportion to the benefits conferred on each by the service; and whether any proportion of the costs should be borne by the terminal operator; and

(3) whether the amended Port Authority tariff definition of warehouse checking unlawfully exculpates the terminal operators from possible liability for their own negligence.

Both the original evidence herein and the evidence obtained at the further hearing on remand have been considered carefully to arrive at the following expanded statement.

RECORD FACTS, POSITIONS OF THE PARTIES, AND PRELIMINARY CONCLUSIONS

REL disputes the assessment of warehouse checking (W.C.) charges, billed against it, and among other things, asks that the Commission direct the respondents to cease and desist from charging, collecting, demanding, or seeking to collect the W.C. charges from complainant, for past or future sailings. From on or about October 1, 1982, no W.C. charges have been assessed against complainant. Since that date REL made three calls at the Harborside facility, in 1984 prior to October 1, 1984. The non-assessment of W.C. charges against the complainant is the result of a change in the tariff provision defining the warehouse checking service effective October 1, 1982. It was then newly provided that the party responsible for payment might specifically request in writing that warehouse checking not be performed. The complainant then so requested, that is, that warehouse checking be not performed on its shipments. Also in the past the complainant never specifically requested that warehouse checking be performed.

The complainant's past shipments of frozen or refrigerated cargo, consisted of items such as frozen poultry exported through the Uiterwyk-Eller cold storage terminal. The complainant has not listed the disputed shipments, but in its complaint refers to the W.C. charge of \$0.91 per net ton for all cargo, (other than citrus and citrus products, and Iron & Steel which bear lower charges); and bananas, cattle and horses which are excepted from the W.C. charge. These \$0.91 charges were in effect from October 1, 1981, through September 30, 1982.

Exhibit No. 3, by its attachments A and B, which are copies of two invoices of Uiterwyk to REL, shows certain billings to the complainant of the W.C. charges dated May, 1981, and June, 1981, based on the rate of \$0.82 per net ton. The first billing above on one ship totalled \$4,987.76, which computes to 6,082 net tons total; and the second billing above on another ship totalled \$4,104.59, and computes to 5,005 net tons. Seven separate cargo items were listed for the first ship, with descriptions such as, Balfour, GK Chix, Hamdyiego, and Interfoods. There are four such listings for the second ship.

The actual charges for warehouse checking as provided in the tariff of the Port of Tampa in recent years on or about the times of the disputed shipments herein were:

On January 1, 1979:

All cargo other than specified below	\$0.64 per net ton
Citrus and Citrus Products	0.61 per net ton
Iron & Steel	0.53 per net ton

EXCEPTION: Not applicable on bananas, cattle, horses or to cargo loaded or discharged from vessels of 999 Gross Registered Tons or less.

On October 15, 1979:

All cargo (as above)	\$0.71 per net ton
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Citrus and Citrus Products	0.67 per net ton
Iron & Steel	0.59 per net ton
EXCEPTION: (same as 01-01-79).	
On October 13, 1980:	
All cargo (as above)	\$0.82 per net ton
Citrus and Citrus Products	0.77 per net ton
Iron & Steel	0.68 per net ton
EXCEPTION (same as 01-01-79).	
On October 1, 1981:	
All cargo (as above)	\$0.91 per net ton
Citrus and Citrus Products	0.86 per net ton
Iron & Steel	0.76 per net ton
EXCEPTION: Not applicable on bananas, cattle or horses.	
On October 1, 1982:	
All cargo (as above)	\$1.01 per net ton
Citrus and Citrus Products	0.95 per net ton
Iron & Steel	0.84 per net ton
EXCEPTIONS: Not applicable on bananas, livestock, or containerized cargo neither stuffed nor unstuffed in the Port.	

On remand, the parties generally adhere to their original theories of this case. That is, the complainant insists that it (the vessel) receives no benefit and is not responsible for warehouse checking. And the respondents insist that the terminals performed the warehouse checking service on behalf of the vessel, and that the vessel is responsible for the charge.

No party supports allocation of W.C. charges as between vessel and shipper/consignee.

Certain other charges, in the Uiterwyk or Harborside tariff are billed to the shipper, and not to the vessel. One such charge is item 70, "Thru-Put," defined as "the charge for accumulating cargo and providing refrigerated protection prior to loading on vessel (export cargo only) and will be billed for the account of the Shipper. Does not apply to fresh citrus."

Other such charges billed to the shipper, include item 35, "Inspection U.S.D.A.," item 15, "Delivery Charge," for preparation of documents for shipping products; and item 60, "Storage," billed to the firm owning the cargo at the time it is placed into storage. Certain other items billed to the shipper were referred to, but generally relate specifically to import cargoes, rather than to export cargoes. The complainant's position is that warehouse checking is in the category of services which also should be billed to the shipper, but in any event not to the vessel.

At the original hearing, a witness for the cold storage terminal herein candidly testified on cross-examination by complainant's counsel, that every function of the warehouse checking service was done for *three purposes*, one, for the warehouse's own benefit, because of its own liability (as

bailee) for the goods; two, for the benefit of the shipper, to assure that the shipper continues to ship through this warehouse; and, three, for the benefit of the shipping line, so that the ocean carrier receives the proper cargo in order.

The same witness above also pointed out that on the refrigerated and freezer cargo handled through this terminal, there is only one way to get cargo from a truck (or railcar) to the ocean vessel, and that way is through this terminal facility. The truck does not pull up and load directly into the vessel, that is, there is no direct discharge.

This terminal facility has received at times certain cargoes with the notation of vessel "TBN" (to be named). When this happens, the ocean carrier knows that it will have to pick up cargo, for example, on the 30th of a month, and the terminal may start receiving cargo on the 1st, 2nd, or 3rd of a month. The terminal knows the name of the ocean carrier, and the ocean carrier will name its vessel in due course. Cargo may stay in this facility as long as 30 to 45 days on the outside for export cargo. An average for export cargo might be 25 to 35 days.

Export freezer cargo at times may be sold three times over in the warehouse. The terminal may receive cargo up to 5,000 tons for shipment on a vessel. In the warehouse, there may be, for example, beef livers going to 7 different consignees, and maybe going on 7 different ships, or maybe all on one Reefer Express Lines' vessel.

Quite often while a vessel is "working," that is, being loaded with export cargo, besides the original cargo intended for the vessel, additional, or other cargo, is received in the terminal to be loaded on the vessel. Also, the terminal may have in its possession cargo which was not destined originally for the vessel, but which is released subsequently to go on board the vessel. The terminal in performing its warehouse checking service in such instances in checking out cargoes from the terminal is performing a service needed by the vessel.

It is important that the vessel be loaded in an orderly manner, so that the vessel can both be loaded (and ultimately discharged in an orderly manner).

Warehouse checking services for export cargoes were performed at the Uiterwyk-Eller cold storage terminal as a normal function of this terminal at least twice on all cargoes. That is, once during receipt and assembly of cargoes for each vessel, and again at the time of delivery of these cargoes from the cold storage terminal to each vessel. The latter checking was of necessity precisely made so that cargoes could be loaded efficiently and properly aboard ship for export.

At the first hearing, the then Vice President and General Manager both of Uiterwyk and of Harborside considered it difficult if not impossible for a refrigerated warehouse to allocate the costs of the service of warehouse checking, unless the warehouse were a party to the contract of affreightment, bill of lading, or charter agreement, which established where delivery to

or from the ocean carrier would be complete and which also established the party responsible for moving the cargo to and from the place of delivery to the vessel.

On cross-examination the successor Vice President and General Manager of Harborside so employed since October 8, 1984 (who also was employed at Uiterwyk from February, 1974 to June, 1981), testified that warehouse checking on export cargo was performed in part at the time the cargo came into the warehouse on the land side of the warehouse, and in part at the time the cargo left the warehouse on the water side of it to be loaded on the ship. What actually was done in the performance of warehouse checking depended in large part on the specifics of various shipments. On first reception of the export cargo on the land side, there was a count of the merchandise, a check on the condition of the merchandise, and depending on the circumstances, also on occasion an identification of the port of discharge for the cargo, separation of the cargo by shippers, and separation by commodities. All these were done in order to determine how to put the cargoes in the warehouse. The warehouse then signed a dock receipt. These functions of warehouse checking in the land side, took place within the warehouse facility, but not in the freezer or cooler areas of the warehouse.

Later on, warehouse checking also would be performed, at least, in substantial part, immediately prior to the sailing date of a vessel from the Port of Tampa. In the case of such checking during delivery from cold storage to the vessel or to its stevedore, this checking was performed by non-deep-sea I.S.A. checkers employed by Uiterwyk. This warehouse checking included the preparation of a loading list for the vessel.

To deliver the products, to the ocean carrier, requires the warehouse checking, of lots, the tallying, and the delivery of cargo in the right order, by the right lot, to the stevedore, which loads the export cargo on the ocean carrier.

As stated in the original initial decision warehouse checking is defined as follows:

Warehouse checking is a service performed by terminal personnel (of Uiterwyk or Eller), using tally clerks and checkers to:

(1) Tally, by count, lot, supplier, and/or mark the product/cargo into the cold storage terminal facility and record where, in the cold storage terminal facility, the various lots, marks, or shipper's product/cargo is stored;

(2) Tally and withdraw from the cold storage terminal facility, by count, lot, mark, and/or shipper the product/cargo to the vessel's side, or the overland carrier's equipment, to insure correct count and delivery by lot, mark, or shipper of the overall product/cargo furnished to the vessel or overland carrier; and

(3) Act as the interface of product/cargo information, both as to count and lot/mark/shipper information between the cold storage

terminal facility and the contract stevedore for the vessel so that the vessel can be loaded and the product/cargo delivered to the vessel's side for loading in an efficient and reasonable manner.

In the cold storage terminal's (now Harborside's) dock office is a master board which shows where products are stored, that is, for example, in what area of the freezer or in what cooler. Notations are made on this board after the products are placed in the freezer or in a cooler.

When the ocean vessel arrives at the dock, or prior to such arrival, a shipper or a number of shippers will provide the warehouse by telex a release, which provides for the releasing of certain cargo to the ocean vessel or to the vessel's agent, the stevedore. A customer may have 1,000 tons of a product in the warehouse, and might release only 500 tons to go on the particular ocean vessel at the time. Five-hundred tons would be released by designated lot number.

In other words, while some warehouse checking occurs at the time the cargo enters the freezer or cooler facilities, other warehouse checking of necessity must occur at the time or just prior to when the cargo leaves the freezer or cooler facilities, for loading aboard ship. A witness for the complainant admitted that this was so at the first hearing. Warehouse personnel checked to the extent at least, "as far as this lot goes to the ship, this one doesn't."

Freezer or cooler cargo when exported, because of the temperature (heat) at Tampa, must not be exposed to the elements for more than a half-hour or an hour. In other words, to make loading efficient, advance checking appears necessary to avoid undue delays between cold storage and loading on ships.

As noted above, a pertinent date in this proceeding is October 1, 1982. At this time the applicable tariff description of warehouse checking was changed to read as follows:

285	WARE-	The employment of warehouse clerks and
(C)	HOUSE	checkers, as differentiated from shipside
	CHECK-	clerks and checkers, as defined in Item 205,
	ING	for delivery of inbound cargo upon com-
		men- commencement of discharge of cargo and the end
		of the Free Time allowance; or for receipt of
		outbound cargo from the beginning of the
		Free Time allowance until completion of the
		loading aboard vessel of the cargo. Ware-
		house Checking is assessed against party re-
		sponsible for stevedoring charges based on
		inbound or outbound cargo manifest weight.

Warehouse Checking will be performed on all inbound and outbound cargo and charges assessed as provided above, except in cases of direct discharge or direct load cargo and container cargo not stuffed nor unstuffed in port, as described in Item 330, and when party responsible for payment specifically requests, in writing, that Warehouse Checking not be performed. When Warehouse Checking is requested not to be performed, terminal operators will not be responsible for any overages and/or shortages. EFFECTIVE OCTOBER 1, 1982.

In part, above it is provided that the assessment be "against party responsible for stevedoring charges." Also, above it is provided in part that warehouse checking be performed on all cargoes, except in cases of direct discharge or direct load cargo and container cargo not stuffed or unstuffed in port, and except "when party responsible for payment specifically requests, in writing, that Warehouse Checking not be performed."

Prior to October 1, 1982, the Port of Tampa tariff provided:

- 285 WARE- The employment of warehouse clerks and
 HOUSE checkers, as differentiated from shipside
 CHECK- clerks and checkers, in delivery of inbound
 ING cargo upon commencement of discharge of
 cargo and the end of the Free Time allow-
 ance; or, in receipt of outbound cargo from
 the beginning of the Free Time allowance
 until completion of the loading aboard vessel
 of the cargo. "Warehouse Checking" is as-
 sessed against the carrying vessel based on
 total inbound and outbound cargo manifest
 weight. (Intended to clarify application of
 provision without change of past practice.)
 EFFECTIVE FEBRUARY 1, 1974.

As seen above, the assessment in earlier years was "against the carrying vessel."

It may or may not be significant, that Uiterwyk provided only a service as a terminal, handling refrigerated and freezer cargoes through its freezer and cooler facilities, and that Uiterwyk did not provide stevedore services. In contrast, Uiterwyk's successor terminal, namely Harborside (owned by Eller) is not only a terminal but also is a stevedore.

In other words, Harborside may have more options for recovery of its expenses for its so-called "warehouse checking" service.

The history of warehouse checking at the Port of Tampa is of interest. The rates for warehouse checking at the Port of Tampa are prescribed by the Tampa Port Authority as per Chapter 23338 of the Laws of the State of Florida, Special Acts of 1945. Also required are public notice and public hearing by the Port Authority before fixing and establishing its tariff rules, regulations and rates.

Warehouse checking at Tampa was considered originally in 1965. The charge was proposed by the terminal operators of the Port of Tampa to recoup asserted labor charges for performing this warehouse checking service. The warehouse checking was changed and increased from time to time. The charge originally was established on February 1, 1966.

At this time warehouse checking became a new item in the tariff and it was a charge against the vessel. The rate originally was 35 cents a ton of 2,000 pounds for all cargo not otherwise specified; also excepted from the warehouse checking charge were bananas, cattle, horses and certain containerized cargo.

At a public hearing held by the Tampa Port Authority on October 25, 1965, it was stated that "warehouse checking" historically had been an item absorbed by the terminal operators, with no rate for same being published in the tariff at that time. Further, it was the desire of the terminal operators to incorporate a charge for warehouse checking in the tariff, and to make it a charge against the vessel.

At another public hearing on December 22, 1965, before the Tampa Port Authority, Mr. John Imparato, a spokesman for one terminal operator at Tampa, objected to the manner of increasing the revenues of the terminal operators. For example, he opposed the warehouse checking charge as such, preferring to recoup his expenses through his stevedore rates.

In that manner he stated that he could adjust his stevedore rates as he saw fit, depending upon the nature of the cargoes handled. His objection also related to the wharfage and dockage charges, as well as to the warehouse checking charges. This terminal operator believed that he had high stevedore rates in relation to his competitors' stevedore rates. He stated that stevedoring was his terminal's main business and that "without stevedoring, we don't need terminals."

Also, he saw no need "to increase rates that are published over the area we serve and scare people away when they see these figures." He acknowledged that any increase in stevedore charges at his terminal would be paid by his steamship principals.

It was also pointed out at the above 1965 hearing, that storage, handling, and loading and unloading (of trucks and railcars) were charged against the cargo. It was pointed out that it was a constant problem as to where various charges should be placed, that is, whether against the ship or against the cargo. It was not then elaborated whether this was considered a problem of legality or not, but it is concluded that at least it was considered to be a problem of sales promotion.

At the same public hearing before the Tampa Port Authority on December 22, 1965, Mr. W. A. Freeman of Garrison Terminal Port of Tampa, testified that a number of this terminal's steamship line principals were paying warehouse checking charges in every other port which they called in the U.S. Gulf range, of from 50 cents to a dollar, and that these steamship line principals were laughing at Tampa because they were not paying in Tampa for warehouse checking. At that time, Tampa was proposing a charge of 35 cents a net ton. In this witness' view, the ocean carrier had a responsibility to the cargo during the free time period because the ocean carrier remained responsible for the care and safekeeping of the cargo including warehouse checking. Mr. Freeman took the view that he could not adjust his stevedoring rates to cover warehouse checking expenses.

At a public hearing before the Tampa Port Authority on July 21, 1982, it was testified in part that the original warehouse checking charge started out when ocean vessels handled a multitude of cargo at the same time, and further that the warehouse checking services had to be performed and could not be relied upon as being requested. At the same hearing the then counsel for REL stated that warehouse checking charges should be limited to instances where the service both is performed and is requested, but with emphasis on the service being requested in the view of REL.

Respondent, the Port of Tampa, at the hearing on remand, introduced copies of the terminal tariffs of certain other ports.

The Port of Portland, Oregon's tariff contains the following:

SERVICE AND FACILITIES CHARGE

Service and facilities charges are assessed against ocean vessels, their owners, or operators which load or discharge cargo at the marine terminal facilities for the use of terminal working areas in the receipt and delivery of cargo to and from vessel and for services in connection with the receipt, delivery, checking, care, custody and control of cargo required in the transfer of cargo. (See Notes 1 through 6 and Item 1040(A-2).) (Emphasis supplied.)

Item 1040 A.2.a. provides:

Where the contract of affreightment establishes the responsibility between the parties thereto for the payment of the service and facilities charge named in a tariff, the full amount of such charges shall be billed to and paid by the vessels, its owners, or operators. The term "Contract of Affreightment" as used herein shall mean tariff, charter party, ocean rate or any other arrangements under which the vessel transports cargo. Allocation or adjustment of these charges between vessel and cargo shall be made solely by the parties to the contract of affreightment and not by the Port. (Emphasis supplied.)

The *Port of Seattle's* terminal tariff contains a *Service and Facilities Charge* substantially the same as Portland's. In particular the full amount of such charge shall be billed and paid by the vessel, its owners . . . or operators to the terminal. Also allocation or adjustment of this charge between vessel and cargo shall be made solely by the parties to the contract of affreightment. The latter is defined in the same manner as in the Portland tariff.

The *Port of Palm Beach's* tariff refers to a service of furnishing checker foremen when vessels are loading cargo, to supervise the release of the cargo being loaded. "Charges for this service will be rendered against the vessel, their owners, or agents."

The *Georgia Ports Authority Terminal Tariff* similarly provides that the terminal will furnish checker-foremen to supervise the release of cargo being loaded on vessels, and it states, "Charges for the service will be rendered against vessels, the owners and agents."

The *South Carolina State Ports Authority's* tariff defines "Checking" as the service of counting and checking cargo against appropriate documents for the account of the vessel.

So far as this record shows, neither the Port of Tampa tariff, nor any other United States Port terminal tariff, contain any provisions which divide the cost and assessment of terminal services between the vessel, cargo, or stevedore, depending upon the ocean carrier's terms of affreightment.

The witness for the Port of Tampa testified, and there was no contrary testimony, that a division of a terminal's charge for terminal services as between the vessel, cargo or stevedore would not only be unworkable but unmanageable. It is concluded that this testimony should be given great weight.

It is not believed by the Presiding Officer that the W.C. checking charge in this proceeding is the type of charge or assessment that lends itself or ought to lend itself to apportionment. To do so apportion the many charges or expenses of terminals would lead to a morass in the administration and handling of such charges and expenses.

As seen above, at certain ports, such as the Port of Portland, certain charges are assessed against the vessel, and this assessment is made regardless of the terms of affreightment, such as "tackle-to-tackle," or whatever.

In *Terminal Rate Structure-Pacific Northwest Ports*, 5 F.M.B. 326, 327, with reference to handling and service charges incurred between point of rest and ship's hook, it was stated that "in every case the terminal operator may bill and collect from the vessel, and in instances where the charges are incurred for the benefit of the cargo the carrier shall bill and collect such charges from the shipper or consignee.

It is the ocean vessel, rather than the shippers which control the flow of transportation through the terminal at the Port of Tampa. The vessel decides which terminal it will use, and when a shipper wants to use that vessel, the vessel (ocean carrier) instructs the shipper to deliver his

cargo to the terminal selected by the vessel, usually to meet a specific sailing date. The cargo goes to the ship, rather than the ship going to the shipper's cargo.

The complainant emphasizes that many of its rates are "tackle-to-tackle rates. In such instances, the shipper contracts with the vessel (ocean carrier) to bring the export cargo to the ship's tackle, and the vessel unloads the cargo at its tackle in the foreign port. Thus, as between shipper and vessel, there are contractual obligations. The complainant reaches the conclusion that the warehouse checking service physically takes place in its entirety early in the export process, prior to the time when the shipper assertedly yields possession of the cargo at ship's tackle to the vessel, and that ergo the warehouse checking is in the category of services for cargo. But it does not necessarily follow that the terms of the vessel's tariff determine who is responsible for warehouse checking.

The complainant's tariff rates included eleven tackle-to-tackle rates. Other terms in its tariff are Free In and Out (one rate), Liner In and Free Out (three rates) Liner Terms (two rates), and Full Liner Terms (17 rates). The respondents admit that when the terms free in, or free out, are used the stevedoring is assessed otherwise than to the vessel. Respondents contend that full liner terms and liner terms connote services beyond the tackle of the vessel, but complainant disputes this, and avers that liner terms and full liner terms notwithstanding, that on all of its shipments, the established meaning of liner terms is that the ship shall pay all expenses from tackle to tackle. In any event, the vessel's tariff terms relate only to its contracts of affreightment with the shipper, rather than to the relationship between the vessel and the cold storage terminal.

The complainant admits that the duty to bring cargo alongside vessel, and the responsibility or risk up to that point are conceptually different, and depend upon tariff, agreement and general law.

The shipper makes no contractual arrangements with the terminal operator under ordinary circumstances, but rather the shipper makes his contractual arrangements with the land and ocean carriers, that is, with the inland carrier for movement of the cargo to or from the terminal facility, and with the ocean carrier for movement of the cargo between the ports of call.

Also, the respondent terminal operators are not made aware of the terms of the contractual arrangements as between the vessel and shipper. The respondents are not given copies of papers such as bills of lading, or charter arrangements.

It is important to recognize that it is the vessel's responsibility, (regardless of its terms of affreightment with the shipper), to provide a convenient place for receiving the cargo from the shipper, and to provide for the giving of a receipt for the cargo.

When the cold storage terminal gives such a receipt (dock receipt) to the shipper or to the rail line, or trucker, or forwarder, acting on behalf

of the shipper, the cold storage terminal then acts as agent for the vessel. It follows from this line of reasoning that the cold storage terminal become the agent of the vessel, of necessity, prior to the time that the cargo is delivered to ship's tackle.

An ocean carrier such as Reefer Express cannot avoid its obligation to provide a convenient place for receiving cargo from the shipper and cannot avoid its obligation to give a receipt for the shipper's cargo, by reliance either upon its terms of affreightment with the shipper, or upon its bill of lading.

The respondents reasonably reach the conclusion that warehouse checking is rendered by the respondent terminal operators on behalf of the vessel, which in turn is responsible for the warehouse checking, as part of the vessel's obligations to provide a convenient place to receive the cargo, to give a receipt therefor, and to see that the cargo is moved from place of receipt to ship's tackle.

While the shipper may be responsible for cargo stored in the cold storage terminal for extra long periods not covered by free time, and for some other services which may be provided by the terminal, a shipper certainly is not responsible for the vessel's obligation to provide a convenient place to receive the cargo, and the vessel's obligation to give the shipper a receipt for his cargo.

This is so regardless of any terms of affreightment as between the shipper and vessel, because of the vessel's common carrier responsibilities, and because of the impracticality of requiring a shipper to provide a convenient place for the receipt of the cargo by the vessel. In fact, the vessel chooses the terminal at which it will call. In other words, the vessel selects the place to receive the cargo.

It follows that an ocean carrier's responsibility to accept delivery of goods on a pier includes the movement of refrigerated cargo to and from a refrigerated terminal when necessary to protect the cargo from damage from the elements, while such cargo is being assembled during free time.

The complainants insist that because certain charges of the cold storage terminal are assessed to the shipper, that so also should the W.C. charges be assessed. The respondents reply that certain other cold storage terminal charges, besides warehouse checking, well might be imputed as the responsibility of the ocean carrier. Such other charges are not in issue herein, inasmuch as the cold storage terminal has not opted to assess such charges against the vessel.

Generally, while all of the statements or conclusions above are true as to the relationship of the ocean carrier with the marine terminal, it is true the above statements and conclusions are not controlling necessarily as to the relationship or relationships between the shipper and ocean carrier. The ocean carrier's terms of affreightment with the shipper and the ocean carrier's bill of lading govern between these persons. The tariffs of the Ports of Portland and Seattle explicitly so provide, that is, that certain

charges for the use of the terminals' working areas are assessed against ocean vessels; and that adjustments or allocations of these charges between the vessel and cargo shall be made solely by the parties (shipper and vessel) to the contracts of affreightment. But, how the vessel adjusts its charges, tariff rates, charter agreements, etc., with the shipper, is neither the concern nor the responsibility of the terminal operator.

GENERAL DISCUSSION AND ULTIMATE FINDINGS AND CONCLUSIONS

The complainant insists that all of its shipments of export freezer cargoes were and are under contracts of affreightment providing tackle-to-tackle rates or the equivalent. Assuming this to be so, the shippers then would be responsible for placing their cargoes under ship's tackle, and the ocean carrier would be responsible for the stevedores charge of loading the ship.

The "new" tariff item for warehouse checking (effective October 1, 1982) makes the person responsible for stevedoring charges the one assessed the W.C. charges. Also, the "old" tariff item made the vessel responsible for W.C. charges. Therefore in cases of tackle-to-tackle terms (but not, for example, "free in" and "free out" arrangements) the vessel was, and remains, the one to be assessed W.C. charges because the vessel remains responsible for stevedoring charges (loading charges for export cargoes).

To the extent that the vessel may fail to request in writing that warehouse checking be not performed, the complainant retains an interest in this proceeding as to its "future" shipments. But, for some time, at least from on and after October 1, 1982, the complainant has requested that warehouse checking services be not performed on all of its shipments.

Therefore, as far as the complainant's shipments are concerned, the present controversy relates largely, if not only, to its past shipments, those prior to October 1, 1982.

1. The first question on remand herein is in light of REL's tariff provision for tackle-to-tackle rates, whether the Port Authority's tariff lawfully provides charges for warehouse checking against the vessel.

History is one pertinent factor. Prior to 1966, the terminals at Tampa absorbed this W.C. charge or expense. At about that time and onward, W.C. charges were assessed against the vessel. Other ports in the Gulf of Mexico range already had done so, that is assessed the vessel. Presently, other ports assess the vessel. The Ports of Portland and Seattle assess terminal service and facilities charges against the vessel.

The experience of the witness, who was Vice-President and General Manager, both of Uiterwyk and of its successor, Harborside, at this cold storage terminal, shows that the function of warehouse checking separates and identifies the total cargo received at the cold storage terminal and delivered to the vessel into individual counts of cargo and weight by mark/lot/supplier, all of which is information required by the ocean carrier

and by the loading stevedore for proper and efficient loading and carriage by the vessel. Experience shows that warehouse checking is a service required and beneficial to vessels receiving cargo at the Port of Tampa at the dock facility adjacent to the cold storage terminal. The record shows that warehouse checking, as distinguished from simple tallying and checking, does *not* benefit the refrigerated warehouse facility. That is, simple tallying and checking is required so that the warehouse can keep track of cargoes as bailee or custodian. But, checking further for proper and efficient loading of the vessel is "warehouse checking," which benefits the vessel.

An ocean carrier has an obligation to afford to the shipper the free time necessary to assemble his cargo at a terminal for delivery to the ship. The ocean carrier may fulfill the obligation itself, or more than likely it will fulfill this obligation through an agent (terminal operator) acting on behalf of the ocean carrier. In other words, the terminal operator as agent of the vessel provides the free time to assemble cargo.

The ocean carrier also has the obligation to afford the shipper a convenient place for delivery of the shipper's cargo. This obligation cannot be avoided by the ocean carrier under the guise of the terms of affreightment, or the terms of its bill of lading.

In *Terminal Rate Increases—Puget Sound Ports*, 3 U.S.M.C. 21, the Commission stated in part, at pages 23 and 24, regarding an ocean carrier's obligations to the shipper in performing the carrier's transportation:

The carrier must furnish a convenient and safe place at which to receive cargo from a shipper. . . . If this can be done at end of ship's tackle . . . the contracts of carriage may be limited to such service. *On the other hand, if such receipt . . . is impractical or impossible, the carrier must assume as part of its carrier obligation the cost of moving the cargo . . . from where it can be received from the shipper. . . . The carrier cannot divest itself of this obligation by offering a service which it is not prepared to perform.* (Emphasis supplied.)

In the present proceeding, tackle-to-tackle rates are offered by the ocean carrier, but this service cannot be performed by REL, the ocean carrier, on export refrigerated cargoes unless such cargoes are first received at a convenient and safe place to receive such cargoes, namely at a refrigerated warehouse, where such cargoes can be accumulated during free time prior to loading aboard ship.

Thus, it is concluded and found that the Tampa Port Authority's tariff may charge for warehouse checking for the account of the vessel, not withstanding REL's tariff provision for tackle-to-tackle rates. Such a charge is lawful under the Shipping Act.

2. The second question on remand is, if warehouse checking charges may be assessed against the vessel, whether these W.C. charges should be allocated by the Port's terminals between vessel and shipper/consignee in proportion to benefits conferred on each; and whether any proportion

of such costs should be borne by the terminal operator. This is in effect a question with two parts.

As to part one, there was no evidence adduced by any party as to the merits of any proportional allocation of such charges. As seen, the complainant insisted it received no benefit whatsoever from warehouse checking. The evidence is to the contrary, and the law as seen above is that the ocean carrier is responsible for providing the warehouse checking service as part of its transportation obligation to the shipper.

It is concluded and found that no allocation should be made, or is required to be made, by the Port's terminals, of warehouse checking charges as between the vessel and the shipper. The terminals are not made aware of the contracts of affreightment between the vessels and shippers. Of course, the shipper benefits ultimately from the complete transportation service provided by the ocean carrier, but the shipper pays for this complete transportation service through the tariff rates of REL or through the charter arrangements with REL.

It would be unconscionable and unreasonable to expect the terminal to recover its costs for warehouse checking by apportioning such charges between the vessel and the shipper, particularly since the terminal is not made aware of the ocean carrier's transportation arrangements with the shipper, and more particularly because the terminal is acting as agent of the ocean carrier in providing for that carrier a convenient and safe place for the carrier to receive cargo from the shipper.

As to part two, of question two, above, it is concluded and found that no portion of the warehouse checking charges should be borne by the terminal operator. While all persons, such as the shipper/consignee, the ocean carrier, and the terminal at Tampa, benefit from each other's business, in that each does not exist without the other, the key word here is responsibility, and it is the ocean carrier's responsibility or duty in performing its transportation, to move the cargo from where it can be received from the shipper to the ship. The efficient and orderly movement from the cold storage facility certainly includes warehouse checking out of the facility when this service is done to effectuate efficient and orderly loading upon the vessel.

3. The third question on remand relates to the so-called exculpatory clause in the Port's amended tariff. The latest definition, above, of warehouse checking contains the exculpatory clause:

When warehouse checking is requested not to be performed, *terminal operators will not be responsible for any overages and/or shortages.* (Emphasis supplied.)

The respondent, Tampa Port Authority, on brief, states that it has no objection to amending its tariff to provide that the non-liability for shortages or overages would not apply in cases "*where such shortages and/or over-*

ages resulted from sole negligence of the terminal operator." (Emphasis supplied.)

The complainant in its brief on remand leaves it to the Commission to prescribe a proper formulation of the above exculpatory clause.

It is concluded and found that the word "sole" above should be deleted, and in its place substituted the words, "the substantial." This conclusion is based on the principle that a tariff provision excusing a marine terminal from its own negligence can be contrary to the Shipping Act. Of course, a determination of substantial negligence in a particular case would no doubt be a matter of law to be determined in some other forum than the Commission.

4. OTHER MATTERS NOT SPECIFICALLY REMANDED.

Besides the specific issues on remand, the complainant has contended that the cold storage terminal Uiterwyk-Harborside, is itself a common carrier.

The complainant argues that Uiterwyk was executing duties as a connecting carrier (sometimes at least on cargo moving on through bills of lading between land and sea carrier), that the terminal performed a common carrier duty in giving a dock receipt to the shipper, and that the terminal was protecting itself against claims for loss or goods. The complainant cites *Galveston Wharf Co. v. Ry. Co.*, 285 U.S. 127, 134-135 (1932).

An examination of this cited decision reveals that Galveston Wharf Co. was a connecting common carrier with its own railroad trackage, and it physically transported goods received from a steamship company to its connections with the railroad companies. Also it had on file with the Interstate Commerce Commission, tariffs naming rates for the interstate movement of goods. Furthermore, this wharf company admitted that it was a common carrier. It was only through actual transportation of goods that the wharf company was determined to be a common carrier. The distinguishing feature of the present case, is that Uiterwyk-Eller does not transport goods. It is not a common carrier, but rather an "other person" subject to the Shipping Act.

Alternatively, the complainant states that if Uiterwyk-Eller is not a common carrier, it was acting as agent for the shipper, and not as agent for the ocean carrier, REL. Complainant argues that the compilation of a loading list for the vessel is not warehouse checking, and as proof points out that the terminal continued to furnish a loading list to REL even after receiving notice from REL that warehouse checking was not desired. Assertedly, delivery of the cargo to the ship in the order required for efficient loading is not warehouse checking in complainant's view. Rather it is said to be "handling" or "through-put," and if chargeable as a separate item, would be payable by the party having the duty to bring the cargo alongside the ship. But, who is that party in the present situation? As stated heretofore, if the cargo cannot be safely and conveniently received from the shipper at ship's tackle, but must be received

in the cold storage terminal, then it is the ocean carrier's duty to move the cargo from there to ship's tackle.

In summary, it is necessary herein, to weigh the duty of the shipper to get his cargo to ship's tackle, against the conflicting duty of the ocean carrier to provide a safe and convenient place to receive the cargo from the shipper as part of its transportation service.

Considering the record as a whole, and all arguments, it is concluded and found that the ocean carrier's duty to provide a safe and convenient place . . . is paramount to the shipper's duty under its contract of affreightment with REL (tackle-to-tackle terms). The vessel selects the terminal (place to receive the cargo) and not the shipper. The terminal becomes the vessel's agent, at least insofar as such agency concerns the service of warehouse checking performed so as to provide efficient and orderly loading of the vessel. Contrariwise, warehouse checking of this nature cannot be the responsibility of the shipper.

In *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525, at page 539, the Commission stated, "It is the carrier's obligation not only to afford the necessary free time but also to provide terminal facilities adequate to render such free time meaningful and realistic. . . . This obligation may be fulfilled either by the carrier itself or through an agent." At page 539, it was further stated that where the ocean carriers provided no wharfs nor piers for the receipt and delivery of cargo, and the Port of San Diego provided these facilities and free time, under such circumstances the port became the agent of the ocean carrier for the performance of these transportation obligations of the ocean carrier.

Any contentions of the parties not specifically mentioned herein have been considered, and are deemed to have been denied as not meritorious, or are considered as not necessary to the resolution of the issues herein.

The respondent shall amend its so-called tariff exculpatory clause as provided herein. The complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-18
CONTAINER DISTRIBUTION, INC.

v.

NEPTUNE ORIENT LINES, LTD.

NOTICE

November 14, 1986

Notice is given that no appeal has been taken to the October 9, 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-18
CONTAINER DISTRIBUTION, INC.

v.

NEPTUNE ORIENT LINES, LTD.

ORDER OF DISMISSAL WITH PREJUDICE

Finalized November 14, 1986

On August 28, 1986, the complainant, Container Distribution, Inc. (CDI), served in this proceeding a document, titled "Dismissal of Complaint." The document in toto reads as follows:

Plaintiff, CONTAINER DISTRIBUTION, INC., hereby dismisses without prejudice, its Complaint, dated April 8, 1986 in the above-entitled action.

Inasmuch as the complainant may not itself dismiss its own complaint, the said document has been treated as a motion by complainant for dismissal of its complaint.

The respondent, Neptune Orient Lines, Ltd. (Neptune) served on September 12, 1986, respondent's reply to complainant's motion for dismissal. Therein the respondent urges dismissal of the complaint *with* prejudice. Although time has been allowed for any response which the complainant may have deemed proper, nothing has been offered by the complainant as to why its complaint should not be dismissed *with* prejudice.

Accordingly it is concluded that the complaint should be dismissed with prejudice based upon the reasoning offered by the respondent and summarized below.

Respondent states that the circumstances of this proceeding are such that it is apparent that CDI's purpose has been to harass or to induce Neptune to enter a service contract with CDI in order to avoid litigation in this proceeding, that CDI was not similarly situated to another shipper with whom Neptune had a service contract, and that CDI had no intent to litigate in this proceeding.

A prehearing conference was scheduled by the then Presiding Officer for June 19, 1986. CDI's attorney requested more time to prepare and stated that July 22 or 23, 1986, should be the new date for the prehearing conference. Accordingly the conference was rescheduled for July 23. But CDI's attorney again requested a postponement based on a conflict with litigation in California. The then Presiding Officer declined to further post-

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pone the prehearing conference unless CDI's attorney submitted affidavit evidence of the conflict. CDI was not represented at the prehearing conference, and no justification for failure to appear has been submitted. Nevertheless, the then Presiding Officer allowed CDI a further opportunity to pursue its case. A procedural schedule was established, including an August 27, 1986 date for discovery responses, which had been the date agreed between CDI's attorney and counsel for respondent.

Neptune prepared, filed and served its responses to CDI's discovery requests timely, but CDI filed no reply to Neptune's discovery requests. The result was that Neptune went to considerable effort and expense in defending this case, including attorney's fees.

Many other circumstances also are recited by Neptune, leading it to conclude that complainant's actions comprised an abuse of process, and that complainant has forfeited any right it may have had to reinstitute its complaint.

In all the above circumstances, the dismissal of the complaint herein must be with prejudice, and it is so ordered that the complaint is dismissed with prejudice.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-24

MATSON NAVIGATION COMPANY, INC. PROPOSED OVERALL
RATE INCREASE OF 2.5 PERCENT BETWEEN UNITED STATES
PACIFIC COAST PORTS AND HAWAII PORTS

ORDER DENYING PETITION FOR RECONSIDERATION

November 18, 1986

On June 26, 1986, the Commission issued an Order Partially Adopting Initial Decision (June Order) in the above-captioned proceeding. The June Order concluded that a proposed 2.5% overall rate increase filed by Matson Navigation Company, Inc. (Matson) in the Hawaiian Trade was unjust and unreasonable and directed, pursuant to section 4 of the Intercoastal Shipping Act, 1933 (1933 Act), 46 U.S.C. app. § 845a, that the rate increase be canceled. The June Order also found that Matson's existing rates were unjust and unreasonable to the extent they resulted in a rate of return in excess of 11.5% and ordered a 1.5% overall reduction in rates pursuant to section 18(a) of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. § 817.

Saibot Corporation d/b/a Tobias Christmas Trees (Tobias) has now filed a "Petition for Reconsideration of Tobias Christmas Trees and Tobias E. Seaman" (Petition) of the June Order pursuant to Rule 261 of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.261. The Commission's Bureau of Hearing Counsel (Hearing Counsel) and Matson have filed Replies to the Petition.

DISCUSSION

Tobias argues that Matson should not be permitted to earn a 1986 rate of return in excess of 8.30% and that a 7.50% overall rate reduction plus reparations of 9.00% of 1986 test year revenues collected to date should be ordered. Reduced to its essential elements, Tobias' argument for reconsideration relies upon the following assertions: (1) Matson will realize a rate of return .30% greater than that stated in the June Order due to the continuing decline in fuel costs; and (2) the benchmark rate of return should be reduced an additional 3.20%, 1.00% to reflect a continuing decline in interest rates and 2.20% to reflect Matson's below average risk.

Matson contends that the Petition should be rejected because: (1) Tobias has not complied with the requirements of Rule 261, 46 C.F.R. § 502.261, and section 3 of the 1933 Act, 46 U.S.C. app. § 845; and (2) applicable

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RATE INCREASE OF 2.5 PERCENT

principles of *res judicata* preclude reopening and reconsideration of this proceeding.

Hearing Counsel likewise argues that Tobias has not substantively complied with the requirements of Rule 261, because the Petition is in large part a reargument of the issues already considered and decided by the Commission in the June Order. Further, Hearing Counsel contends that reparations may not be ordered in a rate proceeding under section 4 of the Intercoastal Shipping Act, 1933, or a Commission-instituted investigation under section 18 of the 1916 Act, but only in complaint proceedings brought under section 22 of the Shipping Act, 1916, 46 U.S.C. app. § 821.

The Commission declines to reconsider the June Order. Although Tobias may have technically complied with the requirements of Rule 261(a)(1) by alleging changes in fuel costs and interest rates,¹ Tobias has not shown a sufficient change in circumstances to warrant reopening the proceeding.²

The Commission has held that in order to justify supplementing the record of a rate proceeding under the 1933 Act, "changes in circumstances so significant and certain as to render the original projections substantially unreliable" must be shown. *Sea-Land Service, Inc.—General Rate Increases*, 24 F.M.C. 164, 180 (1981). This standard was promulgated in deference to the legislative determination underlying the 1978 amendments to the 1933 Act,³ that a timely and final disposition of Commission rate cases is in the public interest. *See, generally*, S. Rep. No. 1240, 95th Cong., 2d Sess. (1978). The public policy consideration underlying those amendments would also appear to apply to rate investigations ordered under section 18 of the 1916 Act, especially when these two types of rate investigations are joined in one proceeding as they were here.

Unduly protracted rate proceedings are costly to both carrier and shipper interests and impose substantial burdens on the administrative process. Moreover, unwarranted delay in disposing of such cases seriously erodes their intended benefit to the general commerce of the United States. Therefore, strong public policy considerations militate in favor of finality in the decision making process in rate investigations and against reopening on the basis of new data obtained after the close of the record. *Cf., Alaska Steamship Co. v. F.M.C.*, 356 F.2d 59 (9th Cir. 1966).

¹To the extent Tobias' Petition seeks reconsideration to reargue issues already raised and decided, *i.e.*, Matson's relative risk, it is summarily denied. *See, Sea-Land Service, Inc.—Proposed Rate Increases*, 24 F.M.C. 434, 435 (1981); 46 C.F.R. 502.261(a)(3). Similarly, Tobias' alleged "errors" in the June Order, *i.e.*, the factors involved in the determination of a benchmark rate of return, likewise constitute a reargument of issues considered and decided by the Commission. Tobias has not alleged any *bona fide* "substantive error in material fact" that warrants reconsideration. *See*, 46 C.F.R. 502.261(a)(2).

²Reconsideration of a Commission decision under Rule 261(a)(1), 46 C.F.R. 502.261(a)(1), necessarily requires reopening the record to admit new evidence. While this procedure is not to be confused with requests to reopen under Rule 230, 46 C.F.R. 502.230, the public policy considerations against reopening the record of a rate proceeding apply with equal force to both procedures.

³These 1978 amendments to the 1933 Act, Pub. L. No. 95-475, prescribed statutory time limits for Commission investigations under that Act. *See*, 46 U.S.C. app. § 845.

As stated in the June Order, the Commission was fully aware that more detailed analysis could be achieved by further proceedings in this case and that such evidence could result in a more favorable outcome for affected shipper interests. However, the Commission weighed this potential marginal benefit against the prejudice to shipper interests that might be caused by delaying a final decision. The Commission determined that it was preferable to issue a decision that would be of immediate and substantial benefit to ratepayers, rather than delay and possibly negate any rate reductions for the 1986 test year subject to the investigation. Thus, the Commission determined that a 6-month, 1.5% rate rollback was preferred over continued proceedings resulting in an unknown, albeit possibly larger, rate rollback for a very short period of time near the end of the test year.

In this area of decision-making the Commission must utilize the full measure of its expertise and experience in fashioning an appropriate remedy that best serves the public policies underlying the Intercoastal Shipping Act, 1933. Rate regulation is an inexact science and given the volatility of the various economic factors that must be examined, difficult pragmatic determinations must often be made in rate proceedings. *See, P.R.M.S.A v. F.M.C.*, 678 F.2d 327 (D.C. Cir. 1982). The Commission sees no reason to disturb the findings made and conclusions reached in its June Order.⁴

THEREFORE, IT IS ORDERED, That the "Petition for Reconsideration of Tobias Christmas Trees and Tobias E. Seaman" is denied.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

⁴In light of this disposition of the Petition, the Commission need not address the propriety of the specific remedies Tobias seeks, i.e., a rate rollback and reparations. We note, however, that Hearing Counsel is correct that reparations are not available in this type of rate proceeding and may only be awarded in complaint cases filed under section 22 of the 1916 Act.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-23
ACTIVE INTERNATIONAL SHIPPERS' ASSOCIATION

v.

KOREA SHIPPING CORPORATION

DOCKET NO. 86-25
FREIGHT-SAVERS SHIPPING COMPANY LIMITED

v.

KOREA SHIPPING CORPORATION

NOTICE

December 10, 1986

Notice is given that no appeal has been taken to the November 6, 1986, dismissal of the complaints in these proceedings 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-23
ACTIVE INTERNATIONAL SHIPPERS' ASSOCIATION

v.

KOREA SHIPPING CORPORATION

DOCKET NO. 86-25
FREIGHT-SAVERS SHIPPING COMPANY LIMITED

v.

KOREA SHIPPING CORPORATION

COMPLAINTS DISMISSED

Finalized December 10, 1986

Complainants in these consolidated cases have filed a Notice of Withdrawal of Complaints. Complainants explain that they are withdrawing their complaints on the basis of settlements reached with respondent and will be filing the essential terms of service contracts embodying these settlements with the Commission in accordance with the Commission's regulations. Respondent consents to the filing of the withdrawal notice.

These two cases involved allegations by complainants, a shipper and a shippers' association, in which complainants alleged that respondent Korea Shipping Corporation had refused to make the essential terms of a service contract available, had refused to provide cargo space, and had otherwise refused to deal with or had subjected complainants to undue prejudice and disadvantage, in violation of sections 8(c), 10(b)(6), 10(b)(12), and 10(b)(13) of the Shipping Act of 1984. Complainants had asked for reparations, cease and desist orders, and other relief.

The parties have reached settlement, which action is strongly favored by Commission policy. See *Amtrol, Inc. v. U.S. Atlantic-North Europe Conference, et al.*, 28 F.M.C. 540 (1986). Furthermore, the settlement, being between shippers and a carrier, does not require processing under section 4 or 5 of the 1984 Act (formerly section 15 of the Shipping Act, 1916) or require further evidence as do settlements under section 10(b)(1) of the 1984 Act (formerly section 18(b)(3) of the 1916 Act). In a settlement of this kind, all that is required is the filing of the essential terms of the service contract which has now been extended to the complainants, which filing is being accomplished. See 46 CFR 580.7(b).

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SHIPPING CORPORATION

Under the federal rules applicable in U.S. District Courts, which rules the Commission follows absent a specific Commission rule, a complainant may withdraw its complaint without the permission of the court provided that an answer has not yet been filed. See Rule 41(a)(1), 28 U.S.C.A., and discussion in *Amtrol, Inc. v. U.S. Atlantic-North Europe Conference, et al.*, cited above, 28 F.M.C. at 540-541. No answer has been filed in these cases.¹ Therefore, complainants have the right to withdraw their complaints, and there is no reason for me not to dismiss the complaints. See *Amtrol, Inc. v. U.S. Atlantic-North Europe Conference, et al.*, cited above.

Accordingly, the complaints are dismissed.

(S) NORMAN D. KLINE
Administrative Law Judge

¹ Because the parties were actively engaged in settlement discussions, respondent requested permission to defer filing answers in the hope that settlement would make such filings unnecessary. Permission was granted both by written and oral rulings to permit the settlement discussions to reach successful conclusion.

FEDERAL MARITIME COMMISSION

[46 CFR PART 515]

DOCKET NO. 86-15

FILING OF TARIFFS BY MARINE TERMINAL OPERATORS EXCULPATORY PROVISIONS

December 18, 1986

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its rules governing the filing of terminal tariffs by marine terminal operators to prohibit tariff provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold harmless terminal operators from liability for their own negligence.

EFFECTIVE

DATE: February 23, 1987.

SUPPLEMENTARY INFORMATION:

By the publication of a Notice of Proposed Rulemaking in the FEDERAL REGISTER on April 25, 1986 (51 FR 15655-56) the Commission gave notice of its intent to prohibit exculpatory provisions in tariffs filed by marine terminal operators. Specifically, the proposed rule would add a new section to the Commission's regulations governing the filing of tariffs by marine terminal operators contained in Part 515, CFR. As proposed the new section 515.7, "Exculpatory Tariff Provisions," would provide as follows:

No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

The Commission also requested comments on a possible exception to the general prohibition. The exception would allow terminal operators and users to negotiate an arrangement whereby the user may voluntarily assume liability for certain operations in exchange for operational and rate concessions from the operator. The proposed form of the exception was stated as follows:

Terminal tariffs may contain hold-harmless and indemnification provisions for specific risks and hazards in terminal operations that port facility users have agreed to assume from the terminal operator but only if such provisions plainly indicate that such

assumption by the users is in consideration for the terminal operator's specific concomitant concessions in rates or relinquishment of control to the user over the operations for which the user is assuming liability or providing indemnification.

Comments in response to the Notice were filed by sixteen parties representing both terminal operators¹ and users² reflecting a range of opinion on the proposed rule and possible exception.

Two commenters, Hampton Roads Shipping Association and Hampton Roads Maritime Association, support the proposal. Crowley Maritime Corporation and Lake Charles Harbor and Terminal District endorse the exception to the proposed rule, thereby presumably also supporting the underlying rule.

Several commenters express support for the rule but oppose the exception as published. The Board of Trustees of the Galveston Wharves, Galveston, Texas requests that the exception include terminal agreements containing liability insurance requirements. New Orleans Steamship Association, West Gulf Maritime Association and the Association of Ship Brokers & Agents (USA), Inc. oppose exceptions of any kind. The Master Contracting Stevedore Association of the Pacific Coast, Inc. also opposes any exceptions, and would extend the rule to apply to terminal agreements and leases and specify the various forms of exculpatory provisions prohibited by the rule. In its initial comments, Matson Navigation Company, Inc./Matson Terminals, Inc. (Matson) opposes the exception as it applies to terminal tariffs and argues that any understanding permitted by the exception should be required to be filed as an agreement. Subsequently, Matson filed supplemental comments stating it had given this matter "further consideration" and now supports the position of the Master Contracting Stevedore Association of the Pacific Coast, Inc.

Several commenters express dissatisfaction with the rule and exception as proposed and suggest revisions or clarifications. The Port of Houston Authority of Harris County, Texas argues that ports need protection from nuisance suits and that the Commission should: (1) consider a comparative negligence rule; (2) allow terminal operators to require users to obtain liability insurance; and, (3) not require a formal agreement for the exception to apply. The Port of Seattle agrees and further points out that the exception overrides any need for the rule. The Board of Port Commissioners, City

¹ The following terminal operators filed comments: New Orleans Steamship Association, Board of Trustees of the Galveston Wharves, Galveston, Texas; Board of Port Commissioners, City of Oakland, California; Port of Houston Authority of Harris County, Texas; Lake Charles Harbor and Terminal District; Massachusetts Port Authority; Port of Seattle; South Carolina State Ports Authority; and, Global Terminal and Container Service, Inc.

² The following terminal user filed comments: Hampton Roads Shipping Association; Hampton Roads Maritime Association; West Gulf Maritime Association; Crowley Maritime Corporation; Master Contracting Stevedore Association of the Pacific Coast, Inc.; Association of Ship Brokers and Agents (U.S.A.), Inc.; and, Matson Navigation Company, Inc. (for itself and on behalf of its terminal operating subsidiary, Matson Terminals, Inc.)

of Oakland and the South Carolina State Ports Authority urge the Commission to clarify the proposed rule to specify that terminal users may not use the regulation to exculpate themselves from liability for which they are responsible.

Global Terminal and Container Services, Inc. (Global) opposes the rule as it applies to its particular terminal services. Its terminal facility is said to be a "wheeled" container holding yard, which allegedly renders it a "bailee" of containers. Global believes that under the proposed rule it could be held liable for damages without a showing of negligence on its part. Exculpatory clauses which would limit a bailee's liability to cases of actual negligence are alleged to be reasonable and lawful. Global submits that the published exception is insufficient to remedy the situation.

Massachusetts Port Authority (MPA) opposes any regulation in this area. It argues that the free market should dictate port tariff practices. Alternatively, MPA takes the position that if the rule is adopted then the exception should also be adopted.

Upon review of the comments, the Commission has determined to promulgate a final rule in this proceeding prohibiting exculpatory clauses in terminal tariffs with no exceptions permitted. The discussion in the Notice of Proposed Rulemaking, which is incorporated here by reference, made clear that the prohibition against any form of exculpatory provisions in terminal tariffs is one that has been firmly established by the Commission in its decisions. Nothing presented in the comments filed in this proceeding prompts the Commission to alter its position on such provisions. Accordingly, that position will be codified in a Commission regulation.

Specific liability-shifting agreements between terminal operators and users will only be permitted, if at all, in marine terminal agreements filed with the Commission under section 15 of the 1916 Act or section 5 of the 1984 Act. By separate Notice issued this date in response to a Petition for Rulemaking by the Master Contracting Stevedore Association of the Pacific Coast, Inc. the Commission is instituting a proceeding on the question of the lawfulness of exculpatory clauses in terminal leases and agreements and whether a rule should be promulgated addressing such provisions. Docket No. 86-32, *Exculpatory Provisions in Marine Terminal Agreements and Leases*.

As was noted in the Notice of Proposed Rulemaking in this proceeding, in all but one of the several Commission cases which addressed liability-shifting tariff provisions, those provisions were held to be unlawful under section 17 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 816, and section 10(d) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1709(d).³ The provisions were found to have been unfairly imposed

³The only decision in which the Commission found that a liability-shifting tariff provision was justified on the basis of the arrangement between the terminal operator and the user is *West Gulf Maritime Association v. Port of Houston Authority*, 22 F.M.C. 420, 453 (1980). However, it is important to note that, in that case, it was specifically found that the liability-shifting provision was "not imposed for the purpose of escaping

by the terminal operator through the exercise of greatly superior bargaining power resulting from public-utility-type market conditions for terminal facilities. We therefore see little validity to the suggestion advanced in some comments that "free market forces" exist and should govern the promulgation of liability provisions in terminal tariffs.

Similarly, the argument that the proposed rule would somehow allow terminal users to exculpate themselves from liability for their own negligence is unfounded. There is no indication in the language of the rule or in the case law giving rise to the rule that would lend any support to this argument.

We also find unpersuasive the contention that the rule somehow infringes on the comparative negligence doctrine in maritime and admiralty law. Under that doctrine, negligence is measured in terms of percentage, and any damages allowed are diminished in proportion to the amount of negligence attributable to the person for whose injury recovery is sought. *Black's Law Dictionary* 255 (5th ed. 1979). Exculpatory tariff provisions are, in fact, an attempt to override the traditional application of the comparative negligence doctrine in damage suits resulting from terminal accidents.

Some comments argue, however, that there is nothing unreasonable, and hence unlawful, about a terminal operator and user agreeing upon a liability-shifting arrangement after an arms-length negotiation over the terms and conditions for the use of such facilities. In support of this argument, some commenters allege that actual industry conditions at particular terminal facilities are compatible with the so-called "quid pro quo" exception noted in the Notice of Proposed Rulemaking.

No exception to the general rule prohibiting exculpatory clauses in terminal tariffs is being adopted or will be permitted. The reason favoring a "quid pro quo" exception is that if there generally exists a rough equality of bargaining power between terminal users and operators in the negotiation of the terms and conditions of the use of terminal facilities, reflected in terminal tariffs, then "users" will obtain some significant consideration for their assumption of the port authorities' potential liability. Theoretically, the exception would impose no additional burdens or significant restrictions on the commercial flexibility of the parties; it would only affect terminal tariffs in situations where there is an imbalance of bargaining power. The problem is that if there is, in fact, a general absence of equality of bargaining power between "users" and operators, the exception might only serve to foster litigation over whether negotiations over the provisions are "bona fide" and whether consideration flowing to the "user" is adequate. In short, if general equality of bargaining power existed between operators and "users," the exception would be superfluous and unnecessary. Alternatively, where there is a general inequality of bargaining power, as we

liability for one's own negligence." *Id.* Accordingly, this case is not viewed as involving a truly exculpatory tariff provision.

find to be the case in the promulgation of exculpatory liability-shifting provisions in terminal tariffs, the exception would be ineffective. In either event, there appears to be no basis for providing an exception to the general rule prohibiting exculpatory provisions, at least insofar as terminal tariffs are concerned.⁴

As noted above, any exception to a general rule prohibiting exculpatory clauses in tariffs would most appropriately be permitted, if at all, through an agreement between the parties filed pursuant to the 1916 or 1984 Acts. The appropriate vehicle to consider the general propriety of such exceptions in terminal lease agreements is the separate rulemaking proceeding which the Commission is concurrently instituting.

Finally, it should be noted that the effective date of this final rule is 60 days after its publication in the FEDERAL REGISTER, rather than the customary 30 days. This extended period should allow those subject to the final rule's requirements ample time to conform their tariffs to those requirements.

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

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical region; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete in domestic or export markets.

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

The Paperwork Reduction Act, 44 U.S.C. 3501-3502, does not apply to this Notice of Final Rulemaking because the amendments to Part 515 of Title 46, Code of Federal Regulations, do not impose any additional reporting or recordkeeping requirements or collection of information from members of the public which require the approval of the Office of Management and Budget.

Therefore, for the reasons set forth above, Part 515 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority citation to Part 515 is revised to read as follows:
AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 816, 820, 841a, 1709, 1714 and 1716.

⁴Exception to the rule, although suggested as a possibility in dicta in *I. Charles Lucidi v. Stockton Port District*, 22 F.M.C. 20, 29 (I.D. 1979), has never been formally accepted by the Commission.

2. A new section 515.7, entitled "Exculpatory Tariff Provisions," is added to read as follows:

§ 515.7 Exculpatory Tariff Provisions.

No terminal tariff shall contain provisions that exculpate or otherwise relieve marine terminal operators from liability for their own negligence, or that impose upon others the obligation to indemnify or hold-harmless the terminals from liability for their own negligence.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-5
COMPAGNIE GENERALE MARITIME AND INTERCONTINENTAL
TRANSPORT (ICT), B.V.

v.

S.E.L. MADURO (FLORIDA), INC.

NOTICE

January 12, 1987

Notice is given that no appeal has been taken to the December 4, 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-5

COMPAGNIE GENERALE MARITIME AND INTERCONTINENTAL
TRANSPORT (ICT), B.V.

v.

S.E.L. MADURO (FLORIDA), INC.

COMPLAINT DISMISSED

Finalized January 12, 1987

All the parties to this proceeding have filed a Joint Motion to Dismiss in which they are asking that the complaint be dismissed with prejudice.¹ The reason for the motion is that the parties have entered into a settlement agreement by which they have settled not only this proceeding but a larger, more involved case before a U.S. District Court in Florida and believe their 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." (Motion at 4, quoting from *Celanese Corporation v. The Prudential Steamship Company*, Settlement Approved; Complaint Dismissed, 23 F.M.C. 1, 7 (1980).

The present complaint case is part of an overall controversy involving not only the parties to this case but also a steamship agent named Kerr Steamship Company. In the complaint filed with the Commission on January 30, 1986, complainants, two common carriers operating in the foreign commerce of the United States, alleged that respondent, a marine terminal operator carrying on business at Florida ports, had violated four provisions of the Shipping Act of 1984 and three provisions of the Shipping Act, 1916, by collecting money for freight handling services performed during 1983 and 1984 at Miami and Port Everglades, Florida, which money allegedly should have been collected from other interests, and by engaging in other allegedly unreasonable, prejudicial or discriminatory practices. Complainants asked for reparations and other relief.

Respondent Maduro denied any wrongdoing. In addition, however, on April 7, 1986, Maduro filed its own complaint in U.S. District Court for the Southern District of Florida, in which Maduro sued the two carriers, complainants in this case, plus Kerr Steamship Company under a variety of counts arising under admiralty, contract, and tort law. Maduro asked for payment for various stevedoring and terminal services allegedly per-

¹ The motion was received by me on December 2, 1986.

formed for the two carriers and their vessels. In this lawsuit, the two carriers filed counterclaims against Maduro relating to the same transactions as those involved in the complaint case before the Commission.

The two cases have already consumed considerable time and expense. The parties have conducted discovery and have filed a variety of pleadings on preliminary matters of law both in this proceeding and in the court case. Throughout the proceedings the parties have discussed settlement and have finally reached agreement. As relevant to the Commission proceeding, complainants agree to release Maduro in return for a monetary payment of \$70,000. However, the settlement and accompanying release resolve all of the matters in dispute among all parties both before the Commission and the Court.

The action which the parties have taken to obviate the need for further litigation is fully consistent with the policy of law and the Commission which strongly favors settlements instead of costly litigation and presumes that settlements are fair and reasonable. See, e.g., *Old Ben Coal Company v. Sea-Land Service, Inc.*, 21 F.M.C. 505, 512 (1978); *Kuehne & Nagel, Inc.—Independent Ocean Freight Forwarder License No. 1162*, 24 F.M.C. 316, 325–328 (I.D., 1981); *Celanese Corporation v. The Prudential Steamship Company*, cited above; *Perry's Crane Service v. Port of Houston Authority*, 22 F.M.C. 30, 33–35 (1979); *Merck Sharp & Dohme v. Atlantic Lines*, 17 F.M.C. 244, 247 (1973). As discussed, this case is part of more extensive litigation among the parties arising under various theories as well 95 under seven different provisions of the 1916 and 1984 Shipping Acts. Moreover, the gravamen of the complaint before the Commission is that respondents have engaged in unreasonable practices, not that respondent has charged incorrect rates under its tariff. Accordingly, the settlement does not appear to contravene any statutory scheme. *Perry's Crane Service v. Port of Houston Authority*, cited above, 22 F.M.C. at 34. Nor does the settlement appear to establish any ongoing, cooperative activities which could require filing or approval under section 5(a) of the 1984 Act or section 15 of the 1916 Act. Rather, it is a typical settlement of outstanding claims, containing mutual releases, which do not require further processing under those laws. See *Pan Ocean Bulk Carriers, Ltd.—Investigation of Rates, etc.*, 22 F.M.C. 633, 635 n. 1 (1980); *Farrell Lines, Inc. v. Associated Container Transportation (Australia) Ltd., et al.*, 22 F.M.C. 109, 112 (1979); *Amtrol, Inc. v. U.S. Atlantic-North Europe Conference, et al.*, 28 F.M.C. 540, 541 (1986.)

I conclude that the settlement, which the parties have reached in an effort to terminate litigation, is reasonable, violates no law or policy, and fully comports with the Commission's policy which strongly encourages

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TRANSPORT (ICT), B.V. V. S.E.L. MADURO (FLORIDA), INC.

settlements. Accordingly, the motion is granted and the complaint is dismissed with prejudice.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-1

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES AGAINST NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

NOTICE

January 21, 1987

Notice is given that the time has expired within which the Commission could determine to review the Presiding Officer's "Order, Declaring Certain Tariffs to be Inactive and Cancelling Same, Dismissing Respondents, and Discontinuing the Proceeding." No such determination has been made and accordingly, the discontinuance has become administratively final.

(S) TONY P. KOMINOTH
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-1

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES AGAINST NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER, DECLARING CERTAIN TARIFFS TO BE INACTIVE AND CANCELING SAME, DISMISSING RESPONDENTS, AND DISCONTINUING THE PROCEEDING

Finalized January 21, 1987

The Commission served on January 2, 1986, its "Order to Show Cause" in this proceeding, directed to a total of 201 respondent non-vessel operating common carriers (NVOCC's) in the foreign commerce of the United States, as named in the two appendices to the order (113 in Appendix A and 88 in Appendix B).

The said order pointed out that section 8 of the Shipping Act of 1984 (the Act) requires these NVOCC's to file tariffs showing their rates, charges, etc. for the transportation of cargo, and that section 15(b) of the Act requires these NVOCC's to certify that they have and enforce a policy prohibiting the practice of illegal rebating in ocean shipping. Also, these NVOCC's are required to publish in their tariff the address of their principal office, 46 C.F.R. 580.5(c)(2)(i).

It was ordered that pursuant to sections 8, 11, 13 and 15 of the Act it should be determined whether the 201 named respondents should be assessed civil penalties for any violations of the Act and Commission regulations, and if so the amount of such penalty, among other things ordered.

Of the 201 respondents herein, 91 respondents have been dismissed by orders of the former presiding officer, issued on March 3, March 7, May 1, and July 14, 1986. There then remained 110 respondents.

By motion served September 19, 1986, by Hearing Counsel, it was noted that ten respondents had submitted evidence that they had filed appropriate anti-rebating certificates, and it was moved that these ten respondents be dismissed without cancellation of their tariffs or imposition of penalties. Said motion hereby is granted. These ten respondents now dismissed are:

American International Consolidators, Inc.
EKG Kieserling America Corp.
Aquatran, Inc. (formerly Maritima Aquatran, Inc.)
Buccaneer Line

Compagnie D'Affretement et de Transport U.S.A., Inc.
European Ocean Freight Inc.
Mariner Container Line Ltd.
Smitty's Export/Import Inc.
Trans Ocean Consolidators Ltd.
United Cargo Corporation

Now, there remain for consideration 100 respondents. Hearing Counsel by their recent motion served October 28, 1986, move for the cancellation of certain tariffs, and the dismissal of the remaining respondents, on the principal grounds, that two of the respondents (Delf Shipping (Pty.) Limited and First International Shipping Co.) have requested that their tariffs be cancelled; that twelve respondents (listed in attachment I hereto) have shown that they are out of business; that sixteen respondents (listed in Attachment II hereto) could not be located by the U.S. Postal Service; that fifty-seven other respondents were served but did not respond to the Order to Show Cause; and that the remaining 13 respondents now have filed appropriate anti-rebate certifications, thereby complying with statutory and Commission requirements. These thirteen are Altamirano Shipping, Inc., Backgammon Container Line, C.C. Group Line, Euramer Consolidators Corp., Excel International Freight, Ocean-Air Container Service, Sam Jung Shipping USA Inc., Sesko International, Inc., Sesko Marine Trailers, Inc., TDY Freight Systems Ltd., Transcar of North America, Uniport Express Corp., and West Indies Freight, Inc.

Accordingly, these last thirteen respondents hereby are dismissed, their tariffs remain in effect, and they are deemed in compliance with the anti-rebate certification requirements of the statute.

By motion served November 5, 1986, Hearing Counsel state that Latillean Freight Consolidators erroneously was listed in their motion served October 28, 1986, as not having filed an appropriate anti-rebate certification or as not responding to various Commission orders. Accordingly Hearing Counsel now urge that Latillean be included among those NVOCC's listed in the preceding paragraph. Latillean hereby is dismissed as a respondent, its tariff remains in effect, and it is deemed in compliance with the anti-rebate requirements of the statutes.

The other 86 respondents in summary include two, Delf Shipping (Pty.) Limited and First International Shipping Co., twelve listed in Attachment I, sixteen listed in Attachment II, and fifty-six listed in Attachment III. These 86 have shown, affirmatively or by inaction, that they are not conducting business as NVOCC's. Imposition of penalties on these inactive entities would serve no regulatory purpose and would be inappropriate.

There have been no responses to the said October 28, 1986, motion of Hearing Counsel, and their additional motion of the same date for discontinuance of the proceeding. Also there has been no response to the motion of Hearing Counsel served November 5, 1986.

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES 729
AGAINST NON-VESSEL OPERATING COMMON CARRIERS

It is concluded and found that the 86¹ remaining respondents presently are not acting as non-vessel operating common carriers.

Good cause appearing, and to clear the tariff records of the Commission of out-of-business NVOCC's, among other reasons, the motions of Hearing Counsel served October 28, 1986, as amended by the motion of Hearing Counsel served November 5, 1986, hereby are granted.

The tariffs of the 86 respondents above listed hereby are declared to be inactive and ordered cancelled. These 86 respondents hereby are dismissed.

Inasmuch, as all 201 originally named respondents have been or are now dismissed, and inasmuch as neither oral testimony nor further pleadings appear necessary, this proceeding hereby is discontinued.

(S) CHARLES E. MORGAN
Administrative Law Judge

¹Delf Shipping (Pty.) Limited; First International Shipping Co.; 12 listed in Attachment I; 16 listed in Attachment II; and 56 listed in Attachment III.

ATTACHMENT I

D & L Latin America, Inc.
Marina Pacifica Container Line
MPCL, Inc.
Overseas Carriers, Inc.
Pan World Shipping, Inc.
Panatlantic American Freight, Inc.
Ship Corporation of Hawaii, Ltd.
Space Lines, Inc.
Stavers Corporation
Tiger Container Express, Ltd.
Valley Express, Inc.
West Coast Shipping Lines

ATTACHMENT II

Carrier Systems Inc.
CFCA, Inc.
CML Container Line, Inc.
Com-Tran, Inc.
C.T.C. Shipping SA
Euro-Con
LCL Cargo Ltd.
Maritime Company of the Pacific
Oceanaire International, Inc.
Sea Link Corporation
Southern Int'l Shipping, Inc.
Southern Unitrans, Inc.
Tank Traffic America, Inc.
Trans Yiking International Inc.
W.T.C. Holding Co., Inc.
Winchester Lines, Inc.

ATTACHMENT III

Aeropac
Albury's & Bethel's Frt. Service
Astrans USA, Inc.
Australia-Far East Shipping, Inc.
B Line Shipping Company
BIC Tran International
Cargo Procurement Agency, Inc.
Cargo Ven, Inc.
Caribbean Freightways, Inc.
Cari-Cargo International, Inc.
Denizana Shipping Unlimited, Inc.
DSL International
Fuji Express
Harbour International
Indo Atlantic Freight U.S.A. Inc.
International Express Co., Ltd.
Int'l Cargo Handlers, Inc.
Int'l Freight Consultants, Inc.
Int'l Household Export, Inc.
J I F America, Inc.
Joint Transport (USA) Inc.
L.C.L. Incorporated
Marine Consolidators, Inc.
Michael Davis (Shipping) Inc.
Mobel International, Inc.
Multi-Sea Maritime Inc.
Ned-Con Service Inc.
Ocean Freight Transport Corp.
Oceanaire Int'l Services, Inc.
P & M Line

P. T. Gesuri Lloyd
Pelican Cargo Services, Inc.
Polamer Parcel Service Company
Presto Shipping, Inc.
Progressive Pier Delivery
Refrigerated Container Serv., Inc.
Republic Shipping Line
Royal Star Shipping Corp.
Samad Shipping Services, Inc.
San Yang Yuan
Seair Transport Services, Inc.
Seven Seas Containerline Ltd.
Shipping Time Gateways Overseas Ltd.
Snyder Moving & Shipping Co. Ltd.
Special Shipping, Inc.
Square Deal Shippers
Taiwan Overseas Forwarding Company, Ltd.
Todd International, Inc.
Tradeways International Inc.
Transcontainer Atlantic Pacific Canada Corp.
Transinternational System
Transmodal Express
Transocean Shipping Inc.
Transship Inc.
Vekr's Incorporated
Virginia Int'l Air Freight Inc.

FEDERAL MARITIME COMMISSION

[46 CFR PART 530]

DOCKET NO. 86-20

TRUCK DETENTION AT THE PORT OF NEW YORK INCREASE IN PENALTY CHARGES

January 21, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its truck detention rules at the Port of New York to increase penalty charges for truck delays at marine terminals from \$4.00-per-15-minutes to \$8.00-per-15-minutes.

EFFECTIVE

DATE: February 25, 1987.

SUPPLEMENTAL INFORMATION:

By Notice of Proposed Rulemaking published in the *Federal Register* on May 21, 1986 (51 FR 18622), the Commission proposed to amend its truck detention rules which apply to pickup and delivery of cargo by motor carriers at marine terminal facilities within the Port of New York (Port) (46 CFR 530). Specifically, the proposed rule would increase the penalty charges for pickup and delivery delays in sections 530.7 (f) and (g) from \$4.00-per-15-minutes to \$8.00-per-15-minutes.¹ The Commission's Notice also requested comment on whether there exists a continuing regulatory need for retention of the rule.

Comments on the proposed rule and its retention were submitted by the Bi-State Harbor Carriers Conference, the U.S. Atlantic & Gulf/Australia-New Zealand Conference, the Port Authority of New York and New Jersey, the New York Foreign Freight Forwarders and Brokers Association, Inc., NYTC, and the U.S. Department of Transportation (DOT).

All commenters, with the exception of DOT, supported continuation of the rule. These supporting commenters generally contended that: the rule has played a beneficial role in reducing ambiguities as to proper documentation and other procedures, and in eliminating disputes regarding the responsibility for and levels of detention charges; the rule has effectively encouraged the responsible parties to do their best to eliminate practices and procedures which resulted in the congestion conditions and detention claims that led

¹The proposed rule was issued in response to a petition filed by the New York Terminal Conference (NYTC) (50 FR 53012), which requested the Commission to amend its rules to increase the subject penalty charges to \$8.00-per-15-minutes.

to the original issuance of the rule;² and improved conditions at the Port are the result of the rule, and should not serve as justification for its elimination.

Those who commented on the proposed increase in penalty charges supported the change, stating that the current \$4.00 charge is no longer appropriate, given the substantial increase in operating costs since the rule was promulgated.

DOT, while taking no position on the amount of penalty charges, asserted that the proposed rule appeared unwarranted in that the petition that prompted the rulemaking gave no indication of the frequency with which the current rule is invoked. DOT explained that there has been a shift to containerized cargo and cargo handling facilities at the Port, and that the rule is unnecessary for containerized cargo and is only rarely invoked for less-than-truckload cargo. DOT contended that its Reports to Congress on the Status of the Public Ports of the United States for 1982, 1983, and 1984 do not disclose any port congestion problems for general cargo moving through the Port, and it stated that if the comments on this proposed rule from affected parties confirm that the rule has, in fact, outlived its usefulness, the rule should be suspended or eliminated. According to DOT, suspension and ultimate elimination of the rule, under those circumstances, would appear consistent with the declared purpose of the Shipping Act of 1984, 46 U.S.C. app. 1701-1720, to minimize government intervention and regulatory costs associated with the common carriage of goods by water in the foreign commerce of the United States.

Although DOT argued against retention of the rule based primarily on its information as to the lack of port congestion problems in recent years, its position was contingent upon receipt of similar comments from the industry favoring elimination of the rule. The general support for retaining the rule voiced by industry commenters and discussed below would, therefore, appear to temper DOT's suggested elimination.

The industry representatives who commented on this matter support the continuation of the rule, and did not dispute either the merit of an increase in penalty charges or the actual amount proposed. The industry perceives a need for continued Commission involvement in this area as a steadying influence to avoid the congestion problems of the past and to eliminate disputes and ambiguities. Certain comments suggested that the rule has been the catalyst for the reduction of the Port's congestion problems, and has ensured an appropriate level of cooperation and coordination among the relevant parties.

Continuation of the rule with the increased penalty charges appears to serve a valid regulatory purpose. At the same time, such continuation would not be an unnecessary intrusion by the Commission in the commercial

²The original rule was the subject of Docket No. 72-41—*Truck Detention at the Port of New York*. A final rule in that proceeding was published in the *Federal Register* of November 10, 1975 (40 FR 52385), and, after several postponements, the rule became fully effective on July 5, 1976.

TRUCK DETENTION AT THE PORT OF NEW YORK INCREASE 735
IN PENALTY CHARGES

arena, and would not unduly increase the operating costs of the industry. Instead, it would continue to allow a marketplace consensus to dictate the industry practice and appropriate level of penalty charges. The Commission's role would be to publish the applicable rules in a format which the industry is accustomed to and with which it is apparently satisfied. The rules appear to create no compliance burden on the affected parties, and have minimal impact on agency costs or use of resources. Accordingly, the Commission is adopting the proposed increase as a final rule.

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

- (1) An annual effect on the economy of \$100 million or more;
- (2) A major increase in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographical region; or
- (3) Significant adverse effects on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete in domestic or export markets.

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

The Paperwork Reduction Act, 44 U.S.C. 3501-3502, does not apply to this Notice of Final Rulemaking because the amendments to Part 530 of Title 46, Code of Federal Regulations, do not impose any additional reporting, recordkeeping, or collection of information requirements on members of the public which require the approval of the Office of Management and Budget.

List of Subjects in 46 CFR Part 530, Freight, Harbors, Maritime carriers, Motor carriers, Penalties, Reporting and recordkeeping requirements.

PART 530—[AMENDED]

Therefore, for the reasons set forth above, Part 530 of Title 46, Code of Federal Regulations, is amended as follows:

1. The authority Citation to Part 530 is revised to read as follows:
AUTHORITY: 5 U.S.C. 553; 46 U.S.C. app. 816, 841a, 1709 and 1716.
2. In paragraphs (f)(1), (f)(2) and (g) of § 530.7, the "\$4.00-per-15-minutes" penalty charge is increased to "\$8.00-per-15-minutes."

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 568]

DOCKET NO. 86-26

SELF-POLICING REQUIREMENTS FOR AGREEMENTS UNDER THE SHIPPING ACT, 1916

January 21, 1987

ACTION: Final Rule.

SUMMARY: This action removes Part 568 from Title 46, Code of Federal Regulations. Part 568 presently imposes detailed self-policing procedures and requirements on conference and other rate agreements in the domestic offshore trades. The absence of malpractices or other abuses by the conference system in these trades has eliminated the need for these regulations.

EFFECTIVE

DATE: January 26, 1987.

SUPELEMENTARY INFORMATION:

The Commission published a notice of proposed rulemaking for the removal of Part 568 in the *Federal Register* of October 8, 1986 (51 FR 36034). Part 568 sets forth detailed self-policing requirements for agreements subject to the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 801-842, including the requirement that such agreements establish independent policing authorities. These regulations were initially adopted to ensure that agreements in the foreign commerce of the United States complied with the requirement of section 15 of the 1916 Act, 46 U.S.C. app. 814, that they be adequately policed. However, with the enactment of the Shipping Act of 1984, 46 U.S.C. app. 1701-1720, agreements in the foreign commerce of the United States are no longer subject to the requirement and the 1916 Act has been made applicable solely to the domestic offshore trades. As a result, those few agreements which exist in the domestic offshore trades must comply with Part 568, even though doing so may be prohibitively expensive and serve no clear regulatory purpose.

Comments in response to the rulemaking notice were filed by: (1) the Department of Transportation (DOT), (2) the Pacific Coast/American Samoa Rate Agreement (PCASRA), (3) the Guam Rate Agreement (GRA), (4) Sea-Land Service, Inc. (Sea-Land), and (5) the Puerto Rico Maritime Shipping Authority (PRMSA). DOT, PCASRA, and GRA support removal of Part 568 on the ground that it no longer serves a valid regulatory purpose. Sea-Land and PRMSA also favor removal, but urge clarification of Commission policy with regard to policing requirements after removal. Specifically, Sea-Land requests that the Commission "acknowledge the right of agree-

ment members to agree upon adequate self-policing procedures and include such provisions in agreements filed for approval pursuant to section 15 of the 1916 Act." With regard to future policy for evaluating the adequacy of policing, PRMSA would like the Commission "to give the parties to covered agreements some assistance in judging what is acceptable for the purpose of neutral body policing arrangements, even if it is only a reiteration of the principal elements of Part 568 or a statement that the standards of former Part 568 will be the starting point of the Commission's examination."

The removal of Part 568 does not in any way affect the statutory duty of any agreement to establish adequate self-policing procedures. Since such procedures must be agreed upon, they must also be submitted to the Commission for approval.

PRMSA's request seems to suggest that the Commission reestablish the neutral body requirements of Part 568 by stating that this will be the standard by which the adequacy of policing will be evaluated. However, such a position would be contrary to the basic purpose for removing Part 568 in the first place, i.e., to relieve agreements in the domestic offshore trades from the burden of maintaining elaborate policing systems. As indicated above, every agreement subject to the section 15 policing requirement must demonstrate its compliance with that requirement by describing its self-policing procedures in its agreement. However, whatever system is adopted will initially be left to the discretion of the parties. The Commission will not impose specific self-policing requirements on any agreement except possibly when, after a full investigation, the existing scheme is found to constitute "inadequate policing" of the agreement's obligations.

The Commission has determined that the removal of Part 568 is not a "major rule" as defined in Executive Order 12291 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) a 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.

Pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, it is certified that the removal of Part 568 from Title 46 will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units and small governmental jurisdictions.

List of Subjects in 46 CFR Part 568: Antitrust, Contracts, Maritime carriers, Reporting and recordkeeping requirements, Rates.

Therefore, pursuant to 5 U.S.C. 553 and sections 14, 15, 16, 17, 18(a), 21, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 812, 814, 815,

816, 817(a), 820, 833(a) and 841(a), Part 568 of Title 46, Code of Federal Regulations, is removed.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1447

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT
AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND
SERVICE, INC. FOR THE BENEFIT OF LUSK SHIPPING CO., INC.
AS AGENT FOR KAISER ALUMINUM INTERNATIONAL, INC.

ORDER OF PARTIAL ADOPTION

January 21, 1987

The Commission determined to review the Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) served December 5, 1986, in this proceeding.

The Transpacific Westbound Rate Agreement and Sea-Land Corporation on behalf of Sea-Land Service, Inc. applied, pursuant to section 8(e) of the Shipping Act of 1984 (the Act) 46 U.S.C. app § 1707(e), for permission to waive freight charges for Lusk Shipping Co., Inc. as agent for Kaiser Aluminum International, Inc., on a shipment of aluminum wire and cable from Baltimore, Maryland to Bangkok, Thailand.

The Presiding Officer found that the application met all the requirements of section 8(e) of the Act and properly granted permission to waive the freight charges. However, the Presiding Officer subsequently advised the Commission that the tariff notice required by the Initial Decision to be published in the appropriate tariff inadvertently made the corrected applicable rate effective as of November 3, 1985, 215 days from June 6, 1986, the filing date of the application. In *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421, 422 (1986) the Commission held that no relief can be granted on shipments falling outside the 180-day period.

THEREFORE, IT IS ORDERED, That, in lieu of the tariff notice mandated by the Initial Decision issued in this proceeding, the Transpacific Westbound Rate Agreement promptly publish in its tariff the following notice:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1447, that effective December 8, 1985, and continuing through May 25, 1986, inclusive, the rate on Aluminum Wire is \$2,040.00 per 40 foot container, plus Terminal Receiving Charges of \$110.00 from U.S. Ports and Points (See Rule 1-A) to 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.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission.

FINALLY IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1447

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT
AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND
SERVICE INC. FOR THE BENEFIT OF LUSK SHIPPING CO., INC.
AS AGENT FOR KAISER ALUMINUM INTERNATIONAL, INC.

Application to waive freight charges of \$2,489.57 granted.

INITIAL DECISION¹ OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Partially Adopted January 21, 1987

This application² is for permission to waive \$2,489.57 of freight charges arising out of one shipment of aluminum wire and cable from Baltimore, Maryland to Bangkok, Thailand.

The tariff initially involved in this proceeding is Transpacific Westbound Rate Agreement (TWRA) Westbound Local and Intermodal Freight Tariff FMC No. 3 from U.S. Ports and Points to Southeast Asia Base Ports in Singapore, Malaysia, Indonesia, Thailand, and the Philippines.³ Sea-Land is a member of the agreement. On October 22, 1985, Sea-Land Service Inc.'s (Sea-Land) Assistant Pricing Manager was instructed to have the TWRA publish a rate of \$2,040 per 40 foot container plus a \$110 Terminal Receiving Charge for the shipment of Aluminum Rods and Coils (Item No. 76-0330) and Aluminum Wire (Item No. 76-0400). Instead, he inadvertently only began a rate initiative for the aluminum rods and coils. The initiative was objected to and the rate was ultimately made effective by independent action, effective on November 4, 1985.⁴

When the error in not amending the tariff for aluminum wire was discovered, the original tariff (TWRA Tariff, FMC No. 3) was being revised and was replaced by TWRA FMC No. 7. The old item number (76-0400) was changed to item number 76-4000. A second rate initiative for aluminum wire was submitted to the Conference on May 16, 1986, was objected to and was filed by independent action, effective May 26, 1986.⁵ On December 10, 1985, one intermodal shipment of aluminum wire sailed

¹This 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).

²The application which was filed by Sea-Land and the Conference was filed on June 6, 1986, within the 180 day statutory period set forth in section 8(c), Shipping Act, 1984.

³Application, exhibit No. 1.

⁴Application, Exhibit No. 2.

⁵Application, Exhibit No. 3, page 1. The actual rate filed was \$2,290 per 40 foot container which included a previous general rate increase of \$250, that had been made effective April 15, 1986.

from Takoma, Washington, (after originating in Baltimore, Maryland), for Bangkok, Thailand. The rate then in effect was \$233.00 W and the total freight charges were \$4,639.57. The applicants now seek permission to waive the difference between that amount and the amount due under the corrected tariff of \$2,150.00, which amount the shipper has paid. The difference is \$2,489.57.

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive or refund 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, the record is clear that Sea-Land's employee simply failed to effect the tariff change which Sea-Land intended. The mistake in failing to file a timely tariff is the kind of inadvertence Congress sought to obviate in enacting section 8(e).

The application filed by Sea-Land and the Conference 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 of \$2,040.00 per 40 foot container, from Baltimore, Maryland 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 shippers⁶ 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 applicants filed a new tariff which sets forth the rate upon which the waiver should be based.

4. The application was filed within 180 days from the date of shipment. Wherefore, in view of the above, it is,

Ordered, that permission is granted Sea-Land to waive a portion of freight charges in the amount of 2,489.57 for the benefit of Lusk Shipping Co., as agent for Kaiser Aluminum International Inc., and it is,

Further Ordered, that TWRA promptly publish in the appropriate tariff the following notice:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1447, that effective November 3, 1985, and continuing through May 25, 1986, inclusive, the rate on Aluminum Wire is \$2,040.00 per 40 foot container, plus Terminal Receiving Charges of \$110.00 from U.S. Ports and Points (See Rule 1-A) to Thailand, for purposes of waiver or refund

⁶The applicants state there were no other shipments of the same commodity during the period involved here.

APPLICATION OF TRANSPACIFIC WESTBOUND RATE
AGREEMENT AND SEA-LAND CORPORATION ON BEHALF OF
SEA-LAND SERVICE INC. FOR THE BENEFIT OF LUSK
of freight charges, subject to all other applicable rules, regulations,
SHIPPING CO., INC. AS AGENT FOR KAISER ALUMINUM
terms and conditions of said rate and this tariff.
INTERNATIONAL, INC.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

DOCKET NO. 86-22

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND PROCEDURE

February 5, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its Rules of Practice and Procedure to: allow for appeals from Commission staff actions; establish a procedure for the filing of a brief of an amicus curiae in adjudicatory proceedings and authorize U.S. Government agencies to file amicus pleadings without first asking leave of the Commission; bring special docket procedures into conformity with the Shipping Act of 1984 and recent Commission decisions; and require persons requesting oral argument to set forth the specific issues they propose to address at oral argument.

EFFECTIVE

DATE: March 12, 1987.

SUPPLEMENTARY INFORMATION:

BACKGROUND

This proceeding was initiated by a Notice of Proposed Rulemaking (Proposed Rule) published in the Federal Register on August 14, 1986 (51 FR 29124-29126). The Proposed Rule would amend the Commission's Rules of Practice and Procedure (Rules), 46 CFR Part 502, to provide for appeals from Commission staff actions; to establish a procedure for the filing of a brief of an amicus curiae in adjudicatory proceedings; to bring special docket procedures into conformity with the Shipping Act of 1984 (Act or 1984 Act), 46 U.S.C. app. 1701-1720, and recent Commission decisions; and to set forth the grounds upon which a request for oral argument should be based.

Comments in response to the Notice of Proposed Rulemaking were submitted by the Department of Transportation (DOT or Executive Agencies);¹ by the Transpacific Westbound Rate Agreement (TWRA); by Sea-Land Service, Inc. (Sea-Land); and by Messrs. C. Jonathan Benner, Joseph A.

¹ This comment was submitted by the Department of Transportation on its own behalf and on behalf of the Departments of State and Commerce and the United States Trade Representative.

MISCELLANEOUS AMENDMENTS TO RULES OF PRACTICE AND 745 PROCEDURE

Klausner, Neal M. Mayer, and Russell T. Weil, attorneys who practice before the Commission.²

The Commission has considered the comments received and made certain modifications to the Proposed Rule. These changes and the related comments are discussed in the following section-by-section analysis of the Final Rule.

DISCUSSION

I. *Section 502.69 Petitions—General and fee (Rule 69).*

The Proposed Rule would add the phrase “including appeals from Commission staff action,” after the words “affirmative action by the Commission,” in order to make clear that the petition procedure provided in Rule 69 is available in an appeal from a staff action. TWRA urges that either Rule 69 or the Supplementary Information should indicate that when reference is made to the Commission it means “the Commission acting as the sitting Commissioners and not simply a member or members of the staff.”

A reasonable reading of the reference to “relief or other affirmative action by the Commission” in Rule 69 indicates that matters submitted under Rule 69 are ultimately to be decided by the Commission acting as a collegial body.³ Therefore, no specific language to that effect is necessary in Rule 69 itself.

II. *Section 502.76—Brief of an amicus curiae (Rule 76).*

As proposed, Rule 76 would: (1) allow a United States government entity, or a State, Territory or Commonwealth, to file a brief as an amicus curiae without leave of the Commission; (2) clarify the distinction between participation as an intervener and as an amicus curiae; and (3) provide that amicus participation in oral argument will be granted only for extraordinary reasons.

The Executive Agencies support the Proposed Rule without modification. Both TWRA and Sea-Land object to the provision which would allow government entities to file an amicus brief without leave of the Commission. In addition, TWRA states that Rule 76 should be modified to: (1) limit an amicus brief to comments on law or policy questions already at issue in the proceeding; (2) grant presiding officers the discretion to determine whether or not to accept amicus briefs and to determine the timing and terms of filing such briefs; (3) require that government briefs be filed at the same time as the first brief filed by the party it supports; and (4) liberalize the oral argument standard for an amicus.

² A comment by the Trans-Pacific Freight Conference of Japan and the Japan-Atlantic & Gulf Freight Conference was not accepted because it was not timely filed and hence is not part of the record in this proceeding.

³ Moreover, a definition of the reference to “Commission” in this instance could create uncertainty as to the meaning of that term where it appears elsewhere in the Rules.

A. Treatment of Government Entities.

Rule 76(a), as proposed, would permit the filing of an amicus brief only with leave of the Commission or the presiding officer, except that leave would not be required of a United States government entity, or a State, Territory or Commonwealth.

The Executive Agencies support the exception for government agencies. They argue that it is consistent with federal court rules and the practice of other federal agencies. The Executive Agencies contend that this exception will not prejudice any party because an amicus agency would be required to submit its brief at the same time as parties taking the same position. They point out that responding parties will therefore have the same amount of time to respond to an agency amicus brief. In their view, the exception will not expand or prolong a proceeding. The Executive Agencies believe the benefit of such a rule is that it will facilitate communication between the Commission and those agencies directly concerned with U.S. maritime policy.

TWRA and Sea-Land argue that no special exception should be made for government entities. Sea-Land argues that such an exception for U.S. government entities is unnecessary, preferential, and likely to unduly broaden the scope of a proceeding and increase expenses for parties to the proceeding as well as the Commission. TWRA contends that it is inappropriate to allow federal, state and local agencies to file briefs as a matter of right and without advance notice to other parties. TWRA argues that Rule 29 of the Federal Rules of Appellate Procedure, which permits such filings at an appellate level, is not analogous to trial level proceedings before an administrative law judge. TWRA also argues that if preferential treatment is to be given to U.S. government entities, it should also be given to foreign government entities in the interest of comity. TWRA points out that government entities are sometimes either regulated persons (*e.g.*, state and local port districts) or shippers and consignees. TWRA believes it is discriminatory and inappropriate to permit a government class of regulated persons or government shippers to have preferred status as compared to private sector counterparts. Finally, TWRA contends that no need or justification for granting such preferred status has been demonstrated.

The issue raised here is whether the need for and benefit derived from the proposed special treatment of government entities outweighs any potential adverse effects this provision might have such as increased expense or delay, non-observance of principles of international comity, or preferential treatment of government entities that may also be regulated persons, shippers, or consignees.

The need for a provision such as this arose during several recent proceedings in which the Department of Transportation sought to participate and submit its views. In Docket No. 85-18, the Commission upheld the presiding officer's determination that DOT had failed to satisfy the requirements for intervention but allowed DOT, upon application, to participate

as an amicus curiae. *Member Lines of the Transpacific Westbound Rate Agreement—Possible Violations of the Shipping Act of 1984*, 23 S.R.R. 574, 578 (1985). In Docket No. 86-3, the Commission rejected an untimely “comment amicus curiae” submitted by DOT in a show cause proceeding. See “Order Granting Motion To Reject Comments Amicus Curiae of the United States Department of Transportation,” *Modifications to the Trans-Pacific Freight Conference of Japan Agreement, et al.*, 23 S.R.R. 1161 (1986). These specific instances, however, were not expressly referred to in the Supplementary Information to the Proposed Rule. This may explain why TWRA asks whether any agency has been denied amicus status or has sought preferential treatment and questions whether a need for this provision has been shown.

The benefit to be derived from the amicus rule is that it establishes a vehicle for receiving the views of other government agencies that may have an interest in maritime matters. DOT has not perhaps expressly asked for such preferred status prior to issuance of the Proposed Rule, but it has in its prior filings relied on Rule 29 of the Federal Rules of Appellate Procedure and rules of other agencies and has urged the Commission to treat sister agencies in the same way.

While the alleged potential adverse effects of the preferred status accorded U.S. Government entities are not all necessarily without merit,⁴ they do not appear to be substantial enough to stand as a barrier to retaining this feature in the Final Rule. Moreover, as noted in the Proposed Rule, a number of other government agencies do in fact so provide in their rules of practice. Therefore, the Final Rule shall allow U.S. Government entities to file an amicus brief without leave of the Commission.

There is, however, merit to the contention that nonfederal government entities should not be permitted to file an amicus brief without leave of the Commission. Many states, for example, operate port authorities and these authorities are entities regulated by the Commission. There is thus a reasonable concern that allowing state authorities to file without leave could result in a burdensome avalanche of filings. There would therefore appear to be a need in the case of state government entities to exercise control over their participation in Commission proceedings. Therefore, the Final Rule is modified to delete the phrase “or by a State, Territory or Commonwealth.” State government entities would, of course, still be able to participate as an amicus by filing for, and obtaining, leave.

B. *Limit Amicus Brief to Law or Policy Questions.*

As proposed, Rule 76 did not expressly limit an amicus brief to comment on law or policy questions already at issue in the proceeding. TWRA urges that the rule do so. TWRA states that an amicus should be confined

⁴There appears to be little, if any, danger, however, that permitting U.S. Government entities to file an amicus brief without leave would unduly broaden the scope of proceedings or place excessive burdens on the parties.

to the issues addressed by the parties or raised by an order. TWRA is particularly concerned that, at the trial level, an amicus might assume the role of an unofficial litigant arguing facts and making proposed findings. TWRA states that at the trial level it is important that the line between an amicus and an intervenor be clearly drawn.

The clarifying limitation urged by TWRA shall be adopted. In most cases, an amicus would address legal issues put forward by the parties or the Commission. This is the classic role of an amicus, namely to assist the court with legal issues or to call a legal matter to the court's attention which might otherwise escape the court's notice. Moreover, the clarification requested by TWRA can be accommodated without greatly diminishing the benefit of amicus participation. Therefore, section 502.76(a) shall be modified in the Final Rule by adding the following sentence: "A brief of an amicus curiae shall be limited to questions of law or policy."

C. Broader Discretion for the Administrative Law Judge.

As proposed, Rule 76(a) would allow the presiding officer to grant a motion for leave to file an amicus brief or to request that such a brief be filed. Proposed Rule 76(c) would allow the presiding officer to grant leave for a later filing of an amicus brief, if cause is shown.

TWRA urges that the presiding officer also be given discretion over whether or not to accept amicus briefs from any person, including a government entity, and over the time and terms of filing such briefs. This is necessary, according to TWRA, to protect litigating parties from surprise during the course of a proceeding.

The Final Rule requires that all persons, except U.S. Government entities, obtain leave of the presiding officer (or the Commission) to file an amicus brief. Thus, this discretion, except as to U.S. Government entities, is already vested in the presiding officer. The Final Rule does not expressly give the presiding officer discretion over the timing and terms of filing such briefs. However, such discretion is inherent in the presiding officer's authority to control and direct the course of a proceeding. No modification of the language of Rule 76 appears necessary.

D. Filing With the Initial Brief.

As proposed, Rule 76(c) would require that an amicus file its brief "* * * within the time allowed the party whose position as to affirmance or reversal the amicus brief will support."

TWRA urges "* * * that at the ALJ level, if any party is to have leave to file an amicus brief as of right it must file its brief at the same time as the due date of the *first* brief of the party with whose position the amicus is aligned (emphasis in original)." TWRA seeks to avoid a situation where an amicus files its brief on the date the last party files its reply brief.

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It was intended in the Proposed Rule that an amicus file its brief at the same time as the initial brief of the party it supports. Certainly, an amicus should not be permitted to enter at the reply phase and thereby preclude any opportunity for the opposing side to address the amicus brief. An amicus must file its brief on or before the due date of the initial brief of the party it supports. In view of the presiding officer's authority to control proceedings, it does not appear necessary to expressly state this in the Final Rule.

E. Standard for Oral Argument by Amicus Curiae.

As proposed, Rule 76(d) would provide that: "A motion of an amicus curiae to participate in oral argument will be granted only for extraordinary reasons."

TWRA argues that this standard is too restrictive. TWRA states: "It should be sufficient to require that an amicus show that the position it wished to urge on oral argument (a) would not be adequately represented by actual parties, (b) was one bearing on important issues of law and policy and (c) would be heard only in the Commission's discretion upon application."

As proposed to be amended in this proceeding, Rule 241 would set forth a standard for evaluating requests for oral argument by parties to a proceeding. Proposed amended Rule 241 attracted substantial comment which is discussed below. In light of the changes recommended and made in Rule 241, it would appear preferable to evaluate a request by an amicus curiae to participate in oral argument under the same standard as that of parties to the proceeding. Therefore, Rule 76(d) shall be modified to provide that such requests by an amicus curiae shall be governed by the requirements of Rule 241.

III. Section 502.92(a)—Special docket applications and fee (Rule 92(a)).

This section sets forth the special docket procedure for claiming refund or waiver relief. The proposed revisions are generally aimed at bringing Rule 92(a) into conformity with section 8(e) of the 1984 Act, 46 U.S.C. app. 1707(e).

Sea-Land maintains that the amendment to Rule 92 is unclear as to whether a shipper must file a corrected tariff when applying for a refund or waiver. It argues that the statute contains no exception to the requirement that a corrected tariff be filed with the Commission prior to the filing of the application. In Sea-Land's opinion, were the shipper allowed to file an application without the concurrence of the carrier, a simple procedure for review of mutually acknowledged mistakes might be converted into an adversarial process more appropriately handled under section 11 of the 1984 Act. Sea-Land suggests that Rule 92 be amended to require the shipper to attach to its application an affidavit from the carrier in support of the application, together with a copy of the corrected tariff.

Section 8(e), which gives the shipper the right to file an application for refund or waiver, does not subject the exercise of that right to the consent of the carrier or conference. Nor does the statute, which explicitly directs only the carrier or conference to file a new tariff, appear to contemplate the submission of a tariff by a shipper.⁵ Consequently, Sea-Land's suggested amendment finds no support in the statute. Moreover, such an amendment would frustrate the shipper's right to file its own application.⁶

IV. Section 502.241—Oral Argument (Rule 241).

As proposed to be amended, Rule 241(b) would provide that oral argument generally will not be granted unless: (1) the requesting party demonstrates with specificity that the matter to be addressed presents a significant regulatory issue; (2) the legal arguments have not been adequately addressed on briefs; and (3) the decisional process would be significantly aided by oral presentation.

Messrs. Benner, Klausner, Mayer, and Weil, and TWRA, by its attorney Mr. R. Frederic Fisher, uniformly express the view that the proposed changes would unduly restrict the Commission's discretion to hear oral argument.⁷ The commenters, all of whom are attorneys who practice before the Commission, urge rejection of the Proposed Rule and argue that oral argument provides the only opportunity for the parties to address the Commission directly. They point out that courts generally insist on hearing oral argument rather than deciding cases on briefs, and all commenters find objectionable the burden placed on a party requesting oral argument to be compelled to acknowledge the inadequacy of its briefs.

The proposed oral argument rule has generated strong opposition from members of the maritime bar. Some of the arguments advanced against the proposed changes in Rule 241 have merit and were anticipated when the rule was proposed. The fact remains, however, that the present "oral argument" procedure serves well neither the Commission nor the parties, whom the bar represents.

Clearly, and contrary to the conclusions drawn by some commenters, proposed amended Rule 241(b) was *not* intended to remove the Commis-

⁵ Section 8(e) provides in part:

(e) REFUNDS.—The Commission may, upon application of a carrier or shipper, permit a common carrier or conference 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 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. (Emphasis added).

⁶ The Commission may one day be called upon to address the effect of a carrier's or conference's refusal to concur in a shipper's special docket application, and/or to file the conforming tariff rate and other tariff matter required by section 8(e) of the 1984 Act. However, that issue is best left to resolution in an appropriate case.

⁷ None of the comments addresses the proposed changes in Rule 241(a), 46 CFR 502.241(a), which merely incorporate the Commission's practice for scheduling oral argument, either on its own initiative or at the request of a party.

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sion's unfettered discretion to grant oral argument, nor to reflect any fundamental bias against oral argument on the part of the Commission. On the other hand, it would appear that something more than tacking on "we request oral argument" to the end of exceptions or replies to exceptions (which is a common existing practice), is necessary.

Under these circumstances, while it does not seem advisable to list in Rule 241(b)(2), as suggested by some commenters, the types of reasons which are likely to result in a grant or denial of oral argument, it would appear reasonable to at least require the parties to set forth in their request the issues they believe need to be addressed on oral argument. Such a declaration would serve to focus the oral argument presentations and thereby assist the deliberative process.

Finally, it should be emphasized that a request for oral argument which conforms to the technical requirements of Rule 241 does not automatically entitle the requesting party to an affirmative disposition of that request. A grant or denial of a request for oral argument remains a matter of Commission discretion.

CONCLUSION

The Final Rule, as modified where appropriate to accommodate the comments submitted, amends the Commission's Rules of Practice and Procedure by updating and clarifying certain existing sections of the Rules and by adding a new section governing amicus participation. These changes make significant improvements to the Commission's Rules which should promote greater efficiency in Commission proceedings.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193 (February 27, 1981).

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

List of Subjects in 46 CFR Part 502

Administrative Practice and Procedure.

Therefore, for the reasons set forth in the preamble, and pursuant to section 5 U.S.C. 553, section 43 of the Shipping Act, 1916, 46 U.S.C. app. 841a, and sections 8(e) and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1707(e) and 1716(a), Part 502 of Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation for Part 502 continues to read as follows:

AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; 46 U.S.C. app. 817, 820, 821, 826, 841a, 1114(b), 1705, 1707-1711, and 1713-1716; and E.O. 11222 of May 8, 1965 (30 FR 6469).

2. Section 502.69 paragraph (a) is revised to read as follows:

§ 502.69 Petitions—general and fee.

(a) Except when submitted in connection with a formal proceeding, all claims for relief or other affirmative action by the Commission, including appeals from Commission staff action, except as otherwise provided in this part, shall be by written petition, which shall state clearly and concisely the petitioner's grounds of interest in the subject matter, the facts relied upon and the relief sought, shall cite by appropriate reference the statutory provisions or other authority relied upon for relief, shall be served upon all parties named therein, and shall conform otherwise to the requirements of Subpart H of this part. Replies thereto shall conform to the requirements of § 502.74.

* * * * *

3. Section 502.72 paragraph (c)(3) is amended by removing the word "amicus."

4. Part 502 Subpart E is revised by adding new 502.76 to read as follows:

§ 502.76 Brief of an amicus curiae.

(a) A brief of an amicus curiae may be filed only by leave of the Commission or the presiding officer granted on motion with notice to the parties, or at the request of the Commission or the presiding officer, except that leave shall not be required when the brief is presented by the United States or an agency or officer of the United States. The brief may be conditionally filed with the motion for leave. A brief of an amicus curiae shall be limited to questions of law or policy.

(b) A motion for leave to file an amicus brief shall identify the interest of the applicant and shall state the reasons why such a brief is desirable.

(c) Except as otherwise permitted by the Commission or the presiding officer, an amicus curiae shall file its brief within the time allowed the party whose position as to affirmance or reversal the amicus brief will support. The Commission or the presiding officer shall grant leave for a later filing only for cause shown, in which event the period within which an opposing party may answer shall be specified.

(d) A motion of an amicus curiae to participate in oral argument will be granted only in accordance with the requirements of § 502.241. [Rule 76.]

5. Section 502.92 paragraphs (a)(1) and (a)(2) are revised to read as follows:

§ 502.92 Special docket applications and fee.

(a)(1) A common carrier by water in foreign commerce which publishes its own tariff or, if the common carrier does not publish its own tariff, the carrier and the conference to which it belongs, or a shipper, may file an application for permission to refund or waive collection of a portion of freight charges where it appears that there is (i) an error in the tariff of a clerical or administrative nature or (ii) an error due to inadvertence

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in failing to file a new tariff. Such refund or waiver must not result in discrimination among shippers, ports, or carriers.

(2) When the application is filed by a carrier or conference the Commission must have received prior to the filing of the application a new tariff which sets forth the rate on which refund or waiver would be based.

* * * * *

6. Exhibit No. 1 to Subpart F [§ 502.92] paragraphs 1, 3 and 4 are revised to read as follows:

EXHIBIT NO. 1 TO SUBPART F [§ 502.92]—APPLICATION FOR
REFUND OF OR WAIVER FOR FREIGHT CHARGES DUE TO
TARIFF ERROR

* * * * *

1. * * *

(d) Date(s) of shipment(s), i.e., sailing(s) [furnish supporting evidence].

* * * * *

3. Furnish any information or evidence as to whether grant of the application will result in discrimination among shippers, ports or carriers.

4. State whether there are shipments of other shippers of the same commodity which (i) moved via the carrier(s) or conference involved in this application during the period of time beginning on the date the tariff omitting the intended rate became effective or on the date the intended rate absent the mistake would have become effective and ending on the day before the effective date of the conforming tariff, and (ii) moved on the same voyage(s) of the vessel(s) carrying the shipment(s) described in No. 1, above.

* * * * *

7. Section 502.241 paragraphs (a) and (b) are revised to read as follows:
§ 502.241 Oral argument.

(a) The Commission may hear oral argument either on its own motion or upon the written request of a party. If oral argument before the Commission is desired on exceptions to an initial or recommended decision, or on a motion, petition, or application, a request therefor shall be made in writing. Any party may make such a request irrespective of its filing exceptions under § 502.227. If a brief on exceptions is filed, the request for oral argument shall be incorporated in such brief. Requests for oral argument on any motion, petition, or application shall be made in the motion, petition, or application, or in the reply thereto. If the Commission determines to hear oral argument, a notice will be issued setting forth the order of presentation and the amount of time allotted to each party.

(b)(1) Requests for oral argument will be granted or denied in the discretion of the Commission.

(2) Parties requesting oral argument shall set forth the specific issues they propose to address at oral argument.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 502]

DOCKET NO. 86-27

ATTORNEY'S FEES IN REPARATION PROCEEDINGS

February 26, 1987

ACTION: Final rule.

SUMMARY: The Federal Maritime Commission amends its Rules of Practice and Procedure to provide a standard and procedure for awarding attorney's fees in reparation proceedings. The rule establishes a method of computing reasonable attorney's fees and specific procedures of processing fee requests.

EFFECTIVE

DATE: April 2, 1987.

SUPPLEMENTARY INFORMATION:

By Notice of Proposed Rulemaking published in the Federal Register on October 27, 1986 (51 FR 37917) the Commission gave notice of its intent to establish a method of computing attorney's fees awards in reparation proceedings and specific procedures for processing fee requests. Specifically, the proposed rule deletes the previous provision in the Commission's Rules of Practice and Procedure governing attorney's fees award, Rule 253(b), 46 CFR 502.253(b), and adds a new Rule 254, 46 CFR 502.254. The new provision specifies that the so-called "lodestar" method of computing attorney's fees shall be utilized in cases under section 11 of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1710, wherein the complainant is awarded reparations. The rule also requires that petitions for fees be documented according to the reasonableness of the hours claimed and the customary hourly rate for such services. Finally, the rule establishes time limits for filing attorney's fees petitions and replies, and specifies where they should be filed.

Comments in response to the Notice were filed by Crowley Maritime Corporation (CMC), Asia North America Eastbound Rate Agreement (ANERA), Transpacific Westbound Rate Agreement (TWRA) and the Maritime Administrative Bar Association (MABA). CMC supports the rule as proposed and urges its adoption. ANERA opposes the rule on the grounds that it is unnecessary and in excess of the Commission's statutory authority to the extent it purports to authorize awards of attorney's fees for court proceedings.

TWRA agrees with most provisions of the proposed rule but suggests further amendments to those provisions that specify the scope of the rule and the filing of petitions for fee awards. The suggested changes to the

provisions concerning the scope of the rule would require that fees be awarded only for those portions of a proceeding directly related to a reparations award and would limit fee awards to no more than 50 percent of the reparations awarded. The suggested changes to the provision concerning the filing of a fee petition would provide for such filing after the time for appeal to a court had run or any appeal or subsequent Commission proceeding was terminated.

MABA suggests similar changes to the proposed rule to limit fee awards to only those services directly related to obtaining reparations, and in proportion to the amount of reparations awarded. Further, MABA urges that the "lodestar" hourly rate factor be stated as the rate customarily charged by the attorney actually prosecuting the complaint, or, alternatively, the average fee of a maritime attorney. MABA suggests that the time period allowed for filing a petition be tolled until after all appeals are finished. Finally, MABA argues that fees for non-attorneys and *pro se* litigants be limited to those services that an attorney would otherwise provide and exclude the complainant's time expended as a "client" in pursuit of a reparations award.

The Commission agrees with the argument that awards of attorney's fees should only be permitted for those services directly related to obtaining reparations. However, given the remedial purpose of the attorney's fees award statutory provision, no further restrictions or limits on awards appear justified.

We reject the notion that the hours claimed should be apportioned between the reparations award and other relief obtained. If 100 percent of an attorney's hours are directly related to a reparations award, but a cease and desist order is also issued, there is no justification to reduce the fees because the attorney was able to obtain such additional relief. Similarly, a cap on fees based upon a percentage of reparations awarded appears to be arbitrary and unsupported by the statute or its legislative history. If an attorney's fee claim is unreasonably disproportionate to the resulting reparations obtained, then the respondent may argue, as provided in paragraph (d) of the rule, that a mechanical "lodestar" calculation would yield an unreasonable attorney's fee award.

Conversely, an award of attorney's fees for the successful prosecution of court proceedings directly related to a reparations action is supported by general law and the legislative history of the Shipping Act of 1984. Generally, the calculation of "reasonable attorney's fees" may include hours expended on a separate proceeding, if that other proceeding is so closely related to the primary case as to be considered part of the primary litigation. *See, Webb v. Board of Education of Dyer County*, 85 L. Ed. 2d 233, 242 (1985). The filing of a complaint under section 11(a) is a statutory prerequisite to the filing of an injunctive action under section 11(h)(2) of the 1984 Act, and, if granted, the injunction may not exceed the complaint litigation by more than 10 days. Such linkage between the two

statutory actions indicates that the injunctive action is intended to be an adjunct to the complaint proceeding to prevent further and irreparable injury to a complainant pending a final Commission decision on the merits of a complaint. Because these two proceedings are essentially part of the same "litigation," it is appropriate that section 11(g) attorney's fees, at a minimum, include hours expended in a successful injunctive action under section 11(h)(2).

This interpretation of section 11(g) is not inconsistent with the attorney's fees provision of section 11(h)(2). The latter states only that successful defendants in injunctive actions may be awarded fees by the court. It does not address the rights of successful plaintiffs. However, the legislative history of the 1984 Act indicates that the attorney's fees awarded under section 11(g) should include hours expended on a successful injunctive action under section 11(h)(2).

The Conference Report to the 1984 Act states:

In determining the amount of attorney's fees [in a reparation proceeding], a complainant's expenses for representation before the Commission as well as in any federal court proceeding (such as under subsection (h)) should be considered. But a successful complaint (sic) is not entitled to attorney's fees for any portion of the proceeding for which it did not prevail or for procedural motions that are unsuccessful.

* * * * *

A successful private complainant will recover attorney's fees for the injunctive proceeding if ultimately successful on the merits (subsection (g)). H.R. Rep. No. 600, 98th Cong., 2d Sess. 41 (1984) (emphasis added).

In the absence of incompatibility or inconsistency with an express provision, the statute should be construed to effect its Congressional intent. See, *First National Bank of Logan, Utah v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966). While the legislative history does not specify what other court actions in addition to injunctive suits fall under the attorney's fees provision of section 11(g), the "useful and necessary" *Webb* standard appears to be most appropriate.

The proposed rule does not need to be amended to account for any difference between "average" attorney's fees and "maritime" attorney's fees. The "lodestar" formula, based upon "customary" fees in the attorney's "community" is a flexible concept and may result in an hourly rate established on the basis of services rendered of a specialized nature, whether or not the particular attorney litigating a particular case is considered a "specialist" in the maritime law field. Similarly, "reasonableness of hours" will be construed to include only legal services and not other work normally required by the client in cases involving non-attorneys' and *pro se* litigants' fee claims.

Finally, the point is well taken that fees should not be awarded until any review process that may reverse a reparations award is completed. Accordingly, for purposes of the attorney's fee rule, a reparations award will not be final, and the time period for filing attorney's fees petitions will not begin to run until such review period has expired. The proposed rule has been amended accordingly.

List of subjects in 46 CFR Part 502: Administrative practice and procedure.

Therefore, for the reasons set forth above and pursuant to 5 U.S.C. 553 and sections 11 and 17 of the Shipping Act of 1984, 46 U.S.C. app. 1710, 1716, Part 502 of Title 46, Code of Federal Regulations is amended as follows:

1. The Table of Contents for Part 502 is amended as follows:

PART 502—RULES OF PRACTICE AND PROCEDURE

* * * * *

Subpart O—Reparation

* * * * *

502.253 Interest in reparation proceedings.

502.254 Attorney's fees in reparation precedence.

* * * * *

2. The Authority Citation for Part 502 continues to read as follows:

AUTHORITY: 5 U.S.C. 552, 553, 559; 18 U.S.C. 207; secs. 18, 20, 22, 27 and 43 of the Shipping Act, 1916 (46 U.S.C. app. 817, 820, 821, 826, 841a); secs. 6, 8, 9, 10, 11, 12, 14, 15, 16 and 17 of the Shipping Act of 1984 (46 U.S.C. app. 1705, 1707-1711, 1713-716); sec. 204(b) of the Merchant Marine Act, 1936 (46 U.S.C. app. 1114(b)); and E.O. 11222 of May 8, 1965 (30 FR 6469).

3. Section 502.253 *Interest and attorney's fees in reparation proceedings*, is amended by deleting "and attorney's fees" from the title, by deleting the paragraph designation from paragraph (a) and adding "[Rule 253]" at the end thereof; and by deleting paragraph (b).

4. A new section 502.254 is added reading as follows:

§502.254 Attorney's fees in reparation proceedings.

(a) *Scope.* Except for proceedings under Subpart S of this part, the Commission shall, upon petition, award the complainant reasonable attorney's fees directly related to obtaining a reparations award in any complaint proceeding under section 11 of the Shipping Act of 1984. For purposes of this section, "attorney's fees" includes the fair market value of the services of any person permitted to appear and practice before the Commission in accordance with Subpart B of this part, and may include compensation for services rendered the complainant in a related proceeding in federal

court that is useful and necessary to the determination of a reparations award in the complaint proceeding.

(b) *Content of Petitions.* Petitions for attorney's fees under this section shall specify the number of hours claimed by each person representing the complainant at each identifiable stage of the proceeding, and shall be supported by evidence of the reasonableness of hours claimed and the customary fees charged by attorneys and associated legal representatives in the community where the petitioner practices. Requests for additional compensation must be supported by evidence that the customary fees for the hours reasonably expended on the case would result in an unreasonable fee award.

(c) *Filing of Petition.*

(1) Petitions for attorney's fees shall be filed within 30 days of a final reparation award:

(i) With the presiding officer where the presiding officer's decision awarding reparations became administratively final pursuant to section 502.227(a)(3) of this part; or

(ii) With the Commission, if exceptions were filed to, or the Commission reviewed, the presiding officer's reparation award decision pursuant to section 502.227 of this part.

(2) For purposes of this section, a reparation award shall be considered final after a decision disposing of the merits of a complaint is issued and the time for the filing of court appeals has run or after a court appeal has terminated.

(d) *Replies to Petitions.* Within 20 days of filing of the petition, a reply to the petition may be filed by the respondent, addressing the reasonableness of any aspect of the petitioner's claim. A respondent may also suggest adjustments to the claim under the criteria stated in paragraph (b) of this section.

(e) *Ruling on Petitions.* Upon consideration of a petition and any reply thereto, the Commission or the presiding officer shall issue an order stating the total amount of attorney's fees awarded. The order shall specify the hours and rate of compensation found awardable and shall explain the basis for any additional adjustments. An award order shall be served within 60 days of the date of the filing of the reply to the petition or expiration of the reply period; except that in cases involving a substantial dispute of facts critical to the award determination, the Commission or presiding officer may hold a hearing on such issues and extend the time for issuing a fee award order by an additional 30 days. The Commission or the presiding officer may adopt a stipulated settlement of attorney's fees.

(f) *Appeals.* In cases where the presiding officer issues an award order, an appeal of that order may be made to the Commission under the same criteria and procedures as set forth in paragraphs (b), (c) and (d) of this section. The Commission may award additional attorney's fees to a com-

plainant that substantially prevails in such an appeal proceeding. [Rule 254].

5. Section 502.318 is amended by designating the present text as paragraph (a), and by adding a new paragraph (b) to read as follows:

502.318 Decision.

(a) * * *

(b) If the complainant is awarded reparations pursuant to section 11 of the Shipping Act of 1984, attorney's fees shall also be awarded in accordance with section 502.254 of this part. [Rule 318].

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 84-30

NOTICE OF INQUIRY CONCERNING INTERPRETATION OF SECTION 18(a)(4) OF THE SHIPPING ACT OF 1984

February 27, 1987

ACTION: Notice of Inquiry; Discontinuance of Proceeding.

SUMMARY: This inquiry was initiated for the limited purpose of soliciting information from interested persons. Responses have been received and are being considered by the Commission in carrying out its section 18(a)(4) mandate. No regulatory purpose is served by continuing the proceeding.

SUPPLEMENTARY INFORMATION:

This proceeding was instituted by Notice of Inquiry published in the *Federal Register* of September 6, 1984 (49 FR 35242). The limited purpose of the inquiry was to solicit views and information regarding the proper interpretation to be given the provision of section 18(a)(4) of the Shipping Act of 1984, 46 U.S.C. app. 1717, which requires the Commission to report to Congress, *inter alia*, the cost of major regulatory proceedings. No rule or order was contemplated to be issued in this proceeding. The notice elicited five brief responses from interested parties which are being considered by the Commission in finalizing its approach to fulfilling its section 18(a)(4) mandate.

In view of the foregoing, no regulatory purpose is served by continuing this proceeding and it is hereby ordered to be discontinued.

By the Commission.

(S) JOSPEH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1395

APPLICATION OF TRANSPACIFIC WESTBOUND RATE AGREEMENT
AND SEA-LAND CORPORATION ON BEHALF OF SEA-LAND
SERVICE, INC. FOR THE BENEFIT OF DARRELL J. SEKIN & CO.,
INC. AS AGENT FOR BRUCE INTERNATIONAL CORPORATION

Reliance on erroneous information is not the type of error for which section 8(e) of the Shipping Act of 1984 provides a remedy.

Application for relief under section 8(e) to waive collection of a portion of freight charges is denied.

REPORT AND ORDER

February 27, 1987

BY THE COMMISSION: (Edward V. Hickey, *Chairman*; James J. Carey, *Vice Chairman*; Francis J. Ivancie, Thomas F. Moakley and Edward J. Philbin, *Commissioners*)

The Commission determined to review the Supplemental Initial Decision of Administrative Law Judge Joseph N. Ingolia (Presiding Officer) issued in this proceeding. The Presiding Officer granted the application of the Transpacific Westbound Rate Agreement (TWRA or Conference) and Sea-Land Corporation on behalf of Sea-Land Service, Inc. (Sea-Land) filed pursuant to section 8(e) of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. § 1707(e). The application requested permission to waive collection from Darrell J. Sekin & Co., Inc. (Sekin), as agent for the shipper, Bruce International Corporation, a portion of the freight charges payable on the transportation of a shipment of hardwood flooring from Nashville, Tennessee to Yokohama, Japan.

BACKGROUND

In May, 1985, Sea-Land, a TWRA member, negotiated with Sekin, the shipper's agent located in Dallas, Texas, a rate of \$2090 (plus a \$100 Container Yard Delivery Charge) per 40-foot container for the transportation of hardwood flooring from Nashville to Yokohama.

The circumstances and chronological sequence of events surrounding the negotiations and subsequent publication of the agreed-to rate is as follows:

On May 3, 1985, R.T. Savoie, Sea-Land's Assistant Pricing Manager in Chicago, Illinois, advised Sea-Land's office in Dallas by telephone of his agreement to have the \$2090 negotiated rate filed.¹

¹ Affidavit of Linda Christensen, Sea-Land's Market Support Coordinator in Dallas, Texas, dated October 3, 1986.

On May 6, 1985, Sea-Land's Dallas office advised R.T. Savoie by telex that it had a booking for a shipment of hardwood flooring ready to be delivered by the middle of the week, beginning May 12, 1985.²

On May 7, 1985, R.T. Savoie directed Al Cherry, Sea-Land's Assistant Pricing Manager in Oakland, California, to request a TWRA membership telephone vote on the proposed rate.³

On May 8, 1985, Al Cherry submitted the rate request to Stacey M. Adams, TWRA's Manager of Pricing Activities in San Francisco.⁴

On May 14, 1985 Ms. Adams advised Mr. Savoie that the rate initiative had passed, effective that same day. Mr. Savoie relayed the information to the Dallas office, which informed the shipper accordingly.⁵

On May 15, 1985, the shipper delivered one shipment of hardwood flooring to Sea-Land's container yard at Nashville.

On May 16, 1985, Sea-Land learned from Ms. Adams that the May 14th verbal communication was incorrect in that one of the voting members had opposed the \$2090 rate and the rate initiative had failed.

On May 21, 1985, TWRA filed the \$2090 rate under the Independent Action provisions of the Conference agreement.

On May 28, 1985, the shipper paid freight at the negotiated rate.

On November 8, 1985, Sea-Land applied for permission to waive collection of additional freight charges in the amount of \$32,130.31, payable under TWRA's tariff in effect on May 15, 1985.

In an Initial Decision (I.D.) served June 25, 1986, the Presiding Officer granted the application based upon the finding "that inadvertent, erroneous information caused the parties to fail to file a new tariff. . . ." ⁶

On review upon its own motion, the Commission vacated the I.D. and remanded the proceeding to the Presiding Officer. In its Order of Remand the Commission found that the record was inadequate to support the grant of a waiver and suggested that, in view of TWRA's refusal to adopt the proposed rate, there appeared to be no error in the TWRA tariff in effect on May 15, 1985.⁷

In a Supplemental Initial Decision (S.I.D.) served October 31, 1986, the Presiding Officer, after review of the additional evidence, granted the application.⁸

DISCUSSION

Section 8(e) of the 1984 Act provides in part:

² Sea-Land's letter, dated September 26, 1986, addressed to the Presiding Officer, with attached copy of the May 6, 1985 telex.

³ Affidavit of R. T. Savoie, dated November 7, 1985, and affidavit of Sea-Land's A. S. Cherry, dated February 26, 1986.

⁴ Affidavit of Stacey M. Adams, dated February 26, 1986.

⁵ Affidavit of R. T. Savoie, *supra*, note 3 at 2, and Linda Christensen, *supra*, note 1 at 2.

⁶ *Application of Transpacific Westbound Rate Agreement for the Benefit of Darrell J. Sekin & Co., Inc.*, Special Docket No. 1395, slip op. at 5 (Initial Decision served June 25, 1986).

⁷ *Application of Transpacific Westbound Rate Agreement*, 28 F.M.C. 536 (1986).

⁸ *Application of Transpacific Westbound Rate Agreement*, 23 S.R. R. 1502 (S. I.D. 1986).

(e) REFUNDS.—The Commission may, upon application of a carrier or shipper, permit a common carrier or conference 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—

(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 and the refund will not result in discrimination among shippers, ports, or carriers. . . .

The Presiding Officer held on the basis of the evidence in the record that “the error which was involved here was an error due to mistake and inadvertence in failing to file a new tariff and falls within the ambit of section 8(e) of the Shipping Act, 1984.”

This conclusion is based on the following findings of fact:

There is no question here that Sea-Land and the carrier [sic] agreed to a rate of \$2,090.00, plus \$100 CY, and that they intended that rate to be on file when the shipment in question began. There is also no question that a Conference employee, due to the volume of paperwork, mistakenly told Sea-Land on May 14, 1985, that the negotiated rate had been adopted by the Conference and that the rate would be filed that day and that the employee did not discover the error until May 16, 1985, one day after the shipment actually moved. Further, there is no question that the shipment began on May 15, 1985, because of the misinformation. We hold that had the misinformation not been given the shipment would not have begun until the independent action had been completed and the intended, negotiated rate filed in the tariff.

13 S.R.R. at 1504.

The underlying theory is that, to the extent the tariff did not reflect the rate both the carrier and the shipper intended be charged, there was an error in the tariff in effect on May 15, 1985 when the shipment moved.

The Presiding Officer distinguished on the facts and found inapposite cases in which relief was denied under arguably similar circumstances,⁹ and the Presiding Officer relied on the several decisions that, in his opinion illustrated the Commission’s established liberal construction of the statute.

He noted that in *D. F. Young Inc. v. Cie. Nationale Algerienne de Navigation*, 18 S.R.R. 1645 (1979), relief was granted even though the carrier had inadvertently failed to ask the conference to file a negotiated rate. However, here, by contrast, TWRA was asked and declined to file the \$2090 rate.

⁹The Presiding Officer limited his discussion of such precedent to *Application of Sea-Land Service, Inc. for the Benefit of Alimenta (U.S.A.), Inc.*, 19 S.R.R. 1111 (1979), *Munoz y Cabrero v. Sea-Land Service, Inc.*, 20 F.M.C. 152 (1977), and *Farr Co. v. Seatrain*, 20 F.M.C. 441 (1978).

In the Presiding Officer's opinion, *Application of Lykes Bros. Steamship Co., Inc., for the Benefit of Wilhelm Schleaf GMBH & Co. KG*, 27 F.M.C. 844 (1985), is a case where the application was granted notwithstanding a lack of affirmative evidence of a pre-shipment intent to apply a certain rate. On review we find that the issue in that case was the proper description of the cargo, which, in light of some ambiguity in the record the Commission resolved in favor of the shipper.

The Presiding Officer points out that in *Application of Afram Lines Ltd. for the Benefit of Commodity Credit Corp.*, 23 S. R. R. 434 (1985), a waiver was granted even though the shipment had been re-routed to another port after the shipment began. But in that particular case, flood damage to a rail line at the initial point of discharge caused the diversion to a different port than the port originally intended. The application was granted on a finding that the carrier's policy was to maintain comparable low rates on relief cargo for delivery within a range of ports on the West Coast of Africa.

Finally, the Presiding Officer finds support for a liberal interpretation of the statute in *Nepera Chemical, Inc. v. F.M.C.*, 662 F.2d 18 (D.C. Cir. 1981), where the court found that an insignificant discrepancy between the negotiated rate and the rate shown in the tariff filed with the application was an insufficient ground to deny relief. This case does not address the failure to fulfill the basic requirements of section 8(e).

It should be noted that Sea-Land, as a TWRA member could have had the \$2090 rate filed either with TWRA's concurrence or by independent action. Having submitted the rate request on May 8, 1985, Sea-Land did what was in its power to obtain the filing of the proposed rate by May 15, 1985. TWRA's refusal to approve the \$2090 rate makes the rate on file on May 15, 1985 the rate TWRA intended be applied to the shipment. Under these circumstances no inadvertent failure to file the intended rate may be attributed to TWRA, by whose tariff Sea-Land was bound by virtue of its membership in the Conference, or for that matter to Sea-Land. Sea-Land could not reasonably expect that under the independent action provisions the rate would be published earlier than May 18, 1985, that is, ten days after submitting the rate request on May 8 but three days after it took delivery of the shipment.¹⁰

Under these circumstances, where the carrier is unable to file or obtain the filing of a proposed rate by a certain time, the mere intent to have that rate on file does not of itself create an error in the tariff. In this instance, having submitted the rate initiative on May 8, 1985, and in light of TWRA's refusal, Sea-Land was never in a position to obtain by independent action the filing of the \$2090 rate before it took possession of the shipment. Consequently, the holding, in the S.I.D., that there was "an

¹⁰The rate was eventually published on May 21, 1985, although it should have been filed 10 days after the initial rate request on May 8, 1985. See *Order of Remand*, 28 F.M.C. at 536, note 2.

error due to mistake and inadvertence in failing to file a new tariff rate,"¹¹ does not find support in the record.

The Presiding Officer also found that, were it not for the erroneous information, the shipper would have waited for the rate to become effective before delivering the shipment to the carrier. However, the fact that the shipper acted in reliance on the erroneous information did not affect the validity of the rate on file. In this instance, TWRA's verbal notification that the \$2090 rate was approved effective May 14, 1985 amounted to a misquotation of the applicable rate. Misquotations or incorrect information concerning rates and charges have been held to be irrelevant to the shipper's obligation to pay the rate on file. "Ignorance or misquotation of rates is not an excuse for paying or charging either less or more than the rate filed." *Louisville & N.R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915).¹²

Consequently, on the record as it stands on remand, the wrong alleged is not of the type for which section 8(e) provides a remedy and the application must be denied.

THEREFORE, IT IS ORDERED, That the Supplemental Initial Decision served in this proceeding on August 29, 1986 is reversed;

IT IS FURTHER ORDERED, That the application of the Transpacific Westbound Rate Agreement and Sea-Land Corporation on behalf of Sea-Land Service, Inc. filed in this proceeding is denied;

IT IS FURTHER ORDERED, That Sea-Land Service, Inc. collect within 30 days from the service of this order from Bruce International Corporation, unpaid freight charges in the amount of \$32,130.31, and adjust freight forwarder compensation charges accordingly; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

¹¹23 S.R.R. at 1504.

¹²To the same effect is *Louisville & Nashville R. Co. v. Mead Johnson & Co.*, 737 F.2d 683 (7th Cir. 1984) (and cases cited therein) cert. denied, 105 S. Ct. 386 (1984). See also *Mueller v. Peralta Shipping Corp.*, 8 F.M.C. 361, 365 (1965); *Farr Co. v. Seatrain Lines*, 20 F.M.C. 411 (1978), reconsideration denied, 20 F.M.C. 663 (1978).

FEDERAL MARITIME COMMISSION

[46 CFR PART 503]

DOCKET NO. 87-5

IMPLEMENTATION OF FREEDOM OF INFORMATION REFORM ACT

April 21, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission amends its Public Information regulations to incorporate the recent changes to the Freedom of Information Act regarding requests for agency enforcement records and regarding establishment and waiver of fees to be charged for search, review and duplication of records in response to FOIA requests. The rules follow the guidelines established by the Office of Management and Budget on establishment of fees and Department of Justice on fee waivers.

DATE: May 26, 1987.

SUPPLEMENTARY INFORMATION:

On October 27, 1986, President Ronald Reagan signed into law the Anti-Drug Abuse Act of 1986, an omnibus piece of legislation which includes as sections 1801-04 of the law, the Freedom of Information Reform Act of 1986 (Reform Act). This legislation expands the law enforcement protections of the Freedom of Information Act (FOIA) and also modifies its fee and fee-waiver provisions. The new law enforcement provisions were effective immediately. The fee provisions will become effective on April 25, 1987. This 180-day delay was designed to permit the Office of Management and Budget (OMB) and affected agencies time to issue new guidelines and regulations governing them. OMB published proposed guidelines on January 16, 1987 (52 FR 1992).

The Commission on March 19, 1987 (52 FR 8628) published a notice of proposed rulemaking designed to implement the above-mentioned changes mandated by the Reform Act. The proposed rules closely followed the OMB guidelines. The *Federal Register* published a correction to this notice on March 26, 1987 (52 FR 9756). No comments were submitted in response to the notice of proposed rulemaking. Subsequent to the proposed rule publication, OMB issued its final guidelines for implementation of the Reform Act (52 FR 10012; March 27, 1987). The Department of Justice, Office of Information and Privacy (DOJ), issued new fee waiver policy guidance on April 2, 1987, also designed to assist agencies in establishing rules implementing the Reform Act.

The final rules adopted herein closely follow the proposed rules. The only changes are the result of incorporation of the final OMB guidelines on fees and the DOJ guidelines on fee waivers. The final rules contain appropriate amendments to the Commission's current Public Information rules appearing in 46 CFR Part 503. The following is a section by section discussion of the rules.

1. Section 503.35 Exceptions to availability of records.

Paragraph (a)(7) of this section currently describes the circumstances under which "investigatory records may be withheld by the Commission when responding to an FOIA request. Paragraph (a)(7) is being revised to recite verbatim the revised standard promulgated by the Reform Act. The general thrust of the revised standard is to clarify and broaden the scope of the exemptions on law enforcement records or information.

A new paragraph (c) is also being added to this section implementing subsection (c)(1) of the Reform Act, to provide the agency the option of excluding from the requirements of the FOIA, law enforcement records involving a possible violation of criminal law, when there is reason to believe that the subject of the investigation is not aware of its pendency and disclosure of the existence of records could reasonably be expected to interfere with enforcement proceedings. The upshot of this provision is that the agency can, under the appropriate circumstances, withhold acknowledgment even of the existence of an investigation.

2. Section 503.41 Policy and service available.

This section is amended to incorporate a reference to the Reform Act and to conform the description of services available to the terminology used in the Reform Act and defined elsewhere in this rule. Clarification is also included regarding the non-applicability of fees to requests for certain materials.

3. Section 503.43 Fees for services.

Paragraphs (a) through (c) of this section are revised to incorporate the new fee requirements of the Reform Act. The rules closely follow the final guidelines of OMB.

Paragraph (a) sets forth the definitions of terms used in the Reform Act and these rules. They follow almost verbatim the OMB guidelines.

Paragraph (b) sets forth general guidelines regarding collection of fees for search, duplication and review. It acknowledges that, to the extent fees are assessable, they reflect full direct costs as required by the Reform Act. This paragraph also describes the types of fees to be assessed according to the identity of the requester and sets forth restrictions and limitations for assessment of fees as required by the Reform Act. Paragraph (b)(2)(vi) contains summary guidelines for waiver or reduction of fees and are patterned after the DOJ guidelines. The application of these guidelines will also be governed by the more detailed guidance provided by DOJ.

Paragraph (c) sets forth the actual schedule of fees and charges for search, review, and duplication. As indicated above, these charges reflect

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full direct costs as required by the Reform Act and as defined by OMB guidelines. The fees for certification are merely restated from the current schedule and are not affected by the Reform Act.

The following information sets forth the basis upon which the charges for search, duplication and review of records are established. Direct labor costs were separated into two groups, (a) clerical/administrative, and (b) professional/executive. An average rate per hour was developed for each group plus 16 percent of that rate to cover benefits. The computations for search and duplication services exclude salaries of Commissioners and members of the Senior Executive Service. Review of records to determine whether they are exempt from disclosure under section 503.35 is performed by the Secretary of the Commission in his/her capacity as the Commission's FOIA Officer. Accordingly, the full direct costs associated with that position are recovered.

The Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 12193 (February 27, 1981).

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

List of subjects in 46 CFR Part 503, Freedom of Information.

Therefore, for the reasons set forth above, Part 503 of Title 46 CFR is amended as follows:

1. The authority citation for Part 503 continues to read as follows:
AUTHORITY: 5 U.S.C. 552, 552a, 552b, 553; E.O. 12356, 47 F.R. 14874, 15557, 3 CFR 1982 Comp., p. 167.

2. Section 503.35 is amended by revising paragraph (a)(7) and by adding a new paragraph (c) to read as follows:

§ 503.35 Exceptions to availability of records.

(a) * * *

(7) Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information: (i) could reasonably be expected to interfere with enforcement proceedings; (ii) would deprive a person of a right to a fair trial or an impartial adjudication; (iii) could reasonably be expected to constitute an unwarranted invasion of personal privacy; (iv) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source; (v) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could

reasonably be expected to risk circumvention of the law; or (vi) could reasonably be expected to endanger the life or physical safety of any individual.

* * * * *

(c) Whenever a request is made which involves access to records described in paragraph (a)(7)(i) of this section and the investigation or proceeding involves a possible violation of criminal law; and there is reason to believe that the subject of the investigation or proceeding is not aware of its pendency, and disclosure of the existence of the records could reasonably be expected to interfere with enforcement proceedings, the Commission may, during only such time as that circumstance continues, treat the records as not subject to the requirements of 5 U.S.C. 552 and this subpart.

3. Section 503.41 is amended by revising the introductory text and paragraph (a) to read as follows:

§ 503.41 Policy and services available.

Pursuant to policies established by the Congress, the Government's costs for special services furnished to individuals or firms who request such services are to be recovered by the payment of fees (Act of August 31, 1951, 5 U.S.C. 140 and Freedom of Information Reform Act of 1986, October 27, 1986, 5 U.S.C. 552).

(a) Upon request, the following services are available upon the payment of the fees hereinafter prescribed; except that no fees shall be assessed for search, duplication or review in connection with requests for single copies of materials described in §§ 503.11 and 503.21:

- (1) Records/documents search.
- (2) Duplication of records/documents.
- (3) Review of records/documents.
- (4) Certification of copies of records/documents.

* * * * *

4. Section 503.43 is amended by revising paragraphs (a) through (c) to read as follows:

§ 503.43 Fees for services.

(a) *Definitions.* The following definitions apply to the terms when used in this subpart:

(1) "Search" means all time spent looking for material that is responsive to a request, including page-by-page or line-by-line identification of material within documents. Search for material will be done in the most efficient and least expensive manner so as to minimize costs for both the agency and the requester. Search is distinguished, moreover, from "review" of material in order to determine whether the material is exempt from disclosure. Searches may be done manually or by computer using existing programming.

(2) "Duplication" means the process of making a copy of a document necessary to respond to a Freedom of Information Act or other request. Such copies can take the form of paper or machine readable documentation (e.g., magnetic tape or disk), among others.

(3) "Review" means the process of examining documents located in response to a commercial use request to determine whether any portion of any document located is permitted to be withheld. It also includes processing any documents for disclosure, e.g., doing all that is necessary to excise them and otherwise prepare them for release. Review does not include time spent resolving general legal or policy issues regarding the application of exemptions.

(4) "Commercial use request" means a request from or on behalf of one who seeks information for a use or purpose that furthers the commercial, trade, or profit interests of the requester or the person on whose behalf the request is made. In determining whether a requester properly belongs in this category, the agency must determine the use to which a requester will put the documents requested. Where the agency has reasonable cause to doubt the use to which a requester will put the records sought, or where that use is not clear from the request itself, the agency will seek additional clarification before assigning the request to a specific category.

(5) "Educational institution" means a preschool, a public or private elementary or secondary school, an institution of graduate higher education, an institution of undergraduate higher education, an institution of professional education, and an institution of vocational education, which operates a program or programs of scholarly research.

(6) "Non-commercial scientific institution" means an institution that is not operated on a "commercial" basis as that term is referenced in paragraph (a)(4), and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.

(7) "Representative of the news media" means any person actively gathering news for an entity that is organized and operated to publish or broadcast news to the public. The term "news" means information that is about current events or that would be of current interest to the public. Examples of news media entities include television or radio stations broadcasting to the public at large, and publishers of periodicals (but only in those instances when they can qualify as disseminators of "news") who make their products available for purchase or subscription by the general public. These examples are not intended to be all-inclusive. As traditional methods of news delivery evolve (e.g., electronic dissemination of newspapers through telecommunications services), such alternative media would be included in this category. "Freelance" journalists, may be regarded as working for a news organization if they can demonstrate a solid basis for expecting publication through that organization, even though not actually employed by it. A publication contract would be the clearest proof, but

the agency may also look to the past publication record of a requester in making this determination.

(8) "Direct costs" means those expenditures which the agency actually incurs in searching for and duplicating (and in the case of commercial requester, reviewing) documents to respond to a Freedom of Information Act request. Direct costs include, for example, the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits) and the cost of operating duplicating machinery. Not included in direct costs are overhead expenses such as costs of space, and heating or lighting the facility in which the records are stored.

(b) *General.*

(1) The basic fees set forth in paragraph (c) of this section provide for documents to be mailed with postage prepaid. If copy is to be transmitted by registered, certified, air, or special delivery mail, postage therefor will be added to the basic fee. Also, if special handling or packaging is required, costs thereof will be added to the basic fee.

(2) The fees for search, duplication and review set forth in paragraph (c) of this section reflect the full allowable direct costs expected to be incurred by the agency for the service. Cost of search and review may be assessed even if it is determined that disclosure of the records is to be withheld. Cost of search may be assessed even if the agency fails to locate the records. Requesters must reasonably describe the records sought. The following restrictions, limitations and guidelines apply to the assessment of such fees:

(i) For commercial use requesters, charges recovering full direct costs for search, review and duplication of records will be assessed.

(ii) For educational and non-commercial scientific institution requesters, no charge will be assessed for search or review of records. Charges recovering full direct costs for duplication of records will be assessed, excluding charges for the first 100 pages. To be eligible for inclusion in this category, requesters must show that the request is being made under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of scholarly (if the request is from an educational institution) or scientific (if the request is from a non-commercial scientific institution) research.

(iii) For representative of the news media requesters, no charge will be assessed for search or review of records. Charges recovering full direct costs for duplication of records will be assessed, excluding charges for the first 100 pages.

(iv) For all other requesters, no charge will be assessed for review of records. Charges recovering full direct costs for search and duplication of records will be assessed excluding charges for the first 100 pages of duplication and the first two hours of search time. Requests from individuals for records about themselves, filed in a Commission system of records,

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will be treated under the fee provisions of the Privacy Act of 1984 which permit fees only for duplication.

(v) No fee may be charged for search, review or duplication if the costs of routine collection and processing of the fee are likely to exceed the amount of the fee.

(vi) Documents shall be furnished without any charge or at a reduced charge if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester. In determining whether a waiver or reduction of charges is appropriate the following factors will be taken into consideration.

(A) The subject of the request: Whether the subject of the requested records concerns the operations or activities of the government;

(B) The informative value of the information to be disclosed: Whether the disclosure is likely to contribute to an understanding of government operations or activities;

(C) The contribution to an understanding of the subject by the general public likely to result from disclosure: Whether disclosure of the requested information will contribute to public understanding;

(D) The significance of the contribution to public understanding: Whether the disclosure is likely to contribute significantly to public understanding of government operations or activities;

(E) The existence and magnitude of a commercial interest: Whether the requester has a commercial interest that would be furthered by the requested disclosure; and, if so

(F) The primary interest in disclosure: Whether the magnitude of the identified commercial interest of the requester is sufficiently large, in comparison with the public interest in disclosure, that disclosure is primarily in the commercial interest of the requester.

(vii) Whenever it is anticipated that fees chargeable under this section will exceed \$25.00 and the requester has not indicated in advance a willingness to pay fees as high as anticipated, the requester will be notified of the amount of the anticipated fee. In such cases the requester will be given an opportunity to confer with Commission personnel with the object of reformulating the request to meet the needs of the requester at a lower cost.

(viii) Interest may be charged record requesters who fail to pay fees assessed. Assessment of interest may begin on the amount billed starting on the 31st day following the day on which the billing was sent. Interest will be at the rate prescribed in section 3717 of Title 31, United States Code and will accrue from the date of the billing. Receipt of payment by the agency will stay the accrual of interest.

(ix) Whenever it reasonably appears that a requester of records or a group of requesters is attempting to break a request down into a series

of requests for the purpose of evading the assessment of fees, such requests will be aggregated and fees assessed accordingly. Multiple requests on unrelated subjects will not be aggregated.

(x) The agency may require a requester to make advance payment only when:

(A) a requester has previously failed to pay a fee charged in a timely fashion (i.e., within 30 days of the date of the billing), in which case the requester will be required to pay the full amount owed plus any applicable interest as provided above, and to make an advance payment of the full amount of the estimated fee before the agency begins to process a new request or a pending request from that requester; or

(B) the agency estimates or determines that allowable charges that a requester may be required to pay are likely to exceed \$250, in which case, the agency will notify the requester of the likely cost and obtain satisfactory assurance of full payment where the requester has a history of prompt payment of FOIA fees, or will require an advance payment of an amount up to the full estimated charges in the case of requesters with no history of payment.

(xi) Unless applicable fees are paid, the agency may use the authorities of the Debt Collection Act (Pub. L. 97-365), including disclosure to consumer reporting agencies and use of collection agencies where appropriate to encourage payment.

(xii) Whenever action is taken under paragraphs (b)(2)(viii) and (b)(2)(ix) of this section, the administrative time limits prescribed in subsection (a)(6) of 5 U.S.C. 552 (i.e., 10 working days from receipt of initial requests and 20 working days from receipt of appeals from initial denial, plus permissible extensions of these time limits) will begin only after the Commission has received fee payments described above.

(c) *Charges for search, review, duplication and certification.*

(1) Records search will be performed by Commission personnel at the following rates:

(i) Search will be performed by clerical/administrative personnel at a rate of \$11.00 per hour and by professional/executive personnel at a rate of \$23.00 per hour.

(ii) Minimum charge for record search is \$11.00.

(2) Charges for review of records to determine whether they are exempt from disclosure under §503.35 shall be assessed to recover full direct costs at the rate of \$38.00 per hour. Charges for review will be assessed only for initial review to determine the applicability of a specific exemption to a particular record. No charge will be assessed for review at the administrative appeal level.

(3) Charges for duplication of records and documents will be assessed as follows, limited to size 8½" x 14" or smaller:

(i) If performed by requesting party, at the rate of five cents per page (one side).

IMPLEMENTATION OF FREEDOM OF INFORMATION REFORM 775
ACT

(ii) By Commission personnel, at the rate of five cents per page (one side) plus \$11.00 per hour.

(iii) Minimum charge for copying is \$ 3.50.

(4) The certification and validation (with Federal Maritime Commission seal) of documents filed with or issued by the Commission will be available at \$5.00 for each certification.

* * * * *

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1472

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF
SEA-LAND SERVICE, INC. FOR THE BENEFIT OF B.D.P.
INTERNATIONAL, INC. AS AGENT FOR JAMES RIVER PAPER
COMPANY

ORDER OF PARTIAL ADOPTION

April 27, 1987

The Commission determined to review the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officer") issued in the above-docketed proceeding. The Presiding Officer properly granted permission pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e) ("the Act"), to Sea-Land Service, Inc. ("Sea-Land") to refund a portion of the freight charges collected from B.D.P. International, Inc., as agent for James River Paper Company ("James River") on a shipment of Cotton Linter from New Orleans, Louisiana, to Bombay, India.

The only matter under review is the Presiding Officer's determination of the "critical period" during which the rate on which the waiver is based is made effective at a date earlier than the date of filing with the Commission.¹ The "critical period" in the I.D. runs from March 6, 1986, the date of the bill of lading. However, in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corp.*, 19 S.R.R. 1407 (1980), as qualified by *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421 (1986), the Commission held that the proper standard for establishing the effective date of the corrected tariff is the date the mistake in filing occurred, that is, either the date the tariff omitting the intended rate becomes effective, or, the date the intended rate, absent the mistake, would have become effective, but in no event earlier than 180 days before the filing of the application.

Sea-Land and James River had agreed on January 31, 1986 to a rate of \$3450 per 40-foot hi-cube container for filter paper. Due to an error, the rate filed on February 6, 1986 applied to standard 40-foot containers only. The mistake was corrected by a tariff filed March 18, 1986. Following the rulings in *Yamashita* and *Embassy of Tunisia*, the earliest date the

¹ See section 8(e)(3) of the Act, 46 U.S.C. app. § 1707(e)(3).

APPLICATION OF SEA-LAND FOR THE BENEFIT OF JAMES 777
RIVER PAPER COMPANY

March 18 tariff may be made effective is February 27, 1986, that is, 180 days from the date of the filing of the application.

THEREFORE, IT IS ORDERED, That Sea-Land Service, Inc. promptly publish in its tariff the following notice:

Notice is given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1472, that effective February 27, 1986, and continuing through March 17, 1986, inclusive, the rate on Cotton Linter Pulp (including Filter Paper—100 pct. Cotton Linters) from New Orleans, La. to Bombay, India, per 40 ft. Std. and Hi-Cube container is \$3450.00, not subject to Terminal Handling Charge U.S.A. Ports (Rule 45) and Container Service Charge (India) (Rule 41). This Notice is effective for purposes of refund or waiver of freight charges on any shipment of the commodity described which may have been shipped during the specified period of time.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1472

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF
SEA-LAND SERVICE, INC. FOR THE BENEFIT OF B.D.P.
INTERNATIONAL, INC. AS AGENT FOR JAMES RIVER PAPER
COMPANY

Application for permission to waive 2,326.64 of the applicable freight charges, granted.

INITIAL DECISION¹ OF CHARLES E. MORGAN, ADMINISTRATIVE
LAW JUDGE

Partially Adopted April 27, 1987

By application timely mailed on August 26, 1986, the applicant, Sea-Land Service, Inc., for the benefit of B.D.P. International, Inc., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the 1984 Shipping Act (the Act), to waive \$2,326.64 of the applicable freight charges on a shipment, in one Hi-Cube 40-foot container, of Cotton Linter Pulp (Including Filter Paper—100 pct. Cotton Linters), weighing 36,979 pounds, from New Orleans, Louisiana, to Bombay, India, sailing date March 2, 1986, and bill of lading date March 6, 1986.

The applicable rate on filter paper base, from U.S. Atlantic and Gulf Coast ports to Bombay, found in Sea-Land Service, Inc. Tariff No. 308, FMC No. 190 was \$292 (W), minimum 19 tons per 40-foot container. Thus, basic applicable freight charges were \$5,548. These charges were subject to certain additional charges, of \$7.50 (W) per ton on 19 tons for terminal handling (U.S.), of \$5 (W) per KT on 17.277 kilo tons for a container service charge in India, and of \$1.30 per ton on 18.99 tons for a wharfage charge at New Orleans. These miscellaneous charges, respectively, amounted to \$142.50, \$86.14, and \$24.69, making total applicable charges of \$5,801.33. The above \$24.69 wharfage charges is not in issue herein.

The sought charges are based on the 40-foot Hi-Cube container charge of \$3,450, plus the above wharfage charge, and with the basic rate of \$3,450 not subject to the U.S. terminal handling charge, and not subject to the India container service charge. Thus, total sought charges are \$3,474.69. The difference between this figure and the total applicable charges of \$5,801.33 is \$2,326.64 the amount sought to be waived by this application.

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).

As a result of negotiations between Sea-Land's Middle East Division Pricing Manager and the shipper, an agreement was made on January 31, 1986 to publish the sought \$3,450 Hi-Cube container rate.

An inadvertent error was made during preparation of the tariff, which resulted in non-application of the agreed rate to Hi-Cube 40-foot containers (the tariff item listed only standard 40-foot containers at the \$3,450 rate). The error was discovered and the tariff was corrected effective March 18, 1986, as per 1st revised page 29-A-2 of Sea-Land's Tariff No. 308, FMC No. 190.

The critical period herein is from March 6, 1986, bill of lading date, through March 17, 1986, the day before the effective date of the corrected tariff.

Applicant states that there were no other shipments of the same or similar commodity moved via applicant during the period in issue.

Applicant also states that Sea-Land will make any necessary adjustments in the freight forwarder compensation upon a favorable decision by the Commission.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Sea-Land in failing to publish the agreed reduced rate so as to apply on Hi-Cube 40-foot containers, with the result that higher charges applied based on a per ton (W) rate and other charges; that the agreed rate was made effective after the shipment herein moved, and prior to this application; that the application was mailed timely; and that the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Sea-Land Service, Inc., is authorized to waive \$2,326.64 of the applicable freight charges on the shipment herein. An appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariff of the applicant.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1475

APPLICATION OF UNITED STATES LINES, INC. FOR THE
BENEFIT OF CONFIBRES A.B.

ORDER OF PARTIAL ADOPTION

April 27, 1987

The Commission determined to review the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officer") issued in the above-docketed proceeding. The Presiding Officer found that the application met all the requirements of section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e) ("the Act"), and properly granted United States Lines, Inc. ("USL") permission to waive collection from Confibres A.B. of a portion of the freight charges assessed on a shipment of waste paper from Chicago, Illinois to Barcelona, Spain.

The only matter under review is the Presiding Officer's determination of the "critical period" during which the rate on which the waiver is based is made effective at a date earlier than the date of filing with the Commission.¹ The "critical period" in the I.D. runs from April 17, 1986, the date of the bill of lading. However, in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corp.*, 19 S.R.R. 1407 (1980), as qualified by *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421 (1986), the Commission held that the proper standard for establishing the effective date of the corrected tariff is the date the mistake in filing occurred, that is, either the date the tariff omitting the intended rate becomes effective, or, the date the intended rate, absent the mistake, would have become effective, but in no event earlier than 180 days before the filing of the application.

In this instance the mistake in filing occurred on April 9, 1986 and the corrected tariff was filed on May 6, 1986. Accordingly, the effective date of the tariff on which the waiver here is based runs from April 9, 1986 through May 5, 1986.

THEREFORE, IT IS ORDERED, That United States Lines, Inc. promptly publish in its tariff the following notice:

Notice is given as required by the decision of the Federal Maritime Commission in Special Docket No. 1475, that effective April 9,

¹ See section 8(e)(3) of the Act, 46 U.S.C. app. 1707(e)(3).

APPLICATION OF UNITED STATES LINES, INC. FOR THE 781
BENEFIT OF CONFIBRES A.B.

1986, and continuing through May 5, 1986 inclusive, the rate on Waste Paper is \$1000 per 40-ft. container, including THC, from Chicago, IL to Barcelona, Spain. This Notice is effective for purposes of waiver or refund of freight charges on any shipment of the commodity described which may have been shipped during the specified period of time.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission; and
FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1475

APPLICATION OF UNITED STATES LINES, INC. FOR THE
BENEFIT OF CONFIBRES A.B.

Application for permission to waive \$606.48 of the applicable freight charges, granted.

INITIAL DECISION¹ OF CHARLES E. MORGAN, ADMINISTRATIVE
LAW JUDGE

Partially Adopted April 27, 1987

By application timely mailed on September 10, 1986, the applicant, United States Lines, Inc., for the benefit of Confibres A.B., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a) and section 8(e) of the 1984 Shipping Act (the Act), to waive \$608.50 of the applicable freight charges on a shipment of waste paper, in two 40-foot containers, weighing 97,036 pounds, from Chicago, Illinois, to Barcelona, Spain, sailing date and bill of lading date April 17, 1986.

The applicable rate on the waste paper was \$1,000 lump sum per 40-foot container from Chicago rail terminal to Barcelona, plus a terminal handling charge of \$14K per ton of 2,240 pounds. The lump sum rate for the two containers, of \$2,000 is not in issue, but the terminal handling charge is in issue. Based on a total of 97,036 pounds (49,822 pounds in one container, plus 47,214 in the other container) the applicable terminal handling charge is \$606.48. (In error applicant's computation of \$608.50 was based on 97,360 pounds.)

The sought total charges are based on the \$1,000 lump sum container rate *inclusive* of the terminal handling charge. Thus the waiver sought by this application is of \$606.48.

On April 9, 1986, United States Lines agreed to file the sought lump sum rate including terminal handling and container service charges per 40-foot container from Chicago rail terminal to Barcelona of \$1,000. The rate of \$1,000 was filed the same day. The cargo was loaded on the vessel and sailed April 17, 1986. Inadvertently the \$1,000 rate as published on April 9, 1986, did not include the terminal handling charges and container service charges. The error was caused by United States Lines' pricing supervisor's failure to verify the agreed rate against the published tariff page.

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 error was corrected effective May 6, 1986, as shown on 17th revised page 117 of United States Lines, Inc. Intermodal Freight Tariff 729, F.M.C. No. 192. The critical period herein is from April 17, 1986, the bill of lading date, through May 5, 1986, the date prior to the effective date of the corrective tariff.

Applicant states that there were no other shipments of the same or similar commodity made by it during the period in issue. The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by applicant in failing to publish timely the agreed lump sum container rate inclusive of terminal handling charges, with the result that the latter charges were not included in the lump sum rate as published; that the intended agreed lump sum rate inclusive of the terminal handling charges was made effective after the shipment herein moved, and prior to the application; that the application was mailed timely; and that the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, United States Lines, Inc., is authorized to waive \$606.48 of the applicable freight charges on the shipment herein. An appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariff of the applicant, covering the period in issue. Should there be no appropriate tariff of applicant, at this date, other appropriate action should be taken by applicant to notify the public.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1478

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF
SEA-LAND SERVICE, INC. FOR THE BENEFIT OF LAND JOY
INTERNATIONAL FORWARDERS, INC.

ORDER OF PARTIAL ADOPTION

April 27, 1987

The Commission determined to review the Initial Decision ("I.D.") of Chief Administrative Law Judge Charles E. Morgan ("Presiding Officers") in the above-docketed proceeding. The Presiding Officer granted, pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e) ("the Acts"), the application of Sea-Land Corporation filed on behalf of Sea-Land Service, Inc. ("Sea-Land") for the Benefit of Land Joy International Forwarders, Inc. ("Land Joy"). The Presiding Officer found that the application met all the requirements of section 8(e) and properly granted Sea-Land permission to waive collection from Land Joy of a portion of the freight charges assessed on a shipment of rags from San Juan, Puerto Rico to Santo Tomas, Guatemala, C.A.

The only matter under review is the Presiding Officer's determination of the "critical period" during which the rate on which the waiver is based is made effective at a date earlier than the date of filing with the Commission.¹ The "critical period" in the I.D. runs from the date of the bill of lading, April 17, 1986. However, in *Application of Yamashita-Shinnihon Line for the Benefit of Nissho-Iwai American Corp.*, 19 S.R.R. 1407 (1980), as qualified by *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421 (1986), the Commission held that the proper standard for establishing the effective date of the corrected tariff is the date the mistake in filing occurred, that is, either the date the tariff omitting the intended rate becomes effective, or, the date the intended rate, absent the mistake, would have become effective, but in no event earlier than 180 days before the filing of the application.

In this instance, the shipment of rags sailed from San Juan on April 9, 1986, while the application was filed on October 6, 1986, that is, 180 days later. Consequently, the rate on which the waiver is based should be effective from April 9, 1986 through April 17, 1986, the date preceding the filing of the corrected tariff.

¹ See section 8(e)(3) of the Act, 46 U.S.C. app. § 1707(e)(3).

APPLICATION OF SEA-LAND FOR THE BENEFIT OF LAND JOY 785
INTERNATIONAL FORWARDERS, INC.

THEREFORE, IT IS ORDERED, That Sea-Land Service, Inc. promptly publish in its tariff the following notice:

Notice is given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1478, that effective April 9, 1986, inclusive, and continuing through April 17, 1986, the rate on Rags, N.O.S. from San Juan, Puerto Rico to Santo Tomas, Guatemala, is \$107 per kilo ton, minimum 14 tons. This Notice is effective for purposes of refund and waiver of freight charges on any shipment of the commodity described which may have been shipped during the specified period of time.

IT IS FURTHER ORDERED, That the Initial Decision issued in this proceeding is otherwise adopted by the Commission; and
FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1478

APPLICATION OF SEA-LAND CORPORATION ON BEHALF OF
SEA-LAND SERVICE, INC. FOR THE BENEFIT OF LAND JOY
INTERNATIONAL FORWARDERS, INC.

Application for permission to waive \$8,910.59 of the applicable freight charges, granted.

INITIAL DECISION¹ OF CHARLES E. MORGAN, ADMINISTRATIVE
LAW JUDGE

Partially Adopted April 27, 1987

By application timely mailed on October 6, 1986, the applicant, Sea-Land Service, Inc., for the benefit of Land Joy International Forwarders, Inc., seeks permission, pursuant to Rule 92(a) of the Commission's Rules of Practice and Procedure, 46 CFR 502.92(a), and section 8(e) of the 1984 Shipping Act (the Act), to waive \$8,910.59 of the applicable freight charges on a shipment of rags, N.O.S., in one 40-foot container, measuring 52.39 cubic meters, weighing 14.22 kilo tons, from San Juan, Puerto Rico, to Santo Tomas, Guatemala, Central America, sailing date April 9, 1986, and bill of lading date April 17, 1986.

The applicable rate on cargo, N.O.S., was \$189 (M) per ton of one cubic meter, and the applicable ocean freight on 52.39 tons was \$9,901.71. Other charges also were applicable. There was a container lift charge in Guatemala of \$1.65 (W) per ton of 1,000 kilograms, on 14.22 kilo tons, of \$23.46. This charge is not in issue herein. There was a maritime development surcharge in Guatemala of 6 percent on the ocean rate, or \$594.10. There was a documentation charge of \$15 per bill of lading, which is not in issue herein. There was also a wharfage (arrimo) charge in Puerto Rico of \$0.85 (M) on 52.39 tons, of \$44.53.

The sought ocean freight rate is \$107 (W) per kilo ton, on 14.22 tons, making ocean charges of \$1,521.54. The maritime development surcharge of 6 percent, as sought, is \$91.29. The sought wharfage charge of \$1.19 per kilo ton on 14.22 tons is \$16.92.

The difference between total applicable charges of \$10,578.80 and total sought charges of \$1,668.21 is \$8,910.59, the amount sought to be waived by this application.

The total amount of freight charges actually collected was \$1,643.13. Thus, with approval of this application, remaining to be collected will be \$25.08.

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).

APPLICATION OF SEA-LAND FOR THE BENEFIT OF LAND JOY 787
INTERNATIONAL FORWARDERS, INC.

Sea-Land Service, Inc., publishes its own tariff, Freight Tariff No. 302, FMC No. 183, from San Juan to ports in Central America.

As a result of negotiations with the shipper, Sea-Land agreed to publish a rate of \$107 per kilo ton, minimum 14 tons, for Rags, N.O.S. from San Juan to Santo Tomas. But, Sea-Land's Sales Manager failed to confirm this rate's acceptance, by the shipper, to Sea-Land's Pricing Manager for its timely publication. The Sales Manager's error was discovered after the cargo had moved. Effective April 18, 1986, the tariff was corrected to show the agreed \$107 rate, on 8th revised page 89-A of Tariff No. 302.

Thus, the critical period herein is from April 17, 1986, bill of lading date, through April 17, 1986, the date prior to the effective date of the corrective tariff.

Applicant states that there were no other shipments of the same or similar commodity made by it during the period in issue.

The statutory requirements have been met. It is concluded and found that there was an error of administrative or clerical nature made by Sea-Land Service, Inc., in failing to publish in its tariff timely the intended agreed rate, with the result that a higher cargo, N.O.S. rate applied; that the intended agreed rate was made effective after the shipment herein moved, and prior to this application; that the application was mailed timely; and that the authorization of a waiver will not result in discrimination among shippers, ports, or carriers.

The applicant, Sea-Land Service, Inc., is authorized to waive \$8,910.59 of the applicable freight charges on the shipment herein. An appropriate notice of this matter and of the details of the waiver shall be published in the pertinent tariff of Sea-Land.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-14
UNION CARBIDE CORPORATION

v.

WATERMAN STEAMSHIP CORPORATION

NOTICE

May 5, 1987

Notice is given that no appeal has been taken to the March 26, 1987, 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) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-14

UNION CARBIDE CORPORATION

v.

WATERMAN STEAMSHIP CORPORATION

Applicable rates on dry cell battery parts found to be those in item 445 of the tariff under the sub-heading "And Parts, N.O.S.," found under the heading "Batteries, Viz." Complaint dismissed.

Paul S. Aufrichtig and Leonard D. Kirsch for the complainant, Union Carbide Corporation.
George H. Hearn for the respondent, Waterman Steamship Corporation.

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

Finalized May 5, 1987

By complaint filed April 8, and served April 16, 1986, the complainant, Union Carbide Corporation, Battery Division, alleges that the rates charged by the respondent, Waterman Steamship Corporation, on five shipments of dry cell battery parts, from the ports of Newport News, VA. (one shipment), and from New York, New York (four shipments), to Port Sudan, Sudan, bill of lading dates, respectively, December 7, 1983 (two shipments), February 21, 1984, March 23, 1984, and April 9, 1984, were unlawful, in violation of the 1984 Shipping Act (the Act).

The complainant seeks reparation in the amount of \$20,923.06 for the alleged unlawful charges.

The above five shipments occurred during the period when Waterman Steamship Corporation operated under the automatic stay provisions of the Bankruptcy Act. Waterman emerged from Chapter XI on June 17, 1986.

The main issue herein is a matter of tariff interpretation, that is, what rate or rates, applied on these shipments of dry cell battery parts.

Union Carbide manufactures dry cell batteries at its plant in Khartoum, Sudan. A wide variety of products goes into the fabrication of dry cell batteries, and Union Carbide is the sole American producer of dry cell batteries in Khartoum. From at least as early as May 1, 1981, and since then, Waterman's tariff No. 18-D, F.M.C. No. 161 has provided rates on batteries, with the same description, as follows, in its item 445:

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).

	Rate basis
Batteries, Viz: Storage, without Acid And Cells, Elec- trical Dry (NOT Storage Type)	W/M
And Parts, N.O.S.	W W/M

The parties' dispute is between the second and third listed descriptions above under the "Batteries, Viz." heading. The respective tariff rates for the second and third listings above effective on December 7, 1983, were \$288.25 W, and \$268.25 W/M (per ton of 2,240 pounds or 40 cubic feet, whichever produces the greater revenue). The rates for the second and third listings above effective for the 1984 shipments, respectively, were \$302.75 W, and \$281.75 W/M.

The above second listing with its rates on *the W (weight) basis produces the lower of the two possible charges* for the complainant's shipments herein, and this is the rate basis sought by the complainant. The respondent supports the third listing above, with its W/M rates as the applicable basis of rates.

The complainant relies on Waterman's Rules and Regulations found in Section I of its tariff, which in part provide:

43. PARTS OF ARTICLES

Whenever rates are provided for on articles named in this Tariff, the same rate will be applicable on named parts of such articles when so described on ocean Bills of Lading, *except where specific rates are provided herein for such parts.* (Emphasis supplied.)

The complainant contends, by using Rule 43 above, that it is entitled to the same rate basis for dry cell battery parts, as applied on dry cell batteries, that is, on "And Cells, Electrical Dry (NOT Storage Type).

The respondent disputes the application of Rule 43 in the circumstances herein, contending that the rate on "And Parts, N.O.S." above specifically includes three types of battery parts, namely any parts, of storage batteries without acid, any parts of "And Cells, Electrical Dry (NOT Storage Type)," and any parts of any other batteries.

Tariffs must be interpreted reasonably, and the intention of the maker does not necessarily govern, in the case of ambiguous tariffs. The pertinent tariff herein is not ambiguous.

In the present situation we have three categories listed under the heading of Batteries. The second and third categories are preceded by the word, "And."

Reasonably, under the circumstances of the trade herein to Sudan, it is likely that a limited number of battery types moved from the United

States to Sudan, and that the volume of such movement justified only a limited listing of rates on specific types of batteries.

Specific rates were published in Waterman's tariff herein on two types of batteries, and *there was a third specific rate on battery parts, N.O.S.*

Rule 43 cannot apply, where specific rates are provided herein (in the tariff) for such parts. If, as is not the situation here, the "And Parts, N.O.S." description were not a part of item 445, then the conclusion herein might favor the complainant. But, to repeat, since there was a specific rate on battery parts in item 445, there could be no recourse to the application of Rule 43 of the tariff.

It is concluded and found that the applicable rates on complainant's shipments herein were those on the W/M basis in item 445 of the tariff under the sub-heading "And Parts, N.O.S.," found under the heading "Batteries, Viz."

The complaint is dismissed.

(S) CHARLES E. MORGAN
Administrative Law Judge

FEDERAL MARITIME COMMISSION

DOCKET NO. 84-31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS
ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

ORDER PARTIALLY ADOPTING INITIAL DECISION

May 6, 1987

The Federal Maritime Commission ("Commission" or "FMC") instituted this proceeding by an Order of Investigation and Hearing issued September 10, 1984 to determine whether respondents, Arctic Gulf Marine, Inc. ("AGM"), Peninsula Shippers Association, Inc. ("PSA") and Southbound Shippers, Inc. ("SSI"), have violated the Intercoastal Shipping Act, 1933 ("ISA") and the Shipping Act, 1916 ("1916 Act"). Specifically, the Commission directed that the proceeding address: (1) whether AGM violated section 2 of the ISA, 46 U.S.C. app. § 844, by charging rates and absorbing drayage charges not reflected in its tariff filed with the Commission; (2) whether PSA and SSI violated section 2 of the ISA by operating as common carriers by water in domestic offshore commerce without a tariff on file with the Commission; (3) whether AGM, PSA and SSI violated section 15 of the 1916 Act, 46 U.S.C. app. § 814, by entering into and carrying out unfiled and unapproved preferential cooperative working agreements; and, (4) whether civil penalties should be assessed.

The proceeding was initially assigned to Administrative Law Judge Seymour Glanzer who presided over the evidentiary hearings. Neither PSA nor SSI called any witnesses or presented any direct case. Subsequently, AGM offered to settle the case and pay a civil penalty. An Initial Decision In Part was issued on August 5, 1986, approving the proposed settlement and levying a \$40,000 civil penalty against AGM. The Initial Decision In Part became administratively final pursuant to Rule 227(a)(3) of the Commission's Rules of Practice and Procedure, 46 C.F.R. § 502.227(a)(3).

Subsequently, the proceeding was reassigned to Administrative Law Judge Norman D. Kline ("Presiding Officer") who has issued an Initial Decision ("I.D.") finding that PSA and SSI had violated section 2 of the ISA and section 15 of the 1916 Act and assessing civil penalties of \$300,000 against PSA and \$50,000 against SSI. The Commission's Bureau of Hearing Counsel ("Hearing Counsel") has filed Exceptions to the I.D. urging the assessment of maximum penalties.

BACKGROUND

The critical facts as found in the I.D. can be very briefly summarized as follows.

AGM, PSA and SSI operated under an arrangement from 1982 to 1985 whereby AGM operated a barge service between Seattle, Washington and ports in Alaska and granted special preferential space accommodations to PSA and SSI who, in turn, solicited cargo as non-vessel-operating common carriers ("NVOCC's").

AGM entered into charter arrangements with PSA on a flat container rate basis with a guaranteed minimum volume. PSA, although incorporated as a non-profit "shippers' association," actively solicited cargo from the general public, accepted responsibility for the cargo and charged rates for the transportation that provided a profit. SSI also booked cargo with AGM on the account of PSA that was publicly solicited, and for which SSI accepted responsibility and rated on a profit-making basis.

PSA offered three defenses in the proceeding: (1) that it was a shippers' association and need not file a tariff; (2) that it was exempted from regulation as an Interstate Commerce Commission freight forwarder; and (3) that it did not engage in port-to-port operations. The Presiding Officer rejected these defenses. He found that PSA's status as a shippers' association was a sham, that its alleged status as a shippers' association did not exempt it from FMC regulation as an NVOCC, and that its operations were a port-to-port service with local pick-up and delivery subject to FMC jurisdiction.

Finally, the Presiding Officer noted that the maximum penalties would be approximately \$1.3 million for PSA and \$210,000 for SSI. Under the criteria for assessing the amount of civil penalties set forth in the Commission's Rules at 46 C.F.R. 505.3(b), the Presiding Officer determined that the violations were serious, intentional and long-standing. He further found a lack of cooperation and a pattern of impeding the Commission's investigation as well as a general lack of mitigating circumstances. Although it was noted that the respondents were no longer in business, the Presiding Officer concluded that the deterrent effect of substantial penalties and alternative avenues of collection were sufficient considerations to preclude mootness of the civil penalty issue. As a result, he recommended penalties of \$300,000 against PSA and \$50,000 against SSI payable in equal monthly installments over two years.

Hearing Counsel filed Exceptions to the amount of the civil penalties assessed by the Presiding Officer. It is argued that the amounts of the penalties are insufficient to adequately promote the regulatory objectives of the Commission and will not provide sufficient deterrence in relation to the potential gain from the unlawful conduct found in the I.D. Based upon the findings of the Presiding Officer of serious, willful and long-standing violations and a general absence of mitigating factors, Hearing

Counsel urges the Commission to impose the statutory maximum penalties against PSA and SSI.

DISCUSSION

No party has contested the Presiding Officer's findings of fact or excepted to the findings of violations of the 1916 Act and the ISA. The Commission finds those portions of the I.D. to be proper and well founded. Accordingly, they are adopted. Therefore, the only issue now before the Commission is whether the amount of the civil penalties assessed by the Presiding Officer is appropriate under the circumstances.

Hearing Counsel's objection is essentially with the Presiding Officer's determination of what constitutes a "severe" penalty under the facts of this case. Hearing Counsel urged below, and the Presiding Officer agreed in the I.D., that "severe penalties" are warranted, regardless of the fact that PSA and SSI are no longer viable entities. Although Hearing Counsel did not specifically urge the Presiding Officer to impose maximum civil penalties, it is now argued that, in essence, "severe penalties" means "maximum penalties" under the facts presented here. Hearing Counsel is of the opinion that anything less than maximum penalties would not have a sufficient deterrent effect.

Because this issue was not expressly raised below, the Presiding Officer did not address the question of why the maximum potential penalties should not be assessed. However, the only countervailing factor that would arguably warrant less than maximum penalties is that the respondents may no longer be viable entities. In this context, it is not inappropriate to consider the respondents' ability to pay as well as the costs and risks of collection of the amount of penalties assessed. See Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum.L.Rev. 1435, 1469-72 (1979). However, in light of the facts of this case, the Commission will not permit the possible abandonment and subsequent dissolution of the respondent corporate entities to be considered a mitigating circumstance or otherwise be used as a shield for the egregious violations of law documented in the record of this proceeding. See *United States v. Atlantica, S.p.A.*, 478 F.Supp. 833, 836 (S.D.N.Y. 1979). Accordingly, the Commission agrees with Hearing Counsel that maximum civil penalties must be assessed in this case. Based upon the Presiding Officer's findings, PSA will be assessed \$1,308,000 and SSI will be assessed \$210,000. See I.D. at 63.

While there may exist a low probability of successfully collecting maximum penalties, alternative collection avenues might be available. See I.D. at 69, n. 25. Because the Commission views this case as evincing a mode of business conduct that poses a serious threat to the efficacy of the programs and procedures that have been implemented to enforce the law by means of civil penalties, maximum effort will be expended to collect the penalties assessed here. Moreover, future cases of this type will be

carefully scrutinized for appropriate factual and legal bases to impose individual liability for civil penalties on corporate officials engaged in illegal conduct. The Commission will not permit the abandonment of corporate structures to be used as a tactic to erode the deterrent effects of civil penalties.

THEREFORE, IT IS ORDERED, That, except as modified in this Order, the Initial Decision issued in this proceeding is adopted by the Commission and made a part hereof; and

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

IT IS FURTHER ORDERED, That civil penalties in the amount of \$1,308,000 are assessed against Peninsula Shippers Association, Inc.; and

IT IS FURTHER ORDERED, That civil penalties in the amount of \$210,000 are assessed against Southbound Shippers, Inc.; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.*

(S) JOSEPH C. POLKING
Secretary

*Commissioner Moakley would adopt the Initial Decision in its entirety.

FEDERAL MARITIME COMMISSION

DOCKET NO. 84-31

ARCTIC GULF MARINE, INC., PENINSULA SHIPPERS
ASSOCIATION, INC., SOUTHBOUND SHIPPERS, INC.

Respondents Peninsula Shippers Association, Inc. (PSA) and Southbound Shippers, Inc. (SSI) found to have operated as non-vessel operating common carriers by water (NVOCCs) between Seattle, Washington, and Alaska from 1982 to 1985 for PSA and during 1982 for SSI. Both respondents also found to have entered into and carried out cooperative working arrangements with another carrier, giving them special privileges and advantages during 1982. Neither PSA nor SSI filed their tariffs or the agreements with the other carrier, thereby violating section 2 of the Intercoastal Shipping Act, 1933, and section 15 of the Shipping Act, 1916, respectively.

PSA, SSI, and the third respondent, a carrier which has settled with the Commission, were incorporated and operated by a small group of men who coordinated the operations of PSA and SSI and other companies. Both PSA and SSI actively advertised and solicited cargo from the public and made use of the third carrier's vessels to perform the service under the terms of the agreements with that carrier. PSA's defenses, namely, that it was a shippers' association, that it offered more than port-to-port services which lay outside the F.M.C.'s jurisdiction, and that the F.M.C. ought not to follow its previous decision holding such associations to be subject to Commission jurisdiction, have no merit either in fact or in law.

Although warned about the possible violations of law in 1982, the persons behind PSA and SSI continued to operate without cooperating with the Commission's investigators or seeking advice or exemption from the Commission under proper legal procedures. Despite a record of significant culpability and non-cooperation, respondents put on no direct case and presented little or nothing in mitigation. Under such circumstances, it is imperative that penalties be assessed which will deter others from emulating these respondents even if the two companies have dissolved. Penalties amounting to \$300,000 assessed against PSA and \$50,000 against SSI will send the appropriate message and serve as an effective deterrent.

Joseph T. Mijich, John P. World, and John M. Stern, Jr., for respondent Peninsula Shippers Association, Inc.

Aaron W. Reese and Charna Jaye Swedarsky for Hearing Counsel.

INITIAL DECISION¹ OF NORMAN D. KLINE, ADMINISTRATIVE LAW JUDGE

Partially Adopted May 6, 1987

This proceeding began with the issuance of the Commission's Order of Investigation and Hearing on September 10, 1984. The purpose of the proceeding was to determine whether respondent Arctic Gulf Marine, Inc.

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).

(AGM), a barge-operating common carrier by water which had operated in the Seattle, Washington/Alaska trade under an F.M.C. tariff until December 3, 1982, had violated its tariff in certain ways and had carried out unfiled arrangements and agreements with two other entities, Peninsula Shippers Association, Inc. (PSA), and Southbound Shippers, Inc. (SSI). If so, such conduct would violate section 2 of the Intercoastal Shipping Act, 1933, 46 U.S.C. app. sec. 844, and section 15 of the Shipping Act, 1916, 46 U.S.C. app. sec. 814.

In addition to the above matters involving AGM, the proceeding was to determine whether the other respondents, PSA and SSI, had been operating as common carriers by water in the Seattle, Washington/Alaska trade without filing tariffs in violation of section 2 of the 1933 Act and whether PSA and SSI had entered into and carried out unfiled arrangements and agreements, the former with AGM and the latter with PSA and AGM, in violation of section 15 of the 1916 Act. The Commission further explained that it had information indicating that the three named respondents had been operating in the manner described during 1982.

Finally, the Commission wished to determine whether, if the three respondents had violated sections 2 and 15, cited above, penalties should be assessed and, if so, in what amount.

After extensive prehearing discovery was conducted under schedules established by Judge Seymour Glanzer, to whom the case was assigned, the case proceeded to evidentiary hearings which consumed 18 days between June 10 and August 16 in Seattle, Washington, and Anchorage, Alaska. Hearing Counsel and AGM presented witnesses and documentary evidence at the hearing. Neither PSA nor SSI called any witnesses nor presented any direct case. Indeed, SSI never appeared throughout the entire proceeding, and Hearing Counsel reported on January 24, 1985, that SSI had been involuntarily dissolved as a corporation by the State of Washington on November 16, 1984.

After the filing of Hearing Counsel's opening brief on December 3, 1985, respondent AGM requested permission to file a petition for settlement instead of an answering brief. Permission was granted by Judge Glanzer and, on January 31, 1986, AGM filed its "Offer of Compromise and Settlement" together with another document entitled "Proposed Compromise Agreement." Following further discussions between Hearing Counsel and AGM, AGM filed a new "Offer of Settlement" on March 28, 1986, to replace the earlier one filed in January. On April 11, 1986, AGM filed a supplemental document entitled "Proposed Settlement of Civil Penalty." Simultaneously, Hearing Counsel filed their reply to AGM's offer, recommending its approval. In an Initial Decision served August 5, 1986, confined to the question of approvability of AGM's proposed settlement, Judge Glanzer approved the settlement. On September 12, 1986, the Commission made that decision administratively final and, pursuant to the decision and settlement, ordered AGM to pay the sum of \$40,000, together

with accumulated interest since March 25, 1986, to the Commission by September 19, 1986. (28 F.M.C. 542.)

Effective September 4, 1986, Judge Glanzer was named to the position of Director, Bureau of Hearing Counsel, thereby becoming unavailable for the issuing of an Initial Decision dealing with the remaining issues in the case concerning respondents PSA and SSI. (In addition, Judge Glanzer, now Director of the Bureau, notified all the parties to this proceeding that he was recusing himself from participating in the case. See letter to Judge Kline, dated September 10, 1986.) When Judge Glanzer became unavailable, the case was reassigned to the undersigned judge on September 4, 1986. The parties were notified of the change of judges on the same day. (See Notice of Reassignment, September 4, 1986.) On September 8, 1986, I notified the parties that unless there was a legal impediment preventing me from deciding the remaining issues, I would, as provided by the Administrative Procedure Act (5 U.S.C. sec. 554(d)), issue such a decision. I instructed the parties to advise me if they had any reason to believe that I could not by law issue such a decision on the record developed before Judge Glanzer and to advise me of the current status of respondent PSA. The parties were to advise me by September 26, 1986.

In response to my instructions and queries, both Hearing Counsel and respondent PSA advised me that on February 14, 1986, PSA was involuntarily dissolved as a corporation pursuant to Alaskan law. Hearing Counsel responded, furthermore, that they had no objection to my issuing a decision. (See Hearing Counsel's letters of September 23 and 26, 1986, and letter dated September 22, 1986, from PSA's counsel, John P. World, with attachment.)²

The Commission's Order of Investigation and Hearing had established due dates for the Initial Decision and for the Commission's decision as January 10 and May 10, 1986, respectively. However, the offer of settlement submitted by AGM and other factors necessitated additional time for issuance of these decisions. At the request of Judge Glanzer, on December 18, 1985, the Commission extended the time for issuance of the decisions until July 3 and December 3, respectively. Time for consideration of the offer of settlement and for issuance of appropriate decisions on the offer as well as the remaining issues required still further time. At the request of Judge Glanzer, by order served July 16, 1986, the Commission further extended the dates to October 3, 1986, and March 3, 1987. Upon my

² If a party fails to request a new hearing when a case is reassigned to a new judge who has not presided at the hearing and the party attempts to request such a hearing after the decision is issued, the party has been held to have waived its rights to such a hearing. See *Millar v. F.C.C.*, 707 F.2d 1530, 1538 (D.C. Cir. 1983). As the court noted, furthermore, it is not crucial that the deciding judge observe witnesses when the facts are largely shown by records and documents and demeanor is not the critical factor in resolving factual disputes. 707 F.2d at 1538-1539. This record contains documentary evidence, written testimony, and records, among other things, and I do not find that demeanor of the witnesses is an essential factor in resolving such factual disputes as appear in the case.

request, the Commission extended these dates once more to November 14, 1986, and April 14, 1987.

The Initial Decision and Settlement Concerning AGM

In the settlement which Judge Glanzer approved and which the Commission finalized, respondent AGM, without admitting that it had committed any violations of law, paid \$40,000 as a penalty. As shown in the Initial Decision, AGM had stipulated that certain misratings had occurred and the record showed that AGM had entered into a space-charter agreement and a later voyage-charter agreement with PSA in 1982. Furthermore, there was evidence of a cooperative working arrangement between AGM, PSA, and SSI from March 18, 1982 to December 3, 1982, but no evidence of a filing of any such arrangement with the Commission, although a copy of the space-charter arrangement was given to a Commission employee voluntarily by AGM two months before the charter was to expire. However, by settling, AGM chose not to have a decision on the merits of its defenses. However, because AGM has settled, care must be taken to ensure that the decision on the merits concerning possible violations of law by PSA and SSI is not used against AGM for any purpose. Therefore, even though the record shows "an intricate linkage of interest, personnel, and finances involving AGM, PSA and SSI" (Initial Decision at 547 and even though one of the issues involving PSA and SSI concerns the question whether PSA, SSI, and AGM were parties to unfiled agreements, it has been made clear that the findings as to PSA and SSI in this Initial Decision will not be binding on AGM under the principles of *res judicata* or collateral estoppel. The last ordering sentence in Judge Glanzer's Initial Decision approving AGM's settlement offer is explicit on this point. (See Initial Decision at 551.)

Accordingly, although findings made in this decision unavoidably involve AGM because of the nature of the issues, the purpose of such findings is not to undermine AGM's settlement or to decide any issues on the merits against AGM, which, in return for settlement, has waived its right to litigate its defenses fully. Consequently, the findings and orders to be issued in this decision will bind and affect only PSA and SSI. However, in order to understand the nature of the operations of PSA and SSI, which overlap with those of AGM, some findings concerning AGM must be made. Some of these findings have already been made in Judge Glanzer's Initial Decision and serve as useful background.

FINDINGS OF FACT

Arctic Gulf Marine, Inc. (AGM)

1. Arctic Gulf Marine, Inc. (AGM), which, as discussed, has settled with the Commission, was organized as a corporation in the State of Wash-

ington on or about January 20, 1982. Its charter authorized it to engage in the business of operating barges and other vessels for the transportation of freight. AGM was dissolved on April 17, 1986. Prior to its dissolution, AGM had operated a barge service in the Seattle/Alaska trade as a common carrier by water under a tariff (FMC-F No. 1) which AGM had filed with the Commission effective March 18, 1982, and which AGM had canceled on December 3, 1982. Thereafter, AGM operated as a contract carrier in 1983 and 1984 and ceased operations in November 1984. AGM's address, according to its Articles of Incorporation, was 737 South Stacy St., Seattle, Washington, and its incorporator was Edward J. O'Brien, of the same address. Mr. O'Brien was also its President and registered agent. AGM's Secretary-Treasurer was Evelyn Varon, and its Directors were Francis (Jake) X. Moesh, Lewis M. Dischner, Kenneth Rogstad, and Carl Mathisen. These four were also owners of AGM together with a Mr. William (Jake) Pierce. Ms. Varon resigned as Secretary-Treasurer of AGM in August 1983 and Mr. Rogstad assumed that position. Ms. Varon had not been informed that she had been named as Secretary-Treasurer of AGM until one or two years after AGM's incorporation and had been named only as a matter of convenience to be close to the checkbooks and accounting people.

2. Mr. Moesh, a consultant to PSA as well as one owner of AGM, had promised Mr. O'Brien the job as President of AGM. Mr. O'Brien, however, had no substantive operational tasks for AGM, received no salary from AGM, and signed contracts at the direction of Mr. Pierce. Mr. O'Brien had his own consulting business when he became president of AGM and did work for a company known as Ocean Dock Industries, which was the unloading agent for PSA in Anchorage, Alaska, and was partially owned by Mr. Moesh. Mr. O'Brien resigned as an officer of AGM on November 2, 1984.

Peninsula Shippers Association (PSA)

3. Peninsula Shippers Association (PSA) was incorporated in Alaska on November 22, 1971, as a non-profit corporation authorized to consolidate, transport and deliver privately-owned goods of its members. According to its articles of incorporation, PSA was a nonstock, no-dividend corporation, and no profits were to be declared or paid to its members, each of whom had one vote. The Board of Directors was authorized to elect an executive committee which could exercise all the Board's authority in the management of the corporation except for distribution of proceeds, selection of officers, and filling of vacancies.

4. There was no requirement under PSA's articles of incorporation for regular meetings of the membership or meetings of the Board of Directors, the latter meetings being discretionary. Nor were there provisions for the time and manner of the election of officers. From 1979-1985, the officers of PSA were James Simpson, President; Fred D. Donadel, Vice-President,

and Marion Davis, Secretary-Treasurer. In 1979 and 1980, according to PSA's corporate reports filed with the State of Alaska, the directors were Bud Center, James Avey, and Volney Grace.

Persons and Companies Affiliated with PSA

5. Marion Davis was Secretary-Treasurer of PSA and was responsible for collection of accounts receivable. Mr. Davis was put in charge of PSA's Alaska operations in approximately 1980 and continued in that position until 1985. As head of PSA's Alaska operations, it was Mr. Davis's responsibility to see that freight was delivered on a timely basis, to take calls from and visit members, and to keep the PSA Board of Directors informed of the Alaska operations. Mr. Davis, who had received an annual salary from PSA as general manager, severed his association with PSA because it ceased doing business around the first part of 1985.

6. Francis X. Moesh, the part owner and director of AGM, was a consultant to PSA. As a consultant, it was part of Mr. Moesh's responsibility to arrange for cargo to move via PSA and to solicit customers to move cargo with PSA. Mr. Moesh was also responsible for entertaining, calling on members, and negotiating or dealing with water carriers. Mr. Moesh used, among other offices, the office at AGM's South Stacy Street, Seattle address, and the Commission's District Investigator, Michael F. Carley, in August 1982, contacted Mr. Moesh at that address for a telephonic interview. Mr. Moesh informed Mr. Carley that PSA had no paid employees, only agents, that PSA's agent in Seattle was a company known as Penn Van, Inc., and that PSA's agent in Alaska was a company known as Ocean Dock Industries, which was Mr. Moesh's company.

7. PSA also used the services of a company known as Consulting Traffic Services, Inc., owned by Fred D. Donadel, Vice-President of PSA. This company and Mr. Donadel called on PSA members, solicited members, provided information, sent out applications, and explained PSA's services. PSA paid Mr. Donadel for his services through Consulting Traffic Services, Inc. This company was located at AGM's South Stacy Street address in Seattle and later moved to another address in Kent, Washington, at which address a company known as Anchorage Fairbanks Freight Service (AFFS) was located, for which company AGM's Mr. O'Brien had worked.

8. PSA has had employees working for it in Alaska since 1971 or 1972. From 1982-1985, PSA had approximately 8-10 paid employees in Anchorage. PSA's accounting was done by Mr. Arnie Haugen, who was President and sole shareholder of Transportation Accounting & Traffic Services, Inc. (TATS). TATS's services for PSA included bookkeeping, payroll, and tax service. TATS was originally located at AGM's South Stacy Street address but later moved to the Kent, Washington, address shared by AFFS and PSA. PSA was billed for PSA's rental of office space by TATS. In Anchorage, PSA rented premises from a company known as F & M Investments and shared space with Ocean Dock Industries, its agent in

Alaska. F & M Investments was owned by Francis X. Moesh, the part owner and director of AGM and consultant to PSA, and by Marion Davis, general manager and Secretary-Treasurer of PSA. PSA's Seattle agent Penn Van, Inc., was formed as a partnership in 1971 between Francis X. Moesh and John Whalen, the latter one of PSA's original (1971) corporate officers and directors. In 1973, Penn Van became a corporation under Washington law. As of October 1982, Penn Van's corporate officers were: Richard Willecke, President; Marion Davis, Vice-President; and Fred D. Donadel, Secretary-Treasurer. Its four stockholders were Messrs. Moesh, Donadel, Davis, and Willecke. Penn Van had the lease at AGM's South Stacy Street address in Seattle. Penn Van allowed Mr. Haugen, PSA's accountant, to offer accounting and financial services at South Stacy Street beginning in January 1982 through Penn Van's offices without billing Mr. Haugen. Mr. Haugen's employees in 1982 were initially Penn Van's employees, paid by Penn Van. These employees also performed work for PSA. In 1982, Mr. Haugen's services were performed for, among other companies, PSA, Penn Van, AGM, and Ocean Dock Industries, which was PSA's agent in Alaska and Mr. Moesh's company.

9. All accounting functions for PSA were turned over to Mr. Haugen's service bureau in 1982, and Mr. Haugen remained a salaried employee of PSA. Mr. Haugen personally prepared PSA's tax returns between 1974 and 1982. Between 1982 and 1985, one of Mr. Haugen's staff prepared the returns under his direction. PSA also had employees in Anchorage, Alaska, who performed accounting and financial functions there for PSA. Mr. Haugen received a salary from PSA from December 1974-June 30, 1984, while was operating TATS and a motor carrier which he owned, Anchorage Fairbanks Freight Service, Inc. (AFFS), formed in April 1982 to operate between points in Washington and points in Alaska. TATS, Penn Van, and later AFFS worked with PSA and coordinated their efforts from the same office locations. Mr. Haugen bought the trucking rights for AFFS from a carrier known as United Cartage, owned by Messrs. Moesh, Willecke, Davis, and Donadel. During the period 1982-1985, AFFS performed motor carrier services exclusively for PSA. After July 1, 1984, AFFS took over the accounting functions of TATS, which became inactive, and Mr. Haugen operated his service bureaus under AFFS.

10. Penn Van, Inc., operated as the loading agent for PSA, receiving freight at its loading terminal to which PSA shippers and consignees would route their freight. Penn Van would receive and load the freight into vans going to Alaska by PSA. Ocean Dock Industries was the unloading agent for PSA in Anchorage. Mr. Davis and Mr. Moesh were officers and shareholders of Ocean Dock Industries.

11. Mr. Moesh was authorized, on July 9, 1982, to sign checks for PSA in an account with the Seattle First National Bank. So were Messrs. Donadel, Davis, Haugen, and Nancee Stanley, former Traffic Manager of PSA from 1982-1985, now Traffic Manager of AFFS, and also a former

employee of TATS, Mr. Haugen's company. Ms. Stanley was also authorized to sign checks for AGM, PSA, Penn Van, and AFFS and thought that of all the companies that she worked for, Penn Van, TATS, PSA, and AFFS, were the same employer and company. From 1982, Ms. Stanley worked for the same people, Mr. Moesh, Mr. Donadel, Mr. Willecke, and Mr. Haugen, and performed the same duties even though the company she worked for changed. From 1982 to the present, Ms. Stanley considered Mr. Moesh and Mr. Willecke to be her bosses. As traffic manager of PSA and AFFS, Ms. Stanley thought of Mr. Francis X. Moesh as the overall boss of all the companies she has worked for, with the exception of TATS and AFFS. However, Mr. Moesh gave orders to the staff people performing work for PSA as well as AFFS and Mr. Moesh gave orders to employees in the motor carrier and service bureau operations of AFFS. Mr. Haugen did not control Mr. Moesh's dealing with AFFS. As of August 12, 1985, all management decisions regarding AFFS and its operations were made by Mr. Haugen, Mr. Moesh, and a Mr. Ambrosia.

PSA's Agreements With AGM and SSI

12. As noted previously, PSA was incorporated under Alaska law on November 22, 1971, as a non-profit association authorized to carry, consolidate, transport and deliver the goods of its members. In 1982, PSA entered into two agreements with AGM. On February 25, 1982, PSA entered into a space-chartering agreement with AGM, a company which had only been formed the previous month. The space-charter agreement began on March 15, 1982, for a four-month term. The agreement was part of an arrangement which included oral understandings as well as another written instrument. Under the terms of the agreement, AGM agreed to provide whatever space PSA required for the carriage of goods to or from Valdez and other Alaska ports at a particular per-container rate, \$2,000 per 40-foot equivalent of cargo carried. For its part, PSA agreed to pay for a minimum of 200 units on AGM's first barge voyage, regardless of actual use. It was commonly known at the time the agreement was made that there would be a serious dearth of available vessel space in the trade during the life of the agreement. Therefore, PSA's right under the agreement to use whatever space it required gave it an advantage over other non-vessel operating common carriers or other shippers that AGM held itself out to serve under AGM's tariff.

13. Under the terms of the space-charter agreement, AGM agreed to provide a dock-to-dock service to PSA for the carriage of goods to or from Valdez, Alaska, or such other ports as the parties would agree upon. PSA was responsible for securing insurance to protect against loss or damage to the cargo, and PSA assumed all risk for loss, damage, delay, mis-delivery, failure to deliver, and all handling charges on its behalf and on behalf of the owner, shipper and consignee of the cargo.

14. The space-charter agreement was entered into between Mr. Pierce, AGM's general manager, who discussed the agreement with Mr. Moesh on behalf of PSA. The agreement was signed by Mr. Donadel, PSA's Vice-President. Mr. Pierce had thought that PSA was a shipper's co-op which carried cargo for its members. AGM had been formed partially at least because of the need for new barge service for 1982 to carry construction materials to the North Slope, Alaska, for a company known as H.W. Blackstock Co. Furthermore, through the winter of 1981 and into the early spring of 1982, there was an abundance of cargo moving between the lower 48 states and Alaska, the two major trunk lines were full, and there was a backlog of up to six weeks to move freight from Seattle to Anchorage. Furthermore, the biggest sealift in history was to take place in the summer of 1983 between Seattle and Prudhoe Bay, Alaska, for the oil industry, and every barge from the carriers serving the trade would be utilized.

15. On June 15, 1982, AGM and PSA entered into a voyage-charter agreement for the remainder of the calendar year. The agreement involved southbound cargo from Anchorage or Valdez to Seattle. Among other things, it provided that AGM would operate the vessels but not as a common carrier, and AGM's tariffs would not be applicable. PSA would charter all cargo space on the vessels and would assume all liability and responsibility for the cargo, including loading and unloading. AGM's compensation for the southbound service was based on the amount of cargo that PSA could solicit or induce to be shipped on the barges and was based on charges per platform, container, or vehicle not containerized. The agreement was signed by Mr. O'Brien, AGM's President, and by Mr. Davis, PSA's general manager in Alaska, using the name of Mr. Simpson, PSA's President. One reason for the agreement appears to be that Mr. Davis and Mr. Ray Fendenheim had crushed automobiles to move in the southbound trade from Anchorage to Seattle. AGM and PSA therefore entered into the voyage-charter agreement to move this cargo. However, freight transported on AGM on its southbound voyages for PSA actually belonged to SSI. Furthermore, in 1982, AGM advanced freight and drayage charges to SSI to move cargo southbound on AGM barges to the Puget Sound area at the request of PSA's general manager in Alaska, Mr. Davis. (As of June 1985, SSI had not paid AGM back for all of the freight charges advanced by AGM in 1982.)

The Close Working Relationships Among PSA, SSI, and AGM

16. Other events during 1982 show the close interrelationships among AGM, PSA, and SSI in addition to the formal space and voyage-charter agreements and AGM's advancement of freight charges on behalf of SSI. For example, PSA provided AGM with funds initially in 1982 to start service because the first voyage that AGM was going to make under the space-charter agreement was to carry PSA cargo, and AGM did not

have money available for start-up expenses. The record shows also that PSA's Secretary-Treasurer and general manager in Alaska, Mr. Davis, advanced expense funds on PSA's account for AGM in Anchorage, that PSA paid for airline tickets for AGM's Mr. Pierce and Mr. O'Brien prior to the formation of AGM and advanced money for start-up costs in January 1982 to Mr. Pierce, that PSA made payments to a bank on a loan to AGM, deposited funds for AGM's start-up costs in AGM's account in February 1982, paid Mr. Pierce, AGM's general manager, for expenses in connection with trips, advanced payment for AGM's payroll and equipment, loaned AGM money to pay rent on AGM's freight terminal for March 1982, and allowed AGM to use office space at 737 South Stacy Street, Seattle, rent-free. Sometimes, Mr. Pierce of AGM accompanied Mr. Donadel of PSA on joint solicitations. AGM would also call PSA before a sailing to determine how much cargo PSA was planning to book on a particular AGM sailing. That information determined how much space was available on the AGM vessel for other shippers.

17. Mr. Pierce, AGM's general manager, believed it not unreasonable to conclude that AGM had been started mainly to transport PSA cargo. In the discussions to begin AGM's service, Mr. Moesh, part owner and director of AGM and consultant to PSA, indicated that he was concerned about moving PSA cargo and wanted AGM to move PSA cargo, and, in the initial discussions, it had been decided that AGM should be a contract carrier to cover specific movements of cargo in the spring of 1982 to Valdez, Alaska, for PSA. Mr. Moesh, on behalf of PSA, was involved in the discussions as to the freight charges to be billed PSA for cargo moved in 1982 under the space-charter agreement with AGM. Mr. Davis, PSA's general manager in Alaska, was also involved in the decision to enter into both the space-charter and voyage-charter agreements with AGM.

18. AGM's tariff (FMC-F No. 1) was filed effective March 18, 1982. The first voyage by AGM departed Seattle on or about March 19, 1982, with 100 percent of the cargo carried for PSA under the space-charter agreement. A second voyage departed on or about March 19, 1982, with 80 percent of the cargo carried for PSA under contract with the remaining 20 percent carried as common carriage. PSA paid AGM freight rates as per the space-charter agreement until July 1982. Thereafter, PSA paid under the AGM northbound tariff. AGM offered one sailing a month with two barges during 1982. Eighty to 90 percent of the cargo transported by AGM in 1982 was PSA cargo. Toward the end of 1982, 90-95 percent of AGM's cargo was PSA cargo.

Details as to PSA's Operations

19. During 1982, AGM had eight barge sailings of common-carrier cargo at monthly intervals between March and October and one contract carriage barge on which common-carrier cargo was carried. Through July 12, 1982,

PSA paid AGM under the space-charter agreement. After that date, PSA paid AGM under the AGM FAK rates which had been filed in the AGM tariff with an effective date of July 14, 1982. After that date, virtually the only shipper on these barge voyages was PSA, only one non-PSA shipment being carried on the last barge voyage in October. During 1982, PSA also offered a weekly regular service using the carriers Sea-Land and Tote as well as the above monthly barge service of AGM. In 1983 and 1984, PSA used the following underlying carriers: Central Alaska Marine Lines (CAML), Tote, Seaway Express, and Sea-Land. CAML and Seaway Express had tariffs on file with the F.M.C. CAML had filed its initial tariff with the F.M.C. effective July 25, 1983. The tariff covered Seattle, Washington, to/from the Alaska ports of Anchorage, Valdez, Kenai, and Cordova. PSA paid CAML and Seaway Express the rates published in their F.M.C. tariffs, and, when using CAML, quoted its own rates and prepared the freight bills. A CAML barge docked in Anchorage the week of March 7, 1984, carrying 300-plus trailerloads of PSA cargo. On March 20, 1984, PSA shipments moved south from Anchorage on CAML barges. Actually, PSA advertised northbound and southbound service to and from Alaska as a carrier in newspapers and other publications from 1982-1985 and had advertised service as a carrier of general freight to Alaska since 1966.

20. The Commission's District Investigator, Mr. Carley, having been rebuffed in efforts to obtain detailed information about PSA's operations from PSA officials, obtained such information from AGM documents and from direct contacts with PSA's shippers and consignees whose shipments moved on AGM barges in 1982. An intensive analysis was performed on AGM's barge, Voyage No. 211, which sailed in July 1982. Mr. Carley contacted 20 shippers of various commodities. In 19 of the 20 shipments, the Alaskan consignees had paid the freight and selected the carriers. None of the shippers was a member of PSA. Most of the consignees of these shipments were either not members of PSA or didn't know if they were members. Four indicated that they were probably members and two recalled paying a small membership fee. However, none of the consignees contacted reported that they had ever received copies of PSA's by-laws or any information on members' rights, responsibilities, liabilities, benefits, etc. Even the probable members' only contact with PSA was receipt of freight bills. Most of the shippers or consignees were either dimly aware or completely unaware of AGM's role in transporting their cargoes. Those shippers and consignees that were aware of AGM believed that AGM was a subsidiary or affiliate of PSA or a partner in a joint operation with PSA. Sometimes, PSA's advertisements stated that membership in PSA was required although there were no stated restrictions on membership. However, none of PSA's 1985 ads contained any reference to a membership requirement or referred to a \$10 membership fee which PSA purported to require.

21. For the nine AGM barge voyages on which PSA cargo was carried northbound between March and October 1982, Mr. Carley analyzed PSA's revenue situation. His analysis showed that PSA marked up AGM's charges to PSA between 30.85 percent and 247.34 percent on seven AGM barge sailings consisting of Anchorage-destined cargo. On two barge sailings, a considerable amount of freight was destined to Fairbanks, Alaska, and involved substantial inland costs. For all nine barge voyages, PSA derived \$7.4 million in revenue and paid AGM \$3.3 million in freight charges. The above calculations do not include inland transportation costs paid by shippers who delivered cargo to AGM's dock directly at their own expense.

22. PSA attempted to offer rates on which they could make a profit and still give the person paying the freight a good deal. There were no set rules by which PSA fixed rates. However, PSA would consider what competitors charged in addition to the underlying water carrier's freight rate in order to establish a PSA rate. A number of people connected with PSA appear to have been involved with quoting and fixing rates, including Messrs. Davis, Donadel, Moesh, and Ms. Stanley. With various people quoting rates, it was not common for PSA to charge the same rate to different shippers although they might be shipping the same volume of the same commodity, and different rates could be charged different shippers of the same commodities even on the same voyage. Ms. Stanley, PSA's traffic manager, did not keep track to see whether this was happening. Nor did she verify that a shipper asking for a rate quotation was a member of PSA before quoting a rate.

23. From 1982-1985, PSA solicited cargo in its own name by letter, telephone and personal sales calls, newspapers and other publications, and maintained a sales staff and consultants to solicit cargo on their behalf. Among the persons involved in these solicitation activities were Mr. Moesh, the part owner and director of AGM and consultant to PSA, Mr. Davis, the Alaska general manager, Mr. Donadel, Vice-President of PSA, through his consulting firm, and Mr. O'Brien, President of AGM. PSA employees in Anchorage were responsible for advertising PSA's services under the supervision of Mr. Davis. PSA representatives actively solicited customers from a PSA booth at the 17th Annual Gas, Oil, Mining and Construction Industry Show in Anchorage on September 12, 1984, and, according to PSA's 1983 tax return, PSA had advertised at trade shows and had spent over \$25,000 in advertising expenses for that year.

24. PSA arranged transportation with underlying water carriers and was considered the shipper by those carriers. A shipper who wished to book cargo in Seattle with PSA would make the booking with Penn Van, Inc., PSA's agent in Seattle. Also, in 1982, shippers and consignees could place bookings with Ms. Stanley or contact Mr. Davis or Mr. Ray Fendenheim, a director of Southbound Shippers, Inc. (SSI), in Anchorage. A shipper of LTL (less-than-trailerload) cargo who desired to move cargo via PSA to Anchorage, could also make arrangements with a PSA salesperson in

Anchorage. The shipper would be given a rate and would send the cargo to Penn Van's terminal in Seattle via a motor carrier selected and paid by the shipper, the cargo carried under the motor carrier's bill of lading. Penn Van would consolidate the LTL cargo with other cargo, and the consolidated cargo would become a PSA shipment on the underlying water carrier. PSA would issue its own freight bill instead of a bill of lading, the bill prepared by TATS. The freight bill showed the billing party, consignee, shipper, description of the cargo, weight of and rate for the cargo and the freight charged. PSA would also prepare the underlying water carrier's bill of lading for PSA shipments. Loading and unloading operations were performed by PSA agents who were furnished equipment by PSA. The PSA loading agent in Seattle was Penn Van, Inc., and the unloading agents in Alaska were Ocean Dock Industries in Anchorage and Alcan Freight Service in Fairbanks. Fairbanks-destined cargo was received at Anchorage and moved directly to Fairbanks for Alcan to unload and deliver. In 1982, PSA also had paid costs for labor to receive and deliver freight in Valdez, Alaska.

25. Full-load PSA shipments moved initially by truck under truck bills of lading. Full-load PSA shipments delivered directly to AGM were not consolidated by Penn Van. PSA issued its own freight bill for these shipments to the shipper based on its quoted rates. AGM issued dock receipts and bills of lading and billed PSA, which AGM considered to be the shipper. In 1982, 99 percent of AGM freight consisted of full loads that were not consolidated by Penn Van. PSA competed directly with AGM for the same customers and sometimes AGM obtained the customer. PSA also competed with other underlying water carriers for full shipper-load cargo. For full-load cargo, both PSA and the underlying shipper would select the water carrier. PSA selected the water carrier for LTL freight.

26. PSA assumed the risk for loss or damage to cargo on its own behalf and on behalf of the owner, shipper, or consignee of the cargo transported and was required to procure insurance to cover such risk under the space-charter agreement between PSA and AGM. PSA acquired additional cargo insurance above what any water carrier had for the purpose of insuring the cargo that moved under its name. Claims for loss and damage were handled by PSA's Anchorage office. PSA has paid claims amounting to \$119,702 in 1982 and \$197,590 in 1983. Some shippers or consignees have filed suit against PSA on account of unsettled claims.

27. PSA negotiated rates with underlying water carriers. Mr. Moesh, AGM's part owner and director and consultant to PSA, negotiated these rates and also agreements with CAML and Seaway Express for PSA and agreements between AFFS and CAML and Seaway Express. PSA also had agreements with Sea-Land and Tote. These various agreements with the underlying carriers provided PSA with lower rates for volume movements.

28. Mr. Simo Belcheff, special agent for the Interstate Commerce Commission, contacted shippers and motor carriers and reviewed records of the latter. The information which he obtained indicated that PSA was still carrying shipments at least as of February 1985, and that PSA was carrying for shippers who were not members of PSA. Mr. Davis, PSA's general manager in Alaska, testified that PSA ceased doing business around the first part of 1985. According to information received by Hearing Counsel from the Corporations Section of the Department of Commerce, State of Alaska, PSA was involuntarily dissolved on February 14, 1986. (See letter dated September 23, 1986, addressed to me by Charna J. Swedarsky, with attachment, and letter dated September 22, 1986, from John P. World, with attachment.)³

Southbound Shippers, Inc. (SSI)

29. Southbound Shippers, Inc. (SSI), was incorporated in Alaska on July 27, 1982, to "engage in any phase of the business of transportation." According to the Articles of Incorporation, Marion G. Davis (PSA's Secretary-Treasurer and Alaska general manager) was the initial registered agent for SSI. The directors of the corporation were Raymond Fendenheim, Jim Canfield, and Marion G. Davis. The corporation address was in Anchorage at the same location as PSA, as of October 1982, according to the telephone directory. Mr. Davis testified that he believed himself to be an officer as well as registered agent of SSI. On one occasion in September 1982, District Investigator Carley contacted Mr. Canfield, SSI's Sales Manager, at the PSA phone number.

30. By letter dated November 3, 1982, John M. Stern, Jr., counsel for SSI, informed the I.C.C. that SSI was "operating as a non-vessel operating common carrier pursuant to regulation by the Federal Maritime Commission," that "Southbound Shippers, Inc. does not provide any motor transportation," and that "[t]he rates of Southbound Shippers, Inc. are port-to-port rates." However, as of December 15, 1982, there was no record of an FMC tariff, VOCC or NVOCC, ever having been filed in the name of SSI (or PSA) in the Alaskan or any other U.S. domestic offshore trade.

31. SSI transported cargo via AGM through PSA under the terms of the 1982 voyage-charter agreement between AGM and PSA. Several SSI shipments were analyzed to determine how SSI operated. On one shipment, dated October 4, 1982, SSI transported two tractors from a location in Anchorage to AGM's dock in Seattle. A freight invoice was issued in the name of SSI and contained a reference to "PSA work order #02232."

³In an offer of settlement presented by PSA on May 30, 1985, PSA represented that it had terminated all activity and that its Board of Directors had resolved to dissolve the corporation on March 7, 1985. In its post-hearing brief, PSA asserts that it ceased doing business in January 1985, and is presently insolvent. (See PSA brief, dated February 21, 1986, at 16.)

That work order showed freight charges, billing party, and a description of the tractors. Also included was a statement to AGM covering hostling (drayage) performed in Alaska on the shipper's southbound shipment. A shipment of scaffolding material dated October 4, 1982, similarly referred to a PSA work order on the SSI invoice. Freight charges on the invoice corresponded to rates quoted in SSI advertisements. The shipments moved from Anchorage to Portland, Oregon. Another shipment of scaffolding material, dated November 10, 1982, shows a reference to a work order written on a PSA work-order form on the SSI freight invoice and shows also the same rates as the preceding shipment. Documents show that AGM advanced inland transportation charges to an inland carrier from AGM's Seattle dock to Portland, Oregon, for which charges SSI later paid AGM.

32. AGM possessed voyage manifests for PSA and SSI cargo on AGM's southbound voyages between July 6 and November 9, 1982. The effective date of the PSA/AGM voyage-charter agreement was June 15, 1982. On July 27, 1982, SSI was incorporated and began to advertise. The first SSI manifest was dated August 7, 1982, followed by SSI manifests dated October 4, November 8, and November 9, 1982, covering cargo moving on AGM's Voyages 2, 3, 4, and 5, respectively. These manifests showed that SSI carried 372 loads for 166 shippers. When PSA shipments are added to the AGM southbound voyages, an aggregate of 622 loads were carried on AGM's barges for PSA/SSI shipments. SSI shipments carried under SSI manifests on AGM's four voyages between August 7 and November 1982, comprised a variety of commodities, including household goods, privately owned vehicles, machinery, crushed auto bodies, trucks, boats, tires, scrap metal, scaffolding materials, rags, rendering fat, scrap wire, snowmachines, motor homes, and tractors. SSI shipments were covered by PSA work orders containing particulars on shippers, consignees, and cargo. An AGM invoice dated December 7, 1982, shows that AGM billed PSA for 622 PSA/SSI loads carried by AGM in 1982. AGM also submitted freight bills to SSI as shipper for cargo transported southbound from Alaska to Seattle on AGM barges in 1982.

33. SSI was advertising in the newspapers in late July 1982. An ad appeared in the *Anchorage Daily News* in July 1982, advertising barge service from Anchorage, Alaska, to Seattle, Washington, by 20- or 40-foot vans, at quoted rates of \$400 and \$650, respectively. The ad stated: "Vans to Seattle—You fill them—in Anchorage; We take them—by barge to Seattle. . . ." An almost identical ad appeared in the August 3, 1982, edition of the *Anchorage Times*. On September 10, 1982, an SSI ad appeared in the *Anchorage Daily News* soliciting bookings to transport vans to Seattle from Anchorage by barge. Among other things, the ad stated: "Book now! Call [telephone numbers]—We spot—You load—We pick up—Within 8 mile radius of downtown Anchorage—Southbound Shippers, Inc." Another SSI ad appeared in the *Anchorage Daily News* on October 15, 1982. The ad was similar to SSI's earlier ads and was entitled "VANS TO SE-

ATTLE." The ad included the statement: "Call us for quotation on anything that won't fit in van." It also proclaimed in bold-face letters: "LAST BARGE THIS YEAR. DEPARTING ANCHORAGE FIRST WEEK IN NOVEMBER." The same rate quotations appeared as those in the earlier ads.

34. According to Mr. Davis, SSI's registered agent in Alaska and a director of SSI, SSI was no longer in business as of May 15, 1985. According to the State of Alaska, SSI was involuntarily dissolved on November 16, 1984, for failure to file its biennial report and to pay its corporate tax. (See Hearing Counsel's Status Report filed January 24, 1985, referring to a letter dated December 5, 1984, from the Department of Commerce and Economic Development, State of Alaska.) There is no evidence in this record that SSI was active after 1982.

DISCUSSION AND CONCLUSIONS

The issues remaining for determination in this proceeding concern the questions whether respondents PSA and SSI operated as common carriers by water without filing tariffs as required by section 2 of the 1933 Act and whether those respondents entered into and carried out agreements without filing them for approval with the Commission as required by section 15 of the 1916 Act. If so, the proceeding is to determine whether penalties should be assessed and, if so, in what amounts.

Hearing Counsel contend that the evidence of record shows overwhelmingly that PSA and SSI operated as non-vessel operating common carriers (NVOCCs) without filing their tariffs. Hearing Counsel point out the numerous facts in the record showing this to be true. Thus, they contend, among other things, that PSA offered barge service to the general public, that PSA carried for members and non-members of PSA alike, that it offered regular service between 1982 and 1984, that it arranged transportation with underlying water carriers in its own name, assumed the risk for loss and damage to cargo, issued freight bills to shippers, advertised itself as a carrier of general freight, and offered a port-to-port service using underlying FMC-tariffed water carriers.

As for SSI, Hearing Counsel contend that although the record is not as full as it is for PSA, the evidence nevertheless shows that SSI operated as an NVOCC without a tariff between July and November 1982 in the southbound Alaska/Washington trade, that it was incorporated in the State of Alaska specifically to engage in transportation, that it advertised rates and regular service in its own name, prepared and sent freight bills to shippers in its own name and received freight bills from the underlying carrier, AGM, in its own name as shipper of the cargo, and that its counsel, in response to inquiries from the I.C.C., advised that agency that SSI was operating as an NVOCC pursuant to FMC regulation and that SSI's rates were for port-to-port service.

SSI, as noted, made no appearance and filed nothing throughout the proceeding. PSA, however, did appear and although not producing a direct case, makes several arguments in its post-hearing brief. Thus, PSA argues that throughout its history (beginning in 1971) PSA has operated as a nonprofit cooperative shippers' association which is exempted from regulation as a freight forwarder (i.e., carrier) under the Interstate Commerce Act (49 U.S.C. sec. 10562(3)); that it was organized so that its members could obtain speedy transportation of their goods to Alaska at competitive freight rates; and that it did not engage in port-to-port operations at any time nor quote port-to-port rates, all of its rates including delivery in Anchorage or to cities outside of Anchorage. PSA argues furthermore that it was desperate to move freight for its members in the spring and summer of 1982 because of severe vessel-space shortages and an upsurge of traffic, that Hearing Counsel have not proved that PSA's service was port-to-port and therefore subject to FMC jurisdiction, and that even if the F.M.C. has jurisdiction, it should not exercise jurisdiction over shippers' associations and should overrule a previous decision involving shippers' associations in the Alaskan trade, if that decision is applicable, because, among other reasons, PSA had only 436 members shipping to the railbelt area of Alaska.⁴

Hearing Counsel reply to PSA's jurisdictional arguments, characterizing them as "a clumsy attempt to avoid jurisdiction of both the FMC and the ICC." (Reply Brief of H.C. at 3.) Hearing Counsel argue that PSA's use of an underlying water carrier whose service is covered by a tariff filed with the F.M.C. brings PSA's service under F.M.C. jurisdiction. The mere fact that PSA may have provided pickup and delivery service via motor carriers and include such service within its rates does not bring PSA's service under I.C.C. jurisdiction, argue Hearing Counsel. This is because the PSA service was not one involving through routes and joint rates. Rather, the record shows that PSA assumed sole responsibility for its cargo movements and charged single rates, and if there was movement prior to or after a port-to-port leg of the service, such movement was performed by independent motor carriers under their own bills of lading with no evidence that the motor carrier had entered into a joint-rate arrangement with PSA. Nor is there evidence that any PSA shipments were carried under an I.C.C. carrier's tariff. If there were any such shipments, furthermore, that does not detract from the fact that the record shows many shipments falling within F.M.C. jurisdiction. (Reply Brief of H.C. at 11.) The record shows that PSA was not a bona fide, exempt shippers' association under I.C.C. law, argue Hearing Counsel. But even if PSA was a freight forwarder (i.e., carrier) under I.C.C. law but exempt under that law as a shippers' association, that fact would not deprive the F.M.C. of jurisdiction over PSA's activities as an NVOCC. As to PSA's arguments

⁴ The decision to which PSA refers is *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962).

that Hearing Counsel did not show a single PSA shipment for a non-member which was port-to-port, Hearing Counsel respond by asserting that PSA's argument "represents an unsupportable desperate attempt by PSA to refute an overwhelming record. . . ." (Reply Brief of H.C. at 14.) Hearing Counsel again refer to record evidence that shows that PSA often carried cargo for non-members and that it used the underlying services of FMC-tariffed water carriers.

Applicable Legal Principles

Section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. app. sec. 844), provides in pertinent part that:

. . . every common carrier by water in intercoastal commerce shall file with the Federal Maritime Commission and keep open to public inspection schedules showing all rates, fares, and charges for or in connection with transportation between intercoastal points on its own route; and if a through route has been established, all the rates, fares, and charges for or in connection with transportation between intercoastal points on its own route and points on the route of any other carrier by water.⁵

The standard of proof in administrative proceedings is that of a preponderance of the evidence, not "clear and convincing," or "beyond a reasonable doubt," the latter being the standard in a criminal trial. *Port Authority of New York v. New York Shipping Association*, 27 F.M.C. 614, 647 n.21 (1985); *Steadman v. S.E.C.*, 450 U.S. 91 (1981), rehearing denied, 451 U.S. 933 (1981); *McCormack on Evidence* (3d ed. 1984), section 339 at 956-957. The "preponderance of the evidence" standard is a qualitative one that means that the evidence makes the existence of a fact more probable than not. *Port Authority of New York v. New York Shipping Association*, cited above. The standard also means that a party having the burden of proof does not have to produce a "smoking gun." An agency having expertise over the subject matter is entitled to draw inferences from facts either because of its expertise or because any reasonable person would draw such inferences. *Id.* See also *Saipan Shipping Co., Inc. v. Island Navigation Co., Ltd. and Oceania Lines, Inc.*, 24 F.M.C. 934, 979-981 (1982).

The evidence in this record showing that both PSA and SSI were operating as common carriers by water without having filed tariffs does not merely preponderate; it is clear and convincing. The leading Commission decision on common carriage is *Tariff Filing Practices of Containerships, Inc.*, 9 F.M.C. 56 (1965). In *Containerships, Inc.*, the Commission stated that the term "common carrier" as used in the shipping acts means "a

⁵Section 2 of the 1933 Act, previously 46 U.S.C. sec. 844, was not affected by passage of the Shipping Act of 1984 and is now found in 46 U.S.C. app. sec. 844.

common carrier at common law." 9 F.M.C. at 62. Several definitions of the common carrier at common law were noted by the Commission but the common theme running through these definitions is that a common carrier is a person who "holds out" to accept goods for carriage for hire "from whomever offered to the extent of his ability to carry." *Id.* That definition essentially has been adopted in the Shipping Act of 1984.⁶

In determining the status of a carrier, the Commission has stated that it is not what the carrier calls itself but rather the nature of its service which is determinative. 9 F.M.C. at 64; see also *Possible Violations of Section 18(a) of the Shipping Act, 1916, and Section 2 of the ICSA*, 19 F.M.C. 43, 52 (1975); *United States v. California*, 297 U.S. 175, 181 (1936). A close look at the carrier's activities is therefore necessary. In making such analysis, furthermore, one does not determine status by focusing on only one characteristic. As the Commission stated (9 F.M.C. at 65):

The determination of a carrier's status cannot be made with reference to any particular aspect of its carriage. The regulatory significance of a carrier's operation may be determined by considering a variety of factors—the variety and type of cargo carried, number of shippers, type of solicitation utilized, regularity of service and port coverage, responsibility of the carrier towards the cargo, issuance of bills of lading or other standardized contracts of carriage, and method of establishing and charging of rates.

The Commission proceeded to emphasize that "[t]he absence of one or more of these factors does not render the carrier noncommon, and common carriers may partake of some or all of these enumerated characteristics in varying combinations." *Id.* Furthermore, the presence of some of the factors did not necessarily render a carrier common. *Id.*

It is important to consider all the factors present in each case and to determine their combined effect. Thus, in some cases the Commission has found persons to be common carriers because they exhibited a number of common-carriers' characteristics although not advertising, soliciting, or publishing sailing schedules⁷ or disclaiming liability for loss or damage to cargo⁸ or negotiating contracts with each shipper⁹ or by claiming to act as shippers' agents in booking cargo for subsequent carriage on another carrier's line route¹⁰ or without maintaining regular calls at ports or regular sailings¹¹ or without holding out to carry all types of commodities for

⁶ Section 3(6) of the 1984 Act provides in pertinent part as follows (46 U.S.C. app. sec. 1702): "common carrier" means 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. . . .

⁷ *Containerships, Inc.*, 9 F.M.C. at 63.

⁸ *Containerships, Inc.*, 9 F.M.C. at 64; *Possible Violations of Section 18(a)*, 19 F.M.C. at 53-54.

⁹ *Containerships, Inc.*, 9 F.M.C. at 64.

¹⁰ *Possible Violations of Section 18(a)*, 19 F.M.C. at 52-53.

¹¹ *Containerships, Inc.*, 9 F.M.C. at 63.

all shippers¹² or claiming to be shippers' associations carrying only for their members¹³ or claiming to be a nonprofit business.¹⁴

The fact that a carrier may not itself own or operate vessels has no significance as far as common-carrier status is concerned. All that this factor means is that the carrier may be an NVOCC rather than a VOCC (vessel-operating common carrier). See *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Non-Vessel Operators*, 6 F.M.B. 245, 252, 257 (1961); *Possible Violations of Section 18(a) of the Shipping Act, 1916*, cited above, 19 F.M.C. at 51, and cases cited therein.

As Hearing Counsel cogently point out in their brief, PSA satisfies the numerous factors set forth in the Commission's decisions as indicating common carrier status. Thus, as noted above, PSA offered regular service between Seattle and Alaska, regularly advertised itself as a carrier of general freight, issued freight bills to its shippers, who were both members and non-members of PSA, assumed responsibility for loss and damage to cargo, fixed its rates so as to earn a profit, and arranged for transportation with underlying vessel-operating carriers, appearing as shipper on those carriers' bills of lading. The record therefore shows clearly and convincingly that PSA was operating as a common carrier. The fact that it may have first incorporated itself as a nonprofit shippers' association is of no significance in view of the way the record shows it to have operated. Indeed, the record in this case is even more conclusive than that developed in *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962). In that case the Commission found two shippers' associations, Alaska Outport Transportation Association (AOTA) and Ketchikan Merchants Charter Association (KMCA), to have operated as common carriers without filing their tariffs, in violation of section 2 of the 1933 Act. The two associations made arguments which are similar to those made by PSA in this case. Thus, they argued that they were nonprofit shippers' associations set up to carry for their members and that they were exempt from the tariff-filing requirements of the 1933 Act because of the fact that they were exempt from regulation under another statute having to do with vessel inspection by the Coast Guard under a special statute (46 U.S.C.A. sec. 404, as amended). The Commission found the associations to be common carriers nonetheless. It held specifically that exemption from inspection under a different statute had no effect on the tariff-filing requirements of the 1933 Act (7 F.M.C. at 327); that the associations were common carriers if they provided their carriage to a "substantially unrestricted membership" (7 F.M.C. at 327

¹²*Id.*

¹³*Investigation of Tariff Filing Practices*, 7 F.M.C. 305, 326-330 (1962).

¹⁴*Ibid.*, 7 F.M.C. at 328.

and 329-330);¹⁵ and that "it is not necessary to make, or even seek a profit in order to be carrying for hire." (7 F.M.C. at 328).

Although not as fully detailed as in the case of PSA, as Hearing Counsel show, the record also demonstrates that SSI held out or operated as a common carrier without a tariff between July 27, 1982 and November 9, 1982, satisfying a number of the factors set forth in the Commission's decisions for this determination. Thus, SSI was incorporated in Alaska on July 27, 1982, specifically "to engage in any phase of the business of transportation." In pursuit of this objective, from July through October 1982, SSI, in its own name, advertised rates and regular barge service from Anchorage to Seattle in Anchorage newspapers. SSI transported cargo on at least four different AGM voyages in its own name, prepared and sent freight invoices to shippers, and received freight bills from AGM as the shipper of the cargo transported southbound on the AGM vessels. When asked about its status by the I.C.C., SSI's counsel advised that agency that SSI was operating as an NVOCC subject to F.M.C. regulation, that SSI did not provide any motor transportation, and that its rates were port-to-port rates. SSI shipments carried under SSI manifests on four AGM voyages between August and November 1982 consisted of a variety of commodities carried for 166 shippers. Although there is not the same evidence concerning SSI's assumption of liability for loss and damage to cargo as there was for PSA, the absence of this factor is not determinative. The Commission has several times held that the operations of a carrier such as an NVOCC may result in imposition of liability as a matter of law and this may happen even if the carrier attempts to disclaim it on its shipping documents. See *Carriers by Water—Status of Express Companies, etc.*, cited above, 6 F.M.B. at 256 (an NVOCC may have "liability imposed by law," according to the Commission's definition of such carrier); *Possible Violations of Section 18(a) of the Shipping Act, 1916*, cited above, 19 F.M.C. at 53-55, and the numerous cases discussed therein.

¹⁵ As found earlier, the record shows that PSA carried for nonmembers as well as members and usually made no reference to a membership requirement in its ads, which requirement, in any event, was only a \$10 fee. In the PSA shipments analyzed by Commission investigator Carley carried on AGM's voyage No. 211 in July 1982, none of the shippers were PSA members and most of the consignees were either not members or didn't know if they were members. Furthermore, none of the consignees, who paid the freight on these shipments, had ever received copies of PSA's by-laws or any information as to members' rights, responsibilities, benefits, etc. It is ironic that PSA, in its post-hearing brief, asks the Commission not to follow its decision in *Investigation of Tariff Filing Practices*, cited above, 7 F.M.C. 305, because PSA allegedly has only 436 members compared to the 300 members of KMCA shipping to the limited population of Ketchikan. There is no record evidence to support such a figure. Mr. Haugen, PSA's accountant, testified that he did not have a membership list and kept track of members through other means. Mr. Moesh told Mr. Carley that PSA's membership list was confidential. Mr. Carley was unable to find a membership list in the documents subpoenaed by Hearing Counsel and was never able to obtain such a list during the three-year period he worked on the case.

PSA's Defenses

As noted, PSA has raised three defenses, one, that it was a shippers' association exempt from I.C.C. regulation; two, that it did not offer port-to-port service and therefore was not under F.M.C. jurisdiction; and three, even if its operations fell under F.M.C. jurisdiction, the Commission ought not to regulate such activities and ought not to follow its precedent established in *Investigation of Tariff Filing Practices*, cited above, 7 F.M.C. 305. I find no merit to any of the defenses.

First, the F.M.C.'s jurisdiction over PSA or any of its operations depends upon the nature of PSA's service and whether that service fell within the requirements of section 2 of the 1933 Act, not whether PSA might have somehow been excluded from regulation as a freight forwarder (i.e., carrier) under I.C.C. law. Furthermore, if PSA's service fell within the scope of the 1933 Act and PSA had not obtained an exemption from the F.M.C. pursuant to section 35 of the Shipping Act, 1916, 46 U.S.C. app. sec. 833a (which section applies also to the 1933 Act), PSA would have been in violation of the 1933 Act. In other words, if PSA wished this Commission not to follow its precedent which held that two so-called shippers' associations in Alaska were subject to F.M.C. regulation, it should have petitioned this Commission to consider exemption in a proper section 35 proceeding. Or, alternatively, PSA could have asked the Commission for a declaratory order under Rule 68, 46 CFR 502.68.

If PSA's service consisted of the type of port-to-port service which the F.M.C. and courts have held to fall under the 1933 Act, then PSA's operations were in violation of section 2 of the 1933 Act. If, on the other hand, PSA's service consisted of a true through-route-and-joint-rate operation or a bona fide I.C.C. freight-forwarder service, PSA's operations, in whole or in part, could have fallen outside the scope of the 1933 Act. I find no evidence in this record, however, that PSA's operations did in fact fall outside the scope of the 1933 Act, although there may be an uncertain area in some aspects of its service regarding particular shipments to Fairbanks, Alaska, or southbound to Portland, Oregon (as regards SSI).

PSA's Claim That It Was a Shippers' Association

PSA's argument that it was a shippers' association exempt from regulation pursuant to 49 U.S.C. sec. 10562(3) is relevant only to the extent that any of PSA's operations would otherwise have fallen under the Interstate Commerce Act as an I.C.C.-regulated freight forwarder (i.e., carrier). (The I.C.C. was, in fact, conducting an investigation of PSA. See *PSA v. I.C.C.*, 789 F.2d 1401 (9th Cir. 1986).) If PSA had not operated as an exempt shippers' association and if any of its operations met all of the requirements set forth in the Interstate Commerce Act as an I.C.C.-regulated freight forwarder or, as I discuss later, if any of its operations were conducted

under a through route, joint rate arrangement, then those operations would have been subject to the jurisdiction of the I.C.C. The F.M.C.'s jurisdiction over I.C.C.-regulated freight forwarder operations would have been precluded because section 33 of the 1916 Act (46 U.S.C. app. sec. 832) forbids the F.M.C. to have jurisdiction "over any matter within the power or jurisdiction of the [Interstate Commerce] Commission." See *IML Sea Transport Corp. v. United States*, 343 F.Supp. 32, 36 (N.D. Cal.) 1972); *Trailer Marine Transport Corp. v. F.M.C.*, 602 F.2d 379, 393 ns. 61, 62 (D.C. Cir. 1979).¹⁶ Similarly, as I discuss below, if any of PSA's operations had been conducted under a true through route, joint rate arrangement, they would have been subject to the exclusive jurisdiction of the I.C.C. because of the so-called Rivers Act (P.L. 87-595, 76 Stat. 397), which amended the Interstate Commerce Act in 1962. The record in this case, however, shows that PSA never came near meeting the requirements of a bona fide, exempt shippers' association and that there was no through route, joint rate arrangement or agreement between PSA and another carrier. Furthermore, the record does not show that any particular PSA shipments were carried by PSA as a freight forwarder subject to I.C.C. jurisdiction.

First, as to PSA's claim that it had been a shippers' association exempted from I.C.C. regulation, the evidence and law is to the contrary. As the case law shows, a bona fide shippers' association must, in fact, be controlled by its shipper-members, must be non-profit, the members must bear the essential risks and burdens of conducting the operations, and the association must not carry for nonmembers. In other words, the association must be conducting its operations so that its members may obtain cheaper transportation for their goods. The association cannot turn itself into a common carrier providing service for hire to the public. See the discussion in *Sunshine State Shippers and Receivers Association, et al.*, 350 I.C.C. 391, 396-410 (1975); see also *Freight Consolidators Cooperative, Inc. v. U.S.*, 230 F.Supp. 692, 696-699 (S.D. N.Y. 1964); *National Motor Freight Traffic Association, Inc. v. International Shippers Association, Inc., et al.*, 94 M.C.C. 440, 443-447 (1964); *Atlanta Shippers Association, Inc.—Investigation of Operations*, 322 I.C.C. 273, 275-289 (1964).

The record in this case shows convincingly that PSA never qualified under the standards established by these case authorities. Thus, PSA carried for nonmembers, membership was easily obtained by anyone, its members never attended meetings or obtained literature about PSA, explaining their rights, obligations, etc., it was controlled not by its members but by certain individuals who were not members, it made money at the expense of the shippers by greatly marking up basic costs of the underlying services provided by water carriers, it assumed responsibility for cargo loss and

¹⁶This does not mean that the F.M.C. and the I.C.C. cannot each regulate the particular activities which fall within each agency's respective statutory jurisdiction. See *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278, 292 (D.C. Cir. 1977); *Alabama Great Southern R. Co. v. F.M.C.*, 379 F.2d 100, 102 (D.C. Cir. 1967).

damage, etc. These operations bore a striking resemblance to those of the alleged shippers' association found by the I.C.C. and court to be a freight forwarder (i.e., carrier) subject to I.C.C. regulation in *Freight Consolidators Cooperative, Inc. v. U.S.*, cited above, 230 F.Supp. at 697-698.

As I discuss below, there is no evidence whatsoever that PSA had entered into a true through route, joint rate arrangement so as to remove any services provided thereunder from F.M.C. jurisdiction pursuant to the so-called Rivers Act. Nor is there any evidence in this record showing that PSA ever became a freight forwarder subject to I.C.C. regulation as to any particular shipments. To become an I.C.C.-regulated freight forwarder, it is necessary for a person to meet five standards set forth in 49 U.S.C. sec. 10102(8), formerly 49 U.S.C. sec. 1002(a)(5). These are, according to the I.C.C.: 1) holding out to the general public as a common carrier; 2) assembly and consolidation of shipments; 3) break-bulk and distribution services; 4) responsibility for transportation from point of receipt to destination; and 5) utilization of services of underlying rail, motor, or water carriers subject to I.C.C. jurisdiction. See *Sunshine State Shippers and Receivers Association, et al.*, cited above, 350 I.C.C. at 400. I find no evidence in this record that all of these elements had been satisfied by PSA. For example, none of its full trailerload shipments could qualify because it is necessary under the definition for the forwarder to consolidate and deconsolidate. Furthermore, when PSA utilized F.M.C.-tariffed carriers such as AGM, CAML, or Seaway Express, there is no evidence that an I.C.C.-regulated motor carrier was directly employed by PSA. Also, PSA's pickup or delivery around the Anchorage area was not shown to have been performed by a motor carrier subject to I.C.C. regulation. As I discuss below, such pickup and delivery service has long been considered to be incidental to F.M.C.-regulated water service. When PSA carried shipments from Seattle to Fairbanks or Valdez or SSI carried southbound to Portland, Oregon, via Seattle, it is possible that PSA (or SSI) utilized directly an I.C.C.-regulated motor carrier but I cannot determine that fact from this record. Unless all of the factors are shown on the record and PSA was shown to have utilized directly, not indirectly, a motor carrier not exempt from I.C.C. regulation, the common-carrier operations would have been those of an F.M.C. NVOCC and not an I.C.C.-regulated freight forwarder. See *IML Sea Transit, Ltd. v. United States*, 343 F.Supp. 32 (N.D. Cal. 1972). However, PSA chose not to put on any direct case or to show which of its operations may have been those of an I.C.C.-regulated freight forwarder, evidently not wishing to be found subject to the jurisdiction of either the F.M.C. or I.C.C.¹⁷

¹⁷ Had PSA wished to claim an exemption from F.M.C. jurisdiction because any of its operations had been conducted as an I.C.C.-regulated freight forwarder, it would have been incumbent upon PSA to come forward with the evidence showing which operations and shipments fully qualified as I.C.C.-regulated freight for-

Continued

The Status of a Port-to-Port Service Which Includes Pickup and Delivery

As to the 1933 Act, PSA's main defense is that it did not provide a port-to-port service. PSA contends that all rates which it quoted included delivery in Anchorage or included drayage to cities outside of Anchorage, whether LTL or TL shipments. PSA cites testimony of its general manager in Alaska, Mr. Davis, that Ocean Docks Industries performed unloading and delivery functions in Anchorage and that Alcan Freight Service performed identical services in Fairbanks. PSA contends, furthermore, that Hearing Counsel "forgot to prove that PSA performed port-to-port transportation." (Brief of PSA at 9.) PSA cites testimony of Commission investigator Carley regarding PSA's service from Seattle to Fairbanks and delivery in Anchorage and vicinity. Having cited such testimony, PSA relies upon two court decisions limiting the F.M.C.'s jurisdiction, namely, *Totem Ocean Trailer Express v. F.M.C.*, 662 F.2d 563 (9th Cir. 1981); and *Alaska Steamship Co. v. F.M.C.*, 399 F.2d 623 (9th Cir. 1968).

It is ironic that PSA would rely upon *Totem* and *Alaska Steamship Co.* as authority for its contention that the F.M.C. has no jurisdiction over its allegedly non-port-to-port service. That is because in *Totem* the carrier had asked this Commission for a declaratory order that would have required all Alaskan carriers which had established through routes with motor carriers to file tariffs showing rates for the port-to-port portion of the through route, and in *Alaska Steamship Co.*, the carrier, which had established through routes and joint rates with a motor carrier, had, in fact, filed its tariff with the I.C.C. In this case, of course, PSA filed no tariff with either agency and argues that it is exempt from both F.M.C. and I.C.C. jurisdiction.

As I mentioned earlier, if PSA's service had been one involving a true through route and joint rate established with an I.C.C.-regulated carrier or if PSA's service had been that of an I.C.C. forwarder, PSA would not have fallen within the scope of the 1933 Act. The *Alaska Steamship Co.* case is one of several in which it was held that the F.M.C.'s jurisdiction over carriers operating in the Alaskan or other domestic offshore trades was limited to so-called port-to-port service and did not embrace through route, joint rate arrangements. The latter were held to fall within the exclusive province of the I.C.C. As pertains to Alaska, that is because Congress amended former sections 216(c) and 305(b) of the Interstate Commerce Act (49 U.S.C. secs. 316(c) and 905(b)), recodified as 49 U.S.C. sec.

warders and not merely rely upon its thin argument that it was a shippers' association. It was not Hearing Counsel's job to prove negatives or exemptions. See, e.g., *Freight Consolidators Cooperative, Inc. v. U.S.*, cited above, 230 F.Supp at 698-699; *McKelvey v. United States*, 260 U.S. 353, 357 (1922); *Federal Trade Commission v. Morton Salt*, 334 U.S. 37, 44-45 (1949). The fact that PSA obviously chose not to show which, if any, of its shipments may have qualified as I.C.C.-regulated freight forwarding because it did not wish to be regulated by the I.C.C. or to be found in violation of the Interstate Commerce Act does not excuse its failure to come forward with evidence. It rather shows a lack of cooperation with two agencies and supports Hearing Counsel's argument "that PSA's violative conduct was a purposeful and flagrant attempt to avoid regulation. . . ." (Reply Brief of H.C. at 18.)

10703(a)(4), by passing the so-called Rivers Act, P.L. 87-595, 76 Stat. 397, in 1962. These amendments, among other things, provided that I.C.C.-regulated motor carriers and F.M.C.-regulated water carriers (including NVOCCs) who had established through routes and joint rates in the Alaskan and Hawaiian trades would be subject to the exclusive jurisdiction of the I.C.C. for the services encompassed within their through route, joint rate arrangements. The reason for the passage of the Rivers Act, according to its legislative history, was that motor carriers attempting to establish through routes and joint rates with water carriers between Alaska and the contiguous 48 states could not get their tariffs filed with either the I.C.C. or the F.M.C. See *Sea-Land Service, Inc. v. Federal Maritime Commission*, 404 F.2d 824, 826, 827 n. 14 (D.C. Cir. 1968); H.R. Report No. 1769, 87th Cong., 2d Sess. (1962); S. Rep. No. 1799, 87th Cong., 2d Sess. (1962). *Totem Ocean Trailer Express, Inc.*, 20 SRR 509, 510 n. 4 (1980), affirmed, *Totem Ocean Trailer Express v. F.M.C.*, cited above, 662 F.2d 563.

The fact that true through route, joint rate arrangements between I.C.C.-regulated motor carriers and water carriers fall within the exclusive jurisdiction of the I.C.C. was established not only by the decision in *Alaska Steamship Co.*, cited above, but also by the court in *Sea-Land Service, Inc. v. F.M.C.*, cited above, 404 F.2d 824. In the latter case, it was made clear that the F.M.C. "lost" jurisdiction over such arrangements only if they were true through route, joint rate arrangements. However, to constitute such an arrangement, as the court held (404 F.2d at 827):

What is required is that both motor and water carriers hold themselves out to the public as participants in a joint transportation endeavor and file appropriate tariff schedules reflecting these joint rates and through services.

The court further distinguished the true through route, joint rate arrangement from the single-carrier service. In the former arrangement, the water carrier "is a participant with a motor carrier in a joint undertaking" and "there is a contract of carriage between both carriers and the shipper (or consignee), and both carriers are jointly and severally liable." 404 F.2d at 828. In the single-carrier operation, in which the water carrier offers port-to-port service with an incidental pickup and delivery by motor carrier included in the water carrier's rates, as the court stated, "the regulation . . . remains within the authority of the FMC." (404 F.2d at 827.) See also *IML Sea Transit, Ltd. v. United States*, 323 F.Supp. 562, 566 (N.D. Cal. 1971) ("A true joint rate for through routes consists of a joint undertaking between two carriers who share the responsibility for delivering consigned goods, and who divide the fee paid by the shipper."); *IML Sea Transit, Ltd. v. United States*, 343 F.Supp. 32, 41 ("the crucial factor in both of these recent decisions [i.e., *Alaska Steamship Co.* and *Sea-Land Service, Inc.*] is whether the carriers hold themselves out to

the public as joint participants in a through route.'') Furthermore, as Hearing Counsel point out (Reply Brief at 6-7), in a true through route, joint rate situation, one carrier publishes a single charge as the rate that applies to a through movement from point of origin on the line of the carrier to point of destination on the line of the others, the other carriers concur in that charge, each retains a "division" of the joint through rate agreed upon by the carriers, and the carrier where the cargo originates issues its bill of lading which covers the entire through movement. See *Commonwealth of Pennsylvania v. I.C.C.*, 561 F.2d 278, 281-282 (D.C. Cir. 1977); *McLean Trucking Co. v. U.S.*, 346 F.Supp. 349, 351 (M.D.N.C. 1972), affirmed, 409 U.S. 1121 (1973).

As Hearing Counsel show in detail (Reply Brief at 9-12), the evidence in this record in no way supports the idea that PSA conducted a through route, joint rate operation. Instead, PSA offered a service and assumed responsibility for the entire movement on its own, advertised and quoted rates in its own name, employed underlying FMC-tariffed water carriers (although not always), paid those carriers either under a space-charter agreement or under their tariffs, and, when employing a motor carrier for delivery in Alaska, did so without entering into a joint-rate agreement with the motor carrier. All of these facts show no arrangements with I.C.C.-regulated motor carriers such as would place the service under the exclusive jurisdiction of the I.C.C. under the Rivers Act. Moreover, even PSA unwittingly corroborates this analysis when it points out on brief that PSA's rates included delivery in Alaska by motor carriers. (Brief of PSA at 8.)¹⁸ The record does indeed support this statement. However, PSA obviously made this admission in the belief that the inclusion of delivery service beyond dockside removed the F.M.C. from jurisdiction.¹⁹ As I proceed to show, PSA was badly mistaken.

¹⁸ It does not matter if PSA charged for its water plus incidental pickup and delivery service under one single-factor rate or charged separately for the pickup and delivery beyond dockside in Alaska. The essential point is that PSA's service included the additional delivery service, PSA assumed responsibility for the cargo when delivering it or picking up in Alaska, and that shippers are supposed to be able to tell what is the exact price of PSA's total service offered to themselves and their competitors by looking at a filed tariff. See *Certain Tariff Practices of Sea-land Service, Inc.*, 7 F.M.C. 504 (1963); see also *J.G. Boswell Company et al. v. American-Hawaiian Steamship Company et al.*, 2 U.S.M.C. 95 (1939) (separate charges for incidental services beyond ship's tackle allowed).

¹⁹ Thus, elsewhere in its brief, PSA argues (PSA Brief at 12):

In the case at hand, we are going even further and not talking about joint through rates, but through rates established by an exempt shippers association. These through rates involve at least incidental terminal pickup and/or delivery services and in many cases more inland transportation than just terminal services. PSA's contention is that the FMC has no jurisdiction over any shipments handled by PSA which involved any provision of terminal motor pickup and/or delivery services.

PSA also chastises Hearing Counsel, claiming that she "forgot to prove that PSA performed port-to-port transportation" (PSA Brief at 9). However, as the record shows, and as PSA itself points out, PSA's freight bills and testimonial evidence show that PSA's services included pickup and delivery in Alaska. The mistake was not Hearing Counsel's but PSA's, which believed that such services did not constitute port-to-port services because of the incidental pickup and delivery, apparently ignoring all of the Commission cases discussed below so holding.

In fact, what the record does show is that PSA was conducting a port-to-port service with an ancillary delivery service in Anchorage, among other services, and that PSA employed motor carriers for delivery to consignees in Alaska and paid their charges. But such a service has long been considered to be an F.M.C.-regulated operation. The courts in *IML Sea Transit, Ltd.*, *Alaska Steamship Co.*, and *Sea-Land Service, Inc.* all recognized this fact. See *IML Sea Transit, Ltd.*, cited above, 343 F.Supp. at 40; *Alaska Steamship Co.*, cited above 399 F.2d at 627; *Sea-Land Service, Inc.*, cited above, 404 F.2d at 827. In discussing the fact that the F.M.C. had jurisdiction over a water carrier (Matson) operating in the Hawaiian trade with an ancillary pickup and delivery service in port areas, the court in *Alaska Steamship Co.* distinguished this type of operation from that of a true through route, joint rate operation. The court stated as to Matson (399 F.2d at 627):

The ICC does not dispute the FMC's decision in *Matson*. An arrangement between carriers whereby one employs the other as agent for terminal delivery service, paying that carrier the ICC tariff rate, simply does not entail a joint rate. It does not entail obligations to the shipper such as are found in through routes. It does not present the regulatory problems presented by through-route and joint-rate arrangements.

The *Matson* decision to which the court refers is actually one of several in which the F.M.C. has exercised jurisdiction over water carriers who provided pickup and delivery services in sizeable port areas. In that decision, *Matson Navigation Co.—Container Freight Tariffs*, 7 F.M.C. 480 (1963), the Commission held that Matson, a vessel-operating common carrier, could file its tariff under the 1933 Act, such tariff publishing single-factor rates for service between California ports and Hawaii, which service included pickup and delivery within sizeable areas around San Francisco, Stockton, and Los Angeles, California. For this pickup and delivery service, Matson employed a motor carrier certificated by the I.C.C. and paid whatever charges that motor carrier assessed. The Commission rejected arguments that Matson was precluded from offering a service beyond docksides and from including such service within its rates, that Matson's use of commercial zones and other criteria to establish the port area within which it offered the pickup and delivery service was unreasonable, and that the Commission's acceptance of Matson's tariff would encroach upon the I.C.C. because of Matson's employment of I.C.C.-regulated motor carriers. In rejecting all of these arguments, the Commission held that "common carriers by water," as that term is defined in the Shipping Act, 1916 (and consequently in the 1933 Act), were not restricted "solely to the performance of 'transportation by water . . . on the high seas . . .'" (7 F.M.C. at 490.) Rather, such carriers were permitted to perform "terminal" or "incidental services" which would include Matson's pickup and delivery service, and the "terminal area" within which the water carrier could perform such

service was not limited to "the particular terminal structures at the point where a vessel berths." (7 F.M.C. at 490-491.) The Commission commented on the Matson service as follows (7 F.M.C. at 491):

Matson has undertaken to provide a more efficient and less costly service to its shippers. A part of this containerized operation is a pickup and delivery service which is physically performed by common carriers by motor vehicle who act as agents for Matson. Throughout the entire operation Matson is the principal charged with the direction of and liability for the services performed. The service is offered by Matson in its capacity as a common carrier by water and it is in this capacity that Matson is subject to the regulatory jurisdiction of this Commission.

The Commission proceeded to state that the pickup and delivery services were services "commonly considered as incidental to line haul transportation by water" but that the Commission's decision should not "be taken as extending our findings and conclusions as applying to other combinations of services such as two line hauls," and that the decision did not mean that the motor carriers were removed from I.C.C. jurisdiction or that the F.M.C. was attempting to exercise concurrent jurisdiction over the motor carriers which was precluded by section 33 of the 1916 Act. (*Id.*)

The Commission's findings with regard to Matson's definitions of "port areas" within which, under its tariff, pickup and delivery service was provided, are significant in view of PSA's argument that all of its rates and services included delivery in Anchorage or Fairbanks. The F.M.C. decided that a water carrier's designation of these "port areas" as terminal areas could be based upon practical considerations on a case-by-case basis as regards their geographical extent. The water carrier could consider such factors as "[t]he coincidence of the terminal area with a homogeneous industrial or business community surrounding the port," or "[p]resent and potential traffic patterns, commercial zones and the concentration of a carrier's shippers . . ." (7 F.M.C. at 493.) In the *Matson* case, as the Commission noted, Matson had considered, among other things, the fact that the port areas it had selected around the cities contained large numbers of its shipper customers who shipped more than 5 tons per month. The maximum distance within the port areas under Matson's tariff was found to be 40 miles. (7 F.M.C. at 493-494.)

As I mentioned, the *Matson* decision is one of several in which the F.M.C. has found that water carriers providing pickup and delivery services in conjunction with port-to-port transportation by water should file their tariffs with this Commission. See, e.g., *Certain Tariff Practices of Sealand Service*, 7 F.M.C. 304 (1963) (water carrier's service included pickup and delivery 15 miles within Puerto Rico plus an unspecified distance inland); *North Carolina Line-Rates To and From Charleston, S.C.*, 2 U.S.S.B. 83 (1939) (pickup and delivery service within corporate city limits of Charleston, S.C., and Baltimore, Md.); *Increased Rate—Kuskokwim River*,

Alaska, 4 F.M.B. 124 (1952) (water carrier also performed drayage to places of business); *J.G. Boswell Company et al. v. American-Hawaiian Steamship Company et al.*, 2 U.S.M.C. 95 (1939) (water carrier providing incidental terminal services beyond ship's tackle entitled to charge separately for such services). All of these cases amply support the Commission's statements in *Matson* regarding the propriety of a water carrier's providing inland delivery services, quoted as follows (7 F.M.C. at 490):

We think it clear that the Shipping Act does not preclude a common carrier by water performing services other than "transportation by water . . . on the high seas," but contemplates and authorizes the performance by such carriers of so-called incidental services.

To conclude, therefore, I find that PSA's operations using F.M.C.-tariffed water carriers from Seattle to Anchorage were port-to-port services with incidental delivery by motor carrier in Anchorage and, as such, were within the scope of section 2 of the 1933 Act. PSA's argument that because it made delivery in Anchorage, its service somehow was no longer port-to-port and therefore not subject to F.M.C. jurisdiction is, as discussed, invalid and rests either on the mistaken belief that an incidental delivery service converts a port-to-port service to a through route, joint rate arrangement or the equally mistaken belief that a water carrier's service cannot be extended beyond dockside without the carrier's losing its status as one subject to F.M.C. jurisdiction.²⁰

The Commission's Precedent and Policies as to Shippers' Associations

PSA's next argument is that the F.M.C. ought not to follow its precedent in *Investigation of Tariff Filing Practices*, 7 F.M.C. 305 (1962), in which

²⁰I cannot determine with certainty the correct classification of the PSA service to Fairbanks as opposed to the service to Anchorage. Although there is no record evidence that PSA had a through route, joint rate agreement with Alcan Freight Service, Inc., the motor carrier operating between Anchorage and Fairbanks, it is possible that Fairbanks, being more than 300 miles from Anchorage, cannot be considered a terminal or port area even under the Commission's flexible standards enunciated in the *Matson* case. If Alcan was not exempted from I.C.C. regulation, any LTL shipments of PSA moving to Fairbanks could possibly have been those of a freight forwarder subject to I.C.C. jurisdiction. If Alcan were exempted from I.C.C. regulation, the shipments could possibly have been those of an F.M.C.-regulated NVOCC as was the carrier in *IML Sea Transit, Ltd.*, cited above, 343 F. Supp. 32, which carrier had utilized motor carriers in Hawaii who had been exempted from regulation by the I.C.C. This problem does not, however, exist with regard to PSA's Anchorage service. As large as Anchorage is (the borough of Anchorage being some 1,732 square miles in area, according to the 1986 *Rand McNally Commercial Atlas and Marketing Guide* at page 243) it is still a borough or municipality and could qualify as a port or terminal area under the *Matson* standards which allowed an inland service of 40 miles. According to I.C.C. regulations, furthermore, the borough or municipality of Anchorage appears to qualify as a "terminal area" or "commercial zone" and motor carriers operating within may qualify under some circumstances for exemptions. See 49 CFR 1049; 1048.100; 1048.101. There is no evidence in this record that Ocean Dock Industries, the Anchorage motor carrier used by PSA, was certified by the I.C.C. or subject to I.C.C. regulation. SST's southbound service to Portland, Oregon, presents similar problems as service to Fairbanks. However, because PSA took responsibility from the Seattle dock, the shippers arranging for motor carriage to Seattle under separate motor-carriers' bills of lading, there is no problem as regards the Seattle end of the PSA service.

the Commission found that two shippers' associations operating in the Alaskan trade were common carriers by water and had to file their tariffs notwithstanding their claims that they served only their members and were exempt from regulation under another federal statute. PSA argues that one of those associations consisted of 300 members, virtually every business in the area. PSA, without record evidence (which PSA previously would not furnish, as I noted earlier), now argues that there were only 436 members of PSA, a small number compared to the population of the railbelt area of Alaska. Also, PSA argues that the F.M.C. has indicated that shippers' associations will not be subject to ongoing regulation under the Shipping Act of 1984. These arguments are also without merit.

Even if I were to accept PSA's belated, non-record figure of 436 as showing the true number of members, the record shows that PSA carried for non-members as well as members and that membership was very easy to obtain. Furthermore, because PSA may not have been able to obtain the business of every shipper in the railbelt area does not mean that it was not holding out to the general public, seeking to obtain as much business as it possibly could. Moreover, as I have noted earlier, it is not necessary to hold out to every member of the public to carry everything in order to become a common carrier. There is no more reason to excuse PSA's failure to file a tariff than there was to excuse the two Alaskan associations in the case cited. In fact, if anything, in this case there is less reason because the persons behind PSA were not naive, unsophisticated novices in the transportation business, they had been warned in the first half of 1982 by F.M.C. investigators, they had carried on activities indicating a deliberate intention to avoid lawful tariff-filing requirements, and, of course, they had the benefit of the Commission's decision which had been issued in 1962 right on point.²¹ Furthermore, if they really believed that they were exempt or should have been exempt from regulation, PSA could have petitioned the Commission for an exemption pursuant to section 35 of the 1916 Act (46 U.S.C. app. sec. 833a) or for the Commission's advice as to their status by seeking a declaratory order, as provided by Rule 68, 46 CFR 502.68. Neither PSA nor SSI nor any of the persons running those companies took either action. On the contrary, they resisted the Commission's investigation both before and after the proceeding was docketed.

PSA's argument that the Commission's policies toward shippers' associations under the 1984 Act regarding limited ongoing regulation should somehow justify PSA's violation of the 1933 and 1916 Acts is way off base. Whatever the 1984 Act does for shippers' associations and whatever rights

²¹ Contrast these facts with those which existed in the 1962 case. In that case, *Investigation of Tariff Filing Practices*, cited above, the Commission noted that the law had been unclear as to respondents' statuses and indicated that one or more respondents might even have been given advice by the Commission's staff that they did not have to file tariffs. Therefore, the Commission felt that it would be "harsh" to seek penalties. See case cited, 7 F.M.C. at 330.

or privileges that Act confers on such associations have nothing whatsoever to do with an association which acted as a common carrier and violated the 1933 and 1916 acts. Neither the 1933 Act nor the 1916 Act, of course, even mentions shippers' associations. Therefore, it is senseless to argue that such associations should be given exemptions in those acts because of something that happened in a different act for different purposes. As the Commission noted in *Investigation of Tariff Filing Practices*, cited above, 7 F.M.C. at 327-329, exemptions conferred in one statute for a specific purpose have no bearing on the requirements of a different statute where no exemptions are mentioned.

Moreover, the recognition of shippers' associations in the 1984 Act, even if that Act were somehow applicable to this case, has nothing to do with tariff-filing or agreement-filing requirements of the earlier acts. As the legislative history to the 1984 Act indicates, shippers' associations were defined in that Act in order to identify them and to allow them to negotiate rates with carriers. Moreover, as the legislative history also clearly states (Conference Report No. 98-600 to accompany S. 47, 98th Cong. 2d Sess. at 27-28):

A shippers' association would continue to be subject to laws other than the Shipping Act of 1984.

Finally, as if the above were not enough to refute PSA's argument, as this record so abundantly shows, PSA didn't even come close to meeting the definition of a bona fide shippers' association, as defined in the Interstate Commerce Act (49 U.S.C. sec. 10562(3)), which definition is virtually identical to that set forth in section 3(24) of the 1984 Act (46 U.S.C. app. sec. 1702(24)). See also *NEC Petition for Rule Re "Shipper"*, 23 SRR 1381, 1385 (1986).

Conclusions as to the Section 2 Issue

Although the facts concerning SSI's operations in 1982 are not as detailed as those of PSA, this record shows that SSI also held itself out and performed services as a common carrier by water and more specifically as an NVOCC between July and November 1982. SSI, in its own name, advertised rates and regular barge service from Anchorage to Seattle in Anchorage newspapers, transported cargo on at least four barge voyages of an F.M.C.-tariffed carrier, AGM, prepared and sent freight invoices to its shipper customers, and received freight bills from AGM as the shipper of the cargo with respect to that underlying vessel-operating common carrier. Indeed, SSI, when queried by the I.C.C., replied through its counsel that SSI was operating as an NVOCC pursuant to F.M.C. regulation. Further-

more, SSI informed the I.C.C. that SSI rates were port-to-port rates and that SSI did not provide any motor transportation.²²

The record, therefore, supports the finding that both respondents, PSA and SSI, operated as NVOCCs without filing their tariffs as required by section 2 of the 1933 Act. As Hearing Counsel correctly contend (Brief of Hearing Counsel at 102-103), the tariff-filing requirements of that and similar acts are unambiguous and absolute and should not be taken lightly in view of their very essential purposes, which are to prevent discrimination among shippers and to enable shippers to ascertain their exact costs of transportation as well as those of their competitors. These principles have been enunciated many times in many cases. See, e.g., *Intercoastal Investigation*, 1935, 1 U.S.S.B.B. 400, 421 (. . . Section 2 . . . "imposes a positive duty on respondents . . . one of the principal aims of the law is uniformity in treatment"; the law enables the shipper to ascertain his exact rates and charges and his competitors'; the failure to file the tariff "is as serious a violation of law as its failure to observe strictly such rates, charges, and rules after they have been properly published and filed."); *Intercoastal Rates of Nelson S.S. Co.*, 1 U.S.S.B.B. 326, 327 (1934); *Tariff Filing Practices of Containerships, Inc.*, cited above, 9 F.M.C. at 69-70; *Matson Navigation Co.—Container Freight Tariffs*, cited above, 7 F.M.C. at 487-488; *Certain Tariff Practices of Sea-land Service, Inc.*, 7 F.M.C. 504, 509 (1963); *Sea-Land Service, Inc. v. TMT Trailer Ferry, Inc.*, 10 F.M.C. 395, 398-399 (1967) (precise rates and charges must be filed to "achieve the purpose sought—that of closing the door on possible unlawful rebates or concession to favored shippers.'").

All of the salutary purposes of tariff-filing law, of course, are defeated when carriers such as PSA and SSI fail to file. The record in this case serves as a reminder of the pernicious effects of such failure. It shows that PSA quoted rates on a case-by-case basis without regard to uniformity among similarly situated shippers with the result that different shippers of the same commodity were, in fact, probably charged different rates even on the same voyage. Obviously, as Hearing Counsel point out (Brief of Hearing Counsel at 103), it was PSA's intention to obtain the cargo and make a profit without concern for competing carriers. Not only is such conduct unfair among shippers but it is unfair to such carriers which complied with law and filed their tariffs.

The Section 15 Issue

To determine whether persons have entered into agreements without filing them with the Commission, in violation of section 15 of the 1916 Act,

²²This advice from SSI's counsel is curious in view of the fact that SSI advertised a spotting and pickup service "within 8 mile radius of downtown Anchorage" and sometimes without designating any particular radius. How did the vans get from the shipper's place of business to dockside in Anchorage if not by motor carriage, and if that is a port-to port service, as the letter indicates, then its author agrees with my preceding discussion that port-to-port service may include an incidental pickup and delivery service in a port area.

there are three necessary elements. In *Hong Kong Tonnage Ceiling Agreement*, 10 F.M.C. 134, 140 (1966), the Commission listed them as follows: 1) an agreement; 2) common carriers by water or other persons subject to the 1916 Act; 3) anticompetitive or cooperative activity of the types specified in section 15. Furthermore, it has been established that to qualify as an agreement subject to section 15, the agreement must be one between two or more carriers subject to Commission jurisdiction, which agreement constitutes an ongoing relationship over which the Commission has a continuing duty of surveillance. See *F.M.C. v. Seatrain Lines, Inc.*, 411 U.S. 726, 729 (1973); *Agreement No. 9955-I*, 18 F.M.C. 426, 451-458 (1975).

Section 15 of the 1916 Act (46 U.S.C. app. sec. 814) provides in pertinent part:

Every common carrier by water . . . shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier . . . giving or receiving special rates, accommodations, or other special privileges or advantages; . . . or in any manner providing for an exclusive, preferential, or cooperative working arrangement. . . .

Any agreement and any modification or cancellation of any agreement not approved or disapproved by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval . . . it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement. . . .

This record contains ample evidence of agreements between PSA, SSI, and AGM, in which PSA and SSI enjoyed special privileges and advantages and in which they engaged in cooperative working arrangements without filing such agreements.

The evidence on this issue is well summarized by Hearing Counsel. (See Brief of Hearing Counsel at 106-111.) As they state, PSA, SSI, and AGM, the parties to these agreements, were all common carriers by water subject to the 1916 Act. AGM was in fact incorporated in 1982 in order to fill a need for vessel space in the face of an upsurge of traffic. A space-charter agreement was entered into in 1982 between AGM and PSA to run from March 15 to July 1982, specifically to guarantee space to PSA for forthcoming movements of PSA cargo and, in fact, 80 to 90 percent of AGM's space ultimately went to PSA. Under the terms of the space-charter agreement, AGM agreed to provide PSA with space that PSA required at a guaranteed rate, and PSA agreed to pay for a minimum of cargo units on the first AGM voyage regardless of whether it furnished that volume of cargo. PSA therefore obtained a particularly valuable advantage in securing space in view of the expected shortage of vessel space at that time. Beyond this special privilege and advantage, the space-charter agreement embodied a cooperative working arrangement

between AGM and PSA which, among other things, enhanced both carriers' competitive abilities. Thus, for example, in return for the space privileges, PSA also assisted AGM in various ways, for example, by advancing certain of AGM's expenses, giving loans, providing office space, etc. Officers and shareholders of AGM shared common interests with PSA as either consultants or employees. For example, Mr. Moesh, a director and part owner of AGM, acted as "consultant" to PSA, helping to set rates and negotiating rates with underlying water carriers on PSA's behalf. Edward O'Brien, named President of AGM after being promised the job by Mr. Moesh, performed public relations for PSA and certain tasks for Ocean Dock Industries, PSA's unloading agent in Anchorage. Consultants employed by PSA to solicit cargo in PSA's name were also employed by AGM to conduct sales and solicitation. Mr. Donadel, PSA's Vice-President, solicited customers for PSA and AGM and he and Mr. Pierce, AGM's general manager, engaged in joint solicitation of customers. Mr. Pierce even provided sales leads to PSA through Mr. Donadel and discussed using PSA as an alternative to using AGM, even though PSA and AGM were competing for the same cargo.

In addition to the above working arrangements, AGM and PSA entered into a voyage-charter agreement on June 15, 1982, to run to the end of the 1982 calendar year. Under the terms of this agreement, PSA agreed to charter space on AGM barges returning from Anchorage to Seattle. AGM was responsible for providing fully-equipped vessels and operating them while PSA agreed to assume all liability and responsibility for the cargo. This agreement was entered into between Mr. Pierce, AGM's general manager, and Marion Davis, Secretary-Treasurer and general manager of PSA. It was designed to give Mr. Davis and Ray Fendenheim, a consultant to AGM and PSA and a director of SSI, the ability to ship crushed automobiles from Anchorage to Seattle under the name of SSI.

SSI, which was incorporated on July 27, 1982, to "engage in any phase of the business of transportation," transported its cargo on AGM barges through coordinated efforts with PSA, whose work orders covering the SSI cargo were used. In addition, AGM billed both SSI and PSA as the shipper for the freight charges and AGM advanced freight and drayage charges to SSI. Mr. Davis, PSA's general manager in Alaska, had moreover, requested AGM to advance freight charges to SSI on southbound voyages.

The written space-charter and voyage-charter agreements, the coordinated efforts and interrelationship among employees and officers of the three companies, and the evidence showing actual voyages and cargo carried by AGM in the name of PSA and SSI are more than sufficient to support the finding that PSA, SSI, and AGM had entered into and carried out

cooperative working arrangements and had enjoyed special privileges and advantages in conducting their common-carrier solicitations and services.²³

The Penalty Issues

The final issues set forth in the Commission's Order of Investigation and Hearing concern the questions whether penalties should be assessed against PSA and SSI and, if so, in what amounts.

Hearing Counsel urge significant penalties against these two respondents. They argue that PSA and SSI knowingly violated the law and, in the case of PSA, the violations were by "obvious design." (Brief of Hearing Counsel at 111.) They argue, furthermore, that the Commission should consider PSA's and SSI's deliberate actions which impeded the Commission's investigation and the administrative proceeding. They contend that "the PSA and SSI violations were a well thought out deliberate scheme" (Brief at 112) and that "the nature, extent, and gravity of the violations in this case are all severe." (*Id.*) They urge a "severe" penalty under the factors set forth in the Commission's regulations (46 CFR 505). They cite the fact that the maximum penalty for violation of both section 2 of the 1933 Act and section 15 of the 1916 Act is \$1,000 per day for each day such violation continues. For PSA, which operated without a tariff from March 15, 1982, to around January 1, 1985 (1019 days), this would be over \$1 million in penalties for the section 2 violation; for section 15, the amount would be \$289,000 (for the period March 15, 1982, to December 31, 1982, i.e., 289 days). The maximum penalty for PSA would therefore be almost \$1.3 million. For SSI, the maximum penalty for the section 2 violation would be \$105,000 (July 27, 1982 to November 9, 1982, i.e., 105 days); and for the section 15 violation, \$105,000 (July 27, 1982 to November 9, 1982). Thus, the maximum penalty for SSI would be \$210,000. Total maximum penalties for both PSA and SSI would amount to approximately \$1.5 million.

As discussed in Judge Glanzer's decision, cited above, at 11-12, the Commission considers a number of factors when determining the amount of penalties to assess, which factors are set forth in 46 CFR 505.3(b). The factors to consider are: "the nature, circumstances, extent and gravity of the violation committed and the policies of deterrence and future compliance with the Commission's rules and regulations and the applicable statutes. The Commission shall also consider the respondent's degree of culpability, history of prior offenses, ability to pay and such other matters as justice requires." Moreover, under the previous regulations of the Commission regarding assessment of penalties, the Commission recognized the specific

²³ It bears repeating, however, that respondent AGM, which has settled with the Commission and is now dissolved, according to the terms of the settlement which the Commission has finalized, has waived the defenses it would have argued and in return is not to be bound by the above findings as matters of res judicata or collateral estoppel. (Initial Decision of Judge Glanzer, cited above, at 14.)

consideration that "willful and substantial violations" could be dealt with more severely than violations which were "accidental or technical" in nature. These criteria have, in effect, been carried forward into the current regulation. See *Marcella Shipping Co., Ltd.*, 28 F.M.C. 259, 272 (1986); *Cari-Cargo International, Inc., Jorge Villena, and Sea Trade Shipping*, 28 F.M.C. 394, 407 (1986); Judge Glanzer's Initial Decision, cited above, at 12 n. 11, and case cited therein.

In considering the "nature, circumstances, extent and gravity of the violation committed and the policies of deterrence and future compliance" with law in this case, it appears that the violations were particularly egregious. As was noted in *Cari-Cargo International, Inc.*, cited above, 28 F.M.C. at 405-406, the requirement that carriers file their tariffs and adhere to them strictly is extremely important to effective protection of the shipping public and industry. Indeed, as was observed in that case, "[T]he enforcement of these laws goes to the very heart of the Commission's responsibilities, and the Commission and courts have long recognized the extreme importance of these laws (i.e., tariff-filing and adherence laws). *Id.* In fact, the Commission has emphasized the critical need to enforce tariff-filing laws and has stated in one case (*Ghiselli Bros. v. Micronesia Interocean Line, Inc.*, 13 F.M.C. 179, 182 (1968):

The requirement of the act that all rates should be published is perhaps the chief feature of the scheme provided for the effective outlawing of all discriminations. If this portion of the act is not strictly enforced, the entire basis of effective regulation will be lost. Secret rates will inevitably become discriminating rates.

Not only were the violations committed by PSA and SSI extremely serious but they were not merely inadvertent. The Commission has long held that one who "intentionally disregards" law or is "plainly indifferent" to law or persistently fails to inform or even attempt to inform himself of the requirements of law has acted "knowingly and willfully." See *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483, 486 (1954); see also the discussion and cases cited in *Marcella Shipping Co., Ltd.*, cited above, 28 F.M.C. 273.

The record in this case shows more than a pattern of indifference. It shows that a group of people operating PSA and SSI, who were not unsophisticated novices, chose to ignore the tariff-filing requirements of law, in the case of PSA, for almost three years, at least, as far as this record shows. Furthermore, in the case of SSI, its counsel advised the I.C.C. that it was operating as a carrier subject to F.M.C. regulation. In the case of PSA, furthermore, its Vice-President, Mr. Donadel, was informed by Mr. Carlos Niemeyer, F.M.C. District Investigator, that even if PSA were a shippers' association, it might have to file a tariff with the Commission as shown by previous Commission decisions. Mr. Donadel was so informed in May of 1982. (Ex. 6 at 4-5.)

Both during the pre-docketed investigation of PSA's and SSI's activities and during the docketed proceeding, these respondents exhibited scant cooperation and, on the contrary, impeded the investigations. F.M.C. investigator Carley was given no access to PSA's documents from the time he began his investigation until after May of 1985, after the formal proceeding had been docketed, and then, only pursuant to a subpoena duces tecum. PSA's failure to respond to Mr. Carley's telephone calls and office visits made it necessary for Mr. Carley to send certified letters in late November 1982 to PSA's Vice President, Mr. Donadel, and PSA's general manager in Alaska, Mr. Davis, requesting information and documents. PSA was again advised that it might have been operating as a common carrier by water subject to F.M.C. jurisdiction. Mr. Carley's letters and inquiries were referred to Mr. Stern, PSA's counsel in Anchorage, and Mr. Carley was advised to contact Mr. Stern. However, Mr. Carley's contacts with Mr. Stern were fruitless. First, Mr. Stern assured Mr. Carley that written responses would be forthcoming. Later, during the months of May and June 1983, Mr. Stern refused to accept or return any telephone calls although Mr. Carley was told that Mr. Stern was in the office working.

Even when PSA later answered Hearing Counsel's interrogatories, which had been served in October 1984, PSA, through Mr. Davis, gave answers regarding PSA's employees which were later shown to be erroneous. Attempts to serve PSA officials, employees, or consultants with subpoenas were difficult and on one occasion the process server was told that PSA persons were purportedly out of town. PSA documents were, however, eventually furnished to Mr. Carley by Mr. World PSA's counsel, pursuant to subpoena.

In the face of evidence showing the gravity of the violations, knowing and willful refusal to comply with law or even to attempt to comply with law, refusal to cooperate with the Commission's investigators, and a history extending over several years of persistent violations, there is little or nothing in the nature of mitigating factors. SSI never appeared or offered any defense. PSA's defenses consist of a thin, transparent argument that it was a shippers' association and that its services included delivery beyond portside in Alaska, neither of which defenses is valid according to previous Commission decisions. Its final defense, namely, that the Commission ought not to follow its previous decision holding shippers' associations in the Alaskan trade to be subject to tariff-filing requirements under the 1933 Act, is equally empty. If PSA really believed it had good reasons to be exempt from tariff-filing, it could have asked the Commission for a declaratory order under Rule 68 or for an exemption under section 35 of the 1916 Act. The request, in any event, might not have qualified in view of the fact that PSA engaged in discriminatory, ad hoc rating practices.

Aside from the above defenses presented in its post-hearing brief, PSA presented no direct case at the hearing. Therefore, there is little for me

to consider in mitigation, such as ability to pay. All that PSA says on brief is that it "ceased business in January 1985, and is presently insolvent." As I comment below, this untested assertion does not warrant inaction by the Commission.²⁴

The primary consideration, in view of the above record showing culpability and the gravity of the offenses committed by PSA and SSI is the factor of deterrence. This Commission has been an active body for enforcement of the shipping laws. It would be ludicrous in the face of a record such as that in this case to excuse PSA and SSI on the ground that they have ceased business and have been dissolved and simply to terminate the proceeding. Such inaction would make a travesty of law enforcement and have absolutely no deterrent effect. This record warrants imposition of severe penalties for the lengthy and serious violations committed by PSA and SSI, especially PSA, as Hearing Counsel urge. Anything short of such action would send a message to persons engaged in the Alaskan and other trades that they may violate laws with impunity, no matter how egregious and willful the violations and no matter what harm they may have caused to shippers and law-abiding carriers competing with them. Furthermore, the record shows that PSA earned gross revenues of \$7.4 million on 9 AGM voyages in 1982 (paying AGM \$3.3 million in freight charges). Therefore, excusing PSA now because of an untested assertion of insolvency would send a similar message to entrepreneurs in Alaska, namely, go into the common carrier business, earn sizeable revenues, totally ignore federal shipping laws, and when you are finally investigated, close down the business, let the corporation be dissolved, and plead insolvency. If such behavior is excused, why would not other persons be encouraged to try to do the same thing in the future or even the same persons who ran PSA and SSI?

In *United States of America v. Atlantica, S.p.A.*, 478 F.Supp. 833 (S.D.N.Y. 1979), a case involving four and one-half years of rebating by a carrier in the foreign trade, the court considered such factors as willfulness of the violation, degree of harm to the public, the extent to which the carrier may have profited by the violations, and ability to pay. (478 F.Supp. at 836.) The court, however, found the most important factor to be that of deterrence. *Id.* It found that the carrier had profited from its rebating by earning \$1.5 million in net freight revenues and had acted willfully. Furthermore, although the carrier had argued that "it cannot pay any penalty because it is in voluntary liquidation under Italian law," the court found this not to be a serious consideration (*id.*) and imposed heavy penalties (\$1,345,000) (478 F.Supp. at 837).²⁵

²⁴ As regards PSA's finances, furthermore, the record shows that Hearing Counsel's efforts to obtain certain financial information about PSA from PSA were resisted and were unsuccessful.

²⁵ The question of how the Commission may ultimately recover any penalties from dissolved corporations is one for enforcement officials and should not inhibit the Commission from sending the necessary message of deterrence by assessing significant penalties. However, it should be noted that the mere dissolution of a corporation may not mean that no moneys can ever be recovered. The Model Business Corporation Act,

For the sake of effective law enforcement and deterrence and for the sake of carriers, shippers, and the public whose interests have been violated over a long period of time by a pattern of willful violations of law, a severe penalty is warranted. Determination of the precise amount of penalties is, as the Commission has noted, "not an exact science," and there is a "relatively broad range within which a reasonable penalty might lie." *Midland Pacific Shipping Co., Inc.—Independent Ocean Freight Forwarder License*, 25 F.M.C. 715, 719 (1983). In two recent cases, *Cari-Cargo International, Inc.* and *Marcella Shipping Company, Ltd.*, cited above, respondents were assessed \$100,000 and \$150,000, respectively, for tariff-filing violations occurring over varying periods of time. Respondents in this proceeding were more sophisticated, however, and had even fewer mitigating factors in their favor. Furthermore, the degree of culpability and willfulness are greater in this case. In *Saipan Shipping Co., Inc. v. Island Navigation Co. et al.*, cited above, 24 F.M.C. 934, a case involving violations of section 15 and failure to file tariffs, reparation was awarded amounting to over \$250,000 plus further amounts to be determined even though the violations had ceased many months earlier. That case, somewhat like the instant one, involved the establishment of companies by one man or a small group of men as part of a deliberate plan.

After careful consideration of this record and the various factors relevant to the determination of the proper amount of penalties with special consideration of the need to deter other persons from trying to profit by conduct which constitutes willful disregard of law and consideration of the lack of meaningful mitigating factors, I find that a penalty of \$300,000 assessed against respondent PSA and \$50,000 assessed against respondent SSI, which was far less involved in the violations, will send the appropriate message of deterrence. Such penalties may be paid in equal monthly installments over a period not to exceed two years, commencing within 30 days after the Commission finalizes this order, or in such manner as the Commission may otherwise order if it reviews or modifies this decision. As was done in the *Cari-Cargo* and *Marcella* cases, furthermore, if respondents make good-faith payments over a minimum period of time, here, six months, they may, upon a proper and persuasive showing of changed events, petition

which the State of Alaska has substantially adopted, provides for suits and claims against corporations for two years after the corporation has dissolved. See *VII Martindale-Hubbell Law Directory* (1986 ed.) *Alaska Law Digest at 5*; section 105 of that Act; see also 19 Am Jur 2d, Corporations, secs. 2882; 2896-2900 (rev. ed. 1986). Criminal prosecutions have been continued against dissolved corporations, and fines have been levied against them notwithstanding their dissolution when state law allowed suits to continue against dissolved corporations. See *Melrose Distillers, Inc. v. U.S.*, 359 U.S. 271 (1959); *United States v. P.F. Collier & Son Corp.*, 208 F.2d 936 (7th Cir. 1953); 18B Am Jur 2d, Corporations, sec. 2140 (rev. ed. 1985); Annotation: 40 A.L.R. 2d 1396. Sometimes, even aside from the doctrine of "piercing the corporate veil," shareholders who continue in business may become personally liable for the wrongdoing of the dissolved corporation. See 19 Am Jur 2d, Corporations, sec. 2897 at 675 n. 10. In *Saipan Shipping Co., Inc. v. Island Navigation Co. et al.*, cited above, 21 SRR at 647, 651, reparation was awarded for violations of sections 15 and 18(b)(1) of the 1916 Act even though one or more of the respondents had ceased operations.

the Commission for a modification of this order and possible remittance of some or all of the remaining penalties.

(S) NORMAN D. KLINE
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 500-587]

DOCKET NO. 85-6

NOTICE OF INQUIRY CONCERNING INTERPRETATION OF SECTION 8(a) AND SECTION 8(c) OF THE SHIPPING ACT OF 1984

May 6, 1987

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission discontinues its inquiry concerning the interpretation of sections 8(a) and 8(c) of the Shipping Act of 1984 with regard to excepted commodities. The Commission determines that the issues raised are generally not subject to administrative resolution based on the record established in this proceeding. The Commission will include this record in the section 18 report to be submitted to Congress in 1989.

DATES: May 12, 1987.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Commission initiated this proceeding by a Notice of Inquiry published in the *Federal Register* (50 FR 10807-10810, March 18, 1985) which solicited public comment on the interpretation to be given to section 8(a), 46 U.S.C. app. 1707(a), and section 8(c), 46 U.S.C. app. 1707(c), of the Shipping Act of 1984 (Act or 1984 Act) with regard to excepted commodities.¹ The purpose of this inquiry was to obtain the most complete information available regarding the proper interpretation of sections 8(a) and 8(c) of the 1984 Act, and to establish a record which would enable the Commission to determine whether the questions raised could be addressed administratively or whether they require legislative clarification.

Interested persons were invited to comment on the proper treatment of excepted commodities and to respond to the following specific questions:

A. Is it lawful for an ocean common carrier or a conference of such carriers voluntarily to file a tariff with the Federal Maritime Commission covering a commodity which is excepted from mandatory tariff filing under section 8(a) of the Shipping Act of 1984?

B. Is it lawful for a conference, whether or not it has express enabling authority in its agreement, to agree on a rate covering a commodity which

¹Those commodities which are excepted from mandatory filing of tariffs or service contracts are: bulk cargo, forest products, recycled metal scrap, waste paper, and paper waste. 46 U.S.C. app. 1707(a)(1).

is excepted from mandatory tariff filing under section 8(a) of the Shipping Act of 1984?

C. May the Federal Maritime Commission require that a conference, which has agreed to a rate and filed a tariff covering an excepted commodity, allow for a right of independent action as provided for under section 5(b)(8) of the Shipping Act of 1984?

D. Is it lawful for an ocean common carrier or a conference to voluntarily file a service contract which covers an excepted commodity?

A total of 20 comments were filed in response to this Notice of Inquiry.² Comments were received from the following persons: (1) United States Department of Justice (DOJ); (2) Chemical Manufacturers Association (CMA); (3) American Paper Institute, Inc. (API); (4) National Association of Recycling Industries, Inc. (NARI); (5) Western Shippers Group (WSG); (6) Great Southern Paper; (7) Central National-Gottesman, Inc.; (8) Tampa Port Authority (Tampa); (9) Terminal Operators Conference of Hampton Roads (TOCHR); (10) The Pacific and Arctic Railway and Navigation Company and Skagway Terminal Company (PARN/STC); (11) Journal of Commerce; (12) Sea-Land Service, Inc. (Sea-Land); (13) U.S.-Flag Far East Discussion Agreement (Agreement No. 10050); (14) Inter-American Freight Conference (IAFC); (15) Transpacific Westbound Rate Agreement (TWRA); (16) "8900" Lines, U.S. Atlantic & Gulf Ports/Italy, France & Spain Freight Conference, and U.S. Atlantic Ports/Eastern Mediterranean & North African Freight Conference (Mediterranean Conferences); (17) Trans-Pacific Freight Conference of Japan/Korea and Japan/Korea-Atlantic and Gulf Freight Conference (Japan/Korea Conferences); (18) Atlantic and Gulf/West Coast of South America Conference, United States Atlantic and Gulf/Colombia Conference, United States Atlantic and Gulf/Ecuador Conference, United States Atlantic and Gulf/Venezuela Freight Association, United States Atlantic and Gulf/Southeastern Caribbean Conference, and United States Atlantic and Gulf/Hispaniola Steamship Freight Association (Latin American Conferences); (19) North Europe-U.S. Pacific Freight Conference, Pacific-Australia/New Zealand Conference, and Pacific Coast European Conference (Pacific Conferences); and (20) United States-European Carrier Associations (USECA).³ A summary of the comments is attached as an Appendix to this Notice of Discontinuance.⁴

² The California Association of Port Authorities submitted a letter, dated April 15, 1985, that declined comment inasmuch as the subject matter of the inquiry did not include terminal tariffs. Subsequently, the Association inadvertently submitted a letter, dated May 15, 1985, that did make a substantive comment on the issues in this proceeding. On May 20, 1985, the Commission received a telex from the Association stating that the May 15, 1985 letter had been mistakenly filed and requesting that it be withdrawn. Accordingly, the May 15, 1985 letter of the California Association of Port Authorities is not part of the record in this proceeding.

³ USECA consists of the following conferences: North Europe-U.S. Gulf Freight Association, Gulf-European Freight Association, North Europe-U.S. Atlantic Conference, U.S. Atlantic-North Europe Conference, and Pan-Atlantic Carrier Trade Agreement.

⁴ The Appendix is not included in the *Federal Register* publication of this notice.

II. DISCUSSION

A. Voluntary Tariff Filing.

The first question raised in the Notice of Inquiry is whether a common carrier or conference may voluntarily file a tariff on an excepted commodity. Section 8(a) of the 1984 Act requires common carriers and conferences to file tariffs with the Commission showing their rates and charges. Certain commodities, however, are expressly excepted from this mandatory tariff filing requirement. As relevant to this Inquiry, section 8(a)(1) provides 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.

Section 8(a) basically continues the tariff filing requirement of section 18 of the Shipping Act, 1916, 46 U.S.C. app. 817. The class of excepted commodities first created by Congress in 1961 has been further expanded by the 1984 Act to include recycled metal scrap, waste paper and paper waste. Section 8(a), like its predecessor section 18, does not expressly address the question of whether a common carrier or conference may voluntarily file a tariff on an excepted commodity.

The conferences' comments generally contend that there is no need to go beyond the plain language of the statute for an answer to this question. They argue that the statute merely excepts certain commodities from mandatory tariff filing and that nothing in the language of section 8(a) or any other section of the 1984 Act prohibits voluntary filing. In the absence of an express prohibition, they argue that voluntary filing is lawful and should be permitted. The conferences point out that nowhere in the legislative history is voluntary filing prohibited. Moreover, they note that voluntary filing is a long standing practice of which Congress was aware and which it had several opportunities to change. They argue that in the face of Congressional knowledge and inaction, it can be presumed that Congress has endorsed this practice.

The shipper groups and the Department of Justice recognize that the Act does not prohibit voluntary filing. They do not agree, however, that the analysis should be terminated at that point. Rather, they proceed to the legislative history of the 1984 Act, as well as amendments to the 1916 Act, to determine the underlying purpose for excepting certain commodities from filing and how that purpose is affected by allowing filing. They find in the legislative history of the 1984 Act, especially in the legislative history of the debate over whether to retain a tariff filing system, a Congressional intent not to expand that system. In the legislative history

of the amendments to section 18 of the 1916 Act, they see a purpose to preserve an unregulated market for excepted commodities.

In 1961, Congress passed an amendment to the 1916 Act, Pub. L. No. 87-346, 75 Stat. 764 (1961) (1961 Amendment), which for the first time provided for the mandatory filing of tariffs with the Federal Maritime Commission. This same legislation, however, excepted from mandatory tariff filing "cargo loaded and carried in bulk without mark or count."⁵ The Notice of Inquiry noted the benefits to shippers of bulk cargo in terms of greater pricing flexibility afforded by the 1961 Amendment. In addition, the conference comments draw attention to the fact that carriers and conferences were also intended beneficiaries of the 1961 Amendment.

In 1963, Congress further amended the 1916 Act, Pub. L. No. 88-103, Stat. 129 (1963 Amendment), to exclude lumber from the mandatory tariff filing requirement. Again, both carriers' and shippers' interests were apparently served by this expansion of the list of excepted commodities. Carriers in the Northwest found themselves in intense competition with Canadian carriers and desired an exception from tariff filing for lumber in order to meet the competitive conditions in this market. Lumber exporters also supported the exception in order to meet the strong competition of Canadian lumber interests.

In 1965, Congress passed yet another amendment to the 1916 Act, Pub. L. No. 89-303, 79 Stat. 1124 (1965) (1965 Amendment), which cut back on the lumber exception. It distinguished between softwood and hardwood lumber and restored mandatory tariff filing for hardwood lumber. This legislation was intended primarily to benefit the hardwood lumber industry which sought the more stable ocean transportation rates that could be achieved by tariff filing.

As is well known, the entire tariff filing regulatory regime was intensely debated during the legislative process that led to the passage of the 1984 Act. A number of legislative proposals would have eliminated tariff filing and enforcement by the Commission. Although Congress continued tariff filing, it specifically directed the Commission to report on the continuing need for the statutory requirement that tariffs be filed with and enforced by the Commission. Congress also expanded the list of excepted commodities by adding recycled materials. The purpose of this change was to enable recycled materials to compete with virgin commodities.

⁵The comment filed by USECA identifies an earlier instance in which bulk cargo was excepted from a tariff filing requirement. In 1935, the Shipping Board undertook an investigation pursuant to section 19(1)(b) of the Merchant Marine Act, 1920, 46 U.S.C. app. 876(1)(b), into certain rate-cutting practices in the export trades of the United States. This investigation ultimately led to a rule which required common carriers in the export trade to file tariffs with the Board. The rule, however, expressly excepted "cargo loaded and carried in bulk without mark or count." The purpose of the bulk cargo exception was to exclude tramp operators from the rule because "... the evidence of record in this investigation does not show that competitive methods employed by such carriers in our export trades have produced conditions unfavorable to shipping." *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 470, 499 (1935).

Having reviewed the legislative history of the 1916 Act and 1984 Act with regard to excepted commodities, it is difficult to give a definitive answer to the first question posed in the Notice of Inquiry, namely, whether voluntary filing of a tariff covering an excepted commodity is lawful. A simple answer may be that there is nothing in the language of the Act or the relevant legislative history which expressly prohibits it. Nevertheless, there remains an apparent contradiction in allowing voluntary filing. The fundamental purpose of excepting certain commodities, beginning with the 1961 Amendment, was to remove those commodities from the requirements of the tariff system. That purpose would appear to be undermined, if not defeated, by voluntary filing.

Voluntary filing appears to run counter to the apparent purpose of allowing excepted commodities to be priced in a free market. There is no indication, however, that Congress directly considered the impact of voluntary filing on the underlying policy of excepting certain commodities. Therefore, any further action on this question appears problematic. There simply does not appear to be an adequate basis for resolving this question administratively. This is particularly so in light of the fact that voluntary tariff filing has been permitted since 1961. There would need to be a clearer basis for reversing this policy at this time.

Such a basis does not appear in the record established in this Notice of Inquiry. Although shippers opposed voluntary filing on legal grounds, none suggested the presence of any existing problems brought about by allowing voluntary filing. Carrier interests, on the other hand, did point out areas in which business operations or carrier-shipper relationships would be disrupted by a change in policy. The Commission therefore will continue its current policy and maintain the status quo by continuing to accept tariffs on excepted commodities that are voluntarily filed and subjecting such filings to the same tariff regulations as apply to non-excepted commodities.

B. Collective Ratemaking.

The second question raised in the Notice of Inquiry is whether collective ratemaking on excepted commodities is lawful. Section 4(a)(1) of the 1984 Act, 46 U.S.C. app. 1703(a)(1), establishes jurisdiction over agreements by or among ocean common carriers to "discuss, fix, or regulate transportation rates, including through rates, cargo space accommodations, and other conditions of service." Section 4(b)(1) of the 1984 Act, 46 U.S.C. app. 1703(b)(1), applies to marine terminal operator agreements to "discuss, fix, or regulate rates or other conditions of service." These provisions essentially continue in the 1984 Act similar provisions from the 1916 Act. See 46 U.S.C. app. 814.

Conferences contend that the language of section 4(a) confers general ratemaking authority upon conferences and does not in any way limit that authority with regard to particular commodities. They argue that this grant of authority is so clear that there is no need to resort to legislative

history. The conferences argue further that the legislative history does not reveal any intent to exclude excepted commodities from their ratemaking authority. In fact, they contend one of the purposes of the 1961 and 1963 Amendments was to enable conferences and carriers to compete with tramps for bulk and other excepted cargoes. They contend that Congress was aware of conference ratemaking on excepted commodities and may be presumed to have endorsed it.

The Department of Justice and shipper groups argue that section 4 must be read in light of the purpose to be achieved by excepting certain commodities from tariff filing. They contend that the legislative history of the excepted commodity amendments to the 1916 Act reveals an intent to preserve an unregulated market for rates on excepted commodities. That purpose is undermined, they contend, if collective ratemaking on excepted commodities is permitted. Moreover, they point out that with mandatory independent action, regular tariffed commodities are subject to more flexible pricing than excepted commodities. From their perspective, this is an ironic and incongruous result.

Prior to the 1961 Amendment, it appears that conferences fixed rates on all commodities including those which later were excepted by subsequent amendments. It also appears that during the consideration of the 1961, 1963, and 1965 Amendments, Congress was aware that conferences exercised ratemaking authority over excepted commodities. Moreover, in the 1984 Act, Congress did not remove such commodities from the Commission's jurisdiction.

With regard to the question of collective ratemaking, further review and analysis of the legislative history clarifies a number of factors which support conference authority: (1) both the 1916 Act and the 1984 Act in unambiguous and unqualified language provide for a grant of general ratemaking authority to conferences; (2) the legislative history of the tariff filing amendments dealing with excepted commodities does not reveal any express intent to restrict conference ratemaking authority over those commodities; (3) the Commission in the past has not challenged conference ratemaking authority over excepted commodities; and (4) Congress was aware that conferences exercised collective ratemaking on excepted commodities prior to 1961 and expressed no intention to prohibit that practice. The record in this proceeding supports, rather than calls into question, the authority of a conference to fix rates covering a commodity that is excepted from mandatory tariff filing under section 8(a). Therefore, no change in current Commission policy, which recognizes that authority, is warranted.

C. Independent Action.

The third question raised in the Notice of Inquiry is whether a conference, which has elected to agree upon a rate and file a tariff for an excepted commodity, may be required to allow its members a right of independent action on such a rate as provided for under section 5(b)(8) of the 1984 Act, 46 U.S.C. app. 1704(b)(8).

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AND SECTION 8(c) OF THE SHIPPING ACT OF 1984

The conference comments argue that section 5(b)(8) of the 1984 Act mandates independent action only with respect to those commodities which are required to be filed in a tariff by section 8(a) of the Act. The conferences contend that the language of section 5(b)(8) is clear and that there is no need to examine legislative history. One conference argues that this construction of section 5(b)(8) does not lead to an illogical result, but rather merely allows conferences to set rates on vital base cargo (*i.e.*, excepted commodities), but to provide for independent action on 8(a) tariff items.

Shipper comments generally dispute the premise assumed by this question, inasmuch as they argue that collective ratemaking is not permissible. Assuming *arguendo* that collective ratemaking is lawful, shippers contend that independent action should be permitted. Otherwise, according to the shipper comments, excepted commodities would enjoy less rate flexibility than commodities subject to mandatory tariff filing. These comments argue that the Commission could mandate a right of independent action on any tariff voluntarily filed for an excepted commodity. One comment states that the Commission could promulgate such a rule pursuant to its general rulemaking authority under section 17(a) of the Act, 46 U.S.C. app. 1716(a).

Section 5(b)(8) mandates that each conference agreement provide a right of independent action to its members with respect to any "rate or service item *required* to be filed in a tariff under section 8(a)." (Emphasis added.) Section 5(b)(8) does not "require" independent action on rates on excepted commodities because such rates by definition are not subject to the section 8(a) tariff filing requirement. The introduction of a broad mandatory right of independent action into the scheme of the 1984 Act appears to have resulted in an anomaly with regard to the treatment of excepted commodities. A conference may fix rates and file tariffs covering these commodities but does not appear to be required by the Act to allow members to take independent action. Thus, commodities subject to mandatory tariff filing may enjoy greater pricing flexibility than excepted commodities voluntarily filed in a tariff.

The Commission might attempt to address this dichotomy under its general rulemaking authority. However, given the unambiguous language of section 5(b)(8), the lack of legislative history indicating Congressional intent, the absence of a factual record upon which to base administrative action, and the unknown implications of any modification of the existing regulatory regime, it would appear at this time that the matter is best left to resolution by Congress. Therefore, the Commission will continue the current policy which allows a conference to determine whether or not to allow its member lines to take independent action on excepted commodities.

D. Service Contracts.

The fourth question raised in the Notice of Inquiry is whether an ocean common carrier or a conference may voluntarily file a service contract which covers an excepted commodity.

The conferences generally take the position that the Commission should continue to allow the voluntary filing of service contracts covering excepted commodities. A number of conferences point out that nothing in the 1984 Act prohibits such voluntary filing. One conference states that filing promotes competition by providing better information on market conditions to shippers. Other comments allege that certain adverse consequences would occur if voluntary filing were prohibited.

The Department of Justice and shipper groups oppose voluntary filing. One shipper group alleges that voluntary filing reduces rate flexibility on excepted commodities. Another argues that voluntary filing is contrary to the policy of the 1984 Act.

Voluntary filing of service contracts covering excepted commodities does not appear to trigger the same concerns as arise in connection with the voluntary filing of tariffs. Service contracts are negotiated in an open market between carrier and shipper. The stability established by the contract is mutually agreed to by both parties. Service contracts exist for an extended period of time. There is therefore less concern for speedy and flexible adjustments in terms. Moreover, the legislative history of the excepted commodity amendments to the 1916 Act does not have direct relevance to service contracts. Nevertheless, the question of service contracts on excepted commodities has been raised in Docket No. 86-6, *Service Contracts*, and appears to be more appropriately handled in that proceeding. See "Notice of Proposed Rulemaking," 51 FR 5734 (February 18, 1986).

III. CONCLUSION

The Notice of Inquiry focused on certain issues which arise in confirming the concept and treatment of an excepted commodity with the tariff filing, concerted ratemaking, independent action and service contract provisions of the 1984 Act. A fundamental tension occurs in the statutory scheme when an excepted commodity, which apparently is intended to be governed only by free market forces, is subjected to the additional regulatory restraints associated with tariff filing or the collective control of concerted ratemaking. This inherent tension existed under the 1916 Act. It continued under the 1984 Act and was complicated further by the Act's inclusion of a mandatory right of independent action on rate or service items required to be filed in a tariff.

The purpose of the Notice of Inquiry was to reconcile, if possible, the apparently conflicting provisions of the 1984 Act and to better define the parameters of the regulatory scheme envisioned by Congress. In particular, the Notice raised certain issues to determine if there were areas where the apparent conflict could be resolved through rulemaking. The key to this effort is determining Congressional intent.

The language of the 1984 Act, as well as that of the predecessor 1916 Act, and relevant legislative history, does not always clearly reveal the intent. Moreover, one limitation of the legislative history is that it is not

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AND SECTION 8(c) OF THE SHIPPING ACT OF 1984

25 years old and addresses a different statutory scheme. It would appear, therefore, that the broad policy issues raised in the Notice of Inquiry require legislative attention because there does not appear to be a clear enough basis for an administrative resolution through rulemaking. In this posture, the best course appears to be to maintain the status quo.

In summary, the Commission will continue to accept tariffs on excepted commodities filed on a voluntary basis. The longstanding authority of conferences to collectively set rates on excepted commodities will continue to be recognized. A right of independent action on excepted commodity rate or service items will remain a matter of conference discretion. And the issue of filing service contracts covering excepted commodities will be resolved in Docket No. 86-6, *Service Contracts*.

Although no change is being made in current policy, the Commission believes that the issues raised in the Notice of Inquiry are significant and are of continuing concern and should be included in the reports required by section 18 of the 1984 Act, 46 U.S.C. app. 1717, which, among other things, requires that the Commission report to the Congress on mandatory tariff filing. The issues raised in the Notice of Inquiry relate to tariff filing and the implications and consequences thereof. The Commission therefore will make the record established in this proceeding a part of its section 18 report.

THEREFORE, IT IS ORDERED, That the record in this proceeding, consisting of the Notice of Inquiry, the comments received, and this Notice of Discontinuance and Appendix summarizing the comments, shall be included in the report prepared by the Commission pursuant to section 18 of the Shipping Act of 1984; and

IT IS FURTHER ORDERED, That this proceeding is hereby discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

APPENDIX—SUMMARY OF COMMENTS

I. Voluntary Tariff Filing

A. Comments Opposing Voluntary Tariff Filing

The comments filed in opposition to voluntary filing of tariffs on excepted commodities recognize that the 1984 Act is silent on the question of whether voluntary filing is lawful. These comments therefore rely on the legislative history of the amendments to the 1916 Act dealing with excepted commodities.

DOJ argues that the legislative history of the excepted commodity amendments to the 1916 Act indicates that Congress intended to remove excepted commodities from the restrictions and limitations imposed by the tariff filing system, and that voluntary tariff filing by a single common carrier or a conference is contrary to the Congressional purpose.

API contends that the legislative history of the 1961, 1963 and 1965 Amendments to the 1916 Act demonstrates that Congress intended that excepted commodities be unregulated with regard to carrier or conference rate practices. According to API, the purpose of excepting certain commodities was to preserve their competitive standing. API contends that market forces should be permitted to determine applicable rates.

CMA contends that voluntary tariff filing is inconsistent with the legislative history of the 1916 Act Amendments. CMA notes that the objectives of tariff filing are to apprise shippers and the Commission of lawful rates and to enable the Commission to enforce the 1984 Act's prohibition against unjust discrimination among similarly situated shippers. According to CMA, the harmful byproducts of tariff filing include its stabilizing effect on rates and the increased regulation required to enforce the tariff filing system. CMA finds nothing in the history of the 1961, 1963 and 1965 Amendments to the 1916 Act that would suggest that Congress intended to permit voluntary filing of tariffs covering excepted commodities. In particular, CMA notes that the 1965 Amendment reinstated tariff filing for hardwood lumber but continued the exception for softwood lumber in order to retain rate flexibility. If voluntary filing is permitted, CMA asserts that the Congressional purpose is defeated.

WSG points out that, historically, excepted commodities have moved in a free market where rates can change dramatically in response to market conditions. WSG states that the Commission should preserve this competitive market and declare that voluntary filing of tariffs is unlawful.

A number of comments suggest that the extensive debate over retention of the tariff filing system and enforcement by the Commission in the legislative history leading to the passage of the 1984 Act supports the position that voluntary filing should not be permitted. API notes that some legislative proposals would have eliminated tariff filing and enforcement in order to encourage greater competition in rates and services. API contends that these proposals were put aside in favor of other means of offsetting

carrier and conference market power. API notes, however, that certain commodities were excepted from tariff filing. API contends that the rates for these commodities were intended to be subject to market forces. API concludes that the legislative history of the debate over tariff filing is wholly inconsistent with any interpretation which would permit voluntary filing of tariffs, where not required, and the subsequent enforcement of such tariffs by the Commission.

DOJ also refers to the debate over tariff filing and states that even though Congress decided to retain the tariff filing system under the 1984 Act, it recognized that tariff filing is inconsistent with consumer interests and that any expansion of the tariff regime is contrary to the Congressional compromise in the 1984 Act, which retained the tariff system but reduced its anticompetitive impact with other specific new reforms. DOJ contends that the purpose of excepting certain commodities is to remove them entirely from the price stabilizing effect of a tariff and thereby provide shippers of those commodities with the flexibility to negotiate rates. DOJ asserts that voluntary tariff filing inhibits that flexibility because once a tariff is filed no other rate can be charged and because any rate increase is subject to a 30-day notice requirement. According to DOJ, voluntary filing frustrates the purpose of the Act because it removes the commodity from an unregulated market.

NARI contends that excepted commodities are not subject to the jurisdiction of the Federal Maritime Commission and have been deregulated by law under the 1984 Act. NARI contends that Congress was responding to *National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 658 F.2d 816 (D.C. Cir. 1980) when it added recycled metal and paper to the list of excepted commodities, and that its intent was to remove them from the Commission's jurisdiction. NARI states that when tariff filing was continued, it was understood that there would be no filing of tariffs on excepted commodities.

Finally, a number of comments argue that policy considerations support a prohibition on voluntary filing.

CMA notes that the 1984 Act added recycled commodities in order to put recycled commodities on the same footing as virgin bulk commodities. Permitting voluntary filing of tariffs on recycled commodities allegedly would allow a carrier to disrupt this competitive parity.

NARI expresses concern over the potential for discrimination that may arise from allowing ocean common carriers and conferences to voluntarily file tariffs on excepted commodities. NARI fears that this would enable carriers and conferences selectively to discriminate against recycled commodities by voluntarily filing tariffs and service contracts applicable to them while other tariffs and service contracts covering competing virgin commodities are fixed in secret and seldom, if ever, filed. NARI argues that this flies in the face of Congress' determination to promote the competitiveness of recycled commodities. NARI finds further evidence of this Con-

gressional policy in the field of railroad legislation and court decision interpreting that legislation.

CMA also contends that voluntary filing is contrary to the minimum government intervention purpose of the 1984 Act. For example, in the case of bulk carriers, CMA argues that the Commission would be required to expend resources to determine whether a bulk carrier was a common carrier. The Commission would then be required to enforce the Act's tariff provisions and thereby allegedly incur further unnecessary administrative burdens.

CMA argues that voluntary filing does not achieve benefits and that no legitimate regulatory purpose would be served by allowing it. CMA states that voluntary filing would not enable the Commission to enforce the prohibited acts that are intended to protect against discrimination among similarly situated shippers because voluntary filing would not provide shippers with an adequate "price list."

CMA also notes that the 1984 Act directs the Commission not to regulate excepted commodities in the area of terminal tariffs. CMA concludes that the legislative history thus demonstrates that voluntary filing produces results at odds with Congressional objectives. Finally, CMA argues that voluntary filing is harmful to U.S. trade, particularly in the export of bulk commodities.

B. Comments Supporting Voluntary Tariff Filing

Several conferences argue that there is nothing in the legislative history of the amendments to the 1916 Act regarding excepted commodities that would indicate that Congress intended to preclude the voluntary filing of tariffs on those commodities. TWRA, for example, states that the purpose of the 1961 Amendment was to lessen the administrative burden on carriers and permit them to compete with tramp vessels. IAFC states that the purpose of the 1961 Amendment was to assist conferences as well as shippers and enable liner carriers to compete with tramps for "bottom cargo." IAFC finds support for this assertion in the following testimony of Chairman Stakem before the Merchant Marine and Fisheries Committee:

MR. DREWRY. Now, on page 7 of the statement, you would exclude from the filing requirements cargoes loaded in bulk without mark or count.

Take the case of a big shipper who deals in all kinds of things, one of these big American enterprises that produces hard manufactured goods and also deals, maybe, in chemicals in bulk or other bulk commodities.

Would he be thus protected as far as any shipments he was to make of bulk cargoes? Would his shipper contract with the conference allow him to be free to ship any way he wanted to in this type of commodity?

INQUIRY CONCERNING INTERPRETATION OF SECTION 8(a) 849
AND SECTION 8(c) OF THE SHIPPING ACT OF 1984

MR. STAKEM. I think that he would be protected, Mr. Drewry. As you know, the bulk cargo is usually an open rate item for most of the conferences, and the liner ships are in competition with the tramps to put this cargo in as filler cargo.

It seems to us that it is the type of commodity that we would not necessarily require an advance filing of rates on.

I think it would be a little bit impossible in the light of the fact that the tramps are free to do as they please, and it would put the liners in a very bad position in connection with the bottom cargo that they constantly seek.

To Provide for the Operation of Steamship Conferences: Hearings on H.R. 4299 Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries, 87th Cong., 1st Sess. 35-36 (1961).

Similarly, IAFC argues that the 1963 Amendment merely added lumber to the commodities excepted from the mandatory tariff filing requirement of the 1961 Amendment. Again, IAFC notes that the purpose of the 1963 Amendment was to benefit conferences as well as shippers by making lumber ratemaking more flexible and therefore more competitive. IAFC argues that the 1963 Amendment was merely an enabling statute which permitted an additional exception from mandatory tariff filing. IAFC states that there is no evidence in the legislative history of any intention to prohibit the voluntary inclusion of lumber in any tariff on file with the Commission.¹ Finally, IAFC argues that the 1965 Amendment merely reestablished mandatory tariff filing for hardwood lumber.²

The conclusion drawn by IAFC and TWRA in their discussion of the 1961, 1963, and 1965 Amendments is that these amendments merely address the question of mandatory tariff filing and that there is no evidence of any Congressional intent to preclude voluntary filing.

USECA also argues that the amendments to the 1916 Act do not reflect any intention to prohibit voluntary tariff filing. USECA suggests that the origin of the 1961 exception for bulk cargo is the Shipping Board Bureau's decision, *Section 19 Investigation, 1935*, 1 U.S.S.B.B. 490 (1935). USECA states that the Board promulgated tariff filing rules that, nevertheless, did not apply "to cargo loaded and carried in bulk without mark or count." This exclusion allegedly was later codified in the 1961 Amendment to the 1916 Act. USECA states that the purpose of the bulk cargo exception

¹ IAFC quotes from a letter dated April 11, 1963 in which the Commission commented that the bill which became P.L. 88-103 was unnecessary because conferences already had sufficient flexibility with regard to rate decreases. H.R. Rep. No. 630, 88th Cong., 1st Sess. (1963), reprinted in 1963 U.S. Code Cong. & Adm. News 826, 829-830.

² IAFC cites a Commission letter dated September 15, 1965 commenting on the bill which became P.L. 89-303. IAFC suggests that this letter confirms, by implication, conference ratemaking authority over accepted commodities. S. Rep. No. 873, 89th Cong., 1st Sess. (1965) reprinted in 1965 U.S. Code Cong. & Adm. News 3834, 3835-3836.

was to provide ocean common carriers with the opportunity to more readily compete with non-regulated ocean tramp carriers.

A number of comments argue that there is no need to go beyond the language of the 1984 Act to resolve the question of the permissibility of voluntary filing. The Mediterranean Conferences, for example, state that there is nothing in section 8(a) of the Act, or any other section of the 1984 Act, that precludes voluntary filing. They conclude that, in the absence of any prohibition, voluntary filing is permitted. Moreover, the Mediterranean Conferences state that because the language of the Act is clear there is no need to resort to legislative history and reliance on it is improper.

USECA argues that the plain language of section 8(a) merely states that it is unlawful not to file tariffs required to be filed by section 8(a). USECA states that it cannot be interpreted to mean that it is unlawful to file tariffs covering excepted commodities. USECA contends that there is no ambiguity in the language of section 8(a) and so there is no need to go to extrinsic sources such as legislative history. USECA also provides an extensive section-by-section analysis of the 1984 Act in which it contends that the plain language of the Act taken as a whole demonstrates the lawfulness of voluntary filing. USECA also makes a detailed analysis of the legislative history of each of the excepted commodity amendments to the 1916 Act and concludes that nothing in that history precludes voluntary filing. Finally, USECA discusses other relevant legislative history of the Act and policy considerations which it believes support voluntary filing.

Agreement No. 10050 states that section 8(a) merely excepts certain commodities from mandatory tariff filing requirements. Tampa states that if Congress had intended to deregulate excepted commodities, it would have provided for deregulation in all sections of the 1984 Act rather than merely the tariff filing section. Tampa also states that the Act does not prohibit voluntary filing. TOCHR states that the Act does not preclude voluntary filing and that therefore it is lawful.

A number of carriers note that the Commission's own rules (46 CFR 580.1(a)) allow for the voluntary filing of tariffs covering excepted commodities and that the Commission has permitted such filings since 1961. The Latin American Conferences state that Congress had three opportunities since 1961 to prohibit voluntary filing and did not do so. They and other conferences argue that Congress was aware of the Commission's long standing practice of accepting voluntary filings, and therefore may be presumed to have confirmed, ratified and sanctioned the Commission's construction of the statute.

Finally, a number of comments argue that policy considerations favor voluntary filing. TWRA and others point out that one of the benefits of permitting voluntary filing is that shippers will then be afforded the protection against discrimination and the 30-day notice of any rate increase. Sea-Land believes that filing subjects the tariff to the mandatory adherence

INQUIRY CONCERNING INTERPRETATION OF SECTION 8(a) 851
AND SECTION 8(c) OF THE SHIPPING ACT OF 1984

requirements of sections 10(b) (1)-(4), 46 U.S.C. app. 1709(b) (1)-(4), and that it would also not be excepted from sections 10(b) (6) (A), (10), (11) or (12), 46 U.S.C. app. 1709(b) (6) (A), 10, 11, 12. Agreement No. 10050 also believes that filing subjects the tariff to sections 10. Thus some argue that voluntary filing should be permitted because it triggers the protections of the tariff filing system.³

Central National Gottesman, Inc., a "forest products merchant," states that the 1984 Act does not prohibit filing of rates on excepted commodities. It favors such filing because it, in effect, makes a price list available to shippers and enables a shipper to know if it has obtained the best available rate.

PARN/STC states that the Commission should allow carriers, conferences and marine terminal operators voluntarily to include rates, charges and regulations on excepted commodities in tariffs, but require those provisions to be included in a separate appendix to the tariff reserved exclusively for excepted commodities. This would allow for dissemination of price information without inhibiting pricing flexibility.

The Journal of Commerce also argues that voluntary filing should continue to be permitted because it is a useful vehicle for disseminating information on rates and service.

A number of comments allege that if voluntary filing were not permitted, adverse effects would result. The Pacific Conferences, PARN/STC, and the Journal of Commerce all note ambiguities in the definitions for some excepted commodities. The Pacific Conferences state that a cautious carrier or conference should file a tariff rate so that there is no question of possible violation of section 8 of the Act. PARN/STC foresees even direr consequences, including possible antitrust exposure. IAFC states that a prohibition on voluntary filing would have a deleterious effect on carrier-shipper relationships. It gives as an example project rates which include commodities which are excepted as well as required to be filed. At present, a single project rate covers all such commodities. This allegedly would be interfered with if voluntary filing were prohibited. Finally, Sea-Land argues that time-volume rates on excepted commodities would be unlawful if voluntary filing were prohibited.

³ A number of conferences, however, do not believe that voluntary filing makes other tariff provisions applicable. The Mediterranean Conferences argue that the 1984 Act tariff requirements pursuant to section 8(a) do not apply to excepted commodities. Thus, the 30-day notice requirement of section 8(d) is not applicable and so filing does not interfere with maximum rate flexibility. The Japan/Korea Conferences argue that even though rates on excepted commodities are voluntarily filed, this does not subject them to the filing and notice requirements of the Act.

The Journal of Commerce also questions whether voluntary filing necessarily subjects the filing party and the tariffs to all the Act's regulatory provisions.

II. Collective Ratemaking

A. Comments Opposing Collective Ratemaking

The commenters opposing voluntary tariff filing on excepted commodities also oppose collective ratemaking on excepted commodities. DOJ, CMA, API, NARI and WSG all oppose allowing conferences to collectively establish rates on excepted commodities. These comments do not dispute the fact that there is nothing in the 1984 Act which expressly excludes excepted commodities from the grant of general ratemaking authority. Rather, they argue from the legislative history of the 1984 Act, and previous amendments to the 1916 Act, that collective ratemaking on excepted commodities was never intended by Congress.

DOJ, for example, asserts that the legislative history indicates that Congress intended to deregulate excepted commodities. DOJ also notes that in the case of terminal services there is a specific Congressional directive in the legislative history of the 1984 Act to the Commission, not to impose any terminal tariff filing requirements for excepted commodities. DOJ states that allowing private parties to voluntarily set such rates would be inconsistent with the intent of Congress.

CMA contends that Congress did not intend to immunize from the antitrust laws the collective activity of ocean common carriers at least with respect to bulk commodities (including bulk chemicals). CMA cites the following passage from the legislative history of H.R. 1878:

[A] small change was made in the definition of ocean common carrier by deleting the words "bulk cargo vessels". However, the elimination of the term is not intended to extend coverage of this Act to bulk shipments, but merely removes an ambiguity. That is, antitrust immunity granted in H.R. 1878 does not extend to agreements relating to rates and service practices for the transportation of bulk commodities.

Joint Report of the House Merchant Marine and Fisheries Committee and Judiciary Committee on H.R. 1878, 129 Cong. Rec. H. 8124 (October 6, 1983). Through this and other references to legislative history, CMA concludes that the Shipping Act of 1984 was not intended to immunize the collective activity of common carriers of bulk commodities.

API contends that allowing collective ratemaking on excepted commodities is particularly anomalous in light of the independent action provision of the 1984 Act. It allegedly would lead to a result which was the opposite of that intended by Congress, *e.g.*, less competition and less price flexibility for excepted commodities than for tariffed commodities. These unintended effects include the following: (1) less competition for excepted commodities than for tariffed commodities; (2) less price flexibility for excepted commodities than for tariffed commodities; (3) less ability of shippers to meet the collective market power of the conference; (4) less rate flexibility

because they must be acted on by a conference; and (5) less rate flexibility because of tariff filing requirements.

NARI asserts that collective ratemaking should not be permitted because excepted commodities were, in effect, deregulated by the 1984 Act.

WSG urges the Commission to declare that collective ratemaking on excepted commodities is unlawful. WSG also states that antitrust immunity should not be extended to excepted commodities.

B. Comments Supporting Collective Ratemaking

IAFC maintains that under the 1916 Act there was no question as to the authority of conferences to collectively establish rates. Section 15 of the Act authorized agreements among common carriers by water "fixing or regulating transportation rates or fares." 46 U.S.C. app. 814. Prior to the Bonner Amendment in 1961, which established mandatory tariff filing, there was no distinction between bulk and other commodities. Therefore, there could be no question of the effect of tariff filing requirements on the scope of conference ratemaking. The authority to fix rates prior to 1961 applied to all kinds of liner rates, including rates on bulk cargo and other excepted commodities.

IAFC contends further that at the time that Congress considered the 1961 Amendment, it was aware that conferences fixed rates on bulk cargo. Congress did nothing to change this. According to IAFC, the 1961 Amendment merely permitted conferences to exclude bulk cargo from their tariffs. There was no intent to remove bulk cargo from conference ratemaking authority.

IAFC contends that subsequent amendments in 1963 and 1965 did nothing to take away conference ratemaking authority. IAFC notes that both amendments were desired by conferences as well as shippers and that conferences would not have supported the bill if it was intended to restrict ratemaking authority.⁴

The conferences generally point out that the language of section 4(a)(1) of the 1984 Act clearly authorizes ocean common carriers to "discuss, fix, or regulate transportation rates." The Japan/Korea Conferences argue that this language is clear on its face and that there are no restrictions as to the commodities on which conferences may fix rates. USECA states that section 4(a)(1) clearly states that the Act applies to carrier agreements to "discuss, fix, or regulate transportation rates," and that there is no qualification of this ratemaking authority. Sea-Land points out that section 4(a)(1) is a general grant of ratemaking authority and that there are no words of limitation in that grant. Agreement No. 10050 states that the

⁴IAFC quotes passages from the Commission's letter of April 11, 1963 commenting on the legislation that stated that the legislation was not necessary because conferences already had enough flexibility with regard to rate decreases. IAFC also quotes from a September 15, 1965 letter of the Commission commenting on the 1965 Amendment which IAFC believes confirms by implication that conferences have ratemaking authority over excepted commodities.

Act does not exclude any commodity from the grant of ratemaking authority. IAFC states that section 4(a)(1) is not limited to rates required to be filed in a tariff and that the 1984 Act does not distinguish different kinds of commodities as far as ratemaking is concerned. TWRA and the Pacific Conferences state that section 4(a)(1) authorizes collective ratemaking with respect to excepted commodities.

The Mediterranean Conferences state that the language of section 4(a)(1) is completely clear and therefore controlling and must be adhered to. The Japan/Korea Conferences state that the language of section 4(a)(1) is clear and that there is therefore no need to inquire into legislative history other than to determine whether Congress intended to link sections 4, 5 and 6 with section 8(a).

Tampa states that sections 4, 5 and 6 of the 1984 Act neither relieve nor prohibit common carriers or marine terminal operators from filing agreements that include fixing of rates on commodities which are either excepted from or required to be filed with the Commission. Tampa concludes that it is lawful for carriers or terminals to fix rates under filed agreements.

PARN/STC states that sections 4, 5, 6 and 7 constitute a clear grant of ratemaking authority and antitrust immunity to agreements of carriers and marine terminal operators without regard to the commodities transported or handled.

TOCHR states that the Act does not exclude excepted commodities from the grant of general ratemaking authority.

IAFC asserts that the 1984 Act merely expanded the list of excepted commodities. The 1984 Act allegedly did not disturb a conference's authority to set rates on excepted commodities.

As with voluntary tariff filing on excepted commodities, the carriers and conferences assert that Congress was aware for many years that conferences agreed upon rates on excepted commodities. TWRA states that under the 1916 Act, conferences set rates on all commodities. IAFC states that Congress knew that conferences fixed rates on bulk commodities and did not prohibit this practice when it passed the 1961 Amendment. The Latin American Conferences point out that Congress had three separate opportunities to change this practice and did not. The Mediterranean Conferences conclude that Congress thereby codified this practice. Sea-Land describes collective ratemaking on excepted commodities as a "long standing" practice. The Pacific Conferences state that collective ratemaking is a "barnacle-encrusted" practice.⁵

Finally, the conferences advance two policy arguments as to why collective ratemaking should be permitted.⁶ TWRA notes that a prohibition on

⁵ IAFC notes that, subsequent to the passage of the 1984 Act, Congress corrected certain provisions that were inconsistent with its intent, but did not address collective ratemaking. See Pub. L. No. 98-585.

⁶ IAFC also suggests a number of adverse effects that would result if collective ratemaking authority were denied. IAFC enumerates a number of uncertainties in connection with commodities excepted by the FMC pursuant to 46 CFR 580.1(c), special permissions under 46 CFR 580.13, and under section 8(e) of the Act.

collective ratemaking would undermine the conference system and destroy the potential stability which it represents. The Pacific Conferences state this argument in terms of the base cargo that excepted commodities represent. The Pacific Conferences state that taking away ratemaking authority over this base cargo would undermine the conference system.

III. Independent Action

A. Comments Supporting Independent Action

Several commenters dispute the assumed premise of this question, namely that collective ratemaking is permissible.⁷ Assuming *arguendo* that such ratemaking would be found to be permissible, then these commenters contend that independent action must also be permitted.

Although CMA disputes the premise of this question, it nevertheless states that it would be inconceivable for the Commission to permit collective ratemaking and voluntary tariff filing on excepted commodities without requiring a conference to permit independent action on such tariffs. CMA argues that it would be a perverse result if excepted commodities, which were intended to be non-tariffed and therefore subject to greater rate flexibility, would not be guaranteed a right of independent action. CMA argues that the Commission could mandate a right of independent action on any tariff voluntarily filed for an excepted commodity. But it concludes that this situation should be avoided by prohibiting voluntary filing of such tariffs.

API states that it would be a travesty and mockery of the Act to allow conferences to prohibit independent action on the very commodities whose rates Congress intended to be particularly responsive to competitive forces. API states that the right of independent action should be guaranteed by the Commission and implemented without disclosure to the conferences and without filing of tariffs. Such a requirement would mitigate the worst effects of conference-initiated tariffs and rules governing excepted commodities. The following effects, however, would allegedly still remain: (1) the inherent inflexibility of rates embodied in tariffs; (2) the restrictions on any independent action which some carriers have placed in their agreements; and (3) the unofficial institutional pressures of conferences against the exercise of independent action. API therefore maintains it would be preferable to prohibit conferences from agreeing upon excepted commodity rates or filing such tariffs.

Central National-Gottesman, Inc. has no objection to voluntary tariff filing, “. . . as long as carriers retain the right of independent action.”

⁷NARI states that the question is based on a false premise. WSG says there is no need for independent action if collective rates are not established. CMA and API also dispute the premise of the question but offer comments on the need for independent action should collective ratemaking be permitted. DOJ did not comment on the question of independent action, presumably because it does not accept the premise that conferences may set rates on excepted commodities.

On the question of independent action, U.S.-flag carriers and one terminal operator broke ranks with the position of the conferences. Sea-Land states that the Commission can, under its section 17(a) rulemaking authority mandate a right of independent action on excepted commodities. Moreover Sea-Land states that the Commission would be warranted in requiring that voluntary filing by a conference be accompanied by a voluntary undertaking to allow member lines to take independent action with respect to such items. In addition, Agreement No. 10050 (the U.S.-Flag Discussion Agreement) also takes the position that the Commission should make independent action mandatory on excepted commodities. TOCHR also believes that independent action should be allowed on excepted commodity rates.

B. Comments Opposing Independent Action

TWRA states that section 5(b)(8) of the Act only mandates independent action on items required to be filed in a tariff. TWRA states that the Commission has no power to expand the right of independent action beyond that provided in section 5(b)(8).

USECA states that Congress did not mandate independent action with regard to excepted commodities but left the matter to conferences to determine for themselves. USECA believes the Commission may not mandate independent action by regulation because such a regulation would not be consistent with the intent of the Act.

The Mediterranean Conferences state that the clear language of section 5(b)(8) is controlling. Independent action is required only for items subject to mandatory tariff filing. The Mediterranean Conferences state that independent action on excepted commodities is permissive and that conferences cannot be required to provide it.

The Latin American Conferences also believe that the plain language of section 5(b)(8) is controlling.

The Japan-Korea Conferences state that the Commission has no authority to require independent action on excepted commodities. They state that the language of section 5(b)(8) is clear and so there is no need to examine legislative history.

The Pacific Conferences state that the Commission cannot go beyond section 5(b)(8) and has no authority to force an across-the-board modification of conference agreements.

IAFC states that the plain meaning of the statute is that there shall be independent action only on section 8(a) tariff items. IAFC argues that this does not lead to an illogical result. It merely allows conferences to set rates on vital base cargo but to allow independent action on 8(a) tariff items.

Finally, Tampa states that section 5(b)(8) refers only to items that were required to be filed in a tariff. Tampa concludes that independent action is not mandatory on excepted commodities.

V. Service Contracts

A. Comments Opposing Voluntary Filing of Service Contracts

DOJ contends that voluntary filing of service contracts on excepted commodities is unlawful. DOJ notes that section 8(c) of the Act distinguishes excepted commodity service contracts from other types. DOJ interprets this distinction to mean that such contracts are to be unregulated and not subject to the collective market power of conferences. DOJ also contends that the absence of a mandatory right of independent action with regard to service contracts indicates that service contracts are not to be subjected to any tariff filing regime.

CMA argues that voluntary filing of the essential terms of service contracts covering excepted commodities should not be allowed as it would reduce the rate flexibility on excepted commodities. In addition, CMA states that the Commission could not adequately regulate such filings to ensure fair treatment of similarly situated shippers because a common carrier or conference could selectively choose to file some contracts and not others.

Great Southern Paper supports the position that service contracts covering excepted commodities should not be required to be filed. According to Great Southern Paper, a filing requirement would “. . . circumvent the rate filing exemption that our industry so actively and successfully pursued in the Shipping Act of 1984.

API states that the same legislative and policy considerations which render unlawful the filing of tariffs on such commodities also render unlawful the filing of service contracts.

NARI's position is that the filing of service contracts covering excepted commodities should not be permitted.

WSG also states that the Commission should not permit the voluntary filing of service contracts covering excepted commodities.

B. Comments Supporting Voluntary Filing of Service Contracts

The Japan/Korea Conferences note that the Commission's own regulations (46 CFR 580.7(b) (1) and (2)), currently allow the filing of the terms of service contracts on excepted commodities. The Japan/Korea Conferences state that there is no difference between voluntary filing of tariffs covering excepted commodities and voluntary filing of service contracts.

USECA states that neither the plain language of the Act nor its legislative history or purpose reveals any legislative intent to render it unlawful for carriers or conferences to file service contracts, either including both excepted and non-excepted commodities or excepted commodities only.

The Mediterranean Conferences and Agreement No. 10050 note that section 8(c) merely exempts service contracts covering excepted commodities from mandatory filing and assert that voluntary filing is permissible. The Pacific Conferences, IAFC, and TOCHR all contend that the same reasoning which supports voluntary filing of tariffs applies to voluntary filing of

service contracts. The Latin American Conferences state that voluntary filing is lawful.

TWRA states that it is easier to make the case for voluntary filing of service contracts because service contracts cover an extended period of time. Thus, there is less concern for speed and flexibility than there is with tariffs. TWRA also notes that filing promotes competition by giving better notice of market conditions to interested parties.

The Journal of Commerce supports retention of existing Commission rules allowing voluntary filing of essential terms of service contracts. Central National-Gottesman, Inc. urges the Commission to permit the voluntary filing of essential terms of service contracts because it provides useful information to shippers.

Sea-Land believes that voluntary filing should be permitted but that this should trigger the same regulatory requirements as apply to service contracts subject to mandatory filing. Agreement No. 10050 believes that optional filings should be permitted.

TOCHR believes that voluntary filing should be permitted. Tampa states that voluntary filing is not unlawful. If it were, then any contract covering a mixture of excepted and non-excepted commodities would have to be prepared as separate contracts. IAFC points out a number of adverse effects that would result if voluntary filing were prohibited.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1459

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE
BENEFIT OF FICKS REED CO.

ORDER OF PARTIAL ADOPTION

May 6, 1987

The Commission determined to review the Initial Decision ("I.D.") issued in this proceeding in which the Administrative Law Judge ("Presiding Officer") granted permission pursuant to section 8(e) of the Shipping Act of 1984, 46 U.S.C. app. § 1707(e) ("the Act"), to American President Lines, Ltd. ("APL") to refund \$585.00 of the freight charges collected from Ficks Reed Co. on a shipment of rattan furniture that moved from Jakarta, Indonesia, to Cincinnati, Ohio.

BACKGROUND

The Asia North America Eastbound Rate Agreement ("ANERA"), of which APL is a member, approved, on October 3, 1985, a rate of \$4090 per 40-foot container, including a \$290 CY destination delivery charge, for the transportation of rattan furniture from Jakarta to Cincinnati. The rate was to be filed in APL's independent tariff, as ANERA did not, at the time, publish tariffs on behalf of its members. A telex message from APL's Hong Kong office to its Pricing & Government Cargo Service in Oakland, California, directing the filing of the \$4090 rate, was misplaced. As a result, the rate was not on file with the Commission when the shipment sailed from Jakarta on January 14, 1986. APL apparently did not discover the error until June, 1986. It applied for a waiver on July 11, 1986.

The Presiding Officer held that the failure to file the intended rate was the kind of mistake contemplated by section 8(e) of the Act and granted the application.¹ As to the tariff notice required by section 8(e)(3), the Presiding Officer accepted a tariff filed by ANERA on June 26, 1986,

¹ Section 8(e) authorizes refund or waiver relief 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 and the refund will not result in discrimination among shippers, ports, or carriers;

(2) the common carrier or conference has, prior to filing an application . . . , filed a new tariff with the Commission that sets forth the rate on which the refund or waiver would be based;

(3) the common carrier or conference agrees that if permission is granted by the Commission, an appropriate notice will be published in the tariff, . . . that give[s] notice of the rate on which the refund or waiver would be based, . . .

46 U.S.C. app. § 1707(e).

in which a "NOTE" at the bottom of the page indicates that certain rates, including the \$4090 rate, "were effective for APL . . . during the period October 8, 1985, through January 25, 1986. . . ."

DISCUSSION

The Presiding Officer correctly determined that the error which led to APL's failure to timely file the intended rate was of a type for which section 8(e) of the Act affords relief. Therefore, review here is limited to the tariff filed in this proceeding by ANERA on June 26, 1986 ("June 26 filing"), on which the waiver is based, and the Presiding Officer's failure to order the publication of the tariff notice referred to in section 8(e)(3).

Section 8(e)(2) requires the carrier to file a "new tariff" before applying for a refund or waiver, while section 8(e)(3) refers to a "notice" which is to be published in the carrier's tariff by order of the Commission after the application is granted. The Presiding Officer held the June 26 filing to be the new tariff referred to in section 8(e)(2) and also viewed the "NOTE" in that same tariff as eliminating the need for the publication of a section 8(e)(3) notice, thus finding one filing to satisfy the requirements of both sections 8(e)(2) and 8(e)(3).²

The first issue, therefore, is whether the Presiding Officer is correct and the June 26 filing may also be considered to be the "new tariff" referred to in section 8(e)(2). The use in the statute of two different terms tends to indicate different types of filings with different functions. While section 8(e)(2) sets forth the rate the carrier seeks permission to apply, section 8(e)(3) reflects the rate approved by the Commission. A section 8(e)(3) notice is published at the discretion of the Commission. The filing of a section 8(e)(2) tariff, however, is mandatory: unless the carrier, prior to applying for relief, files the tariff referred to in section 8(e)(2), the Commission has no authority to consider the merits of the application. In this instance, the \$4090 rate is shown to have been in effect at an earlier date and to have expired before the June 26 tariff was filed with the Commission.⁴

The retroactive nature of the June 26 filing raises yet another issue. Neither the statute nor the rules governing the filing of rates in foreign commerce authorize such a filing.⁵ Section 8(d) of the Act provides that a rate may become effective at the earliest upon filing with the Commission. 46 U.S.C. app. § 1707(d), except by action of the Commission taken pursuant

² I.D. at 3-4.

³ *Louis Furth, Inc. v. Sea-Land Service, Inc.*, 20 F.M.C. 186 (1977); *Oppenheimer Intercontinental Co. v. South African Marine Corp.*, 15 F.M.C. 49, 52 (1971). These cases were decided under former section 18(b)(3) of the Shipping Act, 1916 (formerly 46 U.S.C. § 817(b)(3)) (the 1916 Act), the predecessor to section 8(e) of the 1984 Act.

⁴ The rate was, in fact, canceled before it was filed.

⁵ See *Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United States* 46 C.F.R. Part 580, section 580(b) and (c)(1) (1985).

ant to section 8(e)(3). Furthermore, section 8(f), 46 U.S.C. app. § 1707(f), provides that the Commission "may reject a tariff that is not filed in conformity with this section and its regulations."⁶ Consequently, the June 26 filing could have been rejected for failure to comply both with the statute and the Commission's rules.

However, the Commission has in the past, on at least two occasions, granted relief on tariffs filed by a carrier or a conference effective earlier than the date of filing.⁷ In *Application of Japan Line (U.S.A.) Ltd. for Japan Line Ltd. for Benefit of Nomura (America) Corp.*, 28 F.M.C. 825 (1980) ("*Japan Line*"), the Commission adopted the Initial Decision granting relief on the basis of a tariff filed by the Pacific Westbound Conference that contained two rates for the same commodity: a higher rate which appeared in the body of the tariff and a lower rate set forth in a notice with an earlier effective date. In Special Docket No. 901, *Application of Delta Steamship Lines, Inc. for the Benefit of Commodity Credit Corp.* (Initial Decision served June 17, 1982) ("*Delta Lines*"), the Presiding Officer accepted as valid the new tariff filed by the carrier in which the rate sought to be applied was shown as being effective earlier than the date of filing with the Commission. The decision became administratively final by notice served August 5, 1982.⁸

In view of the carrier's apparent reliance on the *Japan Line* and *Delta Lines* decisions, and because of the failure to timely reject the June 26 tariff, the Commission will adopt the Presiding Officer's grant of the waiver. However, a tariff of the type filed in this proceeding will not in the future be deemed to satisfy the "new tariff" requirement in section 8(e)(2). The decisions in *Japan Line* and *Delta Lines*, *supra*, are, to that extent, overruled.

The Commission finds inappropriate, however, the Presiding Officer's reliance on the "NOTE" in the June 26 filing as a substitute for the Commission ordered notice referred to in section 8(e)(3) of the Act. As mentioned the "NOTE" shows the \$4090 as having been in effect from October 8, 1985 through January 25, 1986. Under the guidelines established in *Application of Lykes Bros. Steamship Co., Inc. for the Benefit of Embassy of Tunisia*, 28 F.M.C. 421 (1986), the effective date of the corrected tariff, referred to in section 8(e)(2), on which the refund or waiver is to be based runs from the date the mistake in filing occurred through the day preceding the filing of the corrected tariff, but in no event earlier than 180 days from the date of the filing of the application, which in this

⁶ See also 46 CFR 580.10(b) (1985).

⁷ These decisions were also rendered under section 18(b) of the 1916 Act.

⁸ It should be noted that in neither *Japan Line* nor *Delta Lines* did the Commission address the propriety of the tariffs under former sections 18(b)(2) and 18(b)(4) of the 1916 Act (the predecessors to sections 8(d) and (f) of the Act).

instance would be January 11, 1986.⁹ Although the application does not explain the January 25 termination date, the Commission takes official notice of a tariff filed by APL, effective January 26, 1986, with a different rate for the same service, which would have cancelled the \$4090 rate had it been timely filed.¹⁰ Consequently, ANERA will be required to file in its tariff a notice, as set forth below showing the rate on which the waiver is based.

THEREFORE, IT IS ORDERED, That the Asia North America Eastbound Rate Agreement promptly publish in its tariff the following notice:

Notice is given, as required by the decision of the Federal Maritime Commission in Special Docket No. 1459, that effective January 11, 1986, and continuing through January 25, 1986, inclusive, the rate on Rattan Furniture from Jakarta, Singapore to Cincinnati, OH per 40/G container is \$4090.00, not subject to CY Destination Delivery Charge. This Notice is effective for purposes of refund or waiver of freight charges on any shipment of the commodity described which may have been carried by APL during the specified period of time.

IT IS FURTHER ORDERED, That the Initial Decision issued in the proceeding is otherwise adopted by the Commission; and

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH POLKING
Secretary

⁹ Citing the decision in *Application of Sea-Land Corporation on behalf of Sea-Land Service, Inc. for the Benefit of Forwarding Services, Inc. as Agent for Pana-York Shipping Corporation/Frito Lay*, 28 F.M.C. 42 (1986), the Presiding Officer made the rate applicable 180 days from the date the application was filed—that is, January 11, 1986, rather than October 8, 1985, as appears in the "NOTE."

¹⁰ *American President Lines, Ltd. Eastbound Intermodal Tariff No. 715-B I.C.C. APLS 715-B, FMC No. 124, 15 Rev. page 155*, effective January 26, 1986.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1459

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR THE
BENEFIT OF FICKS REED CO.¹

Application to refund freight charges of \$585.00 granted.

INITIAL DECISION² OF JOSEPH N. INGOLIA, ADMINISTRATIVE
LAW JUDGE

Partially Adopted May 6, 1987

This application³ is for permission to refund \$585.00 of freight charges arising out of one shipment of Rattan Furniture from T.G. Priok, Jakarta, to Cincinnati, Ohio.

The original tariff involved in this proceeding is American President Lines, Ltd. (APL) Eastbound Intermodal Freight Tariff No. 715-B, I.C.C. APLS 715-B, FMC No. 124, from Foreign Ports as noted in Rule 1-A to Destination Carriers' Terminals in the United States. Prior to October 3, 1985, the rate in the tariff for Rattan Furniture to Cincinnati was \$4,385.00 plus a CY Destination Delivery Charge of \$290.00.⁴ On October 3, 1985, members of the Asia North American Eastbound Rate Agreement (ANERA) met in Hong Kong. APL proposed a set of rates for Rattan Furniture of \$4,090 per 40 foot container, inclusive of the Destination Delivery Charge. The conference member lines agreed to adopt the proposed rate,⁵ which rate should then have been filed in APL's independent tariff, since ANERA did not then have any tariffs filed on behalf of member lines. A telex message directing the tariff filing was sent from APL's Hong Kong office to the Pricing & Government Services Cargo Services office in Oakland, California. However, the telex was misplaced and the tariff was not timely filed.

The shipment involved here began on January 14, 1986. At that time the \$4,385.00 rate, plus CY destination charges, was on file and the shipper paid the freight bill of \$4,675.00.⁶ The applicant did not discover the error until June of 1986. By that time APL's independent tariff had been superseded by ANERA Common Rate Tariff No. FMC-17, and the corrected

¹ The original title of the case indicated the beneficiary was the Westinghouse Elevator Co. This was due to a computer error and the correct beneficiary (shipper) is set forth above.

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

³ The application was mailed on July 11, 1986, within the 180 day statutory period set forth in section 8(e), Shipping Act, 1984.

⁴ Application, Exhibit 2.

⁵ Application, Exhibit 4 (enclosed with the letter dated November 4, 1986, from Douglas A. Grandt).

⁶ Application, Exhibit 1.

rate was then filed.⁷ The applicant now seeks permission to refund the difference in the freight charges between the old and the negotiated rate such difference being \$585.00.

Section 8(e) of the Shipping Act, 1984, permits the Commission to waive or refund 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, there is no question but that from the misplacing of a telex communication the rate APL intended to file would have been controlling in regard to the shipment involved here. The mistake involved is precisely the kind of error Congress sought to rectify in enacting section 8(e).

The application conforms to the requirements of Rule 92(a), Special Docket Application, 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 of \$4,090 per 40 foot container, inclusive of Destination Delivery Charge, on Rattan Furniture moving from T.G. Priok, Jakarta, to Cincinnati, Ohio, which rate would have been in effect had the error not been made.

2. The refund will not result in discrimination among shippers,⁸ and there is no evidence that any carrier or ports would suffer discrimination should the application be granted.

3. Prior to applying for the refund the applicant filed a new tariff which sets forth the rate upon which the refund should be based.⁹

4. The application was filed within 180 days from the date of shipment. Wherefore, in consideration of the above and the entire record, it is *Ordered*, that permission is granted APL to refund a portion of freight charges in the amount of \$585.00 to the Ficks Reed Company, subject to any necessary adjustments to freight forwarder fees or the like.

Also, it is noted that the pertinent ANERA tariff already contains notice that the \$4,090.00 rate, including CY destination charges, was in effect from October 8, 1985, through January 25, 1986, so that no further notice is required at this time. However, insofar as shipments occurring before January 11, 1986, are concerned, the Commission would deny permission to allow any waiver or refund of freight charges.¹⁰

(S) JOSEPH N. INGOLIA
Administrative Law Judge

⁷ Application, Exhibit 3.

⁸ The applicants state that there were no other shipments of the same commodity during the pertinent time period involved here.

⁹ As has been noted, at the time the correction was made ANERA's tariff had superseded the APL Tariff and therefore, the correction was made in the applicable tariff then extant.

¹⁰ See *Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. as Agent for Pana-York Shipping Corporation/Frito-Lay (Pana-York)*, Special Docket No. 1412 (28 F.M.C. 427).

APPLICATION OF AMERICAN PRESIDENT LINES, LTD., FOR 865
THE BENEFIT OF FICKS REED CO.¹

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 516, 559, AND 572]

DOCKET NO. 85-10

MARINE TERMINAL AGREEMENTS

May 14, 1987

ACTION: Final Rule.

SUMMARY: This exempts marine terminal agreements (other than marine terminal conference, interconference, joint venture and discussion agreements) from the waiting period requirement of the Shipping Act of 1984 and from the approval requirement of the Shipping Act, 1916. The Final Rule establishes a uniform exemption procedure conditioned upon the filing of the agreement and *Federal Register* publication. The exemptions become effective upon the filing of the agreement with the Federal Maritime Commission. The Final Rule shall be published as amendments to Part 559 and Subpart C of Part 572 of the Code of Federal Regulations, respectively.

EFFECTIVE

DATE: The amendments to Part 559 shall become effective July 20, 1987, or upon the receipt of OMB clearance for the collection of information requirements, whichever is later. OMB approval will be published when received. The amendments to Part 572 shall become effective July 20, 1987.

SUPPLEMENTARY INFORMATION:

By Notice of Proposed Rulemaking published in the *Federal Register* on April 5, 1985 (50 FR 13617) pursuant to sections 16 and 17 of the Shipping Act of 1984 (1984 Act), 46 U.S.C. app. 1715 and 1716, and sections 35 and 43 of the Shipping Act, 1916 (1916 Act), 46 U.S.C. app. 833a and 841a, the Commission invited comments on the exemption of certain classes of marine terminal agreements from the filing and/or waiting period requirements of section 5 of the 1984 Act, 46 U.S.C. app. 1705, and from the filing and/or approval requirements of section 15 of the 1916 Act, 46 U.S.C. app. 814.¹ The Proposed Rule implemented the Commissioner Robert Setrakian's recommendations in *Report of Inquiry—Officer—Part I* (served September 26, 1984 (49 FR 38987)) in Federal Maritime Commission Docket No. 83-38, *Notice of Inquiry and Intent to Review Regulation of Ports and Marine Terminal Operators*.

¹ A correction to the Supplementary Information of the Proposed Rule was published in the *Federal Register* on May 10, 1985 (50 FR 19727).

The Proposed Rule would have incorporated the exemptions for marine terminal agreements in a new Part 516 of Title 46 of the Code of Federal Regulations. In the interest of maintaining the integrity of the current organizational scheme, the exemptions will now be included in existing Parts 559 and 572 of the Code of Federal Regulations, which currently set forth agreements that are exempt from requirements of the 1916 Act and the 1984 Act, respectively.

Fifteen port, marine terminal operator, trade association and ocean common carrier interests filed comments in response to the Commission's Notice. These are: (1) the Maryland Port Administration (MPA); (2) the Port of Sacramento (Sacramento); (3) the Terminal Operators Conference of Hampton Roads (TOCHR); (4) the Virginia Port Authority and Virginia International Terminals (collectively, VPA); (5) the Port of Houston Authority of Harris County, Texas (Port of Houston); (6) American President Lines, Ltd. (APL); (7) the Port of Oakland (Oakland); (8) Matson Terminals, Inc. (Matson); (9) the Houston Port Bureau, Inc. (Houston Port Bureau); (10) the Tampa Port Authority (Tampa); (11) the American Association of Port Authorities (AAPA); (12) the Port of Seattle (Seattle); (13) Sea-Land Service, Inc. (Sea-Land); (14) the United States Atlantic & Gulf Ports/Italy France & Spain Freight Conference (Conference); and (15) the Jacksonville Port Authority (Jacksonville).

All of the commenters support at least a partial exemption for marine terminal agreements, other than marine terminal conference and interconference agreements, from the waiting period/approval requirements of the 1984 and 1916 Acts. A majority recommend that all exempt agreements be filed with the Commission for *Federal Register* publication. Some of the commenters favor a pre-effectiveness review procedure while others support the proposal that the exemption become effective immediately upon an agreement's filing. A number of commenters also addressed the Commission's policy concerning agreements that relate back to events or activities that occurred before the agreement became effective or was approved pursuant to the appropriate Shipping Act.²

DISCUSSION³

After careful consideration of the comments, we are establishing a uniform waiting period/approval exemption procedure for all classes of marine

²On December 17, 1985, the Commission published a Notice of Proposed Rulemaking in the *Federal Register* (50 FR 51418) in Docket No. 85-22, *Agreements by Ocean Common Carriers and Other Persons Subject to the Shipping Act of 1984*. Docket No. 85-22 proposed to add a new paragraph (h) to Part 572 setting forth the Commission's policy with regard to agreement provisions that relate back to events that occurred before the agreement's effectiveness or approval. By separate Notice served this date, the Commission has determined to withdraw the proposed rule and to continue to address retroactive agreement provisions on an *ad hoc* basis.

³This discussion addresses those sections of proposed Part 516 that are being retained in the Final Rule. Certain sections, such as proposed section 516.3 "Policy and Scope," are not being retained and will not be addressed herein. It indicates, however, where the retained provisions of Part 516 will appear in Parts 559 and/or 572.

terminal agreements, other than marine terminal conference, interconference, joint venture, and discussion agreements. This procedure requires agreements to be filed and published in the *Federal Register*, with the exemption becoming effective upon the agreement's filing. The Final Rule should serve to reduce regulatory delays to a minimum while preserving the benefits derived from prompt public notice of the existence and content of marine terminal agreements. For the reasons more fully explained below, we have determined that the Final Rule will not substantially impair effective regulation by the Commission, be unjustly discriminatory or detrimental to commerce within the meaning of section 16 of the 1984 Act and section 35 of the 1916 Act; nor result in a substantial reduction in competition within the meaning of section 16 of the 1984 Act.

We have considered all of the comments received in this proceeding and the Supplementary Information discusses some of the more significant issues raised by the comments. Any comments not expressly discussed have either been incorporated as a technical change without discussion, have been found to be mooted by the changes incorporated in the Final Rule, or have been found to be irrelevant or without merit.

A. Proposed sections 516.4(a) and (e)—“Agreement” and “Marine Terminal Agreement” (now section 559.7(a) and section 572.307(a))

Proposed section 516.5(a) defined the term “agreement” for the purposes of the rule. This definition was narrowly drawn to exclude agreement provisions relating back to activity or events that occurred prior to an agreement's execution. Proposed section 516.4(d) defined the term “marine terminal agreement.” The Final Rule combines these definitions under the term “marine terminal agreement.” However, because the Final Rule exempts the agreement only upon filing, the term “marine terminal agreement” is defined to only include agreements that apply to “future, prospective activities” that occur after filing. In response to comments filed in this proceeding and consistent with the Commission's action taken this date in Docket No. 85-22, *supra*, the Final Rule deletes specific references to unacceptable types of agreement provisions. It is extremely difficult, if not impossible, to prescribe a rule which addresses the legitimate concerns of the commenters while at the same time providing clear, definitive guidelines covering all potential variant situations. Accordingly, determinations as to retroactivity will continue to be made on an *ad hoc* basis.

Four commenters urge clarification as to the manner in which the exemption should apply to agreement provisions relating to activity or events occurring prior to an agreement's execution. VPA notes that neither the 1916 and 1984 Acts nor the cases interpreting them provide adequate guidance in this area, and states that a number of valid factors in the business environment could result in entirely reasonable circumstances where parties to marine terminal agreements—wholly lacking unlawful intent—

might lock in triggering events or dates ultimately predating the agreement's actual effectiveness. APL believes that the Proposed Rule may blur the distinction between agreement provisions which are, on the one hand, prospective in effect, but which quite properly relate back in terms of an accounting or an adjustment period or some other measure of future performance, and, on the other hand, provisions which on their face provide for performance which predates the filing of an agreement. Accordingly, APL recommends revising the proposed definition to exclude agreement provisions that on their face become effective as of a date, or as of an event, or as of any activity, occurring prior to the agreement's execution, rather than categorically excluding all agreement provisions relating back to pre-execution activity or events.

Oakland is encouraged to see a clear statement on the retroactivity issue in the Proposed Rule, stating that it has found some uncertainty concerning the acceptability of pre-execution provisions under the Commission's precedents. AAPA urges the Commission to advise whether preapproval events may properly be included in marine terminal agreements.

The complexity of the retroactivity issue is amply attested to by the comments which have been received in this proceeding and in Docket No. 85-22, *supra*. The Commission limited the exemption provided by the rule proposed in this proceeding to those agreements which relate to prospective events or activities on the grounds that is unlawful to implement an agreement that has not been approved, become effective or exempted from applicable 1916 or 1984 Act requirements. *See* 46 U.S.C. app. 816, 833a, 1704, 1706(a), 1709(a) and 1715. The Commission may not therefore exempt, or otherwise act to grant antitrust immunity to an agreement or the activity that occurred thereunder prior to the agreement being made lawful under the applicable Shipping Act. *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). *See also, Carnation v. Pacific Westbound Conference*, 383 U.S. 213 (1966); *Pacific Coast European Conference v. FMC*, 439 F.2d 514 (D.C. Cir. 1970); *River Plate and Brazil Conference v. Pressed Steel Car Co.*, 327 F.2d 60 (2d Cir. 1955). The Final Rule continues the limitation to the exemption conferred and defines the term "marine terminal agreement" in sections 559.7(a) and 572.307(a) to limit the exemption provided to those arrangements which apply solely to prospective activities or events.

Finally, the Final Rule also clarifies that the definition of "marine terminal agreement" (and therefore any exemption accorded herein to that class of agreement) does not apply to joint venture arrangements among marine terminal operations. Given their significant and possible competitive impact, these arrangements will continue to be subject to the filing and approval/waiting period requirements of the 1916 and 1984 Acts.

- B. Proposed sections 516.5(a) and (b)—Marine Terminal Agreements—Exemptions (now sections 559.7(f) and 572.307(e))

Proposed sections 516.5(a) and (b) contained the operative provisions exempting certain classes of marine terminal agreements from the filing and/or waiting period requirements of the 1984 Act, or from the filing and/or approval requirements of the 1916 Act, depending on which Act applies to the agreement in question. Two types of exemptions were proposed, which were differentiated on the basis of the likely anticompetitive impacts of the classes of agreement involved. The Supplementary Information to the Proposed Rule also invited comment on an alternative to each type of exemption.

The first alternative was set forth in section 516.5(a) and proposed an exemption from both Acts' filing requirements (hereinafter referred to as the "Paragraph (a) Exemption") for four classes of agreements: (1) landlord-tenant marine terminal facility leases; (2) agreements relating to marine terminal facilities or services used in connection with the handling of proprietary cargo; (3) agreements relating to the financing or construction of marine terminal facilities; and (4) agreements relating to off-dock container freight station facilities or services (the four classes hereinafter referred to as "Paragraph (a) Agreements").

We also invited comments on a procedure that would exempt Paragraph (a) Agreements from only the waiting period/approval requirements, on condition that they be filed for informational purposes and *Federal Register* publication (hereinafter referred to as the "Paragraph (a) Exemption Alternative"). The exemption provided by the Paragraph (a) Exemption Alternative would become effective upon filing as the Commission did not intend to substantially review these agreements before they were implemented. The Commission proposed this Alternative because of its concern that agreements should generally be made available to the maritime community as a matter of public information.

The second type of exemption, as proposed in section 516.5(b), provided an exemption from the 1984/1916 Acts' waiting period/approval requirements (hereinafter referred to as the "Paragraph (b) Exemption") for classes of marine terminal agreements other than Paragraph (a) Agreements, with the exception of marine terminal conference, marine terminal interconference and marine terminal discussion agreements, on condition that they be filed for *Federal Register* publication. (These "other" marine terminal agreements are hereinafter referred to as "Paragraph (b) Agreements").⁴ Again, no substantive pre-implementation review of these agreements would be undertaken.

We also invited comments on an alternative exemption for Paragraph (b) Agreements which would provide a substantive pre-effectiveness review procedure to ensure overall conformity with the exemption's standards and the Commission's rules (hereinafter referred to as the "Paragraph (b) Ex-

⁴Terminal services arrangements, berthing agreements and other such arrangements are examples of Paragraph (b) Agreements.

emption Alternative"). Under this Alternative, the exemption would take effect on the earlier of: (1) twenty-one days after the filing of the agreement; or (2) the date of the letter from the Commission advising that the agreement has been accepted for exemption. An agreement not accepted for exemption under the Paragraph (b) Exemption Alternative would instead be processed for effectiveness or approval under the normal procedures prescribed in 46 CFR Part 572 or 560, as appropriate for the category of agreement involved.

Fourteen commenters specifically addressed proposed section 516.5(a): one favors the Paragraph (a) Exemption in its proposed form; four recommend that certain other agreements be designated Paragraph (a) Agreements; and nine urge adoption of the Paragraph (a) Exemption Alternative. TOCHR favors adoption of the Paragraph (a) Exemption in its proposed form.

Of the four commenters recommending that other types of agreements be designated Paragraph (a) Agreements, MPA and APL suggest inclusion of marine terminal leases where the lessor retains some control over the facility through its public tariff. Matson urges the Commission to classify marine terminal services agreements between marine terminal operators and their common carrier customers as Paragraph (a) Agreements. Matson argues that there is competition among terminal operators performing terminal services and there is therefore no regulatory need to file such agreements. However, if this suggestion is not adopted, Matson urges enforcement of the requirement that complete marine terminal services agreements be filed, including the rates and charges agreed to by the parties involved.

The Conference recommends that all marine terminal agreements, except marine terminal conference agreements, be classified as Paragraph (a) Agreements. The Conference argues that the majority of such agreements have no anticompetitive effects, due to the availability of such facilities and services, as well as the innocuous, purely operational nature of the arrangements involved. The Conference also urges elimination of section 516.5(a)(3), which requires furnishing exempted agreements to any interested party, stating that this procedure is without precedent in Commission practice and is susceptible to abuse through "fishing expeditions" by carriers and terminals solely interested in keeping abreast of competitors' terminal rates and conditions.

Whatever the merits of the various recommendations to expand the types of agreements classified as Paragraph (a) Agreements, they are beyond the scope of this rulemaking and will not be addressed further. With regard to Matson's comments concerning the need to file complete marine terminal agreements, we believe that the Final Rule makes clear that agreements

are not entitled to the exemption if they do not completely set forth the rates and charges agreed to by the parties.⁵

A majority of commenters support the Paragraph (a) Exemption Alternative in one form or another, on the grounds that it would allow all interested parties timely and accurate notice of the existence and content of agreements that may affect them, protect the Commission and other interested parties from the loss of relevant information that would otherwise be in the agreement parties' private files,⁶ and enable negotiations and decisions in the industry to be based on actual knowledge of the relevant facts.

Many commenters urge the Commission to avoid artificial distinctions between classes of agreements and to treat all classes the same. The division of marine terminal agreements into different categories for exemption purposes, some of which would no longer be filed and others continuing to be filed but exempt from subsequent waiting period/approval requirements, allegedly would create uncertainty concerning which agreements should be filed; may be discriminatory as between the types of agreements and carriers involved, particularly as to off-dock CFS agreements; and would render effective regulation of agreements entitled to the Paragraph (a) Exemption impossible, since there would be no effective, uniform and timely procedure to ascertain the nature of an agreement to ensure that it properly falls within the exemption. Several of these commenters note that the Paragraph (a) Exemption Alternative would create no additional burden for marine terminal operators in comparison to the system currently in place, and is similar to current procedures, while affording a significant savings in time.

The reasons advanced in support of the Paragraph (a) Exemption Alternative are meritorious and this Alternative, modified as discussed below, is adopted in the Final Rule. The common thread running through virtually all of the comments supporting this Alternative is that marine terminal agreements falling within the scope of the 1984 or 1916 Acts should generally be made available to the maritime community as a matter of public information. The concern here is that all interests that are not parties

⁵ The Commission has recently received numerous inquiries and requests concerning its requirement that marine terminal operators' charges for terminal services be set forth in an agreement on file with the Commission or separately reflected in a filed tariff. As a result of these inquiries, and the apparent confusion regarding the Commission's requirements, the Commission gave notice that it would waive assessing penalties for the pre-filing implementation of such terminal services agreements until a formal study of the issue had been completed. *Notice of Waiver of Penalties*, 51 FR 23154 (June 25, 1986). Because there still appeared to be some continuing confusion regarding its requirement, the Commission on October 15, 1986 extended indefinitely the waiver of penalties provided by the June Notice. The Commission, by separate Order served this date is instituting Fact Finding Investigation No. 17 to study this matter. The Commission is also issuing this date a Second Supplemental Notice of Waiver of Penalties to extend the June Notice.

⁶ Sea-Land argues that the Paragraph (a) Exemption would be counterproductive to the Commission's obligations under section 18 of the 1984 Act, 46 U.S.C. app. 1717, which requires the Commission to collect and analyze information concerning the Act's impact on the international ocean shipping industry, and to submit a report thereon specifically addressing, among other things, the need for antitrust immunity for ports and marine terminals.

to an agreement—but nonetheless may be affected by the agreement—have timely and accurate knowledge of the agreement's existence and content.

The objections to dividing marine terminal facility and services agreements into classes for exemption purposes are also well supported. Marine terminal facility and services agreements are often "mixed" in their characteristics. As a result, the proposed Paragraph (a) Exemption would not apply to agreements which, while primarily landlord-tenant leases or other arrangements described in section 516.5(a) of the Proposed Rule, also include other activities which would not fit within the Paragraph (a) Agreement category. Moreover, the several recommendations for aggregating all marine terminal facility and services agreements into a single class for uniform treatment for exemption purposes are well supported in logic. The adoption of this approach should result in a significantly clarified and more easily administered Final Rule.

Eleven commenters specifically address proposed section 516.5(b): four support the Paragraph (b) Exemption as proposed; another would classify intra-port discussion agreements as Paragraph (a) Agreements; two suggest that some or all of the agreements included as Paragraph (b) Agreements be instead classified as Paragraph (a) Agreements; and four support the Paragraph (b) Exemption Alternative.

Sacramento, Tampa, Seattle and Sea-Land favor the Paragraph (b) Exemption without substantive change. They state that this procedure would allow all interested parties sufficient and timely notice of agreements that may affect them, provide adequate safeguards to make the Paragraph (b) Exemption Alternative unnecessary and avoid significant and unnecessary delay to the parties. Tampa believes that this exemption would provide a basis for ensuring that Congress continues the antitrust exemption presently afforded marine terminal agreements by the 1916 and 1984 Shipping Acts. Seattle suggests clarifying the effective date of the Paragraph (b) Exemption to deem an agreement to be "filed" when deposited in the United States mail or delivered to a courier for delivery. Seattle also urges the Commission to reduce the number of copies required to be filed to the absolute minimum necessary—perhaps a true original and two copies—in view of the cost and time consumed in providing the oversized exhibits often included in a terminal lease.

The Final Rule does not adopt Seattle's suggested technical modifications. The filing "date" for exemption purposes is consistent with our procedures for agreements in general, and the requirement that an original and fifteen copies be filed is based on our need to have sufficient number of copies available to facilitate agency processing, the *Federal Register* notice and assure prompt public access to copies of filed agreements. We will, however, continue the current practice of accepting agreement copies that have had oversized exhibits reduced to standard paper size, provided that they are complete, legible and reproducible.

MPA suggests that intra-port discussion agreements be classified as Paragraph (b) Agreements, stating that such agreements warrant special treatment. A discussion agreement involving local port interests is said to present a much different set of regulatory options than do two-port or range wide discussion agreements.

Two other commenters recommend that certain or all of the Paragraph (b) Agreements be instead classified as Paragraph (a) Agreements and therefore entitled to the less stringent Paragraph (a) Exemption. Matson believes that marine terminal services agreements should be classified as Paragraph (a) Agreements for the reasons summarized in the discussion of section 516.5(a); and the Conference urges that all agreements proposed as Paragraph (b) Agreements be instead afforded the Paragraph (a) Exemption, for the reasons summarized in the discussion of section 516.5(a). As noted earlier, we cannot consider the merits of recommendations to expand the scope of this proceeding beyond that originally set forth in the Proposed Rule.

TOCHR, VPA, Oakland and Houston Port Bureau favor adoption of the Paragraph (b) Exemption Alternative in one form or another. They note that it is consistent with the shortened review procedure now requested by many parties under the 1984 Act, and argue that it is preferable to the Paragraph (b) Exemption since the latter exemption may permit agreements that do not conform to the Commission's requirements to become effective without even a cursory review. These commenters argue that Paragraph (b) Exemption is inconsistent with the Commission's obligations, and would be inequitable to other parties who might well be damaged if they did not have the opportunity to review and challenge an agreement before it became effective.

The Final Rule adopts the Paragraph (b) Exemption for all classes of marine terminal agreements, other than marine terminal conference, interconference, joint venture and discussion agreements, with the exemption becoming effective upon the filing of an agreement with the Commission. Thus, the Final Rule implements a uniform procedure consisting of the Paragraph (a) Exemption Alternative and the Paragraph (b) Exemption for all classes of marine terminal agreements, excepting marine terminal conference, interconference, joint venture and discussion agreements.

On balance, we agree with the many views favoring a uniform exemption procedure. There is merit to the objections to the classification system upon which the Proposed Rule was predicated. Another factor we considered in adopting this Final Rule is the disproportionate amount of the Commission's own resources that would have been required to administer an exemption alternative that would subject all agreements filed thereunder to a substantive pre-effectiveness review procedure within twenty-one days following filing (as suggested under proposed section 516.5(b) (the Paragraph (b) Exemption Alternative)) or within fourteen days following *Federal Register* publication (as suggested by some of the commenters favoring this

alternative). The Commission will, however, monitor those agreements that are filed for exemption pursuant to the Final Rule to ensure that the agreements otherwise conform to the Commission's statutory and regulatory requirements. In this connection it should be noted that the Final Rule makes it clear that only agreements that apply to prospective activities, *i.e.*, events or payments that occur after filing are entitled to the exemption. The exemption also does not apply to agreements which fail to completely set forth the rates and charges agreed to by the parties. Parties who implement agreements that do not qualify for the exemption or which otherwise are in violation of the Commission's requirements will be subject to substantial penalties of the applicable statute.

The Federal Maritime 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 effect on competition, employment, investment, productivity, innovations, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

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

The Federal Maritime Commission has determined that this action does not constitute a major Federal action significantly affecting the quality of the human environment. Therefore, no environmental assessment or environmental impact statement was prepared.

The collection of information requirements contained in this regulation have been previously approved under 46 CFR 516, OMB Control Number 3072-0049. Since that Part is being discontinued, the requirements that are being codified in Part 559 are being resubmitted to OMB for review under section 3504(h) of the Paperwork Reduction Act of 1980 (44 U.S.C. 3504). No clearance is necessary for the requirements being codified in Part 572 as these requirements do not add to the burden already present therein. A copy of the request for OMB review and supporting documentation may be obtained from John Robert Ewers, Director, Bureau of Administration, Federal Maritime Commission, 1100 L Street, N.W., Room 12211, Washington, D.C. 20573, telephone number (202) 523-5866. Comments

may be submitted to the Agency and the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, D.C. 20503. Attention: Desk Officer for the Federal Maritime Commission.

List of Subjects in 46 CFR Parts 559 and 572, Antitrust, Contracts, Maritime carriers, Administrative practice and procedure, Rates and fares, Reporting and record-keeping requirements.

Therefore, pursuant to 5 U.S.C. 553, and sections 5, 16 and 17 of the Shipping Act of 1984, 46 U.S.C. 1704, 1715, 1716 and sections 15, 35 and 43 of the Shipping Act, 1916, in order to exempt certain marine terminal agreements from the waiting period requirement of the 1984 Act and from the approval requirement of the 1916 Act, Title 46 of the Code of Federal Regulations is amended as follows:

1. The authority citation to Part 559 continues to read:

AUTHORITY: 5 U.S.C. 553; sections 15, 35 and 43 of the Shipping Act, 1916, 46 U.S.C. app. 814, 833a and 841a.

2. Section 559.7 to Part 559 in Subchapter C in Title 46 of the Code of Federal Regulations is redesignated § 559.8.

3. A new § 559.7 to Part 559 in Subpart C in Title 46 of the Code of Federal Regulations is added to read as follows:

§ 559.7 Marine Terminal Agreements—Exemption

(a) *Marine terminal agreement* means an agreement, understanding, arrangement or association, written or oral (including any modification, cancellation or appendix) that applies to future, prospective activities between or among the parties and which relates solely to marine terminal facilities and/or services among marine terminal operators and among one or more marine terminal operators and one or more common carriers in interstate commerce that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement. The term does not include a joint venture arrangement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff.

(b) *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or common carriers in interstate commerce for the conduct or facilitation of marine terminal operations in connection with waterborne common carriage in the domestic commerce of the United States and which:

(1) (i) Provides for the fixing of and adherence to uniform marine terminal rates, charges, practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo for all members; and
or

(ii) Provides for the conduct of the collective administrative affairs of the group; and

(2) May include the filing of a common marine terminal tariff in the name of the group and in which all the members participate, or, in the

event of multiple tariffs, each member participates in at least one such tariff.

(c) *Marine terminal discussion agreement* means an agreement between or among two or more marine terminal operators and/or marine terminal conferences and/or common carriers in interstate commerce solely for the discussion of subjects including marine terminal rates, charges, practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo.

(d) *Marine terminal interconference agreement* means an agreement between or among two or more marine terminal conference and/or marine terminal discussion agreements.

(e) *Marine terminal facilities* means one or more structures (and services connected therewith) comprising a terminal unit, including, but not limited to, docks, berths, piers, aprons, wharves, warehouses, covered and/or open storage spaces, cold storage plants, grain elevators and/or bulk cargo loading and/or unloading structures, landing and receiving stations, which are used for the transmission, care and convenience of cargo and/or passengers or the interchange of same between land and common carriers by water in interstate commerce, or between two common carriers by water in interstate commerce. This term is not limited to waterfront port facilities and includes so-called off-dock container freight stations at inland locations and any other facility from which inbound waterborne cargo may be tendered to consignees or at which outbound cargo may be received from shippers for vessel or container loading.

(f) All marine terminal agreements as defined in §559.7(a), with the exception of marine terminal conference, marine terminal interconference and marine terminal discussion agreements, as defined in §559.7 (b), (c) and (d) are exempt from the approval requirements of section 15 of the Shipping Act, 1916 on the condition that they be filed with the Commission. Such filing shall consist of:

(1) A true copy and 15 additional copies of the filed agreement;

(2) A letter of transmittal, which shall:

(i) Clearly state that the agreement is being filed for exemption pursuant to this paragraph;

(ii) Identify all of the documents being transmitted including, in the instance of a modification to an approved or exempted agreement, the full name of the approved or exempted agreement, the Commission-assigned agreement number of the approved or exempted agreement and the revision, page and/or appendix number of the modification being filed;

(iii) Provide a concise summary of the filed agreement or modification separate and apart from any narrative intended to provide support for the acceptability of the agreement or modification;

(iv) Clearly provide the typewritten or otherwise imprinted name, position, business address and telephone number of the filing party; and

(v) Be signed in the original by the filing party or on the filing party's behalf by an authorized employee or agent of the filing party.

(3) To facilitate the timely and accurate publication of the *Federal Register* Notice, the letter of transmittal shall also provide a current list of the agreement's participants where such information is not provided elsewhere in the transmitted documents.

(f) Agreements filed for and entitled to exemption under this paragraph will be exempted from the approval requirements of the Shipping Act of 1916 effective on the date they are filed with the Commission.

4. The authority citation to Part 572 continues to read:

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

5. Section 572.307 to Part 572 in Subpart C of Subchapter D of Title 46 of the Code of Federal Regulations is redesignated § 572.308.

6. A new § 572.307 to Part 572 in Subpart C of Subchapter D, Marine Terminal Agreements—Exemption is added to read as follows:

§ 572.307 Marine Terminal Agreements—Exemption

(a) *Marine terminal agreement* means an agreement, understanding, or association written or oral (including any modification, cancellation or appendix) that applies to future, prospective activities between or among the parties and which relates solely to marine terminal facilities and/or services among marine terminal operators and among one or more marine terminal operators and one or more ocean common carriers that completely sets forth the applicable rates, charges, terms and conditions agreed to by the parties for the facilities and/or services provided for under the agreement. The term does not include a joint venture arrangement among marine terminal operators to establish a separate, distinct entity that fixes its own rates and publishes its own tariff.

(b) *Marine terminal conference agreement* means an agreement between or among two or more marine terminal operators and/or ocean common carriers for the conduct or facilitation of marine terminal operations in connection with waterborne common carriage in the foreign commerce of the United States and which:

(1) (i) Provides for the fixing of and adherence to uniform marine terminal rates, charges, practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo for all members; and
or

(ii) Provides for the conduct of the collective administrative affairs of the group; and

(2) May include the filing of a common marine terminal tariff in the name of the group and in which all the members participate, or, in the event of multiple tariffs, each member participates in at least one such tariff.

(c) *Marine terminal discussion agreement* means an agreement between or among two or more marine terminal operators and/or marine terminal

conferences and/or ocean common carriers solely for the discussion of subjects including marine terminal rates, charges, practices and conditions of service relating to the receipt, handling and/or delivery of passengers or cargo.

(d) *Marine terminal interconference agreement* means an agreement between or among two or more marine terminal conference and/or marine terminal discussion agreements.

(e) All marine terminal agreements, as defined in §572.307(a), with the exception of marine terminal conference, marine terminal interconference and marine terminal discussion agreements as defined in §572.307 (b), (c) and (d) are exempt from the waiting period requirements of section 6 of the Shipping Act of 1984 and Part 572 of this Chapter on the condition that they be filed in the form and manner presently required by Part 572 of this Chapter.

(f) Agreements filed for and entitled to exemption under this paragraph will be exempted from the waiting period requirements effective on the date of their filing with the Commission.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

[46 CFR PART 572]

DOCKET NO. 85-22

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

May 14, 1987

ACTION: Discontinuance of Proceeding.

SUMMARY: The Federal Maritime Commission is discontinuing its proposed rulemaking proceeding concerning provisions in agreements subject to the Shipping Act of 1984 that affect or relate back to activities or events which occurred prior to the agreements becoming effective. The Commission will continue to address these matters on an *ad hoc* basis.

DATES: May 19, 1987.

SUPPLEMENTARY INFORMATION:

The Commission initiated this proposed rulemaking proceeding by Notice published in the *Federal Register* (50 FR 51418-51420, December 17, 1985). The proposed rule would have amended the Commission's agreement rules by adding a new subparagraph to 46 CFR 572.103 to read as follows:

(h) An agreement filed under the Act shall apply only to prospective, future activities of the parties and may not in any way directly or indirectly affect or rely upon activities, events or payments which occurred prior to the effective date of the agreement.

In proposing this rule, the Commission advised that it had been receiving an increasing number of agreements which contained provisions affecting activities or events which occurred prior to the effective dates of the agreements. The Commission noted that these provisions were particularly pervasive in the area of marine terminal agreements, where ocean common carriers often agree to use port facilities in the future, but in so doing, attempt to credit prior use to future formulas or rerate prior use at a new and lower rate once the agreement becomes effective. The Commission explained that agreements with retroactive application raised legal concern under various provisions of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. app. 1701-1720.

Comments in response to the Notice were received from ocean common carriers, ocean carrier conferences, port authorities, terminal operators, law firms, and the Department of Justice. Some commenters supported the rule as proposed or in a modified form. Several commenters expressed

the view that there is no particular need for a rule on "retroactivity" because the parameters of acceptable conduct under the 1984 Act are already clear, as a matter of law. In addition, many of the commenters raised concerns about portions of the proposed rule which appeared to be overbroad, in that they would condemn agreement provisions which have heretofore been considered legitimate. In this regard, some commenters requested that any final rule identify with particularity unacceptable retroactive provisions.

Upon careful consideration of all of the comments submitted, and in light of the regulatory objectives underlying this proceeding, the Commission has decided to withdraw the proposed rule. We do not believe that a formal regulation defining the limits of an agreement's application to past events is either feasible or necessary, at least at this time. Section 10(a)(2) of the 1984 Act, 46 U.S.C. app. 1709(a)(2), prohibits anyone from "operat[ing] under an agreement required to be filed under section 5 . . . that has not become effective under section 6 [of that Act]" Similarly, section 7 of the Act, 46 U.S.C. app. 1706, conveys no antitrust immunity on activity which has occurred prior to an agreement becoming effective. As a result, and because it would be extremely difficult, if not impossible, to prescribe a rule which would address the legitimate concerns of the commenters while at the same time providing clear, definitive guidelines covering all potential variant situations, the Commission has decided to discontinue this rulemaking proceeding and continue to address the issue of possible retroactive agreement provisions on an *ad hoc* basis.

THEREFORE, IT IS ORDERED, That the rule proposed in this proceeding is withdrawn and the proceeding discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 85-5

FAILURE OF NON-VESSEL OPERATING COMMON CARRIERS IN
THE FOREIGN COMMERCE OF THE UNITED STATES TO COMPLY
WITH THE ANTI-REBATE CERTIFICATION FILING REQUIREMENT
OF SECTION 15 (b) OF THE SHIPPING ACT OF 1984

DISCONTINUANCE OF PROCEEDING

June 1, 1987

The Commission instituted this proceeding on March 7 1985, by Order to Show Cause ("March Order") directed to 367 named non-vessel operating common carriers ("NVOCCs" or "Respondents") as to why they should not be found in violation of section 15(b) of the Shipping Act of 1984, 46 U.S.C. app. 1714 for failure to file the anti-rebate certification required by that section for calendar year, 1984.

On December 9, 1985, the Commission issued a further order which dismissed the majority of Respondents in the proceeding and at the same time referenced the institution of Docket No. 86-1, *Cancellation of Tariffs or Assessment of Penalties Against Non-Vessel Operating Common Carriers in the Foreign Commerce of the United States*. Docket No. 86-1 was initiated, in part, as a vehicle for canceling the tariffs of non-responding NVOCCs to the March Order.

This proceeding has remained open primarily to allow for follow-up action to be taken on certain matters; i.e., the issuance of warning letters to certain Respondents by the Commission's Bureau of Hearing Counsel, the refiling of correct anti-rebate certificates by a number of Respondents, and for a last attempt to serve the March Order on certain other Respondents for which more current addresses had been discovered. As a result of these actions, there now remain six non-responding NVOCCs which require some final disposition by the Commission.

This proceeding did not provide for the assessment of penalties or tariff cancellation. Docket No. 86-1, which as indicated was initiated in part as a vehicle for canceling these tariffs, was discontinued on January 2, 1987.

The Commission's Bureau of Domestic Regulation is currently considering options for action against other non-vessel operating common carriers which have failed to file anti-rebate certifications for 1987. The six Respondents remaining in this proceeding fall within this category since they also have failed to file a current certification. For this reason, this matter

FAILURE OF NVOCC TO COMPLY WITH ANTI-REBATE 883
CERTIFICATION FILING REQUIREMENT

as it pertains to these Respondents will be referred to the Bureau of Domestic Regulation for appropriate action.

THEREFORE, IT IS ORDERED, that the Respondents identified in the attached Appendix are dismissed from this proceeding and this matter is referred to the Bureau of Domestic Regulation for appropriate action; and IT IS FURTHER ORDERED, that this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

Attachment

APPENDIX

Mundial Enterprises, Ltd., c/o Peter Morales, Pres., 540 Militia Hill Road,
Southampton, Pennsylvania 18966

Pan Caribbean Freightliners, Inc., 2780 SW Douglas Road, Suite 200A,
Miami, Florida 33133

Seven Star Container Line, Port of Sacramento, World Trade Center, Suite
101, West Sacramento, California 95691

Stalker Enterprises Inc., 10320 Little Patuxent Pkwy, Equitable Bank Center,
Columbia, Maryland 21044

Trans World Export Boxing Corp., 808 Garfield Avenue, Jersey City, New
Jersey 07305

Worldwide Consolidators, Inc., 9032 South Vermont Avenue, Torrance,
California 90502

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-1

CANCELLATION OF TARIFFS OR ASSESSMENT OF PENALTIES AGAINST NON-VESSEL OPERATING COMMON CARRIERS IN THE FOREIGN COMMERCE OF THE UNITED STATES

ORDER OF LIMITED REOPENING

June 5, 1987

On January 2, 1986, the Commission initiated this proceeding by Order to Show Cause ("1986 Order") directed to 201 non-vessel operating common carriers ("Respondents" or "NVOCCs") in the foreign commerce of the United States. The 1986 Order was issued to determine whether the Respondents should be assessed civil penalties for any violations of the Shipping Act of 1984 ("the Act"), 46 U.S.C. app. § 1701-1720, and Commission regulations, principally the failure to file a current anti-rebate certification. Subsequently, on January 21, 1987, the Commission issued a notice advising that the Administrative Law Judge's Order, Declaring Certain Tariffs to be Inactive and Canceling Same, Dismissing Respondents and Discontinuing the Proceeding ("1987 Order") had become "administratively final."

Included among the tariffs canceled by the 1987 Order was that of Fuji Express. Fuji's tariff was declared to be inactive and ordered canceled because Commission records did not indicate any response to the various orders issued in this proceeding.

The Commission's Bureau of Hearing Counsel has now filed a petition to reopen this proceeding for the limited purpose of amending the 1987 Order by deleting Fuji Express from the list of canceled NVOCC tariffs. A current review of Commission records indicates that Fuji had responded to the 1986 Order by filing its anti-rebate certification. Fuji did not follow the procedural requirements set forth by the Administrative Law Judge, thereby causing its filing not to be included in the record of the proceeding. The fact remains that Fuji was in compliance with Commission regulations and, therefore, its tariff should not have been ordered canceled.

Hearing Counsel's petition falls outside of the time limits for a petition for reconsideration as set forth in Rule 261 (46 CFR 502.261) of the Commission's Rules of Practice and Procedure. However, Rule 10 (46 CFR 502.10) allows for a waiver of the Commission's Rules in "any particular case to prevent undue hardship, manifest injustice. . . ." The instant situation would appear to be appropriate for relief under Rule 10 and Hearing Counsel's petition will be granted.

THEREFORE, IT IS ORDERED, That the petition to reopen this proceeding is granted for the limited purpose of amending the 1987 Order, by deleting Fuji Express from the list of those NVOCCs whose tariffs were canceled.

IT IS FURTHER ORDERED, That the proceeding is discontinued.

(S) TONY P. KOMINOTH
Assistant Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-17

MOBIL OIL CORPORATION V. BARBER BLUE SEA LINES

ORDER OF REMAND

June 17, 1987

The Commission determined to review the decision of Administrative Law Judge Joseph N. Ingolia ("Presiding Officer"), titled "Complainant's Motion to Withdraw Complaint Granted, With Prejudice," dated March 12, 1987, approving an agreement in settlement of a complaint filed by Mobil Oil Corporation ("Mobil" or "Complainant") against Barber Blue Sea Line ("BBS"), an ocean common carrier subject to regulation under the Shipping Act of 1984 ("the Act") 46 U.S.C. app. §1701, *et seq.*, and granting Mobil's Motion to Withdraw the Complaint ("Motion").

BACKGROUND

The complaint alleged freight overcharges by BBS in violation of section 10(b)(1) of the Act on a shipment transported from New York, New York to Singapore.¹ In its answer to the complaint BBS denied any violation of the Act. Subsequently, Mobil filed the proposed settlement agreement and the Motion.

DISCUSSION

The Presiding Officer approved the settlement agreement and granted the Motion on the grounds "the settlement of administrative proceedings is favored by the Congress, the Courts and administrative agencies themselves" Presiding Officer's decision at 2. No other explanation is given for the Presiding Officer's action.

The Commission, as a matter of policy, encourages the settlement of disputes. However, in claims alleging freight overcharges, the Commission requires that the settlement be scrutinized in order to ensure that the agreement between the parties does not result in an unlawful refund or rebate. A settlement of an overcharge claim "can only be approved on a finding that the settlement reflects a reasonable interpretation of the carrier's tariff, unless circumstances make such a finding infeasible." *Clark International Marketing S.A., a Division of Clark Equipment Company v. Venezuelan*

¹ Section 10(b)(1), 46 U.S.C. app. §1709(b)(1), provides:

(b) Common Carriers.—No common carrier, either alone or in conjunction with any other person, directly or indirectly, may—

(1) charge, demand, collect, or receive greater, less, or different compensation for the transportation of property or for any service in connection therewith than the rates and charges that are shown in its tariffs or service contracts; . . .

Line, 22 S.R.R. 464, 465 (1983) (Order of Remand). Therefore, parties which propose to settle a claim alleging freight overcharges in violation of the carrier's tariff must:

- (1) submit to the Commission a signed settlement agreement;
- (2) file with the settlement agreement, an affidavit setting forth the reasons for the settlement and attesting that the settlement is a bona fide attempt by the parties to terminate their controversy and not a device to obtain transportation at other than the applicable rates and charges or otherwise circumvent the requirements of the Shipping Act;
- (3) show that the complaint on its face presents a genuine dispute and the facts critical to the resolution of the dispute are not reasonably ascertainable. *Organic Chemicals (Glidden-Durkee) Corp. v. Atlantitrafik Express Service*, 18 S.R.R. 1536a, 1539-40 (1979).²

While Complainant here filed the settlement agreement with its Motion to Withdraw the Complaint, it failed to meet the requirements referred to above. The Presiding Officer granted the Motion without any comment or finding on the propriety of the settlement under BBS's tariff and section 10(b)(1) of the Act. In the absence of such a determination, approval of the settlement is, at best, premature.

The proceeding will consequently be remanded to the Presiding Officer for an analysis of the settlement agreement under the standards set forth above.

THEREFORE, IT IS ORDERED, That the Presiding Officer's decision titled "Complainant's Motion to Withdraw Complaint Granted, With Prejudice," is vacated; and

IT IS FURTHER ORDERED, That this proceeding is remanded to the Presiding Officer for further action consistent with this Order.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

² This standard was established in a case arising under section 18(b) (3) of the Shipping Act, 1916, formerly 46 U.S.C. 817(b)(3). Section 18(b)(3) was substantially the same as section 10(b)(1) of the Shipping Act of 1984.

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-24
M-C INTERNATIONAL

v.

HANJIN CONTAINER LINES, LTD.

ORDER OF ADOPTION

June 17, 1987

Upon review on its own motion, the Commission has determined to adopt the decision of Administrative Law Judge Joseph N. Ingolia, titled "Complainant's Motion to Withdraw the Complaint Granted, With Prejudice," served April 2, 1987, in which he approved an agreement in settlement of a complaint filed by M-C International against Hanjin Container Lines, Ltd.

THEREFORE, IT IS ORDERED, That the decision of the Administrative Law Judge, titled "Complainant's Motion to Withdraw the Complaint Granted, With Prejudice," is adopted;

FINALLY, IT IS ORDERED, That this proceeding is discontinued.

By the Commission.

(S) JOSEPH C. POLKING
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 86-24
M-C INTERNATIONAL

v.

HANJIN CONTAINER LINES, LTD.

COMPLAINANT'S MOTION TO WITHDRAW COMPLAINT GRANTED, WITH PREJUDICE

Adopted June 17, 1987

This proceeding was begun by a complaint filed by M-C International against Hanjin Container Lines, Ltd., on September 15, 1986. The complaint alleges that the respondent violated "sections 10(b) (3) (6) (C) (11) (1) of the Shipping Act of 1984" by discriminating against the complainant in cancelling eight reefer bookings it had previously made and confirmed. The complainant sought reparations of \$7,581.00 with interest as well as certain other relief from the Commission.

On March 16, 1987, the parties filed a settlement agreement which in pertinent part states:

. . . After negotiations, the parties have agreed that Hanjin will pay to M-C \$3,750.00 in return for which M-C International will withdraw its complaint.

Hanjin is aware of no other shipper which can make the same claim as M-C, so settlement would not improperly favor M-C or discriminate against any other shipper.

The complainant has filed a motion to withdraw its complaint in accordance with the above.

Wherefore, in view of the above and the entire record as well as the fact that the settlement of administrative proceedings is favored by the Congress, the Courts and the administrative agencies themselves,¹ it is

¹ *Quality Food Corporation v. Tropical Shipping Co., Ltd.*, 23 F.M.C. 602 (1981); see also the authorities summarized in *Ellenville Handle Works, Inc. v. Far Eastern Shipping Co.*, 23 F.M.C. 707 (1981); and *Ben Coal Co. v. Sea-Land Service, Inc.*, 21 F.M.C. 505 (1978).

Ordered, that the complainant's unopposed motion to withdraw the complaint is granted subject to the payment of \$3,750.00 by the respondent to the complainant and the proceeding is hereby dismissed, with prejudice.

(S) JOSEPH N. INGOLIA
Administrative Law Judge

FEDERAL MARITIME COMMISSION

[46 CFR PARTS 580 AND 581]

DOCKET NO. 86-6
SERVICE CONTRACTS

June 23, 1987

ACTION: Final Rule.

SUMMARY: The Federal Maritime Commission is adopting a Final Rule that substantially revises its existing service contract regulations and places them in a newly created part. Those changes that are primarily technical in nature are intended to better assist the Commission in meeting its statutory responsibilities over service contracts. In addition, other changes have been adopted to ensure that service contracts comply with all statutory requirements.

DATE: July 27, 1987.

SUPPLEMENTARY INFORMATION:

The Commission initiated this proceeding by Notice of Proposed Rulemaking published in the *Federal Register* on February 18, 1986 (51 FR 5734-5744). The proposed rule reflected the Commission's experience dealing with the large number of service contracts that had been filed with it since the Shipping Act of 1984 ("Act" or "1984 Act"), 46 U.S.C. app. 1701-1720, was enacted. It was intended to ensure that service contracts more fully comply with all statutory requirements and the intent of Congress, to update and streamline the service contract filing process and to make non-substantive technical revisions. As a result, the proposed rule altered the existing service contract rules in several ways.

Thirty-three commenters submitted their views on the proposed rule. Attachment A lists these commenters and the acronyms by which they will be referred throughout this discussion. The specific comments of each commenter are discussed below in the context of each section of the proposed rule.

ANALYSIS OF COMMENTS

The following addresses, in numerical order, each section of the proposed rule that received comment. For each section, the proposed language is set forth and a brief description of its purpose and effect is included. This is followed by a discussion and analysis of the comments of the parties and an explanation, where appropriate, of the course of action taken in the final rule.

A. Proposed section 581.1(e)

(e) "Contract party" means any party signing a service contract as an ocean common carrier, conference, shipper or shippers' association.

This provision revises the present definition of "contract party," 46 CFR 580.7(a)(1), by including a "conference" as an entity which can sign a service contract. It also deletes language in the present rule which includes "any other named entity associated with such a party entitled to receive or authorized to offer services under the contract as a contract party."

The South/Central American Conferences contend that the rule should be revised to again include a reference to "named entities associated with" in the definition of "contract party." The North European Conferences likewise support restoration of the deleted language. They note that the proposed rule otherwise treats such entities as contract parties, citing as examples proposed sections 581.3(a)(3)(v)(B) and 581.4(a)(1)(v-vi).

The proposed definition of "contract party" will be adopted without charge. It is consistent with the basic concept that the only entity which can be a party to a contract is one which *signs* the contract. Other affiliated entities may take advantage of the provisions of a service contract as a third party beneficiary, if named as an affiliate pursuant to proposed section 581.4(a)(1)(vi), but they are not *obligated* under the contract itself unless they too have signed it.

B. Proposed section 581.1(f)

(f) "Essential Terms Publication" means the single publication which is maintained by each carrier or conference for service contract(s) and which contains statements of essential terms for every such contract.

This new definition, together with the proposed definition of "statement of essential terms" in section 581.1(r), is intended to clarify the different uses of the words "essential terms," *i.e.*, (1) the "essential terms" which must be included in a service contract pursuant to section 8(c) of the 1984 Act, 46 U.S.C. app. 1707(c), (2) the "statement of essential terms" which must be filed with the Commission, and (3) the "essential terms publication" which must contain the various statements of essential terms of a carrier or conference.

Hercules questions whether the contents of a service contract should become public by way of an "essential terms publication." It contends that service contracts are commercial transactions which should be of no concern other than to those who are parties to the contract. Hercules further contends that even though the name of a shipper is not an essential term, it could be ascertained by other information available in a statement of essential terms, contrary to the interests of the shipper. DuPont suggests that the word "only" be inserted between the words "which contains" in the proposed definition. It believes that this will ensure further confiden-

tiality of service contracts by prohibiting carriers or conferences from voluntarily including anything else in an essential terms publication.

The proposed definition of "essential terms publication" will be adopted without change. The comments by Hercules indicate a basic misconception about the confidential nature of service contracts. Although service contracts must be filed "confidentially" with the Commission, the 1984 Act requires that a concise statement of their essential terms must also be made available to the general public and those essential terms must be available to a shipper similarly situated. DuPont's suggestion also appears to be unnecessary. It is clear from the definition that the "essential terms publication" is to contain only statements of essential terms.

C. Proposed section 581.1(h)

(h) "Geographic area" means the general location from which and to which cargo subject to a service contract will move in intermodal service.

This definition of "geographic area" is essentially the same as the present definition, 46 CFR 580.7(a)(2). The North European Conferences suggest that the term "through service" be substituted for the term "intermodal service" in the proposed definition. They contend that this would more accurately reflect the terminology employed in sections 3(25) and 3(26) of the 1984 Act.

The Commission agrees that the Conferences' suggested language is more consistent with the statute and it will therefore be included in the final rule.

D. Proposed section 581.1(m)

(m) "Port range" includes those ports of loading or unloading of service contract cargo that are regularly served by the contracting carrier or conference, as specified in its tariff of general applicability, even if the contract itself contemplates use of but a single port within that range.

This provision is substantially the same as the present definition of "port range," 46 CFR 580.7(a)(3). It does, however, omit language in the present rule which limits coverage to ports "in the countries" of loading or unloading.

The North European Conferences object to the deletion of the words "in the countries," and the substitution of "includes" for the word "means" in the proposed definition of "port range." They argue that the current definition should be retained, except for the unexplained pluralization of "country." The Mediterranean Conferences, ANERA, and Sea-Land believe that the proposed definition is too broad and suggest that it be limited to the ports actually specified by the contracting carrier or conference in a service contract. They further contend that whatever is done vis-a-vis foreign port ranges should also apply to the definition of U.S. port range. The Japanese Conferences likewise believe that the

proposed definition is too broad and support retention of the existing definition.

APL contends that there is no clear Congressional indication of what was intended by the term "port range." It contends, therefore, that the Commission's definition should conform to trade practices and include only "ports in the same general location as the ports covered in the initial service contract."

As suggested by the North European Conferences, the Commission will retain the existing definition of "port range," modified to include the words of limitation—"in the country." We agree that this is more consistent with the intent of Congress, as expressed by the Senate Committee on Commerce, Science, and Transportation when it stated:

The term "port range" is intended to encompass those ports *in the country of loading or unloading* of the contract cargo that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983) (emphasis added). The Commission will also make two minor alterations to the present definition which were suggested by the North European Conferences. Given the language of the statute and its legislative history, the Commission cannot, however, limit the geographic scope of "port range" further, as was suggested by other commenters.

E. Proposed section 581.1(n)

(n) "Service contract" means a contract between one or more shippers or shippers' associations and one or more ocean common carriers or conferences, in which the shipper makes a commitment to provide a certain minimum quantity of its cargo or freight revenue over a fixed time period, and the ocean common carrier or conference 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.

The proposed definition alters the existing definition of "service contract," 46 CFR 580.7(a) (4), by permitting *one or more* shippers, shippers' associations, ocean common carriers, or conferences to enter into service contracts. This revision was explained as being a clarification of existing law.

The North European Conferences do not believe that the proposed definition is consistent with the definition set forth in section 3(21) of the 1984 Act. They find no support in the Act or its legislative history for the proposition that two or more unrelated or unaffiliated shippers or shippers' associations may join together on a single service contract. The South/

Central American Conferences likewise recommend that the Commission retain the existing definition of "service contract," on the assumption that it was not the Commission's intent to permit unrelated shippers or groups of shippers' associations to enter into service contracts.

USL contends that the net effect of the proposed definition would be the establishment of *de facto* shippers' associations, on the one hand, or associations of carriers on the other, with the membership varying from contract to contract. It submits that such a result is beyond the Commission's statutory jurisdiction. Lastly, Sea-Land avers that the proposed definition is not a clarification, but rather a misreading, of the 1984 Act. It argues that more than one carrier can enter a service contract only by joining or creating a conference and that more than one shipper may enter a service contract only by joining or forming a legitimate shippers' association.

The proposed definition of "service contract" will not be adopted. The Commission will instead retain the existing definition, which is essentially the definition of "service contract" which is contained in the 1984 Act. Under this definition, shippers can continue to affiliate to take advantage of service contracts, if that affiliation meets the definition of a "shippers' association."

F. Proposed section 581.1(p)

(p) "Shipper" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

This definition is the same as that in the Commission's existing rules 46 CFR 580.7(a)(5). Moreover, it is a verbatim restatement of the definition of "shipper" contained in section 3(23) of the 1984 Act, 46 U.S.C. app 1702(23).

ANERA, Sea-Land, and the Australia-New Zealand Conference suggest that the Commission more precisely define the term "shipper" to preclude certain middlemen from taking advantage of the Act, without subjecting themselves to regulation under it. They suggest that the Commission adopt the definition of "shipper" which was proposed by the North European Conferences in a petition filed with the Commission on February 3, 1986 (57 FR 5402 (1986)). This proposal would require any person who transports cargo for its own account, but resells the transportation services to underlying shippers at higher rates, to have a tariff on file in order to enter into a service contract.

While opposing the North European Conferences' proffered definition of "shipper," AISA suggests that the Commission's proposed definition be modified to include "owners or other persons on whose account the ocean transportation is provided." It contends that this would correspond to the definition of "shipper" at 46 CFR 572.104(aa), and would clarify

that shippers' associations are shippers for the purposes of the service contract regulations.

The proposed definition of "shipper" will be adopted without change. The Commission addressed the North European Conferences' proposed revision in the context of its order denying the Conferences' petition to amend the definition of shipper. See *In the Matter of Petition of the U.S. Atlantic-North Europe Conference and North Europe-U.S. Atlantic Conference for a Rule Regarding the Term "Shipper,"* 23 S.R.R. 1381 (1986). Moreover, as a result of that petition, the Commission initiated a fact finding investigation into the use of shippers' associations and service contracts by various middlemen. *Fact Finding Investigation No. 15*, Order, served September 17, 1986. Any revision of the existing definition of "shipper" should appropriately await the conclusion of this investigation.

AISA's suggestion that the definition be modified to include "owners or other persons" is likewise rejected. The definition of "service contract" in the 1984 Act clearly distinguishes between shippers and shippers' associations. Given the fact that the 1984 Act and the Commission's rules define a service contract as one by a shipper or shippers' association, there is no need to attempt to include shippers' associations within the ambit of "shipper." It appears that Congress has created shippers' associations as distinct entities, and has specifically delineated their rights and obligations throughout the Act. Again, any possible modification of the definition of "shipper" to include, directly or indirectly, shippers' associations should await completion of Fact Finding Investigation No. 15.

G. Proposed section 581.1(t)

(t) "Tariff of general applicability" means the effective tariff, on file at the Commission under Part 580 of this chapter, that would apply to the transportation in the absence of a service contract.

This new definition was proposed because the term "tariff of general applicability" was used in several other places in the proposed rule.

Sea-Land recommends that this definition be deleted. It contends that there is no direct relation between rates set forth in tariffs and rates set forth in service contracts, and believes that any definition which implies such a connection may be confusing.

The Commission agrees with Sea-Land that there is not always a direct relationship between a rate contained in a service contract and a rate in a tariff. A service contract stands on its own, if properly drafted by its parties. However, there are certain administrative requirements in the final rule that necessitate a definition of "tariff of general applicability." Moreover, the term is used in the context of voluntarily filed contracts on exempt commodities. Accordingly, this definition will be retained.

H. Additional comments on proposed section 581.1 (definitions)

APL, ANERA, and IBP suggest various definitions for "similarly situated shipper," which each believes should be incorporated into the final rule. APL alleges that the lack of a definition of "similarly situated shipper" is inhibiting service contracting, because a carrier entering into a service contract for a commodity does not know whether it must grant the same rate to a shipper in a completely different industry shipping a similar commodity.

Even if the Commission were to agree that a definition of "similarly situated shipper" is desirable, it cannot do so in the context of this rule-making proceeding. Any action along these lines is outside the scope of this proceeding, and would have to be proposed as a new rule. In any event, the Commission does not find that a definition of "similarly situated shipper" is necessary or appropriate, at least at this time.

It is extremely doubtful that the lack of a definition of "similarly situated shipper" is in any way inhibiting the use of service contracts. While it is true that the number of "me-too" contracts is a very small percentage of the service contracts filed with the Commission, this may merely reflect the fact that any shipper which can come close to meeting the terms of a service contract is probably in a position to negotiate its own. Moreover, concepts like "similarly situated" are perhaps best left to resolution on an *ad hoc* basis, especially given the infinite variety of terms in a service contract.

Warner-Lambert and NYCCI raise identical objections to any provision in the proposed rule which could be interpreted as restricting non-vessel-operating common carriers ("NVOs") from offering service contracts to shippers in their capacity as carriers. They contend that the language of the 1984 Act does not support such an interpretation.

Presumably, these commenters are referring to the definition of "service contract" in proposed section 581.1(n), which indicates that a service contract can only be offered by an *ocean common carrier* or conference. Contrary to the assertions of Warner-Lambert/NYCCI, there is nothing in the statute which authorizes NVOs to offer service contracts as "carriers." In fact, as section 8(c) of the Act makes clear, a service contract can *only* be offered by a "ocean common carrier," and an NVO cannot qualify as an ocean common carrier since it does not operate *vessels*.

I. Proposed section 581.2(a)

(a) Geographical Scope. Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States.

This amendment to the existing rule is designed to limit service contracts to those involving transportation of cargo which moves through a U.S. port in the foreign commerce of the United States.

The Mediterranean Conferences, HPB, the North European Conferences, NITL and USL support the provision.

CMA, Hercules, DuPont, Stauffer, Ford, NYCCI and PPG believe that the scope of service contracts should be broad enough to include foreign-to-foreign traffic because shippers and carriers often negotiate a single contract package covering both the foreign commerce of the U.S. and foreign-to-foreign commerce. Their main concern is with the movement of Canadian cargo.

Sea-Land suggests amending the proposed rule to permit service contracts to include foreign-to-foreign cargo that moves through a U.S. port even if it does not enter the foreign commerce of the United States.

In arguing that the scope of service contracts should be broad enough to include foreign-to-foreign cargo, the commenting parties appear to be treating the issue as purely one of policy which is within the Commission's discretion to decide. The Commission, however, cannot expand by its own regulations the power given to it by Congress. *Austasia Intermodal Lines, Ltd. v. Federal Maritime Commission*, 580 F.2d 642, 646 (D.C. Cir. 1978). Accordingly, the threshold question is whether the scope of the jurisdiction over service contracts conferred on the Commission by section 8(c) of the 1984 Act, 46 U.S.C. app. 1707(c), extends to foreign-to-foreign cargo.

Only service contracts offered by "an ocean common carrier or conference" are subject to section 8(c) of the 1984 Act. The term "common carrier," which subsumes the term "ocean common carrier, is defined in section 3(6) of the 1984 Act, 46 U.S.C. app. 1702(6), as meaning a carrier holding itself out to the general public to provide transportation between the United States and a foreign country that:

. . . 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* . . . (emphasis added).

The Report of the Senate Committee on Commerce, Science, and Transportation on S. 504, contains the following explanation of the definition of "common carriers":

This definition applies only to the extent the passengers or cargo transported are loaded or discharged at a U.S. port. Thus, a liner carrier that accepts U.S.-origin intermodal cargo (or, for that matter, Canadian-origin cargo) at Halifax and calls at Boston for further loading en route to Rotterdam would be a "common carrier" for purposes of the bill only with respect to the Boston-Rotterdam leg of its voyage.

S. Rep. No. 3, 98th Cong., 1st Sess. 19 (1983). Likewise, the House Report makes it clear that the definition does not encompass cargo that is transported by land from the United States to a contiguous foreign country and from there by water to an overseas foreign country. H.R.

Rep. No. 53, 98th Cong., 1st Sess. 29 (1983). It appears, therefore, that inclusion of foreign-to-foreign cargo, over which the Commission has no jurisdiction, in service contracts subject to filing under section 8(c) of the 1984 Act would be contrary to the intent of Congress to limit the scope of the 1984 Act to cargo moving in the ocean commerce of the United States which is loaded or discharged at a U.S. port.

Even if the Commission were to conclude that there was no legal impediment to the inclusion of foreign-to-foreign cargo in service contracts, enforcement problems would remain. The Commission would have no legal means of obtaining information relating to foreign-to-foreign movements. This could seriously hamper the Commission's ability to enforce the provisions of section 8(c). Accordingly, the Commission is adopting proposed section 581.2(a) as a final rule. In so doing, the Commission notes that carriers and shippers are not prevented from making separate service contracts for the carriage of foreign-to-foreign cargo. Section 8(c) of the 1984 Act does not purport to regulate or prohibit service contracts which a carrier may enter into while *not* acting in the capacity of an ocean common carrier in the United States foreign commerce.

J. Proposed section 581.2(b)

(b) Parties: NVOs and Forwarders—

(1) A non-vessel-operating common carrier may sign a service contract only in its capacity as a shipper to the offering ocean common carrier or conference.

(2)(i) A licensed ocean freight forwarder may sign a service contract only in its capacity either as the actual shipper or as forwarding agent for and on behalf of a named shipper contract party.

(ii) Whenever a licensed ocean freight forwarder:

(A) Signs a service contract as the actual shipper, all bills of lading covering shipments under the contract shall indicate as "shipper" [on the shipper line of the bill of lading] the name of the licensed ocean freight forwarder, and in no event may the forwarder collect ocean freight compensation on such shipments; or

(B) Acts as forwarding agent in signing a service contract, written authorization for such signature as agent shall be submitted to the carrier or conference contract party; shall accompany the service contract filing under § 581.3(a) (1); and shall be kept confidential under § 581.9.

The proposed rule clarifies that NVOs and ocean freight forwarders, which cannot offer service contracts as carriers, may enter into them as shippers, but only under certain conditions.

NCBFAA supports the rule, but suggests that it be modified to cover the situation in which the exporter activity is performed by an affiliate of a freight forwarder.

TWRA contends that the proposed rule would permit freight forwarders to sign service contracts and offer them to shippers without filing a tariff

as an NVO. It suggests that the proposed rule be amended to make it clear that an ocean freight forwarder may only sign a service contract as: (1) an agent on behalf of a named shipper; (2) a shipper having a beneficial interest in the cargo; or (3) an NVO. ANERA, Australia-New Zealand Conference, APL, the South/Central American Conferences, and USL filed similar comments.

Hercules believes that NVOs and freight forwarders may execute service contracts and hold themselves out to the public to provide transportation. Its only concern seems to be that NVOs and freight forwarders have sufficient financial resources in case of default on the service contract.

NITL opposes the rule, apparently in the belief that it would require shippers to utilize the services of a freight forwarder when entering into a service contract.

NEPFC, PCEC, Sea-Land and the North European Conferences believe that the rule is unnecessary and should be deleted. Sea-Land points out that only ocean common carriers, conferences, shippers and shippers' associations can be parties to a service contract. Each of these entities has already been defined. If an NVO or forwarder is to be a party to a service contract, it must fall within the definition of "shipper."

NYCCI and Warner-Lambert have no objection to the rule, but believe that the issue of whether a freight forwarder, acting as a shipper, should receive compensation is a matter best left to the contracting parties.

It appears that the proposed rule pertaining to NVOs and ocean freight forwarders is subject to misinterpretation. Moreover, it does not appear necessary. As Sea-Land has pointed out in its comments, only ocean common carriers, conferences, shippers, and shippers' associations can be parties to a service contract. If an NVO or forwarder is to become a party to a service contract, it must be a "shipper," as defined in section 3(23) of the 1984 Act, 46 U.S.C. app. 1702(23).

Accordingly, the Commission is deleting section 581.2 (b) from its final rule. It should be noted, however, that even in the absence of section 581.2(b), section 19(d)(4) of the 1984 Act, 46 U.S.C. app. 1718(d)(4), prohibits freight forwarders from receiving compensation from a carrier for any shipment in which the forwarder has a direct or indirect beneficial interest.

K. Proposed section 581.3(a)(2)

(2) Statement of essential terms. At the same time as the filing of the service contract under paragraph (a)(1) of this section, the statement of essential terms of the contract shall be submitted:

- (i) In form and content as provided in §§ 581.4(b) and 581.5;
- (ii) In tariff format;
- (iii) On page(s) to be included in the Essential Terms Publication as described in paragraph (b) of this section; and

(iv)(A) With an accompanying transmittal letter in an envelope which contains only matter relating to essential terms; and

(B) The envelope and the inside address on the transmittal letter are to be addressed to the "Director, Bureau of Tariffs, Federal Maritime Commission, Washington, D.C. 20573."

This is substantially the current rule, 46 CFR 580.7(i), with the clarification that the statement of essential terms pages are to be filed in the Essential Terms Publication.

The North European Conferences note that, under current rules, the statement of essential terms filing requirements may be met by filing the entire text of the service contract, absent the name of the shipper. They assume that this option is still available.

The North European Conferences are correct that the requirement to file the statement of essential terms can still be met by filing the entire text of the service contract, minus the shipper's name. As the Commission previously stated, "[t]o the extent that a service contract meets all the essential terms format requirements and is appropriately stated in terms of geographic areas or port ranges, it could be submitted, minus the shipper's name, in lieu of a statement of essential terms." Docket No. 84-21, *Publishing and Filing Tariffs by Common Carriers in the Foreign Commerce of the United States—Service Contracts and Time/Volume Contracts*, 27 F.M.C. 323 at 333 (1984). This alternative filing procedure remains available under the final rules.

L. Proposed section 581.3(a)(3)

(3) Notices of: change to contract, contract party or rate; availability of changed terms to similarly-situated shippers; and settlement of account. There shall be filed with the Commission pursuant to the procedures of paragraph (a)(1) of this section, a detailed notice, within 30 days of the occurrence, of:

(i) The making available of newly operable essential terms to similarly situated shippers under § 581.6(b)(5);

(ii) Termination by mutual agreement, breach or default not covered by the service contract under § 581.7(b);

(iii) The adjustment of accounts, by rerating, liquidated damages, or otherwise under §§ 581.5-581.8;

(iv) Final settlement of any account adjusted as described in paragraph (a)(3)(iii) of this section, attested to by the involved shipper or shippers' association; and

(v) Any change to:

(A) The name of a basic contract party under § 581.4(a)(1)(v); and

(B) The list of affiliates under § 581.4(a)(1)(vi) of any contract party entitled to receive or authorized to offer service under the contract.

This section, which is new, was proposed to assist the Commission in monitoring and auditing contracts. The Commission was concerned that

many substantive changes in existing service contracts may not have been made available as essential terms to similarly situated shippers, nor been brought to the attention of the Commission in a timely manner. Accordingly, the proposed rule required that the Commission be given notice within 30 days of certain specified events.

The Japanese Conferences object to proposed section 581.3(a)(3)(i), arguing that notification to the Commission of newly operable essential terms would be burdensome.

Sea-Land suggests that the proposed rule be revised by deleting subparagraphs (i) through (iv). It argues that, as a practical matter, substantive changes to the essential terms cannot be made available at mid-course to similarly situated shippers in any equal or comparable way and, hence, such changes should be prohibited, as should termination by mutual agreement. It suggests that adjustments made by liquidated damages and final settlement can be handled in section 581.7(b), in a non-confidential manner.

The North European Conferences support the notice requirement of the proposed section, but contend that notice of newly operable essential terms to similarly situated shippers under subparagraph (i) and termination by mutual agreement not covered by express contract provision under subparagraph (ii) should not be confidentially filed with the Commission, but rather made publicly available. They contend that this would provide the public the opportunity to ascertain the essential terms of service contracts and allow public monitoring of potential abusive practices. In addition, these Conferences request the deletion of the requirement that notices of final settlements of accounts under subparagraph (iv) be "attested to by the involved shippers or shippers' association," because carriers do not have the authority to obtain such documentation.

TWRA, NEPFC, PCEC and USL also endorse the notice requirements. However, some of these commenters urge that the section be modified to require that all occurrences for which notice must be given to the Commission also be published in the *Essential Terms Publication* to allow other shippers and carriers the opportunity to assist in the enforcement of the rules and to protect their own interests.

USL contends that any change in the rate structure of a service contract should be prohibited, because a rate change on the basis of events occurring subsequent to the contract's execution is contrary to the purposes of the proposed rule's provision that each filed service contract must be made available for 30 days to all similarly situated shippers. USL also supports notice to the Commission of any final settlement made under a contract, but suggests that such notice include a statement of the actual amount of cargo carried in order to discourage unauthorized settlements.

DuPont questions the basis for the rule, maintaining that the Commission should not seek to assess the correctness of the adjustment of accounts. It argues such matters are for appropriate courts under the standard application of contract law. Ford opposes the notification requirements, maintaining

that they would discourage the use of service contracts by adding substantially to the cost and burden for both the carrier and shipper. Hercules again asserts that a service contract is a commercial agreement between consenting parties and should not become a matter of public information.

IBP objects to the mechanism for making the new essential terms available to similarly situated shippers, indicating that the proposed section does not state how the new essential terms are to be made available, *i.e.*, who are similarly situated shippers.

RCA sees no need for the proposed section, maintaining that parties to a contract should be free to negotiate mutually acceptable terms and conditions. It suggests that shippers would be adequately protected through the use of "most favored shipper" clauses and through the use of warranties and/or covenants by the carrier with respect to its non-discriminatory treatment of similarly situated shippers.

NITL opposes the proposed rule, maintaining that it significantly increases paperwork and is unnecessary regulation. It points out that compliance with the terms of service contracts is presently achieved through the use of random audits, and suggests this is still adequate.

DOT sees no need for the Commission to require carriers to provide notice of a newly operable essential term to a shipper that entered into a service contract as a similarly situated shipper. DOT argues that the invocation of any express or implied *force majeure* or commercial contingency clause depends on circumstances which may be unique to a particular shipper and of no concern to a similarly situated shipper.

The commenters' main concerns are that the notice requirement of "newly operable" essential terms in section 581.3(a)(3) (i): (1) would create additional paperwork and other unnecessary burdens; and (2) should not be confidentially filed with the Commission, but rather made public through a filing in the Essential Terms Publication. For the reasons stated below, the Commission rejects both of these arguments.

All the instant rule requires is that, when certain changes occur during the course of a contract, the Commission be given notice thereof. This can be accomplished by providing the Commission a copy of whatever document is transmitted between the parties. This should not prove to be particularly burdensome or unreasonable. Moreover, this information will enable the Commission to be better aware of the status of service contracts, and to ensure that they meet all statutory and regulatory requirements.

As indicated in the Supplementary Information to the proposed rule, the Commission considered the non-confidential filing of such notices, but rejected this approach because there appeared to be substantial practical difficulties. For instance, there could be problems protecting the confidentiality of the shipper's name. Moreover, the types of events which require notice to the Commission do not appear to warrant notice to the general public. The only event that does require notice to someone other than the Commission is the availability of newly operable essential terms, pursuant

to section 581.6(b)(5), and this is accomplished directly between the carrier and any similarly situated shipper.

However, lest there be any confusion or uncertainty as to the nature of the changes contemplated by paragraph (a)(3)(i), the essential terms that are subject to that paragraph are referred to in the final rule as "contingent" rather than "newly operable." This designation appears to be more appropriate.

Lastly, the North European Conferences' concern that ocean common carriers and conferences may lack authority to obtain a "shipper's attestation" of a final settlement of any account described in paragraph (a)(3)(iv) of this section has merit. Accordingly, this requirement has been deleted from the final rule.

M. Proposed section 581.3(c)

(c) Who must file: (1) As further provided in paragraph (c)(2) of this section, the duty under this part to file service contracts, statements of essential terms and notices, and to maintain an Essential Terms Publication, shall be upon:

(i) A service-contract signatory carrier which is not a member of a conference for the services covered by the contract; or

(ii) The conference which:

(A) Is signatory to the service contract; or

(B) Has one or more member carriers signatory to a service contract for a service otherwise covered by the conference agreement.

(2) When a conference files a service contract for and on behalf of one or more of its member lines and the contract covers service from, to or between ports and/or points not included within the scope of the conference, the complete text of the statement of essential terms shall be simultaneously filed in the Essential Terms Publications of both the conference(s) and carrier(s) involved, which shall comply with all other Essential Terms Publication filing and maintenance requirements under paragraph (b) of this section and § 581.4(b).

The proposed rule identifies those who have the duty of filing and maintaining service contract materials. The purpose of this section is to clarify the service contract filing obligations as between conferences and their member lines.

TWRA contends that a mandatory requirement that conferences file service contracts and statements of essential terms for individual members' service contracts is inappropriate. It claims that timeliness may be affected by additional conference action and such filings should be left to the choice of the carrier or conference.

IBP objects to the requirement that conferences file service contracts, statements of essential terms and notices when the signatory is a member line of the conference. It argues that the confidentiality of contracts will inevitably be lost and, in addition, conferences will informally regulate

the contents of such service contracts. It suggests an additional rule prohibiting conferences from interfering with independently negotiated service contracts that were concluded in the manner permitted by the conference agreement.

The requirement that the Essential Terms Publication of a conference also contain the statements of essential terms issued by one or more of the members of a conference is necessary to ensure that the shipping public is aware of any statement of essential terms offered by a conference or any of its members in a particular trade. The form and manner requirements applicable to Essential Terms Publications are, except as provided in these regulations, the same as those applicable to tariffs. Under current rules, it is a common carrier's obligation to file its own tariffs when the common carrier is not a party to an agreement, and when it is a party to an agreement, to participate in a single tariff filed by the conference. Under the tariff filing format of conference tariffs, the conference rate on a commodity and a member line's rate on the same commodity are contained in the same rate item of the conference tariff, thus allowing interested parties immediate access to all current, available rates on a particular commodity. The same benefit would flow to shippers by allowing them to be aware of all service contract rates in the trade by perusal of the conference's Essential Terms Publication. In addition, the proposed filing procedure will allow the Commission to monitor conference members' activities more effectively.

We see no need for IBP's recommended rule prohibiting conferences from interfering with service contracts independently negotiated by member lines. There is no indication or suggestion that such interference presently occurs. Nor is there any basis to assume that the mere filing by conferences somehow results in the informal regulation of the contents of members' service contracts. Where member line service contracts are negotiated independently from the conference, such negotiations are concluded prior to the member line transmitting the final contents of the contract to the conference for filing with the Commission. The conference in this instance is merely acting as a filing agent for the member line and nothing more. In such instances, the conference would have an obligation to maintain appropriate confidentiality of the subject matter.

N. Proposed section 581.3(d)

(d) Exempt commodities: (1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, this section does not apply to contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper or paper waste.

(2) An exempt commodity listed in paragraph (d)(1) of this section may be included in a service contract filed with the Commission, but only if there is a tariff of general applicability for the transportation which contains a specific commodity rate for the exempted commodity.

(3) Upon filing under this paragraph, the service contract and essential terms shall be subject to the same requirements as those contracts involving non-exempt commodities.

This provision amends the present sections relating to exempt commodities, 46 CFR 580.7(b)(1) and (b)(2), by requiring that, before a service contract on an exempt commodity can be filed, there must be a rate on that same commodity in a tariff of general applicability. The Supplementary Information which accompanied the proposed rule states that this requirement was included to cover situations in which a contract was rejected or otherwise had to be rerated. Under these circumstances, there would then be a rate in a governing tariff to use as the basis for determining the proper charges.

APL suggests that subsection (d) should be revised to permit service contracts on exempt commodities to be filed, but without the requirement that there be a tariff of general applicability covering the exempt commodity. APL further suggests that the Commission could accomplish its intended result by requiring service contracts for exempt commodities to contain *bona fide* deadfreight or liquidated damages provisions. APL contends that it is unnecessary to subject exempt commodities to the full panoply of tariff regulation just because a service contract is entered covering such traffic.

ANERA and TWRA likewise oppose the requirement that a tariff of general applicability be filed covering any exempt commodity included in a service contract. They support a rule that would simply require any necessary rerating provisions to be included in a service contract covering an exempt commodity. NITL also opposes the requirement as "unnecessary."

Sea-Land does not believe that rerating is an appropriate remedy for breach or non-performance of a service contract because such a contract stands on its own, with actual or liquidated damages for enforcement. It further contends that it makes no sense to rerate a service contract on exempt commodities which is rejected, because Congress intended that these commodities not be governed by tariffs.

CMA agrees that if the Commission continues to allow the filing of tariffs on exempt commodities, it should not accept a service contract on such a commodity unless there is a generally applicable tariff rate on file for the exempt commodity. CMA contends, however, that the Commission should not allow the voluntary filing of rates in tariffs which cover exempt commodities. CMA notes that the issue of whether to permit exempt commodities to be included in tariffs is presently before the Commission in Docket No. 85-6, *Notice of Inquiry Concerning Interpretation of Section 8(a) and Section (c) of the Shipping Act of 1984*, and contends that a decision in that proceeding may render the instant issue moot. DuPont likewise notes the pendency of Docket No. 85-6, and contends that until

it is resolved, there is no legal precedent for proposed sections 581.3(d)(2) and (3).

NARI suggests that all of proposed section 581.3(d) should be withdrawn. In its place, NARI suggests a rule that any tariff or service contract applicable to exempt commodities which is tendered to the Commission for filing will be rejected pursuant to section 8(f) of the 1984 Act.

There is, of course, no requirement that service contracts covering bulk cargo, forest products, recycled metal scrap, waste paper, or paper waste be filed with the Commission in the first instance. Indeed, they are statutorily *exempt* from filing by section 8(c) of the 1984 Act. Most commenters agree, however, that once service contracts on exempt commodities are voluntarily filed with the Commission, they should be subject to all of the regulations governing service contracts in general. The only provision in the proposed rule which has raised concern is the requirement that there must also be a rate in a tariff of general applicability which covers the exempt commodity.

The Commission will not preclude the voluntary filing of service contracts on exempt commodities, as was suggested by some commenters. This approach is consistent with the Commission's treatment of the voluntary filing of tariff rates on exempt commodities. See *Notice of Inquiry Concerning Interpretation of Section 8(a) and Section 8(c) of the Shipping Act of 1984*, [Docket No. 85-6], 28 F.M.C. 841 (1987). That Notice also indicated that the issue of whether to allow the voluntary filing of service contracts on exempt commodities would be decided in this proceeding.

Permitting the filing of service contracts on exempt commodities should benefit the shipping public. Shippers who would otherwise be unaware of the existence of a service contract on an exempt commodity may now take advantage of such a contract as a similarly situated shipper. Even if a shipper has no intention of taking advantage of a service contract on an exempt commodity on a "me-too" basis, the information contained in the statement of essential terms may be commercially useful to it. The Commission will also be in a better position to monitor activity in certain trades if it is made aware of movements on exempt commodities by way of the filing of service contracts. Moreover, the voluntary filing of such contracts is not specifically precluded by the 1984 Act.

The choice of whether or not to voluntarily file a service contract on an exempt commodity is one which involves both parties to the contract. In this regard, the Commission notes that service contracts often include a mixture of exempt and non-exempt commodities, so that a shipper can obtain a better contract rate. Presumably, the ability to offer service contracts on mixed commodities also benefits carriers.

Because service contracts on exempt commodities will be permitted to be filed, the Commission continues to believe that some provision must be made in the event the contract is terminated or rejected. If there is a tariff rate covering the same exempt commodity, it will apply in such

circumstances. However, carriers or conferences are not required to maintain a tariff rate on any exempt commodity which they wish to include in a voluntarily filed service contract. The contract itself can contain a rate or charge which will be applied in the event the contract is rejected or terminated. This will allow parties the optimum degree of flexibility, consistent with their election to file a service contract on an exempt commodity, while at the same time ensuring that there is some basis upon which to rerate the contract in the event it is rejected or terminated. The proposed rule has been modified to reflect this decision.

O. Proposed section 581.4(a)

(a) Service contract. Every service contract shall clearly, legibly and accurately set forth in the following order:

(1) On the first page, preceding any other provisions:

(i) A unique service contract number bearing the prefix "SC";

(ii) The FMC number [FMC No. _____] of the carrier's or conference's Essential Terms Publication;

(iii) A reference to the statement of essential terms number ["ET No. _____"] as provided in paragraph (b)(1)(iii) of this section;

(iv) The FMC number(s) [FMC No. _____] of the tariff(s) of general applicability;

(v) The names of the contract parties. Any further references in the contract to such parties shall be consistent with the first reference (e.g., "[exact name]," "carrier," "shipper," or "association," etc.); and

(vi) Every affiliate of each contract party named under subparagraph (a)(1)(v) of this section entitled to receive or authorized to offer services under the contract, except that in the case of a contract signed by a conference or shippers' association, individual members need not be named. In the event the list of affiliates is too lengthy to be included on the first page, reference shall be made to the exact location of such information; and

(2) Following the first page of the service contract:

(i) The complete terms of the contract, including all essential terms required under § 581.5; and

(ii) (A) A description of the shipment records which will be maintained to support the contract; and

(B) The name, address and telephone number of the individual who will make shipment records available to the Commission for inspection under § 581.10.

This proposed section is intended to facilitate processing of service contracts and establish format requirements that will allow the Commission to readily identify responsible parties from whom documentation relevant to the contract can be obtained.

NEPFC and PCEC support the proposed section, but note that it puts additional paperwork burdens on carriers and conferences.

The Japanese Conferences express concern over language in section 581.4(a) that requires service contract provisions to be set forth "clearly, legibly and accurately." They contend that such a standard requires a subjective determination that could result in unwarranted encroachment upon, and rejection of, an otherwise valid contract. The Japanese Conferences also suggest that section 581.4(a)(2)(ii)(B) be amended to provide that the named individual be the person who will "respond to requests," because determining whether the records would be made available normally would be beyond the authority of an employee of a carrier or conference. The South/Central American Conferences suggest that section 581.4(a)(1)(vi) be modified to read ". . . a contract signed by *or on behalf of* a conference or *by or on behalf of* a shippers' association"

NITL opposes sections 581.4(a)(1) (i), (ii), (iv) and (vi), stating that negotiations between the parties and implementation of the contract would be significantly hampered and delayed by excessive attention to detail, regulatory technicalities and increased paperwork that would necessarily be involved.

The North European Conferences suggest that section 581.4(a)(2) be revised by adding the language "Commencing on or" at the beginning of the provision. They contend that this will allow the parties to include additional material, other than that required on the first page, and will result in a decrease in the number of pages of service contracts. The North European Conferences also object to the language of section 581.4(a)(2)(ii)(B), which requires service contracts to name an individual "who will make" shipment records available to the Commission. They suggest that the rule be modified to provide that the contract parties shall advise the Commission of the person to contact for a record inspection. They further note that the Commission has legal remedies under the 1984 Act if its request for documents was not honored.

APL, ANERA, and TWRA suggest that section 581.4(a)(2)(ii)(B) be amended to permit designation of an office where document requests can be lodged. DuPont urges deletion of the section, arguing that Congress did not give the Commission responsibility for contract enforcement.

The suggested modification of section 581.4(a)(1)(vi), *i.e.*, adding the language "or on behalf of," might clarify that agents could execute contracts for the parties, but appears unnecessary since basic contract law allows such action. The Commission will, however, delete the words "signed by" and substitute in their place the words "entered into by." This should clarify the intent of the proposed rule and satisfy some commenters' concerns.

Additionally, sections 581.4(a)(1)(vi) and 581.5(a)(3)(vi) have been amended to clarify that if the terms of a service contract are limited to less than the full membership of a conference or shippers' association, a conference or shippers' association must list the members to whom the contract applies in the service contract.

The North European Conferences' suggested revision of section 581.4(a)(2), adding the language "Commencing on or," also has merit, and will be adopted. This language clarifies that service contracts may include contract provisions on the first page following the required material as specified in section 581.4(a)(1).

The suggestion that section 581.4(a)(2)(ii)(b) be amended to eliminate the requirement to designate a *named* individual to make shipment records available is being incorporated into the final rule. The final rule will allow the *title* of the person who will respond to a request for shipment records (rather than the person's name) to be contained in the service contract. This change will eliminate the need for contract modifications when a company changes its personnel during the course of a contract and should not inhibit the Commission's surveillance efforts.

P. Proposed section 581.4(b)(1)

(b) Essential terms.

(1) Statement of essential terms. Every statement of essential terms shall:

(i) Be printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) Be identified by an essential-terms number bearing the prefix "ET No." which shall be located on the top of each page of the statement of the essential terms; and

(iv) Contain on the first page, in a manner similar to that set forth in §§ 580.5(a)(8) and 580.5(a)(10) of this chapter, the period of availability of essential terms to similarly situated shippers under § 581.6(b), *i.e.*, both the beginning date [which shall be the date the contract is filed at the Commission] and the expiration date [which shall be no less than 30 days after the beginning date].

This section revises the existing rule by requiring the period of availability of terms to shippers under proposed section 581.6(b) to have a definite beginning and expiration date. DuPont recommends that this section be modified to provide that the time period for making essential terms available to similarly situated shippers be precisely 30 days.

The Commission is adopting the rule as proposed. For reasons stated more fully below in our discussion of section 581.6, carriers must make the essential terms of service contracts available for at least 30 days, but can offer them for a longer period, if they so desire. There has been no compelling reason offered for limiting the period of availability to *exactly* 30 days.

Q. Proposed section 581.4(b)(2)

(2) Essential Terms Publication. The Essential Terms Publication shall:

(i) Have all its pages printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) (A) Contain a currently maintained "Index of Statements of Essential Terms" structured as follows:

ET No.	Effective Date	Expiration Date	Page No(s).	Section No(s).	Date of Cancellation of Page(s)
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The Index shall include for every statement of essential terms, the ET number, as provided in paragraph (b)(1)(iii) of this section, the effective duration, as provided in §581.5(a)(3)(i), the page and section number(s) [where used], and a column for cancellation dates which shall be used as an alternative to cancelling each individual page of the Essential Terms Publication; and

(B) The statement of essential terms may not be cancelled until after the duration of the contract, including any renewal or extension, has expired

(iv) Include an alphabetical index of the commodities covered by the service contracts in which each commodity shall make reference to the relevant ET number or numbers;

(v) Contain on its title page, or in a rule, reference to each carrier's or conference's tariff of general applicability; and

(vi) Be referenced in each of the carrier's or conference's tariffs of general applicability, where required to be filed under the Act and this chapter.

In addition to format refinements, this proposed section adds a requirement that the Essential Terms Publication contain an index of the statements of essential terms.

The Japanese Conferences suggest that section 581.4(b)(2)(iii)(B) be amended to permit cancellation of a statement of essential terms following the termination of a contract, as well as after it has expired.

DuPont recommends that section 581.4(b)(2)(iii)(B) be revised to provide that the "statement of essential terms must be removed from the essential terms publication upon expiration of the period of availability to similarly situated shippers." It contends that maintaining the statement in an essential terms publication serves no purpose after the expiration of the period of availability to similarly situated shippers.

Hercules believes that only a full contract and subsequent amendments should be filed with the Commission.

The Japanese Conferences' suggestion that the rule be amended to permit the cancellation of the statement of essential terms pages when such cancellation is effected by a "termination" of a service contract has merit and has been incorporated in the final rule. The proposed rule was intended to make known the status of each statement of essential terms, including a date on which the essential terms are cancelled, and to provide carriers

and conferences with an alternative to cancelling each individual page of the statement of essential terms. The reason for the cancellation of any particular statement of essential terms—*i.e.*, whether the statement of essential terms is placed in a cancelled status because it terminated, expired under the original terms of the service contract, or was extended or renewed—is irrelevant for purposes of the rule.

The Commission does not agree with DuPont's position that maintaining the statement of essential terms serves no purpose after the expiration of the period of availability to similarly situated shippers. Removing the statement of essential terms from the Commission's files after the period of availability would deprive the public of knowledge of the terms of the service contract while it is still in effect. This information allows the shipping public to be aware of all of a carrier's or conference's rates (tariff rate or service contract rate) that are in effect in a trade.

The Commission has made one technical modification to the proposed rule. It has been clarified to indicate that multiple contracts may be represented by a single statement of essential terms.

R. Proposed section 581.5(a)

(a) Essential terms:

(1) May not be uncertain, vague or ambiguous;

(2) May not contain any provision permitting modification by the parties other than in full compliance with this part; and

(3) Shall include the following:

(i) The duration of the contract, stated as a specific, fixed time period, with a beginning date and ending date;

(ii) The origin and destination port ranges in the case of port-to-port movements, and the origin and destination geographic areas in the case of through intermodal movements, except that, in service contracts, the origin and destination of cargo moving under the contract need not be stated in the form of "port ranges" or "geographic areas" but shall reflect the actual locations agreed to by the contract parties;

(iii) The contract rate, rates or rate schedule(s), including any additional or other charges [*i.e.*, general rate increases, surcharges, terminal handling charges, etc.] that apply, and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges;

(iv) The commodity or commodities involved;

(v) The minimum quantity of cargo or freight revenue necessary to obtain the rate or rate schedule(s), except that the minimum quantity of cargo committed by the shipper may not be expressed as a fixed percentage of the shipper's cargo.

(vi) The service commitments of the carrier or conference;

(vii) Liquidated damages for nonperformance, if any; and

(viii) Where a contract clause provides that there can be a deviation from an original, essential term of a service contract, based upon any

stated event occurring subsequent to the execution of the contract, a clear and specific description of the event, the existence or occurrence of which shall be readily verifiable and objectively measurable. This requirement applies to, inter alia, the following types of situations:

- (A) Retroactive rate adjustments based upon experienced costs;
- (B) Reductions in the quantity of cargo or amount of revenues required under the contract;
- (C) Failure to meet a volume requirement during the contract duration in which case the contract shall set forth a rate, charge, or rate basis which will be applied;
- (D) Options for renewal or extension of the contract duration with or without any change in the contract rate or rate schedule;
- (E) Discontinuance of the contract;
- (F) Assignment of the contract; and
- (G) Any other deviation from any original essential terms of the contract.

This provision changes the existing service contract regulations concerning the content of essential terms, 46 CFR 580.7(g), by: (1) strengthening the requirement for "concise" essential terms to clearly prohibit uncertainty, vagueness or ambiguity; (2) imposing a prohibition against contract modifications, except when permitted by contingency clauses published with the original filed contract; (3) requiring the contract's term to be stated as a specific date-to-date time period; (4) allowing contracts to reflect the specific origin and destination locations to be served (as opposed to port ranges and geographic areas that must be published in the statement of essential terms); (5) prohibiting cargo commitments to be stated as a fixed percentage of a shipper's cargo; (6) treating cargo rerating provisions for failure to meet volume commitments as a form of contingency clause instead of a form of liquidated damages; and (7) requiring contingency clauses to be tied to an objective and verifiable event.

Virtually every commenter expressed opinions on the various aspects of this proposed section. Accordingly, no attempt has been made to catalogue each commenter's views in detail. The essential arguments of the parties on the issues presented by the proposal are summarized below in the discussion of each subsection.

Section 581.5(a)(1): uncertainty, vagueness or ambiguity

Several comments challenged the authority of the Commission to control the clarity of service contract language. These comments are generally from shippers or shippers' organizations and essentially state that the language of a service contract is a private commercial agreement not subject to oversight by the Commission.

Other comments in support of the requirement were filed, mostly by carriers, but also including at least one shipper. They generally agree with the Commission that because third parties have rights involved, clarity

in the contractual terms is essential and that, therefore, uncertain, vague or ambiguous language should not be permitted.

The final rule will require service contract essential terms to be clear and definite. Parties opposed to this requirement are confusing the concept of "flexibility," which service contracts should afford the contract parties, with "uncertainty, vagueness or ambiguity," which impedes the statutory rights of third parties and the Commission's enforcement responsibilities. Arguments that continue to insist at this late date that service contracts are purely private commercial arrangements are irrelevant. The fact that these contracts must be filed and their essential terms published in tariff format and made available to similarly situated shippers necessarily charges them with an element of the public interest. See, *Publishing and Filing Tariffs in Foreign Commerce*, 27 F.M.C. 323 (1984). Additionally, although service contracts are exempt from many of the "prohibited acts" applicable to tariff rates and practices, they are not exempt from all of them. See 46 U.S.C. app. 1709(b). The Commission's regulatory authority over service contracts can only be exercised if the essential terms of filed contracts are sufficiently precise to inform interested third parties of the exact nature of the obligations undertaken by the contract parties. Accordingly, section 581.5(a)(1) will be adopted as proposed.

Section 581.5(a)(2): modifications

Apart from those who generally support restricting the ability of contract parties to modify a contract during its term, few commenters addressed section 581.5(a)(2). Some argued, however, that this section was too restrictive and suggested that it be amended to allow for modifications necessary because of mistakes of fact or changes in commercial conditions.

The Commission again rejects the suggestion that it lacks authority to restrict the rights of contract parties to modify a service contract during its term on the basis that they are purely private commercial arrangements. See 27 F.M.C. at 330. The relevant questions are whether the essential terms of service contracts can be modified at all after publication, and, if so, how can the statutory interests of third parties be protected against potential abuses of modification rights. The solution the Commission has accepted is to require the parties to provide for potential modifications through contingency clauses published with the essential terms publication. See 27 F.M.C. at 335. Because utilizing these provisions does not require any change in the contract itself, they are not true "modifications" but rather "contingency clauses." Permitting contingency clauses, but not contract modifications, strikes a balance between the commercial flexibility service contracts are supposed to provide and the meaningful commercial disclosure of the terms of the contract that publication of the essential terms is intended to achieve.

Section 581.5(a)(3): content of essential terms

The focus of the comments on the content of essential terms was on those concerning "fixed percentage" contracts and cargo commitments (section 581.5(a)(3)(v)), service commitments (section 581.5(a)(3)(vi)), liquidated damages (section 581.5(a)(3)(vii)), and contingency clauses (section 581.5(a)(3)(viii)). The comments on these essential terms generally fall into two categories: (1) those that favor more Commission control and less flexibility in contract provisions (mostly carriers); and (2) those that favor less Commission control and more flexibility in contract provisions (mostly shippers). Although a few comments addressed other essential terms, none raises significant legal issues or sufficient policy considerations to warrant a change in the proposed rule or discussion here.

The comments that suggest permitting "fixed percentage" service contracts rely for the most part upon a technical, legal argument concerning the definition of "loyalty contract" at section 3(14) of the 1984 Act, 46 U.S.C. app. 1702(14). They contend that, because the definition specifically excludes service contracts, such contracts stated in "all or a fixed portion" of a shipper's cargo are not loyalty contracts and may be filed under section 8(c) of the 1984 Act.

The meaning of "loyalty contract" as defined in the 1984 Act, cannot be solely ascertained by a reading of the statute. Further guidance can be obtained by reference to the overall statutory scheme and the legislative history of the 1984 Act. As the Commission explained in a prior rulemaking on this subject, to permit "fixed percentage" service contracts:

. . . would, in effect, convert a service contract to a 'loyalty contract' as that term is defined by the Act (46 U.S.C. app. 1702(14)). It would be inconsistent with Congress' treatment of loyalty contracts elsewhere in the Act (46 U.S.C. app. 1709 (b)(9)). . . .

27 F.M.C. at 327. Nothing in the comments submitted in this proceeding warrants a departure from the Commission's previous determinations of this issue. Accordingly, the prohibition against "all or a fixed percentage" service contracts will be retained.

The majority of comments on the content of essential terms concerned the issue of "contingency clauses." Again, comments were generally divided between those favoring strict regulation or even a ban on contingency clauses, and those opposed to any Commission regulation on the matter. The former stressed the need for meaningful contract commitments and the protection of third party rights, while the latter stressed contract freedom and commercial flexibility. Some comments supported the proposed rule as a reasonable balance between these competing policies.

The proposed rule was generally designed to allow less flexibility in those areas susceptible to contract malpractices, while retaining the maximum amount of contract freedom in all other areas. The Commission

has attempted to strike a balance between the need for regulations to prevent service contract abuses and the commercial flexibility service contracts are intended to afford shippers and carriers. However, the Commission rejects the extreme arguments in some comments that it has no authority to promulgate any substantive regulations concerning service contracts. Section 17(a) of the 1984 Act, 46 U.S.C. app. 1716(a), grants broad rulemaking authority to the Commission with no exception in the area of service contracts. The Commission is cognizant of the Congressional policy of minimum government intervention expressed in section 2(1) of the Act, and has been guided by the policy in drafting these rules. It does not, however, read section 2(1), 46 U.S.C. app. 1701(1), as a limitation on its section 17(a) authority to promulgate rules. We believe that the regulations promulgated in this proceeding are fully consistent with the overall statutory and legislative intent relevant to service contracts and are a reasonable response to industry conditions. For reasons stated above, and in a prior rulemaking proceeding on service contracts, *see* 27 F.M.C. at 320, the Commission will adopt the proposed rule.

S. Proposed section 581.5(b)

(b) Notice. Detailed notice shall be given to the Commission under §581.3(a)(3) within 30 days of:

(1) Any account adjustment resulting from either liability for liquidated damages under paragraph (a)(3)(vii) of this section, or the occurrence of an event described in paragraph (a)(3)(viii) of this section; and

(2) Final settlement of any account adjusted under paragraph (b)(1) of this section.

This provision requires notice to the Commission within 30 days of account adjustments due to contract breaches or deviations.

TWRA favors this provision and additionally suggests that notice be given in essential terms tariff publication for reasons stated in its comments on section 581.3(a), *infra*. DOT urges that the Commission not impose surveillance reporting requirements. Ford also opposes the imposition of these notification requirements, maintaining that they would discourage the use of service contracts by adding substantially to the cost and burden for both the carrier and shipper.

The proposed notice requirement is necessary to enable the Commission to perform its contract surveillance role and ensure that the terms of contracts are met. The notice requirements should not be burdensome since such information is exchanged in the normal course of business by the contract parties. Compliance with the notice requirement can be met merely by providing the Commission with a copy of whatever documents are exchanged between the parties under such circumstances.

In the Supplemental Information to the proposed rule the Commission noted that it had considered the nonconfidential filing of the notices, as was suggested by TWRA, but rejected this approach since there appeared

to be substantial practical difficulties, such as protecting the name of shippers. One exception to the confidential filings of notices would be a change in the duration of a contract as a result of any renewal, extension or termination implemented pursuant to the terms of a service contract. Such "notices" would be made public through amendments to the Index of Statements of Essential Terms.

T. Proposed section 581.5(c)

(c) Issuance of proposed final accounting. Any proposed final account adjustment resulting from liability for liquidated damages or the occurrence of an event under paragraph (b)(1) of this section shall be issued to the appropriate contract party within 30 days of the termination or discontinuance of the service contract.

This section is intended to prevent abuses in the collection or non-collection of the final amount due under service contracts.

NEPFC and PCEC suggest that the final accounting rule be expanded to require that carriers file a "certification" with the Commission at the conclusion of a particular service contract attesting that the contract has been fulfilled in accordance with its terms.

The North European Conferences contend that the 30-day proposed final account period is impractical and unrealistic. They request that the time period be enlarged to no less than 90 days. DOT urges that the Commission not impose any surveillance reporting requirements in this area. TWRA's comments are the same as for section 581.5(b). AISA's comments are the same as for section 581.5(a)(1).

The suggestion that the Commission require a certification that every contract has been fulfilled in accordance with its terms would place an unnecessary burden on carriers and conferences and the Commission's staff. The proposed rule was intended to apply to only those service contracts where there has been a change to the basic compensation required by the terms of the service contract. Therefore, when no account adjustment is necessary, no regulatory purpose would be served by requiring the filing of a final accounting certifying completion of those contracts.

The 90-day proposed final account period suggested by the North European Conferences appears too long, considering that the widely accepted commercial practice for the settlement of accounts is 30 days, as evidenced by the carriers' and conferences' credit privileges published in their tariffs of general applicability. However, considering the volume of paperwork inherent in service contract activities and the time that may be involved in collecting the data necessary in preparing a proposed final accounting, the Commission, in the final rule, is extending the period prescribed for issuance of such final accounting to 60 days.

U. Proposed section 581.6

(a) Availability of statement. A statement of the essential terms of each service contract as set forth in tariff format shall be made available to the general public pursuant to the requirements of this section and §§ 581.3, 581.4(b) and 581.5.

(b) Availability of terms.

(1) The essential terms of each service contract shall be made available to all other shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than thirty (30) days from the date of filing of the service contract as may be adjusted under 581.8(d).

(2) Whenever a shipper or shippers' association desires to enter into a service contract with the same essential terms, a request shall be submitted to the carrier or conference in writing.

(3) The carrier or conference shall reply to the request by mailing, or other suitable form of delivery, within 14 days of the receipt of the request, either a contract offer with the same essential terms which can be accepted and signed by the recipient upon receipt, or a valid reason in writing why the applicant is not entitled to such a contract.

(4) The service contract resulting from a request under this section may not go into effect until an executed copy, signed by all necessary parties, is filed with the Commission under this section.

(5) In the case of any expressly described event which results in a change to an original essential term by the operation of a contract clause in the service contract under § 581.5(a)(3)(viii), the newly operable essential term(s) shall be immediately made available in writing to other shippers and shippers' associations subject to the same, original essential terms, with copies to the Commission under § 581.3(a)(3)(ii).

This section amends the present procedures for a *similarly situated shipper* to obtain a service contract's essential terms, 46 CFR 580.7(g)(1)(ii), in several ways: (1) the request by a *similarly situated shipper* seeking the same contract terms must be in writing; (2) a carrier or conference must respond to such a request within 14 days, with either a similar contract offer or an explanation why the carrier or conference does not believe that the shipper is entitled to the contract; and (3) a contract executed by a *similarly situated shipper* cannot itself go into effect until it is filed with the Commission. In addition, when a service contract provides for a deviation from an essential term and such an event occurs, the proposed section would require that notice be provided to any other shipper which is subject to the same terms so that it can have the opportunity to avail itself of the altered terms.

APL has no objection to the proposed section but suggests that the term "*similarly situated shipper*" be defined. The North European-U.S. Pacific Freight Conference and PCEC also generally concur with the proposed procedures. They suggest, however, that a copy of a carrier's "rejec-

tion letter" also be sent to the Commission. ANERA and the Mediterranean Conferences do not take issue with the proposed regulation, except to recommend that a deadline by which a similarly situated shipper must return an executed copy of a proffered contract be established. They suggest three working days.

The Japanese Conferences request that proposed section 581.6(b)(3) be amended by deleting the words "a valid reason" and substituting therefor "an explanation." Otherwise, they believe that they could be found in violation of the rule if at a later time a reason given in good faith is found to be invalid. The Japanese Conferences also believe that the words "signed by all necessary parties" in section 581.6(b)(4) should be deleted, because the requirement that such a contract must be "executed" is sufficient. Those Conferences oppose the present wording of subparagraph (b)(5), which would require all changes in essential terms which result from operation of a contract clause (e.g., a force majeure clause) to be immediately made available to all shippers subject to the same essential terms. They believe that this could provide an unfair windfall to a shipper which is not itself subject to the conditions which caused the change in the essential terms. They would amend the subparagraph to indicate that the changed terms need only be made available to shippers which are "similarly affected" by the change. Lastly, the Japanese Conferences contend that paragraph (b)(5) should be clarified to require that notice need only be given to similarly situated shippers which have in fact entered into a like contract.

The North European Conferences believe that the phrase "signed by all necessary parties" in subparagraph (4) should be revised to read "signed by *or for* all necessary parties." They contend that this would clarify that service contracts may be executed on behalf of the contract parties by duly authorized representatives. The North European Conferences also correctly note that the reference to "§ 581.3(a)(3)(ii)" in subparagraph (5) should actually be "§ 581.3(a)(3)(i)."

In accord with its comments on proposed section 581.5(a)(3)(viii), Sea-Land suggests that proposed section 581.6(b)(5) be deleted, on the ground that commercial contingency clauses should not be permitted in service contracts. Moreover, even if the proposed section were retained, Sea-Land questions whether a change in terms permits a total reopening of the contract or only allows shippers who already have a "me-too" contract to avail themselves of the changed terms.

TWRA generally agrees with the proposed section, but believes that 14 days may be too short a period of time to respond to a shipper, if a good faith determination is to be made as to whether a shipper is "similarly situated." TWRA also urges that the rule be amended to define "similarly situated shipper."

While expressing no objection to the basic 30-day availability period set forth in proposed section 580.6(b)(1), USL suggests that the period should commence on the date the essential terms are published in the

carrier's or conference's tariff. USL further urges that the proposed rule be clarified to provide that the 30-day availability period only applies to the initial essential terms' filing. It contends that when a similarly situated shipper takes advantage of a previously filed service contract, the filing of the essential terms for the subsequent contract should not extend the availability period for an additional 30 days. In this regard, USL advocates the elimination of the filing of such subsequent essential terms. Lastly, USL takes the position that the Commission should not attempt to define "similarly situated shipper" and instead proposes that for a shipper to take advantage of an existing contract, it must be ready, willing, and able to execute the same contract as did the original shipper.

AISA suggests that, with respect to proposed section 581.6(b)(5), if the Commission is merely seeking to ensure that similarly situated shippers have changed terms made available to them, the provision should be revised to provide that a shipper and carrier may mutually agree not to invoke the provision after receiving the requisite notice. DuPont contends that the 30-day period of availability in section 581.6(b)(1) is reasonable, but it should not be permitted to extend any longer.

IBP questions whether *all* essential terms of a requested service contract must be identical to those in the original contract. IBP also takes issue with the mechanism created by proposed section 581.6(b)(5) for making new essential terms available to similarly situated shippers. Because of perceived ambiguities in this subparagraph, IBP fears that carriers will become unwilling to negotiate service contracts, to the detriment of the shipping public.

The NYCCI and Warner-Lambert contend that the notice requirement of proposed section 581.6(b)(5) imposes an unreasonable burden on carriers and also unreasonably discloses the business affairs of the shipper. They argue that if a shipper encounters a condition which triggers a deviation from the original essential terms, either all other shippers encounter the same condition, in which case they can also deviate or opt not to, or they do not encounter the same condition and are not similarly situated.

The issue of whether to adopt a definition of "similarly situated shipper" has been addressed elsewhere and will not, therefore, be further discussed here.

Some of the comments offer suggestions of a technical nature which would appear to clarify or otherwise improve the proposed rule. The suggestion of the Japanese Conferences that the words "a valid reason" be deleted from subparagraph (b)(3) and the words "an explanation" be substituted, has merit and is adopted. In addition, we agree that it is not necessary to state that an executed service contract be "signed by all necessary parties," as is presently required by subparagraph (b)(4), since an executed copy would perforce be signed by all parties. Also, as pointed out, the reference in subparagraph (b)(5) to "§ 581.3(a)(3)(ii)" should read "§ 581.3(a)(3)(i)."

The Commission is not convinced, however, that the rule should contain a specific deadline for a requesting shipper to return a proffered contract to a carrier, as was suggested by ANERA. Carriers or conferences making offers to similarly situated shippers, pursuant to subparagraph (b)(3), are certainly free to impose their own deadlines. Presumably, any similarly situated shipper requesting a "me-too" contract might want to begin using the contract as soon as possible and would, therefore, return its executed copy quickly. In any event, subparagraph (b)(3) has been amended to indicate that a carrier or conference may require a contract offer to be accepted by a date certain.

We also find merit to the proposal that subparagraph (b)(5) be amended to clarify that similarly situated shippers which have entered into "me-too" contracts are entitled to altered essential terms as a result of contingencies stated in the initial contract only if they are similarly affected by the described event. This would prevent some shippers from otherwise experiencing a windfall even though they did not likewise experience the event which occasioned the change in terms.

We are not adopting the remainder of the comments or suggestions. They appear to be either unwarranted by the circumstances, or reveal a misconception about the purpose and effect of the proposed rule. Moreover, many of these comments would require additional rulemaking before they could be implemented, since they were not within the scope of the proposed rule.

In this regard, there is no reason at this time to require that a copy of a rejection letter prescribed in subparagraph (b)(3) be filed with the Commission. Any shipper aggrieved by a carrier's decision not to offer a "me-too" contract can easily bring the matter to the Commission's attention. We also see no need to amend subparagraph (b)(5) to clarify that the notice of newly operable essential terms must only be given to shippers that have in fact entered into the same contract. The present wording is unambiguous. The notice must be made to "other shippers and shippers' associations subject to the *same, original* essential terms." (Emphasis added). Nor do we agree that it is unclear whether a change in essential terms subject to subparagraph (b)(5) requires a reopening of the contract. Again, these changes are *only* made available to other shippers which have entered into a contract having the *same* essential terms.

Only one commenter has suggested that 14 days is too short a period of time to respond to a request for a similar contract. This time limit was originally proposed so that carriers or conferences could not unnecessarily delay acting on such a request. Nothing presented convinces us that the period prescribed is unreasonable. We are therefore retaining the 14-day limit.

Likewise, we see no need to change the beginning of the 30-day availability period to the date the essential terms are *published*, as was suggested. The publication of the statement of essential terms should generally coincide

with the filing of the service contract. In any event, the date of the *filing* of a service contract is a date which is readily ascertainable by the Commission and will be retained. On the same subject, it was the proposed rule's intention that the availability period only apply to the initial service contract filed and that any "me-too" contract which was also filed did not extend the availability period for an additional 30 days. This also appears to be the interpretation which has been adopted by carriers and conferences in practice. Nevertheless, to avoid any potential confusion in this area, subparagraph (b)(1) will be amended to more clearly indicate that the availability period only applies to the essential terms of an *initial* service contract.

DuPont has suggested that the 30-day minimum availability period should not be allowed to extend beyond 30 days. It has not, however, provided any compelling reason for imposing such a limitation. Carriers or conferences should be free to determine their own availability periods, so long as they are at least 30 days.

There is nothing in subparagraph (b)(5) which requires a similarly situated and affected shipper to also adopt newly operable essential terms after receiving notice thereof. The decision as to whether to do so is solely the shipper's, and it is not therefore necessary to provide that a shipper and carrier may mutually agree *not* to invoke the provision.

V. Proposed section 581.7(a)

(a) Modification. The essential terms originally set forth in a service contract may not be modified during the duration of the contract.

This section is essentially the same as the existing prohibition against contract modifications, 46 CFR 580.7(d)(1). Comments on proposed section 581.7(a) were generally divided between those opposed to any Commission regulation restricting the contract parties' rights to modify a contract and those in favor of a general ban on contract modifications. For a discussion of this basic issue see the discussion of proposed section 581.5(a), *infra*.

The Commission will continue the prohibition against contract modifications, while at the same time permitting parties to the service contract to provide for known and ascertainable commercial contingencies.

Specific comments requesting that some grace period be allowed for contract modification were also filed. However, we do not view these proposals as feasible at this time and believe that the provisions in proposed section 581.5(a) allowing for contingency clauses will satisfy these concerns. Requiring contract parties to carefully and skillfully draft their agreements before putting them into effect, does not appear to impose an unreasonable burden on those parties.

W. Proposed section 581.7(b)

(b) Termination or breach not covered by contract. In the event of a contract termination which is not provided for in the contract itself

and which results from mutual agreement of the parties or from breach or default because the minimum quantity required by the contract has not been met:

(1) Further or continued implementation of the service contract is prohibited;

(2) The cargo previously carried under the contract shall be rerated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of each shipment; and

(3) Detailed notice shall be given to the Commission under §581.3(a)(3) within 30 days of:

(i) The occurrence of the contract termination, breach of default under this paragraph;

(ii) Any rerating or other account adjustment resulting from the contract termination, breach or default under this paragraph; and

(iii) Final settlement of the account adjusted under subparagraph (3)(ii) of this paragraph.

(4) Any proposed rerating or other final account adjustment resulting from termination, breach or default under this paragraph shall be issued by the carrier or conference to the shipper or shippers' association within 30 days of the termination of the service contract.

The proposed rule does not change the existing provision allowing termination of service contracts by mutual agreement of the parties. Similarly, the proposed rule continues to allow the parties to provide for termination and breach remedies in their contract. The amendments proposed in this proceeding are intended to address those terminations and breaches that are not provided for in the contract. In these cases, the proposed rule provides: (1) cessation of contract implementation; (2) rerating of cargo according to the otherwise applicable tariff; and (3) notification to the Commission and the shipper of termination or breach actions proposed or performed by the carrier. In essence, when a service contract is repudiated and the parties are no longer acting pursuant to the contract, the Commission will require adherence to the otherwise applicable tariff.

The comments filed on proposed section 581.7(b) are generally divided into three groups: (1) those that support the Commission's suggested method of regulating terminations and breaches of contracts when the contract does not cover such a contingency; (2) those that argue that actual or liquidated damages be imposed; and (3) those that argue that the Commission has no authority to prescribe remedies and procedures caused by a termination or breach of a contract.

The proposed rule was intended to address two situations: (1) when carrier and shipper mutually agree to terminate a service contract and (2) when a shipper fails to meet its minimum volume commitment. The purpose of this provision is *not* to enforce contracts or prescribe particular remedies for contract breaches as between the parties themselves. That function is the role of the courts under section 8(c) of the 1984 Act.

Rerating applies only to cargo actually shipped and has no direct relationship to "deadfreight" or other measures of damages for contract breaches. The purpose of this provision is to prevent collusive action between the parties to a service contract to terminate or "breach" their commitments without seeking appropriate remedies. The rule is intended to prevent carriers and shippers from using service contracts as a device to unlawfully evade tariff rates. Service contracts with no meaningful cargo or service commitments could, at a minimum, violate section 10(a)(1) of the Act, 46 U.S.C. app. 1709(a)(1).

The report of the House Merchant Marine and Fisheries Committee expressed a clear Congressional intent that service contracts not become a "device" to undermine common carriage under public tariffs when it stated:

The Committee is seriously concerned that service contracts not be employed so as to discriminate against all who rely upon the common carriage tradition of the liner system. The purpose of this legislation is to regulate fairly a system of common carriage. . . .

. . . [T]he Committee expects the FMC to be cognizant of the effects of [sic] common carriage that abuse of service contracting may occasion.

H.R. Rep. No. 53, Part 1, 98th Cong., St. Sess. 17 (1983).

Proposed section 581.7(b) does, in effect, impose a type of regulatory consequence for contract breach or termination consistent with Congress' intent that service contracts not be abused. However, if the parties include in their contracts in the first instance provisions concerning mutual termination and shipper failure to meet the minimum commitment, there is no need to invoke this provision. Another option to rerating, particularly if the shortfall is slight, is for the shipper to pay for what has not moved at the contract rate. This would in effect constitute compliance with the shipper's cargo commitment.

Finally, to conform section 581.7(b)(4) to section 581.5(c), the period within which to issue a proposed rerating or other final account adjustment has been extended to 60 days.

X. Proposed section 581.8

(a) Initial filing and notice of intent to reject.

(1) Within 30 days after the initial filing of the contract and statement of essential terms, the Commission may notify the filing party of the Commission's intent to reject a service contract and/or statement of essential terms that does not conform to the form, content and filing requirements of the Act or this part. The Commission will provide an explanation of the reasons for such intent to reject.

(2) The parties will have 20 days after the date appearing on the notice of intent to reject to resubmit the contract and/or statement of essential

terms, modified to satisfy the Commission's concern as set forth in paragraph (a)(1) of this section.

(b) Rejection. The Commission may reject the contract and/or statement of essential terms if the objectionable contract or statement:

(1) Is not resubmitted within 20 days of the notice of intent to reject; or

(2) Is resubmitted within 20 days of the notice of intent to reject as provided in paragraph (a)(2) of this section, but still does not conform to the form, content or filing requirements of the Act or this part, as set forth in paragraph (a)(1) of this section.

(c) Implementation; prohibition and rerating.

(1) Performance under a service contract may begin without prior Commission authorization on the day both the service contract and statement of essential terms are on file with the Commission, except as provided in paragraph (c)(2) of this section:

(2) When the filing parties receive notice that the service contract or statement of essential terms has been rejected under paragraph (b) of this section:

(i) Further or continued implementation of the service contract is prohibited;

(ii) All services performed under the contract shall be rerated in accordance with the otherwise applicable tariff provisions for such services with notice to the shipper or shippers' association within 30 days of the date of rejection; and

(iii) Detailed notice shall be given to the Commission under §581.3(a)(3) within 30 days of:

(A) The rerating or other account adjustment resulting from rejection under this paragraph; and

(B) Final settlement of the account adjusted under paragraph (c)(2)(iii) (A) of this section.

(d) Period of availability. The minimum 30-day period of availability of essential terms required by §581.6(b) shall be suspended on the date of the notice of intent to reject a service contract and/or statement of essential terms under paragraph (a)(1) of this section and a new 30-day period shall commence upon the resubmission thereof under paragraph (a)(2) of this section.

This proposed section amends the procedures for return and rejection of contracts or statements of essential terms. These procedures provide the Commission 30 days to reject a service contract, with a written explanation of the reasons for rejection. The filing party will then have 30 days to correct the contract. Failure to correct a contract will result in rejection, thereby prohibiting continued service under the contract.

APL, ANERA, TWRA, Ford, and NITL oppose the proposal to increase the time within which notification of intent to reject a service contract

must be given by the Commission. They favor the current 15-day period for notice to reject and the 15-day period for resubmission.

The Mediterranean Conferences and the Japanese Conferences suggest that the filing parties should have 30 days to respond to a notice of intent to reject, the same period the Commission has for considering a rejection. In addition, the Japanese Conferences oppose the retroactive rerating required by proposed section 581.8(c) due to a service contract rejection, maintaining that the contract rates are the only lawful rates on file at the time of shipment. The North European Conferences suggest the 30-day period in section 581.8(c)(2)(ii) is impractical and unrealistic. They request that the time period be enlarged to no less than 90 days.

Sea-Land suggests the rule be revised to delay implementation of service contracts (14 days after filing) to permit an initial Commission review in order to protect the parties against having to rerate cargo due to a rejection.

DuPont suggests that "shall" be substituted for "may" in section 581.8(a)(1) to make the notification a more definite requirement. Lastly, DOT urges that the Commission not adopt the proposed section 581.8(c) rerating obligation and surveillance reporting requirements for partial performance of a service contract prior to its rejection by the Commission.

Experience has proven that the current 15-day period is sometimes inadequate for the contract parties to resolve problems and for the Commission to process the contracts. On the other hand, it appears, based on the comments, that the proposed 30-day period may be too long a time to expose the parties to possible rejection and to commercial problems which could arise as a result of rejection. Therefore, as a compromise, the final rule will provide for a 20-day period for both the notice of intent to reject and the period for resubmission.

Sea-Land's suggestion of requiring service contracts and statements of essential terms to be filed in advance of the effective date has previously been considered by the Commission in its interim rule to implement the 1984 Act. The Commission rejected such a course of action in favor of the present procedure because advanced filing appears to be more detrimental to the interests of the contracting parties. Further, there is no statutory authority to require an advance notice of filing of service contracts. However, contract parties are always free to file service contracts in advance of their effective dates to accommodate the possibility of rejection.

In response to comments opposing retroactive rerating in the event of rejection, the Commission reaffirms its position expressed in the Supplemental Information. If a shipper was permitted to obtain the rate contained in a "contract" that was rejected because it did not comply with all statutory or regulatory requirements, it would be obtaining an unlawful benefit. The rules expressly put the parties on notice that a service contract may possibly be rejected during the short review period. If they desire to avoid the possibility of rerating for cargo carried prior to rejection,

they could elect the course suggested by Sea-Land and simply file their contracts well in advance of any cargo moving under them.

ADDITIONAL ISSUES

The Supplementary Information to the proposed rule also advised that the Commission was concerned about four additional areas and accordingly solicited comment as to whether further rulemaking proceedings should be pursued in any or all of them. Specifically, the Commission questioned whether: (1) the definition of "port range" should be adjusted to address problems relating to the scope of foreign port ranges; (2) it should adopt specified minimums for shipper cargo commitments, carrier service commitments, or liquidated damages; (3) it should require a single form, with detachable sections, for filing all relevant service contract information; and (4) "most-favored-shipper" clauses were a problem and, if so, whether they should be limited in some manner.

A discussion of the comments and analysis of each of these issues follows.

Y. Foreign Port Ranges

The Notice of Proposed Rulemaking invited comments on the application of the current port range requirement to foreign port ranges, which are often dispersed over a wide geographic area, and queried whether this was inhibiting the use of service contracts. Commenters were asked to identify any problem areas and propose solutions.

In response, CMA, DuPont, Stauffer and Union Carbide advise that they had experienced no difficulties as a result of the application of the port range rule to foreign port ranges.

On the other hand, APL, ANERA, the Mediterranean Conferences, the Japanese Conferences, PCEC, the North Europe-U.S. Pacific Freight Conference, and TWRA believe that there is a need to limit the geographic scope of foreign port ranges in service contracts. This is also the view of the North European Conferences which further urge that the description of origin and destination non-U.S. port ranges included in essential terms filings should only identify ports: (1) in a country where cargo is to be loaded or discharged under the terms of the underlying service contract; and (2) which are regularly served by a contracting carrier or contracting members providing service. The North European Conferences would define the term "regularly served" to include only those ports in the range that are served in a manner that would enable the carrier to meet its obligations under the service contract.

The legislative history of the 1984 Act supports the view that ocean common carriers and conferences may restrict the foreign port range in a service contract to ports in a single country which are regularly served by the carrier or conference. The Report of the Senate Committee on Commerce, Science and Transportation states in pertinent part:

The term "port range" is intended to encompass those ports *in the country of loading or unloading of the contract cargo* that are regularly served by the contracting carrier or conference, as specified in the tariff applicable to the service in which the contract is to be employed, even if the contract itself contemplates use of but a single port within that range.

S. Rep. No. 3, 98th Cong., 1st Sess. 31 (1983) (emphasis added). Accordingly, and in response to comments on the definition of "port range," the final rule defines "port range" to only encompass "ports *in the country of loading or unloading.*"

Whether a port in the range is "regularly served," as that term is used in the rule, appears to be a question of fact that would be particularly difficult to address in a rule of general application. Moreover, no compelling need has been demonstrated to justify such action. In any event, even if a need and basis had been shown to define the term "regularly served," this could not be done in this rulemaking since it is beyond the scope of the proceeding. Accordingly, the Commission will not modify the rule here to add a definition of the term "regularly served."

Z. Minimum Volume Commitments, Carrier Service Commitments and Liquidated Damages

In addressing this topic in the Supplementary Information to the proposed rule, the Commission identified three areas of concern: (1) low volume commitments; (2) *de minimis* carrier service commitments; and (3) miniscule liquidated damages for breach of a service contract. The Commission suggested that requiring specified minimums to apply to these situations might possibly solve these problems, and therefore invited comment on the need for additional regulations in these areas.

Most, but not all, commenters oppose any additional regulation which might impose service contract minimums in the areas suggested by the Commission. They contend that there is no demonstrated need for regulation and that carriers and shippers will not enter into a service contract in the first place unless they each receive a benefit therefrom. Some (*e.g.*, PCEC, AISA, CMA, PPG, and DOJ) contend that the Commission has no legal authority to impose minimum levels for cargo and service commitments or for liquidated damages. One commenter (Stauffer) believes that minimums are not consistent with the spirit of the 1984 Act, which it contends favors a more commercial and less bureaucratic "interface" between the service contract parties. Several commenters raise concerns about the effects of minimums on small or medium shippers, contending that they may result in fewer service contract opportunities for such shippers. The inherent problems in determining a specific minimum level have also been raised, especially in light of the large number of variables which would have to be considered in the process. The Japanese Conferences,

NEPFC, and PCEC suggest that the Commission could adequately address any problems which may exist on an *ad hoc* basis.

TWRA argues that a fixed volume or revenue minimum would inhibit the flexibility to deal with small shippers. It contends that the solution is to put in place a regulatory mechanism which creates a commercial incentive for both parties to arrive at meaningful commitment levels. TWRA therefore suggests that the Commission should require all service contracts to state a maximum as well as minimum number of cargo units and to further require that the maximum cannot exceed the minimum by more than a reasonable proportion (*e.g.*, 33 $\frac{1}{3}$ %).

The North European Conferences and the Australia-New Zealand Conference share the Commission's concerns about low volume commitments on the part of shippers and therefore support adoption of a rule providing for a minimum volume commitment. The Australia-New Zealand Conference notes that, while drafting such a rule may be a complex matter, there is nonetheless a need for it.

IBP also supports the establishment of a minimum volume of cargo for a service contract. It suggests that the minimum volume could be based on a specified percentage (*e.g.*, 1%) of the shipping market for a given commodity or some other reasonable absolute number (*e.g.*, 200 TEUs/year in a containerized trade). IBP also contends that it probably would be more advantageous for shippers with less than 1% of a market to use a shippers' association, rather than attempt to negotiate small-volume service contracts.

Only the South/Central American Conferences specifically address service contract minimums as they apply to carrier service commitments. They argue that the Commission should not proceed further in this area, unless it has specific evidence that carriers or conferences are failing to provide adequate service and space to fulfill their contractual obligations.

Two commenters oppose any further rulemaking in this area. The South/Central American Conferences do not believe that minimum cargo commitments are realistic or fair to small shippers in smaller trades. The other, DuPont, contends that, to the extent that low volume commitments exist, they are attributable to the Commission's positions on percentage requirements contracts and loyalty contracts.

The North European Conferences share the Commission's concerns about *de minimis* liquidated damages for shipper breach of its volume commitment. Along with USL, ANERA, and the Mediterranean Conferences, the North European Conferences support the consideration of further rulemaking in this area. They contend, however, that in the interim the Commission could reject service contracts containing *de minimis* liquidated damages on an *ad hoc* basis pursuant to existing rules.

TWRA maintains that the 1984 Act permits liquidated damages as an alternative to actual damages for breach of a service contract. It further contends that the Act does not permit a "no damages" option or liquidated

damages that do not closely approximate actual damages. TWRA thus urges the Commission to require carriers to collect deadfreight in the event of a cargo or revenue shortfall or require the use of actual damages (deadfreight less the carrier's avoided incremental costs) or some other reasonable liquidated approximation of actual damages. The South/Central American Conferences offer yet another alternative measure of liquidated damages—15 percent of the freight charges for any shortfall from the minimum volume.

DuPont believes that the matter of whether or not to specify liquidated damages in the event of breach is one that should be left to the contracting parties. It submits that if the Commission eventually sets specific limits on liquidated damages, carriers and shippers will simply elect not to specify any at all.

As the above discussion indicates, there was no clear consensus among the commenters in any of the three areas the Commission asked to be addressed. However, the Commission presently has pending before it a petition for rulemaking, submitted the International Council of Containership Operators, that includes the issue of *de minimis* liquidated damages. That issue is more appropriately addressed in the context of that petition.

As for the remaining issues, *i.e.*, shipper cargo and carrier service commitments, it would be difficult if not impossible, as a practical matter, to specify absolute specific minimums. What is a reasonable number in one trade may not be in another. Moreover, small or medium sized shippers could be adversely affected by arbitrary minimums. While some sort of formula may alleviate this problem, the task then becomes one of choosing the right formula. For this reason and because the Commission's experience with service contracts over the last three years has not demonstrated a compelling need for the Commission to prescribe rules governing shipper cargo and carrier service commitments, no such rulemakings are contemplated at this time.

The Commission cautions, however, that there must be meaningful commitments on the part of both parties in order for there to be a valid service contract. In this regard, the service commitment of a carrier or conference must be more than a mere recitation of their basic common carrier obligations. Similarly, the shipper's cargo commitment must be commercially reasonable in light of all relevant factors.

AA. More Convenient, Combined Form

The proposed rulemaking indicated that the Commission was considering a new format for filing service contracts that would eliminate multiple submissions. This could consist of one filing, with detachable sections, as follows:

1. A machine-readable ADP form (data confidential, where necessary);
2. The essential terms; and
3. Shipper data and signature (confidential).

All commenters, except DuPont, support this proposal for a service contract filing procedure that would eliminate multiple submissions to the fullest extent possible. DuPont, however, fears that an abbreviated filing procedure would not ensure the confidentiality of information in the service contract.

Under the suggested provision, one portion of the form would contain the essential terms of the contract, excluding the name and signature of the shipper(s) and any other information considered as a non-essential term of the contract (if the filers desire to conceal such information from the public). This procedure would avoid time now spent by the staff in ensuring that the separately filed statements of essential terms contained in the Essential Terms Publication represent a true summary of the service contract's essential terms, a process which is now very time-consuming.

Although implementation of the procedure will require special equipment and appropriate rulemakings to prescribe form and format, the Commission intends to pursue this matter.

BB. Most-Favored-Shipper Clauses-

In the Notice of Proposed Rulemaking the Commission noted the growing use of the so-called "most-favored shipper" clauses, a type of "contingency clause" which allows the shipper to obtain a lower rate if one is offered to another shipper in a given trade. The Commission asked for comments on whether this practice should be prohibited or limited.

The comments filed concerning Commission regulation of most-favored-shipper clauses are divided between: (1) the carriers and conferences who oppose such provisions and advocate a prohibition against their use; and (2) the shippers and shipper interest groups which state that such provisions are legitimate commercial arrangements that the Commission should not inhibit. Carriers argue that these clauses cause serious depression of freight revenues and rate instability, contrary to one of the intended purposes of service contracts. It is also argued that such clauses substantially negate a shipper's commitment to the carrier. Shippers, on the other hand, argue that rate flexibility in a contract ensures that the shipper will honor its volume commitments to a carrier, and, that the clauses also deter carriers from excessive rate cutting in their tariffs, thereby contributing to rate stability.

Whatever the merits of these contentions relating to most-favored-shipper clauses, they were not intended to nor will they be decided here. Since the issuance of the Notice of Proposed Rulemaking in this proceeding, the Commission has received and presently has before it the above-mentioned petition of the International Council of Containership Operators, which raises the same issues. The Commission will, therefore, consider them in the context of that proceeding.

CONCLUSION

The Commission has carefully considered all comments submitted to the proposed rule and, as discussed above, has made a number of changes to accommodate valid suggestions therein, while still giving effect to the 1984 Act provisions governing service contracts and the Act's legislative history. Other nonsubstantive technical or style changes have also been made, but not expressly discussed. Any comment not specifically mentioned has nonetheless been considered and found to be without merit, unwarranted, or unnecessary.

The Federal Maritime Commission has determined that this rule is not a "major rule" as defined in Executive Order 12291, 46 FR 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 Chairman of the Commission certifies pursuant to section 605(b) of the Regulatory Flexibility Act (5 U.S.C. 601, *et seq.*) that this Rule will not have a significant economic impact on a substantial number of small entities, including small businesses, small organizational units, and small governmental jurisdictions.

List of subjects in 46 CFR Parts 580 and 581: Administrative practice and procedure; Antitrust; Automatic data processing; Cargo vessels/ Confidential business information; Contracts; Exports; Freight; Freight forwarders; Imports; Maritime carriers; Penalties; Rates and fares; Reporting and record keeping requirements.

Therefore, pursuant to 5 U.S.C. 553 and sections 3, 8, and 17 of the Shipping Act of 1984, Title 46, Code of Federal Regulations, is amended as follows:

1. The Authority Citation to Part 580 continues to read:

Authority: 5 U.S.C. 553; 46 U.S.C. app. 1702-1705, 1707, 1709, 1712, 1714-1716 and 1718.

2. Section 580.7 is removed.

3. A new Part 581 is added to read as follows:

FEDERAL MARITIME COMMISSION

[46 CFR PART 581]
SERVICE CONTRACTS

Sec.
581.1

- Definitions.
- 581.2 Scope.
- 581.3 Filing and maintenance of service contract materials.
- 581.4 Form and manner.
- 581.5 Content of essential terms; contingency clauses.
- 581.6 Availability of essential terms.
- 581.7 Modification, termination or breach not covered by the contract.
- 581.8 Contract rejection and notice; implementation.
- 581.9 Confidentiality.
- 581.10 Recordkeeping and audit.
- 581.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

AUTHORITY: 46 U.S.C. 553; 46 U.S.C. app. 1702, 1706, 1707, 1709, 1712, 1714-1716 and 1718.

SOURCE: 49 FR 18849, May 3, 1984; 49 FR 20817, May 17, 1984; 49 FR 23183, June 5, 1984; 49 FR 24696 and 24701, June 14, 1984; 49 FR 45364, Nov. 15, 1984; 49 FR 48927, Dec. 17, 1984.

§ 581.1 Definitions.

In this part:

(a) "Act" means the Shipping Act of 1984 [46 U.S.C. app. 1701-1720].

(b) "*Common carriers*" or "*carrier*" means a person holding itself out to the general public to provide transportation by water of cargo between the United States and a foreign country for compensation that:

(1) Assumes responsibility for the transportation from port or point of receipt to the port or point of destination; and

(2) 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, except that the term does not include a common carrier engaged in ocean transportation by ferry boat, ocean tramp, or chemical parcel tanker. As used in this paragraph, 'chemical parcel-tanker' means a vessel whose cargo-carrying capability consists of individual cargo tanks for bulk chemicals that are a permanent part of the vessel, that have segregation capability with piping systems to permit simultaneous carriage of several bulk chemical cargoes with minimum risk of cross-contamination and that has a valid certificate of fitness under the International Maritime Organization Code for the Construction and Equipment of Ships Carrying Dangerous Chemicals in Bulk.

(c) "*Commission*" means the Federal Maritime Commission.

(d) "*Conference*" means an association of ocean common carriers permitted, pursuant to an approved or effective agreement, to engage in concerted activity and to utilize a common tariff. The term shall also include any association of ocean common carriers which is permitted, pursuant to an effective agreement, to fix rates and to enter into service contracts,

but the term does not include a joint service, consortium, pooling, sailing or transshipment agreement.

(e) "*Contract Party*" means are party signing a service contract as an ocean common carrier, conference, shipper or shippers' association.

(f) "*Essential—Terms Publication*" means the single publication which is maintained by each carrier or conference for service contract(s) and which contains statements of essential terms for every such contract.

(g) "*File*" or "*Filing*" of service contract materials means actual receipt at the Commission's Washington, D.C. offices.

(h) "*Geographic area*" means the general location from which and/or to which cargo subject to a service contract will move in through service.

(i) "*Non-vessel-operating common carrier*" means a common carrier that does not operate the vessels by which the ocean transportation is provided and is a shipper in its relationship with an ocean common carrier.

(j) "*Ocean common carrier*" means a vessel-operating common carrier.

(k) "*Ocean freight forwarder*" means a person in the United States that:

(1) Dispatches shipments tram the United States via common carriers and books or otherwise arranges pace for those shipments on behalf of shippers; and

(2) Processes the documentation or performs related activities incident to those shipments.

(1) "*Person*" includes individuals, corporations, partnerships and associations existing under or authorized by the laws of the United States or of a foreign country.

(m) "*Port range*" means those ports in the country of loading or unloading of service contract cargo that are regularly served by the contracting carrier or conference, as specified in its tariff of general applicability, even if the contract itself contemplates use of but a single port within that range.

(n) "*Service contract*" means a contract between a shipper or shippers' association and an ocean common carrier or conference, in which the shipper makes a commitment to provide a certain minimum quantity of its cargo or freight revenue over a fixed time period, and the ocean common carrier or conference 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.

(o) "*Shipment*" means all of the cargo carried under the terms of a single bill of lading.

(p) "*Shipper*" means an owner or person for whose account the ocean transportation of cargo is provided or the person to whom delivery is to be made.

(q) "*Shipper's association*" means a group of shippers that consolidates or distributes freight on a nonprofit basis for the members of the group in order to secure carload, truckload, or other volume rates or service contracts.

(r) "*Statement of essential terms*" means the concise summary of all essential terms of a service contract required to be filed with the Commission and made available to the general public in tariff format by the carrier or conference in its Essential Terms Publication.

(s) "*Submit*" or "*submission*" means "file" or "filing" under this section.

(t) "*Tariff of general applicability*" means the effective tariff, on file at the Commission under Part 580 of this chapter, that would apply to the transportation in the absence of a service contract.

§ 581.2 Scope.

Service contracts shall apply only to transportation of cargo moving from, to or through a United States port in the foreign commerce of the United States.

§ 581.3 Filing and maintenance of service contract materials.

(a) *Filing*. There shall be filed with the Director, Bureau of Domestic Regulation, the following:

(1) *Service contract*. On or before the effective date of every service contract, a true and complete copy of the contract shall be submitted in form and content as provided by §§ 581.4(a) and 581.5, in single copy contained in a double envelope which contains no other material, as follows:

(i) The outer envelope shall be addressed to the Director, Bureau of Domestic Regulation, Federal Maritime Commission, Washington, D.C. 20573.

(ii) The inner envelope shall be sealed, contain only the executed contract, and shall state: "This Envelope Contains a Confidential Service Contract."

(iii) The top of each page of a filed service contract shall be stamped "Confidential."

(2) *Statement of essential terms*. At the same time as the filing of the service contract under paragraph (a)(1) of this section, the statement of essential terms of the contract shall be submitted:

(i) In form and content as provided in §§ 581.4(b) and 581.5;

(ii) In tariff format;

(iii) On page(s) to be included in the Essential Terms Publication as described in paragraph (b) of this section; and

(iv) (A) With an accompanying transmittal letter in an envelope which contains only matter relating to essential terms; and

(B) The envelope and the inside address on the transmittal letter are to be addressed to the "Director, *Bureau of Domestic Regulation*, Federal Maritime Commission, Washington, D.C. 20573."

- (3) Notices of: change to contract, contract party or rate; availability of changed terms to similarly-situated shippers; and settlement of account.

There shall be filed with the Commission pursuant to the procedures of paragraph (a)(1) of this section, a detailed notice, within 30 days of the occurrence, of:

(i) The making available of contingent essential terms to similarly situated shippers under § 581.6(b)(5);

(ii) Termination by mutual agreement, breach or default not covered by the service contract under § 581.7(b);

(iii) The adjustment of accounts, by rerating, liquidated damages, or otherwise under §§ 581.5–581.8;

(iv) Final settlement of any account adjusted as described in paragraph (a)(3)(iii) of this section; and

(v) Any change to:

(A) The name of a basic contract party under § 581.4(a)(1)(v); or

(B) The list of affiliates under § 581.4(a)(1)(vi) of any contract party entitled to receive or authorized to offer services under the contract.

(b) *Essential Terms Publication; maintenance.* Each carrier or conference shall maintain a single, current Essential Terms Publication in the form prescribed under § 581.4(b)(2).

(c) *Who must file.*

(1) As further provided in paragraph (c)(2) of this section, the duty under this part to file service contracts, statements of essential terms and notices, and to maintain an Essential Terms Publication, shall be upon:

(i) A service contract signatory carrier which is not a member of a conference for the service covered by the contract; or

(ii) The conference which:

(A) Is signatory to the service contract; or

(B) Has one or more member carriers signatory to a service contract for a service otherwise covered by the conference agreement.

(2) When a conference files a service contract for and on behalf of one or more of its member lines and the contract covers service from, to or between ports and/or points not included within the scope of the conference, the complete text of the statement of essential terms shall be simultaneously filed in the Essential Terms Publications of both the conference(s) and carrier(s) involved, which shall comply with all other Essential Terms Publication filing and maintenance requirements under paragraph (b) of this section and § 581.4(b).

(d) *Exempt commodities.*

(1) Except as provided in paragraphs (d)(2) and (d)(3) of this section, this section does not apply to contracts relating to bulk cargo, forest products, recycled metal scrap, waste paper or paper waste.

(2) An exempt commodity listed in paragraph (d)(1) of this section may be included in a service contract filed with the Commission only if: (i)

there is a tariff of general applicability for the transportation which contains a specific commodity rate for the exempted commodity; or (ii) the contract itself sets forth a rate or charge which will be applied if the contract is rejected or otherwise terminated.

(3) Upon filing under this paragraph, the service contract and essential terms shall be subject to the same requirements as those for contracts involving non-exempt commodities.

§ 581.4 Form and manner.

(a) *Service contract.* Every service contract shall clearly, legibly and accurately set forth in the following order:

(1) On the first page, preceding any other provisions:

(i) A unique service contract number bearing the prefix "SC";

(ii) The FMC number [FMC No. _____] of the carrier's or conference's Essential Terms Publication;

(iii) A reference to the statement of essential terms number ["ET No. _____"] as provided in paragraph (b)(1)(iii) of this section;

(iv) The FMC number(s) [FMC No. _____] of the tariff(s) of general applicability;

(v) The names of the contract parties. Any further references in the contract to such parties shall be consistent with the first reference (e.g., "[exact name]," "carrier," "shipper," or "association," etc.); and

(vi) Every affiliate of each contract party named under paragraph (a)(1)(v) of this section entitled to receive or authorized to offer services under the contract, except that in the case of a contract entered into by a conference or shippers' association, individual members need not be named unless the contract includes or excludes specific members. In the event the list of affiliates is too lengthy to be included on the first page, reference shall be made to the exact location of such information; and

(2) Commencing on or following the first page of the service contract:

(i) The complete terms of the contract, including all essential terms required under § 581.5; and

(ii) (A) A description of the shipment records which will be maintained to support the contract; and

(B) The address, telephone number, and title of the person who will respond to a request by making shipment records available to the Commission for inspection under § 581.10.

(b) *Essential terms.*

(1) *Statement of essential terms.* Every statement of essential terms shall:

(i) Be printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) Be identified by an essential-terms number bearing the prefix "ET No." which shall be located on the top of each page of the statement of the essential terms; and

(iv) Contain on the first page, in a manner similar to that set forth in §§ 580.5(a)(8) and 580.5(a)(10) of this chapter, the period of availability of essential terms to similarly situated shippers under § 581.6(b), *i.e.*, both the beginning date [which shall be the date the contract is filed at the Commission] and the expiration date [which shall be no less than 30 days after the beginning date].

(2) *Essential Terms Publication.* The Essential Terms Publication shall:

(i) Have all its pages printed in black on yellow paper;

(ii) Be subject to the form and manner requirements applicable to governing tariffs as set forth in Part 580 of this chapter;

(iii) (A) Contain a currently maintained "Index of Statements of Essential Terms" structured as follows:

ET No.	Effective Date	Expiration Date	Page No(s).	Section No(s).	Date of Cancellation of Page(s)
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The Index shall include for every statement of essential terms, the ET number, as provided in paragraph (b)(1)(iii) of this section, the effective duration, as provided in § 581.5(a)(3)(i), the page and section number(s) [where used], and a column for cancellation dates which shall be used as an alternative to cancelling each individual page of the Essential Terms Publication; and

(B) The statement of essential terms may not be cancelled until after the contract(s), including any renewal or extension, has expired. In the event a contract is terminated, the effective date of the termination shall be used as the date of cancellation;

(iv) Include an alphabetical index of the commodities covered by the service contracts in which each commodity shall make reference to the relevant ET number or numbers;

(v) Contain on its title page, or in a rule, reference to each carrier's or conference's tariff of general applicability; and

(vi) Be referenced in each of the carrier's or conference's tariffs of general applicability, where required to be filed under the Act and this chapter.

§ 581.5 Content of essential terms; contingency clauses.

(a) *Essential terms:*

(1) May not be uncertain, vague or ambiguous;

(2) May not contain any provision permitting modification by the parties other than in full compliance with this part; and

(3) Shall include the following:

(i) The *duration* of the contract, stated as a specific, fixed time period, with a beginning date and ending date;

(ii) The *origin and destination port ranges* in the case of port-to-port movements, and the origin and destination geographic areas in the case

of through intermodal movements, except that, in service contracts, the origin and destination of cargo moving under the contract need not be stated in the form of "port ranges" or "geographic areas" but shall reflect the actual locations agreed to by the contract parties;

(iii) *The contract rate, rates or rate schedule(s)*, including any additional or other charges [i.e., general rate increases, surcharges, terminal handling charges, etc.] that apply, and any and all conditions and terms of service or operation or concessions which in any way affect such rates or charges;

(iv) *The commodity or commodities involved*;

(v) *The minimum quantity of cargo freight revenue necessary to obtain the rate or rate schedule(s)*, except that the minimum quantity of cargo committed by the shipper may not be expressed as a fixed percentage of the shipper's cargo.

(vi) *The service commitments* of the carrier, conference or specific members of a conference such as, assured space, transit time, port rotation or similar service features;

(vii) *Liquidated damages for nonperformance*, if any; and

(viii) Where a contract clause provides that there can be a deviation from an original, essential term of a service contract, based upon any stated event occurring subsequent to the execution of the contract, a clear and specific description of the event, the existence or occurrence of which shall be readily verifiable and objectively measurable. This requirement applies to, *inter alia*, the following types of situations:

(A) Retroactive rate adjustments based upon experienced costs;

(B) Reductions in the quantity of cargo or amount of revenues required under the contract;

(C) Failure to meet a volume requirement during the contract duration, in which case the contract shall set forth a rate, charge, or rate basis which will be applied;

(D) Options for renewal or extension of the contract duration with or without any change in the contract rate or rate schedule;

(E) Discontinuance of the contract;

(F) Assignment of the contract; and

(G) Any other deviation from any original essential terms of the contract.

(b) *Notice*. Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(1) Any account adjustment resulting from either liability for liquidated damages under paragraph (a)(3)(vii) of this section, or the occurrence of an event described in paragraph (a)(3)(viii) of this section; and

(2) Final settlement of any account adjusted under paragraph (b)(1) of this section.

(c) *Issuance of proposed final accounting*. Any proposed final account adjustment resulting from liability for liquidated damages or the occurrence of an event under paragraph (b)(1) of this section shall be issued to the

appropriate contract party within 60 days of the termination or discontinuance of the service contract.

§ 581.6 Availability of essential terms.

(a) *Availability of statement.* A statement of the essential terms of each service contract as set forth in tariff format shall be made available to the general public pursuant to the requirements of this section and §§ 581.3, 581.4(b) and 581.5.

(b) *Availability of terms.*

(1) The essential terms of an initial service contract shall be made available to all other shippers or shippers' associations similarly situated under the same terms and conditions for a specified period of no less than thirty (30) days from the date of filing of the service contract as may be adjusted under § 581.8(d).

(2) Whenever a shipper or shippers' association desires to enter into a service contract with the same essential terms, a request shall be submitted to the carrier or conference in writing.

(3) The carrier or conference shall reply to the request by mailing, or other suitable form of delivery, within 14 days of the receipt of the request, either a contract offer with the same essential terms which can be accepted and signed by the recipient upon receipt, or an explanation in writing why the applicant is not entitled to such a contract. The carrier or conference may require the contract offer to be accepted within a specified period of time.

(4) The service contract resulting from a request under this section may not go into effect until an executed copy is filed with the Commission under this section. No additional statement of essential terms need be filed.

(5) In the case of any expressly described event which results in a change to an original essential term by the operation of a contract clause in the service contract under § 581.5(a)(3)(viii), the new essential term(s) shall be immediately made available in writing to other shippers and shippers' associations which have entered into a contract with the same, original essential terms, and which are similarly affected by the event. Copies shall also be submitted to the Commission under § 581.3(a)(3)(i).

§ 581.7 Modification, termination or breach not covered by the contract.

For purposes of this part:

(a) *Modification.* The essential terms originally set forth in a service contract may not be modified during the duration of the contract.

(b) *Mutual termination or shipper failure to meet cargo minimum.* In the event of a contract termination which is not provided for in the contract itself and which results from mutual agreement of the parties or because the shipper or shippers' association has failed to tender the minimum quantity required by the contract:

(1) Further or continued implementation of the service contract is prohibited;

(2) The cargo previously carried under the contract shall be rerated according to the otherwise applicable tariff provisions of the carrier or conference in effect at the time of each shipment; and

(3) Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(i) The occurrence of the contract termination, breach or default under this paragraph;

(ii) Any rerating or other account adjustment resulting from the contract termination, breach or default under this paragraph; and

(iii) Final settlement of the account adjusted under paragraph (b)(3)(ii) of this section.

(4) Any proposed rerating or other final account adjustment resulting from termination, breach or default under this paragraph shall be issued by the carrier or conference to the shipper or shippers' association within 60 days of the termination, breach or default of the service contract.

§ 581.8 Contract rejection and notice; implementation.

(a) *Initial filing and notice of intent to reject.*

(1) Within 20 days after the initial filing of the contract and statement of essential terms, the Commission may notify the filing party of the Commission's intent to reject a service contract and/or statement of essential terms that does not conform to the form, content and filing requirements of the Act or this part. The Commission will provide an explanation of the reasons for such intent to reject.

(2) The parties will have 20 days after the date appearing on the notice of intent to reject to resubmit the contract and/or statement of essential terms, modified to satisfy the Commission's concerns, as set forth in paragraph (a)(1) of this section.

(b) *Rejection.* The Commission may reject the contract and/or statement of essential terms if the objectionable contract or statement:

(1) Is not resubmitted within 20 days of the notice of intent to reject; or

(2) Is resubmitted within 20 days of the notice of intent to reject as provided in paragraph (a)(2) of this section, but still does not conform to the form, content or filing requirements of the Act or this part, as set forth in paragraph (a)(1) of this section.

(c) *Implementation; prohibition and rerating.*

(1) Performance under a service contract may begin without prior Commission authorization on the day both the service contract and statement of essential terms are on file with the Commission, except as provided in paragraph (c)(2) of this section:

(2) When the filing parties receive notice that the service contract or statement of essential terms has been rejected under paragraph (b) of this section:

(i) Further or continued implementation of the service contract is prohibited;

(ii) All services performed under the contract shall be rerated in accordance with the otherwise applicable tariff provisions for such services with notice to the shipper or shippers' association within 30 days of the date of rejection; and

(iii) Detailed notice shall be given to the Commission under § 581.3(a)(3) within 30 days of:

(A) The rerating or other account adjustment resulting from rejection under this paragraph; and

(B) Final settlement of the account adjusted under paragraph (c)(2)(iii)(A) of this section.

(d) *Period of availability.* The minimum 30-day period of availability of essential terms required by § 581.6(b) shall be suspended on the date of the notice of intent to reject a service contract and/or statement of essential terms under paragraph (a)(1) of this section and a new 30-day period shall commence upon the resubmission thereof under paragraph (a)(2) of this section.

§ 581.9 Confidentiality.

(a) *Service contracts.* All service contracts filed with the Commission shall, to the full extent permitted by law, be held in confidence.

(b) *Amendments to non-essential terms.* Amendments to non-essential terms of a service contract shall be accorded similar confidential treatment.

§ 581.10 Recordkeeping and audit.

Every common carrier or conference shall:

(a) Maintain service contract shipment records currently and for a period of five years from the termination of each contract; and

(b) Tender service contract shipment records to the Commission for inspection upon request.

§ 581.91 OMB control numbers assigned pursuant to the Paperwork Reduction Act.

The information collection requirements contained in these regulations [46 CFR 581] have been approved by the Office of Management and Budget [OMB] in accordance with 44 U.S.C. Chapter 35 and have been assigned OMB Control Number 3072-0044.

By the Commission.*

(S) JOSEPH C. POLKING
Secretary

* Commissioner Thomas F. Moakley's dissent in part is attached.

Commissioner Moakley, dissenting in part

I dissent from the requirement set forth in section 581.7(b) of the final rule that cargo previously carried under the contract must be rerated according to the otherwise applicable tariff upon mutual termination or when the shipper fails to tender the minimum quantity required by the contract. I cannot find a legal basis for the link that the rule would make between these distinct types of pricing and service. If there has been a breach of the service contract, section 8(c) of the Shipping Act of 1984 states specifically that the exclusive remedy is in a court of law. If, instead, we are assuming that any unfulfilled contract constitutes a violation of section 10(a)(1) of the Act, the sanction for such a violation is the civil penalty prescribed in section 13 of the Act.

Moreover, the use of a service contract to circumvent tariff rates would also be likely to constitute a violation of section (10)(b)(4) of the Act by the carrier. The solution contained in the rule would reward the carrier for such a violation by requiring him to collect the tariff rate which, in most instances would be higher.

I would delete section 581.7(b) from the final rule and focus more effort on enforcing the considerable sanctions set forth in section 13 of the Act against both the carrier and the shipper where service contracts are being used merely as a device to circumvent tariffs.

Attachment A

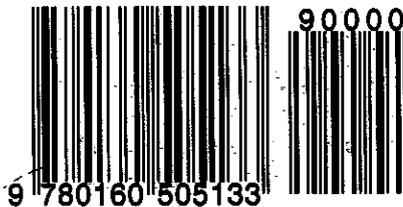
Docket No. 86-6

Commenters

1. American Association of Exporters and Importers (AAOEXIM)
2. American Institute for Shippers' Associations, Inc. (AISA)
3. American President Lines, Ltd. (APL)
4. Asia North America Eastbound Rate Agreement (ANERA)
5. Atlantic and Gulf/West Coast of South America Conference, et al. (South/Central America Conferences)
6. Chemical Manufacturers Association (CMA)
7. Department of Justice (DOJ)
8. Department of Transportation (DOT)
9. E.I. duPont de Nemours & Company (DuPont)
10. Ford Motor Company (Ford)
11. Greece/U.S. Atlantic and Gulf Conference, et al. (Mediterranean Conferences)
12. Hercules Incorporated (Hercules)
13. Houston Port Bureau, Inc. (HPB)
14. IBP, Inc.
15. National Association of Recycling Industries, Inc. (NARI)
16. National Customs Brokers and Forwarders Association of America, Inc. (NCBFAA)
17. National Industrial Transportation League (NITL)
18. New York Chamber of Commerce and Industry (NYCCI)
19. North Europe-U.S. Pacific Freight Conference (NEPFC)
20. Pacific Coast European Conference (PCEC)
21. Phillips Petroleum Company (Phillips)
22. PPG Industries, Inc. (PPG)
23. RCA Corporation (RCA)
24. Sea-Land Service, Inc. (Sea-Land)
25. Stauffer Chemical Company (Stauffer)
26. Trans-Pacific Freight Conference of Japan and Japan-Atlantic and Gulf Freight Conference (Japanese Conferences)
27. Transpacific Westbound Rate Agreement (TWRA)
28. Union Carbide Corporation (Union Carbide)
29. United States Lines, Inc. and United States Lines (S.A.) Inc. (USL)
30. U.S. Atlantic & Gulf/Australia-New Zealand Conference (Australia-New Zealand Conference)

31. U.S. Atlantic-North Europe Conference, et al. (North European Conferences)
32. Warner-Lambert Company (Warner-Lambert)
33. Westwood Shipping Lines (Westwood)

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