FEDERAL MARITIME BOARD

No. M–44

MISSISSIPPI SHIPPING COMPANY, INC.—APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE SERVICE BETWEEN UNITED STATES GULF PORTS AND PORTS ON THE WEST COAST OF AFRICA (SERVICE 2 OF TRADE ROUTE NO. 14)

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Mississippi Shipping Company, Inc., for bareboat charter of a C–1A- or a C–1B-type, Government-owned, war-built, dry-cargo vessel for use "for a period of not less than 4 months and probably for a period of 6 months or more" in the company's subsidized freight service on Trade Route No. 14.

Hearing on the application was held before an examiner on November 2, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. There was no opposition to the application. The examiner's recommended decision was served on November 13, 1951, in which he recommended that the Board should make the necessary statutory findings in favor of the application. No exceptions were filed to the examiner's recommended decision within the 24-hour period agreed to by counsel for applicant and counsel for the Board.

Trade Route No. 14 has been determined to be an essential foreign trade route of the American merchant marine. Applicant is at present the only regular American-flag operator between United States Gulf ports and ports on the West coast of Africa, which is Service 2 of Trade Route No. 14. Applicant inaugurated its subsidized service on this route in May 1947 with three C–1A-type vessels. Originally applicant was authorized to make a minimum of 10 and a maximum of 12 sailings yearly. In July 1950 applicant was authorized to increase its sailings to a minimum of 14 and a maximum of 18 sailings yearly.

Cargo offerings over this route have been steadily increasing. In May 1951 applicant obtained approval from the Maritime

Administration for the transfer of a C–1A-type vessel, the *Del Campo,* from its South American service (Trade Route No. 20) to its West African service (Service 2 of Trade Route No. 14) for a maximum of four voyages to be completed not later than March 31, 1952. Applicant intends to apply to the Maritime Administration for authority to retain the *Del Campo* in the West African service beyond March 31, 1952.

The cargo moving over Trade Route No. 14 is important both to the economy and the defense effort of the United States and to the economy and the development of the area serviced in West Africa. Outbound from the United States Gulf coast applicant carries such cargo as petroleum, petroleum products, road-building machinery, and vehicles. Inbound applicant carries such cargo as bauxite, manganese, fish meal, mahogany, asphalt, rubber, and coffee. There promises to be a substantial increase in the movement of ore to the United States, principally from the Belgian Congo, with the further development of this area. We have no difficulty in finding that this service is in the public interest.

The evidence is undisputed that tonnage offering on this service far exceeds available vessel space. All of applicant's vessels are sailing substantially full outbound from the Gulf, and they are sailing 65 to 75 percent full inbound. Applicant's witness testified that as to recent sailings there has not been enough outbound space for the cargo offered, and that the backlog of cargo has continued to pile up. Up until the time of hearing, applicant had been offered 6,000 tons of cargo for December alone, which it cannot presently carry, and indications are that the volume of offerings which applicant must refuse will increase. This tonnage includes road machinery, petroleum products, automobiles, tractors, and general cargo.

The application herein involved is for a C–1A- or a C–1B-type vessel or, if such vessels are unavailable, a Victory-type vessel. At the hearing, however, applicant stated that a Victory-type vessel would not be suitable for operation in this service. Applicant has made a canvas of the private-charter market and its witness testified that he was informed that there are no privately owned C–1A- or C–1B-type vessels available for charter at any price.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service will not be adequately served without the use therein of the additional Government-owned vessel herein applied for; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided for in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under the operating-differential subsidy agreement with applicant for this service.

Chairman Cochrane, being absent, took no part in this report.

By the Board.

NOVEMBER 16, 1951.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–41

AMERICAN-HAWAIIAN STEAMSHIP COMPANY—APPLICATION FOR BAREBOAT CHARTER OF SEVEN VICTORY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE INTERCOASTAL SERVICE

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of American-Hawaiian Steamship Company for bareboat charter of seven Victory-type, Government-owned, war-built, dry-cargo vessels for employment in the intercoastal service.

Hearing on the application was held before an examiner on November 7, 1951, pursuant to notice in the Federal Register of October 29, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. Although American President Lines, Ltd., Luckenbach Steamship Company, Inc., Waterman Steamship Corporation, and West Coast Lumbermen's Association appeared as interveners, there was no basic objection to the granting of the application. The examiner's recommended decision was served on November 9, 1951, in which he recommended that the Board should make the necessary statutory findings in favor of the application. A memorandum on behalf of Luckenbach requests amplification of the examiner's recommended decision pursuant to suggestions which will be set forth below. A memorandum in behalf of applicant requests an expedited decision by the Board adopting the recommended decision of the examiner. No exceptions were filed to the examiner's recommended decision within the 7-day period provided for in the notice of hearing.

Applicant bases the present application on the inadequacy which will result upon a proposed 9-month charter to Military Sea Transportation Service (hereinafter referred to as MSTS) of its five C–4-type vessels presently engaged in the intercoastal service. A representative of MSTS testified that these vessels

are required as a matter of sudden urgency in order to move a special type of vehicles to various off-shore areas within a time limit. The details of this movement are restricted to military information. MSTS desires to place these five C–4-type vessels in its service between now and January 1, 1952, and their use will be spread over at least a 9-month period. These particular vessels are requested by MSTS because of their large amount of deck space which makes them especially adaptable to the carriage of vehicles. The witness from MSTS testified that applicant's vessels are the only vessels of this type that are presently available from any source.

Applicant's president expressed the desire of his company to do whatever it can to accommodate MSTS, but he also stated that the company is reluctant to suspend, even temporarily, its own intercoastal service, which would be the case were their owned vessels chartered to MSTS without replacement by other tonnage simultaneously. While it may be recognized that the granting of this application would immediately promote the defense effort by releasing applicant's owned vessels to the military for a highly desirable purpose, the present application, being founded on Public Law 591, must stand or fall on the requirements of that Act. Public Law 591 requires the Board to find (1) that the service under consideration is required in the public interest, (2) that such service will not be adequately served without the use therein of the vessels applied for, and (3) that privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates.

We have no difficulty in finding that the intercoastal service is in the public interest. Applicant's witness testified that the company's vessels are running substantially full in both directions, and that the company has been forced to decline some cargo. The witness testified that there has been no substantial change in the space situation on this service since applicant's earlier application in Docket No. M–13, wherein the Board found, in its report of October 17, 1950 (3 F.M.B. 446), that the service would be inadequately served without the use therein of applicant's vessels.

It was testified that traffic has increased somewhat since the time of that report. The representative of West Coast Lumbermen's Association testified that there is a definite lack of vessel space to handle eastbound shipments of lumber, which situation

is aggravated by the shortage of rail cars. The total cubic space of the seven Victory-type vessels herein applied for is less than that of the five C–4-type vessels applicant proposes to charter to MSTS.

The evidence is undisputed that there are no privately-owned vessels available for charter from private operators on reasonable conditions and at reasonable rates. Letters from three vessel brokers to applicant satisfactorily support this conclusion.

Counsel for Luckenbach has urged before the examiner and in a memorandum to the examiner's recommended decision that any charter granted to applicant should "contain a provision permitting reopening of this proceeding by a competitor for good cause shown to permit the Board to determine whether the charter should be continued or terminated, or alternatively * * * that the Board's decision herein recognize the right of competing carriers to request a cancellation under the usual 15-day cancellation clause to be included in the charter." We agree with the examiner that such a provision is unnecessary since any interested person may petition the Board for good cause shown to reexamine the then-current necessity for the continuation of an existing charter, and may thereby cause the Board to invoke the 15-day cancellation clause should the Board at that time be unable to make the necessary statutory findings. Luckenbach does not otherwise oppose the present application.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service will not be adequately served without the use therein of the seven Government-owned vessels herein applied for; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the charters which may be granted pursuant to the findings in this case be effective upon consummation of arrangements with MSTS and be limited to a period of 9 months, or to such lesser period ending upon the redelivery to applicant of its five C–4-type vessels from MSTS, and that such charters be at the rate of 15 percent per annum of the

statutory sales price of each vessel computed as of the date of the charter.

Vice-Chairman Williams concurs in this report.

By the Board.

NOVEMBER 19, 1951.

(Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

FEDERAL MARITIME BOARD

No. M–42

POPE & TALBOT, INC.—APPLICATION TO EXTEND EXISTING BAREBOAT CHARTER OF THREE LIBERTY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE INTERCOASTAL SERVICE

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Pope & Talbot, Inc., to extend for an indefinite period the existing bareboat charters of three Liberty-type, Government-owned, war-built, dry-cargo vessels for employment in the intercoastal service.

Hearing on the application was held before an examiner on November 7, 1951, pursuant to notice in the Federal Register of November 2, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. Although American President Lines, Ltd., Luckenbach Steamship Co., Inc., Pacific-Atlantic Steamship Company, Waterman Steamship Corporation, and West Coast Lumbermen's Association appeared as interveners, there was no objection to the granting of the application. The examiner's recommended decision was served on November 21, 1951, in which he recommended that the Board should make the necessary statutory findings. No exceptions were filed to the examiner's recommended decision within the 7-day period provided for in the notice of hearing.

Since July 1950 applicant has operated an average of eight vessels in its intercoastal service except for the period from July through September 1951. During the latter period, one of applicant's vessels was chartered for a single voyage to Pacific Argentine Brazil Line, Inc., a wholly-owned subsidiary of applicant, for operation under subsidy contract on Trade Route No. 24. At the present time applicant is operating five of its owned vessels in the intercoastal service, viz., four Victorys and one C–3. Another C–3 owned by applicant, the *P.&T. Explorer,* is under charter to Military Sea Transportation Service. The charter of

the *P.&T. Explorer* expires in December 1951 and applicant has been advised by MSTS that an extension of that charter will be requested. Applicant will agree to such extension.

In addition to its owned vessels, applicant operates three Liberty vessels under bareboat charter from the Government pursuant to our recommendations in Docket No. M–17. The existing authority for applicant's operation of these vessels will expire with respect to one of the vessels on December 16, 1951, and as to the other two vessels, in the middle of January 1952. The present application is for an indefinite extension of these charters. Applicant's witness states that two of the three Libertys under consideration are required as substitutes for the C–3 under charter to MSTS; the witness states that because of larger cubic capacity and greater speed, the C–3-type vessel has the approximate transportation equivalent of two Liberty vessels.

As we have recently stated in Docket No. M–41 *(Application of American-Hawaiian S.S. Co.)*, 3 F.M.B. 693, we have no difficulty in finding that the intercoastal service is in the public interest. The importance of this service to the national defense and the national economy of the United States has been confirmed by the Interstate Commerce Commission, the Congress, and the Maritime Board and Administration.

Because of heavy lumber shipments, all of the vessels operated by applicant on this service have been operating at full capacity eastbound. Applicant plans to operate the three Liberty vessels applied for in this proceeding eastbound primarily in the lumber trade, carrying nothing eastbound other than lumber and occasional shipments of bulk commodities, such as silicate of soda. This has been the past method of operation of these Libertys by applicant, and no change in this method of operation is presently contemplated. Applicant's present vessel capacity is urgently needed for the movement of lumber and other commodities from the Pacific Northwest area of the United States.

Applicant's westbound service operates from Philadelphia, Baltimore, and Norfolk. The company has been able to obtain reasonably full westbound cargoes for the past 6 months, and it has been advised by its shippers that the need for its present capacity for westbound traffic will continue.

It appears clearly from the evidence that there are no suitable privately-owned vessels available for charter to applicant upon reasonable conditions and at reasonable rates. Applicant's witness states that the current private-charter rate is far beyond that

which can be paid for vessels to be employed in the intercoastal service without the charterer incurring prohibitive losses.

During the course of the hearing before the examiner, applicant expressed a desire to have the privilege of using the applied-for vessels for calling at Puerto Rico eastbound should it become necessary to do so. The examiner ruled that the application did not cover Puerto Rican calls. We agree with the examiner, with the understanding that it in no way prejudices applicant's right to apply for the inclusion of Puerto Rican calls under all the conditions of Public Law 591.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service will not be adequately served without the use therein of the three Government-owned vessels herein applied for; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charters which may be renewed pursuant to the findings in this proceeding be for an indefinite period except that the renewal of two such charters be effective upon the consummation of an extension of the charter of applicant's C–3-type vessel, *the P.&T. Explorer*, to MSTS, and that said two charters be reviewed upon the redelivery by MSTS to applicant of the *P.&T. Explorer*. The Board further recommends that any charters renewed pursuant to our findings herein be subject to the usual right of cancellation by either party on 15 days' notice and subject further to annual review as provided for in Public Law 591.

By the Board.

DECEMBER 5, 1951.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–45

PRUDENTIAL STEAMSHIP CORPORATION—APPLICATION FOR BAREBOAT CHARTER OF A VICTORY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR EMPLOYMENT IN ITS BERTH SERVICE BETWEEN UNITED STATES NORTH ATLANTIC PORTS AND NEAR EAST PORTS

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Prudential Steamship Corporation for bareboat charter for an indefinite period of a Victory-type, Government-owned, war-built, dry-cargo vessel for use in its berth service between United States Atlantic ports (excluding ports south of Charleston, S. C.) and Mediterranean and Near East ports (including ports in Morocco, Algiers, France, Italy, Greece, Turkey, Lebanon, Syria, Israel, Egypt, Trieste, Spain, Yugoslavia, Tunisia, and Libya).

Hearing on the application was held before an examiner on November 21, 1951, pursuant to notice in the Federal Register of November 3, 1951. The examiner's recommended decision was served on November 27, 1951, in which he recommended that the Board should make the necessary statutory findings. No exceptions were filed to the examiner's recommended decision.

We have no difficulty in finding that the service under consideration is in the public interest. See *Application of American Export Lines, Inc.*, Docket No. M–19, 3 F.M.B. 455, and *Application of Prudential Steamship Corporation*, Docket No. M–34, 3 F.M.B. 627.

Applicant now regularly employs three Victory-type vessels in its Mediterranean service, viz., an owned vessel, a vessel bareboat chartered from private interests, and a vessel bareboat chartered from the Government. The partially owned Liberty-type vessel, which applicant was employing in this service at the time of hearing in Docket No. M–34, was withdrawn and is presently engaged in the carriage of bulk cargo to and from the Far East.

Applicant stated this vessel is unsuited for operation in their berth service and when in the service was incurring a considerable loss. In place of the withdrawn Liberty ship, applicant, pending a decision on its application in this case, chartered the SS. *Frances*, a privately-owned C–2-type vessel, which went on berth November 11, 1951. This vessel is under charter for one voyage of approximately 60 days. The time-charter rate was reported as $90,000 per month. According to applicant's witness, the only justification for the charter of the SS. *Frances* at this rate "is the Company's willingness to suffer a loss to insure that its service to its shippers will be maintained." Applicant estimated that a loss of about $40,000 would be sustained on the venture. The present application is for the introduction into its berth service of a vessel to take the place of the SS. *Frances*, which returns to its owner at the expiration of the present charter.

Since July 26, 1951, applicant has made seven sailings outbound in the Mediterranean berth, and all of its vessels have sailed substantially full. In many cases the vessels were fully booked two or three weeks in advance of sailing and cargo offerings had to be refused. From July 26 and up to October 15, 1951, the commencement date of the East coast longshoremen's strike, applicant was compelled to refuse cargo for shippers aggregating 28,639 deadweight tons. In addition, applicant was unable to accept an equal, if not greater, quantity of military cargo. Since the end of the longshoremen's strike on November 9, 1951, applicant has had to refuse cargo from approximately 13 shippers, representing 8,489 deadweight tons. Applicant's witness stated that these figures represent only firm commercial cargo offerings which were refused, and do not include informal solicitations or requests for space. Demand is expected to increase because of the efforts of shippers to secure space for cargo that has failed to move during the longshoremen's strike.

It appears from the evidence that no privately owned American-flag vessels suitable for operation in the United States North Atlantic/Mediterranean berth service are available for charter upon reasonable conditions and at reasonable rates.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest:

2. That such service will not be adequately served without the use therein of the additional Government-owned vessel herein applied for; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided for in Public Law 591.

By the Board.

DECEMBER 5, 1951

(Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

FEDERAL MARITIME BOARD

No. M–40

GRACE LINE INC.—APPLICATION TO BAREBOAT CHARTER GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR OPERATION BETWEEN CALIFORNIA PORTS AND PORTS IN VENEZUELA

REPORT OF THE BOARD

This is a proceeding under Public Law 591, Eighty-first Congress, to consider the application of Grace Line Inc. to bareboat charter two Government-owned, war-built, dry-cargo vessels of the Liberty type for a period of from 8 months to 1 year for operation primarily between Los Angeles, Calif., and contiguous oil ports in Venezuela.

Notice of the hearing before the examiner was published in the Federal Register of October 27, 1951, and such hearing was held on November 7 – 9, 1951. The usual 15 days' notice was not given because of the urgency of the matter. The examiner, on November 15, 1951, issued his report recommending that the Board make the required statutory findings. Exceptions to the recommended decision of the examiner were filed by the Committee for the Promotion of Tramp Shipping, and oral argument was heard by the Board on December 3, 1951.

According to testimony in this case, applicant operates in a service between the United States and Canadian ports and the West coast of Mexico, West coast of Central America, and Caribbean ports with four C1–MA–V1 vessels chartered from the Government. These vessels, in conjunction with applicant's operation of C–2 vessels to the West coast of Mexico, West coast of Central America, and West coast of South America, provide a sailing approximately every 3 weeks. Between November 1950 and May 1951, due to seasonal cargo offerings, applicant obtained additional tonnage from Alaska Steamship Company of C1–MA–V1-type vessels bareboat chartered from the Government pursuant to this Board's findings in Docket No. M–11. There is now pending before this Board an application for the time charter of vessels from Alaska Steamship Company for the current winter

FEDERAL MARITIME BOARD

No. M–43

PACIFIC-ATLANTIC STEAMSHIP COMPANY—APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE INTERCOASTAL TRADE

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Pacific-Atlantic Steamship Company to extend the existing bareboat charter on three Government-owned, war-built, Liberty-type vessels now employed by applicant in the intercoastal trade.

Hearing on the application was held before an examiner on November 8, 1951, pursuant to notice in the Federal Register of November 2, 1951. Because of the urgency of the matter, the usual 15 days' notice was not given. The examiner's recommended decision was served on November 21, 1951, in which he recommended that the Board make the necessary statutory findings. All parties have waived the filing of exceptions, except the applicant, which, through its counsel, has filed a letter in support of the examiner's recommended decision.

We agree with the examiner's statement of fact and conclusions, which we adopt as our own.

The examiner correctly finds, predicated upon prior decisions of the Board, that the intercoastal service is in the public interest. See also *Application of Pope & Talbot, Inc.*, Docket No. M–42, decided December 5, 1951.

Applicant owns three Victory-type and one C–2-type vessels. One of the Victory-type vessels and three currently chartered Libertys, in addition to one Victory owned by its parent company, States Steamship Company, are presently being operated in the intercoastal trade. Its other vessels are engaged in the transpacific trade carrying principally military-type cargoes.

Testimony introduced in this case indicates that applicant's vessels eastbound are sailing substantially full; westbound, its vessels are running about 90 percent full. Much of the cargo

moving eastbound is lumber; westbound, steel and general cargo. Testimony offered by West Coast Lumbermen's Association indicates a shortage of space for the carriage of lumber, which is accumulating at several ports in substantial volume. Testimony further indicates that the lumber market continues strong, and because of the shortage of rail cars lumber must move by water. It is clear, therefore, that the intercoastal service will not be served adequately without the use therein of the vessels applied for.

Applicant's witness stated that suitable privately-owned vessels are available only at rates which are not practicable or feasible for intercoastal operation. There was no contrary evidence.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service will not be adequately served without the use therein of the three Government-owned vessels herein applied for; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charters renewed pursuant to its findings herein be subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review as provided for in Public Law 591.

By the Board.

DECEMBER 6, 1951.

(Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

FEDERAL MARITIME BOARD

No. M–43

PACIFIC-ATLANTIC STEAMSHIP COMPANY — APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE INTERCOASTAL TRADE

The Board should find and so certify to the Secretary of Commerce that the intercoastal service is required in the public interest, that such service will not be adequately served without the use therein of the vessels for which the present application is made, and that there are no suitable privately-owned American-flag vessels available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

William I. Denning for applicant.

Sterling F. Stoudenmire, Jr., for Waterman Steamship Corp., *Robert H. Duff* for American President Lines, Ltd., *Odell Kominers* for Luckenbach Steamship Company, Inc., and *K. C. Batchelder* for West Coast Lumbermen's Association.

Alan F. Wohlstetter for the Board.

RECOMMENDED DECISION OF C. W. ROBINSON, EXAMINER

Pacific-Atlantic Steamship Company, hereinafter referred to as applicant, presently has under bareboat charter from the Government, pursuant to Public Law 591, Eighty-first Congress, three Liberty-type vessels which are employed in the intercoastal trade. By letter of October 15, 1951, applicant seeks to charter the same vessels for an indefinite period upon the termination of the current charters. Notice of hearing on the application was published in the Federal Register of November 2 and hearing was held on November 8, 1951. The usual 15-day notice was not given in view of the urgency of the matter. No objection was interposed to the granting of the application.

Public interest.—On November 19, 1951, in Docket No. M–41, the Board stated as follows:

We have no difficulty in finding that the intercoastal service is in the public interest.

Inasmuch as the hearing in Docket No. M–41 was held 1 day prior to the hearing in the instant proceeding, the same conclusion on the particular point must here be reached.

Adequacy of service.—Applicant owns three Victory-type and one C–2-type vessels; its parent company, States Steamship Company, owns four Victorys and one C–2. One of applicant's Victorys and its three currently-chartered Libertys, in addition to one Victory owned by States, are presently being operated by applicant in the intercoastal trade. Applicant's two other Victorys and C–2 are engaged in the transpacific trade. According to its president, applicant does not prefer the transpacific to the intercoastal trade, and would like to use its Victorys intercoastally, but the transpacific needs of Military Sea Transportation Service are such as to make this impracticable. In the transpacific trade applicant's vessels are running 60 – 70 percent with military cargo, the remainder being principally foodstuffs. Three of the vessels in that trade go to Japan from the Pacific coast and then turn around; the fourth goes to the Philippines, sometimes to Indo-China and Hong-Kong, and then back to Japan before proceeding homeward.

It was testified by applicant's president that eastbound intercoastal cargo has increased since July 1951, and that his company is unable to handle all that has been offered to it. The peak season, it was said, is now extending over a longer period than previously because of shippers' inability to obtain space. Eastbound, applicant's individual vessels, owned as well as chartered, carry between 3½ and 4½ million feet of lumber (60 percent of capacity) and 3,500 tons of general cargo (40 percent of capacity), principally canned goods. Lumber is stowed in the lower holds and on deck, and general cargo is stowed in the 'tween decks, the general cargo being lifted mainly in California. It was stated that there would be no difficulty in filling the entire space of applicant's vessels with lumber, which is piling up in substantial lots, but that good business judgment requires that a part of the space be allotted to shippers of general cargo. Westbound, applicant's vessels are running about 90 percent full, loaded principally with steel and general cargo.

The witness for West Coast Lumbermen's Association stated that the members thereof are experiencing a serious shortage of space, that lumber is accumulating at several ports in substantial volume for lack of space, that the market continues strong, and that there is a shortage of rail cars. The witness further

stated that the Association depends upon applicant to carry 16 million board feet of lumber eastbound in November and December 1951.

Applicant's witness stated that there are fewer vessels in the intercoastal trade at the present time than in 1950, and that without the three vessels here sought the present aggravated condition in the trade will be worsened. From the evidence as a whole it is clear that the intercoastal service will not be served adequately without the use therein by applicant of the vessels under consideration.

Availability of vessels.—Applicant's vessel broker has advised applicant that the time-charter rate for Liberty vessels is about $65,000 per month. Operation in the intercoastal trade at this rate, in the opinion of applicant's witness, probably would result in a loss. There is no evidence to the contrary on the availability of Liberty vessels in the private market. (See the Board's report of November 19, 1951, in Docket No. M–41, 3 F.M.B. 693).

Miscellaneous.—Because of unchanged conditions in the trade, and the inability accurately to foresee changes, applicant requests that the charters be on an indefinite basis, with the usual 15-day cancellation provisions. This request should be accorded under the circumstances.

CONCLUSIONS AND RECOMMENDATION

The Board should find and so certify to the Secretary of Commerce:

1. That the service in question is required in the public interest;
2. That such service will not be served adequately without the use therein of the vessels here sought; and
3. That there are no suitable privately owned American-flag vessels available for charter by private operators on reasonable conditions and at reasonable rates for use in such service.

It is recommended that the charters be for an indefinite period if the application be granted, with the usual 15-day cancellation provision.

FEDERAL MARITIME BOARD

No. M–46

GRACE LINE INC.—TIME CHARTER OF TWO GOVERNMENT-OWNED C1–M–AV1 TYPE VESSELS FROM ALASKA STEAMSHIP COMPANY FOR USE IN THE SERVICE BETWEEN UNITED STATES PACIFIC COAST PORTS AND PORTS ON THE WEST COASTS OF MEXICO AND CENTRAL AMERICA AND VIA PANAMA CANAL FOR CALLS AT CARIBBEAN PORTS

REPORT OF THE BOARD

This proceeding was instituted by order of the Board upon its own motion for the purpose of considering whether existing conditions justify the granting to Alaska Steamship Company of permission to time charter two Government-owned C1–M–AV1-type vessels to Grace Line Inc. The vessels were bareboat chartered to Alaska Steamship Company pursuant to the Board's decision in Docket No. M–11.

Amended notice of hearing was published in the Federal Register on November 20, 1951, and hearing was held on November 27, 1951. The usual 15 days' notice was not given because of the urgency of the matter. Alaska Steamship Company, Moore-McCormack Lines, Inc., Pacific Argentine Brazil Line, Inc., and the Committee for the Promotion of Tramp Shipping appeared as interveners.

Whether permission should be granted to Alaska to time charter the vessels to Grace this winter as it did last, depends upon whether the record shows that the service for which Grace intends the vessels meets the requirements of Public Law 591. The examiner has recommended (1) that the service is in the public interest, (2) that the service is not adequately served, and (3) that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in the service. No exceptions have been filed to the examiner's recommended decision although counsel for the Board recommends certain restrictions to any charter that may be granted.

Alaska has nine C1–M–AV1-type vessels under bareboat charter from the Government for use in the Alaskan service pursuant

to our findings in Docket No. M–11, which included permission to time charter three of them to Grace from October 15, 1950, to April 15, 1951. The extension of Alaska's bareboat charters was approved by our action of August 31, 1951. In our report in Docket No. M–11, 3 F.M.B. 435, we pointed out the advantages of the tripartite arrangement which was authorized for the winter season of 1950–1951. The same advantages may be expected to accrue during the present winter season if permission is granted to Alaska to make the time charters here under consideration.

Grace is presently operating between United States Pacific coast ports and ports on the West coast of Mexico, West coast of Central America, and Caribbean ports with four C1–M–AV1-type vessels chartered directly from the Government pursuant to the provisions of the Merchant Ship Sales Act, 1946, as extended by our action above referred to, dated April 31, 1951. Sailings are offered every 3 weeks to the following ports as conditions require.

West coast of Mexico: Manzanillo, Acapulco, Salina Cruz.

West coast of Central America: Champerico, San Jose de Guatemala, Acajutla, La Libertad, La Union, Amapala, Corinto, Puntarenas, Golfito, Puerto Armuelles.

Caribbean: Balboa, Cristobal, Barranquilla, Maracaibo, Amuay Bay.

The Caribbean portion of the service is on Trade Route 23 and the remainder is on Trade Route 25, both being essential foreign trade routes of the American merchant marine.

The increasing importance of this service to the trade and commerce of the United States is demonstrated by the revenue tons carried to and from the United States during the calendar year 1950 and during the first 6 months of the year 1951, which was as follows:

	1950, tons	*First 6 months 1951, tons*
Outward	78,671	63,885
Homeward	59,733	40,670

The seasonal requirements of this trade have made it necessary for Grace to augment its service between the months of November and May in order to satisfy the requirements of the trade. These requirements were met during the 1950–51 season by the three C1–M–AV1 type vessels chartered from Alaska. It is necessary for Grace to have additional vessels during this period when the tonnage movement is particularly heavy; this period includes seasonal movements of fresh fruits to Central American ports and coffee movements from Central American and Mexican ports

northbound starting in January. The C1–M–AV1-type vessels that Grace proposes to charter from Alaska have refrigeration facilities which are particularly important during this season. All of the vessels now operated by Grace in this trade are fully booked outbound through their December sailings. In addition, Grace indicates that it has sufficient cargo offerings to fill substantially the first voyages of the two vessels which it proposes to charter from Alaska.

Grace's witness testified that it has been advised by its brokers that there are no C1–M–AV1 vessels available for charter in this service. Counsel for the Board suggests that adequate provisions be incorporated into any new charter made with Grace so as to assure that Alaska will receive no profit from the arrangement, and that Alaska's net income from the subcharter be taken into account in computing additional charter hire on its fleet charters with the administrator. Accordingly, Board counsel suggests that Grace should be required to pay not merely the full 15 percent rate, but that any additional profits should be absorbed into Grace's obligation for additional charter hire under its direct charters with the administrator.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the services under consideration are required in the public interest;

2. That such services will not be adequately served without the use therein of the two additional Government-owned vessels herein considered; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the terms and conditions of any time charter agreement between Alaska Steamship Company and Grace Line Inc. shall be subject to approval of the Administrator so as to include all necessary provisions to protect the interests of the Government.

By the Board.

DECEMBER 10, 1951.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–21

UNITED STATES LINES COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 8, SERVICE 2

Submitted April 19, 1951. Decided January 7, 1952

Applicant is found to be an existing operator on Service 2 of Trade Route No. 8 within the meaning of section 605(c) of the Merchant Marine Act, 1936.

The effect of a subsidy contract with applicant for operation of vessels on Service 2 of Trade Route No. 8 would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines.

Section 605(c) of the Act creates no bar to the making of an operating-differential subsidy contract with the applicant.

Cletus Keating for applicant.

John J. O'Connor for Isbrandsten Company, Inc., *Francis H. Inge* for Waterman Steamship Corporation, and *John Tilney Carpenter* for States Marine Corporation, interveners.

Joseph A. Klausner for the Board.

REPORT OF THE BOARD

This proceeding concerns an application filed on May 31, 1950, by United States Lines Company for an operating-differential subsidy, under Title VI of the Merchant Marine Act, 1936, as amended, for operation of freight vessels in the commerce of the United States on Service 2 of Trade Route No. 8, described by applicant as between United States North Atlantic ports, north of Cape Hatteras, and Antwerp, Rotterdam, and Amsterdam. Hearings were held before an examiner in November 1950, at which Isbrandtsen Company, Inc., Waterman Steamship Corporation, and States Marine Corporation intervened.

Applicant and the three interveners, all American citizens, are common carriers engaged in foreign commerce. Applicant holds subsidy contracts on other routes. The purpose of the hearing was to receive evidence on issues under section 605(c) of the Mer-

chant Marine Act, 1936, as amended (hereinafter referred to as the Act). The examiner's recommended decision served on March 2, 1951, recommended that the Board find (1) that the vessels for which applicant seeks subsidy would not be in addition to the existing service or services; (2) that the effect of a subsidy contract with applicant would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines; and (3) that a subsidy contract is necessary to provide adequate service by vessels of United States registry. Exceptions were filed by Waterman and States Marine. Oral argument was heard by the Board in April 1951.

Service 2 of Trade Route No. 8 is described in the report of the Maritime Commission on Essential Foreign Trade Routes of the American Merchant Marine as follows:

TRADE ROUTE NO. 8.—U. S. North Atlantic ports (Maine-Cape Hatteras, inclusive)—Belgium and Netherlands * * *

2. Freight Service (Commission recommendation of May 20, 1946; amended).

Itinerary: U. S. North Atlantic ports (north of Cape Hatteras) to Antwerp and Rotterdam and return to U. S. North Atlantic ports.

Sailing frequency: 52 weekly sailings per year.

Number and type of ships: Not specified.

It is to be noted that the itinerary of Service 2 does not include the port of Amsterdam, although applicant's subsidy application embraces Amsterdam as well as Antwerp and Rotterdam. Counsel for Waterman challenges the authority of the Board "to set for hearing under section 605(c) an application for a subsidy over a trade route which has not been declared essential under section 211 of the 1936 Act." Trade Route No. 8, as described in the report of the Commission, provides primarily a United States North Atlantic-Belgium and Netherlands service. The itinerary described in the service should not be considered inflexible. Most of the lines in the service move Amsterdam cargo through Rotterdam, covering the distance between Amsterdam and Rotterdam by barge. Applicant's service providing direct Amsterdam calls is, of course, much quicker and involves less handling. The appeal of this service is evidenced by the fact that in the fiscal year 1950, 15 percent of applicant's outbound and

35 percent of its homeward carryings on Trade Route No. 8 was Amsterdam cargo.[1] It would seem desirable that Amsterdam should be an optional call on this route as traffic offers, since this would provide a more adequate service and would afford a subsidized operator greater flexibility.[2]

For the purpose of this hearing the itinerary of Service 2 of Trade Route No. 8 will be considered to include the port of Amsterdam; the final determination on this point will be made by the Maritime Administrator.

The only issue presently before the Board is whether section 605(c) of the Act is an obstacle to the granting of a subsidy We agree with the examiner that section 605(c) is not an obstacle; but whether a subsidy will in fact be awarded depends on other issues as well, and this question is expressly reserved for future determination.

Section 605(c) provides as follows:

(1) "No contract shall be made under this title with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be in addition to the existing service, or services, unless the Commission shall determine after proper hearing of all parties that the service already provided by vessels of United States registry in such service, route, or line is inadequate, and that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon; and

(2) no contract shall be made with respect to a vessel operated or to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry, if the Commission shall determine the effect of such a contract would be to give undue advantage or be unduly prejudicial, as between citizens of the United States, in the operation of vessels in competitive services, routes, or lines,

(3) unless following public hearing, due notice of which shall be given to each line serving the route, the Commission shall find that it is necessary to enter into such contract in order to provide adequate service by vessels of United States registry.

(4) The Commission, in determining for the purposes of this section whether services are competitive, shall take into consideration the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, the ports or ranges between which they run, the character of cargo carried, and such other facts as it may deem proper." (Subparagraphing supplied.)

Applicant contends (a) that it is an existing American-flag

[1] The only other lines serving the route that made calls at Amsterdam during that period were Isbrandtsen and three foreign-flag carriers. Their combined outbound carryings to Amsterdam were less than one-tenth of applicant's in the same period, and they carried none homebound.

[2] Official notice may be taken of the new Amsterdam-Rhine River Canal, which will be opened to traffic in May 1952, which promises to increase materially Amsterdam's importance as a transit port for the whole of western Europe.

operator on Trade Route No. 8, and that there is, therefore, no problem under subparagraph (1); (b) that the granting of a subsidy to applicant would not result in undue prejudice or advantage as between American-flag operators on the route; and (c) that a subsidy to applicant is necessary, in any event, to maintain adequate service on the route by vessels of United States registry. The interveners, while admitting that applicant is an existing operator on the route, dispute the latter two contentions.

Applicant has been engaged in Trade Route No. 8 operations since 1945. Until 1948 applicant acted as berth agent for War Shipping Administration and was an independent operator of chartered vessels. In 1946 it made 19 chartered sailings carrying general cargo, and in 1947 it made 46 such sailings. During this period full cargoes of coal and grain were also carried on this route. Since March 1948 applicant has operated on the route with a fleet of five or six 15½-knot Victory-type vessels purchased from the Maritime Commission. Forty-five sailings were made during 1948. In 1949 weekly sailings were scheduled between North Atlantic ports and Belgium and Holland and have been continued to the present time. Applicant calls at Antwerp and Rotterdam, and at Amsterdam when cargo warrants; in 1949, 32 calls were made at the latter port. Applicant is clearly an existing operator within the meaning of the first subparagraph of section 605(c) of the Act, thus making further discussion of that part of the section unnecessary. Applicant says that it has always, since beginning its Trade Route No. 8 service, intended to apply for an operating-differential subsidy, although it opposed the applications of others in 1946 and in 1948 on approximately the same grounds now urged against it by the present interveners.

TRADE ROUTE NO. 8 IN GENERAL

Proceeding now to the succeeding subparagraphs of section 605(c), the relevant issues to be determined are (1) whether a subsidy to applicant would give an undue advantage or would be unduly prejudicial as between applicant and other American-flag operators on Trade Route No. 8, and (2) if the preceding question should be determined in the affirmative, whether it is necessary to enter into a subsidy contract with applicant in order to provide adequate service on the route by vessels of United States registry. Before attempting to resolve these issues it is necessary to describe the existing situation on Trade Route

No. 8 and the nature of the services thereon. No United States-flag operator presently holds an operating-differential subsidy contract for operations on this route. Of the 31 essential trade routes in the foreign commerce of the United States, Trade Route No. 8 stands about sixth in total volume of tonnage moved. The importance of this route has increased in the postwar years, since it appears that the ports of Antwerp, Rotterdam, and Amsterdam are natural European gateways. With the collapse of German nationalistic pressure, which promoted Hamburg and Bremen, a greater proportion of traffic is now moving through Antwerp, Rotterdam, and Amsterdam. In the fiscal year 1948 approximately 1,500,000 tons of export liner cargo and 176,000 tons of import liner cargo moved over Trade Route No. 8, and in the fiscal year 1950 the export figure decreased to about 1,000,000 tons and the import figure increased to about 561,000 tons. The outbound segment of this service is clearly the more important one.

Before World War II, the sole American-flag line on this route was Black Diamond Line, which made 70 annual sailings and carried 35 percent of the tonnage moving over the route; there were only five foreign-flag competitors. From 1945 to 1948 there was a large amount of cargo moving on Trade Route No. 8, and relatively few foreign vessels. Freight rates were at a satisfactory level and the position of the American-flag lines on the route in the first postwar years was favorable. In the fiscal year 1948 there were 257 American-flag sailings as compared with 190 foreign-flag sailings; the American lines carried 53 percent of outbound tonnage and 49 percent of the inbound. Since 1948, however, the American position in this trade has steadily deteriorated in contrast with the foreign lines so that in the fiscal year 1950 United States-flag vessels carried 28.7 percent of outbound tonnage and 17.8 percent of the inbound. Black Diamond, which made 114 United States-flag sailings in 1948 with chartered vessels, now operates foreign-flag vessels only. Waterman, in 1948, offered direct weekly service but now calls at German ports before Route No. 8 ports, and recently reduced its sailings to one every 10 days. Waterman's share of Route No. 8 export cargo has dropped from 11 percent in the fiscal year 1948 to 4.5 percent in the fiscal year 1950. Isbrandtsen's share has also fallen but to a lesser degree. Conversely, the number of foreign-flag operators serving Route No. 8 ports has increased from 5 to 14, and foreign sailings have increased to an estimated 317

per year as against 151 United States-flag sailings for the same period.

Applicant, on the contrary, in the fiscal year 1950 carried 2½ percent more of the total Trade Route No. 8 export cargo and 2.9 percent more of the total import cargo than in the fiscal year 1948. It is the only American line that shows an increase in this period. For the fiscal year 1950 the percentage of the total export cargo carried by applicant (14.5%) exceeded the combined total (14.2%) carried by the three interveners, and applicant's percentage of the total import carryings (10.9%) exceeded their combined total (6.9%).

AMERICAN OPERATORS ON TRADE ROUTE NO. 8

It appears that Waterman, States Marine, Isbrandtsen, and South Atlantic Steamship Line, Inc., presently serve the route in addition to applicant, although South Atlantic does not carry commercial cargo to or from ports north of Hampton Roads.

Applicant—A brief history of applicant's operation on Trade Route No. 8 has been stated above. Applicant is the only American-flag carrier operating exclusively between United States North Atlantic ports and Antwerp, Amsterdam, and Rotterdam. By means of its exclusive, direct service, applicant maintains a running time of 9 to 10 days in each direction.

Applicant's executive vice president testified that in 1949 his company lost $667,614.50 from its operations on the route, including depreciation, interest, taxes, and other overhead expenses; the witness testified that in 1950 the estimated loss on the same basis would be approximately $800,000. The company believes that it would have been better off financially if it had called at other ports and had not served Trade Route No. 8 exclusively. Applicant's witness expressed the opinion that in order to keep the following of shippers and increase the company's business on Trade Route No. 8 "it is absolutely essential to give them an opportunity of shipping once per week from a regular loading berth on ships that have speed equal to the competition." Applicant's president testified that he does not believe that any American line can remain in this service indefinitely without a subsidy under present conditions, but stated that applicant will stay on the route as long as it can.

Waterman Steamship Corporation.—This company commenced service on Trade Route No. 8 with a sailing from New York in

April 1946. Until April 1948 it served Trade Route No. 8 ports directly on the outbound voyage, returning via German ports.

Beginning with the sailing of the *Beauregard* on April 17, 1948, it "reversed the discharging itinerary by calling at German ports before calling at Antwerp and Rotterdam for the reason that it was impossible for [it] to obtain military cargo as well as United States mail destined to Germany unless [it] made direct sailings to Germany." This procedure increased the running time to Antwerp by three or four days. Its carriage of Trade Route No. 8 export cargo has fallen, as already indicated, from 11 percent to 4.5 percent of the total movement. In the fiscal year 1950 approximately 80 percent of Waterman's outbound tonnage and approximately 63 percent of its inbound tonnage moved to or from foreign ports other than Antwerp, Amsterdam, and Rotterdam.

Operating C–2-type vessels in its North Atlantic/European service, Waterman covered a wide range of ports and services, including Trade Routes Nos. 7 and 8. It reported a profit on this operation in 1949 and expected to "show a comparatively small profit" in 1950.

States Marine Corporation.—States Marine operates a combined service over Trade Routes Nos. 7 and 8 with approximately two sailings per month, using owned and chartered vessels of various types. The company usually runs its vessels westward in ballast because it does not believe that the amount of cargo available westbound justifies any other operation. In short, the company attempts to keep its various owned and chartered vessels in continuous balance, sending the vessels where the cargo appears to be moving at the time.

In the fiscal year 1950 States Marine carried 5.3 percent of the outbound tonnage on Trade Route No. 8. Approximately 64 percent of the tonnage which it carried outbound was for ports not on Trade Route No. 8. The vice president of States Marine testified that the company has been "making money right straight along."

Isbrandtsen Company.—Isbrandtsen offered no testimony, but evidence from others shows that it operates a combined Trade Route Nos. 7 and 8 service, with approximately two sailings a month, with various types of ships, mostly chartered vessels. Although most of its outbound sailings to Trade Route No. 8 ports have been direct, some have been indirect. In the fiscal

year 1950 about two-thirds of Isbrandtsen's Trade Routes Nos. 7 and 8 carryings were for destinations not on Route No. 8.

South Atlantic Steamship Line, Inc.—This company did not intervene in the proceeding and can hardly be called a direct competitor of the four lines last mentioned. It operates approximately two outbound sailings per month from South Atlantic ports and Hampton Roads (with limited calls for military cargo at Philadelphia and Baltimore) to Antwerp and Rotterdam, and to German and British ports, returning to United States ports south of Hampton Roads. In the fiscal year 1950 it carried only 1,619 tons of outbound cargo to Trade Route No. 8 destinations and 47 tons inbound.

UNDUE ADVANTAGE OR PREJUDICE

Since Trade Route No. 8 is served by two or more citizens of the United States, subparagraph (2) of section 605 (c) of the Act, as quoted above, requires that the Board determine as an initial question whether the effect of a subsidy contract would be to give undue advantage or would be unduly prejudicial as between citizens of the United States in the operation of vessels in *competitive* services, routes, or lines. Interveners allege that the contract would have such an effect. In determining whether services are *competitive*, subparagraph (4) of section 605(c), as quoted above, provides that the Board shall take into consideration "the type, size, and speed of the vessels employed, whether passenger or cargo, or combination passenger and cargo, vessels, *the ports or ranges between which they run*, the character of cargo carried, and such other facts as it may deem proper." (Emphasis supplied.) We agree with the finding of the examiner that the effect of granting the present subsidy application would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines.

Waterman contends that, if the subsidy be granted, applicant "will be able to schedule and to provide more sailings on Trade Route No. 8 than are justified under present conditions, the result of which will be to deprive Waterman and the other American-flag operators of substantial cargo which none of them can providently share with applicant." But there is no indication in the record of any such intention by applicant. Waterman further asserts that the "subsidy awards can be used by applicant to intensify its solicitation and advertising for the cargo moving

over Trade Route No. 8, all of which can only result in serious economic injury to Waterman and other American-flag operators." This is, of course, quite uncertain, but in any event such use would not support a charge of undue prejudice. States Marine contends that in view of the volume of United States military and Government-financed cargo moving to "North European ports," the grant of the subsidy "would amount to a double subsidy" to applicant. States Marine itself shares in the carriage of military and Government cargo as do all United States-flag lines on this route. They are not subsidized within the meaning of the 1936 Act, and the carriage of such cargo has indeed no bearing upon the issue of undue advantage or undue prejudice under section 605(c) of the Act.

Several things stand out about applicant's service. It is concentrated on direct runs between North Atlantic and European ports on Route No. 8 and thus gives quicker time than that offered by interveners who operate between these ports by indirect routes. Applicant's direct service to Antwerp, Rotterdam, and Amsterdam has resulted in a net loss to the company over 2 years ending 1950, but has resulted in a relative increase of applicant's share of the trade to and from these ports. Waterman and States Marine have been financially successful during the 2 years in question when the results of their service to Route No. 8 ports are combined with the Route No. 7 German ports. Isbrandtsen has disclosed no operating results. However, the financial gain of interveners has been at the expense of the completeness and directness of their services to Route No. 8 ports, and in contrast to applicant, interveners Waterman and Isbrandtsen have dropped back percentagewise in the amount of cargo which they have carried to and from Route No. 8 ports. States Marine combines its service to Route No. 8 ports with service to Route No. 7 German ports on the outbound leg and offers no transportation from Route No. 8 ports homebound. If a subsidy is granted in this case applicant will be required to agree to continue to operate exclusively between North Atlantic and Route No. 8 European ports and will not be permitted to combine that operation with service to other European ports no matter what profit might appear to result from such combination. A subsidy under such circumstances is thus no more than a fair allowance for the necessary restriction and will not give to applicant undue advantage as compared with the interveners who are now and will hereafter be free to seek higher voyage revenues because

of freedom from such restriction. The importance of Trade Route No. 8 to the foreign commerce of the United States, together with the steady deterioration of the relative carryings of American-flag vessels in recent years as compared with their foreign-flag competitors on the route, as well as the facts bearing on the nature of applicant's service, lead necessarily to the conclusion already indicated that the granting of a subsidy to applicant would not give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines. The opposition of applicant to the granting of a subsidy on Trade Route No. 8 to Black Diamond in 1946 and to Arnold Bernstein in 1948 does not militate against applicant's present position because of the very different conditions which exist on the route today.

OTHER MATTERS

The examiner considered the question of inadequacy of service by vessels of United States registry within the meaning of subparagraph (3) and recommended that the Board make a finding that a subsidy contract with applicant was necessary to provide adequate service on the route. The record shows that at the time of the hearings in the case there was substantial unused deadweight and cubic capacity of the vessels of applicant and some of the interveners serving European ports on Route No. 8. The existence of such unused space is one of the elements of the "adequate service" mentioned in section 605(c), but not the only one. In view of our findings on the issue of undue advantage and undue prejudice within the meaning of subparagraph (2) of this section, it is unnecessary for us to determine the question of adequacy of service under subparagraph (3).

The exceptions of the various interveners have been carefully considered and, except to the extent that the examiner's recommended decision has been modified by this report in conformity with any of the exceptions, they are overruled.

CONCLUSIONS

The Board, therefore, concludes:

1. Applicant, United States Lines Company, provides an existing service on Trade Route No. 8, Service 2, within the meaning of section 605(c) of the Act;

2. The effect of the making of an operating-differential subsidy contract with applicant, United States Lines Company, with

respect to the operation of vessels on Trade Route No. 8, Service 2, would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines; and

3. The provisions of section 605(c) of the Act create no bar to the making of an operating-differential subsidy contract with applicant for the operation of cargo vessels on Trade Route No. 8, Service 2. All questions arising under other sections of the Act are reserved for future determination.

By the Board.

JANUARY 7, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–49

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR BAREBOAT CHARTER OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR USE IN THE SERVICE BETWEEN UNITED STATES NORTH ATLANTIC PORTS AND PORTS IN THE UNITED KINGDOM AND CONTINENTAL EUROPE

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of Isbrandtsen Company, Inc., for bareboat charter of one Government-owned, war-built, dry-cargo Victory-type vessel for employment in its berth service between United States North Atlantic ports and ports in the United Kingdom and continental Europe (Bordeaux/Hamburg Range). The vessel proposed to be chartered is needed principally to make up a deficiency in service occasioned by the recent loss of applicant's SS. *Flying Enterprise,* a C–1-type vessel.

Hearing on the application was held before the Board January 14, 1952, pursuant to notice in the Federal Register of January 10, 1952. Because of the urgency of the matter, the usual 15 days' notice was not given. Applicant's president testified in support of the application, which was not opposed.

We have no hesitancy in recognizing, in the light of present world conditions and the defense measures being taken by the United States, Great Britain, and western Europe, that the service involved is in the public interest. Applicant's witness testified that approximately 50 percent of his eastbound traffic in the service was military-controlled cargo and that in addition a considerable amount of Government-aid cargo was handled. On the question whether the service would be adequately served without replacement of the *Flying Enterprise,* the testimony is that not only have applicant's vessels been sailing fully laden eastbound but probably all other American-flag eastbound vessels in the same service are now sailing likewise. The eastbound

leg of the service is clearly the more important one. Applicant's witness further testified that it will require several months to reorient the company's schedules to fill in the gap unless the application is granted. Cargo had been booked for the next voyage of the lost ship. Applicant's witness testified further that he was unable to charter a suitable privately-owned vessel upon reasonable terms and conditions. Isbrandtsen plans eventually to purchase a ship with which to replace the one lost. The evidence of record is convincing that privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates for use in the North Atlantic service.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;

2. That such service will not be adequately served without the use therein of one additional Government-owned vessel herein applied for; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that the charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided for in Public Law 591.

By the Board.

JANUARY 14, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–51

AMERICAN PRESIDENT LINES, LTD.—APPLICATION FOR BAREBOAT CHARTER OF A VICTORY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR EMPLOYMENT IN THE ROUND-THE-WORLD SERVICE

This proceeding was instituted pursuant to Public Law 591, Eighty-first Congress, upon the application of American President Lines, Ltd., for the bareboat charter for an indefinite period of a Victory-type, Government-owned, war-built, dry-cargo vessel for employment in Line B of the company's round-the-world service.[1]

Hearing on the application was held before an examiner on February 11 through February 14, 1952, pursuant to notice in the Federal Register of February 1, 1952. Because of the urgency of the matter the usual 15 days' notice was not given. Luckenbach Steamship Company, Inc., Pacific Far East Line, Inc., and Waterman Steamship Corporation appeared as interveners. The examiner's recommended decision was served on February 20, 1952, in which he recommended that the Board should make the statutory findings. Exceptions to the examiner's recommended decision were filed by Pacific Far East Line and counsel for the Board. An original request for oral argument attached to the exceptions of Pacific Far East Line was subsequently withdrawn, and the proceeding was submitted to the Board without oral argument.

Applicant explains its present application to be in the nature of an interim emergency measure, designed to fill what would otherwise be nearly a 30-day gap in its normal 14-day sailing schedule. Applicant desires the vessel herein applied for to begin a sailing from the Pacific coast, and, for this reason, requested

[1] Described in applicant's operating-differential subsidy agreement as follows: From New York via Panama Canal, California, Hawaiian Islands, Japan, China, Hong Kong, Philippine Islands, Straits Settlements (Malaya, including Singapore), Ceylon, India and Pakistan, Suez Canal, Egypt, Italy, France in the Mediterranean, to New York, with the privilege of calling at Boston, Havana (Cuba), ports in the Dutch East Indies (Indonesia) and Gibraltar.

at the hearing before the examiner that its eligibility for intercoastal operations should be reserved, without prejudice, for future determination. The present application may, therefore, be considered modified so as to exclude from our present consideration the intercoastal segment of applicant's round-the-world service.

Applicant further explains that its present application for one Victory-type vessel for employment in its round-the-world service is part of a larger plan which involves another application for the bareboat charter of three Government-owned vessels for employment in its Atlantic/Straits service. The latter application for three vessels will include the vessel herein applied for should the present application be granted. The basic intention of applicant is to operate its owned vessels in its subsidized round-the-world service, pursuant to the mandate of the Board in Docket No. S–17 that chartered vessels should not be employed on subsidized services at a time when owned vessels are being operated on an unsubsidized service. It is applicant's purpose, therefore, to transfer two owned vessels from its unsubsidized Atlantic/Straits service to its round-the-world service, and to use the three Government-owned vessels on its Atlantic/Straits service. The final result of this plan, should these charters be granted, would be to provide two additional vessels for applicant's round-the-world service and one additional vessel for applicant's Atlantic/Straits service. We are presently concerned, however, only with the instant application for the bareboat charter of a Government-owned vessel for employment in applicant's round-the-world service, and our findings are consequently limited to this service and the vessel for which applicant herein applies.

Applicant's round-the-world service has been determined essential to the foreign commerce of the United States, and it appears that applicant carries military and commercial cargo which is essential to the defense effort of the United States and the economy of the areas serviced. We have no difficulty, therefore, in finding that the service under consideration is in the public interest.

Applicant's witness testified that this is primarily a measurement trade, and that for a total of 28 sailings from the last continental port of the United States in 1951 the average free space available on each vessel was about 1 percent; and that for the same period and same number of sailings inbound to the first United States port the average free space on each vessel

was about 10 percent. It was testified that during the year 1951 applicant was forced to decline 35,855 tons of cargo outbound from the Atlantic coast and 70,492 tons of cargo outbound from the Pacific coast. For the same period, cargo declinations of inbound cargo amounted to 17,742 tons, of which 9,642 tons was rubber destined for the Atlantic coast. Applicant's witness stated that the cargo declined during 1951 may have subsequently moved, but he did not know whether it had moved on United States-flag or foreign-flag vessels.

Applicant's witness also testified that since January 1, 1952, there has been no free space available on any of its vessels sailing from the last United States port on this service. Applicant's evidence discloses that, during January and the first 12 days of February 1952 the company has declined offerings from San Francisco amounting to 5,960 tons destined for all areas on this service, including Malaya (approximately 1,000 tons of this cargo was for ports in Indonesia). In addition, applicant's exhibit discloses that there are forward bookings of cargo from the Pacific coast either under consideration or declined since January 1, 1952, amounting to approximately 130,000 tons.

Counsel for the Board in his exceptions argues that the charter of the vessel herein applied for should be limited to one voyage since there is insufficient evidence in the record to support a finding of inadequacy of American-flag service from the Atlantic coast of the United States. Counsel for the Board agrees that the evidence is convincing that there is a present inadequacy of service from the Pacific coast. He contends, however, that there is an inference from statements made by applicant's witness that a second voyage of the vessel herein applied for will accommodate to a very limited extent, if at all, the needs of Pacific coast shippers. Counsel for the Board points out that the expectation of applicant is to operate the ship virtually full from the Atlantic coast. We believe that applicant has sustained its burden of proving inadequacy on the service herein involved, and that applicant's obligation to serve the requirements of the route can, in any event, be administratively controlled. It is also to be noted that the standard form of bareboat charter contains a 15-day termination clause, which the Maritime Administrator is at liberty to exercise at any time changed conditions warrant such termination.

Pacific Far East Line excepts to the finding of the examiner that the notice of hearing in this proceeding is broad enough to

include the privilege of serving Indonesia. Although the notice stated that the application was for a vessel "for employment in (applicant's) round-the-world service," and applicant's operating-differential subsidy agreement includes Indonesia as a privilege call, Pacific Far East Line contends that the notice "places in issue only ports regularly served by the *existing* round-the-world service of APL, and does not include calls at the 'privilege' ports in Indonesia, which have not been served for at least 2 years." Counsel for Pacific Far East Line maintains that this contention is supported by the Board's decisions in *Application of Prudential Steamship Corporation* (Docket M–34), 3 F.M.B. 627, *Application of Pope & Talbot, Inc.* (Docket M–42), 3 F.M.B. 697, and *Application of American Export Lines, Inc.* (Docket M–48), 3 F.M.B. 763. The cited cases fail to support this contention. In the *Prudential* and *American Export Lines* cases we held that the reference in the notice of hearing "to ports in the Mediterranean" was not sufficiently broad to cover ports in Portugal, Spanish Atlantic ports, and ports in the Black Sea. In the *Pope & Talbot* case, we held that an application for a vessel to be used in the intercoastal service was not sufficiently broad to permit calling at Puerto Rico. The question is ultimately whether the Board has "given due notice to all interested parties" in accordance with the requirements of Public Law 591.

Although we agree with the examiner that a reference in the notice of hearing to the descriptive title of applicant's service is broad enough to include privilege port calls on such service, even though such ports have not been regularly served in the period immediately preceding the application, we conclude in this instance, however, that the privilege for calls at ports in the Dutch East Indies (Indonesia) must be denied for the following reasons:

(1) The showing of inadequacy for this segment of the service was insufficient, applicant not being certain whether it would make Indonesian calls even if permission were granted;

(2) Applicant has not, according to our own records, served Indonesia in its round-the-world service for at least 2 years; and

(3) Applicant has an application pending before the Board which, if successful, would provide an additional vessel for its Atlantic/Straits service which includes, as one of its principal objectives, service between ports on the East and West coasts of the United States and Indonesia.

It appears from the evidence that no privately owned United States-flag vessels suitable for operation in this service are

available for charter upon reasonable conditions and at reasonable rates.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That such service (exclusive of the intercoastal service and service to Indonesia) is not adequately served; and
3. That privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided for in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under its operating-differential subsidy agreement with applicant for this service.

By the Board.

FEBRUARY 28, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. S–22

GRACE LINE INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 4

Submitted August 6, 1951. Decided January 15, 1952

Applicant is found to be subject to direct foreign-flag competition, both passenger and cargo, on Trade Route No. 4.

Applicant is found to be an existing operator on Trade Route No. 4 within the meaning of section 605(c) of the Merchant Marine Act, 1936.

The Board is unable to find that the effect of a subsidy contract with applicant for operation of vessels on Trade Route No. 4 would give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, and lines.

Neither section 602 nor 605(c) of the Act creates any bar to the making of an operating-differential subsidy contract with applicant.

W. F. Cogswell for applicant.

William A. Weber for Alcoa Steamship Company, Inc.

George F. Galland and *Joseph A. Klausner* for the Board.

REPORT OF THE BOARD

This proceeding concerns an application, dated November 27, 1950, of Grace Line Inc. for an operating-differential subsidy under Title VI of the Merchant Marine Act, 1936, as amended (hereinafter referred to as "the Act"), for the operation of combination passenger and freight vessels and also freight vessels in the foreign commerce of the United States on services on Trade Route No. 4 between United States North Atlantic ports and ports in the Netherlands West Indies, Venezuela, and the North coast of Colombia. Hearings were held before an examiner in May 1951. Alcoa Steamship Company, Inc., entered an appearance but did not participate in the hearings, and no party appeared in opposition to the application.

The stated purpose of the hearing was to receive evidence upon relevant issues arising under sections 602 and 605(c) of the Act. The examiner, on July 20, 1951, recommended that the Board find

(1) That foreign competition, except direct foreign-flag competition, has not been shown;

(2) That the vessels with respect to which applicant seeks an operating-differential subsidy would not be in addition to the existing service or services;

(3) That the effect of a subsidy contract would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines;

(4) That, in view of the findings under (1), (2), and (3) above, no determinations after hearing are required pursuant to the provisions of sections 602 or 605(c) of the Act.

No exceptions to the examiner's recommended decision were filed within the required time limit, and the case was thereupon submitted for decision without oral argument. We agree with the essential findings of the examiner.

Counsel for the Board suggests a possible lack of jurisdiction of the Board to determine the issues presented because the services on Trade Route No. 4 described by applicant in its application have not been determined to be essential by the Maritime Commission (our predecessor) or the Maritime Administrator. The report of the Maritime Commission on Essential Foreign Trade Routes of the American Merchant Marine describes Trade Route No. 4 as follows:

U. S. Atlantic ports (Maine-Key West inclusive)—Caribbean ports (Commission recommendation of May 20, 1946).

The Caribbean is served by a variety of steamship services many of which touch at the same ports en route but most of which ultimately end at different Caribbean termini. Caribbean liner services generally are operated as a part or in conjunction with industrial operations. To a great extent these services are dependent upon crop conditions and other variable factors so that they do not remain constant year after year as to the ships employed, the frequency of sailings or even as to the route followed. In view of these circumstances it is considered impractical to attempt to specify ships and schedules for such services.

It is true that before any operating-differential subsidy contract can be entered into with applicant there should be a determination by the Administrator that the services are essential in the foreign commerce of the United States. However, a decision in these proceedings need not be delayed until a determination of this question. The only issues presently before the Board are whether section 602 or 605(c) of the Act presents any obstacle to the granting of a subsidy for the services. Our determination that these sections do not present obstacles still leaves for future determination other issues before a subsidy contract can be executed.

GRACE LINE OPERATIONS

Applicant has been operating a service between United States North Atlantic ports and ports of Venezuela, the North coast of Colombia, and the Netherlands West Indies since 1938. A predecessor company, which Grace purchased in 1937, had operated a service to this area for many years before. Applicant at present offers a weekly sailing over each of the following three services, with calls at some of the smaller ports only as traffic offers:

1. Between New York and Curacao, Netherlands West Indies, LaGuaira and Puerto Cabello, Venezuela, and Cartagena, Colombia, with two 18-knot combination passenger and cargo vessels of the *Santa Rosa* type with passenger accommodations for 228 and deadweight cargo capacity of 7,121 tons each.

2. Between New York and Puerto Cabello, Venezuela (Aruba, Netherlands West Indies, optional), Amuay Bay (Las Piedras, Punta Cardon), Maracaibo (and lake ports), Venezuela, and Barranquilla (Cartagena), Colombia, with three 16-knot C–2 combination passenger and cargo vessels with passenger accommodations for 52 and deadweight cargo capacity of 8,700 tons each.

3. Between New York (Philadelphia, Boston) and Aruba, Netherlands West Indies (Amuay Bay, Las Piedras, Punta Cardon), La Guaira, Guanta, Puerto La Cruz, Puerto Sucre (Cumana) Carupano, Venezuela, and St. Marc, Haiti (northbound only), with four 16-knot C–2-type freighters, two of which have passenger accommodations for eight and two have no passenger accommodations, and having deadweight cargo capacity ranging from 9,290 tons to 10,310 tons.

The vessels on these three services operate as an integrated group and furnish a complete over-all service to a large number of ports for commercial travelers, merchants, tourists, including cruise passengers, mail, and general cargo, including refrigerated freight. The combination vessels on services No. 1 and No. 2 carry substantial amounts of freight as well as passengers, while the freighters on service No. 3 carry but few passengers.

FOREIGN-FLAG COMPETITION

Some of the foreign-flag competition on the services is made up of a number of lines operating smaller and slower cargo vessels than the Grace ships and with passenger facilities for not more than 12 persons. The foreign-flag competition also includes a number of large luxury liners making cruises during the winter months into the area served by Grace and carrying

for the most part cruise passengers, but also some passengers seeking foreign destinations.

Freight.—The three principal foreign-flag freight-carrying competitors on Trade Route No. 4 which operate cargo vessels with limited passenger accommodations substantially parallel to Grace on a weekly or more frequent basis are Flota Mercante Grancolombiana S. A., a company organized by the governments of Colombia, Venezuela, and Ecuador; Compania Venezolana de Navegacion, a company wholly owned by the Venezuelan government; and Royal Netherlands Steamship Company. In addition, there is evidence that applicant is subject to direct foreign-flag competition from the following companies also operating freighters with limited passenger accommodations: Compania Colombiana de Navegacion Martina S. A., States Marine Corporation,[1] Barber Steamship Lines, Inc., North Atlantic & Gulf Steamship Company, Saguenay Terminals Company, Ltd., Swedish American Line, Alcoa Steamship Company, Inc.,[1] and United Fruit Company.[1] There are also a number of small freighters, generally individually owned, offering minor competition. The extent of the cargo carryings on these services by Grace, other United States-flag carriers, and foreign-flag carriers for the years 1948, 1949, and 1950 is shown in the following table:

CARGO STATISTICS

	1948			
	South-bound		North-bound	
	Tons	*Percent*	*Tons*	*Percent*
Grace	459,188	42.6	97,099	55.3
Other United States flag	238,852	22.1	29,207	16.6
Foreign flag	380,171	35.3	49,454	28.1
Total	1,078,209	100.0	175,760	100.0
	1949			
Grace	368,814	37.2	48,368	48.4
Other United States flag	45,128	4.5	19,361	19.3
Foreign flag	578,301	58.3	32,301	32.3
Total	992,243	100.0	100,030	100.0
	1950			
Grace	308,962	42.6	45,204	43.0
Other United States flag	23,805	3.3	17,754	16.9
Foreign flag	369,928	51.1	25,870	24.6
All carriers except Grace—N.W.I. only	21,635	3.0	16,320	15.5
Total	724,330	100.0	105,148	100.0

[1] Also operators of United States-flag ships.

From the foregoing table it appears that the southbound carryings far exceed the northbound carryings, and that since 1948 the southbound carryings of American-flag vessels not operated by Grace have greatly diminished. This table, as well as the other evidence presented, clearly shows direct competition by foreign-flag cargo carriers.

Passengers.—With respect to passengers, applicant contends that its vessels are subject to direct competition from (1) foreign-flag freighters and tankers with limited passenger accommodations, and (2) foreign-flag cruise ships calling at one or more points on applicant's itineraries. The passenger carryings to the ports on applicant's itineraries for the years 1949 and 1950 are shown in the following table.

PASSENGER STATISTICS

	1949					
	Local passengers		Cruise passengers		Total	
	Number	*Percent*	*Number*	*Percent*	*Number*	*Percent*
Grace Line	11,730	90	3,953	36	15,683	65
Other United States flag	411	3	0	0	411	2
Foreign flag	921	7	7,019	64	7,940	33
Total	13,062	100	10,972	100	24,034	100
	1950					
Grace Line	11,334	85	3,857	39	15,191	65
Other United States flag	627	5	0	0	627	3
Foreign flag	1,402	10	6,099	61	7,501	32
Total	13,363	100	9,956	100	23,319	100

From the above table it appears that during the 2 years under consideration the passengers carried by foreign-flag freighters and tankers were not numerous in comparison to the noncruise passengers carried by the Grace vessels. On the other hand, the passengers carried in this area during the winter months by the competing foreign-flag cruise ships were very substantial in number, Grace participation on this kind of traffic being only 36 percent to 39 percent of the total. Whereas Grace is the principal all-year passenger carrier on the route, the table shows that the Grace cruise passengers on the route make up approximately one-fourth of the total number of passengers which the company carries. The evidence supports a finding that Grace is subject to direct foreign-flag passenger competition on the trade route.

680426 O—63——53

ISSUES UNDER SECTION 602

The language of section 602 of the Act which is important in this proceeding is as follows:

> No contract for an operating-differential subsidy shall be made by the Commission for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Commission, after a full and complete investigation and hearing, shall determine that an operating subsidy is necessary to meet competition of foreign-flag ships.

We observed in *New York and Cuba Mail Steamship Company —Application for Resumption of Operating-Differential Subsidy on Trade Route No. 3*, Docket No. S–24, 3 F.M.B. 739:

> We construe this section (section 602) to mean that the investigation and hearing provided for under it is required only to determine competition other than direct foreign-flag competition. Section 601 and other sections of Title VI of the Merchant Marine Act, 1936, as amended, permit determinations of direct foreign-flag competition without the requirement of a hearing.

As indicated above, the evidence in the case shows that Grace is subject to direct foreign-flag competition, both as to cargo and as to passengers, on Trade Route No. 4. No claim is made or evidence offered that applicant is subject to foreign competition other than direct foreign-flag competition. Under the circumstances, it is unnecessary to make any determination as to competition other than direct competition, and section 602 of the Act creates no obstacle to the making of an operating-differential subsidy award.

Counsel for the Board contends that the foreign-flag competition in the passenger field is not substantial, and that there may thus be an obstacle to the granting of a subsidy under sections 601(a), 603(b), or other provisions of the Act, but this issue need not be determined at this time. The record here presented, however, with such other evidence as the parties may desire to introduce, may readily form the basis of the determination of this and other issues not now decided.

ISSUES UNDER SECTION 605(c)

There are two requirements under section 605(c), the first part of which may, for the purpose of this proceeding, be paraphrased to the effect that no contract shall be made with respect to a vessel to be operated on a service, route, or line served by citizens of the United States which would be *in addition to the existing service or services*. The evidence is clear that the ser-

vices for which applicant is seeking a subsidy contract have been in existence for many years and are not new services so as to be "in addition" to existing United States-flag services now serving the route.

The second requirement of section 605(c) may be paraphrased to the effect that no contract shall be made with respect to a vessel to be operated in a service, route, or line served by two or more citizens of the United States with vessels of United States registry if the Board shall determine that the effect of such contract would *give undue advantage or be unduly prejudicial as between citizens of the United States,* unless, after hearing, the Board shall find that a subsidy contract is necessary to provide adequate United States-flag service. The two principal operators of United States-flag vessels on Trade Route No. 4 are Alcoa Steamship Company, Inc., and United Fruit Company, but each of these also operates vessels under foreign flags as well. In any event, neither these or any other American operators made any claim that the granting of a subsidy contract to applicant would give to applicant undue advantage or as to them would be unduly prejudicial. Clearly, any evidence on this issue should come from parties claiming undue prejudice under this section. In the absence of any such complaint or evidence, the Board is not in a position to find that the making of the contract would give undue advantage or be unduly prejudicial as between citizens of the United States, and is, therefore, not required to make any further finding under this second requirement of section 605(c) as a condition to entering into a subsidy contract.

CONCLUSIONS

The Board therefore concludes:

1. Within the requirements of section 602 of the Act, applicant, Grace Line Inc., is subject to direct foreign-flag competition, both with respect to the transportation of cargo and passengers, on its existing services on Trade Route No. 4 and, therefore, foreign-flag competition, except direct foreign-flag competition, becomes immaterial;

2. Applicant, Grace Line Inc., provides existing services on Trade Route No. 4 within the meaning of section 605(c) of the Act;

3. The Board is unable to find that the effect of the making of an operating-differential subsidy contract with applicant, Grace Line Inc., with respect to the operation of vessels on Trade

Route No. 4 would be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines within the meaning of section 605(c) of the Act;

4. Neither the provisions of section 602 or 605(c) of the Act create any bar to the making of an operating-differential subsidy contract with applicant, Grace Line Inc., for the operation of cargo and passenger vessels on Trade Route No. 4. All questions arising under other sections of the Act are reserved for future determination.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

FEDERAL MARITIME BOARD

No. S–24

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY—APPLICATION FOR RESUMPTION OF OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 3

Submitted July 31, 1951. Decided August 3, 1951

An operating subsidy to applicant on Trade Route No. 3 is required to meet foreign-flag competition.

William Radner and *Odell Kominers* for applicant.

Samuel H. Moerman for The Port of New York Authority, intervener.

Joseph A. Klausner and *George F. Galland* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

This proceeding was based upon an application by New York and Cuba Mail Steamship Company for the resumption of its operating-differential subsidy covering vessels operating on Trade Route No. 3, between United States Atlantic ports and the East coast of Mexico, with privilege of calling at Havana and other Cuban ports.

The hearing was held before the examiner for the purpose of receiving evidence to enable the Board to make determinations with respect to foreign-flag competition pursuant to section 602 of the Merchant Marine Act, 1936, as amended. The examiner has recommended that the Board find:

1. That between 1947 and 1950 applicant encountered direct competition, although not substantial, from foreign-flag lines operating between United States North Atlantic ports and Mexico; substantial direct competition from such lines between eastern Canadian ports and Mexico; substantial direct competition from lines between New Orleans and Mexico; and substantial competition from such lines (1) direct between foreign countries and Mexico and (2) by transshipment via New Orleans;

2. That there is insufficient evidence upon which to make a finding as to whether applicant encountered competition from foreign-flag lines, from 1947 to 1950, on its Cuba service operated as a segment of its over-all Mexico service;

3. That competition encountered by applicant from foreign-flag lines on its strict Cuba service is not within the scope of the proceeding; and

4. That an operating subsidy to applicant on Trade Route No. 3 is necessary to meet competition from foreign-flag vessels.

Counsel for applicant has filed a memorandum, primarily in support but partially in exception to the recommended decision. Counsel to the Board has filed a memorandum partly supporting and partly excepting to the examiner's recommended decision. Both agree with the ultimate conclusion of the examiner that applicant is subject to substantial foreign-flag competition. Counsel to the Board suggests that, under certain conditions, oral argument be granted. We do not consider that oral argument is necessary.

Applicant has been engaged in vessel operations on Trade Route No. 3 as a subsidized line since 1937. Previously, applicant or its predecessors had been engaged in this trade for over 70 years and in the Cuba trade for over 100 years. Applicant now operates on this route three owned C-1B's and one C1-M-AV1 chartered from an affiliate. Applicant also operates a separate service between New York and Havana, Cuba.

We deem it unnecessary to recite the additional facts, which are set forth fully in the examiner's recommended decision.

The substantial question here involved is whether for the period 1947 through 1950 there was competition from foreign-flag vessels, either direct or indirect, or both, sufficient to justify the making of an operating-differential subsidy contract. Section 602 of the Merchant Marine Act, 1936, as amended, upon which this proceeding is predicated, provides as follows:

> No contract for an operating-differential subsidy shall be made by the Commission for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Commission, after a full and complete investigation and hearing, shall determine that an operating subsidy is necessary to meet competition of foreign-flag ships.

We construe this section to mean that the investigation and hearing provided for under it is required only to determine competition other than direct foreign-flag competition. Section 601 and other sections of Title VI of the Merchant Marine Act, 1936,

as amended, permit determinations of direct foreign-flag competition without the requirement of a hearing. Findings of the examiner deal with various elements of competition, and each element is discussed by him at some length.

In his recommendation 1, the examiner has recommended that the Board make specific findings with regard to each element of foreign-flag competition on this trade route. We do not feel that such Board action is necessary or contemplated by the Merchant Marine Act, 1936, as amended. It is our view that applicant, during the period January 1, 1947, to December 31, 1950, in the operation on Trade Route 3, encountered direct foreign-flag competition sufficient to justify a finding under section 601 of the Act that an operating subsidy is necessary to meet competition of foreign-flag ships. Under these circumstances no finding by the Board is necessary as to competition other than direct foreign-flag competition.

With regard to the examiner's proposed findings numbers 2 and 3, we hold that since applicant's strict and exclusive Cuba service is not within the purview of this inquiry, no finding regarding that service is necessary. As to applicant's Cuba service, which is a privilege-call segment of its Trade Route 3 operation between United States ports and Mexico, such service constitutes only an estimated 13 percent of applicant's north and south traffic on the route. Since direct competition clearly exists on the route as a whole, a separate finding of competition on this segment of the route is not necessary.

Finally, with regard to the examiner's proposed finding number 4, we find, as above stated, that an operating subsidy to applicant on Trade Route No. 3 is required to meet foreign-flag competition.

FEDERAL MARITIME BOARD

No. S–24

NEW YORK AND CUBA MAIL STEAMSHIP COMPANY—APPLICATION FOR RESUMPTION OF OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 3

Between 1947 and 1950 applicant encountered direct competition, although not substantial, from foreign-flag lines operating between U. S. North Atlantic ports and Mexico; substantial direct competition from such lines between eastern Canadian ports and Mexico; substantial direct competition from such lines between New Orleans and Mexico; and substantial competition from such lines (1) direct between foreign countries and Mexico and (2) by transshipment via New Orleans.

There is insufficient evidence upon which to make a finding as to whether applicant encountered competition from foreign-flag lines, from 1947 to 1950, on its Cuba service operated as a segment of its over-all Mexico service.

Competition encountered by applicant from foreign-flag lines on its strict Cuba service is not within the scope of the proceeding.

An operating subsidy to applicant on Trade Route No. 3 is necessary to meet competition from foreign-flag vessels.

William Radner and *Odell Kominers* for applicant.

Samuel H. Moerman for The Port of New York Authority, intervener.

Joseph A. Klausner and *George F. Galland* for the Board.

DECISION RECOMMENDED BY C. W. ROBINSON, EXAMINER

This proceeding involves the application of New York and Cuba Mail Steamship Company, hereinafter referred to as applicant, for the resumption of payment of operating-differential subsidy for its vessels on Trade Route No. 3 (between United States Atlantic ports and the East coast of Mexico, with privilege of calling at Havana and other Cuban ports), as described in the United States Maritime Commission's report of Essential Foreign Trade Routes of the American Merchant Marine, issued May 1949. Notice of the hearing was published in the Federal Register of May 18, 1951, and hearing was held on May 31 and

June 1, 1951. The Port of New York Authority intervened on behalf of applicant.

As announced in the notice of hearing, the purpose of the hearing was "to receive evidence relevant to the following determinations which the Board is required, after hearing, to make pursuant to the provisions of section 602 of the Merchant Marine Act, 1936, as amended;[1] (1) whether, and to what extent, the operations of New York and Cuba Mail Steamship Company on Trade Route No. 3 were subject to foreign-flag competition between January 1, 1947, and the present date, or any part of that period; (2) whether such competition, if any, was (a) direct foreign-flag competition, or (b) competition other than direct foreign-flag competition, within the meaning of section 602; and (3) whether an operating subsidy to New York and Cuba Mail Steamship Company on Trade Route No. 3 is necessary to meet competition of foreign-flag vessels." At the hearing, counsel for the Board raised the question whether competition encountered by applicant on the Cuba leg of its Mexico operation was involved inasmuch as the description of the freight service for Trade Route No. 3 in the Maritime Commission's report issued May 1949 does not refer to calls at Cuban ports. In view of the terms of the notice of hearing, however, the examiner ruled that the Cuba phase was in issue.

Applicant and its predecessors have been in the Mexico trade for over 70 years and in the Cuba trade for over 100 years, operating on Route No. 3 as a subsidized line since 1937. Four vessels are employed on the route, three owned C–1B's and one C1–M–AV1 chartered from an affiliate. Although New York has been the traditional terminal port in the United States, Baltimore, Md., was added in the latter part of 1949, at which time there was no foreign-flag competition at that port. Applicant's sailings from both New York and Baltimore call at Havana, the terminal ports in Mexico being Tampico and Vera Cruz. A separate service is operated between New York and Havana only. Southbound, Mexican traffic handled by applicant consists principally of iron and steel products, chemicals, building materials, industrial raw materials, and manufactured goods generally; northbound, coffee, ixtle fiber, canned pineapple, and lead and other minerals. There has been no major shift in the nature of the traffic since 1948.

[1] Quoted hereinafter.

Applicant contends that it competes with foreign-flag lines operating (1) between United States North Atlantic ports and Mexico, (2) between eastern Canadian ports and Mexico, (3) between New Orleans, La., and Mexico, (4) between foreign ports and Mexico, direct, or by transshipment at New Orleans, and (5) between United States North Atlantic ports and Havana.

United States North Atlantic competition.—Since 1947 applicant has encountered competition from the following foreign-flag lines out of New York, Baltimore, Boston, Mass., and Philadelphia and Chester, Pa.: Federal Commerce and Navigation Company, Ltd. (Canada-Mexico Line), from 1947 to 1950; Clipper Line, commencing in 1949; and Smith and Johnson (Mexican Line), commencing in 1950. Smith and Johnson does not call regularly at Baltimore.

Table 1 shows the number of tons of cargo handled by applicant and the foreign-flag lines from United States North Atlantic ports to Mexico between 1947 and 1950, with the percentages of the totals for each.[2]

TABLE 1

	1947	1948	1949	1950	Total
N. Y. & C. M.:					
Tons	148,600	102,060	114,653	132,623	497,936
Percentage	99.6	98.03	96.47	89.64	95.31
Foreign lines:					
Tons	591	2,049	4,200	15,329	24,487
Percentage	0.4	1.97	3.53	10.56	4.69
Total	149,191	104,109	118,853	147,952	522,423

Although no figures were given, applicant's witness testified that his records indicate a downward trend for applicant in 1951 over 1950 in the percentage of the total movement from United States North Atlantic ports to Mexico. In 1950 a considerable amount of cargo was diverted by applicant to Baltimore from New York after service was started from the former place late in 1949. The 1950 figures are said to reflect panic buying in Mexico resulting from the war in Korea, but this business is on the downward trend at the moment. The unused space in applicant's vessels, southbound, was 2.16 percent in 1947, 39.54 percent in 1948, 54.4 percent in 1949, and 28.3 percent in 1950. Since it appears that cargo in the trade runs preponderantly to measurement, weight seldom is determinative. Based on experience, applicant's witness is of the opinion that the over-all unused space picture for 1951 will be about the same as for 1950.

2 Statistics in Mexico are based on the metric ton, measuring 2,204.6 pounds.

The sailings of the foreign-flag lines from United States North Atlantic ports totaled one in 1947, seven in 1948, 14 in 1949, and 47 in 1950. It is believed by applicant's witness that there will be a greater number of sailings by those lines in 1951. The foreign-flag sailings aggregated 2.7 percent of applicant's sailings in 1947, 16.7 percent in 1948, 25 percent in 1949, and 47 percent in 1950. The participation of the foreign-flag lines in the traffic, in relation to participation in the number of sailings, was less than 1 percent in 1947, less than 2 percent in 1948, less than 5 percent in 1949, and less than 14 percent in 1950. Applicant's witness is of the opinion that no substantial part of the company's business could be retained if its rates were increased; the foreign-flag competition out of the United States North Atlantic ports was sufficient during the period to preclude such move by applicant. The foreign-flag lines have advertised regularly in the New York Journal of Commerce since 1947, have actively solicited cargo, and are represented by well-known American agents. Brokerage has been paid by those lines since their services began, a practice which applicant started in 1949 when some traffic was lost to a competitor.

Table 2 shows the number of tons of cargo handled by applicant and the foreign-flag lines from Mexico to United States North Atlantic ports between 1947 and 1950, with the percentages of the totals for each.

TABLE 2

	1947	1948	1949	1950	Total
N. Y. & C. M.:					
Tons	71,460	77,559	81,036	108,866	338,921
Percentage	100.0	100.0	94.6	90.7	95.6
Foreign lines:					
Tons			4,585	11,189	15,774
Percentage			5.4	9.3	4.4
Total	71,460	77,559	85,621	120,055	354,695

The improved northbound movement for applicant in 1950 stems from the carriage of lead to Philadelphia, for use in the war effort, but this type of traffic was said to be uncertain for the future. The rate on lead is only $9 per ton as compared with applicant's average rate of $21.44 per ton for its entire service, and provides about a 10-cent profit per ton, according to applicant's witness. No figures were given, but it was testified that the northbound unused space on applicant's vessels for the 1947–50 period was considerably greater than that southbound.

Canadian competition.—Prior to World War II there was no regular berth service between eastern Canada and Mexico, all Canadian liner cargo being routed to and from Canada via New York on applicant's vessels. It was testified that there are approximately 168 traffic accounts in Canada that are interested in shipping on the route. Direct sailings to and from eastern Canada have been furnished since World War II by the following foreign-flag lines: Federal Commerce and Navigation Company, Ltd. (Canada-Mexico Line), since 1947; Swedish-American Line, since 1948; and Saguenay Terminals, since 1949.

Table 3 shows the number of tons of cargo handled by the foreign-flag lines between eastern Canadian ports and Mexico between 1947 and 1950.

TABLE 3

	1947	1948	1949	1950	Total
Southbound	15,458	20,689	25,130	21,639	82,916
Northbound	276	1,541	6,903	7,076	15,796
Total	15,734	22,230	32,033	28,715	98,712

The southbound traffic is approximately 15 percent of the total Canadian-United States North Atlantic movement and approximately 4 percent of the northbound movement. Applicant's participation in the traffic is estimated to have decreased from 100 percent in 1946 to 20–25 percent in 1950.

According to the witness for The Port of New York Authority, the rail rates to and from points on and west of a line from Chicago, Ill., to Cincinnati, Ohio, are lower to and from Montreal, Canada, than New York, and are equal to Halifax and St. John, Canada. Customarily, Halifax, St. John, and Montreal rates on imports are on the Baltimore level, which is lower than New York. The foreign-flag lines serving eastern Canadian ports have always paid brokerage, sometimes have enjoyed a favorable exchange, and occasionally have sought traffic by rate reductions. Saguenay Terminals has appealed to Canadian shippers to ship via Canadian vessels, and that carrier transports most of the aluminum of its parent, Canadian Aluminum Company. Applicant's participation in the Canadian business, it was testified, has been maintained because of faster and more frequent service via New York, long and favorable standing with important shippers, the desire of some shippers to assist in maintaining competitive services out of New York, and various other competitive

reasons, and it is believed that applicant could compete for the aluminum traffic were it not for the tie-in of the shipper with the parent company. Applicant has tried, as far as possible, to maintain the same rates out of New York on Canadian traffic as those applicable at eastern Canadian ports, and reductions have been made in some instances. In the opinion of applicant's witness, there is no doubt that the Canadian traffic would move through New York if the foreign-flag services out of eastern Canadian ports were discontinued.

New Orleans competition.—Foreign-flag operations between New Orleans and Mexico are considered by applicant's witness to be the most important competition that it must meet. The following foreign-flag lines have operated between New Orleans and Mexico at some time since January 1947: Smith & Johnson (Mexican Line), since 1947; Standard Fruit & Steamship Co., discontinued in 1948; Mexican Government services, discontinued in 1947; Noca Line, discontinued in 1948; and Continental Navigation Company, discontinued in 1947. Smith & Johnson, the only line now operating, operates on approximately a fortnightly basis, and since 1947 its sailings have been stepped up to take up part but not all of the slackening off by the other lines, and has the capacity to handle all the Mexico cargo via that port.

Table 4 shows the number of tons of cargo handled by the foreign-flag lines between New Orleans and Mexico from 1947 to 1950.

TABLE 4

	1947	1948	1949	1950	Total
Southbound	65,214	32,112	29,923	32,814	160,063
Northbound	10,478	15,274	15,402	19,568	60,722
Total	75,692	47,386	45,325	52,382	220,785

Transit time between New Orleans and Mexico is three or four days as compared with eight or nine days between New York and Mexico, and the ocean rate from New Orleans, differentially lower over New York since 1949, is at present more than 10 percent lower. A witness for intervener Port of New York Authority testified that New York is keenly competitive on traffic to and from points on and west of a line from Chicago to Cincinnati, and that the rail rates to and from this territory are lower to and from New Orleans than New York. He further testified that competitive ports and railroads serving them fre-

quently carry on extensive promotional work in New York. Applicant's witness testified that the rail-rate differential ordinarily is three cents higher to New York over New Orleans from the midwest area; that from Michigan, part of Ohio, eastern Indiana, and eastern Kentucky it is cheaper to ship via New York, but is more expensive from Chicago, Indianapolis, Ind., Milwaukee, Wis., Evansville, Ind., Cincinnati, and numerous other important points; and that barge facilities at cheaper rates have enabled New Orleans to penetrate into the area normally serviced by New York if rail rates were the sole governing factor. Of approximately 4,500 shippers to Mexico, applicant's witness estimates that nearly 10 percent are located in the general midwest area, and that in spite of the various handicaps encountered, applicant has been able to obtain some of the traffic even from areas that normally are tributary to New Orleans. This has been possible because of a weekly service, some rail-rate advantages, and applicant's historic position in the trade. According to the witness, applicant is considering the reinstitution of equalization practices to draw from New Orleans traffic which originates at competitive points in the midwest where the cost to the port places applicant at a disadvantage.

A shipper witness for applicant, whose company sells iron and steel commodities in Mexico, testified that the company uses both New York and New Orleans; that New Orleans, merely because of its shorter distance from Mexico, does not necessarily get all the business which shippers must deliver by a certain date, frequency of service helping to overcome this factor; and that his company would not ship out of New Orleans unless the producing point were favorably located. This witness is of the opinion that applicant out of North Atlantic ports and the foreign-flag lines out of New Orleans offer direct competition to each other.

As further competition applicant's witness cites (1) traffic which the shipper may move out of a production point tributary to New Orleans or a point tributary to New York, as he prefers, and (2) traffic generally handled by exporters dependent upon New York in competition with exporters who are dependent upon New Orleans for their water service. A list of 14 major shippers was cited as being able to ship from either New York or New Orleans, and that the volume of their business would account for 10,000–12,000 tons annually. Some Louisiana cargo naturally moves out of New Orleans, but applicant has no records of the

amount which is indigenous to New Orleans and environs as distinguished from that which comes from other origins.

Competition is said to exist in the import trade also, and importers have advised applicant's witness that lower rates have been a major factor in influencing a large part of the business via New Orleans. A substantial part of the imports are destined to interior points.

In reply to the suggestion that applicant possibly might consider having its vessels call at New Orleans, applicant's witness stated that such a move would be out of the question because of the added time in transit and the days in New Orleans. Furthermore, any such delays would have a tendency to encourage shippers to route their cargo via foreign-flag direct lines.

Transshipment competition.—In addition to its other traffic, applicant handles business which originates in or is destined to foreign countries and transshipped at New York to or from Mexico. It is contended that on this traffic applicant competes (1) with the services of foreign-flag lines operating direct between foreign countries and Mexico, and (2) with foreign-flag lines serving New Orleans who influence transshipment at that port rather than at New York. Applicant has a general European agent as well as sub-agents in 50 cities in Europe and the Mediterranean area, and advertising is done in those areas to obtain cargo for Mexico. The cargo thus secured moves on applicant's through bills of lading. Most of the transshipment cargo originates in or is destined to Europe or the Mediterranean area, although some of it is from or to South America, the Caribbean area, and the Far East.

The total transshipment traffic handled by applicant amounted to 6.6 percent of its total revenue in 1947 and 17.68 percent in 1950; in 1938, a representative prewar year, the percentage was 28 percent. Southbound, the percentage relationship of applicant's transshipped cargo and total cargo was 6.22 percent in 1947; 11.09 in 1948; 11.46 in 1949; and 16.41 in 1950. Northbound, the percentages were 7.97, 19.22, 24.90, and 20.09, respectively. Applicant considers transshipment cargo very desirable, and it is believed that the volume will increase with the years. It was estimated that if applicant obtained all the transshipment business it would amount to an additional 19,000 tons annually, which, at $22 per ton, the approximate average rate for all commodities carried by applicant, would represent over

$400,000 additional revenue, or about 12 percent of applicant's gross revenue.

(*a*) Table 5 shows the number of tons of foreign cargo handled by applicant in the Mexico service, with transshipment at New York, as well as cargo handled by direct foreign-flag lines to and from Mexico for the years 1947–50, with the percentages for each method of routing. The amounts and the percentages would differ to a small extent if only European cargo be considered.

TABLE 5

	To Mexico—					From Mexico—				
	1947	1948	1949	1950	Total	1947	1948	1949	1950	Total
N. Y. & C. M.:										
Tons	4,852	9,368	12,030	16,729	42,979	2,580	6,000	9,853	9,234	27,776
Percentage	6.6	14.4	17.6	9.6	11.1	2.7	7.5	14.9	22.4	9.8
Foreign lines:										
Tons	68,716	55,488	56,192	157,116	337,512	91,372	73,767	56,068	32,055	253,262
Percentage	93.4	85.6	82.4	90.4	88.9	97.3	92.5	85.1	77.6	90.2
Total	73,568	64,856	68,222	173,845	380,491	93,952	79,767	65,921	41,289	280,929

In 1947 there were five foreign-flag lines operating between Europe and Mexico, whereas at the present time there are 12.

The shipper witness already referred to, whose company deals in iron and steel commodities to Mexico, testified that shortages brought about in this country because of the war in Korea have forced his company to place some of its orders in Europe, some moving direct to Mexico and some via transshipment at New York. The witness believes that speed is a very important factor in some cases in determining the route, and where the freight rate is lower the shipment usually moves from Europe to Mexico direct. Unless the European shipment is sold c. & f. (cost and freight) or c. i. f. (cost, insurance, freight), the shipper or the ultimate consignee decides the routing. European suppliers are said to advertise extensively in Mexico and try to sell c. i. f.

In its transshipment business applicant concentrates on higher-rated commodities inasmuch as the low-rated items do not supply applicant with sufficient revenue when split with the participating carriers. It is estimated by applicant's witness that solicitation is directed to substantially less than one-third of the total Europe-Mexico business, and is based on a greater frequency of service and a shorter time in transit. Applicant's rates from New York to Mexico are higher on local than on transshipment cargo.

(*b*) Table 6 shows the number of tons of cargo transshipped

at New York and New Orleans to and from East coast of Mexico ports between 1948 and 1950.

TABLE 6

	Southbound				Northbound			
	1948	1949	1950	Total	1948	1949	1950	Total
New York	16,121	18,017	23,013	57,151	7,361	11,137	13,618	32,116
New Orleans	9,270	7,041	9,396	25,707	12,678	10,765	16,492	39,926
Total	25,391	25,058	32,409	82,858	20,039	21,902	30,110	72,042

Applicant's witness is of the opinion that practically all of the transshipment cargo could move by either New York or New Orleans. There is more frequent transshipment service from Europe to New Orleans than direct service from Europe to Mexico. New York and New Orleans compete on Far East rubber transshipped to Mexico, this commodity accounting for about 9 percent of Smith and Johnson's New Orleans business in 1950. It was testified that Smith and Johnson do not obtain much transshipment cargo at New York as they are not members of the particular conference covering the trade, but that their application for membership in the conference is now pending.

United States North Atlantic/Mexico and Europe/Mexico competition.—Although Board counsel is not fully satisfied with the evidence, it seems reasonably clear that the same general run of commodities move from United States North Atlantic ports to Mexico as from Europe to Mexico, and that United States exporters are in direct competition with European suppliers for the business. The shipper witness heretofore referred to testified that his company is in keen competition with European exporters and that the company has lost some business to them although he has no way of knowing the amount. Low-rated commodities from Europe, moving direct to Mexico, are said to be depressed in order to permit competition, and low rates have been established by the direct lines on a number of basic commodities; in most instances, these low rates are about the same as or slightly lower than those of applicant, notwithstanding the latter's shorter haul. Applicant has received requests at various times from United States exporters for lower competitive rates, and representative letters to that effect were made part of the record. Most shippers using the direct lines from Europe ship under exclusive patronage arrangements whereby they receive rebates from the lines.

Table 7 shows (1) the number of tons of United States cargo handled by applicant to Mexico and (2) the number of tons carried by foreign-flag lines from Europe to Mexico direct, between 1947 and 1950; also the percentage of the total movement in each case.

TABLE 7

	1947	1948	1949	1950	Total
N. Y. & C. M.:					
Tons	138,606	85,792	94,247	108,681	427,326
Percentage	69.2	63.8	63.5	41.3	57.2
Direct lines:					
Tons	61,663	48,730	54,246	154,479	319,118
Percentage	30.8	36.2	36.5	58.7	42.8
Total	200,269	134,522	148,493	263,160	746,444

The tons allocated to applicant in table 7 are approximate only, calculated as follows: from the total number of tons carried by applicant is subtracted (1) the number of tons handled by applicant by transshipment from foreign countries other than Canada, and (2) the approximate number of tons of Canadian cargo handled by applicant. It should be stated that applicant's transshipment figures are not separated in such manner as to show the volume from Europe as distinguished from the volume from other areas.

Cuba competition.—Table 8 shows the number of tons of cargo handled by applicant between United States North Atlantic ports and Havana as a part of the over-all Mexico service from 1947 to 1950.

TABLE 8

	1947	1948	1949	1950	Total
To Havana		10,136	4,870	21,124	36,130
From Havana	14,679	28,956	17,719	15,528	76,882
Total	14,679	39,092	22,589	36,652	113,012

The record contains no evidence as to the competition, if any, offered by foreign-flag lines between United States North Atlantic ports and Havana as a segment of the Mexico service.

Table 9 shows the number of tons of cargo handled by applicant, other United States-flag lines, and foreign-flag lines, with percentages of the total for each group, from United States North Atlantic ports to Havana, with Havana as the terminal port, during the years 1947–50.

TABLE 9

	1947	1948	1949	1950	Total
N. Y. & C. M.:					
Tons	192,658	142,976	81,701	109,280	526,615
Percentage	40.3	34.4	22.0	25.6	31.1
Other American lines:					
Tons	139,468	126,229	92,346	79,035	437,078
Percentage	29.2	30.3	24.8	18.4	25.8
Foreign lines:					
Tons	145,553	146,641	197,618	239,369	729,181
Percentage	30.5	35.3	53.2	56.0	43.1
Total	477,679	415,846	371,665	427,684	1,692,874

The record is devoid, however, of concrete evidence as to the amount of cargo carried by applicant and foreign-flag lines from Havana to United States North Atlantic ports, with Havana as the terminal port, although applicant's witness testified that the foreign-flag participation was to a lesser extent than southbound.

Applicant's financial position.—As already observed, the notice of hearing calls for evidence on "whether an operating subsidy to New York and Cuba Mail Steamship Company on Trade Route No. 3 is necessary to meet competition of foreign-flag vessels," but it is questionable whether this would entail consideration of applicant's financial position; rather, it would seem to mean that inquiry should be made as to whether the foreign-flag competition is sufficiently substantial to justify a subsidy. Be that as it may, evidence relating to applicant's financial position was received in aid of the Board's determination of the application.

The chairman of applicant's executive committee testified that operating results for the past 4 years do not justify continuation without a subsidy; that the company would not have operated for the past 2 years had it known that there would be no subsidy; and that the company will not operate in the future without one. The witness further testified that as of December 31, 1950, applicant's book value for the years 1947–50, without subsidy, was approximately $17,000,000; that if subsidy is paid for that period the book value, net after taxes, would be a trifle over $19,000,000; and that as about half of the assets of the company are employed in the Mexico service, the invested capital in that service is about $9,500,000 with subsidy and $8,500,000 without subsidy.

Table 10 shows the voyage results for applicant's vessels in the Mexico service, with calls at Havana, for the years 1947–50.

Based upon table 10, applicant's average annual income for the years 1947–50, after subsidy and before income tax, was

TABLE 10

	1947	1948	1949	1950	Total
Before subsidy	$357,388.96	$133,214.94	$65,742.80	[1] $53,288.78	$503,057.92
Estimated subsidy	459,144.15	490,834.52	535,144.26	774,750.28	2,259,873.21
After subsidy and before income tax	816,533.11	624,049.46	600,887.06	721,461.50	2,762,931.13

[1] Loss.

approximately $690,000. Subtracting the arbitrary tax figure of 45 percent, the average annual net income would be approximately $370,000. If it be assumed that a fair net return after income taxes would be 10 percent on the capital necessarily employed, the annual income of $370,000 would represent a maximum of $3,700,000 in capital necessarily employed. As indicated, however, applicant's witness estimated that the invested capital in the Mexico service would approximate $9,500,000 with subsidy and $8,500,000 without subsidy. On the foregoing assumptions, the annual net income of $370,000 would be considerably below a fair return on the capital necessarily employed.

Applicant's witness was of the opinion that the substantial inroads of the foreign-flag lines in the trade would continue, and he doubted whether, in the future, the net income before subsidy can be anticipated as any higher than at present, and would be pleased if it did not go lower.

CONCLUSIONS

Section 602 of the Merchant Marine Act, 1936, as amended, hereafter referred to as the Act, upon which this proceeding is predicated, provides as follows:

> No contract for an operating-differential subsidy shall be made by the Commission for the operation of a vessel or vessels to meet foreign competition, except direct foreign-flag competition, until and unless the Commission, after a full and complete investigation and hearing, shall determine that an operating subsidy is necessary to meet competition of foreign-flag ships.

Applicant concedes for present purposes that the foreign-flag competition must be substantial to justify an operating subsidy. For all practical purposes it is immaterial whether the competition be direct or so-called "indirect," for the existence of either in substantial degree satisfies the requirements of section 602, the only mandate being a complete investigation and hearing if the operator relies upon indirect competition.

United States North Atlantic competition.—As appears from table 1, applicant handled 95 percent of all southbound traffic

from United States North Atlantic ports to Mexico between 1947 and 1950. Northbound, according to table 2, applicant also is the predominant carrier, accounting for 95 percent of all cargo in that period. It can hardly be said that the 5-percent share of the foreign-flag lines in each direction, standing alone, would justify a subsidy, and applicant so agrees.

Canadian competition.—Commencing in 1947, service from eastern Canadian ports to Mexico has been furnished by three foreign-flag lines. From table 3 it appears that 82,916 tons of cargo were carried southbound by those lines between 1947 and 1950, representing about 15 percent of the total Canadian-United States North Atlantic southbound movement. It cannot be doubted that this is substantial competition, particularly when it is remembered that prior to World War II no cargo between eastern Canada and Mexico moved other than on applicant's vessels via New York. Northbound, a total of 15,796 tons moved by foreign-flag lines in the same period, or approximately 4 percent of the total Canadian-United States North Atlantic northbound movement. It admits of little doubt that the Canadian competition must be included in a proceeding based on section 602 of the Act.

New Orleans competition.—Table 4 shows that a total of 160,063 tons of cargo southbound and 60,722 tons northbound moved on foreign-flag vessels between New Orleans and Mexico from 1947 to 1950. This approximates 32 percent of applicant's southbound carryings and 17 percent of its northbound carryings from and to United States North Atlantic ports in the same period. Although it is impossible to ascertain with any degree of exactness what part of the total movement to and from New Orleans could have used applicant's North Atlantic service as well, the rail and barge rates are such that it is fairly inferable, considering the type of cargo involved, that a substantial part of the cargo using New Orleans could have used North Atlantic ports. This is especially true of the southbound traffic.

Counsel for the Board raises the question whether the natural advantages of New Orleans over New York in the Mexico trade —such as shorter time in transit and lower rates, rail as well as water—can be offset by a subsidy under the Act. In other words, is New York, within the purview of the Act, fairly competitive with New Orleans under the circumstances here developed? The legislative history of the Act affords no insight into the problem, but it would seem, from an over-all perspective,

that the Act is interested solely in competition and not what brings it about. The bald and inescapable fact is that New York and New Orleans (and hence applicant and the foreign-flag lines serving New Orleans) are in actual and intensive competition for Mexican traffic to and from many points in a large part of the mid-west area of the United States. This conclusion, however, should not be considered to include that part of the traffic which originates at or near New Orleans, for it is clear that on such traffic the shipper does not have a real choice of routes. As already noted, there is no evidence of record that would throw light on how much of the cargo out of New Orleans originates at or near that port, but again it is fairly inferable, under all the circumstances hereinbefore discussed, that it is a small volume.

Transshipment competition.—From table 5 it is clear that applicant, by transshipment, handled only a small portion of the total cargo moving between foreign countries and Mexico, approximating 11 percent to Mexico and 9 percent from Mexico during the four relevant years; the remainder moved via direct foreign-flag lines. As between transshipment cargo at New York and at New Orleans, table 6 shows that, southbound, applicant handled slightly more than twice as much cargo at New York as the foreign-flag lines did at New Orleans between 1948 and 1950, but that on northbound traffic during the same period the foreign-flag lines handled slightly more at New Orleans than applicant did at New York. Applicant thus encountered substantial competition from the direct lines serving the foreign countries as well as from foreign-flag lines transshipping at New Orleans. The only question, therefore, is whether the competition comes within the fair intendment of the Act. It seems fairly reasonable to conclude that applicant's transshipment business is foreign commerce of the United States, there being no logical reason to believe that traffic must originate in or be destined to the United States in order to make it foreign commerce of the United States. The term "foreign commerce" has broad significance; it cannot be confined to the cargo itself but necessarily must include the instrumentalities of transportation. See the general principles announced in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 298.

United States North Atlantic/Mexico and Europe/Mexico competition.—Table 7 demonstrates that during 1947, 1948, and 1949 applicant handled approximately two-thirds of the combined traffic moving direct from United States North Atlantic ports

to Mexico and direct from Europe to Mexico, but in 1950 the trend was reversed, applicant handling about 41 percent in that year. For the four years applicant handled about 57 percent. Competition has been spirited and substantial.

Doubt is raised by Board counsel as to the legal relevancy of the competition here being discussed. The legislative history of section 602 of the Act was presented *in extenso* by applicant's counsel, and from its mutations until finally enacted it is reasonably arguable that section 602 is broad enough to emcompass the so-called "triangular competition" of the foreign-flag lines operating between Europe and Mexico direct. In the final analysis, to grant a subsidy for this type of competition is to stimulate exports from the United States as against those from Europe, which, if successful, must necessarily stimulate the American merchant marine, one of the avowed purposes of the Act. Prior to World War II the United States Maritime Commission, the Board's predecessor, granted a subsidy to Oceanic Steamship Company under circumstances similar to those here involved. Oceanic operated between California and Australia in competition with Canadian-Australasian Line operating between British Columbia, Canada, and Australia.

Cuba competition.—A certain hiatus exists in the record as to the Cuba portion of applicant's service. Although applicant's carryings to and from Havana as a part of its over-all Mexico service are set forth in table 8, there has been no showing of the competition, if any, encountered from foreign-flag lines in either direction. Furthermore, while table 9 graphically shows applicant's carryings as well as those of its foreign-flag competitors from United States North Atlantic ports to Cuba, where Havana is the terminal port, there are no statistics on applicant's northbound carryings on the same service or those of its foreign-flag competitors. It is impossible, therefore, to make a satisfactory finding as to foreign-flag competition on the Cuba segment of applicant's Mexico service. Nor can consideration be given to the competition encountered on applicant's strict Havana service because that service is not within the ambit of Trade Route No. 3 or within the scope of the present proceeding. Cuba traffic is relevant when and only when it forms part and parcel of the over-all Mexico traffic.

RECOMMENDATIONS

The Board should find:

1. That between 1947 and 1950 applicant encountered direct

competition, although not substantial, from foreign-flag lines operating between United States North Atlantic ports and Mexico; substantial direct competition from such lines between eastern Canadian ports and Mexico; substantial direct competition from such lines between New Orleans and Mexico; and substantial competition from such lines (1) direct between foreign countries and Mexico and (2) by transshipment via New Orleans;

2. That there is insufficient evidence upon which to make a finding as to whether applicant encountered competition from foreign-flag lines, from 1947 to 1950, on its Cuba service operated as a segment of its over-all Mexico service;

3. That competition encountered by applicant from foreign-flag lines on its strict Cuba service is not within the scope of the proceeding; and

4. That an operating subsidy to applicant on Trade Route No. 3 is necessary to meet competition from foreign-flag vessels.

FEDERAL MARITIME BOARD

No. 710

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LEEWARD AND WINDWARD ISLANDS AND GUIANAS CONFERENCE

Submitted August 8, 1951. Decided August 10, 1951

In considering a motion to its jurisdiction the Board is limited to the pleadings properly before it and cannot consider affidavits or statements of additional facts.

In the absence of all the facts, the Board cannot determine its jurisdiction over respondent's contract rates on a motion prior to the hearing. Motion denied without prejudice to the right of respondent to interpose objections at the hearing to the relevancy of any evidence pertaining to respondent's northbound operations, and without prejudice to the right of respondent to renew its motion before the Board on exceptions to the examiner's recommendations.

Case remanded to the examiner for further proceedings not inconsistent with this report.

Irwin W. Silverman for complainant.

Parker McCollester for respondent.

Joseph L. Fitzmaurice for Director of Price Stabilization, and *Joseph A. Klausner* for the Board, interveners.

REPORT ON MOTION TO BOARD'S JURISDICTION

BY THE BOARD:

The complaint in this case, filed April 4, 1951, by the Government of the Virgin Islands against the Leeward and Windward Islands and Guianas Conference, alleges that the respondent conference is an association of common carriers by water and as such is subject to the provisions of the Shipping Act, 1916, as amended, and that on January 19, 1951, it filed with the Board Southbound Freight Tariff VS–4, increasing southbound rates to the Virgin Islands about 15 percent. The complaint also alleges that the proposed rates are unjust and unreasonable, in violation of section 18 of the Act, and, in paragraph 11, alleges that the

principal conference member serving the Virgin Islands is a common carrier outbound from the United States and a contract carrier returning to the United States; that by seeking to increase its common-carrier rates southbound, it aims to have the common carrier trade absorb costs which otherwise would be absorbed in its contract rates; that this is especially unfair because the carrier referred to is a wholly-owned subsidiary of a company for which bauxite, the bulk of its contract cargo, is carried; and that while "wages and prices have been going up, the contract rate for bauxite has actually been reduced." The prayer for relief asks that the Board find that the proposed increased southbound rates are unreasonable, investigate to determine whether the southbound rates are disproportionately high because the northbound rates are disproportionately low, issue a minimum rate order for bauxite and other contract commodities carried north by the conference members, and grant other miscellaneous relief.

The answer denied that the sole-named respondent, the Leeward and Windward Islands and Guianas Conference, is a common carrier or other person subject to the Shipping Act, 1916, as amended, and avers that Alcoa Steamship Company, Inc., and Furness Withy and Co., Ltd., two members of the conference, are common carriers subject to the Act, engaged in business between ports of the United States and the Virgin Islands. Respondent, by its answer, offers to have a general appearance entered for the two common carriers mentioned, and to agree that the proceeding may be deemed to be against the carriers as well as against the conference, and, if such offer is not accepted, respondent moves for dismissal of the complaint. The record now shows that respondent's offer has been accepted by complainant and no action is therefore needed on the first motion.

Respondent's answer, filed on its own behalf and on behalf of the carriers, alleges that certain matters included in the complaint and in the relief asked for are not within the Board's jurisdiction. With its answer it filed a second motion for an order of the Board to specify and define the issues properly before the Board for determination and to limit the evidence to such issues. After pretrial conference, held pursuant to section 201.59 of the Board's rules, the case was referred to the Board for oral argument on the question of jurisdiction over the carriers' contract rates northbound, referred to in paragraph 11 of the complaint. It is there alleged, as already noted, that the principal carrier

serving the Virgin Islands is a common carrier outbound from United States ports and a contract carrier returning to United States ports. Although not expressly so stated, the reasonable inference from the foregoing allegation is that the return voyage to United States ports is from the Virgin Islands.

At the hearing held before the Board on August 8, prior to argument, counsel for respondent offered an affidavit of Robert D. Weeks, vice president of Alcoa Steamship Company, Inc., covering the operations of that company, and, during the course of the argument, respondent's counsel averred that that carrier's northbound contract traffic moved not from the Virgin Islands but from foreign ports.

The Board, in considering respondent's motion, is limited to the record on the pleadings properly before the Board, and cannot consider affidavits or statements of additional facts.

Respondent, in support of its motion, argues that the Board has no jurisdiction to fix minimum rates for the carrier's northbound contract business (1) because, on the statement of counsel, the carrier, so far as its northbound business is concerned, is engaged in foreign commerce and not subject to rate regulation by the Board, (2) because in such business the carrier is a contract carrier and not subject to regulation by the Board under the Shipping Act, 1916, and (3) because the Board in any event lacks authority to prescribe minimum rates in foreign trade.

As already noted, there are not sufficient facts before us to permit of a determination as to whether respondent Alcoa in respect to its north-bound operation is engaged in foreign trade, domestic trade, or both, and whether such operation is as a contract or common carrier, or both. On the question of the Board's jurisdiction over respondent's northbound contract rates, while there is some doubt as to the Board's jurisdiction over contract rates as such, nevertheless it is our view that, where a common carrier operates also as a contract carrier on the same voyage or in the same traffic, the Board can inquire into such contract rates for the purpose of determining whether they create prejudicial or discriminatory impacts on the common carrier operations. See *Puerto Rican Rates*, 2 U. S. M. C. 117, 126, and *Agreements 6210 etc.*, 2 U. S. M. C. 166, 170. The Board must have all the available evidence in the matter and is entitled to know whether the characteristics of respondent's northbound service are such as to bring it within the commonly accepted definition of common carriage and the effect it might have upon respond-

ent's southbound common carrier operations. The proper and orderly way to obtain the necessary evidence in matters such as are here before us is by open hearing before an examiner. The examiner is well qualified to pass upon all questions of evidence and we see no reason to limit or restrict his conduct of this case.

Respondent's second motion is denied, without prejudice to the right of respondent to interpose objections at the hearing to the relevancy of any evidence pertaining to respondent's northbound operations, and without prejudice to the right of respondent to renew its motion before the Board on exceptions to the examiner's recommendations. The matter will be remanded to the examiner for further proceedings not inconsistent with this report.

The Chairman, being absent, took no part in this report.

(Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 10th day of August A.D. 1951

No. 710

GOVERNMENT OF THE VIRGIN ISLANDS

v.

LEEWARD AND WINDWARD ISLANDS AND GUIANAS CONFERENCE

Respondent Alcoa Steamship Company, Inc., having filed a motion to the Board's jurisdiction over said respondent's contract rates referred to in paragraph 11 of the complaint herein, and the motion having come on for oral argument before the Board, and the Board, on the date hereof, having made and entered of record a preliminary report containing its conclusions and decision as respects jurisdiction in the matter, which report is hereby referred to and made a part hereof:

It is ordered, That respondent's motion to the jurisdiction of the Board over respondent's contract rates herein be, and it is hereby denied, without prejudice to the right of respondent to interpose objections at the hearing to the relevancy of any evidence pertaining to respondent's northbound operations, and without prejudice to the right of respondent to renew its motion before the Board on exceptions to the examiner's recommendations;

It is further ordered, That the case be, and it is hereby, referred to the examiner for hearing and recommendations not inconsistent with this order.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–48

AMERICAN EXPORT LINES, INC.—APPLICATION FOR BAREBOAT CHARTER OF TWO GOVERNMENT-OWNED, VICTORY-TYPE, WAR-BUILT, DRY-CARGO VESSELS FOR EMPLOYMENT IN THE SERVICE BETWEEN UNITED STATES NORTH ATLANTIC PORTS AND PORTS IN THE MEDITERRANEAN (TRADE ROUTE NO. 10)

REPORT OF THE BOARD

This proceeding was instituted pursuant to Public Law 591, 81st Congress, upon the application of American Export Lines, Inc., for the bareboat charter for an indefinite period of two Victory-type, Government-owned, war-built, dry-cargo vessels for employment in its berth service between United States North Atlantic ports and ports in the Mediterranean.

Hearing on the application was held before an examiner on January 16 and January 21, 1952, pursuant to notice in the Federal Register of January 10, 1952. Because of the urgency of the matter, the usual 15 days' notice was not given. There was no objection to the application. The examiner's recommended decision was served on January 28, 1952, in which he recommended that the Board should make the statutory findings. No exceptions were filed to the examiner's recommended decision.

Applicant's witness stated at the hearing before the examiner that the present application is intended to cover only Lines A, B, and C of Trade Route No. 10, as described in applicant's operating-differential subsidy agreement with the Board. Line A is applicant's North African service, serving primarily ports in North Africa from Casablanca to the western boundary of Egypt; Line B is applicant's Italian service, serving primarily ports on the West coast of Italy, on the Mediterranean coast of France, and Adriatic ports; Line C is applicant's eastern Mediterranean service, serving primarily ports from the northern entrance of the Suez Canal to and including Greece. Although applicant's operating-differential subsidy agreement gives it the privilege of using vessels interchangeably over Lines A, B, C,

and D, applicant's witness states that the company does not intend to use either of the vessels herein applied for on its Line D service.

Under its operating-differential subsidy agreement applicant also has the privilege of calling at Portugal, Spanish Atlantic ports south of Portugal, and ports in the Black Sea. We consider that the reference in the notice of hearing "to ports in the Mediterranean" is not sufficiently broad to cover these latter ports. See *Application of Prudential Steamship Corporation,* Docket No. M–34, 3 F.M.B. 627. Substantially all of applicant's evidence was directed toward a showing of inadequacy between United States North Atlantic ports and ports in the Mediterranean, and we consider that the application must be so limited.

We have no difficulty in finding that the services under consideration are in the public interest. See *Application of American Export Lines, Inc.,* Docket No. M–19, 3 F.M.B. 661, and *Application of Prudential Steamship Corporation,* Docket No. M–45, 3 F.M.B. 700.

Applicant's witness testified that the company has been operating on Trade Route No. 10 since 1925. Applicant presently maintains its service on Lines A, B, and C with 4 owned C–3 type vessels (which are unsubsidized), 12 owned C–2, C–3, and Victory-type vessels (which are subsidized), and 1 Victory-type vessel chartered to applicant pursuant to our findings in Docket No. M–19, *supra.*

The cargo movement over these services is predominantly outbound, and applicant bases its present application entirely on the outbound movement. Applicant admits that there is no inadequacy of service in so far as the inbound movement is concerned. Applicant's witness testified that this is primarily a cubic trade, and that applicant's outbound vessels have been sailing substantially full for the past year. Applicant's exhibit discloses that, for a total of 46 sailings in the first half of 1951, there was an average of 6 percent of measurement capacity unused on each vessel; for 52 sailings in the second half of 1951, there was an average of 16 percent of measurement capacity unused for each vessel. The somewhat lower percentage of vessel utilization for the last 6 months of 1951 was said to be due to the maritime strikes on the East coast of the United States during the months of June and November 1951.

Applicant's witness testified that outbound cargo offerings increased substantially in December 1951, compelling the company

to refuse considerable quantities of commercial and Government-controlled cargo, destined primarily to the Mediterranean area, because of lack of space. Applicant's witness testified that between December 1, 1951, and January 15, 1952, the company has declined 80,500 deadweight tons, including 12,000 deadweight tons of Government-controlled cargo, destined for ports on Lines A, B, and C. The witness testified that 50 percent of the declined cargo ultimately moved on foreign-flag vessels. Applicant's witness testified that the November longshoremen's strike did not contribute substantially to the present heavy volume of cargo offerings, and that such offerings promise to continue at their present volume for some time.

Counsel for the Board points out that "The inadequacy of service contemplated by the statute is inadequacy of all American-flag operations in the service, not merely the inadequacy of the service of a particular applicant or line." *Application of American President Lines, Ltd.,* Docket No. M–20. 3 F.M.B. 646. We believe that applicant has sustained its burden of proving inadequacy of all American-flag operation in this service. The evidence is undisputed that cargo offerings for Mediterranean ports on applicant's services at the time of the hearing far exceeded available space on American-flag vessels.

Applicant's witness testified that the company needs two fast Victory or other suitable type vessels, comparable with its owned fleet, operating at 16 knots, to satisfy traffic requirements of the trade. The witness also testified that the total amount of cargo being currently declined for lack of vessel space is more than enought to fill two Victory-type vessels. It appears from the evidence that no privately owned American-flag vessels suitable for operation in these services are available for charter upon reasonable conditions at reasonable rates.

Upon questioning of counsel for the Board, applicant's witness admitted that the *Elmira Victory,* chartered to applicant pursuant to our findings in Docket No. M–19, has been employed exclusively on the East coast of Italy segment of applicant's Line B service, which has proven to be the most unprofitable part of applicant's Trade Route No. 10 operations. Applicant explains that the greater profit resulting from the operation of its owned vessels is partly due to the fact that charter hire on chartered vessels is greater than the depreciation on owned vessels. The witness stated that if this application is granted, the two vessels will be integrated with applicant's entire Mediterranean opera-

68042G O—62——55

tion on Lines A, B, and C, and will take their turn with the company's owned ships on each service. This is a matter which can be administratively controlled.

Applicant has expressed its willingness to operate any vessel chartered pursuant to this proceeding without subsidy and to incorporate any profits therefrom in its subsidized operation account.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the services under consideration are required in the public interest;

2. That such services are not adequately served; and

3. That privately owned American-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for use in such services.

The Board recommends that any charter which may be granted pursuant to the findings in this case be for an indefinite period, subject to the usual right of cancellation by either party on 15 days' notice, and subject further to annual review of the charter as provided in Public Law 591. The Board also recommends that any such charter include provisions to protect the interests of the Government under its operating-differential subsidy agreement with applicant.

By the Board.

FEBRUARY 4, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. M–50

LUCKENBACH GULF STEAMSHIP CO., INC.—APPLICATION FOR BAREBOAT CHARTER OF A VICTORY-TYPE, GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSEL FOR EMPLOYMENT IN THE GULF INTERCOASTAL SERVICE

REPORT OF THE BOARD

This proceeding was instituted, pursuant to Public Law 591, Eighty-first Congress, upon the application of Luckenbach Gulf Steamship Co., Inc., for the bareboat charter for an indefinite period of a Victory-type, Government-owned, war-built, dry-cargo vessel for employment in its Gulf intercoastal service.

Hearing on the application was held before an examiner on January 28, 1952, pursuant to notice in the Federal Register of January 19, 1952. Because of the urgency of the matter, the usual 15 days' notice was not given. There was no objection to the application. The examiner's recommended decision was served on February 1, 1952, in which he recommended that the Board should make the statutory findings. No exceptions were filed to the examiner's recommended decision.

Applicant and Isthmian Steamship Company are the only common carriers by water certified by the Interstate Commerce Commission to operate in the Gulf intercoastal service. Applicant's president states that in February 1951 his company was the only operator offering a regular service in the Gulf intercoastal trade, at which time applicant was operating therein with two owned C–2 type vessels and two Victory-type vessels chartered from the Government. In Docket No. M–14, *Am.-Haw. S.S. Co.—Charter of War-Built Vessels*, 3 F.M.B. 499, applicant sought to continue the charter on the two above-mentioned Victory-type vessels and to charter two additional Victory-type vessels from the Government, so that it could withdraw its privately-owned vessels for operation in the more lucrative foreign trades. In our report of March 1, 1951, we found that the Gulf intercoastal service was required in the public interest and that

adequate service in the trade required the continued operation of the four vessels then serving it, or their equivalent, but that there was not sufficient justification for substitution of Government-owned vessels for applicant's privately-owned vessels. The continued charter of only two Government-owned vessels was therefore recommended.

During the course of negotiations with the Maritime Administration over the terms of its charter agreement for the two above-mentioned Government-owned vessels, other intercoastal operators withdrew several ships from the Atlantic intercoastal service. Applicant thereupon agreed with the Board and the Administrator to place its two owned C–2 vessels, then being operated in the Gulf intercoastal service, in the Atlantic intercoastal service, and this was made a condition of applicant's charter agreement with the Maritime Administration. Applicant thereupon advised the Administration that an adequate Gulf intercoastal service would require at least a third Victory-type vessel, for which it requested a charter. Applicant withdrew this latter request upon the filing by Isthmian of an application for the bareboat charter of two Victory-type vessels for use in this service, and upon the assurance of Isthmian that the operation of such vessels would be synchronized with applicant's operation of the two vessels chartered to it. Such synchronized operation by applicant and Isthmian would have provided the adequacy of service contemplated by our report in Docket No. M–14, *supra.*

In our report of April 28, 1951, Docket No. M–25, *Isthmian S.S. Co.—Charter of War-Built Vessels,* 3 F.M.B. 528, we recommended the charter of two Victory-type vessels to Isthmian, and the vessels were subsequently delivered to that operator. The synchronized operation never materialized because Isthmian's vessels became strikebound and have only recently completed their first round voyage in the trade. Because of these labor difficulties, Isthmian has notified the Administration that it will immediately redeliver the two vessels under charter to it. The Gulf intercoastal service is presently served, therefore, with only the two Victory-type vessels being operated by applicant.

We have previously found in Docket Nos. M–14 and M–25 that the Gulf intercoastal service is in the public interest. There does not appear to have been any substantial change in traffic conditions with respect to this service since the time of those reports. Applicant's president testified that it is his understanding that the railway box-car shortage has been considerably eased,

but that he has been informed by defense authorities that this "is only a cycle and that shortly again there will be a shortage of box cars, more perhaps than there was before."

We have found in Docket Nos. M–14 and M–25 that four vessels are necessary to maintain an adequate Gulf intercoastal service. Although applicant's exhibit discloses that, since March 1951, applicant has operated at only 65 percent of capacity, applicant's president contends that two vessels operating on a 30- to 35-day frequency cannot compete successfully with the railroads for traffic. Counsel for the Board, in his argument before the examiner and in a memorandum filed after the examiner's recommended decision, questions whether a service can be determined inadequate solely because of a lack of frequency of the service. An adequate service must provide for the needs of the shippers, which for a berth operator normally means a frequent and regular service with adequate port coverage. As we have stated in Docket No. M–20, *American President Lines, Ltd.—Charter of War-Built Vessels*, 3 F.M.B. 504:

> Adequacy of service cannot be measured in terms of spot availability of cargo alone. In the case of a berth service operator there must be taken into account regularity and frequency of the service, continuity of that service, its schedules, speed and other factors which give assurance to shippers to enable them to meet their commitments in a businesslike manner.

It is clear that the Gulf intercoastal service is inadequately served with only the two vessels now serving it. The present service does not offer shippers sufficient regularity, frequency, or certainty to attract the cargo which would normally move by water. An additional vessel will enable applicant to maintain an approximate sailing frequency of 21 days, which applicant contends will provide satisfactory port coverage.

It appears from the evidence that no privately owned American-flag vessels suitable for operation in this service are available for charter upon reasonable conditions and at reasonable rates.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, the Board finds and hereby certifies to the Secretary of Commerce:

1. That the service under consideration is required in the public interest;
2. That such service is inadequately served; and
3. That privately owned American-flag vessels are not avail-

able for charter from private operators on reasonable conditions and at reasonable rates for use in such service.

The Board recommends that any charter which may be granted pursuant to the findings in this report be for an indefinite period, subject to the usual right of cancellation by either party of 15 days' notice, and subject to annual review of the charter as provided in Public Law 591, and that the basic charter hire for such vessel be at a rate of 15 percent per annum of the statutory sales price, of which 8½ percent is payable unconditionally and the remainder of 6½ percent payable if earned, under the same general conditions that now prevail.

By the Board.

FEBRUARY 4, 1952.

(Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

FEDERAL MARITIME BOARD

No. 701

BERNHARD ULMANN CO., INC.

v.

PORTO RICAN EXPRESS COMPANY

Submitted November 23, 1951. Decided February 11, 1952

Respondent found to be a common carrier by water, within the meaning of section 1, as amended, of the Shipping Act, 1916, in its operations between New York and Puerto Rico, and directed to file with the Board its rates, charges, classifications, rules, and regulations in accordance with section 2 of the Intercoastal Shipping Act, 1933.

The limitation of liability clause in respondent's contract of carriage found to be unreasonable in certain respects. Respondent directed to redraft its contract of carriage in accordance with the findings herein.

Wilson E. Tipple and *Ross W. Strait* for complainant.

Frank L. Ippolito and *Jules Steinbrenner* for respondent.

Benjamin L. Tell for Albert Ullman Marine Office, Inc., *James M. Hughes* and *Alfred Ogden* for Manhattan Shirt Company and Loomerica, Inc., and *Ignatz Reiner* for I. Shalmon & Company, Inc., interveners.

REPORT OF THE BOARD

BY THE BOARD:

The complaint in this case, filed August 4, 1950, alleges that complainant is a shipper of goods by water between New York and Puerto Rico, and that respondent is a common carrier by water between the same points within the purview of the Shipping Act, 1916 (herein called the "Shipping Act") and the Intercoastal Shipping Act, 1933 (herein called the "Intercoastal Act"), and that it issues through bills of lading and furnishes motor vehicle pick-up and delivery service in New York City and Puerto Rico in connection therewith. Complainant charges that respondent has failed to file schedules of rates as required by the two Acts and that respondent's receipt or bill of lading contains limitation of liability provisions which are unjust, unreasonable,

and discriminatory in violation of sections 16, 17, and 18 of the Shipping Act. The complaint further alleges that even if respondent is not a "common carrier by water in interstate commerce" within the definitions of the Shipping Act, it is an "other person subject to this Act" within the definitions, and that the provisions of respondent's bill of lading or receipt are unreasonable, unjust, and discriminatory in violation of sections 16 and 17 of the Shipping Act. Respondent, in its answer, denies that it is a common carrier by water and denies that it is engaged in the transportation of merchandise across the ocean or that it has any common control, management, or arrangement for continuous carriage of goods with any ocean carrier. Respondent denies that it comes within the purview of the shipping acts.

The examiner has recommended that the complaint should be dismissed, finding (1) that respondent is not a "common carrier by water in interstate commerce" and is, therefore, not required to file its tariffs, rates, and charges under section 2 of the Intercoastal Act, and (2) that respondent is an "other person" as defined in section 1 of the Shipping Act, and (3) that the clauses in respondent's receipt or bill of lading are not unreasonable or otherwise in violation of the Shipping Act. Exceptions were filed to the examiner's recommended decision by complainant, but oral argument was not requested. We disagree with the examiner's conclusions.

The evidence shows that respondent is a New York corporation engaged since 1906 in the business of transporting goods for the general public for hire both ways between New York and Puerto Rico. Respondent also operates as a freight forwarder in the foreign trade, but the inquiry in this case is limited to respondent's New York-Puerto Rico service.

Respondent solicits and advertises its business both in New York and Puerto Rico offering "through store-door service" between New York and Puerto Rico and "rail and truck service through Puerto Rico." Respondent has offices in New York City and at several points in Puerto Rico. Respondent's witness testified that respondent had no affiliation with any ocean carrier. Respondent operates truck, pick-up, and delivery service in both New York and Puerto Rico. It uses regular ocean carriers between New York and Puerto Rico, but also uses the railroads in Puerto Rico. Respondent assumes complete responsibility for the safe transportation and delivery of goods entrusted to it from the time of receipt from the shipper until arrival at ultimate

destination. It does not deny that it is a common carrier so far as shippers are concerned, but denies, as above stated, that it is a "common carrier by water in interstate commence" as defined by section 1 of the Shipping Act so as to bring itself within the regulatory requirements of both Acts.

Shippers ordinarily telephone respondent's office in either New York or Puerto Rico for the pick-up. The shipment is called for by respondent's truck, accompanied by respondent's "wagon man" who examines the packages on the shipper's premises, inquires as to their value and whether the shipper wants insurance, and then fills in a set of shipping papers. The top sheet, signed by respondent's "wagon man," is delivered to the shipper and constitutes the contract of carriage. Some large shipments are carried directly from the shipper's premises to the pier of the ocean carrier, but generally shipments go to respondent's warehouse where they are unloaded, weighed, measured, and marked. At the warehouse the shipments are loaded into special containers furnished by the ocean carrier and thereafter delivery is made to the pier of the ocean carrier, which maintains weekly sailings to Puerto Rico. The ocean carrier issues to respondent an ocean bill of lading incorporating the Carriage of Goods by Sea Act upon which respondent appears as both consignor and consignee. Respondent pays the same ocean rate which the carrier charges to other shippers, and respondent testified that there was no understanding or agreement between respondent and the ocean carrier for through arrangement. Respondent's shipper has no contractual relations with the ocean carrier. Respondent's freight bill to the shipper shows total transportation charges, which include the ocean carrier's freight charges plus respondent's fee for pick-up and delivery and any insurance charges. Respondent's tariff of rates and charges are neither filed nor published but may be examined by interested shippers.

Upon the ocean carrier's arrival at discharging port respondent's employees take over the goods on the carrier's pier, and they are then delivered locally by truck, and in some cases in Puerto Rico forwarded to destination by railroad. Cargo forwarded by rail in Puerto Rico is loaded in cars and accompanied by respondent's own messengers who load, seal, and break the seal on the cars.

Respondent's receipt, which constitutes the contract of carriage with the shipper, shows the name of the shipper, the name and address of the consignee, a description and weight of the ship-

ment, and provides that the company undertakes to forward the goods to the nearest point to the named destination reached by it. The receipt is marked "non-negotiable," has the usual attributes of a non-negotiable bill of lading, and contains a number of terms and conditions and the following statement concerning value:

VALUE: Shipper accepts the limitation of value as set forth in Paragraph 1 hereof, unless a greater value is stated below.
Declared Value,
. . . . . Dollars.

Paragraph 1 of the terms and conditions which complainant charges to be unreasonable, unjust, and discriminatory reads as follows:

In consideration of the rate charged for carrying said property, which is dependent on the value thereof and is based upon an agreed valuation of not more than twenty-five cents per pound, nor more than fifty dollars, unless a greater value is declared at the time of shipment and is stated herein, the shipper agrees that the Company shall not be liable in any event for more than the value so stated nor for more than twenty-five cents per pound, nor more than fifty dollars, unless a greater value is stated herein. No oral declaration, nor statement of value for governmental or customs purposes, nor the presentation of invoices for use in foreign customs, collection of C.O.D. or other purposes, nor the declaration of value for insurance, nor instructions to the Company to insure shall be deemed a declaration of value or shall supplement or amend this contract or alter in any way the liability of the Company for the value as stated or as limited herein and on which the charge for transportation is based. The Company, if liable, shall be liable for any partial loss or damage only in the proportion that the amount of its maximum liability for total loss bears to the total value of the shipment.

If the shipper declares a value the amount is written on the receipt. If the declared value exceeds $50 and the shipper declines insurance respondent takes out insurance on the shipment for its own protection and charges the shipper 50 cents per $100 of declared value in addition to its transportation charges. If the shipper requests insurance the receipt is so marked and respondent obtains insurance for the benefit of the shipper. The rate for this insurance may be more or less than the 50 cents per $100 uninsured declared-value shipments, depending upon the insurance company's charge for the risk. It thus appears that respondent has one standard transportation rate for limited liability not over $50, as set forth in paragraph 1, quoted above, and this rate is based upon the size, weight, and destination of shipment. If a value higher than $50 is declared and the shipper does not request insurance a surcharge based on declared value

is paid; and if the shipper does request insurance a surcharge for the cost of the insurance is paid. Respondent testified that in case of loss it makes claim against the insurance company if insured and against the ocean carrier if uninsured for loss occurring during ocean transit, and that in other cases it settles claims in accordance with the limitation provisions of paragraph 1 quoted above.

We consider, first, whether respondent is a common carrier by water in interstate commerce so as to be subject to the requirement of filing and publishing its schedule of rates and charges pursuant to section 2 of the Intercoastal Act.

The following statutory definition appears in section 1 of the Shipping Act:

> 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 or between one State, Territory, District, or possession of the United States and any other * * * Territory, District, or possession of the United States, or between places in the same Territory, District, or possession.

Respondent's president admits that it is a common carrier, at least for part of its operation, in so far as its own trucks carry shipments from points of origin to the ocean carrier's pier or from pier to destination, but claims that it is not a common carrier "engaged in transportation by water" because it owns nothing that floats and carries nothing across the water. We believe that respondent's status as a "common carrier" does not depend on its ownership or control or means of transportation, but, rather, on the nature of its undertaking with the public which it serves. A time charterer of a vessel undertaking to carry for the public generally is held to be a common carrier although it does not own the carrying vessel. *Pendleton* v. *Benner Line,* 246 U. S. 353 (1918). Carriers contracting for space in railroad cars or on vessels are also common carriers. *Bank of Kentucky* v. *Adams Express Co.,* 93 U. S. 174 (1876); *Agreements 6210, etc.,* 2 U.S.M.C. 166 (1939).

In *Agreement No. 7620,* 2 U.S.M.C. 749 (1947), the Maritime Commission dealt with a contention that under section 1 of the Shipping Act the vessel itself was the common carrier. The Commission rejected this contention, saying:

> Such construction does not accord with the legislative history of the statute, which indicates that the person to be regulated is the common carrier at common law, namely, one who undertakes for hire to transport the goods of those who may choose to employ him.

The characteristics of a common law common carrier are given by Hutchinson on *Carriers*, 3d ed., vol. 1, sec. 48, as follows:

(1) He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods for persons generally as a business, and not as a casual occupation. (2) He must undertake to carry goods of the kind to which his business is confined. (3) He must undertake to carry by the methods by which his business is conducted and over his established road. (4) The transportation must be for hire. (5) An action must lie against him, if he refuses without sufficient reason to carry such goods for those who are willing to comply with his terms.

With respect to ownership and control over means of transportation the same author continues (sec. 83):

The law, regardless of forms or names, will look at the real transaction, and if the contract be in fact one for the transportation and delivery of the goods to a consignee, no matter through what agencies it is to be effected, the undertaking will be construed as that of a common carrier.

In section 84 the author quotes from *J. H. Cownie Glove Co.* v. *Merchants' Dispatch Transportation Co.*, 130 Iowa 327 (1906), as follows:

To constitute a common carrier, it is not essential that the person or corporation undertaking such service own the means of transportation. If the contract is that the goods will be carried and delivered, it makes the one so contracting a common carrier, regardless of the name or the ownership of the line or lines over which the service extends.

Respondent claims that since it has the status of a shipper in relation to the ocean carrier and accepts the ocean carrier's usual bill of lading it cannot be a common carrier by water. Respondent expressly claims the status of a "forwarder"[1] in paragraph 4 of the terms and conditions of its receipt or bill of lading, which provides:

4. The Express Company shall not be liable for any loss or damage except as FORWARDERS ONLY * * *.

But we deem that respondent's status depends upon the nature of the service offered to the public and not upon its own declara-

[1] Under our practise a forwarder is a dispatcher and is generally not a common carrier. As a dispatcher it is an "other person subject to this Act" within the definition of section 1 of the Shipping Act and is subject to regulation under General Order No. 72. It is to be noted, however, that in rail transportation two types of forwarders have long been recognized: (1) Those acting merely as shipper's agents to dispatch; and (2) those undertaking to transport to destination. The latter, like Porto Rican Express Company, consolidate and ship their customer's goods under standard railroad bills of lading, paying the published tariff and relinquishing control over shipments during the period of the railroad haul. These have always been held, so far as their customers are concerned, to be common carriers. *Krender* v. *Woolcott*, 1 Hilt. (N. Y.) 223; *Chicago etc. Railroad Co.* v. *Acme Fast Freight, Inc.*, 336 U. S. 465. In 1942, by Chap. 4 of the Interstate Commerce Act, rail forwarders of the common carrier type were subjected to regulation by the Interstate Commerce Commission.

tions. *Bank of Kentucky* v. *Adams Express Co., supra,* p. 180. Since it undertakes to transport from door to door it is a common carrier over the entire limits of its route, both the portion over land and the portion over sea. Express companies offering door to door service between points in continental United States and both Alaska and Hawaii have long been subject to regulation under the Shipping Act and the Intercoastal Act as common carriers by this Board and its predecessor. Unless respondent's transportation business from continental United States to Puerto Rico is substantially different from the express companies serving Alaska and Hawaii, it should likewise be subject to regulation.

It is suggested that because respondent has no control over the shipments made by it while in the custody of the ocean carrier and because respondent pays the regular published tariff, accepts the regular ocean bill of lading, and has no special contract or arrangement with the ocean carrier, respondent is not a common carrier by water. As already indicated in Note 1, the above elements exist in the case of rail forwarders undertaking to transport to destination, which have been held to be common carriers. As to this type of rail forwarder, the Supreme Court in 1949 said in *Chi., Milw., St. P. & Pac. R. Co.* v. *Acme Fast Freight Line, Inc.,* 336 U. S. 465, at page 485:

> If, on the other hand, the shipment had been entrusted to a forwarder of the second type — i.e., one who contracted to deliver the goods to the consignee at rates set by itself — the forwarder was subjected to common carrier liability for loss or damage whether it or an underlying carrier had been at fault. The fact that the forwarder did not own the carriers whose services it utilized was held to be immaterial. Its undertaking was to deliver the shipment safely at the destination. Common carrier liability was the penalty for failure of fulfilment of that undertaking.

Reference must be made to the earlier decision of the Maritime Commission in *Alaskan Rates,* 2 U.S.M.C. 558, made in 1941, relied on by the examiner, where International Ocean Express System, Inc., operating in the manner in which respondent operates in this case, complained of prejudice and discrimination on the ground that Alaska Steamship Company, the ocean carrier, refused to make an arrangement for reserved space on its vessels with International like the arrangement then in existence between the ocean carrier and Railway Express Agency, Inc. Our predecessors noted that "Railway Express' activities are conducted in a manner substantially similar to those of International," except that International accepted the ocean carriers usual bill of lading and paid the published ocean freight rate,

whereas Railway Express had an arrangement or contract with the ocean carrier providing for the equal division of the Express Company's gross freight revenue between the Express Company and the ocean carrier, the ocean carrier issuing no bill of lading or freight bill of its own. The Commission held Railway Express Agency to be a common carrier, apparently on the ground of the special contract that it had with the steamship company, saying "through its contract with Alaska Steamship it has the status of a common carrier by water operating on regular routes from port to port," but held International not a common carrier and not entitled to the same treatment accorded to Express Agency because it did not have a contract with the steamship company. The determination of whether such other company is or is not a common carrier should not depend upon whether it has or has not such a special arrangement.

Although the examiner's recommended decision followed the *Alaskan Rates* case, *supra*, we are unable to agree with the reasoning of the decision in that case, believing, as already indicated, that the common carrier status depends on the nature of what the carrier undertakes or holds itself out to undertake to the general public rather than on the nature of the arrangements which it may make for the performance of its undertaken duty. The latter is, of course, of no interest or concern to the carrier's customer public. It may be said in passing that the portion of the decision in the *Alaskan Rates* case to which we refer was only a minor incident in an extensive general investigation of water transportation between United States West coast ports and Alaska.

We next consider whether respondent's receipt or bill of lading contains provisions which are unjust, unreasonable, or discriminatory so as to be in violation of sections 16, 17, or 18 of the Shipping Act.

The requirement that the form and substance of receipts and bills of lading of common carriers by water in interstate commerce shall be just and reasonable is contained in part of section 18 of the Shipping Act, as follows:

> Sec. 18. That every common carrier by water in interstate commerce shall establish, observe, and enforce just and reasonable rates, fares, charges, classifications, and tariffs, and just and reasonable regulations and practices relating thereto and to the issuance, form, and substance of tickets, receipts, and bills of lading, the manner and method of presenting, marking, packing, and delivering property for transportation, the carrying of personal, sample, and excess baggage, the facilities for transportation, and all other matters

relating to or connected with the receiving, handling, transporting, storing, or delivering of property.

Complainant objects that the limitation of liability clause, already quoted, limiting respondent's liability to $50 for each shipment or 25 cents per pound, whichever is less, is unreasonable on several grounds. It claims that the $50 outside limit is unreasonable because the same dollar limit applies to small shipments as well as large shipments, but value limits in this type of clause need not vary with the size or shipment of the package. The Carriage of Goods by Sea Act, 46 U.S.C. 1304 (5), contains a limitation clause limiting liability to a fixed amount per package regardless of size.

Complainant next claims that the limitation clause is unreasonable because respondent offers no alternative rate for assuming full liability. It appears, however, that, except for the restrictive clauses criticized below, respondent does offer to assume liability for shipper's full declared value at a higher rate and for this reason the limitation of liability to a fixed sum coupled with the lower rate is not basically objectionable. *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U. S. 28 (1936); *Union Pacific Railroad Company* v. *Burke*, 255 U. S. 317 (1921). Complainant further objects to that part of the limitation clause limiting liability for partial loss or damage to the shipment to a pro rata share of its maximum liability under the limited liability provision. It is true that under the Carriage of Goods by Sea Act the authorities hold that any clause reducing the carrier's limit of liability in case of partial loss below the statutory figure of $500 per package is unlawful, *Pan-Am Trade & Credit Corporation et al.* v. *The Campfire et al.*, 156 F. 2d 603 (1946), but the same considerations do not apply here where the carrier is not subject to the provisions of that Act.

We feel, however, that the reduction of the carrier's limit of liability for the complete loss or destruction of a shipment below the figure of $50, as set forth in the clause, is complicated, confusing, and works out to a limit so low when applied to small weight shipments as to be entirely illusory, particularly where it is coupled with the further provision that the maximum liability may be further reduced in case of partial loss. This feature of the limitation clause should, therefore, be eliminated.

We believe the entire receipt should be redrafted in the light of this opinion and in conformity with law, and called a "bill of lading." Besides modifications already indicated, we point

out that the last sentence of Paragraph 4 providing "and the Company shall not be liable for any loss, damage or detention of said property or any part thereof from any cause whatever, unless in every case the same be proved to have occurred from the fraud or gross negligence of said Company or its servants" is at variance with current rules of common carrier liability and those relating to the burden of proof in suits against common carriers. Similarly, Paragraph 8, providing that articles of glass are carried at owner's risk, is at variance with such rules.

FINDINGS

We find:

1. That respondent is a common carrier by water in interstate commerce within the meaning of section 1 of the Shipping Act, 1916, as amended.

2. That respondent's present form of contract of carriage issued to shippers contains provisions which are unreasonable, in violation of section 18 of the Shipping Act, 1916, as amended.

3. Respondent's rates, charges, classifications, rules, and regulations shall be published and filed in accordance with section 2 of the Intercoastal Shipping Act, 1933, and respondent shall in all respects comply with section 18 of the Shipping Act, 1916, as amended.

4. That respondent's contract of carriage shall be designated a bill of lading and redrafted in accordance with the findings in this report.

An order will be entered directing respondent to comply with Findings Nos. 3 and 4 set forth above, within 60 days from the date of this report, and upon receipt of notice of respondent's compliance the proceeding will be discontinued.

By the Board.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

WASHINGTON, D. C., *February 11, 1952.*

FEDERAL MARITIME BOARD

No. 691

UNITED NATIONS ET AL.

v.

HELLENIC LINES LIMITED ET AL.

Submitted January 23, 1952. Decided February 25, 1952

Rate on cotton from New York to Trieste not shown to be in violation of the Shipping Act, 1916, as amended. Complaint dismissed.

Edward P. Troxell and *Meyer A. Greene* for complainants.

Elliot S. Bogart for Hellenic Lines Limited.

Herman Goldman, Elkan Turk, Elkan Turk, Jr., John Tilney Carpenter, Thomas W. Norton, and *Paul Bauman* for States Marine Corporation and States Marine Corporation of Delaware.

REPORT OF THE BOARD

BY THE BOARD:

On July 28, 1947, complainant United Nations Relief and Rehabilitation Administration (hereinafter designated as "UNRRA") shipped 4,696 bales of raw cotton on the SS. *Wolverine State,* owned by respondent States Marine Corporation of Delaware, for transportation from New York to Trieste. Freight charges were paid August 18, 1947. On August 12, 1949, complaint was filed herein alleging that the rate charged was unreasonably prejudicial in violation of section 16 of the Shipping Act, 1916, as amended (hereinafter called "the Act"), and unjustly discriminatory in violation of section 17 of the Act. The complaint filed in the name of UNRRA and the United Nations, its assignee, demanded the issuance of a cease and desist order and reparation in the amount of $8,730.49, with interest, being the amount of the alleged overcharge. At the hearing the complaint was dismissed against all respondents except the respondent vessel

[1] United Nations Relief and Rehabilitation Administration.

[2] States Marine Corporation and States Marine Corporation of Delaware.

owner named above. The examiner has recommended that the complaint be dismissed. Exceptions were filed by complainant and the case argued on January 23, 1952. Our report supports the examiner.

According to respondent's tariff, high compression cotton weighing 32 pounds or more to the cubic foot carried a rate of $1.75 per 100 pounds, and standard compression cotton weighing less than 32 pounds per cubic foot carried a rate of $2.25 per 100 pounds. There is no dispute that the shipment weighed 1,940,107 pounds. Complainant alleges the shipment measured 49,090.17 cubic feet and averaged 39.5 pounds to the cubic foot and took the high density rate. It says it was wrongfully charged the standard rate, less a reduction of 10 per cent allowed on shipments by UNRRA, whereas the high density rate should have been charged, less a corresponding 10 per cent.

Respondent replies that the shipment measured 62,785.52 cubic feet and averaged 30.9 pounds to the cubic foot and was properly charged the standard compression rate.

The issues are (1) whether the cotton weighed 32 pounds or more to the cubic foot at New York, and (2) if so, whether complainant was subjected to unreasonable prejudice or unjust discrimination within the meaning of sections 16 or 17 of the Act. The cotton originated in Brazil and had been transported from Santos to New York on the SS. *Mormacowl* of Moore-McCormack Lines, Inc. Moore-McCormack's freight bills showed the weight and measurement in kilos and cubic meters equivalent to 1,940,105 pounds in weight and 49,091.55 cubic feet in measurement.

Complainant relies on the weight and measurement computation as set forth in the Moore-McCormack bills of lading. It called Moore-McCormack's revenue auditor, who showed that under the tariff used by that company not less than 20 percent of the bill of lading quantity should have been measured for the purpose of determining density, but testified he did not know whether the company weighed or measured the shipment or that the weights and measurements in the bills of lading were accurate. The transportation specialist of the Department of Agriculture, appearing for complainant, testified that Brazilians customarily measure cotton on the side where the bands have not cut into the cotton or "over the bulge." He testified that Brazilian cotton is usually compressed to about 40 pounds to the cubic foot and generally weighs about 400 pounds to the bale,

but varies in measurement depending on the pressure used, and that there is some variance even if the bales are from the same press unless the same kind of cotton is used and the same pressure applied. He said that on a direct ocean voyage from Brazil to New York a bale of cotton would not expand more than a twentieth or a fiftieth of an inch between bands, but this witness had no personal knowledge of this particular shipment. He said it was customary for shippers to supply weights and measurements for the bills of lading. Moore-McCormack's bills of lading showed that the bales in this shipment varied in weight from 394 to 425 pounds, and in density from 36.5 to 40.6 pounds per cubic foot. A printed provision in Moore-McCormack's bills of lading stated that unless otherwise indicated the description and particulars of the packages are furnished by the shipper.

Respondent's bills of lading issued in New York showed the weight to be 1,940,107 pounds and the measurement to be 62,613 cubic feet, resulting in an average density of 30.9 pounds per cubic foot. Respondent called two cargo checkers who testified they had examined the cotton at the time it was loaded onto the SS. *Wolverine State* from lighters, and these checkers produced their dock tally sheets which showed that all bales measured 3′ x 10″ in length, 2′ x 1″ in width, and 1′ x 8″ in thickness, giving the total cubic feet shown on respondent's bill of lading. These witnesses testified that they measured approximately one out of each fifteen bales in the shipment, using calipers. Almost every bale was fluffed out from the top. The checkers were instructed to get the largest measurements, and they, therefore, measured over the fluffed out places. They said the bales were pretty consistent in size, one checker finding the first 20 or 30 bales to be identical, and the other finding the first 5 or 6 identical in size. Thereafter, both checkers found minor variations, some being ½″ larger, others being 1″ larger or 1″ smaller. One of the checkers said there might be a play of 1″ or 2″ in measurements, but they recorded what they said was an over-all average. Some of the bales had broken bands, and while these were measured, their measurements were not recorded on the tally sheets.

A vice president of States Marine Corporation testified that he was in Brazil in 1947 at about the time this shipment was made from that country, and he had observed the operation of cotton compressors and the transportation of cotton from press to ship in Brazil. He stated that he had considerable experience with the measurement of cotton loaded onto his company's ships in

Brazil; that the measurements furnished by the shippers do not reflect actual measurements; and that a spot check which he made of one shipment showed the shipper's measurements to be 12 per cent understated, and that this situation applied generally in Brazil. The witness, however, had no knowledge respecting the measurements of this particular shipment in Brazil.

Complainant contended that if the Brazilian measurements were taken and 12 percent added to offset the shipper's understatement of cubic as testified to by respondent's vice president, and if further allowances were made for expansions due to weather, stowage, transportation, and handling, including expansion of bales with broken bands, the difference would be insufficient to reduce the cotton density below 32 pounds per cubic foot. Complainant argued that the bales as shipped could not have had the uniformity of measurement shown by the tally sheets because the undisputed weight of the bales ranged from 394 to 425 pounds.

Respondent's counsel claims that after giving the shipper the benefit of all variations in evidence with respect to fractions of an inch or full inches in the New York measurements, the cotton would still have been of density less than 32 pounds per cubic foot, and that if the measurements of bales with broken bands had been included, the average density would have been even lower. Respondent argues with some force that complainant's evidence as to the measurements of the shipments is insubstantial and that it was not based on the testimony of witnesses having personal knowledge of measurements at point of shipment, but on the contrary was based on bill of lading statements of another carrier. Complainant tried to take depositions of an officer of the company which was supposed to have measured the cotton in Brazil. The officer wrote to the United States consul in Brazil that he lacked personal knowledge and, therefore, declined to testify. Certificates of measurement previously issued by his company and referred to in his letter to the Consul were not included in the evidence. The record lacks details of the time or place of any measurement of the shipment in Brazil and even the identity of the measurers. Respondent claims that such evidence as there is of measurement is not sufficient to sustain the burden of proof resting on complainant to prove its case, and in any event is not evidence of such substance as to be entitled to consideration in opposition to direct testimony of respondent's checkers who made actual measurements at New York, on the

basis of whose examination the density was found by respondent to be less than 32 pounds per cubic foot and the freight rate determined. We are inclined to agree with respondent that its testimony on the disputed issue of fact is of greater weight and relevance than is the testimony of complainant, but, for reasons indicated below, we do not find it necessary to decide the case on the disputed issue of fact.

The second issue raises a question of law. Respondent argues that even if the cotton measurement were such as to make the shipment "high density" cotton, and even though the rate charged was not the filed rate for high density cotton, still the complaint must be dismissed because no violation of the Act has been shown.

Of course, complainant's right to file proceedings before this Board depends entirely upon section 22 of the Act, which permits the filing of a complaint only if it sets forth "a violation of the Act." Complainant, as already indicated, specifies that two sections of the Act are violated: (a) That respondent's charging of a rate greater than the filed rate subjects complainant "to undue and unreasonable prejudice and disadvantage" under section 16, and (b) that the charging of such rate is "unlawfully discriminatory between shippers" or "unjustly prejudicial to exporters as compared with their foreign competitors" under section 17. Complainant also urges that the charging of a rate higher than the filed rate is a violation of the order of the Secretary of Commerce in Docket No. 128, *Section 19 Investigation, 1935*, 1 U.S.S.B. 470, at p. 500, issued on July 12, 1935, and still in effect, which requires every common carrier by water in foreign commerce to file with the Board schedules showing all rates and charges within thirty days from the date on which they become effective. Complainant argues that the mere making of a charge greater than the filed tariff constitutes prejudice, discrimination, and a violation of the Act. Complainant's counsel, in the course of argument before the Board, admitted that there was no evidence in the case of a shipper of cotton comparable with complainant's, who was in a competitive position with it. Counsel argued that a legal violation of the Act and regulation exists quite apart from any showing of competition. Complainant relies on the similarity between the Interstate Commerce Act, section 6 (7), and the Shipping Act, 1916, as amended, sections 16 and 17, and urges that complainant's position is supported by authorities interpreting the Interstate Commerce Act. Section 6 (7) of the Interstate Commerce Act provides:

nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such transportation of passengers or property * * * than the rates, fares, and charges which are specified in the tariff filed and in effect at the time.

Complainant calls attention to the general similarity between the Interstate Commerce Act and the Shipping Act, 1916, referred to by the Supreme Court in *U. S. Navigation Company* v. *Cunard Steamship Company,* 284 U. S. 474, and particularly to the case of *Prince Line* v. *American Paper Exports,* 45 Fed. (2d) 242 (S.D. N.Y. 1930), affirmed 55 Fed. (2d) 1053 (C.C.A. 2, 1932).

In view of the reliance placed by complainant on the *Prince Line* case, it must be carefully considered. There the Prince Line had twelve classifications for different grades of paper, each with its appropriate rate, though not all different. These rates were filed with the Shipping Board. The carrier, with the connivance of the shipper, transported paper at a rate lower than the filed rate, due to improper classification, and thereafter recanted and sued the shipper to recover the difference to make up the full rate as filed, relying on section 16 (2) of the Shipping Act, which provides:

That it shall be unlawful for any common carrier by water * * *

Second. To allow any person to obtain transportation for property at *less* than the regular rates or charges then established and enforced on the line of such carrier by means of false billing, false classification * * * or by any other unjust or unfair device or means. (Emphasis supplied.)

The rate charged by the carrier was *less* than the regular rate, and, therefore, an express violation of the quoted section of the Act. The defense was raised that the carrier, having agreed to the lower rate and to a violation of the statute, could not base a cause of action against the shipper on its own wrongdoing. The District Court ruled that no contract of the carrier with the shipper could reduce the amount legally payable, that no act or omission of the carrier could estop or preclude it from enforcing payment of the full amount by a person liable therefor, and that though the rule might work a hardship in some cases, it embodied the policy which has been adopted by Congress in the regulation of interstate commerce in order to prevent unjust discrimination. The District Court cited certain Supreme Court cases where interstate carriers had made recoveries for undercharges made contrary to the provisions of the Interstate Commerce Act, section 6 (7), and said, page 242:

Every consideration referred to by the Supreme Court in these cases applies with equal force and effect to the provision of the Shipping Act that it

shall be unlawful for any common carrier by water directly or indirectly to allow any person to obtain transportation for property at *less* than the regular rates * * *. (Emphasis supplied.)

Similarly the Circuit Court, considering the same argument that the carrier's violation of law prevented a recovery, said at page 1055:

Whether the line can take advantage of its own violation of the statute by recovering the amount of the preference is another matter. Prima facie it may not; volenti non fit injuria. But the situation is similar to that arising under the Interstate Commerce Act, section 6 (7) * * *.

The court continued, page 1056:

We think that a shipper in foreign trade is equally charged, and that he becomes liable for the rates as filed and approved if he obtains cheaper transportation by any means unfair to his competitors. The statute overrides all such contracts, and imposes a liability upon him which the carrier may, and indeed, must enforce. *Within its own ambit*, the same remedies attend a violation of the Shipping Act, as have been accorded under the Interstate Commerce Act. (Emphasis supplied.)

It will be noted that the Act, sections 16 and 17, does not make it unlawful for the carrier to charge a greater amount than the regular or published rates, although section 18, applying to common carriers by water in interstate commerce, expressly makes such action unlawful. We have frequently pointed out the difference in treatment accorded under sections 16 and 17 of the Act to common carriers by water in foreign commerce, and that accorded under section 18 to common carriers by water in interstate commerce. The *Prince Line* case shows that in certain respects and "within certain ambits" there is a similarity between the Interstate Commerce Act and the Shipping Act, but it is not authority for the proposition, as urged by complainant, that the charging of a greater than published rate is, in the absence of a showing of competition, a violation of section 16 or 17 of the Shipping Act. Nor is there any requirement in the order in Docket No. 128 requiring the filing of rates thirty days *after* their effective date which expands the statutory definition of what is unlawful.

As we pointed out in *Afghan-American Trading Company, Inc.* v. *Isbrandtsen Company, Inc.*, 3 F.M.B. 622, the Supreme Court in *U. S. Navigation Co.* v. *Cunard Steamship Co., supra*, recognized "that similarity of construction" of the Shipping Act and the Interstate Commerce Act could not apply where there was "dissimilarity in the terms" of the statutes.

In the *Afghan* case, a shipper filed complaint demanding reparation, claiming that it had been charged a rate of $19.50 per ton and should have been charged a rate of only $19 per ton, which was the tariff on file. In the *Afghan* case it was stipulated that no other shipper paid a lower rate than was charged to complainant, and we said for that reason that there was no showing of undue prejudice in violation of section 16 of the Act nor of unjust discrimination in violation of section 17 of the Act. In this case, as in the *Afghan* case, the record shows, and complainant's counsel concedes, that there is no evidence of a competitive shipper of cotton who received from respondent a different rate from that actually charged complainant. Under the circumstances, it must follow in this case, as in the *Afghan* case, that there has been no showing of any violation of the Act, and that, regardless of the actual measurement of the cotton, the complaint must be dismissed.

An order will be entered dismissing the complaint.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 27th day of March A. D. 1952

No. 691

UNITED NATIONS ET AL.

v.

HELLENIC LINES LIMITED ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the 25th day of February 1952, having made and entered of record a report stating its conclusions, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the complaint be, and it is hereby, dismissed.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 700

PENNSYLVANIA MOTOR TRUCK ASSOCIATION ET AL.[1]

v.

PHILADELPHIA PIERS, INC., ET AL.[2]

Submitted September 27, 1951. Decided February 25, 1952

Respondent railroad companies required to modify their tariff regulations so as to allow not less than 5 days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck.

Any storage charges on truck cargo brought to respondents' piers at Philadelphia for shipment by water carrier, when delivered to the piers in accordance with instructions from the water carrier, shall be charged against the water carrier and not against the shipper of such cargo, unless unforeseen causes beyond the control of the water carrier delay the loading of such cargo, and the water carrier notifies the shipper to remove such cargo or be responsible for further storage charges.

Robert H. Shertz for complainants.

Windsor F. Cousins for respondents.

George E. Miller for S. S. White Dental Manufacturing Company and *S. H. Moerman* for The Port of New York Authority, interveners.

REPORT OF THE BOARD

BY THE BOARD:

By complaint filed May 26, 1950, complainants allege that respondents, to the extent that they carry on the business of furnishing wharfage facilities in connection with common carriers by water, are "other persons" subject to the Shipping Act, 1916 (hereinafter referred to as "the Act"), as defined in section 1 thereof, and as such "other persons" respondents have (a) limited the free time applicable to all freight handled over their piers at Philadelphia moving by truck to 2 days while permitting

[1] Pennsylvania Motor Truck Association, Shanahan Trucking Co., Harry F. Atkinson, C. P. Speitel Co., Inc., Harry B. Neihaus, Carl C. Lenz, John Sheahan, Jr., and New York & Brunswick Express.

[2] Philadelphia Piers, Inc., Pennsylvania Railroad Company, The Reading Company, The Baltimore and Ohio Railroad Company.

5 days or more for freight moving by railroad, and (b) imposed charges for storage for such truck traffic in excess of the charges applicable to traffic moving by railroad; and that such practices have subjected truck freight to undue prejudice and disadvantage and constitute unjust and unreasonable regulations and practices in violation of sections 16 and 17 of the Act.

Complainants are Philadelphia truck operators and a truck association; original respondents were a pier company and three railroad companies. On May 31, 1950, the pier company changed its practices and the complaint as to it was dismissed. The remaining three respondents (hereinafter called "respondents") moved to dismiss the complaint for want of jurisdiction on the ground that they were not "other persons" subject to the Act. We found the rail respondents to be "other persons subject to the Act", as defined in section 1, because of their operation of pier facilities, and denied the motion. After hearing the examiner recommended, in substance, that the Board find (1) that respondents are enforcing unreasonable regulations relating to the receiving, handling, storing, or delivering of property in violation of section 17 of the Act; (2) that the collection from shippers of storage charges on outbound cargo is unreasonable; (3) that free time on inbound cargo should not be less than five days; (4) that any difference in free time for inbound or outbound cargo between motor carrier and railroad traffic is unreasonable; and (5) that respondents' free time and storage provisions were not otherwise shown to be unlawful.

Exceptions to the examiner's report were filed by respondents and the case was orally argued. The Port of New York Authority and S. S. White Dental Company intervened in support of the report. Our conclusions are in general agreement with the recommendations of the examiner.

Complainants haul goods to and from piers in Philadelphia, including respondents' piers. Of eighteen piers currently in use at Philadelphia, respondents operate thirteen. By tariffs and practices most recently revised in 1950, respondents restrict free time on inbound and outbound truck cargo to 2 days, whereas free time allowed to rail cargo using the piers is 5 to 7 days, except that cargo moving over the piers by rail to or from points within the Philadelphia port area is allowed 2 days. All other general merchandise piers in Philadelphia allow 5 days free time for both truck and rail cargo, whether inbound or outbound. In computing time, Saturdays, Sundays, and holidays are

excluded. Time on inbound cargo entering Philadelphia begins to run from 7 a. m. on the day following completion of discharge of all cargo by the vessel and continues until the cargo is removed from the pier, except that where the cargo owner gives instructions for further transportation by rail, time stops when such notice is given rather than when the cargo actually moves. Time on outbound cargo leaving Philadelphia by vessel begins when the shipment arrives at the pier and continues until the day when the vessel for which the cargo is destined begins loading.

After the lapse of the 2-day free time allowed to truck cargo and the longer time allowed rail cargo, a charge is made for storage. The storage charge made against truck cargo differs from that made against rail cargo, the truck cargo being charged 15 cents per cwt. for the first 15 days' storage while rail cargo is charged the same rate for the first 30 days. For additional periods of time the ratio likewise favors rail cargo.

Respondents' piers are, for the most part, old wooden structures of the finger type erected before the advent of large motor trucks and trailers. The piers were erected primarily for the interchange of cargo between vessels and railroad cars. Motor vehicles must be driven inside the pier sheds and load or unload freight on the floor of the piers. Some of the piers are double-decked, equipped with elevators or chutes. In some cases, although there are two lanes or driveways, crossbeams or columns prevent two vehicles from passing on the pier. Respondent railroads make a charge of 5 cents per cwt. for top wharfage on inbound and outbound truck cargo for the privilege of moving the freight over the piers. No top wharfage charge is made against rail cargo.

Normally the truck operators have no business relations with respondents' representatives on the pier. Respondents use the records kept by the water carriers as the bases for computing free time and storage charges, and there is some testimony that these records are not always accurate. Respondents usually bill the shippers or consignees for pier storage charges, but sometimes bill truck operators who pass the bills on to the cargo owners. The trucks are loaded and unloaded on the piers by truck employees who usually supply their own fork-lift equipment. On the other hand, rail cars are loaded and unloaded by respondents' employees or contractors. The piers are kept open by the railroad seven days a week, but since the motor carriers must deliver to

and receive from the water carrier's employees on the piers, the trucks can only do business while the vessel's agents are present, which is from 8 a. m. to 12 noon and from 1 p. m. to 4:45 p. m. on working days, excluding Saturdays, Sundays, and holidays.

Import cargo.—Testimony of complainants' witnesses was directed mainly to the free time and storage practices applicable to import cargo. They describe the procedures and difficulties incident to removing such cargo from the piers within the 2-day free time period. First, the truck operators receive a notice from the consignee several days before the vessel's arrival. The trucker contacts the water carrier to ascertain at what pier the vessel will discharge and when the discharge is completed so that cargo is removable. The trucker must obtain a pick-up order and delivery permit from the consignee's customs broker to obtain delivery at the pier. Each shipment must pass the customs inspectors on the pier and may be removed only when all charges are paid. Truck owners testified that permits are rarely available until the day after the vessel is completely discharged, which is the last of the two days of free time allowed, making it necessary in that event for all truck cargo to be sent for, cleared, and removed from the pier on that day if storage charges are to be avoided. Truck witnesses testified that delays and confusion result at respondents' piers due to the 48-hour free time limit in that various truck operators are required to send their equipment to the pier at the same time, causing serious congestion on the pier, and on the approaching streets while waiting to get to the pier. There is evidence that it is not unusual for trucks to wait two or three hours in traffic before getting onto respondents' piers. The water carriers, during periods of congestion, prohibit more than one truck for the same consignee on the pier at the same time. Sometimes trucks must move away from piles of freight they are servicing on the piers to accommodate railroad car loaders who have a preference. If such movement does not cause a stoppage of truck loading it delays it due to longer hand movement from the pile to the truck. Where cargo is discharged from vessel onto the second deck of a pier the truck must wait its turn to use the chute. Even when trucks are loaded and ready to go they may not be able to move off the pier because of pier congestion or blocking by other equipment. Sometimes commodities such as coffee in bags consigned to different receivers is mixed on the piers, and time is lost making separation according to different receivers. Complainants' estimates vary as to

the amount of inbound truck cargo that can be cleared from the piers within the 2-day free time, depending on the nature and volume of shipments. They indicate that small amounts of cargo up to 25,000 pounds not involved in customs delays can usually be removed on the same day that the pick-up order is received. As to some other types and quantities, the estimates indicate that only 40 percent can be moved in 2 days, and in the case of large lots of wool sometimes only 10 percent can be handled in that time.

There appears to be no difference in the handling of domestic inbound cargo from foreign inbound cargo, except that delays due to customs regulations or brokers are not involved.

Complainants offered evidence of a number of Philadelphia wool importers who frequently receive shipments from 100,000 to 500,000 pounds at a time. It is apparently impracticable at Philadelphia to remove the wool from the piers prior to inspection by customs and other Government officials. Wool must be examined, weighed, sampled, and otherwise checked by representatives of the Bureau of Customs and the Bureau of Animal Industry. A customs house broker testified that the Government processing alone requires usually from three to four days. Meat products, plants, straw, seeds, drugs, and foodstuffs also require special inspection by official agencies other than customs, although these articles do not arrive at Philadelphia in the same quantity as wool. Some of the wool importers have railroad sidings at their plants, but for the most part use trucks and not the railroads for transportation from piers to plants or warehouses. Some of the Philadelphia importers resell wool to New England customers and are considering the likelihood of seeking other ports of entry if the present two-day free time rule continues in Philadelphia.

Export cargo.—Shippers are notified by water carriers when cargo may be sent to the piers for export, and truck operators must make deliveries in accordance with such instructions to secure dock receipts from the water carriers' clerks on the pier. The truckers experience the same congestion difficulties and delays in delivering cargo to the pier within the 2-day period before ship's arrival as are experienced with inbound cargo.

Intervener S. S. White Dental Manufacturing Company, appearing in support of the complaint, manufactures at Philadelphia and Staten Island and exports from both Philadelphia and New York, depending on which affords the lowest over-all

transportation charges. It employs motor trucks from its plants to the piers, since it has no railroad facilities, and in 1950 shipped some 500 tons from Philadelphia. These shipments sometimes pass over respondents' piers where 2 days' free time is allowed, and sometimes over other Philadelphia piers where 5 days' free time is allowed, depending on what pier is selected by the ocean carrier. Ocean carriers do not always use the same Philadelphia piers. This intervener objects to being charged for storage by respondents, particularly since it is not notified of the charge until as long as two months after the charges accrue and is not then told of any reason for delay on the pier. This intervener sells its product for export f.o.b. plant, and collects its selling price, including all known shipping charges, by letter of credit draft against the buyer, with shipping documents attached. This draft is computed and negotiated as soon as the carrying vessel sails. Pier storage charges reaching intervener 2 months later are, therefore, not collectible from the buyer, and, so far, the intervener has declined to pay such charges to respondents.

Respondents claim that the delays to truck cargo on the piers are over-estimated, claiming some wool merchants are able to get from 50 percent to 60 percent of their consignments off the piers within two days, and that records indicate that 60 percent of truck freight is removed from the B. & O. piers, 66 percent from the Pennsylvania piers, and 80 percent from the Reading piers in the two days' free time allowed. Respondents' showing in this regard makes it clear that a substantial part of the truck cargo is regularly unable to be removed within the time allowed. Respondents' piers handle a very substantial amount of truck cargo, the ratio moving over Pennsylvania Railroad piers averaging about five tons of rail cargo to four tons of truck cargo. Respondents point out that 2 days' free time is customarily allowed for truck cargo moving over piers at Baltimore and conversely complainants point out that five days' free time is allowed in New York and Boston. In the absence of any showing that the conditions at the piers in Baltimore, New York, or Boston are substantially similar to the situation at the piers in Philadelphia, this evidence is of little weight either on the issue of discrimination or unreasonableness.

As already stated, respondents moved to dismiss the complaint on the ground that respondents are not "other persons subject to the Act", and this motion was dismissed by our prior order. The following authorities sustain that action. *Port of Philadel-*

phia Ocean Traffic Bureau v. *The Philadelphia Piers, Inc., et al.*, 1 U.S.M.C. 701 (1938); *California* v. *United States*, 320 U.S. 577 (1944).

Respondents, without waiving the jurisdictional point, take the position that they have no legal obligation to accord any free time on non-rail cargo passing over their piers. They say that the obligation to accord free time is incident to the ocean carrier's duty to deliver cargo and that respondents have no such duty with respect to truck freight which they do not handle. They argue that since they have no obligation at all, their present two-day rule is a voluntary concession and cannot be the basis of valid complaint by truck operators.

It is true the primary responsibility of furnishing reasonable free time to deliver outbound cargo on the pier and remove inbound cargo from the pier rests on the ocean carrier as part of its carrier responsibility. *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89, at page 101 (1948). Nevertheless, for many years, respondents have permitted motor trucks to use their piers and in 1937 instituted a top wharfage charge of 2½ cents per cwt. (now increased to 5 cents per cwt.). This was a toll for the privilege of moving (non-rail) freight over the piers; the charge was upheld as not unreasonable or discriminatory by the Maritime Commission in *Port of Philadelphia Ocean Traffic Bureau* v. *The Philadelphia Piers, Inc., et al., supra.* Respondents have moreover solicited vessels to load and discharge freight at their piers in anticipation of movement of such freight by rail. A witness for the respondents testified that few vessels would use their piers unless they were furnished facilities for truck as well as rail shipment. Thus, it is obvious that respondents are engaged in the furnishing of pier facilities without restriction as to their use. Ocean carriers have arranged with respondents for the use of railroad piers for the discharge and intake of vessel cargo and for a place where shippers and consignees can expect to receive the necessary free time for pick-up and delivery. Respondents, as pier owners, are at liberty to restrict the use of their piers to rail cargo and deny it entirely to truck cargo, but they have not done so and have permitted the use of their piers for truck cargo. In so doing they must furnish the full reasonable use of their pier facilities or not permit their use at all. If respondents permit the use of their piers to the vessel owners for the receipt and delivery of truck cargo, they thereby assume responsibility to carry out the ocean carrier's full duty

toward truck cargo. This includes furnishing non-discriminatory and reasonable pier service, and service which is in no other respect in violation of the Act.

The examiner made no recommendation for a finding of unjust discrimination on account of the difference in free time allowed to rail cargo and truck cargo, and on this record we agree that a case of unjust discrimination is not made out. Complainant truck operators service only customers in the Philadelphia area, and rail cargo to and from this area like truck cargo under present tariffs is allowed 2 days' free time. Rail cargo entitled to more than two days' free time is solely that shipped away from Philadelphia, and this is not competitive with the local truck cargo which complainants carry, and which is the only truck cargo mentioned in these proceedings.

The examiner, however, did find that the 2-day free time limit on truck cargo constituted an unjust or unreasonable regulation and practice, both as to inbound freight cargo and outbound freight cargo. We agree that quite apart from delays caused by customs and other governmental inspectors, the 2-day period now allowed for the ingress pick-up, and egress of such number of trucks as are necessary to pick up or deliver the very substantial amounts of truck cargo passing over respondents' piers is, in view of the pier construction, the congestion, and the other conditions referred to, too short a time to be reasonable and proper under the circumstances. We believe the record indicates that a reasonable free time allowance on respondents' piers for all inbound and outbound truck cargo should be not less than five days as allowed for line-haul rail cargo—and this is on the assumption that the calculation of time be continued in the manner now in force. Furthermore, if truck cargo is delivered on respondents' piers for vessel shipment in compliance with instructions from water carriers, and the vessel does not arrive at the pier to start loading within the allotted free time, any storage charges which respondents may impose in such cases should be for the account of the vessel owner and not for the account of the truck-cargo owner. It is not reasonable for respondents to look to the owner of truck cargo for storage charges incurred after he has lost all control over the shipment. It cannot be said that he is in any way responsible for the delay causing such charges, which would appear to result either from delay in the vessel's arrival, or from the vessel owner's miscalculation in ordering the cargo onto the pier too soon.

The remaining issue in the case is whether the storage charges assessed against truck cargo are unduly prejudicial or amount to an unreasonable regulation or practice. It is true that the storage charges made by respondents against truck and rail cargo are not identical, but neither are respondents' charges identical with respect to the imposition of top wharfage charges. There is nothing in the record to sustain a charge that the storage charges collected by respondents cast an undue burden upon the freight moving by truck so as to be an unjust or unreasonable regulation or practice within the meaning of section 17 of the Act. Furthermore, the different storage rate does not necessarily constitute undue prejudice against truck cargo, in the absence of a showing of some injurious effect on traffic prejudiced and advantage to the traffic preferred. No such showing is made on this record.

The examiner in his report points out that, in the course of the hearing, certain agreements were brought to his attention which were such as might require approval under section 15 of the Act, although not in fact so approved. These agreements are now a matter of special study and will be dealt with at a later time.

CONCLUSIONS

We conclude:

1. That respondent railroad companies should modify their tariff regulations so as to allow not less than five days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck;

2. That any storage charges on truck cargo brought to respondents' piers at Philadelphia for shipment by water carrier, when delivered to the piers in accordance with instructions from the water carrier, should be charged against the water carrier and not against the shipper of such cargo, unless unforeseen causes beyond the control of the water carrier delay the loading of such cargo, and the water carrier notifies the shipper to remove such cargo or be responsible for further storage charges; and

3. That on this record respondents' tariff provisions relating to free time and storage on cargo shipped over respondents' Philadelphia piers have not been shown to be otherwise unlawful.

An order requiring respondents to promulgate and file with the Board new tariffs not inconsistent with this report will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 25th day of February A. D. 1952

No. 700

PENNSYLVANIA MOTOR TRUCK ASSOCIATION ET AL.

v.

PHILADELPHIA PIERS, INC., ET AL.

This case being at issue upon complaint and answer on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondents Pennsylvania Railroad Company, The Reading Company, and The Baltimore & Ohio Railroad Company be, and they are hereby, notified and required to promulgate and file with the Board within 60 days from the date hereof tariffs modifying their tariff regulations now in force so as to allow not less than 5 days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck; and

It is further ordered, That any storage charges on truck cargo brought to respondents' piers at Philadelphia for shipment by water carrier, when delivered to the piers in accordance with instructions from the water carrier, shall be charged against the water carrier and not against the shipper of such cargo, unless unforeseen causes beyond the control of the water carrier delay the loading of such cargo, and the water carrier notifies the shipper to remove such cargo or be responsible for further storage charges.

By the Board.

(Sgd.) A. J. WILLIAMS,
Secretary.

FEDERAL MARITIME BOARD

No. 699

HECHT, LEVIS & KAHN, INC., AND NEW ENGLAND TRADING CORPORATION

v.

ISBRANDTSEN COMPANY, INC.

Submitted November 8, 1950. Decided November 15, 1950

Motion to dismiss the complaint for failure to state a cause of action within the Board's jurisdiction denied because the complaint alleges facts which might amount to a violation of specified sections of the Shipping Act, 1916. Matter referred to an examiner for hearing and recommendations.

Harold B. Finn for complainants.
John R. Mahoney for respondent.

REPORT OF THE BOARD ON JURISDICTION

BY THE BOARD:

This case came on for hearing before the Board on respondent's motion to dismiss the complaint for failure to state a cause of action within the jurisdiction of the Board. The complaint, filed May 25, 1950, claimed violation of sections 14 (4), 16 (1), and 17 of the Shipping Act, 1916, and prayed for reparation. The complaint alleged that complainant, Hecht, Levis & Kahn, Inc., of New York, entered into a booking agreement with Isbrandtsen Company, Inc., for the carriage of 1,600 tons of jute from Chittagong to New York. It alleged that on arrival of the vessel at the loading port there was a substantial delay in providing the cargo, and even then only about 1,200 tons were lifted instead of 1,600 tons as agreed. The vessel owner declined to give clean bills of lading, but instead noted the extent of the vessel's delay at the loading berth. On the vessel's arrival at New York its owner, claiming to exercise "its time honored carrier's lien," declined to deliver the shipment to the consignees unless they paid $16,898 dead freight on the cargo booked but not carried and $12,990.67 for damages due to the vessel's detention at load-

ing berth. Eventually the consignees, in order to obtain the cargo, paid the full amount of dead freight and part of the detention damages, or a total of $23,357.34. The exaction of this sum by the carrier from the consignees is alleged to be in violation of the Act and to cause damages to complainants in that amount.

In considering a motion to dismiss a complaint the Board is necessarily limited to the facts set up in the complaint and cannot consider matters of defense raised in respondent's answer attached to the motion to dismiss.

Respondent urges as a ground for dismissal that many of the events giving rise to the action occurred outside the United States. We do not deem this a valid objection since the gist of the complaint hinges upon an alleged withholding of delivery of cargo in New York pending the payment of charges alleged to be unreasonable. Respondent's chief ground for urging dismissal of the complaint is that the cause of action is one between shipper and carrier and as such is determinable by the courts but not by this Board. If this were a case in which the common carrier were given an express contract lien for dead freight or detention damages, its justification for enforcing such lien would have more weight. This case does not involve a charter party or other agreement giving any such lien, and the booking contract between the parties is entirely silent on that point. Respondent's intimation that it was doing in this case only what it had a right to do, and, presumably, would do in other similar cases, leads to the belief that what was done here was a usual practice. It appears, therefore, that the complaint alleges facts which might amount (1) to unfair treatment of a shipper, who in this case was also a consignee, in the matter of the adjustment and settlement of claims, in violation of section 14 (4), and (2) to the establishment of an unreasonable practice relating to the receiving, handling, storing, or delivering of property, in violation of section 17 of the Act. It is not necessary to decide whether a violation of section 16 (1) is alleged.

For the reasons given, the motion to dismiss is denied, and the matter is referred to an examiner for the taking of testimony and for recommendations as to further action by the Board.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 15th day of November A.D. 1950

No. 699

HECHT, LEVIS & KAHN, INC., AND NEW ENGLAND TRADING CORPORATION

v.

ISBRANDTSEN COMPANY, INC.

Respondent having filed a motion to dismiss the complaint herein on the ground that the complaint failed to state a cause of action within the jurisdiction of the Board, and the motion having come on for oral argument before the Board, and the parties having filed briefs in the matter, and the Board, on the date hereof, having made and entered of record a preliminary report containing its conclusions and decision as respects jurisdiction in the matter, which report is hereby referred to and made a part hereof;

It is ordered, That respondent's motion to dismiss the complaint be, and it is hereby, denied; and

It is further ordered, That the matter be, and it is hereby, referred to an examiner for hearing and recommendations.

By the Board.

[SEAL] (Sgd.) A. J. WILLIAMS,
Secretary.

3 F. M. B.

DECISIONS OF THE

U.S. MARITIME COMMISSION, FEDERAL MARITIME BOARD, AND MARITIME ADMINISTRATION DEPARTMENT OF COMMERCE

TABLE OF COMMODITIES

Cigarettes. From and to points in Alaska. 229.

Cigars. From and to points in Alaska. 229.

Cocculus. North Atlantic ports to Greece, Egypt, Turkey. 187.

Cocculus, in Bags. New York, N.Y., to Piraeus, Greece. 53.

Cotton. New York to Trieste. 781.

DDT. North Atlantic to Athens, Greece. 232.

Fish, Frozen. Alaska to Seattle, Wash. 632.

Fruit, Fresh. New York, N.Y., to Rio de Janeiro. 248.

Groceries. From and to points in Alaska. 229.

Jute. Chittagong to New York. 798.

Lanolin. New York, N.Y., to Piraeus, Greece and Istanbul. 53.

Lanolin. North Atlantic ports to Greece, Egypt, Turkey. 187.

Lumber. Demurrage provisions—California to Balboa, Canal Zone. 254.

Oil company equipment. Atlantic and Gulf ports and Curacao, Aruba, Bonaire, Netherlands West Indies and Venezuela. 227.

Quartz crystal. Rio de Janeiro to New York, N.Y. 79.

Refrigerated cargo. Chile to New York, N.Y. 608.

Road building equipment. Okinawa and Guam to Los Angeles and San Francisco, Calif. 183.

Salmon. Bethel, Alaska, to Seattle, Wash. 583.

Snuff. From and to points in Alaska. 229.

Sugar. New York, N.Y., to Karachi, Pakistan. 622.

Woodpulp. Loading into rail cars at San Francisco. 128.

INDEX DIGEST

[Numbers in parentheses following citations indicate pages on which the particular subjects are considered]

ABSORPTIONS. See also Insurance; Port Equalization.

Failure to limit the amount of equalization which may be absorbed by a carrier does not render equalization rules and regulations unlawful, in the absence of any indication that the amount absorbed has been such as to place an undue burden on other traffic not subject to absorptions, or that the rule has been applied in a discriminatory manner with respect to different shippers. Seatrain Lines, Inc. *v.* Gulf and South Atlantic Havana Steamship Conference, 122 (125).

The practice of conference members absorbing out of their freight revenues the excess cargo insurance premiums charged by underwriters for the insurance of cargoes transported in vessels which have been placed on the underwriters' penalty list because of age, nationality or other reason or because cargoes have been stowed on deck for the vessel's convenience, did not result in any unfair or unjust discrimination against ports, carriers or shippers, did not operate to the detriment of the commerce of the United States, and did not violate any of the provisions of the Shipping Act, 1916. Absorption of Insurance Premiums, 201 (209).

Optional provisions in a conference agreement covering the adoption of practices as to absorption of excess cargo insurance premiums constitute an authorization that the conference may adopt such practices when conditions so warrant; such provisions do not permit member lines individually to exercise any option with respect to the use of such practices, nor do they permit a conference to place such practices into effect indiscriminately; such provisions are not violative of the Shipping Act, 1916. Id. (209, 210).

Provisions of conference members' tariffs relative to absorption of excess insurance premiums must set forth the procedure for making such absorption, including the character of proof to be required of the shipper before absorption will be made; conference members' tariffs may not contain language indicative of an option in the absorption of excess premiums. Id. (210).

Provision of conference agreement that "member lines may, when necessary, equalize actual insurance differentials on cargo caused by flag, over-age or undersize disability, and when large or bulky pieces, ordinarily susceptible to under deck storage, are stowed on deck for the convenience of the carrier," is approved. Id. (210).

ADVERTISEMENTS. See Common Carriers.

ADMISSION TO CONFERENCES. See Agreements under section 15.

AGREEMENTS UNDER SECTION 15. See also Absorptions; Brokerage; Contract Rates; Discrimination; Forwarders and Forwarding; Jurisdiction; Pooling Agreements; Preference and Prejudice; Tariffs.

—In general

Letter sent by applicant for conference membership to member of conference, in which letter applicant agreed not to serve certain ports within the conference range, was not an agreement contemplated by section 15 of the Shipping Act, 1916, but merely a confirmation of an original and continuing intention not to serve certain ports. East Asiatic Co., Ltd. *v.* Swedish American Line, 1 (2).

Conference decisions that proper rate was charged for transportation of lanolin and cocculus did not come within scope of order in section 19 Investigation, 1935, 1 U.S.S.B.B. 470, requiring filing of certain decisions. Himala International *v.* Fern Line, 53 (56).

—Conference Membership

Where a conference agreement contains no provision limiting member lines to any specific port or ports, the conference cannot either limit the service of its members to certain ports or insist upon its members serving all ports within the conference range. Therefore, even if a conference knew of a letter from a carrier seeking admittance to the conference, to a conference member, agreeing not to service certain ports, there would be no legal justification, in the absence of other factors, for the conference refusing to admit applicant. East Asiatic Co., Ltd. *v.* Swedish American Line, 1 (2).

Applicant for conference membership is not required to produce a contract of sale of a subsidiary to a conference member, for the purpose of determining whether there was any provision restricting the seller from thereafter operating on a trade route which the conference agreement involved covered, since any possible violation of the contract made about 1930 was a matter of concern solely to the buyer and not to the conference itself, and the buyer had never opposed the seller's bid for membership. Id. (3).

Applicant for conference membership has presented reasonable evidence of its intention and ability to engage in a regular service as required by the conference agreement where its vessels are sufficient for all of its services and additional vessels will be chartered if justified by increased traffic; it has an experienced staff and has leased a pier; its assets total $50 million; it has made four sailings and more are scheduled; the fact that it did not solicit cargo for a certain period was because it considered it to be improper to solicit cargo until it was admitted to the conference; it had begun negotiations with one of the conference members with a view toward having the latter withdraw its objection to complainant's admission to the conference and advertising in trade papers and journals had begun when the negotiations were unsuccessful; it had become a member of two conferences and had agreed to maintain regular service between the ports in question and had moved its principal office to one of the ports. Id. (4, 5).

Absence of contract rates in a trade does not justify refusal to admit an applicant to membership in a conference since it is generally known that shippers ordinarily will not patronize nonconference lines because they desire stability in the trade, and applicant believes, therefore, that membership would increase its business. Thus applicant is being subjected to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Shipping Act of 1916 by conference's refusal to admit it to membership. Id. (5).

Adequacy of existing service is not sufficient reason to justify refusal of admission to a conference, as otherwise existing lines could perpetuate a monopoly by continuing to maintain adequate service. Further, as applicant's operations are already established, admission to the conference will not increase the vessel tonnage in the trade. Id. (5).

Respondents allowed 30 days within which to admit complainant to full and equal membership in conference, failing which consideration will be given to issuance of order disapproving agreement. Id (6).

Modification of conference agreement limiting admission to membership to those regularly engaged as common carriers in the trade covered by the agreement, so that those giving substantial and reliable evidence of intention of operating regularly in the trade may qualify for membership, eliminated that issue. Pacific Coast European Conference Agreement (Agreement Nos. 5200 and 5200-2), 11 (12).

Proposal to increase new member admission fee in conference from $250 to $5,000 was disapproved in the absence of any showing of necessity therefor as undue and unjust discrimination, and as a detriment to the commerce of the United States. Id. (14).

—Conference voting rules

Where an article of a conference agreement requires the conference to advise the Commission of the record vote where application for membership is denied, with a full statment of the reasons therefor, and this was not done and the secretary of the conference admitted that it is never done, there is a clear violation of the agreement and the conference will be expected to conform to the terms of the agreement in the future. East Asiatic Co., Ltd., *v.* Swedish American Line, 1 (6).

The lawfulness of conference voting rules, whether requiring unanimous, two-thirds, three-fourths, or majority approval must be determined on the basis of evidence introduced at a hearing as to their use in practice, and not on the basis of organizational procedure. Unanimous vote rule not shown to be unlawful. Pacific Coast European Conference Agreement (Agreement Nos. 5200 and 5200-2), 11 (19, 20).

—Rates

While the Board must approve *agreements* between common carriers and between "other persons subject to the Act" under section 15, there is no reason why rates established under such agreements may not become effective when filed without the prior approval of the Board. Carloading at Southern California Ports, 261 (266).

AGREEMENTS WITH SHIPPERS. See Contract Rates.

ANTITRUST LAWS. See Agreements under Section 15; Contract Rates; Monopoly; Pooling Agreements.

BERTHAGE.

Berthage may properly be charged irrespective of whether a vessel is loading or discharging cargo. Terminal Rate Increases—Puget Sound Ports, 21 (25).

To include "berthage" with other services "incidental to receiving and delivering of freight" adds to the general confusion in the use of terminal definitions. Berthage should be established as a separate item since it is purely a use charge for space occupied by the vessel and has no relation to a "service" as such. Id. (25).

BILLS OF LADING. See also Charters; Common Carriers; Free Time; Jurisdiction.

A bill of lading is both a receipt and a contract, and under certain circumstances it is also documentary evidence of title to the goods. Bills of Lading—Incorporation of Freight Charges, 111 (114).

Freight charges, when placed on a bill of lading, are not part of the receipt for the goods but are part of the contract of transportation. Id. (114).

Commission is without jurisdiction to promulgate rule in export trade requiring common carriers to incorporate in bills of lading their freight and other charges. Id. (115).

A limitation of liability clause in a receipt or bill of lading applying the same dollar limit to small shipments as to large shipments is not unreasonable under section 18 of the Shipping Act, 1916. The Carriage of Goods by Sea Act, 46 U.S.C. § 1304(5), contains a limitation clause limiting liability to a fixed amount per package regardless of size. Bernhard Ulmann Co., Inc. *v.* Porto Rican Express Co., 771 (779).

A limitation of liability clause in a receipt or bill of lading offering to assume liability for shipper's full declared value at a higher rate with a lower rate to apply to liability for a fixed sum is not basically objectionable under section 18 of the Shipping Act, 1916. Id. (779).

BLAND FORWARDING ACT. See Brokerage.

BOOKING. See also Discrimination.

The question of whether the mere description of a person as booking agent for a vessel is determinative of his status as a person not subject to the provisions of the Shipping Act, 1916, is not easily resolved. In the past the Commission has held persons describing themselves as agents to be carriers or other persons subject to the Act. The mere designation of a person as agent would not conclusively determine his status if in the record it appeared that in his actual course of business he assumed the responsibilities and performed the duties of the carrier or of the person subject to the Act. Waterman *v.* Stockholms Rederiaktiebolag, 131 (132).

BROKERAGE. See also Forwarders and Forwarding; Detriment to Commerce.

Brokerage paid to a shipper on his own shipments constitutes a rebate in violation of section 16 of the Shipping Act, notwithstanding that the shipper may also be a forwarder and may purport to receive brokerage in the latter capacity. Similarly, a forwarder who has any beneficial interest in a shipment and accepts brokerage thereon, is guilty of accepting a rebate in violation of section 16. Port of New York Freight Forwarder Investigation, 157 (164).

Contention that ban on payment of brokerage results in discriminations in violation of sections 15 and 17 is not supported by the evidence. Payment of brokerage by the carrier is not payment to a shipper nor does the shipper in any way benefit from the payment. The Act does not mention forwarders or brokers as a group to be protected from undue or unjust discrimination. Mere fact that carrier may pay brokerage to forwarder in connection with transportation of commodity from Atlantic coast to Far East and not pay either another or same forwarder brokerage in connection with transportation of a like commodity from Pacific coast to the same destination is not unlawful discrimination under the Act. Agreements and Practices Re Brokerage, 170 (175).

Conference agreement provisions prohibiting the payment of brokerage to forwarders by water carriers engaged in foreign commerce are not inconsistent with the Bland Forwarding Act (56 Stat. 171) since that Act is a recognition of the value of the forwarding industry, and no mention is made in it of agree-

ments and practices for the payment of brokerage so that things done by carriers can hardly be construed as within the purview of the Act. Accordingly, the Commission modified the grounds of its disapproval of the agreement in Agreement No. 7790, 2 USMC 775. Id. (176).

Motions to dismiss an investigation of conference agreements and practices regarding brokerage payments, for lack of jurisdiction by the Commission, will be dismissed since such agreements are subject to review to determine whether their provisions result in detriment to the commerce of the United States, in any discriminations enumerated in section 15 of the Shipping Act, or in violations of the Act, and since, contrary to the contentions made in the motions, such payments are for services performed for carriers and the Commission is not undertaking to pass upon the reasonableness of any payment nor to establish any definite level of payment. Id. (176, 177).

Brokerage payments to forwarders may be made or not by individual carriers by water in foreign commerce as managerial discretion dictates, nor is there any limitation as to the amount that may be paid provided payments do not result in violations of applicable statutes; moreover, carriers acting under conference agreements may establish reasonable rules which will prevent payment of brokerage under circumstances which would violate the Shipping Act, and may place limitations upon the amounts which may be paid, provided that any limitation below 1¼ percent of the freight involved, which is the amount generally paid in various trades over the years, may not be imposed since it would circumvent the Commission's finding that concerted prohibition against brokerage results in detriment to the commerce of the United States. Id. (177).

BROKERS. See Brokerage.

BURDEN OF PROOF. See also Charter of War-Built Vessels; Discrimination; Liability of Carriers.

The burden of proof is on the vessel owner to justify the imposition of a demurrage charge made for the vessel's detention by showing that the charterer failed in its duty to accept the cargo seasonably, and to show the extent of the vessel owner's resulting damages. D. L. Piazza Co. *v.* West Coast Line, Inc., 608 (618).

CANAL ZONE.

In view of finding that demurrage rule and charges are not unreasonable or otherwise unlawful, it is unnecessary to make any findings as to whether section 18 of the Shipping Act, 1916, is applicable to commerce from the continental United States to the Canal Zone. Olsen *v.* W. S. A. and Grace Line, Inc., 143 (149).

The Canal Zone is not a possession of the United States within the meaning of the definition of "common carrier by water in interstate commerce" in section 1 of the Shipping Act of 1916. To hold otherwise would seem counter to previous court holdings, and create administrative confusion in view of the long continued practices of the Board in treating commerce between the United States and the Canal Zone as foreign commerce. Olsen *v.* W. S. A. and Grace Line, Inc., 254 (259).

CARLOADING AND UNLOADING. See also Compensatory Rates; Cost of Service; Discrimination; Practices; Reparation; Tariffs.

Respondents are not performing under the new Tariff any services not performed under the old, although an apparent new service has been added covered by the service charge. Respondents eliminated checking from items formerly covered under "handling" and carloading, but they placed it in the service charge. Each of the handling and carloading charges was increased by 20

percent of the basic rates in spite of deletion of the checking service. It was of paramount importance that cost studies be presented showing the expense of performing each service so that any question as to the measure of the charge, with the attendant cost, and as to the existence of duplicate charges for the same service, could be resolved. As cost is the very basis of the contention that the charges are justified, the record leaves in doubt the correctness of respondents' position. Studies must be made and records kept so that respondents may report within 3 months, with supporting data, the financial results of their operations over a test period for each service for which they publish rates or charges. Terminal Rate Increases—Puget Sound Ports, 21 (30, 31).

"Car service" means the loading or unloading of railroad cars on steamship piers. "Indirect" car service means unloading of freight from the car to a place of rest in the pier or loading freight from the place of rest into a car. "Direct" car service means the loading or unloading of an open top car under ship's tackle. "Continuous" car service means the unloading from a car spotted on the low line of the pier to ship's tackle or the loading of a car on the low line from the ship's tackle. Status of Carloaders and Unloaders, 116 (118); Id. at 270; Carloading at Southern California Ports, 261 (262).

Proposed rate increase based on studies of experience of both privately owned and publicly owned wharfingers is not justified where (1) none of respondents, most of whom are contracting stevedores and independent carloaders and unloaders, were included in studies of wharfingers who were engaged in many other terminal services and had substantial investments in terminal property; (2) there is no proof that the overhead burden of the public wharfingers is comparable to that of respondents, with relatively smaller organizations and investments in property; (3) there is no showing that the volume of tonnage and relative costs of direct labor to overhead are comparable; and (4) claim for an overhead of a certain percentage of the direct labor cost, based on factors inapplicable to present situations cannot be reconciled with former claim of an overhead of a lower percentage based on actual costs of loading. Case is held open to allow respondents to present full and complete evidence concerning direct labor costs of handling various commodities, and the costs of overhead over a substantial period. Id. (120, 121).

"Car Service" means the loading or unloading of railroad cars on steamship piers. Carloading at Southern California Ports, 137 (139).

"Indirect" car service involves the use of a place of rest on the pier at which the commodity is piled and generally assorted pending further movement as an intermediate stop in its movement between the vessel and the rail car. Id. (139).

"Direct" car service is the loading or unloading of a flatcar immediately under ship's tackle. Id. (139).

"Continuous" car service is the transportation of a commodity directly between the car and the ship's tackle without any stop at the point of rest. Id. (139).

Inasmuch as carloaders are advertising two services, one to place of rest on docks and the other to ship's tackle, and undertaking to perform them for a charge assessed against the shipper, carloaders should not attempt to collect from the vessel or others a part of the cost of the service. It may be that the increased cost for continuous movement will result in a higher rate therefor, but carloaders must justify the same. Failure to charge a remunerative rate for the respective services will result in discriminations. Id. (141).

Carloaders have obligation to Maritime Commission to keep records in such manner that the Shipping Act of 1916 may be administered just as they have obligation to shippers to keep accounts so that shippers may be assured they are not paying for service rendered to others. Id. (141).

CARRIAGE OF GOODS BY SEA ACT. See Bills of Lading.

CHARTER OF WAR-BUILT VESSELS—P. L. 591, 81st CONG.

—In general

Public Law 591 authorizing charters of Government-owned vessels under specific conditions, is sufficiently broad to meet such emergencies as were created by the Korean war. American-Hawaiian S.S. Co., 446 (448).

Public Law 591 imposes no requirement to purchase vessels (and thus terminate the competition of charter Government-owned vessels with privately owned vessels). Failure to purchase, even refusal to do so, while entitled to consideration, should not be determinative of whether applicants have met the conditions of Public Law 591. Id. (448).

Insofar as the burden of proof is concerned, the law is clear that the applicant must affirmatively show that the service in which the ships are desired to be chartered under Public Law 591 is in the public interest; that such service is not otherwise adequately served; and that privately owned vessels are not available on reasonable conditions and at reasonable rates for use in such service. Lykes Bros. S.S. Co., Inc., 510 (511).

Where applicant for charter of Government-owned vessels proposes to use them interchangeably on two routes for a limited period, and has authority from the Board in its contracts to use its owned, subsidized vessels interchangeably on the routes, Public Law 591, in using the term "service," does not prohibit such interchangeability, nor, in view of the limited period of use contemplated is there any reason for the Board imposing any such restriction. Id. (511).

Whether the cargo required to be moved on the trade routes involved could or should be moved by vessels operated by the Government through general agents rather than by charter of Government-owned vessels to a subsidized operator is not an issue under Public Law 591, but a matter of policy within the discretion of the Administrator. Id. (511).

An applicant for charter of Government-owned vessels under Public Law 591 does not have to show that the vessels are necessary to meet a specific emergency. Id. (511).

Although favorable findings with respect to public interest, inadequacy of service, and reasonable rates and conditions, are justified, application for bareboat charter of Government-owned vessels for use in a service presents a question of policy where the applicant proposes their use exclusively whereas applicant's competitor uses its owned or privately chartered vessels. Since applicant owns a vessel which is scheduled to be used in the service, but which it desires to use in another service, the applicant should be required to continue to maintain in the service one of its owned ships. Pacific Far East Line, 535 (537).

Public Law 591, for purposes of determining such factual conditions as adequacy of service or availability of vessels under charter from private operators, requires consideration of current conditions. In the absence of definite statistics, testimony as to applicant's present cargo operations as well as those of the past 9 months, which was uncontradicted, is sufficient to serve as a basis for projecting cargo volume, available space, and generally, the market conditions under which applicant will operate in the immediate future.

There is adequate provision in the statute and adequate provision will be included in any Government charter to applicant to protect competitors in case of materially changed conditions in the future. Prudential S.S. Corp., 627 (628, 629).

Public Law 591 does not foreclose all possibility of substitution for privately owned vessels of Government-owned vessels in a particular service, but such substitution would require a showing of unusual circumstances. Such circumstances are not present where the applicant considered that its partially owned converted Liberty-type vessel was not as well suited for the service as a Victory-type vessel which it proposed to charter. Id. (630).

Although the Board has indicated its opposition to the grant of applications under Public Law 591 where it would amount to the substitution of a Government-owned vessel for a privately-owned vessel "intended for use in the intercoastal trade," this principle does not apply where it appears that the privately owned vessel allegedly "intended for use in the intercoastal trade," presently chartered to MSTS, in effect will be required by the Maritime Administration for other employment in the Pacific upon its availability from MSTS. Pacific-Atlantic S.S. Co., 650 (653).

—Charter conditions

The following conditions were recommended to be included in charters to be granted under Public Law 591 in view of the Korean emergency: that the use of the vessels be restricted to charters to MSTS for transportation of military and other Government-controlled cargoes; and that the term of the charters be limited to such time as the vessels remain chartered during the period of military necessity. American Mail Line, Ltd., 409 (410); Actium Shipping Corp., 415 (416); 418 (420); 421 (423); Department of the Navy, MSTS, 507 (508).

Review of stipulation entered into between counsel for the Board and counsel for the applicant satisfies the Board that no restrictions or conditions need be included in the standard form of charter at this time. South Atlantic S.S. Line, Inc., 606.

Evidence clearly shows that the Board can make the three statutory findings necessary to permit charter of war-built vessels for use on Line "D" of Trade Route No. 22. Since applicant has found it necessary to decline substantial amount of cargo and situation is growing more acute, it was not appropriate to recommend restrictions on the charter as to time or number of voyages. The standard form of bareboat charter contains a 15-day termination clause, which can be exercised any time changed conditions warrant. Lykes Bros. S.S. Co., Inc., 640 (641).

—Charter hire

Recommendation is made that charter hire payable shall not be less than 15 percent of the statutory sales price of the vessels chartered as provided by section 5(b) of the Ship Sales Act of 1946. Pacific-Atlantic S.S. Co., 489 (491); Id. at 526.

Merchant Ship Sales Act of 1946 may be sufficiently broad to permit a proposed charter rate of 5 percent or 100 percent of earnings, whichever is higher; however, the legality of the proposed rate is of no concern at this time since such rate is not warranted under present circumstances. American-Hawaiian S.S. Co., 499 (501, 502).

Recommendation is made that basic charter rate be fixed at 15 percent of the statutory sales price of the vessel or of the floor price, whichever is higher, of which 8½ percent is payable unconditionally and the remainder

payable if earned. American-Hawaiian S.S. Co., 499 (502); Isthmian S.S. Co., 528 (529); Luckenbach Gulf S.S. Co., Inc., 767 (770).

—Charters to subsidized operators

Other statutory requirements being met, charter was recommended where applicant expressed its willingness to operate the chartered vessel without subsidy, and to incorporate any profits therefrom in its subsidized operation account so that such profits will, to the extent provided by the Merchant Marine Act 1936, and by its operating-differential contract, be available for the repayment to the Government of any operating-differential subsidy received in connection with the operation of its other vessels. American Export Lines, Inc., 455.

While it was clear that the Gulf intercoastal trade (a required service) would not be adequately served without the four vessels now serving it, or their equivalent, the Board would not recommend the substitution of two chartered Government-owned vessels for two vessels owned by the applicant who was applying for continuation of two such charters and for two additional charters. Need for the service is not sufficient justification for substitution of Government-owned vessels for privately owned vessels and the record was bare of the probable financial outcome of operating four vessels, either all owned, all chartered, or a combination of owned and chartered, on a revised schedule, eliminating minor ports and concentrating on major sources of traffic. American-Hawaiian S.S. Co., 499 (500–502).

While certain limitations may well be imposed to prevent chartered Government-owned vessels from competing with the applicant's subsidized vessels—both to be used on the same routes—since the subsidized operation is controlled by terms of the subsidy contract, the Administration under Reorganization Plan 21 of 1950 is fully clothed with authority to impose such conditions as may be necessary under the subsidy agreement. Lykes Bros. S.S. Co., Inc., 510 (512).

Section 805(a) permission will be granted to subsidized operator to call at Adak, Alaska, in connection with charter of two Government-owned vessels for unsubsidized use in the transpacific trade, since there was no evidence that unfair competition would result to any exclusively domestic operator or that there would be prejudice to the objectives and policy of the 1936 Act. American President Lines, Ltd., 597 (599).

—Inadequacy of service

(a) *In general*

Adequacy of service cannot be measured in terms of spot availability of cargo alone. In the case of a berth service operation there must be taken into account regularity and frequency of the service, continuity of that service, its schedules, speed, and other factors which give assurances to shippers to enable them to meet their commitments in a businesslike manner. Where, without another vessel, applicant's schedule for a reasonable berth service cannot now or in the immediate future be maintained, and applicant is not in a position to adjust its round-the-world service or transpacific service to make available another owned vessel for the C–2 service of Trade Route 17 without serious dislocations, applicant has met the requirement of Public Law 591 as to adequacy of service. American President Lines, Ltd., 504 (506).

Application filed pursuant to the provisions of Public Law 591 for bareboat charter was not found to be supported by evidence that the service was inadequately served, where the applicant's own vessel was apparently able to lift 130,000 to 150,000 tons of its own cement out of a total of 200,000 tons and applicant had failed to use small craft and common carrier services calling

at Puerto Rico to handle the balance of its export cement. Ponce Cement Corp., 550 (551).

(b) *Foreign trade*

Services out of Philadelphia and Baltimore in connection with applicant's Trade Route 11 service were not shown to be inadequate. Intervenor produced evidence to show that those services are adequate. South Atlantic S.S. Line, Inc., 600 (604).

Application for charter of Government-owned vessel is granted where the record discloses the space available is not sufficient for the cargo offerings to applicant and it has been necessary for applicant to refuse cargo offerings and to limit its freight solicitations. Prudential S.S. Co., 627 (628).

There is not an inadequacy of service within the meaning of Public Law 591, where there is not an inadequacy of all American-flag operations in the service. The adequacy or inadequacy of the service of a particular applicant or line does not control. Clear showing by applicant that its U.S.-flag vessels are unable to provide adequate service is some evidence that all U.S.-flag vessels are unable to do so, and in the absence of evidence to the contrary from competitive or other sources may be sufficient to support the statutory finding. American President Lines, Ltd., 646 (648).

Where applicant for charter of war-built vessels, for use on Service C–2 of Trade Route No. 17, shows that its vessels on sailing from Atlantic ports carry approximately 40 percent of capacity for the Indonesia-Malaya area and approximately 40 percent for other transpacific ports, leaving some space to be filled at California ports, the testimony does not show that applicant's vessels are concentrating on Indonesia-Malaya cargo, or that there is more of such cargo than the vessels can carry if they exclude shipments to ports which are secondary in the service. A similar situation exists with respect to cargo originating in the Indonesia-Malaya area on home-bound voyages. Thus the record does not support a finding that there has been in the recent past an inadequacy of service on the C–2 service and the Board is unable to make the third finding (required by Public Law 591) of inadequacy of service. Id. (649).

Findings that the service for which application is made is not now adequately served, are based on the general requirements of the trade rather than on the operator's desire to develop its long-range program. American Export Lines, Inc., 661 (662).

Service on Trade Route 20 will not be adequately served without addition of another vessel where there is considerable cargo without available space; although applicant's vessels have not always sailed full northbound, coffee is sold in the United States in a position basis and the vessel that is in position gets the business; and foreign-flag vessels are sailing substantially full. Mississippi Shipping Co., Inc., 669 (666).

Application for extension of bareboat charter of Government-owned vessels granted where the volume of traffic (on Routes 13 and 21) is heavy and expected to increase; all sailings are fully booked; and applicant has refused cargo including considerable cargo offered by the military and proposed Government aid should substantially increase the traffic in the future. Lykes Bros. S.S. Co., Inc., 668 (669–671).

Application for charter of Government-owned vessels granted where cargo offerings have increased substantially for applicant's vessels at the time of the application, with more cargo being offered for the future than it could handle; applicant has turned down substantial cargo offerings; commodities carrier hauls are essential for the economic well-being and development of the area

serviced and are needed in American industry and for the defense effort; and foreign-flag service is to be curtailed. Lykes Bros. S.S. Co., Inc., 672 (673, 674).

Application for bareboat charter of Government-owned vessels granted where volume of freight offered has been increasing, applicant's vessels have sailed with capacity cargoes, and applicant has had to decline cargo. Moore-McCormack Lines, Inc., 680 (681, 682).

Application for bareboat charter of Government-owned vessel is granted where one of applicant's vessels which was badly damaged, will not be in sailing position until a later date than previously expected; even with the return of that vessel, another vessel will be needed to handle increased cargo offerings; traffic condition on the route involved (Route 20) has been aggravated by serious port congestion, resulting in increased estimated turnabout time; and the situation is not likely to improve in the foreseeable future. Mississippi Shipping Co., Inc., 686 (687, 688).

Service is inadequate where the tonnage offering far exceeds available vessel space; all of applicant's vessels are sailing substantially full outbound from the Gulf, and 65 to 75 percent full inbound; and backlog of cargo destined outbound is piling up. Mississippi Shipping Co., Inc., 690 (691).

Service is inadequate where applicant's vessels have sailed substantially full; cargo offerings had to be refused; some military cargo could not be accepted, and demand was expected to increase because of the efforts of shippers to secure space for cargo that failed to move during a longshoremen's strike. Prudential S.S. Corp., 700 (701).

Permission for Alaska Steamship Co. to time charter vessels to Grace for the winter was granted where the service for which Grace intended the vessels was not adequately served. During the winter the tonnage movement is particularly heavy. The period includes seasonal movements of fresh fruits to Central American ports and coffee movements from Central American ports and Mexican ports northbound. The vessels involved have refrigeration facilities which are particularly important during this season. Grace has sufficient cargo offerings to fill substantially the first voyages of the two vessels which it proposes to charter from Alaska. Grace Line, Inc., 710 (711, 712).

Application for charter of Government-owned vessel granted where all American-flag vessels are sailing fully laden and cargoes are booked for future voyages, thereby proving that the service would not be adequately served without the vessel. Isbrandtsen Co., Inc., 724 (725).

Facts that applicant's vessels have sailed without free space, some cargo has had to be declined, and forward bookings of applicant are large, verify a finding that the service would be inadequate without the vessel to be chartered. American President Lines, Ltd., 726 (727, 728).

Application for charter of Government-owned vessels for use in applicant's round-the-world service will be denied insofar as it includes Indonesia as a privilege call, as there was insufficient showing of inadequacy of service for this segment, applicant not being certain it would make such calls even if permission were granted; applicant has not served Indonesia for at least 2 years; and applicant has pending before the Board an application which, if granted, would provide an additional vessel for another service which includes, as one of its principal objectives, service between ports on the east and west coasts of the United States and Indonesia. American President Lines, Ltd., 726 (729).

Application for charter of Government-owned vessels granted where evidence that applicant's outbound vessels have been sailing substantially full for the past year and that applicant had to refuse considerable quantities of commercial

and Government-controlled cargo because of lack of space sustain the burden of proving inadequacy of all American-flag operation in this service. American Export Lines, Inc., 763 (764, 765).

(c) *Intercoastal trade*

Intercoastal service is not adequately served where there are not enough vessels or rail cars to handle eastbound movement of lumber, for which there is an urgent and critical need. Efforts of individual lines to build up intercoastal trade should be encouraged. Pope & Talbot, Inc., 411 (412).

Applications for charter of vessels for operation in the intercoastal trade are denied, though the service in question is in the public interest, and the record shows that no privately owned American-flag vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in the service, where one applicant assures the Board that the trade will be adequately served after the present charters expire, because it will replace all of the chartered tonnage now in the trade with privately owned vessels, and supply more tonnage if necessary. American-Hawaiian S.S. Co., 476 (477, 487, 488).

Inadequacy of existing service within the meaning of Public Law 591 is shown, where applicant's ships are running full and, at times, have been overbooked, and indications are that the vessels will be booked full if application for additional service is granted. Pacific-Atlantic S.S. Co., 489 (494).

Gulf intercoastal service will not be adequately served without the use of two additional Government-owned, war-built vessels. Isthmian S.S. Co., 528 (529).

Objections by intervenor in proceedings under Public Law 591, on ground that Government-owned vessels should not be used in intercoastal service in competition with privately owned vessels, will not be sustained where intervenor failed to offer evidence to controvert testimony of applicant on inadequacy of service. Pacific-Atlantic S.S. Co., 650 (659).

Application for charter of Government-owned vessels to replace vessels which will be chartered by the military, is granted where applicant's vessels are running substantially full in both directions; some cargo has been declined; traffic has increased since time of previous report finding that the service would be inadequately served without the use of applicant's vessels; and situation is aggravated by shortage of rail cars. American-Hawaiian S.S. Co., 693 (694, 695).

Application for bareboat charter of Government-owned vessels granted on findings that applicant's vessels are sailing substantially full; cargo is accumulating in substantial volume, and the market continues strong; and because of the shortage of rail cars, cargo must move by water. Pacific-Atlantic S.S. Co., 705 (706).

Application for charter of Government-owned vessel granted as the intercoastal service is inadequately served. It does not offer shippers sufficient regularity, frequency, or certainty to attract the cargo which would normally move by water. Luckenbach Gulf S.S. Co., Inc., 767 (768, 769).

(d) *Government—military—national defense requirements*.

Evidence clearly shows that, in view of the present Korean situation, 15 victory-type ships in addition to vessels presently operating are needed immediately for the transportation to Korea of Government-owned or controlled cargo for the military services. American Mail Line, Ltd., 409 (410).

In connection with application to charter vessels to transport military cargoes to Korea, the testimony was clear that regular berth services would not suffice for logistic support of American troops in the Far East as all movements are

unit movements, and any vessel carrying cargo for such movements must be under direct orders of MSTS. Id. (410).

Service was inadequate where private tonnage suitable to handle the cargo movement was not available by the deadline fixed by military authority. Coastwise Line, 413 (414).

Charter of vessels from Government's reserve fleet will be granted where the service in question is not adequately served; there is an urgent need for vessels to handle Government-owned and controlled cargo; there are no privately owned vessels to meet the military's time requirements; operation by the military itself is necessary to meet logistic requirements; coast liner services are presently being extensively utilized by the military; and no suitable vessels are available within the time requirements. Actium Shipping Corp., 418 (419); 421 (422).

Extension of charter of vessels will be granted where the service in question would not be adequately served without such extension; without applicant's vessels' capacity there would be a serious inadequacy of reefer space in the areas served; vessels sailed substantially full; only competitor has been utilizing its reefer space; applicant has been able to provide its service to the military at approximately half of the conference rates; there are no privately owned refrigerated cargo vessels under American flag suitable for operation other than a fleet which is obviously not available; and any reduction of the fleet at this time would be extremely detrimental to national defense interests. Pacific Far East Line, 428 (431-432).

Charter of Government-owned vessels will be granted where services in question are not adequately served; applicant gave two vessels, which are not expected to be returned immediately, to the military; schedule has been reduced by military deferred redeliveries; fleet is being called upon to handle a greatly enlarged volume of traffic and is unable to accommodate cargo offered for shipment; and situation is especially acute with respect to products which are, in the main, Economic Cooperation Administration—financed. Lykes Bros. S.S. Co., Inc., 453 (454).

Charter of Government-owned vessels should be granted, where the service is not adequately served; Government witnesses testified that the grant is needed for the national defense and the economy and that commodities will move in the trade in greater quantities; and a principal shipper testified that there was an urgent need for additional coastwise transportation facility. Spot condition of cargo offerings and space utilization on particular voyages are not the only factors to be considered in measuring adequacy or inadequacy of service. Coastwise Line, 515 (516).

Applications for charter of Government-owned vessels should be granted, where the service in question would not be adequately served without the use therein of such vessels; vessels are for use primarily to provide military requirements in the Far East and the applications are predicated upon and supported by military necessity. American President Lines, Ltd., 518 (524).

Where a substantial increase in the volume of Alaska traffic connected with the national defense effort was indicated; there has been a substantial increase in southbound movement of lumber and other products; and due to the rail car shortage, there is urgent need for additional vessels to carry this traffic, the service is not adequately served. Coastwise Line, Alaska S.S. Co., 545 (546).

—Notice and hearing

Usual 15 days' notice of application was not given because of urgency of the matter and although counsel for the Committee for the Promotion of Tramp Shipping under the American Flag in Foreign Commerce contended he had not

had sufficient time to secure the desired number of witnesses, he was permitted wide latitude in the presentation of his case and it appears reasonably certain from his statements that the testimony of any additional witnesses would have been merely cumulative. Pope and Talbot, Inc., 411.

Application filed pursuant to the provisions of Public Law 591 for bareboat charter recommended to the Maritime Administration for dismissal with prejudice, where the applicant twice failed to appear at scheduled hearings, and its only excuse was that the matter had been forgotten. Isbrandtsen Co., Inc., 543 (544).

Where the notice of hearing indicated that charter application was to be considered under section 3 of Public Law 591, and the notice stated that the purpose was to receive evidence on the issue of public interest, adequacy of service, and availability of privately owned American-flag vessels, the Examiner would have been technically correct in excluding eidence relating to possible charter restrictions and conditions if the evidence were to be strictly limited to the issues. However, in the past, and in cases heard directly by the Board, such evidence has been admitted to guide the Board in its recommendations to the Secretary. Since the notice indicated that the hearing was to be held pursuant to section 3, the hearing should have been conducted in a manner so as to place upon the record material evidence on all matters pertinent to the Board's statutory functions. Future notices should indicate that such evidence will be received and this case will be remanded to the Examiner to receive the excluded evidence. South Atlantic S.S. Line, Inc., 600 (601).

Notice of hearing in Public Law 591 proceeding referring to "ports in the Mediterranean" was sufficient to cover Mediterranean ports in Spain and Yugoslavia, but not Lisbon which is not such a port. Prudential S.S. Corp., 627.

An application for charter of Government-owned vessels for use in applicant's intercoastal service is not broad enough to cover privilege calls at Puerto Rico. However, applicant's right to apply for inclusion of such calls under all the conditions of Public Law 591 is not prejudiced by its failure to do so in the instant application. Pope and Talbot, Inc., 697 (699).

A notice of hearing in a proceeding concerning an application for charter of a Government-owned vessel is broad enough to include privilege port calls (Indonesia) even though such ports have not been regularly served in the period immediately preceding the application, since the requirement of Public Law 591 is "due notice to all interested parties" and the application was for "employment in (applicant's) round-the-world service" and applicant's operating subsidy agreement includes Indonesia as a privilege call in such service. American President Lines, Ltd., 726 (729).

Notice of hearing in Public Law 591 proceeding referring to "ports in the Mediterranean" is not sufficient to cover "Portugal, Spanish Atlantic ports south of Portugal, and ports in the Black Sea." Under its operating subsidy agreement applicant has the privilege of calling at these ports. Substantially all of the evidence offered was directed toward a showing of inadequacy between U.S. North Atlantic ports and ports in the Mediterranean and the application must be so limited. American Export Lines, Inc., 763 (764).

—Service required in the public interest

(a) *In general*

Extension of charter, and time charter of certain of the vessels involved to another steamship company, was found by the Board to have advantages accruing to all parties, where, otherwise, certain of the vessels would be laid up for

a 6-month period, uninterrupted employment would be afforded to the officers and crew of the vessels to be time chartered, and the Government would benefit from an increase in basic charter hire rates. Alaska S S. Co., 435 (436) ; Grace Line, Inc., 710 (711).

Application for charter of two Government-owned vessels to move 47,000 tons of iron or steel pipe from California to Venezuela ports between December 21, 1951, and May 1952, for use in increasing the production of the Maracaibo Lake district oil fields, will be denied as not in the public interest The intended service is the haulage of a single commodity from a single shipper to one consignee, from one port to substantially one port. While such concentration may be warranted under exceptional circumstances as a matter of sound operating practice, the purpose here has not been shown to be in the public interest by any strong or convincing evidence. Grace Line, Inc., 703 (704).

(b) *Foreign trade*

Indefinite extension of applicant's charter of war-built vessels for continued use in conjunction with service between U.S. Pacific coast ports and the west coast of Central and South America is required in the public interest. Applicant's principal competitor is a foreign-flag line. Grace Line, Inc., 424 (427) ; Alaska S.S. Co., 435 (436).

Services, being for the carriage of coal and grain from the United States to Europe, are required in the public interest. American Export Lines, Inc., 451 (452).

Service between U.S. Atlantic ports and Mediterranean ports is required in the public interest. American Export Lines, Inc., 455 (456) ; 763 (764) ; Prudential S.S. Corp., 627 (629) ; 700.

World shipping conditions having become more acute original findings are broadened to include carriage of sulphur, coal, coke, pitch, lumber, and grain from the United States to Europe, as required in the public interest. American Mail Line, Ltd., 497 (498).

Predicated upon prior decision of Board and Administrator that applicant's Atlantic/Straits service is inadequately served with U.S.-flag services, and upon testimony offered herein, the Board has no difficulty in finding that the service is required in the public interest. American President Lines, Ltd., 504 (505).

Service to Mediterranean countries is in the public interest. These countries are now more dependent than before World War II upon a number of Pacific coast products, Israel being a particularly important destination. Pacific Far East Line, 535 (536).

Service operated by applicant within Trade Route 11 between South Atlantic ports and ports in the United Kingdom and Atlantic Europe, is required in the public interest. South Atlantic S.S. Line, Inc., 606 (607).

The burden of proof is upon an applicant for charter of Government-owned vessels to establish that the service in which the vessels are to be used is required in the public interest. Public Law 591 does not provide that the use of the vessels shall be in the public interest. While there was no direct evidence in the record that the service contemplated was in the public interest, the Board will take judicial notice that such is the case in view of its recent consideration of services from this country to the Mediterranean area, which is the service proposed by the applicant. Prudential S.S. Corp., 627 (629).

Application for charter of war-built vessel granted where the route involved (Trade Route 20) has been determined by the Maritime Commission to be an

essential trade route and the continuance of the service is in the public interest. Mississippi Shipping Co., Inc., 664 (665, 666).

Trade Route 15–B is an essential trade route. Applicant is the only U.S.-flag operator serving the route. It is the only carrier operating over the entire route and providing a regular service from South and East Africa to the Gulf of Mexico. The service is required in the public interest. Lykes Bros. S.S. Co., Inc., 672.

Freight service from United States Atlantic ports to the east coast of South America is required in the public interest. Moore-McCormack Lines, Inc, 680 (682).

Service between the Gulf coast and the east coast of South America is required in the public interest. Mississippi Shipping Co., 686 (688).

Application for charter of Government-owned vessel is granted where the route involved (Route 14) has been determined to be an essential foreign trade route; applicant is the only U.S.-flag operator on the route; and cargo moving over the route is important to the defense effort and economy of the United States and the economy and development of the area serviced. The service is in the public interest. Mississippi Shipping Co., Inc., 690 (691).

Since American President Lines round-the-world service has been determined essential to the foreign commerce of the United States, and applicant carries military and commercial cargo which is essential to the national defense effort and the economy of the areas served, the service under consideration is in the public interest. American President Lines, Ltd., 726 (727).

(c) *Intercoastal trade*

Alaskan service was one of the reasons for extending the authority of the Secretary of Commerce to charter vessels. Alaska S.S. Co., 435 (439).

The intercoastal service is required in the public interest. American-Hawaiian S.S. Co., 446 (447); 476 (487); 693 (694); Pacific-Atlantic S.S. Co., 525 (526); 650 (659); 705 (706); Pope & Talbot, Inc., 697 (698); Luckenbach Gulf S.S. Co., Inc., 767 (768).

Applications under Public Law 591 for use of vessels in the intercoastal trade are in the public interest since the importance of the intercoastal trade has been recognized by Congress, the Interstate Commerce Commission, and the Maritime Administration. Pacific-Atlantic S.S. Co., 489 (494).

Gulf intercoastal service is required in the public interest. American-Hawaiian S.S. Co., 499 (502); Isthmian S.S. Co., 528 (529); Luckenbach Gulf S.S. Co., Inc., 767 (768).

Alaska service is required in the public interest. Coastwise Line, 515 (517); 545 (546).

(d) *Government—military—national defense requirements*

Grant of an application filed pursuant to the provisions of Public Law 591 for charter, for one round voyage, to transport Government contract materials from Seattle to Alaska, and return with commercial cargo was found by the Board to be required in the public interest. Coastwise Line, 413 (414).

Applications for charter of a total of 20 vessels under Public Law 591 were granted where it was shown by MSTS that on account of the Korean situation there was urgent need for such vessels to handle Government-owned and controlled cargo; operation by MSTS itself was necessary to meet logistic requirements; Pacific coast liner services were being utilized by MSTS at their full capacity; and there were no available privately owned vessels. Actium Shipping Corp., 415 (416).

Applications filed pursuant to the provisions of Public Law 591 for charters were found by the Board to be required in the public interest, where the current and potential programs for the movement of Economic Cooperation Administration-financed and non-ECA financed cargo were in excess of the capacity of available privately owned American and foreign vessels, failure to make additional vessels available promptly would result in further aggravation of the conditions prevailing and compel the ECA to pay even greater premiums for vessels, and participating countries would be prevented from or delayed in receiving vitally needed cargoes. American Export Lines, Inc., 451 (452).

In proceedings under Public Law 591 the Board found the required services to be in the public interest, where it was shown by MSTS that, due to the loss of privately-owned ships plus several highly classified moves which involve trade routes in different areas of the world, vessels in question were needed by the MSTS for the support of its military forces world-wide. Department of the Navy, Military Sea Transportation Service, 507.

Application for charter of Government-owned vessels for use in the transpacific trade will be granted where the service involved is required in the public interest to carry military cargo for MSTS. American President Lines, Ltd., 597 (598).

Application for extension of charter of war-built vessels granted where the service (North Atlantic-Mediterranean) continues to be in the public interest, not only because of its general importance, but also as the result of world-wide conditions which influence and augment the flow of military and related supplies. American Export Lines, Inc., 661.

In the light of present world conditions and the defense measures being taken by the United States, Great Britain, and Western Europe, service from North Atlantic ports to ports in the United Kingdom and continental Europe is required in the public interest. Isbrandtsen Co., Inc., 724.

—Unavailability of privately-owned vessels

Privately-owned vessels were not available for charter on reasonable conditions and at reasonable rates. American Mail Lines, Ltd., 409 (410); Actium Shipping Corp., 415 (416); 418 (419); 421 (422); Grace Line, Inc., 424 (427); 710 (712); Pacific Far East Line, Inc., 428 (434); 535 (537); Alaska S.S. Co., 435 (436); American Export Lines, Inc., 451 (452); 455 (456); 661; 763 (765); Lykes Bros. S.S. Co., Inc., 453 (454); 510 (512); 668 (670); 672 (674); American-Hawaiian S.S. Co., 476 (487); American President Lines, Ltd., 504 (506); 518 (524); 597 (598); 726 (729); Coastwise Line, 515 (517); 545 (546); Pacific-Atlantic S.S. Co., 525 (526); 705 (706); South Atlantic S.S. Line, Inc., 606 (607); Prudential S.S. Corp., 627 (630); 700 (701); Mississippi Shipping Co., Inc., 664 (666); 686 (688); 690 (691); Moore-McCormack Lines, Inc., 680 (682); Pope & Talbot, Inc., 697 (698); Isbrandtsen Co., Inc., 724 (725).

Privately-owned vessels are not available on reasonable conditions and at reasonable rates where such a vessel could have arrived in the Pacific coast but not on time to meet the schedule for applicant's first sailing. Not only is the time factor important, but the vessels would have had to move westward in ballast at an estimated cost of $41,000 per vessel. This, added to charter hire, constitutes an unreasonable rate for one round voyage. Pope & Talbot, Inc., 411 (412); Coastwise Line, 413 (414); American-Hawaiian S.S. Co., 446 (448).

While it was clear that privately-owned vessels have been available since the last hearing, and that applicant could have chartered them had it so wished, the conditions attendant upon their charter have not been reasonable. Such vessels are still not available on the Pacific coast, where applicant's voyages commence,

and taking such vessels in ballast from the Atlantic coast or the Gulf coast would cost in excess of $40,000. Counsel for the Committee for the Promotion of Tramp Shipping contends, however, that the Maritime Administration could permit redelivery of the two bareboat-chartered vessels on the Atlantic coast and that applicant could then charter privately-owned vessels in such area, thus eliminating the taking of the latter vessels to the Pacific coast in ballast. Redelivery, however, of the Government-owned vessels on the Atlantic coast would necessitate repatriation of the crew at applicant's expense pursuant to its labor contract. Although applicant might possibly integrate its operations in the manner described, timing is such an important factor that the Board does not feel such procedure can be insisted on. Pope & Talbot, Inc., 444(445); American-Hawaiian S.S. Co., 446(448).

The Board will find that no privately-owned vessels are available in the intercoastal trade at reasonable rates, within the meaning of Public Law 591, where available Liberty-type vessels, due to the Korean emergency, are absorbed by the foreign trade and command rates as high as $60,000 per month, whereas applicants, due to railroad competition with intercoastal trade, are prevented from increasing pre-Korean rates of $40,000 to $42,000. Pacific-Atlantic S.S. Co., 489 (495).

CHARTERS. See also Demurrage. For Charter of War-Built Vessels under Public Law 591, 81st Congress, see Charter of War-Built Vessels.

A charterer may be a common carrier whether the charter is a bareboat or demise charter, by the terms of which the charterer assumes exclusive possession, command, and navigation of a vessel, or an affreightment contract under which such possession, command, and navigation are retained by the general owners. Transportation Between Pacific Coast Ports of the United States and Hawaii, 190(197).

One who charters a barge and a tug under an affreightment contract, and ships the cargo of a number of shippers from San Francisco to Honolulu, is a common carrier by water, not a tramp, in interstate commerce and must file a schedule of rates in accordance with the requirements of section 2 of the Intercoastal Shipping Act, 1933. Id. (198, 199).

Where a charter gives to the charterer the full capacity of the ship and the charterer is the only shipper, the carrier is not a common carrier, but where there were various shippers, whose order bills of lading made no reference to the charter, their rights were determined by their respective bills of lading, and the ship was, therefore, a common carrier. D. L. Piazza Co. *v.* West Coast Line, Inc., 608(612).

Where there were various shippers whose order bills of lading made no reference to a charter, their rights were determined by their respective bills of lading and the ship was a common carrier within the definition and requirement of sections 1 and 22 of the Shipping Act of 1916 on which the Board's jurisdiction is based. Id. (612).

Where complainant chartered a vessel, agreeing to ship a definite amount of apples or their equivalent in other fruit, and actually delivered a less amount for shipment, the shipowner was authorized to fill the space which complainant had agreed to take, and in fact was required to make reasonable effort to do so to minimize the damages which complainant's breach of contract might occasion. Thus the vessel owner was entitled to carry fruit belonging to other persons and to discharge such shipments at a port along the route. The failure of the shipowner to give complainant exclusive use of the ship created no unjust discrimination or unreasonable prejudice or disadvantge. Id. (613–615).

CLASSIFICATIONS.

A tariff rate charge for cargo N.O.S., rather than for dried fruit, was properly applied to cocculus which is a fruit of the vine in the language of botany but is not a fruit in the ordinary sense; thus no violation of the Shipping Act of 1916 was involved. Himala International *v.* Fern Line, 53(55).

Although the tariff item, "Grease, Animal," rather than "General Cargo, N.O.S.," should have been applied to lanolin which is animal grease, no violation of the Shipping Act of 1916 was shown where there was no movement of lanolin other than that shipped by the complainant and there was no evidence that the rate actually assessed resulted in undue preference or disadvantage or unjust discrimination. Id. (55, 56).

Lanolin is a generic or descriptive term, not a trade name, and therefore may be used as a commodity designation in a tariff Himala International *v.* Greek Line, 187(189).

COMMON CARRIERS. See also Charters; Findings in Former Cases; Forwarders and Forwarding; Free Time.

—Who is common carrier

A person who uses lighters to transport commodities for the general public on regular routes between ship and shore, makes his own contracts of charges or rates which are separate from control by the ocean carrier, and assumes liability to shippers for loss or damage to cargo is a common carrier under section 1 of the Shipping Act of 1916. Merely because such carrier furnishes wharfage, dock, warehouse, or other terminal facilities does not preclude it from being a common carrier; the Intercoastal Shipping Act of 1933 contemplates such services by common carriers and requires them, in filing their schedules to "state separately each terminal or other charge, privilege, or facility granted or allowed." Rates Between Places in Alaska, 7(9).

Where transportation between Seattle and Alaskan ports is accomplished jointly by an ocean carrier and by a ship-to-shore service which does not participate in the line haul of the ocean carrier, each is common law carriage, and the latter is regular and on the high seas within the meaning of section 1 of the Shipping Act of 1916. Id. (10).

Carrier which repeatedly refused to take refrigerated cargo for anyone, but thereafter accepted such cargo from one shipper on special terms to the exclusion of other shipper who had applied for space, was a common carrier subject to the Shipping Act, 1916, with respect to the refrigerated space on its vessel. Waterman *v.* Stockholms Rederiaktiebolag Svea, 131 (136).

Common carriers are such by virtue of their occupation, not by virtue of the responsibilities under which they rest. Absence of evidence that a person held himself out as a common carrier, that a sailing schedule was ever published, that cargo was solicited, or that there was no advertisement that the cargo of anyone or everyone would be taken, is not decisive on the common carrier issue. That printed terms and conditions of the common carrier form of the bill of lading were crossed out and shipments covered by separate contract, does not negative a holding out as a common carrier. Transportation Between Pacific Coasts Ports of the United States and Hawaii, 190 (196).

A common carrier is one who undertakes for hire to transport goods for such as choose to employ him. One transporting goods from place to place for hire, for such as see fit to employ him, whether usually or occasionally, whether as a principal or an incidental occupation, is a common carrier. Id. (197).

A charterer may be a common carrier whether the charter is a bareboat or demise charter, by the terms of which the charterer assumes exclusive possession,

command, and navigation of a vessel, or an affreightment contract under which such possession, command, and navigation are retained by the general owners. Id. (197).

One who charters a barge and a tug under an affreightment contract, and ships the cargo of a number of shippers from San Francisco to Honolulu, is a common carrier by water in interstate commerce and must file with the Maritime Commission a schedule of rates in accordance with the requirements of section 2 of the Intercoastal Shipping Act, 1933. Id. (198, 199).

Where a charter gives to the charterer the full capacity of the ship and the charterer is the only shipper, the carrier is not a common carrier, but where there were various shippers, whose order bills of lading made no reference to the charter, their rights were determined by their respective bills of lading, and the ship was, therefore, a common carrier. D.L. Piazza Co. *v.* West Coast Line, Inc., 608 (612).

Where there were various shippers whose order bills of lading made no reference to a charter, their rights were determined by their respective bills of lading and the ship was a common carrier within the definition and requirement of sections 1 and 22 of the Shipping Act of 1916 on which the Board's jurisdiction is based. Id. (612).

Carriers contracting for space in railroad cars or on vessels are common carriers. Bernhard Ulmann Co., Inc. *v.* Porto Rican Express Co., 771 (775).

Status as a common carrier does not depend on ownership or control or means of transportation, but, rather on the nature of the undertaking with the public served. Id. (775).

Status as a common carrier depends upon the nature of the service offered to the public and not upon the party's own declaration. Id. (776).

Express companies offering door-to-door service between points in continental United States and both Alaska and Hawaii have long been subject to regulation under the Shipping Act and the Intercoastal Act as common carriers by the Board and its predecessor. Id. (777).

A company which undertakes to transport goods door-to-door from New York to Puerto Rico is a common carrier by water although it has no control over the shipments made by it while in the custody of the ocean carrier, it pays the regular published tariff, it accepts the regular ocean bill of lading, and it has no special contract or arrangement with the ocean carrier. Id. (777, 780).

—Duties of common carrier

Carriers have obligation to furnish safe and convenient place to receive cargo from shipper and deliver cargo to consignee. If this cannot be done at end of ship's tackle, carrier must arrange to move cargo to place of rest but it may separate its rates to cover the actual transportation and the handling between tackle and place of rest. Furthermore, carrier must receive and receipt cargo, deliver it to those entitled to it, and handle all necessary papers. Terminal Rate Increases—Puget Sound Ports, 21 (23, 24).

Duty of ocean common carrier in transporting cargo such as borax, potash, soda ash, and cement in bags or package lots is to pick it up from some place on the docks where the shipper places it and move it to ship's tackle, load it on board and carry it to destination. Los Angeles Traffic Managers' Conference, Inc. *v.* Southern California Carloading Tariff Bureau, 569 (578).

COMPENSATORY RATES. See also Detriment to Commerce; Free Time; Rate Structure.

Carloaders' evidence concerning labor costs and costs of overhead approved and found sufficient to determine compensatory rates. Status of Carloaders and Unloaders, 268 (271).

CONSTRUCTION COST. See Subsidies, Construction-Differential.

CONSTRUCTION-DIFFERENTIAL SUBSIDIES. See Subsidies, Construction-Differential.

CONSTRUCTION RESERVE FUND.

Authority of the Commission to grant extensions of time for the obligation of deposits in the Construction Reserve Fund is permissive rather than mandatory, and is not retroactive as to deposits withdrawn or deposits as to which the time for extension has lapsed. American-Hawaiian S.S. Co.—Construction Reserve Fund Deposits, 389 (390).

Time within which deposit in applicant's Construction Reserve Fund shall be expended or obligated for construction or acquisition of new vessels as defined in section 511 of the Merchant Marine Act of 1936 should be extended pursuant to P.L. 50 (81st Cong.) where every effort is being made to reduce costs, it would not be prudent for applicant either to plan for the construction of new vessels under prevailing circumstances, or to purchase vessels at prevailing prices; if requested extension were not granted, applicant would have no alternative but to withdraw the deposits in its fund and pay a substantial portion thereof in taxes, and that this would remove this amount from possible future investment in the American merchant marine; in the face of demands from some stockholders to liquidate, the board of directors has taken affirmative action to stay in business although losing money; and applicant states that if it receives extension, it is confident something can be worked out. Id. (392, 393).

Time within which deposits in applicant's Construction Reserve Fund shall be expended or obligated for construction or acquisition of new vessels as defined in section 511 of the Merchant Marine Act of 1936 should be extended where applicant has developed several plans for modern vessels and, by conducting tests, has eliminated all but two hull patterns from consideration, applicant states that it hesitates to build vessels because of uncertainties as to what quantities of what cargoes will be carried; and applicant believes that the present uncertainty will be resolved in 2 years and there will be no delay in construction simply because the requested extension was granted. Id. (394, 395).

CONTRACT RATES. See also Agreements under section 15; Damages; Discrimination; Monopoly.

Menacho *v.* Ward, holding the contract rate system illegal per se, is not controlling precedent in view of subsequent enactment of Shipping Act and, specific provisions of section 15 removing from application of antitrust statutes all agreements approved by Commission as well as all activities of the parties thereunder. Pacific Coast European Conference Agreement (Agreement Nos. 5200 and 5200–2), 11 (16).

If Congress had intended to prohibit the contract rate system when it passed the Shipping Act, 1916, it would have done so with the same force as it prohibited the deferred rebate system. The system is not unlawful per se. Id. (16).

Where the trade is highly competitive and of a seasonal nature the contract rate system is necessary to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates. Id. (17).

Penalty clause of exclusive patronage contract giving carriers option as to whether they will assess damages is objectionable, since it opens the door to possible discrimination and removes uniformity of treatment sought to be accomplished by conference agreement. Id. (18).

Penalty clause of exclusive patronage contract which, in effect, prevents a violating shipper from securing a contract in the future is objectionable. Id. (18).

A violation of an exclusive patronage contract by a shipper may not be penalized by a retroactive method of establishing damages which may result in discrimination. The large volume or frequent shipper would, in effect, be compelled to use conference carriers permanently, whereas the small or infrequent shipper would not be deterred. Fixing of damages at the amount of the freight involved, or at a certain number of times thereof, would establish a definite formula by which the penalty could be calculated and would have no retroactive feature. Id. (18, 19).

Exclusive patronage contract rate system of conference is not in violation of the Shipping Act, 1916. Himala International *v.* American Export Lines, Inc., 232 (233).

Exclusive patronage provision of conference contract with shipper, giving carrier an option to terminate the contract and collect damages if the shipper violates it by shipping via a nonconference vessel is unreasonable. Id. (234).

The exclusive patronage contract dual rate system does not violate section 14-Third of the Shipping Act which provides that no carrier shall retaliate against a shipper or discriminate against him because he has patronized another carrier for three reasons: (1) such an interpretation would be contrary to those uniformly given since adoption of the Act in 1916; (2) such an interpretation would make impossible any harmonious administration of the Act since any agreement between carriers found to contain no unjust or unreasonable discrimination under sections 15, 16 and 17 of the Act might require an opposite finding under section 14-Third, and since section 15 expressly refers to agreements giving "special rates" which is the effect of the dual rate system; and (3) the language of section 14-Third is not to be considered as a standard for judging all carrier agreements, but establishes a prohibition against retaliation, and the dual rate system is not retaliatory against a shipper who voluntarily declines to give his exclusive patronage to a carrier. Isbrandtsen Co. *v.* North Atlantic Continental Freight Conference, 235 (240, 142).

The dual rate system is not contrary to section 15 of the Shipping Act since it permits regularity of service by the carriers, regular availability of cargo from the shippers, stability of rates, better estimation of the volume of traffic to be expected, better arrangement of sailings, and, as to both small and large shippers, encourages operation in "forward trading" which is so necessary for foreign commerce. Id. (245).

The enforceability or nonenforceability of exclusive patronage contracts does not enter into a determination by the Board as to whether agreements by conference carriers to use such contracts are to be approved under section 15 of the Shipping Act, as in fact, such contracts are observed without resort to court action. Id. (245).

COST OF SERVICE. See also Carloading and Unloading; Compensatory Rates; Rate Structure.

Although the Board has the power to fix minimum charges so as to reflect actual costs of car service rendered and so as to prevent undue burdens on other services performed by the same contractors, it has determined not to do so in this case. It has required carloaders themselves to establish rates that will meet statutory requirements. Carloading at Southern California Ports, 261 (266).

DAMAGES. See also Burden of Proof; Contract Rates; Discrimination.

Exclusive patronage contract, providing for liquidated damages in case of violation, equal to twice the amount of freight that would have been payable under the contract in respect to the shipment constituting the violation, is reasonable, since the harm caused is almost impossible to accurately estimate, some member of the conference whose ship has sailed has lost the freight involved, and the conference as a whole has been weakened. The fact that the conference collects the damages instead of an individual carrier, does not militate against reasonableness, since there will be damage to an individual though unascertained member of the conference as well as to the conference as a whole. The collection of damages by the conference appears to be a practicable measure to make the contracts effective for the benefit of the conference members. The result is in substance a pooling of damages analogous to the pooling of earnings or profits which the Shipping Act of 1916, section 15, expressly authorizes. Isbrandtsen Co. *v.* North Atlantic Continental Freight Conference, 235 (246).

Damages must be the proximate result of violations of the statute in question; there is no presumption of damage; and the violation in and of itself without proof of pecuniary loss resulting from the unlawful act does not afford a basis for reparation. Waterman *v.* Stockholms Rederiaktiebolag Svea, 248 (249).

Proof of damages, resulting from failure of carrier to provide shippers with equal opportunity with competitor to secure space to ship fresh fruit from New York to Rio de Janeiro, found wanting; to award damages there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Board as would be deemed necessary under the well-established principles of law in such cases as a basis for a judgment in court. Id. (253).

DEFERRED REBATES. See Brokerage; Contract Rates.

DELIVERY. See Common Carriers; Free Time; Practices.

DEMURRAGE. See also Burden of Proof; Canal Zone; Charters; Free Time; Jurisdiction; Practices; Preference and Prejudice.

In the absence of proof, Commission cannot assume that demurrage penalties are sustained with excessive frequency or in unwarranted amounts. A record which does not support a finding that demurrage is unduly burdensome, cannot and does not require or authorize a conclusion that existing free time is inadequate, since demurrage is, in at least a general way, a measure of the inadequacy of free time. Free Time and Demurrage Charges at New York, 89 (102).

The cases which call for a departure from penal scales of demurrage are those in which community-wide disturbances, of which trucking strikes are a good example, render it impossible for consignees as a class to take possession of their cargoes; an individual consignee is liable for demurrage when his disability to remove his cargo results from a strike of his own personnel. Id. (107).

Where carriers and consignees are jointly affected by conditions beyond their control, such as by a truck driver's strike preventing consignees from removing their shipments, neither should be subjected to an avoidable penalty and neither should be permitted to profit from the other's disability. Under such circumstances, the penal element of demurrage charges—assessed to induce removal of property—is useless, and consequently an unjust burden on consignees, and a source of unearned revenue to carriers. Id. (107).

Where consignees are unable to remove cargo, through reasons beyond their control, levying of charges for demurrage to the extent they are penal, i.e., in excess of compensatory, constitutes an unjust and unreasonable practice in connection with the storing and delivery of property, but the carrier is entitled

to fair compensation for sheltering and protecting a consignee's property during period of involuntary bailment after expiration of free time. Id. (107, 108).

The Interstate Commerce Commission has consistently held, in relation to car demurrage, that where a locality is paralyzed by a strike against transport facilities, cars detained at or en route to that facility, in consequence of strike conditions, are not subject to demurrage at rates in excess of compensatory levels. Id. (108).

Demurrage charges at penal levels are not justified by reference to a carrier's need for revenue in circumstances where consignees are unable to take possession of their cargoes for reasons beyond their control. Id. (108).

Where a consignee is prevented from removing his cargo by factors beyond his control, such as, but not limited to, trucking strikes or weather conditions, which affect an entire port area or a substantial portion thereof, carriers shall, after expiration of free time, assess demurrage against imports at the rate applicable to the first demurrage period, for such time as the inability to remove the cargo shall continue. Every departure from the regular demurrage charges shall be reported to the Commission. If first-period charges are not compensatory, the tariffs should be amended. Id. (109).

Demurrage charge established at Balboa, in connection with cargo from Pacific coast ports of the United States, was not unreasonable or otherwise unlawful, in view of admitted congestion at Balboa. Lack of similar charge on lumber from the Atlantic coast was not discriminatory since there were no delays at Cristobal or elsewhere in the Canal Zone similar to those at Balboa. Failure to establish demurrage charge against general cargo was not discriminatory since there was no showing of any competitive situation as between classes of cargo or that a comparatively infinitesimal amount of general cargo was the occasion of any appreciable amount of delay. The measure of the demurrage did not exceed the costs occasioned by the delay to the ships. Fact that the charge was established to urge consignees to secure speedy discharge of ships, and that the shipper or consignee had little if any control over the discharge, does not render the demurrage unreasonable or otherwise unlawful. Olsen *v.* W. S. A. and Grace Line, Inc., 143 (148, 149).

Demurrage charges were unjust and unreasonable regulations and practices with respect to the delivery of property in violation of section 17 of the Shipping Act of 1916 where, though complainant's duty was to take the goods from the end of ship's tackle, demurrage was charged against shipper before discharging operations had commenced, while the ship was in stream, or while idle because of port regulations, or while unloading cargo of other shippers who might or might not be subject to demurrage charges; and charges were assessed for delays which the shippers and receivers did not cause, and had neither the power nor the duty to prevent. Olsen *v.* W.S.A. & Grace Line, Inc., 254 (258).

Where an oral agreement for the charter of a vessel for carrying commodities made no reference to demurrage, demurrage as such is not collectible. However, the charterer is under an implied obligation to receive cargo at such time as is reasonable in view of existing facts and circumstances. D. L. Piazza Co. *v.* West Coast Line, Inc., 608 (618).

DEPARTMENT OF AGRICULTURE. See Discrimination; Free Time.

DETRIMENT TO COMMERCE. See also Absorptions; Agreements under Section 15; Brokerage; Pooling Agreements; Port Equalization; Rate Structure; Special Rates.

Rate structure for carloading which is noncompensatory, and rates which produce revenue less than the direct cost of service are detrimental to com-

merce under section 15 of the Shipping Act, 1916. Carloading at Southern California Ports, 137 (142).

Concerted prohibition against the payment of brokerage results in detriment to the commerce of the United States in that it has had and will have a serious effect upon the forwarding industry. Agreements and Practices Re Brokerage, 170 (177).

DEVICES TO DEFEAT APPLICABLE RATES. See also Equalization.

Carrier had no obligation to quote charter per diem rates, or to charge such rates, rather than unit weight rates for shipment of surplus road building equipment from Okinawa and Guam to the Pacific coast in the absence of any information available at the time of agreement and loading calling for a quotation of the lower per diem rates. Substitution of the per diem rates, under such circumstance, would violate section 16 of the Shipping Act, 1916, which forbids a shipper to accept and a carrier to grant transportation at less than regularly established rates. Ken Royce, Inc. *v.* Pacific Transport Lines, Inc., 183 (186).

DIFFERENTIALS. See also Absorptions.

Increased rates due to respondent's failure to maintain the percentage differentials between ports which existed in prior tariffs and resulting in ton-mile rate higher from the port in question than from more distant ports are not shown to be unduly prejudicial in violation of section 16 of the Shipping Act of 1916 where the absolute money differential between ports is almost the same by the new rates as the old rates; matter of distance is not controlling as a factor in rates; lessening of percentage differential in rates caused no loss of business; and various considerations other than price govern the port at which the commodity (fish) is delivered. Increased Rates—Alaska S.S. Co., 632 (637).

DISCRIMINATION. See also Absorptions; Agreements under Section 15; Brokerage; Carloading and Unloading; Charters; Classifications; Contract Rates; Demurrage; Forwarders and Forwarding; Free Time; Jurisdiction; Pooling Agreements; Port Equalization; Preference and Prejudice; Rate and Commodity Comparisons; Special Rates; Tariffs; Terminal Facilities.

Where carloading conference represented on its behalf and on behalf of respondent member that a rate for loading woodpulp, contained in a tariff on file with the California Railroad Commission, was reasonable as increased by 33⅓ percent (which increase was approved by the Maritime Commission), the higher rate assessed by respondent (merchandise, N.O.S.) because the conference tariff failed to contain a rate for loading woodpulp, was unjustly discriminatory, and subjected woodpulp to undue and unreasonable prejudice, in violation of sections 16 and 17, and the rate was unreasonable and thus contrary to the express provisions of the agreement approved by the Maritime Commission. Fibreboard Products, Inc. *v.* W. R. Grace & Co., 128 (130).

Complainants were entitled to rely upon booking agent's repeated statements that a vessel would not carry fruit. When respondent thereafter decided to carry fruit complainants should have been given the opportunity to avail themselves of the same terms (guarantee to hold vessel owner harmless for damage to the fruit) that were offered to another exporter who had applied for space after complainants applied. The special contract between respondent and the party given the space affected the legal relations of those parties only and did not alter respondent's obligations to shippers in general under the Shipping Act, 1916. Respondent's failure to accord complainants the opportunity to ship on the same terms resulted in violation of section 14-Fourth, and section 16. Waterman *v.* Stockholms Rederiaktiebolag Svea, 131 (136).

Granting of lower contract rate without obtaining signature of shipper to contract, would have amounted to an unreasonable discrimination by the carrier. Himala International *v.* American Export Lines, Inc., 232 (234).

Option in an exclusive patronage contract whereby carrier can declare the agreement terminated if the shipper makes shipments in violation thereof makes it possible for the carrier to discriminate between shippers; therefore, the contract must be modified so as to eliminate the option feature and substitute therefor the specific treatment which will be accorded shippers in all cases of violation. Isbrandtsen Co. *v.* North Atlantic Continental Freight Conference, 235 (245).

Clause of an exclusive patronage contract which requires all the shipper's cargo originating out of North Atlantic ports to be tendered to carriers at seven American ports and several Canadian ports is not discriminatory against a shipper who has cargo located at an intermediate, unnamed port, or discriminatory as between the named and unnamed ports, since the shipper is given a broad selection of ports from which to choose and the carrier cannot be required to serve ports beyond his choosing. Id. (246, 247).

Special treatment accorded to the Department of Agriculture by carriers on Government-owned or -controlled cargo, in granting the lower contract rate without requiring the signing of an exclusive patronage contract, is a reasonable exception in the public interest and is not a discriminatory practice in violation of the Shipping Act. Id. (247).

Charge of discrimination and prejudice based upon imposition of separate handling and carloading charges at southern California ports, whereas no separate handling charges were imposed at Atlantic or Gulf ports, can apply only to common carriers operating from both ports to the same foreign destinations for only in such cases is the carrier the common source of the alleged discrimination. Los Angeles Traffic Managers' Conference, Inc. *v.* Southern California Carloading Tariff Bureau, 569 (575).

To support a charge of unjust discrimination and unreasonable prejudice, there must be evidence of actual loss of business due to discriminatory rate situation. Proof was not satisfactory that loss or damage or prejudice to exporters resulted from collection of handling charge at sourthern California ports. Id. (576).

Determination of whether discrimination exists requires a comparison of like charges and like services. Failure of carrier to charge separately for handling of cargo on the east coast and Gulf when compared with imposition of a separate charge on the west coast is not discriminatory, for on the east coast and and Gulf the ocean rate includes handling across the dock whereas on the west coast the ocean rate excludes handling. Id. (579).

While the total rate to destination from a California port is greater than the total rate to the same destination from an Atlantic or Gulf port, this difference does not constitute an unreasonable discrimination, since there is no showing that the general conditions of transportation are so similar as to make any difference in overall rates an unjust discrimination. Id. (579, 580).

Charge of discrimination in that rates charged (under charter) where higher than the advertised rates of the regular lines in the trade is not sustained, where there was no refrigerated space available at time of shipment on any of the regular liners, and the vessel involved was sent specially in ballast for complainant's cargo so that the services are not comparable. In any event, respondents had no responsibility for the lower advertised rate of the regular liners, and legal discrimination cannnot be charged against respondents on

such showing since they were not the common source of the alleged discrimination or prejudice. D. L. Piazza Co. *v.* West Coast Line, 608 (615).

Fact that vessel owner charged only the liner rate on nonrefrigerated cargo carried for other persons, whereas it charged more than the liner rate on complainant's refrigerated cargo, does not mean that a difference in the refrigerated cargo rate constituted unjust discrimination. The services are not comparable. The vessel involved was primarily a refrigerated vessel with a small amount of nonrefrigerated space. The liner vessels were the reverse, and, moreover, no liner refrigerated space was available at the time. Id. (615).

Rate on cotton not shown to be unjustly discriminatory in violation of section 17 of the Act, where there is no evidence of a competitive shipper who received from respondent a different rate from that actually charged complainant. The charging of a greater than published rate is not, in the absence of a showing of competition, a violation of section 16 or 17 of the Shipping Act. United Nations *v.* Hellenic Lines Limited, 781 (788).

A case of unjust discrimination is not made out where Philadelphia pier operators allowed 2 days' free time for truck cargo, and rail cargo entitled to more free time is solely that shipped away from Philadelphia, while truck operators service only customers in the Philadelphia area and rail cargo to and from this area is allowed 2 days' free time. Rail cargo entitled to more than 2 days' free time is not competitive with the local truck cargo. Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc., 789 (796).

DISMISSAL OF COMPLAINTS.

Complaint alleging unjust discrimination in booking cargo space was dismissed as to respondent general agent of the vessel owner, since the general agent did not commit the act of discrimination complained of. Waterman *v.* Stockholms Rederiaktiebolag Svea, 131 (132).

A complaint will be dismissed without prejudice to the filing of another complaint in the event of resumption of operation of service with any equalization practice charged to be in violation of law; proceeding will not be held in abeyance to consider possible future violations of law. Beaumont Port Commission *v.* Seatrain Lines, Inc., 581 (582).

Where the gist of a complaint, alleging violations of sections 14–Fourth, 16–First and 17 of the Shipping Act, hinges upon an alleged withholding of delivery of cargo in New York pending the payment of dead freight and detention charges alleged to be unreasonable, the Board will not dismiss the complaint as failing to state a cause of action merely because many of the events giving rise to the action occurred outside the United States, or on the ground that the cause of action is one between shipper and carrier to be determined by the courts. The case does not involve an agreement giving a lien to the carrier for dead freight or detention charges but, on the contrary, the carrier intimated that what was done was a usual practice. Therefore, the complaint alleges facts which might amount to unfair treatment of a shipper, who was also a consignee, in the matter of adjustment and settlement of claims, in violation of section 14–Fourth, and to the establishment of an unreasonable practice relating to the handling, receiving, storing, or delivering of property, in violation of section 17. Hecht, Levis & Kahn, Inc. *v.* Isbrandtsen Co., Inc., 798 (799).

DUAL COMMON AND CONTRACT CARRIERS. See Jurisdiction.

DUAL RATE SYSTEM. See Contract Rates.

DUAL OR MULTIPLE SUBSIDIES.

Section 605(c) of the Merchant Marine Act of 1936 expressly authorizes the Maritime Commission to grant dual and multiple subsidies, subject only to

the limitations therein stated. Exercise of such power rests in sound discretion of Commission upon findings of warrantable facts. American South African Line, Inc., Seas Shipping Co., Inc., 277 (283).

The Merchant Marine Act, 1936, does not invest subsidy contract with the legal effect of an exclusive franchise although under section 605(c) services created after the passage of the law cannot be subsidized so long as the existing service or services are found to be adequate. Id. (284).

Where an exclusive operating-differential subsidy, if granted to one existing service would result in the discontinuance of another existing service, and in direct benefit to foreign-flag operators to the detriment of the interests of the American merchant marine, such subsidy will be denied, and subsidies will be granted to both of the existing services on a nonexclusive basis. Id. (287).

Maritime Commission in awarding two subsidy contracts for operation in the same trade route, mindful of problems presented by such dual subsidies, limited awards to 6-month experimental period, directed contractors (1) to exert efforts to merge or consolidate, or make satisfactory arrangements covering sailing dates, rates, and pooling of homebound cargo so as to eliminate competition between themselves and further competition against foreign lines, (2) to complete plans and specifications for replacements, secure bids thereon, and prove willingness to proceed in accordance therewith, and provided that, during experimental dual subsidy period, each contractor would have right to apply for reopening of proceeding to introduce evidence in support of or in opposition to continuance of subsidy to the other company. Id. (287–289).

EDWARDS-DIFFERDING FORMULA. See Freas Formula.

ESSENTIAL TRADE ROUTES. See also Subsidies.

The route from North Atlantic ports to ports in South and East Africa is an essential trade route of foreign commerce of the United States. American South African Line, Inc., Seas Shipping Co., Inc., 277 (287).

Operations from U.S. Atlantic and Gulf ports to West Africa (Trade Route 14) should be separated in view of foreign-flag competition and to provide better service to the Gulf. American South African Line, Inc.—Subsidy, Route 14, 314 (319, 320).

Trade Route 11 should be extended in scope to include service from and to ports in the Hampton Roads area, and South Atlantic Steamship's application for subsidy should be approved. Arnold Bernstein S.S. Corp.—Subsidy, Routes 7, 8, 11, 351 (352).

Trade Routes 7 and 8 should be considered as separate essential foreign trade routes, and applications of Arnold Bernstein, Black Diamond and U.S. Lines for subsidy should be denied. Id. (352).

ESTOPPEL.

Where carloading conference and a respondent member submitted agreement for approval and agreement was accompanied by a proposed tariff designed to increase charges in a tariff on file with California Railroad Commission, which tariff contained a rate per ton for carloading of woodpulp, respondent was estopped from denying that the proposed tariff charges were noncompensatory. The representations made in connection with the tariff, coupled with the fact that, as a result of a request by complainant, the conference tariff which failed to contain a rate for woodpulp was revised to reinstate the rate, precluded any consideration that the costs of loading woodpulp were other than represented. Fibreboard Products, Inc. *v.* W. R. Grace & Co., 128 (129, 130).

EQUALIZATION. See also Absorptions; Port Equalization; Profit to Shippers.

Carrier's equalization practice is not a regulation or practice connected with the receiving, handling, storing or delivering of property within the meaning of section 17(2) of the Shipping Act of 1916. Though rates include charges for services at the receiving and at the delivering end of the voyage as is true generally of freight rates of water carriers, this incidental element in the rates does not give the Board full jurisdiction to enforce reasonable rates for carriers in foreign commerce. To rule otherwise would disregard the difference of Board's authority over such carrier under sections 16 and 17 of the Act from its jurisdiction over certain offshore carriers in interstate commerce under section 18 of the Act. Beaumont Port Commission *v.* Seatrain Lines, Inc., 556 (561).

Equalization rates are "regular rates" within the meaning of section 16–Second of the Shipping Act of 1916. The term means any rate duly established and published or determined by a specific method published in the tariff and an equalization rate, therefore, is just as "regular" as a local rate, each being applicable to a separate type of traffic and inapplicable to any other type. Moreover, the equalization practice of carrier does not come within the meaning of "other unjust or unfair device or means" described in section 16–Second of the Act, as that term must be construed as limited to practices of the same general class of dishonest practices specifically mentioned. Id. (562, 563).

EXCLUSIVE PATRONAGE CONTRACTS. See Contract Rates.

FAIR RETURN. See also Freas Formula; Rate Structure.

To the extent that carrier's rates, fares, and charges yield net income in excess of a fair rate of return, they are, and for the future will be unjust and unreasonable in violation of section 18 of the Shipping Act of 1916. No risks were indicated by carrier to warrant higher rate of return than 7 percent. Rates Between Places in Alaska, 33 (39, 40).

FINDINGS IN FORMER CASES. See also Booking; Brokerage; Canal Zone.

Board is unable to agree with reasoning in decision in Alaskan Rates, 2 USMC 558, that express company which undertook to transport door-to-door, accepted the ocean carrier's usual bill of lading and paid the published ocean freight rate, was not a common carrier. Common carrier status depends on the nature of what the carrier undertakes or holds itself out to undertake to the general public rather than on the nature of the arrangements which it may make for the performance of its undertaken duty. Bernhard Ulmann Co., Inc. *v.* Porto Rican Express Co., 771 (777, 778).

As the Board pointed out in Afghan—American Trading Co., Inc. *v.* Isbrandtsen, Co., Inc., 3 FMB 622, the Supreme Court in U.S. Navigation Co. *v.* Cunard Steamship Co. recognized "similarity of construction" of the Shipping Act and the Interstate Commerce Act could not apply where there was "dissimilarity in the terms" of the statutes. United Nations *v.* Hellenic Lines Limited, 781 (787).

The Prince Line case is not authority for the proposition that the charging of a greater than published rate is, in the absence of a showing of competition, a violation of section 16 or 17 of the Shipping Act. Nor is there any requirement in the order in section 19 Investigation, 1935, 1 USSB 470, requiring the filing of rates 30 days after their effective date which expands the statutory definition of what is unlawful. Id. (787).

FOOD AND DRUG ADMINISTRATION. See Free Time.

FORWARDERS AND FORWARDING. See also Brokerage.

Some exporters and shippers maintain their own exporting department and perform all steps necessary to secure transportation by water and delivery of the goods in the foreign country. These are not forwarders, because it is only when such activities are for and on behalf of the shipper or consignee in return for a consideration, money or otherwise that they constitute forwarding subject to Commission jurisdiction. New York Freight Forwarder Investigation, 157 (160).

The Commission has power to prescribe reasonable regulations to remedy any unreasonable practices of freight forwarders. Forwarders are in a position to enter into agreements with carriers which may be contrary to the policy of section 15 of the Shipping Act of 1916 and to induce or commit discriminations forbidden by section 16. They are intimately connected with the receiving, handling, storing, and delivering of property, practices as to which must be just and reasonable under section 17; and they have access to confidential shipping information the disclosure of which is forbidden by section 20. Id. (162).

Any person carrying on the business of dispatching shipments by ocean-going vessels in foreign or domestic commerce, and handling the formalities incident thereto, is a forwarder within provisions of the Shipping Act. The definition includes manufacturers, exporters, export traders, manufacturers' agents, resident buyers, and commission merchants if they do not ship in their own name and if they charge a fee for forwarding services. The test is whether a person is "carrying on the business" of forwarding, so that persons who merely perform forwarding on their own behalf, even though the cost is passed on to the buyer, cannot be regarded as carrying on a forwarding business. Moreover, such a shipper needs no protection, whereas shippers who rely through choice or necessity on professional forwarders need a measure of protection. Id. (163).

Practice of forwarders in failing to specify clearly and state separately all service charges, and to segregate them from out-of-pocket costs for accessorial services, appears to arise out of the highly competitive nature of the business, and affords more leeway in bidding—contrary to their allegations that the reason is that foreign consignees would be upset and our foreign trade would be injured. Certain service charges can be made to appear nominal while the profit is concealed in such items as trucking, insurance, and warehousing. This practice is unjust and unreasonable. An appropriately detailed invoice must be presented before or after shipment itemizing charges and disclosing exactly outlays for which reimbursement is sought. Id. (163, 164).

For regulatory purposes it is immaterial whether forwarders act as agents of shippers or are independent contractors. What they do determines their status and resultant obligations under law, and in either case they are precluded by the equality provision of section 16, of the Shipping Act from unduly or unreasonably preferring, or discriminating against, any person for whom they perform forwarding service. Id. (164).

Commission finds that there is need for the registration of all forwarders as a means of controlling abuses in the trade. Id. (164).

In the absence of legislation providing a licensing system similar to that applied to custom brokers, the Commission must require all forwarders to register with it, since a program of regulation undertaken without means of identifying members of the industry would be largely ineffective. Id. (164).

The term "forwarder" as used in report means any person employed by shippers or consignees to dispatch shipments by ocean steamships and to take care of formalities incident thereto. Agreements and Practices Re Brokerage, 170 (172).

Under Board's practice a forwarder is a dispatcher and is generally not a common carrier. As a dispatcher it is an "other person subject to this Act" within the definition of section 1 of the Shipping Act and is subject to regulation under General Order No. 72. In rail transportation dispatchers undertaking to transport to destination, consolidate and ship their customer's goods under standard railroad bills of lading, paying the published tariff and relinquishing control over shipments during the railroad haul period. These have always been held, so far as their customers are concerned, to be common carriers. Bernhard Ulmann Co., Inc. *v.* Porto Rican Express Co., 771 (776).

FREAS FORMULA

Purpose of the Freas study is to determine cost of performing services from which wharfingers receive their revenue. Expenditures were determined, separated and apportioned among the various tariff services after wholly nonwharfinger expenses were eliminated. Two primary groupings were adopted: (a) carrying charges and (b) operating charges. Carrying charges embrace all expenses resulting from the maintenance of the bare plant whether it is in operation or not. Operating costs, which result from operation of the facilities, are divided further between dock operating costs and general and administrative expenses. Terminal Rate Structure—California Ports, 57 (59).

Carrying charges include return on investment, taxes and rentals on land, structures and facilities, insurance on structures, and depreciation and maintenance. Id. (60).

Dock operating charges embrace cost of superintendence, clerking, direct dock labor, and such miscellaneous items as watchmen, claims, and cleaning sheds. Id. (60).

General and administrative costs include all remaining items such as salaries and expenses of general officers and clerks, accounting, legal, and traffic and solicitation expense. Id. (60).

Vessel costs are those incurred in providing dockage facilities, in rendering services to vessel embraced in "service charge," in furnishing facilities rented to vessel under preferential or temporary assignments, in assembling cargo for account of vessel, and in handling lines or furnishing any other labor for the benefit of the vessel. Id. (60).

Cargo costs are those incurred in providing (1) wharfage, the charge for passing cargo over the wharf, or from vessel to vessel at wharf, and holding cargo during free time; (2) wharf demurrage, the charge for storage or holding cargo beyond free time; (3) car loading and unloading; (4) trucking facilities; and (5) accessorial services. Id. (60, 61).

Nonwharfinger costs, so interwoven with wharfinger expenditures as to make their initial separation impracticable, are eventually deleted. Id. (61).

As a general principle expenditures were assigned to the activities in whose furtherance they have been incurred. Contributions of both labor and facilities were measured by the proportionate use made thereof. The apportionment is as follows: A. Costs allocated to the vessel—(1) Waterways, (2) Fifty percent of open wharves and of land on which they are located, (3) Aprons, (4) One hundred percent of the land supporting aprons without tracks, and 50 percent with tracks, (5) Aisle space within the shed used by the vessel, (6) Services covered by the so-called service charge, and (7) Office and other space used by

vessel's clerical forces. B. Costs allocated to the cargo—(1) All land not covered by (1), (2), (4), and (5) above, (2) All trackage and supporting substructure, (3) Fifty percent of open wharves (exclusive of trackage and its supporting substructure, (4) Aisle space not included in (5) above, (5) All cargo areas within sheds, (6) All other trackage, roadways, etc., and (7) Any services rendered for the benefit of the cargo. Id. (61, 62).

Determination of an adequate return on "invested capital" is based upon a consideration of: (a) fair value of the property employed for the convenience of the public, (b) the financial needs of respondents, (c) the returns secured at the time from other similar enterprises in the general territory involved, and (d) the relative risk to which the capital is subjected. Id. (62, 63).

Fair value consists of present market value of land, values assigned to buildings, structures, other facilities and equipment, depreciated, and working capital. Id. (63).

Rate of return was fixed after considering several factors. The industry is highly competitive. Respondent's business may be seriously affected by a shift of tonnage between water and rail carriers. The business fluctuates with seasonal peaks and valleys and during periods of prosperity and depression. Developed costs for privately operated terminals are generally less than for those publicly owned; therefore the return was determined for the former and extended to the latter. A return of 7 percent for the private operators was determined to be adequate and fair to the terminals, as well as to the carriers and the shipping public. Id. (64).

Depreciation included in the carrying charges is the amount actually chargeable to operating expenses to reflect a loss in service value of the facilities used. The straight-line reserve method was employed. Id. (65).

Maintenance includes the amount actually spent for that purpose regardless of any reserve. Id. (65).

Rented property was evaluated and included in the rate base as though owned by the terminals. Therefore, the rentals paid were disregarded as an operating cost, inasmuch as the rate base and resulting return thereon was increased. Id. (65).

The term, "gift property," means property acquired without money cost, or at a price well below recognized commercial value. Regardless of the source of such property, it is reflected in the rate base—land through inclusion of present market value, and structures through consideration of reproduction cost in the same manner as allowances for intangibles. Inasmuch as there are not great amounts of depreciable gift property involved, it was depreciated in the same manner as other property. Id. (66).

Comparison of the results of the Freas formula with those of the Edwards-Differding formula shows that as to dockage the former develops 11.07 cents per ton for all respondents and the latter 10 cents for Howard and Encinal. In the case of service charges, the former develops direct costs amounting to 48 percent of the cost where as the latter develops 44 percent. As to wharfage the former develops 28 cents at Howard and Encinal and the latter 21 cents. The Freas formula develops carloading rates substantially higher than the Edwards-Differding formula—the former range from 51.47 cents to $1.51, the latter 45 to 47 cents. These differences are explained by changes in the costs and efficiency of labor, volume of cargo handled, and the fact that witness Freas included an additional charge representing cost of the portion of the structure or facility denied to carloading use. Id. (68).

Commission approves the Freas formula as a proper method of segregating terminal costs and carrying charges, and of apportioning such costs and charges to various wharfinger services. Id. (69).

FREE TIME. See also Demurrage; Discrimination; Intercoastal Shipping Act of 1933.

Wharfage charge has no reference to "free time." Free time means that the cargo once lawfully on the pier may remain on and during the period established at no extra expense, or without the enforcement of any of the rights reserved by the carrier or the terminal operator to remove the cargo to a warehouse at the expense of the cargo, or to charge demurrage beyond the free time period. Terminal Rate Increases—Puget Sound Ports, 21 (24).

Section 17 of the Shipping Act of 1916 provides that whenever the Commission finds certain regulations or practices are unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice. This constitutes an unlimited grant to the Commission of the power to stop effectively all unjust and unreasonable practices in receiving, handling, storing or delivering property. Minimum free time, and demurrage practices, as well as maximum free time regulations, over which the Supreme Court has upheld the jurisdiction of the Commission, come within the broad scope of the Court's decision. Free Time and Demurrage Charges at New York, 89 (93).

The determination of whether regulations and practices with respect to free time and demurrage are just and reasonable is not an exercise of rate-making power. Carriers must impose compensatory demurrage charges after the expiration of reasonable free time; if current tariff rates of demurrage are not compensatory, new rates should be published which are. Id. (93).

Discrimination in free time in favor of coffee and cocoa beans would violate decision in Storage Charges Under Agreements 6205 and 6215 (2 U.S.M.C. 48). Id. (95).

The fact that the necessity for weighing precludes the removal of cargo from piers within the free time does not mean that free-time periods are unlawful. The weighing is not done for any reason that concerns the carriers but is an operation connected with a transaction between the importer and customs. Id. (96).

Carriers cannot be required to accommodate cargo in their piers free of charge because it may fail to conform to the standard applicable to it. The Food and Drug Administration does not require goods to be left on the piers pending sampling by it. Id. (97).

Requirements of Department of Agriculture respecting plant quarantine do not cause goods to remain on piers after the expiration of free time. Id. (98).

If carriers are responsible for the condition of certain goods before they go to a warehouse and must rebrine goods such as olives, the carriers may be warranted in considering whether free time periods should not voluntarily be lengthened, but the Commission would not be justified in requiring that more free time be allowed. Id. (99).

Sampling of coffee and cocoa beans, required by the trade before shipment to plants, is not an operation necessary in connection with delivery by the carriers and thus can provide no valid ground for contention that free time allowed is unjust or unreasonable. Id. (99).

The unavailability of lighters to remove coffee and cocoa beans from piers, which lighters are furnished by others than the water carriers, affords no warrant for holding that the free time which the carriers allow is unjust or un-

reasonable. Importers may reasonably be assumed to have, or be able to obtain, equipment needed to receive the goods. Id. (100).

Free time allowed for removal of wood pulp from piers is not unjust or unreasonable where the delay is caused by the inability of the consumer mills to receive the wood as fast as it could be shipped. Id. (100).

Carriers, in determining the duration of free time, are not obliged to take account of delays in the removal of cargo which result from Government procedures and trade practices. Id. (100, 101).

Free time is granted by the carriers not as a gratuity, but solely as an incident to their obligation to make delivery. This is an obligation which the carrier is bound to discharge as a part of its transportation service and consignees must be afforded fair opportunity to accept delivery of cargo without incurring liability for penalties. Free time must be long enough to facilitate this result—but need not be longer. Id. (101).

The best index to the adequacy of free time is evidence relative to the frequency and amount of demurrage assessments. Id. (101).

The burden of proof is upon importers who seek relief from carriers' free time regulations. They must show that demurrage penalties are sustained with excessive frequency or in unwarranted amounts. Id. (102).

The Commission may not order an extension of free time merely because importers claim that such extension would reduce or eliminate congestion at piers. Free time is not a gratuity to consignees but is allowed solely to permit carriers to fulfill their obligation to deliver goods. It need not exceed a reasonable time allowed for their removal and a reasonable time is determined with due regard for the rights of all parties, including carriers and importers, and especially for the public interest which requires that congestion of ports be minimized in the interest of efficient water transportation. Id. (103).

While free time of 5 or 6 days imposes substantial burdens on importers, transfer of those burdens to carriers by extending free time is not justified where the record shows that 5 or 6 day deadlines are being met with considerable success, import traffic is moving across the piers more rapidly than it did under a 10-day rule, and a greater percentage of cargo is delivered with 6 days at present than was delivered within 6 days when the free time was 10 days. Requiring a general enlargement of free time would risk disorganization of pier operations. Id. (103).

Under present conditions at the port of New York, 5 days free time is the shortest that affords consignees reasonable opportunity to take delivery of imports. A tariff which fails to assure consignees a minimum of 5 days free time, and which authorizes public storage at the risk and expense of the cargo prior to expiration of such free time (exclusive of Saturdays, Sundays, and legal holidays) is an unjust and unreasonable regulation under conditions prevailing at the port of New York. Id. (104).

A tariff which reserves provisions of bills of lading including those whereby removal of cargo may be required within a shorter period than 6 days, deprives consignees of the right to insist upon any allowance of free time except at a carrier's election. This follows from the fact that bills of lading almost universally provide for transportation only to the end of ship's tackle, and a provision for ship's tackle delivery is obviously one whereby removal of cargo may be required within a shorter time than 6 days. Id. (104).

Where delivery can seldom, if ever, be made at the end of ship's tackle, a provision in a bill of lading purporting to require the receipt of cargo at ship's tackle is inconsistent with the common-law requirement of due and reasonable

notice to the consignee so as to afford him a fair opportunity to remove the goods. Moreover, regardless of the actual ability or inability of carriers to deliver at ship's tackle, it is the established custom of the port to make delivery to the dock and such custom supersedes all contrary provisions of bills of lading. Id. (104).

Carrier's practice of allowing some cargo to be removed by consignees while the vessel is discharging and before tariff free time officially begins is proper because it speeds delivery. However, Commission does not require that free time be defined in the tariffs to include any part of the period of discharge since such definition might imply a right in consignees to enter the pier and demand their cargoes as soon as landed. To confer that right would be impracticable because the carriers, in order to operate efficiently, must retain the power to exclude the public, except as admittance may conveniently be granted, until a vessel's entire cargo has been landed, sorted, and laid out in accessible position. Id. (105).

Free time cannot be extended to take account of the waiting time of trucks and lighters, as this rule would result in less efficient operation to the detriment of all concerned. Carriers could also prefer favored shippers. Id. (105).

A notice of availability of cargo should not be required in order to start the running of free time, as this requirement would merely postpone the removal of cargo by as long a time as the notice took to reach the consignee, and would serve no discernible need. Consignees are universally apprised of the arrival of vessels and routinely inform themselves by telephone, messenger, or reference to shipping publications as to the availability of their cargoes and the commencement and expiration of free time. Insisting upon a notice of availability would subject the carriers to extra work and expense that would be largely futile, and which appears quite unjustifiable. Id. (106).

Free time must be extended by carriers to cover periods of time when cargo cannot be removed by reason of strikes by employees of carriers. Tariff provisions which set forth that free time commences when shipments are available for delivery to consignees, or that free time shall be extended for a period equal to that during which the cargo is unavailable, afford adequate protection to consignees against assessment of demurrage where due to strikes of carrier personnel, or other impediments, cargo cannot be tendered for delivery. Id. (106, 107).

Where a carrier is for any reason unable, or refuses, to tender cargo for delivery, free time must be extended for a period equal to the duration of the carrier's disability or refusal. Id. (109).

Primary responsibility of furnishing reasonable free time to deliver outbound cargo on the pier and remove inbound cargo from the pier rests on the ocean carrier as part of its carrier responsibility. Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc., 789 (795).

Two-day free time period allowed for the ingress pick up, and egress of such number of trucks as are necessary to pick up or deliver the very substantial amounts of truck cargo passing over respondents' piers is, in view of the pier construction, the congestion, and other conditions, too short a time to be reasonable and proper. Five days would be proper. Id. (796).

GEOGRAPHICAL ADVANTAGES AND DISADVANTAGES. See Port Equalization.

HANDLING. See also Carloading and Unloading; Common Carriers; Discrimination; Practices; Rate and Commodity Comparisons; Tariffs.

Handling takes place after freight has been received and before it is delivered on behalf of the carrier. It is a service performed for the ship. Tariff definitions of handling which are ambiguous as to whether handling charge is applied

against ship or the freight are unjust and unreasonable regulations relating to the handling of property, in violation of section 17. Terminal Rate Increases—Puget Sound Ports, 21 (27).

Maritime Commission cannot issue order against carriers not parties to proceeding, where shippers intervening in rate proceeding raise question as to whether they should be charged by carriers for handling cargo when such cargo was not moved between place of rest on pier and ship's tackle, as in the case in continuous movement. Carloading at Southern California Ports, 137 (141).

HIGH SEAS.

Ship-to-shore service from anchorages adjacent to Nome, in connection with the line haul of ocean carrier is regular and on the high seas within the meaning of section 1 of the Shipping Act, 1916. Rates between Places in Alaska, 7 (10).

Where transportation is accomplished jointly by an ocean carrier and by a ship-to-shore service which does not participate in the line haul of the ocean carrier, each is common law carriage, and the latter is regular and on the high seas within the meaning of section 1 of the Shipping Act of 1916. Id. (10).

INFORMATION ILLEGALLY DISCLOSED. See Forwarders and Forwarding.

INSURANCE. See also Absorptions.

A tariff insurance rule, providing that the cargo rates do not include marine insurance and that no premium for the account of the shipper may be absorbed by the carrier, does not violate the Shipping Act of 1916 when the rule is interpreted by the carrier as not requiring prior notice to a shipper of a higher premium on cargo shipped on vessels of a certain age, and the shipper may not be compensated for the extra cost since the rule forbids any absorption of premiums. Himala International *v.* Fern Line, 53 (56).

INTERCOASTAL OPERATIONS (SEC. 805(a)).

—In general

Steamship service between ports of the United States mainland and ports in the islands of Guam, Midway, and Wake is not "domestic intercoastal or coastwise service" within the meaning of section 805(a) of the Merchant Marine Act, 1936. This interpretation is limited to Guam, Midway, and Wake and does not signify that a similar interpretation is or would be applicable to Hawaii, Puerto Rico, or Alaska. American President Lines, Ltd., (450).

In adopting the Merchant Marine Act, 1936, Congress manifested a special concern for the protection of coastwise and intercoastal operators, who are not eligible for subsidy, against the competition of subsidized lines (secs. 506, 605(a), 805(a)). The great importance to our merchant marine if its domestic fleet, and the serious difficulties that have attended the reestablishment of domestic shipping in the period since World War II, should prompt us to resolve all doubts against activities of subsidized companies whose operations might tend to impede the development of domestic transportation by sea. American President Lines, Ltd., 457 (470).

—Charter terms

Charters contemplated under certain section 805(a) applications for the use of vessels in the intercoastal trade, must be approved as to their actual terms where the United States has a pecuniary interest in the successful operation of two of the applicants by reason of the fact that they are subsidized operators. Baltimore Mail S.S. Co., 294 (297, 298).

—Competition to domestic operators

Application of carrier for permission to enter the intercoastal trade is approved where the service which applicant's proposed operation will afford will not be competitive with that of existing operators as to refrigerated and passenger service; loss of cargo is result of existing business conditions and overtonnaging in trade is temporary; there is no substantial volume of new vessel construction likely and, therefore, the transfer of applicant's vessels may be the only means of insuring adequate long term service; and proposed readjustment of indebtedness does not introduce any element of unfair competition. Therefore, there will be no unfair competition within the purview of the 1936 Merchant Marine Act to existing carriers or prejudice to the policy and objects of the Act from the operation of applicant's vessels in the intercoastal trade. Baltimore Mail S.S. Co., 272 (275, 276).

An amendment to an order issued under section 805(a) of the Merchant Marine Act of 1936, authorizing the use of five vessels in intercoastal trade, to provide for the use of additional vessels, owned or chartered, is not too broad where the amendment also restricts the extent of the authorization to not more than one sailing per week or utilization of any vessel not having a carrying capacity similar to the five vessels then operating, and competitors will know that no greater or different competition can be offered and that they will have the protection of section 805(a) in its requirement of a hearing on any proposal to use a vessel owned by a subsidized operator or an affiliate of such operator. Baltimore Mail S.S. Co., 294 (297).

Under section 805(a) the continued operation by a subsidized line of nonsubsidized vessels westbound from the Pacific to the Atlantic, in intercoastal trade, will result in unfair competition to an exclusively domestic operator where the domestic operator, during the most recent period of record, had an average of 10 percent unused space and claimed that had it filled such space its losses would have been eliminated; and it was required to sail two extra ships eastbound to handle a peak canned-goods movement and one of these proceeded to the Pacific in ballast. American President Lines, Ltd., 457 (470).

Complaint of intercoastal carriers that section 805(a) permission, for subsidized operator to provide reefer service on intercoastal leg of its nonsubsidized foreign trade route should be denied because the rates are noncompensatory carries little weight in view of the fact that such rates are fixed by the intercoastal conference, of which all the principal intercoastal operators are members. Intercoastal rates are subject to ICC regulation and the logical remedy lies in conference action or appropriate ICC proceedings rather than in an attempt to destroy the service. Id. (471).

Grandfather Clause

Applicant for resumption of subsidized operations in round-the-world service was in bona fide operation as a common carrier by water in the domestic intercoastal trade in 1935 and ever since within the meaning of section 805(a) where previous reductions in service were caused by a strike over which it had no control; during another reduction, caused by the strengthening of applicant's financial position and management by extensive repairs and improvement of vessels, there was at least one vessel in operation on the route; and applicant maintained its various intercoastal staff functions, continued to solicit intercoastal business, maintained its membership in the Intercoastal Steamship Freight Association and remained party to intercoastal rate schedules. American President Lines, Ltd. Round-The-World Subsidy, Intercoastal Operations, 553 (554, 555).

—Single voyages; unopposed applications

Application for permission under section 805(a) of the Merchant Marine Act of 1936 to charter a vessel from a subsidized operator for one round trip from New York to the Pacific coast was granted where the primary purpose of the trip was to advertise the transatlantic service of the owner of the vessel, the owner had offices on the Pacific coast for the solicitation of business, the cargo to be carried was only half the amount the regular steamer would carry, the regular steamer would replace the chartered vessel on the transatlantic route for one voyage, without subsidy, and there was no serious objection to the application. Baltimore Mail S.S. Co., 294 (296).

Application for permission under section 805(a) of the Merchant Marine Act of 1936 to operate two intercoastal voyages while returning from abroad on regular scheduled voyages, is granted where shipper requested applicant to move the shipments because of the urgent and critical need of the commodities for manufacturing purposes before a certain date; all certificated intercoastal carriers were offered this cargo, but none were able to furnish the necessary space in time; those carriers have waived objections to applicant performing the transportation in question; and applicant intends to apply to the Interstate Commerce Commission for the requisite permit to engage in this transportation, at the rates and subject to conditions stipulated in the current tariff of the Intercoastal Steamship Freight Association on file with said Commission. Lykes Bros. S.S. Co., Inc., 349 (350).

Application under section 805(a) of the Merchant Marine Act of 1936 for permission for parent company of subsidized operator to engage in the coastwise trade carrying automobiles granted where there has been a growth in trade in the area involved; present operators do not handle a sufficient quantity to meet the demand; traffic which applicant plans to handle will not be diverted from other carriers, but will represent added traffic by water which would otherwise move by other methods of transportation; money which applicant can gross will be an important contribution to the rehabilitation of its intercoastal service; no objection has been raised to the proposed operation; all of the certificated water carriers have instead furnished the Commission their written waivers and consent; and applicant has a certificate from the Interstate Commerce Commisison permitting operation in both the intercoastal and coastwise trades, including transportation between all the ports in question. Pacific Argentine Brazil Line, Ltd., 407 (408).

INTERCOASTAL SHIPPING ACT, 1933. See also Charters; Common Carriers.

Carrier did not file with the Commission schedules "showing all of its rates," in violation of section 2 of the Intercoastal Shipping Act of 1933, where it charged for services according to percentages of rates of another carrier and not in terms of cents or in dollars and cents per cubic foot per 100 pounds or other unit or basis. Rates Between Places in Alaska, 33 (40).

Carrier, by allowing a longer period of free time for storage of shipments than is permitted by the rule in its tariff, violates section 2 of the Intercoastal Shipping Act of 1933. Id. (40).

By charging rates different from those named in its tariff on file with the Commission, carrier violated section 2 of the Intercoastal Shipping Act of 1933. Id. (41).

Charter per diem rates established for transportation of certain equipment from Okinawa to Pacific coast ports of the United States cannot be made to apply to Guam shipments because they were not published and filed as required by the Intercoastal Shipping Act, 1933, as amended, and were less than the rate

on file with the Maritime Commission. A carrier cannot charge other than its established rate. Ken Royce, Inc. *v.* Pacific Transport Lines, Inc., 183 (186).

INTERSTATE COMMERCE ACT. See Findings in Former Cases; Jurisdiction.

INVOICES. See Forwarders and Forwarding.

JURISDICTION. See also Brokerage; Charters; Equalization; Forwarders and Forwarding; Free Time; War Shipping Administration.

Although Congress did not intend to give the Commission jurisdiction over those who perform the separate and distinct service of lighterage for or on behalf of common carriers or in connection with common carriers, the Commission's jurisdiction over common carriers is plenary irrespective of whether accessorial services, such as terminal handling, ordinarily rendered by an "other person subject to this act" may be performed by the common carrier. Thus the deliberate exclusion of lighterage from the definition of "other person" in section 1 of the Shipping Act of 1916 does not affect the Commission's jurisdiction over a person who is a common carrier even if facilities called lighters are used. Rates Between Places in Alaska, 7 (9).

Though not between ports, transportation between ship and shore from anchorages in Alaska by a common carrier is subject to the purisdiction of the Commission since Congress, in distinguishing between transportation between States and other States, Territories, districts, and possessions on the one hand, and intraterritorial transportation, on the other hand, and in providing that the former must be between "ports" and the latter beween "places," intentionally used an all inclusive term for the latter. Id. (10).

The Commission's jurisdiction in a rule-making proceeding instituted pursuant to provisions of the Shipping Act of 1916 is not affected by failure to charge a violation of the act in the notice of hearing. The proceeding is for the purpose of making findings and conclusions on the record after consideration of the evidence, to enable the Commission to prescribe reasonable regulations and practices for the future. Free Time and Demurrage Charges at New York, 89 (91).

The Board at this time does not claim general jurisdiction to inquire into or pass on regulations and practices in foreign ports relating to or connected with the receiving, handling, storing, or delivery of property. In this case, a demurrage regulation was imposed upon the shipper as a condition to shipment at an American port and was a part of a tariff under a conference agreement approved pursuant to section 15 of the Shipping Act. Thus, there are peculiar characteristics of the demurrage regulation which are the basis of jurisdiction here. Olsen *v.* W. S. A. & Grace Line, Inc., 254 (259).

On motion to its jurisdiction the Board is limited to the pleadings properly before it and cannot consider affidavits or statements of additional facts. Government of the Virgin Islands *v.* Leeward and Windward Islands and Guianas Conference, 759 (761).

While there is some doubt as to the Board's jurisdiction over contract rates as such, nevertheless where a common carrier operates also as a contract carrier on the same voyage or in the same traffic, the Board can inquire into such contract rates for the purpose of determining whether they create prejudice or discriminatory impacts on the common carrier operations.

LIABILITY OF CARRIERS. See also Bills of Lading; Booking; Common Carriers; Discrimination.

Reduction of a carrier's limit of liability for the complete loss or destruction of a shipment below the figure of $50 is complicated, confusing, and works out to

a limit so low when applied to small weight shipments as to be entirely illusory, particularly where it is coupled with the further provision that the maximum liability may be further reduced in case of partial loss. This feature of the limitation of liability clause in the carrier's contract is unreasonable in violation of section 18 of the Shipping Act, 1916. Bernhard Ulmann Co., Inc. *v.* Porto Rican Express Co., 771 (779).

The rules of common carrier liability and those relating to the burden of proof in suits against common carriers require the redrafting of provisions of a common carrier contract which provides no liability for loss, damage or detention of property from any cause whatever, unless proven to have occurred from the fraud or gross negligence of the carrier or its servants. Id. (780).

LIGHTERAGE. See Common Carriers; Free Time; Jurisdiction.

LIQUIDATED DAMAGES. See Damages.

LOADING AND UNLOADING. See Carloading and Unloading.

MERCHANT MARINE ACT, 1936. See Subsidies.

MERCHANT SHIP SALES ACT OF 1946. See Charter of War-Built Vessels; Subsidies, Construction-Differential

MISQUOTATION OF RATES.

Misquotations or misrepresentations as to the correct tariff rate by the carrier's agent, upon which the shipper acts, do not establish a contractural basis between the shipper and the carrier; otherwise some shippers would enjoy rates not open to all. Ken Royce, Inc. *v.* Pacific Transport Lines, Inc., 183 (186).

MONOPOLY. See also Agreements under Section 15; Contract Rates; Pooling Agreements.

Contention that a construction of section 14-Third of the Shipping Act of 1916 which approves the dual rate system, violates several sections of the Constitution and the 5th Amendment in that it is equivalent to granting to conferences the power to exclude independents from the trade and that such power to exclude is equivalent to a power to grant certificates of convenience and necessity such as Congress sometimes gives to regulatory bodies, but has not given to the Board with respect to foreign trade, is far-fetched, as there is no evidence that the system has in the past, or will in the future, effectively cause the exclusion of an independent carrier from any trade route on which he wishes to operate, and, in fact, independents may join the conference at any time. Isbrandtsen Co. *v.* North Atlantic Continental Freight Conference, 235 (243, 244).

MULTIPLE SUBSIDIES. See Dual or Multiple Subsidies.

NON-COMPENSATORY RATES. See also Rate Structure.

Even though Matson's financial position was such as to enable it to stand substantial losses, the law does not compel it to operate under such conditions. Matson's financial standing is of no evidentiary value in determining the lawful level of the rates. Matson Navigation Co.—Rate Structure, 82 (85).

ON-CARRIAGE.

Provisions of dual rate contract requiring tender of American shipments to conference lines, regardless of whether the cargo is to be transported on a through vessel or subject to transshipment, is valid since both types of carriers must be deemed to serve the ultimate destination, whether directly or through an on-carrier. Himala International *v.* American Export Lines, Inc., 232 (233).

OPERATING-DIFFERENTIAL SUBSIDIES. See Subsidies, Operating-Differential.

POOLING AGREEMENTS. See also Damages.

Pooling agreements are not shown to be unjustly discriminatory or unfair or to subject complainants to undue or unreasonable prejudice or disadvantage or to operate to the detriment of the commerce of the United States, or to be in violation of the Shipping Act of 1916, as amended, where the agreements were not entered into for the purpose of eliminating carriers from the trade but were motivated by a foreign country's import regulations; and they did not result in reducing the participation of complainants in the trade. West Coast Line, Inc. *v.* Grace Line, Inc., 586 (594).

A finding by the Board that operations of pooling agreements do not today result in unfair discrimination does not close the door to a re-examination of the same pooling agreements at a future date if changed conditions bring about changed results. Section 15 of the Shipping Act of 1916 expressly provides that the Board may "disapprove, cancel, or modify any agreement . . . whether or not previously approved by it that it finds unjustly discriminatory or unfair." Id. (595).

Agreement to pool earnings by two or more carriers in a particular trade is not per se unlawfully discriminatory or a violation of the Shipping Act, 1916. Nor does refusal by the members of a pool to admit an additional applicant necessarily render the continued operation of the pool unjustly discriminatory or a violation of the Act. The division of earnings, losses, or traffic by members of a pool contemplates close relations and exchanges of confidential information between them which may well be voluntarily assumed by competitors, but which should hardly be imposed upon them from the outside. Id. (596).

PORT EQUALIZATION.

Port equalization rules containing a prohibition of equalization with respect to certain traffic are not unjustly discriminatory or unfair as between carriers or ports or detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916, where (1) a possible resultant diversion of traffic from Texas and Louisiana ports to New Orleans might cause the discontinuance or serious curtailment of existing service at the former ports; (2) large local and Federal expenditures had been made for the development of harbors and facilities; (3) rail rates had been prescribed by the Interstate Commerce Commission which rates would be disrupted by equalization; and (4) there were no complaints as to the adequacy of service provided at the ports involved. Seatrain Lines, Inc. *v.* Gulf and South Atlantic Havana Steamship Conference, 122 (125).

Where by equalization practices of a carrier, traffic is drawn away from certain ports and the area around them to which they are entitled by reason of their geographical location, there is undue prejudice under section 16-First of the Shipping Act of 1916. It does not matter that the equalizing carrier does not serve both the preferred and the prejudiced ports, as the prejudice is created by its action in drawing away of traffic inherently and geographically belonging to the latter ports. Moreover, under section 16-First the drawing away of traffic does not have to be due to the equalization plan directly; the diversion can be due indirectly to the method of proportional rates and absorption practices. Since the carrier can correct the unjust discrimination without reference to the conduct of any other person, a complaint by the prejudiced ports states a cause of action. Id. (564–566).

Record is inadequate to make determinations on issues under sections 16-First and 17(1) of the Shipping Act of 1916 as to lawfulness of port equalization

rules, where a detailed analysis of shipment of other commodities besides that in question is lacking; and there is no statement of comparative figures from complainant ports broken down into relevant periods for comparative analysis. Record, therefore, should be remanded to the examiner for further hearing and report on issues under sections 16-First and 17(1) of the Act. Id. (567, 568).

PORTS. See Agreements under Section 15; Differentials; Discrimination; Port Equalization.

PRACTICES. See also Demurrage; Dismissal of Complaints; Forwarders and Forwarding; Free Time; Rate and Commodity Comparisons; Terminal Facilities.

Practice of ocean carrier to divide its total charges against shippers so as to specify separately the charge for handling from railroad cars at point of rest to ship's tackle, and the charge for ocean carriage from ship's tackle at loading port to destination, is not unreasonable or in violation of the second paragraph of section 17. Los Angeles Traffic Managers' Conference, Inc. *v.* Southern California Carloading Tariff Bureau, 569 (573).

Practice of making separate charges for handling of cargo in continuous movement and for carloading is not improper or unreasonable or a violation of sections 15 or 17 of the Shipping Act of 1916, as cargo handling in connection with "indirect" or "continuous" service is a separate and distinct service from the loading or unloading of cars. Id. (572, 573).

Acceptance by carrier of the agreed freight rate without furnishing the exclusive use of the ship was not an unreasonable practice under section 17 of the Shipping Act of 1916, as the taking of shipments of outsiders was justified by shipper's failure to ship the maximum of goods it had agreed to ship. Further, the carrier's action was not a practice connected with the handling, storing, or delivering of property within the statutory language of section 17. D. L. Piazza Co. *v.* West Coast Line, Inc., 608 (616).

Where the gist of a complaint, alleging violations of sections 14-Fourth, 16-First and 17 of the Shipping Act, hinges upon an alleged withholding of delivery of cargo in New York pending the payment of dead freight and detention charges alleged to be unreasonable, the Board will not dismiss the complaint as failing to state a cause of action merely because many of the events giving rise to the action occurred outside the United States, or on the ground that the cause of action is one between shipper and carrier to be determined by the courts. The case does not involve an agreement giving a lien to the carrier for dead freight or detention charges but, on the contrary, the carrier intimated that what was done was a usual practice. Therefore, the complaint alleges facts which might amount to unfair treatment of a shipper, who was also a consignee, in the matter of adjustment and settlement of claims, in violations of section 14-Fourth, and to the establishment of an unreasonable practice relating to the handling, receiving, storing, or delivering of property, in violation of section 17. Hecht, Levis & Kahn, Inc. *v.* Isbrandtsen Co., Inc., 798 (799).

PREFERENCE AND PREJUDICE. See also Agreements under Section 15; Charters; Classifications; Differentials; Discrimination; Free Time; Jurisdiction; Pooling Agreements; Port Equalization; Rate and Commodity Comparisons; Tariffs.

Tariff rates specifically applicable to lanolin and cocculus and of the level of rates applied to general cargo, N.O.S., do not violate sections 16 or 17 of the Shipping Act of 1916 or a conference agreement, where there is no persuasive evidence that the products are entitled to a lower rate, no showing of undue

prejudice or disadvantage or unjust discrimination, and, in fact, no substantial movement of the items. Himala International *v.* Greek Line, 187 (189).

Demurrage charges did not create undue and unreasonable prejudice and unjust discrimination in violation of sections 16 and 17 of the Shipping Act of 1916. The fact that similar charges were not made against the commodity in question from other ports to the same destination is not evidence of unlawful discrimination where there was no testimony that similar delays occurred in the latter trade, or that complainant was injured as a result of competition encountered on shipments in the latter trade. The contention that demurrage was not charged against general cargo and that a discrimination resulted therefrom is not supported by the evidence. There is no showing of any competitive situation as between the classes of cargo. Olsen *v.* W.S.A. & Grace Line, Inc., 254 (258).

Charging of lower rates for "continuous" car service than for "indirect" car service violates section 16 of the Shipping Act of 1916 as the result is the same for either method; the terminal operator and not the carloader or shipper decides which method shall be used; changing conditions determine which method shall be used, therefore making it impossible for a terminal operator to arrange long in advance for any particular kind of car service; and the situation opens the door to the possibility of carriers "arranging" for preferred shippers the servicing of their cargo at the lower rate. Carloading at Southern California Ports, 261 (264, 265).

Since it is stipulated that no other shipper paid lower rates than charged complainant for sugar from New York to Karachi, Pakistan, there is no showing of undue prejudice in violation of section 16 or of unjust discrimination in violation of section 17. Afghan—American Trading Co., Inc. *v.* Isbrandtsen Co., Inc., 622 (623).

PROFIT TO SHIPPERS.

Facts that the frozen-fish business has proved unprofitable since 1947, and one of the complainants has recently been losing money; and that there has been a tremendous influx of foreign frozen fish into the United States in competition with the Alaskan product, are not proof of unreasonableness of newly increased rates. The law does not contemplate the equalization of natural advantages and disadvantages through adjustment of freight rates. Increased Rates—Alaska S.S. Co., 632 (638).

PROPORTIONAL RATES. See Port Equalization.

PUBLIC LAW 591, 81ST CONGRESS. See Charter of War-Built Vessels.

RATE AND COMMODITY COMPARISONS.

Attempts to compare the rates in the Alaskan trade with rates to Hawaii and Puerto Rico have no significance by reason of lack of similarity in the trades. Alaskan Rate Investigation No. 3, 43 (45).

Each carrier in Alaskan trade must scrutinize continually and with great care the operation of its passenger vessels to be sure that it does not result in such loss as will seriously affect the level of its freight rates. Id. (47).

Tariff rates on fishery products southbound from Alaska and on some fishing supplies northbound from Puget Sound which are lower than other rates, are not unduly discriminatory or preferential and do not result in the fishery traffic bearing less than its fair share of the transportation burden where the volume of cannery traffic is greatly in excess of the town freight, southbound cannery cargo is cheaper to handle, much of the handling at the canneries is done by cannery

personnel, and the vessels get full loads and thereby make quicker and more direct voyages without calling at way-ports. Id. (49).

Carriers' rates, fares, charges, regulations, and practices have not been shown to be unlawful after examination of the following general characteristics of the trade; lack of similarity with other trades; traffic pattern; passenger traffic; operating costs; operating results; differences in rates; competition; allocation of costs; relation of freight rates to cost of living; joint rates; and consolidation of carriers to decrease expenses. However, record is held open for submission of additional evidence reflecting operations. Id. (46–52).

Collection of separate handling charges for transportation of freight from southern California terminals to world ports by common carriers transporting like cargoes from Atlantic and Gulf ports without separate handling charges to the same destinations is not a practice unduly prejudicial to southern California shippers, is not unduly preferential to Atlantic or Gulf shippers, and does not constitute unjust discrimination in violation of sections 15 and 17 of the Shipping Act, 1916. Los Angeles Traffic Managers' Conference, Inc. *v.* Southern California Carloading Tariff Bureau, 569 (580).

RATES. See also Agreements under Section 15; Compensatory Rates; Contract Rates; Cost of Service; Detriment to Commerce; Discrimination; Fair Return; Freas Formula; Misquotation of Rates; Non-Compensatory Rates; Preference and Prejudice; Rate and Commodity Comparisons; Rate Structure; Special Rates; Tariffs; Volume; Weight or Measurement.

Where carrier's contract rate is not sufficient to cover costs, and as a result, an undue burden is cast upon traffic not embraced within the contract in question, the rate is unjust and unreasonably low in violation of section 18 of the Shipping Act of 1916. Rates Between Places in Alaska, 33 (41).

Tariff rates for the transportation of commodities to and from points in Alaska are not shown to be unlawful where net income was less than a fair return; deficiency of net income does not warrant conclusion that each and every rate in force is below a reasonable maximum. Suspended increased rates on certain items are not justified in the absence of evidence showing whether present rates are lower than maximum reasonable rates. Increased Rates-Ship's Anchorage to Shore-Nome, Alaska, 229 (230, 231).

Where carrier charged a northbound rate on refrigerated cargo of salmon for a southbound shipment in accordance with its published tariff, and this rate varied so greatly from other southbound rates for refrigerated transportation of fish from nearby points as to be clearly unreasonable, the carrier charged an unlawful rate in violation of section 18 of the Shipping Act of 1916. Oxenberg Bros., Inc. *v.* United States, W.S.A., 583 (584).

Where a carrier's old rate provided for a change without notice, and the Board's rules permitted the filing of a changed rate within 30 days thereafter, carrier's charge of a changed rate agreed to at the time by the shipper, was not contrary to law or regulation. The Board's regulation with respect to carriers in foreign commerce is different from provisions of law affecting rail carriers and coastwise and intercoastal water carriers, which require filing of rates before they become effective. Afghan-American Trading Co., Inc. *v.* Isbrandtsen Co., Inc., 622 (624).

Charge that new rates are unreasonable because they single out frozen fish, was rejected where it was shown that rates on frozen fish were increased only slightly when several years previously, respondent's other rates were generally increased. Increased Rates—Alaska S.S. Co., 632 (638).

RATE STRUCTURE. See also Detriment to Commerce; Freas Formula; Non-Compensatory Rates.

Reasonable rate increases are not to be denied for the simple reason that merchants use such increases as an excuse to inflate their prices. Matson Navigation Co.—Rate Structure, 82 (85).

In revenue case, increased rates proposed by the rate making line are not unlawful where recent past operations have been conducted at a loss, though such loss provides no reliable basis upon which to predicate a reasonable and stable rate structure for the future because recent operations were conducted with old ships and under unusual traffic and shipping conditions; and where immediate future operations will yield only a modest rate of return. The rate structure in the Hawaiian trade must be judged by the development from the old to the new operation with development costs spread out over the future, and by the fact that the ratemaking line has accumulated large reserves after enjoying a long and successful operation so that during the present transition stage the highest permissible return on investment is not warranted. Id. (87).

Present rate structure was noncompensatory as a whole, and those rates which produce revenue less than the direct cost of service as revealed by cost studies of record are detrimental to commerce within the meaning of section 15. Status of Carloaders and Unloaders, 116 (121).

REASONABLENESS. See Brokerage; Contract Rates; Damages; Demurrage; Discrimination; Fair Return; Forwarders and Forwarding; Free Time; Handling; Liability of Carriers; Practices; Profit to Shippers; Rates; Tariffs.

REBATES. See Brokerage; Contract Rates.

RECEIPTS. See Bills of Lading.

REPARATION. See also Charters; Damages.

Where carloader charged merchandise N.O.S. rate for loading woodpulp rather than rate represented to Commission as reasonable, complainant was entitled to reparation in the amount of the difference with interest. Fibreboard Products, Inc. *v.* W. R. Grace & Co., 128 (130).

Complainants were injured by their inability to secure refrigerated space on vessel. As they failed to establish extent of injury, the matter will be assigned for further hearing unless the parties within 30 days, prepare, certify, and file with the Commission a reparation statement in accordance with the Commissioner's Rules. Waterman *v.* Stockholms Rederiaktiebolag Svea, 131 (136).

Complainant has been reimbursed by his customers for the full amount of the freight charges with respect to which he complains. This fact alone, however, would not be considered as a basis for refusing reparation if complainant were otherwise entitled to it, since complainant would be under obligation to hold the amount of any recovery for the benefit of the party justly entitled thereto. Complainant is not entitled to reparation. He paid the noncontract published rate, and because he had not signed the conference contract he was not entitled to the contract rate. Himala International *v.* American Export Lines, Inc., 232 (234).

As between vessel owner and charterer the agreement of carriage is not modified by the bill of lading. A complaint filed on May 5, 1948, is within the 2-year statutory period under section 22 of the Shipping Act where statutory violations are claimed to have arisen from payment of freight and demurrage on May 21, 1946, and May 24, 1946. D. L. Piazza Co. *v.* West Coast Line, Inc., 608 (612).

Where no undue prejudice or unjust discrimination is shown and where there is no showing that the failure to file new rate caused the shipper to change its position, a shipper who agreed to a new rate is not entitled to a refund because the carrier through oversight or error failed to post the new rate within the 30-day period required by the Board's rules. Afghan-American Trading Co., Inc. *v.* Isbrandtsen Co., Inc., 622 (624, 625).

REGULAR ROUTES.

The phrase "on regular routes" found in section 1 of the Shipping Act, 1916, was intended to exclude from the coverage of the term "common carrier by water in interstate commerce" only tramp operations. Transportation Between Pacific Coast Ports of the United States and Hawaii, 190 (198, 200).

RETALIATION. See also Contract Rates.

Establishment by a conference of tariff rates specifically applicable to lanolin and cocculus and of the level of rates applied to general cargo, N.O.S., which rates were so established during pendency of a Shipping Act violation proceeding involving the two products, and which were the same as the rates charged prior thereto under the classification, general cargo, N.O.S., provides no basis for assertions by the complainant shipper in the present and prior proceedings that the purpose of the conference was to catch his shipments by surprise thus subjecting him to serious loss if he should make shipments of the products during the pendency of the prior proceeding, and to retaliate against him because he had filed a complaint. Himala International *v.* Greek Line, 187 (188).

Section 14(3) was a codification of the common law on illegality of retaliation as appearing in the case of Menacho *v.* Ward, 27 Fed. 529. The distinction between retaliation and the dual rate system was recognized in Lough *v.* Outerbridge, 143 N.Y. 271, decided well before the 1916 Act. Isbrandtsen Co. *v.* North Atlantic Continental Freight Conference, 235 (243).

SALE OF VESSELS. See Subsidies, Construction-Differential.

SERVICE CHARGE. See Carloading and Unloading; Forwarders and Forwarding; Tariffs; Terminal Facilities.

SHIPPING ACT, 1916. See also Absorptions; Common Carriers; Jurisdiction; Statutory Interpretation.

Congress in enacting the Shipping Act of 1916 intended to regulate small operators as well as scheduled liner service of larger steamship lines operating regularly between two ports. Transportation Between Pacific Coast Ports of the United States and Hawaii, 190 (199).

SOLICITATION. See Agreements under Section 15; Common Carriers.

SPECIAL RATES. See also Contract Rates; Discrimination.

Agreements, insofar as they authorize special rates to oil companies on supplies and equipment to Netherlands West Indies and Venezuela, do not result in unjust discrimination or unfairness as between shippers or exporters. No other shipper has asked for a similar contract and been refused, and shippers similarly circumstanced, irrespective of whether they are oil companies, would be accorded the same rights and privileges. Agreement No. 6870—Practices with Respect to Rates Granted Oil Companies, 227 (App. iii).

Granting of special rates to oil companies on supplies and equipment for their own use in Netherlands West Indies and Venezuela, is not detrimental to the commerce of the United States. To show detriment there must be at least a plausible possibility that the action complained of will affect commerce adversely.

Here the special rates enable American exporters to compete in foreign markets, a most desirable end. Furthermore, the traffic might be lost to tramps or foreign-flag vessels. Id. (App. iv).

Section 14(4) of the Act forbids unfair or unjust discrimination based on volume of freight offered. While carriers' contracts with oil companies to transport supplies and equipment for the companies' own use in South America at special rates are based on volume, for 25 percent of respondents' entire southbound traffic in the trade is a substantial figure, the contracts are not unfair or unjustly discriminatory in view of the circumstances. The commodities are such as to remove them from the realm of ordinary commercial competition, and no shipper or consignee has been shown to be hurt by the contracts. Section 16(1) is basically the same as 14(4) with respect to this matter and neither section has been violated. Id. (App. iv).

STATUTORY INTERPRETATION.

The Intercoastal Shipping Act of 1933 contemplates services by common carriers such as wharfage, dock, warehouse, or other terminal facilities, and requires the carriers, in filing their schedules, to "state separately each terminal or other charge, privilege, or facility granted or allowed." Rates Between Places in Alaska, 7 (9).

In defining a "common carrier by water in interstate commerce," Congress made a distinction between transportation between states and other states, territories, districts, and possessions, on the one hand, and intraterritorial transportation, on the other hand. As to the former the transportation must be between "ports," whereas in the latter it is between "places." This distinction must be given its full meaning. Congress was aware of the lack of ports and of the different kind of transportation to be encountered in the territories and possessions, and intentionally used a term which would be all inclusive. It was realized that there would be transshipment at places with destinations at ports or other places. Rates Between Places in Alaska, 7 (10).

Commission is without jurisdiction to order carriers in the export trade to incorporate their freight and other charges in their bills of lading. Such authority would have to be derived from an interpretation that "receiving" of property covers bills of lading under section 17 of the Shipping Act of 1916. However, section 18 relating to domestic commerce makes a clear distinction between the processes of transportation and those applicable to activities which precede and follow the actual transportation; no other law relating to transportation and issuance of bills of lading makes it mandatory that freight and other charges connected with transportation be placed on bills of lading; the courts have held that freight charges, when placed on a bill of lading, are not a part of the receipt of goods but a part of the contract of transportation; and it has been held that the ICC had no power to draw carriers' bills of lading, notwithstanding that the Interstate Commerce Act contained a provision giving the Commission authority similar to that conferred by section 18 on the Maritime Commission. Bills of Lading—Incorporation of Freight Charges, 111 (113, 114).

The Canal Zone is not a possession of the United States within the meaning of the definition of "common carrier by water in interstate commerce" in section 1 of the Shipping Act of 1916. To hold otherwise would seem counter to previous court holdings, and create administrative confusion in view of the long continued practices of the Board in treating commerce between the United States and the Canal Zone as foreign commerce. Olsen *v.* W.S.A. & Grace Line, Inc., 254 (259).

Steamship service between ports of the United States mainland and ports in the islands of Guam, Midway, and Wake is not "domestic intercoastal or coastwise service" within the meaning of section 805(a) of the Merchant Marine Act, 1936. This interpretation is limited to Guam, Midway, and Wake and does not signify that a similar interpretation is or would be applicable to Hawaii, Puerto Rico, or Alaska. American President Lines, Ltd., 450.

The Supreme Court in U.S. Navigation Co. *v.* Cunard S.S. Co., 284 U.S. 474, recognized that "similarity of construction" could not apply where there was "dissimilarity in the terms" of the Shipping Act, 1916 and the Interstate Commerce Act. Afghan—American Trading Co., Inc. *v.* Isbrandtsen Co., Inc., 622 (625).

STORAGE.

If truck cargo is delivered on respondents' piers for vessel shipment in compliance with instructions from water carriers, and the vessel does not arrive at the pier to start loading within the allotted free time, any storage charges which pier operators may impose in such cases should be for the account of the vessel owner and not for the account of the truck-cargo owner. Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc., 789 (796).

STRIKES. See Demurrage.

SUBSIDIES, CONSTRUCTION-DIFFERENTIAL.

The Maritime Commission, having agreed to enter into reconstruction subsidy contracts, certain aspects of which would be governed by specific statutes (1936 Merchant Marine Act and 1946 Merchant Ship Sales Act) was without authority to insist that the formal contracts resulting from the agreement contain clauses not covered in such specific statutes. American President Lines, Ltd., 675 (678).

Where the Maritime Commission agreed with an applicant for a reconstruction subsidy on vessels sold to the applicant under the Merchant Ship Sales Act of 1946 that section 802 of the 1936 Act would be applied, through a clause in the final subsidy contracts, "with such revision of the standard provisions as may be necessary for consistency with the pertinent provisions of" the 1946 Act, the Commission could not use the words "depreciated acquisition cost" in the contracts rather than "depreciated construction cost" (the term in section 802), in connection with valuation of the vessels for requisition by the Government. The Ship Sales Act of 1946 includes no provision regarding the price for which vessels purchased under the Act may be reacquired by the Government, although early drafts of the Act included such a provision. Thus no change from the terms of section 802 would be required to make the contracts "consistent" with the 1946 Act, and the applicant could not reasonably be expected to have gathered from the agreement that any such change was contemplated by the Commission. Id. (679).

SUBSIDIES, OPERATING-DIFFERENTIAL. See also Charter of War-Built Vessels; Construction Reserve Fund; Dual or Multiple Subsidies; Essential Trade Routes; Intercoastal Operations (Sec. 805(a)).

—In general

Legislative history of section 605(c) of 1936 Act. American South African Line, Inc., Seas Shipping Co., Inc., 277 (App.).

Subsidy contract will be awarded where the freight services involved are essential within the meaning of section 211 of the Merchant Marine Act of 1936; there is no established American-flag operator in the freight service, under the provisions of section 605(c) of the Act; applicant possesses the ability and experience, financial resources, and other qualifications necessary to conduct

the proposed operation so as to meet competitive conditions and promote foreign commerce; and the granting of the aid as applied for under Title VI of the Act is necessary to place the proposed operation on a parity with foreign competitors and will carry out the purposes and policies of the Act. Oceanic S.S. Co.—Trade Route 27, 309 (313).

Cargo moving between the Gulf and West Africa will support only one applicant for subsidy aid; likewise, cargo moving between U.S. Atlantic ports and West Africa should support only one applicant. American South African Line, Inc.—Subsidy, Route 14, 314 (320).

While a subsidy applicant is not entitled to preference as such, by reason of its proposed plan to meet special needs of the services which it seeks to enter, as opposed to applicants which propose only what the Commission has suggested for the services, the Commission will consider the scope of the proposed plan in selecting an operator where there are several applicants. Id. (322).

The type of operation, with feeder service for West African ports, proposed by American South African is superior to that propsed by other applicants and should receive financial aid in the operation of the U.S. Atlantic-West Africa service. Id. (323).

Mississippi Shipping Company is the only applicant who prefers to confine its operation to a service from U.S. Gulf ports only. It has the support, financial and otherwise, of the domestic communities primarily interested, which gives it a preference under the 1936 Act. It should receive financial aid in the operation of the U.S. Gulf-West Africa service. Id. (323).

Based on Commission report with respect to the need for U.S.-flag service on trade routes, the Commission granted subsidy aid to applicant otherwise qualified under Title VI of the Merchant Marine Act of 1936, but limited its service to the scope of the trade route involved. United States Lines Co., 325 (330).

An application for operating-differential subsidy will be granted, subject to eligibility under section 601 of the Merchant Marine Act of 1936, where the applicant has met the requirements of section 605(c), is supported by local interests within the meaning of section 809, the presently subsidized carrier was unable to handle cargo offerings on the trade route involved, the frequency and regularity of the subsidized carrier's service failed to meet the needs of many shippers, the subsidized carrier's services were subject to delays in sailing schedules of serious consequences to shippers, the subsidized carrier provided no service to certain Pacific coast ports, and trade on the route is increasing rapidly. Pacific Argentine Brazil Line, Inc., 357 (359–361).

—Absence of U.S.-flag operation on route

No American-flag operator is now operating on Trade Route 14. Now is the time to extend aid in view of the advantages accruing to the Government and to the operator in the development of this service through the operation of the recapture and trust fund provisions of the 1936 Act. Therefore, in furtherance of the long-range program enunciated in the Act, the Commission finds that subsidy contracts should be awarded to U.S.-flag operators in the development and operation of the Route on a permanent basis. American South African Line, Inc.—Subsidy, Route 14, 314 (321).

—Accomplishment of the purposes and policy of the Act—Section 605(c)

The addition of a new service on a trade route, pursuant to section 605(c) of the Merchant Marine Act of 1936, will aid in the accomplishment of the purposes and policy of the Act where the Commission has previously determined

that the service should be maintained as an essential part of American Merchant Marine operations, there are no combination vessels presently in operation, and the existing service is inadequate with respect to passenger service, even though the particular vessels proposed for use may not be suitable to meet the passenger requirements of the route since that question is not relevant under section 605(c). Arnold Bernstein Line, Inc., 362 (364).

—Adequacy of service

Service of American South African Line, Inc., on route from North Atlantic ports to ports in South and East Africa is not adequate within the purview of section 605(c), and that line alone cannot provide adequate service. American South African Line, Inc., Seas Shipping Co., Inc., 277 (287).

Under the provisions of section 605(c) of the Merchant Marine Act of 1936 Commission is precluded from granting financial aid to a carrier where there is no evidence that the service of a carrier already operating in the trade is inadequate. Bloomfield S.S. Co., 299 (305).

Carrier's statement in its brief that it is "ready, willing and able" to serve ports in the Straits Settlement and Netherlands East Indies is not an important factor in evaluating the adequacy of existing service. United States Lines Co., 325 (337).

Application of carrier for financial aid under Title VI of the Merchant Marine Act of 1936 must be denied where present operator provides adequate service to meet the requirements of section 605(c) of the Act, since it makes more sailings on the route than recommended in the Commission's "Report." Id. (342).

Existing service is adequate under section 605(c) of the Merchant Marine Act of 1936, where the operator proposes 12 regular sailings per year instead of the 48 sailings recommended in the Commission's "Report," since the Commission recognizes the uncertain nature of trade and that a less number of sailings than mentioned in the "Report" may be sufficient. Moreover, the operator has promised to increase its proposed sailings to meet the requirements of the trade. Id. (347).

Existing service on a trade route is inadequate under section 605(c) of the Merchant Marine Act of 1936 where only one regular passenger service to Rotterdam is provided, the only service to Antwerp is provided by freight vessels, the level of passenger traffic to both ports will be sufficiently high to support the service envisaged, and the German vessels which, due to German national pressure, sustained the rather artificial use of Hamburg and Bremen, have been lost. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 362 (363, 364).

Existing passenger service, whether considered in terms of Trade Route 8 alone, or in conjunction with Trade Route 5, is inadequate. This meets the statutory requirements as to a determination of inadequacy, making unnecessary a discussion of cargo aspects. Id. (364).

If a subsidy applicant is found to be an existing operator under the first part of section 605(c) of the Marchant Marine Act of 1936, it need not prove that the service of another operator on the route is inadequate. Shepard S.S. Co., 366 (367, 368).

U.S.-flag services between U.S. Atlantic and California ports and Malaya-Indonesia are inadequate, since such services (including applicant's C-2 Service) are carrying, outbound and inbound, substantially less than 50 percent of the traffic in that trade. American President Lines, Ltd., 457 (472).

While the record showed that applicant's and some of the intervenors' vessels had substantial unused deadweight and cubic capacity, and while unused space is an element of "adequate service" under section 605(c), the question of ade-

quacy of service need not be determined where the Board has found in favor of the applicant on the issue of undue advantage and undue prejudice. United States Lines Co., 713 (722).

—Diversion of revenue from subsidized operations

Where the Commission granted permission to a company for operation of a service with unsubsidized vessels on condition that an agreement be entered into providing for protection of the company's subsidized operations from diversion of cargo and revenue by the nonsubsidized operations, and because of the intersecting and overlapping pattern of the several routes involved, some measure of diversion is possible, the condition will be modified since the aim is the prevention of undue diversion, having regard for practical problems encountered in such operations as the services of the company embrace. American President Lines, Ltd., 457 (467).

The practice of a subsidized operator in allocating chartered vessels to its subsidized services while at the same time operating owned ships in an unsubsidized service, results in reduction of the net earnings of the subsidized services (charges for the hire of chartered ships being generally in excess of capital charges on owned ships) to the prejudice of the Board's position relative to recapturable profits of the subsidized services. It is also inconsistent with the Board's and the Administrator's view of sound operating practice which calls for employment of the operator's own ships in its subsidized services. An operator's subsidized, rather than unsubsidized services must be accorded first claim on its owned vessels suitable for use in its subsidized operations. Id. (469).

—Essential service

Often services do not show commensurate returns for each portion of the round voyage, and it is not improper to consider the round voyage in its entirety as a standard for the needs of the service. American South African Line, Inc., Seas Shipping Co., Inc., 277 (285).

Section 211 of the Merchant Marine Act, 1936, requires the Commission to give due weight to "facts and conditions that a prudent businessman would consider in dealing with his own business." Thus, in determining what services are essential to the promotion of the commerce of the United States, the Commission will take account not only of the immediate competitive situation, but also of the reasonable probability of future competition. Moore-McCormack Lines, Inc., 396 (403).

—Existing service

The word "existing," in the first clause of section 605(c) of the Merchant Marine Act, 1936, cannot be impliedly restricted to an existing "subsidized" service or services. American South African Line, Inc., 277(284).

Since section 605(c) of the Merchant Marine Act does not define "existing service" and the legislative history of the section is silent, the Commission will examine the construction of analogous statutes by the courts and administrative agencies. Bloomfield S.S. Co., 299(304).

Where permission of the Commission was required only for return via North Atlantic ports and for operation of certain vessels, but not for the right of steamship company to operate in the past on a trade route, the company's status as an "existing" operator depends on section 605(c) of the Merchant Marine Act of 1936, and is not affected by the permissive nature of the aforesaid phases of the operation. Id. (304).

Court decision, under grandfather clause of section 206(a) of the Motor Carrier Act of 1935, that proof of actual operations as a common carrier to and from termini and some intermediate points on a regular route, with evidence of willingness to serve all points when shipments are offered, justifies finding of bona fide operation to and between all points on the route; and Interstate Commerce Commission holding that operations are bona fide when openly conducted and in such manner as to indicate a real intent to maintain the business, are pertinent to a determination of what constitutes "existing service" within the meaning of section 605(c) of the Merchant Marine Act of 1936. Id. (304, 305).

A service is an existing one under section 605(c) of the Merchant Marine Act of 1936 where the steamship company made 35 sailings in a service before requisition by the Government of its vessels in 1942; four sailings were made after termination of requisition and before the present hearing; 295,000 tons of cargo were carried by the company for its own account; no cargo was ever refused for which the company had space; and the company stated at least twice to the trade that its service was permanent and that it intended to place new vessels therein as soon as possible. Bloomfield S. S. Co., Id. (305).

Applicant is an existing operator within the meaning of section 605(c) of the Merchant Marine Act of 1936, as amended, where, because its own vessels were taken by the Government during the war, applicant has chartered and purchased vessels and has made numerous voyages to provide needed freight service; and applicant advertised sailings in the service and clearly views it as a permanent operation. United States Lines, Co., 325 (342).

Under section 605(c) of the Merchant Marine Act of 1936 an applicant for operating-differential subsidy aid is an existing operator where its predecessor pioneered on a trade route between 1926 and 1940 and applicant resumed service in 1947 and maintained regular service thereafter. Pacific Argentine Brazil Line, Inc., 357 (359, 360).

Applicant for an operating-differential subsidy is providing an existing service on Route 1 under section 605(c) of the Merchant Marine Act of 1936 where it has rendered continuous and regular service since May 1947; employed 6 vessels; handled 89,000 tons of cargo on 18 sailings in the last 6 months of 1947 and 89,000 tons on 19 sailings in the first 6 months of 1948; and has no intention of withdrawing from the trade even though its application be denied. Shepard S.S. Co., 366 (368).

Applicant for operating-differential subsidy is an existing operator within the meaning of section 605(c) of the Merchant Marine Act of 1936 where it has engaged in operations in the trade for over 6 years, first as a berth agent for the War Shipping Administration and as an independent operator of chartered vessels making numerous chartered sailings carrying general cargo; and then operating on the route with a fleet of vessels purchased from the Maritime Commission and making weekly sailings between certain ports and making other calls when cargo warrants. United States Lines Co., 713 (716).

Applicant is an existing operator within the meaning of section 605(c) of the Merchant Marine Act of 1936 where the services for which applicant is seeking a subsidy contract have been in existence for many years and are not new services so as to be "in addition" to existing United States-flag services now serving the route. Grace Line, Inc., 731 (737).

—Foreign-flag competition

Financial aid under Title VI of the Merchant Marine Act of 1936 should be granted where although present service is adequate, severe foreign-flag competition is encountered on the route in question, and adequate American-flag

freight service cannot be maintained on a permanent long range basis without subsidy. The freight and passenger services on the route are so interrelated that it would not further the purposes of the Act to have one of the services operated on a subsidized basis and the other on a nonsubsidized basis. United States Lines Co., 325 (342).

Substantial foreign-flag competition is encountered on Trade Route 1 and an operating-differential subsidy for the Good Neighbor Fleet is necessary to meet such competition and to promote the commerce of the United States in furtherance of the policy and purposes of the Act. Moore-McCormack Lines, Inc.—Good Neighbor Fleet, 396 (400).

An operating-differential subsidy is not intended as a guaranty of profitable operation, but the losses of a steamship operator are relevant to the extent that they enable the Maritime Commission to appraise the importance of foreign competition which contributes to such losses. Id. (401).

Discontinuance of service compelled by losses sustained in consequence of foreign competition would be significant as indicating that foreign competition was substantial, and should be met by way of an operating-differential subsidy to insure continuance of an essential service on an essential trade route. Id. (401).

The substantiality of foreign competition should be evaluated on the basis of the critical importance to a steamship company of the number of passengers diverted to foreign-flag ships, rather than on the basis of minimizing the small percentages of foreign-flag traffic. Id. (401).

Competition to be met within the contemplation of the Merchant Marine Act, 1936, is competition of foreign-flag passenger space for the same passengers sought by United States-flag carriers. The Act does not require the Commission to insist that United States-flag operators provide accommodations or vessels identical with those of foreign competitors. To do so would be to permit foreign competitors to dictate the character and composition of the United States Merchant Marine. Id. (402).

Cruise to South America of foreign-flag vessel carrying 607 passengers who paid $2,700,000, alone must be considered as providing substantial competition with the Good Neighbor Fleet. The effect of cruise competition on Mormac's regularly scheduled service on essential Trade Route 1 cannot be ignored. Id. (403).

Where no claim is made or evidence offered that subsidy applicant is subject to foreign competition other than direct foreign-flag competition, it is not necessary for the Board to make any determination as to competition other than direct, and section 602 creates no obstacle to the making of an operating subsidy award. Grace Line, Inc., 731 (736).

Where direct foreign-flag competition clearly exists on a route as a whole, a separate finding of competition on a privilege-call segment, constituting 13 percent of the traffic, on the route is not necessary. New York & Cuba Mail S.S. Co., 739 (741).

—Hearings and determinations

Issues presented by section 605(c) of the Merchant Marine Act of 1936 are separate and distinct from those involved in section 601(a) which contains no hearing requirement for Commission determinations thereunder. Thus the scope of 605(c) hearing will not be enlarged to cover 601(a) issues. Arnold Bernstein Line, Inc., 362 (364).

While other sections of the Merchant Marine Act of 1936 are involved in a subsidy application, issues arising under them will not be considered in a hearing called to determine whether section 605(c) is a bar to the grant of subsidy; such issues will, of course, be passed upon before the application is disposed of on the merits. Shepard S.S. Co.—Subsidy, Route 1, 366(367).

For the purposes of a section 605(c) hearing the Board will consider subsidy applicant's proposed service including calls at a port not included in the Maritime Commission's description of the trade route involved; the final determination as to such calls will be made by the Administrator. United States Lines Co., 713 (715).

While it is necessary that the Administrator determine that the services are essential in the foreign commerce of the United States, a decision on section 602 or 605(c) issues need not be delayed pending the Administrator's decision under section 211. Grace Line, Inc., 731 (732).

The record presented in sections 602 and 605(c) proceedings, with such other evidence as the parties may desire to introduce, may form the basis of the Board's determination of issues under sections 601(a) and 603(b), or other provisions of the Act, but they need not be determined at this time. Id. (736).

Section 601 and other sections of Title VI of the Merchant Marine Act of 1936 permit determinations of direct foreign-flag competition without the requirement of a hearing. The investigation and hearing provided for under the Act is required only to determine competition other than direct foreign-flag competition. New York & Cuba Mail S.S. Co., 739 (740, 741).

—Purpose of subsidy

Financial aid under Title VI of the Merchant Marine Act of 1936 is not necessary to promote the foreign commerce of the United States where the record discloses that the only foreign-flag operator on the route in question carried approximately the same tonnage as the United States-flag operator; American-flag participation in export tonnage in this route has showed a decided improvement; applicant is prepared to continue to operate the service without a subsidy if Commission does not grant financial aid; and Commission has authorized sale of vessels to applicants under the Merchant Ship Sales Act of 1946 and such vessels will be equal to, if not superior to, those employed by the foreign-flag competitor. Bloomfield S.S. Co., 299 (306, 307).

The purpose of an operating-differential subsidy is to equalize certain operating expense items of the U.S.-flag operator with the corresponding expense items of its foreign competitor or competitors, and the necessity therefor is not determined on a profit basis. The Commission would not pay a subsidy, irrespective to disparity to costs, if an essential foreign service could and would be adequately maintained on a long-range basis without subsidy. American South African Line, Inc.—Subsidy, Route 14, 314 (321).

—Undue advantage or prejudice as between citizens

Grant of an application for operating differential subsidy will not give undue advantage or be unduly prejudicial as between citizens of the United States in the operation of vessels in competitive services, routes, or lines under section 605(c) of the Merchant Marine Act of 1936, where the presently subsidized carrier on the route involved was unable to handle cargo offerings due in part to the absence of competition, the needs of shippers have not been met, the subsidized carrier's services were subject to delay in sailing schedules of serious consequences to shippers, the subsidized carrier provided no service to certain Pacific coast ports, and trade on the route was increasing rapidly. Pacific Argentine Brazil Line, Inc.—Subsidy, Trade Route 24, 357 (359, 360).

The second clause of section 605(c) of the Merchant Marine Act of 1936—providing that no subsidy contract shall be made with respect to operation on a service served by two or more U.S. citizens, if the Commission shall determine that such operation would be unduly advantageous or unduly prejudicial as between U.S. citizens, unless certain requirements are met following a hearing—applies only where the applicant is an existing line furnishing services on the trade route with respect to which it asks Government aid. Arnold Bernstein Line, Inc.—Subsidy, Route 8, 362 (363).

The requirement of section 605(c) of the Merchant Marine Act of 1936 that no operating-differential subsidy contract shall be made with respect to a vessel to be operated on a route served by two of more citizens of the United States, if the Commission determines the result would be unduly advantageous or unduly prejudicial, as between citizens, in the operation of vessels in competitive routes, does not apply where the applicant for subsidy aid proposes the addition of a new service to existing service provided by a number of United States citizens. Id. (363).

Granting of an operating-differential subsidy would not give undue advantage or be unduly prejudicial under section 605(c) of the Merchant Marine Act of 1936, where the present slump on the route in question is temporary and may be eased in the not too distant future; development plans of countries on the route will probably create a strong demand for goods for some time; though another operator has ample facilities to handle all cargo now moving by American vessels, the figures indicate that this operator has been holding its own reasonably well since applicant entered the trade; applicant has already made inroads on cargo formerly carried by foreign lines; and shippers have testified that they have used foreign lines when a second American line was not available and that they prefer to ship by American lines when possible. Shepard S.S. Co., 366 (375, 377).

Carriage of military and Government-financed cargo is not subsidized within the meaning of the 1936 Act, so that an award of subsidy to an applicant carrying such cargo would not amount to a double subsidy. The carriage of such cargo has no bearing upon the issue of undue advantage or undue prejudice under section 605(c). United States Lines Co., 713 (721).

Effect of a subsidy contract would not be to give undue advantage or be unduly prejudicial as between citizens of the United States in the operations of vessels in competitive services, routes, or lines within the meaning of section 605(c) of the Merchant Marine Act of 1936, where there is no indication that applicant will schedule and provide more sailings than are justified under present conditions; fact that applicant would intensify its solicitation and advertising, if true, would not support a charge of undue prejudice; carriage of military and Government-financed cargo has no bearing upon the issue; applicant will be restricted to a certain route while competitors will be free to service other routes and seek higher revenues; the route in question is important to the foreign commerce of the United States; and there has been a steady deterioration of relative carryings of American-flag vessels in recent years. Id. (720–722).

Granting of subsidy application would not be unduly advantageous or unduly prejudicial, within the meaning of section 605(c), where the applicant has concentrated on direct runs on the trade route, resulting in a financial loss but in a relative increase of its share of the trade; intervenors have been financially successful when the results of their service on the route are combined with service on another route; the financial gain of intervenors has been at the expense of completeness and directness of their services to ports on the route

in question; and, if subsidy is awarded, applicant will be required to agree to continue to operate exclusively on the route involved and thus its subsidy would be no more than a fair allowance for the restriction, as the intervenors will remain free to seek higher revenues because of freedom from such restriction. Id. (721).

Where under section 605(c) a subsidy applicant does not propose a service in addition to existing service, and the Board, therefore, is required to determine the issue of undue advantage or undue prejudice, the burden of proof is upon the parties claiming undue prejudice and, in the absence of such complaint or evidence, the Board cannot find that award of subsidy would be unduly advantageous or unduly prejudicial, and is, therefore, not required to make any further findings as a condition to entering into a subsidy contract. Grace Line, Inc., 731 (737).

—Unsubsidized operations

An operator serving Trade Route 15 B (Gulf/South and East Africa) does not compete to any greater extent with an operator serving the same foreign ports from the Atlantic coast than an operator serving the east coast of South America from the Gulf competes with an operator serving the east coast of South America from the Atlantic. Thus the Commission is not required to exercise special jurisdiction over sailings, rates, charges, etc. of an unsubsidized operation in Trade Route 15 B by an operator subsidized in other trades and alleged to be in direct competition with subsidized operations on Trade Route 15 A (Atlantic Coast/South and East Africa). Bloomfield S.S. Co. and Lykes Bros. S.S. Co.—Trade Route 15 B, 299 (307).

Objection of Isthmian to permitting subsidized vessels of Oceanic to serve the Hawaiian Islands on the ground that this is domestic transportation served for many years by Isthmian and Matson without subsidy, is met by provision of section 605(a) for reduction of subsidy for that part of voyage between ports of the United States and its possessions. Oceanic S.S. Co.—Trade Route 57, 309 (312).

It would not further the purposes of the 1936 Act to require that one leg of a subsidized voyage be operated without subsidy. United States Line Co., 325 (337).

It is inconsistent with the purposes and policies of the Merchant Marine Act of 1936 to permit a subsidized operator, with respect to other foreign services, to operate vessels with or without subsidy in a service adequately served by another subsidized operator. Application was necessary because the subsidized operator was prohibited by provisions of its operating-differential contract from operating any unsubsidized vessels in the foreign commerce in competition with any other service receiving subsidy. Id. (342, 343).

In a proceeding to determine whether an applicant should be permitted to continue operation in a service (Trade Route 17, Freight Service C–2) with unsubsidized vessels—permission being necessary under its subsidy contract for operation on another route—an intervener who does not serve the area in question will not be heard in protest on the issue of unfair competition or undue prejudice in foreign trade, and its contention that nine other lines will be subjected to unfair competition will be rejected, as six of those nine were not represented at the hearing, one other took no position, and the remaining two objected only to applicant's intercoastal activities. American President Lines, Ltd., 457 (466).

American President Lines' application to operate on C–2 service of Trade Route No. 17, without subsidy, is approved with conditions. American President Lines, Ltd.—Unsubsidized Operation, 354 (355).

—Vessels, Suitability of

Whether particular vessels a subsidy applicant proposes are suitable to meet the passenger requirements of a trade route is not a question relevant under section 605(c) of the Merchant Marine Act of 1936. Arnold Bernstein Line, Inc., 362 (364).

SURCHARGES. See Tariffs.

TARIFFS. See also Absorptions; Agreements under Section 15; Classifications; Common Carriers; Discrimination; Findings in Former Cases; Free Time; Handling; Insurance; Intercoastal Shipping Act, 1933; Jurisdiction; Misquotation of Rates; Preference and Prejudice; Rate and Commodity Comparisons.

Tariff definitions of various terminal services should be uniform and clear, and a clear and inclusive list of the specific activities contained in each definition to enable the operators, shippers, carriers, and the Commission to determine whether each service is bearing its fair share of the cost load. Such uniformity should be sought in all ports; however, this does not mean necessarily a uniformity of charges. The industry will be healthier and there will be fewer noncompensatory charges if uniformity of definitions is required. Terminal Rate Increases—Puget Sound Ports, 21 (23).

Definitions of "service charge," "handling," "handling charge," and "carloading and unloading" contained in tariff are unjust and unreasonable regulations in violation of section 17 of the Shipping Act of 1916 in view of their inadequacy and ambiguity. Respondents directed to make necessary changes. Id. (26–28).

Definitions in a tariff of "handling" and "handling charge" are unjust and unreasonable regulations relating to the handling of property, in violation of section 17 of the Shipping Act of 1916, where they are ambiguous as to whether the charge is applied against the ship, which it should be, or the freight. Id. (27).

Definitions of "handling" and "handling charge" in tariff which do not provide that ordinary sorting, breaking down, and stacking on wharf are included in handling, are unjust and unreasonable regulations relating to the handling of property, in violation of section 17 of the Shipping Act of 1916, since such sorting, breaking down, and stacking are so related to handling of freight that they are properly to be covered by the handling charge. Id. (27).

Tariff definitions of carloading and unloading must indicate that the charge is against the cargo, and in not providing that ordinary sorting, breaking down, and stacking are included they are unjust and unreasonable regulations relating to the receiving and delivering of property in violation of section 17 of the Shipping Act of 1916. Id. (28).

Man-hour rates for loading or unloading trucks at pier lack the definiteness of per-ton charges and must be cancelled when the circumstances requiring their use as a stop-gap measure no longer exist. Id. (28).

When in dispute, a tariff of a common carrier is construed as any other document. Himala International *v.* Fern Line, 53 (54).

Every effort should be made by carriers, particularly those that are members of conferences and therefore parties to the same tariff, to so draw their tariffs as to remove all uncertainties; otherwise there is a possibility of preferences and discriminations in violation of sections 16 and 17. Id. (55).

Where Commission-approved conference agreement, to which respondent carriers are parties, provides that charges will be collected in accordance with tariff filed with the Commission, Commission can determine applicable charges under its authority with respect to the agreement. P. A. Dana, Inc. *v.* Moore-McCormack Lines, Inc., 79 (80).

A rate item for quartz crystal which included a 2 percent ad valorem is consistent with a tariff rule providing that "unless otherwise specifically provided in individual rate items" the shipper must pay an additional 2 percent of total declared value if he desires liability coverage in excess of $500, but the rule should be clarified to evidence that it is not intended to give the carrier the right to charge another 2 percent on top of the 2 percent specifically provided in the individual rate item. Id. (80, 81).

An individual tariff rate charge which specifically included a 2 percent ad valorem tax was not in violation of the Shipping Act of 1916 where the shipper did not request the carrier to assume a liability higher than that allowed by the carrier's bill of lading form, in which event, according to a further tariff provision, and additional 2 percent charge was to be made unless otherwise provided in an individual rate item; however, such further tariff provision should be changed to make it clear that a second 2 percent charge is not intended where the individual rate item already includes such a charge. Id. (80, 81).

Where carloading conference and a respondent member submitted agreement for approval and agreement was accompanied by a proposed tariff designed to increase charges in a tariff on file with California Railroad Commission, which tariff contained a rate per ton for carloading of woodpulp, respondent was estopped from denying that the proposed tariff charges were noncompensatory. The representations made in connection with the tariff, coupled with the fact that, as a result of a request by complainant, the conference tariff which failed to contain a rate for woodpulp was revised to reinstate the rate, precluded any consideration that the costs of loading woodpulp were other than represented. Fibreboard Products, Inc. *v.* W. R. Grace & Co., 128 (129, 130).

Rule requiring the filing of new rates within 30 days after they become effective does not mean a rate charged but not filed within the time limit is unlawful under sections 16 or 17 of the Shipping Act where no undue prejudice or unjust discrimination is shown. The purpose of the rule was to correct certain methods and practices of foreign-flag nonconference carriers who were openly or secretly soliciting freight at cut rates and creating conditions unfavorable to shipping in the foreign trade. Sections 16 and 17 place an obligation on every common carrier in foreign commerce to make its rates public in order to prevent undue prejudice and unjust discrimination between shippers. Afghan American Trading Co., Inc. *v.* Isbrandtsen Co., Inc., 622 (624).

TERMINAL FACILITIES. See also Berthage; Demurrage; Discrimination; Freas Formula; Free Time; Preference and Prejudice; Tariffs.

Service charge "for use of terminal facilities" is broad enough to comprehend the use of terminal facilities for which compensation is included in other charges, such as wharfage, and quoted phrase should be eliminated. Terminal Rate Increases—Puget Sound Ports, 21 (26).

Phrase, "administrative expense in serving the carrier," as part of terminal's "service charge" should be deleted. Each service presumably bears its proper share of the administrative expense in the charge established for the service, and to exact payment for such expense in the service charge would be duplication of charges. Id. (26).

Checking (which involves the counting and measuring of packages, recording any identifying marks, and making notations as to the apparent condition of the packages) performed for the ship should be covered by the service charges whether it is done at place of rest or not. Thus words, "at place of rest on dock, to or from vessel" should be eliminated from terminal's service charge for checking cargo. Id. (26).

Maritime Board suggested review by interested parties of the problem of separate billings for carloading and other miscellaneous terminal charges received by certain west coast shippers, whereas at certain east coast and Gulf ports, where identical service is provided, car service charges are included either in the line haul of the land carrier to or from the ocean terminal or the water-haul of the ocean carrier, so that a satisfactory solution may be voluntarily adopted to eliminate practices which might be unfair as between ports in different sections of the United States. Carloading at Southern California Ports, 261 (266, 267).

Respondents, as pier owners, are at liberty to restrict the use of their piers to rail cargo and deny it entirely to truck cargo, but they have not done so. Thus they must furnish the full reasonable use of their pier facilities or not permit their use at all. If respondents permit the use of their piers to the vessel owners for the receipt and delivery of truck cargo, they thereby assume responsibility to carry out the ocean carrier's full duty toward truck cargo. This includes nondiscriminatory and reasonable pier service, and service which is in no other respect in violation of the Act. Pennsylvania Motor Truck Assn. *v.* Philadelphia Piers, Inc., 789 (795).

THROUGH ROUTES AND RATES. See Equalization; Port Equalization.

TRADE ROUTES. See Essential Trade Routes; Subsidies.

TRANSSHIPMENT. See On-Carriage.

UNJUST OR UNFAIR DEVICES. See Devices to Defeat Applicable Rates; Equalization.

VOLUME.

Lawfulness of per diem rates as violative of section 14 as being based upon volume and available to large shippers only, would not be passed upon in view of lack of evidence of the existence of other shippers in the trade. Ken Royce, Inc. *v.* Pacific Transport Lines, Inc., 183 (186).

WAR SHIPPING ADMINISTRATION.

The Maritime Commission does not have jurisdiction over a claim by a shipper against its predecessor, the War Shipping Administration, and Grace Line, seeking waiver of unpaid demurrage charges and cancellation of bonds held by Grace Line to secure payment, on the ground that sections 15, 16, 17, and 18 of the Shipping Act were violated, since the proceeding is in reality a suit against the United States; the vessels involved were owned by or chartered to the United States; the transportation involved was performed by the United States through W.S.A.; Grace was a berth agent for W.S.A.; use of conference machinery to publish the tariff rule relating to the demurrage in question, of which conference Grace was a member but the United States was not, was merely a handy means of making it public; the judgment sought would not only expend itself on the public treasury but would seriously interfere with the activities of the United States as a common carrier in wartime; and the only section of the Shipping Act which might make the United States subject thereto, namely section 9, is inapplicable here because the vessels in question were not chartered

or leased by the United States to others but were maintained by agents of the United States, the actual operator, the cargo space was used by more than one shipper, and bills of lading, not charters, were used. Olsen *v.* W.S.A. and Grace Line, Inc., 143 (145–147).

The Maritime Commission, as an administrative agency, may pass upon the propriety of acts of its predecessor, the War Shipping Administration, although its quasi-judicial authority does not extend to the determination of claims against the United States; and evidence of possible violations of the Shipping Act will be received to determine whether such violations could have been condemned and corrected had the vessels been owned and operated by private interests rather than by the United States. Id. (147).

War Shipping Administration comes within the literal definition of a "common carrier by water" as set forth in section 1 of the Shipping Act of 1916, and is subject to Board jurisdiction where it voluntarily adopts conference rates and practices through its agent. Olsen *v.* W.S.A. & Grace Line, Inc., 254 (256).

War Shipping Administration, an agency of the United States Government, while operating merchant vessels as common carriers, is subject to the requirements of the Shipping Act, 1916. Congress has expressly declared in favor of equal treatment as between Government-owned and privately-owned merchant vessels. See MMA 1920, section 19(4). Oxenberg Bros. Inc. *v.* W.S.A. and Northland Transp. Co., 583 (584).

WEIGHT OR MEASUREMENT.

Where carrier's new rates for shipment of fish were computed on a weight basis, rather than on a cubic basis, in order to bring about uniformity between local ship rates and through ship and rail rates, and cubic rates were difficult to assess because the standard fish boxes bulged when packed, carrier's new rates will not be set aside by reason of the change alone. Increased Rates—Alaska S.S. Co., 632 (635, 636).

WHARFAGE. See also Free Time; Terminal Facilities.

Wharfage, which is a charge against the cargo for use of the wharf, is justified only on the principle that the carrier, or terminal operator on its behalf, does not take possession or deliver up possession of the cargo other than at the place of rest on the pier rather than from the end of ship's tackle. Between place of rest and the entrance to or exit from the pier the cargo is using the pier to get into position to utilize the carrier's facilities or has finished the use thereof. Establishment of the charge against the cargo for this use has been widespread under various names, viz: "wharfage," "top wharfage," "tollage," "wharf tollage." Terminal Rate Increases—Puget Sound Ports, 21 (24, 25).

U.S. GOVERNMENT PRINTING OFFICE: 1963 O—680426