FEDERAL MARITIME BOARD

No. S-60

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY AGREEMENT—EASTBOUND ROUND-THE-WORLD SERVICE

No. S-60 (Sub. No. 1)

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR WRITTEN PERMISSION—SECTION 805(a)

Submitted September 22, 1958. Decided October 9, 1958

The continuation by Isbrandtsen Company, Inc., of (1) its eastbound intercoastal service from California to New Haven, and (2) its service from Puerto Rico to Norfolk, when and if subsidy is awarded, found not to constitute unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

SUPPLEMENTAL REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

On September 12, 1958, Isbrandtsen Company, Inc. (Isbrandtsen), filed a petition for partial reconsideration of the Board's report herein of August 12, 1958 (5 F.M.B. 448). Specifically, Isbrandtsen seeks a modification of the report with respect to (1) its bulk coastwise and cross-Gulf service, (2) its intercoastal service to New Haven, and (3) its service from Puerto Rico to Norfolk.

Replies to the petition were filed by interveners A. H. Bull Steamship Co., Bull-Insular Line, Inc., Luckenbach Steamship Co., Inc., and Marine Transport Lines, Inc. (interveners), and by Public Coun-

sel. Public Counsel supported applicant on items (2) and (3), above, and interveners voiced no objection to item (3).

Bulk coastwise and cross-Gulf. Isbrandtsen's arguments that the Board reverse its conclusion so as to allow the continuation of this service, as sought in its application and as noticed for public hearing, are unconvincing and were fully considered prior to the issuance of the first report. As to Isbrandtsen's proposal to augment its bulk coastwise and cross-Gulf service with a service from South Atlantic ports to Puerto Rico, we note that written permission is sought for a service substantially different from that in the original application, upon which public hearings were held, and therefore it must be denied. This denial is without prejudice, however, to the filing of an application under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), for such service.

Intercoastal service to New Haven. Applicant contends that the written permission granted Isbrandtsen to continue its intercoastal service to Puerto Rico, Norfolk, and Baltimore in conjunction with its eastbound round-the-world service, should be extended to include New Haven, particularly since the record shows that no intervener serves the port of New Haven intercoastally. Isbrandtsen contends that the rationale followed by the Board in authorizing service to Norfolk and Baltimore, when applied to the facts of record with reference to New Haven, requires a conclusion that the permission be granted. There is one difference however: Isbrandtsen is *now* operating to Baltimore and Norfolk intercoastally; it has not served New Haven for more than three years. We do not propose to extend section-805(a) permission authorizing a subsidized operator to serve a particular port at some future time when it deems the service feasible. On this record, however, we find that the service to New Haven, at this time, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and that it would not be prejudicial to the objects and policy of the Act. In the event Isbrandtsen does not re-establish its intercoastal service to New Haven within a reasonable time, the findings herein made will be subject to modification or vacation.[1]

The argument of intervener Luckenbach that in serving both New York and Boston it adequately serves the needs of New Haven intercoastally, is not controlling here. To accept such argument would

[1] In *Matson Orient Line, Inc.—Subsidy, Route 12,* 5 F.M.B. 410, after finding that the provisions of section 605(c) of the Act did not interpose a bar to the award of subsidy, and assuming the applicant would qualify for subsidy under other sections of the Act, it was stated that "* * * unless a subsidy contract, if offered, is executed and operations have commenced within a reasonable time, we shall review our determinations here in light of conditions as they then exist."

prejudice New Haven consignees of intercoastal cargo. Further, we feel that the granting of the permission here sought is consonant with the congressional policy favoring port development, as manifested in section 8 of the Merchant Marine Act, 1920, 46 U.S.C. 867. *Pacific Far East Line* v. *United States*, 246 F. 2d 711 (1957).

Puerto Rico to Norfolk. Upon re-examination of the record, we find that Isbrandtsen is the only carrier offering a service in this trade. In view of all the circumstances, we cannot find that the continuation of the service would result in unfair competition to any person, firm, or corporation operating exclusively in the domestic trades, and we believe that by authorizing this service the objects and policy of the Act would be promoted. Further, the consignees at Norfolk as well as those at New Haven are entitled to a direct service.

In conclusion, in the event Isbrandtsen is awarded a subsidy contract, and in the absence of any later action by the Board, this will serve as written permission under section 805(a) of the Act for Isbrandtsen to continue (1) its eastbound intercoastal service from California to New Haven, and (2) its domestic service from Puerto Rico to Norfolk, both in conjunction with its eastbound round-the-world service. Permissions herein granted are in addition to those set forth in the prior report.

FEDERAL MARITIME BOARD

No. 828

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

Submitted June 9, 1958. Decided October 9, 1958

Respondents' proposed increased rates and charges, and regulations and practices, found just and reasonable.

Stanley B. Long, *Richard S. Sprague*, and *Edward G. Dobrin* for Alaska Steamship Company and Garrison Fast Freight, Division of Consolidated Freightways, Inc., *Alan F. Wohlstetter* for Alaska Freight Lines, Inc., and *Vaughn E. Evans* and *Martin P. Detels, Jr.*, for Coastwise Line, respondents.

Harry C. Burnett for Upper Columbia River Towing Company, *J. Gerald Williams* and *David J. Pree* for Territory of Alaska, *John Regan*, *C. M. Graff*, *Edward C. Sweeney*, *F. W. Denniston*, *Malcolm D. Miller*, and *Clarence J. Koontz* for Administrator of General Services, *Wilbur L. Morse*, *W. Harwood Huffcut*, *Harry R. Tansill*, and *Milton J. Stickles, Jr.*, for Department of Defense, *Fred H. Tolan* for Northwest Fish Traffic Committee and Associated Grocers, Incorporated, *Omar O. Victor* for United States Smelting, Refining and Mining Co., *J. D. Paul* for Seattle Traffic Association, and *H. E. Franklin, Jr.*, for Tacoma Chamber of Commerce, interveners.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

In October 1957, respondents Alaska Steamship Company (Alaska Steam) and Coastwise Line (Coastwise) filed tariff schedules with the Board to become effective December 2, 1957, providing a general 15-percent increase in rates and charges applicable to the carriage of cargo between United States Pacific coast ports and ports in Alaska,

and setting forth new rules, regulations, and practices affecting such rates and charges. In November 1957, respondents Garrison Fast Freight Division of Consolidated Freightways, Inc. (Garrison), and Alaska Freight Lines, Inc. (Alaska Freight), filed changes in their tariffs effecting similar rate increases in the ocean portion of their services, to be effective December 18, 1957.[1]

Pursuant to section 18 of the Shipping Act, 1916, as amended (the 1916 Act),[2] and section 3 of the Intercoastal Shipping Act, 1933, as amended (the 1933 Act),[3] the Board, by order served on December 2, 1957, instituted this investigation into and concerning the lawfulness of the foregoing rates, charges, rules, and regulations, and suspended the effective date of the proposed changes until April 2, 1958.

Pursuant to petitions filed by respondents, the Board permitted interim rate increases of 7½ percent,[4] to become effective January 30, 1958.

Upper Columbia River Towing Company intervened in support of respondents but took no active part in the proceeding, indicating that it proposed to enter the Alaskan trade in the near future. Northwest Fish Traffic Committee, Associated Grocers, Inc., Territory of Alaska, General Services Administration on behalf of the executive agencies of the Federal Government except the Department of Defense, and United States Smelting, Refining & Mining Co., intervened in opposition to the proposed increases. The Department of Defense, Seattle Traffic Association, and Tacoma Chamber of Commerce intervened as their interests might appear.

Hearing was held, briefs were filed, and the examiner issued his initial decision on May 5, 1958. The examiner found and concluded that the proposed rates, charges, regulations, and practices were just and reasonable and not unlawful.

Alaska Steam provides the only common-carrier service covering all areas of Alaska. It operates a fleet of 13 vessels, five of which are Liberty type and eight are vessels of the C1–M–AV1 class. Four of the C1–M–AV1 vessels are bareboat chartered from Maritime Administration and the other nine vessels are owned by Alaska Steam. All these vessels are normally used during the peak season (approximately May through September) but several are laid up during the

[1] Alaska Freight and Garrison published through one-factor rates including pick-up and delivery charges as well as charges for the water haul, without segregation as between rates for the water transportation and for the land transportation. Their over-all rates were generally increased 7.5 percent, reflecting, they allege, an increase of approximately 15 percent in the portion of the rates applicable to the water haul.

[2] Set forth in pertinent part in the appendix.

[3] Set forth in the appendix.

[4] The actual increases of Alaska Freight and Garrison on their through one-factor rates was again about half the increase of the other respondents, or 3.75 percent.

remainder of the year. The Government-owned vessels continue under charter for the full year but are in an off-hire status when laid up. In the past years certain of the idle vessels have been chartered out for use in other trades, but Alaska Steam asserts there appears to be no prospect of such charter during 1958.

Alaska Steam furnishes weekly C1–M–AV1 service, year-round, from Seattle to Ketchikan, Petersburg, and Juneau, in Southeastern Alaska, with biweekly stops at Seward, Wrangell, and Sitka, and monthly stops at Haines and Skagway. Weekly Liberty-ship service is furnished from Seattle to Seward and Valdez, with calls every third voyage at Cordova, and with calls at Whittier as traffic demands. During the summer months an additional C1–M–AV1 operates biweekly to Seward from Seattle with a stop at Cordova. Every third Wednesday, year-round, a C1–M–AV1 sails for Kodiak and Womens Bay with occasional calls at Seldovia and Homer. Service to cannery and cold storage locations along the Alaska Peninsula and Bristol Bay ports is scheduled as traffic warrants during the fishing season. About three or four trips are scheduled each summer to the Norton Sound area, with one proceeding to the northernmost port of Kotzebue.

Southbound service from the salmon canneries requires the stationing of more vessels in those areas than northbound traffic would justify, since these canneries, which furnish the greater part of the southbound traffic via Alaska Steam, have only limited storage facilities. The canneries generally are located at out-of-the-way ports where no stevedore personnel are available, and cannery personnel must be used to assist in the loading.

Coastwise owns one C–4 type vessel, and operates seven chartered vessels consisting of four C–2's and three Libertys. In early 1957 Alaska service was provided with three Liberty vessels sailing from California ports to Portland and Puget Sound, and thence to Seward, Whittier, and Valdez in the rail belt area of Alaska, with occasional calls at Kodiak, Ketchikan, and Anchorage. Later in the year the three Liberty vessels were gradually replaced by C–2 vessels operating only to Seward, Whittier, and Valdez; the Liberty vessels thereafter were operated in foreign trades.

At the beginning of 1958, Coastwise discontinued its direct C–2 service and substituted an interchange arrangement with Alaska Steam at Seattle on traffic between California and Alaska. In this service Coastwise uses its owned C–4 vessel. Costs of loading and discharging are borne by each carrier, and the costs of pier handling at Seattle and revenues are divided 45 percent to Coastwise and 55

percent to Alaska Steam. This interchange arrangement can be discontinued by either line, but Coastwise could not predict whether it would be continued or whether the direct C–2 service would be reinstituted.

Alaska Freight operates nine owned tugs, one chartered tug, one tug held under a lease-purchase agreement, 16 owned barges, one owned power barge, and one LSM held under lease-purchase agreement. It provides regular scheduled integrated sea-land service between points in and around Seattle, Tacoma, Longview, and Vancouver, Washington, and Portland, Oregon, and points in Alaska in and around Anchorage, Fairbanks, Palmer, Big Delta, Seward, and Valdez. Substantial fleets of trucks and trailers are maintained at Seattle and in Alaska, and most of the cargo carried is packed in trailer vans and transported on the decks of barges, although some is loose-stowed in the holds of the barges. On February 10, 1958, a service consisting of one sailing every two weeks was instituted from Portland to Alaska, and it is expected that a monthly sailing from California ports will be instituted later this year. Rates for the latter service are not involved in this proceeding.

Garrison operates no vessels but files a tariff naming through rates for the through movement of cargo in motor cargo vans from points in the United States to points in Alaska. The vans are carried on vessels of Alaska Steam under a division-of-rates arrangement.

Prior investigations by the Board in Alaskan rate proceedings [5] have emphasized the particular difficulties and hazards inherent in providing water transportation to Alaska. There are an exceptionally large number of small ports to be served. In 1957, for example, Alaska Steam called at 65 different ports. Hazards to navigation are extreme because of ice, wind, fog, shoals, strong tides at narrow passages, and poor berthing accommodations. The trade is highly seasonal, with the majority of the cargoes moving in the period from April through September. The movement is severely unbalanced, as indicated by the fact that in 1957 northbound traffic of Alaska Steam was about 3.5 times that of southbound traffic; for Alaska Freight and Coastwise, northbound traffic was about 90.2 percent and 95.8 percent, respectively, of their total revenue tons. Our previous observations as to the general characteristics of this trade are confirmed by the present record.

Since May 1947 there have been two general rate increases in this trade, one of 15 percent in 1952 and one of 7½ percent in 1954. In-

[5] *Alaskan Rate Investigation,* 1 U.S.S.B. 1 (1919); *Alaskan Rates,* 2 U.S.M.C. 558 (1941); *Alaskan Rate Investigation No. 3,* 3 U.S.M.C. 43 (1948).

cluding the interim rate increase of 7½ percent made effective on January 30, 1958, the cumulative rate increases since May 1947 amount to 32.9 percent. This compares with corresponding cumulative rate increases of 101.5 percent in the Pacific coast-Puerto Rican trade and 85.2 percent in the Pacific coast-Hawaiian trade.

Alaska Steam is by far the dominant carrier in the trade, carrying 514,301, or 71.2 percent, of the total 722,375 revenue tons handled by the four respondents in 1955; 532,214, or 71.0 percent, of the total 749,304 revenue tons carried in 1956; and 481,411, or 71.7 percent, of the total 671,051 revenue tons carried in 1957. Alaska Steam thus being clearly the dominant carrier in the trade and generally the rate-making line, we believe an examination of that carrier's operations will correctly determine the issues here presented. Our analysis will therefore be directed to the operations of Alaska Steam. *General Increase in Hawaiian Rates*, 5 F.M.B. 347 (1957).

The increases under consideration apply only to commercial cargo, but the traffic projections presented by Alaska Steam assume that similar increases will be sought and granted from the various Government agencies shipping so-called military cargoes. In 1957, 18.3 percent of the revenues and 18.9 percent of the traffic of Alaska Steam consisted of military cargo.

Alaska Steam carried the following revenue tons in recent years:

TABLE I

1949	690, 626	1954	518, 967
1950	635, 210	1955	514, 301
1951	715, 049	1956	532, 214
1952	555, 502	1957	481, 441
1953	586, 216		

Traffic officials of Alaska Steam estimated a decline in cargo movement of 15 percent in 1958 as compared with 1957, but the total movement projected for 1958 in Alaska Steam exhibits was 429,307 tons, or a decrease of 10.8 percent from 1957. This decrease was based upon the experienced decrease from the carryings in the last half of 1957 as compared with the last half of 1956. This projected decrease was supported by predictions of Alaska Steam that the southbound movement of canned salmon would continue to decline; that there would be a decline in the movement of military cargo; that construction activity in 1958 will be less than in 1957; and that the sparse population of Alaska will decline in 1958.

Public Counsel and certain of the interveners contend that Alaska Steam's traffic projections are unduly pessimistic. They point out that Alaska Steam did not allow for additional traffic which will arise from the Coastwise interchange, and that the data relied upon by Alaska Steam was insufficient for a reliable prediction of such a sharp decrease. Public Counsel estimates a decrease in tonnage of about 4½ percent in 1958, the same rate of annual decrease experienced by Alaska Steam from 1953 to 1957.

Based upon its projected decrease for 1958, the assumption that the proposed 15-percent rate increase had been in effect for the full year, the adjustments in expenses to reflect for a full year the increased wages incurred during 1957, and adjusting expenses to reflect five fewer sailings in 1958, Alaska Steam presented the following operating results for 1957 and as projected for 1958:

TABLE II

	1957	1958 (projected)
Revenues	$13, 521, 327	$14, 160, 951
Expenses	13, 539, 369	13, 079, 651
Profit before income tax	(18, 042)	1, 081, 300
Profit after income tax	----------	519, 024

Alaska Steam contends that the proper and lawful value of the property owned and used by it in the Alaskan trade, i.e., the "rate base" to be used in determining whether the increased rates will result in a fair and reasonable rate of return, is $23,591,769.00, made up of the following asset valuations:

TABLE III

Owned vessels	$10, 790, 700
Chartered vessels	5, 377, 900
Property other than vessels:	
Owned	684, 400
Used	1, 329, 518
Working capital	3, 591, 000
Going concern value	1, 818, 251
Total	23, 591, 769

The record shows the following to be the net book value,[6] reproduction cost depreciated,[7] and domestic market value[8] of Alaska Steam's owned and chartered vessels.

TABLE IV

	Net book value	Reproduction cost depreciated	Domestic market value
Owned vessels	$3, 006, 000	$14, 127, 000	$4, 500, 000
Chartered vessels	1, 518, 600	7, 032, 000	2, 540, 000
Totals	4, 524, 600	21, 159, 000	7, 040, 000

In reaching its rate base valuation of $10,790,700.00 for owned vessels and $5,377,900.00 for chartered vessels, Alaska Steam used a formula weighting original cost depreciated at 30 percent and reproduction cost depreciated at 70 percent, in order, it states, to give effect to the long-continued and consistently upward trend in the reproduction cost of the type vessels utilized by it.

Public Counsel and certain interveners contend that nonowned chartered vessels should not be included in the rate base if the charter hire therefor is included in operating expenses; that the value of owned vessels should be either book value or present market value; and that reproduction costs should not be given controlling weight in the determination of a fair vessel valuation for rate base purposes.

Owned property other than vessels include automobiles, office and repair shop supplies, equipment and machinery, furniture and fixtures, life boat radios, and real estate, with a net book value of $94,-820.00, appraised by Alaska Steam at $133,726.00, and the unitized cargo equipment owned by Alaska Steam with a net book value of $88,625.00, appraised by Alaska Steam at $550,692.00. The unitized cargo equipment consists of lift trucks, pallet jacks, cargo gards,

[6] In accordance with the initial decision of the examiner, net book value of the four chartered C1–M–AV1 vessels has been included in this table at the same net book value as the four C1–M–AV1 vessels.

[7] Reproduction cost was estimated in exhibits prepared and presented by Alaska Steam, and depreciation was calculated on a 20-year life basis.

[8] Domestic market value of the vessels was estimated by an expert witness for Alaska Steam and by a Maritime Administration appraiser. Recognizing that experts will honestly differ in appraisals of value, we have accepted, as did the examiner, an approximate average of the two appraisals for the owned and chartered vessels at the time of hearing.

and cargo cribs. The gards were depreciated over a 3-year period and are fully depreciated. The collapsible crib parts are of wooden construction, and the sides, ends, and tops are written off in one year while the pallet board bottoms are written off in two years.

The value of nonowned property, other than vessels, urged by Alaska Steam has been computed on the basis of 90 percent of the net book value of the cargo vans, semitrailers, highway cargo vans, and temperature control devices utilized principally in the through transportation arrangements between Alaska Steam and Garrison, some of which are leased individually by Alaska Steam on a per diem rental arrangement. The equipment is owned by Arctic Terminals, a corporation of which the stock is held 49 percent by Alaska Terminal & Stevedoring Co., an affiliate of Alaska Steam, and 51 percent by Consolidated Freightways, Inc. The figure of 90 percent was used on the theory that at least that much of the equipment was utilized in the service of Alaska Steam. The record does not disclose the actual or approximate time that the equipment is in the possession of and used by Alaska Steam, as compared with the time the equipment is used by Garrison, so no fair allocation for valuation can be made. The 90-percent figure does not represent actual use by Alaska Steam. The per diem rental charges for this equipment are included as an item of expense by Alaska Steam, and in the case of through traffic handled by Garrison and Alaska Steam, the rental charges are deducted from the gross revenues before division of the latter between the two carriers.

Public Counsel and interveners contend that the valuation of owned property other than vessels should be based on book value, and that nonowned property other than vessels should be excluded from the rate base, particularly where, as here, the rental charges for the use of such property are included in operating expenses and cannot be clearly segregated.

Alaska Steam computed working capital by adding together two items: (1) net investment in working capital, determined by subtracting unpaid current accounts, taxes payable, unterminated voyage revenue, and deferred liabilities from uncollected accounts receivable, working funds, cash in transit, prepayments, unterminated voyage expenses, and materials and supplies; and (2) a buffer fund of cash equal to the maximum month's operating expenses in 1957. These computations, showing average, maximum, and minimum working capital in 1957 are as follows:

TABLE V

	Monthly average	Minimum month	Maximum month
Net investment in working capital, exclusive of buffer fund of cash	$1, 195, 223	$1, 042, 426	$1, 602, 274
Operating expenses, including taxes other than income taxes, exclusive of depreciation	1, 102, 375	670, 663	1, 989, 070
Total	2, 297, 598	1, 713, 089	3, 591, 344

Public Counsel and certain interveners contend that working capital was overstated by Alaska Steam and should be limited to $2,000,000.00 or less. Public Counsel urges that working capital is a fund needed to support the lag between payment by the company of expenses for conducting operations, and receipt by the company of revenues for the service for which the expense was incurred. Under this definition they argue that working capital in the Alaska trade should be not more than $2,000,000.00, or approximately the highest-month's operating expenses.

The item of going-concern-value represents an arbitrary ten percent of the value of all the physical assets otherwise included in the rate base. Public Counsel and interveners urge that no specific item should be included in the rate base for "going concern value," and the examiner rejected this item.

In concluding that the proposed increases were just and reasonable, the examiner did not fix one precise rate base for determining a fair return. He determined that for Alaska Steam, on a rate base of $9,540,000.00, consisting of the market value of owned and chartered vessels, $2,200,000.00 working capital, and $300,000.00 for all other properties, the revenue of $14,160,951.00 projected for 1958 would produce a net profit of $519,024.00, or a 5.44 percent return, and on a rate base of $15,341,800.00 weighting the net book value and reproduction cost depreciated of owned and chartered vessels equally, and allowing the amounts stated immediately above for working capital and other property, the same net profit would result in a return of 3.38 percent. He concluded that these rates of return on the rate bases considered could not be said to be unreasonably high, and that the increases were therefore just and reasonable.[9] The examiner gave no controlling

[9] The examiner also made separate findings with respect to Alaska Freight, but since we are treating Alaska Steam as the rate-making line in the Alaska trade, we have not separately considered the operations of Alaska Freight.

weight to the operating ratio theory [10] advanced by Alaska Steam and Alaska Freight, merely commenting that the projected operating ratio of 96.33, after income taxes, cannot reasonably be characterized as unduly low.

Exceptions were filed by Public Counsel, Administrator of General Services, Northwest Fish Traffic Committee, Associated Grocers, Inc., Alaska Steam, Garrison, and the Territory of Alaska. Replies to exceptions were filed by Alaska Freight, Public Counsel, Alaska Steam, and Garrison. Exceptions taken and recommended findings not discussed in this report and not reflected in our findings and conclusions have been found not relevant or not supported by the evidence.

Discussion and Conclusions

Under the 1933 Act the burden of proving that the proposed increases are just and reasonable rests upon respondents (section 3), and if the tariffs are found to be unjust or unreasonable the Board may "determine, prescribe, and order enforced a just and reasonable maximum or minimum, or maximum and minimum rate, fare, or charge, or a just and reasonable classification, tariff, regulation or practice" (section 4).

What Alaska Steam and the other respondents are entitled to is a "fair return on the reasonable value of the property at the time that it is being used for the public." *San Diego Land Company* v. *National City*, 174 U.S. 739 (1899), cited in *General Increase in Hawiian Rates*, *supra*.

We agree with the examiner that the operating-ratio theory has never been followed by the Board or its predecessors and should have no controlling weight in this proceding. Operating ratio has been used in motor carrier rate cases by the Interstate Commerce Commission, where the ratio of operating revenues (and expenses) to investment in capital equipment is relatively large, i.e., four or five to one or better. In contrast, Alaska Steam's ratio of revenue (or expenses) to capital investment is only slightly in excess of two to one. We see no reason to depart from the fair-return-on-fair-value standard which the Board and its predecessors have used.

We first direct our inquiry to the cargo carryings which can reasonably be expected by Alaska Steam in 1958, and to the operating profit which may be expected from carrying such traffic under the 15-percent increase and the increased costs estimated for 1958.

[10] Operating ratio is the ratio of operating expenses to gross revenues.

It is clear from the record that Alaska Steam can expect some decline in cargo offerings in 1958 as compared with 1957. The record does not support a decline, however, as great as the 10.82 percent projected by the company.

The total movement of traffic between the United States and Alaska has shown a consistent decline in recent years. In the years 1949–1957, as shown in table I, *supra*, Alaska Steam's revenue tons fluctuated widely but generally declined, as follows:

1949	690, 626	1954	518, 967
1950	635, 210	1955	514, 301
1951	715, 049	1956	532, 214
1952	555, 502	1957	481, 441
1953	586, 216		

From 1949 to 1957 the traffic of Alaska Steam decreased a total of 209,215 revenue tons, or an average annual decrease of 3.8 percent; from 1954, the date of the last rate increase, to 1957, traffic decreased 37,556 revenue tons, or an average annual decrease of 2.4 percent; and from the peak Korean War year of 1951 to 1957, the decrease was 233,638 revenue tons, or an average annual decrease of only 5.5 percent.

The factors relied upon by Alaska Steam in supporting its projected decline in traffic do not support the calculation of a precise and reliable mathematical projection. In view of the traffic experience of Alaska Steam, and upon consideration of the record as a whole, we find that a decrease of 5 percent can be reasonably projected for 1958 as compared with 1957. On this basis, it can be predicted that Alaska Steam will carry 457,340 revenue tons in 1958.

Based upon its projection of 429,307 revenue tons to be carried in 1958 at the increased 15-percent rates for the full year, Alaska Steam has estimated total revenues of $14,160,951.00. Applying a return of $32.26 per revenue ton [11] to the 457,340 revenue tons we consider reasonable for 1958, Alaska Steam's gross revenues for the year would be $14,753,788.00.

Based upon 429,307 revenue tons projected for 1958, Alaska Steam has estimated its annual total expenses at $13,079,651.00. Adding to this the cost of handling the additional 28,033 revenue tons [12] which we estimate will be carried, or $303,878.00, the projected total expenses for carrying 457,340 revenue tons in 1958 would be $13,383,529.00.

[11] $32.26 is the average return per revenue ton for commercial and military cargoes as projected by Alaska Steam for 1958 at the 15-percent increased rate.

[12] The average cost of handling commercial cargo in 1957 was $10.84 per ton.

Revenues of $14,753,788.00 and expenses of $13,383,529.000 result in a net profit of $1,370,259.00 before taxes and $647,724.00 after taxes.[13]

We next direct our inquiry to the rate base, i.e., the fair value of the property devoted to the common-carrier operations of Alaska Steam. In ascertaining such a fair value we are not bound by any artificial rules or formulae. *General Increase in Hawaiian Rates, supra.*

The rate-base valuations advanced by Alaska Steam consisted of vessels, owned and chartered; property other than vessels, owned and leased; working capital; and going-concern value.

Vessels. The record shows the net book value, reproduction cost depreciated, and domestic market value of Alaska Steam's owned and chartered vessels to be as follows:

TABLE VI

	Net book value	Reproduction cost depreciated	Domestic market value
Owned vessels	$3, 006, 000	$14, 127, 000	$4, 500, 000
Chartered vessels	1, 518, 600	7, 032, 000	2, 540, 000
Total	4, 524, 600	21, 159, 000	7, 040, 000

Various valuations of vessels for rate-base purposes were presented—$16,168,600.00 (net book value weighted 30 percent, and reproduction cost depreciated weighted 70 percent), proposed by Alaska Steam; $12,841,800.00 (50–50 average of net book value and reproduction cost depreciated); $7,040,000.00 (domestic market value of owned and charted vessels); and $4,500,000.00 (domestic market value of owned vessels only—chartered vessels excluded), urged by Public Counsel.

We consider the value of $16,168,600.00, weighting net book value 30 percent and reproduction cost depreciated 70 percent, to be excessively high as it gives unreasonable emphasis to hypothetical reproduction costs where the record shows that these vessels will probably not be reproduced and that Alaska Steam has historically never operated with newly constructed tonnage. We further consider book value alone as unrealistic. In *General Increase in Hawaiian Rates, supra*, we considered as two possible valuations for rate-base purposes the average of net book value and depreciated reproduction cost and fair market value adjusted to eliminate short term peaks or valleys in

[13] Taxes are calculated at 52 percent, the tax rate used by Alaska Steam in its exhibit calculations.

vessel values. For Alaska Steam's own and chartered vessels the average of the net book value and depreciated reproduction cost is $12,841,800.00. Considering the upward trend in vessel values in recent years, and allowing for the decline in such values which has occurred since the excessively high values during the Korean War and the Suez crisis, we consider the domestic market value at the time of hearing of $4,500,000.00 for owned vessels and $2,540,000.00 for chartered vessels to be a fair and reasonable market valuation for rate-base purposes.

We do not agree with the contention of Public Counsel and interveners that the proper method of handling these Government-owned chartered vessels is to exclude their value from the rate base, but instead allow charter hire to remain as an item of operating expense. We consider inclusion of a fair value for these vessels in the rate base to be more realistic and less subject to market fluctuations than to exclude such vessels from the rate base and allow charter hire as an item of expense. We will therefore include the rate-base values, as set forth in the preceding paragraph, for both owned and chartered vessels.[14] It would be improper, however, to allow a return on the value of nonowned property and at the same time allow the cost of using such property, i.e., charter hire, to remain as an operating expense.[15] We will therefore reduce projected operating expenses for the year 1958 by $155,190.00, the amount of such annual charter hire.

Property other than vessels. Alaska Steam valued owned property other than vessels at an appraised value of $684,418.00, although the net book value of such property is only $183,445.00. It is evident that the value of much of this property has been charged off as depreciation in operating expenses, and the record shows that certain of this equipment is depreciated in only one or two years and is treated more as an expense item than as capital equipment. We consider the proper valuation of this owned property to be book value, or $183,445.00. This is consistent with our decision in *General Increase in Hawaiian Rates*, *supra*, wherein we allowed net book value in the rate base for property other than vessels.

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[14] We consider these chartered vessels used and useful in Alaska Steam's service during the entire year, even though they may be withdrawn from service during a portion of the year. In *Alaska Rates, supra,* the Board disallowed a pro rata portion of vessel valuation for the period they were engaged in other services. Here the record indicates these chartered vessels will not be used in any other service while withdrawn from the Alaska trade.

[15] On this record it is impossible to determine with accuracy the owner's expenses for these chartered vessels, the owner being the United States Government, and we have not included in expenses any item of "owner's costs." We find it unnecessary to determine whether we would allow such expense costs in a proceeding where they could be precisely determined.

Property other than vessels, used but not owned by Alaska Steam, consists of cargo vans, semitrailers, highway cargo van carriers, and other equipment utilized in the through transportation arrangement with Garrison, and owned by a company jointly owned by an affiliate company of Alaska Steam and Consolidated Freightways. The valuation of $1,329,518.00 placed on this property by Alaska Steam is stated to be 90 percent of its net book value, on the theory that this much of the equipment is utilized in the services of Alaska Steam. The record is silent as to how much of the time the property is used by Alaska Steam, on the one hand, and by Garrison, on the other hand. It is impossible on this record to allocate a value of the equipment to Alaska Steam based upon percentage of use in its services. The rental cost is included in Alaska Steam's operating expenses, though not separately identified on the record. As previously stated in regard to chartered vessels, we think it improper to allow the value of nonowned property to be included in the rate base, while at the same time the charges for the use of that capital equipment is included as an operating expense. Since the proper valuation of this nonowned property in Alaska Steam's operations is difficult if not impossible to determine accurately, and since the expenses for its use is included in operating expenses, we will not include any value for the equipment in the rate base.

Working capital. Alaska Steam has included in its rate base a value for working capital of $3,591,344.00, which consists of the maximum-month's net investment in working capital in 1957 of $1,602,274.00, plus a buffer fund of the maximum-month's operating expenses of $1,989,070.00. This is stated to be the method used by the Board's predecessor in *Alaskan Rates*, 2 U.S.M.C. 639, 644–6 (1942).

Working capital consists of funds necessary to pay operating expenses prior to the time revenues are received for the service rendered. As stated in *Alabama-Tennessee Nat. Gas Co.* v. *Federal Power Com'n*, 203 F. 2d 494 (3d Cir. 1953), working capital for rate base purposes is—

> "* * * [the] allowance for the sum which the Company *needs to supply from its own funds* for the purpose of enabling it to meet its current obligations as they arise and to operate economically and efficiently." Barnes, The Economics of Public Utility Regulation (1942) 495. Since it is normally contemplated that all operating expenses will eventually be paid for out of revenues received by the Company, the need for working capital arises largely from the time lag between payment by the Company of its expenses and receipt by the Company of payments for service in respect of which the expenses were incurred.

Public Counsel contend that working capital should be limited to not more than the net balance of current assets over current liabilities, or approximately one month's operating expenses, but that under no circumstances are both these items justified. On this basis Public Counsel urge that working capital should be valued at no more than $2,000,000.00. The examiner valued working capital at approximately the average (rather than maximum) monthly net investment in working capital plus the average monthly expenses, or $2,200,000.00. Calculation of working capital in accordance with General Order No. 71 [16] (superseded by General Order 31) would give a working capital valuation in recent years of slightly under $1,000,000.00.

The record shows that the Alaska trade is to some extent prepaid, and it is further apparent that certain operating expenses of Alaska Steam are of the type normally paid after the expense is incurred. It is not clear to what extent these factors may counteract each other, and it is impossible to ascertain with any accuracy the extent of lag between payment of expenses and receipt of revenues. We consider a calculation in accordance with General Order No. 71 to be a fair and reasonable valuation of working capital for rate-base purposes. Such a value was allowed in *General Increase in Hawaiian Rates*, *supra*, and no sound reason justifying a higher value for working capital has been presented in this proceeding. We conclude, therefore, that the fair and reasonable value for Alaska Steam's working capital should be limited to approximately the value calculated under General Order No. 71, or $1,000,000.00.

Going concern value. Neither the Board nor any of its predecessors has ever included a separate "going concern value" in a rate base; on the contrary, such a separate value in rate proceedings has been specifically rejected. *Alaskan Rates*, 2 U.S.M.C. 558, 568. No separate item of "going concern value" should be included in the rate base for Alaska Steam.

Based upon revenues of $14,753,788.00 and expenses of $13,228,339.00,[17] Alaska Steam's profit for 1958 would be $1,525,449.00 before taxes and $732,215.00 after taxes. On a rate base of $8,223,445.00, consisting of market value for owned and chartered vessels, or $7,040,000.00, $183,445.00 for property other than vessels, and $1,000,000.00 for working capital, the rate of return would be 8.90 percent. On a rate base of $14,025,245.00, consisting of an average of net book value and reproduction cost depreciated for owned and chartered vessels, or

[16] General Order No. 71 (46 C.F.R. Part 291) sets forth the basis for determination of working capital for subsidized water carriers. Working capital as therein calculated basically consists of the average voyage expenses for each vessel in the carrier's fleet.

[17] Expenses have been reduced by $155,190.00, the annual charter hire for vessels.

$12,841,800.00, $183,445.00 for property other than vessels, and $1,000,000.00 for working capital, the rate of return would be 5.22 percent.

In view of all the evidence of record, we find that the foregoing rates of returns on the "fair value" rate bases above considered are within the zone of reasonableness, and we find it unnecessary to determine one precise rate base for measuring the reasonableness of the rates. We conclude, therefore, that the proposed increased rates and charges and the regulations and practices of Alaska Steam and the other respondents are just and reasonable and not unlawful.

Alaska Steam has excepted to a ruling of the examiner which denied incorporation in the record of a verified statement of Alaska Steam's vice president filed after the close of hearing and the filing of briefs, pursuant to Rule 10(w) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.163). In view of the reservations and objections to such statement filed by certain respondents, the examiner was correct in his ruling.

An order discontinuing this proceeding will be entered.

APPENDIX

Section 18, Shipping Act, 1916:

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

Section 3, Intercoastal Shipping Act, 1933:

SEC. 3. Whenever there shall be filed with the board any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the board shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice: *Provided, however*, That there shall be no suspension of a tariff schedule or service which extends to additional ports, actual service at rates of said carrier for similar service already in effect at the nearest port of call to said additional port.

Pending such hearing and the decision thereon the board, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than four months beyond the time when it would otherwise go into effect; and after full hearing whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the board may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period. At any hearing

under this paragraph the burden of proof to show that the rate, fare, charge, classification, regulation, or practice is just and reasonable shall be upon the carrier or carriers. The board shall give preference to the hearing and decision of such questions and decide the same as speedily as possible.

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 9th day of October A.D. 1958

No. 828

GENERAL INCREASES IN ALASKAN RATES AND CHARGES

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof, and having found that the proposed rates, charges, regulations, and practices herein under investigation are just and reasonable:

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

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–79

THE OCEANIC STEAMSHIP COMPANY—APPLICATION UNDER SECTION 805(a)

Submitted November 17, 1958. Decided November 17, 1958

One voyage by SS *Lurline* commencing on or about January 6, 1959, between San Francisco and Seattle, Seattle and Hawaii, and Seattle and California ports via Hawaii, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the domestic trade, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Willis R. Deming and *Alvin J. Rockwell* for The Oceanic Steamship Company.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

The Oceanic Steamship Company (Oceanic) has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to permit its parent organization, Matson Navigation Company (Matson), to operate the SS *Lurline* on one voyage commencing at San Francisco on or about January 6, 1959, carrying passengers and their automobiles between (a) San Francisco and Seattle, (b) Seattle and Hawaii, and (c) Seattle and ports in California via Hawaii. The hearing, notice of which was published in the Federal Register of November 6, 1958, was held before the Administrator on November 17, 1958. No one appeared in opposition to the application.

The SS *Lurline*, together with the SS *Matsonia*, is regularly engaged in the California-Hawaii passenger trade. Matson experiences a lull in this trade during January and feels that there is a demand

for passenger service for a voyage at that time between the ports set forth in the application. By granting the application Matson would avoid the possibility of laying up the vessel with its attendant consequences.

Pope and Talbot, Inc., a domestic carrier between San Francisco and Seattle, has indicated that it has no objection to the application, and Hawaiian Textron, Inc., a domestic operator between California ports and Hawaii, likewise does not oppose the granting of the permission.

Upon this record, it is found and concluded that the granting of the written permission under section 805(a) of the Act for one voyage by the SS *Lurline*, carrying passengers and their automobiles, between (a) San Francisco and Seattle, (b) Seattle and Hawaii, and (c) Seattle and California ports via Hawaii, commencing on or about January 6, 1959, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, nor be prejudicial to the objects and policy of the Act.

This report will serve as written permission for the voyage.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of November A.D. 1958

No. S–57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRICONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

RULING ON MOTION FOR COMPARATIVE CONSIDERATION *

On October 28, 1958, American President Lines, Ltd., and American Mail Line Ltd. (APL/AML) filed a motion requesting that decision on States Marine Lines' (SML) request to operate along the full Pacific coast range on Trade Routes Nos. 29 and 30 be deferred until similar requests by APL/AML can be presented and given comparative consideration with that of SML. Replies to the motion have been filed by SML and Public Counsel.

APL/AML urge comparative consideration on the grounds (1) that a section-211 determination may be made by the Maritime Administrator fixing the number of subsidized voyages which will be permitted full-coast loading privileges on Trade Routes Nos. 29 and 30, (2) that such number, if and when set, may be insufficient to allow subsidy on all the full-coast loading voyages requested by SML and APL/AML, and (3) that therefore the section-605(c) determinations with respect to SML and APL/AML are mutually exclusive and should be given comparative consideration by the Board, citing *Ashbacker Radio Co.* v. *F.C.C.*, 326 U.S. 327 (1945).

*Report of the Board under sections 605(c) and 805(a) of the Merchant Marine Act, 1936, is found at 5 F.M.B. 537 (1959).

It appearing, That at this time the effect of a possible future section-211 determination by the Maritime Administrator upon the pending applications of SML and APL/AML are unknown; and

It further appearing, That findings under section 605(c) do not guarantee a subsidy contract or award subsidy to any particular applicant, and are not, therefore, "mutually exclusive" within the meaning of the *Ashbacker* doctrine;

Now, therefore, for the foregoing reasons, among others, and upon consideration of the motion and memorandum in support thereof and the replies thereto:

It is ordered, That the motion be, and it is hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 824

MARKT & HAMMACHER COMPANY—MISCLASSIFICATION OF GLASSWARE

Submitted October 31, 1958. Decided November 24, 1958

Respondent Markt & Hammacher Company, a shipper, found to have knowingly and willfully, by means of false classification, obtained transportation by water for property at less than rates or charges which would otherwise be applicable, in violation of section 16 of the Shipping Act, 1916, as amended.

Louis H. Powell for Markt & Hammacher Company, respondent.
Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This investigation, instituted on the Board's own order, concerns alleged violations of section 16 of the Shipping Act, 1916, as amended (the Act), 46 USC 815.[1]

As recited in the order of investigation, it appeared that during 1956 Markt & Hammacher Company (respondent or Markt & Hammacher), an exporter, made certain shipments of glassware [2]—cake

[1] Section 16 provides in pertinent part:
"That it shall be unlawful for any shipper, consignor, consignee, forwarder, broker, or other person, or any officer, agent, or employee thereof, knowingly and willfully, directly or indirectly, by means of false billing, false classification, false weighing, false report of weight, or by any other unjust or unfair device or means to obtain or attempt to obtain transportation by water for property at less than the rates or charges which would otherwise be applicable."

[2] The items under question are set forth in the appendix.

pans, loaf pans, mixing bowls, and the like—via ocean carriers from the United States to Venezuela at less than the applicable freight rates, through the device of falsely classifying the shipments, in violation of section 16 of the Act.

Hearings were held and a stipulation of facts with attached exhibits was agreed to by the parties. A recommended decision was served, in which the examiner concluded that respondent's misclassification was not knowingly and willfully made, and therefore section 16 of the Act was not violated. Exceptions to this decision were filed by Public Counsel and a reply was filed by respondent. No oral argument was requested or held.

FACTS

Markt & Hammacher, long engaged in the foreign trade, purchased the glassware items in question [3] from Anchor Hocking Glass Corporation, at a discount, and resold the items to Venezuelan customers at Anchor Hocking's catalogue price. Title to the goods passed in the United States and freight and related costs were paid by the foreign buyers. In arranging the ocean carriage in each instance respondent was acting on behalf of the foreign buyer. Independent freight forwarders were not employed and respondent prepared all the shipping documents in its own traffic department.

The items in question moved under United States Atlantic & Gulf/Venezuela and Netherlands Antilles Conference Freight Tariff No. VEN-7. This tariff contains Item 1000, "Glassware NOS",[4] and Item 115, "Bottles or Jars, Empty, Glass;" the former takes a higher rate than the latter. Respondent's traffic manager caused the shipments to be designated "Bottles or Jars" and hence caused them to move at the lower rate. During the same period, through its traffic manager, respondent shipped similar items as "Glassware NOS," and has not shipped any of the items under the lower-rated classification since the Board instituted its preliminary investigation.

In selecting the lower classification respondent's traffic manager stated in his affidavit:

> An examination of Freight Tariff No. VEN-7 tariff schedule showed that "Bottles or Jars, Empty, Glass" were to be classified under Item 115. I consulted a dictionary in an effort to determine what would be defined as "Jars." The definition contained in the dictionary described "Jars" as "deep wide mouthed vessels." I therefore classified as jars those items of glassware which I feel fulfilled that description.

[3] See appendix.
[4] Not otherwise specified.

Discussion

There can be no question that the shipment of these items as "Bottles or Jars" constituted a factual misclassification and that the misclassification resulted in the payment of a lower freight rate than would be otherwise applicable. Respondent has admitted the misclassification. Whether section 16 has been violated depends upon whether the misclassification was knowingly and willfully made.

The examiner concluded that the misclassification was not knowingly and willfully made. His conclusion was grounded on two findings: (1) that since title passed to the foreign buyer in the United States, prior to shipment, no benefit inured to respondent or its traffic manager, and (2) the traffic manager's misclassification was neither condoned nor known by the management and was made contrary to its policy and instructions.

We feel that neither of these findings negates a record which otherwise indicates knowing and willful conduct. Through its traffic manager, respondent obviously was aware of the proper tariff classification, and the resort of the traffic manager to a dictionary definition of a jar, which does such violence to the clear meaning of the tariff, at best, manifests such an indifference and lack of care in construing the tariff as to constitute a deliberate violation of section 16. *Rates from United States to Philippine Islands*, 2 U.S.M.C. 535 (1941). Where a shipper has doubt as to the proper tariff designation of his commodity, he has a duty to make diligent and good faith inquiry, that is, inquiry of the carrier or conference publishing the tariff. *Hazel-Atlas Glass Co.—Misclassification of Glass Tumblers*, 5 F.M.B. 515, decided this date.

A benefit to the shipper is not a *sine qua non* to a finding of a knowing and willful misclassification by a shipper. Although no direct benefit was proved here, the most that can be inferred from it is that no *motive* or reason is apparent for the violation. But a motive or reason is not necessary for the finding of a violation. *State* v. *Santino*, 186 S.W. 976 (1916).

The misclassification here involved was made by an employee acting within the scope of his employment, and it is beyond dispute at this late date that a corporation is liable for the acts of its agents when done within the scope of their authority. *New York Central R.R.* v. *United States*, 212 U.S. 481 (1909); *United States* v. *George F. Fish, Inc.*, 154 F. 2d 798 (1946); *United States* v. *General Motors Corporation*, 226 F. 2d 745 (1955).

An appropriate order will be entered.

APPENDIX

Catalogue or ware No.	*Invoice description*
H 452	Sq. Cake Pan
H 410	Baking Pan
H 411	Baking Pan
H 408	Cass. K/Cover
H 407	Cass. K/Cover
H 406	Cass. K/Cover
H 405	Cass. K/Cover
H 426	Pie Dish
H 409	Loaf Pan
H 440	Sq. Baking Pan
H 442	Ind. Baker
W300/148	Mix. Bowl
H 424	Dessert
W300/149	Mix. Bowl
L4374	Dessert
G355	Mixing Bowl
G356	Mixing Bowl
G357	Mixing Bowl
L4157	Mixing Bowl
L4159	Mixing Bowl
G655	Batter Bowl
G291	Soup
W291	Soup
G300/129	Bowl Set
G300/130	Bowl Set
W355	Bowl
W356	Bowl
W357	Bowl
H 425	Pie Dish
G4159	Mixing Bowl
G4158	Mixing Bowl
G4157	Mixing Bowl
L4378	Veg. Bowl
1426	Bowl
3355/127	Ftd. Ivy Ball
3306/128	Crimp Top Vase
3306/127	Crimp Top Vase
598	Butter and Cov.
595	Milk Pitcher
E86	Ice Lip Pitcher
L4354	Creamer
G3854	Creamer
G3874	Dessert
G3878	Veg. Bowl
G221	Butter and Cover
L235	French Cass/Cov.
M4177	Veg. Bowl
M4178	Veg. Bowl

Catalogue or ware No.	*Invoice description*
W221	Butter and Cover
W300/182	Mix. Bowl Set
W1400/50	Punch Set
687	Ice Lip Pitcher
B4067	Soup Pl.
B4078	Veg. Bowl
L291	Soup
M498	Meas. Pitcher
E333	Sherbet
H 496	Meas. Cup
H 498	Meas. Pitcher
B4054	Creamer
H 402	Cass. and Cover

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of November A.D. 1958

No. 824

MARKT & HAMMACHER COMPANY—MISCLASSIFICATION OF GLASSWARE

This proceeding having been instituted by the Board upon its own motion, and having been duly heard and submitted, and 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 containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. Respondent Markt & Hammacher Company be, and it is hereby, notified and required to hereafter abstain from the practices herein found to be in violation of section 16 of the Shipping Act, 1916, as amended;

2. Respondent Markt & Company be, and it is hereby, required to notify the Board, within ten (10) days from the date of service hereof, whether it has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure, 46 C.F.R. 201.3; and

3. The proceeding be, and it is hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 823

HAZEL-ATLAS GLASS COMPANY, INGE & COMPANY—MISCLASSIFICATION OF GLASS TUMBLERS

Submitted March 28, 1958. Decided November 24, 1958

Respondent Hazel-Atlas Glass Company, a shipper, found to have knowingly and willfully, by means of false classification, obtained transportation by water for property at less than rates or charges which would otherwise be applicable, in violation of section 16 of the Shipping Act, 1916, as amended.

H. Bartow Farr, *Vincent R. Fitzpatrick*, and *S. Roy French, Jr.*, for Hazel-Atlas Glass Company, respondent.

Francis J. Haley for Inge and Company.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This proceeding was instituted by order of the Board dated July 25, 1957, and is an investigation into and concerning alleged violations of the Shipping Act, 1916, as amended (the Act). As recited in the Board's order, it appeared that during 1954 and thereafter, certain shipments of glass tumblers had been made by Hazel-Atlas Glass Company (Hazel-Atlas), a manufacturer-shipper, by ocean carriers from the United States to Venezuela at less than applicable freight rates, as a result of misbilling, and that Inge and Company (Inge), a forwarder, had performed foreign freight forwarding services on such shipments, all in violation of section 16 of the Act.[1]

[1] Section 16 of the Act provides in part as follows:

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

A hearing was held in New York on November 22, 1957, and a stipulation of facts with attached exhibits was submitted and agreed to by respondents and Public Counsel, which stipulation was received in evidence and constituted the entire record in the case.

The issue presented is whether either or both respondents, knowingly or willfully, shipped packer's tumblers as "Bottles or Jars, Empty, Glass" rather than as "Glassware, N.O.S." or as "Tumblers," each of such classifications being contained in the applicable ocean tariffs.

A recommended decision was served on March 13, 1958, in which the examiner concluded that Hazel-Atlas had not misclassified its shipments of glassware and hence had not violated section 16 of the Act; that Inge, who performed freight forwarding services in connection with the shipments in question, had not misclassified the shipments; and that the proceeding should be discontinued as to each respondent.

No exceptions were filed to this decision, but on June 5, 1958, U.S. Atlantic & Gulf-Venezuela and Netherlands Antilles Conference (the conference) filed a petition for permission to intervene, seeking to reopen the proceeding for the purpose of presenting additional evidence.

FACTS

Hazel-Atlas, long engaged in the glass business, sold its assets to Continental Can Company, Inc. (Continental), on September 13, 1956, since which time the business has been carried on as Hazel-Atlas Division of Continental.

Between March 27, 1954, and September 16, 1957, Hazel-Atlas shipped certain quantities of packer's tumblers to Venezuela via ocean carriers. The freight forwarding services on these shipments were performed by Inge, a duly registered freight forwarder, which, in preparing the bills of lading and other shipping documents in connection therewith, followed the written instructions of Hazel-Atlas.

The shipments were made via conference vessels and pursuant to conference tariffs VEN–6 and VEN–7, which list various commodities and rates to be charged by conference members on shipments from Atlantic ports to Venezuela during the period in which the shipments under investigation were made. The tariffs [2] provide:

> Item 115
>
> Bottles or Jars, Empty, Glass (not Cut Glass or Vacuum), with or without their equipment of Caps, Covers, Stoppers, or Tops (not Nipples) * * *.
>
> Item 1000
>
> Glassware, N.O.S. * * *.

[2] None of the parties contends that "Glassware, N.O.S." is the correct classification for packer's tumblers, and it is readily apparent that packer's tumblers do not fall within the terms "Glassware, N.O.S."

Item 1000
Tumblers, viz:
Glass * * *.

There is no classification for "Packer's Tumblers." The first of the three classifications, "Bottles or Jars", takes the lowest rate and was used by Hazel-Atlas in the designation of its shipments of packer's tumblers.

By definition, a packer's-tumbler is a glass jar used for the packing of certain products and suitable for reuse as a drinking glass, and a drinking glass is a tumbler. All of the shipments in question were made to purchasers who package food products.

The 1955 edition of the *Glossary of Packaging Terms*, published by the Packaging Institute, Inc., and incorporated in part in the stipulation of facts, contains the following excerpts:

P. 274—"tumbler"—A container made like a drinking glass, with straight sides or sides flaring slightly outward toward the opening. Also *packer's tumbler*. Usually made of glass but also made from transparent molded plastic.

P.274—"tumbler, packer's"—A glass jar, pressed, without neck, used for packing of certain products and suitable for re-use for drinking purposes.

A price list of packer's tumblers is maintained by Hazel-Atlas. This list is separate and distinct from its price list for tumblers and glassware and its list for decorated glassware. There is no price list for bottles or jars in the record, and these items are not included in the packer's tumblers price list.

The affidavit of the vice chairman of the conference indicates that he would have advised Hazel-Atlas that the items shipped should be classified as "Tumblers" had the shipper made inquiry of him as to their proper classification, but the affidavit of the traffic manager of the Venezuelan Line indicates that had the shipper inquired of him as to their correct tariff classification he would have advised that "Bottles or Jars" was correct.

Discussion and Conclusions

To constitute a violation of section 16 of the Act resulting from an alleged false classification of goods, there must be affirmative findings supported by the record (1) that there has been a factual misclassification and (2) that the misclassification was knowingly and willfully made in order to obtain transportation by water of property at rates less than those otherwise applicable.

In shipping the packer's tumblers as "Bottles or Jars," Hazel-Atlas caused them to be shipped at a rate lower than the rates for "Tumblers."

We are not here concerned with the question whether the tariff could have included packer's tumblers within Item 115. We are concerned only with the question whether, by a fair and reasonable interpretation of the tariff, it can be said that the particular items shipped should properly have been shipped under Item 115, "Bottles or Jars", or under Item 1000, "Tumblers."

We do not agree with the examiner that "packers' tumblers fall within the classification 'Bottles or Jars, Empty, Glass' ", contained in the tariffs. It is true that packer's tumblers embody the attributes of both jars and drinking glasses, but although they are designed, manufactured, and sold as food containers, they are nevertheless designed, manufactured, and sold to be used as drinking glasses.

The packer's tumblers depicted in Exhibit 5, and covered by the packer's tumblers price list not containing prices for bottles or jars, reflects, we believe, the intention of Hazel-Atlas, in designing and manufacturing packer's tumblers, to offer for sale something more and different than a jar—a glass container and a drinking glass. This is confirmation of the fact that the food packer has bought more than a container, and that in marketing its product it is also marketing a tumbler.

Although we agree that the purpose for which a thing is manufactured—the controlling use—determines its classification tariffwise, we do not agree that its controlling use is necessarily its first use in point of time. A jelly jar, which in some households might be used ultimately as a drinking glass, does not thereby become a tumbler for tariff purposes, but, by the same token, a packer's tumbler, which is designed for use as both a container and a tumbler, is not excluded from the tariff classification "tumbler" by reason of its use as a container. These very items contain the generic term "tumbler." It is a term which the industry itself has adopted, and but for the use of the article as a drinking glass, we think the term would not have been employed. Further, in the Packaging Institute's Glossary, to which Hazel-Atlas subscribes, this commodity is cataloged "tumbler, packer's."

We find from all the evidence that Hazel-Atlas has considered packer's tumblers as separate and distinct from bottles or jars, and conclude, therefore, that Hazel-Atlas is guilty of a misclassification.

Since the misclassification has in fact resulted in the movement of the commodities at a lower rate than would otherwise be applicable under the appropriate tariffs, the critical question in determining whether the statute has been violated turns upon whether the misclassification was knowingly and willfully made.

An unwitting failure to comply with the statute, of course, is not sufficient to constitute a violation. *Boone* v. *United States* 109 F. 2d 560 (1940). In order to show a knowing and willful violation, however, it is not necessary to establish an intentional violation of law or an evil purpose (*United States* v. *Erie R. Co.*, 222 F. 444 (1915)), particularly, as here, where the statute does not involve turpitude. *U. S.* v. *Illinois Cent. R. Co.*, 303 U.S. 239 (1938). A conscious purpose to avoid enlightenment, where there is a duty to know, supports a charge of a violation. *United States* v. *General Motors Corporation*, 226 F. 2d 745 (1955). Knowledge may be presumed where one, upon whom a duty to know has been cast, intentionally or willfully keeps himself in ignorance. Indifference to diligent inquiry on the part of a shipper or a forwarder constitutes knowing and willful conduct tantamount to an outright and active violation. *Misclassification of Tissue Paper as Newsprint Paper*, 4 F.M.B. 483 (1954).

Hazel-Atlas, as a shipper, had a duty to correctly classify its shipments, and where it entertained doubt or was in possession of facts sufficient to raise a doubt, it had a duty to inform itself as to the proper tariff classification of the goods it was exporting. There is no evidence in this record that it ever took any steps to inform itself. It is argued that in designating the goods as jars it did what was reasonable, right, and proper,[3] and having no doubt that jars constituted the correct classification, it had no duty to inquire further.

From what we have said above, it is obvious that respondent's classification was not correct. We find it difficult, indeed, to believe that this shipper could—without doubt of error—classify these commodities as "Bottles or Jars." Hazel-Atlas maintains an experienced export department which was familiar with the classification "Tumblers," and the commodities, as we have noted, were advertised to prospective customers as having a use as a drinking glass—a tumbler.

Having not found the specific tariff classification, we believe that Hazel-Atlas had two alternatives: (1) to designate the articles as tumblers, or (2) to inquire of the carrier or the conference as to the correct classification.[4] The failure to designate the shipments properly, together with the failure to inquire—a manifest lack of due diligence in view of all the surrounding circumstances—evinces a

[3] Whether packer's tumblers move via rail at the same rate as jars, is of no consequence for we note that the specimen of the inland bill of lading of record specifically provides for "Jelly Glasses (Packing Glasses)."

[4] We give no weight to the affidavit of an official of the Venezuelan Line—the carrier of many of these shipments—rendered after the fact, that he would have construed the tariffs so as to authorize the classification "Bottles or Jars."

knowing and willful attempt on the part of the shipper to avoid the proper tariff rate.

On the record as a whole, we find that the course of conduct on the part of Hazel-Atlas supports the conclusion that it has knowingly and willfully violated section 16 of the Act.

With respect to Inge, the record discloses only that it is a registered freight forwarder, preformed freight forwarding services for Hazel-Atlas on all the shipments here involved, and did so in accordance with "written instructions from a duly authorized official of Hazel-Atlas specifying the tariff classification to be used on the shipping documents." A freight forwarder, in following written instructions from its principal, is not thereby insulated from a finding of a violation of section 16 of the Act as to the forwarder. A registered freight forwarder holds itself out to the shipping public as an expert in the handling of ocean freight, and its expertise includes a knowledge of applicable tariffs. Indeed, if Inge prepared the necessary bills of lading, procured cargo insurance, consular invoices, and customs declarations, as forwarders generally do, the nature of the cargo necessarily should be within Inge's knowledge. The forwarder has a duty to take reasonable steps to inform itself as to the nature of the cargo it is handling and to act lawfully with respect thereto.

Since the record fails to evidence any conduct whatsoever on the part of respondent Inge as to the shipments involved, other than the fact that written instructions were followed, the proceeding will be remanded to the examiner for further hearing. Further hearing, however, shall be limited in scope to whether Inge acted in violation of section 16 of the Act as to the instant shipments of packer's tumblers.

In view of our disposition of the issues as to Hazel-Atlas, the conference's petition to intervene is denied, without prejudice to the filing of another petition with respect to the further hearing.

Contentions of the parties not specifically answered herein have been considered and have been found not relevant to, or unnecessary for, the disposition of the issues here presented or not supported by the evidence.

An appropriate order will be entered.

Vice Chairman GUILL, dissenting:

I cannot agree with the majority in this case.

First, this record, in my opinion, does not establish a factual misclassification of the particular items shipped. A packer's tumbler is first and foremost a glass container—a jar—manufactured for the

primary purpose of packaging food stuffs. Its ultimate use as a drinking glass is both secondary and incidental to its primary use. As glass containers or jars, therefore, these packer's tumblers were properly classified by respondents under the applicable tariffs.

Second, I believe that the applicable tariffs are ambiguous, and even if packer's tumblers are not to be equated with jars, under the prevailing rules of tariff interpretation, the selection of the classification "Bottles or Jars" was correct. If it can be said that a packer's tumbler is something different from a jar, it is likewise something different from a drinking glass. In the absence of a specific tariff classification, a shipper is entitled to select the lower-rated tariff designation where, in so doing, a strained tariff interpretation would not result. I think that is the case here.

Third, the conference, after the case had been submitted, petitioned to intervene, avering that it "had no idea that its tariff was under attack or that the decision would be based on such attack." This statement is incredible in view of the affidavit of the conference's vice chairman, which is an exhibit of record, relating to the tariff and its interpretation. The conference apparently desires two bites at the apple.

Fourth, in view of the above, I see no reason for remanding the proceeding for further hearing as to the freight forwarder.

I would dismiss the proceeding as to both respondents.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of November A.D. 1958.

No. 823

HAZEL-ATLAS GLASS COMPANY, INGE & COMPANY—MISCLASSIFICATION OF GLASS TUMBLERS

This proceeding having been instituted by the Board upon its own motion, and having been duly heard and submitted, and 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 containing its conclusions and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That:

1. Respondent Hazel-Atlas Glass Company be, and it is hereby, notified and required to hereafter abstain from the practices herein found to be in violation of section 16 of the Shipping Act, 1916, as amended;

2. Respondent Hazel-Atlas Glass Company be, and it is hereby, required to notify the Board, within ten (10) days from the date of service hereof, whether it has complied with this order, and if so, the manner in which compliance has been made, pursuant to Rule 1(c) of the Board's Rules of Practice and Procedure, 46 C.F.R. 201.3;

3. The proceeding as to respondent Hazel-Atlas Glass Company be, and it is hereby, discontinued;

4. The petition of United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference to intervene be, and it is hereby, denied; and

5. The proceeding be, and it is hereby, remanded to the examiner for the purpose of receiving further evidence, at a public hearing to be held at a time and place to be hereafter determined by the Chief Examiner, on the issue of whether respondent Inge and Company knowingly and willfully participated in the misclassification herein found; and

6. The further hearing be conducted in accordance with the Board's Rules of Practice and Procedure, and that a recommended decision be issued by the examiner.

By the Board.

(Signed) JAMES L. PIMPER,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–80

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted November 25, 1958. Decided November 25, 1958

One voyage by the SS *Robin Mowbray*, commencing on or about December 4, 1958, carrying a full cargo of lumber from United States North Pacific ports to United States North Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ira L. Ewers and *William B. Ewers* for Moore-McCormack Lines, Inc.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE ADMINISTRATOR

BY THE ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *Robin Mowbray*, which is under time charter to States Marine Corporation of Delaware (States Marine), to engage in one intercoastal voyage commencing at United States North Pacific ports on or about December 4, 1958, carrying a full cargo of lumber to United States North Atlantic ports. Notice of hearing was published in the Federal Register of November 11, 1958, and hearing has been held before the Administrator. There were no petitions to intervene, and no one appeared in opposition to the application.

States Marine, the charterer of the SS *Robin Mowbray*, conducts as a part of its regular steamship operations a regular eastbound intercoastal lumber service. For the early December sailing under con-

sideration it has endeavored to obtain a C–2 or C–3 type vessel which is required for this service, but has been unable to do so. No exclusively domestic operators in this trade have objected to the use of the SS *Robin Mowbray* for this sailing.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act, for the Mormac-owned vessel SS *Robin Mowbray*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at United States North Pacific ports on or about December 4, 1958, carrying a full cargo of lumber to United States North Atlantic ports, will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

FEDERAL MARITIME BOARD

No. S-64

ISBRANDTSEN COMPANY, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 32

Submitted November 18, 1958. Decided January 2, 1959

Service by vessels of United States registry between North Atlantic ports of the United States and the United Kingdom, Germany, Holland, Belgium, Atlantic France, and Northern Spain is inadequate within the meaning of section 605(c) of the Merchant Marine Act, 1936, as amended, and in the accomplishment of the purposes and policy of the Act, additional vessels of United States registry should be operated thereon.

Section 605(c) of the Merchant Marine Act, 1936, as amended, does not interpose a bar to the granting of an operating-differential subsidy contract to Isbrandtsen Company, Inc., for the operation of cargo vessels in the service described in the paragraph above.

John J. O'Connor and *Richard W. Kurrus* for applicant.

Robert E. Kline, Jr., *Ronald A. Capone*, and *Russell T. Weil* for United States Lines Company, intervener.

Odell Kominers and *Mark P. Schleffer* for domestic interveners.

Robert E. Mitchell, *Edward Aptaker*, *Edward Schmeltzer*, and *Robert B. Hood, Jr.*, as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

Isbrandtsen Company, Inc. (Isbrandtsen), has filed an application for an operating-differential subsidy contract which contemplates (1) two services on Trade Route No. 32 (Great Lakes/Europe) during the open navigation season,[1] and (2) two services from North Atlantic ports to Europe on Trade Routes Nos. 5, 7, 8, and 9 during

[1] Those months during which the Great Lakes are navigable. The "closed season" refers to those months during which the Lakes are not navigable.

the closed season. It is the application for subsidy during the closed season which is now before us.[2] Together with this application is a request under section 805(a) of the Act for written permission by Isbrandtsen to continue certain of its domestic operations. The 805(a) issues were before the Board in Docket Nos. S–60 and S–60 (Sub. No. 1), which resulted in the granting of written permission for the continuation of a portion of Isbrandtsen's domestic operations (5 F.M.B. 448, 483).[3] A motion to dismiss this part of the present proceeding is now pending.

Under section 605(c), since Isbrandtsen does not claim to be operating an "existing service" within the meaning of the Act, we must determine (1) whether U.S.-flag service on the routes involved is adequate, and if it is not adequate, (2) whether, in the accomplishment of the purposes and policy of the Act, additional U.S.-flag vessels should be operated on the routes.

In Service "A", Isbrandtsen proposes to operate three sailings per month between U.S. North Atlantic ports and London and Hamburg, with the privilege of calling at Liverpool and Bremen. In Service "B", applicant plans three sailings per month between the same U.S. North Atlantic ports and Antwerp and Rotterdam, with the privilege of calling at Le Havre, Dunkirk, Bordeaux, and Amsterdam. Essential trade routes involved are Nos. 5, 7, 8, and 9.

United States Lines (U.S. Lines), the predominant carrier in the trades, presented the only opposition to the application.[4]

In his recommended decision served August 20, 1958, the examiner found that U.S.-flag service over the routes proposed by Isbrandtsen is inadequate, and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated on the routes, and concluded that section 605(c) did not interpose a bar to the granting of a subsidy contract to Isbrandtsen in accordance with its application. U.S. Lines excepted to these findings and replies thereto were filed by Isbrandtsen and Public Counsel. Oral argument on the exceptions has been held.

Applicant's Service "A" involves ports on Trade Routes Nos. 5 and 7. Between 1952 and 1956, the greatest U.S.-flag participation in the liner commercial movement on these two routes occurred in

[2] By order of the Board dated May 6, 1958, the 605(c) hearings with respect to applicant's open-season service were discontinued, the Board having determined that the provisions of 605(c) would not interpose a bar to the proposed subsidy award.

[3] The domestic interveners here, Bull-Insular Line, Inc., A. H. Bull Steamship Co., Luckenbach Steamship Company, Inc., Marine Transport Lines, Inc., Weyerhaeuser Steamship Company, and Pope & Talbot, Inc., were heard in Docket Nos. S–60 and S–60 (Sub. No. 1). No arguments in opposition to the granting of the permission not considered in that proceeding were raised here.

[4] While both Waterman Steamship Corporation and States Marine Lines operate in these trades, they have carried little or no general commercial cargo, and did not intervene.

1955, when it reached 2,273,000 long tons, or 44 percent.[5] On Trade Route No. 5, U.S.-flag participation was 44 percent in 1956, the most recent year reflected in the statistics of record, when 1,492,000 long tons were lifted. On Trade Route No. 7, U.S.-flag vessels accounted for only 33 percent of the 1956 movement of 571,000 long tons.

Trade Routes Nos. 8 and 9 are covered in applicant's Service "B". On Trade Route No. 8, during the 5 years of record the highest U.S.-flag participation was 28 percent in 1952, when 1,164,000 long tons of liner commercial cargo was moved. Although liner commercial on this route had increased by 1956 to 1,768,000 long tons, U.S.-flag participation slipped to 17 percent. Thus, U.S.-flag vessels carried less cargo in 1956 than they did in 1952, when the total movement was smaller. On Trade Route No. 9, in 1956, 482,000 long tons of liner commercial cargo were handled, and U.S.-flag vessels accounted for 38 percent of the movement. In that year, both total liner offerings and U.S.-flag-vessel participation therein were the highest of the years of record. On Trade Routes Nos. 8 and 9 combined the total liner commercial movement in 1956 reached a high of 2,250,000 long tons, but U.S.-flag participation therein skidded to 21 percent from the 1952 participation of 28 percent in the much smaller total movement of 1,473,000 long tons.

The first contention raised by U.S. Lines in its exceptions is that, since Isbrandtsen proposes to serve only selected ports on the trade routes involved, the statistics relating to entire routes cannot support a finding of inadequacy as to individual ports. In short, it claims that adequacy should have been determined strictly by measuring U.S.-flag service to the ports applicant proposes to service. Had such statistics been used, U.S. Lines argues, a different result would have been reached. It is true that Isbrandtsen proposes to serve only London and Liverpool in the United Kingdom, but we note that over 50 percent of U.S. Lines Trade Route No. 5 cargo is discharged at these two ports. Similarly, most of intervener's Trade Route No. 7 cargo is discharged at Hamburg and Bremen, the only major ports on the route, *all* of its Trade Route No. 8 cargo moves to Antwerp, Rotterdam, and Amsterdam, and most of its Trade Route No. 9 movement is discharged at Le Harve, Dunkirk, and Bordeaux, all ports Isbrandtsen proposes to serve.

Section 605(c) prohibits the award of subsidy in a case such as this unless the Board determines "that the service already provided * * * in such service, route, or line is inadequate, and that

[5] The liner commercial movement on Trade Routes 5, 7, 5 and 7 combined, 8, 9, and 8 and 9 combined, with U.S.-flag participation therein, from 1952 through 1956, is set out in the appendix.

in the accomplishment of the purposes and policy of this Act additional vessels should be operated thereon."

While the facts in a particular case might indicate that analysis on an over-all basis is uninformative, the Board, in the instant case, should properly resolve the issues under section 605(c) on the basis of statistics for the entire trade route.

In view of the comparatively small geographical areas defined by these particular trade routes and the preponderance of the movement on these routes passing through the ports Isbrandtsen proposes to serve, we feel that the over-all trade route statistics are appropriate for a determination of adequacy here. Further, after section 605(c) issues are resolved, the Board under other sections of title VI of the Act may well insist on a contract at variance with the service proposed by the applicant. It is obvious that an applicant cannot limit the scope of the ports of call which the Board might require under a contract by applying only for those which he might wish to serve. If such were the case, the functions of the Maritime Administrator under section 211 of the Act and those of the Board under title VI of the Act would become meaningless.

Intervener's second exception urges that the examiner erred in finding that the trades in issue are now inadequately served by U.S.-flag vessels. U.S. Lines claims that the examiner, in determining adequacy, (1) relied upon a rigid 50-percent formula which was intended to be but a general guide, and in view of the factors in these trades is unrealistic here, and (2) considered bulk cargoes not heretofore carried by liners in these trades. A rigid 50-percent guide was not used here. It is obvious that U.S.-flag participation in the liner commercial movement has been well below 50 percent (see the appendix). Based on the liner movement alone, together with the relatively low free-space factor of U.S. Lines,[6] we feel that U.S.-flag service on these routes is inadequate. Additionally, the combined liner/nonliner commercial offerings in each of these trades have shown a marked growth since 1952, with an attendant over-all decline in U.S.-flag participation. In view of Isbrandtsen's experience as a transatlantic bulk hauler, the examiner correctly concluded that Isbrandtsen should have success in converting some of these nonliner offerings.

Finally, U.S. Lines contends that the granting of the application would not be consonant with the purposes and policy of the act. It is true, as U.S. Lines points out, that there has been no appreciable increase in North Atlantic cargo offerings during the winter months, and that Isbrandtsen's service from North Atlantic ports would be

[6] In 1955 and the first half of 1956, U.S. Lines' cargo vessels achieved 95 percent utilization. During the last six months of 1956 intervener's cargo vessels sailed 89 percent full on these routes. For fiscal 1957, intervener averaged 12 to 17 percent free space.

on a part-time basis only. But U.S.-flag service on these routes is inadequate and we feel that the service proposed by applicant would increase our participation in the commercial movement. Inadequacy of present service, plus the ability of applicant to lessen the inadequacy, necessarily leads to the conclusion that the granting of the application would be in furtherance of the purposes and policy of the Act. Moreover, we are here presented with a special problem stemming from the physical limitations presented on the Great Lakes. During the open season, applicant intends to operate its vessels on Trade Route No. 32 from Great Lakes and St. Lawrence River ports in the United States to the same European ports as from North Atlantic ports during the closed season. Depending upon the severity of any given winter, applicant's vessels cannot operate from the Lakes during 4 or 5 months each year. Unless suitable employment for these vessels can be found for the winter months, they would have to be tied up, with resulting unemployment for American seamen and the jeopardizing of the open season service. We believe applicant's winter service on routes inadequately served would be in the accomplishment of the purposes and policy of the Act.

We find that U.S.-flag service on Trade Routes Nos. 5, 7, 8, and 9 is inadequate within the meaning of section 605(c) of the Act, and that, in the accomplishment of the purpose and policy of the Act, additional U.S.-flag vessels should be operated thereon. It is our conclusion, therefore, that section 605(c) of the Act does not interpose a bar to the award of an operating-differential subsidy contract to Isbrandtsen for the operation of cargo vessels on Trade Routes Nos. 5, 7, 8, and 9 during the closed navigation season, to the extent of 23 to 30 sailings per year.

Since no evidence relating to the continuance of the domestic services has been raised here, and since the matter was fully considered in Docket Nos. S–60 and S–60 (Sub. No. 1), the written permissions authorized therein will not be disturbed here. The section-805(a) portion of this proceeding therefore is dismissed.

Contentions and arguments of the parties, not specifically referred to here, have been considered and have been found not relevant to or not necessary for the disposition of the issues here presented, or not supported by the evidence.

APPENDIX

I. Trade Route No. 5 Outbound Liner Commercial

Year	Long tons	U.S. Percent
1952	1, 178, 000	37
1953	844, 000	33
1954	1, 135, 000	40
1955	1, 727, 000	48
1956	1, 492, 000	44

II. Trade Route No. 7 Outbound Liner Commercial

1952	601, 000	52
1953	542, 000	32
1954	546, 000	29
1955	546, 000	33
1956	571, 000	33

III. Trade Routes Nos. 5 and 7 Combined Outbound Liner Commercial

1952	1, 779, 000	42
1953	1, 386, 000	33
1954	1, 681, 000	36
1955	2, 273, 000	44
1956	2, 063, 000	41

IV. Trade Route No. 8 Outboard Liner Commercial

1952	1, 164, 000	28
1953	1, 486, 000	15
1954	1, 583, 000	15
1955	1, 742, 000	16
1956	1, 768, 000	17

V. Trade Route No. 9 Outbound Liner Commercial

1952	309, 000	26
1953	243, 000	29
1954	248, 000	25
1955	309, 000	38
1956	482, 000	38

VI. Trade Routes Nos. 8 and 9 Combined Outbound Liner Commercial

1952	1, 473, 000	28
1953	1, 729, 000	17
1954	1, 831, 000	16
1955	2, 051, 000	19
1956	2, 250, 000	21

FEDERAL MARITIME BOARD

No. S-67

T. J. McCarthy Steamship Company—Application for Section 805(a) Permission

Submitted December 12, 1958. Decided January 2, 1959

Proceeding remanded to examiner for further hearing under section 805(a) of Merchant Marine Act, 1936, as amended.

Paul D. Page Jr., and *Arthur E. Tarantino* for applicant.

John H. Eisenhart, Jr., for Great Lakes Ship Owners Association, and *Donald A. Brinkworth* for Eastern Territory Railroads, interveners.

Robert E. Mitchell, Edward Aptaker, and *Edward Schmeltzer* as Public Counsel.

Report of the Board

Clarence G. Morse, *Chairman*, Ben. H. Guill, *Vice Chairman*, Thos. E. Stakem, Jr., *Member*

By the Board:

On March 9, 1956, T. J. McCarthy Steamship Company (McCarthy) filed an application for operating-differential subsidy aid for its proposed operations on Trade Route No. 32. The application also contained a request for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1223 (the Act), to continue certain domestic operations in the event a subsidy contract is awarded: (1) an automobile-carrier service from Detroit to Cleveland and to Buffalo, and (2) a bulk service between United States ports on the Great Lakes, both with owned, unsubsidized vessels.

Since the Board, on March 6, 1958, concluded that section 605(c) of the Act did not interpose a bar to the award of a subsidy contract, only the request for written permission to engage in domestic operations remains for decision.

The Great Lakes Ship Owners Association[1] (the Association) and Eastern Territory Railroads intervened in opposition to the request for the permission.

A hearing, at which applicant's president was the sole witness, was held before an examiner, who, in his recommended decision, found that the continuation of the domestic operations, in the event subsidy aid is awarded, would not result in unfair competition to any person, firm, or corporation operating exclusively in the domestic service, and would not be prejudicial to the objects and policy of the Act. He concluded that section 805(a) permission should be granted.

Exceptions to this decision were filed by the Association, applicant and Public Counsel replied thereto, and the matter was orally argued before the Board.

Briefly, McCarthy has been engaged in the Great Lakes carriage of automobiles from Detroit to Cleveland and from Detroit to Buffalo since 1935, with the exception of the years during World War II, and since 1947 has continuously carried bulk commodities between United States Great Lakes ports.

Applicant now owns three vessels which have been specially converted for the automobile trade, and each can accommodate from 420 to 450 cars. Shoreside facilities to accommodate automobiles are owned and maintained by McCarthy at Detroit, Cleveland, and Buffalo. The turnaround time to Cleveland and Buffalo—24 hours and 48 hours, respectively—allows the vessels to ballast back to Detroit. The movement by water on the Lakes of new automobiles reached its peak in 1953, and since the Chrysler Corporation, the principal shipper of automobiles by water from Detroit, has established an assembly plant in Delaware, it is anticipated that the 1953 automobile offerings will not be equaled in the foreseeable future. One of applicant's automobile carriers is now tied up for lack of business.

McCarthy has carried full loads of iron ore, grain, coal, and the like, and during 1957 operated at a profit, carrying almost 300 full cargoes. This amounted, however, to less than one percent of the total movement of bulk cargo on the Great Lakes, restricted to American-flag vessels. The amount of Great Lakes domestic cargo which is the subject of proprietary carriage is not shown, but apparently it is substantial, and McCarthy's carryings would certainly exceed one percent if such movement were excluded from the figures. The record indicates that many bulk carriers on the Lakes were laid up by September 1957 for want of cargoes.

[1] Bison Steamship Company, Oglebay Norton Company, Copper Steamship Company, Gartland Steamship Company, Nicholson Transit Company, and Roen Steamship Company.

Several of the Association's members are certificated to transport automobiles. Nicholson has three specially converted automobile carriers tied up because it cannot get automobiles. These vessels formerly operated in the Detroit to Cleveland and Detroit to Buffalo service, but in 1957, after McCarthy filed its subsidy application, Chrysler allocated all of its eastbound automobile business to McCarthy and its Duluth business to Nicholson. Since it is not economically feasible to employ specially converted automobile carriers in the Duluth trade—the turnaround time is six days and return cargoes are necessary—Nicholson hauls cars in bulk carriers accommodating 99 to 119 cars.

Under section 805(a) of the Act written permission to continue applicant's domestic services, in the event subsidy is awarded, may not be granted if such operation (1) would result in unfair competition to any person, firm, or corporation operating exclusively in the domestic coastwise or intercoastal service, or (2) would be prejudicial to the objects and policy of the Act.

The Association contends, chiefly, that the provisions of section 605(a) of the Act [2] establish its member lines as exclusively domestic operators entitled to the protection of section 805(a), and applicant should be denied the requested written permission because it failed to sustain its burden of proof in establishing that its operations would not result in unfair competition to exclusively domestic carriers and would not be prejudicial to the objects and policy of the Act.

Section 605(a) is misconstrued by the Association. That section refers to the payment of subsidy, and, as respects trade between the United States and Canada on the Great Lakes, it prohibits the Board from subsidizing such voyages. Section 605(a) clearly relates solely to the Board's authority to pay subsidy. Further, in our opinion section 605(a) was not intended to change by law an existing factual situation nor to increase or enlarge the number or class of persons specified in section 805(a) "exclusively operating in the coastwise or intercoastal service." An operator on the Great Lakes engaged in foreign commerce between the United States and Canadian ports is not con-

[2] Section 605(a) provides:

"No operating-differential subsidy shall be paid for the operation of any vessel on a voyage on which it engages in coastwise or intercoastal trade: *Provided, however,* That such subsidy may be paid on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States or a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, and if the subsidized vessel earns any gross revenue on the carriage of mail, passengers, or cargo by reason of such coastal or intercoastal trade the subsidy payment for the entire voyage shall be reduced by an amount which bears the same ratio to the subsidy otherwise payable as such gross revenue bears to the gross revenue derived from the entire voyage. No vessel operating on the Great Lakes or on the inland waterways of the United States shall be considered for the purposes of this Act to be operating in foreign trade."

verted by that section into a person "exclusively operating" in the domestic trade, for the purposes of section 805(a) of the Act.

Prior decisions of this Board have held that the burden of proof in a section-805(a) proceeding rests upon applicant, and a protestant has only the burden of rebutting applicant's *prima facie* case. *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B. 555 (1955); *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.—M.A. 287 (1957). We have also manifested a special concern for the plight of the coastwise and intercoastal operators (*American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.-M.A. 488 (1954)),[3] even where the domestic operator has not operated exclusively in the coastwise or intercoastal service (*Isbrandtsen Co., Inc.—Subsidy, E/B Round The World*, 5 F.M.B. 448 (1958)), and have indicated that doubts should be resolved in favor of the exclusively domestic operator. *American President Lines, Ltd.—Sec. 805(a) Application*, 4 F.M.B.-M.A. 436 (1954). We are more concerned with the merits of the controversy than with the niceties or technicalities of procedure.

This record establishes that Nicholson has in the past provided automobile transportation by water between Detroit and Cleveland and Buffalo and that the vessels formerly used in this service are now laid up. Too, the record does not contain sufficient data as to bulk trading on the Great Lakes.

Since we feel that the present record does not afford us the facts necessary to determine the far-reaching issues attendant in a section-805(a) case, the proceeding will be remanded to the examiner for further hearing.

We realize, as was pointed out to us at oral argument, that a remand would afford a protesting intervener a second opportunity to establish his case. But in a proceeding of this nature the Board is charged with an affirmative duty, and since we feel that a more complete record is essential for the discharge of our obligation to determine the controversy on the merits, the case will be remanded.

In view of the relatively short time remaining between now and the opening of the 1959 navigational season on the Great Lakes, further hearing will be expedited in a manner deemed proper by the examiner.

[3] "* * * in our judgment those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to whatever intercoastal cargoes they can carry." (p. 504).

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-82

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION 805(a)

Submitted January 27, 1959. Decided January 27, 1959

The carriage of passengers booked by Military Sea Transportation Service from California to Hawaii aboard voyage 17 of the SS *President Hoover*, sailing from San Francisco on or about February 5, 1959, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the domestic trade, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Warner W. Gardner for American President Lines, Ltd.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

American President Lines, Ltd. (APL), has applied for written permission of the Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to carry ten passengers booked by Military Sea Transportation Service (MSTS) from California to Hawaii on voyage No. 17 of the SS *President Hoover* sailing from San Francisco on or about February 5, 1959. A hearing, notice of which was published in the Federal Register of January 23, 1959, was held before the Administrator on January 27, 1959. Matson Navigation Company (Matson) intervened as its interests might appear.

Due to the withdrawal of the SS *Leilani* from the California-Hawaii service on January 8, 1959, MST requested APL to indicate the number of MSTS passengers it could accommodate between California

and Hawaii. Probable available passenger space to Hawaii on its transpacific vessels during 1959 was furnished MSTS by APL, and the earliest space offered was 10 berths on voyage No. 17 of the SS *President Hoover*. MSTS advised that it desired to book this space. It is not known whether MSTS will desire further passenger bookings on subsequent transpacific sailings of this vessel, but this application contemplates written permission for voyage No. 17 only.

At present, APL carries passengers between California and Hawaii on two of its vessels, the SS *President Cleveland* and the SS *President Wilson*, and the application of APL for written permission to add a third vessel is now being considered by the Federal Maritime Board in Docket No. S–78. Matson has no objection to the proposed permission for the single voyage here under consideration, provided the granting of the permission is without prejudice to the position of any party in Docket No. S–78.

Upon this record, it is found and concluded that the granting of the written permission under section 805(a) of the Act for the carriage of ten passengers booked by MSTS from California to Hawaii on voyage No. 17 of the SS *President Hoover* commencing on or about February 5, 1959, would not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, nor be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage. The action herein is without prejudice to the position of any party in Docket No. S–78.

FEDERAL MARITIME BOARD

No. S–57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRICONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

No. S–57 (Sub. No. 1)

No. S–57 (Sub. No. 2)

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805(a), MERCHANT MARINE ACT, 1936

Submitted September 30, 1958. Decided February 16, 1959

Section 605(c) of the Merchant Marine Act, 1936, as amended, found not to interpose a bar to the granting of an operating-differential subsidy contract to States Marine Corporation and States Marine Corporation of Delaware for the operation of vessels (1) in their tricontinent service (a) to the extent of 12 to 24 direct annual sailings on Trade Route No. 12 and an additional 12 annual sailings on the route topping off in California, (b) to the extent of 12 to 24 direct annual sailings on Trade Route No. 22 and an additional 24 annual sailings topping off in California, (c) to the extent of 14 to 17 annual sailings on Trade Route No. 23, and (d) to the extent of 24 to 36 annual sailings on Trade Routes Nos. 26 A & B, all topping off on Trade Routes Nos. 5, 6, 7, 8, 9, and 11, with the privilege of lifting cargo at Hawaii for discharge in Europe; (2) in their Gulf/Mediterranean service to the extent of 12 to 24 annual sailings on Trade Route No. 13; and (3) in their transpacific service (a) to the extent of 18 to 24 direct annual sailings on Trade Route No. 29, (b) to the extent of 6 to 12 annual sailings on Trade Route No. 30, and (c) to the extent of 12 to 24 annual sailings serving both Trade Routes Nos. 29 and 30, half to sail last from a Trade Route No. 29 port and the other half to sail last from a Trade Route No. 30 port.

Section 605(c) of the Merchant Marine Act, 1936, as amended, found to interpose a bar to the award of an operating-differential subsidy contract to

States Marine Corporation and States Marine Corporation of Delaware for (1) inbound service on Trade Route No. 30 from the Far East to the Pacific Northwest with vessels other than those which sailed outbound on Trade Route No. 30; (2) inbound service to Hawaii from the Far East; (3) inbound service to the Gulf from Europe on Trade Route No. 21 in the tri-continent service; and (4) service between the Gulf and the Azores on Trade Route No. 13 sailings.

The continuation of (1) a Pacific/Atlantic lumber service to the extent of 24 to 36 annual sailings, and (2) a Pacific/Gulf intercoastal service to the extent of 14 to 17 eastbound sailings and 24 westbound sailings, by States Marine Corporation and States Marine Corporation of Delaware, when and if subsidy is awarded, found not to result in unfair competition to any person, firm, or corporation operating exclusively in the domestic coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Written permission for the continuation of these services will be granted in the event subsidy is awarded.

Isthmian Lines, Inc., and its predecessor in interest found to have been engaged continuously in the Atlantic/Hawaii leg of its Atlantic-Gulf/Hawaii service since 1935, and the continuation of the Gulf/Hawaii leg of the service found not to result in unfair competition to any person, firm, or corporation operating exclusively in the domestic coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended. Written permission for the continuation of the Atlantic-Gulf/Hawaii service by Isthmian Lines, Inc., will be granted in the event a subsidy contract is awarded States Marine Corporation and States Marine Corporation of Delaware.

Herman Goldman, *Elkan Turk*, *Irving Zion*, *George F. Galland*, and *Robert N. Kharasch* for applicant.

Warner W. Gardner, *Lawrence W. Hartman*, and *Vern Countryman* for American President Lines, Ltd., and American Mail Line Ltd., *Odell Kominers* and *J. Alton Boyer* for Pacific Far East Line, Inc., Lykes Bros. Steamship Co., Inc., and Weyerhaeuser Steamship Company, *David P. Dawson*, *Robert E. Kline, Jr.*, and *Russell T. Weil* for United States Lines Company and Moore-McCormack Lines, Inc., *Albert F. Chrystal* for Moore-McCormack Lines, Inc., *James L. Adams*, *Tom Killefer*, *Harold E. Mesirow*, and *Gordon L. Poole* for States Steamship Company, Pacific Transport Lines, Inc., and Pacific-Atlantic Steamship Co., *Carl S. Rowe*, *Frank B. Stone*, and *William Caverly* for American Export Lines, Inc., *Alvin J. Rockwell* and *Willis R. Deming* for Matson Orient Line, Inc., *Sterling F. Stoudenmire, Jr.*, for Waterman Steamship Corporation and Pan-Atlantic Steamship Corporation, *Wade W. Hollowell* for Mississippi Valley Association, *Cyrus Guidry* for Board of Commissioners of the Port of New Orleans, *Richard B. Swenson* for Gulf Ports Association, Inc., and *Thomas J. White* for The Commission of Public Docks of the City of Portland, Oregon, interveners.

Robert E. Mitchell, *Edward Aptaker*, and *Robert J. Blackwell* as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This is a proceeding under section 605(c) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1175(c), to determine whether the provisions of that section interpose a bar to the award of an operating-differential subsidy contract to States Marine Corporation and States Marine Corporation of Delaware (SML), joint applicants, and under section 805(a) of the Act, 46 U.S.C. 1223(a), to determine whether written permission should be granted applicant and its wholly owned subsidiary, Isthmian Lines, Inc. (Isthmian), to continue certain domestic operations.

The application seeks subsidy for an aggregate of 108 minimum and 168 maximum annual sailings over many trade routes embraced in three distinct services: (1) a tricontinent service, (2) a transpacific service, and (3) a Gulf/Mediterranean service.[1] The tricontinent service covers, westbound, outbound sailings on Trade Routes Nos. 12 and 22, with top-offs on Trade Route No. 29, and eastbound, inbound sailings on Trade Route No. 30 and outbound sailings on Trade Routes Nos. 23 and 26 A and B, with top-offs at North Atlantic ports on Trade Routes Nos. 5, 6, 7, 8, 9, and 11, whence the vessels return to Atlantic and Gulf ports.

The tricontinent service. Applicant seeks a minimum of 60 and a maximum of 84 annual subsidized sailings in this service. Westbound, it proposes (1) 12 to 24 direct outbound sailings on Trade Route No. 12—Atlantic coast ports to ports in the Far East—plus an additional 12 outbound sailings on the route which will top off at California ports (Trade Route No. 29), and (2) 12 to 24 outbound sailings on Trade Route No. 22—Gulf ports to ports in the Far East—plus an additional 24 outbound sailings which will top off at California ports.[2] On these sailings (from both the Atlantic and the Gulf) applicant desires the privilege of calling at ports in the Canal Zone, the west coast of Mexico, and Okinawa.

Eastbound, after returning its vessels to the Pacific Northwest, on Trade Route No. 30, some in ballast and some with cargo, SML proposes 24 to 36 outbound sailings per year on Trade Routes Nos. 26 A and B—Pacific coast ports to the United Kingdom and Eire, and to

[1] Applicant does not seek subsidy for its Pacific/Mediterranean service, which it proposes to continue in the event the instant application is granted.

[2] These sailings, it is proposed, also will provide a westbound Gulf/Pacific intercoastal service, *infra*.

ports in the Havre/Hamburg range—all topping off at North Atlantic ports carrying outbound cargo on Trade Routes Nos. 5, 6, 7, 8, 9, and 11.[3] A service on Trade Route No. 23—Pacific coast ports to Havana—with a minimum of 14 and a maximum of 17 outbound annual sailings per year, also is proposed.[4] Applicant proposes that its tricontinent vessels, after discharging cargoes in Europe, return to North Atlantic and Gulf ports with cargoes for those areas and the Pacific coast. Inbound to the Gulf, the vessels would traverse Trade Route No. 21.[5]

The pattern of applicant's operations is further evidenced by the fact that its eastbound intercoastal services—Pacific/Atlantic lumber trade and Pacific/Gulf trade, the eastbound service of the latter in conjunction with the proposed outbound (eastbound) Pacific coast to Havana service on Trade Route 23—are vehicles for the positioning of the vessels on the Atlantic and Gulf coasts for the commencement of westbound (outbound) tricontinent sailings (Trade Routes Nos. 12 and 22).

Transpacific service. A minimum of 36 and a maximum of 60 subsidized sailings per year are proposed for this service. Applicant intends a minimum of 18 and a maximum of 24 direct sailings on Trade Route No. 29—California to the Far East—a minimum of 6 and a maximum of 12 direct sailings on Trade Route No. 30—Pacific Northwest ports to the Far East—and a minimum of 12 and a maximum of 24 additional sailings serving both routes, half to sail last from a California port and the other half to sail last from a northwest port. In conjunction with these services, the privilege is sought to make calls at ports on the west coast of Mexico, Okinawa, and British Columbia. Some inbound service is proposed, to be in addition to that proposed to the Pacific Northwest with tricontinent vessels. Inbound service is proposed from the Philippines on these routes, but only limited outbound service to the southern Far East.

Gulf/Mediterranean service. Subsidy is sought for a minimum of 12 and a maximum of 24 annual sailings on Trade Route No. 13, with the privilege of making calls at east coast of Mexico ports, the West Indies, and the Azores.

Domestic operations. Section 805(a) permission is sought for (1) the continuation of applicant's Gulf/Pacific intercoastal service—14 to 17 sailings eastbound with tricontinent vessels in the Pacific/Ha-

[3] SML requests the privilege on these sailings of lifting Hawaiian cargo destined for Europe, and calling at the west coast of Mexico, the Canal Zone, and Iceland.

[4] These sailings also will provide an eastbound Gulf/Pacific intercoastal service, *infra.*

[5] No outbound service is offered on Trade Route No. 21, but it is proposed to traverse this route from Europe to the Gulf in order to position certain of the vessels for the outbound (westbound) Trade Route No. 22 sailings in the tricontinent service, and to carry some inbound European cargo to the Gulf.

vana trade, and 24 sailings westbound, to be accomplished with Gulf/Far East tricontinent vessels topping off in California; (2) the continuation of applicant's intercoastal lumber service—about 2 to 3 sailings per month—which provides Atlantic coast positioning of some of the tricontinent vessels for outbound Trade Route No. 12 sailings; and (3) continuation of Isthmian's Atlantic-Gulf/Hawaii service, a self-contained entity.

Applicant also proposes the free interchange of its vessels among the several services.

Applicant has operated to a considerable extent with chartered vessels; if subsidized, it proposes to replace them with suitable owned vessels.

American President Lines, Ltd. (APL), American Mail Line Ltd. (AML), Lykes Bros. Steamship Co., Inc. (Lykes), Moore-McCormack Lines, Inc. (Mormac), Pacific Far East Line, Inc. (PFEL), Pacific Transport Lines, Inc. (PTL), States Steamship Co. (States),[6] United States Lines Company (U.S. Lines), Mississippi Valley Association, Board of Commissioners of the Port of New Orleans, Gulf Ports Association, Inc.,[7] Matson Orient Line, Inc.,[8] Waterman Steamship Corporation,[8] American Export Lines, Inc. (Export),[9] and the Commission of Public Docks of the City of Portland (Portland Docks) intervened in the 605(c) portion of the proceeding.

APL, AML, and States operate in the transpacific trades and oppose so much of the application as pertains to transpacific operations, including the California top-offs in the tricontinent service. Lykes operates on Trade Routes Nos. 21, 22, and 13 (as they are involved here), and opposes the application for subsidy on those routes. Lykes also contests the proposed California top-offs as well as the essentiality of the tricontinent service, and alleges that an unlawful agreement between SML and Bloomfield Steamship Company (Bloomfield) disqualifies SML from receiving subsidy. U.S. Lines and Mormac oppose the proposed Atlantic top-offs with tricontinent vessels operating in the Pacific-Atlantic/UK-Europe trade, and Portland Docks seeks direct transpacific service from that port.

In the 805(a) portion of the proceeding, interveners include Weyerhaeuser Steamship Company (Weyerhaeuser), Pacific-Atlantic Steamship Co.,[10] PTL,[10] and PFEL.[10]

[6] PTL and States have merged since this proceeding was instituted; both will be referred to as States.

[7] Its motion to withdraw was granted.

[8] Matson Orient offered no evidence; Waterman submitted traffic figures only.

[9] Export contends that the continuation of SML's unsubsidized west coast/Mediterranean service with Atlantic top-offs would somehow prejudice Export. This contention is not cognizable in a 605(c) proceeding and no further reference will be made to it.

[10] Presented no evidence.

The examiner issued a recommended decision in which he concluded that the provisions of section 605(c) of the Act do not interpose a bar to the award of subsidy to SML for the services proposed, save the proposed California top-offs on westbound tricontinent sailings, *provided* (1) applicant is not permitted to enjoy sailing spreads materially larger than those of its competitors, (2) applicant is required to serve the Philippines to the same extent as its subsidized competitors on the routes, and (3) inbound services be provided to the same degree that other subsidized competitors provide it, except that with reference to vessels returning to the Pacific Northwest, only sailings originating in that area should be permitted to move inbound cargoes to the Northwest. He also concluded that written permission for the continuation of domestic services should be granted.

Exceptions to the recommended decision were filed by applicant, APL, AML, PFEL, States, Weyerhaeuser, U.S. Lines, Mormac, Export, and Lykes, and replies thereto were filed. Oral argument was held before the Board on September 30, 1958. Contentions and arguments of the parties not specifically discussed herein have been considered and have been found not to be related to material issues or supported by the evidence.

Discussion

The only issues are whether the provisions of section 605(c) of the Act interpose a bar to the award of subsidy to SML with respect to its application, and whether, under the provisions of section 805(a) of the Act, written permission should be granted authorizing the continuance of certain domestic operations in the event subsidy is awarded.

Under the first clause of section 605(c) we may conclude that the provisions thereof do not interpose a bar to the award of subsidy if the record dictates that the service already provided by U.S.-flag vessels, other than those of applicant, on the route or routes involved, is inadequate to carry a substantial portion of our foreign commerce, and that in the accomplishment of the purposes and policy of the Act, additional vessels of U.S. registry should be operated on the route or routes. The second clause of the section is concerned with whether applicant is conducting an existing service. If the service is existing, within the meaning of the section, and the award of subsidy for such service would not unduly advantage applicant or unduly prejudice its U.S.-flag competitors, the section would not interpose a bar to the award of the subsidy. And even if undue advantage or undue prejudice would result from the award of subsidy, we may conclude nevertheless that the provisions of the section do not interpose a bar to the award of subsidy if the record supports a finding that the trade or trades are

inadequately served by other U.S.-flag operators and that, in the accomplishment of the purposes and policy of the Act, additional U.S.-flag vessels should be operated on the route or routes.

Under section 805(a), we must determine whether the continuation of the domestic services for which permission is sought (1) would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or (2) would be prejudicial to the objects and policy of the Act, unless applicant qualifies under the "grandfather" clause of that section, in which case the permission to continue the service must be granted.

The application and the record here made, then, will be measured in the light of the standards set out in sections 605(c) and 805(a). Contentions and arguments which do not fall within their purview will not be considered. It is well settled that a favorable 605(c) determination does not of itself result in a subsidy contract (*Matson Orient Line, Inc.—Subsidy, Route 12*, 5 F.M.B. 410 (1958)), and precedent to any award the Board must make other determinations with respect to the application under other sections of the Act. We are not here concerned with issues properly within the scope of other sections of the Act, which have been injected into the proceeding, e.g., the alleged unlawful agreement between SML and Bloomfield, vessel interchange, sailing spreads, and "round voyages."

Tricontinent service. Since this service encompasses several trade routes, it is necessary that the 605(c) standards be met as to each route. The first to be considered is the proposed service on Trade Route No. 12—Atlantic to Far East. SML proposes from 12 to 24 direct sailings on this route, plus an additional 12 sailings which will top off in California. Between 1952 and 1955, the liner commercial outbound movement on this route increased from 961,000 long tons to 1,722,000 long tons. U.S.-flag participation in the movement has not kept pace with the offerings, actually declining from 19 percent in 1952 to 16 percent in 1955. There is no evidence to indicate that liner commercial offerings on the route, in the foreseeable future, will not remain at least at their 1955 level. This application was pending at the time of the Board's decision in *Matson Orient, supra*, where it was noted that "* * * the granting of all pending applications pertaining to this service would amount to about 52 percent U.S.-flag vessel participation, assuming that there is no increase in the liner cargo offerings in the future." In view of the ability of U.S.-flag vessels to capture offerings in this trade, as evidenced by the high space utilization of such vessels, and the inability of other U.S.-flag carriers to carry an appreciable amount of applicant's commercial carryings—in 1955, SML carried 12,326 long tons of liner commercial and 49,261 long tons of bulk

commercial—we conclude that U.S.-flag participation on Trade Route No. 12 is inadequate, and that in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. We have no need, therefore, to discuss applicant's contention that its service on the route is "existing."

In connection with applicant's proposed Trade Route No. 12 leg, we note that chiefly outbound service is contemplated and that 12 sailings are to include California top-offs. There is a substantial inbound movement on Trade Route No. 12—1,740,000 long tons inbound as compared to 1,722,000 long tons outbound in 1955—and if subsidy is awarded, the Board, under other sections of the Act, may well insist upon substantial inbound service being rendered by vessels on the route. The California top-offs proposed to be made in conjunction with Trade Route No. 12 vessels are considered *infra*.

U.S.-flag participation in the offerings on Trade Route No. 22, although substantial, would be inadequate without the contribution of SML. Both liner and bulk commercial offerings materially increased between 1952 and 1955: liner from 509,000 long tons to 1,451,000 long tons and bulk from 514,000 long tons to 1,666,000 long tons. Liners have carried large amounts of bulk cargoes in this trade—phosphate rock, soya beans, wheat, rice, and corn. Disregarding the bulk movement, and without the contribution made by SML—118,000 long tons in 1955, accounting for over 30 percent of the U.S.-flag liner commercial movement—the trade would be inadequately served by U.S.-flag vessels. In 1952 American-flag vessels handled 57 percent of the liner movement. After slight declines in 1953 and 1954, they again carried 57 percent of the much larger movement in 1955. The low level of U.S.-flag vessel free space (Lykes, the principal carrier in the trade, had less than 2 percent free space during the 1952–1955 period) indicates that, without SML's contribution, U.S.-flag participation would be considerably less than 50 percent.

SML proposes that 24 of its Trade Route No. 22 sailings top off in California. These top-offs are to be made on sailings which provide the westbound leg of the Gulf/Pacific intercoastal service, and since they constitute sailings on Trade Route No. 29 they will be considered hereinafter with the proposed transpacific services. At this juncture it is sufficient to say that section 605(c) of the Act does not interpose a bar to the award of subsidy to applicant for 24 to 36 annual sailings on Trade Route No. 12 and for 36 to 48 annual sailings on Trade Route No. 22 in the tricontinent service.

Applicant proposes to return its tricontinent vessels from the Far East to the Pacific Northwest, some in ballast and some with cargo, with the privilege of calling at Hawaii and British Columbia. This leg constitutes an inbound sailing on Trade Route No. 30, with respect

to which SML does not conduct an existing service. Further, there is no evidence to support a finding of inadequacy on this inbound route to the extent of 60 to 84 sailings (over and above those proposed in SML's transpacific service). We therefore conclude that section 605(c) interposes a bar to the award of a contract to SML which would include provisions for inbound sailings to the Pacific Northwest over and above those proposed for its transpacific services. This conclusion should not be construed as a bar to the inbound carriage of cargoes on such vessels for discharge at Gulf or Atlantic ports. It is a bar, however, to the carriage of cargoes inbound to the Pacific Northwest by vessels operating in the tricontinent service. Further, as the record fails to show inadequacy of U.S.-flag service from the Far East to Hawaii, and as applicant does not operate an existing service there, section 605(c) interposes a bar, *Matson Orient*, *supra*. For like reasons, the same result is required as to the privilege of serving British Columbia inbound with vessels operating in the tricontinent service.

SML proposes that its tricontinent vessels, upon return to the Pacific Northwest, have three options while remaining in the tricontinent service: (1) Pacific coast ports to Europe on Trade Routes Nos. 26 A and B, all topping off at North Atlantic ports with cargo destined for ports on Trade Routes Nos. 5, 6, 7, 8, 9, and 11; (2) Pacific coast ports to North Atlantic ports with full loads of lumber; and (3) Pacific/Gulf eastbound intercoastal service as part of applicant's Pacific/Havana Trade Route No. 23 eastbound sailings.[11]

On Trade Routes Nos. 26 A and B, a minimum of 24 and a maximum of 36 annual sailings are proposed, all topping off at North Atlantic ports. SML is the only American-flag operator offering a Pacific to Europe service in this growing trade. Liner commercial offerings almost doubled between 1952, when 457,000 long tons were carried, and 1955, when 886,000 long tons moved. A similar increase was experienced in bulk offerings: 306,000 long tons in 1952 to 508,000 long tons in 1955. Since (1) U.S.-flag participation is extremely low in this trade (about 8 percent in 1955, practically all of which was moved by SML), (2) applicant provides the only U.S.-flag liner service, and (3) there is no evidence that the commercial offerings will not remain at least at the 1955 level during the foreseeable future, we conclude that U.S.-flag service on Trade Routes Nos. 26 A and B is inadequate and that, in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. Section 605(c) of the Act does not interpose a bar to an

[11] The Pacific/Atlantic lumber service and the Pacific/Gulf intercoastal service are considered *infra*.

award of subsidy to SML for the operation of 24 to 36 sailings per year on the routes.[12]

As to the proposed North Atlantic top-offs on Trade Routes Nos. 26 A and B, we find that the routes involved in the topping-off operation (Nos. 5, 6, 7, 8, 9, and 11—eastbound sailings from the North Atlantic) are inadequately served, and that in the accomplishment of the purposes and policy of the Act, additional vessels should be operated thereon. The proposed minimum of 24 and maximum of 36 top-offs would allow SML to lift about 70,000 tons of cargo annually outbound in these trades. Since U.S.-flag participation has been well below 50 percent,[13] since U.S.-flag vessels have a comparatively high utilization ratio, and since these routes enjoy the largest movement of U.S. outbound liner commercial traffic, we find that in the accomplishment of the purposes and policy of the Act, additional vessels to the extent proposed in the application should be operated thereon. As the routes in their entirety are inadequately served, section 605(c) is not a bar to either the inbound or the outbound movement.

The outbound-inbound ratio on Trade Routes Nos. 26 A and B is about 2 to 1 outbound, and while SML does not propose substantial inbound service on the routes, the Board, under other sections of the Act, may well insist upon certain inbound service to the Pacific coast from Europe. But that problem is not presented here. The routes in their entirety are inadequately served, and section 605(c) does not bar the award of subsidy for the operation of U.S.-flag vessels thereon. The Board is aware that foreign-flag vessels in the Pacific coast/Europe trade do not top off at North Atlantic ports, and whether a definitive contract, if one be awarded, will permit such top-offs or will restrict the number of sailings on which top-offs will be permitted, is an issue to be considered by the Board under other sections of the Act.

Once they are in Europe and after discharging their cargo, SML proposes to dispatch some of its vessels to the Gulf, traversing Trade Route No. 21, so as to position them for outbound sailings on Trade Route No. 22 to the Far East. It is desired to carry inbound cargo on these Gulf vessels. Since there has been no showing that there is an existing service on Trade Route No. 21 or that the route is inade-

[12] Applicant seeks the privilege of calling at Hawaii for outbound cargoes destined for Europe. 26,000 tons were moved by applicant in this trade in 1956, and since it is the only U.S.-flag operator providing a liner service there, section 605(c) does not interpose a bar to the granting of the privilege. The fact that section 605(c) is no bar, however, is not a commitment that the Board will include it in a contract under section 601 of the Act.

[13] In 1955 U.S.-flag participation in the outbound liner movement on these routes was 48 percent on Trade Route No. 5; 31 percent on Trade Route No. 6; 33 percent on Trade Route No. 7; 16 percent on Trade Route No. 8; 38 percent on Trade Route No. 9; and 31 percent on Trade Route No. 11.

quately served, section 605(c) interposes a bar to such proposal. There is no prohibition, however, against the carriage of inbound cargoes on Trade Routes Nos. 26 A and B from Europe to the Pacific coast on vessels sailing from Europe to the Gulf. Indeed, such service may be required by the Board under other sections of the Act.

On Trade Route No. 23—Pacific coast to Havana—SML proposes a minimum of 14 and a maximum of 17 annual sailings eastbound. Applicant offers the only U.S.-flag liner service on the route, having maintained it since late in 1953. It averages 15 sailings yearly with an average of about 2,300 long tons per sailing. The vessels also provide the eastbound leg of applicant's Gulf/Pacific intercoastal service, *infra*. The record supports a finding that Trade Route No. 23 is inadequately served by U.S.-flag vessels and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. We conclude that the provisions of section 605(c) do not interpose a bar to the award of subsidy for 14 to 17 yearly sailings in this service. Again, however, the Board may require applicant, if subsidy be awarded, to provide a westbound (inbound) service from Havana to the Pacific coast, but that is not an issue here. We will not consider in this proceeding, which arises under sections 605(c) and 805(a) of the Act, questions concerning "round voyages" under section 605(a) of the Act, raised by interveners.

Gulf/Mediterranean service. Applicant proposes a minimum of 12 and a maximum of 24 sailings on Trade Route No. 13, with the privilege of calling at ports on the east coast of Mexico eastbound and the Azores. Although U.S.-flag participation in the liner commercial movement on the route has been high—a high of 59 percent in 1952 and a low of 50 percent in 1955—both the liner and bulk commercial movement have experienced some growth. U.S.-flag service would be inadequate without the carryings of SML. In the 1952–1955 period SML averaged about 97,000 long tons of commercial cargo per year, and Lykes, the major U.S.-flag operator on the route, had sufficient free space to accommodate only about 4,000 additional long tons per year. Without applicant's carryings, and because of the physical limitations of the remaining U.S.-flag lines to accommodate more than a small fraction of applicant's carryings, U.S.-flag participation would amount to about 42 percent. We find that the trade is inadequately served and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon. We are not impressed with the argument that, since the trade is adequately served inbound, section 605(c) is a bar to the award of subsidy. Outbound carryings amount to 10 times inbound carryings. On this record we find that section 605(c) does not interpose a bar of 12 to 24 annual sailings in this service.

As to the privilege of calling at the Azores, we cannot find that SML is conducting an existing service with respect thereto or that the trade is inadequately served. The provisions of section 605(c) therefore interpose a bar to the award of subsidy for this service. *Matson Orient, supra; Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958).

Transpacific services. As noted, applicant proposes a minimum of 36 and a maximum of 60 sailings in its three transpacific services: 18 to 24 on Trade Route No. 29, 6 to 12 on Trade Route No. 30, and 12 to 24 on both routes, half of which will sail last from California and half will sail last from the Northwest. Too, 36 top-offs at California are proposed with tricontinent sailings on Trade Routes Nos. 12 and 22. As we said in *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957):

> The transpacific foreign commerce of the United States is overwhelmingly export trade, and it is on this basis that applicant's operations and the needs of the trades shall be judged.

Apart from the California top-off sailings, SML has averaged 61.75 sailings per year in its transpacific services, which should be credited toward its claim of existing service. On Trade Route No. 29, where 24 to 36 sailings are proposed, SML averaged 24.5 direct liner commercial sailings per year between 1952 and 1955.[14] On Trade Route No. 30, where 12 to 24 sailings are sought, there was an annual average of four such sailings.[15] During the same period, SML averaged 33.25 annual sailings which served both routes, and the dual range or integrated sailings proposed, 12 to 24 in number, half to sail last from California and half to sail last from the Northwest, are included above in the totals proposed on each route. Although the integrated sailings demonstrate that 23.5 loaded last in California and 9.75 loaded last in the Northwest, since they served both areas they may be credited 50 percent to Trade Route No. 29 sailings and 50 percent to Trade Route No. 30 sailings. Thus, SML has established an average of 41 yearly sailings serving Trade Route No. 29 and 20.5 yearly sailings serving Trade Route No. 30, sufficient to establish it as conducting an existing service, within the meaning of section 605(c), for its proposed direct and integrated transpacific trades.

It is clear from the record that SML has topped off, annually, an average of 39 sailings from California with its Trade Routes Nos. 12 and 22 vessels, carrying, generally, slightly less than 400 tons of general cargo per voyage. We find that this average is sufficient to estab-

[14] Sailings on which four or more tons of general cargo were booked.

[15] Two direct sailings on Trade Route No. 30 in 1955 are discounted since they were made under charter, while four sailings which carried only MSTS and bulk cargoes in 1954 are counted in recognition of the nature of the trade.

lish applicant as an existing operator, within the meaning of section 605(c), as to the 36 proposed California top-offs.

Whether section 605(c) will interpose a bar to the proposed transpacific services, including the top-offs, depends upon whether the granting of subsidy aid to SML for such services would unduly advantage SML or unduly prejudice its American-flag competitors on the route or routes.

As we understand the application in the light of this record, SML proposes to carry inbound cargoes as it chooses and to exercise selectivity regarding outbound port and area coverage. A section-605(c) proceeding affords no such election; service descriptions in subsidy contracts are not measured solely by the application.

AML's claim that it would be unduly prejudiced by the inbound carriage of cargoes on Trade Route No. 30 has been removed by the conclusion that the operation inbound of tricontinent vessels on the route is barred by the provisions of section 605(c). Any prejudice which AML might suffer by reason of SML's carriage of inbound cargoes *by vessels sailing outbound from the Pacific Northwest* springs not from the fact of subsidization but from the fact of SML's presence in the field.

APL's claim that it would be unduly prejudiced by SML's ballasting many voyages home, and proposing only limited service to the Philippines as well as to other areas in the southern Far East, does not constitute undue prejudice. We do not feel that APL can complain, in the context of section 605(c), that SML would be in a better position than APL if subsidy be awarded, merely because SML petitions for and might receive something different from that which APL petitioned for and received. To hold that these facts constitute undue prejudice would result in our requiring that all operators on any given trade route must receive identical contracts and provide identical service thereunder. If APL and other operators in the transpacific trades now feel that the service descriptions in their contracts do not provide for efficient service, their relief, if any, is to petition for modifications of their contracts.

Lykes' claim that undue prejudice would result from California top-offs with Trade Route No. 22 tricontinent vessels is not supported by the record. The allegation of an unlawful agreement between SML and Bloomfield is beyond the scope of a section-605(c) proceeding and will not be considered here.

We conclude that section 605(c) does not interpose a bar to the award of subsidy to SML for its proposed number of transpacific sailings, including the top-offs with tricontinent vessels. Under section 601(a), however, we may well insist upon a service description

quite different from that contemplated in the application, and we may require all of applicant's Trade Route No. 12 and Trade Route No. 22 sailings to be direct, thereby foreclosing California top-offs which are not barred by section 605(c).

Domestic operations. In the event a subsidy contract is awarded to SML, section-805(a) permission to continue certain domestic operations depends upon whether they would result in unfair competition to any exclusively domestic operator within the meaning of that section or whether they would be prejudicial to the objects and policy of the Act. The contention that such operations are barred by the provisions of section 605(a) is irrelevant here. As we recently said in *T. J. McCarthy Steamship Co.—Sec. 805(a) Application*, 5 F.M.B. 531 (1959), "Section 605(a) clearly relates solely to the Board's authority to pay subsidy." Whether section 605(a) does prohibit the payment of subsidy on a particular voyage which includes a domestic leg is, like other issues, to be considered by the Board precedent to the tender of a subsidy contract. It cannot be the subject of a collateral attack in an 805(a) proceeding. The requested permission must be measured here in the light of the standards set out in section 805(a).

Isthmian and its predecessor in interest have continuously engaged in the Atlantic/Hawaii trade since 1935, except for interruptions beyond their control during World War II, and Isthmian unquestionably qualifies under the "grandfather" clause of section 805(a) for written permission for its continued operation in such trade in the event subsidy is awarded. There is some question as to whether "grandfather" rights attach to Isthmian's Gulf/Hawaii service because the record discloses that very little westbound service was offered between 1935 and 1939. It is not necessary for us to resolve this issue here, however, since no exclusively domestic operator contends that the continuation of the service would result in unfair competition, and it is apparent from this record that continuation would be in the furtherance of the objects and policy of the Act. We conclude that in the event subsidy is awarded, section 805(a) permission will be granted for the continuation of Isthmian's Atlantic-Gulf/Hawaii service.

As to the continuation of SML's Pacific/Atlantic lumber service, we find that it would not result in unfair competition to any exclusively domestic operator nor be prejudicial to the objects and policy of the act. SML has conducted this service since 1953 as an integral part of its tricontinent service, and under subsidy it proposes about 24 to 36 sailings yearly. The record establishes that lumber offerings have exceeded available vessel space since 1952, that SML carried 186,000 long tons of lumber in 1955, accounting for 12 percent of the movement, and that the growing offerings of lumber have resulted in

the intercoastal trade becoming unbalanced—1,900,000 long tons westbound compared to 2,700,000 long tons eastbound in 1955. Intervener Weyerhaeuser, in addition to its contention that section 605(a) prohibits the continuation of this service if subsidy be awarded, claims that there is no showing that the service is needed or that it would be profitable for SML. Weyerhaeuser also suggests that the number of lumber sailings proposed is not determined, hence the degree of competition to which it may be subjected is unknown. The foregoing facts of record answer most of these arguments. Section 605(a) issues will be considered by the Board prior to the tender of any subsidy contract, and the number of such sailings will not exceed from 24 to 36 annually.

SML proposes 24 westbound sailings in its Gulf/Pacific intercoastal service in conjunction with its proposed Trade Route No. 22 leg of the tricontinent service, topping off at California, and 14 to 17 eastbound sailings in conjunction with its proposed Pacific coast/Havana service. Section 805(a) permission will be granted for the continuation of this Gulf/Pacific intercoastal service in the event a subsidy contract is awarded. The record clearly establishes that SML and its predecessor have continuously operated in this service since 1935, except during World War II. The "grandfather" clause of section 805(a) therefore requires that the permission be granted. Although it is not necessary to consider whether the continuation of the service after subsidy would result in unfair competition to any exclusively domestic operator or would be prejudicial to the objects and policy of the Act, the record demands negative answers in both respects. There is no evidence of unfair competition since SML offers the only general cargo service in the trade, a large number of shippers are served, and SML's carryings have been substantial. Similarly, the record supports the finding that the continuation of the service would be in furtherance of the objects and policy of the Act. As noted hereinbefore, section 605(a) questions relating to "round voyages" are beyond the scope of this proceeding.

On this record, we conclude that the provisions of section 605(c) do not interpose a bar to (1) the award of subsidy to SML for its proposed tricontinent service:

a. to the extent of 12 to 24 direct annual sailings on Trade Route No. 12 and an additional 12 annual sailings on the route topping off in California;

b. to the extent of 12 to 24 direct annual sailings on Trade Route No. 22 and an additional 24 annual sailings topping off in California;

c. to the extent of 24 to 36 annual sailings on Trade Routes Nos. 26 A and B, all topping off on Trade Routes Nos. 5, 6, 7, 8,

9, and 11, with the privilege of lifting cargo at Hawaii for discharge in Europe; and

d. to the extent of 14 to 17 annual sailings on Trade Route No. 23;

(2) the award of subsidy to SML for its proposed 12 to 24 annual sailings on Trade Route No. 13; and (3) the award of subsidy to SML for its proposed transpacific services:

a. to the extent of 18 to 24 direct annual sailings on Trade Route No. 29;

b. to the extent of 6 to 12 direct annual sailings on Trade Route No. 30; and

c. to the extent of 12 to 24 annual sailings serving both Trade Routes Nos. 29 and 30, half to sail last from ports on each route.

We also conclude that the provisions of section 605(c) do interpose a bar to the award of subsidy to SML for (1) its proposed carriage of inbound cargo to the Pacific Northwest with vessels other than those which sail outbound on Trade Route No. 30; (2) its proposed inbound service to Hawaii; (3) its proposed inbound service to the Gulf of Mexico from Europe on Trade Route No. 21; and (4) its proposed outbound service to the Azores in conjunction with its proposed Trade Route No. 13 service.

We do not in this proceeding concern ourselves with allegations of an unlawful arrangement between SML and Bloomfield, matters relating to SML's proposed flexibility of operations, including vessel interchange and minima-maxima sailing spreads, and the construction of the term "round voyage" as used in section 605(a); those matters, along with others, are reserved for proper determination under other sections of the Act.

We further conclude that under section 805(a), in the event a subsidy contract is entered into with SML, written permission will be granted for:

1. the continuation of *a* Pacific/Atlantic lumber service to the extent of 24 to 36 sailings per year;

2. the continuation of *a* Pacific/Gulf intercoastal service to the extent of 14 to 17 sailings eastbound and 24 sailings westbound; and

3. the continuation, by Isthmian, of its present Atlantic-Gulf/Hawaii service.

In the event a contract is entered into, this report will serve as the written permission contemplated under section 805(a) of the Act. Whether SML may perform the Pacific/Atlantic and Gulf/Pacific intercoastal services with subsidized vessels is a matter which will be determined under sections 601 and 605(a) of the Act.

FEDERAL MARITIME BOARD

No. M–78

GRACE LINE INC. ET AL.—APPLICATIONS TO BAREBOAT CHARTER GOVERNMENT-OWNED DRY-CARGO VESSELS

Submitted May 31, 1957. Decided May 31, 1957

The Board should find and so certify to the Secretary of Commerce that the services considered are required in the public interest, that such services are not adequately served, and that privately owned American-flag vessels are not available for charter by private operators on reasonable conditions and at reasonable rates for use in such services.

George F. Galland and *Robert N. Kharasch* for Grace Line Inc.
Walter J. Murray, *Arthur E. Tarantino*, and *Paul D. Page, Jr.*, for T. J. McCarthy Steamship Company.
John J. O'Connor for Isbrandtsen Company, Inc.
Einar H. Crown pro se.
Edward Aptaker as Public Counsel.

INITIAL DECISION OF EDWARD C. JOHNSON, EXAMINER[1]

This proceeding under Public Law 591, 81st Congress, was instituted by the Board's notice of March 14, 1957, upon the applications of Grace Line Inc. and others to bareboat charter on an interim basis certain designated war-built ships of the N3–S–A2 type for employment in general cargo carriage between ports of the Great Lakes and the Caribbean area and the United Kingdom and Continent of Europe. The specific ships requested are located in the Government's reserve fleet at Wilmington, N.C.[2]

[1] In the absence of exceptions thereto by the parties and notice by the Board that it would review the examiner's initial decision, the decision became the decision of the Board on the date shown (section 8(a) of the Administrative Procedure Act and Rules 13(d) and 13(h) of the Board's Rules of Practice and Procedure).

[2] The reserve fleet includes only 11 vessels of this type, now owned by the Government and available for charter. The remaining 7 are at various reserve fleet anchorages on the Pacific Coast. The number of N3 vessels in existence is less than the aggregate number sought by the applicants.

Notice of the hearing was published in the Federal Register of March 16, 1957, and pursuant to such notice certain applicants complied with the terms and conditions set forth therein. Grace Line Inc. ("Grace") seeks to charter 4 N3's for the Great Lakes to the Caribbean area. Isbrandtsen Co., Inc. ("Isbrandtsen") and T. J. McCarthy Steamship Company ("McCarthy") respectively ask for 8 and 4 of these type vessels and propose to operate them between the Great Lakes and the United Kingdom and Continent of Europe. In addition, Einar H. Crown ("Crown") seeks to charter 2 N3's for similar Great Lakes–European service.[3] Prior to the hearing United States Lines Co. ("United States") showed some interest in chartering 8 N3's for use in the Great Lakes–European service. No formal application however was filed as is required by General Order 60 nor were they represented at the hearings held in Chicago beginning on March 28, 1957. In consequence, no consideration will be given to this Company's mere prior expressed interest in these vessels.

All applications for charter are conditioned on grants of operating subsidy.

The notice of hearing confined the testimony to the statutory issues set forth in Public Law 591. In pertinent part it provided:

> * * * to receive evidence with respect to whether the services for which such vessels are proposed to be chartered are required in the public interest and are not adequately served, and with respect to the availability of privately owned American-flag vessels for charter on reasonable conditions and at reasonable rates for use in such services. Evidence will be received with respect to any restrictions or conditions that may be necessary or appropriate to protect the public interest in respect of such charters as may be granted and to protect privately owned vessels against competition from vessels chartered as a result of this proceeding.

At the conclusion of the hearings Grace's counsel requested the Presiding Examiner to make, from the Bench, the necessary statutory findings under the Merchant Ship Sales Act as amended by PL 591 and cited as reasons therefor that the N3 vessels sought by the various applicants would be serviceable only during two navigation seasons—1957 and 1958—since the deep channel Seaway is due to open in 1959 and that larger ships would come into use, and the N3 vessels would then have no further utility. Further, that the navigation season on the St. Lawrence is short, that the season is now about to open and the reconditioning of the N3's would take time and money, that it was essential that the ships be operated for two years in order to permit the spreading of the breakout costs over a two-year period, and that the Board must act promptly if Grace, or anyone else, is to use the ships at all.

[3] While Crown submitted a skeletal supplement to the form of application required under General Order 60, Crown has not filed a basic application as required by General Order 60.

In recognition of these circumstances decision was then rendered, summarizing the evidence in support thereof, finding:

1. That the services under consideration were in the public interest;
2. That such services were not adequately served; and
3. That privately owned United States-flag vessels were not available for charter from private operators on reasonable conditions and at reasonable rates for use in such services; and stating that the aforementioned findings and conclusions would be supported, in due course, by a formal written memorandum.

The above ultimate findings with the record transcript were transmitted to the Board in memorandum form on April 15, 1957, for such action as the Board might desire to take. My formal basic findings and conclusions, in more detailed fashion follow:

GRACE LINE INC.

(Trade Route 33)

Grace, through its Executive Vice President, T. B. Westfall testified that the Company is an established carrier and has for many years operated vessels between the Caribbean area and the United States Atlantic ports. It seeks to charter four (4) N3's named in its application and located at Wilmington, N.C., for use on the Great Lakes–Caribbean route.[4] The service proposed will connect Chicago, Milwaukee, Detroit and Cleveland (plus Toronto and Montreal) with ports on the North coast of Colombia and Venezuela and ports in the Netherland Antilles. No United States-flag service is presently provided between the Great Lakes and the Caribbean, and the only service of any kind is furnished by two foreign flag carriers [5] which cannot accommodate all shipments, with the result that cargo must be shipped to seaboard ports for transfer to ocean carriers.

There was abundant evidence, from numerous witnesses representing shippers, ports, public bodies, as well as private associations and institutions indicating that the service proposed by Grace would relieve a shipping bottleneck for firms exporting from the Great Lakes to the Caribbean areas where the present service is inadequate as to frequency of sailings, regularity, dependability and vessel capacity. The ports of Venezuela and Colombia offer a natural outlet for a wide variety of mid-western products originating in the Great Lakes region. An impressive list of industrial goods and other high-rated items are presently being, and will be shipped to Latin America—agricultural

[4] On April 8, 1957, shortly after the hearings in Chicago were concluded this route was tentatively designated as essential under Sec. 211 of the Merchant Marine Act, 1936, 20 F.R. 2646.

[5] Ahlmann Transcaribbean Line (German-flag) and Saguenay Terminals Ltd. (Norwegian-flag).

machinery, animal by-products, auto parts, automobiles, canned meats, chemicals, drugs, electrical equipment, paint, paper and glass products, refrigerators, power shovels and cranes, rubber crude and finished products, seeds, steel, tractors—the list is a long one. Many exporters who are using Great Lakes shipping services now find that rates are lower than rail-ocean rates and that there are savings in handling costs. Others report that they do not use Great Lakes overseas shipping because of poor and irregular service, inadequate port facilities, and because no American ships are available. In addition, substantial cost savings for shippers can be had by reducing inland transportation charges now incurred in shipping exports from midwestern origins to seaboard for loading aboard ocean vessels. Then too, the service proposed will expedite collection procedures by permitting exporters to obtain more promptly their on-board bills of lading against which letters of credit are payable, reduce total freight charges for certain shippers and enable others to effect savings by doing away with export packaging.

Since the N3's are not usable as is, Grace has inspected the ships and made a survey of necessary repairs and modifications. They estimate it will cost about $600,000 to get them in shape for use and take six weeks to do the job. Grace proposes to operate the ships on a 54–56 day turnaround, affording fortnightly service in a range of 14–17 sailings during a full season.

Isbrandtsen Company, Inc.

(Trade Route 32 [6])

Isbrandtsen's Executive Vice President, Matthew S. Crinkley, a man with wide knowledge and extensive experience in steamship line operations of a world wide nature testified that his company wanted eight (8) N3 [7] ships for two services, one involving four ships to the United Kingdom and Continental ports, and in another service four ships for use between Great Lakes and the Continent, twice a month in each instance. He further stated that no one was in a better position "* * * to get hold of these vessels and get them into operation sooner or more economically * * * than the Isbrandtsen Company". Trade Route 32 over which the company proposes to use the vessels for operation during the interim period until the Seaway is fully open, has been declared essential. Many witnesses for Grace also spoke in favor

[6] The Great Lakes/European service has been determined by the Maritime Administrator to be an essential foreign trade route F.R. Vol. 21, No. 31, pg. 1060, February 15, 1955.

[7] The four specific N3 type vessels applied for by all applicants (except Crown who requests any 2 N3 type ships) located on the East Coast at Wilmington, N.C. are SS. Kolno, SS. Kowel, SS. James Miller and SS. George Crocker. Isbrandtsen asks for four (4) additional vessels from the reserve fleets on the West Coast of the United States.

of the other applications for ships to be used on Trade Route 32. Isbrandtsen relies in part on a February 9, 1956 release of the Maritime Administrator with an accompanying Press Release, to support its position. (Exhibit 16)

The Maritime Administration estimated that during the period of shallow draft, approximately 8 or 9 small shallow draft N3–S–A2 or similar type freighters would provide the minimum sailing requirements of the newly designated Trade Route and that in 1959, and in subsequent years after deep draft passage is provided, approximately 18 to 26 fast, "at least 18-knot or equivalent" freighters would be required to provide 11 to 16 sailings per month on the route. These, it was indicated, would possibly be divided into 8 to 12 sailings per month to the United Kingdom/Atlantic Europe area and approximately 3 to 4 sailings per month to the Baltic/Scandinavian area.

In "Background Information for the Press", accompanying the release, the Administrator also stated:

Great Lakes/Overseas traffic for many years has been moving between various ports in the Great Lakes/St. Lawrence River basin and several foreign areas. Some cargo moves between Great Lakes ports and ports in the Mediterranean, and smaller amounts move between the Great Lakes and the Caribbean and the West Coast of Africa. However, as the Great Britain-Ireland-Atlantic Europe area is the most important, attention has been centered on this area which for convenience is termed Western Europe.

* * * * * * *

Traffic on the Great Lakes/Western Europe route comprises not only cargoes moving through United States Great Lakes ports, but also cargo moving through Canadian ports on the Great Lakes and on the St. Lawrence River west of Montreal. During the last decade the traffic trend in Great Lakes overseas shipping has been decidedly upward with the result that total carryings in dry cargo ships which exceeded one-half million tons in 1953 and 1954 was four to five times larger than in 1948. The great majority of the cargo moved between the Great Lakes and Western Europe.

The Great Lakes/Western Europe route is primarily a general cargo route and indications are that with the opening of the Seaway general cargo will be carried in increasing amounts, supplemented by part cargoes of grain moving as bottom cargo to fill out the deep-draft freighters.

The evidence clearly indicates that large portions of the cargo which originates in the Great Lakes area will move directly by water out of the Lakes, rather than by rail to the North Atlantic for transshipment by water to foreign areas.

There are no American flag vessels in service on Trade Route 32 and the only ships available for this interim service are the N3 ships in the Government lay-up fleet. The testimony adequately discloses that the service by the foreign-flag ships engaged is not adequate.

T. J. McCarthy Steamship Company

(Trade Route 32)

While McCarthy has never engaged in foreign trade, this Company has nevertheless had extensive experience in transporting freight and has for a great many years successfully operated steamships on the Great Lakes. The President of the Company, Daniel J. McCarthy stated that he hoped to get four (4) of the ships and place them in service on Trade Route 32 from the Great Lakes to the North Atlantic European ports of Antwerp, Rotterdam and Hamburg, with the privilege of calling at Bremen and LeHavre. The Company further relies on the February 9, 1956 release by the Maritime Administrator in which it is shown that the Great Britain–Ireland–Atlantic Europe area is most important as a cargo area, and in which the Maritime Administrator stated:

* * * * * * *

In taking this action we have given careful consideration to economic and national defense factors. We are expressing here our faith in the traffic possibilities of the future, not only for the post-Seaway period which will begin in 1959 after completion of this great project, but also for the interim period from 1956 to the opening of the Seaway in 1959.

* * * * * * *

The Federal Maritime Board and the Maritime Administration of the U.S. Department of Commerce will do everything within the law to encourage establishment at an early date of liner service for this essential route by ships of United States Registry.

At present no American-flag vessels operate between the Great Lakes and Western Europe. Foreign-flag vessels provide all of the service now available. The government-owned N3's sought by the applicants for charter are the only American-flag vessels available for use in the above described services since the draft of these ships is adequate to permit navigating the canal between the Great Lakes and the Saint Lawrence River. There are no privately-owned American-flag ships available for charter on reasonable rates and conditions by any of the applicants.

Einar H. Crown

(Trade Route 32)

Crown's application states that he wants to bareboat charter two (2) of the N3's for a 5-year period for use on Trade Route 32 between the Great Lakes ports and those of Northwest Europe, "* * * and with a port on the lower Mississippi during the closed season on the Great Lakes; 15 November to 15 April, for the transfer to and from barges

to maintain continuous service to and from Chicago and other Great Lakes ports".

Applicant who has been in the importing business for the past 25 or 30 years, does not operate any ships at the present time nor does the record indicate that he has in the past operated any vessels. This application, like the others, is conditioned upon receiving subsidy, yet the only subsidy application by the Crown interests to date, was drawn up on behalf of a company to be named Corydon and Ohlrich, not yet in existence, and the application itself had not been formally submitted at the time of closing the Chicago hearings.

Each applicant through its learned counsel contends that it has met the three requirements of P.L. 591. Public Counsel agrees, and suggest that there are no particular considerations involved in the proposed operations that require the imposition of restrictions or conditions.

Findings, Certification and Recommendation

Upon consideration of the facts adduced in the record, and the evidence summaries hereinbefore set forth, it is concluded and found, and the Board should find and certify to the Secretary of Commerce:

1. That the services in which N3's are proposed to be used on Trade Routes 32 and 33 are in the public interest;

2. That the services in which the vessels are to be operated are not adequately served; and

3. That privately owned American-flag vessels are not available for charter on reasonable conditions and at reasonable rates.

Terms and Conditions

The notice of hearing contemplates the receipt of evidence bearing on any restrictions or conditions that may be necessary to protect the public interest in respect to such charters as may be granted, and to protect privately owned vessels against competition from vessels chartered as a result of this hearing. The record is without evidence suggesting the need for the imposition of any conditions or restrictions to protect private vessel owners. In fact, no competitive American-flag interests are involved, nor do there appear to be any other special considerations which would justify any conditional recommendations to the Administrator by the Board, and none are made herein.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-77

OCEANIC STEAMSHIP COMPANY—APPLICATION FOR WRITTEN PERMISSION UNDER SECTION 805(a), MERCHANT MARINE ACT, 1936

Submitted April 2, 1958. Decided April 2, 1958

Charter by Matson Navigation Company to States Marine Corporation of Delaware of the SS *Hawaiian Fisherman*, or similar substitute, for a single one-way intercoastal voyage from Seattle, Washington, to United States Gulf and North Atlantic ports with a full load of lumber, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Willis R. Deming and *Alvin J. Rockwell* for applicant.

Marvin J. Coles for American Tramp Shipowners Association, Inc.

Robert E. Mitchell, *Edward Aptaker*, and *Edward Schmeltzer* as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

This proceeding arises out of an application filed on March 19, 1958, by Oceanic Steamship Company (Oceanic), which seeks written permission under section 805(a) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1223 (the Act),[1] to permit its parent organization, Matson Navigation Company (Matson), to charter the latter's owned C-3 vessel, SS *Hawaiian Fisherman*, or a similar substitute owned vessel, to States Marine Corporation of Delaware (States Marine) for a single one-way intercoastal voyage from Seattle, Washington, to United States Gulf and North Atlantic ports with a full load of lumber, to commence on or about April 2, 1958.

American Tramp Shipowners Association, Inc. (ATSA), filed a telegram protesting grant of the application and requesting hearing

[1] Section 805(a) is set forth in the appendix.

and leave to intervene. There was no other opposition to the application.

After hearing and oral argument on April 2, 1958, written permission under section 805(a) of the Act was granted to Oceanic for its parent corporation, Matson, to make the charter requested, it having been found that such permission would not result in unfair competition to any person operating exclusively in the coastwise or intercoastal trade or be prejudicial to the objects and policy of the Act. The permission was based upon the following findings and determinations:

Oceanic holds an operating-differential subsidy agreement with the Federal Maritime Board for operation on Trade Route No. 27. It is wholly owned by Matson, an unsubsidized carrier operating in the United States-Hawaii trade. States Marine operates various unsubsidized services in the foreign commerce of the United States, including a service between the Gulf, California, and the Far East.

Sometime prior to March 19, 1958, States Marine sought to charter a C–3 type vessel for a single intercoastal voyage from Seattle to United States Gulf and North Atlantic ports with a full load of lumber, the vessel to continue on charter in States Marine's berth service from Atlantic, Gulf, and California ports to the Far East for discharge at Japan, Korea, and Formosa. An employee of States Marine, presented as a witness by Matson, testified that States Marine has a certificate of public convenience and necessity from the Interstate Commerce Commission for intercoastal carriage of cargoes from Pacific coast ports to United States Gulf and Atlantic ports. Loading of the lumber was to be in early April.

Victory Carriers, Inc., a tramp operator (Victory), offered to States Marine the *Northwestern Victory* for this charter. The offer was turned down because the capacity of a Victory ship would be inadequate for charterer's requirements for both the intercoastal lumber movement and the Atlantic-Gulf-California Far East voyage.

On March 19, 1958, States Marine entered into a charter with Matson for the latter's own C–3 type vessel *Hawaiian Fisherman*. The charter is a time form for 100 days at $225,000.00 lump-sum hire, early April loading, redelivery to be at a Pacific coast port or Hawaii at owner's option. The charter was conditioned on approval by the Federal Maritime Board and/or Maritime Administration.

Victory had offered the *Northwestern Victory* to States Marine, and such vessel had been in position on the west coast for delivery in early April; it had been tendered at a rate slightly higher than $50,000 per month. As previously noted, States Marine refused this offer because of the inadequacy of the Victory-type vessel.

On March 31, 1958, two days before the hearing, the *Northwestern Victory* had been chartered for a voyage from the Gulf, and at the time of hearing was being moved under ballast from California to be in position for the charter. The record fails to show whether the charter was more favorable or less favorable than the charter to States Marine might have been.

At approximately the same time States Marine was arranging the charter of the *Hawaiian Fisherman* from Matson, one of its owned vessels, the *Golden State*, a C–2 type vessel, was fixed for a coal charter from the west coast to Korea. The record fails to show that the *Northwestern Victory* or any other tramp vessel was offered for the Korean coal charter, or that any tramp vessel was in fact deprived of such cargo because of the *Golden State* charter. The Executive Secretary of ATSA, who also appeared for Victory, a member of ATSA, knew of no tramp ships in layup on the west coast.

Discussion And Conclusions

ATSA concedes that under section 805(a) of the Act it is not entitled to protection from unfair competition as a "person, firm, or corporation operating exclusively in the coastwise or intercoastal service." It contends, however, that the charter to States Marine would be "prejudicial to the objects and policy of the Act", and that it thus is entitled to the protection of the section. Its position is that the privately owned United States-flag tramp fleet is a large and vital part of the American merchant marine, and that to permit the present charter would deprive an unsubsidized United States-flag privately owned tramp vessel of needed cargoes, which would be "prejudicial to the objects and policy of the Act."

Upon this record there is no showing that Victory or any other tramp operator could be prejudiced by the grant of permission for charter here sought. Victory's *Northwestern Victory* was refused because of the inadequacy of capacity for charterer's requirements; it had in fact been chartered from the Gulf under conditions which may or may not be more advantageous than the States Marine charter might have been; at the time of hearing it was unavailable for the charter here under consideration; and no other United States-flag tramp vessel appears to have been available. As to the charter of the *Golden State* for the movement from the Pacific coast to Korea, the record fails to show whether any tramp operator offered for that charter or was in fact even interested.

At the time of hearing the parties were informed that decision would be reserved as to whether ATSA or Victory was "a person, firm, or corporation having any interest in such application", with the right to intervene.

Having determined from the record, however, that no prejudice could result to the protesting parties from the grant of permission for this charter, it is unnecessary to decide the "interest" question.

APPENDIX

Section 805(a) of the Merchant Marine Act, 1936, as amended:

"It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona-fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona-fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

"If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor."

FEDERAL MARITIME BOARD

No. 800

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., AND NEW JERSEY MOTOR TRUCK ASSOCIATION, INC.

v.

AMERICAN EXPORT LINES, INC., ET AL.

No. 801

TRUCK LOADING AND UNLOADING OF WATERBORNE CARGO AT NEW YORK—INVESTIGATION OF RATES AND PRACTICES OF PARTIES TO AGREEMENT NO. 8005

No. 821

IN THE MATTER OF AGREEMENT NO. 8005-1 BETWEEN AMERICAN EXPORT LINES, INC., AMERICAN PRESIDENT LINES, LTD., BULL-INSULAR LINE, INC., AMERICAN STEVEDORES, INC., INTERNATIONAL TERMINAL OPERATING CO., INC., ET AL.

Submitted July 8, 1958. Decided February 24, 1959

Respondents' Tariffs Nos. 3 and 4 found not to be new agreements or modifications of an agreement, within the meaning of section 15 of the Shipping Act, 1916.

General level of rates in Tariff No. 3 not shown to be unjustly discriminatory or unfair, deterimental to commerce, or in violation of the Shipping Act, 1916.

Failure of respondents properly to comply with the express provisions of Agreement No. 8005 and the tariffs issued thereunder found to be in violation of section 17 of the Shipping Act, 1916.

General level of rates in Tariff No. 4 not shown to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Shipping Act, 1916.

Rates in Tariff No. 4 on iron and steel and tinplate found to be unreasonably high in relation to other rates and therefore unjustly discriminatory and unfair and detrimental to commerce.

Provision that extra charge for loading or unloading cargo weighing more than 6,000 pounds will be determined by negotiation, found to be an unjust and unreasonable practice in violation of section 17 of the Shipping Act, 1916.

Agreement No. 8005–1, insofar as it would eliminate "no service" with respect to truck unloading, found detrimental to commerce and not approved. Agreement No. 8005–1, modified so as to eliminate "no service" with respect only to truck loading, found not to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Shipping Act, 1916, and approved as so modified.

Complainants not shown to have been injured and are not entitled to reparation.

Herbert Burstein, *Nathan E. Zelby*, and *Arthur Liberstein* for complainants and certain interveners.

Herman Goldman, *Benjamin Wiener*, and *Seymour Kligler* for respondents.

Nicholas Maarschalk for American Can Company, *Seymour Graubard* and *Peter Nicholas Schiller* for American Institute for Imported Steel, Inc., *Bradshaw Mintener* for Association of Cocoa and Chocolate Manufacturers of the United States, *Charles A. Pascarella* for Association of Food Distributors, Incorporated, *D. J. Speert* and *A. C. Welsh* for Brooklyn Chamber of Commerce, *Albert Hoffman* for Cocoa Merchants' Association of America, Incorporated, *Stephen Tinghitella* and *J. S. Sinclair* for Commerce and Industry Association of New York, Inc., *Richard E. Costello* and *Frederick G. Hoffman* for General Managers' Association of New York Harbor Railroads, *W. E. Aebischer* for Great Atlantic and Pacific Tea Company, *Hugo Rothschild* for Kurt Orban Company, Incorporated *Donald E. Cross* for the Middle Atlantic Conference, *Robert de Kroyft* for New Jersey Industrial Traffic League, *Edward I. Kaplan* and *David Weisband* for New York Fruit Auction Corporation *John J. Duffy* for Noritaki Company, Incorporated, *George A Olsen* for Peat Moss Association, Inc., *Charles Lurie* for Providence Import Company, Incorporated, *John A. Jancek*, *Abe McGregor Goff*, and *Julian T. Cromelin* for United States Post Office Department, *Michael C. Bernstein* for Anthony A. Bianco, Anthony Scotto Company, Charles Schnell, Emil Tassini, Fruit Export Corporation Gargiulo & Amendola, Inc., Levatino Company, Marichal-Agosto Inc., Robert T. Cochran & Company, Inc., The El Morro Corporation, and William Turino Company, Inc., *Sidney Elliott Cohn* and *Jerome B. Lurie* for Truck Drivers Local Union No. 807, I.B. of T *William P. Sirignano*, *David Simon*, and *Irving Malchman* fo Waterfront Commission of New York Harbor, *Sidney Goldstein Daniel P. Goldberg*, *Patrick J. Falvey*, *Joseph Lesser*, and *Francis A Mulhern* for the Port of New York Authority, *Louis Waldman* an *Seymour M. Waldman* for International Longshoremen's Association

Maurice W. Fillius for National Association of Alcoholic Beverage Importers, Inc., and *Alfred Giardino* and *C. P. Lambos* for the New York Shipping Association, Inc., interveners.

Robert E. Mitchell, *Edward Aptaker*, *Richard J. Gage*, and *Allen C. Dawson* as Public Counsel.

REPORT OF THE BOARD

BY THE BOARD:

These consolidated proceedings involve a complaint and orders of investigation on the Board's own motion.

No. 800

The complaint in No. 800 was filed August 22, 1956. It alleges, in substance, that respondents'[1] Tariff No. 3, which assesses charges and establishes rules and regulations for the loading and unloading of waterborne cargo onto and from trucks in the port of New York, violates the provisions of sections 14, 15, 17, and 18 of the Shipping Act, 1916, as amended (the Act).[2] Complainants[3] seek a cease and desist order, cancellation of the tariff, and reparation. On October 10, 1956, respondents filed their answer, denying all allegations of unlawfulness and requesting that the complaint be dismissed.

No. 801

The Board's orders of September 14, 1956, and August 1, 1957, in No. 801 instituted investigations to determine (1) whether the rates, charges, rules, and regulations set forth in respondents' Tariffs Nos. 3 and 4, issued pursuant to F.M.B. Agreement No. 8005, are detrimental to the commerce of the United States, and (2) whether the practices resulting from the adoption of the tariffs are unjust and unreasonable practices for or in connection with the receiving, handling, or delivering of property.

On August 1, 1957, the Board requested respondents to postpone the effective date of Tariff No. 4 until completion of its investigation. Effective August 19, 1957, respondents suspended until fur-

[1] Respondents, except W. L. Swain, are marine terminal operators in the port of New York. They receive, handle, and deliver freight moving in foreign or interstate commerce by common carriers by water. As a part of their terminal operations, they provide the service of and issue tariffs covering charges for truck loading and unloading involved in this proceeding, pursuant to F.M.B. Agreement No. 8005, approved by the Board on March 23, 1955. Respondent W. L. Swain is the terminal operators' agent designated pursuant to the provisions of the agreement.

[2] 46 U.S.C. 812, 813, 816, 817.

[3] Complainants are associations whose members are motor carriers engaged in the transportation of property in either interstate or intrastate commerce, or solely within the New York City commercial zone. In the course of their operations, the motor carriers deliver to, or pick up at, the piers in the port of New York waterborne freight which has a subsequent or prior movement in foreign or interstate commerce by common carriers by water.

ther notice the rules, regulations, and rates contained in the tariff. Tariff No. 3 remained in effect until April 14, 1958, when respondents withdrew their voluntary suspension of Tariff No. 4. Tariff No. 4 became effective and has remained in effect since that date.

No. 821

The Board's order of June 13, 1957, instituted an investigation to determine whether operations under F.M.B. Agreement No. 8005–1,[4] filed by respondents for approval pursuant to section 15 of the Act, would be unjustly discriminatory or unfair, detrimental to commerce, or result in violation of sections 16 First or 17 of the Act.

The proceedings were consolidated for hearing, which was held before an examiner in New York, N.Y., from August 19 through October 18, 1957. All parties who participated did so as their interests appeared on a common record, and the issues will be determined in this single report.

Prior to the examiner's recommended decision the following parties intervened in opposition to the provisions of the tariffs and agreements involved, or as their interests might appear: American Can Company, American Institute for Imported Steel, Inc., Association of Cocoa and Chocolate Manufacturers of the United States, Association of Food Distributors, Incorporated, Brooklyn Chamber of Commerce, Cocoa Merchant's Association of America, Incorporated, Commerce and Industry Association of New York, Inc., General Managers' Association of New York Harbor Railroads, Great Atlantic and Pacific Tea Company, Kurt Orban Company, Incorporated, Middle Atlantic Conference, New Jersey Industrial Traffic League, New York Fruit Auction Corporation, Noritaki Company, Incorporated, Peat Moss Association, Inc., Providence Import Company, Incorporated, United States Post Office Department, Anthony A. Bianco, Anthony Scotto Company, Charles Schnell, Emil Tassini, Fruit Export Corporation, Gargiulo & Amendola, Inc., Levatino Company, Marichal-Agosto, Inc., Robert T. Cochran & Company, Inc., The El Morro Corporation, and William Turino Company, Inc.

The examiner concluded and found that:

1. Tariffs Nos. 3 and 4 (a) are within the authority of respondents' basic Agreement No. 8005, and (b) are not new agreements or modifications of an agreement, within the purview of section 15 of the Act, requiring approval by the Board before being made effective.

2. Departures from Tariff No. 3 with respect to (a) refusal to load trucks present at 3 p.m., and (b) denial of partial service, are unjust

[4] Agreement No. 8005–1, more fully set forth hereinafter, would, in effect, allow respondent terminals to prohibit anyone other than themselves from loading and/or unloading trucks at their facilities.

and unreasonable practices relating to the receiving, handling, or delivering of property, in violation of section 17 of the Act.

3. Tariff No. 3 rate structure is noncompensatory and thus detrimental to commerce within the meaning of section 15 of the Act.

4. Tariff No. 4 application of rates to fruits and vegetables, iron and steel, and tinplate is too high in relation to rates applied to certain other commodities, and thus detrimental to commerce within the meaning of section 15 of the Act.

5. Tariff No. 4, except as found in paragraph number 4 above, not shown to be in violation of the Act.

6. Tariff No. 3 should be canceled, and Tariff No. 4 should be put into effect upon respondents' publishing and filing new rates applicable to fruits and vegetables, iron and steel, and tinplate, reflecting the findings made.

7. Agreement No. 8005–1 not shown to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or otherwise to be in violation of the Act.

8. Complainants not shown to have been injured and entitled to reparation. Complaint in No. 800 should be dismissed, and Nos. 801 and 821 should be discontinued.

Subsequent to the issuance of the recommended decision the following parties intervened: Port of New York Authority, Waterfront Commission of New York Harbor, International Longshoremen's Association, New York Shipping Association, Inc., Truck Drivers Local Union No. 807, International Brotherhood of Teamsters, and National Association of Alcoholic Beverage Importers, Inc.

Exceptions to the recommended decision and replies thereto were filed, and oral argument has been heard. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in these proceedings.

1. Respondents operate about 125 piers in the port of New York, varying in size, physical facilities, and age. Most of the piers are of the finger type and were constructed at a time when the largest percentage of cargo on the piers moved by lighters and the balance by horse-drawn vehicles. The piers were not designed to accommodate the large number of trucks which now call at the terminals to load or unload cargo. Some of the Staten Island piers have facilities for rail cars, but there are little or no such facilities in Manhattan or Brooklyn. The great preponderance of cargo must therefore be moved to and from the piers by trucks and lighters. This fact under-

lies practically all of the terminal and trucking problems about which this proceeding revolves.

2. Practically all of the common-carrier-by-water import and export general cargo handled in the port of New York moves over the piers operated by respondents. It is hardly necessary to note that the volume of such cargo is great. Ten major or principal general cargo import items [5] moving through New York in 1956 amounted to approximately 3,552,017 long tons. The total import tonnage through New York in 1956 was approximately 6,494,649 long tons, valued at approximately $4,026,900,000.

3. While the volume and value of import cargo through New York have increased over the past few years, the character of such cargo has not changed appreciably.

4. Prior to December 31, 1953, truck loading and unloading at New York was performed by public loaders. Abuses developed under this system, and public loaders were outlawed by the provisions of the New York–New Jersey Waterfront Commission Compact, Public Law 252 of the 83rd Congress (approved August 12, 1953). In pertinent part the declaration of policy stated in the compact is:

> * * * that the function of loading and unloading trucks and other land vehicles at the piers and other waterfront terminals can and should be performed, as in every other major American port, without the evils and abuses of the public loader system, and by the carriers of freight by water, stevedores and operators of such piers and other waterfront terminals or the operators of such trucks or other land vehicles.

5. After the public loaders were outlawed, committees representing the terminal operators and the truckers met and arrived at the informal decision that the terminal operators should take over the responsibility of furnishing the truck loading and unloading service. After a period of flux, during which the responsibility for the service and the charges therefor were unsettled, the present system evolved pursuant to Agreement No. 8005 [6] and tariffs thereunder. The necessity of a uniform tariff throughout the port of New York is generally conceded both by the truckers and the terminal operators.

6. Agreement No. 8005 in pertinent part provides that respondents

> * * * are permitted to load or unload waterborne freight onto or from vehicles at piers or at other waterfront terminals in the Port of Greater New York and vicinity, for a fee or other compensation, under the provisions and subject to the requirements of Public Law 252—83rd Congress, approved August 12, 1953, granting the consent of Congress to a compact between the State of New Jersey and the State of New York known as the Waterfront Commission Compact.

[5] Sugar, coffee, bananas, crude rubber, newsprint, iron and steel products, lumber and shingles, cocoa, inedible vegetable oils, liquors and wines.

[6] Agreement No. 8005 was approved by the Board on March 23, 1955.

* * * with respect to the fixing of charges to be made by them [respondents] to truckers for the service of loading or unloading, or assisting in loading or unloading, freight * * * onto or from trucks * * * [respondents] agree * * *:

1. That they shall establish, publish and maintain tariffs containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such services * * *.

2. That they shall assess and collect rates and charges for and in connection with such services strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs and, further, shall not in any respect whatsoever deviate from or violate any of the terms or conditions or provisions of said tariffs * * *.

7. Agreement No. 8005–1, if it should be approved by the Board, would authorize respondents to insert the following pertinent provision in their tariff:

1(a) The tariff may contain rules, regulations and practices prohibiting the loading and/or unloading of trucks at the piers or other waterfront terminals in said Port by anyone other than the operators of said piers or waterfront terminals.

8. The essential dispute in these proceedings is between the trucking firms (truckers) and the terminal operators (terminals or respondents), involving, primarily, the reasonableness and lawfulness of the rates, charges, rules, regulations, and practices in and under Tariffs Nos. 3 and 4 and Agreement No. 8005–1, with respect to loading and unloading trucks at the New York piers.

The tariffs.

9. Following Board approval of Agreement No. 8005, respondents issued Tariff No. 1 on April 25, 1955. This tariff became the subject of dispute and litigation and never went into effect. During the period from May to August 1955, representatives of respondents and representatives of truckers conducted negotiations which resulted in the issuance of Tariff No. 2, effective August 15, 1955. The rates in this tariff represented a compromise between the truckers and the terminals, and the tariff remained in effect until it was canceled and superseded by Tariff No. 3, effective September 15, 1956. Rates were increased generally in Tariff No. 3 over Tariff No. 2. These increases, and other provisions of Tariff No. 3, were not satisfactory to the truckers and resulted in commencement of these proceedings. Tariff No. 4, also, is unsatisfactory to the truckers.

10. The format of Tariff No. 2, i.e., its breakdown as between class and commodity rates, was agreed upon by committees representing truckers and terminal operators. Truckers at the hearing indicated approval of the concept of class and commodity rates. The same format was followed in Tariffs Nos. 3 and 4. Generally, the class rates are higher than commodity rates. Under Tariff No. 2, about

90 percent of the cargo was covered by class rates; under Tariff No. 3, about 50 percent; and under Tariff No. 4, still more items would be removed from the class rates to the commodity-rate category. The class rates in Tariffs Nos. 3 and 4 are divided into three categories, based upon density of the cargo: (1) cargo measuring 100 cubic feet or less per ton (2240 lbs.), about 90 percent of which falls within this density, (2) cargo measuring 101 to 200 cubic feet per ton, and (3) cargo measuring 201 cubic feet per ton and over. Under both the class rates and the commodity rates, one rate is applied to truck loads of 25,000 pounds or more and another to less than truckloads. The 25,000-pound dividing line was adopted partly as a result of the negotiations between the truckers and the terminal operators. The terminals made no specific study of their own to determine this figure.

11. The great preponderance of service performed by the terminals under the tariffs is truck loading rather than unloading. The truckers, in most cases, do their own unloading, as described later.

12. Tariff No. 3 (as did No. 2) provides for "partial service," defined as follows:

> Partial service shall mean the moving of cargo from a place of rest on the dock which is readily accessible to the truck and elevating the same to a place of rest on the truck without the necessity of placing men on the truck.

13. Tariff No. 3 also provides for "full service", which, in addition to partial service, includes stowing the cargo in or on the truck by one or more of the terminal's employees getting onto the truck to complete the loading. In addition, the tariff provides for "no service," under which the trucker may perform the complete loading or unloading himself and no charge is made therefor. Tariff No. 3 provides lower rates for partial service than for full service.

14. Some commodities can be loaded directly onto open trucks by a fork-lift truck, or "hilo" machine, without the aid of men on the truck. This has created a source of conflict since some of the terminals contend that any placement beyond the tailgate is full service, whether performed directly with the hilo machine or with men placed on the truck.

15. Partial service is considered by some of the terminals to be uneconomical because the men who assist the hilo machine driver are kept idle when partial service is rendered. In addition, partial service has not been in great demand by the truckers. Another area of conflict over partial service arises in connection with the relative speed or tardiness with which the truck driver stows cargo on the truck. If the truck driver is unnecessarily slow in stowing the cargo,

the hilo machine and its driver are idle and the truck itself blocks off pier space which may be needed for other trucks. Sometimes the terminals charge the full-service rate in such a case.

16. Tariff No. 4 does not provide for partial service, leaving to truckers the choice between full service and no service. It sets separate rates for closed and open trucks, the latter rates being lower and reflecting increased efficiency resulting from the ability to stow cargo directly by hilo machine without the need for placing men on the truck. The lower rate for open-top trucks is to some extent a substitute for partial service, and reflects cost savings resulting from use of such trucks.

17. Other reasons given by the terminals for elimination of partial service, under Tariff No. 4, are (1) that it will expedite the loading of trucks, particularly those that call without helpers and require tailgate service, which prolongs the loading and delays other trucks, (2) that it will enable the terminals to better estimate the number of loaders required, and thus effect a saving in their labor cost, particularly at the piers where the loaders work in teams and the men not engaged in the partial loading service remain idle, and (3) that it will eliminate disputes that arise, including those of a jurisdictional nature.

18. A tariff expert and consultant engaged by complainants to analyze Tariffs Nos. 3 and 4 stated that these tariffs contain more ambiguities than most tariffs. For example, he points out, Tariff No. 3 provides that:

> Trucks not supplying a helper to assist the driver, shall employ the services of the Terminal Operator to load or unload the truck, unless the nature of the cargo is such that the driver can load or unload his truck within 40 minutes time.

19. The "40 minutes time" starts to run when the truck is in position, ready to load. The terminal operator does not guarantee, however, to keep cargo flowing to or from the truck, and moreover, the terminal determines whether the cargo can be loaded or unloaded in 40 minutes.

20. Another difficulty arises in relation to heavy lifts. Tariff No. 4 provides that cargo weighing over 6,000 pounds per piece is subject to a negotiated rate. This provision was adopted by the terminals because most of them have equipment capable of handling a maximum of 6,000 pounds. When heavier pieces must be loaded, outside firms must be employed to bring in heavy-lift equipment. No standards have been set as to how the individual terminal is to interpret these and other discretionary provisions of the tariffs.

Procedure followed in setting rates.

21. In arriving at the rates to be charged for the truck loading and unloading service, respondents considered cost of the service and the type, value, and volume of the commodities. Respondents state that because of the variety of commodities and of the radical variations between the physical facilities of the various terminal operators, it is difficult, if not impossible, to fix rates in exact relation to costs, and that the rates were established on the basis of "educated guesses":

> We try to arrive at a rate which will produce the overall revenue that is required for the entire port. In other words, if Pier A can take a certain commodity and handle it more efficiently than Pier B, we would take the average between Piers A and B. We are not trying to subsidize the inefficient.

In setting the rates for Tariff No. 2, the terminals were admittedly "shooting in the dark" and "needed experience."

22. Tariff No. 3 was prepared under more organized conditions; respondents had gained more experience. Also, they had before them certain income and expense statements, segregated as to truck loading and unloading, for the period January 1 to June 30, 1956, which had been prepared by individual terminals on request of the Board, discussed later. These statements indicated that the terminals were operating at losses from 25 to 28 percent of gross revenue under Tariff No. 2. The level of rates in Tariff No. 3 was set so as partially to recoup such losses. No comprehensive study was made in the preparation of this tariff, however. The differential between partial and full service was set on the basis of discussions between representatives of truckers and terminals, and on experience of some of the terminals. Commodity rates (lower than class rates) were established in Tariffs Nos. 3 and 4 for aluminum, lead, and zinc, but not for steel, although steel moves in large volume, the primary reason for commodity rates.

23. In the preparation of Tariff No. 4, the terminals had more information available to them and they had gained more experience. Even so, this tariff represents a "guess," to some extent, as to the rates on specific commodities. New York Port Authority statistics were relied upon, although not exclusively, to determine volume of commodities handled. Volume of movement was the primary consideration in determining which commodities would be given a commodity rate. Studies were available on asbestos pipe, mail, flower bulbs, appraiser's stores, and bagged coffee. Also available was the report of the certified public accounting firm retained by respondents to conduct a cost study of terminal operations during the spring of 1957, discussed later.

24. Some adjustments in commodity rates were made in Tariff No. 4, based on the experience of some of the terminals. Various rates

and plans were proposed by individual terminals prior to adoption of the tariff. Some, such as surcharges per truck, were rejected as being impractical. All proposals were discussed fully, including review and revision of Tariff No. 3 in the light of the losses shown to have been sustained thereunder. The terminals unanimously approved Tariff No. 4 on July 17, 1957.

Cost studies.

25. Respondents retained a certified public accounting firm to conduct a cost study of their terminal operations during the spring of 1957, as previously mentioned. The study embraced six terminals comprising 11 piers, selected as being representative of all the terminals, and covered truck loading only.

26. The cost study covers three elements: labor, machines, and overhead. As to overhead, each of the six terminals performs functions other than loading trucks, making difficult, the accountants stated, a precise allocation of overhead expenses assignable to truck-loading operations. They accepted, therefore, the data supplied by the terminals to compute the ratio of general overhead to their total income, which ratios were then applied to the truck-loading income. Each of the six terminals had a different rate of overhead, and none included pier rental in the overhead costs. In most cases the overhead expense was based on 1956 experience. There was no attempt to determine actual overhead during the period of the study. The same is true of machine costs per hour. One of the items of machine cost was depreciation, and this was based upon reproduction cost as reported by the manufacturer.

27. The study covered five days: April 17, 18, 22, 23, 24, 1957. The total revenue pounds loaded on trucks at the six terminals was 37,707,216. The total number of trucks loaded at "full service" rates was 1,886; at "partial service" rates, 459; and at "no service," 129. The total man-hours of truck-loading labor was 9,555.

28. The study does not purport to be minutely exact, and it does not by itself solve the question as to whether Tariff No. 3 is compensatory. It does, however, afford statistical information as to the frequency of use of full as compared to partial service, and class rates as compared to commodity rates. The accountants' report shows the financial results of the operations over the five days, in summary, as follows:

TABLE 1

	Revenue	*Expense*	*Loss*
Class rates	$17,405.73	$30,164.14	$12,758.41
Commodity rates	11,316.72	15,629.72	4,313.00
Total, Tariff 3	28,722.45	45,793.86	17,071.41

29. The report indicates that all of the six terminals were operating at a loss under Tariff No. 3, that every commodity listed and handled under full-service truckload rates was handled at a loss, that all except one commodity handled under full service at less-than-truckload rates also was handled at a loss, and that a few commodities showed profits in partial service, but the total revenue and expense figures for partial service are so small as to be inconclusive.

30. Complainants presented an accountant in rebuttal to the cost study discussed above. His principal criticism was that respondents' accountant did not have complete charge of deciding what data was to be used, did not satisfy himself that the sample study was representative, and did not compare his study with some independently ascertained figure. From his study of respondents' accountant's report, however, he was not able to state whether or not it reflects true conditions in New York.

31. One of the terminals made a study while Tariff No. 2 was in effect, disclosing income and expense for the four-week period March 7–April 2, 1956. This study listed the 16 commodities moving in greatest volume and "Others." It projected revenue for the same commodities based upon the rates in Tariff No. 3. The results of this study, not claimed to be perfect, were shown to be as follows:

TABLE 2

	Tariff No. 2	*Tariff No. 3 projection*
Revenue	$11,185	$14,415
Expense	18,228	18,228
Loss	7,043	3,814

32. The tariff expert and consultant engaged by complainants made a study of respondents' terminal operations. He went to the terminals and conducted studies on individual trucks. As an example, he studied the loading of two trucks of a large trucker at a certain terminal. He counted the men working and the time, and found the cost to the terminal to be $36.96 and the revenue to be $53.90. No allowance was made for overhead, however, nor for idle labor time. The record shows the latter to be substantial.

Confidential income and expense statements.

33. Pursuant to requests of the Board's Regulation Office, each respondent submitted to the Board income and expense statements for the periods January 1–June 30, 1956, and October 1, 1956–February 28, 1957. These statements, individually and consolidated, are in confidential exhibits, and they are the principal evidence in the proceeding on the issue of the reasonableness of the level of the rates involved, i.e., whether they are compensatory. The first period repre-

sents operations under Tariff No. 2 and the second period under Tariff No. 3.

34. The consolidated experience of all the terminals during each of the two periods is shown in the following table:

TABLE 3

Period[1]	*Revenue*	*Expenses*	*Loss*
January–June 1956	$2,315,989	$3,119,298	$803,309
Oct. 1956–Feb. 1957	2,261,376	2,807,785	546,409

[1] One period is 6 months the other 5 months.

35. Witnesses representing eight of the terminals testified in respect of their individual income and expense statements; four were selected by counsel for complainants and four by Public Counsel. While the sample of eight may or may not be representative of all the terminals, it furnishes a check upon the validity of the bookkeeping systems employed by the group selected. The income and expense figures of these eight terminals were subjected to exhaustive check and cross-examination at the hearing. The loss or profit results of the eight terminals during the two periods of study, after adjustments based upon cross-examination and analysis, are shown in the following table.

TABLE 4

(Profit in parentheses)

	First period	*Second period*	*Second period adjusted to 6 months*[1]
	$44,190	$27,600	$33,120
	47,000	34,253	41,104
	131,523	52,506	63,007
	(1,999)	(8,784)	(10,541)
	6,744	6,510	7,812
	16,742	(877)	(1,052)
	6,681	13,990	16,788
	(187)	(3,269)	(3,923)
Total	250,694	121,929	146,315

[1] Since the second period consists of only five months, it is here increased by 20 percent to give a six-month series of figures to permit comparison with the first period. The assumption is that experience in the sixth month would be the average of the five month's study.

36. The aggregate losses for all the terminals, including the selected eight, are shown as follows:

First period	*Second period*	*Second period adjusted to 6 months*
$803,309	$546,409	$655,691

The measure of rate increases in Tariffs Nos. 3 and 4.

37. The record furnishes no acurate statement of the volume of each of the commodities handled under the tariffs. The following table does show, however, a few selected commodities which, the record indicates, move in large volume. The table shows the rate on the listed commodities moving under Tariffs Nos. 2, 3 and 4, and the rate increases and decreases in Tariffs Nos. 3 and 4. The class rates shown apply to truck loads, "full service," and the commodity rates apply to any quantity, "full service." The rates are in cents per hundred pounds unless otherwise noted.

TABLE 5

Commodity	*Tariff 2*	*Tariff 3*	*Tariff 4*
Class Rate	5½	7 (27% inc.)	11 (57% inc.)
Aluminum, Copper, Lead, Newsprint, Tin, Zinc	5½	6 (9% inc.)	5 (17% dec.)[1] 8 (33% inc.)[2]
Cocoa, Coffee	5½	6 (9% inc.)	8 (33% inc.)
Sugar	5½	7 (27% inc.)	9 (28% inc.)
Rubber	5½	4½ (18% dec.)[3] 8½ (54% inc.)[2]	5 (11% inc.)[3] 10½ (23% inc.)[2]
Fruits and vegetables, 0–25 lb. packages	2	2½ (25% inc.)	5 (100% inc.)
26–50 lb. packages	3	3½ (16% inc.)	6 (70% in.)

[1] Open flat-bed trucks.
[2] Other trucks.
[3] When dumped.

38. Since total volume of each commodity presently moving is not shown in the record, it is impossible to construct a weighted average percentage of increase in rates or revenues in Tariff No. 4 over Tariff No. 3, or Tariff No. 3 over Tariff No. 2. In addition, the total rates and revenues are affected by the extent to which truckers will utilize open flat-bed trucks, and thereby pay the lower rates contemplated therefor in Tariff No. 4. As shown in table 3, the totals for operations during the period October 1956–February 1957 were: revenue, $2,261,376; expenses, $2,807,785; loss, $546,409. According to these figures, and assuming that expenses and volume remain the same, revenues would have to be increased slightly over 24 percent to bring the terminals to a break-even point. An increase of 33⅓ percent would result in a profit of $207,383 for the five months' period, for an operating ratio of $1.07 of revenue for each dollar of expense. We think the examiner's estimate that the over-all rate increase in

Tariff No. 4 over Tariff No. 3 will not exceed 33⅓ percent, is reasonable.

Truck loading procedure and operation.

39. The piers are policed and no one may enter or leave a pier without permission. The procedure for loading a truck is fairly uniform. The truck is registered at the entrance of the pier. The driver proceeds to the delivery clerk and submits the necessary custom permits, releases, and proof of his authority to receive the cargo. If the driver's papers are approved, he is given a gate pass which permits entry of the truck to the pier area. At the same time, the driver makes known to the dock boss whether he wishes full service, partial service, or no service. The delivery clerk, from his records, ascertains the exact location of the cargo on the dock, and notes the same on the papers delivered to the checker. The checker then locates the cargo and arranges with the dock boss for loaders, if any were requested by the driver. The checker or dock boss then assigns the truck to a position on the dock or area adjacent thereto, and checks the cargo as it is loaded on the truck. After the truck is loaded, it is dispatched from the loading area and the gateman permits the truck to leave the pier and makes the necessary entries in his book.

40. Trucks, to be loaded speedily and efficiently, require the use of hilos, pushers, cranes, escalators, pallets, pallet and live rollers, and other special equipment. Such equipment is owned and maintained by the terminals at the piers they operate, and it is utilized by them for the truck loading and unloading service.

41. The principal factor affecting the efficiency and cost of the operation is the physical character of the piers themselves, described heretofore. The lineup for trucks at one pier is some three blocks away. At another it is immediately outside.

42. There is congestion on the piers due to the amount of cargo piled on them. This affects the maneuverability of the trucks within the pier. Because of such congestion and the large number and size of modern trucks, much of the loading is done outside the pier area, on land adjacent to the pier, or sometimes on the street. This area is called the "farm."

43. Truckers send a wide variety of truck types to the terminals and often the truck will not be suitable for the job at hand. Some arrive with documents not properly executed, requiring time for straightening out. Consignees very commonly leave cargo at the piers until the last day of free time, causing a great convergence of trucks and resulting congestion five days after a ship discharges. Some congestion, too, arises from hold-on-dock cargo, i.e., export

cargo from inland points consolidated at the terminal for ocean shipment.

44. Involved in the movement of cargo from ship's tackle to the truck are the terminal operators, the longshoremen who work for the terminal operators, the motor carriers, and the teamsters who drive the trucks. Any inefficiency, carelessness, or assertion of claimed rights by any one of the parties will fundamentally affect the efficiency, and the consequent costs, of the whole operation.

45. The terminals have to hire longshoremen for truck loading. They must estimate each day how great the following day's demand for truck-loading labor will be. The men are hired for the four-hour period from 8 a.m. until noon, and then may be rehired for the afternoon period from 1 to 5. If men are hired and an inadequate number of trucks arrive for cargo, the men stand idle but must nevertheless be paid for at least a four-hour period. The approximations for labor requirements are made on the experience of the individual operators. Even so, there is a substantial area of uncertainty. The magnitude of this problem is indicated by noting that the variation in number of trucks loaded and unloaded per day at some of the terminals in July and August 1957 was from none to 63, 1 to 10, 8 to 125, 11 to 35, 46 to 157, and 58 to 154.

46. The terminal's labor force is usually divided into "teams" consisting of a "hilo" operator and two laborers. In partial service, only the "hilo" operator is occupied and the men who would normally work on the truck are held idle. The terminal operators find it difficult to gainfully employ these extra men, largely due to labor union insistence that a man be employed only on the job for which he was hired.

47. Labor, both longshoremen and teamsters, contributes to the difficulties and inefficiencies existing at the piers. The number of tons of cargo handled per man-hour, which is the real determinant of efficiency, has decreased despite the increased use of hilo machines.

48. Some truckers, particularly the larger ones, have made considerable effort to facilitate operations. Those who have large fleets of trucks will dispatch, in many cases, the most efficient truck for the commodity involved. In addition, they generally arrange in advance to call for the cargo. Terminal operators have improved their facilities and increased their equipment from time to time but, on occasions, they contribute to inefficiency by failing to provide adequate labor, particularly checkers, thus creating bottlenecks in the truck loading operation. The elements of inefficiency referred to have resulted in many lengthy delays in the service, additional and burdensome ex-

pense of the service, and, according to some testimony, have caused diversion of cargo from the port of New York to other ports.

49. The port of New York is primarily a general cargo port. There is a wide variance as to the number of commodities, their size, shape, weight, volume in individual shipments, the number of consignees among whom a shipment must be distributed, and the customs observed in selling and delivering cargoes. Thus, a variety of problems arise in performing the truck-loading service. Rubber, for example, moves in large volume and is imported in bundles which are only approximately of the same size. It can be handled expeditiously at some of the terminals by being dumped into trucks with open tops. Several bundles are elevated at one time by the hilo machine to a point above the side of the truck and dumped on its floor. In this operation, no men can be stationed on the truck because of risk of injury. When the rubber is loaded into a closed-top truck it must be raised to the tailgate of the truck and then moved manually to final place in the truck. The bundles do not palletize well, and because of weight, two men are required to lift and stow each bundle when a closed-top truck is used. This is hard labor and time consuming, and subsequent trucks must wait longer for their turn. Rugs and a number of other commodities can be dumped into open-top trucks, but many items are too fragile to be handled this way. Drums of liquid are usually placed on pallets and raised to the tailgate, and then rolled by hand into position on the truck. Sugar, too, is placed on pallets, raised to the tailgate, and then stowed manually. Normally, bagged commodities, such as sugar and coffee, can be loaded much more quickly onto an open-top truck than into a closed-top truck.

50. Imported fruits and vegetables often are sold at auction while still on the dock. In such cases, samples must be taken to the auction site and then the main lot must be sorted according to purchasers and loaded onto trucks for removal. Receivers of perishables frequently congregate at the dock as cargo is being removed from a vessel, trying to sell it at that time.

51. Iron and steel are imported in various shapes, sizes, and weights. Some of it is difficult to handle and outside aid may be required to load the truck. Most of the iron and steel, however, is relatively easy to handle, is compact, and in most respects is similar to the metals listed in table 5.

52. Tin plate, thin sheet iron or steel coated with tin, is packaged in metal-covered bundles strapped to skids. The bundles weigh approximately 2,840 pounds each, with a density of 380 pounds per cubic foot. Importers of this commodity use their own trucks (van-type

trailers), on which an average of seven bundles are loaded. The hilo machine operator loads two bundles through one side door of the truck and one bundle through the other side door. He then places two bundles at the rear floor of the truck and pushes them forward by the hilo machine to complete the loading. No one is required on the truck, and the loading is accomplished in approximately 15 minutes.

53. Peat moss, an organic soil conditioner, is imported in machine-pressed bales, generally averaging approximately 100 pounds each, or 7½ cubic feet. In 1955, about 800,000 bales were imported through New York, and in 1956 about 900,000 bales. The bales are put on pallets at the piers, 18 bales per pallet. In loading the truck the hilo machine picks up the pallets and places them on the tailboard of the truck. The terminal furnishes a loader on the truck, who, with the truck driver, stacks the bales on the truck to a height of about five feet. The trucks used are flat bed ranging from 32 to 35 feet in length, without sides or top, and hold approximately 250 bales. The loading of this commodity is accomplished in approximately one hour when there is no delay.

54. Incoming mail is in bags weighing approximately 35 to 50 pounds each. Approximately 1,500,000 bags a year are picked up at the piers. The mail is loaded into trucks in two ways: (1) when the bags are taken off the ship in slings and dropped on the pier, they are dragged by terminal employees a distance of 20–30 feet to the truck and handed to the men inside, and (2) when the bags are removed from the hold of the ship on a moving belt to a place on the pier, they are transferred at such place by terminal employees to another moving belt which carries the bags into the truck. There is no employee of the terminal in the truck in either case. The stowing of the mail in the truck is done by the trucker and his helper.

Truck unloading procedure.

55. When cargo is unloaded from the truck, the terminal, for the convenience of the truck driver, and to get the truck off the pier as quickly as possible, places pallets at the foot of the tailgate of the truck. The cargo is then stowed on the pallets, which are taken away by the terminal with hilo machines; new pallets are brought to the tailgate immediately. There is no charge for this service unless the terminal's employees remove the cargo from the truck and place it upon the pallets. The truckers unload their trucks unless the cargo is of such a nature that it cannot be physically handled by the driver. In such latter case, the service and equipment of the terminal are used. Also, the terminals unload trucks when requested

by truckers. In any event, the terminals are called upon to perform only about 10 percent of the truck-unloading service at the piers. When they perform such service they apply the same rates as for truck loading. In determining to apply such rates no particular factors were considered; the terminals "just followed the same rates."

Practices under certain provisions of Tariff No. 3.

56. Tariff No. 3, page 5, in paragraph headed OVERTIME CHARGES, provides that:

> Any truck in line to receive or discharge cargo at 3 p.m. and which has been checked in with the Receiving Clerk or Delivery Clerk, as the case may be, shall be worked at the straight-time rates, until loading or discharging is completed.

The evidence shows that some of the terminals have failed at times to comply with this provision. Truckers listed more than 50 instances of such failure from November 1, 1956, through January 31, 1957. In some of these instances, the trucker stated he was especially inconvenienced when his truck arrived at the pier at 1 p.m., waited until 4 p.m., and was then sent away without any service. A witness for one of the terminals stated that "If we're overloaded at the pier, there's no sense in a truck standing by, and we so notify them." Sometimes the terminal will start loading a truck before 5 p.m. and then stop at 5 p.m. without completing the loading, necessitating the truck's return on the following day. The terminal in this case will not work its men beyond 5 p.m. unless overtime wage rates are authorized by the steamship line the terminal serves.

57. The evidence also shows that in some instances some of the terminals have failed to comply with the tariff provision respecting "partial service," quoted in paragraph 12, above. One trucker stated that one terminal refused to provide partial service to him under all circumstances. Another stated that his trucks were held up interminably when he wanted partial service, and that in view of this, he changed his policy and now agrees to full service. Another trucker stated that his experience had been essentially the same, and that he had an "uncomfortable feeling" when he asked for partial service.

Agreement No. 8005–1.

58. The provision of this agreement in issue is quoted in paragraph 7, above. It authorizes the terminals to agree to limit all truck loading and unloading at the terminals to the terminal operators.

59. Since the outlawing of public loaders by the Waterfront Commission Compact in 1953, the longshoremen's and teamsters' labor unions have each sought to achieve control over the truck loading. The collective bargaining agreement between the International Long-

shoremen's Association (I.L.A.) provides that the terminal operators will do all they can to assure that the loading of trucks shall be done by members of the I.L.A. Teamsters normally have jurisdiction over their trucks, and longshoremen over work done upon the terminals. The great majority of trucks are loaded by teamsters and longshoremen working side by side. A witness for the terminals stated that even if the terminals elect to assert exclusive control over truck loading, it is contemplated that truck drivers will help in the loading to insure that the truck is loaded in the proper manner.

60. Terminal witnesses stated that in addition to the labor jurisdictional question as a reason for Agreement No. 8005–1, the control sought by the terminals would reduce interruptions and permit better conduct of the terminal business. The main reasons given are that the terminals could better estimate and procure labor each day, and better know and plan for the purchase of their equipment requirements.

61. In the truck-loading operation the truckers very seldom request "no service," but in unloading it is prevalent. As to the extent to which the terminals' claim for Agreement No. 8005–1 may apply to "no service," a large trucker, opposed to the agreement on the ground it might deny him some right in his operation, stated that he uses "no service" about one percent of the time only. Some consignees, by nature of their products, do not need any loading service but, under Agreement No. 8005–1, they could be required to take full service. With respect to truck unloading, exercise of authority under the agreement would constitute a major change in operations at the terminals since approximately 90 percent of the unloading is presently done by the truckers (par. 55, above).

62. If Agreement No. 8005–1 is approved, the record shows that the terminals propose to amend Tariff No. 4 so as to provide that all truck loading shall be performed by the terminal operator solely, and that unloading operations may be performed by the trucker, shipper, consignee, or any of their representatives, if the same does not unreasonably interfere with the normal activities of the terminal operator at the pier.

Discussion and Conclusions

We consider, first, complainants' contention that Tariffs Nos. 3 and 4 are agreements or modifications of an agreement within the meaning of section 15 of the Act, and require prior approval of the Board before they may become effective.

Complainants urge that the approved basic Agreement No. 8005, which authorized respondents to establish tariffs containing just and

reasonable rates, charges, classifications, rules, regulations, and practices for the loading and unloading of waterborne cargo onto and from trucks, does not, and did not at time of approval, contain the actual rates and charges for this service, nor does it set forth any of the rules, regulations, and practices governing the application of the tariffs. They contend that Tariffs Nos. 3 and 4, issued pursuant to Agreement No. 8005, not only set forth the rates and charges, but define the nature of the terminals' obligations, adopt rules with respect to their liability, describe the conditions under which other persons might load and unload trucks, and generally set forth the manner and method by which trucks may be loaded and unloaded. They argue that the issuance and adoption of Tariffs Nos. 3 and 4 therefore were more than mere routine implementation of the basic agreement, and were new agreements, or modifications of an agreement, which required specific Board approval under section 15 before being made effective.

We agree with the examiner and find that the tariffs are not modifications of the basic agreement or new agreements, within the meaning of section 15. The issuance of tariffs, including rates, charges, rules, and regulations covering the application of the tariffs, were authorized and contemplated by the approved basic agreement.

The Board and its predecessors have uniformly held since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), that the issuance of tariffs, including rules and regulations covering their application, have been routine matters authorized by an approved basic conference agreement, not requiring separate approval under section 15. While most of the Board's activities with respect to concerted tariff activities have involved carrier conferences and tariffs issued thereunder, the same regulatory scheme under the Act applies to concerted activities and tariffs of the respondent terminals, who are "other person[s] subject to this act" (section 1).

In support of their argument that the issuance of Tariffs Nos. 3 and 4 required section-15 approval, complainants cite *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (D.C. Cir. 1954) (cert. den. sub. nom. *Japan-Atlantic & Gulf Conference et al.* v. *United States et al.*, 347 U.S. 990), and *River Plate and Brazil Confer.* v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (S.D.N.Y. 1954), aff'd 227 F. 2d 60 (2d Cir. 1955). These cases do not support complainants' contention, and are not in conflict with our conclusion herein Each of the cited cases involved the institution of an exclusive patronage contract/noncontract dual-rate system. The courts and the Board have recognized that the institution of a dual-rate system involves a "prima facie"

discrimination between shippers.[7] Furthermore, in the *Isbrandtsen* case, *supra*, the court found that institution of a dual-rate system introduced "an entirely new scheme of rate combination and discrimination not embodied in the basic agreement."[8] Similarly, the Board case cited by complainants, *Pacific Coast European Conf.—Payment of Brokerage*, 4 F.M.B. 696 (1955), and 5 F.M.B. 225 (1957), involved a nonconference brokerage rule which was "prima facie" discriminatory in the same manner as the dual-rate system, and was a new scheme of regulation and control not embodied in the basic agreement. The issuance of Tariffs Nos. 3 and 4, including changes in the level of rates, elimination of the availability of partial service, and the promulgation of other rules and regulations governing the loading and unloading of trucks at respondents' terminals, introduced no new scheme of competition or "prima facie" discrimination, as does the institution of the dual-rate system. They were no more than implementations of the authority granted them by approval of the basic agreement to establish and maintain uniformly applicable tariffs, "containing just and reasonable rates, charges, classifications, rules, regulations and practices with respect to such [truck loading and unloading] services." No prior section-15 approval is required for the issuance of such tariff modifications.[9]

While consistently holding that issuance and modifications of uniformly applicable tariffs pursuant to an approved basic agreement are routine matters and are not new agreements or modifications of an agreement requiring prior section–15 approval, the Board and its predecessors have recognized that if such rates or practices established in a conference tariff are shown to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act, they will be ordered canceled or modified, or approval of the basic agreement may be withdrawn. *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395 (1935); *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939).[10] It is in this posture that the examiner and the Board have investigated Tariffs Nos. 3 and 4 to determine whether the rates, rules, or regulations therein may operate in a manner to be unjustly discriminatory or unfair, detrimental to commerce, or violative of the Act.

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[7] *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F.M.B. 744 (1955); *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706 (1955); *Swayne & Hoyt, Ltd.* v. *United States*, 300 U.S. 297 (1937).

[8] *Isbrandtsen Co.* v. *United States*, *supra*, at page 56.

[9] We note that complainants made no argument that issuance of Tariff No. 2 constituted the effectuation of an unapproved section-15 agreement.

[10] See also: *Status of Carloaders and Unloaders*, 2 U.S.M.C. 761 (1946); *Contract Rates—Japan/Atlantic-Gulf Freight Conf.*, 4 F.M.B. 706 (1955); *Contract Rates—Trans-Pacific Freight Conf. of Japan*, 4 F.M.B. 744 (1955) (Dissent of Chairman Morse).

As to the general level of rates in Tariff No. 3, the record does not show them to be so high as to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

We recognize that the record does not permit a precise and completely accurate mathematical answer as to the operating results under Tariff No. 3. On the other hand, our analysis of the cost study conducted by the terminals in the spring of 1957, the income and expense statements submitted to the Regulation Office of the Board covering comparable periods of operations under Tariffs Nos. 2 and 3, shown in the confidential exhibits of record, and the detailed and exhaustive analysis of the individual income and expense statements of the eight terminals selected at random by Public Counsel and complainants, support the conclusion in the paragraph next above. We find the financial data of record to be probative and sufficient to support the findings made herein. We have carefully considered the rebuttal exhibits, testimony, and arguments presented by complainants, and conclude that they do not support their contention that the rates in Tariff No. 3, over-all, produce an unreasonably high profit to the terminals. It would be manifestly impossible, and we do not herein attempt, to determine the reasonableness of every rate for every particular commodity as handled at every different terminal in the port of New York. Our conclusion with respect to the general level of rates in Tariff No. 3 is necessarily based upon our analysis of over-all operations as presented in the record.

In providing service under Tariff No. 3, it is apparent from the record that some of the terminals have failed in certain respects to comply with the express provisions thereof. They have refused to provide "partial service" when requested, or have charged for "full service" when only "partial service" was in fact provided. In addition, there have been numerous examples of violation of the "three o'clock rule" (par. 56, above) in that trucks checked in before three o'clock p.m. were not worked at straight-time rates until loading or discharging was completed.

The approved basic Agreement No. 8005 expressly provides that the terminals shall "assess and collect rates and charges for and in connection with such [truck loading and unloading] services *strictly in accordance with rates, charges, classifications, rules, regulations and practices set forth in said tariffs and, further, shall not in any respect whatsoever deviate from or violate any of the terms or conditions or provisions of said tariffs*" (emphasis added). The agreement provides steps to be taken against any party violating the agreement, including arbitration and expulsion from participation thereunder. It is clear that these provisions have not been carried out, and that

the terminals have not maintained the uniformity of practices required by the basic agreement.

We cannot stress too strongly the importance of uniform application of tariff provisions where competitors (herein the terminals) have been permitted to operate in concert under a joint tariff pursuant to section-15 approval of such concerted action. The parties to such an agreement must insist that the individual member terminals properly apply all charges, rules, and regulations of the tariff. In the event of violation of such tariff provisions by any member, proper corrective action should be taken, as provided by the basic agreement. Concurrence by the members in activity differing from and in derogation of the express provisions of their agreement and tariff might, under certain circumstances, amount to a tacit understanding which would modify their approved agreement. *Rates from Japan to United States*, 2 U.S.M.C. 426 (1940). Under such circumstances the Board would necessarily consider disapproval of the basic agreement unless proper corrective steps should be taken. While on this record we are unable to find that there is a tacit understanding to permit individual terminals to violate provisions of the tariff, we will insist that steps be taken to maintain uniformity of practices under the tariff. Our general discussion in this paragraph specifically applies to present and future conduct of operations under Tariff No. 4, which is now in effect, as well as past practices under Tariff No. 3.

We find further, as did the examiner, that the failure by some terminals to comply with express provisions of Tariff No. 3 was an unjust and unreasonable practice relating to the receiving, handling, or delivering of property, in violation of section 17 of the Act.

We next consider whether the rates, charges, rules, and regulations set forth in Tariff No. 4 are unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

As to the general level of rates in Tariff No. 4, we find that, except as to certain specific rates and practices hereinafter discussed, they have not been shown to be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

Complainants contend that the rates in Tariff No. 4 were arrived at in an arbitary and capricious manner, without proper consideration of such factors as cost of service, transportation and traffic conditions, revenue derived, nature and value of commodities, degree of damage, rights of shippers, etc. They further contend that the level of rates in Tariff No. 4 are unjust and unreasonable in that they are exorbitant and allow the terminals an excessively high profit.

The rates and provisions in Tariffs Nos. 2, 3, and 4 have not been determined by precise measurement of all the standards referred

to by complainants. It is clear from the record that Tariff No. 2 was not based upon detailed cost and revenue studies, but was put into effect in August of 1955 after limited discussions and negotiations between the truckers and the terminals. The rates in this first effective tariff were admittedly set by "shooting in the dark" and were not based upon any cost or revenue experience of the terminals. The record shows, however, that Tariff No. 3 was prepared under more organized circumstances, and was based on a year's experience under Tariff No. 2. Tariff No. 4, while still somewhat of an estimate, was based upon more experience and upon certain cost and statistical studies available to the terminals in 1957.

In determining whether the general level of rates and the rules and regulations of Tariff No. 4 conform to the standards of the Act, we are more concerned with the effect of the implementation of the tariff than with the particular methods by which the tariff was constructed. Upon the full record herein, we conclude, as did the examiner, that the general level of rates in Tariff No. 4 will not allow the terminals an excessively high profit (pars. 37 and 38, above), and except as to particular rates and practices specifically considered hereafter, we find that the rates, rules, regulations, and practices in Tariff No. 4 have not been shown to be unjust or unreasonable or otherwise in violation of the Act.

Tariff No. 4 contains no provision for partial service, i.e., it eliminates partial service which had heretofore been available to truckers under previous tariffs. A description of partial service and an analysis of the effects of its abolition are set forth in paragraphs 14–17, above. After careful consideration of the full record and the contentions of the parties, we agree with the conclusions of the examiner that elimination of partial service should encourage the use of specialized trucks, thus relieving congestion at the piers and reducing costs, and would remove an important area of friction and disputes between truckers and terminals. The record does not support a finding that elimination of partial service would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act.

We next consider whether any specific rates in Tariff No. 4 may be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act. It is contended by intervener importers of iron and steel, tin plate, fruits and vegetables, and peat moss, that the rates on these commodities are too high as compared with other rates in the tariff. The handling problems and characteristics of these commodities are discussed in paragraphs 50–53, above.

Iron and steel and tin plate move under a class rate of 11 cents per 100 pounds, while the other metals—aluminum, copper, lead, tin,

and zinc—have a rate of five cents when loaded in open flat-bed trucks and eight cents when loaded in other trucks (see table 5). The record indicates that iron and steel move in larger volume than the other metals and that shipments are generally similar to these other metals in handling characteristics. To the extent iron and steel products may come in shapes and sizes which are difficult to handle, the tariff should provide uniformly applicable special rates for such shipments.

We conclude that the rates in Tariff No. 4 on iron and steel and tin plate are unreasonably high; unless modified, Agreement No. 8005 would operate to the detriment of the commerce of the United States. Respondents will be allowed fifteen days within which to withdraw such rates and substitute therefor the same commodity rates as are applied to the other metals listed in table 5, failing which consideration will be given to the issuance of orders disapproving Agreement No. 8005.

As to the Tariff No. 4 rates on fruits and vegetables and peat moss, considering all the factors involved in the handling of these commodities, the record does not support a finding that these rates are so high as to be detrimental to commerce or in violation of the Act.

Tariff No. 4 provides for an extra charge for loading or unloading cargo weighing more than 6,000 pounds per piece, such charge to be determined by negotiation (par. 20, above). The tariff provides no standards by which individual member terminals will be guided in determining this special charge.

The provisions of respondents' tariff should be reasonably clear and precise in order that its application will be understood by the terminals, the truckers, and the general public, and so that charges will be uniform as between shippers similarly situated. We consider a tariff provision such as this one, under which it is impossible to know what a charge will be or how it will be determined, to be an unjust and unreasonable practice in violation of section 17 of the Act. We will insist that this provision be modified by the inclusion of reasonable standards by which the individual terminals will determine this extra handling charge uniformly.

We next consider whether Agreement No. 8005–1, which would authorize the terminals to modify their tariff to limit all truck loading and unloading at the terminals to the terminal operators, would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act. If this agreement should be approved it would permit the terminals to eliminate "no service" under the tariff, and since Tariff No. 4 has eliminated "partial service," the truckers would be required to accept "full service" from the terminals in both truck loading and truck unloading.

Agreement No. 8005–1 is set forth in paragraph 7, above, and the factors involved in eliminating "no service" are set forth in paragraphs 58–62, above. We note that even if the agreement should be approved in its entirety, the terminals intend to implement the agreement only with respect to truck loading, i.e., they will eliminate "no service" on truck loading but will continue to offer "no service" as well as "full service" with respect to truck unloading.

Complainants in No. 800 and certain interveners in No. 821 urge that Agreement No. 8005–1 be disapproved, contending that approval would create in the terminals a monopoly of truck loading and unloading; that approval would cause more frequent disputes and greater confusion in the operations of the piers; that it has traditionally been the custom for truckmen to perform unloading services, and there is no showing that such activity has interfered with efficient operation of the piers; that approval will bring back the evils of the public loaders which the New York-New Jersey Waterfront Commission Compact is intended to eliminate; that federal approval of the Waterfront Commission Compact vested that commission with exclusive authority to regulate truck-loading and unloading practices at the New York terminals; and that elimination of "no service" would allow truck loading and unloading to be provided only by the terminal operators, which would be in conflict with the provisions of the Waterfront Compact. Neither the record nor the applicable law supports these contentions.

Respondents are common carriers and "other person[s]" subject to the Act, and the Board has exclusive jurisdiction over the agreements and truck loading and unloading tariffs and activities under consideration. *Status of Carloaders and Unloaders*, *supra*; *Carloading at Southern California Ports*, 2 U.S.M.C. 784 (1946). Approval by Congress of the New York-New Jersey Waterfront Commission Compact did not convert that interstate compact to federal law and thereby supersede the primary and exclusive jurisdiction of this Board as set forth in the Act. *Delaware River Joint Toll Bridge Com'n* v. *Miller*, 147 F. Supp. 270 (E.D. Pa. 1956); *Rivoli Trucking Corp.* v. *American Export Lines*, 167 F. Supp. 937 (E.D. N.Y. 1958).

We do not feel that approval of Agreement No. 8005–1 would bring back the evils of the public loaders or otherwise conflict with the purposes of the Waterfront Commission Compact. That Compact declares it "against the public policy of the States of New Jersey and New York and to be unlawful for any person * * * other than * * *" water carriers, truckers, terminal operators, shippers and consignees, and licensed stevedores, to engage in truck loading and unloading at the New York piers.[11] Under Agreement No. 8005–1 truck loading

[11] Waterfront Commission Compact, Article VII, Paragraph 2.

and unloading would be provided by terminal operators, who are permitted to carry on such activity under the terms of the Compact. We read the Compact as making it unlawful for anyone other than the five categories mentioned to load and unload trucks, but not as requiring that truckers, as one of the five mentioned categories, must be permitted to load and unload trucks.

There is merit to the contention that truckmen have historically provided most of the service of truck unloading at the piers, and there has been substantial use of "no service" in connection therewith. The record indicates that unloading by truckmen has not interfered with the efficient operation of the piers. On the record as a whole, we consider it would be detrimental to the commerce of the United States to change this practice of long standing and eliminate "no service" as to truck unloading. We will not approve so much of Agreement No. 8005–1 as would permit such a change. This conclusion is consistent with the position of respondents at the hearing that they would not eliminate "no service" as to truck unloading.

In contrast, the record shows that as to truck loading there has been much less use of "no service," and traditionally the terminals have provided substantially more truck loading services than unloading services. The record indicates that if the terminals provided all truck loading services they would be able to schedule more efficiently the use of their labor and equipment and could substantially improve the efficiency of their terminal operations. While we recognize that there are certain instances where the loading of a particular shipment might be efficiently handled by the truckmen, we feel that the record as a whole indicates that elimination of "no service" only as to truck loading would be a reasonable regulation of terminal activity, and we cannot find that Agreement No. 8005–1, as so modified, would be unjustly discriminatory or unfair, detrimental to commerce, or in violation of the Act. We agree with the examiner that it has not been shown on this record that Agreement No. 8005–1, as so modified, would adversely affect the function of the Postmaster General in transporting the U.S. Mail. We will therefore approve so much of Agreement No. 8005–1 as will permit the elimination of "no service" as to truck loading.

Complainants have not discussed sections 14 and 18 of the Act, and nothing in the record supports the allegations of violations of those sections. As did the examiner, we consider the allegations under those sections to have been abandoned.

Complainants have made numerous exceptions to rulings of the examiner during the course of the hearing. We have considered these exceptions and conclude that the rulings did not constitute error.

On the record, we find no evidence that any of complainants have been injured or damaged by the violations of the Act herein found, and we conclude that there has been no proof of damages which would entitle any of complainants to an award of reparation. In their exceptions, and by letter to the Secretary of the Board dated April 30, 1958, complainants indicate that they did not intend to develop proof of damages at the hearing, but, in the event violations of the Act by respondents should be found by the Board, they desire to reserve the right to request further hearing for the purpose of proving damages.

In view of the fact that no effort was made by complainants to prove damages and respondents have not been required to meet such proof on this record, the record in No. 800 will be kept open for sixty days, within which time we shall require complainants to notify the Board in writing if they desire further proceedings, limited to the issue of proof of damages and reparation. In the event no such request is made within the sixty-day period, No. 800 will be discontinued.

An appropriate order will be entered.

Vice Chairman Guill, concurring:

I concur reluctantly in this report. I feel that the following comments are appropriate, however.

I agree that the only violations of the Act proven on the record were those found by the Board. I further agree that this record does not support findings that other violations were proven, or that any other activities of the terminals would contravene the standards of section 15 of the Act, and thus subject Agreements Nos. 8005 or 8005–1 to disapproval.

It is apparent from the record that the accounting statistics and cost studies available on this record were limited to truck loading and unloading activities only, an activity which is not the major or only function of the New York terminals. Such a limited investigation was sufficient to meet the issues raised in the proceedings, which involved only the truck loading and unloading tariffs and activities of the terminals. I feel, however, that there should be an investigation of terminal operators in which thorough and complete accounting and operational studies would be made of all their activities which are subject to the regulatory jurisdiction of the Board. Only on the basis of such a complete investigation can the Board be certain that the rules, regulations, and practices of the terminals are in all respects consistent with the provisions of the Act.

The record indicates that some carriers may be underwriting losses sustained by terminals in their truck loading and unloading operations, and it may be that shippers are suffering some degree of double

charges for truck-loading and unloading services. It further appears from the record that carriers to some extent influence the use of terminal labor engaged in truck loading and unloading. While these arrangements were not deemed by the Board to be relevant to the issues, a full investigation of all terminal activities would disclose the extent of these arrangements and would permit the Board to take corrective action if necessary.

I feel the record developed in these proceedings points up the need for such a broad and thorough investigation of terminal activities. In my opinion the Board should proceed as soon as possible with the terminal investigation now docketed as No. 816. The order of investigation in that proceeding, served by the Board on March 15, 1957, is sufficiently broad in scope to include the type of full-scale terminal investigation which I believe is essential to the proper carrying out of the regulatory functions vested in the Board.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 24th day of February A.D. 1959.

No. 800

EMPIRE STATE HIGHWAY TRANSPORTATION ASSOCIATION, INC., AND NEW JERSEY MOTOR TRUCK ASSOCIATION, INC.

v.

AMERICAN EXPORT LINES, ET AL.

No. 801

TRUCK LOADING AND UNLOADING OF WATERBORNE CARGO AT NEW YORK—INVESTIGATION OF RATES AND PRACTICES OF PARTIES TO AGREEMENT NO. 8005.

No. 821

IN THE MATTER OF AGREEMENT NO. 8005–1 BETWEEN AMERICAN EXPORT LINES, INC., AMERICAN PRESIDENT LINES, LTD., BULL-INSULAR LINE, INC., AMERICAN STEVEDORES, INC., INTERNATIONAL TERMINAL OPERATING CO., INC., ET AL.

Docket No. 800 being at issue upon complaint and answer on file, and Docket Nos. 801 and 821 having been instituted by the Board on its own motion, and the proceedings having been consolidated for hearing and 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 a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That respondents be, and they are hereby, notified and required to cease and desist and hereafter to abstain from engaging in the violations of section 17 of the Shipping Act, 1916, as amended, herein found to have been committed by respondents; and

It is further ordered, That respondents be, and they are hereby, required, within fifteen days after the date of service of this order, to modify the provisions of their Tariff No. 4 and the rates therein on iron and steel and tin plate, in a manner consistent with our report herein; and

It is further ordered, That Agreement No. 8005-1, modified so as to eliminate "no service" with respect to truck loading only, be, and it is hereby, approved; and

It is further ordered, That respondents, within fifteen days after service of this order, shall file with the Board a copy of Agreement No. 8005–1 in form as amended and approved herein; and

It is further ordered, That respondents be, and they are hereby, required, within sixty days after the date of service of this order, to report to the Board in writing the steps taken and procedures instituted to insure that the provisions of Agreements Nos. 8005 and 8005–1, and the rules, regulations, practices, and rates set forth in tariffs issued thereunder, are properly and uniformly carried out by all respondent parties to said agreements and tariffs; and

It is further ordered, That Docket No. 800 be, and it is hereby, held open for a period of sixty days after the date of service of this order, within which time complainants shall, if they desire further proceedings directed to proof of damages and right to award of reparation, file with the Board a petition for such further proceedings in accordance with the provisions of Rule 5(j) of the Board's Rules of Practice and Procedure (46 CFR 201.69), and in the event no such petition is filed within said period, Docket No. 800 will be discontinued; and

It is further ordered, That Docket Nos. 801 and 821 be, and they are hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 844

ASGROW EXPORT CORP., PHOENIX SHIPPING CO., INC., AGENTS

v.

THE HELLENIC LINES, LTD.

Submitted February 24, 1959. Decided March 12, 1959

Sections 14 Fourth, 16, and 17 of the Shipping Act, 1916, as amended, not shown to have been violated. Complaint dismissed.

H. Rueckheim for complainant.
Edward L. Smith and *James Proud* for respondent.

REPORT OF THE BOARD

Clarence G. Morse, *Chairman*, Ben H. Guill, *Vice Chairman*, Thos. E. Stakem, Jr., *Member*.

BY THE BOARD:

The recommended decision of the examiner was served on February 9, 1959, and no exception thereto has been filed. Upon review, we concur in and hereby adopt the recommended decision:

"By complaint filed September 23, 1958, complainant alleges that the rate charged by respondent on a shipment of seed beans moving January 31, 1957, from New York, N.Y. to Piraeus, Greece, was in violation of sections 14 Fourth, 16 and 17 of the Shipping Act, 1916, as amended. Reparation is sought. A hearing was held on December 16, 1958 in New York City at which neither party testified. The facts are as stipulated by the parties and as stated in the sworn complaint to which no answer was filed.

"Complainant, the International Division of Associated Seed Growers, Inc., is engaged at Milford, Conn. in the sale of agricultural seeds and related articles for the agricultural industry abroad. Respondent is a common carrier by water and as a member of the North Atlantic-Mediterranean Freight Conference engages in transportation between

North Atlantic ports of the United States and ports on the Mediterranean Sea.

"Prior to submitting a bid for an order of seed beans as an element of one of the government's foreign assistance programs, Asgrow Export Corp. (Asgrow) requested its foreign freight forwarders, Phoenix Shipping Co., Inc., (Phoenix), to quote the applicable ocean freight rate so as to permit establishment of the C & F Piraeus price. In November 1956, Phoenix reported that the rate would be $27.50 per ton of 2,240 pounds, subsequently explaining that this was the rate for dry beans, in bags, rather than seed beans. However, Asgrow submitted its bid naming a C & F price based on the original quotation of $27.50. Upon receipt of the order Asgrow notified Phoenix that it would not remit ocean freight charges billed at more than $27.50 per long ton.

"Asgrow then, through its forwarder, on January 31, 1957, shipped on respondent's S.S. *Patria*, 499 bags of seed beans, gross weight 55,753 pounds, from New York to Piraeus consigned to order, notify ultimate consignee, the Agricultural Bank of Greece, Permanent Supplies Committee, Athens, Greece. The effective tariff of the North Atlantic-Mediterranean Freight Conference named commodity rates on numerous kinds of seeds, but no specific rate was provided for seed beans. Accordingly, respondent assessed the rate for 'Seeds, Agricultural, n.o.s.,[1] $57.50 W/M'.[2] Freight charges calculated on the basis of 1,248 cubic feet amounted to $1794.00 and this was paid to the Hellenic Lines, Ltd., by Phoenix Shipping Co. Thereafter on February 11, 1957, under authorization from Asgrow, Phoenix petitioned the Conference to establish a commodity rate of $45.00 per ton on seed beans which would be in line with related agricultural seed items and to retroactively apply such reduced rate to the shipment of January 31, 1957. The stowage factors, method of packing, values, gross and net weight per bag of seed beans were assertedly about the same as those of seed peas and seed corn for which the tariff named rates lower than the $57.50 rate charged complainant. On February 27, 1957, the Conference notified Phoenix that at a meeting held on February 21, 1957, a rate of $49.50 per ton of 2,240 pounds had been adopted on 'Seeds, bean', effective that date on new business but that the request for adjustment of the ocean freight on the January 31, 1957 shipment on the S.S. *Patria* had failed of adoption. Phoenix again petitioned the Conference on March 21, 1957, in an endeavor to have the new rate applied retroactively but was advised by the Conference by telephone and confirmation by letter of May 1, 1957, that

[1] Not otherwise specified.

[2] A tariff rule provided "Rates shown as applying W/M (weight or measurement) are per ton of 2,240 pounds or per ton of 40 cubic feet, ship's option and the rate yielding vessel the greater revenue must be charged."

the request for adjustment had been respectfully declined. On May 6, 1957 Phoenix requested the Conference to once again refer the matter to the member lines. This was done and at a meeting held on May 23, 1957 the request for adjustment failed of adoption and advice of that action was communicated to Phoenix. Thereafter by letter of June 12, 1957, Phoenix requested the Federal Maritime Board to investigate the matter. Replying to the Board's letter of June 18, 1957, the Conference, on June 28, 1957, stated that since the tariff provided no specific commodity item, the carrier had properly assessed the rate then in effect, namely 'Seeds, Agricultural, n.o.s., $57.50 W/M' and reviewed the three requests of Phoenix for adjustment of the ocean freight on the Asgrow shipment. Formal complaint was then filed with the Board.

"Section 14 of the Shipping Act, 1916, as amended, provides in pertinent part:

> That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country— * * *
>
> Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or unfairly treat or unjustly discriminate against any shipper in the matter of (a) cargo space accommodations or other facilities, due regard being had for the proper loading of the vessel and the available tonnage; (b) the loading and landing of freight in proper condition; or (c) the adjustment and settlement of claims.

"The only contract disclosed of record is the exclusive patronage contract of Asgrow with the carriers members of the North Atlantic-Mediterranean Freight Conference, but there is no contention that this is considered unlawful. Complainant's position is that the alleged discrimination results from the respondent not having established a rate on seed beans at the time its shipment moved, because as a result of its petitions filed after its shipment had been transported, a rate on seed beans was established. Complainant emphasized at the hearing that the rate of $57.50 was discriminatory when compared with the rates on similar commodities which stow the same as seed beans and have the same values but no evidence of any comparative transportation factors was presented. Likewise, there is no evidence that respondent's failure to adjust and settle complainant's claim for application of the reduced rate has resulted in unjust discrimination against complainant in favor of any other shipper. Accordingly, no violation of section 14 Fourth is shown.

"Sections 16 and 17 of the Act, insofar as they may 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 unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. * * *

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 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. See *Port of New York Authority* v. *Ab Svenska et al.*, 4 F.M.B. 202, 205, (1953).

"The January 1957 shipment was complainant's first and, up to the time of hearing, only shipment of seed beans to the Mediterranean and there is no evidence that any other shipper of seed beans to the Mediterranean had been charged a lower rate. To the contrary complainant's representative stated that any other shipper of seed beans "must have paid the same rate because under the established rules of the Conference all freight rates have to be the same." The situation here is comparable with that considered in *Afghan-Amer. Trading Co., Inc.* v. *Isbrandtsen Co., Inc.*, 3 F.M.B. 622, where, at page 623, the Federal Maritime Board said:

> Since it is stipulated that no other shipper paid lower rates than were charged complainant in this case, there is no showing of undue prejudice in violation of section 16 of the Act or of unjust discrimination in violation of section 17 of the Act. *Remis* v. *Moore-McCormack Lines, Inc.*, 2 U.S.M.C. 687, 692."

Upon this record, therefore, we find and conclude that the alleged violations of sections 14 Fourth, 16, and 17 of the Act have not been shown, and an order dismissing the complaint will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 12th day of March A.D. 1959

No. 844

ASGROW EXPORT CORP., PHOENIX SHIPPING CO., INC., AGENTS

v.

THE HELLENIC LINES, LTD.

This proceeding being at issue on complaint on file and oral answer made at the hearing, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been made, and the Board, on the date hereof, having made and entered of record a report adopting the findings and conclusions of the examiner promulgated in his recommended decision served on February 9, 1959, which report and recommended decision are hereby referred to and made parts hereof:

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

By the Board:

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 799

ALEUTIAN HOMES, INC.

v.

COASTWISE LINE ET AL.

Submitted October 24, 1958. Decided March 30, 1959

Coastwise Line found to have violated section 18 of the Shipping Act, 1916, as amended, and section 2 of the Intercoastal Shipping Act, 1933, as amended, in misclassifying shipments of prefabricated houses and in failing to file terminal charges with the Board.

Complainant found injured by unlawful misclassification and resulting overcharges in freight and terminal payments, and entitled to reparation except for amounts barred by the two-year limitation in section 22 of the Shipping Act, 1916, as amended.

John H. Dougherty for complainant.

James C. Dezendorf and *Nicholas H. Zumas* for Coastwise Line and West Coast Terminals Co. of California, *Richard J. Brownstein* for The Commission of Public Docks of the City of Portland, Oregon, and *Russell E. Arnett* for City of Kodiak, Alaska, respondents.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This proceeding arose out of a complaint filed on August 10, 1956. Complainant alleges that the rates charged and collected on prefabricated houses shipped by it from Portland, Oregon, to Kodiak, Alaska, were inapplicable and in violation of sections 15, 16, 17, and 18 of the Shipping Act, 1916 (1916 Act) (46 U.S.C. 814, 815, 816 and 817), and section 2 of the Intercoastal Shipping Act, 1933 (1933 Act) (46 U.S.C. 844). Reparation is sought.

Coastwise Line (Coastwise), which transported the shipments, is a common carrier between the United States and Alaska and has a tariff on file with the Board covering such service. West Coast Terminals Co. of California, although a terminal operator at *California ports only*, is named as a respondent because it is alleged to be the successor of and the same organization as West Coast Terminals, Inc., which provided terminal services and facilities for the shipments here involved at Portland until September 1, 1953. At that time its facilities were sold to The Commission of Public Docks of the City of Portland, Oregon.[1] The latter and the City of Kodiak are terminal operators and furnished services and facilities for the shipments at Portland and Kodiak, respectively.

Hearing was held before an examiner, who served his recommended decision on July 31, 1958. Exceptions and replies thereto were filed by the parties, and oral argument has been held before the Board.

The examiner concluded that complainant had been overcharged in violation of section 18 of the 1916 Act and section 2 of the 1933 Act, to the extent freight and terminal charges were increased by improper reclassification; that the claims covering alleged overcharges paid on August 14, 1954, were seasonably filed, but that the remainder were barred by the statute of limitations; that complainant was injured by such overcharges and entitled to reparation; and that complainant should submit a reparation statement in compliance with Rule 15(b) of the Board's Rules of Practice and Procedure.

We generally agree with the findings and conclusions of the examiner. Exceptions taken and recommended findings not discussed in this report and not reflected in our findings have been found not relevant or not supported by the evidence.

The shipments here involved moved from Portland to Kodiak on seven Coastwise voyages beginning in June 1953 and ending in October 1953. The cargoes consisted of (a) wooden sections of prefabricated houses, together with (b) such articles as kitchen cabinets, closets, wardrobes, insulation, and "panel shake" siding, which are intended to be the components of 344 prefabricated homes to be erected in Kodiak. On the first three voyages Coastwise charged the prefabricated house rate on all articles, as provided by Item 1315 of its Freight Tariff 1–A (F.M.B.–F No. 2). Starting with the fourth voyage, however, it determined that the articles named in (b) were not integral parts of a prefabricated house, and reclassified such articles and retroactively assessed higher rates on them.

[1] The record shows that at all relevant times the dominant stockholders and officials of the two West Coast Terminal companies were identical; also, that the dominant stockholders of said companies and of Coastwise were identical.

Complainant contends that all the articles involved were component parts of a prefabricated house, asserts that reclassification of the articles also resulted in increased terminal charges, and demands refund of the alleged overcharges.

The two major issues for determination are: (1) were any of the shipments involved misclassified in violation of the 1916 Act or the 1933 Act, and (2) is any of the claimed reparation for injury caused by the alleged violations barred by the two-year statute of limitations contained in section 22 of the 1916 Act?

We first consider whether any of the articles involved in these shipments were misclassified. The shipments consisted of the components of 344 homes to be erected by complainant at Kodiak. Carlton Lumber Company (Carlton), the supplying manufacturer, prefabricated the wooden house parts at Portland and procured kitchen cabinets, closets, wardrobes, and panel shake siding from other suppliers. Carlton was to and did assemble the materials in house packages and transport them to docksite for shipment to Kodiak. Carlton met with Coastwise prior to shipment and discussed the articles to be shipped and the right kind of packaging.[2] Coastwise thereafter sent a letter to complainant quoting the Item 1315 rate applicable to "Houses, KD, prefabricated, etc."[3] The components of the houses were to be shipped as ready and not broken down into specific house lots. This was at the direction of Coastwise, which stated there could be shipped "three hundred and forty-four of anything at any time * * * as long as [shipper] didn't exceed 344 of any particular item".[4] Such arrangement suited the convenience of shipper, carrier, and terminal. Also West Coast Terminal decided the materials should be assembled in piles of uniform size regardless of the particular house.

The wooden house parts were shipped in bundles, which consisted of gables and trusses, floor, wall, plumbing, ceiling panels, plywood, and sheathing or lumber cut to size. The bundles were of uniform size and were made up of identical parts for one or more houses, laid flat, and banded together. None of the house parts was set up singly or with any other part.

The cabinets were metal, were shipped in sections in wooden crates, and had to be uncrated, bolted together, and attached to the walls after the structure had been erected. The sink sections were attached to the plumbing. The wardrobes and closets—the latter knocked down

[2] Carlton testified that there were to be three types of houses and 10 sub-types. Before beginning production, he prepared ten material lists—one for each of the sub-types—which shows the quantities of cabinets, etc., that each sub-type would include.

[3] Complainant was advised that the same item would apply on concrete posts upon complainant's statement that they are to be a "constituent part of the prefabricated house".

[4] Thus most of the 344 flues went forward on one vessel at the Item 1315 prefabricated house rate.

(KD)—consisted of an inclosure with side walls, back, top, bottom, and door. They were not part of the bearing wall. Except for a small broom closet, however, they formed part of an interior wall which could not be completed without the wardrobe. They could not be put in after the house was completed, nor could they be moved around the house like furniture or be removed if the house were sold.

The panel shake siding was used in varied amounts to change the exterior appearance of each house so that they would not all look alike. Some houses had the shake siding on three sides and some on four sides. In all cases the siding was attached to the panels after the house had been erected.

Cabinets, closets, wardrobes, and panel shakes were shipped to the dock by the suppliers, who were instructed by Carlton (a) to mark and pack closets and wardrobes so they would be distinguishable by house type, and (b) to mark all packages by name of consignee.

Insulation was installed in the interior panels but was shipped in bulk for the exterior panels. When shipped in bulk it was nested in bundles of gables and trusses so that the combined articles occupied no more cubic area than such bundles would have occupied without the insulation. Before shipment the insulation could have been installed in the exterior wall panels and the shake siding could have been applied to the panels. Since some of the outside panels were to be stowed on deck, these items were shipped separately in order to avoid the risk of damage from salt spray and weather to the insulation and from the rubbing together of the panel shakes.

As previously stated, on the first three voyages Coastwise classified the shipments in their entirety under Item 1315 of its Freight Tariff 1–A.[5] This item provided for a rate by weight only on the following commodity:

> Houses, KD, prefabricated, including electrical, plumbing, heating and ventilating equipment, also not to exceed one each of the following articles: Refrigerator, Stove, Wall Heater, Washing Machine, Water Heater.

The term "knocked down" (KD) was defined in Item 250 of the tariff as follows:

> The term Knocked Down (KD) will apply only when the article is taken apart in such manner as to materially reduce space occupied. Merely separating article into parts without reducing bulk does not constitute knocking down or entitle article to KD rating.

Starting with the fourth voyage, however, and retroactively with respect to the first three voyages, Coastwise reclassified certain of the articles under items other than number 1315. The kitchen cabinets,

[5] Replaced by identical Item 910, effective September 1, 1953. Reference herein to Item 1315 includes Item 910, where appropriate.

wardrobes, and closets were reclassified under Item 1260 and Item 1270 as furniture; panel shakes and insulation were reclassified under Item 120 as building material; and certain articles were reclassified under Item 1220 as freight N.O.S. (not otherwise specified).

The furniture items (1260 and 1270), which Coastwise contends are more specifically applicable to cabinets and wardrobes than Item 1315, refer to "Furniture, Wooden or Metallic, set up or not completely unassembled", and include "Cabinets", "Chests", "Chiffoniers", etc. The building material item (120), which Coastwise contends is more specifically applicable to panel shakes and insulation than Item 1315, lists "Insulation Material, building", "Shakes", "Siding, wood or composition", etc. Practically all of the *freight* overcharges alleged by complainant result from the reclassifying of the articles above mentioned and the consequent shift from a weight to a measurement basis, which increased the freight charges.

Since the charges under the terminal tariffs were based on weight or measurement according to the ship's manifest, the shift from the weight to the cubic basis under the freight tariff automatically shifted the rating from a weight to a cubic basis under the terminal tariffs, thus increasing the terminal charges at Portland and Kodiak. Moreover, although the rating on wooden house parts was not changed from Item 1315 in the freight tariff, it was changed under the terminal tariff, resulting in substantially increased terminal charges at Portland.[6] These parts were classified originally as per ship's manifest under Item 101 of the Portland terminal tariff applying to "Freight N.O.S." They were reclassified as "Frame work and sections" under Item 132 of that tariff, which provides a weight rate on "Building Materials, prefabricated, wooden or metallic, S.U. [set up] etc."[7]

Coastwise's rate clerk, who prepared the correction notices on both the revised freight and terminal charges, testified that wooden house parts were re-rated under Item 132 because "It would have been virtually impossible to rate them underneath anything else because I didn't have anything except the weight." He admitted, however, that they could have remained, as originally classified, under the lower freight N.O.S. classification (Item 101), which also provides a weight rate. He also testified that both the terminal tariff and Coastwise's freight tariff were difficult to apply because the commodity descriptions were not specific enough. He did not see the articles shipped.

Although Coastwise's tariff provided only a tackle-to-tackle rate

[6] It is difficult to compute the increased terminal charges generally as Coastwise billed all such charges at Kodiak in one lump sum, and in lump sum services at Portland. Complainant computed the increases at Portland on wooden house parts to be $11,137.83.

[7] Item 132 provided substantially lower handling and car-unloading rates on "Millwork, N.O.S."

and published no terminal charges,[8] Coastwise collected both freight and terminal charges, paying the latter over to the terminals. Terminal charges were calculated by Coastwise based upon the terminal operator's tariffs. No exceptions were taken by the terminal operators to these calculations.

Coastwise's rate consultant, who helped formulate its tariff, including Item 1315, testified that the four disputed items, cabinets, etc., were not parts of a KD house, and that there was no intention to include them in the KD house classification. He also asserted that the disputed items were not prefabricated. His understanding was that a KD house would include only the basic, rudimentary parts of the structure of the house—"the shell of the house"—plus the other specific equipment and articles named. However, he admitted that a prefabricated house could be essentially the same as a conventionally built house, the two differing only in the method of construction. He contended that at least cabinets, shake siding, and insulation were listed as specific commodities and could not be included in KD houses in view of the tariff rule (Item 10–f) that: "Commodity rates named in the tariff are specific and may not be applied to analogous articles." The witness pointed out that Coastwise's tariff to Valdez and Seward, Alaska, contains Item 730, which is identical with Item 1315, and that Item 730 is followed by Item 740, which covers fabricated houses with *cabinets installed.* He reasons from this that the presence of Item 740 indicates that Item 730 does not include cabinets; therefore, neither does the similar Item 1315.

Complainant relies upon the following statement in a pamphlet published by the Housing and Home Finance Agency to show the meaning of the term "prefabricated house":

> The housing package varies as among manufacturers and models, but *usually* consists of panels for exterior and interior walls, ceiling, floor, and roof. Included in the housing package *may* be such *miscellaneous* materials as finish flooring, trim, roofing, heating equipment, wall cabinets, and hot water heaters. The package, no matter how complete, is far from being a finished house, and the manufacturer should be thought of more as a material supplier than as a builder of houses." (Italic supplied.)

Carlton agreed with the above definition and stated that there may be a KD prefabricated house which does not include flooring, kitchen cabinets, panel shakes, etc. He stated further that at times his company builds and ships only the shell of a house, and that at other times it provides more refinements or finishes.

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[8] Coastwise's stevedore handled the shipments from place of rest on dock at Portland to ship's tackle and into hold of vessel, for which Coastwise collected a handling charge. Coastwise's tariff did not specify the docks at which it called at Portland and Kodiak.

Complainant also referred to a magazine published by the Prefabricated House Manufacturers Institute, in which the description of some of the houses pictured listed various items which included the commodity items here in dispute. However, the floor plans of the homes set out in this magazine also indicated that some kitchens included cabinets and others did not.

We agree with the conclusion of the examiner that all articles involved in these shipments properly should have remained classified under Item 1315, "prefabricated house."

It is a well established rule of tariff interpretation that the terms used in a tariff should be construed in a manner consistent with general understanding and accepted commercial usage. *Samuel Kaye—Collection of Brokerage/Misclassification*, 5 F.M.B. 385 (1958), and cases cited therein.

The examiner properly concluded from the record that there is no clear-cut or customary meaning of the term "prefabricated house". It can refer only to the wall panels, etc., which constitute the "shell" of a house, or it can include other constituent parts of a completed house such as cabinets, siding, insulation, etc. See the definition given by the Housing and Home Finance Agency; *Prefabricated Houses in Southern Territory*, 280 I.C.C. 406 (1951); and *Texas Prefabricated H. and T. Co.* v. *A., T. & S.F. Ry. Co.*, 272 I.C.C. 61 (1948).

While Coastwise's witness testified that Item 1315 was intended to be limited to the "shell" of the house only, it is the meaning of the express language employed in the tariff and not the unexpressed intention of the carrier which controls the interpretation of a tariff item. *National Cable and Metal Co.* v. *American-Hawaiian S.S. Co.*, 2 U.S.M.C. 470 (1941); *Atlantic Bridge Co.* v. *Atlantic Coast Line R. Co.*, 56 F. 2d 163 (S.D. Fla. 1932). Coastwise concedes that the term "prefabricated house" is ambiguous and could reasonably be construed to include the particular items here in dispute. It contends, however, that the addition of the words "including electrical, plumbing, heating and ventilating equipment" in Item 1315 cures such ambiguity, and, as so modified, the term clearly includes only the "shell" of the house, plus the enumerated items, and necessarily excludes all other articles which might otherwise be considered as included in the term "prefabricated house".

We cannot agree with the foregoing contention. The meaning of the word "including" is far from clear and unambiguous. The cases illustrate the varied meanings which have been applied to the word "including". It has been construed as a word of enlargement, as a word of limitation or restriction, as merely prefacing an illustrative example, as specifying particularly something belonging to the class

already mentioned, and as adding to a class a genus not naturally belonging thereto.[9] We cannot see that the addition in Item 1315 of the phrase "including electrical, plumbing, heating and ventilating equipment" cures the admitted ambiguity of the term "houses, KD, prefabricated"—rather it appears to increase the ambiguity of the item. Applying the rule applicable to written instruments generally, this ambiguity must be construed against the carrier which made and issued the tariff. *Atlantic Bridge Co.* v. *Atlantic Coast Line R. Co., supra; Union Wire Rope Corporation* v. *Atcheson, T. & S. F. Ry. Co.*, 66 F. 2d 965 (8th Cir. 1933); *Rubber Development Corp.* v. *Booth S. S. Co., Ltd.*, 2 U.S.M.C. 746 (1945).

It is clear from the record that Coastwise was fully aware of the particular items to be shipped, and of the fact that the cabinets, closets, wardrobes, insulation, and shake siding were shipped separate from the basic "shell" structure of the house. With such knowledge, Coastwise quoted the Item 1315 rate, thereby directly implying that the articles should be considered as "constituent" parts of a "prefabricated house".[10] Moreover, Coastwise advised Carlton to ship up to but not more than 344 of anything at any time, as the articles became ready for shipment, and indicated that it was not necessary that the shipments be broken down by house unit. This instruction was pointless if complainant was not shipping prefabricated houses but was really shipping building material or furniture, since under the tariff these latter articles could be shipped without limitation. The record clearly evinces a course of conduct strongly indicating that both the carrier and the shipper understood that the "prefabricated house" Item 1315 rate would be applicable to all these shipments.[11] In fact, the Coastwise rate clerk who later reclassified certain of the articles involved in these shipments had great difficulty in determining what other commodity rate should have been applied. We consider it to be reasonable and natural to construe Item 1315 as embracing those things which would become a permanent and constitutent part of the completed house. Under this construction, the cabinets, wardrobes, closets, shake siding, and insulation were entitled to be so classified and properly should have moved under the

[9] *State* v. *Sho-Me Power Co-op.*, 191 S.W. 2d 971 (Mo. 1946); *Illinois Cent. R. Co.* v. *Franklin County*, 387 Ill. 301, 56 N.E. 2d 775 (1944); *Red Hook Cold Storage Co.* v. *Department of Labor*, 295 N.Y. 1, 64 N.E. 2d 265 (1945); *Oil Workers Internat'l Union* v. *Superior Court*, 230 P. 2d 71 (Cal. 1951); *Ex Parte Martinez*, 132 P. 2d 901 (Cal. 1942); *Lowry* v. *City of Mankato*, 42 N.W. 2d 553 (Minn. 1950).

[10] See footnote 3.

[11] We recognize that an understanding between a carrier and a shipper cannot vary the proper construction or application of a tariff, since the published tariff is binding on the parties. We find here, however, that the action of the carrier and the shipper are factors to be considered in determining what was a fair and reasonable interpretation of an ambiguous tariff item.

Item 1315 rate. The reclassification of the articles under items other than 1315 was improper and in violation of section 18 of the 1916 Act and section 2 of the 1933 Act.

We further find, as did the examiner, that the reclassification of wooden house parts under the Portland terminal tariff from Item 101, "Freight N.O.S.", to Item 132, "Building Materials, prefabricated, wooden or metallic, S.U. [set up] etc.—Framework and sections", was improper and in violation of section 18 of the 1916 Act and section 2 of the 1933 Act.

To the extent that the unlawful reclassifications caused complainant to pay higher freight and terminal charges, complainant has been injured, and, unless barred by the limitations contained in section 22 of the 1916 Act, is entitled to reparation for such injury. Section 22 provides in pertinent part as follows:

> The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before the day named, of full reparation to the complainant for the injury caused by such violation [violation of the 1916 Act or the 1933 Act by a common carrier by water or other person subject to the 1916 Act].

Following are the details of the shipments and payments of ocean freight and terminal charges herein involved:

Voyage No.	Vessel	Date departing Portland [1]	Date of payment of freight and terminal charges		Alleged freight overcharges
			June to September 1953	Aug. 14, 1954	
(1)	(2)	(3)	(4)	(5)	(6)
13	*Tarleton Brown*	June 1953	$37,690.79	$5,798.16	[2] $3,431.40
23	*North Beacon*	June 1953	23,458.62	1,353.78	[2] 397.86
15	*Charles Crocker*	July 1953	36,342.83	7,338.82	[2] 3,974.48
					[3] (cr. 88.84)
16	*Charles Crocker* (B/L P-5)	Aug. 1953	65,252.00	[4] (cr. 2,149.72)	[5] 7,153.26
16	*Charles Crocker* (B/L P-2)	Aug. 1953	8,808.66	88.83	
17	*Charles Crocker* (B/L P-3)	Sept. 1953	49,041.57	[4] (cr. 2,091.44)	[5] 3,294.37
17	*Charles Crocker* (other B/Ls)	Sept. 1953		4,046.21	
23	*Seafair*	Sept. 1953		5,791.64	[2] 473.67
24	*Pacificus*	Oct. 1953		5,631.73	
			220,594.47	25,808.01	$18,725.04

[1] Cargo was delivered to consignee between June and October 1953.
[2] Alleged overcharges collected August 14, 1954.
[3] Refunded by Coastwise in January 1956.
[4] Corrected copy of freight bill allowing these credits was issued Dec. 9, 1953.
[5] Alleged overcharges collected in August and September 1953.

Charges of $220,594.47 were collected on the first five voyages during June–September 1953 (col. 4 in table). Such collections were made more than two years prior to the filing of the complaint on August 10, 1956. On August 14, 1954, however, complainant made additional payments totalling $25,808.01 (col. 5 in table), because of lien asserted by Coastwise in April 1954 against some applicances owned by complainant in the dock warehouse at Kodiak. This payment covered freight adjustment of charges on the first five voyages. When Coastwise issued correction notices covering the credit or balance due in connection with this payment, each individual charge was restated and not merely the particular adjustment which resulted in the credit or balance due.

Coastwise billed for freight charges according to its tariff, which provided that only one freight bill would be issued for freight covered by one bill of lading. The bills of lading (21) provided that full freight is considered completely earned on receipt of goods, that all charges be paid in full without offset, counterclaim, or deduction, and that the carrier is to have a lien for all charges on any or all goods designated in the bill of lading.

Coastwise's contention that the cause of action accrued at the time of delivery of the shipments is untenable. In *Oakland Motor Car Co.* v. *Great Lakes Transit Corp.*, 1 U.S.S.B.B. 308, 310, 311 (1934), our predecessor said:

> [Complainant] was injured the moment he *paid* the charges * * *. *His claim accrued at once* * * *. (Emphasis supplied.)

See also *Louisville Cement Co.* v. *Int. Com. Comm.*, 246 U.S. 638 (1918), holding that, since no controlling language to the contrary is used, the cause of action accrues when the freight charges are paid; and *Accrual of Cause of Action*, 15 I.C.C. 201, 204 (1909), holding such cause accrued only when *full* payment has been made. These two cases were decided under the Interstate Commerce Act when it—like the 1916 Act now—contained no language contrary to the settled rule that "the time when a cause of action accrues [is] * * * when a suit may first be legally instituted upon it * * *." *Louisville Cement Co.* v. *Int. Com. Comm.*, *supra.*

Under the foregoing rule there is no question that the claims covering overcharges paid on August 14, 1954, amounting to $8,277.41, for voyages 13 *Tarlton Brown*, 23 *North Beacon*, 15 *Charles Crocker*, and 23 *Seafair*, were filed within the two-year period of limitation provided by section 22 of the 1916 Act (col. 6 in table). Respondents are correct, however, in challenging the claims of $7,153.23 (voyage 16 *Charles Crocker*, B/L P–5) and $3,294.37 (voyage 17 *Charles Crocker*, B/L P–3), totalling $10,447.63, for charges paid in August

and September 1953, or more than two years prior to the filing of the sworn complaint. These charges are barred by the two-year statute of limitations.

Complainant's contention that the two barred claims were seasonably filed because every building was merged into a single account which was liquidated by the payment of $25,808.01 on August 14, 1954, cannot be accepted. There is no convincing evidence to support the claim that there was an open account between complainant and Coastwise so as to "keep alive" the time within which an action could be brought on all the bills of lading. The rights and obligations of the parties were defined and limited by each separate bill of lading, and as the contract was fully paid the statute of limitations began to run as to that payment. Under the most liberal interpretation of the rule, the statute would have begun to run on December 9, 1953, when the credits of $2,149.72 and $2,091.55, respectively, were allowed on the shipments in question (col. 5 in table). Even then the claims would be barred. Implicit in complainant's argument is the assumption that the parties may agree to waive or postpone the running of the statute. This cannot be done since the expiration of the time limit not only bars the remedy but also extinguishes the right (*Midstate Co.* v. *Penna. R. Co.*, 320 U.S. 356 (1943)), thereby nullifying the jurisdiction of the Board over the claims. *Reliance Motor Car Co.* v. *Great Lakes Transit Corp.*, 1 U.S.M.C. 794 (1938).

We find that complainant paid and bore the charges on the shipments in question; that complainant was overcharged by Coastwise to the extent freight and terminal charges were increased by the reclassifications herein found unlawful; that complainant was injured thereby; and that, except to the extent barred by section 22 of the 1916 Act, complainant is entitled to reparation from Coastwise in the amount of such overcharge.

The final question for consideration goes to the legality of the tariff publishing practices of Coastwise and the liability of respondents other than Coastwise for the overcharges for terminal service, there being no question that Coastwise alone is liable for the ocean freight overcharges. Coastwise published a tackle-to-tackle rate, as previously mentioned. It is clear from the record that the shipper was not permitted to deliver or receive cargo at the end of ship's tackle, that Coastwise assessed the terminal charges at Portland and Kodiak, and that at least at Portland it provided certain of the terminal services itself. It is the duty of a common carrier by water to provide a place for the receipt and delivery of property. This obligation may be fulfilled by the carrier itself or through an agent. In any event, the 1933 Act requires that the charges for the services

involved, regardless of who makes them, must be stated separately in the tariff of the carrier. *Intercoastal Investigation 1935*, 1 U.S.S.B.B. 400, 433, 447 (1935). The failure of Coastwise to do this, particularly when it calculated and collected such charges, resulted in a violation of section 2 of the 1933 Act and section 18 of the 1916 Act.[12]

Coastwise alone may be held responsible for the terminal overcharges. It had the duty to publish lawful terminal charges and to apply them in a lawful manner. This it failed to do. Instead, it in effect adopted the terminals' tariffs, misapplied them to the extent indicated herein, and collected the overcharges. The resulting injury to complainant was due solely to the acts of Coastwise.

Complainant contends that the liability of respondents for reparation is joint and several, citing *L. & N. R.R.* v. *Sloss-Sheffield Co.*, 269 U.S. 217 (1925). With this we cannot agree. Section 18 of the 1916 Act and section 2 of the 1933 Act, which require the filing of rates, rules, and regulations relating to terminal services, apply only to common carriers by water in interstate commerce—they do not apply to an independent terminal. Terminal operators as such are not subject to the same statutory obligations as are common carriers by water in interstate commerce, i.e., specifically, they are not required by the 1933 Act to file their tariffs with the Board or to meet the statutory requirements of that Act. Thus, the terminal operators herein cannot be found in violation of section 18 of the 1916 Act or of section 2 of the 1933 Act. Of course, as pointed out by the examiner, such operators may violate sections 15, 16, or 17 of the 1916 Act, and may be liable for proven damages resulting therefrom. There is no evidence, however, showing such violation by any of the terminals.

Attorneys for Coastwise and West Coast Terminals Co. of California and the attorney for complainant have indicated, in response to a request of the Board made at oral argument, that they consider the present record to be adequate to permit a determination of the amount of reparation without a conference or further hearing. We will therefore require the parties immediately to prepare, certify, and file with the Board a reparation statement in accordance with the provisions of Rule 15(b) of the Board's Rules of Practice and Procedure (46 C.F.R. 201.252).

No order will be entered at this time as to the determination of the amount of reparation due, but when such order is issued it will include an award of interest at the rate of 6 percent per annum from the date of payment of the overcharges.

[12] Also, the failure of Coastwise to specify the docks at which it called at Portland and Kodiak was a violation of these sections. In December 1956, Coastwise filed terminal charges at Portland but not at Kodiak.

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 30th day of March A.D. 1959.

No. 799

ALEUTIAN HOMES, INC.

v.

COASTWISE LINE ET AL.

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

It is ordered, That respondent Coastwise Line be, and it is hereby, notified and required to cease and desist and hereafter to abstain from activities herein found to be in violation of section 18 of the Shipping Act, 1916, as amended, and section 2 of the Intercoastal Shipping Act, 1933, as amended; and

It is further ordered, That respondent Coastwise Line be, and it is hereby, required, within thirty days after the date of service of this order, to modify the provisions of its appropriate tariff on file with the Board in a manner consistent with our report herein; and

It is further ordered, That complainant and respondent Coastwise Line be, and they are hereby, required to submit, as soon as possible, and in any event not later than thirty days after the date of service of this order, a certified reparation statement in accordance with the provisions of Rule 15(b) of the Board's Rules of Practice and Procedure, 46 C.F.R. 201.252; and

It is further ordered, That the proceeding as to respondent Coastwise Line be, and it is hereby, held open pending the issuance of an order respecting reparation; and

It is further ordered, That the complaint as to respondents other than Coastwise Line be, and it is hereby, dismissed.

(Sgd.) JAMES L. PIMPER,
Secretary.

FEDERAL MARITIME BOARD

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

Decided May 4, 1959

Respondent, in the operation of freighters and combination vessels between ports on the west coast of South America and U.S. Atlantic ports, found to be a common carrier by water, and therefore subject to the provisions of the Shipping Act, 1916.

Respondent's practice of contracting all of its refrigerated space on these vessels to three shippers, to the exclusion of other qualified shippers, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916, and to be unduly and unreasonably prejudicial and disadvantageous in violation of section 16 First thereof.

Forward-booking arrangements of two-year periods, entered into pursuant to just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, and discharging of bananas, under which respondent's refrigerated space would be equitably prorated among qualified banana shippers, found to be not unjustly discriminatory in violation of sections 14 and 16 of the Shipping Act, 1916.

Marvin J. Coles, *Francis B. Goertner*, and *Richard W. Kurrus* for Banana Distributors, Inc.

John J. O'Connor, Jr., and *John J. Foley* for Arthur Schwartz.

John H. Hanrahan, Jr., *John J. McElhinny*, and *Francis A. Wade* for Stanley Grayson, *Robert F. Martin* for Robert Martin Associates, *Maurice Finkelstein*, *Thomas J. Beddow*, and *Douglass Hunt* for Irving B. Joselow and Compania Frutera Sud Americana (Ecuador) S.A., *George F. Galland* and *William J. Lippman* for Philip R. Consolo, interveners.

Lawrence J. McKay, *Arthur Mermin*, and *James E. Greeley* for Grace Line Inc.

Robert J. Blackwell as Public Counsel.

SUPPLEMENTAL REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

As noted in our earlier report (5 F.M.B. 278), these two cases, consolidated for hearing, arose out of complaints filed by Banana Distributors, Inc. ("Banana Distributors"), and Arthur Schwartz ("Schwartz"), alleging that Grace Line Inc. ("Grace"), a common carrier by water between Ecuador and U.S. Atlantic coast ports, refused to carry complainants' bananas in its refrigerated ("reefer") space, in violation of sections 14, 15, and 16 of the Shipping Act, 1916 ("the Act"), and of sections 1 and 2 of the Sherman Antitrust Act ("the Sherman Act").[1]

Schwartz and Stanley Grayson ("Grayson") intervened in No. 771; Banana Distributors intervened in No. 775; and Irving B. Joselow ("Joselow"), Compania Frutera Sud Americana (Ecuador) S.A. ("Frutera"), Philip R. Consolo ("Consolo"), Robert Martin Associates ("Martin"), and Public Counsel intervened in both proceedings. Grayson and Martin substantially supported the contentions of complainants whereas Joselow and Frutera supported the position of Grace. Consolo intervened only as his interests appeared.

Complainants asked the Board to (1) declare the contracts between Grace and the existing banana shippers in this trade contrary to law and void, (2) direct Grace to desist from further carrying out the illegal contracts, (3) require Grace to allot reefer space to complainants in an amount deemed fair and reasonable by the Board, and (4) award other relief which the Board deems proper.[2]

In his recommended decision the examiner concluded that (1) Grace is a common carrier of bananas in the trade, and (2) the denial of reefer space to complainants and their supporting interveners resulted in violation of sections 14 and 16 of the Act; he recommended that Grace prorate its reefer space on a fair and reasonable basis among existing shippers, complainants, and interveners under two-year forward-booking arrangements. Exceptions to this decision were filed by Grace, Joselow, Frutera, and Consolo; replies to the exceptions were filed by complainants and Public Counsel; and the matter was argued before the Board.

[1] Allegations of violation of the Sherman Act were abandoned by complainant in No. 771.
[2] Although reparation was demanded, all parties agreed to defer this question.

Respondent's exceptions contend that (1) it is a contract carrier of bananas in the trade under consideration, (2) its exclusion of complainants and others from participation in its reefer space was not in violation of sections 14 and 16 of the Act, and (3) a 2-year forward-booking arrangement in the banana trade is not common carriage but is a form of contract carriage, and at any rate would be unworkable. The exceptions of Joselow, Frutera, and Consolo present no issues not raised by Grace.

In our first report and order, we concluded that bananas are susceptible to common carriage, and that Grace, as a common carrier, should have carried bananas under terms of common carriage. Grace was ordered, *inter alia*, to cease and desist from entering into or carrying out contracts with banana shippers in violation of sections 14 and 16 of the Act, to equitably prorate its reefer space to all qualified banana shippers under terms of forward bookings for periods not to exceed two years, to employ uniform, fair, and reasonable standards in determining the qualifications of prospective banana shippers, and to establish and enforce just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas on its common-carrier vessels.

The report and order were reviewed by the United States Court of Appeals for the Second Circuit (*Grace Line Inc.* v. *Federal Maritime Board*, 263 F. 2d 709 (2d Cir. 1959)), which vacated the order and remanded the proceeding to us, specifically rejecting our sole reliance on what the court called the "susceptibility test":

> This susceptibility test would appear to be clearly contrary to the Congressional purpose, for it is obvious that Congress intended that sections 14 and 16 should apply not to all carriers but only to "common" carriers by water.

We have reviewed the matter in the light of the court's decision and, upon further consideration without argument or hearing, arrive at the same conclusion without reference to the susceptibility test.

The Facts

Respondent is the only United States-flag operator offering a common-carrier berth service on Trade Route No. 2, which encompasses U.S. Atlantic ports and ports on the west coast of South America, and receives operating-differential subsidy aid for its service on the route. Grace also is a member of the Association of West Coast Steamship Companies, a conference of common carriers approved by the Board pursuant to section 15 of the Act, and carries over 150 different commodities northbound in this trade as a common carrier.

In this service, at the time of hearing, Grace operated three freighters with approximately fortnightly sailings and six combination pas-

senger-cargo vessels with weekly sailings, all of which vessels have reefer facilities. United Fruit Company and Standard Fruit Company have vessels plying this trade route, but they carry bananas as exclusively proprietary cargo. Grancolombiana Line and Chilean Line, both foreign-flag operators, operate berth-line vessels with reefer space in this trade, but Grancolombiana calls at Philadelphia before New York, and due to infrequent or irregular service Chilean Line is not a satisfactory banana carrier.

All of the bananas carried by Grace from Ecuador to New York since the inception of its reefer service on Trade Route No. 2 in 1934 have been by special contract, bananas being the only product carried on a contract basis; every other commodity is carried by Grace in its capacity as a common carrier.

At the time of the hearing, three shippers [8] utilized all of Grace's reefer space under two-year contracts, renewable at the option of the carrier. Each shipper had exclusive use and control of individual compartments. The shipper loaded the vessel at Guayaquil, Ecuador, at his own risk and expense, and unloading was performed by Grace at the risk and for the account of the shipper. Grace followed the shipper's temperature control instructions en route. Except in rare instances, all shippers requested that their bananas be transported at the same temperature.

Loading of bananas at Guayaquil is difficult. Port limitations necessitate loading offshore from barges, and the vessel is available for loading for about 12 hours only. Each shipper moves his bananas shipside by barge, from which gangways are erected into side ports and loading is accomplished manually. When one shipper completes his loading and stowing another shipper draws his barges alongside and the entire operation is repeated.

Growing, shipping, and marketing of bananas, due to the nature of the commodity itself, requires a carefully synchronized operation. Bananas grow quickly and are subject to rapid ripening when once cut from the plants. A shipper requires an assured amount of space in order to integrate his entire operation properly. There are no shoreside refrigerated warehouses in Guayaquil, and refrigeration does not prevent the normal ripening process. Shippers rigidly inspect bananas prior to their loading and stowing in order to prevent the shipment of overripe or sigatoka-diseased bananas, since they could adversely affect otherwise "healthy" bananas. Each shipper strives to have his fruit reach destination as green as possible.

On this trade route Grace carries Chilean fruit northbound in its reefer space during the Chilean fruit season, thereby reducing the

[8] Joselow, Frutera, and Consolo.

space otherwise available for bananas. There is no commingling of Chilean fruit with bananas due, in part, to the difference in temperature requirements between the two. Chilean fruit, although carried pursuant to "special arrangements" with the shippers, is carried by Grace in its capacity as a common carrier.

Banana Distributors is an experienced importer and distributor of bananas.[4] This complainant imported a substantial quantity of bananas from Panama and, as the New York agent for Consolo, distributed Ecuadorian bananas. It had requested reefer space of Grace since 1953, but each request was denied. Schwartz has been connected with the banana business since 1928 and his business reputation is good. He had requested space since 1946 but his requests were denied. Grace offered Schwartz reefer space on the cargo vessels but because these vessels could offer a fortnightly service only, he refused it. Although Schwartz has had financial difficulties there is no evidence that respondent denied him space for that reason.

Grayson has been in this business since 1942 and has had considerable experience importing bananas. At the time of hearing he was not an importer but was associated with others in a wholesale banana business in New York. Although he himself could not finance a banana operation from Ecuador, the record establishes that he could obtain the necessary financial backing. He requested reefer space from respondent since 1945, to no avail.

Martin has had limited experience in the banana trade, but at the time of hearing was associated with others in a proposed banana importing project. One of his associates has had experience importing bananas from Ecuador. Grace has refused Martin reefer space since 1954. This intervener apparently has sufficient financial backing to engage in this trade and has agreed to post a performance bond with Grace.

Discussion and Conclusion

The ultimate question here is whether respondent lawfully can allocate all of its reefer space, on its vessels engaging in the trade between certain South American ports and U.S. Atlantic ports, to certain banana shippers to the exclusion of other qualified shippers of bananas.

Grace contends that it is not a common carrier of bananas because it has never held itself out to the shipping public as a common carrier of bananas, and therefore its activities with respect to its banana movement are not subject to the provisions of the Act. Respondent,

[4] Throughout this report, unless otherwise clearly indicated, the recitation of facts and the reference to "present" shippers speak as of the time of hearing.

claims also that bananas, because they require specialized handling, constitute a specialty which justifies their being carried under special contracts. It asserts that it may refuse bananas altogether or accept them on special terms for selected shippers without running afoul of the provisions of the Act.[5]

Our first inquiry is into the scope of the Act, i.e., whether respondent, in the operation of these vessels, falls within the purview of the statute. Section 1 of the Act provides in part:

> The term "common carrier by water in foreign commerce" means a common carrier, except ferryboats running on regular routes, engaged in the transportation by water of passengers or property between the United States * * * and a foreign country * * * *Provided*, that a cargo boat commonly called an ocean tramp shall not be deemed such "common carrier by water in foreign commerce".

Thus, the entity which constitutes a "common carrier by water in foreign commerce" is subject to the provisions of the Act and the jurisdiction of this Board. The term "common carrier" is not defined in the Act, but the legislative history of the Act indicates that the person to be regulated is the common carrier at common law. *Agreement No. 7620*, 2 U.S.M.C. 749 (1945). And at common law a common carrier is one who holds himself out to carry for hire the goods of those who choose to employ him. *Propeller Niagara* v. *Cordes et al.*, 62 U.S. 7 (1858); *Railroad Company* v. *Lockwood*, 84 U.S. 357 (1873); *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U.S. 397 (1889). In the *Niagara* case, it was held (page 22):

> A common carrier is one who undertakes for hire to transport the goods of those who may choose to employ him from place to place. *He is, in general, bound to take the goods of all who offer*, unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey. (Emphasis added).

Grace transports goods generally in this trade on these vessels. Bananas do not confront Grace with liability from extraordinary danger, and they constitute a commodity which respondent is most accustomed to convey.

What is not a common carrier has likewise been defined judicially. Generally, where the full reach of the vessel is let to a single shipper, there exists private carriage, a bailment for hire. *Lamb et al.* v. *Parkman*, 14 Fed. Cas. 1019 (D.C. Mass. 1857); *Sumner* v. *Caswell*, 20 Fed. 249 (S.D.N.Y. 1884); *The Wildenfels*, 161 Fed. 864 (2d Cir. 1908).

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[5] We are not concerned with the question of whether bananas are carried under a bill of lading or under some other form of transportation document, nor are we concerned with the lawfulness of the terms of the document of carriage (Carriage of Goods by Sea Act, 1936, 46 U.S.C. 1300 *et seq.*). Our concern is whether bananas must be carried under the provisions of the Shipping Act, 1916.

In *Lamb* v. *Parkman* the court said at page 1023:

> It is contended, in behalf of the respondent, that the libellants were common carriers. By the charter-party, the whole ship was let to the defendant, who was to furnish a full cargo, and the owners had no right to take goods for any other person. In no sense were they common carriers, but bailees to transport for hire * * *.

Grace admittedly is a common carrier in this trade. The record emphasizes this: the vessels employed in carrying bananas for its chosen shippers are otherwise engaged in carrying general cargo for all who choose to employ them. We therefore find that respondent, in the operation of its freighter and combination vessels between certain west coast South American ports and U.S. Atlantic ports, is a common carrier by water within the meaning of section 1 of the Act.

We next inquire whether a common carrier subject to the provisions of the Act may exempt itself, in part, from the provisions of the Act. Grace makes much of the fact that it has not held itself out as a common carrier of bananas, and argues that it has lawfully excepted bananas from its holding out, relying heavily upon *Express Cases* 117 U.S. 1, 601 (1886) to support its contention that it may legally exclude complainants and other banana shippers from sharing in its reefer space on vessels which operate as common carriers. In *Express Cases* the Supreme Court was called upon to decide whether a common carrier by rail could exclude an express company from using its facilities to conduct its own common carrier business:

> The exact question, then, is whether these express companies can now demand as a right what they have heretofore had only as by permission. That depends, as is conceded, on whether all railroad companies are now by law charged with the duty of carrying all express companies in the way that express carriers when taken are usually carried, just as they are with the duty of carrying all passengers and freights when offered in the way that passengers and freight are carried (page 26).

The specificity of the scope of the question is further emphasized in the Court's opinion:

> The question is not whether these railroad companies must furnish the general public with reasonable express facilities, but whether they must carry these particular express carriers for the purpose of enabling them to do an express business over the lines (page 27).

Whether the railroads could refuse express matter from the general public was not an issue, and there is no inkling in that case that the railroads could refuse to carry express matter offered by some of the general public and accept it from others:

> If the general public were complaining because the railroad companies refused to carry express matter themselves on their passenger trains, or to allow it to be carried by others, different questions would be presented (page 28).

Of importance in the instant proceeding is the following statement by the Court:

> So long as the public are served to their reasonable satisfaction, it is a matter of no importance who serves them. The railroad company performs its whole duty to the public at large and to each individual when it affords the public all reasonable express accommodations. If this is done the railroad company owes no duty to the public as to the particular agencies it shall select for that purpose. The public require the carriage, but the company may choose its own appropriate means of carriage, always provided they are such as to insure reasonable promptness and security (page 25).

Similarly, in *Chicago &c. Railroad Co.* v. *Pullman Car Co.*, 139 U.S. 79 (1891), where a contract between a railroad and the Pullman Co., by which the railroad granted a sleeping car company the exclusive right to furnish all sleeping cars required by the railroad for a period of 15 years, was assailed as contrary to public policy and in restraint of the trade, the Court said:

> The defendant was under a duty, arising from the public nature of its employment, to furnish * * * such accommodations as were reasonably required by the * * * passenger traffic. Its duty, as a carrier of passengers, was to make suitable provisions for their comfort and safety. Instead of furnishing its own * * * cars, as it might have done, it employed the plaintiff, whose special business was to provide cars of that character, to supply as many as were necessary to meet the requirements of travel. It thus used the instrumentality of another corporation in order that it might properly discharge its duty to the public. So long as the defendant's lines were supplied with the requisite number of drawing-room and sleeping cars, it was a matter of indifference to the public who owned them (page 89).

We believe *Express Cases* affords respondent no comfort here. Grace is a common carrier and as such owes a duty to the shipping public to serve similarly situated shippers alike. Joselow, Frutera, and Consolo are not the instrumentalities of Grace whereby it discharges its common carrier obligations to the banana-shipping public. Paraphrasing *Express Cases*, Grace, in order to perform "its whole duty to the public at large and to each individual," must afford the public all reasonable reefer accommodations.

The Act confers jurisdiction over *carriers*, specifically over "common carriers", as distinguished from types of *carriage*, i.e., common or contract, and the movement of any commodity by a common carrier, regardless of the name the carrier uses in connection with it—or any part of it—must conform to the requirements of the Act, including its discriminatory injunctions, or be stricken down. We agree with Grace that a common carrier by water may except certain goods from its holding out to carry, but whatever Grace—a common carrier by water—carries, it carries subject to the provisions of the

Act. To accept Grace's contentions would result in a perversion of the will of the legislature as expressed in the Act. In excluding some qualified banana shippers from participation in its reefer space, Grace is derelict in the performance of its duty to the public.

Grace also relies on *United States* v. *Louisville & Nashville Railroad Co.*, 221 F. 2d 698 (6th Cir. 1955), to support its position here. Although that case recites that "a common carrier acting outside the performance of its required duties * * * may contract as a private carrier * * *", when the statement is considered in its proper perspective it involves facts far different from the one presented here: the cargo consisted of reactors, a commodity never before carried by the railroads; they were shipped by and for the Government—the only possible shipper thereof—during war time; the cars involved in the tranportation had to be substantially modified to accomodate the reactors; and the cars had to be withdrawn from their regular service during the course of their special employment. That movement can hardly be equated with the transportation of bananas from Ecuador to the United States by a carrier regularly moving them, for several shippers, in substantial quantities (one of its prime revenue producing commodities in the northbound trade), over the course of a quarter century, in facilities (reefers) which are able to, and do, accomodate all commodities requiring refrigeration. Properly analyzed, the *Louisville* case is consonant with the rule in the *Niagara* case, *supra*, which requires a common carrier to accept the goods of all who offer "unless his complement for the trip is full, or the goods be of such a kind as to be liable to extraordinary danger, or such as he is unaccustomed to convey,"[6] which is particularly appropriate here, as Grace has long carried bananas and they do not present liability from extraordinary danger.

What we said in *Philip R. Consolo* v. *Grace Line Inc.*, 4 F.M.B. 293,300 (1953) is controlling here:

> 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 * * *. 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.

We now look to respondent's actions with respect to its banana carryings to determine whether they square with the prohibitions against

[6] Not a single case cited by Grace supports the proposition that similarly situated *shippers* may be treated discriminatorily by a common carrier with respect to space accommodations.

discrimination in sections 14 Fourth [7] and 16 [8] of the Act. Under section 14 Fourth a common carrier by water may not unjustly discriminate against any shipper in the matter of cargo space accommodations or other facilities, and under 16 First such carrier may not give any undue or unreasonable preference to any particular person or subject any particular person to any undue or unreasonable prejudice or disadvantage. In summarily denying reefer accommodations to complainants and their supporting interveners, all of whom repeatedly requested such space, and in favoring Joselow, Frutera, and Consolo with that space, respondent discriminated against the former and subjected them to prejudice and disadvantage with reference to cargo space; similarly, Joselow, Frutera, and Consolo were preferred.

Whether respondent has violated sections 14 and 16, however, depends upon whether its prejudice and discrimination were undue and unreasonable. As noted above, complainants and their supporting interveners are experienced banana importers, and we find the existence of no lawful reason why Grace denied them space.

In our original report we considered Grace's contention that bananas constitute a "specialty" and therefore not "susceptible" of common carriage. Grace contended that bananas of several shippers could not be commingled. We have found the facts on this point contrary to this contention. As we stated in the prior report, there is nothing in the banana trade which prevents bananas from being transported by respondent in its capacity as a common carrier, and therefore find no merit in this argument.

We are convinced that bananas of different shippers can be commingled in the same compartment. Although we recognize that the intermingling of ripe and sigatoka-diseased bananas might adversely affect otherwise healthy bananas, in view of the facts of record—(1) good quality bananas are plentiful in Ecuador, (2) only Gros Michel bananas are exported from Ecuador, (3) all such

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[7] In pertinent part, section 14 of the Act provides:

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * * * *

"Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or *unfairly treat or unjustly discriminate against* any shipper in the matter of (a) *cargo space accomodations or other facilities,* due regard being had for the proper loading of the vessels and the available tonnage * * *." (Emphasis added.)

[8] Section 16 of the Act provides in part:

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

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

bananas move at the same carrying temperature, (4) all shippers rigidly inspect their fruit prior to loading, and (5) shippers desire to get their bananas to their destination in as green a condition as possible—coupled with the absence of any evidence tending to indicate that complainants and their supporting interveners would operate differently from Grace's present shippers, we believe that respondent's fear of commingling does not afford it a legal justification for its prejudicial and discriminatory treatment of otherwise qualified banana shippers. We also note that other perishable fruits and vegetables are commingled in cooled or refrigerated spaces.

It is acknowledged that banana shippers have made substantial investments in their trade, that the entire operation, from grower in Ecuador to retailer in the United States, requires careful coordination, that bananas ripen rapidly, that care in shipment is essential, that the fruit is highly perishable, and that loading is difficult and must be accomplished within a relatively short time. On the other hand, the record clearly indicates that bananas are readily available to newcomers to the trade, that bananas from different plantations have been successfully mixed in a single compartment, that all exporters carefully inspect the fruit before loading, and that carrying temperatures seldom vary. While it may be that loading and stowing difficulties will increase as the number of shippers increases, this factor is present in every trade and it is not an excuse for a common carrier discriminating against some shippers in favor of a few.

Since no valid reason has been forthcoming to justify the refusal of space to qualified shippers and the preference accorded the chosen shippers, we conclude that the discrimination was unjust in violation of section 14 First of the Act, and that the prejudice and disadvantage was undue in violation of section 16 Fourth thereof.

It is obvious that respondent cannot satisfy all the reefer space desires of its present shippers and those of complainants and their supporting interveners, and thus arises the problem of providing a plan of allocating space to qualified banana shippers.

Where the demand for space exceeds the supply, the law is clear: a common carrier must equitably prorate its available space among shippers. *Penna. R.R. Co.* v. *Puritan Coal Co.*, 237 U.S. 121 (1915); *Patrick Lumber Co.* v. *Calmar S. S. Corp.*, 2 U.S.M.C. 494 (1941). Equitable proration of space alone, however, in view of the economic factors inherent in this trade, is not a panacea. And it was with these economic factors in mind that the examiner recommended the adoption of a forward-booking arrangement.

Grace argues that a forward-booking system is an admission that bananas do constitute a specialty. We need go no further than

respondent's own operation on this very trade route to dispose of the argument: during the Chilean fruit season Grace, as a common carrier, transports such fruit under forward-booking arrangements, and when the offerings exceed the available space, the space is prorated among the shippers.

Grace further contends that there is no justification in law for a forward-booking system of the character and duration recommended. Forward booking is not new to common carriage. *Ocean S.S. Co.* v. *Savannah Locomotive Works & Supply Co.*, 131 Ga. 831, 63 S.E. 577 (1909). It is, then, the duration of the period connected with the system with which we must be concerned. We are mindful that once the system is initiated, qualified applicants for space would be foreclosed from any proration in the space until the end of any given period. In view of the economic problems presented here, we believe and find that the 2-year duration can be characterized as "just" and "reasonable" rather than "unjustly discriminatory" and "unreasonably prejudicial", and affords existing importers the protection they require while providing a reasonable opportunity for prospective shippers to engage in the trade.

Qualified banana shippers must not be excluded from participation in Grace's reefer space in this trade. As we stated in our earlier report, however, the making of any necessary and practical arrangements designed to minimize or eliminate commingling of bananas of several shippers shall be left to the parties involved. We here reaffirm our adoption of the examiner's recommendation that Grace prorate its reefer space, upon a fair and reasonable basis, among qualified banana shippers, under forward-booking arrangements of two years.

Grace may require prospective shippers in this trade to post a bond covering the reefer space assigned, and may otherwise establish reasonable rules covering dead freight, inspection, and loading and stowing, which prospective shippers must meet in order to qualify as users of such space.

At the end of any forward-booking period, in the event that additional qualified importers desire reefer space, it will be incumbent upon respondent to reallocate space to existing importers and the new applicants upon a fair and reasonable basis.

An appropriate order, consonant with this report, will be issued.

Although complainant in No. 771 alleged that respondent, as a member of the Association of West Coast Steamship Companies (F.M.B. Agreement No. 3302), has operated contrary to the terms of the conference agreement in violation of section 15 of the Act, the matter was not pursued, and since neither the conference nor the members thereof other than Grace were parties to the proceeding, no determination of the issue is made here.

SUPPLEMENTAL ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C. on the 4th day of May A.D. 1959.

No. 771

BANANA DISTRIBUTORS, INC.

v.

GRACE LINE INC.

No. 775

ARTHUR SCHWARTZ

v.

GRACE LINE INC.

The Board, on the date hereof, having made and entered of record a supplemental report in these proceedings, restating the findings and conclusions set forth in its report of April 29, 1957, which supplemental report is incorporated as a part hereof:

It is ordered, that respondent Grace Line Inc. be, and it is hereby, notified and required to cease and desist and to abstain from entering into, or continuing, or performing any of the contracts, agreements, or understandings for the carriage of bananas found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended;

It is further ordered that respondent, unless it is now complying with our prior order herein served August 19, 1957, shall offer, within ten (10) days after the date of service of this order, to its present shippers and to all qualified shippers, including complainants and their supporting interveners, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to U.S. Atlantic ports for a period not to exceed two years, said period to begin not later than July 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage;

It is further ordered, that respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant

shippers, and in exercising its judgment in this regard, respondent shall take into consideration applicant's (1) financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested, (2) ability to arrange for the purchase, loading, and stowage of the bananas to be shipped, and (3) ability to arrange for the discharge of bananas; to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

It is further ordered, that respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, stowing, transporting, carrying, and discharging of bananas on or from its vessels, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for the performance of all its obligations under the two-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to twelve and one-half percent (12½%) of the total minimum freight charges due under said forward booking; (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any right secured by him under said forward booking; (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned; (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, and respondent shall have the right to designate the stevedore or itself perform the necessary stevedoring at the port of discharge; (e) during the Chilean fruit season respondent may proportionately reduce the refrigerated space assigned to banana shippers, without discrimination, upon reasonable notice, to permit the carriage of Chilean fruit; (f) the treatment as a single shipper of those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

It is further ordered, that respondent shall file with the Board (a) copies of the two-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

It is further ordered, that these proceedings be held open for further proceedings on the claims of complainants for reparation, if any.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S-90

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted May 27, 1959. Decided May 27, 1959

One voyage by the SS *Mormacsun*, commencing on or about June 2, 1959, carrying a full cargo of lumber from United States North Pacific ports to United States Gulf or North Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ira L. Ewers and *Randall J. Thompson* for Moore-McCormack Lines, Inc.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *Mormacsun*, which is under time charter to States Marine Corporation of Delaware (States Marine), to engage in one intercoastal voyage commencing at United States North Pacific ports on or about June 2, 1959, carrying a full cargo of lumber to United States Gulf or North Atlantic ports. Notice of hearing was published in the Federal Register of May 12, 1959, and hearing has been held before the Deputy Maritime Administrator. There were no petitions to intervene and no one appeared in opposition to the application.

States Marine, the charterer of the *Mormacsun*, conducts as a part of its regular steamship operations an eastbound intercoastal lumber service. For the early June sailing under consideration it has en-

deavored unsuccessfully to obtain an appropriate vessel of the type required for this service. No exclusively domestic operators in this trade have objected to the use of the *Mormacsun* for the sailing in question.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the *Mormacsun*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at United States North Pacific ports on or about June 2, 1959, carrying a full cargo of lumber to United States Gulf or North Atlantic ports, will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act.

This report will serve as written permission for the voyage.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–94

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION 805(a)

Submitted June 19, 1959. Decided June 19, 1959

The carriage of passengers booked by Military Sea Transportation Service from Hawaii to California aboard the SS *President Hoover*, Voyage No. 20, sailing for San Francisco from Hawaii on or about July 29, 1959, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the domestic trade or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Warner W. Gardner for American President Lines, Ltd.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

American President Lines, Ltd. (APL), has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to carry 19 passengers booked by Military Sea Transportation Service (MSTS) from Hawaii to California on Voyage No. 20 of the SS *President Hoover* sailing for San Francisco from Hawaii on or about July 29, 1959. The hearing, noticed in the Federal Register of June 10, 1959, was held before the Deputy Maritime Administrator on June 19, 1959. Matson Navigation Company (Matson) intervened as its interests might appear.

MSTS requested APL to indicate the number of MSTS passengers it could accommodate from Hawaii to California during July 1959.

APL advised MSTS that it could not accommodate any MSTS passengers on its SS *President Cleveland*, but could book 19 passengers on Voyage No. 20 of the SS *President Hoover*. MSTS advised that it desired to book this space.

At present APL carries passengers between California and Hawaii on two of its vessels, the SS *President Cleveland* and the SS *President Wilson*, and the application for written permission for APL to add a third vessel in this trade is now being considered by the Federal Maritime Board in Docket No. S-78. Matson has no objection to the proposed permission for the single voyage, provided the granting of the permission is without prejudice to the position of any party in Docket No. S-78.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the carriage of 19 passengers booked by MSTS from Hawaii to California on Voyage No. 20 of the SS *President Hoover*, commencing on or about July 29, 1959, would neither result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service nor be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage. The action herein is without prejudice to the position of any party in Docket No. S-78.

FEDERAL MARITIME BOARD

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

Submitted May 12, 1959. Decided June 22, 1959

Respondent, in the operation of vessels between ports on the west coast of South America and ports on the North Atlantic coast of the United States and between ports on the west coast of South America and United States Gulf of Mexico ports, found to be a common carrier by water and therefore subject to the provisions of the Shipping Act, 1916, as amended.

Respondent's practice of contracting all of its refrigerated space on its vessels operating between ports in Ecuador and ports on the North Atlantic coast of the United States to one banana shipper to the exclusion of other qualified banana shippers, found to be unjustly discriminatory in violation of section 14 Fourth of the Shipping Act, 1916, as amended, and to be unduly and unreasonably prejudicial and disadvantageous in violation of section 16 First thereof.

Forward-booking arrangements of periods not to exceed two years, entered into pursuant to just and reasonable regulations and practices relating to the receiving, handling, stowing, transporting, and discharging of bananas, under which respondent's refrigerated space would be equitably prorated among qualified banana shippers, found to be not unjustly discriminatory in violation of sections 14 Fourth and 16 First of the Shipping Act, 1916, as amended.

Robert N. Kharasch and *William J. Lippman* for Philip R. Consolo, and *Richard Kurrus* and *Paul D. Page, Jr.*, for Banana Distributors, Inc., complainants.

Renato C. Giallorenzi and *John H. Dougherty* for Flota Mercante Grancolombiana, S.A., respondent and petitioner.

Elias Rosenzweig for Panama Ecuador Shipping Corporation, and *Thomas J. O'Neill* for Newark Banana Supply, interveners.

Robert J. Blackwell as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

These three consolidated proceedings relate to the lawfulness of the movement of bananas by Flota Mercante Grancolombiana, S.A. (Flota), from Ecuador to United States ports in the foreign commerce of the United States. In No. 827, Philip R. Consolo (Consolo) alleges that Flota, in refusing to allocate part of its refrigerated (reefer) space to Consolo for the movement of his bananas from Ecuador to U.S. North Atlantic ports, and in granting that space to Panama Ecuador Shipping Corporation (Panama Ecuador), unjustly discriminated against Consolo in violation of section 14 Fourth [1] of the Shipping Act, 1916, as amended (the Act), and unduly prejudiced him and unduly advantaged Panama Ecuador in violation of section 16 [2] of the Act. Consolo further alleges that in contracting all of its reefer space to a single shipper, and in refusing the shipments of others, respondent operated contrary to the terms of a duly approved agreement, in violation of section 15 of the Act.

In No. 841, Banana Distributors, Inc. (Banana Distributors), similarly alleges violation of sections 14 Fourth and 16 of the Act.

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[1] Section 14 of the Act provides in part:

"That no common carrier by water shall, directly or indirectly, in respect to the transportation by water of passengers or property between a port of a State, Territory, District, or possession of the United States and any other such port or a port of a foreign country—

* * * * * * *

Fourth. Make any unfair or unjustly discriminatory contract with any shipper based on the volume of freight offered, or *unfairly treat or unjustly discriminate against* any shipper in the matter of (a) *cargo space accommodations or other facilities*, due regard being had for the proper loading of the vessel and the available tonnage * * *." (Emphasis added)

[2] Section 16 of the Act provides in part:

* * * * * * *

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

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

Flota, in No. 835, petitioned for a declaratory order relating to its banana practices in the Ecuador-U.S. North Atlantic trade and the Ecuador-U.S. Gulf trade. It contends that it is not a common carrier of bananas, that its contracts with Panama Ecuador are not unlawful, and that the physical characteristics of its vessels are so different from those of its competitor Grace Line Inc. (Grace) that our rule in *Banana Distributors, Inc.* v. *Grace Line Inc.*, 5 F.M.B. 278 (1957), and *Philip R. Consolo* v. *Grace Line Inc.*, 4 F.M.B. 293 (1953), is not applicable to its banana carryings.

Public Counsel, a party in each of these proceedings, contends that, in contracting all of its reefer space to Panama Ecuador to the exclusion of other qualified shippers, including complainants here, Flota has violated sections 14 Fourth and 16 of the Act. In No. 835 it is his position that Flota be ordered to cancel its present contracts and make its reefer space available to all qualified shippers.

Panama Ecuador, an intervener in all of the proceedings, argues, in effect, that the physical limitations of the Flota vessels are such that only one shipper can be accommodated on them and therefore the resulting discrimination, prejudice, and advantage, if any, are not undue, unreasonable, or unjust.

Newark Banana Supply intervened in No. 841 but did not participate further in the proceedings.

FACTS

Flota operates six vessels in its common-carrier service between ports on the west coast of South America and U.S. North Atlantic ports, with a weekly frequency. At the time of hearing it employed five new 17½-knot vessels in the trade and a sixth was scheduled to be added in early 1959. They carry general cargo northbound and southbound on this regularly advertised and maintained service. Northbound sailings commence in Peru, proceed to Ecuador where bananas are loaded, to Buenaventura, Colombia, where coffee—Flota's most important northbound commodity—is loaded, then to Philadelphia where bananas are unloaded, and thence to Baltimore and New York. Although the vessels stop at Buenaventura for about 60 hours, steaming time from Guayaquil, Ecuador, to Philadelphia generally is 11 days.

Bananas have been carried by Flota in this trade since 1950, always under special contract, and never has the company accommodated more than one shipper at any one time.

Both Consolo and Banana Distributors are experienced banana shippers. Consolo repeatedly has sought reefer space from Flota for the carriage of its bananas since 1955. Banana Distributors un-

successfully sought reefer space on Flota's vessels in 1957. Others also have requested reefer space for bananas, but Flota made no check to determine whether such applicants were financially or otherwise responsible.

In 1955 Flota presented Consolo a rate for the entire reefer space on its five vessels in the trade. Consolo then countered with an offer to take the space if the rate on the lower hold were reduced 25 percent, or in the alternative, to occupy and pay for only the upper 'tween and lower 'tween decks of the reefer hold on each ship.[3] Flota rejected this bid and later (July 25, 1955) entered into an exclusive two-year contract with the predecessors in interest of Panama Ecuador covering all the reefer space on the then five vessels in the trade. Consolo was advised that the space was under contract for two years. In 1957 Consolo again submitted an offer on Flota's reefer space, which was rejected in favor of an offer from Panama Ecuador covering, this time, a period of three years. After our decision in *Banana Distributors, Inc.* v. *Grace Line Inc., supra*, both Consolo and Banana Distributors sought an allocation of reefer space from Flota, but without success.

The single reefer hold on each of Flota's vessels has a capacity of 55,000 cubic feet, and is divided into three levels: upper 'tween, lower 'tween, and lower deck. Hatches between these levels are closed off with three 450-pound plugs each, over which are placed hatch covers. The hold was designed primarily for the accommodation of frozen commodities in contrast to such holds on the Grace vessels, which were designed for the carriage of bananas. The longer the period the hold is open for loading, the longer it takes to reduce the hold temperature to the desired 52 degrees. Uncontraverted testimony indicates that with a 15-hour loading time, 40 hours are required to reduce the hold temperature, and that for every additional hour of loading it would take two additional hours of cooling time to reach 52 degrees.

As previously noted, the single shipper utilizing Flota's reefer hold usually completes loading within 13½ to 15 hours. There are two side ports (one on each side of the vessel) at the upper 'tween deck of the hold. A ramp runs from the side port to a pontoon secured to the vessel. Barges carrying from 800 to 4,000 stems tie up to the pontoon and stevedores then carry the cargo up the ramps and stow it as directed. The side ports are somewhat smaller than those on the Grace vessels, and they are higher above the water line, causing

[3] The reefer hold on each ship is divided into three decks: upper 'tween, lower 'tween, and lower hold. The lowest deck is so high that it will accommodate three upright layers of bananas, rather than two, subjecting the bottom layer to damage from excessive weight. This is not the case in Flota's new vessels: four of the five actually have less height in the lower hold than in the other two decks.

the ramp to be more steeply inclined. Too, the single ramp must be traversed both entering and leaving the ship, whereas on the Grace ships separate ramps are used for entering and exiting. Stowing begins in the lower hold, which necessitates descent via catwalks through hatches in the upper 'tween and lower 'tween decks. While the lower hold is being filled the select fruit is segregated and stowed in the upper 'tween deck. Upon completion, hatch plugs and covers must be replaced, sealing off the compartments. Ramps, catwalks, hatch plugs and covers, and bin boards impede, to some extent, the rapid loading of the compartments. The decks are fitted for stanchions, into which boards are inserted to form bins. Thus fruit is separated and more properly stowed. In unloading, generally all the fruit must be removed through one side port only. Unloading is accomplished in the inverse order of loading.

Flota also operates, as a common carrier by water, a service between ports on the west coast of South America and U. S. Gulf of Mexico ports, utilizing four older and slower vessels. These vessels have reefer facilities and involve an 8 to 10 day transit time from Ecuador to Galveston, Texas. where bananas are discharged for a single shipper (Grand Shipping, Inc.). This shipper enjoyed an exclusive-use contract of the space for a one-year period from June 1, 1957, to June 1, 1958, and it was renewed for a 6 months' period in view of the petition for the declaratory order herein. It is not apparent that other qualified banana shippers have applied for, and have been denied, reefer space in this trade.

Recommended Decision

The presiding examiner found that (1) Flota is a common carrier of bananas from Ecuador to the Atlantic and Gulf coasts of the United States; (2) Flota's exclusion of Consolo and Banana Distributors from participation in the use of its reefer space on its vessels from Ecuador to U.S. Atlantic ports results in violation of sections 14 Fourth and 16 of the Act; (3) Flota should cancel its existing contracts for the carriage of bananas from Ecuador to the U. S. Atlantic and Gulf coasts; and (4) Flota should be required to prorate its reefer space on a fair and reasonable basis among existing shippers and all other qualified banana shippers, under forward-booking arrangements of not more than two years.

Exceptions were filed by Consolo, Flota, and Panama Ecuador. Replies were filed by Consolo, Panama Ecuador, Flota, and Public Counsel.

Although generally supporting the recommended decision, Consolo excepted to the failure of the examiner (1) to recommend that the

Board order Flota to allot to him 50,000 cu. ft. of reefer space per week, and (2) to make certain findings of fact relating to common carriage and discrimination and prejudice.

Flota excepted to the findings that (1) it is a common carrier of bananas; (2) it has violated sections 14 Fourth and 16 of the Act; and (3) it should cancel its present banana contracts and prorate its reefer space among all qualified shippers. It contends that the decision is not supported by evidence, is contrary to law, and that the findings of violation of sections 14 and 16 of the Act were beyond the scope of the proceeding.

In its exceptions Panama Ecuador claims that the findings are not supported by the record and that the conclusions are contrary to law. It contends that the contract between it and Flota is not subject to the jurisdiction of the Board since it involves contract carriage.

Discussion and Conclusions

What we said recently in the Supplemental Report in *Banana Distributors, Inc.* v. *Grace Line Inc.*, 5 F.M.B. 615 (herein referred to as the Supplemental Report) is appropriate here, and we feel is dispositive of the issues presented in these proceedings. It is clear that in the operation of its freighter vessels between Ecuador and U. S. North Atlantic ports and between Ecuador and U. S. Gulf of Mexico ports, Flota is a common carrier by water in the foreign commerce of the United States, and therefore is subject to the provisions of the Shipping Act and to the jurisdiction of this Board. It is of no moment that Flota has restricted its banana carryings to special contracts: "* * * the movement of any commodity by a common carrier, regardless of the name the carrier uses in connection with it—or any part of it—must conform to the requirements of the Act, including its discriminatory injunctions, or be stricken down." (Supplemental Report, page 622) Likewise, in *Philip R. Consolo* v. *Grace Line Inc.*, *supra*, we stated "* * * in spite of special arrangements of whatever sort, respondent [a common carrier by water] 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." (page 300) And again, in the Supplemental Report, page 622, we said that "* * * a common carrier * * * owes a duty to the shipping public to serve similarly situated shippers alike."

It is clear from this record that both complainants are qualified banana shippers. It is similarly clear that they were denied reefer space accommodations by Flota, to their prejudice and disadvantage, and that Panama Ecuador, in receiving and using that space, was fav-

ored and advantaged. We find no justification for this conduct on the part of Flota, and conclude that in denying reefer space to complainants, and in granting that space to a single favored shipper, Flota has acted in violation of sections 14 Fourth and 16 of the Act.

The arguments relating to the differences between Flota's vessels and Grace's vessels are not impressive. Both companies are common carriers by water and the Act applies equally to both. Inferior refrigeration, smaller sideports (and higher from the water line), an additional deck, cumbersome hatch plugs, and other paraphernalia found on the Flota vessels do not exempt Flota from the discriminatory proscriptions of the statute: qualified banana shippers must not be excluded from participation in the reefer space.

The limitations of Flota's vessels relate, we believe, to operational matters which we feel may be more properly solved by an experienced carrier.[4] Our concern is with the protection afforded by the Act to qualified shippers.

Much has been made of the loading time required. The present shipper takes from 13½ to 15 hours to complete loading. Testimony on the additional time required by multiple shippers varies. Panama Ecuador's witness believes that loading time would be increased by 7 to 12 hours if three shippers were accommodated, 10 to 15 additional hours if six shippers were granted space, and up to 50 additional hours if ten shippers were involved; on the other hand, Consolo estimated that only an additional hour would be necessary if six shippers shared the space, and Banana Distributor's witness was of the view that six shippers would cause a two hour delay. Based on the record, the examiner found that loading by multiple shippers should not add more than five hours to the present loading time. We feel that the judgment of the examiner is clearly supported by the evidence. But even if up to 15 additional hours were required to accommodate six banana shippers, that fact would not justify exclusive long term space contracts to a favored shipper and the denial of that space to a qualified competitor. Operational difficulties and vessel limitations do not justify prejudice and discrimination otherwise undue and unreasonable.

On this record we find and conclude that Flota's practices in the Ecuador-North Atlantic trade—the exclusion of Consolo and Banana Distributors from participation in its reefer space and the allocating of that space to Panama Ecuador exclusively—constitute a violation

[4] Similarly, segregating or otherwise identifying bananas of different shippers is an operational function and was so recognized by the examiner. The solutions suggested by him do not constitute error. As he pointed out, "There may be other means of easy identification which would suggest themselves to those intimately familiar with the ramifications of the banana business."

of sections 14 Fourth and 16 First of the Act. Contracts with the present shipper must be cancelled and the reefer space on the vessels in this trade must be made available, upon fair and reasonable basis, to all qualified banana shippers. Similarly, we find that Flota, as a common carrier by water between Ecuador and U.S. Gulf of Mexico ports, must make its reefer space available to all qualified banana shippers in that trade.

As we said in the Supplemental Report, a forward-booking system under which space contracts would be firm for not to exceed two years, in view of the economic problems inherent in the banana importing business, would be characterized as "just" and "reasonable" as opposed to "unjust" and "unreasonable", which aptly describes the present system.

What we shall require of Flota is that it make its reefer space prorationally available to all qualified banana shippers, upon a fair and reasonable basis, under forward-booking arrangements of not to exceed two years. We feel, however, that the operational problems may best be solved by the parties concerned. Flota may, through reasonable rules and regulations, require bonds from shippers, provide for dead freight, inspection, loading, stowing, and discharging, as well as other reasonable requirements, taking into consideration the physical limitations of the vessels and their reefer accommodations and the like, which shippers must meet in order to qualify as users of space. At the end of any forward-booking period, Flota shall reallocate its space for additional periods among qualified applicants consonant with our directives herein.

Since we believe that the foregoing disposes of the matter, we make no findings with reference to the allegations of violation of section 15 of the Act.

An appropriate order will be entered.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 22nd day of June A.D. 1959.

No. 827

PHILIP R. CONSOLO

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

No. 835

FLOTA MERCANTE GRANCOLOMBIANA, S.A.—CARRIAGE OF BANANAS FROM ECUADOR TO THE UNITED STATES

No. 841

BANANA DISTRIBUTORS, INC.

v.

FLOTA MERCANTE GRANCOLOMBIANA, S.A.

The proceedings docketed as Nos. 827 and 841 being at issue upon complaints and answers on file, and the proceeding docketed as No. 835 being at issue upon a petition for a declaratory order and replies thereto on file, and the proceedings having been consolidated and duly heard with respect to all issues other than reparation, and full investigation of the matters and things involved having been had, and the Board, on the date hereof, having made and entered a report stating its conclusions, decision, and findings therein, which report is hereby referred to and made a part hereof:

It is ordered, That:

1. Respondent be, and it is hereby, notified and required, not later than August 1, 1959, to cease and desist and to abstain from entering into, or continuing or performing any of the contracts, agreements, or understandings for the carriage of bananas, found herein to be in violation of sections 14 and 16 of the Shipping Act, 1916, as amended;

2. Respondent, within ten (10) days after the date of service of this order, shall offer to its present banana shippers and to all qualified banana shippers, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to United States ports for a period of not to exceed two years, said period to begin not later than August 1, 1959, and shall thereafter offer, for periods not to exceed two years, refrigerated space available for such carriage;

3. Respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant shippers, and in exercising its judgment in this regard, respondent shall take into consideration (1) applicant's financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested, (2) applicant's ability to arrange for the purchase, loading, and stowing of the bananas to be shipped, and (3) applicant's ability to arrange for the discharge of bananas; and to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

4. Respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to, or connected with, its receiving, handling, stowing, transporting, carrying, and discharging of bananas, which regulations and practices may include the following requirements: (a) each shipper shall furnish and maintain as security for performance of all of its obligations under the two-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to 12½ percent of the total minimum freight charges due under said forward booking, (b) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any rights secured by him under said forward booking, (c) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned, (d) loading, stowing, and unloading shall be at the expense and risk of the shipper, respondent to have the right to designate the stevedore or itself to perform the necessary stevedoring at the port of discharge, (e) the treatment as a single shipper those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

5. Respondent shall file with the Board (a) copies of the two-year forward bookings entered into hereunder, (b) the regulations and practices adopted by respondent relating to its receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (c) the criteria used by respondent in determining what applicant shippers are qualified;

6. The proceedings docketed as Nos. 827 and 841 be, and they are hereby, held open for further proceedings on the claims of complainants for reparation, if any; and

7. The proceeding docketed as No. 835 be, and it is hereby, discontinued.

By the Board.

(Sgd.) JAMES L. PIMPER
Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–96

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted July 22, 1959. Decided July 22, 1959

One voyage by the SS *Mormacpine*, commencing on or about July 29, 1959, carrying a full cargo of lumber from United States North Pacific ports to United States North Atlantic ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in coastwise or intercoastal services, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

William B. Ewers for Moore-McCormack Lines, Inc.
Robert C. Bamford as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE MARITIME ADMINISTRATOR:

Moore-McCormack Lines, Inc. (Mormac), has applied for written permission of the Maritime Administrator under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *Mormacpine*, which is under time charter to States Marine Corporation of Delaware (States Marine), to engage in one eastbound intercoastal voyage commencing at a United States North Pacific port on or about July 29, 1959, carrying a full load of lumber for discharge at United States North Atlantic ports. Notice of hearing was published in the Federal Register of July 13, 1959, and hearing has been held before the Administrator. No petitions to intervene were filed and no one appeared in opposition to the application.

States Marine, the charterer of the SS *Mormacpine*, conducts as a part of its regular steamship operations an eastbound intercoastal lumber service. For this late July sailing it has endeavored to obtain an appropriate vessel of the type required for this service, but has been unable to do so. No exclusively domestic operators in this trade have objected to the use of this vessel for this sailing.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the Mormac owned vessel SS *Mormacpine*, which is under time charter to States Marine, to engage in one intercoastal voyage commencing at a United States North Pacific port on or about July 29, 1959, carrying a full cargo of lumber to United States North Atlantic ports, will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–97

AMERICAN PRESIDENT LINES, LTD.—APPLICATION UNDER SECTION 805(a)

Submitted July 27, 1959. Decided July 27, 1959

The carriage of nine privately owned automobiles and household goods in an amount not to exceed 10 measurement tons, booked by Military Sea Transportation Service, from Hawaii to California aboard the SS *President Hoover*, voyage No. 20, sailing for San Francisco on or about July 28, 1959, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the domestic trade, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Vern Countryman for American President Lines, Ltd.

Willis R. Deming and *Alvin J. Rockwell* for Matson Navigation Company.

Robert C. Bamford as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY MARITIME ADMINISTRATOR:

American President Lines, Ltd. (APL), has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, to carry 9 automobiles and household goods in an amount not to exceed 10 measurement tons, booked by Military Sea Transportation Service (MSTS), from Hawaii to California on voyage No. 20 of the SS *President Hoover*, sailing for San Francisco on or about July 28, 1959. Hearing was noticed in the Federal Register of July 21, 1959, and was held before the Deputy Maritime Administrator on July 27, 1959. Matson Navigation Company (Matson) intervened as its interests might appear.

MSTS, on or about July 10, 1959, requested APL to carry the automobiles and household goods of MSTS passengers authorized to be carried on this voyage pursuant to the decision in Docket No. S–94. Matson has no objection to the proposed permission for the single voyage provided such action is without prejudice to the position of any party in Docket No. S–78.

Upon this record, it is found and concluded that the granting of written permission under section 805(a) of the Act for the carriage of 9 automobiles and household goods in an amount not to exceed 10 measurement tons, booked by MSTS, from Hawaii to California on voyage No. 20 of the SS *President Hoover*, commencing on or about July 28, 1959, would neither result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service nor be prejudicial to the objects and policy of the Act.

This report shall serve as written permission for the voyage. The action herein is without prejudice to the position of any party in Docket No. S–78.

FEDERAL MARITIME BOARD

No. 830

AGREEMENTS NOS. 8225 AND 8225–1, BETWEEN GREATER BATON ROUGE PORT COMMISSION AND CARGILL, INC.

Submitted June 23, 1959. Decided August 6, 1959

Agreement No. 8225 between respondent Greater Baton Rouge Port Commission and its lessee, respondent Cargill, Inc., leasing the former's grain elevator to lessee to operate as a public terminal facility, and under which lessee is granted certain exclusive and preferential rights, found subject to the filing and approval requirements of section 15 of the Shipping Act, 1916.

Respondents have effectuated Agreement No. 8225 prior to filing with and approval by the Board, in violation of section 15 of the Shipping Act, 1916.

Agreement No. 8225 found not unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Shipping Act, 1916, and approved by the Board.

Agreement No. 8225–1, a modification of Agreement No. 8225, creating a monopoly in grain stevedoring in respondent Cargill, Inc., would operate to the detriment of the commerce of the United States, and would be an unjust and unreasonable practice relating to the receiving, handling, and storing of property, in violation of section 17 of the Shipping Act, 1916. Agreement not approved by the Board.

George Mathews and *Theo F. Cangelosi* for respondent Greater Baton Rouge Port Commission.

Weston B. Grimes and *Samuel D. Timmons* for respondent Cargill, Inc.

Walter Carroll for intervener Baton Rouge Marine Contractors, Inc.

Robert E. Mitchell, *Edward Aptaker*, and *Robert T. Hood, Jr.*, as Public Counsel.

REPORT OF THE BOARD

CLARENCE G. MORSE, *Chairman*, BEN H. GUILL, *Vice Chairman*, THOS. E. STAKEM, JR., *Member*

BY THE BOARD:

This proceeding is an investigation instituted on the Board's own motion to determine whether Agreement No. 8225 and/or the amend-

ment thereto, Agreement 8225–1, between respondents Greater Baton Rouge Port Commission (Port), an agency of the State of Louisiana, and Cargill, Inc. (Cargill), has been carried out prior to approval by the Board, in violation of section 15 of the Shipping Act, 1916 (46 U.S.C. 814) (the Act), and whether operation under the agreements would otherwise result in violations of sections 16 First or 17 of the Act (46 U.S.C. 815 and 816), or would contravene any of the standards of section 15.[1] Notice of the two agreements, which were filed with the Board on April 25, 1957, for approval, if required, was published in the Federal Register on May 25, 1957 (22 F.R. 3713), and a protest thereto was filed by Baton Rouge Marine Contractors, Inc. (BARMA).

Hearings were held before an examiner, briefs were filed, and the examiner issued his recommended decision on February 3, 1959. The recommended decision concluded and found that:

1. Agreement No. 3225, leasing Port's grain elevator to lessee, was not subject to the filing and approval requirements of section 15.

2. Even if the lease agreement were subject to the requirements of section 15, it was not shown that the agreement contravened section 15 in any respect, and approval should be granted if required.

3. The lease agreement as modified by Agreement No. 8225–1, giving lessee exclusive right to stevedore vessels loading grain at the terminal, was subject to section 15 and resulted in unreasonable regulations and practices in violation of section 17 and was detrimental to commerce under the standards of section 15.

Exceptions to the recommended decision and replies thereto were filed, and oral argument has been heard by the Board. Exceptions and proposed findings not discussed in this report nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in the proceeding.

Facts

Agreement No. 8225, dated September 7, 1955, is a lease from Port to Cargill of Port's grain elevator and wharf for 20 years, with option for renewal for another 20-year term. Article 10 thereof stipulates that the facilities shall be maintained as public port facilities; that the:

> lessee further agrees to the extent economically feasible that it will give preference to this grain elevator over other grain elevators operated by lessee in the Gulf area

and that:

[1] Pertinent portions of sections 15, 16, and 17 are reproduced in the appendix.

lessee is to maintain and publish rates and charges for the handling and storage of grain upon or within the facility on a competitive basis to rates published for similar services at New Orleans and other competitive Gulf ports * * *.

Article 17 provides in part that:

The lessor agrees that its rates for any and all privileges and services shall be competitive with, and not greater than, rates for similar services and privileges charged at other Gulf ports

and that:

during the term of this lease Cargill shall have the exclusive right to operate hereunder a public grain elevator within the Port Area as such area is defined by law

and that if:

the Port decides to construct additional grain storage and handling facilities, Port must first offer such facilities to Cargill for operation * * *.[2]

Agreement No. 8225–1, dated March 22, 1957, amended Article 10 and provides that Cargill will render stevedoring services exclusively, at rates competitive with New Orleans and other competitive Gulf ports.

Cargill is licensed by the Department of Agriculture (Agriculture), in accordance with the United States Warehouse Act (7 U.S.C. 241, *et seq.*), to conduct the grain elevator, which is described in the license as consisting of tanks, bins, etc., located between Louisiana Highway No. 1 and the levee of the Mississippi River one mile south of Port Allen, La. Not mentioned are the wharf, loading galleries, chutes, and other paraphernalia used in the delivery of grain to vessels, which installations are located on the river side of the levee in the river itself and outside the area described in the license. Cargill, referred to as "warehousemen," is authorized to store not in excess of 2,800,000 bushels at any one time.

Agreement No. 8225–1 and a schedule of charges for receiving, unloading, handling, storing, delivering, loading, and stevedoring has been filed by Cargill with Agriculture. The rates were accepted and the agreement was not disapproved.[3] The licensing by and filing with Agriculture are relied upon by Cargill in support of its contention that the primary regulatory authority over its activities rests with Agriculture and not with the Board.

Certain preliminary functions are performed by the stevedore before the ship goes to the elevator. For instance, he must know the

[2] The elevator is financed by Port with money received as rent from Cargill.

[3] There is no showing that the Warehouse Act or the rules and regulations thereunder require the filing with Agriculture of stevedoring rates or the lease agreements.

capacity of each compartment of the ship; the terms of the charter party and the kinds of grain involved; the overtime provisions, and apply them in the best interest of the ship owner; and the ship's condition as to grain fitting, and must install or repair them as needed. The ship must be "laid out" and the stowage carefully planned with due respect to proper draft and distribution, as well as the discharge of grain in the several ports in the proper rotation. Also, he must cooperate with the various inspection services to obtain the proper authorization before loading.

The loading of grain vessels requires skill and judgment to assure the ship's seaworthiness. The relation between vessel and stevedore involves trust, reliance, and dependence on the skill, reliability, and efficiency of the stevedore in the performance of an important ship-operating function. Under the form of grain charter used in the Gulf, including Baton Rouge, the vessel owner appoints the stevedore, except where by special provision the right of appointing is given the charterer. In all instances the decision on all matters of loading rests with the master, the vessel and her owners are legally and contractually responsible for the proper loading and seaworthiness of the vessel, and they pay the cost of loading.

There is a complete separation of the function of the elevator in delivering grain and that of the vessel in receiving and stowing it. There is no physical connection between vessel and elevator except mooring and guide lines. The latter hold the spout which discharges the grain into the hatch under control of the stevedore. The elevator has completed delivery when the grain flows out of the spout. All remaining functions are those of the stevedore, who in effect takes over the ship's operation for the time being.[4] The elevator personnel perform no function on the vessel; the stevedore personnel perform no services in the elevator or on the wharf. There is, of course, necessity for cooperation between the two groups as the stevedores must signal terminal personnel in order to control the flow of grain.

Port commenced operations as a newly expanded general cargo and grain port with the opening of the grain elevator in September 1955. Cargill published Tariff No. One, effective July 1, 1955, embodying charges for storage, receipt, and delivery of grain, but not for berthing and loading of vessels. Later, rates for berthing and loading of vessels were published in Vessel Tariff No. One, effective October 4, 1955, which gave preference to ocean liners for berthing.[5]

[4] As grain is dropped into the ship, samples are taken to a laboratory licensed by Agriculture for inspection to determine its quality. The elevator must correct any mistakes resulting from delivery of the wrong grade or type of grain through the spout.

[5] This tariff was superseded by a similar tariff—Vessel Tariff No. Two—effective October 1, 1957.

In the meantime, four Gulf stevedoring firms[6]—with the encouragement of Port and Cargill, and with the advice from Cargill that the elevator would be "open" to stevedores and not operated on an exclusive basis, and that the stevedore would have to deal directly with the vessel—organized BARMA to supply agency and stevedoring services, particularly on grain, at Baton Rouge. Previously, these firms had solicited and sought from Cargill (unsuccessfully) an exclusive stevedoring agreement, but finally decided to organize a joint company in view of the substantial capital investment required for trimming machines. BARMA purchased equipment, including grain trimming machines, opened and staffed an office in Baton Rouge, and commenced procuring supervisory personnel and labor, most of which had to be trained. Because of this and difficulties encountered with the new elevator, which has only one delivery belt, efficiency and turnaround of vessels was not up to par, beginning with loading of the first grain vessel in September 1955. By spring of 1956, however, after many meetings between Cargill and BARMA relative to means of improvement, efficiency was improved and the operation compared favorably with that at other Gulf elevators having only one delivery belt. Due to inexperienced labor, plus the unknown quantities involved in handling the new grain facilities, BARMA's original stevedoring rates were fixed somewhat higher than at New Orleans. They are still slightly higher although the labor rate per hour at Baton Rouge has been lower than at New Orleans.

In August 1956, after renewing complaints to BARMA about dispatch,[7] Cargill brought into Baton Rouge its wholly owned subsidiary, Rogers Terminal and Shipping Corporation (Rogers), and advised BARMA that it was no longer welcome at the elevator, and that thereafter all the grain stevedoring would be done by Rogers. BARMA refused to withdraw, and in March 1957, respondents, without notice to BARMA, entered into the exclusive stevedoring arrangement by execution of Agreement 8225–1. Port made no inquiry as to how Cargill would conduct the stevedoring operation. After this ar-

[6] Texas Transport and Terminal Corp., Atlantic & Gulf Stevedores, Inc., Strachan Shipping Co., and T. Smith & Son, Inc., which serve Gulf ports generally and perform approximately 75 percent of grain stevedoring at New Orleans. These companies designate BARMA as Baton Rouge agent for all vessels represented by them in New Orleans.

[7] Cargill's elevator superintendent testified that at a meeting on August 9, 1956, he complained to BARMA's officials about the efficiency of its superintendent. This, the officials could not recall. Cargill's superintendent also testified as to other complaints, but he could recall only one instance of what he termed a lack of cooperation, which was explained by BARMA's general manager as due to the orders of the master of the vessel. At this meeting BARMA presented data to Cargill showing that dispatch and turnaround at Baton Rouge compared very favorably with that at New Orleans and other Gulf ports as to vessels handling only one grade or type of grain. Neither Cargill nor Port made any complaints in writing.

rangement the Baton Rouge elevator was the only one of nine elevators in the Gulf area not "open" to stevedores.

The reason given for the amended agreement is that the loading of vessels may be "integrated into the over-all elevator operation so as to provide a more efficient service." The performance records indicate, however, that the average hourly tonnage loaded by BARMA has exceeded that of Rogers by a substantial percentage, both before and after the exclusive arrangement. Rogers hired away from BARMA some of its key supervisory personnel. Both use the same type of equipment and the same union labor force and pay the same wages. Their stevedoring rates are the same except for such discount as is given by BARMA for an annual contract with the shipowner.

Since the advent of Rogers, Cargill's affiliates [8] have appointed it as stevedore. BARMA has been able, however, to hold on to half of the grain stevedoring business at Baton Rouge and 80–85 percent of business on vessels having the right to select the stevedore. BARMA is in a sound financial position, but its vice-president testified that the loss of grain business, which provides its largest income, probably would force it to go out of business.

In *D. J. Roach, Inc.* v. *Albany Port District et al.*, 5 F.M.B. 333 (1957), the Board decided that the Warehouse Act relates to the storage of grain as opposed to its movement, and that it did not limit the jurisdiction of the Board over Cargill's activities at Albany, N.Y., as an "other person subject to this act." Soon thereafter, Cargill published at Baton Rouge Tariff No. Two, effective November 7, 1957, which superseded both its tariff covering storage, etc. (Tariff No. One) and its tariff covering berthing and loading (Vessel Tariff No. Two), the latter of which had been in effect only since October 1, 1957. (See footnote 5.) The new tariff, which, as stated, was filed with Agriculture, combines into one document the hitherto separate elements of its two predecessors—storage of grain and berthing and loading of vessels. It publishes for the first time rates for stevedoring services, and provides for vessel owner's application for and Cargill's approval of berth occupancy, which constitutes a contract between them to abide by the terms of the tariff. Like its predecessor, the new tariff provides that ocean liners shall be given preference. The elevator is open to both common and contract carriers. No change in practice resulted from publishing Tariff No. Two. Cargill has not required the exclusive use of its stevedoring service, or charged the stevedoring rates in Tariff No. Two, or required signed applications for berthing service. Thus it appears that Agreement 8225–1 has not been carried out prior to approval by the Board.

[8] By itself or through affiliates, Cargill is a substantial charterer of grain vessels.

We first conclude, as did the examiner, that the fact that Cargill's grain storage activities are regulated by the Secretary of Agriculture under the Warehouse Act, in no way limits our jurisdiction over Cargill's terminal activities under the Shipping Act, 1916. *D. J. Roach, Inc.* v. *Albany Port District et al., supra.*

Cargill operates terminal facilities in Baton Rouge and in other areas, and is clearly an "other person" subject to the Act. Port operates a public general cargo dock and admits that it is an "other person" subject to the Act, and we find that the agreements here involved are between such "other person[s]."

If agreement No. 8225 and amendment No. 8225–1 are agreements in any way—

> * * * fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement—

then section 15 of the Act requires filing with and approval by the Board before they may be carried out.

We consider first the original lease, Agreement No. 8225.

Cargill urges, and the examiner found, that this agreement was purely and simply a lease establishing Cargill as a tenant and Port as a landlord; that it did not limit and restrain competition between the parties; and that it did not fix rates, or prevent, destroy, etc., competition, or constitute a working arrangement within the meaning of section 15. With this we cannot agree.

Agreement No. 8225 goes far beyond the usual provisions of a mere lease of property. Article 10 recognizes that Cargill operates other grain elevator facilities in the Gulf area, and provides that Cargill will prefer the Baton Rouge facility over such other facilities in the Gulf area. Article 17 provides that Cargill will maintain rates competitive with but not greater than rates at other Gulf ports; that Cargill has the exclusive right to operate the terminal for up to 40 years; and that if Port should construct additional grain facilities, such facilities would be first offered to Cargill for operation.

These provisions fix and regulate transportation rates or fares, give special privileges or advantages, control, regulate, prevent, or destroy competition, and provide for an exclusive, preferential, or cooperative working arrangement within the meaning of section 15. This exclusive lease has never been approved by the Board as required by sec-

tion 15, but has been carried out by the parties since September 7, 1955. To this extent, Cargill and Port have acted unlawfully and in violation of section 15.

We find nothing in the record, however, which indicates that Agreement No. 8225 in any way is unjustly discriminatory or unfair, detrimental to the commerce of the United States, or in violation of the Act. Publication of notice of Agreement No. 8225 in the Federal Register on May 25, 1957, elicited no protest other than that of BARMA, which was primarily directed to the subject matter of the amendment, Agreement No. 8225–1. In view of the foregoing, we will approve Agreement No. 8225.

We next consider whether the modification of the lease agreement, Agreement No. 8225–1, requires approval under section 15, and if so, whether such approval should be given.

Agreement No. 8225–1 clearly is within the coverage of section 15. It is between "other person[s]" subject to the Act and provides that Cargill will render stevedoring services exclusively at the grain terminal here involved. This modification of the lease agreement controls and regulates competition, and requires approval by the Board under section 15 before it may be carried out. It is apparent that the agreement has not been carried out by the parties without approval, in violation of section 15.

The clear purpose and intent of Agreement No. 8225–1 is to vest in Cargill the exclusive right to provide stevedoring at this grain terminal in Baton Rouge. The effectuation of this monopoly would result in all the grain trimming on vessels using the terminal being done by Cargill's wholly owned subsidiary, Rogers, while neither BARMA nor any other stevedore could provide such service. Vessels using the grain facility would be foreclosed from choosing any stevedore except Rogers to trim grain as it is loaded into the vessel.

The particular operation performed by the stevedores at this grain elevator involves merely the trimming of the grain in the vessel; none of the stevedore activity here in issue involves the use of any of the property or facilities of the terminal. Responsibility for the proper loading and seaworthiness of the vessel rests with the master, and to permit Port and Cargill to prohibit the vessel from participation in the selection of a stevedore would require strong justification.

We do not consider the justification advanced by Cargill and Port to be persuasive. The record does not show that a monopoly of stevedoring in Cargill's subsidiary, Rogers, will improve the efficiency of the grain terminal, but does show that BARMA has gradually improved its stevedoring service, which has, in fact, evidenced some superiority over that of Rogers.

In view of the foregoing, and the further fact that Agreement No. 8225–1 would create in Cargill a monopoly over activities which take place exclusively on the vessel and not on terminal property, we conclude that Agreement No. 8225–1 would be detrimental to the commerce of the United States, and would be an unjust and unreasonable practice relating to the receiving, handling, and storing of property, in violation of section 17 of the Act. We will not approve Agreement No. 8225–1.

The conclusion here reached is not in conflict with our decision in *Roach*, *supra*, where there was no showing that Cargill had been granted an exclusive stevedoring right by the Albany lease, and the issue involved was the right of Cargill, where it had entered into a stevedoring contract with the vessel, to appoint a sub-agent of its own choosing.

An appropriate order will be entered.

Appendix

Section 15, Shipping Act, 1916, in part:

That every common carrier by water, or other person subject to this Act, shall file immediately with the board a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this Act, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character or sailings between ports: limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The board may by order disapprove, cancel, or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

Agreements existing at the time of the organization of the board shall be lawful until disapproved by the board. It shall be unlawful to carry out any agreement or any portion thereof disapproved by the board.

All agreements, modifications, or cancellations made after the organization of the board shall be lawful only when and as long as approved by the board, and before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

Section 16, Shipping Act, 1916, in part:

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

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

Section 17, Shipping Act, 1916, in part:

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

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 6th day of August A.D. 1959

No. 830

AGREEMENTS NOS. 8225 AND 8225–1, BETWEEN GREATER BATON ROUGE PORT COMMISSION AND CARGILL, INC.

This proceeding having been instituted by the Board on its own motion, and having been duly heard and submitted by the parties, and full investigation of the matters and things having been had, and the Board, on the date hereof, having made and entered of record a report stating its conclusions and decision thereon, which report is hereby referred to and made a part hereof:

It is ordered, That Agreement No. 8225 be, and it is hereby, approved; and

It is further ordered, That Agreement No. 8225–1 not be approved; and

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

BY THE BOARD.

(Sgd.) GEO. A. VIEHMANN,
Assistant Secretary.

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–99

FARRELL LINES INCORPORATED—APPLICATION UNDER SECTION 805(a)

Submitted August 19, 1959. Decided August 19, 1959

One voyage of the SS *African Pilot*, commencing on or about August 25, 1959, carrying lumber or lumber products from United States Pacific ports to United States North Atlantic ports, or general cargo to United States Gulf ports, found not to result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service, and not to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended.

Ronald A. Capone for Farrell Lines Incorporated.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE DEPUTY MARITIME ADMINISTRATOR

BY THE DEPUTY ADMINISTRATOR:

Farrell Lines Incorporated (Farrell) has applied for written permission of the Maritime Administrator, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act), 46 U.S.C. 1223, for its owned vessel the SS *African Pilot*, which is under charter to States Marine Lines, Inc. (States Marine), to engage in one intercoastal voyage commencing at United States Pacific ports on or about August 25, 1959, carrying lumber or lumber products to United States North Atlantic ports, or general cargo to United States Gulf ports. Notice of hearing was published in the Federal Register of August 13, 1959 (24 F.R. 6584), and hearing was held before the Chief Examiner. There were no petitions to intervene and no one appeared in opposition to the application.

The Chief Examiner issued an oral initial decision at the close of the hearing. He found and concluded that since no intervener appeared after proper publication of notice, and since no exclusively domestic operator has indicated opposition to the requested sailing, the granting of the requested written permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, and will not be prejudicial to the objects and policy of the Act, and that written permission should be granted. The parties stipulated that no exceptions to these findings and conclusions would be filed.

I adopt the foregoing findings and conclusions of the Chief Examiner, and this report will serve as written permission for the requested voyage.

FEDERAL MARITIME BOARD

SPECIAL DOCKET NO. 242

KETCHIKAN SPRUCE MILLS

v.

COASTWISE LINE

*Submitted September 17, 1959. Decided September 17, 1959**

Rate charged by respondent on a shipment of insulating material from Long Beach, California, to Seward, Alaska, destined to Fairbanks, Alaska, not shown to be unreasonable. Application denied.

INITIAL DECISION OF C. W. ROBINSON, EXAMINER

Pursuant to Rule 6 (b) of the Board's Rules of Practice and Procedure, sworn application has been submitted by respondent to permit it voluntarily to pay reparation to complainant.

By bill of lading dated October 8, 1958, respondent accepted from Johns-Manville Products Corporation 15,512 pounds of mineral wool (insulating material) for carriage by respondent from Long Beach, California, to Seward, Alaska, thence by Alaska Railroad to Fairbanks, Alaska, consigned to Fairbanks Lumber Supply. The material was purchased by complainant, which was billed by the shipper for the freight charges.

Measuring 3,695 cubic feet, the commodity involved was billed as 55,425 pounds in accordance with Item 102, First Revised Page 18–B, of respondent's Freight Tariff 3–A, F.M.B.–F No. 6.[1] The rate charged was $4.14 per 100 pounds, plus surcharge of 15 percent (or a total rate of $4.76), in accordance with Item 750, 13th Revised Page 35, and Item 57, 4th Revised Page 15, of the said tariff, plus wharf-

*In the absence of exceptions thereto by the parties, and upon notice by the Board, the initial decision became the decision of the Board on the date shown (section 8(a) of the Administrative Procedure Act and Rules (13(d) and 13(h) of the Board's Rules of Practice and Procedure).

[1] Item 102 provides as follows:

"When light and bulky articles are accepted, the weight of which is less than fifteen (15) pounds per cubic foot of space occupied, the charges on such light and bulky shipments will be computed by applying the commodity or class rate applicable, based on a weight of fifteen (15) pounds for each cubic foot of space occupied."

age at Long Beach of $5.43. The total charges collected by respondent for its portion of the transportation amounted to $2,643.66, including Long Beach wharfage.[2]

Complainant states that the assessed charges did not come to its attention until the invoice for the shipment was received from the shipper, and it contends that if it had been informed by the shipper, prior to shipment, what the charges would have been via the route actually used, it would have instructed routing from Long Beach to Seattle, Washington, by rail, thence by Alaska Steamship Company to Seward, and thence by rail to Fairbanks, at a total cost of $1,792.42. Refund of $1,422.08 is asked from respondent (refund of $1,468.80 is being sought from Alaska Railroad), on the basis set out in footnote 3.

The application of the rate was explained by respondent to the shipper prior to acceptance of the shipment. Thus, the shipment was made with full knowledge of the legal rate on file with the Board. Having accepted the shipment, respondent was obligated to charge the applicable rate. The payment of reparation under the special docket procedure, whereby the shipper is willing to receive and the carrier is willing to pay, can be approved only upon an affirmative finding that the rate charged was in fact unreasonable, in the same manner as if the carrier were opposing the payment. *Swift & Co.* v. *C. & A.R. R. Co.*, 16 I.C.C. 426, 428 (1909); *Pabst Brewing Co.* v. *C., M. & St. P. Ry. Co.*, 17 I.C.C., 359, 360 (1909). The mere fact, without more, that the ultimate consignee (complainant here) would have routed the shipment via an alternative route, at a lesser total cost, does not justify the conclusion that the rate charged was unreasonable. As there has been no showing that the rate under consideration was unlawful, respondent may not refund the difference between such rate and the rate which would have been applicable had the shipment been routed in the manner outlined by complainant.

The application is denied.

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[2] The application states that respondent collected $2,039.64 for Alaska Railroad as the latter's share of the transportation, in accordance with Item 1540 of Tariff No. 5–M of the latter. The rail tariff is not on file with the Board.

[3]

Respondent's share of rate charged	$2, 638. 23
Respondent would have received on actual weight	738. 37
	1, 899. 86
Less additional cost via alternative route	477. 78
Refund sought	1, 422. 08

DEPARTMENT OF COMMERCE
MARITIME ADMINISTRATION

No. S–100

MOORE-MCCORMACK LINES, INC.—APPLICATION UNDER SECTION 805(a)

Submitted November 10, 1959. Decided November 10, 1959

Moore-McCormack Lines, Inc., granted written permission under section 805(a) of the Merchant Marine Act, 1936, as amended, for its own vessel the SS *Mormacpine*, presently under time charter to States Marine Lines, Inc., to be subchartered to Luckenbach Steamship Co., Inc., for one intercoastal voyage carrying general cargo from the San Francisco Bay area to United States North Atlantic ports, commencing on or about November 14, 1959, since granting of the permission found (1) not to result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, and (2) not to be prejudicial to the objects and policy of the Act.

Ira L. Ewers and *R. J. Thompson* for applicant.

J. Alton Boyer for Luckenbach Steamship Co., Inc., *Ira L. Ewers* of counsel.

Ira L. Ewers for States Marine Lines., Inc.

Robert E. Mitchell, *Edward Aptaker*, and *Robert C. Bamford* as Public Counsel.

REPORT OF THE MARITIME ADMINISTRATOR

BY THE ADMINISTRATOR:

Moore-McCormack Lines, Inc., filed an application for written permission under section 805(a) of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1223) (the Act),[1] for its owned vessel the SS *Mormacpine*, presently under time charter to States Marine Lines, Inc., to be subchartered to Luckenbach Steamship Co., Inc., for one

[1] See appendix.

intercoastal voyage in Luckenbach's intercoastal service, carrying general cargo, commencing San Francisco Bay area on or about November 14, 1959, for discharge at United States North Atlantic ports. The *Mormacpine* is to be redelivered by the subcharterer at an east coast port on or about mid-December.

The application was duly noticed in the Federal Register of October 27, 1959 (24 F.R. 8683), and hearing was held on November 10, 1959. No one intervened in opposition to the granting of the requested permission.

The uncontroverted evidence is that Luckenbach is a common carrier of general commodities in the intercoastal trade; that regular service between United States Pacific coastal ports and North Atlantic ports north of Baltimore has been provided by Luckenbach for many years; that Luckenbach has supplemented its regular service with additional sailings with owned or chartered vessels when sufficient cargo is available to require additional sailings; that current cargo requirements are such that Luckenbach's regular vessels are unable to meet the needs of shippers; and that the *Mormacpine* is required to meet these needs.

On this record it is found that the granting of the requested permission will not result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal trade, or be prejudicial to the objects and policy of the Act.

This report will serve as written permission for the voyage.

APPENDIX

Section 805(a), Merchant Marine Act, 1936:

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic, intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

FEDERAL MARITIME BOARD

No. S–67

T. J. McCarthy Steamship Company—Application Under Section 805(a)

Submitted June 19, 1957. Decided December 4, 1959

Continuation of its automobile carrying service between Detroit and Cleveland and between Detroit and Buffalo by T. J. McCarthy Steamship Company, in the event it is awarded an operating-differential subsidy contract, found not to constitute unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended, within the meaning of section 805(a) thereof, and written permission for the continuation of such service, in the event subsidy is awarded, granted.

Continuation of a bulk cargo service, relating to ore and coal as presently constituted, between United States ports on the Great Lakes by T. J. McCarthy Steamship Company, in the event it is awarded an operating-differential subsidy contract, found to be prejudicial to the objects and policy of the Merchant Marine Act, 1936, as amended, and written permission for the continuation of such service in the event subsidy is awarded, denied.

Paul D. Page, Jr., and *Arthur E. Tarantino* for T. J. McCarthy Steamship Company.

John H. Eisenhart, Jr., for Great Lakes Ship Owners Association, and *Donald A. Brinkworth* for Eastern Territory Railroads, interveners.

Robert E. Mitchell, Edward Aptaker, Edward Schmeltzer, and *Robert B. Hood, Jr.*, as Public Counsel.

Report of the Board

Clarence G. Morse, *Chairman*, Ben H. Guill, *Vice Chairman*, Thos. E. Stakem, Jr., *Member*

By the Board:

This proceeding relates to a request by T. J. McCarthy Steamship Company (McCarthy), an applicant for an operating-differential sub-

sidy contract, for written permission, under section 805(a) of the Merchant Marine Act, 1936, as amended (the Act),[1] to continue certain domestic water-carrier operations in the event it is awarded a subsidy contract. The domestic services which applicant proposes to continue are (1) an automobile-carrier service from Detroit to Cleveland and from Detroit to Buffalo, and (2) a bulk service between any and all United States ports on the Great Lakes (the Lakes).

Eastern Territory Railroads[2] (the railroads) and Great Lakes Ship Owners Association[3] (the Association) intervened in opposition to the request for permission.

Because we felt that the first record presented in this proceeding did not contain facts sufficient to determine the issues, we remanded the matter to the examiner for further hearing. Hearing has been held, a recommended decision has been served, exceptions and replies have been filed, and we have heard oral argument thereon.

FACTS

Automobiles.—The principal shipper of automobiles by water from Detroit to Duluth, Cleveland, and Buffalo is Chrysler Corporation (Chrysler). McCarthy has long been engaged in the water movement of automobiles from Detroit to Cleveland and to Buffalo. It has operated one vessel in the trade continuously since 1935, and two other vessels have been operated by it or its predecessor in interest since 1937, except for the years of World War II. Its three automobile carriers have been specially converted for the trade and each vessel accommodates from 420 to 450 vehicles. Cleveland and Buffalo are served on separate voyages, usually, and the vessels ballast back to Detroit after discharging. Cleveland voyages require a 24-hour turnaround whereas Buffalo voyages require a 48-hour turnaround. McCarthy owns and maintains specialized shoreside facilities at these three cities, but similar facilities other than those of McCarthy are available at those places.

Like McCarthy, Nicholson owns three bulk carriers specially converted for the automobile trade and, from 1955 through 1957, also engaged in the movement of automobiles from Detroit to Cleveland and to Buffalo.

[1] See appendix.

[2] Engaged in the transportation of persons and property between points in northeastern United States—including Detroit, Cleveland, Buffalo—and North Atlantic ports.

[3] Bison Steamship Company (Bison), Copper Steamship Company (Copper), Gartland Steamship Company (Gartland), Nicholson Transit Company (Nicholson), Oglebay Norton Company (Columbia Transportation Division) (Columbia), and Roen Steamship Company (Roen). McCarthy and the Association members are certificated by the Interstate Commerce Commission to operate common-carrier services on the Great Lakes.

In 1957, after McCarthy's application for operating-differential subsidy aid had been filed, Chrysler decided to give all of its Cleveland and Buffalo business to McCarthy and all of its Duluth business to Nicholson. It is not economically feasible, however, for Nicholson to employ its specially converted automobile carriers in the Detroit-Duluth service (the turnaround time being six days), and vessels must be employed which can accommodate return bulk cargoes, principally iron ore and grain. Thus, since 1957, Nicholson's three converted auto carriers have been tied up for lack of business. The record shows that these three vessels were employed exclusively between Detroit and Cleveland and Buffalo.

Gartland and Columbia occasionally carry automobiles but they do not compete with Nicholson or McCarthy.

In 1953 both McCarthy's and Nicholson's auto carriers were fully utilized, but offerings have decreased since that time, and the establishment of an assembly plant by Chrysler in Delaware will tend to prevent the 1953 eastward volume of automobiles from Detroit from occurring in the foreseeable future. McCarthy's own witness is of the view that three automobile vessels can accommodate all the automobiles offered in the foreseeable future.

Bulk trades.—Between 1953 and 1956, about 98 percent of all traffic moving on the Lakes between U.S. ports and U.S. and Canadian ports was bulk cargo, most of it being proprietary cargo and consisting, chiefly, of iron ore, coal, limestone, and grain. The domestic bulk movement on the Lakes has declined from 165,000,000 short tons in 1954 to 153,000,000 short tons in 1956. In 1956 the Association carried less than 10 percent of the available bulk cargoes. In 1957 McCarthy acquired four bulk carriers from Wilson Transit Company, at which time it obligated itself to carry part of the ore which Wilson had contracted to carry for Republic Steel. This contract has three years to run and Wilson has the option to continue it for another five years. Under the contract, McCarthy is required to carry a maximum of 700,000 tons of ore per season for Wilson.

McCarthy's bulk vessels, at the opening of the navigation season, sail for Lake Superior to load ore or other available cargo and generally unload at Lake Erie ports. Occasionally, coal is carried north but more often the vessels travel light in that direction. Grain, salt, sand, and stone are also carried. Although a profit was realized in 1957, McCarthy's bulk service resulted in a loss of $100,000 in 1958.

In 1957, McCarthy made about 300 calls at approximately 20 ports, carrying about 1,093,584 short tons. The capacity of its four vessels is slightly under 30,000 tons or about 3 percent of the capacity of all the independent companies on the Lakes.

In addition to the three converted vessels operated in the eastbound automobile trade, Nicholson also operates nine vessels on the Lakes: four are engaged in the transportation of automobiles to Duluth and bulk cargoes on return, four are used chiefly on Lake Erie in the regulated trade, and one is used generally in the regulated trade, sometimes carrying bulk goods. Grain is the principal bulk commodity handled, and Nicholson is chiefly competitive with McCarthy in the grain and coal carrying business. Nicholson's vessels have served Canada, and under its grain contracts it may be required to call at Canadian ports. Nicholson's vessels are not suitable for carrying ore.

Columbia operates nine bulk carriers on the Lakes. None of its vessels were laid up for lack of cargo in 1956 or 1957, but four were inactive in 1958. Its vessels have consistently called at Canadian ports, and its witness testified that all its vessels are available for Canadian calls.

Four bulk carriers are operated on the Lakes by Gartland, carrying grain, coal, and ore. All its vessels sailed substantially full in 1958, and Canadian ports are served as attractive cargoes are offered.

Bison, Roen, and Copper took no active part in the hearings. Bison owned no floating equipment and had no operating revenue for 1948, the last year for which it filed an annual report with the Interstate Commerce Commission. Copper owns no floating equipment and carried only manufactured goods from Detroit to Duluth. Roen operates tugs and barges only, and has served Canadian ports with its equipment.

Since McCarthy entered the bulk trades, the carryings of coal and grain by the Association members have declined: the combined grain movement of Nicholson, Gartland, and Columbia decreased from 33,000,000 bushels in 1957 to 32,000,000 bushels in 1958, and the coal movement of Nicholson and Columbia decreased from 988,000 tons in 1957 to 433,000 tons in 1958.

Discussion and Conclusion

Written permission to continue its two separate domestic services cannot be granted McCarthy, absent a finding that applicant qualified for the permission under the so-called "grandfather" rights proviso,[4] if it is found that the continuation of such service or services (1) would result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service, or (2) would be prejudicial to the objects and policy of the Act.

[4] "Grandfather" rights were not asserted by McCarthy, hence we have no concern with that proviso.

Not being an entity engaged in the operation of vessels in the coastwise or intercoastal service, and in order to prevail, intervener railroads must show that "the objects and policy of this Act" relate somehow to railroad interests. It is clear, however, as the examiner found, that we are concerned with the objects and policy of *this* Act as opposed to an over-all transportation policy, and that the policy of the Act is specified in section 101: "* * * to foster the development of * * * a merchant marine." The contentions of the railroads therefore must be rejected.

Automobiles.—The record supports the finding that in the operation of its three specially converted automobile carriers from Detroit to Cleveland and Buffalo, Nicholson is an operator "furnishing [a domestic] service that does not include foreign ports," and regardless of the Canadian calls made by this operator in its bulk operations, it is, as to the eastbound automobile trade from Detroit, entitled to the protection which section 805(a) affords exclusively domestic operators. *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17*, 3 F.M.B.—M.A. 457 (1951); *American President Lines, Ltd.—Subsidy, Route 17*, 4 F.M.B.—M.A. 488 (1954). Therefore, if the grant of permission would result in unfair competition to Nicholson in this trade, the permission must be denied.

There is no indication here that the grant of permission to McCarthy would result in McCarthy's ability to compete with Nicholson for additional automobile business. We are called upon to decide whether the retention by McCarthy of its present business would result in unfair competition to Nicholson, and we are urged to apply the so-called "fundamentally entitled" doctrine here, with the result that applicant would be ousted from a business which it long ago established.

The doctrine, we feel, has no applicability to this peculiar situation. It had its beginning in *Am. Pres. Lines, Ltd.—Unsubsidized Operation, Route 17, supra.* An application for section-805(a) permission was denied in that proceeding because the proposed service would "deprive the regular intercoastal lines of cargo which they need, have the capacity to carry, and to which they are fundamentally entitled." There was involved an established subsidized operator's attempt to inaugurate a new intercoastal service in conjunction with an unsubsidized foreign service. In *American President Lines, Ltd.—Subsidy, Route 17, supra*, again the situation presented involved an application to institute a new domestic service, and the Board applied the rule: "* * * those operators who provide exclusively intercoastal services are entitled, as against primarily offshore operators such as APL, to

whatever intercoastal cargo they can carry." In *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, 5 F.M.B.—M.A. 287 (1957), a subsidized operator sought to initiate a service to Hawaii and the Board, relying upon the doctrine here under discussion, denied the permission: "* * * in conformity with principles previously announced * * * we feel that Matson, an exclusively domestic operator in the California/Hawaii trade, has the capacity to carry such cargoes and, as opposed to PFEL, primarily a subsidized offshore operator, is fundamentally entitled to such cargoes." In *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, 5 F.M.B. 448 (1958), the doctrine was relied upon to deny permission to applicant for an eastbound intercoastal service to ports north of Baltimore and for a Puerto Rico-Philadelphia-Baltimore service, as an integral part of the proposed subsidized service. In invoking the doctrine in the former service we noted that the exclusively domestic operator, long established in the trade, had the ability to carry the cargoes and the need for them. Similarly, in the Puerto Rico-Philadelphia-Baltimore service, the long-established exclusively domestic operator was protected by the doctrine.

The facts in the instant application present an entirely different situation: McCarthy, a long-established domestic operator, desirous of pioneering a foreign service on Trade Route 32, is seeking permission to retain a domestic service with which it has been long identified and which would be separate and apart from its proposed subsidized service. The fundamentally entitled doctrine has been employed (a) to deny permission to a subsidized operator to inaugurate a new domestic service where established domestic operators entitled to protection have the need for, and capacity to carry, cargoes which the applicant would attract (*Am. Pres. Lines, Ltd.—Unsubsidized Operation Route 17*, *American President Lines, Ltd.—Subsidy, Route 17*, and *Pacific Far East Line, Inc.—Sec. 805(a) Calls at Hawaii*, *supra*), and (b) to deny permission to a subsidy applicant to continue domestic services as part of subsidized offshore services using subsidized vessels where such domestic services have been served by domestic operators who need the cargo and have the ability to carry it (*Isbrandtsen Co., Inc.—Subsidy, E/B Round the World*, *supra*). We will not extend the fundamentally entitled doctrine to deny the continuation of an exclusively domestic service by a subsidy applicant where, as here, the applicant has a long and continued association with the protected trade, and where he proposes to operate such service separate from his subsidized service. If we did, such an operator could not participate in the development of our merchant marine by

inaugurating a separate and distinct subsidized service without suffering the penalty of being ousted from his unconnected traditional domestic service. We find that the continuation of the automobile business by McCarthy, in the event subsidy is awarded, would not result in unfair competition to any person, firm, or corporation engaged exclusively in the coastwise or intercoastal service.

Nor can we find that the granting of the permission would be prejudicial to the objects and policy of the Act. The denial of the application on this ground would, as the examiner found, result merely in the deactivation of McCarthy's three automobile carriers and the reactivation of Nicholson's three carriers. This would not constitute a furtherance of the policy of the Act, and would result in a denial to the principal shipper of his choice of carriers. We therefore find that permission to engage in the automobile carrying business from Detroit to Buffalo and to Cleveland, in the event subsidy is awarded, would not be prejudicial to the objects and policy of the Act. Section-805(a) permission for this service will be granted, as a separate and distinct service from the proposed subsidized service.

Bulk trades.—None of the interveners operates, within the meaning of section 805(a), an exclusively domestic service in the bulk trades; hence, whether or not the requested permission should be granted depends upon whether the continued operation would be prejudicial to the objects and policy of the Act. *Isbrandtsen Co., Inc.—Subsidy, E/B Round the World, supra.*

Ore, coal, and grain are the chief commodities carried in the bulk trades by McCarthy. About one-half of its total movement—1,093,000 tons—consists of ore which it is obligated to carry for Wilson Transit Company—a maximum of 700,000 tons per year. The balance is mainly coal and grain. With the opening of the St. Lawrence Seaway, it is expected that much of the grain which moved to Buffalo and then overland to an Atlantic port will move directly to foreign destinations, resulting in a total movement reserved to Lakes carriers somewhat smaller than in pre-Seaway days.

Although the intervening carriers have not been exclusively engaged in the domestic trades, it is clear on this record that they have been long associated with the movement of bulk cargoes on the Lakes, devoted primarily to the protected services. This area of McCarthy's operations was inaugurated only in 1957.

The volume of domestic ore carryings has been down for the past few years—although it was anticipated that it would improve in 1959—and with the opening of the new Seaway, the future of the domestic grain movement eastbound is not bright. The result will be additional vessel space competing for existing bulk cargoes.

The facts presented here are very similar to those presented, in part, in the *Isbrandtsen* case, *supra*. We refer to that portion of Isbrandtsen's application requesting 805(a) permission to continue, as a subsidized operator, a Gulf-North Atlantic bulk service. Isbrandtsen was a comparative newcomer to the trade, and in denying the permission, on the ground that the continuation of the service would be prejudicial to the objects and policy of the Act, the Board found that the interveners—primarily domestic operators traditionally associated with the trade—were capable of handling the needs of the domestic shippers, particularly in view of a declining sulphur movement. Here ore has a generally declining recent history, the future of the domestic grain movement is bleak, interveners—primarily domestic operators—have vessel space to accommodate all of the offerings, and McCarthy has been in the trades only since 1957. There is no material difference between this case and the *Isbrandtsen* case in this respect.

We find that the continuation by McCarthy of its bulk-trade service, in the event subsidy is awarded, would be prejudicial to the objects and policy of the Act, and written permission for such service, in the event subsidy is awarded, will be denied.

In the absence of later action by the Board, this report shall serve as written permission for the waivers granted herein, in the event subsidy is awarded.

APPENDIX

Section 805(a), Merchant Marine Act, 1936:

It shall be unlawful to award or pay any subsidy to any contractor under authority of title VI of this Act, or to charter any vessel to any person under title VII of this Act, if said contractor or charterer, or any holding company, subsidiary, affiliate, or associate of such contractor or charterer, or any officer, director, agent, or executive thereof, directly or indirectly, shall own, operate, or charter any vessel or vessels engaged in the domestic intercoastal or coastwise service, or own any pecuniary interest, directly or indirectly, in any person or concern that owns, charters, or operates any vessel or vessels in the domestic intercoastal or coastwise service, without the written permission of the Commission. Every person, firm, or corporation having any interest in such application shall be permitted to intervene and the Commission shall give a hearing to the applicant and the intervenors. The Commission shall not grant any such application if the Commission finds it will result in unfair competition to any person, firm, or corporation operating exclusively in the coastwise or intercoastal service or that it would be prejudicial to the objects and policy of this Act: *Provided*, That if such contractor or other person above-described or a predecessor in interest was in bona fide operation as a common carrier by water in the domestic intercoastal, or coastwise trade in 1935 over the route or routes or in the trade or trades for which application is made and has so operated since that time or if engaged in furnishing seasonal service only, was in bona fide operation in 1935 during the season ordinarily covered by its operation, except in either event, as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall grant such permission without requiring further proof that public interest and convenience will be served by such operation, and without further proceedings as to the competition in such route or trade.

If such application be allowed, it shall be unlawful for any of the persons mentioned in this section to divert, directly or indirectly, any moneys, property, or other thing of value, used in foreign-trade operations, for which a subsidy is paid by the United States, into any such coastwise or intercoastal operations; and whosoever shall violate this provision shall be guilty of a misdemeanor.

ORDER

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D.C., on the 14th day of December A.D. 1959.

No. S–57

STATES MARINE CORPORATION AND STATES MARINE CORPORATION OF DELAWARE—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON THEIR TRICONTINENT, PACIFIC COAST/FAR EAST, AND GULF/MEDITERRANEAN SERVICES

No. S–68

MATSON ORIENT LINE, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY ON TRADE ROUTE NO. 12 (U.S. ATLANTIC/FAR EAST)

No. S–72

ISTHMIAN LINES, INC.—APPLICATION FOR OPERATING-DIFFERENTIAL SUBSIDY AGREEMENT

United States Lines Company (USL), an intervener in these proceedings, has filed a petition for their reopening and consolidation for the purpose of holding further hearings. States Marine Corporation and States Marine Corporation of Delaware (both as SML), joint applicants for subsidy in No. S–57, and Isthmian Lines, Inc. (Isthmian), an applicant for subsidy in No. S–72, have filed a joint reply in opposition to the petition. Matson Orient Line, Inc. (Matson Orient), the applicant in No. S–68, and Public Counsel also filed replies in opposition to the petition.

The gravamen of the petition is that Agreements Nos. 8337 and 8337–1 between SML, Matson Orient, and Isthmian, as amended, and relating to their proposed subsidized services on Trade Route No. 12, present far different issues of undue prejudice under section 605(c) of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1175 (the Act), than were developed at the hearings in these proceedings.

We note that in Nos. S–57 and S–68 it was specifically found by the Board that the service already provided by vessels of United States registry on Trade Route No. 12 is inadequate and that in the accomplishment of the purposes and policy of the Act the 12 to 24 direct sailings, plus 12 additional sailings per year proposed by SML and the 18 to 24 sailings per year proposed by Matson Orient, in Nos. S–57 and S–68, respectively, should be operated thereon. In view of this conclusion, undue prejudice could not be a dispositive issue. *States Steamship Co.—Subsidy, Pacific Coast/Far East*, 5 F.M.B. 304 (1957).

There remains for consideration whether granting of the proposed subsidy to Isthmian in No. 72 for the Trade Route 12 leg of its westbound round-the-world service would result in undue prejudice to petitioner. In that proceeding the record has been closed and there remains pending only the decision of the Board. In the event it is found, in that proceeding, that Trade Route No. 12 is inadequately served and that in the accomplishment of the purposes and policy of the Act additional vessels should be operated thereon, the issue of undue prejudice likewise would be obviated.

In view of the foregoing:

It is ordered, That the petition for reopening and consolidated further hearings be, and it is hereby, denied.

By the Board.

(Sgd.) JAMES L. PIMPER,
Secretary.