FEDERAL MARITIME BOARD

No. 729

AMERICAN-HAWAIIAN STEAMSHIP COMPANY ET AL.[1]

v.

INTERCONTINENTAL MARINE LINES, INC.

Decided March 17, 1953

Respondent, a common carrier by water, found to be eligible for conference membership, and Conference under obligation to admit respondent.

Elkan Turk, Sr., *Elkan Turk, Jr.*, and *Herman Goldman* for all complainants except Isthmian Steamship Company.

Wendell W. Lang for Isthmian Steamship Company.

Leonard G. James and *Alan F. Wohlstetter* for respondent.

Allen C. Dawson for the Board.

REPORT OF THE BOARD

BY THE BOARD:

On October 14, 1952, respondent applied for admission to membership in the Far East Conference (hereinafter referred to as "the Conference"), stating that it intended to furnish common

[1] American-Hawaiian Steamship Company, American President Lines, Ltd., Daido Kaiun Kaisha, Ltd., The De La Rama Steamship Co., The Swedish East Asia Co., Ltd., The Ocean Steamship Co., Ltd., The China Mutual Steam Navigation Co., Ltd., Nederlandsche Stoomvaart Maatachappij "Oceaan" N.V., Ellerman Lines, Limited, Ellerman & Bucknall Steamship Co., Ltd., Hall Line, Limited, The City Iine, Limited, Skibsaktieselskapet Varild, Skibsaktieselskapet Marina, Aktieselskabet Glittre, Dampskibsinteressentskabet Garonne, Skibsaktieselskapet Sangstad, Skibsaksaktieselskapet Solstad, Skibsaktieselskapet Siljestad, Dampskibsaktieselskabet International, Skibsaktieselkapet Nandeville, Skibsaktieselskapet Goodwill, Isthmian Steamship Company, Aktieselskapet Ivarans Rederi, Skibsaktieselskapet Igadi, A/S Besco, A/S Lise, Kawasaki Kisen Kaisha, Ltd., Nissan Kisen Kaisha, Ltd., Toho Kaiun Kaisha, Ltd., Iino Kaiun Kaisha, Ltd., Mitsubishi Kaiun Kaisha, Ltd., Kokusai Kaiun Kaisha, Ltd., Lykes Bros. Steamship Co., Inc., Mitsui Steamship Company, Ltd., Dampskibsselskabet af 1912 Aktieselskab, Aktieselskabet Dampskibsselskabet Svendorg, Nippon Yusen Kaisha, Osaka Shosen Kaisha, Ltd., Prince Line, Ltd., Shinnihon Steamship Co., States Marine Corporation, States Marine Coropration of Delaware, The Bank Line, Ltd., United States Lines Company, Waterman Steamship Corporation, Wilhelmsen Dampskibsaktieselskab, A/S Den Norske Afrika—og Australielinie, A/S Tonsberg, A/S Tankfart I, A/S Tankfart IV, A/S Tankfart V, A/S Tankfart VI, Far East Conference.

carrier service in the U. S. Gulf-Japan trade, with liberty of calling at Mexican or west coast United States ports, that it planned regular sailings approximately monthly beginning either in November or December 1952, and that it was ready to make the deposit of $25,000 with the Conference as required by Article 24 of the conference agreement. After some correspondence the conference members, on December 18, 1952, voted not to admit respondent, and thereafter, on December 22, 1952, the conference members, as complainants, filed these proceedings asking for issuance of a declaratory order under section 5 (d) of the Administrative Procedure Act to determine whether respondent is eligible for conference membership, and whether it is the duty of the Conference to admit respondent. Respondent's reply requests the Board to find that failure to admit respondent to the Conference violates the Shipping Act, 1916, and the conference agreement.

The matter was initially decided by the Chief Examiner on the pleadings and a stipulation of facts. The Chief Examiner found that respondent was entitled to membership in the Conference, that it was the obligation of the Conference to admit respondent, and that failure of the Conference to do so immediately would result in making the conference agreement and the shippers' contracts entered into pursuant thereto unjustly discriminatory and unfair as between respondent and the Conference, and would result in subjecting respondent to undue and unreasonable prejudice and disadvantage.

The Conference filed exceptions to the initial decision and requested oral argument. In view of the adequate written argument of the Conference filed with its exceptions, we are, pursuant to section 201.211 of our Rules, denying the application for oral argument. We agree fully with the decision of the Chief Examiner.

The Far East Conference agreement (F.M.B. Agreement No. 17), originally approved on November 14, 1922, declares that the Conference was organized to promote commerce between Atlantic and Gulf ports of the United States and the Far East for the common good of shippers and carriers. Matters involving tariffs, freights, and charges are determined by majority vote of all the parties to the agreement. Each original party was required to deposit $25,000 with the conference chairman. Parties to the agreement are entitled to withdraw by giving sixty days notice, and after satisfying all obligations undertaken to the Conference are entitled to the return of their deposit. The following Article 24 relates to the admission of additional members:

Any person, firm or corporation may hereafter become a party to this agreement by the consent of a majority of the parties hereto, by affixing his signature hereto, and by depositing the sum of Twenty-five thousand ($25,000) Dollars in United States Government bonds, or in cash, with the Chairman as provided by Article 10 hereof.

The record shows that respondent is a corporation organized under the laws of the Republic of Panama, has no previous experience in the service to be undertaken, but that its general agents and sub-agents in the Gulf and their officers and staff have substantial experience in operating chartered vessels in the trade and liner services in other trades. The record further shows that respondent in October 1952 chartered the Swedish vessel *Mattawunga* on a lump sum basis, for loading in the Gulf in January, and this fact was notified to the Conference by letter dated November 3, 1952, in which respondent stated that if the Conference took prompt action to admit respondent to the Conference, a vessel might be put on the berth for December loading as originally planned. The *Mattawunga* actually sailed from Tampa for the Far East on January 14, 1953. Respondent published a daily advertisement in the New York Journal of Commerce beginning in December 1952, announcing the proposed sailing of the *Mattawunga*, and in January 1953 advertised the sailing of the Italian M/S *Luciano Manara* for the middle of February, and a "steamer" for the middle of March, all from the Gulf to Japan. Official notice is taken of the fact that the Italian-flag SS *Aequitas II* has been named in the card advertisement for the March sailing. The charter thereon, which has been stipulated in the record, shows that respondent time chartered this vessel on January 20, 1953, for a period of 9 months, with an option to extend the charter up to 12 months. Respondent's service is available to all shippers on a common-carrier basis, with respondent assuming all liabilities and obligations of a common carrier.

Respondent's answer asserts that the refusal of the Conference to admit respondent to membership resulted in substantial loss to respondent in connection with the January sailing of the *Mattawunga* because respondent's lack of conference membership prevented it from securing cargo from shippers having exclusive patronage contracts with the Conference. Respondent charges that continued refusal to admit respondent to conference membership will cause it further losses. The balance sheet of respondent as of January 15, 1953, shows cash in bank of $42,789.

The Conference, in support of its exceptions to the Chief Examiner's initial decision, urges that respondent's insubstantial

financial condition, its lack of any dependable supply of tonnage, and other circumstances surrounding its application, make the admission of respondent to the Conference contrary to the principles which underlie the Shipping Act, 1916, and particularly section 15 thereof. The Conference points out (1) that respondent is a newly organized Panama corporation; (2) that it has never had previous experience as a carrier in the trade; (3) that it intends to supply its berth with chartered vessels; (4) that after paying $25,000 to the Conference its cash resources will be reduced to only slightly over $15,000; (5) that except for respondent's chartered vessels, it has no agreement with any steamship owner for furnishing a regular supply of tonnage; (6) that three of respondent's stockholders are contract shippers with the Conference; and (7) that respondent launched its venture when the charter market was at or approaching the low for the postwar period.

We find that these facts when considered separately or in the aggregate are not a basis for refusing conference membership to respondent. In the first place, the conference agreement, which has the approval of the Board, specifically provides, as above set forth, the qualifications for membership. It appears that respondent meets the qualifications set up by the Conference and is prepared to make the necessary deposit.

In *Black Diamond Steamship Corp.* v. *Compagnie Maritime Belge (Lloyd Royal) S. A., et al.*, 2 U.S.M.C. 755, our predecessor, the Maritime Commission, held unreasonable a conference agreement limiting membership to operators actually engaged in operating vessels in the trade, and outlined a rule governing admission to membership which we fully endorse. The rule is to the effect that ability and intention in good faith to institute and maintain a regular service is sufficient. If the members of a conference decline to admit an additional common carrier to membership they must present very clear justification within the rule set forth above, or within such reasonable requirements as their conference agreement may include. No such justification appears in this record.

Taking up the other points made in the Conference's exceptions to the Chief Examiner's decision, we find that the only financial requirement for new members set up by the Conference is for the $25,000 deposit, and this, as stated above, respondent can meet. While it is true that the cash resources of respondent after making the deposit may be small, respondent avers that its stockholders, whose names are of record, are ready to furnish such

additional capital as may be reasonably required. There is no contradiction in the record that respondent has at its service the necessary managerial ability, and that its intention to institute and maintain a regular monthly service on the route is in good faith. That respondent lacks its own or any long-term charter supply of tonnage is an excuse which has been rejected by our predecessors in former cases where admission to conference membership was withheld on that ground. *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa, etc.*, 1 U.S.M.C. 634; *Sprague S.S. Agency, Inc.* v. *A/S Ivarans Rederi*, 2 U.S.M.C. 72; *Sigfried Olsen* v. *Blue Star Line, Limited*, 2 U.S.M.C. 529.

In the first case cited, the Maritime Commission said at p. 640:

> Defendants stress the fact that complainant's service is operated with vessels which it neithers owns nor has under time charters "in sharp contrast with that of the other lines in the trade, operating either their own vessels or vessels under time charter." According to the record, whether complainant operated trip-chartered, time-chartered, or its own vessels, the conference would be no differently affected by its membership therein.

The charge that respondent is a newly organized foreign corporation is clearly not a bar to conference membership for many of the Conference's present members are foreign corporations and age is not essential. Nor is the charge that three of respondent's stockholders are contract shippers with the Conference a reason to deny conference membership, there being no bar in the conference agreement against the present conference members carrying their own or their stockholders' cargo. Likewise, the suggestion that the launching of respondent's service with chartered vessels when the charter market made tonnage available at low rates raises no question where good faith is shown.

FINDINGS, CONCLUSIONS, AND DECLARATORY ORDER

On the record before us in this case we find:

1. Respondent is a common carrier by water on regular routes from port to port in the trade covered by F.M.B. Agreement No. 17 and within the meaning of sections 1 and 15 of the Shipping Act, 1916.

2. Respondent is eligible for and entitled to membership in the Far East Conference functioning under F. M. B. Agreement No. 17 on equal terms with each of the complainants making up said Conference.

3. It is the duty and obligation of complainants as parties to the Far East Conference under F. M. B. Agreement No. 17 to admit respondent to membership in such Conference.

4. Complainants' failure to admit respondent to conference membership immediately, including participation in shippers' contracts entered into pursuant to Agreement No. 17, will result in said agreement and contracts being unjustly discriminatory and unfair as between respondent and complainants, and will result in respondent being subjected to undue and unreasonable prejudice and disadvantage in violation of section 16 of the Act.

Complainants are hereby allowed ten days within which to admit respondent to full and equal membership in the Conference, and they shall notify the Board of their action in this regard within the time limited. Upon satisfactory compliance by complainants of the obligation herein set forth, this proceeding will be discontinued.

By the Board.

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

FEDERAL MARITIME BOARD

No. 718

THE JOINT COMMITTEE OF FOREIGN FREIGHT FORWARDERS ASSOCIATION ET AL.

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

No. 719

PACIFIC COAST CUSTOMS AND FREIGHT BROKERS ASSOCIATION

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

Submitted March 10, 1953. Decided March 24, 1953

Provisions limiting the payment of brokerage on certain commodities to less than 1¼ percent of ocean freight charges and prohibiting the payment of brokerage on heavy lift and long length charges found to be in circumvention of the decision and order of the Maritime Commission in *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170.

Charles S. Haight, Benjamin M. Altschuler, George F. Galland, Gordon W. Paulsen, Clifford B. Alterman, and *Robert L. Rosensweig* for Joint Committee of Foreign Freight Forwarders Associations, Customs Brokers and Forwarders Association of America, Baltimore Custom House Brokers and Forwarders Association, Association of Forwarding Agents and Foreign Freight Brokers of Mobile, Inc., Forwarding Agents and Foreign Freight Brokers Association of New Orleans, Texas Ocean Freight Forwarders Association, of Houston and Galveston, and the individual members of those associations, *Gerald H. Ullman* and *John K. Cunningham* for New York Foreign Freight Forwarders and Brokers Association, Inc., and its individual members, *J. Richard Townsend* and *M. J. McCarthy* for Pacific Coast Customs and Freight Brokers Association, and its individual members, complainants.

Joseph J. Geary and *Allan E. Charles* for respondents.

Henry A. Cockrum for Department of Agriculture, intervener.

Max E. Halpern, Joseph A. Klausner, Alan F. Wohlstetter, and *John Mason* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the examiner's recommended decision were filed, and the matter was argued orally before us. We agree generally with the examiner's decision.

Complainants in No. 718 are associations of foreign freight forwarders on the Atlantic and Gulf coasts. Complainants in No. 719 are foreign freight forwarders on the West coast. Pacific Westbound Conference and its member lines[1] are the respondents named in each complaint. Since the issues raised by each complaint are substantially identical, they were heard together and both will be disposed of in this report.

The United States Department of Agriculture intervened.

Complainants allege that respondents' conference Rule 30 (b), which limits the rate of brokerage that member lines may pay to freight forwarders to less than 1¼ percent of the freight charges on certain commodities named therein, and prohibits the payment of any brokerage on "heavy lift" and "long length" charges (1) violates the decision and order of the Maritime Commission in *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170 (1949) (hereinafter referred to as "Docket No. 657"), and (2) is detrimental to the commerce of the United States in violation of section 15 of the Shipping Act, 1916 (hereinafter referred to as the "Act"), and (3) is unjustly discriminatory and unduly prejudicial, and is an unreasonable regulation and practice in violation of sections 15, 16, and 17 of the Act.

A cease and desist order is requested.

The part of Rule 30 (b) complained of limits conference members to the payment to qualified forwarders of brokerage not in excess of the following amounts, based on the applicable freight rates:

Petroleum and petroleum products, packed	3¾%
All bulk cargo, liquid or dry, n.o.s. Fertilizer, packed Grain in bags, including wheat, barley, corn, oats and rice Flour, viz: barley, corn, rye or wheat Woodpulp	10¢ per ton as freighted
Lumber, logs, poles, piling and other lumber articles, freighted on a board measurement basis	15¢ MBM

No brokerage is payable on heavy lift or long length charges.

[1] Member lines of the Pacific Westbound Conference operate between the Pacific coast of the United States and the Far East.

In two prior cases the Maritime Commission has had occasion to consider the relations of the respondent conference with freight forwarders regarding brokerage. In *Agreement No. 7790* (1946), 2 U.S.M.C. 775, respondent conference submitted to the Commission for approval under section 15 of the Act a new organic conference agreement to supersede its then existing Agreement No. 57, as amended. The new Agreement No. 7790 contained a provision prohibiting the payment of brokerage by conference members on shipments subject to the conference's local tariff[2] although permitting payments not in excess of 1¼ percent of ocean freight on shipments subject to the conference's overland tariff.[3] The Commission declined to approve the new arrangement with the prohibition against the payment of brokerage on local shipments, saying at page 781:

> In view of the Bland Act [46 U.S.C. 1127, 56 Stat. 171], we cannot consistently approve an agreement, the effect of which would prohibit brokerage on a large segment of respondents' traffic. We do not hold or imply, however, that carriers must pay brokerage, for that would seem to be a matter for individual managerial judgment. The agreement will not be approved, therefore, unless the prohibition under discussion is eliminated.

Respondents' then existing agreement under which they were operating at the time of the Commission's decision in *Agreement No. 7790,* supra, contained Rule 16, which was substantially similar to the brokerage rule which was disapproved by the Commission. Rule 16 of Agreement No. 57 and the rules of other conferences on the same subject were considered by the Commission in Docket No. 657. In that case the Commission stated on page 177:

> We find that 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. We are not impressed with the argument that removal of the ban against the payment of brokerage necessarily will result in increases in rates. Respondents should remove all such prohibitions whether contained in their basic conference agreements, the rules and regulations of their tariffs, or both.
>
> Nothing herein is to be construed as a directive that individual carriers must pay brokerage nor as any limitation as to the amount of brokerage that may be paid by such individual carriers, provided the payments do not result in violations of applicable statutes. A carrier should be free

[2] The local tariff applies on all traffc originating in the States of Montana, Wyoming, Utah, Arizona, and States west thereof, and from points in Canada west of the Saskatchewan-Manitoba boundary line and all other traffic originating east thereof on which overland rates may not be applicable.

[3] The overland tariff applies on traffic originating in the States of North Dakota, South Dakota, Nebraska, Colorado, New Mexico, and States east thereof, and from points in Canada east of the Saskatchewan-Manitoba boundary line.

within limits to pay brokerage or not as its individual managerial discretion dictates. Nor is anything herein to be construed as a prohibition against carriers, acting under a conference agreement, from establishing all reasonable rules or regulations which will prevent the payment of brokerage under circumstances which would violate the Act, or as a prohibition against such carriers from placing limitations upon the amounts which they may pay. On the other hand, as we have found that a prohibition against any payment of brokerage results in detriment to the commerce of the United States, we believe that any limitation below 1¼ percent of the freight involved, which is the amount generally paid by carriers in the various trades over a period of years, would circumvent our finding and result in the detriment condemned.

The Commission, after hearing reargument of that case on March 8, 1950, entered an order requiring the conferences "to modify their conference agreements, regulations, and tariffs so as to remove the prohibitions condemned." Respondent Pacific Westbound Conference filed proceedings in the United States District Court for the Northern District of California, Southern Division, to enjoin and vacate that order, and other conferences filed a similar proceeding in the United States District Court for the Southern District of New York. In both cases the action of the Commission was sustained.[4]

The respondent conference thereupon, on March 12, 1951, made effective a tariff rule providing for brokerage on local cargo not in excess of 1¼ percent. On December 1, 1951, however, the conference made effective a new tariff rule, including paragraph 30 (b), with the limitations quoted above.

There can be no uncertainty as to the meaning of the Commission's order of March 8, 1950, that all "prohibitions against the payment of brokerage" were to be "removed" from conference agreements and rules.

The respondent, however, points out that Rule 30 (b) is not a complete prohibition against the payment of brokerage. The record shows that limitations upon the amount of brokerage payable in accordance with the schedule set forth in Rule 30 (b), above quoted, are in every case less than 1¼ percent of the freight involved. The Commission in its report sought to guard against a circumvention of its purpose when it said "*any limitation below 1¼ percent of the freight involved,* which is the amount generally paid by carriers in the various trades over a period of years, *would circumvent our finding and result in the detriment condemned.*" [Emphasis supplied.]

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[4] *Atlantic & Gulf/West Coast, etc. v. United States*, 94 F. Supp. 138; *Pacific Westbound Conference v. United States*, 94 F. Supp. 649.

The last quoted requirement of the Commission, although prefaced by the words "we believe", is an explanation and amplification of the Commission's prohibition, and is an integral part of the prohibition which the Commission's order of March 8, 1950, directs the conferences to remove.

The effect of the Commission's order was stated by the United States District Court for the Southern District of New York in *Atlantic & Gulf, etc.* v. *United States, supra,* at page 142:

> The Commission's order directs merely that plaintiffs' agreements not to pay brokerage be eliminated. * * * The Commission's report did not go so far as to state that all agreements relating to the payment of brokerage would be disapproved, *although it considered that an agreement to pay less than 1¼ percent would perpetuate the condemned detriment.* [Emphasis supplied.]

The conference argues that charges for handling "heavy lift" and "long length" shipments are assessed by ocean carriers to reimburse themselves for actual and indirect expenses incident to the handling of such shipments, and they are not "transportation" charges coming within the Commission's prohibition. The "heavy lift" charge, as set forth in the conference tariff, is assessed on packages which exceed a basic tariff weight, usually 8,960 pounds, and, similarly, the "long length" charge is an additional charge assesed upon any package over a certain length, usually 35 feet. In general, the tariff sets up a basic charge for the various commodities at so much per 2,000 pounds, or 40 cubic feet, whichever produces the greater revenue. The "heavy lift" charge is computed at so much per 2,000 pounds of the entire weight of the "heavy lift" package and added to the basic charge; similarly, the "long length" charge is computed at so much per 2,000 pounds, or 40 cubic feet, whichever is used in computing the basic freight rate, and likewise added to the basic charge. It is possible, therefore, for a single package, which qualifies both as a "heavy lift" and as a "long length" item, to pay a total charge made up of all three component parts described above. Respondent's witnesses were unable to state whether the "heavy lift" and "long length" charges assessed by the member lines were equal to, or more, or less than the additional cost incurred by the lines in handling the specialized items.

Ocean freight tariffs of all carriers vary according to the commodity carried, and one of the factors in the determination of the precise tariff for any commodity is the special trouble and expense which the carriage of such commodity involves. The division of the total ocean charge into a basic tariff and a sur-

charge does not remove either part of the total from the general category of freight charges where both parts must necessarily be paid for transportation of the items of cargo in question. We hold that the special charges named are part of the total freight charges on which brokerage may not be prohibited or reduced below 1¼ percent by the conference tariffs. This ruling is not contrary to the customary practice, for, according to the evidence, where the conference members pay brokerage without question on overland traffic, brokerage is paid on "heavy lift" and "long length" as well as basic freight charges.

Respondents make another point based on that part of the decision in Docket No. 657 which permits carriers individually to pay or not to pay brokerage as their respective managerial discretion dictates. The conference argues that Rule 30 (b) of the conference is no more than evidence that carriers who are members of the conference have each individually agreed on brokerage rates below 1¼ percent as to certain commodities. Respondents argue that since there was, under the decision in Docket No. 657, no prohibition against the carriers individually fixing rates below 1¼ percent, the carriers are within their legal rights to do so collectively and as a group. In this respect the conference's interpretation of the Commission's ruling in Docket No. 657 is erroneous. It was clearly set forth in that decision that "*concerted* prohibition against the payment of brokerage results in detriment to the commerce of the United States", and that respondent conferences should remove such prohibition "whether contained in their *basic conference agreements*, the *rules* and regulations of their *tariffs*, or both." (Emphasis supplied.) Respondent conference members in this case, through their conference Rule 30 (b), have taken *concerted* action, and have not removed the outlawed provision from their tariff rule. The permission granted by the decision in Docket No. 657 not to pay any brokerage or to pay less than 1¼ percent brokerage is given only to *individual* carriers acting *individually*.

That part of the language in Docket No. 657 which permits carriers acting under a conference agreement to establish rules preventing the payment of brokerage is limited to cases and circumstances where the payment of brokerage would violate the Act, and, similarly, the permission to place limitations upon the amounts of brokerage to be charged is subject to the fundamental ruling of Docket No. 657 that the brokerage as limited must not be less than 1¼ percent.

It follows that all provisions of Rule 30 (b) of respondent conference's tariff limiting brokerage rates to less than 1¼ percent of the ocean freight involved are in violation of the Commission's order in Docket No. 657, and must be promptly cancelled and withdrawn.

Conference Rule 30 (a), not attacked in these proceedings, which requires that brokerage

> shall only be paid to such freight forwarder as is designated by the shipper and as defined and properly qualified and continues to be currently registered under General Order No. 72, issued by the United States Maritime Commission (predecessor of the Federal Maritime Board)

and Conference Rule 30 (c), also not under attack, requiring invoice for brokerage submitted by freight forwarders to contain a certificate signed by the shipper and the freight forwarder certifying that

> the undersigned freight forwarder has been designated as such by the shipper with respect to the foregoing shipment * * * and has been authorized to book the cargo and to make such arrangements as may be required with the United States Customs Service,

and further certifying that

> in compliance with section 16 of the Shipping Act, 1916, as amended, no part of any such freight brokerage paid, pursuant to this invoice, shall revert to the shipper or the consignee, either directly or indirectly, and the business of the above mentioned freight forwarder is in no sense subsidiary to that of the shipper or consignee,

appear to be regulations which the conference under the decision in Docket No. 657 is authorized to make to assure that brokerage will not be paid under circumstances which will violate the Act, and only to freight forwarders who have, in fact, earned brokerage by actually securing or booking the cargo for the ship.

In view of our conclusions, it is unnecessary to consider the other grounds for relief set forth in the complaint or the evidence in support thereof. We find it unnecessary to rule on respondent's exceptions Nos. 1 and 2. We overrule respondent's exceptions Nos. 3, 4, 5, and 6, and take no action on respondent's general exception No. 7.

An order will be entered requiring respondent conference promptly to cancel, withdraw, and nullify the provisions of Rule 30 (b) quoted above, and thereafter to cease and desist from the prohibitions and limitations condemned.

ORDER

At a session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 24th day of March A. D. 1953

No. 718

THE JOINT COMMITTEE OF FOREIGN FREIGHT FORWARDERS ASSOCIATION ET AL.

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

No. 719

PACIFIC COAST CUSTOMS AND FREIGHT BROKERS ASSOCIATION

v.

PACIFIC WESTBOUND CONFERENCE ET AL.

These cases being at issue upon complaints and answers 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, decision, and findings thereon, which report is hereby referred to and made a part hereof;

It is ordered, That respondents be, and they are hereby, directed, within thirty days after the date of this order, to cancel, withdraw, and nullify the provisions of Rule 30 (b) of Local Tariff No. 1–V of Pacific Westbound Conference, and thereafter to abstain from the prohibitions and limitations condemned in said report.

By the Board.

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

FEDERAL MARITIME BOARD

No. M–58

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER THREE GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE PACIFIC COASTWISE/BRITISH COLUMBIA/ALASKA SERVICE

No. M–59

ALASKA STEAMSHIP COMPANY—APPLICATION TO BAREBOAT CHARTER TWO GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE SERVICE BETWEEN PUGET SOUND PORTS AND ALASKAN PORTS AND BETWEEN PORTS AND PLACES IN ALASKA

REPORT OF THE BOARD

These are proceedings under Public Law 591, 81st Congress, upon the application of Coastwise Line and Alaska Steamship Company for the bareboat charter of Government-owned, war-built, dry-cargo, Liberty-type vessels for use in their services, as described below, for an indefinite period. Separate hearings on the applications were held before an examiner. Since much of the evidence is relevant to both proceedings and the statutory issues are identical, they may both be disposed of in this report. Each applicant intervened in support of the other's application. The Committee for the Promotion of Tramp Shipping, Ocean Tow, Inc., and Alaska Freight Lines, Inc., intervened in opposition to the applications.

The examiner has recommended that the services under consideration are in the public interest, that the services would not be adequately served without the use therein of the vessels applied for or equivalent tonnage, and that privately owned American-flag Liberty vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in these services. Because of the applicants' failure to meet the third statutory condition, the examiner has recommended that the applications be denied. We agree with the conclusions of the examiner.

Alaska Steamship Company (hereinafter referred to as "Alaska Steam") operates a regular berth service between ports in Puget Sound and various ports in Alaska with two reefer vessels and seven C1–M–AV1 type vessels chartered from the Government, and nine owned vessels including three Libertys. Alaska Steam, by its present application, seeks to charter two additional Liberty vessels, formerly under charter to it pursuant to our findings in Docket No. M–31, 3 F.M.B. 545. The charters of these Libertys were discontinued pursuant to our findings in *Review of Charters, Gov't-Owned Vessels, 1952,* 4 F.M.B. 133, after the vessels were laid up for the winter, because of our inability at that time to find that the service was not adequately served without them. These vessels have radar and other special equipment required for their operation in the service of Alaska Steam.

Coastwise Line (hereinafter referred to as "Coastwise") operates a regular berth service between ports in California, Oregon, Washington, British Columbia, and Alaska, with two owned Libertys and three Libertys chartered from private owners. It seeks, by its present application, to charter from the Government three additional Libertys, formerly chartered to it pursuant to our findings in *Coastwise Line—Charter of War-Built Vessels,* 3 F.M.B. 515, and Docket No. M–30, 3 F.M.B. 545. The charters of these Libertys were also discontinued pursuant to our findings in *Review of Charters, Gov't-Owned Vessels, 1952, supra.* The three Government-owned Libertys are also equipped with radar and other special equipment required for their operation in the service of Coastwise.

It is clear from the record that the Alaska trade engaged in by both applicants is highly seasonal and that a very substantial part of it moves in the spring and summer seasons. The critical issue in these proceedings is whether privately owned American-flag Liberty vessels are available for charter by private operators on reasonable conditions and at reasonable rates for use in the services.

Alaska Steam

Alaska Steam's application is to charter two Government-owned Liberty vessels for an indefinite period, subject to the usual 15-day cancellation privilege. However, the company's vice president stated that he would not accept a long-term charter that did not have a provision for off-hire in the off season when the vessels were laid up, but would accept a charter for a period of from 5 to 7 months at a bareboat rate of $4,500 a month without

right of cancellation. While the application in this case was pending, Alaska Steam applied by advertisement and through brokers for Liberty vessels, suitably equipped for the Alaska trade, for a period of from 5 to 7 months. The best offer received was for the charter of several Libertys at $9,350 per month, the charterer to install the Alaska fittings if not on the vessel and to have the right either to remove the radar at the end of the charter or to leave it on board and receive from the owner half the cost of the installation.

Since privately owned vessels were available to Alaska Steam for charter, we must determine whether the rate and terms offered can be considered reasonable. Alaska Steam takes the position that a bareboat charter rate for Libertys in excess of $4,500 a month (being 8½ percent of the statutory sales price of Government-owned Liberty vessels) cannot be considered reasonable because the company's past experience shows that it was not able to make a profit even at that rate. On this issue, as on the other statutory issues, the burden of proof is on the applicant. Alaska Steam has offered in evidence a summary statement of the receipts and disbursements of the two vessels now applied for, during the prior charter period from June 1951 to the end of 1952.

If the issue of the reasonableness or unreasonableness of charter rates is to be shown by applicant's own operating results, the evidence should include results from at least all of applicant's vessels of the same type in the service involved. This was not done in this case. But even on the limited evidence before us Alaska Steam's contentions are not proven.

It is true that the statement covering the two chartered Libertys shows a substantial net operating loss over the entire year-and-a-half period of their operation. There was, however, a combined net profit of $51,800 on the two ships during the calendar year 1952. It is not necessary to make an analysis of this statement to explain why the operating results for 1952 showed a profit as against a loss in the second half of 1951. In forecasting the traffic to be carried to Alaska in 1953, applicant made a comparison with 1952, indicating that a substantial increase over 1952 was expected, so that the 1952 operating results, rather than combined results for 1951 and 1952, could appropriately be used as a basis to forecast what may be deemed a reasonable operational forecast for 1953. Expenses of operation under Government charters, not incident to operation under private charters, such as expenses and overhead during idle status not applicable under a private

charter, must be eliminated. Considering, therefore, the 1952 operating figures in the company's statement, we believe a reasonable estimate may be made as to what the company would have made in 1952 if it had not had any expenses attendant to the laying up and maintenance of the Government vessels during any idle period.

As stated above, Alaska Steam's statement shows a profit for these two Government-owned vessels for the year 1952 of $51,800, or an average of $25,900 per ship on approximately 8½ months' operations, after paying charter hire of $4,500 per month. The statement referred to shows the following approximate figures with respect to the 1952 operations of the two Libertys covered:

Profit from operations (average)	$25,900
Charter hire at $4,500 per month for period of operations (average)	38,000
Expenses during lay-up (average)	12,800
Overhead expenses during lay-up at $228 a day for average lay-up period of 122 days	27,800
Total	$104,500

When this total figure of approximately $104,500 is divided by 8½, for the months of operation of these vessels, it shows that Alaska Steam's 1952 revenue available to pay private charter hire would have been approximately $12,300 for each operating month. It may be assumed that operation of these vessels in the service of Alaska Steam in 1953 should not be less profitable than operation in 1952, considering that there was a protracted strike in 1952, and also that the cargo offerings in 1953 promise, according to Alaska Steam's testimony, to increase substantially over 1952. Even if the net cost of installing Alaska fittings of $22,000 had been charged against the 8½ months of Alaska Steam's 1952 operation, there would still remain operating revenue available for charter hire in excess of $9,350 per month at which private vessels were offered. Thus the figures presented do not support Alaska Steam's contention that a rate in excess of $4,500 a month is unreasonable for its service. We find that Alaska Steam has not sustained its burden of proving that the charter rate of $9,350 a month for vessels in this service, offered by private owners, is unreasonable.

Coastwise

The application of Coastwise is to charter three Government-owned Libertys for an indefinite period, also subject to the usual 15-day cancellation privilege. While the application was pending, Coastwise applied by advertisement and through brokers for

Libertys suitably equipped for its service for a period of from 7 to 9 months. Several offers were received, but the rates and terms were deemed to be unfavorable by Coastwise. Among the offers so received was one for three vessels at the bareboat rate of $9,000 per month for a period of from 18 to 24 months, the owner agreeing to install radar. Coastwise also received an offer for the charter of three Libertys for from 7 to 9 months at $9,250 per month, the charterer to install the extra equipment required and to have the right either to remove the radar at the end of the charter or to leave it on board and receive from the owner half the cost of installation.

Coastwise points out that the charter rate of $7,980 per month (15 percent of the statutory sales price), paid to the Government for the Liberty vessels under the prior charter is less than the amount it would have to pay for the most favorable private charters, and that the cost of installing the special fittings, estimated to be $40,000 for this service, would have to be added to the private rate. Of this amount approximately $15,000 would be the cost of installing radar, of which $7,500 might be salvaged at the end of the charter. If Coastwise should transfer its presently owned radar from the Government vessels to privately chartered vessels the cost of installation of radar might be substantially less.

Coastwise takes the position that a bareboat charter rate in excess of $7,980 per month cannot be considered reasonable because the company's past 1½ years' experience in operating the three Libertys chartered from the Government resulted in a loss. The evidence of Coastwise on this point was fragmentary, showing only an average daily rate of revenue and expenses for all operations in the year-and-a-half period for the three ships involved. The evidence of Coastwise, like the Alaska Steam evidence, does not contain any record of the operating results of its owned or privately chartered Libertys during the same period. Furthermore, certain breakout expenses incurred at the beginning of the charter and expenses during idle status are charged against the operation of the three Government-chartered Libertys that would be inapplicable to operation of a privately chartered vessel, thus taking from the figures presented relevance as to what would be a reasonable charter rate from a private owner in 1953. The record indicates that the operations of the three Government-owned Libertys in the 12 months of 1952 was profitable, and specific figures are lacking to show that 1952 operations of these vessels would not support the private charter rate offered of $9,250 a

month and the cost of making the required installations for the service.

Under the circumstances, we find that Coastwise, like Alaska Steam, has failed to sustain its burden of proving that the privately offered charter rate is unreasonable for the particular trade for which these vessels have been requested. Moreover, the record shows that Coastwise now has under charter three Libertys from private owners recently renewed for 6 months at a bareboat rate of $10,000 a month, and that the special fittings required for the service were installed on these vessels at applicant's expense when the charters were first made about 3 years ago.

Coastwise, at the time of oral argument, urged that subsequent to the hearing there had been a substantial increase in bareboat rates for private Libertys, and that the vessels offered at the time of hearing, or substitutes therefor, are no longer available at the offered rates. Coastwise argues that this is a matter of which we may take official notice. Since the charter market is subject to fluctuation, we feel that the fact or extent of a rise or fall in charter rates subsequent to the time of hearing is a matter of proof and beyond the scope of official notice.

CONCLUSIONS

We are unable to make the affirmative finding that privately owned American-flag Liberty vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in the two services under consideration. Under the circumstances, we deem it unnecessary to comment on the examiner's recommendations on the other two statutory issues.

By the Board.

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

APRIL 20, 1953.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION
ORDER

No. M–56

S.C.T.T., INC.—ALLEGED VIOLATION OF GENERAL ORDER 70

Notice having been published in the Federal Register of November 4, 1952, of the order of October 27, 1952, directing respondent, S.C.T.T., Inc., to show cause why an order should not be entered pursuant to section 243.2 (h) of General Order 70, striking its name from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes, and hearing on the above order having been held before an examiner, who issued his recommended decision on February 13, 1953, finding respondent not to be a citizen of the United States within the meaning of 46 U.S.C. 802, and to be in violation of General Order 70 by failing to furnish certain information requested by the Administrator, and no exceptions or memoranda having been filed with respect to the examiner's recommended decision, and the Administrator being in agreement with the findings of the examiner;

It is ordered, That the name of respondent, S.C.T.T., Inc., be stricken from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes.

By order of the Maritime Administrator.

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

MAY 4, 1953.

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DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. M–56

S.C.T.T., INC.—ALLEGED VIOLATION OF GENERAL ORDER 70

Respondent, S.C.T.T., Inc., found (1) not to be a citizen of the United States within the meaning of 46 U.S.C. 802, and (2) to be in violation of General Order 70 by failing to furnish certain information requested by the Administrator.

Noah P. Rosoff for respondent.

Gerald H. Ullman for New York Foreign Freight Forwarders and Brokers Association, Inc., intervener.

Alan F. Wohlstetter for the Administrator.

RECOMMENDED DECISION OF A. L. JORDAN, EXAMINER

This is a proceeding initiated by the Maritime Administrator's order of October 27, 1952 (Appendix A), directing respondent to show cause why an order should not be entered pursuant to section 243.2 (h) of General Order 70, striking its name from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes.

Hearing on the order was held November 18 and 25, 1952, pursuant to notice in the Federal Register of November 4, 1952.

The New York Foreign Freight Forwarders and Brokers Association, Inc., hereinafter referred to as the association, intervened. Prior to the institution of this proceeding the association had filed a formal complaint against S.C.T.T., Inc., and its predecessor New York agency, S.C.T.T. France, alleging, among other things, that S.C.T.T., Inc., was not a bona fide citizen of the United States within the meaning of Title 46 U.S.C. 802, and its predecessor was a foreign-owned freight forwarder as defined in section 243.2 (e) of General Order 70, and that both should be removed from the registry involved, retroactively, and required to repay to the United States all forwarding fees and brokerage collected for servicing cargoes and commodities shipped under

the Foreign Assistance Act of 1948 and other relief and rehabilitation statutes. The order instituting the proceeding, however, did not include investigation of the predecessor of S.C.T.T., Inc. Counsel for the association contended that if respondent's predecessor acted in violation of General Order 70, it received revenues to which it was not entitled and was depriving American foreign freight forwarders of revenues which otherwise they would have received. He stated that it was the purpose of the association's complaint to include investigation of the activities of the predecessor of S.C.T.T., Inc., and that the scope of the proceeding should be widened in order that this may be done. Accordingly, counsel for the association requested the Administrator to so enlarge the proceeding, which request the Administrator denied.

The issues in this proceeding are (1) whether respondent violated General Order 70 by failing to furnish information requested by the Administrator, and (2) whether respondent at the time of its registration under General Order 70, or at any time since, was or is a citizen of the United States within the meaning of 46 U.S.C. 802 which so far as relevant reads:

(a) That within the meaning of this Act no corporation, partnership, or association shall be deemed a citizen of the United States unless the controlling interest therein is owned by citizens of the United States, and, in the case of a corporation, unless its president and managing directors are citizens of the United States and the corporation itself is organized under the laws of the United States or of a State, Territory, District, or possession thereof * * *.

(b) The controlling interest in a corporation shall not be deemed to be owned by citizens of the United States (a) if the title to a majority of the stock thereof is not vested in such citizens free from any trust or fiduciary obligation in favor of any person not a citizen of the United States; or (b) if the majority of the voting power in such corporation is not vested in citizens of the United States; or (c) if through any contract or understanding it is so arranged that the majority of the voting power may be exercised, directly or indirectly, in behalf of any person who is not a citizen of the United States; or (d) if by any other means whatsoever control of the corporation is conferred upon or permitted to be exercised by any person who is not a citizen of the United States.

Guy dal Piaz testified that he was President, a stockholder and a director of S.C.T.T., Inc., from the time it was granted a charter under the laws of the State of New York on March 8, 1950, until he resigned both positions on March 31, 1952; that from 1945 until S.C.T.T., Inc., was created he was the representative of S.C.T.T. France in New York for the United States; that his brother-in-law Pierre Olphe-Galliard (Paris) was president of S.C.T.T. France, which is a French corporation, and is

one of the largest freight forwarding companies, with its head office in Paris and having branches in various ports of the world; that the French corporation started its activities in the port of New York in 1927 and continued from that date until the formation of S.C.T.T., Inc.; that in 1926 S.C.T.T. France sent one of its employees, Louis Pijon, from its Paris office to New York to act on its behalf to commence in 1927 its activities in the freight forwarding business, primarily to handle the forwarding of passengers' hold and unaccompanied baggage and automobiles sent forward on vessels of the French Line (arrivals and departures); that for the necessary customs formalities in this connection, the services of customs brokers Frederick Henjes, Jr., Inc. (New York), were utilized; and that such activities of S.C.T.T. France were not limited to the French line business but included, in conjunction with Henjes, all other freight-forwarding activities.

Dal Piaz testified that upon his taking over the agency of the French corporation in New York in 1945 when its activities were under the supervision of Henjes, he performed his duties for a while in association with Henjes, in the latter's office, but later set up his own office; that at this time in 1945 he had applied for American citizenship—granted in 1949; that not long after he became agent in New York for the French corporation he saw the desirability of forming an American corporation to be in existence and in operation in the event of another world war conflict and France again should be occupied or cut off from allies, and because there were new prospective activities in the travel business by air as well as by sea; that as early as 1946 he suggested the formation of an American corporation to his counsel, and again in December 1947; that in August 1948 he consulted counsel as to the requirements of forming a corporation under the laws of New York, and he was advised with respect thereto; that passing events increased the necessity for an American corporation, such as requirement in forwarding U. S. Government cargo under the Marshal plan that the forwarder be a citizen of the United States, although he was handling commercial cargo only and the citizenship requirement as to Government cargo (at that time) was not a handicap for him. Dal Piaz testified that notwithstanding this he continued to urge formation of an American corporation, but the French corporation was not disposed to form a corporation in the United States because in Europe and elsewhere it had grown and developed through representative agencies; that the matter, however, was kept under close study, and

the need for such corporation was clear and compelling when the Maritime Commission issued its General Order 70, effective June 6, 1949, placing heavy restrictions upon non-citizen freight forwarders with respect to commercial cargoes moving under ECA allocations, as thereafter the French corporation could participate in ECA shipments only under the formula in the order with respect to quota restrictions.

Dal Piaz testified that on June 15, 1949, on behalf of the French corporation, he furnished information, by questionnaire, to the Maritime Commission, upon which S.C.T.T. France was duly registered under General Order 70, and carried on its forwarding activities within the quota provisions of the order. He testified that qualifying the French corporation under General Order 70 was an interim action, as his plan for the formation of an American corporation continued, and in November 1949 his counsel, while in Paris on other matters, discussed with officials of the French corporation the question of forming an American citizen corporation; and that after his counsel's return to New York, decision was reached between dal Piaz, Daniel Hoey and S.C.T.T. France to form the American corporation, S.C.T.T., Inc., authorized capital stock of 500 shares, common, par value $10.

In this connection, dal Piaz testified that he and Hoey were in Paris, date not remembered, when the decision was reached that he was to have 130 shares, Hoey 130, and S.C.T.T. France 240. Dal Piaz stated that he considered he should have somewhat more than 50 percent of the shares in view of the business he had produced for the French corporation, but that this was not satisfactory to Hoey and the stock was divided as above stated; that Olphe-Galliard was directing the negotiations as president of S.C.T.T. France and made the decisions; and that the alternative to agreement would have been formation of an American citizen corporation by dal Piaz alone.

Dal Piaz stated that he and Hoey borrowed the money, $1,300 each, from S.C.T.T. France, with which to pay for the stock that was issued to them; that they gave their receipts for the money, but no security, and had no understanding as to time or method of repayment; that the stock was issued upon obtaining charter for S.C.T.T., Inc., March 8, 1950, on the basis agreed upon as above stated stated, and dal Piaz, Hoey and Edward J. Molano, all United States citizens, were elected directors of the new American corporation, and the following officers were then elected: dal Piaz, President, Hoey, vice president and treasurer, and

Molano, secretary. Dal Piaz stated that because of the specialized work of the corporation a provision was printed on the stock certificates that none of the stockholders would sell or transfer their stock without first offering it to the other stockholders; that the voting power of the American corporation was in the owners of the stock, and accordingly a majority of the voting power was vested in Hoey and himself; and that there was no understanding of any kind that the majority of the voting power might be exercised directly or indirectly in behalf of the French corporation or of any person not a citizen of the United States, nor were there any means whatsoever by which the control of the American corporation was conferred upon or permitted to be exercised by the French corporation or by any person not a citizen of the United States.

On March 29, 1950, dal Piaz gave S.C.T.T. France, on the latter's request, an option for 5 years to purchase his stock on 6 months' notice. There is no evidence as to whether Hoey executed a similar option.

Dal Piaz testified that during the first year's operation of S.C.T.T., Inc. the volume of export shipments to France held up fairly well, although the company was not able to break even; that by the end of the second year business had fallen off to such an extent that it was no longer possible for the company to pay him a salary sufficient to enable him to remain with the company, and he resigned as president and director on March 31, 1952; that on April 1, 1952, he delivered his stock certificate, signed by him in blank, to Noah P. Rosoff, then attorney for S.C.T.T., Inc., to be held in escrow until former counsel's fees for legal services to the New York agency of S.C.T.T. France were paid, covering the period from December 1, 1945 to March 8, 1950; that such fees were paid by S.C.T.T. France on July 29, 1952; and that he then gave up his stock in exchange for the canceling out of his obligation to S.C.T.T. France, namely, the $1,300 he had borrowed with which to buy the stock, originally, and left the stock certificate with Rosoff to dispose of as he saw fit.

From records of S.C.T.T., Inc., and a letter dated November 12, 1952, from S.C.T.T. France to Rosoff, shown dal Piaz at the hearing, he testified that as of September 30, 1952, S.C.T.T., Inc., owed S.C.T.T. France about $15,000 or about $12,000, depending upon whether or not a certain $3,000 item was entered in error, consisting of advances, loans, and credits.

The evidence shows that at the time of incorporation, S.C.T.T., Inc. assumed the assets and liabilities of the New York agency

of S.C.T.T. France. It is not clear what the assets were, if any, but real liabilities existed, ranging from $12,000 to $20,000.

Edward A. O'Brien testified that he is an American citizen and has been president of S.C.T.T., Inc., since April 1, 1952 (the day following the resignation of dal Piaz as president); that his employment as president of S.C.T.T., Inc., came about through a business acquaintance who, early in March 1952, arranged for him to meet officials of S.C.T.T. France, then in New York, who offered him the job as president of S.C.T.T., Inc. He stated that the representatives of the French corporation were in New York to restore S.C.T.T., Inc., to the business volume level it had been in 1950 and early 1951.

O'Brien testified that he is the only employee of S.C.T.T., Inc., and conducts its entire administrative business, taking orders from no one, but that the forwarding details are handled by Daniel F. Young, Inc., a New York foreign freight forwarder, on a percentage basis. He stated that he solicits shipments, and Young performs the paper work and service requirements; that S.C.T.T., Inc., has its own furniture, stationery and forms, but no lease, having an office arrangement with Young, and that the net profit on each billing of S.C.T.T., Inc., business is split percentagewise between S.C.T.T., Inc., and Young. O'Brien stated that the above described arrangement between S.C.T.T., Inc., and Young was in writing. There is no evidence, however, that it was ever considered as an agreement under section 15 of the Shipping Act, 1916.

O'Brien testified that he receives a salary for his services; that when he was employed as president of S.C.T.T., Inc., he did not know who the stockholders were, but he was promised by S.C.T.T. France that he would receive stock in S.C.T.T., Inc., if things went well, and that he would share in any profits from future business produced by him. He stated that in fulfillment of such promise he was, on October 8, 1952, issued 260 of the total of 500 shares of the stock of S.C.T.T., Inc., the other 240 shares being owned by S.C.T.T. France. He stated that he paid no money for the 260 shares he received, as they were given to him as an incentive to build up the business; that the stock certificate was handed to him by Rosoff; and that he did not know whose stock it replaced but he learned from the books that 260 shares were formerly held by dal Piaz and Hoey.

O'Brien testified that he did not know whether S.C.T.T., Inc., ever borrowed any money from S.C.T.T. France, but on accepting

employment as president of S.C.T.T., Inc., in April 1952 he was aware of an indebtedness by S.C.T.T., Inc., to S.C.T.T. France of approximately $20,000; that he had no knowledge concerning the time and source of the indebtedness and never checked the books to find out what it arose from; that he did not know whether S.C.T.T., Inc., had given S.C.T.T. France any security for the indebtedness, nor did he know anything concerning the terms of its repayment, but that the account had changed some since April 1952, as about a dozen entries had been made; that neither he nor S.C.T.T., Inc., had made any effort to borrow money from S.C.T.T. France since he went with the company on April 1, 1952, since which time there had been no one in S.C.T.T., Inc., except himself.

Further concerning the indebtedness of S.C.T.T., Inc., to S.C.T.T. France, O'Brien testified that between April 1 and 10, 1952, an official of S.C.T.T. France established a credit of $10,000 for S.C.T.T., Inc., in a New York bank; that no security was furnished for this credit by S.C.T.T., Inc., and he, O'Brien, signed no paper in connection with the credit; that he was merely introduced to an official of the bank by the officer of S.C.T.T. France, and he did not know whether the latter discussed with the bank official the interrelationships of the two companies; that no limit to the time or use of the credit was mentioned; that the workable cash or accounts receivable at the time of the hearing ran close to $15,000; that ordinary funds are sufficient to take care of small accounts; that running deposits keep the account fairly even; that interest is paid on occasional overdrafts of $1,000 or $1,500; and that sometimes freights amount to as much as $8,000 to secure bills of lading, for which purpose he has permission to overdraw the account up to $10,000.

Noah P. Rosoff testified that he had been attorney for S.C.T.T., Inc., for about a year; that he was employed by the Paris attorney for S.C.T.T. France; that at such time of his employment the stockholders of S.C.T.T., Inc., were dal Piaz 130 shares, Hoey 130 shares and S.C.T.T. France 240 shares; that the March 29, 1950, option agreement earlier mentioned was no longer in force because subsequent events nullified it; and that S.C.T.T. France has no option to purchase the stock issued to O'Brien.

Rosoff stated that in March 1952 dal Piaz told him he was leaving the company and returning the stock that had been issued to him; that Hoey had already gone into a monastery; that this left S.C.T.T. France with all the stock and nobody in America

to run the business; that money was owed S.C.T.T. France by S.C.T.T., Inc.; that the French attorney for the French company came to New York to reorganize S.C.T.T., Inc.; and that the French attorney had met O'Brien and arranged to employ him. Rosoff stated that there was a meeting of the Board of Directors of S.C.T.T., Inc., on March 31, 1952, at which time dal Piaz and Molano resigned their respective offices in the company; that the next day, April 1, 1952, he was elected secretary, and he and O'Brien and Andre Vulliet were elected directors of S.C.T.T., Inc., by a vote of 240 share of stock by the representative of S.C.T.T. France and 130 shares by Rosoff which shares he did not own but was custodian of for the French company; and that he, Rosoff, was also custodian for the French company of the 130 shares originally issued to Hoey. Rosoff stated that dal Piaz had signed his stock in blank and left it with him subject to escrow thereafter satisfied as earlier herein described, leaving it free, along with the Hoey stock, for transfer to O'Brien.

William A. Stigler, security officer for the Maritime Administration, testified that he had investigated the citizenship status of S.C.T.T., Inc., to obtain information which would be of aid to the Administrator in determining whether at the time S.C.T.T., Inc., registered under General Order 70, or at any time since, it was or is a citizen of the United States within the meaning of 46 U.S.C. 802. His investigation was occasioned by the complaint filed by the New York Foreign Freight Forwarders and Brokers Association, Inc., earlier referred to.

Stigler's testimony substantially paralleled the collective testimony herein summarized of other witnesses with respect to the organizational setup of S.C.T.T., Inc. He further testified, however, that, about May 16, 1952, he requested Rosoff to furnish the Maritime Administration a photostatic copy of the following documents:

1. Minutes of a board of directors' meeting held on June 27, 1951 (concerning requests on S.C.T.T. France for funds).

2. Copy of letter from Rosoff to dal Piaz, dated April 1, 1952, acknowledging receipt of Stock Certificate No. 3 to be held in escrow.

3. Option to purchase shares of stock in S.C.T.T., Inc., held by dal Piaz, executed in favor of S.C.T.T. France, dated March 29, 1950.

4. A narrative statement under oath from dal Piaz setting forth the origin of S.C.T.T., Inc.

5. Any documentary evidence from the files of S.C.T.T., Inc., which would tend to indicate that its incorporation was under consideration by S.C.T.T. France prior to the complaint filed with the Maritime Administration by the New York Foreign Freight Forwarders and Brokers Association, Inc.

Stigler testified that, as far as he was able to determine, the information requested had not been furnished up to the time of the hearing.

CONCLUSIONS

From 1946 until 1950 the agent in New York of S.C.T.T. France tried to induce the French corporation to form a United States citizen corporation for the purpose of engaging in the foreign freight forwarding business. In late 1949 or early 1950 S.C.T.T. France decided to form such corporation. Upon reaching such decision, it determined the number of United States citizens to whom authorized capital stock should be issued, and who such citizens should be. Upon determining this, it decided how many shares of such stock should be issued to each such citizen. Then it loaned all of the money to each such citizen with which to pay for such stock, without requiring security or fixing time and terms of repayment for such loans.

The American corporation was chartered under the laws of the State of New York on March 8, 1950. Of the authorized 500 shares of capital stock, 130 shares were issued to Guy dal Piaz and 130 shares to Daniel Hoey, both United States citizens, and 240 shares to S.C.T.T. France, a French corporation.

On March 29, 1950, dal Piaz gave S.C.T.T. France an option to purchase all of his shares within 5 years, on 6 months' notice. This option was never exercised. On April 1, 1952, dal Piaz delivered his stock certificate, signed in blank, to Rosoff. Hoey had sometime earlier done the same as to his stock certificate. Having giving up their shares of stock their respective loans from S.C.T.T. France were considered canceled, by all concerned. From April 1, 1952 until October 8, 1952, none of the stock of S.C.T.T., Inc. was owned by any United States citizens. On the latter date O'Brien was given 260 shares of S.C.T.T., Inc., by S.C.T.T. France, without monetary consideration, which represented the total shares formerly held by dal Piaz and Hoey. S.C.T.T., Inc., at that time, owed S.C.T.T. France between $12,000 and $20,000. While O'Brien was aware of this indebtedness he was not sufficiently concerned about it to ascertain why it existed or when or how it was to be repaid. He knew that after he became president of S.C.T.T., Inc., a credit of $10,000 was opened in a New York bank in favor of S.C.T.T., Inc., by S.C.T.T. France, but he was not informed as to the basis of its establishment with respect to security, guaranty or otherwise. In addition to the foregoing, New York counsel

Rosoff for S.C.T.T., Inc., was employed by French counsel for S.C.T.T. France.

The facts and circumstances under which S.C.T.T., Inc., came into being, the manner in which it has been financed, the way it has been operated, and the stake S.C.T.T. France has in it, establishes the French corporation as the life-blood and dominant financial factor in the respondent company, S.C.T.T., Inc., and unquestionably gives the former the power to control the functions of the latter. This control breaches the citizenship requirements of 46 U.S.C. 802, and the registration requirements of General Order 70. *Rochester Tel. Corp.* v. *U. S.*, 307 U. S. 125, 145, 146; *United States* v. *The Meacham,* 107 F. Supp. 997. Therefore, S.C.T.T., Inc., at the time of its registration under General Order 70, was not, has not been at any time since, and is not now, a citizen of the United States within the meaning of 46 U.S.C. 802.

S.C.T.T., Inc., failed to furnish information required by General Order 70, requested by the Administrator.

For the reasons stated an order should be entered, pursuant to section 243.2 (h) of General Order 70, striking the name of S.C.T.T., Inc., from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes.

APPENDIX A

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

S.C.T.T., INC.

ORDER TO SHOW CAUSE

No. M–56

It appearing, from information before the Maritime Administrator that S.C.T.T., Inc. is registered as an American freight forwarder pursuant to General Order 70; and

It further appearing, That the Administrator is in receipt of a formal complaint filed by the New York Foreign Freight Forwarders and Brokers Association alleging, *inter alia,* that S.C.T.T., Inc., is not a citizen of the United States within the meaning of 46 U.S.C. 802; and

It further appearing, That an investigation conducted on behalf of the Administrator casts doubt upon the citizenship of S.C.T.T., Inc.; and

It further appearing, That S.C.T.T., Inc., is in violation of General Order 70 by failing to submit certain information requested by the Administrator;

It is ordered, That the Administrator, on his own motion, order an administrative hearing to determine whether S.C.T.T., Inc., at the time of its registration under General Order 70, or at any time since, was or is a citizen of the United States within the meaning of 46 U.S.C. 802;

It is further ordered, That S.C.T.T., Inc., be, and it is hereby, made the respondent in this proceeding, and that said respondent be, and is required in said proceeding to appear at a public hearing to be held before an examiner of this agency at a date and place to be announced by the Chief Examiner, and to show cause why an order should not be entered pursuant to section 243.2 (h) of General Order 70 striking S.C.T.T., Inc., from the list of freight forwarders eligible to service cargoes shipped under the Foreign Assistance Act of 1948 and other relief and rehabilitation cargoes;

It is further ordered, That a copy of this order be served upon the respondent;

It is further ordered, That this order be published in the Federal Register;

It is further ordered, That all persons (including individuals, corporations, associations, firms, partnerships, and public bodies) desiring to participate in the proceeding should notify the Maritime Administrator within five days after the date of publication.

Dated: October 27, 1952.

By order of the Maritime Administrator.

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

FEDERAL MARITIME BOARD

No. 700

PENNSYLVANIA MOTOR TRUCK ASSOCIATION ET AL.

v.

PHILADELPHIA PIERS, INC., ET AL.

Decided May 14, 1953

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.

When outbound cargo is delivered to respondents' piers at Philadelphia by truck for shipment by water carrier in accordance with instructions from the water carrier as to time of delivery to such piers, the collection from shippers of storage charges on such cargo due to causes beyond the control of the shippers is, and for the future will be, an unjust and unreasonable practice.

Robert H. Shertz for complainants.

Windsor F. Cousins for respondents.

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

SUPPLEMENTAL REPORT OF THE BOARD

BY THE BOARD:

Upon review of our earlier report in this proceeding, *Penna. Motor Truck Ass'n* v. *Phila. Piers, Inc.*, 3 F.M.B. 789, the United States Court of Appeals for the Third Circuit vacated our order and remanded the proceeding for appropriate findings of fact. *Baltimore and Ohio Railroad Co., et al.* v. *United States*, 201 F. 2d. 795, decided February 12, 1953. Accordingly, without further hearing or other proceedings, we restate in this supplemental report, with slight modifications, our findings of fact and our conclusions.

We find the facts to be as follows:

1. Complainants are Philadelphia truck operators and truck associations. Respondents Pennsylvania Railroad Company, the Reading Company, and the Baltimore & Ohio Railroad Company (hereinafter called "the respondents") operate 13 of the 18 general cargo piers currently in use in Philadelphia. Common carriers by water engaging in domestic and foreign commerce come to these piers at the invitation of respondents. The traffic passing over the piers is moved to and from inland points by truck or railroad. The traffic handled by complainants moves principally to and from locations which are not equipped with rail sidings, and hence not readily susceptible to rail handling.

2. By tariffs, most recently revised in 1950, respondents have fixed the free-time period applicable to inbound and outbound truck cargo to two days. By contrast, the free time applicable to inbound and outbound rail freight is either 5, 7, or 15 days, except that rail cargo to and from points within the Philadelphia port area is allowed only 2 days. Time on inbound truck cargo begins to run from 7 a. m. on the day following the completion of discharge of the vessel, and continues, exclusive of Saturdays, Sundays, and holidays, until removal from the pier. On the other hand, where the shipper or consignee instructs the respondents to route any cargo by rail, time stops upon receipt of such instructions rather than when the cargo is actually removed. On outbound cargo, both rail and truck, time begins when the shipment is deposited on the pier, and continues until the vessel for which the cargo is destined begins to load. Upon the expiration of the particular free-time period applicable under the tariff, the cargoes are subject to storage or demurrage charges. The charges applied to truck cargo differ from those applied to rail cargo. For the former, the charge is 15 cents per cwt. for the first 15 days of storage, while for rail cargo the same rate is charged for the first 30 days of storage. The rates exacted for additional periods of storage also favor rail cargo.

3. All general cargo piers at Philadelphia other that those operated by respondents allow 5 days free time to both rail and truck cargo both inbound and outbound. Shippers and consignees, however, normally have no choice between piers allowing 5 days free time and those of respondents. The steamship companies designate the piers at which their vessels berth.

4. Top wharfage, at the rate of 5 cents per cwt., is imposed upon inbound and outbound truck cargo. This is in the nature of compensation for the use of the pier. No top wharfage is imposed

upon rail cargo. The top wharfage charge is not an issue in this proceeding.

5. Respondents' piers for the most part are old wooden structures of the finger type, erected before the widespread use of large motor trucks and trailers. Their design is adapted primarily for the interchange of freight between vessels and railroad cars. Motor vehicles must be driven inside the pier sheds to load or unload freight from the floor. Some of the piers are double-decked and equipped with elevators or cargo chutes. In some cases, although there are two lanes of driveway, crossbeams and columns prevent two vehicles from passing through the pier at the same time. Ordinarily each trucking company is prohibited from placing more than one truck on a pier at one time. On some double-decked piers, only one chute is used at a time, making it necessary for trucks to wait in turn, thus causing delay. Truck cargoes are loaded and unloaded by truck company employees, and rail cargoes by railroad employees. Frequently, it is necessary for truckers to interrupt their work and move aside to permit rail carloading and unloading. Sometimes a trucker will arrive at the pier and find that his shipment is boxed in by other piles of freight, and hence inaccessible until the other piles are removed, also causing delay and congestion.

6. The 2-day free-time period tends to cause the trucks to converge on the piers at the same time. Thus, at times, as many as ten to twenty trucks may be waiting to enter a pier. The resulting waiting periods range from a half hour to 5 hours. After trucks have been loaded they may have to wait up to 2 hours to get off the pier.

7. The cargo is checked on and off the trucks by clerks employed by the steamship companies. Although the piers are kept open 7 days a week, the regular hours for loading and unloading trucks are only from Monday through Friday between 8 a. m. and 12 p. m. and 1 p. m. and 4:45 p. m. because of the working hours observed by the checking clerks.

8. Additional delays, apart from those described above, are occasioned in the removal of import freight by customs clearance and by the inspections which are required by various Federal agencies.

9. In the case of outbound shipments, ship arrivals are sometimes postponed. The shipper must comply with the delivery instructions given him in advance by the steamship company. If the ship is then delayed, or if the steamship company gives erro-

neous advice, the shipper may incur demurrage charges for reasons beyond his control. If he attempts to avoid demurrage charges by delaying his delivery to the pier, he risks having his cargo "shut out."

10. As a result of the above conditions, substantial quantities of inbound and outbound cargo cannot be handled within the 2-day free-time period. Several trucker witnesses estimated that in not over 40 percent of the shipments handled by them could all the cargo be removed from the pier within the 2-day period. The figures submitted by respondent Pennsylvania Railroad Company show that during a 9-month period in 1950, 66 percent of all outbound and inbound truck freight moving across its piers, including foreign and domestic traffic, was removed within free time. Figures of respondent The Baltimore & Ohio Railroad Company show that for the year 1949, 59 percent of its truck cargo was removed within free time, and that, in the first 6 months of 1950, 64 percent of its truck cargo was so removed. The figures of respondent the Reading Company show that in the first 7 months of 1949, approximately 80 percent of its truck cargo was removed within free time. Respondents' statistics, however, show percentages based on weight of traffic moving across the piers and do not necessarily reflect the frequency of the incurring of demurrage.

DISCUSSION

The complaint alleges that the free-time period and the demurrage charges applicable to truck freight moving over respondents' piers subject truck freight to undue prejudice and disadvantage and constitute unjust and unreasonable regulations and practices in violation of sections 16 and 17 of the Shipping Act, 1916 (hereinafter called "the Act").

Respondents have submitted four "general exceptions" to the examiner's recommendations challenging (1) the finding that respondents are other persons subject to the Act, (2) the conclusion that free time on inbound cargo should be not less than 5 days, (3) the conclusion that the collection from shippers of storage charges on outbound cargo is an unreasonable practice, and (4) the conclusion that any difference in free time as between motor-carrier traffic and rail traffic is an unreasonable practice. We are in agreement with the first three of these recommendations of the examiner, and the exceptions thereto are accordingly overruled. Our conclusion on the last recommendation differs

from that of the examiner, and respondents' exception thereto is sustained. Our findings and conclusions on the first point are set forth in our prior report of February 25, 1952, and our findings and conclusions on the remaining points will be fully stated below.

Respondents take the position that the obligation to accord free time is incident to the ocean carrier's duty to receive or 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 2-day rule for truck cargo is a voluntary concession and cannot be the basis of valid complaint by truck operators.

It is true that the responsibility for furnishing reasonable free time for the delivery of outbound cargo on the pier and removal of inbound cargo from the pier rests on the ocean carrier as part of its transportation service. *Free Time and Demurrage Charges —New York*, 3. U.S.M.C. 89, 101 (1948).[1] In that case it appeared that the ocean carriers operated pier facilities at the port of New York and controlled their use according to tariffs, which included provisions governing free time and demurrage. At the port of Philadelphia, however, terminal operators such as respondents, who are independent of the ocean carriers, provide almost all of the available general cargo pier facilities. For many years respondents have permitted truck carriers to use their piers upon payment of the top wharfage of 5 cents per cwt. already mentioned.[2] Respondents solicit vessels to load and discharge freight at their piers in anticipation of movement of a substantial part of such freight by rail. Admittedly, few if any vessels could be induced to use respondents' piers unless respondents furnished facilities for the handling of truck as well as rail cargo. In effect, the ocean carriers have arranged with respondents for the use of respondents' piers for the receipt and delivery of vessel cargo. Respondents maintain control of the physical pier facilities; they fix the rules governing free time and demurrage in published tariffs; and they have held their piers open without restriction to truck-borne cargoes. Thus, the respondents, for their own business reasons, are providing the facilities which it is the obligation of ocean carriers to furnish.

[1] The Maritime Commission stated in *Free Time and Demurrage Charges—New York, supra*, that "free time is granted by the carriers not as a gratuity, but solely as an incident to their obligation to make delivery. *The Eddy*, 5 Wall. 481, 495; *The Titania*, 131 F. 229, 230. 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."

[2] A corresponding charge against rail cargo is said to be included in the rail line-haul rate.

Whether provided by the terminal operator or the ocean carrier itself, reasonable free time must be afforded to outbound and inbound cargo moving over the pier. In undertaking the ocean carrier's obligation to provide such facilities and in holding them out for public use, we hold that respondents have assumed the ocean carrier's responsibility of furnishing reasonable and nondiscriminatory pier services incident to the handling of truck cargoes on their piers, which include an allowance of reasonable free time.

We thus turn to the basic issues, whether the free time and demurrage practices of respondents subject the truck freight to undue prejudice and disadvantage or constitute unjust and unreasonable regulations and practices in violation of sections 16 and 17 of the act.

We find that the record does not establish a case of undue prejudice under section 16 of the Act. Complainants are primarily engaged in rendering trucking services to points within the local Philadelphia area. Rail cargo moving within this area is not shown by the record to be competitive with the local truck cargo carried by complainants, which is the only truck cargo mentioned in this proceeding. In view of complainants' failure to disclose an existing and effective competitive relation between truck and rail cargo, we find that the 2-day free-time limitation is not unduly prejudicial to truck cargo. *Phila. Ocean Traffic Bureau* v. *Export S. S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936). As to the difference in demurrage charges between truck cargo and rail cargo, we find that there is no showing in the record of any injurious effect caused to the truck cargo or undue advantage to the rail cargo, and, under the circumstances, we find that the mere existance of a different demurrage rate does not constitute undue prejudice within the meaning of section 16 of the Act. *Ibid.*

The remaining cause of the complaint is under section 17 of the Act, which requires that respondents observe just and reasonable regulations and practices relating to the receiving, handling, storing, and delivering of property. We find that delays in the handling of outbound and inbound truck cargo beyond the 2-day free-time period are occasioned by the physical shortcomings of respondents' piers, the resulting congestion, the increased density of traffic on and about the piers, and the other conditions already referred to. These delays are apart from any delays caused by governmental inspections and procedures required for import cargo, and they render the present 2-day free-time allowance for

truck cargo unreasonable.[3] On the basis of the facts adduced in the record, we find that a reasonable free-time allowance on respondents' piers for all inbound and outbound truck cargo should be not less than 5 days, as now allowed on other general cargo piers in Philadelphia and as previously allowed by respondents prior to the institution of the present tariffs, assuming that the calculation of such free time is made in the manner now in force.

Respondents contend that complainants are not entitled to relief since complainants are not themselves liable for demurrage, and that the charges actually collected by respondents from shippers have been very small. We find that complainants have shown that they have been adversely affected by respondent's free-time limitation, by the wasted time of their trucks and drivers, and the resulting increased burden to their operations, and are, therefore, proper parties to seek remedial action in this case.

Another unreasonable aspect of respondents' present practice of making charges for demurrage is that shippers may now be assessed demurrage on outbound cargo because of delay in the ship's arrival or due to vessel owner's miscalculation in ordering the cargo onto the piers too soon. If shippers fully comply with the delivery instructions of the water carriers, any delays on the piers and consequent storage charges which respondents may be entitled to impose under reasonable regulations should not be for the account of the owner of the cargo since he has not caused and cannot prevent the delay.

In addition to the four "general exceptions" to the examiner's recommendations, which have been stated above, respondents have submited a list of 19 "specific exceptions," which are directed toward alleged errors and omissions in the examiner's basic findings. We have carefully read and considered each exception. In so far as points raised by these exceptions have not been dealt with in this report, we find them to be without merit or immaterial, and they are accordingly overruled.

FINDINGS AND CONCLUSIONS

We find and conclude:

1. That 5 days is a reasonable free-time period for outbound and inbound truck cargo moving over respondents' piers, and that respondent railroad companies should modify their tariff

[3] Our predecessor, the Maritime Comission, has held that delays which result from governmental inspections and procedures need not be considered by carriers in fixing the limits of free time, and that the delay in the removal of cargo thus caused is not proof that the free-time period is unreasonable. *Free Time and Demurrage Charges—New York, supra.*

regulations so as to allow not less than 5 days' free time for inbound and outbound cargo handled over their Philadelphia piers by truck;

2. That when outbound cargo is delivered by truck to respondents' piers at Philadelphia for shipment by water carrier in accordance with instructions from the water carrier as to time of delivery to such piers, the collection from shippers of storage charges on such cargo due to causes beyond the control of the shippers is, and for the future will be, an unjust and unreasonable practice;

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.

SUPPLEMENTAL ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 14th day of May A. D. 1953

No. 700

PENNSYLVANIA MOTOR TRUCK ASSOCIATION ET AL.

v.

PHILADELPHIA PIERS, INC., ET AL.

The Board, on the date hereof, having made and entered of record a supplemental report in this proceeding, slightly modifying the findings and restating the conclusions in its report of February 25, 1952, which supplemental report is incorporated as a part hereof;

It is ordered, That respondents, Pennsylvania Railroad Company, the Reading Company, and the Baltimore & Ohio Railroad Company, shall promulgate and file with the Board, within 30 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 when outbound cargo is delivered by truck to respondents' piers at Philadelphia for shipment by water carrier in accordance with instructions from the water carriers as to time of delivery to such piers, the collection from shippers of storage charges on such cargo due to causes beyond the control of the shippers is, and for the future will be, an unjust and unreasonable practice.

By the Board.

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

FEDERAL MARITIME BOARD

No. M–60

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER THREE GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE PACIFIC COASTWISE/BRITISH COLUMBIA/ALASKA SERVICE

FINDINGS OF THE BOARD

Exceptions to the recommended decision of the Chief Examiner were filed by interveners, and the case was argued orally before the vice chairman. The record, exceptions, and transcript of oral argument were considered by both members of the Board. We are in substantial agreement with the conclusions of the examiner. Exceptions and requested findings not reflected in our findings or conclusions have been carefully considered and are overruled, and they will be more fully discussed in a subsequent report (see 4 F.M.B. 211).

This is a proceeding under Public Law 591, 81st Congress, upon the application of Coastwise Line for the bareboat charter of three Government-owned, war-built, dry-cargo, Liberty vessels for use in its Pacific coastwise/British Columbia/Alaska service for a period of 6 months. The Portland Chamber of Commerce and the Portland Freight Traffic Association intervened in support of the application. The Committee for the Promotion of Tramp Shipping, Ocean Tow, Inc., Alaska Freight Lines, Inc., and Olympic-Griffiths Lines, Inc., intervened in opposition to the application.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, we find and hereby certify to the Secretary of Commerce:

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

2. That such service (exclusive of a portion of the southbound Pacific coastwise segment thereof) 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.

We recommend that any charters which may be granted pursuant to our findings in this proceeding be for a period not to exceed 6 months, subject to the usual right of cancellation by either party on 15 day's notice. We further recommend that such charters contain no provision for the nonpayment of charter hire during any idle period, and that additional charter hire, over such fixed charter hire as the Administrator shall determine, be determined with reference to all voyages made thereunder, computed, accounted for, and paid separately from any previous charters. We further recommend that such charters contain a restriction prohibiting Coastwise Line from carrying southbound coastwise cargo between Pacific coast ports on Government-chartered vessels, unless privately owned United States-flag vessels are unavailable for the carriage of such cargo.

By the Board.

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

MAY 31, 1953.

FEDERAL MARITIME BOARD

No. 706

THE PORT OF NEW YORK AUTHORITY

v.

AB SVENSKA AMERIKA LINIEN, REDERIAKTIEBOLAGET TRANSATLANTIC, REDERIAKTIEBOLAGET HELSINGBORG, ANTIEBOLAGET TRANSMARIN, AND WILH. WILHELMSEN

Submitted September 30, 1952. Decided May 31, 1953

Rates on wood pulp from Swedish Baltic ports, north of and including the Gefle district, to United States North Atlantic ports found not to be unduly prejudicial or unjustly discriminatory as to New York and Port Newark, in violation of sections 16 and 17, respectively, of the Shipping Act, 1916.

No violation of section 205 of the Merchant Marine Act, 1936, found.

Samuel H. Moerman for complainant.

Herman Goldman, Elkan Turk, and *Seymour H. Kligler* for respondents.

R. A. Cooke for Shippers Conference of Greater New York, and *Kenneth S. Carberry* for Newark Chamber of Commerce, interveners.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the examiner's recommended decision were filed by respondents, and the matter was argued orally before us. Our findings and conclusions differ from those recommended by the examiner. Exceptions and requested findings not discussed in this report, nor reflected in our findings or conclusions, have been given consideration and found not justified.

Complainant is a municipal corporate instrumentality of the States of New Jersey and New York, charged with the duty of fostering and protecting, among other things, the ocean commerce

of the New York Port District.[1] Its jurisdiction extends over an area having a radius of approximately 25 miles from the Statue of Liberty in New York Harbor, including therein Port Newark, N. J. Respondents are common carriers by water transporting, among other commodities, wood pulp and wallboard from Swedish Baltic ports north of and including the Gefle district (hereinafter referred to as the "origin territory") to United States Atlantic ports north of Cape Hatteras. Respondents are parties to an agreement now awaiting our approval or disapproval pursuant to section 15 of the Shipping Act, 1916 (hereinafter referred to as "the Shipping Act"), which agreement provides generally that the parties may establish such uniform rates as are unanimously agreed upon and may contract for their joint account for the transportation of wood pulp and wallboard from the origin territory to United States North Atlantic ports, and that they may apportion among themselves the cargo thus contracted for in the agreement. Respondents have filed with their agreement schedules of their rates on wood pulp and wallboard to the various North Atlantic ports for the years 1950 and 1951.

The complaint, filed in 1950, alleges that respondents charge various basic rates for the carriage of wood pulp from the origin territory to North Atlantic ports, dependent upon the density of the pulp, but that an additional charge of 50 cents per ton is made for carriage of pulp to Albany and an additional charge of $1 per ton for the carriage of pulp to New York and to Port Newark. Complainant alleges that these rates are unduly prejudicial and unjustly discriminatory against New York and against Port Newark (hereinafter referred to as "Newark"), in violation of sections 16 and 17 of the Shipping Act. Complainant also alleges that respondents' proposed conference agreement "contemplates the assessment of unlawfully discriminatory and prejudicial rates against the Port of New York (including Newark) and shippers and importers using that port, and will be detrimental to the commerce of the United States in violation of section 15 of the Shipping Act." Complainant prays that respondents be required to cease and desist from the alleged violations of the Shipping Act, and that they be required to establish and

[1] The New York Port District, as officially established by the Compact of 1921 creating the Port of New York Authority, includes 219 civil divisions with a land area of approximately 1,500 square miles. The population of the district is approximately 11,500,000. The district includes all of New York City and the following counties in New Jersey: Hudson County, practically all of Essex, Bergen, and Union Counties, and portions of Passaic, Middlesex, Monmouth, Somerset, and Morris Counties.

put into force such other rates and charges as may be lawful, and also prays for general relief.

Respondents' answer, filed in 1951, admits most of the factual allegations of the complaint, but denies the allegations that the Shipping Act has been violated. Respondents also state that the differential on wood pulp to Newark was decreased from $1 to 50 cents since the filing of the complaint.

The Chamber of Commerce of the City of Newark, N. J., and the Shippers Conference of Greater New York intervened.

At the oral argument we requested the parties to comment on the relevancy of section 205 of the Merchant Marine Act, 1936, to the issues in this proceeding, and supplemental briefs on this issue were submitted.

In 1947, respondents established a basic rate for the transportation of wood pulp from the origin territory to North Atlantic ports, except that the rate to New York[2] was $1 higher and the rate to Albany 50 cents higher than the basic rate. There was no differential against Newark until 1950, when respondents for the first time imposed an additional charge of $1 upon the Newark rate. The Newark differential was reduced in 1951 as above stated. The Albany rate is not herein involved.

The undisputed evidence shows the following drop in imports of wood pulp from the origin territory to New York, Newark, and Philadelphia[3] between 1949 and 1950:

	1949	1950
	Tons	*Tons*
New York	847	248
Newark	17,901	8,251
Philadelphia	29,084	22,905

Newark suffered a loss of about 50 percent during the first year of the Newark differential as against a loss of about 22 percent for Philadelphia. New York suffered a greater loss percentage-wise, but the imports at New York were not sufficiently large in either year to indicate a trend and cannot be attributed to the $1 differential since that differential was effective during both years.

[2] Port Newark was not included in the New York rates in 1947.

[3] As hereinafter explained, Philadelphia is the only port competitive with either New York or Newark for the importation of wood pulp from the origin territory.

Unjust discrimination under sections 16 and 17 of the Shipping Act

Section 16 and 17 of the Shipping Act, insofar as they have application to the present proceeding, provide:

SEC. 16. That it shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or reasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

SEC. 17. That no common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the board finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

In order to sustain the charge of unjust discrimination, under these provisions of the Shipping Act, complainant must prove (1) that the preferred port, cargo, or shipper is actually competitive with complainant, (2) that the discrimination complained of is the proximate cause of injury to complainant, and (3) that such discrimination is undue, unreasonable, or unjust. *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936); *H. Kramer & Co.* v. *Inland Waterways Corp. et al.*, 1 U.S.M.C. 630, 633 (1937). In the first of these cases the Secretary of Commerce said:

It is well settled that the existence of unjust discrimination and undue prejudice and preference is a question of fact which must be clearly demonstrated by substantial proof. As a general rule there must be a definite showing that the difference in rates complained of is undue and unjust in that it actually operates to the real disadvantage of the complaint. In order to do this it is essential to reveal the specific effect of the rates on the flow of the traffic concerned and on the marketing of the commodities involved, and to disclose an existing and effective competitive relation between the prejudiced and preferred shipper, localities, or commodities. Furthermore, a pertinent inquiry is whether the alleged prejudice is the proximate cause of the disadvantage.

On the requirements for specific proof the Secretary continued:

Manifestly, the general representations made by witnesses for complainant do not afford convincing proof of the alleged disadvantages under which they and other interests at Philadelphia operate, or that the rate situation

is solely responsible therefor. It may be that their conclusions are based on specific facts bearing upon the question of discrimination and prejudice, but the Department cannot accept such conclusions without an examination of the underlying facts upon which they are based, which facts are not of record in this proceeding.

Wood pulp from the origin territory is sold in the United States by American agents of the Swedish wood pulp manufacturers to domestic paper mills. The selling price of pulp does not vary by reason of the ports of delivery. The terms of sale are ex dock or on dock, which means that the Swedish seller pays the ocean transportation cost necessary to make this pulp available to the buying paper mill at the ocean carrier's discharging terminal. The seller of the pulp, therefore, and not the United States purchaser pays the ocean-rate differential.

In the past, pulp was sent to this country for sale on consignment, but now sales of pulp are made before the vessel arrives at the United States port. When the contract of sale is made, the American selling agent usually recommends that the cargo be shipped to the United States port designated by the buying paper mill. This recommendation is not followed in all cases however. If there are not shipments totaling a 500-ton minimum for discharge at a particular port, the vessel under respondents' freight engagement is not required to call there. This minimum, however, does not apply to New York, which is a port of discharge in any event.

The buyer pays all inland transportation charges from the port of delivery to his mill. Respondents presented a satisfactory study of inland transportation rates for the transportation of wood pulp from the various North Atlantic ports to the principal consuming mills in the area east of the Mississippi River and north of the Potomac and Ohio Rivers. From the evidence we find that wood pulp does not move from New York and Newark (the complaining ports) beyond the area immediately contiguous to New York Harbor, which includes parts of New York, Connecticut, Pennsylvania, and New Jersey. This area includes a number of consuming mills which import through New York and Newark and also through Philadelphia. We find that the ports of Newark and Philadelphia are competitive with each other for the importation of the pulp mentioned in these proceedings. The evidence as to the competitive relationship of New York with both Newark and Philadelphia for the importation of pulp is not sufficient to warrant a similar finding as to New York. Nevertheless, for the

purposes of the decision in this case, we may assume that all three ports are competitive.

The evidence of record with respect to the amount of imports of wood pulp from the origin territory into New York relates only to the years 1949 and 1950, and, as already stated, the differential against New York was in effect for both years. There is no evidence in the record upon which we can make a finding that the existence of continuance of the $1 differential against New York has caused injury to the port. On the contrary, the evidence shows that the small participation of New York in the wood pulp trade arises from reasons entirely apart from the assailed differential, such as congestion on the piers, the 5-day limit on free time, the lighterage problem, the difficulty of truck movement, and the lack of storage facilities. One sales representative testified that there would not in any event be any great quantity of pulp moved through New York, and another testified that specific instructions are given not to import large shipments of pulp through New York, and that such instructions would be given notwithstanding elimination of the $1 differential. Since we can make no finding that New York has suffered injury resulting from the differential, the case of New York under sections 16 and 17 must fail.

As to Newark, the great percentage of pulp imported there is for local consumption by the paper mills in nothern New Jersey and in the neighboring States mentioned above, for which area the inland transportation rates favor Newark.

The representatives of two paper mills testified that they preferred Newark over Philadelphia because they can transport their goods by truck from Newark at a cheaper rate than the rail rate from Philadelphia, and they enjoy many collateral advantages in doing so. From 65 to 70 percent of the pulp imported through Newark moves from the piers by truck, whereas practically all of the pulp imported through Philadelphia moves from the piers by rail. One witness testified that, in 1950, his company imported 7,500 tons of wood pulp from the origin territory through Newark and approximately 3,600 tons through Philadelphia. The other paper company witness testified that in 1950 his company imported 425 tons of pulp through Newark and only 85 tons through Philadelphia. These witnesses testified that they wanted all of their pulp imported through Newark even if they should incur the differential. They testified that on several occasions they had been forced to receive wood pulp through Philadelphia rather than Newark. This evidence was uncontradicted, but no evidence was

presented to show that delivery of pulp through Newark could not have been obtained in any case where the 500-ton minimum was available for discharge at that port.

The record shows that after the Newark differential was first enforced in 1950 the traffic decreased sharply. Complainants urge that because Newark decreased so much more sharply than the competitive port of Philadelphia, its case under sections 16 and 17 should succeed. The critical issue in this proceeding, however, is whether the drop in traffic was in fact caused by the differential complained of.

Complainants rely on the testimony of one of the American sales agents, who testified:

> Shippers abroad tell us that they frequently have difficulty in booking our tonnage for Port Newark, because the quantity to be shipped does not justify the vessel to go into Port Newark just for our tonnage, and that other importers[4] who would normally have woodpulp for Port Newark have objected or taken exception to the extra cost going into Port Newark and therefore their tonnage, instead of going to Port Newark, has gone to some other port.

This evidence raises the question of the probative effect of hearsay evidence. While administrative bodies are not bound to the strict application of the rule against the admissibility of hearsay, there is, of course, some limit as to its probative effect. In *John Bene & Sons, Inc.* v. *Federal Trade Commission*, 299 F. 468, at p. 471, the court said:

> We are of the opinion that evidence, or testimony, even though legally incompetent, if of the kind that usually affects fair-minded men in the conduct of their daily and more important affairs, should be received and considered; but it should be fairly done.

We think that where an American sales agent testifies as to the acts reported to him by his own principal in a foreign country, such evidence should be deemed probative and should, therefore, be given effect, but where an agent testifies, as was done in this case, as to rumors of what other importers not the principal of the testifying agent would or would not normally do comes within the realm of hearsay on hearsay and is "mere uncorroborated hearsay or rumor" and "does not constitute substantial evidence". *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197 (1938). We do not believe that the remote hearsay evidence of one witness that the differential causes some unidentified Swedish pulp producer to divert pulp cargoes from Newark is "reliable, probative, and substantial evidence" of the type upon

[4] The witness here uses the term "importer" to refer to other Swedish shippers "importing" pulp into the United States.

which we can premise an order. The record contains no other evidence on which we can find that the Newark differential was the proximate cause of injury to that port. Consequently, Newark's case under sections 16 and 17 must also fail.

Respondents offered much evidence to show that the wharf and terminal costs at New York and Newark substantially exceeded those at Philadelphia and other North Atlantic ports. Respondents claimed that the New York and Newark differentials were imposed to offset these higher costs and that when the Newark excess terminal costs were reduced in 1951 the Newark differential was reduced from $1 to 50 cents per ton. By such evidence respondents attempted to show that any discrimination either at New York or Newark was in any event not undue, unreasonable, or unjust. Even though we find that no unjust discrimination has been shown to be the cause of any injury to New York or Newark, we may say that a rate differential against a port may not be justified for the sole reason that the cost of operation at that port is greater than at another competing port. In *Port Differential Investigation*, 1 U.S.S.B. 61 (1924), the Shipping Board said at page 69:

> * * * the board does not concur in the theory that a carrier is justified in burdening a port with a differential for the sole and only reason that the cost of operation from that port is greater than from some other port. It is obvious to the board that many elements, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others are properly to be considered in arriving at adjustment of rates as between ports.

The record in this case fails to disclose the relevant facts on these other material elements.

Section 205 of the Merchant Marine Act, 1936, as amended, provides as follows:

> Without limiting the power and authority otherwise vested in the Commission, it shall be unlawful for any common carrier by water, either directly or indirectly, through the medium of an agreement, conference, association, understanding, or otherwise, to prevent or attempt to prevent any other such carrier from serving any port designed for the accomodation of ocean-going vessels located on any improvement project authorized by the Congress or through it by any other agency of the Federal Government, lying within the continental limits of the United States, at the same rates which it charges at the nearest port already regularly served by it.

The evidences discloses that the Federal Government has expended $20,146,000, from June 30, 1945, to June 30, 1950, for channel projects in the New York and Newark Harbor area, and that from 1853 to June 30, 1950, $154,136,000 of Federal funds were so expended.

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The language of section 205 very directly implies the possibility of coercive action by means of conference or other agreements between common carriers. There is some evidence in this case that respondents have in one way or another bound themselves and their fellow members to charge the rates which were filed with us with their proposed conference agreement, including unequal rates for New York, Newark, and Philadelphia.

The evidence in this case relates almost entirely to alleged violations of sections 16 and 17 of the Shipping Act and not to issues under section 205 of the Merchant Marine Act, which section was first referred to at the time of oral argument and then only at our suggestion. The present record is, in our judgment, not sufficiently complete on a number of issues material under section 205 for us to make findings with respect to any violations of that section if in fact we are authorized to do so in a proceeding such as this brought under the provisions of section 22 of the Shipping Act.

We shall not in this proceeding attempt to approve or disapprove respondents' proposed agreement. This matter is referred to our Regulation Office for appropriate inquiry and recommendations. The Regulation Office will consider whether the proposed agreement is inconsistent with any of the provisions of law, including the Shipping Act and section 205 of the Merchant Marine Act, and also whether respondents have heretofore been carrying out the terms of any unapproved agreement.

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 31st day of May A. D. 1953

No. 706

THE PORT OF NEW YORK AUTHORITY

v.

AB SVENSKA AMERIKA LINIEN, REDERIAKTIEBOLAGET TRANSATLANTIC, REDERIAKTIEBOLAGET HELSINGBORG, ANTIEBOLAGET TRANSMARIN, AND WILH. WILHELMSEN

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

It is ordered, that the complaint in this proceeding be, and it hereby is, dismissed.

By the Board.

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

FEDERAL MARITIME BOARD

No. M–60

COASTWISE LINE—APPLICATION TO BAREBOAT CHARTER THREE GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS FOR USE IN THE PACIFIC COASTWISE/BRITISH COLUMBIA/ALASKA SERVICE

REPORT OF THE BOARD

Exceptions to the recommended decision of the Chief Examiner were filed by interveners, and the case was argued orally before the Vice Chairman. The record, exceptions, and transcript of oral argument were considered by both members of the Board. Our findings, which are in substantial agreement with those of the examiner, were served on June 1, 1953 (4 F.M.B. 200). Exceptions and requested findings not reflected in our findings or conclusions have been carefully considered and are overruled.

This is a proceeding under Public Law 591, 81st Congress, upon the application of Coastwise Line for the bareboat charter of three Government-owned, war-built, dry-cargo, Liberty vessels for use in its Pacific coastwise/British Columbia/Alaska service for the summer and fall seasons. The Portland Chamber of Commerce and the Portland Freight Traffic Association intervened in support of the application. The Committee for the Promotion of Tramp Shipping, Ocean Tow, Inc., Alaska Freight Lines, Inc., and Olympic-Griffiths Lines, Inc., intervened in opposition to the application.

The record in Docket M–58, concerning a previous application of Coastwise Line for these same vessels, was incorporated into the record in this proceeding. In our report of April 20, 1953, in Docket M–58, we stated that we were unable at that time to make the affirmative finding that privately owned American-flag Liberty vessels were not available for charter by private operators on reasonable conditions and at reasonable rates for use in this service. For that reason, we considered it unnecessary to comment in that report on the other two statutory issues.

Coastwise presently operates a regular berth service between ports in California, Oregon, Washington, British Columbia, and

Alaska with two owned Libertys and three Libertys chartered from private owners. During the 1952 season Coastwise also operated with three Government-chartered Libertys, the charters of which were discontinued pursuant to our findings in *Review of Charters, Gov't-Owned Vessels, 1952*, 4 F.M.B. 133; these vessels have been equipped with radar and other special equipment required for their operation in the service of Coastwise, and they are the particular vessels sought by the present application. The service of Coastwise, which is under consideration, is operated with the three privately chartered Libertys; this service provides: (a) A southbound and northbound Pacific coastwise service; (b) a service between Pacific coast ports and Alaska, including southbound calls at British Columbia ports; and (c) a service between Alaska ports. The two owned vessels are employed exclusively in the trade between Pacific coast ports and British Columbia.

The record is convincing that the service herein under consideration is still in the public interest for the reasons set out in our previous findings to this effect. 3 F.M.B. 515 (1951), 3 F.M.B. 545 (1951).

The vessels applied for in this proceeding are sought by Coastwise primarily to accommodate the peak movement of cargo to Alaska, which will taper off in the late fall of this year. At the time of the hearing Coastwise was faced with a backlog of 56,555 short tons of cargo which has been offered for transportation from Pacific coast ports to Alaska during the months of May, June, and July. The carriage of this cargo alone would have required the employment of at least three more Libertys by Coastwise, making two voyages each during the months of May, June, and July. Coastwise estimates that the amount of cargo which must actually move during this 3-month period will be twice that which has already been booked.

The total military construction program of the Defense Department for 1953 in Alaska will amount to approximately $438,000,000, of which $260,000,000 is under contract, and $178,000,000 is to be awarded during this season. A United States Army witness testified that approximately $137,000,000 of military construction work will be fixed in place in Alaska during 1953, which is $4,000,000 more than in 1952. These figures include labor as well as other costs.

Coastwise estimates that it will move 50,000 tons of northbound cargo and 75,000 tons of southbound cargo in the segment of its service between Pacific coast ports and British Columbia,

and that it will move 50,000 tons of northbound cargo and 254,000 tons of southbound cargo in the Pacific coastwise trade. It is the only American-flag operator presently serving the British Columbia trade in both directions.

Intervener Olympic-Griffiths Lines operates a Liberty vessel in the Pacific coastwise trade. It has made 14 round voyages since the start of its service in August 1952, carrying full cargoes of salt northbound and two half shiploads of newsprint and lumber southbound. It has solicited southbound cargoes only since March 1953, and it points out that it has been largely unsuccessful in participating in the southbound newsprint trade because of the preferential business arrangement which one shipper has with Coastwise for the carriage of southbound newsprint. Olympic-Griffiths argues that the use of the Government-owned vessels sought herein will aid in excluding it from the southbound Pacific coastwise paper trade and will prevent it from acquiring another Liberty vessel for use in this trade. Newsprint is one of the principal commodities in the southbound Pacific coastwise trade. The other principal commodity moving southbound in this trade is lumber, the movement of which falls off during the summer months. Olympic-Griffiths requests that, if we should make the statutory findings herein, we recommend the inclusion of appropriate restrictions to prevent the use of Government-owned vessels chartered to Coastwise from competing for the carriage of southbound coastwise cargo with the privately owned vessels operated by it.

The evidence indicates that the 1953 military and commercial movements to Alaska and the commercial movement in the British Columbia trade and the northbound Pacific coastwise trade of Coastwise will be at least as large as during the 1952 season, during which Coastwise operated the three Libertys herein applied for in addition to its presently operated fleet. We find, therefore, that the Alaska and British Columbia segments and the northbound Pacific coastwise segment of the service of Coastwise will not be adequately served without the use therein of the vessels applied for, or equivalent tonnage. We also find that there is inadequacy of service in the southbound Pacific coastwise segment of the service in so far as the privately operated vessels of Coastwise and Olympic-Griffiths are unable to carry all cargo offerings.

The need of Coastwise for additional Liberty vessels is immediate in view of its present backlog of cargoes. It was testified that this heavy seasonal movement will abate sometime in the late fall,

at which time Coastwise intends to return the Government-chartered vessels. The evidence discloses that Liberty vessels were available on the west coast for early June delivery. Coastwise has been offered the charter of several Libertys at bareboat rates ranging from $9,000 per month for a three-year charter to $15,000 per month for a one-year charter. A witness for the Committee for the Promotion of Tramp Shipping testified that he was authorized to offer Coastwise seven Libertys in behalf of member owners. All of these vessels are positioned on the west coast, available for deliveries beginning early in June. The witness testified that the bareboat rates asked by the owners ranged from $10,500 per month, and that the owners were ready to consider counter offers. While there is some doubt that any or all of these vessels are suitable for operation in the service of Coastwise, only one of these seven vessels was offered for a period under a year. This vessel was offered for a 9-month period at a bareboat rate of $12,500 per month, but it was a converted Liberty tanker with no heavy lift gear needed for this service.

The examiner has found that the 1952 earnings of Coastwise from the operation of these three Government-chartered Libertys would have in that year supported a charter hire in the neighborhood of $12,500 a month, after allowing for the cost of installing the special equipment required for operation in this service. The evidence shows, however, that monthly wage costs have increased since 1952 by over $3,000 per vessel. It was testified by Coastwise that it has not had any general rate increase in this service for over 2 years.

Under the circumstances, we find that privately owned United States-flag vessels are not available for charter from private operators on reasonable conditions and at reasonable rates for the 6-month period of peak seasonal movement in the service.

FINDINGS, CERTIFICATION, AND RECOMMENDATIONS

On the basis of the facts adduced in the record, we find and hereby certify to the Secretary of Commerce:

1. That the service under consideration is in the public interest;
2. That such service (exclusive of a portion of the southbound Pacific coastwise segment thereof) 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.

We recommend that any charters which may be granted pursuant to our findings in this proceeding be for a period not to

exceed 6 months, subject to the usual right of concellation by either party on 15 days' notice. We further recommend that such charters contain no provision for the nonpayment of charter hire during any idle period, and that additional charter hire, over such fixed charter hire as the Administrator shall determine, be determined with reference to all voyages made thereunder, computed, accounted for, and paid separately from any previous charters. We further recommend that such charters contain a restriction prohibiting Coastwise Line from carrying southbound coastwise cargo between Pacific coast ports on Government-chartered vessels, unless privately owned United States-flag vessels are unavailable for the carriage of such cargo.

By the Board.

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

JUNE 16, 1953.

FEDERAL MARITIME BOARD

No. S–47

AMERICAN EXPORT LINES, INC.—REVIEW AND REDETERMINATION OF THE SALES PRICES OF THE "INDEPENDENCE" AND "CONSTITUTION"

Decided February 20, 1952

Kenneth Gardner for American Export Lines, Inc.
Francis T. Greene and *John F. Harrell* for the Board.

REPORT OF THE BOARD[1]

On August 10, 1948, Mr. J. E. Slater, then executive vice president of American Export Lines, Inc. (Export), read a written memorandum of understanding to the United States Maritime Commission (the Commission) setting forth the terms as fixed by the Commission on the previous day and orally communicated to him, under which Export would agree to the construction and purchase, pursuant to Title V of the Merchant Marine Act, 1936, as amended (the Act), of two 20,000-ton, 25-knot passenger vessels. The memorandum recited the construction cost of each ship, on an adjusted-price basis, to be $23,415,000 per ship, being the bid of Bethlehem Steel Company (Bethlehem), the low-bidding shipyard, and the purchase price to Export from the Commission to be $11,956,285, plus a proportion of any increase in cost due to escalation. The cost of certain additional items not included in the shipyard bid nor in the base price of $11,956,285 was recited to be shared 55 percent by Export and 45 percent by the Government. The memorandum also covered other matters discussed by the Commission with Mr. Slater on the previous day, including provisions for a new operating-differential subsidy contract to cover the new passenger ships as well as Export's cargo ships, to run for a period of 18 years. The statements in that memorandum were agreed to in principle by the Commission on August 10, 1948.

[1] See Supplementary Report of Board, 4 F. M. B. 263.

Thereupon Mr. Slater flew to New York and on the same day presented the same memorandum to the directors of Export, who thereupon gave their approval without qualification. Notice of the action of the directors of Export was telegraphed to the Commission on August 11, 1948. On that day the Commission accepted the bid of Bethlehem for the construction of the two ships and thereupon two tripartite contracts (Nos. MCc–61390 and MCc–61391) between the Commission, Export, and Bethlehem, for the construction of the two ships at the price mentioned, with provision for escalation, were duly executed and dated as of August 11, 1948.

Certain statutory findings and determinations by the Commission were required before formal sales (construction-differential subsidy) contracts could be entered into with Export, and, accordingly, on November 16, 1948, the Commission took the necessary formal action, and on that date authorized the sale of the two vessels to Export at the base unit selling price of $11,956,285 per ship, and directed the preparation of the usual sales (construction-differential subsidy) contracts by the general counsel of the Commission.

On November 22, 1948, the Commission formally advised Export that it had made the several findings of fact which, under sections 501 and 502 of the Act, are prerequisite to the sale of a vessel "at a price corresponding to the estimated cost * * * of building such vessel in a foreign shipyard," as provided by section 502. This letter computed the selling price to Export of $11,956,285, as follows:

(1) Base unit contract price (25-knot vessel)	$23,415,000
(2) Base unit contract price (22½-knot vessel)	23,116,000
(3) Amount included in (1) representing excess speed over 22½ knots	299,000
(4) Estimated base unit foreign cost (22½-knot vessel)	12,713,800
(5) Estimated base foreign cost of national defense features other than excess speed (55 percent of $1,377,300, the base United States cost of such features)	757,515
(6) Base unit selling price to applicant	11,956,285

The Commission's terms of November 22, 1948, were accepted in writing by Export.

The tripartite contracts of August 11, 1948, recited that the Commission had concurrently entered into separate contracts with Export for the purchase by Export of the vessels upon completion. However, the preparation and execution of these formal contracts of sale and for construction-differential subsidy was delayed and the contracts were not executed until January 11, 1951, by the Federal Maritime

Board as successor to the Commission. When executed, the contracts included provision of redetermination of the vessels' sales prices by the Board as is hereinafter explained.

Under section 502 (b) of the Act, the Government is authorized to absorb the difference in cost between the American shipbuilder's bid and "the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed under similar plans and specifications (excluding national defense features * * *) in a foreign shipbuilding center which is deemed by the Commission to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed." In addition, "the cost of any features incorporated in the vessel for national defense uses * * * shall be paid by the Commission in addition to the subsidy."

On July 11, 1949, the Comptroller General submitted a report (H. R. Rep. No. 1423, 81st Cong., 1st Sess.) criticizing the determinations of the Commission with regard to the amount of construction-differential subsidy and the allowances for various national defense features on several passenger vessels, including the two Export ships which are the subject of this review. The gist of the Comptroller General's criticisms with respect to the two Export ships appears to be that the Commission's foreign cost estimate of $11,956,285 per ship was not founded on "convincing evidence" as required by section 502 (b) of the Act where the subsidy is over 33⅓ percent, and, further, that the allowance of $1,676,300 per ship for national defense features was, in his judgment, an allowance, at least to some extent, for certain features sought by Export for commercial reasons. Following extensive hearings before a subcommittee (Hardy Committee) during the summer of 1949, the House Committee on Expenditures in the Executive Departments published its Fourth Intermediate Report (H. R. Rep. No. 1423, 81st Cong., 1st Sess.—the Hardy Report). The Hardy Report, while containing numerous critical implications, left open the issues of law and policy dealt with therein and concluded with the recommendation that the Commission should review the instant and other construction-differential subsidy agreements and that all possible action be taken to prevent excessive expenditure of Government funds. Under Reorganization Plan No. 21 of 1950, the Board is the successor to certain of the powers, duties, and unfinished business of the Commission, including the responsibility for the review and redetermination of the sales prices which properly should be charged to Export for these ships.

On August 14, 1950, the Board appointed a special committee to study and submit its recommendations as to the problems herein involved, considering and giving due weight to the reports of the Comptroller General and the Hardy Committee.[2] In addition to the study which has been given by the special committee to the postwar award of subsidies on passenger vessels, the Board and the Board's staff have also independently reviewed the history of these subsidy determinations and have analyzed all available data, which, under the Act, are the bases for subsidy determinations.

On January 11, 1951, when the *Independence* was ready for delivery by her builders, the Board, as already explained, entered into two contracts with Export (Nos. MCc–61468 and MCc–61469) to formalize the prior informal sales agreement between the Commission and Export, and in addition (article 5), to permit the Government to "make a redetermination of the vessels' sales prices, in accordance with the provisions of the Merchant Marine Act, 1936, as amended, as of the date of the Commission's grant of the construction-differential subsidy to the Buyer * * *." The deadline date for this redetermination has been extended. The contracts further provide that within 30 days after the redetermination, Export may refuse to accept the redetermined price and may terminate the agreement *in toto*. In the latter event, the vessels shall be returned to the Government, Export to pay charter hire for their use at the rate of 8½ percent per annum of the Government's redetermined sales price, plus one-half of Export's total net profits from the operation of each ship. Furthermore, Export's operating-differential subsidy agreement of June 6, 1951 (Contract No. FMB–1) provides (article I–11) that if Export fails to accept the Board's redetermination of the sales prices of the *Independence* and *Constitution*, then Export's operating subsidy contract as to all its vessels "shall terminate automatically on December 31, 1952." By those contractual provisions, the Board has sought, pending redetermination of the prices, to discharge its operating responsibilities under both titles V and VI of the Act, precipitated by the completion and delivery of the ships, while at the same time taking no correlative action which might jeopardize the legitimate interests of the Government in the event that it should be decided, after review, that the terms of the sale of these vessels should be renegotiated. What follows is our review of the Government aid granted under Title V of the Act pursuant to direction from the President and to recom-

[2] The original appointees were Prof. H. L. Seward, chairman, Mr. R. E. Gillmor, and Mr. William B. Jones. Mr. Jones being unable to serve, Dr. Walter H. E. Jaeger was appointed in his place on October 12, 1950. Professor Seward resigned March 14, 1951. The remaining members submitted their report, discussed below, under date of September 7, 1951.

mendations of the Hardy Committee, and also our redetermination of the vessels' sales prices pursuant to the provisions of contracts Nos. MCc–61468 and MCc–61469, dated January 11, 1951, between the Board and Export.

It is clear that certain fundamental issues must be resolved before the estimates and calculations can be made of the foreign construction cost of these vessels, and the determination of the vessel features which properly should be classed as national-defense features and be paid for by the Government. Accordingly, a letter was addressed to Export under date of September 12, 1951, posing six issues of law and six issues of fact and policy upon which the views and positions of Export were invited. Thereafter, hearings were held on October 4 and 5 with respect to those issues. Following a 3-week period for Export's examination of the staff's estimate of the 1948 foreign cost of building these ships, further hearings on the validity and basis of the staff estimates were held on November 19, 20, 28, and 30. Briefs have been submitted by Export's counsel and by Board counsel. Counsel or representatives of Export, the Comptroller General, and the Hardy Committee attended all hearings, while the Bureau of the Budget, the Departments of the Navy, Treasury, and Commerce, and the special committee were represented at the October hearings on the general substantive issues.

In order to focus the substantive issues involved and to provide a basis for pointed discussion at the hearing, the Board's staff prepared memoranda stating its opinions and recommendations (exhibits 4, 5, 6, 7, and 8). These, together with the September 7, 1951, report of the special committee (exhibit 10) and a short statement by Export dated September 27, 1951 (exhibit 9), were circulated to all interested parties in advance of the hearing. Inasmuch as the witnesses at the hearings of October 4 and 5, as well as memoranda prepared by the staff and Export, discussed the issues in the order in which they are posed in the Board's letters, we will state and discuss our decisions in the same order.

Issues of Law

1. *In the redetermination by the Board of the respective vessels' sales prices, must the Board's estimate of the foreign-construction cost of the proposed vessels be estimates of the vessels built to American standards or may it be based upon the cost of the vessels if built to foreign standards?*

Decision. American standards.

So far as pertinent, section 502 (a) of the Act provides:

* * * Concurrently with entering into such contract with the shipbuilder, the Commission is authorized to enter into a contract with the applicant for the purchase by him of *such vessel* upon its completion, *at a price corresponding to the estimated cost, as determined by the Commission pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.* [Emphasis added.]

Section 502 (b) of the Act provides:

The amount of the reduction in selling price which is herein termed "construction differential subsidy" may equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel * * * over the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel *if it were constructed under similar plans and specifications* * * * in a foreign shipbuilding center * * *. [Emphasis added.]

The legislative history of the 1938 amendment, which provided for the substitution of the word "similar" for the original word "like" in the reference to plans and specifications upon which the Board must base its estimate of the hypothetical foreign counterpart of the American ship, and the administrative construction followed by the Commission from 1938 to 1948, lead us to conclude that the comparison should be with the hypothetical foreign vessel built to American standards. Export appears to agree (exhibit 9).

We recognize, as did the Commission, that this construction of the act does not achieve full capital parity between the American operator and his foreign competitors and that, to this extent, the Act falls short of its general objective of putting the American ship buyer and operator on a capital parity with his foreign competitors. However, we believe that the remedy, if one is required, should lie in an appropriate amendment of the Act.

2. *In the redetermination by the Board of the respective vessels' sales prices, must the allowance for national-defense features be limited to vessel features added to the applicant's plans and specifications pursuant to specific Navy Department request?*

Decision. No.

The Act does not define what features incorporated in a vessel and useful for national-defense purposes may be made the subject of a national-defense allowance, the entire cost of which shall be paid by the Government. Neither does the Act specify any procedure for the determination of features qualifying for national-defense allowances which must be followed to the exclusion of any other procedure.

Section 501 (b) of the Act provides only:

The commission shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel

shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Commission.

Section 502 of the Act provides that the sales price of the vessel (its estimated foreign construction cost) shall exclude "the cost of any feature incorporated in the vessel for national-defense uses, which shall be paid by the Commission in addition to the subsidy."

In the case of the two Export ships, most of the vessel features which were made the subject of the national defense allowances granted by the Commission were included in the plans and specifications of the two vessels (Design P2–S1–DL2) submitted by Export in December 1947. While Export did not then originally claim that any features were incorporated for national defense purposes, still, after the many conferences between the staff of Export and that of the Commission, held for the consideration of the vessel plans, as well as correspondence between Export and the Commission, the Commission determined that the following features had been incorporated in the vessel plans for national defense purposes and therefore should qualify as national defense features:

(1) The difference between 55,000 maximum shaft horsepower (giving a speed of 25 knots) and the 40,700 shaft horsepower estimated to be required for 22½-knot speed at a cost of	$299,000
(2) Additional bulkheading at a cost of	96,850
(3) The increase in third-class passenger space from 116 to 308 at a cost of	827,365
(4) The increase in generator capacity from 3,600-kilowatt generators to 4,400 generators at a cost of	112,085
(5) The increase in evaporator capacity above 90,000 gallons per day at a cost of	269,000
(6) Design expenses, insurance, classification fees, etc., for the above features	72,000
	1,676,300

In addition to the criticism of the Comptroller General, previously referred to in this decision, the Hardy Report (p. 25) states:

* * * The present wording of the statute appears in practice to present an inadequate administrative criterion, and the lack of legislative history in connection with the applicable provisions sheds further doubt on the real intent of the Congress. It is most difficult to read into the statute the interpretation placed upon it by the Maritime Commission in determining the national defense features of the superliner.

The statute lends itself much more readily to an interpretation that only those features which the Navy determines should be added to commercial requirements are appropriate as national defense features. The language as now written does

not authorize a payment by the Government for those features inherent in every vessel which make it useful as an instrument of national defense, nor is it recommended that it should. Certainly we do not consider that the present law authorizes the utilization of the national defense feature provision as a substitute for awarding an increased construction-differential subsidy. A review of this phase of the statute is of paramount importance toward clarification of congressional intent. The present situation calls for a clear-cut provision setting forth the policy of Congress as to the national defense aspects of the merchant marine and the extent to which the payment for national defense features is a responsibility of the Government.

The Commission, in the exercise of its administrative discretion, adopted on June 10, 1948, the policy of paying for such national-defense features in addition to the construction-differential subsidy, if, and to the extent, such features did not have a commercial utility, or if, and to the extent, their cost was disproportionate to their value for commercial purposes. In our opinion, the above policy is sound.

We conclude that the inclusion of a vessel feature in the applicant's plans and specifications does not *per se* bar the granting of a national-defense allowance for such vessel feature; the Act contains no such bar. The only express requirement in the Act is contained in section 502 (a), which provides that bids for the construction of the vessel can be secured only "If the Secretary of the Navy certifies his approval * * *." Under section 501 of the Act, this approval imports the finding merely that the vessel is "Suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." It is to be noted that, under this language, the Navy certification could be based solely upon the usefulness of the ship to the Government for *civilian* purposes in a national emergency, such as evacuation of nationals; facility of conversion to a troop transport or other military auxiliary is not in such case a prerequisite.

The Act appears to permit but not to require that national defense features, referred to in section 502 (b), be added to the original plans as a result of the Navy's suggestions as authorized by section 501 (b).

The Board takes notice of the fact that the major United States shipyards and principal naval architects, including Bethlehem, which prepared Export's plans in this case, have planned and built large numbers of vessels of numerous kinds for the Navy and are generally familiar with the structural and other features which the Navy considers desirable for inclusion in auxiliaries such as troop transports. Bethlehem, in designing these ships, was necessarily aware of the known desires of the Navy concerning speed, additional bulkhead-

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ing, dual engine rooms, etc. If a ship designer were required to disregard the known objectives of the Navy, it follows, as stated by Mr. Slater, president of Export, that "anybody who designs a ship should design the worst ship they can think of and then let the Navy force them into providing the type of ship that should be there" (R. 110). Such practice would require extensive redesign in order to incorporate subsequent suggested changes into the plans and specifications as originally developed. A ship is an operating unit, and any substantial modification of a final design may entail a vast number of additional coordinating changes.

In 1948 the Commission had a Technical Division (U. S. M. C. Administrative Code, April 24, 1946), which was later redesignated the Technical Bureau. This Bureau, in addition to reviewing from an engineering standpoint vessel plans and specifications submitted by applicants for Government aid, was directed "to authorize the installation of national-defense features on privately owned vessels."[3] Thus, there was close collaboration between the technical staff of the Commission, Export, and the marine architect in the development and expansion of the original plans and specifications for these vessels, to the end that the final plans and specifications would ultimately be approved.

Because of the close liaison between the Commission's technical staff and the Navy, the former (many of whom had had extensive Navy design experience) suggested the inclusion of features during the development of the plans which in their professional capacity they knew the Navy would desire. For example, Andrews, vice president of Export in charge of operations, stated (R. 166) that the divided engine rooms were originally included because the Commission's Technical Division stated that "on a national-defense basis, the Navy no doubt would require the size of this vessel to have two divided (separated independent) engine rooms, and we went along on that basis with the Technical Division of the Maritime Commission." According to Andrews, the generator capacity was increased at the request of the Technical Division so as "to have a surplus in the ship for any emergency purposes that may be placed at a later date for national defense" (R. 184).

In short, it is our conclusion that the bidding plans and specifications for the Export ships were developed with the close collaboration of the technical staff of the Commission and the applicant's ship-

[3] This directive was supplemented by U. S. M. C. General Manager's Order No. 17 of September 24, 1948, which directed the Chief, Bureau of Engineering, to "cooperate with the National Military Establishment in the *preparation of plans and studies for both new designs* and for the conversion of vessels to military types in time of national emergency * * *." [Emphasis added.]

design agent, with full knowledge of the requirements of the Navy. Accordingly, we have no hesitation in rejecting a construction of the Act which would limit allowance for national-defense features to those which are added to Export's plans and specifications as originally filed, in order to comply with the subsequent request of the Navy Department.

3. *In the determination of the respective vessels' sales prices, could vessel-sales prices (estimated foreign construction costs) have been made subject to an escalation clause to reflect changes in wages, material, and other elements of construction cost?*

Decision. Yes.

This question arises from the fact that the Bethlehem bid for the Export ships which was accepted was an "adjusted price" bid of $23,415,000 per ship, which was $2,698,000 less than its fixed price bid of $26,113,000. The "adjusted price" bid was subject to the usual type of escalation under which the price was to be adjusted upward or downward in mathematical relationship to fluctuations in designated indices of wage and material rates. Furthermore, the estimated foreign construction cost under section 502 (b) of the Act was developed by the staff of the Commission as its estimate of what an adjusted price bid of a Netherlands shipyard might be. That basis of estimation was used for three reasons: (1) It corresponded with the basis of Bethlehem's bid; (2) the information available to the Commission indicated that at that time the foreign shipyards would not submit fixed price bids (C. R. 34); and (3) it was the most accurate way to estimate the foreign construction cost of the ships since the amount of a foreign shipyard's estimating factor to cover anticipated increases in labor and material costs would be largely a matter of conjecture. It might or might not coincide with the approximately 11-percent factor that Bethlehem actually used to cover its anticipation of wage and price rises in the United States, i. e., the percentage excess of its fixed price bid over the adjusted price bid.

Furthermore, escalation is and long has been an accepted feature of Government shipbuilding contracts. In general, the shipbuilder, for his own protection, estimates potential cost increases when figuring a fixed price bid above the actual rise experienced. Consequently, an adjusted price basis plus escalation is, in general, to the Government's advantage; the same would be true of the American buyer of the hypothetical foreign-built ship. Consequently, the decision of the Commission to use an adjusted-price basis for its estimate of foreign cost appears reasonable, sound, and in keeping with the parity principle of the Act. For these reasons, the Board has also used the adjusted-price basis for its estimate of the foreign-construction cost of

the two Export ships. Finally, this method has been formally agreed to by Export and the Board in article 3 (a) (iii) of the construction-differential subsidy agreements of January 11, 1951. Section 502 of the Act, particularly when coupled with the authority given under section 207 to "enter into such contracts * * * as may, in its discretion, be necessary," contains sufficient flexibility to permit subsidy determinations to conform to accepted commercial practice in this regard.

There remains the mixed question of law and policy whether the escalation adjustment for the hypothetical ship should be based on changes in foreign shipbuilding costs or whether the adjustment, for administrative convenience, may be geared to United States wage and material indices (exhibit 4, R. 369; exhibit 5, R. 393; exhibit 14, R. 479). From a strictly theoretical point of view, the escalation clause in a foreign vessel sales contract should be geared to appropriate foreign wage and material indices since the vessel sales price is to be "a price corresponding to the estimated cost * * * of building such vessel in a foreign shipyard." Where, at the time of entering into a Title V vessel-sales contract, the trend of foreign labor and material costs is similar to the trends in the United States, administrative convenience may warrant the use of domestic indices. The use of United States indices with which both the Government and the purchaser are familiar would, under such circumstances, normally result in a reasonably accurate and sound provision for future changes in construction costs, and obviate an administrative burden, the cost of which might be disproportionate to a changed result one way or the other, if at all. Hence, the procedure actually followed both by the Board and its predecessor with respect to the Export ships falls within the ambit of "the fair and reasonable estimate of cost * * * of the construction of the proposed vessel * * * in a foreign shipbuilding center", which is our guiding standard under section 502 of the Act.

In the case of the Export ships, the trends of the Netherlands indices of prices for metal and metal products and average hourly wage earnings are substantially similar to those in the United States up until the latter part of 1950. Commencing in October 1950, the Netherlands trend of rising prices was steeper than the domestic trend, presumably due to the delayed impact of the September 1949 devaluation of western European currencies (exhibit 15, R. 481–482). Any attempt to put a money value on the factors for purposes of subsidy determination would be speculative, and if determinable at all would probably be minor in view of the completion dates of the vessels. On the contrary, the original assumption as applied to the Export agreement in 1948, that the foreign cost of labor and materials

would fluctuate up or down on the same general basis percentagewise as would domestic costs, was, in our judgment, a reasonably sound assumption under the conditions then prevailing.

4. *In the determination of the respective vessels' sales prices, could the vessel-sales contract have provided that the estimated foreign construction cost in terms of American dollars should be subject to changes in the value of the foreign currency during the period of construction and payment?*

Decision. Yes. See reasoning under Question 5 below.

The decision on this question is academic since the Commission's agreement with Export of August 1948 contained no provision therefor.

5. *In the redetermination of the respective vessels' sales prices by the Board, does the Act now prohibit adjustments to give effect to changes in the wages, material, and other elements of foreign-construction costs and in the value of the foreign currency during the period of construction and payment?*

Decision. No, provided such redetermination is made on the basis only of circumstances existing as of the date of the construction contracts.

The importance to any American who, during the past 3 or 4 years, was purchasing western European products, of the approximately 30-percent devaluation of sterling and all associated western European currencies which occurred in September 1949, obviously required us to give the most searching scrutiny to its legal and factual impact upon the Export agreement of August 1948. The method by which the estimated foreign cost in foreign currency of the subsidized vessel should be converted into dollars is not touched upon by the Act. The only guidance given us by Congress with respect to price is that the final sales price in dollars should be a "fair and reasonable estimate of cost" of the vessel, were it being built by a foreign yard. The legislative history of the Act sheds no light at all upon the problem of how the Commission should treat fluctuations in foreign exchange rates occurring during the period of construction and progress payments.[4]

On the other hand, the Act and its legislative history is definite beyond substantial question that the estimate of foreign construction cost (below which vessels cannot be sold under the Act) must be made as of the date the contract is entered into for the construction of the ship. The last sentence of section 502 (a) provides:

[4] At p. 81 of the Hearings on S. 2582, 74th Cong., 1st sess., Senator Vandenberg asked but obtained no answer to the question: "So long as international exchanges are in a flux, are not your differentials bound to be very much a speculation anyway?"

Concurrently with entering into such contract with the shipbuilder, the Commission is authorized to enter into a contract with the applicant for the purchase by him of such vessel upon its completion, at a price corresponding to the estimated cost, as determined by the Commission pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.

The last sentence of section 705 of the Act, added by the Act of August 4, 1939 (53 Stat. 1182), reads:

No vessel constructed under the provisions of this Act, as amended, shall be sold by the Commission for operation in the foreign trade for a sum less than the estimated foreign construction cost exclusive of national defense features (*determined as of the date the construction contract therefor is executed*) less depreciation based on a twenty-year life * * * [Emphasis supplied.]

The legislative history of this amendment shows that Congress intended to put the same floor under vessels sold pursuant to Title VII as was provided for ships built and sold pursuant to section 502 (Title V). Thus, Senate Report No. 724, 76th Congress, 1st session, states:

Vessels constructed for the Maritime Commission account under Title VII (or built under Title V and then taken back because of buyer's default) under existing law might be thrown on the market at bargain prices. Section 11 would provide a statutory "floor" such as is provided in Title V * * * under the price at which such vessels may be chartered or sold.

See, also, to the same effect, House Document No. 208, page 8; hearings on House bill 5130, page 7; and House Report 824—all 76th Congress, 1st session. The Board therefore concludes not only that the limitations of the last sentence of section 705 of the Act are applicable to the sale of vessels with construction-differential subsidy under Title V, but that Congress intended Title V to require that the estimate of foreign construction cost should be made as of the date the American construction contract therefor is executed. In the case of the *Independence* and the *Constitution*, the crucial date for purpose of estimating foreign-construction cost is, therefore, August 11, 1948, the date of the two tripartite contracts between the Commission, Bethlehem, and Export.

The requirement of section 705, however, that the estimated foreign cost must be made as of the date the contract is entered into, does not preclude the Board from giving effect to a subsequent occurrence such as devaluation, provided it is a matter which the Commission and the applicant, exercising the judgment of prudent businessmen, would have foreseen and might have provided for in their contract. The reasoning which underlies our conclusions is that the whole objective of Title V is to permit the purchase of the American ship by the American operator at the closest possible approximation to the actual dollar price that it would have cost him had the ship been built foreign. If Export had actually contracted for these ships with

a Netherlands shipyard, and would have had the opportunity to contract in dollars at an appreciable discount because of impending devaluation or had been able to provide for progress payments to be made in guilders during the life of the construction contracts, it would in fact have had the benefit of a substantial reduction in dollar cost. Consequently, to the extent that devaluation could have been reasonably foreseen and turned to the advantage of a purchaser in Export's supposed position, the Board in making its redetermination of the vessel sales prices in 1951 may make adjustments to obtain the benefit of potential devaluation which a prudent businessman would or should have made as of August 1948.

6. *In the determination of the respective vessels' sales prices, could the vessel-sales contract have included in the estimated cost of the respective vessels the following costs not included in the domestic shipyard bid:*

a. *Fees for preparation of bidding plans and specifications;*

b. *Cost of inspection during construction;*

c. *Interior decorator's fees;*

d. *Increases in cost due to running standardization trials;*

e. *The cost of supplying items not included in the construction contract but which may be furnished separately by the Commission or purchased by the applicant with prior approval of the Commission?*

Decision. Yes.

The question here really is whether a subsidy may be paid for these items. The Commission included all of the above items as subsidized cost, of which the Government was to bear 45 percent and Export 55 percent.

So far as pertinent, section 502 (a) of the Act provides:

> * * * Concurrently with entering into such contract with the shipbuilder, the Commission is authorized to enter into a contract with the applicant for the purchase by him of such vessel upon its completion, *at a price corresponding to the estimated cost, as determined by the Commission pursuant to the provisions of this Act, of building such vessel in a foreign shipyard.* [Emphasis added.]

Section 502 (b) of the Act provides:

> The amount of the reduction in selling price which is herein termed "construction differential subsidy" may equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel * * * over *the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed under similar plans and specifications * * * in a foreign shipbuilding center* * * *. [Emphasis added.]

In connection with these items of ship-construction costs, the Comptroller General indicated that there is some question as to whether these items properly can be subsidized and that, in any event, the

subsidy rate determined without regard to these items should not be applied to them (H. R. Rep. No. 1423, 81st Cong., 1st sess., p. 36).

With regard to these same items, the Hardy Committee stated (H. Rep. No. 1423, 81st Cong., 1st sess., p. 25):

> Special examination is recommended of the problem involving items which are normally outside the scope of shipyard bids and their relationship to the granting of a construction-differential subsidy.

All of the items of cost referred to above enter into a completed ship and are costs which would necessarily be incurred in the construction of a ship in a foreign shipbuilding center.

(*a*) The plans and specifications of the ships, including the "bidding plans and specifications" furnished by Export, would be required by the foreign shipbuilder in its construction of the ships. The cost of preparing all such plans and specifications are a part of the over-all cost of a ship whether it is built here or abroad.

(*b*) In constructing a ship either in an American shipyard or in a foreign shipyard, the party for whom the ship is being constructed will employ inspectors who, on behalf of such purchaser, will inspect the work of the shipyard to make certain that the shipyard constructs the ship in accordance with the contract plans and specifications. The purchaser of a ship to be built in a foreign shipyard would employ such inspectors, and their cost necessarily is a part of the total cost of the ship.

The inspection of ships sold under the provisions of Title V was the administrative responsibility of the Commission, and in meeting this responsibility the Commission, in the case of the greater number of ships constructed for it for sale, inspected the construction of such ships with inspectors from its administrative staff, and did not, since no provisions of the Act require the charge of such costs to the sales price of the respective ship, include any part of such inspection costs (or other administrative costs) of the Commission in the ship sales prices. The Commission could have undertaken the entire work and the entire cost for its own account. In this instance Export undertook certain inspection work, a portion of which was in lieu of and/or in substitution of the Commission's inspection. It would appear that it is proper, therefore, to include for subsidy calculation that portion of Export's inspection cost covering work authorized by the Commission to the extent that such work was in fact in lieu of and in substitution of Commission inspection.

(*c*) The interior decorator's fees cover the work of preparing the interior design plans and specifications required in the construction of the ships, and the work of supervising the work of the shipyard in carrying out such plans and specifications. These are costs necessarily

included in the total cost of constructing the respective ships, and cover work which ordinarily would be included in the American shipbuilder's contract and in the contract of a shipbuilder constructing the ships in a foreign country.

(*d*) Standardization trial runs customarily were had in connection with the construction of a new type of ship by the Commission. Such trials were generally run on one ship of a group and were for the purpose of securing operating performance data with respect to all ships in the group and to assist the Commission in its ship design responsibilities under the Act. These trials are run by the shipyard constructing a ship selected for such trials, and their cost would be included in the final contract price of the American shipbuilder; if such trials were required in connection with the construction of a ship in a foreign country, the cost of such trials would be included in the contract price of the foreign shipbuilder.

(*e*) The cost of items not included in the construction contract, furnished to the ships by the Commission or Export with Commission approval, cover the cost of materials and furnishings required for the ships' outfitting. These costs are a part of the construction cost of a ship (sec. 905 (d) of the Act) and are costs which also would normally have been included in the contract of the American shipbuilder and would be similarly included in the contract of a foreign shipbuilder. Such costs, however, should not be included at a figure in excess of the fair and reasonable estimate of the foreign cost. There is no reason to assume that the differential between the foreign costs of these items and their American costs will be the same as the differential between the foreign and domestic costs of the rest of the ship. Consequently, it is necessary to determine the estimated foreign cost of these items as separate and distinct cost items to be included in the over-all foreign cost estimate.

Since all of the above items of cost are items which either were or could have been included in the American shipyard bid and are all items of cost to the American buyer which would be included in the total cost of constructing the proposed ships in a foreign country, it is our opinion that, under a reasonable construction of the applicable provisions of section 502 of the Act, these cost items are properly considered for inclusion in the estimated foreign construction cost of the ships in amounts equal to the estimated foreign cost of each such item.

ISSUES OF FACT AND POLICY

1. *In the redetermination by the Board of the respective vessels' sales prices, should the estimated foreign-construction cost be subject to adjustment by an escalation clause?*

Decision. Yes.

Our discussion of this matter under Issue of Law No. 3, above, concluding that under section 502 of the Act the vessel-sales prices of the *Independence* and *Constitution* can legally be made subject to escalation geared to American wage and material indices, is largely dispositive of the question of policy whether we should do so in the instant redetermination. As a matter of policy, we see no reason to upset either the original agreement of 1948 between Export and the Commission that the prices to Export would be

> * * * plus its proportion of the additional price brought about by the acceleration [5] in the cost as specified in the bidding conditions

or the more detailed provisions of our formal contract of January 11, 1951.

2. *In the redetermination by the Board of the respective vessels' sales prices, should the estimated foreign-construction cost in terms of American dollars be subject to adjustment for the changes in the value of the foreign currency during the period of construction and payment?*

Decision. No.

While we believe it would have been legally possible for the Commission to have included provisions for such an adjustment, and while we must approach this question knowing that a substantial change in the value of foreign currency actually did take place during the course of construction, we must answer this question only on the basis of what our position would have been had we actually been considering the problem in 1948. No provision for adjustment for changes in the value of foreign currency was made in the 1948 contract, and had it been made it would have created further uncertainties in the final sales price, and evidence is lacking that prudent businessmen would have desired to include in contracts made in 1948 provisions committing both parties to such uncertainties. Export frankly states it would not have agreed to assume such risks. We deem the considerations applicable to the solution of this question quite different from those applicable to question of fact and policy No. 1 covering provisions for adjustments for escalation which are quite usual in this sort of construction contract, and the effects of which can often be forecast with a reasonable degree of accuracy.

[5] "Acceleration" is here used synonymously with "escalation."

2a. *In the redetermination by the Board of the respective vessels' sales prices, should the estimated foreign-construction cost, in terms of American dollars, be subject to an adjustment because of the disparity existing as of August 10, 1948, between the official governmental exchange rate and the free-market rates, in terms of dollars, of the foreign currency of the representative shipbuilding center?*

Decision. No.

After carefully weighing the evidence introduced on this point, we conclude that the answer must be "No," because there is no convincing evidence that the foreign-construction cost of vessels similar to the ones under discussion, in terms of dollars, would have been reduced in August 1948 because of the then existing disparity between the official rate of exchange and the free rate.

It is clear that by reason of well-enforced governmental restrictions, foreign (Netherlands) funds sufficient to pay the estimated foreign-construction cost could not have been purchased in the ordinary course of business with dollars at the free-market rate or at any material reduction from the official rate. Our inquiry, however, must consider whether there were other means available and generally used by international merchants to accomplish the same result in a different manner.

The special committee recommends that the foreign-construction cost estimate should be based on "the average free rate throughout the period of construction." The Committee argues that the free rate was a realistic rate and that a foreign operator planning to purchase a ship in a foreign yard could have accumulated a reserve of foreign currency sufficient to pay the foreign price, and that the true value of such a reserve in dollars would have been measured by the free and not the official rate. The Committee did not deal with the practical difficulties of actual conversion facing the owner of dollars endeavoring to accumulate such a reserve at less than the official rate or the difficulties thereafter of using such a reserve fund or of obtaining an export license for a ship purchased therefrom.

Export, outlining its position (exhibit 9), contends that the Board, although making its estimate as of August 11, 1948, should take into account circumstances which have transpired since that date, of which the most important has been devaluation. In apparent support of this position, it argues that an American purchaser armed with dollars in 1948, by making a dollar contract, "unquestionably could have obtained most important concessions in price by reason of the great need of American dollars in the European countries at that moment." During the hearing, Mr. Slater of Export stated, in effect, that an American buyer had two alternatives: (1) To make a contract at "a fixed price in dollars as of the time," or (2) to purchase the foreign

currency to meet a commitment expressed in guilders. He indicated his own preference for the first alternative, saying (R. 239):

> Personally, I believe that the first method would have been the logical one to have followed because we would then be dealing with a known value and not gambling in the foreign currency.

He continued, pages 242–246:

> I would have expected to have made a deal on a fixed dollar basis with substantial reduction below what the Dutch cost, or British cost, would have been in dollars if translated at the official rate * * * I am saying in substance that I would have made a deal in dollars at a fixed price in dollars but at a substantial reduction in cost. * * * I want to say we, from our point of view with what we had in foreign currency, would not have made a deal in which we would have wanted to gamble in foreign currency. * * * I would have expected to have let that job in American dollars at a very substantial reduction as against the former figure that I mentioned, and if I hadn't been able to do that, I would have gone elsewhere because that would have been the obvious prudent thing to have done.

Mr. Slater stated that the substantial reduction which he would have expected for making a dollar, rather than a guilder contract, was "at least in the range of 15 or 25 percent." Strong inferences and rumors of various financial deals to augment the proceeds of dollar credits beyond the official exchange have been reported from foreign countries, and it appears possible that some such transactions took place. The Board has, however, been unable to establish the full nature or amount thereof and cannot take cognizance of them. Export can point to no major important transaction where such an augmentation was obtained (R. 89, 91, 247).

The staff takes the position, opposed to Export, that no consideration should now be given to the disparity between the official and the free rate of exchange existing in 1948. The staff points out that such disparity was not deemed material by the Commission in 1948, and that, insofar as its records show, the Commission gave no consideration to the prospect of devaluation, recognizing that guilders could not be obtained at the free-market rate in any such amounts as would be necessary to cover the foreign purchase price of these ships.

Export, in view of the 45 percent subsidy rate accorded to it in 1948, raised no objection to the conversion of funds at the official rate. The Commission records show that Mr. Curtin of Export stated to the Commission on August 4, 1948:

> In converting we would be justified in using the lower rate and use of it would build up a bigger differential. However, we are satisfied to stand on the official rate, which we know. Using the higher rate, the differential is still there. (See Transcript, Commission meeting August 4, 1948.)

The staff concludes that there is no basis in the record for any presumption that if we had been considering Export's application in 1948 without the hindsight knowledge of the devaluation which actually occurred in 1949, we would, or should have made any provision for the contingency of devaluation. The staff takes the position that, in view of the strong governmental policy both in this country and abroad to protect official rates of exchange, neither a prudent businessman nor a United States Government agency could well make calculations based on a rate of exchange which would have appeared to sanction a business transaction prohibited by law.

After hearing the testimony of the staff and of Export on the point, and before reaching a final conclusion, we directed a field investigation to identify, if possible, any large business transactions between this country and European "soft-money" countries in which concessions or discounts were granted because of dollar payments. This investigation covered foreign transactions generally and also foreign ship construction contracts for American account and included reports obtained both in this country and abroad. In no case were we able to discover any conclusive evidence that substantial business transactions were conducted in a manner which avoided the effect of the various governmental regulations establishing official rates of exchange. A responsible executive of a leading New York bank reported that in the past Americans with dollars were able to obtain discounts from the official rate of exchange on foreign transactions, including those with Holland, but that since early in 1948 the major New York commercial banks discontinued facilitating transactions otherwise than at the official rate of exchange. No discount transaction known to this official involved vessel construction in Holland. Similarly, the official responsible for the foreign department of another prominent New York bank stated that he had no doubt but that American businessmen with dollars in 1948 could have obtained discounts from the Netherlands official rate, which he surmised would have ranged from 10 to 20 percent. He stated, however, that his bank had not handled any foreign transactions except at the official rate nor could he identify any transactions where any such discounts had been arranged. Two officers of still another leading New York bank reported that, although their bank handled no transactions at less than the official rate, they knew that in 1948, as well as today, the Netherlands needed dollars and believe that discounts ranging from 10 to 20 percent could have been arranged in dollar payments. Reports of unidentified transactions in grain, coal, and automobiles at discounts in both pounds and guilders were obtained, but no informant of the banking community could point to any specific case

of monetary concessions or price reduction obtained in connection with the construction of vessels in European yards either in 1948 or 1949.

Certain American companies which were known to have had ships constructed in foreign yards were interviewed. Their reports failed to show that there was either any effort or success in avoiding foreign exchange regulations. One American corporation, designated "Company A," between 1947 and 1950 built seven tankers in Britain and three in Belgium. The British contracts were expressed in sterling and were negotiated without discussion of possible discount for dollar exchange. In order to obtain the necessary British export licenses for the vessels, the buyers found it necessary not to use their existing sterling credits, and used instead American dollars to buy necessary sterling funds at the official rate. The contracts for the Belgian tankers were made in Belgian francs, and in this case the owner's existing franc balances were permitted to be used, supplemented by additional francs bought at the official rate. A second American corporation, designated "Company B," contracted with a British yard in 1948 in sterling for two ore carriers. In negotiating the price, there was no discussion of a discount for a dollar contract, and it is reported that if the British yard had sought a dollar contract the company would not have objected. Sterling was purchased at the official rate as needed to meet contract payments. Since the ships were only 60 percent complete at the time of the September 1949 devaluation, the company bought the remaining 40 percent at the reduced official rate. A third American company, designated "Company C," contracted in sterling with a British yard in 1948 for two tankers, again without discussion of a discount for dollars. The British Ministry of Finance permitted the company to draw on its existing sterling account to pay not more than 15 percent of the contract price. However, a substantial part of the price did not become due until after the 1949 devaluation. A subsidiary of Company C contracted in guilders in 1951 with a Netherlands yard for four super tankers. In this case the Netherlands Government permitted the use of the parent company's existing guilder balances on hand in 1951 to be used in payment, but this entire transaction, of course, occurred after the devaluation of the Netherlands currency in 1949.

Finally, the advices from the American Embassy at The Hague and in London must be noted. In October 1951 The Hague reported to us that during the period under review, no large ships were contracted for in the Netherlands by United States citizens, and the Embassy obtained no evidence that the Netherlands Government or any ship-

yard in that country granted monetary concessions to any foreign purchasers contracting for Netherlands ship construction in dollars, or other so-called "hard currency." The Embassy also reported that it had been reliably informed that no financial inducement would have been offered in 1948 to obtain the construction of two large passenger ships in Netherlands yards for a dollar payment. A similar communication was received from the maritime attaché in London to the effect that he had no evidence of monetary concessions for ship construction contracts expressed in dollars.

On this state of the record and in the absence of a showing of concessions based on the disparity between the official and the free rates of exchange in known contracts with western European yards, and with only unsupported statements by certain bankers and by Export's representative that some unidentified United States business men were obtaining or could obtain such concessions, we are unable to make a finding of fact that a price reduction consequent upon such concessions could in fact have been obtained by an American purchaser contracting with a Netherlands yard in 1948. We must mention in passing that even if such a concession would have been obtained, the amount itself would be a matter of conjecture only. It follows, therefore, that our redetermination of the estimated foreign cost of these ships must be made without adjustment for any disparity between the official and free rate.

3. *In the redetermination by the Board of the respective vessels' sales prices, should there be included in the construction cost of the respective vessels the following costs not included in the shipyard bid:*

(a) *Fees for preparation of bidding plans and specifications;*

(b) *Cost of inspection during construction;*

(c) *Interior decorator's fees;*

(d) *Increases in cost due to running standardization trials;*

(e) *The cost of supplying items not included in the construction contract but which were furnished separately by the Commission or purchased by the applicant with prior approval of the Commission?*

Decision. Yes, subject to limitations.

As stated above in connection with Issue of Law No. 6, Additional Items, it is legally proper to include the above-listed items of cost in the estimated foreign construction cost of the Export ships for the purpose of determining their respective sales prices. It is our opinion, for the reasons already set forth, that in our redetermination of these sales prices these cost items should, as a matter of policy, be included in the estimated foreign-construction costs of said ships, subject to the limitations set out herein.

Limitations on items (a), (b), and (c).—On August 9, 1951, the Board approved certain recommendations of the staff to include in the construction cost the services of Bethlehem and Henry Dreyfuss, the interior decorator, in preparing bidding plans and specifications not exceeding $200,000 for each ship; also payments by Export to Henry Dreyfuss for interior design and decoration work not exceeding $400,000 per ship, plus $75,000 per ship for additional design and decoration work required in connection with approved changes in vessel plans, subject to certain audits and verifications as recommended. The Board also approved further recommendations from the staff to include in the ship construction costs of each vessel one-half of the payments made by Export for inspection work in connection with the construction of the ships, said half being deemed to be inspection work done in lieu of inspection by the Commission for the purpose of ascertaining that the shipyard construction work was properly performed. It is our opinion that there should be included in the vessel construction cost of each ship the items so approved and that the estimated foreign cost of such items should be included in estimating the sales price of each ship.

Limitations on item (e).—On June 4, 1951, the Board approved a budget in the amount of $686,245.45 for certain outfitting items to be purchased after competitive bids by Export for each ship. It is our opinion that there should be included in the vessel construction cost of each ship the outfitting items so approved, subject to the budget limitation indicated, and that the estimated foreign cost of such items should be included in estimating the sales price of each ship.

Further, it is our opinion that the subsidy percentage determined for the ships as a whole should not be applied to determine the subsidizable portion of the foregoing items listed in this paragraph No. 3 unless the estimated foreign cost is included in the over-all foreign cost estimate for the entire ship and is thus reflected in the resulting subsidy percentage for the entire ship.

4. *In the redetermination by the Board of the respective vessels' sales prices, should the Board determine that Holland is a foreign shipbuilding center which furnishes a fair and representative example for the determination of the estimated foreign cost of construction of vessels?*

Decision. Yes.

The staff and the special committee have recommended that the selection of a fair and representative foreign shipbuilding center for the determination of the estimated foreign-construction cost should be based upon certain requirements: First, that it have the personnel, facilities, and experience necessary for the construction of the pro-

posed vessel and be regularly engaged in building vessels of that type; secondly, that it have such a political and economic environment as to give reasonable certainty that contractual obligations as to time, quality, and price would be performed; and, thirdly, that it have the lowest costs. The evidence before us indicates that France, Italy, Britain, and the Netherlands met the first requirement in 1948; that France and Italy must be eliminated because they did not at that time meet the second requirement, France because of the situation there created by inflation, strikes, and social unrest in 1947 and in the early part of 1948, and further because the French shipyards were fully engaged in 1948 in the reconstruction of the French merchant marine and were unable to accept foreign orders; Italy because of then-existing political and economic disturbances which cast serious doubt on the ability of non-Italian vessel operators to obtain from Italian shipyards the performance of ship construction contracts within reasonable time and price limits, and furthermore because of the Italian Government pressure upon shipyards in that country to relieve national unemployment at the expense of construction efficiency. As between the two remaining countries, Great Britain and the Netherlands, the evidence before the Board indicates that shipbuilding costs in the Netherlands in 1948 were at least 5 percent lower than in Britain.

5. *Should all or any part of the construction cost of the following items be determined by the Board to be national-defense features:*

(a) *Speed exceeding 22½ knots;*

(b) *Evaporators;*

(c) *Electric generators;*

(d) *Dual engine rooms;*

(e) *Third-class passenger accommodations;*

(f) *Other items?*

Decision:

Yes, as to (a), (b), (c), and (d).

No, as to (e), and extra bulkheading under (f).

It has been suggested that the inclusion of vessel features in the applicant's plans and specifications when filed with the Commission created an inference that these features were included for commercial reasons, and that this inference of commercial desirability could only be rebutted by a showing that the feature was included at the request or direction of the Navy Department, or to meet a known requirement of the Navy Department. We think this is true as a general proposition, but the amount and nature of evidence necessary to rebut it varies with the nature of the particular feature concerned. Thus,

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if a design included 5-inch gun mounts or ammunition magazines—features of no commercial value whatsoever—defense could be their only purpose. They would be in fact detrimental to commercial use and the characteristics of the features in such case would in themselves be evidence sufficient to rebut a commercial-use presumption. On the other hand, a feature such as the third-class passenger accommodations, which might have both national-defense and commercial characteristics, would require strong evidence of Navy request in order to rebut the presumption of commercial use. Again it must be pointed out that in this case the technical staff of the Commission was charged with the duty of cooperating with the military establishment in the preparation of plans and studies for the installation of national defense features upon merchant vessels. If Export incorporated a vessel feature at the request of the Commission's staff, acting in the Navy's interest, we believe the request should be deemed the equivalent of a Navy request. It is of little moment whether the request was made directly by Navy or by Commission personnel acting in the light of known Navy desires.

The specific features now in controversy will be discussed in the order stated above, in the light of the record before us and after consideration of the record of the 1949 hearings before the Hardy Committee.

(a) *Speed (horsepower)*.—The record shows that Export can make good its projected schedule of 26 fortnightly sailings per year with the *Independence* and the *Constitution* to the west coast of Italy with the use of 40,700 shaft horsepower, which the Commission considered commercially necessary to assure a sustained sea speed of 22½ knots. The record further shows that additional horsepower between 40,700 and 55,000, determined by competitive bids to cost $299,000, has, at least under present-day conditions, little or no commercial value. The contention that this increased horsepower, giving 2½ knots increased speed, is in reality a commercial and not a defense feature, appears to be based principally upon the fact that the Trade Routes Committee of the Commission and the final report of the Commission dated May 22, 1946 (exhibit 20, R. 509) had originally recommended two 28-knot special-type passenger and freight vessels for fortnightly sailings on the service. However, the Trade Routes Committee about 2 months later, on July 13, 1946, endorsed a 22½-knot speed and eliminated certain ports from the proposed itinerary. The earlier recommendations for a 28-knot speed are, therefore, not relevant.

Furthermore, it is now assured that the *Independence* and the *Constitution*, operating at 22½ knots, can make a total of 30 sailings per year to the west coast of Italy. It is also demonstrated that these

ships can make 22½ knots with 27,500 shaft horsepower, leaving ample margin in the 40,700 shaft horsepower for the performance at that speed under adverse conditions.

The highest average observed speed, pilot to pilot, on any of the regular voyages of the *Independence* and the *Constitution* up to the date of our hearings, was 23.24 knots logged by the latter ship on her first voyage in June–July 1951 (exhibit 11). According to the model basin curves as well as the performance data obtained from the Rockland, Maine, trials of the *Independence*, this speed requires only 30,300 neat shaft horsepower. The commercial power rating required on ships of this type is 125 percent of the neat s. h. p. required for scheduled speed of approximately 22–23 knots. The 25 percent margin is provided to take care of adverse weather and fouling of bottoms (R. 419). Consequently, the maximum commercial rating so far indicated is only 37,875 s. h. p. It should be further noted that these power ratings are on the basis of the trial test displacement of 26,068 tons. Even at a maximum displacement of 29,685 tons, which will seldom if ever be encountered on commercial operation, a 23-knot speed would require a commercial power rating of only 40,000 s. h. p. after allowance of the 25 percent margin discussed above.

Finally, the record convinces us that both the Navy and the Commission affirmatively requested Export to increase shaft horsepower from the 40,700 originally sought by Export for the DL1 ships in 1945 to the 55,000 incorporated in the DL2s. Thus, Adm. E. W. Mills, USN, Chief of the Navy Department's Bureau of Ships in 1948, testified:

> We did insist on boosting these American Export ships from 22½ to 25 knots (C. R. 567, 568).

Moreover, Export's original proposals for the DL1 design in 1946 called for only a 22-knot ship, which, by addendum 2 to the bidding plans and specifications dated December 31, 1947, was increased to 25 knots. In Export's amended application for subsidy filed April 20, 1948, it explained that the increased horsepower of 55,000 to develop 25 knots was installed "at the pointed suggestion of the Navy." Mr. Slater also stated at the hearing that the speed feature was the only one which the Navy either asked for or suggested directly to Export (R. 113).

(b) *Evaporators.*—The plans and specifications for the original DL1 vessels as submitted in December 1945, and the *Independence* and *Constitution* as submitted in 1947, provided for two evaporators of 90,000 gallons a day each. A national-defense allowance for evaporator capacity in excess of a total of 90,000 per day was made by the Commission. Although not specifically referred to in the Comptroller

General's report or by the Hardy Committee, the propriety of the allowance must be considered. The staff has submitted a revised recommendation that at least the difference in cost between a 120,000-gallon a day evaporating plant and the 240,000-gallon a day plant actually installed in the vessels should be recognized as a national-defense feature. The staff estimates that with the maximum load of 1,580 persons on board, the total requirements for fresh water, including boiler feed, would not exceed 80,000 gallons per day, and that were it not for standby requirements, a 90,000-gallon a day output would give ample margin of safety. The staff points out, however, that evaporating machinery is of comparatively recent origin and that sound commercial practice requires substantial standby facilities, and in this case the staff believes that two 60,000-gallon per day evaporators would meet such standby requirements. The record shows that the daily evaporation output on the *Independence* and *Constitution* prior to the hearings ranged from a low of 6 tons or 1,380 gallons a day to a high of 424 or 97,520 gallons a day on the *Constitution* on August 21, 1951. The median daily evaporator output of fresh water appears from experience to range between 200 tons or 46,000 gallons and 300 tons or 69,000 gallons per day. The high median figure of 69,000 gallons per day is well within the 120,000 gallons per day total capacity which we hold ample for commercial purposes and indicates only a slight reduction in high median production in case of the breakdown of one of the two evaporator plants. We find from the foregoing estimates that evaporating capacity installed on these vessels in excess of two 60,000-gallon per day units producing a total of 120,000 gallons per day is without commercial value.

Export's representatives testified that the Navy did not affirmatively ask for additional evaporator capacity, but the Navy stated that the 240,000-gallon capacity installed on the ships was agreeable to it (R. 196, 197). Export's witness also stated that Bethlehem, from its experience in building several Navy-type ships, knew that evaporation capacity in excess of that needed for commercial purposes would be required by the Navy. As troopers, these ships are intended to carry about 6,000 persons, including increased crews (R. 415). At the suggestion of Bethlehem that 180,000 gallons per day would not produce adequate fresh water for the comfort of troops in this number, under crowded conditions, with a satisfactory margin of safety, the capacity of the plant was changed to 240,000 gallons a day, but this change from 180,000 gallons to 240,000 gallons was effected by certain redesigning of the plant without additional cost.

We therefore conclude that the increased evaporator capacity from 120,000 gallons a day (two 60,000-gallon units) to 240,000 gallons a

day as actually installed, is properly to be allowed as a national-defense feature. The extra cost of this installation, however, should be only the excess cost of a 180,000-gallon installation over a 120,000-gallon installation.

(c) *Extra generator capacity.*—In the DL1 plans of 1945 four generating turbines were contemplated, each driving a 750-kilowatt a. c. generator and a 200-kilowatt d. c. generator. In the DL2 revision of 1947, the four power plants were increased in size so that each turbine drove a 900 kilowatt a. c. generator and a 200-kilowatt d. c. generator, making 4,400 kilowatts altogether.

In July 1948 the staff recommended to the Commission that the cost of the machinery necessary to generate a. c. electricity in excess of a total of 3,000 kilowatts be considered a national-defense feature and an allowance for this was made in the sum of $112,085. Thereafter, in November 1948, at the suggestion of Bethlehem, the builder, and with the approval of Export, the design was changed so that each turbine drove one 1,100-kilowatt a. c. generator. Two separate 200-kilowatt a. c.-d. c. motor generators were installed for port use and two other 40-kilowatt a. c.-d. c. motor generators for sea use. The a. c.-d. c. motor generators were driven from power taken from the a. c. line. Thus the total maximum power that could be generated at the same time still remained at 4,400 kilowatts. This change in design was made without increasing the cost of construction. The question remains, however, what, if any, part of the total 4,400 kilowatts may be considered a national-defense feature.

The load analysis of the ship as revised September 15, 1951, shows a maximum load under tropical conditions of 3,092 kilowatts. However, the heaviest *normal* load under tropical conditions (normally the severest) [6] is 2,752 kilowatts. This load could be carried without difficulty by three generators of 900 kilowatts each so as to comply with the American Bureau of Shipping rules for building and classing steel vessels, section 35, page 142, as follows:

> The aggregate capacity should be sufficient to carry the necessary load under normal operation with one generator in reserve.

If the vessel should be used as a naval auxiliary, a substantial amount of additional generating capacity would be required for the operation of guns, director systems, radar installations, etc.

Since the heaviest normal load of the vessel, even under tropical conditions, is substantially 2,700 kilowatts, which could be carried on three out of four 900-kilowatt generators, keeping one in reserve as

[6] Tropical conditions are normally the severest because the ventilating and air-conditioning load is highest.

required by the American Bureau of Shipping rule quoted above, we conclude that the excess in generating capacity over 3,600 kilowatts should be made the subject of a national-defense allowance, always assuming that the arrangement outlined above would supply the necessary d. c. power for commercial use from the a. c. line. It thus appears that the value of the excess generating power not needed for commercial purposes as now installed, is measured by the excess cost of four turbines, generators, etc., producing 1,100 kilowatts a. c. each, over the cost of four similar installations producing 900 kilowatts a. c. each. It will be necessary to compute this cost to ascertain the exact amount now properly allowable as a national-defense feature.

It is not disputed that extra generating capacity over and above commercial needs was requested by the Commission staff to meet known Navy requirements. This fact, added to the fact that the commercial needs of the vessel do not exceed 3,600 kilowatts, is sufficient evidence to overcome any inference that the additional generating capacity as installed has or was intended to have commercial utility.

(d) *Dual engine rooms.*—Both the original DL1 plans of 1945 and DL2 plans of 1947 provide for divided engine rooms separated by a 39-foot compartment, either of which could, in the event of casualty, operate independently. The record shows that this feature is of importance to a ship operating in danger of enemy attack, but of negligible importance for operation under usual commercial conditions where the risk of loss of propulsion is minor and, even if incurred, would normally not subject the ship to any increased hazard. The Commission approved the feature for national-defense allowance, but because the purchaser submitted no satisfactory evidence on the extra cost involved, the Commission made no allowance. Both the staff and special committee have recommended that a national-defense allowance be granted for the extra cost entailed by the dual engine-room arrangement. It appears that this feature was incorporated by the shipbuilder after consultation with the Navy, and that the affirmative request of the Commission's staff was made based on their understanding of Navy requirements (R. 165). The record is clear that divided engine rooms are not commercially desirable (R. 193, 413, 167) nor commercially necessary (R. 210, 305). Under the circumstances, we believe that the extra cost of this item, when computed by the staff, should be included in the allowances for national-defense features.

(e) *Third-class passenger accommodations—increase from 116 to 308.*—The Commission granted an allowance of $827,365 for this increased passenger capacity and this decision was the principal focus of the criticism by both the Comptroller General and the Hardy Committee on the allowances for defense features on these ships. Both

the Chief, Office of Ship Construction, and the special committee have recommended that no defense allowance should be granted for this feature (R. 417, 458). Our own review of the record and consideration of the problem leads to the same conclusion. The grounds of our decision may be summarized:

Over 60 percent of the 76,248 passengers carried on Trade Route 10 in foreign-flag vessels in 1948 were third class. American-flag carryings in 1948 of 909 passengers is insignificant in amount. The third-class business is thus an obvious avenue for competition by these two passenger ships being introduced by Export on Trade Route 10.

In connection with the DL1 designs submitted in 1945, the Commission's staff pointed out on January 8, 1946, that "third class has been [the] predominant trade on this route" and recommended that, on the basis of the experience of the *Rex* and *Conte de Savoia*, "further consideration should be given to this matter", i. e., the inadequacy of only 58 third-class accommodations (C. R. 404). Under date of March 18, 1946, the Navy Department approved the plans for the DL1 ships pursuant to section 501 (b) of the Act. No comment was made with respect to increasing passenger accommodations, the only suggestions made were related to increased deck stiffening for gun mounts and increased stability.

The DL2 plans submitted to the Commission in December 1947 increased third-class accommodations from 58 to 308. No claim for national-defense allowance was then made.

On March 5, 1948, the Navy approved the DL2 plans. A supplemental letter from Navy dated March 30, 1948, noted without comment "that the passenger capacity has been increased to about 972."

Export's letter to the Commission of April 14, 1948, requested that the conversion of cargo space to increase third-class passenger space and the related water, light, and sanitary accommodations be certified as a defense feature. As to this, the Navy Department replied on June 8, 1948:

> * * * the Department is of the opinion that inasmuch as such facilities are presumably being provided as a necessary part of the operator's trade requirements, they do not properly form the basis of such certification. It may be further stated that if the proposed ships were converted to naval transports, much of the third-class accommodation would probably be removed to increase troop capacity (C. R. 417).

Although the Navy by letter of July 29, 1948, subsequently certified increased third-class space as a defense feature and by letter of August 4, 1948, requested that the turndown of June 8, 1948, be canceled (C. R. 419), and although Admiral Mills testified that the June 8 letter was written by "a new officer who had just reported" and "with

an incomplete understanding of the case" (C. R. 568), the June 8, 1948, rejection, coupled with the failure of any Navy witness to so testify that the Navy suggested or asked for the increase, weakens Export's position on this item. It should also be noted that our present Chief, Office of Ship Construction, a naval officer of long experience (R. 300–301), agrees that the increased accommodations are of limited utility. Troops and crews of transports are more efficiently berthed in larger spaces, which are more easily maintained, more accessible, and more susceptible of proper sanitation (R. 416).

Export's President stated unequivocally at the Board's hearing that there was commercial value to the increased third-class space (R. 224), that the change from cargo to third-class space was due in part to the change in route, eliminating the east Mediterranean, and that it was done at "our own decision" (R. 225, 226).

On October 19, 1948, Export requested a change under the contract for convertibility between cabin-class space and third-class space so that the latter could be increased from the normal of 308 up to a maximum of 400, using semipermanent cabin-class space for this purpose (R. 221, 416, C. R. 416). This action of Export, supported by passenger traffic statistics for the years 1925 to 1948, indicating the need for even more expanded third-class facilities (R. 416, C. R. 420) and its fear of the impact of airplane competition on first-class traffic (R. 220), leads to the belief that the prior increase of third-class space from 116 to 308 was a commercial feature sought for commercial reasons. Indeed, Export's witness candidly so implied at the hearings (R. 224–226).

In the light of the foregoing, we are unable to grant a defense allowance in this respect.

(f) *Other defense items (additional bulkheads).*—The Commission determined that a defense allowance of $96,850 should be granted for installation of two additional bulkheads. This action was not the subject of specific comment by either the Comptroller General or the Hardy Committee.

These bulkheads are not required by the Coast Guard or the American Bureau of Shipping (R. 180) and hence are not within the minimum mandatory requirements for a commercial vessel (R. 421). However, they are called for by the standards for commercial vessels set out in Senate Report No. 184.[7] Nevertheless, Export contends, and

[7] Senate Report No. 184, 75th Cong., 1st sess., grew out of the investigations of the *Morro Castle* and *Mohawk* disasters and the adequacy of methods and practices for the safety of life at sea. The report contains the full test of safety rules recommended by the various subcommittees composed of outstanding marine architects and marine engineers drawn both from industry and Government. These standards have in all cases been applied in the building of all large oceangoing vessels since their publication, since all such vessels have either been built by the Government or with Government aid.

the special committee has recommended, that they should be considered as a defense feature. We do not agree.

The DL1 plans of 1945 had 14 transverse W. T. bulkheads. No mention of bulkheads as national-defense features was made either by the Navy or the Commission.

The DL2 plans of 1947 provided for the same hull and same number of bulkheads—those forward being spaced slightly differently.

On April 14, 1948, the question of defense allowances was first brought up by Export. The item was later submitted to the Navy, and was certified by the Navy on July 29, 1948.

The standards of Senate Report No. 184, in the matter of subdivision, although higher than those required by international convention and the American Bureau of Shipping, nevertheless represent what an informed committee of the Congress considered desirable commercial practice. The Maritime Administration has consistently required this higher standard for commerical vessels, and has stated that ships built by it would meet the safety standards of Senate Report No. 184. Moreover, the policy of the Act is that the American merchant marine should be "composed of the * * * safest, and most suitable types of vessels" (sec. 101). Accordingly, the bulkheading cannot be allowed as a defense feature.

6. *In the redetermination by the Board of the respective vessels' sales prices, what should be the method of estimating the construction cost of the vessels if constructed under similar plans and specifications (excluding national-defense features) in a foreign shipbuilding center, including items mentioned in Issues of Fact and Policy No. 4 a, b, c, d, and e above, i. e., obtaining bids from foreign shipyards on plans and specifications or any other method? (See special committee report discussion of "Methods of Estimating Foreign Costs.")*

Decision. The Board will use the "detailed method" of estimating foreign costs as outlined and recommended in the staff's memorandum dated September 14, 1951, subject to such modification and supplementation by such other methods of cost computation and the inclusion of any additional pertinent factors as the Board may deem proper.

Neither the Comptroller General nor the Hardy Committee comments with respect to the method by which the estimate of the foreign-construction cost of these or other Title V vessels should be made, the gist of their positions being only that the Commission's determination under section 502 of a "fair and reasonable estimate" must in these cases be based upon "convincing evidence." The special committee discusses at considerable length five possible methods for

making the foreign cost estimate (R. 462). These are (1) obtaining bids from foreign shipyards on the actual vessels involved; (2) comparison with the known cost of similar foreign vessels; (3) estimating by the relationship between major categories of cost such as labor, steel plate, joiner work, main engines, auxiliary machinery and equipment, etc.; (4) using predetermined ratios between the foreign cost and the United States cost of hull machinery and equipment; and, finally, (5) estimating foreign cost in detail by paralleling every item in the detailed estimate of the low United States bid with a corresponding estimate of the foreign cost of that particular item.

Method No. 1 is, in theory, of course, an excellent one, but we do not believe a foreign yard would undertake this costly and lengthy job though compensated for the work. It is well known also that in the private ship construction field the details of a bid are closely guarded business secrets. It is highly improbable that a foreign yard would make substantially public to an agency of a foreign government that information which, if revealed at all, is usually revealed only to actual purchasers. Further, the accuracy of a result from such a procedure would, in our opinion, be impaired by the knowledge on the part of the foreign yard that the vessel under no circumstances would be built in the foreign yard, and that the sole purpose of the bid would be for the establishment of financial aid to an operator who might be in trading competition with the foreign yard's actual customers, with advantage also to a competing American shipyard.

In this instance, however, Export, through Bethlehem, developed cost studies through the use of Method No. 1 in reverse, so to speak. That is to say, it procured building plans and specifications of the Norwegian MS. *Oslofjord* and projected costs in a United States yard. The *Oslofjord* was built for the Norwegian American Line, having been contracted for in a Netherlands shipyard in 1946, the keel laid in May of 1948, delivery made in October 1949, and maiden voyage accomplished in November 1949.

In analyzing this procedure we did not feel, considering all of the factors, that Bethlehem, in its cost study based on the foreign plans and specifications, would necessarily be subjected to the same inhibitions controlling a foreign yard making a study based on United States plans and specifications. Export projected an American yard cost of the *Oslofjord* in 1948 at $15,396,000. To establish a firm cost, they added 10 percent for profit plus 11.5 percent on the combined cost and profit to reflect the percentage differences between the lowest "adjustable" and "firm" bids actually submitted for the *Independence* and the *Constitution*. This resulted in a projected "firm" bid of $18,883,194. As against this, Mr. Slater testified that the foreign price

of the *Oslofjord* was $7,200,000. He further stated that in 1948 the Netherlands builders of the *Oslofjord* quoted $8,200,000 for a sister ship. No details of this quotation were made available, but for the purposes of comparison Export assumes it to be a "firm price."

Export's witness Pennypacker of Bethlehem stated, however, that in his projection of the United States cost of the *Oslofjord* he used the foreign plans and specifications, but that his unit pricings "reflected American practices" (R. 945). It is possible, therefore, under this comparison, that the reported foreign cost figures of $7,200,000 or $8,200,000 would have to be raised to reflect the higher cost of the "American practices." We do not seek to discredit Export's position because of this factor, but use it to illustrate one of the inherent difficulties in the application of the reverse of Method No. 1 as developed by Bethlehem. These same problems would arise in the basic Method No. 1 scheme, since therein the requirements of American practice would be unknown to a foreign shipyard preparing an estimate for the hypothetical foreign ship.

Assuming the validity of the American "firm" cost of $18,883,194 and the $8,200,000 quoted for a sister ship to the *Oslofjord*, the differential for passenger-ship construction in the American yard would have been 56.58 percent, or in excess of the 50-percent limitation.

Even admitting the soundness of Bethlehem's United States projection of the *Oslofjord*, its application is dependent on the final cost of the *Oslofjord* to its owners, a figure which, because of conflicting information, is largely a matter of conjecture. In addition to Export's figure of $7,200,000 for the *Oslofjord* and $8,200,000 supposedly quoted in 1948 for a sister ship, both figures from sources which Export is not at liberty to disclose, reports from other sources show a substantially higher price. State Department Foreign Service representatives and other sources, including the 1949 annual report to its stockholders by the owners of the *Oslofjord*, indicate that the final cost of the vessel might be somewhere between $9.1 million and $11.3 million. Taking the higher of these figures, $11.3 million, and applying it to the projected American cost of $18,883,194, the differential is approximately 40 percent. As was stated, the *Oslofjord* was contracted for in 1946, but, with a lack of reliable information as to its foreign cost, little reliance can be placed on the $8,200,000 quotation in 1948 for a sister ship. It appears then that controlling weight cannot be given to the relationship between the conjectural cost of the *Oslofjord* or its proposed sister ship and Bethlehem's estimate of the 1948 United States cost of this ship. For these reasons, we can see no practicable application of Method No. 1 or the variation thereof in this recalculation. This case is, however, of considerable interest in show-

ing the highly unstable situation as regards shipbuilding costs in the Netherlands during this period, and the difficulty that the Netherlands yards had in determining prices even for ships built by them during the period in question.

Method No. 2 would be of considerable value, but has limited application unless it can be found that an American and a foreign yard are contemporaneously building fairly equivalent vessels. In this instance Export has sought to indicate a proper differential applicable in 1948 by using for comparison under Method No. 2 the British-built *SS Chusan*, laid down in the early part of 1947 and completed in the middle of 1950 for the U. K./Hong Kong service of the Peninsula & Oriental Steamship Co. A comparison as to the *Chusan's* general characteristics with those of the Export ships is as follows:

	Chusan	Independence and Constitution
LOA	672 feet	682 feet.
Beam	85 feet	89 feet.
Propulsion	Steam turbine (2 screws)	Steam turbine (2 screws).
Shaft horsepower, normal	34,000	40,700.
Shaft horsepower, maximum.	42,500	55,000.
Engines	Turbine, 500 pounds square inch gage.	Turbine, 625 pounds square inch gage.
Gross tonnage (British)	24,215	29,496.
Passenger capacity	First class, 475	Cabin, 348.
	Tourist, 551	Tourist, 316.
		Third class, 308.
Dry cargo space—bale cubic feet.	409,690	148,000.
Insulated space—cargo and stores.	71,065	75,000.
Crew	Asians, 256	592.
	Europeans, 316	
Air conditioning	First-class dining room, beauty parlor, and some cabins.	All living space.
Promenade deck and public spaces.	14,000 square feet	16,500 square feet.

Export reports that its indirect advices from the owners of the *Chusan* indicate its total cost at £3,650,000, which amount includes £50,000 for stabilizers, with which the Export ships are not equipped. This cost converted to dollars at the exchange rate of 4.03 produces an estimated total cost to owners of $14,709,500. As against this, and again for comparative purposes, a cost of $26,058,000 each for the

Export ships may be projected. Thus, assuming that the *Chusan* as is constitutes a suitable vessel for Method No. 2 purposes, we arrive at a differential (using a British yard) of roughly 44 percent. It is evident, however, that the Export ships are superior to and larger than the *Chusan*.

Export suggests that the *Chusan* is a suitable vessel for Method No. 2 comparison because "in short, the *Chusan* is not importantly different (with some improvement of accommodations) to what our ships might have been had they been built abroad and for operation under foreign flag without regard to our national-defense requirements." Our disposition of Issues of Law No. 1, however, is clearly indicative that a sound use of the *Chusan* would necessitate its expansion and improvement to closely approximate the *Independence* or *Constitution*. Some of the reasonable and important adjustments figured roughly would be:

Estimated 10 percent difference between United States and British standards	$1,470,950
Supplemental air conditioning	500,000
Increase in size (on basis gross tonnage)	2,725,000
Supplemental working pressure	50,000
Crew space added	73,000
Total added	4,818,950
Less stabilizers	201,500
Net added	4,617,450
Reported cost of *Chusan* as is	14,709,500
Total expanded *Chusan* in British yard	19,326,950
Less 5 percent to reflect lower Netherlands costs	966,348
Estimated net expanded *Chusan* in Netherlands yard	18,360,602

Using this rough figure for a "built up" *Chusan* against the Export ships' figure, we reach a differential of approximately 29.5 percent. Method No. 2, however, is deemed impracticable in this redetermination for two principal reasons. The first is that there is no convincing evidence as to the cost of the *Chusan* to its owners, the only evidence produced by Export being that their London representative reported to them he had been told the cost by an unidentified official of the owning company. Secondly, it is clear that the similarity of the *Chusan* and an Export ship is superficial and the great amount of conjecture necessary to "build up" the *Chusan* further renders Method No. 2 in this instance impracticable.

Inclusive material was also examined covering comparisons fo ships nonsimilar to Export's. We do not believe it is important to g into the details, but we list the differentials they purport to indicate

		Possible differentia (percent)
1950	Proposed reconversion work, *SS General Pope* and *SS General Weigal:* United States, $3,391,650; Netherlands, $1,651,270 (converted to 1948 predevalued guilder)	30
1948	United States and British tanker bids	28
1947	Ore carriers ((1), 422 feet); ((2), 353 feet):	
	(1) United States low bid, $3,494,000; European low bid, $1,720,000	50
	(2) United States low bid, $2,710,000; European low bid, $1,350,000	50
1946	Proposed Argentine Government combination passenger and cargo ships:	
	United States high bid versus Netherlands bid	45
	United States low bid versus Netherlands bid	31
1946	Proposed Argentine Government reefer ships:	
	United States high bid versus Netherlands bid	48
	United State low bid versus Netherlands bid	44.3

Methods 3 and 4 we do not consider necessary to discuss as it is clea they are only elements of the comprehensive Method No. 5.

We therefore believe that Method No. 5 is the most practicable fo this redetermination. The special committee and the staff recommend Method No. 5 as being the most accurate method for this case.

Our determinations of the issues of law and fact having been se forth, consideration must now be given to the mathematics of th redetermination of the estimated foreign-construction cost of the tw Export ships under Method No. 5. The staff prepared a memorandum dated November 16, 1951 (exhibit 23–A), accompanied by a lengthy appendix (exhibit 23–B) containing the summary of the staff's work sheets. These documents supported the staff's recommendation that

$715,000 represents the estimated base domestic cost of national-defens features built into each vessel;

$17,308,000 represents the estimated foreign-construction cost and therefore, the base selling price of each of the vessels;

$6,425,000 or 27.07 percent of the base domestic cost is the base amoun of the construction-differential subsidy on each vessel; and

$18,970,217 is the total estimated foreign construction cost and th total selling price of each vessel, including the cost of escalatio and changes in the contract calculated to the date of the memo randum, subject to minor further adjustments after final audit.

These documents were submitted to Export for examination 2 weeks before the 4-day informal hearings beginning November 19, 1951, at which the Board received full explanation of the staff's calculation and analysis thereof by representatives of Export. It may be said that the calculations were prepared by the staff in accordance with the prior determinations of the Board on the questions of law and policy outlined above.

The Board, after considering all the evidence, including evidence presented by witnesses on behalf of Export testifying at the November 1951 hearings, has come to the conclusion that the recalculated total figure of $18,970,217, as recommended by the staff, is the best estimate of foreign-construction cost of each of the two vessels as of August 11, 1948, that can now be made.

This estimate which we adopt as our own is based, we believe, on the best information available at this time.

We now discuss some of the important elements that have been considered in making up this estimate.

MATERIALS

Efforts have been made to obtain the Netherlands cost of each item of material going into the ships. There was available to us an itemized breakdown of the materials actually put into the ships by Bethlehem and the cost of each and the time expended for the installation of each. The items of material were divided into two main categories—hull items and machinery items. The members of our staff who made the analysis and calculations were men of wide practical engineering background with particular experience in shipbuilding and ship-construction estimating. On this estimating staff were economic experts practiced in the handling of economic statistical material and economic indices. The information as to foreign costs, foreign shipbuilding practices, and the general foreign economic conditions, particularly in Holland, came from maritime attachés stationed with various American diplomatic missions in Europe who had similar practical experience in ship construction and ship estimating and a working familiarity with the foreign conditions involved and a wide acquaintance among foreign shipbuilders. Where possible, these foreign representatives obtained the actual 1948 Netherlands prices of the material items. Where this was not possible and where an item was subject to breakdown into its component parts, these parts were priced and the Netherlands labor cost added to estimate the price of the assembled article. In other cases it was necessary to take Netherlands 1951 prices and by use of appropriate indices derive

the proper 1948 Netherlands price by calculation. Again, where the Netherlands price for the exact size or shape of an item could not be obtained, the Netherlands price of a similar or closely related article was obtained and the ratio of the 1948 Netherlands cost to the American cost of the priced article was deemed to apply to the article for which the exact Netherlands price was not obtainable. For example, the foreign price for 12-inch ports was not obtainable whereas the foreign price for 16-inch ports was obtainable. The actual American price of both types was set forth in the Bethlehem detailed estimate, and by using the ratio derived by comparing the American 16-inch ports with the foreign price of such ports, the foreign price for 12-inch ports was calculated. In one way or another, directly or indirectly, an actual Netherlands price or a derived Netherlands price as of 1948 was obtained for 83 percent in value of all hull items and for 92 percent in value of all machinery items. From such results it appeared that hull items had an over-all average Netherlands price of 100 percent of the American cost, and machinery items had an average of 111 percent of the American cost. The remaining 17 percent of hull items were thereupon assumed to have an average Netherlands price equivalent to 100 percent of the American price, and the remaining 8 percent of the machinery items were similarly assumed to have a Netherlands price of 111 percent of the American price.

It appears that the largest item of metal included in the hull items covered steel plates and shapes. The cost of steel to the Netherlands shipyards in 1948 was found to be 325 florins per metric ton or 5.56 cents per pound. This figure was obtained by a United States maritime representative who in 1948 visited various Netherlands yards and ascertained that their steel came from various European sources at that figure. The result thus obtained by personal inquiry was verified from the Netherlands Government Industrial Report (Maandschrift Report) which gave the 1948 cost of steel plates at Netherlands shipyards in 1948 as 324.97 florins per metric ton. This Netherlands cost proved to be 155 percent of the American cost of similar material, and the question naturally arose as to why American steel could not have been imported into Holland at less than 155 percent of the American cost. It developed, however, that in 1948 the American steel industry was working under a system of voluntary allocations and that surplus steel for export was not available.

It may be noted that counsel for Export has, in many instances, challenged the correctness of the Netherlands figures or the propriety in deriving Netherlands estimated costs by methods of sampling or the use of indices, etc., urging that the methods of pricing used by the staff might not produce the correct result. The staff in each case has

produced its work sheets to show exactly which of the Netherlands material prices were direct quotations, and, as to those prices which were derivative, which of the various methods of derivation outlined above had been used. In our judgment, the methods used by the staff were the best available in 1951 in the absence of direct quotations. It may be pointed out that in no case did Export offer evidence of Netherlands quotations on items of material used in the construction of the ships which were different from either the direct or derivative quotations presented by the staff.

Labor

The Bethlehem analysis of cost of actual construction of the two Export vessels showed the hours of labor necessary to complete and install the various items of material. The total number of American hours multiplied by the average American hourly rate of shipyard labor of $1.71 per hour gave the total American labor cost of each ship. The problem of the staff with respect to foreign labor was twofold—first, to determine the average cost per hour of Netherlands labor, and then, to determine the relative productivity of Netherlands and American labor, and thereupon calculate the total Netherlands labor cost. Reports from the American maritime attaché showed the prices paid by Netherlands shipyards in the second half of 1948 for skilled, semiskilled, and unskilled labor and the proportion of each going into the construction of comparable vessels. By proper weighting of the three types of labor, the average cost of Netherlands labor was found to be the equivalent of 40 cents (U. S. A.) per hour in contrast with the American figure mentioned above of $1.71 per hour.

In order to estimate the relative productivity of Netherlands shipyard direct labor and American shipyard direct labor, the staff made comparisons of the man-hours required to erect the steel hulls of two Netherlands ships built between 1947 and 1949 with the man-hours required to erect the steel hulls of the *Independence* and *Constitution*. Since the ships were not identical, the figures were then reduced to a common denominator of man-hours necessary to erect one ton of steel hull in each case. The staff had available the total direct labor cost of erecting steel hulls on a Netherlands passenger-cargo ship built between 1947 and 1949 and on a Netherlands tanker built in 1949. By dividing the direct labor cost per ton with the then prevailing Netherlands average wage rate, the number of Netherlands man-hours necessary to erect each ton of the steel hull was obtained. The total number of man-hours necessary to erect the steel hulls on the Export ships were shown from the Bethlehem breakdown, and from this was obtained the corresponding American figure. By comparison of the

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figures thus obtained, it appeared that in the case of the Netherlands cargo-passenger ship, the per ton man-hour requirement was 118 percent of the American figure, and, in the Netherlands case of the tanker, the Netherlands man-hour figure was 123 percent of the American figure. A further check was made by the American maritime representative in Europe who obtained figures that indicated the productivity of Netherlands shipyard labor was somewhere between 10 and 20 percent less than American labor. This general result was confirmed by the opinion of one of the leading American shipbuilding companies. The relative productivity ratio of 118 percent, derived from the Netherlands cargo-passenger vessel, was deemed a satisfactory basis for computing the relative productivity of all direct shipyard labor. The man-hours shown on the Bethlehem breakdown for each job were, therefore, multiplied by 118 percent to show the estimated Netherlands man-hours to do the same job, and this was then multiplied by the 40-cent rate derived as above to show the Netherlands direct labor cost.

Export has indicated that it has information to indicate the Netherlands over-all direct labor rate for the second half of 1948 to be 40½ cents, which corresponds generally with the 40-cent rate developed as above. Export claims, however, that neither of these rates should be used in computing the Netherlands labor cost because the 40½-cent rate developed by Export for the second half of 1948 was for adult labor only. Export claims that this rate should be reduced to 37.2 cents to give effect to the lower rates paid to a certain proportion of minor employees in the yard, and still further reduced to 35 cents per hour to give effect to an adjustment necessary to relate the scale to the first half of 1948 on the ground that escalation computations were made from rates effective at that time. However, a careful examination of the record shows that the staff rate of 40 cents per hour was based on the combination of adult and minor labor for the entire year of 1948. Furthermore, the statistics relied on by Export to tie the labor rate back to the first half of 1948 appear to be statistics relating to volume of employment in Holland and not wage rates, and for this reason are not here applicable.

Overhead

Next to be considered is overhead, comprising all indirect, supervisory, and executive labor, taxes, insurance, electricity, yard upkeep, etc., as well as the large item of social charges imposed by law on Netherlands employers. Inquiries made by the Maritime representatives in Europe showed that Netherlands shipbuilding overhead ran

in 1948 from 125 percent to 140 percent of direct labor charges. This information was checked with the cost analysis of the construction of three Netherlands ships built contemporaneously, which showed that the combined overhead and profit to the builder ran from 163 percent to 178 percent of direct labor. It was learned that one of these ships was constructed at a loss and that the builder's profit on the two remaining ran somewhat less than 10 percent of total cost. If, however, a full 10 percent profit on over-all cost is deducted from the combined profit and overhead figures on the two ships that were built at a profit, the remaining amounts attributable to overhead alone represent, in one case, 120 percent of direct labor, and, in the other case, 148 percent of direct labor. We feel that the figure of 130 percent of direct labor costs adopted by the staff is a fair median figure for Netherlands shipyard overhead in 1948. Export points out that the United States rate for overhead in the Bethlehem breakdown of costs on the *Constitution* and *Independence* amounted to only 51 percent of the direct American labor charge and that a Netherlands rate of 130 percent appears excessive. The record shows, however, that there are substantial differences in what goes into Netherlands shipyard overhead and what goes into American overhead. A direct comparison of the two rates is, therefore, meaningless. We were bound to rely, therefore, on evidence of reported Netherlands practice.

Profit

Finally, the staff has included an estimate of 10 percent of other costs to cover profit and margin. The difference between Bethlehem's actual cost and Bethlehem's bid price necessarily represents Bethlehem's allowance to cover its margin and profit, and, in the case of these ships, amounts to 9.4 percent of cost. The estimate of Netherlands profit is based upon reports from the maritime representative abroad who made various inquiries and was uniformly advised that 10 percent of cost was the usual Netherlands allowance for profit and margin. Furthermore, the results of these inquiries are supported by the analysis of actual operating results covering the operations of a major Netherlands shipyard in 1948, which showed that the business of this shipyard ran to 60,029,000 florins and the profit derived thereon was 6,528,000 florins, or approximately 10 percent.

Bidding Practices

Export urges that the price estimates of the staff as well as the estimates for overhead and profit are not based on "fighting bids," and that if the Netherlands shipyards or suppliers were really anxious to

obtain business, their bids would have been reduced below the usual and normal quotations. While this possibility must be admitted, the evidence shows that in 1948 the Netherlands shipyards were well occupied, and their annual reports for 1948 operations show that 1948 was for them a busy and prosperous year. Such reports of actual conditions hardly warrant a generalization that Netherlands prices would have been, to any general extent, cut below the customary and usual levels.

COMMENTS

Before concluding this review the Board deems it appropriate to make certain observations, not only with respect to the redetermination, but also to the whole problem of determining foreign-construction costs and construction-differential subsidies under the Act. These are derived from our study of staff recommendations, extensive testimony and exhibits, arguments of counsel, and from our review of the findings of the Commission in this case. Little administrative history is available.

Our estimate differs greatly from the estimate of our predecessor, the Commission, made in 1948. Where estimates are made at different times, from different approaches, with different sources of material, and in a large measure based on opinion and judgment, closely identical results cannot be expected. This is perhaps best illustrated by the following comparisons of some of the elements reviewed:

Netherlands cost (on two-ship basis) for—	As estimated by U. S. Maritime Commission, 1948		As estimated on redetermination, 1952	
Material		$9,842,875		$11,482,000
Labor	4,900,000 hours at 46.65 cents per hour, less 2 percent for two-ship basis.	2,240,133	3,763,000 hours at 40 cents times 118 percent for productivity.	1,771,000
Overhead	At 50 percent of labor and material.	1,120,066	At 130 percent of labor and material.	2,302,000
Profit	At 7 percent	924,215	At 10 percent	1,556,000

The staff of the Commission and the present staff were confronted with the fundamental problems of properly evaluating foreign costs, with the handicapping knowledge that the sources of information divulged much of it, if at all, reluctantly and usually anonymously. We encountered some difficulties in making recalculations after a considerable lapse of time, but had the advantage of official publications, industrial indices, and a wealth of new material as to conditions in 1948, which information was not in existence at the time of the Commission's computation in that year.

From June 11, 1940, until as late as July 25, 1947, there existed

statutory congressional recognition of the fact that war conditions made reliable foreign-construction costs virtually unobtainable. Between 1936, when the Act was passed, and 1948, construction-differential subsidies for all but one newly constructed ship were governed by special emergency legislation.[8]

We believe the principle of parity underlying the Act is basically sound, but it is apparent that some of the procedures laid down in Title V to achieve this principle, while suited to the more or less static conditions and relationships that may have existed in 1936, are inadequate today in light of changes and fluctuations of economic conditions created by the ordinary passage of time and by World War II.

In planning for new vessels preparatory to entering into a subsidy contract, the operator and the Government must first consider the general type, size, speed, and characteristics of a ship to meet the requirements of the particular trade. National defense and prestige values are additional considerations, particularly important where large passenger ships are concerned. Section 211 of the Act, among other things, directs the Commission in these considerations to determine "other facts and conditions that a prudent businessman would consider when dealing with his own business * * *" It is clear then that a forecast of general business conditions and expected results from operations must be carefully weighed by the Government and the operator in determining what maximum capital (operator's share) outlay a prudent businessman should make for the projected vessels. Without such a joint consideration, we might find the Government making its estimate of the proper capital outlay for the operator by the comparison of United States and foreign shipbuilding costs, and the operator reaching his corresponding figure by an analysis of the economics, competition, and potentialities of his trade route. Yet if these two figures, obtained from nonrelated bases, should not be substantially alike, the project may fail of attainment. Furthermore, if the Act is to accomplish the purposes for which it was designed, including the important statutory aim that the United States must have a merchant marine "composed of the best-equipped, safest, and most suitable types of vessels," it seems clear that the present uncertainties and indefiniteness in the relations between the operator and the Government, such as have been experienced in this case, must be replaced with a degree of certainty and definiteness as well as reasonable promptness in defining what those relations shall be. That corrective measures should be considered was succinctly pointed out by the Hardy Committee in its Recommendation 1 (a) of the Fourth Intermediate Report, when it stated:

[8] PR 82, 76th Cong. (extended from time to time).

Your subcommittee accepts the fact that the process of determining foreign costs is a difficult and complex task perhaps impossible of accurate accomplishment. At the same time, it would seem extremely probable that considerably more detailed data on the subject could be obtained than those upon which the Maritime Commission relied.

and recommended further that:

Revision of the differential-subsidy provision of the statute along clarifying and practical lines would undoubtedly be helpful in dispelling some of the confusion now surrounding its administration.

CONCLUSION

Being of the opinion that the foreign-construction cost estimate, as presented by the staff, was prepared from the best information now available, we adopt as our best estimate of the 1948 foreign cost of the *Independence* and *Constitution* the figure which the staff has presented. As already stated, this is $17,308,000, and indicates a construction-differential subsidy rate of 27.07 percent of $23,733,000, the base domestic cost of each vessel.

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

Chairman COCHRANE, concurring:

I concur in this report of the Board because it is based (*a*) upon our interpretations of the applicable law made as closely to its letter and in the light of the previous history of its administration as could be done, and (*b*) upon the information available (meager though it is, even three years after the date of interest) on the possible level of construction costs in the selected foreign shipbuilding center, of combination passenger-cargo ships.

In reviewing this case, sight must not be lost of the intense contemporary interest of the then newly created Secretary of Defense therein, nor of the national interest in these ships as partial replacements for the serious losses in troop transports during the war and the dire situation in the shipbuilding industry resulting from the suspensions and cancellations of the Navy war building programs as well as of the Maritime war building programs. Because of these two factors, there was an intense urgency to get the contracts placed even at a time when foreign costs were experiencing inflations of such degree that the value of foreign currency in the free market was strongly reduced, although the official exchange was not devalued until some 12 months later.

The Act was drafted following the recovery from the depression of 1933 and apparently envisaged an era of world-wide economic stability in which "fair and reasonable" estimates might be possible.

It did not, I believe, foresee a period of such violent adjustments as have occurred since 1940 and after the war. The Congress itself recognized this situation in extending through July 25, 1947, its joint resolution No. 82 of the 76th Congress, approved June 11, 1940, establishing the foreign shipbuilding costs existing prior to September 3, 1939 (i. e., prewar costs), as the basis for computing construction-differential subsidies. The President's Advisory Committee on the Merchant Marine, of which I was a member, recognized in 1947 the continuing instability, and predicted the difficulty which has developed.

Estimating the cost of building a large ship of a new design is a difficult job even by the management of the shipyard concerned, which over the years accumulates files of carefully analyzed data based on its own methods of recording actual cost returns and upon the shrewd use of quotations from various vendors of materials and parts. Moreover, evidence from the source of most of the foreign information used in the present redetermination shows clearly that the Netherlands builders of a moderately large ocean-going passenger-cargo ship, completed in November 1949, missed the actual costs of that ship widely, even though they were building the ship to their own plans.

In the case in hand, however, it was expected that a "fair and reasonable" estimate of cost could be made "of the construction of the proposed vessel if it were constructed under similar plans and specifications (excluding national defense features * * *) in a foreign shipbuilding center * * *," even though we only had, to start with, the estimate of man-hours of the American shipbuilder, submitted with his bid, and his estimates of the American unit costs of materials in a large number of items. These items are not clearly defined, however, nor of our own records. In addition it was necessary to apply to these values, correction factors for currency devaluation as between present quotations and August 1948 and to correct for the estimated difference in inflation as between the date of the reestimate and the 1948 date of the contract.

This is one situation in which the duties of the chairman of the Board, in his dual capacity also as maritime administrator, have been exceedingly difficult. Because of my ultimate responsibility of sitting in review of the redetermination, I held myself clear of the preparation of the new estimate by the staff. From the presentations made before the Board, it is clear that the best data available to the staff cannot be considered sufficiently complete in scope nor precise in values to be a satisfying basis for a decision of the importance of the one which is now hinging on the result.

The spread of the bids received on January 31, 1951, from ten (10) American shipyards for building ships of the new Mariner class in blocks of five identical sister ships, under conditions as nearly identical as could be provided, ran from $7,775,000 for each of five to $10,526,000 for each of five, i. e., the high bid was 35 percent above the low bid. This spread was due in part to real differences in building costs in various yards—in part no doubt to the estimating. Any one of these bids would clearly qualify as a "fair and reasonable estimate of the cost," etc., but the result in determining a construction-differential subsidy for another ship on these figures, assuming they were from a foreign yard, would vary correspondingly.

In short, while the Act in section 502 (b) purports to present a precise, mathematical formula for determining the construction-differential subsidy for a new ship, it actually presents a practical impossibility from the administrative point of view.

The amount of the subsidy is, of course, very important, equally to the Board and to the prospective steamship operator, in planning what kind of a ship the trade route in view can support. Manifestly, the success of a new ship will be strongly influenced by the degree in which it surpasses the foreign-flag competition on the run, but only, of course, within the over-all trade potential of the route contemplated.

It is even more important that once determined and made a matter of contract the subsidy rate shall remain fixed.

I recommend most earnestly in the interest of these two essential objectives and to avoid a repetition of the grave difficulty which has developed in the present case, that the law be amended to permit a predetermination from time to time of the subsidy rate which can be approved objectively and free from specific application if possible; so that future contracts can be negotiated with confidence and promptness and with fairness and reasonableness both to the Government and to the prospective shipowner. None of these critical elements of satisfactory contract administration exists today. Many thousands of dollars, 4 years of time, and many hours of deep study and concern have produced in the case before us a result which is unsatisfactory to all hands. Unless a more businesslike and realistic method is evolved, it will be difficult to continue to build passenger ships under the Act.

FEBRUARY 25, 1952.

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

FEDERAL MARITIME BOARD

No. S–47

AMERICAN EXPORT LINES, INC.—REVIEW AND REDETERMINATION OF THE SALES PRICES OF THE "INDEPENDENCE" AND "CONSTITUTION"

Decided November 4, 1952

Gerald B. Brophy and *Carl S. Rowe* for American Export Lines, Inc.

Francis T. Greene for the Board.

SUPPLEMENTARY REPORT OF THE BOARD

Our prior report in this matter, dated February 20, 1952 (4 F. M. B. 216), adopted as the 1948 estimated foreign-construction cost of the *Independence* and *Constitution* the estimate of $17,308,000 per vessel, based on a study of the best information then available to us and our staff. This estimated foreign cost made in 1952 was over $5,000,000 per ship higher than the estimate made by the Maritime Commission in 1948, and indicated a construction-differential subsidy rate of 27.07 percent instead of 45 percent as originally found. As previously explained, American Export Lines, Inc. (Export), agreed to the redetermination, and further agreed either to accept the redetermined price within a certain time limit and keep the ships at that price, or to reject the redetermined price and return the ships. The time limit for Export's definitive action has been extended, although Export indicated that if forced to an immediate decision it would have to reject the redetermined price. In the meantime, it asked that the proceedings be reopened to consider additional evidence, some of which it has procured in the Netherlands.

A prehearing conference with Export disclosed that the additional evidence on foreign-construction costs would come from a thoroughly reliable source and would bear directly on the issues involved. Some of the witnesses, officers, employees, or subcontractors of Wilton-Fijenoord (Wilton), a large and well-established shipyard of Schie-

dam, Netherlands, indicated willingness to testify in the Netherlands, but because of their business responsibilities were unable to appear in the United States. Accordingly. we arranged to hear their evidence abroad, and this was accomplished between July 29 and August 8, 1952, at Schiedam. Other witnesses testifying principally as to foreign exchange were heard in Washington on September 10 and 11, 1952. Export had sent to Wilton copies of the bidding plans and specifications of the *Independence* and *Constitution*, and Wilton's estimators and subcontractors who testified before us studied these and inspected the *Constitution* in Italy in March 1952. Wilton agreed with Export to estimate the 1948 cost of constructing the two vessels in its yard; Export agreed to pay Wilton the actual cost of making the estimate, but no fee or profit. This estimate, in summary form, was submitted to us in Washington in July, showing Wilton's estimate for one ship to be 41,306,403 Dutch florins, with a 2 percent reduction for a second ship.

With Wilton's estimate in hand, we visited the Wilton yard, and for the better part of 2 weeks interviewed Wilton's managing directors, Mr. van West and Mr. van Daalen, the manager of the shipbuilding department and chief estimator, Mr. Vermaat, their engineers, estimators, and subcontractors, and examined the contracts, documents, calculations which, in detail, supported the Wilton estimate. Our proceedings were informal, attended, in addition to the Board, by representatives of the Board's staff, representatives of the State Department, two representatives of the General Accounting Office, and representatives of Export. All the Netherlands witnesses spoke English fluently, and we were impressed not only with their complete knowledge and understanding of the subject matter, but by their clearly frank and very comprehensive responses to the questions which we addressed to them regarding the basis for their estimate and the breakdown of various elements that made up the total. Our inquiry of Wilton's methods of estimating and of building ships was searching, and their responses were most satisfactory in the details which they disclosed freely. We were indeed more than gratified at the willingness of Wilton's chief executives to disclose to us matters of business practice and policy which under usual circumstances might have been withheld for business reasons.

The facilities for a verbatim stenographic report were not available. Very full notes were kept, however, which were formalized into a record of 93 pages. Before we left the Netherlands this record was reviewed by all parties attending the hearings and, with minor corrections, was found to be accurate.

Before taking up the Wilton estimate in detail and questioning

witnesses, the Board went through the company's yard and plant. The company is one of the oldest and largest shipbuilding and repair companies in the Netherlands and has a business history of almost 100 years. The company has built and is building various war vessels and also merchant vessels of all classes, and, in addition, does extensive repair work. Many vessels were in the yard when we visited it. Besides a hull construction department, the yard has an engine-building department where both diesels and turbines are now being built, although turbine construction has only recently been resumed at the plant. The company's joiner department includes a furniture-making section, and the yard's practice is to manufacture the furniture both in wood and in metal for staterooms and crew accommodations on passenger ships, but not for public rooms. The latter are subcontracted, as are ventilating, heating, refrigerating, and electrical installations. In the areas of work usually subcontracted for by Wilton, the subcontractors furnished and explained to us their estimates for the work they would have done on the ships. The competence of the Wilton yard and its management to construct vessels of the type of the *Independence* and *Constitution* was established to our entire satisfaction. The yard has recently completed the *SS Rijndam* and *SS Maasdam*, sisterships, for the Holland-America Line's North Atlantic passenger service. These vessels are somewhat smaller than the *Constitution* and *Independence*, being about 503 feet long, 15,000 gross tons, with 8,500 s. h. p. delivered from American-built geared turbine engines, furnishing a speed of 16½ knots per hour. These Netherlands vessels are designed to carry about 800 passengers, mostly in the tourist class. The accommodations are air-conditioned throughout. We spent a day on the *Maasdam* during her trial run out of Rotterdam and had an opportunity to see in operation this excellent product of the Wilton yard.

Wilton's officials explained that their estimate as submitted was a fair estimate of the cost of constructing the *Independence* and *Constitution* in their yard in 1948, based on facts and prices now known. The senior director of Wilton was frank in admitting inability to say whether that yard in 1948 would have been willing to enter into a contract to build the two American ships at the submitted estimate without provision for escalation to protect against rising labor and material costs during construction. He said his yard might have done so, depending on considerations of business judgment such as the work then in hand, general desirability of passenger-ship construction which engages a larger proportion of the yard's facilities than cargo or tanker construction, customer relationships, etc. He said his company would probably not have wanted to assume the risk of rising prices

unless strong business considerations at the time made such a course seem wise.

It was explained that the yard's direct labor going into each item of the estimate was carefully computed according to the yard's regular practice when estimating on its own account, and to this figure was added 130 percent for overhead in all departments except the engineering and machinery department, where 175 percent overhead rate was used. These, it was explained, are the yard's customary and only overhead percentage rates for new commercial construction work, although different rates are used for naval construction and for repair work. Similarly, the Wilton executives stated that 6 percent of the cost of labor, material, and overhead is the rate used for risk and profit on new commercial construction, and that this same rate was generally used by other Netherlands yards.

It was also explained that direct labor was paid at an hourly rate and to this was added incentive pay or "tariff." These two items together make the company's basic hourly rate; all other items of labor, including designing, engineering, and drafting, were included in overhead. The average basic hourly rate, including "tariff," used in Wilton's estimate for 1948 was 1.15 florins per hour in all departments except the machinery department, where it was 1.20 florins per hour. (These labor rates used in the estimate were slightly higher than actual rates paid in May 1948 as discussed hereinafter but were deemed by Wilton to be *fair* and *reasonable.*)

The costs of materials going into the estimate were based on the yard's actual 1948 purchase records so far as comparable items were purchased in that year. Failing 1948 purchases, the cost of comparable items purchased at a later date, particularly in connection with the construction of the *Rijndam* and *Maasdam*, were used, and here the later cost of materials was adjusted for price increases between 1948 and the year of purchase.

We reviewed with the Wilton estimators and subcontractors the computations going into each of the 12 subdivisions making up the estimate. In each case they substantiated from their records the estimated cost of material and gave the estimated number of yard hours required to do the work or make the installation. In the case of refrigeration work, air-conditioning work, public-rooms construction and furnishing, and electrical installation, the subcontractor's estimate included the subcontractors' labor, and to this was added the cost of such yard labor as was connected with the subcontractor's work.

The detailed estimate, summarized under 12 subdivisions, is as follows:

Estimate based 1948

Subdivision	Material	Wage factor
	Florins	*Florins*
1. Hull steel	3. 794. 725	4. 552. 700
2. Hull outfit	1. 196. 070	609. 500
3. Carpenter's work	284. 800	265. 000
4. Joiner's work	5. 567. 500	1. 828. 500
5. Plumber's work	860. 000	675. 750
6. Deck auxiliaries [1]	1. 520. 800	251. 750
7. Ventilating and heating	1. 786. 360	5. 300
8. Kitchen and galley	332. 000	10. 600
9. Refrigerating installation	396. 000	2. 650
10. Electrical equipment	3. 160. 800	26. 500
11. Special items	950. 000	
Material total	19. 849. 055	8. 228. 250
12. Propelling machinery and auxiliaries	9. 010. 000	1. 881. 000
Material total	28. 859. 055	10. 109. 250
Wage factor	10. 109. 250	
Total before profit	38. 968. 305	
Profit and risk 6 percent	2. 338. 098	
Total	41. 306. 403	

[1] Excluding side port cargo gear.

Each subdivision was considered by us in turn, and the basis of all figures of both material and labor were examined and explained. The first schedule covering hull steel showed 10,500 metric tons of steel required, based on Wilton's experience for multiple-deck passenger ships. This quantity estimate varied only 1.6 percent from the quantity estimate made by our staff. The cost of the steel was estimated at f.267.85 per ton, this being the basic contract price for 3,690 tons of British steel contracted for by Wilton in April 1948 for the tanker *Mitra*. The British price, however, was subject to adjustment for changes in basic English steel prices between the date of contract and the date of delivery in 1949. Documents submitted by Wilton showed that the *Mitra* was under construction from January 1949 to December 1949, and that the delivery price of this steel was actually f.281 per ton. The difference between the contract price of f.267.85 and the delivery price of f.281 was due to adjustment in the British price for escalation. Since we hold, as will later be developed, that the Wilton estimate for this ship was not a "fixed price" estimate and that it must, therefore, be considered as an estimate subject to over-all escalation,

we think it consistent to include the steel at the April 1948 contract price rather than at the price after escalation, thus avoiding double escalation on the steel item. The American bids for the ships were based on April 1948 prices, and American escalation on the Bethlehem costs have been computed from that date.

In our February report we used a price for hull steel of f.325 per metric ton, which was obtained for us by Maritime's representative in Europe who visited various Netherlands shipyards and reported that that was an average cost. Furthermore, the official Netherlands Government Industrial Report (Maandschrift) gave the cost of ship construction steel at Netherlands shipyards in 1948 as f.324.97 per ton, which, as we stated in our earlier report, appeared to verify our representative's report. However, Wilton's executives explained that the Maandschrift statistics were based on the price of all steel used in shipyards, including steel requiring quick delivery for repair work as well as special and premium steel, steel used for yard structures and drydocks, and steel used in naval construction. These types, they explained, are considerably more expensive than steel bought ahead for new commercial construction where immediate delivery is not important. It appears that the actual cost of new construction steel is a more accurate figure for our purpose than the average price of shipyard steel, including "special" and "quick delivery" steel. The time for erecting all steel was estimated by Wilton at 110 man-hours per ton. This was based on their past experience for passenger ships. They explained that this was a higher figure than 89.48 man-hours per ton required on tanker construction (*Mitra*, built 1949) and a little lower than 117 man-hours per ton required on the *Rijndam*, which was a smaller passenger ship.

The cost of the other hull steel items was explained by Wilton in detail, with the estimated weights and cost per ton or kilo and the man-hours necessary for fabrication and installation. Their estimate for sternpost propeller brackets and rudder was found to be substantially identical with the 1948 estimates of our staff. In the case of sheet metal, Wilton's estimate of the material cost was over 2 cents United States currency a pound higher than our estimate. The total Wilton estimated cost of labor and material going into the hull steel schedule amounted to 8.347.425 florins.

The remaining 11 subdivisions of the estimate will not be considered in this report with the same detail as the hull steel subdivision, although each item going into the various subdivisions was scrutinized by the Board and its experts and explained by Wilton's representatives. Under subdivision 2, marked HULL OUTFIT, were included estimated costs of derricks, lifeboats, davits, and such heavy items as

anchors and their chains, and such light articles as compasses and other nautical inventory. The cost of most of these items was derived from purchase records for such items installed on the *Rijndam* and the *Maasdam*, although the cost of underflooring installed on the steel deck under the linoleum or other surface material and the cost of heat and sound insulation was taken from subcontractor's figures. The contract of the Wilton yard in acquiring lifeboat davits for the *Rijndam* and *Maasdam* showed care to obtain low prices by encouraging competition between British and Netherlands suppliers. The costs thus incurred in constructing the Netherlands ships were reflected in Wilton's estimate submitted to us. Due to incomplete bidding information furnished to them on lifeboats, the Wilton estimate for this item was based on steel and not aluminum construction as specified, and, therefore, requires adjustment upward.

The items under subdivision 3, CARPENTER WORK, were not extensive, covering the cost of Oregon pine and teak deck lumber, and the processing of this lumber into deck planks and deck margin planks. They also include the construction of wooden hatches, hold ceilings, and wooden gratings throughout the ship.

Next to the hull steel, subdivision No. 4, JOINER'S WORK, involved the greatest cost, showing 5.567.500 florins for material and 1.828.500 florins for labor. Under this subdivision was included the construction of all public rooms and passenger and crew accommodations as well as their furnishings. Fireproof marinite for partitions was specified. This is a proprietary product of American manufacture and Wilton's estimates were based on 1948 quotations for this product with transatlantic freight charges added. Wilton's estimators selected typical cabins, estimated the area and furnishings of each, and from these built up the cost of erecting and completely furnishing all the sleeping accommodations on the ship. The estimator's record showed in detail the number of pieces of furniture in each room and the cost of materials entering into each. In all, 690,000 hours of joiner's work was included under this schedule for installations made by Wilton. In addition, this schedule included the lump-sum charge of the subcontractor de Nijs for material and labor in installing and furnishing the public rooms, swimming pool, and other areas not installed by Wilton. Mr. de Nijs had decorated and furnished the public rooms on the *Rijndam* and *Maasdam* in 1950–52, and also a large part of similar work on the *Oslofjord*, constructed at another yard in the Netherlands in 1948, and on the reconditioning of the *Nieuw Amsterdam*. During the last 21 months, Mr. de Nijs showed that he had completed 4.500.000 florins worth of ship joiner and decorating work. He furnished worksheets showing the area of the floor

and cubic capacity of each of the public rooms on which his estimates were based.

The largest single subdivision of the estimate was No. 12, for supplying and installing the PROPELLING MACHINERY AND AUXILIARIES. For this the material estimate was 9.010.000 florins, with a labor cost of 1.881.000 florins. The detailed estimate was explained by Mr. Sterkman, the chief engineer of Wilton, and also responsible for its engineering estimating department. Mr. Sterkman explained that his company had not in 1948, nor since the war, constructed turbine engines, but in view of the requirement for four large engines for these ships his company might well have undertaken the construction of these turbines, pointing out that Wilton had at the time of our visit to the yard the construction of turbines for seven ships in their shops. Mr. Sterkman stated that he was able to obtain from de Schelde shipyards, another large Dutch concern, estimates which that yard made in 1948 for the construction of turbines for a sistership for the *Nieuw Amsterdam*. He said that his company would have made the turbines as cheaply as de Schelde because the Wilton shipyards were, in Mr. Sterkman's opinion, at least as efficient as the de Schelde yards. In any event, the de Schelde 1948 bid was broken down and refigured for turbines of the size required for the *Independence* and *Constitution*. The profit item in the de Schelde estimate was eliminated inasmuch as, had Wilton constructed the turbines, their profit on them would have been included in the overall 6 percent charge on the cost of the entire ship. Mr. Sterkman pointed out that his plant was not equipped to build reduction gears, which could have been obtained cheaper and better in 1948 in England or Switzerland.

Mr. Sterkman not only examined the plans and specifications of the *Independence* and *Constitution*, but inspected the latter, and all estimating was done with the requirements of high temperature and high steam pressure set forth in the specifications, and all in accordance with the American Bureau of Shipping requirements. The cost of shafting was calculated from the weight and labor required. Two four-blade bronze propellers were included and two spares at the price of 60.000 florins each, which the supplier Lips quoted for 1948. The specifications called for only one spare for each ship, and this has been taken into account in the computation hereinafter set forth. As to boilers, Mr. Sterkman supplied quotations from Stork, the Netherlands licensee of Babcock & Wilcox, for supplying boilers identical to those on the Export ships at a price of 1.500.000 florins per ship. Three competitive bids were obtained to establish the 1948 price of the burners for the boilers, the lowest price for burners being 235.000 florins per ship. Similarly, Wilton's estimates for auxiliaries

were examined, and it was learned that Wilton planned to purchase all auxiliaries from recognized manufacturers. In part Wilton had obtained the 1948 prices on these auxiliaries, and in part the 1952 prices, which were adjusted to give effect to the change in price level between 1952 and 1948. Similarly the cost of generators and other equipment connected with the engine room was presented, with supporting figures showing careful estimate of the cost of material and amount of labor necessary for installation.

Subdivisions 5 and 11, showing PLUMBER'S WORK and SPECIAL ITEMS such as insurance, classification and measurement, scaffolding and launching expenses, docking and tugs, and trial trips were explained in detail.

Subdivision 6, showing DECK AUXILIARIES,[1] including steering engine, windlasses, winches, capstans, watertight doors, and elevators were explained, and it appeared that most of this equipment, as well as the equipment under subdivision 8, KITCHEN AND GALLEY, was to be purchased. The contracts for similar equipment used in preparing the estimate were submitted and explained by Wilton's representative. In the deck auxiliary schedule, it was stated frankly that they were unable to obtain costs for side port cargo gear, and no figure was included in their estimate for this item. The Wilton estimate for elevators was developed from the size and type of elevators installed in the *Rijndam*, designed to lift about 850 pounds, whereas the Export ships' elevators had a capacity of 2,900 pounds. Both the Wilton estimate and the estimate of our staff were based on elevators made under Otis Elevator Co. license. Wilton's total cost of elevators was 190.000 florins as against a considerably higher figure from our staff. The Wilton estimate requires adjustment upward to provide for side port cargo gear equipment and an increase in the elevator figure.

Some remaining comment is required upon subdivision 7, VENTILATING AND HEATING, and subdivision 9, REFRIGERATING INSTALLATION, the former including air-conditioning machinery for passenger rooms, public spaces, and crews quarters, and the latter including refrigerating machinery for cargo holds. The estimate for this equipment assumed it was to be supplied and installed by the firm of Gebr. van Swaay, the Netherlands representative of the Carrier Corporation of America. Mr. Sipkes of this firm explained his experience in air conditioning other vessels built in Holland, and supplied detailed 1948 prices on marine air-conditioning machinery and equipment furnished, for the most part, from the Carrier Corporation. Mr. Sipkes pointed out that his calculations had been based on examination of plans and

[1] Wilton's estimate covered four more topping lift winches than were specified. Adjustment accordingly will be made hereinafter.

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specifications and also an examination of both the *Independence* and the *Constitution* while in Italian ports. Added to the estimate of Mr. Sipkes' firm for labor and material was an item of 10 percent for subcontractor's profit. Mr. Sipkes said that his firm could readily have done the work on the two Export ships and in 1948 would have welcomed a contract at the price which he quoted to Wilton and explained to us.

Similarly, Mr. Nagelkerke supplied to Wilton an estimate for supplying and installing all the electrical equipment on the ship covered by subdivision 10. Mr. Nagelkerke's over-all figure was:

	Florins
Material	2. 373. 445
Labor and overhead	500. 000
10-percent profit	287. 345
Total	3. 160. 790

This subcontractor supplied detailed work sheets showing the cost of switchboards, transformers, transmitters, and cables, and all necessary switches, outlets, and even the normal lighting fixtures where specially decorative features were not required. We had the advantage of the expert advice of Mr. H. F. Harvey, Jr., the electrical engineer of the Newport News Shipbuilding & Dry Dock Co., who accompanied us to the Netherlands on a special-services contract for the particular purpose of checking into the equipment contemplated by the Wilton estimate, and the competence of the Wilton yard, or its subcontractors, to install electrical equipment of a type and in a manner to meet American standards. As Mr. Nagelkerke explained his estimate he was questioned in detail by Mr. Harvey. Mr. Nagelkerke satisfied Mr. Harvey and, through Mr. Harvey, satisfied us that the equipment proposed to be installed under the Nagelkerke subcontract, as explained to us, would meet the United States requirements and standards. Mr. Nagelkerke explained and demonstrated that he was entirely familiar with American and international standards for electrical installations, pointing out that he was a member of the International Committee on Rules for Marine Electrical Installations.

In summary, it may be said that we felt that the estimates presented by Wilton and its subcontractors were carefully prepared. It was stated that the staff of the Wilton yard devoted some 7 weeks in preparing the general estimate, and the subcontractors, in turn, devoted several weeks to their respective estimates. We discussed with Wilton and the subcontractors the various items going into the estimates, and with increases for certain items (i. e., the cost of elevators, lifeboats, and side-port cargo gear) and reductions for

other items also noted (i. e., one extra propeller and four topping winches). We are satisfied that the Wilton estimate, subject to certain adjustments to be referred to, represents the fair and reasonable estimate of the base cost, before giving effect to escalation, of constructing the two Export ships in the Wilton yard in 1948. It has been pointed out already that this estimate is not greatly at variance with the estimate presented by our staff prior to our February 1952 report, but where the differences exist we believe that the Wilton estimate is more to be relied upon because its estimates of cost, both of material and labor, in substantially all instances were based upon actual invoices and transaction prices. Furthermore, the persons presenting the figures were not only working in the field of Netherlands costs and practices with which they were intimately familiar but were subject to questioning and cross-questioning by us and our experts who participated in the review. Due to unusual circumstances which may not again be repeated, the information developed as a result of our personal visit to the Netherlands is more reliable than that heretofore gathered. As we said at page 57 of our February 1952 report: "The staff of the former Maritime Commission and the present staff were confronted with the fundamental problems of properly evaluating foreign costs, with the handicapping knowledge that the sources of information divulged much of it, if at all, reluctantly and usually anonymously."

The Wilton estimate made no deduction for the cost of the four national-defense features incorporated in the ship's plans for which the Government pays the entire costs, i. e., increased speed, additional evaporator capacity, additional generator capacity, and dual engine-rooms, all referred to in our February 1952 report. Nor does the Wilton bid take into consideration the cost of certain miscellaneous items for the completed ship which are provided by the owner and not by the shipyard, such as bidding plans and specifications, owner's inspection, interior decoration, owner's outfitting of linen, silver, and glassware, etc., referred to in our prior report. Adjustments for these items are considered hereafter.

The information obtained at the Wilton yard showed clearly the extra cost in florins for aluminum lifeboats and the deductions that should be made for the propeller and topping winches improperly included. The figures which appear below do not correspond exactly with those submitted by Wilton because those were bare figures of the cost of labor and material without including general charges for insurance and over-all profit. As stated above, the Wilton estimate did not include any figure for side-port cargo gear, and the elevator estimate was admittedly low because the type, size, and speed of the

elevators and the number of decks and doors served were apparently not completely taken into account. For these two items we have, therefore, reverted to our staff estimate of the Netherlands cost of these items.

Export has argued that additions should not be made to the Wilton estimate, except perhaps for the cost of the side-port cargo gear, because of the fact that in a number of other areas Wilton's figures were said to be on the generous side, particularly in use of f.1.15 per hour instead of f.1.08 per hour for yard labor; also because the cost of certain propeller brackets and rudders was based on a slightly higher material cost per kilo than was paid by the yard for similar items contemporaneously installed on the *Rijndam*, and because the electrical subcontractor's estimate was based on a slightly different and presumably more costly method of installation than was required by the specifications. As to the hourly rate of labor, the f.1.15 rate was consciously included by the Wilton estimators as fair and reasonable, and we do not think it should be disturbed. As to the other items that are said to be on the high side, there is no definite basis in the record for making any deduction. Where a definite basis exists as in the case of the extra propeller and extra topping winches, we think the deductions are proper and we have given weight to them. The following table gives our revised fair and reasonable estimate of the shipyard cost of constructing each of the two Export ships in the Netherlands, based on our studies at the Wilton shipyard, all expressed in Dutch florins.

Wilton-Fijenoord's estimate for a single ship			f.41. 306. 403
Adjustments to Wilton-Fijenoord estimate:			
Add for lifeboats—steel to aluminum (W.-F. estimate of extra cost)	f.81. 600		
Add for side-port cargo gear per F. M. B. 1952 estimate	456, 490		
(1) Add for elevators (difference F. M. B. estimate from W.-F. estimate)	503. 300		
		f.1. 041. 390	
Deduct for 1 extra propeller	63. 800		
(2) Deduct for 4 topping winches	26. 700		
		90. 500	
(3) Net addition to W.-F. estimate			950. 890
(4) Net W.-F. estimate after adjustments			42. 257. 293

(5) Deduct for national-defense features 3.06 percent [1] of (4), this being the percentage of United States shipyard bid $23,415,000, represented by United States estimate for national-defense features ($715,325)	f.1. 293. 331
(6) Net after national-defense deductions	40. 963. 962
(7) Deduct 1 percent for 2-ship estimate (to cover 2 percent reduction for second ship)	409. 639
(8) Net shipyard estimate for each of 2 ships	40. 554. 323

[1] 3.06 percent is the ratio of estimated dollar cost of national-defense features ($715,325) to the Bethlehem bid for the entire ship before escalation ($23,415,000). Wilton did not estimate the cost of such features, and we are using the same percentage figure for the purpose of calculating the cost in florins.

As already indicated, we have now heard additional testimony on the question of foreign exchange. Under section 502 (a) of the Merchant Marine Act, 1936 (the Act), the sales price of the *Constitution* and the *Independence* by the Government to the purchaser must be "at a price corresponding to the estimated cost, as determined by the Commission", and under section 502 (b) "The amount of the 'construction-differential subsidy' may * * * not exceed the excess of the bid of the shipbuilder * * * over the fair and reasonable estimate of cost, as determined by the Commission, of the construction of the proposed vessel if it were constructed * * * in a foreign shipbuilding center * * *." To redetermine the sales price and make the necessary comparison between the American cost and the foreign estimated cost, we must convert our estimate in florins so as to be expressed in dollars. In our earlier report this conversion was made at the so-called "official" rate of $0.3775 without adjustment for disparity between the "official" and so-called "free" rate.

Export takes the position that by reason of the additional evidence now before us "it is clear" that such a conversion "does not produce a fair and reasonable comparison of the cost of constructing the ships in the Netherlands and the United States." Mr. Slater, president of Export, stated during the course of our August hearings in the Netherlands:

> The price of money is just as important to a determination of the fair and reasonable estimate of the cost of constructing these ships as the price of steel or any other product used in their construction.

We said in our earlier report (p. 228):

> * * * the whole objective of Title V is to permit the purchase of the American ship by the American operator at the *closest possible approximation* to the actual dollar price that it would have cost him had the ship been built foreign. If Export had actually contracted for these ships with a Netherlands shipyard, and would have had the opportunity to contract in dollars at an appreciable

discount because of impending devaluation *or had been able to provide for progress payments to be made in guilders during the life of the construction contracts*, it would in fact have had the benefit of a substantial reduction in dollar cost. Consequently, to the extent that devaluation could have been reasonably foreseen and turned to the advantage of a purchaser in Export's supposed position, the Board in making its redetermination of the vessel sales prices in 1951 may make adjustments to obtain the benefit of potential devaluation which a prudent businessman would or should have made as of August 1948. [Emphasis now supplied.]

In 1945, in the case of *Barr* v. *United States*, 324 U. S. 83, the Supreme Court had occasion to consider whether the "official" or the "free" rate of exchange should be applied to the British value of goods imported into this country for the purpose of assessing ad valorem duties under the Tariff Act of 1930. The Tariff Act required that the value of the foreign currency should under applicable conditions be "the buying rate for cable transfers payable in the foreign currency so to be converted; and shall be determined by the Federal Reserve Bank of New York and certified daily to the Secretary of the Treasury." At the outbreak of the second World War the British Government took over some control of dealings in foreign exchange and designated certain authorized dealers in foreign currencies, and prescribed that beginning January 8, 1940, British pounds were to be sold by them at the rate of $4.035. When the goods were imported in 1940 the Federal Reserve Bank certified to the Secretary of the Treasury two rates for the pound sterling, one, the official rate at $4.035, and the other, the free rate at $3.475. The Customs assessed duties at the official rate, and this was set aside by the Court, which said, page 90:

> We may assume that the dual or multiple exchange rates which have emerged were not in contemplation when the 1930 Act was passed.

At page 91:

> Congress could, of course, choose any standard of valuation, for the purposes of the assessment and collection of duties. But Congress in this situation endeavored to provide a flexible and realistic, not an arbitrary, standard. * * * The language of section 522 (c) read against the background of these statutes indicates to us that Congress undertook to provide in each case the rate which gives the *closest approximation* to the value in dollars of the imported merchandise. [Emphasis supplied.]

At page 93:

> But this result is criticized on the ground that it interferes with the control of foreign exchange, which fiscal function has been entrusted to the Secretary (of the Treasury) not to the Federal Reserve Bank of New York. It hardly need be pointed out in reply, however, that our decision, like section 522 (c), is concerned only with the assessment and collection of duties upon imports through the use of a formula which Congress designed.

And at page 94:

> We think that the use of the "official" rate of exchange in assessing and collecting duties upon these imports transcended the authority of the collector and of the Secretary and that the "free" rate of exchange certified by the Federal Reserve Bank of New York should have been used.

It appears from the opinion in the case cited that in 1940 British pounds were quoted and were readily purchasable at the "free" rate in the New York market. But as to conditions in 1948, we said (p. 235), based on the only testimony before us at the time of our earlier report,

> In no case were we able to discover any conclusive evidence that substantial business transactions were conducted in a manner which avoided the effect of the various governmental regulations establishing official rates of exchange.

The conclusion reached in our prior report to make the conversion from florins to dollars at the official rate was the necessary consequence of the absence of substantial and convincing evidence before us at that time justifying the use of any other rate. The evidence now before us clearly indicates that the former record was by no means complete. In fact, we now have evidence indicating that substantial business transactions with the Netherlands were conducted at other than the so-called "official" rate, and that such transactions have involved ship construction. The evidence also makes it clear that the devaluation of Netherlands currency was widely discussed and confidently forecast in this country well before August 1948.

The unbalanced state of trade after World War II and the general shortage of dollars at that time in European countries, especially in England and the Netherlands, is a matter of common knowledge. In September 1949 both countries mentioned, as well as several others, devalued their currencies in terms of dollars by about 30 percent. The florin before devaluation was officially quoted at $0.3775; after devaluation, at $0.2631. The record now before us, consisting of many official Netherlands Government press releases as well as the testimony of men experienced in foreign exchange transactions, makes clear several general conditions existing in August 1948 having a very direct effect on foreign exchange values.

First, as stated above, there existed in the Netherlands, as in Europe generally, a serious dollar shortage. The United States had granted temporary economic aid to Europe for several years after the close of World War II, and in 1948 Congress entered on a long-term policy of economic assistance to European countries, including the Netherlands, under the Economic Cooperation Act of 1948 (E. C. A.). Indeed, as early as April 1948, the Netherlands Minister of Finance in

a Government note on foreign exchange, set forth an 8-point program including "Encouragement of export to the dollar area by every means including a plan which will place a certain percentage of the profits in foreign exchange at the disposal of exporters."

Second, there was at this time the widespread use of "transferable" sterling credits as a medium of international exchange. By "transferable" sterling is meant credit balances in pounds sterling with London banks in the names of nationals of certain non-British countries, including Greece and the Netherlands. Under British regulations effective in 1948, these credits were freely transferable between nationals of any country in the special group and were also transferable to the account of British nationals, as might be required for all purposes including the payment of debts owing from these countries to British creditors. In August 1948 "transferable" sterling was bought and sold in the leading financial centers of the world, including New York, in very large quantities at prices that varied from day to day. We have records of quotations from actual transactions in transferable sterling with quotations for every month from August 1948 through devaluation in September 1949. During this period the prices ranged from $3.33 to $3.04 per pound. The going price of $3.33 on August 11, 1948, was approximately 18 percent below the "official" United States-British exchange rate for sterling of $4.03. Holders of American dollars needing credits to pay balances in florins in the Netherlands were able to buy "transferable" sterling at the discount indicated and to convert this into florins at the "official" British-Netherlands exchange rate, thus saving substantially over the cost of converting dollars into florins at the "official" United States-Netherlands rate. In the case of a new export transaction involving the Netherlands, it is our understanding that this method would require the approval of the Netherlands authorities who controlled export licenses or permits for Netherlands products. However, it has been impossible for us to determine what their specific decision might then have been regarding the financing of a vessel transaction of this sort.

Third, there was all through 1948 and until September 1949, when devaluation actually took place, a general opinion among financial experts of all countries that adjustments in currency exchange rates were necessary and that such adjustments were not far off. The Secretary of the Treasury of the United States, acting in the capacity of Chairman, International Advisory Counsel on International Monetary and Financial Problems, in a letter to Hon. John Davis Lodge, dated February 10, 1948, stated that before currency rates of the members of the International Monetary Fund could be maintained at stable levels from which the market rates of exchange would deviate only

within a narrow margin, "there will undoubtedly have to be devaluations of some of the currencies of the countries involved in the European Recovery Program." [2]

The International Monetary Fund in its report dated April 22, 1948, to the Economic and Social Council of the United Nations, of its study on the problem of exchange rates, included among its conclusions the following:

> Exchange rates in a number of countries will have to be changed in the near future because they are interfering with the flow of exports. In some instances a change in parity is overdue but has had to be delayed so that other measures may be taken at the same time.[3]

It was a matter of common knowledge in the spring of 1948 that devaluation of the Netherlands florin, as well as the pound sterling to which it was and is economically tied, was a clear probability which might well have occurred long prior to September 1949.

As above stated, the purpose of the Act is to permit the purchase of an American-built ship by an American operator at the closest approximation of the actual dollar price which the ship would cost had it been built in a foreign yard. This is our guiding principle in fixing our fair and reasonable estimate of the foreign cost, in dollars, of the ships here under consideration. We are now in possession of evidence which is convincing to us that a buyer with dollars in 1948 would have been able to arrange for the construction of vessels such as the *Constitution* and the *Independence* in the Netherlands at a price in dollars substantially below the price which would have been required if the "official" dollar-florin exchange rate in effect during August 1948 had been applied.

We base our conclusions in this regard upon the entire record in this case, including the testimony of Mr. Fred Meer, manager of the foreign exchange department of Hayden, Stone & Co., a well-known private banking firm established in 1892, which has for many years been engaged as principal in foreign exchange transactions in New York, and the testimony of Mr. Herbert Mann, a London shipping expert whose long-standing relations with the Netherlands shipping, shipbuilding, and banking interests have been of the closest, and whose firm has represented Export since 1932. Our conclusions are also supported by testimony of Mr. Manuel Kulukundis, an experienced shipowner and operator, as to actual ship transactions which will be described in detail.

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[2] Quoted in 94 *Congressional Record*, part 9, 80th Cong., 2d sess., A 1095, February 24, 1948, and reported in the Wall Street Journal, February 26, 1948.

[3] Reported in Wall Street Journal, April 30, 1948.

Mr. Meer expressed the opinion that the Netherlands authorities, represented primarily by the Nederlandsche Bank, would have been willing to agree in August 1948 to accept dollars for sufficient florins to pay for the construction of the two hypothetical ships in a Netherlands shipyard, beginning August 1948, at a discount agreed to at the time the construction contract was made, of somewhere from 15 percent to 32 percent below the then existing "official" rate. He felt this discount would have been granted because that bank was then offering discounts of that order to obtain dollars for its sterling and other soft currency. His opinion was based upon exchange transactions either participated in by his firm or the details of which were known to him, involving substantial exports from the Netherlands to this country in which discounts of the order referred to had in fact been obtained by the American importers. Mr. Meer stated that he believed his firm through its Netherlands connections would have been able to close such an agreement with the Netherlands authorities for the construction of ships in 1948.

Mr. Mann's opinion was to the same effect. He pointed to many reasons why a large ship construction contract would have aided the Netherlands economy and would have provided strong inducements for substantial exchange concessions from the Netherlands authorities. While Mr. Mann stated that he was not able to reveal specific transactions effected during the period, he was "well aware of the circumstances under which they were arranged." Mr. Mann expressed the opinion that in 1948 a discount between 10 percent and 25 percent below "official" rates could have been obtained (later estimated by him at from 20 percent to 25 percent).

Mr. Meer, whose firm had, between August 1948 and December 1951 (the hypothetical period of construction of the two ships in the Netherlands yard), sold over 15,000,000 pounds sterling of "transferable" credits, also testified as to the actual cost of such credits in United States dollars if purchased when the successive florin installment payments on the ships had become due. These computations, however, even though based on actual transactions in "transferable" sterling, do not take into consideration such conditions, if any, as the Netherlands authorities might have imposed for its use in the Netherlands for exportable ships.

Of more weight than the opinion evidence referred to is the evidence presented to us of actual arrangements made by buyers from the dollar area for the construction of ships in the Netherlands for discount florins. Mr. Kulukundis, whose offices are in New York, testified that he, with certain associates, entered into a contract for the construction of a 24,000-d. w. t. tanker by a leading Netherlands

shipyard. This contract was received in evidence, and provided for payment of 50 percent of the florin contract price in installments during construction, and 50 percent upon delivery, these timing provisions being tantamount to partial but substantial interest-free financing and unusually favorable to the purchaser. More important was the provision regarding exchange, as follows:

Payments to be made 50 percent in sterling and 50 percent in dollars. The rotation of the currency to be at purchaser's option.

That provision, on its face, is somewhat inconsistent with the contract purchase price expressed entirely in florins. Mr. Kulukundis explained this to mean that 50 percent of the total florin price must be derived from dollar exchange at the official rate, and 50 percent from sterling exchange. He further explained that his negotiations as to exchange as well as other matters were with the shipyard, and that he was told point blank that unless 50 percent of the cost was provided by dollar exchange, no export license would be forthcoming. He continued that the yard dealt with its Government to obtain this export license. The permission in the contract to use sterling to purchase up to 50 percent of the Netherlands currency gave the purchaser the benefit of an exchange discount. Mr. Kulukundis testified:

Now, in the circumstances, we can go to the market and buy sterling and this, of course, we had in mind when we made this contract, that we would be able to get the discount on the dollar. I mean our dollar costs in buying the sterling in the open market—sterling that would be transferable.

The date of the Kulukundis contract was April 14, 1951, well after devaluation, but even after devaluation British "transferable" sterling credits were obtainable at a discount below the official rate of $2.80 per pound, although the discount in 1951 was not nearly as great as in 1948.

Mr. Kulukundis computed that his savings by reason of the exchange discount on sterling will amount to about 5 or 6 percent of the entire cost of the ship. He also estimated additional saving of about 5 percent on the ship's cost due to use of dollar-purchased florins for half the ship's cost, as well as an additional 2½ to 3 percent due to the delayed payment of the purchase price. All the foregoing applied, of course, to Mr. Kulukundis' 1951 contract. He explained that the saving from exchange discount would have been much greater in 1948. He said:

The savings would have been much greater because then the price of the guilder, and sterling for that matter, was different. The same mechanics worked then. The ultimate cost in dollars would have been by so much less, because of the cheaper price we would be getting in sterling.

Mr. Kulukundis also referred to a contract made by a colleague of his in 1950 for the construction of two tankers in a Dutch yard where the entire price was paid in florins derived from "transferable" sterling exchange and even more generous credit terms arranged.

The particulars of another ship construction contract made in early 1950 for the construction of two 4,000-ton freighters in the Netherlands for Zim Israel Navigation Co. Limited were also introduced in evidence in a letter from the managing director of that company to Mr. Slater of Export. It was explained:

1. Our agreements for the building of two ships involved the payment, during building, of 50 percent of the price in dollars and 50 percent in florins, the latter being provided by a group of Dutch Banks by way of loan secured by mortgage.

As far as concerned the dollars we had to provide, it was agreed that we should receive a "bonus" and the amount of the "bonus" was fixed in advance. It amounted to 14.96 percent over the official rate of exchange in relation to the whole sum of dollars transferred by us. The operation was carried out in this way: out of our first dollar remittance, sufficient dollars were converted at the "free" rate of exchange to produce the total "bonus" due to us; the balance of our remittance and all subsequent remittances were converted at the official rate of exchange.

* * * * * * *

b. As stated above, 50 percent of the florins were obtained from dollar conversions. The rates of conversion were (i) official rate 3.795 florins per $1 and (ii) "free" rate, 6.308 florins per $1.[4]

* * * * * * *

d. The Dutch authorities agreed to the arrangement whereby the "bonus" was granted for the dollar conversion, and this of course, played its part in inducing us to build our ships in Dutch shipyards.

The evidence as to the existence of actual contracts permitting ship purchasers, even after the 1949 devaluation, to pay dollars for the ships in amounts substantially less than would have been required had the shipyards' florin prices been converted at the "official" rate of exchange is substantial corroboration of the opinions of the experts that similar and even more favorable arrangements could have been made in 1948.

Exchange concessions alone, after devaluation, on the contracts which came to our attention, ranged from 5 percent to 7 percent of the entire cost of construction. Additional concessions also obtained on the same transactions have already been referred to. What might have been obtained in August 1948 is problematical, with estimates running on exchange alone from 10 percent to 32 percent. As previously stated, transferable sterling available for transfer to the credit of Netherlands

[4] These rates were in effect in early 1950 well after the September 1949 devaluation.

nationals and by them convertible into florins was purchasable in large amounts in August 1948 at a discount of about 18 percent.

From the foregoing we are convinced, as already stated, that as of August 1948 substantial concessions from the official dollar-florin exchange rate could have been obtained, and that no fair and reasonable estimate of the cost of construction of the Export vessels in a Netherlands yard can be reached without due regard to this fact. The practical difficulty that faces us is to determine what precise discount would give to the florin its fair and reasonable purchasing value for ships constructed in the Netherlands in terms of the United States dollar.

The evidence before us makes it clear that in August 1948 there were such obvious warnings of impending devaluation that any prudent businessman would have been aware of the folly of converting at once his entire purchase price from dollars to florins at the official rate to provide for progress payments needed over the succeeding 3 years.

Under section 705 of the Act the determination must be made as of the date of the American construction contract (August 1948). The estimates made to us of the discount that could have been obtained from the official exchange rate at that time vary from 10 percent to 32 percent, but, for reasons already explained, we are unable to conclude from that evidence that the fair and reasonable figure is at either extreme, or halfway between.

We believe that from the evidence of circumstances that have taken place since 1948 we can determine with some precision what a fair and reasonable estimate of the discount should then have been.

The concessions obtainable in 1948 gave the basis for estimating the true value of the florin, and also gave a forecast in 1948 of a value that would in due course be officially recognized. By reference to what actually occurred, as will be hereafter explained, we are able to say that an allowance equal to a discount of 19½ percent from the official August 1948 dollar exchange rate for florins to be used for ship construction would have been conservative, fair and reasonable, and would also have in 1948 produced the total number of florins for ship construction purposes that the dollars would actually have produced if converted when needed for progress payments.

As to progress payments, we find from the record that the usual requirements of the Wilton yard on two ships such as we are here considering, if contracted for in that yard on August 11, 1948, would have provided that 40 percent of the Netherlands price of the first ship would have been payable before the September 1949 devaluation date, and 30 percent of the price of the second ship would thus have been payable before devaluation. Taking both ships together, an average

of 35 percent of their combined Netherlands price thus would have been payable before devaluation and 65 percent after devaluation. A purchaser with dollars, by the use of usual exchange facilities and without recourse to any special treatment, would have been able to convert 35 percent of the total florin cost of the two ships at $0.3775 to the florin and 65 percent at $0.2631 to the florin. His actual dollar cost of meeting the shipyard progress payments in the Netherlands of each ship, if averaged, would, therefore, have been $12,293,638, representing a discount of 19½ percent as shown below:

(1) The Netherlands estimate of f.40.554.323 converted into dollars at the August 1948 official rate of $0.3775 florins to the dollar amounts to		$15,309,257
(2) 35 percent of f.40,554.323 at $0.3775 equals	$5,358,240	
(3) 65 percent of f.40.554.323 at $0.2631 equals	6,935,398	
(4) Netherlands estimate converted to dollars as required to meet progress payments	12,293,638	12,293,638
(5) Difference (1) minus (4) equals		3,015,619
(6) Percentage—(5) equals 19½% of (1)		

It thus appears that an allowance of 19½ percent from the 1948 official exchange rate produces the number of dollars which would have been required to meet the progress payments when they actually would have become due and thus would in August 1948 have been a fair and reasonable, as well as an accurate, estimate of the total number of dollars needed to make the necessary progress payments to the Netherlands yard. The accuracy, and hence the fairness, of such an estimate in August 1948 would have been supported by future events. Of course, we are required to make our fair and reasonable estimate of the foreign-construction cost, including the dollar cost of florins, as of the date of the construction contract, but, as developed below, we are not now limited to evidence then available.

As already stated, we have accepted basically the estimate of the 1948 florin cost of the vessels from the Wilton yard based on facts and prices now known. In many details this 1948 florin cost was based on records, indices, and other evidence not in existence in 1948, when and insofar as such evidence was relevant to disclose the cost as of 1948. Similarly, we believe it is entirely proper and, in this case necessary, to use such evidence as is now in existence to assist us in determining the extent of the difference between the 1948 official dollar value of ship-purchasing florins and their real value. It is clear that to make a fair and reasonable "redetermination" in 1952 of a "determination" made in 1948 without the use of such evidence would be unrealistic in the extreme. By the use of the recorded actual change

in official exchange rates after 1948, we are able to fix a fair and reasonable estimate of the realistic dollar value of florins in 1948.

The "after the fact" evidence which we have thus used was, of course, not available to the Commission in 1948 nor will similar evidence be available to us in making original estimates in the future. What consideration, if any, may be given to the whole problem of foreign currency in cases requiring our original determination of construction-differential subsidy rates will depend upon the facts and evidence available when the cases are presented.

We conclude, therefore, that the fair and reasonable estimate of the base foreign shipyard cost, before escalation, of each of these vessels, less national-defense features, as of August 1948, was $12,293,638.

Wilton supplied no figure as to the Netherlands cost of the following miscellaneous items already mentioned. We have taken the estimated foreign construction cost of these items from our staff estimate (exhibit 23–B), wherein the Netherlands estimated costs were converted to dollars at the 1948 official rate (1 florin equals $0.3775).

(a) Bidding plans and specifications	$100,250
(b) Inspection	15,350
(c) Interior decorator	122,750
(d) Owner's outfit	560,000
	798,350

Export argues that the cost of the owner's outfit on the ship (item (d) above) should be one-half the American cost of $560,000. In support of its position Export has forwarded to us, since the hearings, a table showing the 1952 Belgian prices of certain glassware and table linen and the 1952 American cost of the same items. A comparison of the 1952 figures shows the Belgian cost to be approximately one-half the American cost. The Belgian cost is supported by two letters of Gimble Brothers, Brussels, indicating the present Belgian prices, and a statement of Export's counsel as to the current American costs. From these, Export argues that the foreign estimated cost of its entire owner's outfit is not over 50 percent of what Export actually paid. However, the information supplied to us by the staff showed that the cost of this outfit in the foreign market in 1948 was substantially 100 percent of the American cost, and we should also point out that the total cost to Export of glassware and silverware is not quite one-third of the total spent for owner's outfit. We have no possible basis to assume that the ratio on other items of owner's outfit would be the same as the ratio on silver and linen, and even as to these items, we are not in a position to be governed by the unsupported statements in letters which are so much at variance with the information developed by our

staff. As stated above, however, the dollar estimates were taken from florins converted at the 1948 official rate. If, however, the same realistic value had been given to the florin cost of these items which we have used for converting Netherlands shipyard costs, instead of the 1948 "official" value, their dollar cost would have shown the same 19½ percent reduction. It can be argued that some of these items could have been timed as to the date of purchase and the exchange rate that should apply. The same rate for all of these items as for the ship as a whole is fair. Accordingly, these items will be included in our estimate of foreign-construction cost at $642,672 to reflect this consideration.

There remains the question of the cost of extras and escalation to be added to the base sale price. Under the original contract of sale to Export, the base sale price was subject to adjustment for increases or decreases for extras and for escalation. Export in that contract agreed to pay a percentage of these additional costs, based on the ratio between the Commission's estimate of foreign cost and the Bethlehem bid subject to escalation.

It will be recalled that Bethlehem submitted two bids for the construction of these ships, (a) the price of $23,415,000, subject to escalation, and (b) an alternative price of $26,113,000, not subject to escalation. Export argues that any estimate of the foreign construction cost which we make based on the Wilton estimate should, when converted to dollars, be compared with the Bethlehem fixed-price bid and not the Bethlehem bid subject to escalation. Export makes this argument on the ground that the Wilton witnesses testified that any estimate prepared by their staff (as was done for us in this case) was never raised by the company directors, but was often lowered in order to get a contract. Export made this argument in spite of testimony of the directors of the Wilton yard that they were unable to say whether their yard in 1948 would have been willing to enter into a contract to build the two ships at the submitted estimate without provision for escalation, already referred to. This last-mentioned testimony is inconsistent with a conclusion that the Wilton estimate would necessarily have been reduced by the directors, and is only consistent with a conclusion that it might have been reduced in terms of a basic bid, but might also have been increased by the addition of an escalation clause. Under the circumstances, we believe that the Wilton estimate which we are using for our guidance for foreign shipyard costs must be compared with the Bethlehem bid subject to escalation.

The cost of extras chargeable against the *Independence* is $576,834, and the cost of extras chargeable against the *Constitution* is $630,765. The escalation for labor and material so far chargeable against the

Independence is $1,455,000 [5] and so far chargeable against the *Constitution* is $2,140,000.[5]

The following computation may now be made for each ship:

Bethlehem bid subject to escalation		$23,415,000
Less national-defense features (exhibit 23–B)		715,325
Bethlehem net bid		$22,699,675
Reestimated foreign shipyard construction cost less national-defense features (base sale price to Export)		$12,293,638
Ratio foreign cost to U. S. cost	percent	54.16
Rate of subsidy	do	45.84
	Independence	*Constitution*
Foreign shipyard cost	[6] $12,293,638	[6] $12,293,638
Foreign cost miscellaneous items	642,672	642,672
Subtotal	[7] 12,936,310	[7] 12,936,310
Export's share United States cost of extras (54.16 percent)	312,413	341,622
Export's share United States cost escalation (54.16 percent)	[8] 788,028	[8] 1,159,024
Sales price to Export	14,036,751	14,436,956

[6] This figure corresponds with the Commission's 1948 base price of $11,956,285.

[7] This figure corresponds with our base price including miscellaneous items of $17,308,000 set forth in our report of February 20, 1952.

[8] These figures may be adjusted to conform with escalation as finally determined.

Conclusion

We accordingly modify the conclusions set forth in our report dated February 20, 1952, and, for the reasons herein explained, adopt as the fair and reasonable estimate of the foreign-construction costs of the *Independence* and *Constitution*, together with Export's share of extras and escalation to date, the following:

Independence, $14,036,751.

Constitution, $14,436,956.

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

Adm. E. L. Cochrane (USN Ret.), prior to his resignation as chairman, Federal Maritime Board, on October 1, 1952, participated in the hearings before the Federal Maritime Board and in the deliberations of the Board. Subsequent to that date Admiral Cochrane has furnished very valuable advice and assistance to the Board in arriving at its conclusions, and, while not participating in the final decision, he has advised the Board that he concurs therein.

[5] The figures for escalation may be subject to further adjustment.

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FEDERAL MARITIME BOARD

No. S–41

THE OCEANIC STEAMSHIP COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY FOR "MARINE PHOENIX," TRADE ROUTE 27.

Submitted June 1, 1953. Decided June 16, 1953

Application of The Oceanic Steamship Company for operating-differential subsidy for the *SS Marine Phoenix* on Trade Route No. 27 from January 1947 to August 1948 denied because the necessary statutory findings under section 601 (a) of the Merchant Marine Act, 1936, have not been, and cannot now be, made.

Alvin J. Rockwell and *Brobeck, Phleger & Harrison* for The Oceanic Steamship Company.
John H. Dougherty for the Board.

REPORT OF THE BOARD

On September 28, 1951, we entered into a modified contract with The Oceanic Steamship Company (Oceanic) by which we agreed to grant an operating-differential subsidy for a freight service on Trade Route No. 27 between United States Pacific coast ports and ports in Australia and New Zealand. The contract, made pursuant to statutory findings, provided for from 10 to 13 subsidized freighter sailings a year, and was retroactive to January 1, 1947. The contract, among other things, reserved the question of subsidy for the austerity passenger ship *Marine Phoenix* for later determination under article I–11 (f), which provided:

> The Operator hereby agrees that it will accept and be finally bound by the ultimate decision of the Board as to whether any operating-differential subsidy payments shall be made with respect to Operator's prior operation of the chartered vessel *SS Marine Phoenix* in the Australian service on Trade Route 27.

Oceanic frankly states that it claims no contractual commitment from the Government for a subsidy for the vessel, but urges that the vessel

was operated by Oceanic with the expectation that subsidy would be allowed. For an understanding of the situation, some background statement is necessary.

The first operating-differential subsidy agreement was made with Oceanic in December 1937 and covered the operation (on this route) of two large combination passenger and freight vessels, the *Mariposa* and *Monterey*. This operation continued until 1942, when the service was suspended and the vessels were taken over by the Government for war service. In the latter half of 1946, the vessels were redelivered to Oceanic and were put into a shipyard for restoration and modernization, looking to their return to service on the route.

Meanwhile, in May 1946, the Maritime Commission (the Commission) released its report on essential foreign trade routes, which recommended that Trade Route No. 27 should include (1) a passenger and freight service requiring two special passenger-cargo type vessels, and (2) a separate freight service requiring certain approved-type freighters. In December 1946 and again in October 1947, the Commission made the necessary findings approving the subsidy application of Oceanic for the freight service. No such findings or approvals were made with respect to any combination passenger and freight vessels on the route. Oceanic has, since January 1947, operated its freighter service upon the assurance derived from the Commission's action, although, as stated above, no formal subsidy contract was entered into until September 1951.

Appreciating that there was need for passenger service on the route and realizing that the *Mariposa* and *Monterey* would not be ready for a year or so, Oceanic applied to the War Shipping Administration in 1946 for authority to operate Government vessels in the passenger service under general agency. This was refused because of the Administration's policy to restore all shipping operations to private operation as promptly as possible. Oceanic then applied to charter a Government vessel and, in December 1946, secured the *Marine Phoenix*, which was then put into the passenger service on the route.

The *Marine Phoenix* is a C–4 type vessel used as a troopship during the war, on which certain minimum postwar alterations were made to enable her better to carry commercial passengers. This vessel is similar in type to the *Marine Lynx* and *Marine Adder*, chartered to the American President Lines at about the same time, which were referred to in *American President Lines, Ltd.—Subsidy, Route 29*, 4 F. M. B. 51. The *Marine Phoenix* carried a very limited amount of cargo and had space for approximately 550 passengers in rooms for 6 to 12 occupants and in large dormitory areas holding as many as 80 passengers. The accommodations were austere and in no way

comparable to the accommodations offered on the *Mariposa* and *Monterey* prior to the war. Up to her last return voyage in August 1948, she carried her full passenger capacity, but in her operation without subsidy Oceanic lost on six round voyages in 1947 a total of approximately $168,000, and on five round voyages in 1948, a total of approximately $128,000.

Oceanic contends that its operation of the *Marine Phoenix* was performed in accordance with all requirements necessary to qualify for subsidy, and that for this reason, it incurred certain expenses which it might otherwise have avoided. At one time, in the middle of 1947, Oceanic requested authority from the Commission to withdraw the *Marine Phoenix* from Trade Route No. 27 service for two special trips to the Hawaiian Islands for its affiliate Matson Navigation Company. The request for some reason referred to withdrawing a vessel from the "subsidized service to Australia" and the Government's reply also refers to "the effective operating-differential subsidy agreement." As indicated above, there was no subsidy agreement then covering the *Marine Phoenix* and no determination by the Commission that any would be approved. Nevertheless, Oceanic points to this correspondence as an indication that both the company and the Government considered that the vessel was being operated with the expectation that she would eventually receive subsidy.

During the period of the *Marine Phoenix's* operation, there were three foreign-flag operators carrying some passengers on the route. The Carpenter Line operated two combination vessels having a capacity of 48 passengers each, and the P. A. D. Line had, among its vessels, one in this trade with a capacity for 20 passengers. The foreign-flag passenger carryings amounted to about 4.9 percent of the total in 1947 and 7.8 percent in 1948. On the other hand, foreign-flag vessels carried 67.5 percent of the cargo on the route in 1947 and 56 percent of the cargo in the first 6 months of 1948.

In March 1948, Oceanic wrote to the Commission advising that the reconversion of the *Mariposa* and *Monterey* had to be stopped and future disposition of the vessels was uncertain. Oceanic pointed out that operation of the *Marine Phoenix* had not been profitable and that the Governments of Australia and New Zealand were imposing stringent restrictions on travel in order to conserve exchange. It continued:

> The makeshift character of accommodations with which the *Phoenix* is equipped do not justify any increase in fare while the fixed expenses of operation resist any tendency to decline.

The company accordingly advised that it would terminate the charter for the vessel on May 4, 1948. At the request of the Australian Gov-

ernment, however, Oceanic agreed to operate the vessel for two additional voyages, and, in August 1948, again wrote the Commission advising that the charter of the *Marine Phoenix* was being terminated at the conclusion of her then voyage, and said:

> The accommodations furnished on this vessel are of an emergency type and cannot attract passengers in competition with accommodations on a regular passenger liner such as the *Aorangi*, operated by the Canadian-Australasian Line, which is returning to service this month after two years' reconversion in an Australian yard.

The *Aorangi* mentioned in this letter had been reconverted after the war and was put into operation in August 1948 under the Australian flag. Oceanic recognized that she would offer facilities quite superior to those available on the *Marine Phoenix* and would make it difficult for the *Marine Phoenix* to get any passenger business. The *Aorangi* continued to render passenger service on this route until May 1953.

Section 601 (a) of the Merchant Marine Act, 1936, provides, among other things, that no application for operating-differential subsidy shall be approved unless a determination is made that (1) the operation of the vessel or vessels involved is required to meet foreign-flag competition and to promote the foreign commerce of the United States, and (2) the applicant owns, or can and will build or purchase, a vessel or vessels of the size, type, speed, and number, and with the proper equipment required to enable him to operate and maintain the service in such manner as may be necessary to meet competitive conditions, and to promote the foreign commerce. These determinations have never been made by either the Commission or by us with respect to any postwar operation of a passenger-freight service by Oceanic.

Oceanic urges, however, that, while the *Marine Phoenix* was not a suitable passenger vessel for the route, it was, at the time it was put into service, the best-equipped, safest, and most suitable vessel *then available*, and that we should therefore make the necessary statutory findings. We cannot find that the operation of the *Marine Phoenix* was required to meet foreign-flag competition and to promote the foreign commerce of the United States. This vessel was placed into service as a temporary measure to meet an emergency situation, and, as we pointed out in *American President Lines, Ltd.—Subsidy, Route 29, supra*, vessels of the type of the *Marine Phoenix* are not suitable for the transportation of commercial passengers. We are also unable to make the finding that Oceanic owns, or can and will build or purchase, a vessel or vessels of the required size, type, speed, and number. Oceanic voluntarily discontinued the operation of the *Marine Phoe-*

nix as soon as the *Aorangi* began operations. Admittedly the *Marine Phoenix* was unable to meet the competitive conditions which that foreign-flag vessel created. Oceanic has made no showing of its ability or willingness to acquire a suitable passenger vessel or vessels and to operate and maintain the service in such a manner as is necessary to meet competitive conditions.

For the reasons set forth above, the application of Oceanic for subsidy on the *Marine Phoenix* must be denied.

By the Board.

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

4 F. M. B.

FEDERAL MARITIME BOARD

No. 717

PHILIP R. CONSOLO

v.

GRACE LINE INC.

Submitted May 21, 1953. Decided June 23, 1953

Respondent found to be a common carrier of bananas from Ecuador to United States Atlantic ports, and its method of contracting all of its refrigerated space to three shippers, to the exclusion of complainant, found to be unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act. 1916.

George F. Galland and *Robert N. Kharasch* for complainant.

Parker McCollester and *John R. Mahoney* for respondent.

Roscoe H. Hupper, *Burton H. White*, and *Harold B. Finn* appearing specially.

Joseph A. Klausner for the Board.

REPORT OF THE BOARD

BY THE BOARD:

Exceptions to the examiner's recommended decision were filed by respondent, and the matter was argued orally before the Vice Chairman. Our findings and conclusions agree generally with those recommended by the examiner. Exceptions and recommended findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and found not justified.

Complainant is engaged in the business of shipping bananas from Ecuador and Caribbean areas to the United States. Respondent operates subsidized freighter and combination ship services on Trade Route No. 2, including service from Ecuador to the United States. The complaint alleges that respondent has excluded complainant from the Ecuadorian banana trade by refusing to allot him refrigerated space on respondent's vessels. The complaint further alleges that

this refrigerated space has been and continues to be fully committed under long-term contracts to three other banana shippers, and that respondent's refusal to carry complainant's bananas, while carrying bananas for others, is an unjust discrimination in violation of sections 14, 15, and 16 of the Shipping Act, 1916 (hereinafter sometimes referred to as "the Act"), a violation of the conference agreement covering this trade, to which respondent is a member, a violation of the Sherman Anti-Trust Act, and a violation of section 601 (b) of the Merchant Marine Act, 1936. Respondent claims that it is a contract carrier and not a common carrier of bananas in this trade, although it admits being a common carrier in other respects.

Complainant demands an order requiring that respondent allot to him 40,000 cubic feet per week of refrigerated space, and pay him reparation. The question of reparation has been deferred.

The examiner found respondent to be a common carrier of bananas from Ecuador to United States Atlantic ports, and he found respondent's method of contracting all of its refrigerated space to three banana shippers under long-term contracts, to the exclusion of complainant, to be in violation of sections 14, 15, and 16 of the Act. The examiner recommended that respondent should be required to rearrange its contractual commitments with other banana shippers and to allot to complainant the space requested for a period of one year. He found that the record failed to sustain a violation of the Sherman Anti-Trust Act, and the allegation of a violation of section 601 (b) of the Merchant Marine Act, 1936, was stricken by him upon respondent's motion; since no exceptions were taken to us on these latter rulings, only the alleged violations of the Shipping Act will require further discussion.

The primary issue now before us is whether respondent is legally authorized to enter into private contracts committing its available refrigerated space for indefinite periods in the future, to the exclusion of complainant.

We make the following findings of fact:

1. Respondent's corporate charter authorizes it generally to engage in the shipping business and to enter into agreements of every kind.

2. Respondent operates on Trade Route No. 2, northbound and southbound, between New York and North Atlantic ports and the west coast of South America, including ports in Chile, Peru, and Ecuador. Respondent operates six combination passenger-freight vessels on a weekly service and three freight vessels on a fortnightly service, all making calls northbound at one or more ports in Ecuador.

Each of respondent's vessels on the route has, in addition to space for general cargo, refrigerated compartments suitable for carrying bananas. The combination vessels have six compartments of approximately 20,000 cubic feet capacity each, and the freighters have four compartments of approximately 23,000 cubic feet capacity each. Respondent is the only United States-flag operator offering a regular common-carrier berth service on the route. There are a number of competitive foreign lines, of which the Chilean Line, advertising 15 sailings a year with refrigerated space, is the most important. Respondent has held itself out as a common carrier on this route in the transportation of passengers, general cargo, and refrigerated cargo both northbound and southbound, but respondent contends that it has not held itself out as, and is not, a common carrier of bananas northbound from Ecuador to the United States.

3. Respondent holds an operating-differential subsidy contract covering all of its vessels on the route. Respondent has also received certain construction subsidies for vessels it operates on the route. Respondent, in its applications for construction and operating subsidies under the Merchant Marine Act, 1936, represented that it was an established operator on Trade Route No. 2, calling at several ports in Ecuador, that it provided regular service, and that homeward cargo to New York consisted largely of such cargo as copper, coffee, produce, and bananas. The subsidy contracts recite that the vessels to be subsidized are of the type required to enable the operator to meet competitive conditions and to promote foreign commerce of the United States. The operating-subsidy contract provides that respondent will make a specified number of sailings on the Trade Route No. 2 berth service, and it obligates respondent to obtain our approval before entering into any agreement applicable to the subsidized route which provides for any pooling, allotting of sailings, traffic, or area, or "which restricts or attempts to restrict the volume, scope, frequency, or coverage of any such subsidized service." No approval for any commitments of respondent's refrigerated space has been obtained.

4. Respondent is a party to two conference agreements on the route, both approved by us or our predecessors. Agreement No. 3302 covers northbound commerce from Colombia and Ecuador to the United States, which respondent signed as a "common carried by water". The members of that conference agree not to discriminate unjustly against any shipper or consignee. Respondent contends that, since bananas are considered a specialty, they do not come within the scope of this conference agreement. Respondent is also a member of Conference Agreement No. 7890, covering northbound cargo from Chile and Peru

to the United States. Both conferences have authority to fix transportation rates.

5. Under the Ecuadorian Conference (No. 3302), the tariff to U. S. Atlantic ports shows the following items:

Fruits, fresh, under refrigeration, subject to special arrangements of individual carriers.
General Cargo N. O. S. (not otherwise specified).

The conference tariff also publishes specific rates for fruit, with or without refrigeration, from Ecuador to Panama Canal ports on Trade Route No. 2. The tariff issued by the Chile and Peru Conference (No. 7890), not applicable, of course, to transportation of bananas from Ecuador, but, nevertheless, on the same trade route, provides tariffs for refrigerator fresh fruits, followed by specification of various types of fruits such as apples, but not including bananas, and an item of "fresh fruits, N. O. S." and also "refrigerator cargo, N. O. S.". Bananas are not imported from Chile or Peru, but respondent's ships operating southbound on Trade Route No. 2 carry bananas from Ecuador to Chile on a contract basis with no specific amount of space reserved, the shippers receiving notice of space available 12 days before ship's arrival at the banana loading port. The movement consists primarily of "rejects" and very little moves under refrigeration.

6. Respondent's bill of lading applicable to cargo from Ecuador indicates that respondent will carry green fruits and other refrigerator cargo, but stipulates that to obtain refrigeration the shipper must request such service in writing. The bill of lading also states that the ship is not equipped to carry live animals, birds, or fish and "the carrier does not hold itself out as prepared to transport them."

7. Respondent carries Chilean fruit under refrigeration northbound as a common carrier. Like bananas, this fruit is perishable, but it can be temporarily stored at port of origin in shoreside refrigerated facilities if shipping space is lacking, and it can be carried mixed as to types in the same compartment. Respondent makes preliminary inquiry as far in advance as possible to ascertain how much Chilean fruit will move, and makes advance bookings both of such fruit and general cargo.

8. In one case, but not on this route, respondent shipped pipe in practically full shiploads on a common carrier basis on a forward booking contract extending over a period of 9 months.

9. There are various special requirements for the carriage of bananas. Bananas are cut when green and begin to ripen immediately and must be loaded in the vessel's refrigerated compartments

within 2 to 4 days after cutting. They are highly perishable, and unlike Chilean fruits, for instance, cannot be stored under refrigeration at the port of origin if shut out. Bananas give off a gas, particularly riper bananas and those of poor quality and condition, which will hasten the ripening of other bananas stowed in the same compartment. Bananas in different conditions require different refrigeration. Hence, it is desirable to stow in the same compartment bananas of uniform grade, quality, and condition. Once stowed they must be kept under rigid temperature control, instructions for which are given by the shipper. Banana stems stowed in the same compartment are separated by lots placed in individual bins where they are braced and held upright so as to distribute the weight. It is possible for banana shipments of two or more shippers to be carried in the same compartment if they are of uniform grade and condition. This may involve risk of claims, however, if one lot is damaged due to the ripening of other lots. Moreover, such mingling in the same compartment may cause delay and confusion at port of discharge, where bananas are placed directly in trucks or rail cars. In any event, it has been the custom of respondent to allot a single compartment to no more than one banana shipper.

10. The inception of special contracts for shipping bananas from Ecuador resulted from the desire of respondent in the early 1930's to utilize more fully its northbound refrigerated space. Respondent was advised by engineers of United Fruit Company to make extensive alterations in the refrigeration facilities on its combination vessels. After making such alterations, respondent signed a contract with United Fruit giving that company the exclusive use of the improved refrigerated space for a 6-year period from April 1934. This contractual relation has continued, except during the war, the present contract expiring in July 1954. In April 1947, United Fruit released to respondent one compartment on each combination ship, subject to recall by United Fruit on 60 days' notice. This released compartment was then committed by respondent to one I. B. Joselow, subject to cancellation on 60 days' notice. The commitment with Joselow has been from time to time extended, most recently under a 2-year contract ending July 1954. In 1948, when the three freighters were placed in the trade, their refrigerated compartments were committed to Joselow under contracts which now run until July 5, 1953. Joselow assigned his rights to the space on the freighters to Cia. Frutera Sud Americana, which agreed to purchase bananas from Joselow or a company controlled by him. In 1949, respondent added two additional compartments to each of its combination vessels and committed these directly to Cia. Frutera under contracts which now run to June

30, 1954. These space contracts impose on the shipper the obligation to pay a minimum amount for the space whether used or not; to pay freight on outturn weight; to load, stow, and unload; to furnish refrigeration instructions; and to release certain space for the seasonal movement of Chilean fruit. Bills of lading are issued, but these are subject to the terms of the space contracts. Respondent has the right to cancel all except United Fruit's contracts upon 60–120 days' notice, and United Fruit has the right to suspend shipments on 30 days' notice.

11. Complainant has been engaged in the banana business, sometimes with his brother Charles R. Consolo, until just prior to the hearing in this proceeding in January 1952. He imported bananas from Ecuador to Florida in 1944 or 1945, using chartered corvettes, but refrigeration equipment on these ships broke down on several occasions, and their use was discontinued. Being unable to obtain other space from Ecuador at satisfactory rates, he imported bananas from the Caribbean area until early 1952. Complainant testified that Ecuador is the only open market in which "independents", like himself, can purchase bananas suitable for sale in this country in any quantity. Complainant and his brother Charles R. Consolo, under different corporate names, made a series of requests for space from respondent for the carriage of bananas from Eucador to the United States, by phone, letter, and through intermediaries beginning in 1947 up to 1951 when the complaint was filed. Complainant never called at respondent's New York office personally, but did ask for an appointment and was told that there was no need for an appointment because there was no space available. Respondent advised Charles Consolo in 1947 by letter that they were unable to offer space, but that in the event of a change "we will be pleased to get in touch with you." One month before the filing of the complaint, complainant's attorney notified respondent that Consolo required 40,000–50,000 feet of refrigerated space per sailing, and requested a fair and prompt allotment of space for the shipment of bananas from Guayaquil, Ecuador, to the east coast of the United States. Respondent replied that all space was committed under contracts with various shippers, the first contract to expire August 1952, and said that if complainant so desired, respondent would get in touch with him prior to the contract expiration so that respondent could give consideration to any contractual proposal which complainant wished to make along with similar proposals from others. After this proceeding started, complainant's attorney on April 11, 1952, again wrote respondent for advice as to how complainant should proceed to get space. Respondent offered no advice, and a month later complainant made an offer in writing for 40,000 cubic feet per week of refrigerated space for bananas from Ecuador to New York at $35 per ton, and this offer was

declined by respondent. No comparison can be made between the rate of $35 a ton proposed by complainant and the rates accorded to the present contract shippers, since respondent has refused to produce the rates in their contracts notwithstanding that it was directed to do so by subpena from the examiner.

12. Complainant testified that he had ability to buy from Ecuador 10,000 stems of bananas weekly, requiring 40,000 cubic feet of space, and that growers and agents in Ecuador had offered to sell him bananas in ample quantities, but that before arranging to buy or sell bananas, he would need some assurance of continuity of space. He testified that if he could obtain assurance of space from respondent, he would be willing to pay an agreed amount whether he used the space or not. Complainant testified that he had not made and could not make any commitments to buy bananas because of lack of transportation.

DISCUSSION

As above stated, respondent admits that it operates combination vessels and freighters generally as common carriers on Trade Route No. 2 between Ecuador and the United States, but denies that it has in the past or present held itself out as a common carrier to carry bananas to the United States. It argues that its banana contracts are private arrangements and beyond the reach of the Act and our jurisdiction. Complainant argues that the record shows that respondent has held itself out as a common carrier of bananas as well as other commodities, and that, in any event, even an express denial of such "holding out" by respondent as to a single commodity is, under the circumstances, ineffective to give it the status of a private carrier of such commodity. Complainant contends that if a common carrier may by its own declaration exclude some commodities from common carriage status it will in this manner be able to discriminate unfairly between shippers and avoid common carrier regulations under the Act.

Complainant argues that the following circumstances show that respondent actually holds itself out as a common carrier of bananas in the trade: (a) respondent's corporate charter authorizes it to engage in a common carrier shipping business; (b) respondent's common carrier membership in conferences which are authorized to fix rates and are given protection under section 15 of the Act; (c) the conference tariffs to which respondent is a party, which provide for the carriage of fresh fruit under refrigeration between Ecuador and the United States, and which also provide for certain handling charges for bananas when carried to the west coast of the United States; (d) respondent's bill of lading provisions denying any holding out to carry certain commodities (live animals, etc.) but making no such

denial as to bananas; (e) the fact that respondent actually carries bananas southbound from Ecuador on its Trade Route No. 2 vessels without long-term commitments as to space; (f) the correspondence of respondent already mentioned in connection with applications for northbound banana space; (g) respondent's status as the recipient of operating-differential subsidy from the United States Government for operation of a berth service with combination and freighter vessels on Trade Route No. 2, and the contract undertakings of respondent already mentioned in connection therewith. While some of the circumstances mentioned are consistent with the maintenance of a common-carrier service on the route, they are not inconsistent with the type of service which respondent admits it furnishes between Ecuador and the United States, i. e., a common-carrier service for commodities generally and a contract or private-carrier service for bananas—if, in fact, a common carrier of commodities generally is legally authorized to make exceptions under the circumstances here disclosed.

The term "common carrier" is not defined in the Act, but the legislative history indicates that the person to be regulated is the "common carrier" at common law. *Agreement No. 7620*, 2 U. S. M. C. 749 at 752 (1945). In *The Wildenfels*, 161 Fed. 864 (C. C. A. 2d, 1908), the court said, p. 866:

> According to all the authorities, the essential characteristics of the common carrier are that he holds himself out as such to the world; that he undertakes generally, and for all persons indifferently, to carry goods and deliver them, for hire; and that his public profession of his employment to be such that, if he refuse, without some just ground, to carry goods for any one, in the course of his employment and for a reasonable and customary price, he will be liable to an action.

Respondent admits that it has undertaken to carry general cargo from Ecuador to the United States for all persons indifferently, and has for many years done so on its combination and freighter vessels. We think this admitted fact is determinative of this proceeding and that, in spite of special arrangements of whatever sort, respondent may not lawfully assume the status of a contract carrier to any shipper on its common carrier vessels, or grant to any shipper on such vessel special rates, special privileges, or other special advantages not accorded to all persons indifferently. Respondent has made a holding out to the shipping public to carry cargoes generally on these ships (subject to certain limitations as to specific items not carried at all). It may not on these same ships designate certain items of cargo or certain categories of shippers for special or privileged treatment. To permit such special treatment would be to allow the discrimination which the Act by sections 14 (4) and 16 prohibits.

We are aware of the cases which hold that a carrier may be a common carrier and a private carrier at the same time, provided different vessels are used. In *Transp. by Mendez & Co., Inc., between U. S. and Puerto Rico*, 2 U. S. M. C. 717, 721 (1944), the Maritime Commission said:

> A carrier may be both a common and a contract carrier, not, however, on one vessel on the same voyage.

Separate vessel operation was also presumably the case in *Puerto Rican Rates*, 2 U. S. M. C. 117, 126 (1939). We are also aware of cases where the capacity of a ship or other facility is divided between two or three contract shippers without any holding out to carry for all persons indifferently. *New York Marine Co.* v. *Buffalo Barge Towing Corp.*, 2 U. S. M. C. 216 (1939); *American Range Lines. Inc., Contract Carrier Application*, 260 I. C. C. 362 (1944); *Union Sulphur Co., Inc., Contract Carrier Application*, 260 I. C. C. 749 (1946). We find it unnecessary in this proceeding to consider the requirements as to proprietary cargo of the carrier transported on its own common-carrier vessels where its common-carrier obligations toward the shipping public are respected.

The rule that a carrier which holds out its vessel or other facility to the public generally as a common carrier may not make special arrangements for transportation on the same vessel has been announced by the Maritime Commission in the *Mendez* case, *supra*, and also in *Agreements 6210, etc.*, 2 U. S. M. C. 166 (1939), where the Commission disapproved an agreement permitting a carrier to transport paper for a dominant shipper at one rate and for other shippers on the same vessel at a different rate. The Commission said at p. 170:

> It is contended that no provision of the law permits us to condemn dual operation as a common and as a contract carrier on the same vessel on the same voyage, and that even if such power does exist, this case is not one where it should be exercised. Suffice it to say that although section 16 of the Shipping Act, 1916, does not apply to contract carriers in the coastwise trade, nevertheless, where a carrier subject to our jurisdiction attempts to operate in the above-described manner, we may order the removal of any violation of that section resulting from the operation of the contract portion. Compare *West-Bound Intercoastal Rates to Vancouver*, 1 U. S. M. C. 770, 773, 774. We find that the facts of this case do result in undue preference and prejudice, and consequently, agreement 6210–C will not be approved. See *Southern Pacific Terminal Co.* v. *I. C. C.*, 219 U. S. 498. Coastwise will be required to remove the violation thus found to exist.

In *The City of Dunkirk*, 10 F. 2d. 609 (S. D. N. Y., 1925), a carrier of cocoanut oil attempted to avoid liability for loss on the ground of a special exculpatory provision in its contract of carriage which would not have been permitted to a common carrier. The court, holding

that the vessel was a common carrier as to the cocoanut oil and that the terms of the special agreement were invalid, said, page 611:

> I see no ground whatever for holding, on the evidence, that the vessel was other than a common carrier. The case is very different from a case where the whole vessel is chartered. The *City of Dunkirk* was a general ship taking cargo at various points from various shippers and issuing bills of lading to the several shippers.

In *Gage* v. *Tirrell*, 9 Allen 299 (1864), common-carrier liability was imposed on a vessel in spite of special contract provisions with the shipper, and in that case the Supreme Judicial Court of Massachusetts said at page 302:

> The ship was therefore a general ship; that is, she was employed in the transportation of merchandise for persons generally. This fact is decisive of the character of the contract into which the parties entered, and of the nature of the liability which the defendants assumed under it. They were common carriers.

In *Hubert* v. *Public Service Commission*, 118 Pa. Super. 128 (1935), the court said:

> We have no disagreement with decisions holding that the same person may be engaged in one line of business as a common carrier and in another line of business as a private carrier. * * * Our own cases recognize this * * * But we refuse to extend or apply this ruling to the use of the same facilities, at the same time, in both common carrier and private carrier transportation.

In *Heuer Truck Lines* v. *Brownlee*, 239 Iowa 267 (1948), the court said:

> "The same facilities cannot be used at the same time in both common carrier and private carrier transportation."

See also *Waterman* v. *Stockholms*, 3 U. S. M. C. 131 (1949), where a carrier accepted fruit of certain shippers but declined fruit of other shippers, claiming it was a private carrier as to fruit. This argument was rejected and the carrier held to be a common carrier as to all.

Respondent argues that the distinctions between common carriers and private carriers set out in the judicial decisions relate to common carrier liability for loss and damage to cargo and are not applicable to a regulatory proceeding of the instant type. We believe that Congress, in adopting the common law definition of common carriers for use in the Act, adopted that definition from the cases that then existed, and that the judicial definition of the term "common carrier" is the one which we are required to observe. Respondent argues that the decisions of the Commission in the *Mendez* case, *supra*, and in *Agreements 6210, etc.*, *supra*, are not binding in this case because the type of discrimination which there existed could not exist here. Respondent points out that in both of those cases the carrier attempted to act

both as a common carrier and a private carrier for the same commodity on the same vessel, and that the difference in rates which the carrier charged created in those cases clear discrimination. Respondent contends that in this case such discrimination does not exist because its vessels carried no bananas to the United States except those carried under special contract. But this is not a valid distinction. In the cases cited, the discrimination arose because of a difference in rate, whereas here the discrimination arises because of the acceptance of cargo from one shipper and exclusion of cargo from another. In both cases the common carrier's duty to treat all shippers alike was violated.

Respondent further contends that it, in no event, violated any common-carrier duty because complainant, in fact, never offered any bananas for shipment. It is clear that after the positive statements of respondent that it would provide no space, the tendering of bananas by complainant would have been a futile and idle act, and, under the circumstances, was legally unnecessary. *Atlantic Coast Line* v. *Geraty*, 166 Fed. 10 (C. C. A. 4th, 1908).

Finally, respondent argues that the problems peculiar to the banana trade demonstrate that it is *sui generis*, and that it is impossible for respondent to hold its service out to the public because the special circumstances require the carriage of bananas under private contract. The needs of particular shippers, however, will never justify an unjust discrimination where available space is insufficient to meet the demands of all. Where, as here, compartments for bananas are at a premium, some reasonable arrangement for booking considerably in advance of shipment would appear to be reasonable, similar to advance booking of passenger staterooms where the demand exceeds the supply, or similar to the advance booking conducted by respondent in the carriage of bananas from Ecuador to Chile and in the carriage of northbound Chilean fruit. As pointed out by respondent, if more goods are tendered for transportation than the carrier's facilities can accommodate, a common carrier must apportion its facilities ratably among all shippers desiring them. *Penn. R. R. Co.* v. *Puritan Coal Co.*, 237 U. S. 121 (1915). The carrier may not satisfy one shipper in full, thereby disqualifying itself from meeting the demands of others.

We find that there is no justification for respondent's continuous renewal of space contracts with other banana shippers to the exclusion of complainant, nor is there anything inherent in the shipment of bananas which precludes respondent from offering its space on equitable terms which would take fair account of the necessities of the commerce and the needs of individual shippers. Complainant has

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repeatedly demanded refrigerated space over a period of years and respondent has refused these demands. The record shows that complainant's demand for 40,000 cubic feet of refrigerator space per week was made in good faith to meet his legitimate business requirements.

CONCLUSIONS

On the basis of the facts adduced in the record, we conclude that the contracts under which the present banana shippers have been favored by respondent constitute unjust discrimination in violation of sections 14 (4) and 16 of the Act. Under the circumstances, no determination is necessary under section 15 of the Act. Respondent will be required to cancel its private contracts for the carriage of bananas from Ecuador to the United States, and to prorate available space under forward booking arrangements reasonable for the banana trade. These arrangements necessarily will be made on terms of equality as to rates and conditions and may be made for periods not exceeding six months in advance, which we find to be the limit of reasonableness for forward booking under these circumstances. Such forward booking arrangements may be subject to renewal or modification reasonably in advance of expiration in the light of changing demands and conditions. Because of the past benefits derived by the present banana shippers by the use of space assigned to them as the result of the unjust discrimination against complainant heretofore mentioned, the present shippers shall be deferred in the assignment of space by respondent for the first booking period so as to permit the assignment of 40,000 cubic feet per week to complainant for that period. The booking of suitable space for subsequent booking periods shall be made ratably among bona fide applicants on usual common carrier principles.

Although this decision does not turn on respondent's operating-differential subsidy contract, we believe that the contract clearly contemplates a berth service operation. The clause of that contract, already mentioned, by which respondent has bound itself not to enter into any agreement restricting the coverage of its subsidized services without our permission certainly places some limitation upon any conversion of a subsidized service from a common-carrier operation to a private or contract-carrier operation.

No order will be entered at this time. Within 30 days after the serving of this report, complainant may submit an appropriate order, on matters other than reparation, for our approval, after 7 days' advance service upon respondent. Hearing on the question of reparation will be set by the examiner.

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

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 3d day of September A. D. 1953

No. 717

PHILIP R. CONSOLO

v.

GRACE LINE INC.

No order having been submitted for our approval pursuant to permission granted in our report of June 23, 1953, and the following documents having since that date been filed in this case:

(a) Petition of Compania Frutera Sud Americana to intervene;

(b) Petition of Irving B. Joselow to intervene;

(c) Petition of complainant objecting to our finding that a period not exceeding six months be the limit of reasonableness for forward booking, and asking to take additional evidence relative thereto; also setting forth advice that United Fruit Company, one of respondent's banana shippers mentioned in the report, had surrendered all its space on respondent's ships, and that complainant and respondent had thereupon entered into two contracts assuring to complainant sufficient space to meet all its needs for banana shipments, such contracts running for two years from July 15, 1953, and being subject to termination at such time as any order entered in this proceeding in accordance with our report of June 23, 1953, should become final;

(d) Notice of complainant that it had released respondent from all liability for reparation claimed in this proceeding;

(e) Petition of respondent (1) consenting to the taking of additional evidence relative to the duration of a proper booking period, (2) asking that our report of June 23, 1953, be reconsidered, alleging error in our finding that respondent was a common carrier, or, in the alternative, asking that the report be withdrawn;

(f) Reply of counsel for the Board to complainant's petition (c) recommending (1) that this proceeding be discontinued with-

out final order on the ground that all aspects of the controversy between the parties have been terminated by their agreements, and (2) that the Board undertake a separate investigation as to the lawfulness of respondent's space contracts referred to in complainant's petition (c);

(g) Reply of counsel for complainant to recommendation of Board counsel that an investigation be made as to the lawfulness of respondent's space contracts; and

It appearing, That the complaint filed in this proceeding has been satisfied and that there is no longer any matter in controversy between the parties, and that there is no occasion for further proceedings in this case;

It is ordered, That the petitions above mentioned, (a), (b), (c), and (e), be, and the same are hereby denied; and

It is further ordered, That this proceeding be, and it is hereby, discontinued; and

It is further ordered, That the papers in the case be referred to the Maritime Administrator for his information and for such action as he may deem appropriate in connection with the administration of respondent's operating-differential subsidy contract pursuant to Reorganization Plan No. 21 of 1950.

By the Board.

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

FEDERAL MARITIME BOARD

No. S–34

BLOOMFIELD STEAMSHIP COMPANY—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 13, SERVICE 1, AND TRADE ROUTE NO. 21, SERVICE 5

Submitted April 24, 1953. Decided June 30, 1953

An operating-differential subsidy with respect to vessels to be operated by Bloomfield Steamship Company on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, would involve service which would be in addition to existing services within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

The service already provided by vessels of United States registry on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, is inadequate, and, in the accomplishment of the purposes and policies of the Act, additional vessels should be operated thereon.

The provisions of section 605 (c) of the Act do not interpose a bar to the granting to applicant of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5.

All further questions with respect to the application for operating-differential subsidy are expressly reserved for future determination.

Paul D. Page, Jr., *George A. Butler*, and *Malcolm R. Wilkey* for Bloomfield Steamship Company.

Joseph M. Rault, *Odell Kominers*, and *Wright Morrow* for Lykes Bros. Steamship Co., Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation, and *Nuel D. Belnap* and *Richard J. Hardy* for Jordan River Line, Inc., and others, interveners.

Max E. Halpern, *Joseph A. Klausner*, and *Edward Aptaker* for the Board.

REPORT OF THE BOARD*

Exceptions to the recommended decision of the examiner were filed by interveners, and the matter was argued orally before us. Our

*See Report of Board on Reargument, 4 F. M. B. 349.

findings are in substantial agreement with those of the examiner. Exceptions and requested findings not discussed in this report nor reflected in our findings or conclusions have been given consideration and are overruled.

This is a proceeding under section 605 (c) of the Merchant Marine Act, 1936 (the Act), concerning the application of Bloomfield Steamship Company (Bloomfield) for operating-differential subsidy for the operation of freight vessels on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5. Lykes Bros. Steamship Co., Inc. (Lykes), intervened, opposing the application with respect to both routes; Waterman Steamship Corporation (Waterman) intervened, opposing only as to operations on Trade Route No. 21, Service 5.

Our present determinations are confined to the single issue of whether section 605 (c) of the Act interposes a bar to our approval of an operating-differential subsidy contract with applicant covering either or both of the routes presently involved. Section 605 (c) provides in part 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, 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. (Paragraphing supplied.)

The first part of this section provides that no contract shall be made with an applicant for a service which would be in addition to the existing service unless the existing United States-flag service on the route is inadequate and unless the purposes and policy of the Act require additional vessels. The second part of the section applies if the effect of making a contract with an applicant would be to give undue advantage or would be unduly prejudicial as between citizens of the United States competing on the route, and interposes a bar unless a subsidy is necessary to provide adequate United States-flag service.

The examiner has found that applicant's services on both routes as proposed for subsidy would be in addition to existing services

thereon, that existing United States-flag service on each route was inadequate, and that the policy and purposes of the Act require additional United States-flag vessels. He stated that it was not shown that the effect of a contract with applicant would be to give undue advantage or be unduly prejudicial as between citizens of the United States.

No exceptions were filed to the finding of the examiner that applicant's proposed services on both routes would be in addition to existing services thereon. In connection with this issue, a brief statement of Bloomfield's past operations on the routes is desirable.

Bloomfield purchased five Victory-type and three Liberty-type vessels and began operations on both routes in 1951. On Trade Route No. 13, although Bloomfield made 11 sailings from three Gulf ports between April 7, 1951, and August 8, 1952, carrying bulk grain and cotton outbound and a small amount of beet pulp homebound, there was no regularity of sailings, 7 of the 11 vessels carried full cargoes of grain and in all only three export shippers were served. On Trade Route No. 21/5, Bloomfield made 19 sailings between October 17, 1951, and August 30, 1952, and on all but one of these sailings over 8,000 tons of either bulk grain or bulk sulphur was carried, leaving little space for other shipments. On the other hand, applicant's proposed services on both routes, if a subsidy is granted, would have to be substantially superior to his past operations in the type of vessels regularly employed, the extent of service offered, the regularity and frequency of sailings, the port coverage at origin and destination, and the availability of service to the general public. We agree with the examiner's finding on the statutory issue of "the existing service;" we shall, therefore, proceed to consider the evidence presented as it bears on the other statutory issues, taking up each route separately.

TRADE ROUTE NO. 13, SERVICE 1

Trade Route No. 13, Service 1, covers freighter service generally between United States Gulf ports and the Mediterranean area.[1] Lykes, operating a subsidized service on this route, intervened in opposition to the application. States Marine Corporation and Isthmian Steamship Company also operate United States-flag berth services on the route without subsidy, but neither of these operators

[1] The itinerary is described in the Report of the United States Maritime Commission on Essential Foreign Trade Routes (1949) as follows:

Between a United States Gulf port or ports and a port or ports in Spain and/or Portugal and/or the Mediterranean and/or the Black Sea, with the privilege of calling at Casablanca, Spanish Morocco, and at ports in the United States South Atlantic, south of Norfolk, and at ports in the West Indies and Mexico.

intervened at any stage of the proceeding. Waterman initiated a liner service on the route in 1948, but discontinued it in 1950 shortly after the outbreak of Korean hostilities; Waterman does not oppose a subsidy to applicant on Trade Route No. 13.

During the five prewar years, 1936 to 1940 inclusive, the aggregate volume of exports moving over Trade Route No. 13, including exports from privilege ports in the South Atlantic area, was approximately 600,000 tons per year; the volume of imports ranged from 89,000 tons in 1937 to 27,000 tons in 1940. Italy was the major destination for exports, followed in order by France, Spain, and Greece. During this period, cotton, petroleum products, phosphate, scrap iron, and sulphur were the major commodities exported on liner vessels.

In the postwar years, the export movement from the Gulf alone over this route has increased more than fourfold. Imports are of only minor significance in the over-all picture. Our consideration may, therefore, be directed to the export movement, which is by far the predominant movement on the route.

The following Bureau of Census statistics,[2] introduced by Lykes, show the postwar export movement of goods transported by both liner and tramps on the route from the Gulf, with a breakdown between liner-type and tramp-type commodities and United States-flag participation in this total movement:

TABLE A (13)

Year	Total exports (tons)	Commodities				Total exports carried by United States flag (percent)
		Liner-type	Percent	Tramp-type	Percent	
1948	2,740,000	781,000	29	1,959,000	71	71
1949	2,371,000	812,000	34	1,559,000	66	52
1950	2,153,000	592,000	28	1,561,000	72	35
1951	2,388,000	614,000	26	1,774,000	74	51

Commodities such as grain, sulphur, coal, phosphate rock, and oil seed, which to a large extent move in bulk on tramp vessels, have been referred to by Lykes as "tramp-type commodities." Other items are referred to by Lykes as "liner-type commodities." It is significant that much tramp-type cargo moves on liners as nucleus and filler cargo. Exports from the privilege South Atlantic ports of call, not included in the above statistics, have been small as compared with the total exports on the route, ranging from a high of 10.5

[2] Census statistics exclude military and "in transit" cargoes which are included in Maritime Administration statistics referred to in the examiner's report.

percent of the total on the route in 1947 to a low of 2.3 percent in 1950 and 4.6 percent in 1951.

It is evident that the great increase in exports postwar is in large part the result of our foreign-aid programs and the concomitant exportation of relief and rehabilitation cargoes. This movement has involved great quantities of tramp-type commodities carried on both liners and tramps.

The principal liner-type commodities which have moved outbound during the postwar years are cotton, petroleum products, wheat flour, and cargo NOS. With the exception of wheat flour, all of these commodities moved in substantial volume in the prewar years. The large movement of wheat flour has been a postwar phenomenon, and it has been mostly financed by United States funds.

The principal tramp-type commodities during the years from 1948 to 1951 have been grains, sulphur, and phosphate rock. The movement of grains has been the most substantial, averaging over 1,200,000 tons for each year. The movements of sulphur and phosphate rock, although not entirely uniform for each year, have averaged approximately 100,000 tons for each commodity. There was an extremely heavy movement of coal during 1947 and 1948, but this commodity has now ceased to move.

Italy has continued its historic position of being the predominant receiver of United States exports to the Mediterranean area, but France and Spain have been passed by Greece. Yugoslavia, Turkey, and Levantine countries, which were of minor prewar importance, have become the destinations of very substantial traffic movements.

During the years from 1948 to 1951, liner participation in the total Trade Route No. 13 export movement from the Gulf, and United States-flag participation therein, as shown by census statistics, were as follows:

TABLE B (13)

Year	Total exports (tons)	Liner carryings (tons)	Liner carryings by commodities				Liner exports carried by United States flag (percent) [3]
			Liner-type	Percent	Tramp-type	Percent	
1948	2,740,000	891,000	606,000	68	285,000	32	75
1949	2,371,000	1,148,000	691,000	60	457,000	40	67
1950	2,153,000	875,000	512,000	59	363,000	41	54
1951	2,388,000	810,000	445,000	55	365,000	45	46

[3] Maritime Administration figures show slightly different percentages of liner carryings by United States-flag vessels as follows: 1950, 57.1 percent; 1951, 49.3 percent.

It should be noted that from 1948 to 1951 the tramp-type commodities carried on liner vessels show a steady increase percentagewise from 32 percent to 45 percent.

Lykes is the only subsidized United States operator on either of the routes presently involved. This carrier owns and operates a fleet of 54 vessels, 51 C type and 3 Victory type. Under the terms of its operating-differential subsidy contract, Lykes operates six subsidized berth services out of the Gulf, and it may use its vessels interchangeably on the several services.[4] Its contract provides for a minimum of 24 and a maximum of 48 sailings annually on Trade Route No. 13. Lykes is the principal operator in this trade. Its postwar sailings on the route may be summarized as follows:

TABLE C (13)

Year	Owned vessels		Chartered vessels	Total
	Subsidized	Nonsubsidized		
1947	38	3	72	113
1948	48		61	109
1949	39		32	71
1950	40		2	42
1951	32	5	14	51

The record shows that there were abnormal movements on both Trade Routes Nos. 13 and 21/5 in postwar years due to the necessity of cargoes for feeding and rehabilitating the peoples of Europe and the Mediterranean area, and later, due to Korean, Indian grain, and European coal programs. Lykes met these abnormal needs by chartering Government vessels, and after the abnormal needs were met it returned to its traditional policy of using only its owned ships. In each of the postwar years Lykes has performed substantially more than the minimum 24 berth sailings with owned ships on Trade Route No. 13 required under its contract, and has sailed substantially full on all its outbound voyages.

The other two United States-flag berth operators on this route, States Marine and Isthmian, did not intervene. The complete post-

[4] The six subsidized berth services of Lykes provide for minimum and maximum sailings as follows:

Line	Trade route	Minimum	Maximum
A	19 (Caribbean)	76	108
B-1	21/4 (United Kingdom west coast)	100	146
B-2	21/5 (Continent)		
C	13 (Mediterranean)	24	48
D	22 (Orient)	20	24
E	15-B (South Africa)	8	13

war traffic statistics for each operator are, consequently, not available in this record. States Marine owns 20 vessels: 5 C2's, 5 Victorys, and 10 Libertys; and for operation on this and other routes habitually charters many privately owned vessels. It operates in a number of trades and has maintained a service on Trade Route No. 13 since 1947. It ordinarily operates on the outbound portion of the route only. States Marine operations on Trade Route No. 13 for the years 1948, 1950, and 1951 are shown in the following table:

TABLE D (13)

	Total sailings	Owned	Chartered	Cargo	
				Commercial	Military
1948	11	n. a.	n. a.	90, 559	3, 500
1950	30	12	18	144, 292	50, 531
1951	12	4	8	80, 066	9, 358

States Marine's average commercial and military carryings per vessel of Trade Route No. 13 cargo for the years 1950 and 1951 amounted to 6,768. In 1950, seven of its sailings with owned ships were made with Libertys, and in 1951, 11 of its total of 12 sailings were made with Libertys.

Isthmian, with a large fleet of C3-type vessels, in addition to numerous other services; operates from Gulf and Atlantic ports to the Persian Gulf, and carries some cargo from the Gulf to Beirut, Haifa, and Alexandria, which are ports on Trade Route No. 13. In 1948, 1950, and 1951, Trade Route No. 13 cargo carried by this operator amounted to only 9,711 tons, 22,431 tons and 14,170 tons, respectively, and over these years averaged about 1,000 tons per sailing with respect to destinations on the route.

The foreign-flag competition on this route is substantial and effective. The major foreign-flag competition is provided by three operators, who, together, made 51 sailings a year in 1950 and 1951. The record indicates that foreign-flag lines are aided by such practices of instructed routings, currency restrictions, and other means employed by their countries to force cargo to move on vessels of their own flags. The evidence shows, however, that United States-flag vessels in liner service have sailed substantially full, in the postwar years, but their percentage of carryings has steadily dropped, and that their relative participation in the trade could not have been materially increased unless more United States-flag capacity had been provided.

TRADE ROUTE NO. 21, SERVICE 5

Trade Route No. 21, Service 5, covers freighter service between United States Gulf ports, west of Gulfport, Miss., and ports on the east coast of the United Kingdom and continental Europe.[5] Lykes and Waterman are the only carriers intervening in opposition to the application for subsidy on this route. States Marine also operates a United States-flag berth service on the route, but, as already stated, did not intervene.

During the prewar years from 1936 to 1938, the export and import movement on the entire Trade Route No. 21 [6] and the total export and import movement on Service 5 thereof were as follows:

TABLE E (21)

Year	Exports		Imports	
	Total T. R. 21	Service 5	Total T. R. 21	Service 5
1936	2,740,000	1,154,000	461,000	246,000
1937	3,926,000	1,934,000	548,000	270,000
1938	5,554,000	2,865,000	390,000	205,000

Following the outbreak of the European war in 1939, American vessels were barred from trading on the route, and statistics for 1939 and 1940 are of little value and have not been included. The increased export movement in 1937 and 1938 was occasioned primarily by the movement of wheat and coarse grains from the United States, resulting from a crop failure in Argentina. The United Kingdom and Germany were the destinations for approximately 60 percent of the total exports on the entire route, with the Netherlands, France, Belgium, and the Baltic-Scandinavian area receiving the balance. The import movement originated principally in Belgium, Germany, the Netherlands, and the Baltic-Scandinavian area. Cotton and lumber were the principal liner-type export commodities that moved during this period, aggregating more than 50 percent of the entire export movement of liner-type commodities.

[5] The itinerary of Service 5 is defined in the Report of the United States Maritime Commission on Essential Foreign Trade Routes (1949) as follows:

Between a United States Gulf port or ports (west of but not including Gulfport, Mississippi) and a port or ports on the East Coast of United Kingdom and/or a port or ports in Continental Europe (north of and including Bordeaux) including Baltic and Scandinavian ports, with privilege of calling at Tampa, Port Tampa, Boca Grande, and at ports in the West Indies and Mexico.

[6] Trade Route No. 21 includes, in addition to Service 5, Services 1, 2, and 3 from east Gulf ports to United Kingdom and Continent, and Service 4 from west Gulf ports to west coast of United Kingdom.

As in the case of Trade Route No. 13, the export movement is by far larger and more important than the import movement, and our analysis may be confined to the export movement. The export movement on the route has increased substantially since the Second World War. Census statistics, introduced by Lykes, show the total postwar export movement from the Gulf on all services of Trade Route No. 21, and the postwar export movement on Service 5 thereof, with a breakdown between liner-type and tramp-type commodities and United States-flag participation in this total Service 5 movement, to be as follows:

TABLE F (21)

Year	Entire Trade Route 21 (tons)	Total Service 5 only (tons)	Commodities—Service 5 only				Service 5 export carried by United States flag (percent)
			Liner-type	Percent	Tramp-type	Percent	
1948	4,734,000	3,380,000	1,379,000	41	2,001,000	59	36
1949	4,960,000	3,690,000	1,393,000	38	2,297,000	62	28
1950	4,707,000	3,424,000	923,000	27	2,501,000	73	40
1951	6,831,000	4,605,000	912,000	20	3,693,000	80	44

During these postwar years, the export movement from the privilege ports decreased sharply as compared with the prewar period. Whereas prewar exports from privilege ports in the Tampa area ranged from a low of 495,000 tons in 1937 to a high of 688,000 tons in 1938, postwar exports from the privilege ports have ranged from a low of 102,000 tons in 1947 to a high of 346,000 tons in 1949. Postwar exports from the privilege ports have not accounted for more than 8 percent of the total exports on Service 5, and a substantial portion of these exports has moved via tramp vessels.

As in the case of Trade Route No. 13, it is evident that the great increase in exports is in large part the result of our foreign-aid programs and the concomitant exportation of relief and rehabilitation cargoes. This movement has involved the carriage of great quantities of tramp-type commodities. Whereas the movement of liner-type commodities has decreased from 1,379,000 tons in 1948 to 912,000 tons in 1951, the movement of tramp-type commodities has increased from 2,001,000 tons in 1948 to 3,693,000 tons in 1951.

The principal liner-type commodities which have moved during the postwar years are cotton, petroleum products, wheat flour, fodder and feed, carbon black, and cargo NOS. Lumber, which was a principal prewar commodity, has not moved in significant volume in the postwar years. The movement of petroleum products, wheat flour, and fodder and feed, on the other hand, has been substantially larger in the postwar period than in the prewar period. Carbon black, the average yearly prewar movement of which amounted to 35,000 tons,

did not move during the years from 1947 to 1950, but 63,000 tons of this commodity were exported in 1951. The movement of wheat flour on this route, while substantial, has not accounted for as significant a portion of the total movement on the route during the post war years as on Trade Route No. 13.

The principal tramp-type commodities during the postwar period have been grains, sulphur, and oil seed. The movement of grains has been most substantial, averaging over 2,000,000 tons for each year. The movement of sulphur has averaged approximately 290,000 tons for each year. Oil seed has moved in smaller volume, ranging from a low of 7,000 tons in 1947 to a high of 144,000 tons in 1950. There was an extremely heavy movement of coal during 1947, but this commodity has now ceased to move. As in the case of Trade Route No. 13, it is manifest that the large movement of these tramp-type commodities is due primarily to our relief and rehabilitation efforts in connection with our foreign-aid programs.

France, the Netherlands, the Baltic and Scandinavian countries, and Holland have, during the postwar period, been the principal destinations of the export movement on Service 5. The export movement to the east coast of the United Kingdom has been substantially smaller than the movement to each of those other areas.

During the years 1948 to 1951, *liner* participation in the total export movement on Service 5 from the Gulf and United States-flag participation therein, as shown by the census statistics furnished by Lykes, were as follows:

TABLE G (21)

Year	Service 5 exports (tons)	Liner carryings (tons)	Liner carryings by commodities				Liner exports carried by United States flag (percent) [7]
			Liner-type	Percent	Tramp-type	Percent	
1948	3,380,000	1,601,000	1,214,000	76	387,000	24	48
1949	3,690,000	2,003,000	1,217,000	61	786,000	39	40
1950	3,424,000	1,733,000	861,000	50	872,000	50	46
1951	4,605,000	1,957,000	859,000	44	1,098,000	56	45

On this route also, tramp-type commodities carried by liners increased percentagewise over the period from 24 percent to 56 percent.

As in the case of Trade Route No. 13, Lykes is the principal operator in this trade. Its operating-differential subsidy contract provides for a minimum of 100 and a maximum of 146 sailings annually on

[7] Maritime Administration figures show slightly different percentage of liner carryings by United States-flag vessels as follows: 1950, 46.8 percent; 1951, 47.8 percent.

Services 4 and 5. The contract does not establish separate minima and maxima for the two services, but Lykes has allocated from 18 to 26 sailings to Service 4,[8] and from 82 to 120 sailings to Service 5. The postwar sailings of Lykes on Service 5 may be summarized as follows:

TABLE H (21)

Year	Owned vessels		Chartered vessels	Total
	Subsidized	Nonsubsidized		
1947	88		110	198
1948	86	2	65	153
1949	85	1	18	104
1950	79		2	81
1951	79	12	7	98

Lykes has sailed substantially full on all of its outbound voyages during the postwar years. It has chartered Government-owned vessels to meet the peak loads, as already explained.

Waterman owns 43 C–2 type vessels, which operate on a number of routes in addition to Trade Route No. 21. This intervener inaugurated a service on Service 5 of Trade Route No. 21 in 1946, and it has operated thereon continually. Waterman provides comprehensive coverage to all major ports on Service 5, with the exception of those on the east coast of the United Kingdom and in Scandinavia.[9] Waterman calls regularly at Mobile on outbound sailings, where it loads approximately 20 percent of all its outbound carryings. Mobile is the home port of the Waterman fleet, although not on Service 5 of Trade Route No. 21. On occasion, Waterman tops off with cargo loaded at Atlantic ports; this practice, rare in 1950 and 1951, became more frequent in 1952.

During the years 1948, 1950, and 1951, Waterman made 24, 20, and 28 outbound sailings, respectively, on this service. Waterman has operated successfully in this service in every postwar year. It contemplates not less than two sailings per month in the service as its long-range average.

States Marine has operated a service on Trade Route No. 21 at least since 1948. States Marine operations on this route for the years 1948, 1950, and 1951 are shown in the following table:

[8] Service 4 of Trade Route No. 21 is between the Gulf (west of Gulfport, Miss.) and the west coast of the United Kingdom, with the privilege of calling at Irish ports, Tampa, Port Tampa, Boca Grande, and ports in the West Indies and Mexico.

[9] With respect to Scandinavian cargo, the evidence shows that Scandinavian consignees, by instructions favoring Scandinavian vessels, effectively prevent United States-flag carriers from successfully competing for such cargo.

TABLE J (21)

Year	Total sailings	Owned	Chartered	Cargo (tons)	
				Commercial	Military
1948	20			146,435	24,937
1950	27	10	17	166,911	14,591
1951	15	8	7	88,723	4,360

The average carrying per vessel in 1950 and 1951 of Trade Route 21/5 cargo was 6,540 tons, and in addition some cargo was carried between ports not on Service 5. Of 10 sailings with owned vessels in 1950, four were with Libertys, and of 8 sailings similarly made in 1952, 7 were with Libertys. The sailings of this operator have been irregularly spaced.

Foreign-flag competition on this service is effective and substantial, and in recent years has increased. The present conference foreign-flag competition is provided by seven lines. In 1950, these lines made a total of 206 sailings, and in 1951, a total of 221 sailings. In addition, there has been some competition from nonconference berth operators. As in the case of Trade Route No. 13, the evidence shows that it is a common practice for foreign consignees to instruct routings by way of foreign-flag vessels. Waterman and Lykes contend that the foreign-flag competition is, in fact, so effective that the introduction of a new United States-flag operator into the trade will not result in greater United States-flag participation in the traffic but will only dilute the traffic already carried on United States-flag vessels. The evidence shows, however, that United States-flag vessels have been sailing substantially full during each of the postwar years of record.

DISCUSSION

It being established that the application of Bloomfield is for an operating subsidy covering vessels which will be in addition to the existing services, no contract can be entered into unless the record shows to our satisfaction under the first part of section 605 (c) of the Act that the service already provided by vessels of United States registry on each route is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels are required. It is conceded in this case that if the United States-flag services are shown to be inadequate on the routes, no remaining issue needs to be decided under the second part of section 605 (c). Even if under that paragraph the effect of 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, still the making of a contract would, under the prior finding of inadequacy, be necessary to provide the adequate United States-flag service contemplated by the Act. Thus the issues to be determined are whether the United States-flag services on the routes are inadequate and whether the purposes and policy of the Act require additional vessels thereon.

Section 101 of the Act declares that it is necessary for the national defense and development of the foreign and domestic commerce of the United States that this country shall have a merchant marine which is

> sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States.

The legislative history of the Act establishes that Congress meant by "substantial" more than half of the water-borne foreign commerce of the United States.[10] The final report of the Committee on Interstate and Foreign Commerce in 1951 (Senate Report No. 2494, 81st Congress, 2d Session, p. 29) restates the same idea.

> A further declaration of policy which the Committee sees need of reaffirmation at this time is that which prays for a merchant marine sufficient to carry "a substantial portion of the water-borne export and import foreign commerce of the United States." The term "substantial portion" has at times been interpreted to imply something more than half of the water-borne commerce.

Title VI of the Act contemplates the making of operating-differential subsidies for vessels of the size, type, and speed required to meet foreign-flag competition on essential trade routes in the foreign commerce of the United States. Thus the adequacy of services under consideration in section 605 (c) is adequacy of berth or liner service on the particular trade route in question. What may be considered adequate United States-flag service on one route may be quite inadequate on another. The standard of adequacy must be consistent with the realities of each particular route and with the purposes of the Act. Furthermore, adequacy of United States-flag service under section 605 (c) is not necessarily determined exclusively by the mathematical percentage of cargo capable of being carried in United States-flag vessels. The type, size, and speed of the vessels, the regularity, frequency, and probable permanence of the service, and the relative

[10] Early drafts of the Act provided that the United States should have a merchant marine capable of carrying "at least one half of our foreign commerce." See H. R. 7521, S. 2582, H. R. 8555, 74th Cong. 1st Sess. Under recommendations of the State and Post Office Departments, the relevant language was changed to "a substantial portion" of our foreign commerce. See S. 3500, Committee Print of March 3, 1936, 74th Cong., 2nd Sess. Discussion of the meaning of "a substantial portion" makes it clear United States-flag participation in our foreign trade should be a minimum of 50 percent. See Senate Hearings on S. 3500, March 9, 1936, p. 12; 80th Cong. Rec. 10076.

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importance of export to import trade on a route are among the various matters that must be taken into consideration. In view of these considerations, and in view of the increasing effectiveness of foreign competition, we conclude that on each of the routes herein discussed the United States-flag service must be deemed inadequate unless dependable United States-flag liner sailings are available sufficient to carry at least one-half of the outbound commercial cargo that may be expected to move in liner service.

As has been stated, the liner vessels on both these routes are, and for some years have been, carrying not only general cargo of liner-type commodities, but substantial amounts of bulk commodities frequently carried by tramps. Liner vessels on the routes are relying more and more on this tramp-type cargo to fill up their available space. Some distinction has been made between such cargo used as a "nucleus" and such cargo used as "filler" for space unused up to a short time before sailing. Whether used as "nucleus" or as "filler", this tramp-type cargo along with liner-type cargo constitutes what the liners on the route may reasonably expect to carry.

The most valuable guide to measure adequacy of service in the future is necessarily adequacy of service in the past, modified to such extent as may appear justified by the best available judgment as to what the future may have in store. Before analyzing the statistics of past sailings and carryings as they bear on adequacy of service, we refer briefly to the opinion evidence of two economist witnesses. The witness produced by applicant expressed a sanguine view as to future commerce on Trade Routes Nos. 13 and 21/5, and the belief that the economic vitality and political freedom of this country are too closely tied with the well-being of the countries in Europe and the Mediterranean area to permit the United States to cut off all trade with those areas except for cash on the barrelhead. He pointed out that trade prospects of the Gulf region had been enhanced because of the shift by western Europe to the United States to fill many basic needs heretofore supplied by other countries. The other economist witness, presented by Lykes, took a much more conservative view as to the future trade between this country and western Europe, which he thought would suffer further declines as emphasis was placed on more military and less economic aid. Much of the testimony of both witnesses was, of course, speculative and cannot alone be the basis of our findings in this case.

The chief traffic officer of Lykes submitted certain traffic projections for both routes here under discussion, covering forecasts as to expected movements of liner-type commodities only. These pro-

jections are based on the experience and information available to Lykes and broken down by commodities. These were deemed reasonable by Waterman, insofar as they concerned Trade Route No. 21. Board counsel commented on their conservation and pointed out that the estimate for Trade Route No. 13 contemplates a drastic decline in export traffic from 1950 and 1951 levels. The Lykes' projection for liner-type commodities on Trade Route No. 13 was for an annual movement not exceeding 400,000 tons, and on Trade Route No. 21, Service 5, for an annual movement not exceeding 1,000,000 tons.

Counsel for the Board presented a computation based on the testimony of Lykes' economic witness to the effect that bulk or tramp-type commodities which might be expected for liner movement on Service 5 of Trade Route No. 21 would amount to 617,000 tons per year, consisting of 493,000 tons of grain, 60,000 tons of sulphur, and 64,000 tons of phosphate rock. These figures represent drops of 35 percent, 50 percent, and 40 percent in the liner carryings of grain, sulphur, and phosphate rock from the 3-year average from 1949 to 1951. Similarly, Board counsel estimated that liner vessels on Trade Route No. 13 might be expected to carry 235,000 tons of tramp-type commodities a year, consisting of 167,000 tons of grain, 30,000 tons of sulphur, and 38,000 tons of phosphate rock.

The statistics of record indicate several methods of estimating the future movement of cargo on each route which may reasonably be expected to move on liner vessels, including the following:

A. An estimate based on the actual liner carryings for the last two full years of record, i. e., 1950 and 1951;

B. An estimate based on Lykes' forecast of liner-type commodities plus Board counsel's estimate for tramp-type commodities.

Although submitting no specific traffic forecasts, Bloomfield would seem to adopt the first method. We believe that a forecast based on the first method is perhaps overly optimistic, since it relies entirely on the 1950 and 1951 movements and fails to consider possible changes from those levels. The second method adopts the conservative liner-type traffic estimates of Lykes, and the estimates of Board counsel for the liner movement of tramp-type commodities, the latter being based on the opinion of Lykes' economist witness as to the volume of future commodity movements. We believe that the forecast of tramp-type commodities to be moved in liner vessels presented by Board counsel is on the low side since this forecast fails to give consideration to the increasing proportions of tramp-type cargo carried by liners. During the years 1950 and 1951, the tramp-type commodities carried by liner vessels on Trade Route No. 13 amounted on the average to 43 percent

of the total liner-carried cargoes, and on Service 5 of Trade Route No. 21, for the same years, amounted on the average to 53 percent of the total liner-carried cargoes. The amount of tramp-type commodities that can reasonably be expected to move on liner vessels depends on many factors other than the mere volume of the movement of such commodities, such as rates, general marketing practices and conditions, and the disposition and employment of tramp vessels. These factors, as well as the economic factors which may depress the movement of tramp-type commodities, are not susceptible of precise measurement. Nevertheless, we find that it is reasonable to assume that tramp-type commodities will continue to be available in the foreseeable future on both routes herein discussed, in sufficient volume to allow liner vessels to carry tramp-type commodities in at least the respective ratios prevailing over the period of 1950 and 1951 as set forth above. Consequently, we find that a reasonable estimate of liner carryings on each route may be made in a third method by applying these ratios to compute the movement of tramp-type commodities and by accepting the conservative forecast of Lykes for the movement of liner-type commodities.

We apply the traffic statistics of record for Trade Route No. 13 to the three methods of estimating outlined above, as follows:

CARGO ESTIMATES FOR TRADE ROUTE NO. 13

	Total	50 percent of total
Method A		
Average total liner carryings for 1950 and 1951, exclusive of military, in-transit, and privilege port cargo	842,000	421,250
Method B		
Lykes' forecast for liner-type commodities (400,000 tons) plus Board counsel's estimate for tramp-type commodities (235,000 tons)	635,000	317,500
Method C		
Lykes' forecast for liner-type commodities (400,000 tons) plus 43/57ths of this forecast (300,000 tons) for tramp-type commodities	700,000	350,000

As stated above, we find Method C to be the most reliable, and accordingly, based on the record before us, we find 700,000 tons to be the prospective annual future movement by liner vessels on Trade Route No. 13. The evidence shows that tramp-type commodities carried by liners on each route are increasing percentagewise, thus making our estimate on the conservative side, particularly with respect to tramp-type commodities.

Turning now to the estimated carrying capacity of United States-flag vessels regularly operating on the route, we believe it is reasonable

to count on Lykes for 39 sailings, which is the average of its 1950–1951 subsidized and unsubsidized sailings with owned ships. We have not computed the estimate of Lykes' future sailings at the minimum in the subsidy contract of 24, or at the maximum in the subsidy contract of 48 on this route, but have taken the average of actual sailings with owned vessels. We have not included in this estimate Lykes' chartered vessels operating during these years as on the record these were employed to meet peak demands, whereas the estimate of cargo to be carried is based on conservative estimates of normal rather than peak carryings. The record shows that during 1950 and 1951 the average carryings of Lykes' subsidized vessels for both commercial and military cargo on this route were 6,413 tons. Accordingly, we take 6,400 tons as an average full load for ships used by Lykes on this route. This figure is comparable to the estimate of Lykes' traffic officer, who testified that the average carrying of fully loaded C2-type vessels on this route was between 6,000 and 7,000 tons, and the average carrying of a fully loaded C1-type vessel, approximately 5,500 tons.

We have estimated the capacity of Isthmian for Trade Route No. 13 cargo at its average carryings of such cargo during the years 1950 and 1951. In estimating the capacity of States Marine, we have not included sailings made with chartered vessels, since we believe that for the purpose of establishing adequacy of service under the Act, a chartered operation does not provide the type of adequate, permanent, regular, and frequent service contemplated by the Act. We have, therefore, estimated that States Marine may be counted on for eight sailings per year with its owned vessels, carrying approximately the same amount of Trade Route No. 13 cargo carried by all vessels operated by it during the years 1950 and 1951.

Liner carrying capacity estimate for Trade Route No. 13

	Capacity (tons)
The estimated carryings of Lykes, figured at 39 sailings with owned ships carrying 6,400 tons per ship	249,600
The estimated carryings of Isthmian to the three ports on the route at which it calls, based on the average carryings of Isthmian to these destinations for the years 1950 and 1951	18,000
The estimated carryings of States Marine, figured at eight sailings with owned ships carrying 6,768 tons per ship, based on the average sailings with its owned ships and the average carryings of all vessels operated by it on the route during the years 1950 and 1951	54,000
Total	321,600

We now apply the traffic statistics of record for Trade Route No. 21/5 to the same three methods of estimating:

CARGO ESTIMATES FOR TRADE ROUTE NO. 21/5

	Total	50 percent of total
Method A		
Average total liner carryings for 1950 and 1951, exclusive of military, in-transit, and privilege port cargo	1,845,000	922,500
Method B		
Lykes' forecast for liner-type commodities (1,000,000 tons) plus Board Counsel's estimate for tramp-type commodities (617,000 tons)	1,617,000	808,500
Method C		
Lykes' forecast for liner-type commodities (1,000,000 tons) plus 53/47ths of this forecast (1,127,500) for tramp-type commodities	2,127,500	1,063,750

Turning to the estimated carrying capacity of United States-flag vessels on Trade Route No. 21/5, we believe it reasonable to count on Lykes for 85 sailings per year, being the average number made during the years 1950 and 1951 with owned vessels. We estimate the carrying capacity of each vessel in this trade at 7,575 tons, being the actual average of all Lykes' loadings on its subsidized sailings in this trade for the 2 years mentioned. We believe it reasonable to count on Waterman for 24 sailings a year, being Waterman's estimate for future operations on the route. We estimate the loading of each Waterman vessel from ports on the route at 6,500 tons, being less than Lykes' estimated capacity per vessel because of Waterman's traditional policy of loading of substantial cargo at Mobile, which is not a port on this route. We estimate States Marine's average sailings on the route at nine, being its average with owned vessels for the years 1950 and 1951. The average loadings of all States Marine's vessels, both owned and chartered, for the years 1950 and 1951 amount to 6,540 tons, which we use as the basis for our estimate of its capacity.

Liner carrying capacity estimate for Trade Route No. 21/5

	Capacity (tons)
The estimated carryings of Lykes, figured at 85 sailings with owned ships carrying 7,575 tons per ship	644,000
The estimated carryings of Waterman, based on 24 sailings a year carrying 6,500 tons per ship	156,000
The estimated carryings of States Marine, figured at 9 sailings with owned ships carrying 6,540 tons per ship	59,000
Total	859,000

The foregoing estimates indicate that the liner service on each route is insufficient to carry 50 percent of the cargo which may be expected to be carried in liner vessels in the future. As to the past, the 1951

United States-flag liner carryings on Trade Route No. 13 were only 46 percent of the total liner exports reported in the census figures introduced by Lykes, and 49.3 percent in the Maritime Administration figures. Similarly, the 1951 United States-flag liner carryings on Trade Route No. 21 were only 45 percent of the total liner-carried exports according to census figures, and 47.8 percent according to Maritime Administration figures. Thus, in the last full year for which figures are of record, the actual United States-flag liner carryings on each route were less than 50 percent of the total, but what is more important is the adverse trend over the last four-year period, which shows increasing foreign-flag carryings at the expense of United States-flag vessels.

Lykes argues that United States-flag vessels presently operating on the routes are carrying all the liner cargo that is available to vessels of this country, and that additional vessels will merely dilute the United States carryings and not attract cargo from foreign competitors. This is an argument to which we cannot agree, particularly since the record shows that all United States-flag sailings have in the recent past been fully loaded without capacity for added cargo, and that some United States-flag vessels now on the routes are inferior in type and speed to the new ships placed in competition with them by foreign operators. If Bloomfield should qualify for a subsidy, he would, of course, be required to operate vessels of approved type, size, and speed on regular and approved schedules.

It may be pointed out that the estimates of probable liner cargo have been put on the low or conservative side, and the estimates of United States-flag vessels to carry such cargo have included not only vessels definitely committed to the trade routes in question and qualified to meet the foreign-flag competition thereon but also marginal vessels. Even with such treatment, the estimated cargo to be carried, based on 1950–51 records, exceeds the reasonably expected available capacity. It is perhaps questionable whether the small carryings per vessel of Isthmian to destinations on Trade Route No. 13 is more or less incidental to Isthmian's main interest as a carrier to the Persian Gulf, but we have not eliminated Isthmian from the list of operators actively engaged in meeting foreign-flag competition on Trade Route No. 13. We have included in our estimate of available capacity an allowance for Lykes' non-subsidized owned vessels operated on both trade routes, although non-subsidized operation on the routes is something which Lykes is not committed to in the future. The capacity of States Marine's Libertys and Victorys has also been included in the estimate of available tonnage on both routes.

Having thus found inadequacy of service on the routes, little need be said as to the other finding required under the first paragraph of section 605 (c) of the Act, i. e., "that in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon". The finding of inadequacy of United States-flag service is the primary reason for making this second finding required under the section. Additional reasons have already been set forth in the foregoing discussion, including increasing effectiveness of foreign-flag competition and the desirability of adding to the United States-flag fleet on the routes more vessels that will fully meet the strict requirements of a subsidized service.

The findings which we make in this case of inadequacy of United States-flag liner service on Trade Routes Nos. 13 and 21/5 result in the conclusion that section 605 (c) of the Act does not interpose a bar to the granting of an operating-differential subsidy contract to the applicant for operation on both routes. Our conclusions herein are not tantamount to a finding that the applicant is entitled to a subsidy contract on either route or for any number of sailings, for such a conclusion can be reached only after the necessary administrative study and action required under section 601 and various other provisions of the Act.

CONCLUSIONS

The Board therefore concludes that:

1. An operating-differential subsidy with respect to vessels to be operated by applicant Bloomfield Steamship Company on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, would involve service which would be in addition to existing services within the meaning of section 605 (c) of the Merchant Marine Act, 1936.

2. The service already provided by vessels of United States registry on both Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5, is inadequate, and, in the accomplishment of the purposes and policies of the Act, additional vessels should be operated thereon.

3. The provisions of section 605 (c) of the Act do not interpose a bar to the granting to applicant Bloomfield Steamship Company of an operating-differential subsidy contract covering the operation of cargo vessels on Trade Route No. 13, Service 1, and Trade Route No. 21, Service 5.

4. All further questions with respect to the application of Bloomfield Steamship Company for operating-differential subsidy are expressly reserved for future determination.

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

FEDERAL MARITIME BOARD

Nos. M-11, M-27, M-32, M-14, M-50, M-9, M-10, M-27, M-57, M-60

ANNUAL REVIEW OF BAREBOAT CHARTERS OF GOVERNMENT-OWNED, WAR-BUILT, DRY-CARGO VESSELS, 1953, UNDER PUBLIC LAW 591, EIGHTY-FIRST CONGRESS

REPORT OF THE BOARD

In accordance with section 3 (e) (1) of the Merchant Ship Sales Act of 1946, as amended, an annual review has been made of the bareboat charters of Government-owned, war-built, dry-cargo vessels recommended for use by the United States-flag operators during the period from June 30, 1952, to June 30, 1953, inclusive.

On the basis of the foregoing review, the Board tentatively has found that conditions exist justifying the continuance of each of the following charters under the conditions previously certified by the Board:

Charterer	Vessel	Docket No.	Date vessel delivered
Alaska Steamship Company	Coastal Monarch	M-11	8- 9-48
	Sailors Splice	M-11	4-27-49
	Coastal Rambler	M-11	8-18-48
	Lucidor	M-11	12-16-48
	Palisana	M-11	12-16-48
	Flemish Knot	M-11	7-26-48
	Square Knot	M-11	7- 6-48
	Square Sinnet	M-11	8- 1-48
	Ring Splice	M-11	1-14-49
American President Lines, Ltd	Lightning	M-27	4-16-51
	Shooting Star	M-32	5-23-51
Luckenbach Steamship Company, Inc	Pine Bluff Victory	M-14	3-28-51
	Wayne Victory	M-14	4-23-51
	Red Oak Victory	M-50	2-11-52
Grace Line, Inc	Coastal Nomad	M- 9	12-23-46
	Coastal Adventurer	M- 9	1-21-47
	Anchor Hitch	M- 9	1- 3-47
Pacific Far East Line, Inc	Contest	M-10	4-27-47
	Flying Dragon	M-10	5- 8-47
	Surprise	M-10	12-20-48
	Trade Wind	M-10	1-20-49
	Fleetwood	M-10	12-27-48
	Flying Scud	M-10	12-10-48
	Sea Serpent	M-27	3-28-51

Notice of the foregoing tentative findings was served on all interested parties and was published in the Federal Register on July 18, 1953, and interested parties were granted fifteen (15) days from the date of such publication to request a hearing concerning such tentative findings made with respect to any of the above charters by filing written objections thereto or for other good cause shown. No objections or requests for hearing were filed.

FINDINGS, CERTIFICATION, AND RECOMMENDATION

On the basis of evidence considered by the Board, it is hereby certified to the Secretary of Commerce that conditions exist justifying the continuance of the charters listed above, upon the conditions originally certified by the Board.

By order of the Board.

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

AUGUST 17, 1953.

FEDERAL MARITIME BOARD

No. S-40

AMERICAN PRESIDENT LINES, LTD.—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949 AND 1950

Submitted August 14, 1953. Decided September 3, 1953

The principle of including repatriation as an item of foreign wage costs with respect to the operating-differential subsidy wage rates for the Trade Route No. 29 and Round-the-World Services of American President Lines, Ltd., for the years 1949 and 1950, found to be authorized by law and to be fair and reasonable and in the public interest.

The computation of Norwegian repatriation costs for crews employed in these services should be recalculated to give effect to the applicable provisions of Norwegian law, but in other respects the computation of Norwegian repatriation costs as previously made by the staff found to be fair and reasonable and in the public interest.

The computation of wage costs for the year 1950 of combination vessels operated under the Panama flag in these services, as recomputed in the monthly amount of $15,170, found to be fair and reasonable and in the public interest.

Warner W. Gardner and *Alfred L. Scanlan* for American President Lines, Ltd.

Max E. Halpern, *Edward Aptaker*, and *Thomas Lisi* for the Board.

REPORT OF THE BOARD

BY THE BOARD:

No exceptions were filed to the recommended decision of the Vice Chairman, who sat as the presiding officer at the hearing in this proceeding. Our conclusions agree with those recommended by the Vice Chairman, whose recommended decision we adopt and make a part hereof.* Requested findings of American President Lines, Ltd. (the Operator), not discussed in this report nor reflected in our findings and conclusions have been given consideration and are denied.

This proceeding arises under section 606 (1) of the Merchant Marine Act, 1936 (the Act). Following a staff study of costs of wages of the Operator and of its foreign competitors, we adopted tentative operating-differential subsidy rates under section 603 (b) of the Act for the

*See Appendix.

years 1949 and 1950, with respect to the Operator's Trans-Pacific Service (Trade Route No. 29) and Round-the-World Service. The Operator objected to the rates as tentatively adopted, and an exchange of correspondence took place, but no mutual agreement was reached. The matter was thereafter set for hearing pursuant to section 606 (1) of the Act, at the request of the Operator.

Upon the whole record we find (1) that the principle of including repatriation as an item of foreign wage costs with respect to the operating-differential subsidy wage rates for the years 1949 and 1950 is authorized by law and is fair and reasonable and in the public interest, (2) that the computation of Norwegian repatriation costs for crews should be recalculated to give effect to the applicable provisions of Norwegian law, but in other respects the computation of Norwegian repatriation costs as heretofore made by the staff is fair and reasonable and in the public interest, and (3) that the computation of wage costs for the year 1950 of combination vessels operated under the Panama flag, as recomputed in the monthly amount of $15,170, is fair and reasonable and in the public interest.

Vice Chairman Williams took no part in this decision.

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

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 3d day of September A. D. 1953

No. S–40

AMERICAN PRESIDENT LINES, LTD.—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949 AND 1950

Whereas, on February 17, 1953, the Board issued certain *orders nisi* containing its findings and determinations concerning final subsidy rates for wages of officers and crews of the subsidized cargo and combination vessels operated by American President Lines, Ltd., during the years 1949 and 1950 on Trade Route No. 29–F and in the Round-the-World Service, and such rates having been objected to by American President Lines, Ltd., and a hearing having been requested, pursuant to section 606 (1) of the Merchant Marine Act, 1936, by American President Lines, Ltd.; and

It appearing that such hearing and full investigation of the matters involved has been had, and the Board having, on the date hereof, made and filed its report thereon containing its findings and conclusions, which report is hereby referred to and made a part hereof;

It is ordered, 1. That the following schedule of operating-differential subsidy rates for wages of officers and crews for incorporation into the operating-differential subsidy agreement of American President Lines, Ltd., Contract No. FMB–12, effective for approved voyages of the vessels thereby covered which commenced on or after January 1, 1949, be, and they are hereby, made final:

Service	Vessel type	Wages of officers and crews (including payments required by law to assure old-age pensions, unemployment insurance, or similar benefits) (percent of United States cost)
Trade Route No. 29–F Trans-Pacific	C–3 Cargo	67.23
Round-the-World	C–3 Cargo	68.53
	Victory	66.17
	C–4F Cargo	69.14
	Monroe/Polk (Comb.)	70.55

2. That the following schedule of operating-differential subsidy rates for wages of officers and crews for incorporation into the operating-differential subsidy agreement of American President Lines, Ltd., Contract No. FMB–12, effective for approved voyages of the vessels thereby covered, which voyages commenced on or after January 1, 1950, be, and they are hereby, made final:

Service	Vessel type	Wages of officers and crews (including payments required by law to assure old-age pensions, unemployment insurance, or similar benefits) (percent of United States cost)
Trade Route No. 29–F Trans-Pacific	Cargo	74.48
Round-the-World	Cargo	75.29
	Monroe/Polk (Comb.)	71.76

3. That the other findings and determinations contained in the said *orders nisi* issued on February 17, 1953, be, and they are hereby, made final.

By the Board.

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

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APPENDIX

FEDERAL MARITIME BOARD

DOCKET NO. S–40
AMERICAN PRESIDENT LINES, LTD.—DETERMINATION OF FINAL SUBSIDY RATES FOR 1949 AND 1950

RECOMMENDED DECISION OF ROBERT W. WILLIAMS, MEMBER OF THE FEDERAL MARITIME BOARD AND PRESIDING OFFICER

The Board and the American President Lines, Ltd. (the Operator), were unable to reach an agreement as to the readjustment proposed by the Board in the rate for operating-differential subsidy for wages for the years 1949 and 1950 on the Operator's Trans-Pacific Service (Trade Route No. 29) and the Operator's Round-the-World Service. This recommended decision is made after hearing accorded the operator pursuant to section 606 (1) of the Merchant Marine Act, 1936 (the Act) and the Administrative Procedure Act.

The Board, after considering staff memoranda and taking the testimony of staff officers, heretofore tentatively established differential rates for the operator's wage expenses on the two services. The Operator filed objections.

Section 603 (b) of the Act, under which the Board acted in adopting tentative rates, provides:

> . . . the operating-differential subsidy *shall not exceed the excess* of the fair and reasonable cost of . . . wages . . . in the operation under United States registry of the vessel . . . covered by the contract, over the estimated fair and reasonable cost of the same item[s] of expense . . . if such vessel . . . were operated under the registry of a foreign country whose vessels are substantial competitors of the vessel . . . covered by the contract. [Emphasis supplied.]

The Operator's American-flag wage costs were compared with the estimated wage costs of the foreign-flag competition on the lines and the following subsidy rates [1] for wages were then established:

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[1] Under the Operator's contract these percentage rates of the Operator's American-wage costs are paid to it by the Government as part of its operating-differential subsidy.

	1949	1950
Trade Route No. 29—Cargo ships	65.32	73.14
Round-the-World—Cargo ships	68.34	75.11
Round-the-World—Combination ships	70.55	71.10

Section 606 (1) of the Act provides that, in case of disagreement, the Board is authorized, after proper hearing, to

> determine the facts and make such readjustment in the amount of such future payments as it may determine to be fair and reasonable and in the public interest.

The Operator now raises three issues with respect to the 1949 and 1950 wage differentials.

The wage costs of foreign-flag competitors were estimated at too high a level and the subsidy rate was too low,

(1) because the Board improperly included the estimated cost of repatriating foreign crews on both services;
(2) because even if any foreign repatriation cost was properly included in the foreign wage cost, the amount thereof was overstated with respect to both services; and
(3) because the Board erroneously overestimated the wage costs of the Panama-flag competition in computing the wage differential for the Operator's Round-the-World combination vessel service in 1950.

FACTS RELATING TO ISSUES NOS. 1 AND 2 ON FOREIGN REPATRIATION COSTS

1. The obligation of repatriation is the foreign operator's obligation to transport members of his crew to the home country. Personnel so transported are entitled to wages and subsistence en route, thus making time in transit an important factor. Correlative to the obligation to repatriate crews is the practical necessity on the part of the foreign operator to furnish replacements for his vessels. Such replacements may be recruited from qualified personnel when available at ports from which crew members are repatriated, or may be sent from home. When replaced from home, the cost is borne entirely by the operator. No statistics are available to show the foreign operators' experience in recruiting locally, nor is there evidence to determine whether foreign operators' costs for replacement are greater or less than their costs for repatriation where the obligation of repatriation exists.

2. The Norwegian, Danish, and British competitors of the Operator have repatriation obligations on one or both of the routes here involved. The actual cost of crew repatriation incurred by the Danish competitor for the years 1951 and 1952 was taken as representative of its repatriation costs for 1949 and 1950 and included in estimating Danish wage costs for 1949 and 1950. The British competition in-

cluded some vessels manned by mixed crews as well as some manned by all white crews. No satisfactory information as to the rights of mixed crews to repatriation was available, and their repatriation was excluded in the estimate of British wage costs. British crew members were found to be eligible for repatriation at the end of two years of consecutive service. British competition occurred only on the Operator's Round-the-World Service, and the expense of repatriating white members of British crews from Marseilles to London was divided by twenty-four and the result taken as the estimated monthly expense for British repatriation.

The Operator has objected to the inclusion of any amount for either Danish or British repatriation in the wage differentials involved, but does not question the method of computation. On the other hand, the Operator objects both to the inclusion of repatriation expense under the Norwegian flag as a matter of principle, and also the method of computation. More detailed findings with respect to repatriation of the Norwegian flag are therefore necessary.

3. The obligation of a Norwegian operator to furnish repatriation for officers, including radio officers and chief stewards, is based upon the collective bargaining agreement in force, which, in the years 1949 and 1950, required the operator to pay the full cost of repatriation after two years of service.

4. The obligation of the Norwegian operator to furnish repatriation to other members of the crew is based on the Norwegian Merchant Seamen's Act, section 25 (a), which provides for repatriation once in three years for vessels trading in the Pacific, and once in two years for vessels touching European and Mediterranean ports. Under the Norwegian law, the operator is required to pay one-third of the expense, the seaman and the Norwegian State contributing the balance in equal shares. The Norwegian law does not prevent the operator from assuming the seaman's one-third of the cost, but there is no evidence of any such practice.

5. The officer or crew member on the Norwegian vessel loses his right to repatriation if he fails to serve out the full period indicated or if he elects not to go home, and, in such case, the Norwegian operator is under no alternative obligation to pay cash. If a seaman falls sick, his cost of travel is paid by the owner's P. & I. underwriters, and if he obtains a working passage home at his current wages, he is entitled to nothing further. Repatriation applies only to Norwegian citizens sailing on Norwegian vessels. Norwegian-flag operators are permitted to employ non-Norwegian crews, and these have no repatriation rights.

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6. The Norwegian-flag lines competing with both services of the Operator do not ordinarily return to Norway. In estimating the Norwegian wage cost for cargo vessels, the Board, following the staff's recommendation, included $1,208 per month in 1949 and $1,163 per month in 1950 for the cost of repatriating officers and crews in reaching the Trans-Pacific differential rate, and $216 and $210, respectively, for repatriation costs in reaching the Round-the-World rate. Norwegian repatriation for both officers and crew was in this computation assumed to occur every two years. Thus the full cost of repatriating the entire crew was divided by twenty-four to reflect the pro rata monthly expense to produce the figures set forth above.

7. In estimating the foreign wage cost the staff of the Board took the position that the total cost of replacement as well as repatriation should be considered as a wage factor for the foreign operators. The staff had no precise figures as to the cost of replacement, but in computing the cost of repatriation for the Norwegian competition in the manner above set forth it was stated that the cost of replacement would be a compensating factor to offset any overstatement in assigning to repatriation alone the cost of travel of the full ship's complement at two year intervals although, as explained above, there was a lesser statutory obligation upon the Norwegian operator.

DISCUSSION OF ISSUES NOS. 1 AND 2

The Operator argues on principle that the Board lacks any authority to include foreign repatriation charges in estimating foreign-flag wage costs, claiming that repatriation costs are not and cannot be considered as wages, and that to include them as such unduly swells the estimate of foreign-flag wage costs, thus violating the principle of parity required by section 603 (b) of the Act as effectively as if the estimates of the Operator's American-flag wages were unduly reduced.

There are two answers to this argument. In the first place, the Board must have some latitude in the interpretation of what is to be included in the statutory words "fair and reasonable cost of wages." Wages as defined in Webster's New International Dictionary, Second Edition, are

> That which is pledged or paid for work or other services.

The Board, in comparing American operators' fair and reasonable costs for wages with similar costs of foreign operators, has adopted the practice of including not only payments made directly to the seaman employed, such as basic wages and overtime, but also payments made to government and other funds and insurance plans which redound to the employee's benefit, such as Social Security payments

under American laws, and health, unemployment, pension, and social provisions under foreign laws. It is believed that the Board may properly include within the term "fair and reasonable cost of wages" payment which an employer is required to make with respect to an employed seaman which redound to his benefit and which both he and his employer take into consideration at the time of employment. Such payments, whether made directly into the seaman's hands or into the hands of others for his benefit, come within the broad definition of "that which is paid for his work." The definition does not, however, include gratuities which are not bargained for and which are purely voluntary on the part of an employer. The cost of the foreign operator to repatriate his officers or crew, whether an obligation arising from a bargaining agreement or from a statutory provision, is a cost which we feel may well come within the broad definition of wages. This interpretation was formally adopted by the Board with respect to the period prior to January 1, 1951, when the Board on June 10, 1953, determined to:

> Approve the inclusion of repatriation as an item of foreign wage costs with respect to differential subsidy wage rates applicable to voyages commencing prior to January 1, 1951.

It does not follow from what has been said that an interpretation once given by the Board must necessarily remain unchanged. Any different interpretation which the Board adopted with respect to this matter for rates for voyages commencing on and after January 1, 1951, is, of course, not involved in this case and need not be here discussed.

In the second place, even if foreign repatriation costs may not be deemed to fall within the broad definition of the term "wages", the subsidy rates and amounts to be awarded to the operator as tentatively determined are still rates and amounts which, under the statute, the Board is authorized to award, for section 603(b) only requires that the amount of subsidy "shall not exceed" parity. It does not require that the amount awarded to the Operator be exactly, or not less than, parity. Under no interpretation of the word "wage", as used in the section of the Act referred to, does the inclusion of foreign repatriation costs result in an award that would give to the Operator in this case a sum that would exceed parity.

Coming next to the method used by the staff in computing foreign repatriation costs, the Operator does not attack the method used for estimating Danish and British costs, but concentrates on the method of computing Norwegian repatriation costs, and here we think a modification should be made. The tentative subsidy rates were based on figures which charged the Norwegian competitor with the full cost of repatriating all crew as well as officers every two years, whereas under

the applicable law, the Norwegian operator is responsible for the payment of only one-third of the cost of crew repatriation. Furthermore, the computation failed to make due allowance for the fact that crews on vessels operating in Pacific waters are entitled to repatriation only after three years of consecutive service and not two years. The Board should direct that the calculation of Norwegian repatriation costs should be revised to give effect to the provisions of law applicable to crews, confirming the use of the one-way airplane fare without wage or sustenance allowance during the trip home, as the cheapest means of repatriation. Such a figure will result in a reasonable estimate of the Norwegian operator's maximum liability for repatriation. Any reduction in actual cost to the Norwegian operator below this figure, due to the factors set forth in Finding of Fact No. 5, is not subject to any exact calculation and is offset by the cost of replacement which is actual but equally difficult of precise estimation.

FACTS RELATING TO ISSUE NO. 3 ON PANAMA-FLAG WAGE COMPUTATION.

The remaining differences arise in connection with the computation of estimated wage cost for the Panama-flag competition for combination vessels on the Round-the-World Service in 1950. It does not involve 1949 rates on any vessels or 1950 rates on cargo vessels, since none of these had Panama-flag competition.

8. The Panama-flag competition was furnished by the Home Line, operated by the Italian firm of Fratelli Cosulich, whose operating office is in Genoa. In estimating the base-wage costs of the Home Line the staff treated this operation as virtually equivalent to an Italian line. After recomputation, the Panama base wage was computed as identical with the Italian base wage. Furthermore, since the Home Line crews were recruited in Italy, the staff assumed that the various social benefits [2] which an Italian operator was obliged to contribute for the benefit of its crew would apply equally to Italian crews sailing under the Panama flag. On the other hand, the staff had direct information to the effect that the overtime allowance to crews under the Panama flag was 42 percent of base wages as against 86 percent under the Italian flag. As the result of these assumptions and this information, the staff's computation showed a total estimated wage cost under the Panama flag 17.05 percent below that under the Italian flag for 1950.

[2] *Social Benefits:* These social benefits are separately described as (1) disability, old-age pensions, and supplement; (2) tuberculosis, unemployment, marriage, and birth grants; (3) family allowance, supplementary social insurance, and solidarity fund; (4) industrial accident and sickness insurance; (5) non-occupational sickness insurance; (6) housing allowance; and (7) supplementary contributions.

DISCUSSION OF ISSUE NO. 3

The Operator, complaining that even this computation set Panama wage cost at too high a level, submitted in evidence certain letters and cables received directly from Fratelli Cosulich, comparing the Home Line's Panama-flag wage and social benefit costs for 1950 with costs for operating an identical vessel under the Italian flag. From these, the isolated costs of social benefits actually incurred under the Panama flag appeared to be less than similar costs under the Italian flag. But from these it also appeared that the total wages, including both "take home" items and social benefits for 1950, were only 10.73 percent lower under the Panama flag than under the Italian flag. Thus, the over-all differential in favor of the Panama flag of 10.73 percent was less favorable to the operator than the over-all differential in favor of the Panama flag of 17.05 percent as computed by our staff.

If we are to give the Operator the benefit of the information which he obtained from Fratelli Cosulich with respect to the lower costs for social benefits under the Panama flag, he should, in fairness, also be charged with the higher overtime costs reflected in the Cosulich statement. This case shows the inherent difficulties which the staff and the Board are faced with in making exact estimates of the various elements that go into various foreign-flag competitors' cost of the various subsidized lines. The information submitted by the Operator in this case does not exactly correspond with, and is, therefore, not exactly comparable with, the information available to the staff. We are not willing to disturb the staff's computation in one detail because of the Cosulich letter without giving effect to all information in that letter, which would, of course, be less favorable to the Operator than the computation now made by the staff. Accordingly, we believe that the staff's corrected computation of Panama wages, amounting to $15,170 per month, as compared with the Italian $18,289, should be confirmed.

RECOMMENDATIONS TO THE BOARD

The Board should find:

1. That the principle of including repatriation as an item of foreign wage costs with respect to the operating-differential subsidy wage rates for the years 1949 and 1950 is authorized by law and is fair and reasonable and in the public interest.

2. That the computation of Norwegian repatriation costs for crews should be recalculated to give effect to the applicable provisions of Norwegian law, but in other respects the computation of Norwegian

repatriation costs as heretofore made by the staff is fair and reasonable and in the public interest.

3. That the computation of wage costs for the year 1950 of combination vessels operated under the Panama flag, as recomputed in the monthly amount of $15,170, is fair and reasonable and in the public interest.

4. That the Operator's requested findings 1, 4, 5, 10, 11, 12, 14, 20, 21, 22, 23, 24 should be made, and requested findings 2, 3, 6, 7, 8, 9, 13, 15, 16, 17, 18, 19, 25, 26 should be denied.