DECISIONS OF THE
FEDERAL MARITIME COMMISSION

VOLUME 8

MARCH 1964 TO APRIL 1965

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1966

For sale by the Superintendent of Documents, U.S. Government Printing Office
Washington, D.C., 20402 - Price $3.50

FEDERAL MARITIME COMMISSION

JOHN HARLLEE, *Chairman*
JOHN S. PATTERSON, *Vice Chairman*
ASHTON C. BARRETT, *Member*
JAMES V. DAY, *Member*
GEORGE H. HEARN, *Member*
THOMAS LISI, *Secretary*

CONTENTS

	Page
Table of cases reported	v
Docket numbers of cases reported	xi
Table of cases cited	xix
Decisions of the Federal Maritime Commission	1
Table of commodities	729
Index digest	731

TABLE OF CASES REPORTED

Page

Aetna Forwarding Co., Inc.—Revocation of Freight Forwarder License.. 545
Agreement No. 134–21, Gulf/Mediterranean Ports Conference........ 459, 703
Agreement No. 8545 Between Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc.................................... 476
Agreement No. 8650—Calcutta, East Coast of India and East Pakistan/ U.S.A. Conference—Dual Rate Contract.......................... 16, 267
Agreement No. 8660—Latin America/Pacific Coast Steamship Conference & Dual Rate Contract.. 16, 267
Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade.. 712
Agreement No. 9205: Middle Atlantic Ports Dockage Agreement...... 381
Agreement No. 9218—North Atlantic Continental Freight Conference & Continental North Atlantic W/B Freight Conference.............. 170
Agreement No. T–4: Terminal Lease Agreement at Long Beach, California. 521
Agreement No. T–5: Terminal Lease Agreement at Oakland, California.. 521
Alaska Lower Yukon River Area Increased Freight Rates............. 467
Alaskan Rates and Charges, General Increases in..................... 314
Alaskan Seasonal Rate Increases (1962)............................. 1
Alaska Steamship Co.—Seasonal Rate Increases...................... 1
American & Australian Steamship Line *v.* Blue Star Line, Ltd.......... 433
American Export Lines, Inc., Bernard Bowman Corp. *v*................ 155
American Export Lines, Inc., Government of Israel Supply Mission *v*.... 14
American Export Lines, Inc., L'Aluminium Francais *v*................ 83
American Export Lines, Inc., United States, by GSA *v*.............. 280
Applebaum, Louis—Freight Forwarding License Application............ 306
Associated Steamship Lines (Manila)—Dual Rate Contract.............16, 267
Association of West Coast Steamship Companies (Coffee, Colombia/ United States Atlantic-Gulf)—Dual Rate Contract................ 16, 267
Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory, Nuts, Ecuador/United States Atlantic-Gulf)—Dual Rate Contract.... 16, 267
Atlantic & Gulf American-Flag Berth Operators, Pacific Seafarers, Inc. *v*.. 461
Atlantic and Gulf-Indonesia Conference—Dual Rate Contract.......... 16, 267
Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference—Dual Rate Contract.................................... 16, 267
Atlantic and Gulf, Singapore, Malaya and Thailand Conference—Dual Rate Contract.. 16, 267
Atlantic/Gulf Puerto Rico Trade—Increased Rates..................... 94
Atlantic and Gulf/West Coast of Central America and Mexico Conference—Dual Rate Contract..................................... 16, 267
Atlantic and Gulf/West Coast of South America Conference—Dual Rate Contract.. 16, 267
Atlantic Lines, Ltd., Barr Shipping Co., Inc. *v*...................... 638
Austrian Trade Delegate *v.* Universal Terminal & Stevedoring Corp...... 278

	Page
Barr Shipping Co., Inc. *v.* Atlantic Lines, Ltd	638
Bernard Bowman Corp. *v.* American Export Lines, Inc	155
Blue Star Line, Ltd., American & Australian Steamship Line *v*	433
Blue Star Shipping Corp., Bulkley Dunton Overseas, S. A. *v*	137
Bulkley Dunton Overseas, S. A. *v.* Blue Star Shipping Corp	137
Bunge Corp. and Southern Stevedoring Co., Inc., New Orleans Steamship Assn. *v*	687
Cabezas, Carlos H.—Freight Forwarding License Application	130
Cady, Wm. V.—Freight Forwarding License Application	352
Calcutta/U.S.A. Conference—Dual Rate Contract	16, 267
California Packing Corp. *v.* Hawaii/Orient Rate Agreement	78
California Stevedore & Ballast Co. *v.* Stockton Elevators, Inc	97
Camexco Freight Conference—Dual Rate Contract	16, 267
Canal, Central America Northbound Conference—Dual Rate Contract	16, 267
Capca Freight Conference—Dual Rate Contract	16, 267
Certain Practices of Stockton Elevators	181
Ceylon/U.S.A. Conference (Agreement 8050)—Dual Rate Contract	16, 267
Colpac Freight Conference—Dual Rate Contract	16, 267
Concordia Line, Mahlab, E. *v*	133
Continental North Atlantic W/B Freight Conference & North Atlantic Continental Freight Conference Agreement 9218	170
D. B. Turkish Cargo Line—Dual Rate Contract	16, 267
Deli-New York Rate Agreement—Dual Rate Contract	16, 267
Deli-Pacific Rate Agreement—Dual Rate Contract	16, 267
Del Mar Shipping Corp.—Freight Forwarding License Application	493
Department of State, AID *v.* Lykes Bros. S. S. Co., Inc	153
Dixie Forwarding Co., Inc.—Frieght Forwarding License Application	109, 167
Dual Rate Cases	16, 267
East Coast Columbia Conference—Dual Rate Contract	16, 267
Fall River Line Pier, Inc., International Trading Corp. of Va., Inc. *v*	145, 150
Far East Conference—Dual Rate Contract	16, 267
Flota Mercante Grancolombiana, Jordan International Co. *v*	537
F. W. Hartmann & Co., Inc., Midwest Export & Import Co. *v*	87
Galveston Cotton Co. *v.* Lykes Bros. S.S. Co., Inc	209
General Increases in Alaskan Rates and Charges	314
General Increases in Rates Pacific-Atlantic/Guam Trade	498
Government of Israel Supply Mission *v.* American Export Lines, Inc	14
Graves—Freight Forwarding License Application	109, 167
Great Lakes/Japan Trade Practices—Iino Kaiun Kaisha, Ltd., and Mitsui Steamship Co., Inc	270
Gulf/French Atlantic Hamburg Range Conference—Dual Rate Contract	16, 267
Gulf/Mediterranean Ports Conference Agreement No. 134-21	459, 703
Gulf/Mediterranean Ports Conference—Dual Rate Contract	16, 267
Gulf and South Atlantic Havana Steamship Conference—Dual Rate Contract	16, 267
Hasman & Baxt, Inc.—Misclassification of Goods in Containerized Vans	453
Havana Northbound Rate Agreement—Dual Rate Contract	16, 267
Havana Steamship Conference—Dual Rate Contract	16, 267
Hawaii/Orient Rate Agreement, California Packing Corp. *v*	78
Hellenic Lines, Ltd., Peter Bratti Associates, Inc	375
Increased Freight Rates—Alaska Lower Yukon River Area	467
Increased Rates in the Atlantic/Gulf Puerto Rico Trade	94

Page

India, Pakistan, Ceylon & Burma Outward Freight Conference—Dual Rate Contract ---- 16, 267
International Trading Corp. of Va., Inc. v. Fall River Line Pier, Inc ---- 145, 150
Ipar Transport, Limited—Dual Rate Contract ---- 16, 267
Japan Atlantic and Gulf Freight Conference—Dual Rate Contract ---- 337
Japan, Korea, Okinawa Trade Unapproved Section 15 Agreements ---- 503
Java-New York Rate Agreement—Dual Rate Contract ---- 16, 267
Java-Pacific Rate Agreement—Dual Rate Contract ---- 16, 267
Joint Agreement Between Member Lines of the Far East and Pacific Westbound Conferences ---- 553
Jordan International Co. v. Flota Mercante Grancolombiana ---- 537
Kempner, H. v. Lykes Bros. S.S. Co., Inc ---- 126, 209
L'Aluminium Francais v. American Export Lines, Inc ---- 83
Leeward and Windward Islands & Guianas Conference—Dual Rate Contract ---- 16, 267
Lloyd Brasileiro (Patrimonio Nacional), River Plate and Brazil Conference v ---- 476
Ludwig Mueller Co., Inc. v. Peralta Shipping Corp ---- 361
Lykes Bros. S.S. Co., Inc., Department of State, AID v ---- 153
Lykes Bros. S.S. Co., Inc., Galveston Cotton Co. v ---- 209
Lykes Bros. S.S. Co., Inc., Kempner, H. v ---- 126, 209
Lykes Bros. S.S. Co., Inc.—Refund of Freight Charges ---- 361
Lykes Bros. S.S. Co., Inc., Texas Cotton Industries v ---- 209
Mahlab, E. v. Concordia Line ---- 133
Matson Navigation Co., Orleans Materials and Equipment Co., Inc. v ---- 160
Middle Atlantic Ports Dockage Agreement No. 9205 ---- 381
Midwest Export & Import Co. and Green Textile Export and Import Co., Inc. v. F. W. Hartmann & Co., Inc ---- 87
Misclassification of Goods—Hasman & Baxt, Inc ---- 453
Moore-McCormack Lines, Inc., Nopal Line v ---- 213
Morse Shipping Co.—Freight Forwarding License Application ---- 472
New Orleans Steamship Assn. v. Bunge Corp. and Southern Stevedoring Co., Inc ---- 687
New York Freight Bureau (Hong Kong)—Dual Rate Contract ---- 16, 267
Nopal Line v. Moore-McCormack Lines, Inc ---- 213
North Atlantic Baltic Freight Conference—Dual Rate Contract ---- 16, 267
North Atlantic Continental Freight Conf. & Continental North Atlantic W/B Freight Conference Agreement 9218 ---- 170
North Atlantic French Atlantic Freight Conference—Dual Rate Contract ---- 16, 267
North Atlantic Mediterranean Freight Conference—Dual Rate Contract ---- 16, 267
North Atlantic United Kingdom Freight Conference—Dual Rate Contract ---- 16, 267
North Atlantic Westbound Freight Association—Dual Rate Contract ---- 16, 267, 387
North Atlantic Westbound Freight Association (Wines & Spirits Contract)—Dual Rate Contract ---- 16, 267
Northern Commercial Co. River Lines—Seasonal Rate Increases ---- 1
Northern Pan-America Line, A/S (Nopal Line) v. Moore-McCormack Lines, Inc ---- 213
Orleans Materials and Equipment Co., Inc. v. Matson Navigation Co ---- 160
Overseas Freight and Terminal Corp. (All Cargo Line)—Extra Charges Due to Delay in Unloading Caused by Longshoremen Strike ---- 435

	Page
Pacific-Atlantic/Guam Trade—General Increases in Rates	498
Pacific Coast/Caribbean Sea Ports Conference—Dual Rate Contract	16, 267
Pacific Coast European Conference—Dual Rate Contract	16, 267
Pacific Coast European Conference Procedures for Hearing and Considering Shippers' Requests and Complaints	372
Pacific Coast-Hawaii—Reduction in Rates	258
Pacific Coast/Mexico Freight Conference—Dual Rate Contract	16, 267
Pacific Coast/Panama Canal Freight Conference—Dual Rate Contract	16, 267
Pacific Coast River Plate Brazil Conference—Dual Rate Contract	16, 267
Pacific Indonesian Conference—Dual Rate Contract	16, 267
Pacific Seafarers, Inc. *v.* Atlantic & Gulf American-Flag Berth Operators	461
Pacific/Straits Conference—Dual Rate Contract	16, 267
Pacific Westbound Conference—Dual Rate Contract	16, 267
Pacific/West Coast of South America Conference—Dual Rate Contract	16, 267
Peralta Shipping Corp., Ludwig Mueller Co., Inc. *v*	361
Persian Gulf Outward Freight Conference—Dual Rate Contract	293
Peter Bratti Associates, Inc. *v.* Hellenic Lines, Ltd	375
Peter Bratti Associates, Inc. *v.* Prudential Lines, Inc	375
Practices in the Great Lakes/Japan Trade—Iino Kaiun Kaisha, Ltd., and Mitsui Steamship Co., Inc	270
Prudential Lines, Inc., Peter Bratti Associates, Inc. *v*	375
Ramirez, Chave *v.* South Atlantic & Caribbean Line, Inc	203
Rates, Charges and Practices of Carriers Engaged in the Trade Between United States and Spain/Portugal	596
Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico	404
Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico	404
Reduction in Rates—Pacific Coast-Hawaii	258
River Plate and Brazil Conference *v.* Lloyd Brasileiro (Patrimonio Nacional)	476
River Plate and Brazil Conferences—Dual Rate Contract	16, 267
River Plate/United States-Canada Freight Conference—Dual Rate Contract	16, 267
Santiago de Cuba Conference—Dual Rate Contract	16, 267
Sea-Land Service, Inc.—Application to Waive Undercharges	641
Sea-Land Service, Inc., Puerto Rican Div., Thatcher Glass Mfg. Co., Inc. *v*	645
Seatrain Lines, Inc.—Application of Rates on Shipments in Railroad Cars	516
South Atlantic & Caribbean Line, Inc., Chave Ramirez *v*	203
South Atlantic Steamship Conference—Dual Rate Contract	16, 267
Spanish/Portuguese Trade Unapproved Section 15 Agreements	596
Stockton Elevators, Certain Practices of	181
Stockton Elevators, Inc., California Stevedore & Ballast Co. *v*	97
Straits/New York Conference—Dual Rate Contract	16, 267
Straits/Pacific Conference—Dual Rate Contract	16, 267
Surcharge on Cargo to Manila	395
Swedish American Line—Refund of Freight Charges	142
Terminal Lease Agreements at Long Beach and Oakland, California	521
Texas Cotton Industries *v.* Lykes Bros. S.S. Co., Inc	209
Thatcher Glass Mfg. Co., Inc. *v.* Sea-Land Service, Inc., Puerto Rican Div	645
Trans-Pacific Freight Conference (Hong Kong)—Dual Rate Contract	16, 267
Trans-Pacific Freight Conference of Japan—Dual Rate Contract	337

Page

Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade 503
Unapproved Section 15 Agreements—Spanish/Portuguese Trade 596
Universal Terminal & Stevedoring Corp., Austrian Trade Delegate *v.* 278
United States Atlantic & Gulf/Australia New Zealand Conference—Dual Rate Contract 16, 267
United States Atlantic and Gulf-Haiti Conference—Dual Rate Contract 16, 267
United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference—Dual Rate Contract 16, 267
United States, by GSA *v.* American Export Lines, Inc 280
United States/Persian Gulf Tràde Rate Agreement No. 8900 712
U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference—Dual Rate Contract 16, 267
West Coast of India and Pakistan/U.S.A. Conference—Dual Rate Contract 16, 267
West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference 16, 267
Wharfage Charges on Bulk Grain at Pacific Coast Ports 653

DOCKET NUMBERS OF CASES REPORTED

		Page
267	Government of Israel Supply Mission *v.* American Export Lines, Inc	14
268	Chave Ramirez *v.* South Atlantic & Caribbean Line, Inc	187, 203
364	L'Aluminium Francais *v.* American Export Lines, Inc	83
365	The Austrian Trade Delegate *v.* Universal Terminal & Stevedoring Corp	278
366	Midwest Export & Import Co. and Green Textile Export and Import Co., Inc. *v.* F. W. Hartmann & Co., Inc., Agents for Hansa Line	87
367	California Packing Corp. *v.* Hawaii/Orient Rate Agreement	78
369	E. Mahlab, d/b/a Overseas Leather Importing Co. *v.* Concordia Line (Joint Service of Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskabet Idaho, Skipsaksjeselskabet Hilda Knudsen, and Skipsaksjeselskabet Samuel Bakke)	133
371	Swedish American Line—Application to Refund in Part Freight Charges Collected on Shipment Via MS "Vasaholm" from New Orleans, La., to Oslo, Norway	142
372	Bernard Bowman Corp. *v.* American Export Lines, Inc	155
374	Department of State, Agency for International Development, U.S. Aid Mission to Dominican Republic *v.* Lykes Bros. S.S. Co., Inc	153
377	Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., Agents for Torm Lines	361
378	Lykes Bros. Steamship Co., Inc., Application to Refund Part Freight Charges Collected on Shipment Via SS "Nancy Lykes" from Le Harve, France, to Galveston, Tex	361
396	Sea-Land Service, Inc.—Application to Waive Undercharges	641
397	Barr Shipping Co., Inc. *v.* Atlantic Lines, Ltd	638
732	H. Kempner *v.* Lykes Bros. Steamship Co., Inc	126, 209
733	H. Kempner *v.* Lykes Bros. Steamship Co., Inc	209
734	Galveston Cotton Co. *v.* Lykes Bros. Steamship Co., Inc	209
735	Texas Cotton Industries *v.* Lykes Bros. Steamship Co., Inc	209
872	Joint Agreement Between Member Lines of the Far East Conference and Member Lines of the Pacific Westbound Conference	553
881	General Increases in Alaskan Rates and Charges	314
884	Unapproved Section 15 Agreements—Japan, Korea, Okinawa Trade	503
890	In the Matter of Unapproved Section 15 Agreements—Spanish/Portuguese Trade	596
891	In the Matter of Rates, Charges and Practices of Carriers Engaged in the Trade Between United States and Spain/Portugal	596
901	General Increases in Rates Pacific-Atlantic/Guam Trade	498
921	River Plate and Brazil Conference *v.* Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc	476

		Page
928	Agreement No. 8545 Between Lloyd Brasileiro (Patrimonio Nacional) and Moore-McCormack Lines, Inc	476
947	International Trading Corp. of Va., Inc. and International Trading Corp. of New England, Inc. *v.* Fall River Line Pier, Inc	145, 150
966	Reduction in Rates—Pacific Coast-Hawaii-Oliver J. Olson & Co., C. R. Nickerson, Agent	258
969	Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska	1
971	New Orleans Steamship Association *v.* Bunge Corp. and Southern Stevedoring Co., Inc	687
1000	California Stevedore & Ballast Co. *v.* Stockton Elevators, Inc	97
1001	Gulf/Mediterranean Ports Conference—Dual Rate Contract	16, 267
1002	Pacific Westbound Conference—Dual Rate Contract	16, 267
1003	Capca Freight Conference—Dual Rate Contract	16, 267
1005	Associated Steamship Lines (Manila)—Dual Rate Contract	16, 267
1006	Gulf/French Atlantic Hamburg Range Conference—Dual Rate Contract	16, 267
1007	Pacific Coast European Conference—Dual Rate Contract	16, 267
1009	Colpac Freight Conference—Dual Rate Contract	16, 267
1010	Canal, Central America Northbound Conference—Dual Rate Contract	16, 267
1011	Camexco Freight Conference—Dual Rate Contract	16, 267
1012	Calcutta/U.S.A. Conference—Dual Rate Contract	16, 267
1013	Atlantic and Gulf/West Coast of South America Conference—Dual Rate Contract	16, 267
1014	Atlantic and Gulf/West Coast of Central America and Mexico Conference—Dual Rate Contract	16, 267
1015	Atlantic and Gulf, Singapore, Malaya and Thailand Conference—Dual Rate Contract	16, 267
1016	Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference—Dual Rate Contract	16, 267
1017	Atlantic and Gulf-Indonesia Conference—Dual Rate Contract	16, 267
1018	Association of West Coast Steamship Companies—Dual Rate Contract	16, 267
1018 (Sub. No. 1)	Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory Nuts, Ecuador/United States Atlantic-Gulf)—Dual Rate Contract	16, 267
1018 (Sub. No. 2)	Association of West Coast Steamship Companies (Coffee, Columbia/United States Atlantic-Gulf)—Dual Rate Contract	16, 267
1019	Leeward and Windward Islands & Guianas Conference—Dual Rate Contract	16, 267
1020	The India, Pakistan, Ceylon & Burma Outward Freight Conference—Dual Rate Contract	16, 267
1021	Havana Steamship Conference—Dual Rate Contract	16, 267
1022	Gulf and South Atlantic Havana Steamship Conference—Dual Rate Contract	16, 267
1023	Far East Conference—Dual Rate Contract	16, 267
1025	East Coast Columbia Conference—Dual Rate Contract	16, 267
1026	Java-New York Rate Agreement—Dual Rate Contract	16, 267
1027	Java-Pacific Rate Agreement—Dual Rate Contract	19, 267
1028	Deli-Pacific Rate Agreement—Dual Rate Contract	16, 267

Page

1029 Deli-New York Rate Agreement—Dual Rate Contract 16, 267
1030 Havana Northbound Rate Agreement—Dual Rate Contract 16, 267
1031 New York Freight Bureau (Hong Kong)—Dual Rate Contract 16, 267
1033 North Atlantic French Atlantic Freight Conference—Dual Rate Contract 16, 267
1034 North Atlantic Mediterranean Freight Conference—Dual Rate Contract 16, 267
1035 Pacific Coast/Caribbean Sea Ports Conference—Dual Rate Contract 16, 267
1037 North Atlantic Baltic Freight Conference—Dual Rate Contract 16, 267
1039 North Atlantic United Kingdom Freight Conference—Dual Rate Contract 16, 267
1040 Pacific Coast/Mexico Freight Conference—Dual Rate Contract 16, 267
1041 Pacific Coast/Panama Canal Freight Conference—Dual Rate Contract 16, 267
1042 River Plate/United States-Canada Freight Conference—Dual Rate Contract 16, 267
1043 River Plate and Brazil Conferences—Dual Rate Contract 16, 267
1044 Pacific/West Coast of South America Conference—Dual Rate Contract 16, 267
1045 United States Atlantic and Gulf-Haiti Conference—Dual Rate Contract 16, 267
1046 West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference 16, 267
1047 United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference—Dual Rate Contract 16, 267
1048 U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference—Dual Rate Contract 16, 267
1049 United States Atlantic & Gulf/Australia New Zealand Conference—Dual Rate Contract 16, 267
1050 Trans-Pacific Freight Conference (Hong Kong)—Dual Rate Contract 16, 267
1051 Straits/Pacific Conference—Dual Rate Contract 16, 267
1052 Straits/New York Conference—Dual Rate Contract 16, 267
1053 South Atlantic Steamship Conference—Dual Rate Contract 16, 267
1054 Santiago de Cuba Conference—Dual Rate Contract 16, 267
1055 Pacific/Straits Conference—Dual Rate Contract 16, 267
1056 Pacific Indonesian Conference—Dual Rate Contract 16, 267
1057 Pacific Coast River Plate Brazil Conference—Dual Rate Contract 16, 267
1058 North Atlantic Westbound Freight Association (Wines & Spirits Contract)—Dual Rate Contract 16, 267
1059 North Atlantic Westbound Freight Association—Dual Rate Contract 16, 267, 387
1061 Bulkley Dunton Overseas, S.A. *v.* Blue Star Shipping Corp 137
1067 Northern Commercial Co. River Lines—General Increase in Rates in the Yukon River Area of Alaska 1
1072 Investigation of Certain Practices of Stockton Elevators 181
1077 Investigation of Increased Rates in the Atlantic/Gulf Puerto Rico Trade—Outward Freight Tariff No. 1 FMC–F No. 1, J. L. Marty, Agent 94
1078 Japan-Atlantic and Gulf Freight Conference Exclusive Patronage (Dual Rate) Contract 337

		Page
1079	The Persian Gulf Outward Freight Conference Exclusive Patronage (Dual Rate) Contract	293
1080	Trans-Pacific Freight Conference of Japan Exclusive Patronage (Dual Rate) Contract	337
1081	West Coast of India and Pakistan/U.S.A. Conference—Dual Rate Contract	16, 267
1082	Thatcher Glass Manufacturing Co., Inc. *v.* Sea-Land Service, Inc., Puerto Rican Division	645
1084	Investigation of Wharfage Charges on Bulk Grain at Pacific Coast Ports	653
1088	Jordan International Co. *v.* Flota Mercante Grancolombiana	537
1091	Orleans Materials and Equipment Co., Inc. *v.* Matson Navigation Co	160
1092	In the Matter of Agreement No. 8660—Latin America/Pacific Coast Steamship Conference & Dual Rate Contract	16, 267
1096	The Northern Pan America Line, A/S (Nopal Line) *v.* Moore-McCormack Lines, Inc	213
1100 (Sub. 1)	Agreement No. 9218 Between the Member Lines of the North Atlantic Continental Freight Conference and the Continental North Atlantic Westbound Freight Conference	170
1101	The Ceylon/U.S.A. Conference (Agreement 8050)—Dual Rate Contract	16, 267
1103	Agreement No. 9205; Middle Atlantic Ports Dockage Agreement	381
1104	Pacific Seafarers, Inc. *v.* Atlantic & Gulf American-Flag Berth Operators	461
1105 (Sub. 1)	Agreement No. 8900—Rate Agreement United States/Persian Gulf Trade	712
1106	In the Matter of Agreement No. 8650—Calcutta, East Coast of India and East Pakistan/U.S.A. Conference—Dual Rate Contract	16, 267
1109	Ipar Transport, Limited—Dual Rate Contract	16, 267
1110	D.B. Turkish Cargo Line—Dual Rate Contract	16, 267
1111	Dual-Rate Contracts, 1963—Adjudication of Major Issues—Dual Rate Contract	16, 267
1115	Application for Freight Forwarding License—Dixie Forwarding Co., Inc	109, 167
1116	Application for Freight Forwarding License—Mr. L. H. Graves, d/b/a Patrick & Graves	109, 167
1117	Pacific Coast European Conference Procedures for Hearing and Considering Shippers' Requests and Complaints	372
1127	Overseas Freight and Terminal Corp. (All Cargo Line)—Extra Charges Due to Delay in Unloading Caused by Longshoremen Strike	435
1128	Agreement No. T–4: Terminal Lease Agreement at Long Beach, California	521
1129	Agreement No. T–5: Terminal Lease Agreement at Oakland, California	521
1134	Investigation of Practices in the Great Lakes/Japan Trade—Iino Kaiun Kaisha, Ltd., and Mitsui Steamship Co., Inc	270

		Page
1145	Reduction in Freight Rates on Automobiles—North Atlantic Coast Ports to Puerto Rico	404
1150	Hasman & Baxt, Inc., Valencia Baxt Express, Inc.—Misclassification of Goods in Containerized Trailer Vans in the United States/Puerto Rico Trade	453
1155	Imposition of Surcharge on Cargo to Manila, Republic of the Philippines	395
1157	United States of America, by General Services Administration *v.* American Export Lines, Inc., American Export and Isbrandtsen Lines, Central Gulf Lines, Inc., States Marine Lines, Inc., Concordia Line, Crescent Line, Ltd., Fern-Ville Lines, French Line, Fresco Line, Hansa Lines, Hellenic Lines, Hoegh Lines, Isthmian Lines, Inc., Italia-Societa Per Azione Di Navigazione of Genoa, Levant Lines, Malaya Indonesia Line, National Hellenic American Line, S. A., Orient Mid-East Lines, Stevenson Lines, Torm Lines, Zim Israel Navigation Co., Ltd	280
1158	In the Matter of Agreement No. 134–21—Gulf/Mediterranean Ports Conference	459, 703
1165	Application for Freight Forwarding License—Carlos H. Cabezas, 97 73d St., Brooklyn, New York	130
1167	Reduced Rates on Automobiles—Atlantic Coast Ports to Puerto Rico	404
1168	Application for Freight Forwarding License—Louis Applebaum, 8–10 Bridge St., New York, N.Y	306
1172	Peter Bratti Associates, Inc. *v.* Prudential Lines, Inc. and West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range Conference (W.I.N.A.C.)	375
1173	Peter Bratti Associates, Inc. *v.* Hellenic Lines, Ltd. and West Coast of Italy Sicilian and Adriatic Ports/North Atlantic Range Conference (W.I.N.A.C.)	375
1188	Increased Freight Rates—Alaska Lower Yukon River Area	467
1192	Application for Freight Forwarding License—Wm. V. Cady, 17 Battery Place, New York, 4, New York	352
1196	Application for Freight Forwarding License—Del Mar Shipping Corp., 354 South Spring St., Los Angeles, California	493
1201	Application for Freight Forwarding License—Morse Shipping Co. (Rebecca Ruth Morse, d/b/a) 149 Madison Ave., New York N.Y	472
1207	Seatrain Lines, Inc.—Application of Rates on Shipments in Railroad Cars	516
1211	Independent Ocean Freight Forwarder License No. 542—Aetna Forwarding Co., Inc. Revocation of License	545
65–2	American & Australian Steamship Line, and Port & Associated Lines *v.* Blue Star Line, Ltd., Hamburg Sud-Amerikanische Dampfshiffahrts-Gesellschaft, Eggert & Amsinck (Columbus Line), United States Lines Co., and M. E. Rough	433

TABLE OF CASES CITED

	Page
Absorption or Equalization on Explosives, 6 FMB 138	708
Adair *v.* Reorganization Investment Co., 125 F. 2d 901	290
Addison *v.* Holly Hill Fruit Products, 322 U.S. 607	200
Agreements 6210, Etc., 2 USMC 166	707
Agreement No. 6870, 3 FMB 227	154
Agreements 8225 and 8225-1, Greater Baton Rouge Port Commission and Cargill, Inc., 5 FMB 648	656, 694
Agreement 8492—T. F. Kollmar, Inc. & Wagner Tug Boat Co., 7 FMC 511	460, 708
Agreement No. 8765, Gulf Mediterranean Trade, 7 FMC 495	722
Agreement 8905, Seattle-Alaska Steamship Co., 7 FMC 792	530, 532
Agreements and Practices Re Brokerage, 3 USMC 170	117
Aichmann & Huber *v.* Bloomfield Steamship Co., 7 FMC 811	159, 368
Air Transport Associates, Inc.—Enf. Proc., 1 Ad. L. (2d) 537	310
Alaskan Rates, 2 USMC 558	445–447
Alaska Steamship Co.—General Increase in Rates in the Peninsula and Bering Sea Areas of Alaska, 8 FMC 1	470, 499
Alcoa Steamship Co., Inc. *v.* CAVN, 7 FMC 345	254, 256, 492, 722
Alcoa Steamship Co., Inc. *v.* FMC, 321 F. 2d 756	120
American Export & Isbrandtsen Lines *v.* FMC 334 F. 2d 185	557
American Peanut Corp. *v.* M. & M.T. Co., 1 USSB 78	400
American President Lines, Ltd. *v.* FMB, 317 F. 2d 887	278, 279
American Red Ball, 82 MCC 391	112, 122
American Steel Foundries Co. *v.* Tri-City Council, 257 U.S. 184	359
Archer *v.* SEC, 133 F. 2d 795	131
Arizona Grocery *v.* Atchison Ry., 284 U.S. 370	320
Associated-Banning Co., *v.* Matson Navigation Co., 5 FMB 336	540, 557, 558
Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges, 7 FMC 87	3, 4, 5, 7
Atlantic & Gulf/West Coast Conference *v.* United States, 90 F. Supp 554, 94 F. Supp 138	117
Atlas Waste Mfg. Co. *v.* N.Y. P.R. S.S. Co., 1 USSB 195	289
Auburn Mills *v.* Chicago & A.R. Co., 221 ICC 475	644
Baltimore, Md.-Virginia Ports Wine Rates, 2 USMC 282	263
Baltimore & Ohio R.R. Co. *v.* United States, 277 U.S. 291	201
Baltimore & Ohio R.R. Co. *v.* United States, 345 U.S. 146	408
Banana Distributors, Inc. *v.* Grace Line Inc., 5 FMB 615	200
Barr Shipping Co. *v.* Royal Netherlands S.S. Co., 7 FMC 786	158
Becker, 7 Ad. L. (2d) 151	310
Black Diamond S.S. Corp. *v.* Cie. Maritime Belge, 2 USMC 755	172
Blanton Co., 6 Ad. L. (2d) 736	310
Bluefield Co. *v.* Public Service Commission, 262 U.S. 679	10
Board of Trustees *v.* United States, 289 U.S. 48	287

Page
Bonnell Elec. Mfg. Co. *v.* Pacific Steamship Co., 1 USSB 143 289
Boston Terminal Co., 103 ICC 707 501
Boston Wool Trade Association *v.* M. & M. & T. Co., 1 USSB 24 400
Byer, 4 Ad. L. (2d) 729 310
Cady, Wm. V.—Freight Forwarding License Application, 8 FMC 336 497
California Stevedore & Ballast Co. *v.* Stockton Port District, 7 FMC 75 98, 656, 694
Carey *v.* Corporation Commission, 33 P. 2d 788 319
Cargo to Adriatic, Black Sea and Levant Ports, 2 USMC 342 263
Carloader Corp. Freight Forwarder Application, 260 ICC 123 119, 124
Carnation Co. *v.* Pacific Westbound Conference, 336 F. 2d 650 582
CAVN *v.* A. J. Perez Export Co., 303 F. 2d 692 116
Cement Mfgrs. Assn. *v.* United States, 268 U.S. 588 150
Chesapeake & O. Ry. Co. *v.* Burton, 62 F. 2d 110 369
Chicago Express, Inc., 75 MCC 531 112, 122
Cie. Generale Transatlantique *v.* American Tobacco Co., 31 F. 2d 663, 280 U.S. 555 106
Cities Service Gas Co., Federal Power Commission, Dkt. No. G-18799 (July 15, 1963) 6, 7
Cleveland & Akron *v.* Hope Natural Gas Co., 44 P.U.R. (N.S.) 1, 29 319
Colgate-Palmolive Peet Co. *v.* District of Columbia, 110 F. 2d 264 199
Colonialgrossisternes Forening *v.* Moore-McCormack Lines, Inc., 178 F. 2d 288 451
Commercial Molasses Corp. *v.* New York Barge Corp., 314 U.S. 104 290
Common Carrier Freight Rates and Practices in the Florida/Puerto Rico Trade, 7 FMC 686 412
Consolo *v.* Flota Mercante Grancolombiana, 5 FMB 633 200
Consolo *v.* Grace Line, Inc., 4 FMB 293 200
Continental Can Co. *v.* United States, 272 F. 2d 312 456
Contract Rates—North Atlantic Continental Freight Conference, 4 FMB 353 753
Contract Rates—Port of Redwood City, 2 USMC 727 106
Contract Rates—Trans-Pacific Freight Conference of Japan, 4 FMB 744 338
C. & P. Telephone Co. of Maryland *v.* Maryland Public Service Commission, 187 A. 2d 475 319
Crowe *v.* Southern S. S. Co., 1 USSB 145 140
Crude Petroleum from Mississippi to Illinois, 255 ICC 763 644
Department of State, AID *v.* Lykes Bros. S. S. Co., Inc., 8 FMC 153 286
Dixie Forwarding Co., Inc.—Freight Forwarding License Application, 109, sion, 167 357
D. J. Roach, Inc. *v.* Albany Port District, 5 FMB 333 104, 656, 694
Dipson Theatres *v.* Buffalo Theatres, 86 F. Supp. 716 290
Dual Rate Cases, 8 FMC 16 267, 293–297, 339, 340, 342, 387, 389, 390, 393, 394
Duluth Chamber of Commerce *v.* C., St. P., M. & O. Ry. Co., 122 ICC 739 709
Eastbound Intercoastal Lumber, 1 USMC 608 650
Eden Mining Co. *v.* Bluefields Fruit & S. S. Co., 1 USSB 41 22, 23, 148, 149
Empire State Highway Transp. Assn. *v.* FMB, 291 F. 2d 336 384, 386, 579
Ensminger *v.* People, 95 Am. Dec. 494 (Ill. 1868) 657
Evans Cooperage Co., Inc. *v.* Board of Commissioners of Port of New Orleans, 6 FMB 415 656, 666
Ex Parte 4, Section 15 Inquiry, 1 USSB 121 557, 579
Far East Conference *v.* FMC, 337 F. 2d 146 373

Page

Far East Conference *v.* United States, 342 U.S. 570 — 23
Florida East Coast Ry., 84 ICC 25 — 501
Flota Mercante Grancolombiana *v.* FMC and United States, 302 F. 2d 887 — 708
FMB *v.* Isbrandtsen Co., 356 U.S. 481 — 23, 338, 504, 506
FMC *v.* Anglo-Canadian Shipping Co., 335 F. 2d 255 — 373
FMC *v.* Atlantic & Gulf Panama Canal Zone, Colon and Panama City Conference, 65 Civil 1033 (S.D. N.Y., Apr. 27, 1965) — 627
FPC *v.* Hope Gas Co., 320 U.S. 591 — 10
Francesconi & Co. *v.* Baltimore & Ohio Ry. Co., 274 Fed. 687 — 201
Gannet Co., Inc. *v.* B. & O. R.R. Co., 219 ICC 617 — 644
Gelfand Mfg. Co. *v.* Bull Steamship Line, Inc., 1 USSB 169 — 379, 380
General Increases in Alaskan Rates and Charges, 5 FMB 486 — 320
General Increases in Alaskan Rates and Charges, 7 FMC 563 — 3, 5, 7, 9, 11, 315–319, 328
General Increases in Rates—Pacific/Atlantic-Guam Trade, 7 FMC 423 — 408
Grace Line Inc. *v.* FMB, 280 F. 2d 790 — 695, 708
Grays Harbor Pulp & Paper Co. *v.* A. F. Klaveness & Co., A/S, 2 USMC 366 — 402
Greater Baton Rouge Port Commission *v.* United States, 287 F. 2d 86 — 104, 694
Great Western Distributors, Inc., 1 Ad. L. (2d) 592 — 310
Gregg Cartage Co. *v.* United States, 316 U.S. 75 — 311
Guam *v.* FMC, 329 F. 2d 251 — 8, 408
Gulf Westbound Intercoastal Soya Bean Oil Meal Rates, 1 USSBB 554 — 644, 650
Harrison *v.* Mayor of N.Y., 92 U.S. 259 — 287
Hazel Atlas Glass Co.—Misclassification of Glass Tumblers, 5 FMB 515 — 456
Hellenic Lines, Ltd. *v.* FMB, 295 F. 2d 138 — 600
Hellenic Lines, Ltd.—Violation of Sections 16 (First) and 17, 7 FMC 673 — 609
H. Kramer & Co. *v.* Inland Waterways Corp., 1 USMC 630 — 644
Holly Sugar Corp. *v.* Alton R.R. Co., 216 ICC 85 — 644
Holy Trinity Church *v.* United States, 143 U.S. 457 — 369
Huber Mfg. Co. *v.* Stoomvaart Maatschapij "Nederland," 4 FMB 343 — 291
Increased Freight Rates, 1958, 304 ICC 289 — 386
Increased Rates on Sugar, 1962, 7 FMC 404 — 408
Interchange of Freight at Boston, 2 USMC 671 — 656, 682
Intercoastal Investigation, 1935, 1 USSBB 400 — 201
Intercoastal Lumber Rate Changes, 1 USMC 656 — 448
Intercoastal Rate Structure, 2 USMC 285 — 263, 408
International Trading Corp. of Va. *v.* Fall River Pier Line, 7 FMC 219 — 146, 200
Interstate Circuit Inc. *v.* United States, 306 U.S. 208 — 514
Isbrandtsen Co., Inc. *v.* United States, 211 F. 2d 51 — 338, 579, 504
Isbrandtsen Co., Inc. *v.* United States, 239 F. 2d 933 — 64, 200, 338, 504
Isbrandtsen Co., Inc. *v.* States Marine Corp. of Delaware, 6 FMB 422 — 64, 126, 149, 209
Japan-Atlantic and Gulf Freight Conference—Contract Rates, 4 FMB 706 — 64
Japan-Atlantic and Gulf Freight Conference—Dual Rate Contract, 8 FMC 321 — 389
Johnson Machine Works, Inc. *v.* Chicago, B. & Q. R. Co., 297 F. 2d 793 — 369
Johnson Picket Rope Co. *v.* Dollar S.S. Lines, 1 USSBB 585 — 291
Joint Committee *v.* Pacific Westbound Conference, 4 FMB 166 — 117
Kempner *v.* FMC, 313 F. 2d 586 — 126, 559, 581
Kerr Steamship Co. *v.* United States, 284 F. 2d 61 — 600

Page

Lifshultz Fast Freight Extension—Wisconsin, 285 ICC 659 .... 112, 122
Lopez Trucking Inc. *v.* Wiggin Terminals, Inc., 5 FMB 3 105
Louisville & N.R.R. Co. *v.* Maxwell, 237 U.S. 94 .... 365, 369
Louisville & W. R. Co., 103 ICC 252 501
Ludwig Mueller Co., Inc. *v.* Peralta Shipping Corp., 8 FMC 361 644
Lykes Bros. S.S. Co., Inc.—Refund of Freight Charges, 7 FMC 602 .... 92, 143, 364, 368
Lykes-Harrison Pooling Agreement, 4 FMB 511 200
Maple Island Farm, Inc. *v.* Chicago, B. & O. Ry. Co., 280 ICC 353 287
Markt & Hammacher Co.—Misclassification of Glassware, 5 FMB 509 379
Martini & Rossi *v.* Lykes Bros. S.S. Co., Inc., 7 FMC 453 .... 15, 81, 85, 135, 158, 204, 364, 368, 370
Midwest Export & Import Co. *v.* F. W. Hartman & Co., Inc., 8 FMC 87 368
Millar *v.* N.Y. Central & H.R.R. Co., 19 ICC 78 644
Misclassification and Misbilling of Glass Articles, 6 FMB 155 456
Mitsui Steamship Co., Ltd.—Alleged Rebates to A. Graf & Co., 7 FMC 248 229
Mitsui Steamship Co. *v.* Anglo-Canadian Shipping Co., 5 FMB 72 .... 557, 579
Montship Lines, Ltd. *v.* FMB, 295 F. 2d 147 600
Moog Industries, Inc., 5 Ad. L. (2d) 138 310
National Cable and Metal Co. *v.* American-Hawaiian Steamship Co., 2 USMC 470 380
NLRB *v.* Service Wood Heel Co., 124 F. 2d 470 511
N.Y. *v.* United States, 331 U.S. 284 290
Nydia Foods Corp. *v.* Java Pacific Line, 7 FMC 808 .... 158, 368
Ocheltree Grain Co. *v.* St. Louis & S. F. R. Co., 13 ICC 46 644
Oranje Line *v.* Anchor Line, Ltd., 5 FMB 714 .... 466, 713, 723, 725, 726, 727
Ouachita Packet Co. *v.* Aiken, 121 U.S. 444 657
Oxenberg Bros. Inc. *v.* United States, 3 FMB 583 .... 367, 644
Pacific Coast European Conference, 3 USMC 11 179
Pacific Coast European Conference, 7 FMC 27 231
Pacific Coast European Conference—Rates and Practices, 2 USMC 58 724
Pacific Coast/Hawaii and Atlantic-Gulf/Hawaii General Increases in Rates, 7 FMC 260 .... 4, 5, 7, 500
Pacific Coast Port Equalization Rule, 7 FMC 623 557
Pacific Coastwise Carrier Investigation, 2 USMC 191 263
Pacific Seafarers, Inc. *v.* Atlantic & Gulf American-Flag Berth Operators, 8 FMC 445 286
Pacific Westbound Conference *v.* FMC 373
Panitz *v.* District of Columbia, 112 F. 2d 39 310
People Gas Light & Coke Co., 19 P.U.R. (n.s.) 177, 274 319
Persian Gulf Outward Freight Conference Dual Rate Contract, 8 FMC 277 340
Port of Philadelphia Ocean Traffic Bureau *v.* Export Steamship Corp., 1 USSBB 538 .... 400, 541, 649
Practices, Etc. of Ocean Freight Forwarders, 6 FMB 327 117
Practices, Etc. of San Francisco Bay Area Terminals, 2 USMC 588 .... 525, 657
Public Service Co. of New Hampshire *v.* State, 153 A. 2d 801 319
Puerto Rican Rates, 2 USMC 117 .... 288, 445–447
Ramirez *v.* South Atlantic & Caribbean Line, Inc., 8 FMC 203 643
Rates of Inter-Island Steam Navigation Co., Ltd., 2 USMC 253 288
Rawleigh *v.* Stoomvart, 1 USSB 285 23
Republic Carloading and Distributing Co., Inc., Freight Forwarder Application, 250 ICC 670 311

Page

River Plate and Brazil Conference *v.* Pressed Steel Car Co., Inc., 124 F. 2d 88 582
Royal Netherlands *v.* FMC, 304 F. 2d 938 456
Rubber Development Corp., *v.* Booth Steamship Co., 2 USMC 747 379
San Diego Harbor Comm. *v.* Matson Navigation Co., 7 FMC 394 .... 274, 275, 648
S. H. Kress & Co. *v.* Baltimore Mail Steamship, 2 USMC 450 644
Silent Sioux Corp. *v.* Chicago & N.W. Ry. Co., 262 F. 2d 474 .... 158, 365, 369
Southern Pacific Co. *v.* Darnell-Taenzer Co., 245 U.S. 531 366
States Marine Lines, Inc. *v.* Trans-Pacific Freight Conference of Japan, 7 FMC 204 .... 465, 707
States Marine Lines, Inc. *v.* Trans-Pacific Freight Conference of Japan, 7 FMC 257 603
States Marine Lines, Inc. *v.* FMC, 313 F. 2d 906 149
Sugar from Virgin Islands to United States, 1 USMC 695 644
Swedish American Line—Refund of Freight Charges, 8 FMC 142 .... 363, 364, 368
Swift & Co. *v.* FMC, 306 F. 2d 277 .... 44, 231, 268
Terminal Rate Increases—Puget Sound Ports, 3 USMC 21 .... 185, 656, 664, 682
Terminal Rate Structure—California Ports, 3 USMC 57 .... 525, 657, 677, 678, 679
Terminal Rate Structure—Pacific Northwest Ports, 5 FMB 53 657
Texas & Pacific Ry. *v.* ICC, 162 U.S. 197 .... 709, 710
Theatre Enterprises Inc. *v.* Paramount Film Distributing Corp., 346 U.S. 537 514
Trans-Pacific Freight Conference of Japan *v.* FMC, 314 F. 2d 277 466
Transportation by Mendez & Co. Between U.S. and Puerto Rico, 2 USMC 717 .... 707, 708
Transportation of Lumber through the Panama Canal, 2 USMC 143 445–447
Uddo & Taormina Corp. *v.* Concordia Line, 7 FMC 473 .... 364, 368
Unapproved Section 15 Agreements—Gulf/United Kingdom Conference, 7 FMC 536 513
Unapproved Section 15 Agrements—South African Trade, 7 FMC 159 .... 112, 514, 515, 608, 612, 614, 629
United States *v.* American Union Transport, 327 U.S. 437 117
United States *v.* Anchor Line, Ltd., 232 F. Supp 379 .... 466, 600
United States *v.* Holliday, 70 U.S. 407 287
United States *v.* Illinois Central R.R., 263 U.S. 104 .... 290, 291
United States *v.* Kirby, 74 U.S. 482 369
United States *v.* Turner, 246 F. 2d 228 199
United States *v.* Wabash R. Co., 321 U.S. 403 .... 512, 513
Universal Camera Corp. *v.* NLRB, 340 U.S. 474 121
U.S. Navigation Co. *v.* Cunard S.S. Co., 284 U.S. 474 .... 22, 365, 369
Waterman *v.* Stockholms Rederiaktiebolag Svea, 3 FMB 248 367
Wells Lamont Corp. *v.* Bowles, 149 F. 2d 364 201
West-Bound Alcoholic Liquor Carload Rates, 2 USMC 198 263
West-Bound Carload and Less-Than-Carload Rates, 2 USMC 180 263
West Indies Fruit Co. *v.* Flota Mercante Grancolombiana, 7 FMC 66 .... 291, 367, 400, 402
Wharfage Charges and Practices at Boston, Mass., 2 USMC 245 666
Whitman *v.* Chicago, R.I. & P. Ry. Co., 66 F. Supp 1014 201
Wilson, 5 Ad. L. (2d) 247 310
Yankee Network *v.* FCC, 107 F. 2d 212 369
Y. Higa Enterprises, Ltd. *v.* Pacific Far East Line, Inc., 7 FMC 62 .... 81, 85, 364, 366, 368, 644
Yick Wo. *v.* Hopkins, 118 U.S. 356 512

FEDERAL MARITIME COMMISSION

No. 969

ALASKA STEAMSHIP COMPANY—GENERAL INCREASE IN RATES IN THE PENINSULA AND BERING SEA AREAS OF ALASKA

No. 1067

NORTHERN COMMERCIAL CO. RIVER LINES—GENERAL INCREASE IN RATES IN THE YUKON RIVER AREA OF ALASKA

Decided March 5, 1964

Rates and charges of Alaska Steamship Company and Northern Commercial Co. River Lines found to be unjust and unreasonable to the extent that they provide Alaska Steamship Company with a rate of return in its seasonal service in excess of ten (10) percent.

Stanley B. Long and *Ira L. Ewers* for respondents.
George N. Hayes and *Richard S. Sasaki* for State of Alaska, intervener.
Leonard Shinn for General Services Administration, intervener.
Harold L. Witsaman, Hearing Counsel.
Alton L. Jordan, Hearing Examiner.

REPORT

By the Commission (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice-Chairman;* ASHTON C. BARRETT, JAMES V. DAY, and JOHN S. PATTERSON, *Commissioners*)

On December 18, 1961, the Alaska Steamship Company (hereinafter Alaska Steam) filed certain rates and charges with the Commission to become effective on January 18, 1962. On January 15, 1962, the Commission suspended the effective date of these rates and charges for four months and instituted this investigation to determine whether the rates and charges were just and reasonable. By stipulation, the parties agreed that the decision in Docket 969 would govern the increased rates in Docket 1067, which rates had been filed

Hearings were held before Examiner A. L. Jordan in Seattle from December 4 to 15, 1962, and Examiner Jordan issued his initial decision on June 3, 1963. In his initial decision, Examiner Jordan found, *inter alia*, that the rates and charges of Alaska Steam were unjust and unreasonable to the extent that they produced a rate of return exceeding twelve percent. Alaska Steam and Northern Commercial Company, the respondents, and General Services Administration (hereinafter "GSA") the State of Alaska (hereinafter "State") and the Commission's Hearing Counsel filed exceptions to the initial decision of the Examiner. Oral argument on exceptions was heard.

The increased rates under consideration are a 10-percent increase on general cargo to the seasonal areas of Alaska, Bristol Bay, Nome, Kotzebue, and the general Bering Sea areas; a 20-percent increase on cannery cargo—cans, cartons, and salt, which are used in the salmon canning process; and a 10-percent increase on southbound canned salmon products from all areas of Alaska. Thus, the increases affect the so-called "seasonal trade," as opposed to the "scheduled trade." The seasonal trade exists only during the summer months and is primarily concerned with the movement of cannery supplies and canned salmon, while the scheduled trade operates year-round to the Southeastern and Southwestern areas of Alaska.

Rate Base

In testing the reasonableness of the rate increases, the Examiner constructed a partial rate base for the seasonal service and applied a rate of return with respect to the partial rate base, to which Alaska Steam took exception.

We are in agreement with the Examiner that the rates under investigation should be tested by the results of operation in the "seasonal trade" and not by the over-all operations of Alaska Steam. The increases filed by Alaska Steam apply to commodities moving principally in the "seasonal trade." In this trade Alaska Steam enjoys a virtual monopoly, while in its "scheduled trade" it faces keen competition. The record shows that Alaska Steam has reduced its rates in the scheduled trade. Alaska Steam has put forth no convincing rationale as to why we should measure the increases here by the results of the carrier's over-all operations. To do so would, in our opinion, allow the carrier to offset losses in the competitive trades with profits from the trade in which it presently enjoys a virtual monopoly. Shippers in the seasonal trade are dependent upon Alaska Steam's service. We think it would be unfair to saddle such captive shippers with the burden of the carrier's losses resulting from operations in the scheduled trade. The separation of services and construction of a partial rate base, while perhaps subject to some infirmities regarding exactitude of allocations, is the fairest method of testing these increases. And, while Alaska Steam objects to this procedure, the evidence presented by it during the course of the hearing was sufficient to enable the construction of the partial rate base. All figures necessary for such a computation were presented in the exhibits and testimony of the carrier. We therefore reject the contentions of GSA and State that Alaska Steam failed to meet its burden of proof. The carrier was entitled to urge on the Examiner its theory of rate-making, as it did, but the fact that it did not present a computation of a partial rate base cannot be equated with a failure to meet its burden of proof. Alaska Steam presented all the information required for a separation of the seasonal and scheduled services, and the Examiner in making his decision constructed the partial rate base from this information.

Alaska Steam excepted to certain allocations made by the Examiner in his computation of the partial rate base. The Examiner did not include the entire net book value of all vessels used in the seasonal service in the partial rate base, for the reason that the seasonal ships are used in the scheduled service when the need arises. Although the ships are used primarily in the seasonal service, they also generate revenue for the scheduled service, and we think that the Examiner's allocation was a proper one.

The Examiner utilized net book value in valuation of the ships of Alaska Steam. Alaska Steam contends that the Commission should value ships on the basis of market value, but we are unconvinced that we should depart from the use of net book value, utilized in several previous rate cases. See *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87, 106 (1962) and *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, 581–582 (1963) where the use of net book value as opposed to market value is fully discussed.

Alaska Steam took exception to the Examiner's non-inclusion in the partial rate base of the investment in deferred charges and expenses and his failure to include a specific amount for working capital of related companies. The Examiner allowed as working capital an amount approximately equal to one round average voyage expense for each ship in the service. Thus provision has been made not only for current operating expenses of Alaska Steam, including the costs of services performed for Alaska Steam by related companies, but also for deferred charges and expenses. Alaska Steam's exceptions are rejected.

Alaska Steam contends that the Examiner should have included in the partial rate base the fair value of property used in the trade but not owned. We reject this contention. In *Atlantic & Gulf-Puerto*

Rico General Increase in Rates and Charges, 7 F.M.C. 87 (1962), we said:

In the earlier decision in this case (6 F.M.B. 14), the Board determined, correctly we think, that the value of terminal facilities used but not owned by the carriers should not be included in the rate base. The carriers are not devoting their capital to the public use insofar as such property is concerned.

It is proper to include as expenses the rentals paid and other expenses of the carriers which arise by reason of the use of the facilities. However, to include the value of non-owned property in the rate base and owners' expenses, instead of rentals as expenses results in a windfall to the carriers at the expense of the shipping public. 7 F.M.C. 87, 110.

The fact that the non-owned property that Alaska Steam would have us include in the rate base consists of chartered vessels, which are claimed to be indispensable to the seasonal operation, does not alter the principle that such property is not included in the rate base. The rate of return is essentially a return on invested capital, and non-owned property does not represent an investment of the owners' capital.

Allocation of Income and Expenses

The Examiner allocated administrative and general expense according to the proportion that total vessel operating expense in each service bears to the total vessel operating expense. In so doing, the Examiner followed earlier precedent set by us. See *General Increases in Rates (1961)*, 7 F.M.C. 260, at 288 (1962). Alaska Steam excepted to this allocation, and it contends that the allocation should be according to "vessel days" computed pursuant to Maritime Administration General Order 60. Alaska Steam's contention that M.A. General Order 60 should be used is premised on the proposition that since it has considerable pre-season and post-season activity in regard to its seasonal operations, the use of the formula under the M.A. General Order is more fair.

First, while Alaska Steam may comply with M.A. General Order 60 in its accountings to the Maritime Administration, there is nothing to prevent us from prescribing another allocation procedure different from that of M.A. General Order 60. M.A. General Order 60 involves a complex formula relating to excess charter hire, and we are not convinced that its use is justified in this case.

Second, since administrative and general expenses are a mixture of salaries and expenses that pertain to the over-all management and operation of Alaska Steam, logical reasoning dictates that their allocation should follow those expenses (i.e., vessel operating expenses) that management must control to profitably operate the business. Under the circumstances, we believe that the Examiner's allocation was fair and equitable. The very fact that these expenses are being allocated means that exactitude is impossible, and Alaska Steam has not shown on the record that the Examiner's allocation is inequitable or unfair.

The Examiner included in the income account of Alaska Steam the profits of Alaska Terminal and Stevedoring Company. Alaska Steam excepted to this inclusion and stated that by so doing the Examiner had disallowed a portion of its stevedoring expense. We agree with the Examiner. In *General Increases in Rates (1961)*, 7 F.M.C. 260 (1962), we held that "the shipping public is entitled to protection from the siphoning-off of revenues by affiliates of the regulated carrier." 7 F.M.C. 260, at 282. This holding followed earlier precedent established in the *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges* case, *supra*, and reiterated in *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, at 579–580 (1963).

The Examiner allocated depreciation, inactive expenses, vessel values, and working capital attributable to each trade assuming that the asset was available for use in the regulated trade for 365 days, so that in allocating the value of an asset, the numerator would be days in service, and the denominator would be 365. To this method of allocation, Hearing Counsel objects. We are persuaded that in this allocation the Hearing Examiner was correct. The asset was available for use in the regulated trade for 365 days each year, and this fact should be accorded weight in the allocation of inactive expenses, vessel values, depreciation, and working capital.

TAXES

The Examiner applied as taxes the actual taxes incurred by Alaska Steamship Company on all operations for 1962. Rates and charges under consideration in this proceeding were tested by the results of 1962 operations. In its "Notice of Request to Submit Exhibits" received by the Commission on November 5, 1962, Alaska Steam stated: "The facts showing the actual operations and results of operations for the full calendar year 1962 are the best evidence regarding the reasonableness of Respondent's revenues and income from all operations including increased freight rates which are the subject of these proceedings." And, during the course of the hearing before the Examiner, the attorney for Alaska Steam stated: "We judge the rates as of 1962, 1960, 1961, 1959 are not relevant." In 1962 Alaska Steam made money on its seasonal service but lost money on its scheduled service. Its actual tax liability for all operations in 1962 was less than a hypothetical liability of 52 percent on its seasonal service profits. Alaska Steam contends that the Commission should allow as taxes a figure of 52 percent of the profits of the seasonal service (plus an additional percentage for State of Alaska income taxes), notwithstanding the fact that a lesser amount was incurred by the company on its over-all operations. Hearing Counsel supports the Examiner's allowance for taxes.

We are not unmindful that rate-making is essentially prospective, and that it should not be assumed that one service will always lose money while another service will always be profitable. However, the increases under consideration are being tested by the actual results of 1962 operations, and during 1962 the scheduled service lost money, so that Alaska Steam's tax liability was reduced. To disregard this fact, it seems to us, would be to allow Alaska Steam to subsidize the scheduled service at the expense of the seasonal rate payers. It would, in effect, allow Alaska Steam a return over and above that which is shown to be just and reasonable in the seasonal service.

The Federal Power Commission has recently had to deal with the issue of tax allocations, although in a somewhat different context. The Power Commission decision, *Cities Service Gas Company*, Docket No. G–18799, issued July 15, 1963, involved a consolidated tax return [1] filed by the Cities Service Company and its subsidiaries. Since some of the subsidiaries had losses, and some had profits, a saving was achieved by filing the consolidated return, and the Gas Company argued that the saving should accrue only to the unregulated companies, and that the Commission should allow, for rate-making purposes, a tax factor of 52 percent against the profits of the Gas Company, despite the fact that its portion of the actual tax liability paid under the consolidated return was much less. The Power Commission rejected Gas Company's contention and applied as income taxes a portion of the net total consolidated tax liability of the regulated and unregulated groups over a representative period of time. The Power Commission's rationale was:

> To accept Cities Service's position would be to approve fixing jurisdictional rates on the basis of converting a hypothetical tax payment into a prudent operating expense. In effect, Cities Service argues that Gas Company should make Cities Service stockholders whole for the tax losses of nonregulated enterprises even though this means an allowance for taxes paid over and beyond that which the consolidated system as a whole actually paid. We reject this view as neither just nor reasonable. Tax allowances in a cost of service are for the purpose of permitting the regulated entity to secure a rate which, after taxes, will provide a reasonable return on jurisdictional investment, not to insure that other components of a complex corporate system are enabled to

[1] Internal Revenue Code, §§ 1501–1504.

"cash-in" on their tax losses. Docket No. G–18799, Federal Power Commission, page 4.[2]

We are not concerned here with a consolidated return or two separate corporate entities, one regulated and another not regulated. Alaska Steam is one corporation, with two different services which have been separated solely for the purposes of this proceeding. But the rationale of the Power Commission in the *Cities Service* case is applicable and with a greater force in the instant proceeding, because Alaska Steam is one company that is entirely regulated by this Commission and there can be no claim that the Commission is exercising improper jurisdiction.

Evidence was presented at the hearing before the Examiner that Alaska Steam has a virtual monopoly in its seasonal service, whereas in the scheduled service it is subject to competition. We are unwilling to speculate as to what management decisions regarding rates might be prompted by such a situation, but we are convinced that it is our duty to protect the rate payers of both services. This is one reason behind our support for the Examiner's separation of services in setting up a rate base, and we are of the opinion that it equally supports the Examiner's allowance of taxes. On the basis of the record, we hold that the equities are best served by allowing as tax against the income of the seasonal service only that amount of Federal income taxes which Alaska Steam incurred in 1962 on its over-all operations.

WORKING CAPITAL COMPUTATION

The Examiner allowed as working capital an amount approximately equal to one round average voyage expense for each ship in the service. The Examiner's allowance is in accord with that which we have allowed in past rate proceedings. See *Atlantic & Gulf-Puerto Rico General Increase in Rates and Charges*, 7 F.M.C. 87, at 109 (1962); *General Increases in Rates (1961)*, 7 F.M.C. 260, at 289 (1962), and *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, at 582 (1963).

Alaska Steam excepted to the Examiner's allowance. Through the testimony of its witnesses, Alaska Steam contended that it needed an allowance for working capital in its over-all operations of $2,800,000. Alaska Steam's request was based on the difference between current assets and liabilities on its balance sheet at a given time plus an additional sum for contingencies. The amount allocated on the basis of Alaska Steam's request to the seasonal service would be $661,920.

[2] Our citation of this decision should not be taken to mean that we endorse the cost of service principle for rate-making in the instant proceeding. As stated *infra*, we are adhering to the prudent investment standard.

The most generally accepted definition of working capital is that of Barnes:

> Working capital, in the technical sense in which it is here employed, does not include the total liquid funds with which the business is conducted. It is not the property which the business *has:* that is, it is not the excess of current assets over current liabilities. Working capital, rather, is an 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.[3]

This definition was used with approval by the Court in the recent case of *Government of Guam* v. *Federal Maritime Commission*, 329 F. 2d 251 (D.C. Cir., 1964), which case involved this very issue of working capital. In remanding the case to the Commission for further findings the Court said:

> The nub of the point here is that working capital is not a doctrinaire entry in the rate base; it is a realistic allowance—realistic in need and realistic in amount. Its inclusion in a rate base must bear a real relationship to the realities of the situation. 329 F. 2d at 257.

Alaska Steam's request for working capital is unrealistic. It bears no relationship to the needs of the carrier. In past rate proceedings the allowance of one round average voyage expense for each ship in the service has, in our opinion, provided amply for a carrier's needs in meeting any lag between expenses incurred and revenues received. There is no showing that such an allowance in this case will not be ample for Alaska Steam.

In examining Alaska Steam's operations, it is readily apparent that the seasonal service requires working capital. Alaska Steam engages in substantial pre-season planning and in a certain amount of post-season wind-up of operations, finding it necessary to maintain a year-round staff to insure that the seasonal operations go smoothly. Alaska Steam has considerable inactive vessel expenses attributable to the seasonal service, and part of its administrative and general expenses attributable to the seasonal service must be met throughout the lay-up months and the slack months when little cargo is being carried. The record shows that Alaska Steam's carryings in the seasonal service for 1962 went from a low of 5,000 revenue tons in May to a high of 42,000 revenue tons in August.

In 1962, inactive vessel expenses allocated to the seasonal service were $250,013. Administrative and general expense allocated to the seasonal service was $384,229. Alaska Steam needs working capital to cover its inactive vessel expense, and the allowance for working capital should include provision for part of the $384,229 of administrative and general expense which will be incurred in off-months. The allowance for working capital must also take into account cash requirements during other periods when revenues do not cover costs such as costs resulting from periods of vessel lay-up due to accidents, periods of increased vessel operating costs prior to the effective date of increased rates, and periods of strike.

Judged in the light of the above considerations, we are of the opinion that the Examiner's allowance of $453,090 is a realistic one and is fully justified.

Hearing Counsel excepted to the Examiner's allowance on the basis that only seven-twelfths of the Examiner's allowance should be included in the seasonal rate base since Alaska Steam's operations in its seasonal service cover only 7 months of the year. As we have found that the Examiner's allowance is a fair and a realistic one, a reduction of this allowance by five-twelfths would be unwarranted and might impede the seasonal operations. Hearing Counsel's exception is rejected.

Test Period

The Examiner used 1962 as the test period for the rate increases under consideration, to which only the State of Alaska excepted. State contends that the Examiner should have used a period of 3 to 4 years, to take into account the red salmon run cycle. While State's contention may have merit, the Examiner found 1962 to be a representational year, and we conclude, on the basis of the record, that this finding was correct. The record does not contain adequate information on seasonal operations over a 3- to 4-year period to support the use of such a period as the test period.

Operating Ratio Test

Alaska Steam urges that the Commission adopt the operating ratio test for the purposes of testing the rate increases under consideration. Alaska Steam has previously urged the operating ratio test on the Commission, and it has been rejected. *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563, at 584 (1963). Here, as in that case, the same facts hold true. The carrier has a substantial investment in property used and useful in providing service, and even though it charters vessels to round out its seasonal fleet, we are not persuaded that the owned equipment used in the service is so unsubstantial as to cause us to depart from the prudent investment standard.

Rate of Return

The Examiner, in his initial decision, found that the rates and charges under consideration were unjust and unreasonable to the extent that they provided the carrier with a rate of return in excess of twelve (12) percent. He further found that "a reasonable maximum rate of return for Alaska Steam in its seasonal service is 12 percent." (Initial Decision, page 29.)

In its testimony and exhibits, Alaska Steam repeatedly emphasized the uncertainty of its operation and the hazards which it encounters. It is true that the success or failure of the seasonal operations is largely dependent on the salmon run, and that the carrier must be prepared to move cannery supplies and salmon at given locations on short notice. In this respect, we accept the carrier's evidence that its operation is not comparable with a regular liner operation that has a steady flow of cargo and can expect to pick up and discharge, within certain limits, the same amount of cargo each time at a given port. The cannery operations, as the evidence shows, are dependent upon the carrier being able to supply cans, boxes, and salt and at the same time moving the already canned salmon out so that the canning operation can be continued. For these reasons, the seasonal operations of Alaska Steam have perhaps a higher degree of risk than other steamship operations.

On the other hand, we are unconvinced that physical hazards are any greater or should be given more weight than they are in any other trade. Even though lighter operations must be utilized to move cargo in and out of ports because of insufficient dockage facilities or shallow harbors, we are of the opinion that these are the operational facts of life of any carrier which chooses to call at many small ports. Furthermore, Alaska Steam's evidence that the shoreside operations are conducted by several men shows efficiency of operation which would ordinarily be expected of most carriers. Also, the risk to capital is reduced by Alaska Steam's monopolistic position in the trade. Alaska Steam is well aware that it will carry any available cargo, and the absence of competition minimizes the risks attendant in Alaska Steam's seasonal operations.

The criteria to be employed in a determination of a rate of return are well settled. In *Bluefield Co.* v. *Public Service Commission*, 262 U.S. 679, at 693 (1923), the Court said: "The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, to maintain and support its credit and enable it to raise the money necessary for the proper discharge of its public duties." And in *Power Commission* v. *Hope Gas Company*, 320 U.S. 591, at 603, the Court stated: "The rate-making process under the Act, i.e. the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests * * * From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of business. These include service on the debt and dividends on the stock." The testimony of the principal witness of Alaska Steam, an economist, was that the carrier needed a rate of return of 20 to 25 percent to prevent attrition of capital. While this witness testified at length, we have come to the conclusion that his testimony does not support Alaska Steam's contention. His analysis of Alaska Steam's operations was based on an earlier study made for Alaska Steam which had been updated for the purposes of the hearing, and he did not, in our opinion, take into consideration the realities of the situation. Here, as in the argument regarding working capital, Alaska Steam is relying on speculation. Alaska Steam is a Seattle-based corporation, it is a closely held corporation, and does not go to the public for capital. It does not have to go into the Alaskan capital market for funds, nor was any evidence introduced that it ever has. We can find no basis for allowing Alaska Steam a rate of return in the neighborhood of 20 to 25 percent—such a return would be allowed only on a showing of the most exceptional circumstances, which circumstances have not been shown here.

As to our conclusions, first we do not agree with the Examiner's finding that a maximum rate of return should be set in this proceeding. As stated above, the Examiner found that "a reasonable *maximum* rate of return * * * is 12 percent." (Italic supplied.) No purpose can be served by binding ourselves to setting a maximum rate of return in this proceeding, and such a finding is unnecessary. In this respect, the Examiner's finding is reversed. As to the actual rate of return to be allowed, we find that the increases here under consideration are unjust and unreasonable to the extent that they allow Alaska Steam a rate of return in its seasonal service in excess of ten (10) percent. In *General Increases in Alaskan Rates and Charges*, 7 F.M.C. 563 (1963), we allowed the carrier a rate of return on its over-all operations of 9.07 percent. And, though the testimony of Alaska Steam's expert witness on the subject of rate of return is in our view an incorrect appraisal of Alaska Steam's needs, we find that the nature of the seasonal operations of Alaska Steam is such that a ten percent rate of return is justified. We conclude that a ten percent rate of return in the seasonal service is fair to stockholders and rate payers alike.

Computations

The following computations are based on the evidence of record and the principles expressed *supra*, and are in accord with the Examiner's computation with the exception of the Federal income tax computation.[4]

---

[4] This computation differs from that of the Examiner in that he failed to take into account the fact that the additional 22 percent surtax is applicable only to profits in excess of $25,000.

Rate base (seasonal service):	
Vessels, at cost	$1,699,468
Less reserve	738,129
Net	961,339
Other property	138,387
Working capital	453,090
Total	1,552,816
Income account (seasonal service):	
Revenue	4,529,725
Expense	3,425,067
Inactive vessel exp.	250,013
Vessel depreciation	108,933
Administrative & General	384,228
Alaska Income Tax	976
Total	4,169,217
Gross Profit	360,508
Federal Income Tax	*77,226
	283,282
Profits of related companies	23,461
Net Profit	306,743
Rate Base	1,552,816
Rate of Return (percent)	19.75

*Computation of Federal Income Tax:	
Over-all Operations	[5] $160,064
Alaska Tax	976
Total	159,088
Federal Tax (30 percent on all profits; 22 percent additional on all profits in excess of $25,000)	77,226

[5] Per Alaska Steam's exhibit, using 20 year vessel life for Federal Income Tax Computation.

CONCLUSION

An appropriate order will be issued to the effect that all rates and charges producing a rate of return in excess of 10 percent in the seasonal service of Alaska Steamship Company are unjust and unreasonable, and Alaska Steamship Company and Northern Commercial Company River Lines will be required to submit to the Commission within thirty (30) days following the date of this decision amended tariff schedules in accord with our decision.

By the Commission, March 5, 1964.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 969

ALASKA STEAMSHIP COMPANY—GENERAL INCREASE IN RATES IN THE PENINSULA AND BERING SEA AREAS OF ALASKA

No. 1067

NORTHERN COMMERCIAL CO. RIVER LINES—GENERAL INCREASE IN RATES IN THE YUKON RIVER AREA OF ALASKA

ORDER

Full investigation in this proceeding having been had, and the Commission on this day having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that the increased rates and charges of Alaska Steamship Company and Northern Commercial Company River Lines are unjust and unreasonable to the extent that they provide Alaska Steamship Company with a rate of return in its seasonal service in excess of ten (10) percent,

Therefore, it is ordered, That respondents Alaska Steamship Company and Northern Commercial Company River Lines file with the Commission within thirty (30) days from the date of this decision revised schedules of rates and charges in accord with our findings and conclusions herein.

By the Commission, March 5, 1964.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 267

GOVERNMENT OF ISRAEL SUPPLY MISSION

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines, Inc., to waive collection of a portion of the applicable charges on two shipments of dry milk powder from the port of New York to Haifa, Israel, granted.

A. T. De Smedt for applicant.

INITIAL DECISION OF CHARLES E. MORGAN, EXAMINER [1]

This is an application filed May 14, 1963, by American Export Lines, Inc. (AEL), pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure for permission to waive collection of a portion of the applicable tariff charges on two shipments in March 1963, of non-fat dry milk powder, spray process, in bags, from Hoboken, New Jersey, Port of New York, to Haifa, Israel. Pending the outcome of this application AEL has not attempted collection of the freight charges on these shipments.

The first of these two shipments of dry milk powder consisted of 4,591 bags, amounting to 465,987 pounds, or a fraction over 208 long tons. The second shipment consisted of 3,889 bags, amounting to 394,734 pounds, or a fraction over 176 long tons. They were loaded respectively, on the SS EXPORT AIDE, voyage No. 12, and on the SS EXPORTER, voyage No. 99. The consignor of the shipments, which concurs in this application, was the Government of Israel Supply Mission, and the consignee was the Foreign Loans Department, Ministry of Finance, Jerusalem, Israel.

From June 6, 1962, through December 31, 1962, a special rate of $45.00 a long ton of 2,240 pounds had been in effect on milk powder from the Port of New York to Israel, but the ordinary tariff rate of

[1] This decision became the decision of the Commission on July 16, 1963, and an order was entered granting the application.

$50.50 again became effective on January 1, 1963, upon the automatic expiration of the above special rate. Approximately 4,450 long tons of milk powder had moved at the special rate.

Toward the end of 1962, the Government of Israel experienced difficulties in obtaining delivery of bagged milk powder to AEL vessels for shipment, because of the longshoremen's strike situation and other technical problems with suppliers. At that time, the Government of Israel requested that the special rate of $45.00 be applied to about 400 long tons of milk powder which could not be loaded prior to the end of 1962. AEL concurred inasmuch as the problems were clearly beyond the control of the shipper. AEL also experienced the interruption of some of its normal clerical procedures when its office employees honored the longshoremen's picket lines at AEL's office premises. As a result, AEL was not aware that the $45.00 special rate had been terminated, and no steps were undertaken to extend it into 1963. On the other hand, under normal circumstances, AEL would have anticipated no difficulty in continuing the special rate in effect.

This application seeks to adjust the charges from the basis of the applicable rates of $50.50 per long ton to the basis of the special rate of $45.00 per long ton. While any shipper would be well advised to check the applicable tariffs carefully to be sure that a quoted rate is in fact the effective tariff rate, in the present circumstances, AEL's failure to extend the special rate was an oversight and the result of events of which the shipper was innocent. The granting of the relief sought will not result in any discrimination between shippers. *Martini & Rossi et al.* v. *Lykes Bros. S.S. Co.*, 7 F.M.C. 453 (1962).

American Export Lines, Inc., will be authorized to waive collection of that portion of the charges on each of these two shipments, which is the difference between the charges based on the tariff rate of $50.50 and the special rate of $45.00 per long ton. Since no charges have been collected by AEL, stating this waiver in other words, AEL will be authorized to collect at the special rate, charges of $9,361.35 on the first shipment and charges of $7,929.92 on the second shipment. An appropriate order will be entered.

CHARLES E. MORGAN,
Presiding Examiner.

JUNE 21, 1963.

FEDERAL MARITIME COMMISSION

THE DUAL RATE CASES[1]

Proposed dual rate contracts approved as modified herein.

Decided March 27, 1964

Appearances:

For respondent conferences and carriers: Edward S. Bagley and Walter Carroll, Nos. 1001, 1006, 1053; Ronald A. Capone, and Robert Henri Binder, Nos. 1058, 1059; Robert L. Harmon and F. Conger Fawcett, Nos. 1055, 1056; Leonard G. James, No. 1007; Leonard G. James, Robert L. Harmon and F. Conger Fawcett, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; Seymour H. Kligler, Michael L. Goldstein, and Herman Goldman, Nos. 1026, 1027, 1028, 1029, 1051, 1052; Elmer C. Maddy, Nos. 1012, 1020, 1049, 1101, 1106; Elmer C. Maddy and Paul F. McGuire, No. 1081; John R. Mahoney, Nos. 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2); Paul F. McGuire, Nos. 1042, 1043; David Orlin, Nos. 1015, 1017; Edward D. Ransom, Lillick, Geary, Wheat, Adams & Charles, No. 1002; Elkan Turk, Elkan Turk, Jr., Sol D. Bromberg, Nos. 1005, 1023, 1031, 1050; Burton H. White and Elliott B. Nixon, Nos. 1033, 1034, 1037, 1039, 1046.

For interveners: Raymond V. Wolf, Ford Motor Company, Nos. 1033, 1034, 1037, 1039; Don A Boyd, E. I. du Pont de Nemours & Co., and du Pont de Nemours Internationl, S.A., Nos. 1012, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1020, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054, 1101, 1106; Donald Caldera, American Export Lines, No. 1081; Edward P. Cotter, D.B. Turkish Cargo Lines and Ipar Transport, Ltd., Nos. 1109, 1110; Paul Daniel, Brown & Williamson Tobacco Corp., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054; James H. Davis,

[1] The cases included in this report are set forth below.

Sun Oil Company, Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054; Maurice W. Fillius National Association of Alcoholic Beverage Importers, Inc., Nos. 1058, 1059; Jerome H. Heckman, Dow Chemical Co., and Dow International, S.A., Nos. 1012, 1013, 1014, 1016, 1019, 1020, 1021, 1022, 1025, 1030, 1042, 1043, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1101, 1106; Jerome H. Heckman and Charles M. Meehan, Dow Chemical Co., and Dow Chemical International, S.A., Nos. 1033, 1034, 1037, 1039; Lawrence D. Hollman, Paul Daniel and James N. Ravlin, Brown & Williamson Tobacco Co., Nos. 1012, 1020, 1101, 1106; James A. Kenney, Government of Pakistan, Nos. 1012, 1020, 1101, 1106; Richard E. Keresey, Esso International Inc., Nos. 1033, 1034, 1037, 1039; Dickson R. Loos, National Industrial Traffic League, Nos. 1012, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1020, 1021, 1022, 1025, 1026, 1027, 1028, 1029, 1030, 1045, 1047, 1048, 1054, 1101, 1106; Robert P. Nash, Esso International Inc., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1101, 1106; James E. O'Boyle, Ford Motor Co., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1026, 1027, 1028, 1029, 1030, 1045, 1047, 1048, 1054, 1101, 1106; T. R. Stetson, United States Borax & Chemical Corp., Nos. 1002, 1003, 1007, 1009, 1010, 1011, 1018, 1035, 1041, 1044, 1055, 1056, 1057, 1092; J. Richard Townsend, Pacific Coast Coffee Association and Pacific Coast Customs and Freight Brokers Association, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; R. S. Trigg, Armstrong Cork Co., Nos. 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019 1021, 1022, 1025, 1030, 1033, 1034, 1037, 1039, 1045, 1047, 1048, 1054, 1101, 1106; Burton H. White, North Atlantic Mediterranean Freight Conference Nos. 1109, 1110; John C. White, American Cotton Shippers Association, and Anderson, Clayton & Co., Nos. 1001, 1006, 1013, 1014, 1016, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1053, 1054, 1101, 1106.

As Hearing Counsel: Frank Gormley and Robert J. Blackwell, Nos. 1033, 1034, 1037, 1039; Norman D. Kline and Robert J. Blackwell, Nos. 1051, 1052; Howard A. Levy and Robert J. Blackwell, Nos. 1005, 1007, 1023, 1026, 1027, 1028, 1029, 1031, 1050; Thomas R. Matias and Robert J. Blackwell, Nos. 1012, 1020, 1058, 1059, 1101, 1106; Thomas R. Matias, Howard A. Levy, and Robert J. Blackwell, No. 1081; Roger A. McShea, III, and Robert J. Blackwell, Nos. 1015, 1017, 1109, 1110; H. B. Mutter, Howard A. Levy, and Robert J. Blackwell, Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092; J. Scot Provan and Robert J. Blackwell, Nos. 1042, 1043, 1049, 1055, 1056;

J. Scot Provan, William Jarrel Smith, Jr., and Robert J. Blackwell, No. 1046; William Jarrel Smith, Jr., and Robert J. Blackwell, 1002; Harold Witsaman and Robert J. Blackwell, Nos. 1001, 1006, 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1053, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2).

Hearing Examiners:

Herbert K. Greer, in Docket Nos. 1001, 1006, and 1053.

Edward C. Johnson, in Docket Nos. 1003, 1009, 1010, 1011, 1018, 1035, 1040, 1041, 1044, 1057, 1092, 1058, and 1059.

John Marshall, in Docket Nos. 1015, 1017, 1042, 1043, and 1111.

Charles E. Morgan, in Docket Nos. 1026, 1027, 1028, 1029, 1046, and 1111.

Paul D. Page, Jr., in Docket Nos. 1012, 1020, 1101, 1106, 1051, 1052, and 1111.

C. W. Robinson, in Docket Nos. 1013, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018 (Sub. No. 1), 1018 (Sub. No. 2), 1049, and Chairman of the Panel of Examiners in Docket No. 1111.

E. Robert Seaver, in Docket Nos. 1033, 1034, 1037, 1039, 1055, 1056, 1081, and 1111.

Walter T. Southworth, in Docket Nos. 1002, 1005, 1023, 1031, 1050, and 1007.

Benjamin A. Theeman, in Docket Nos. 1109 and 1110.

THIS REPORT INCLUDES THE EXCLUSIVE PATRONAGE (DUAL RATE) CONTRACTS IN THE FOLLOWING DOCKETS:

No. 1001—Gulf/Mediterranean Ports Conference.
No. 1006—Gulf/French Atlantic Hamburg Range Conference
No. 1053—South Atlantic Steamship Conference
No. 1002—Pacific Westbound Conference
No. 1003—Capca Freight Conference
No. 1009—Colpac Freight Conference
No. 1010—Canal, Central America Northbound Conference
No. 1011—Camexco Freight Conference
No. 1018—Association of West Coast Steamship Companies
No. 1035—Pacific Coast/Caribbean Sea Ports Conference
No. 1040—Pacific Coast/Mexico Freight Conference
No. 1041—Pacific Coast/Panama Canal Freight Conference
No. 1044—Pacific/West Coast of South America Conference
No. 1057—Pacific Coast River Plate Brazil Conference
No. 1092—In the Matter of Agreement No. 8660—Latin America/ Pacific Coast Steamship Conference
No. 1005—Associated Steamship Lines (Manila)

No. 1023—Far East Conference
No. 1031—New York Freight Bureau (Hong Kong)
No. 1050—Trans-Pacific Freight Conference (Hong Kong)
No. 1007—Pacific Coast European Conference
No. 1012—Calcutta/U.S.A. Conference
No. 1020—The India, Pakistan, Ceylon & Burma Outward Freight Conference
No. 1101—The Ceylon/U.S.A. Conference (Agreement 8050)
No. 1106—In the Matter of Agreement No. 8650—Calcutta, East Coast of India and East Pakistan/U.S.A. Conference
No. 1013—Atlantic and Gulf/West Coast of South America Conference
No. 1014—Atlantic and Gulf/West Coast of Central America and Mexico Conference
No. 1016—Atlantic and Gulf/Panama Canal Zone, Colon and Panama City Conference
No. 1019—Leeward and Windward Islands & Guianas Conference
No. 1021—Havana Steamship Conference
No. 1022—Gulf and South Atlantic Havana Steamship Conference
No. 1025—East Coast Columbia Conference
No. 1030—Havana Northbound Rate Agreement
No. 1045—United States Atlantic and Gulf-Haiti Conference
No. 1047—United States Atlantic & Gulf-Venezuela & Netherlands Antilles Conference
No. 1048—U.S. Atlantic and Gulf Ports-Jamaica Steamship Conference
No. 1054—Santiago de Cuba Conference
No. 1018 (Sub. No. 1)—Association of West Coast Steamship Companies (Cocoa, Coffee, Ivory Nuts, Ecuador/United States Atlantic-Gulf)
No. 1018 (Sub. No. 2)— Association of West Coast Steamship Companies (Coffee, Columbia/United States Atlantic-Gulf)
No. 1015—Atlantic and Gulf, Singapore, Malaya and Thailand Conference
No. 1017—Atlantic and Gulf-Indonesia Conference
No. 1026—Java-New York Rate Agreement
No. 1027—Java-Pacific Rate Agreement
No. 1028—Deli-Pacific Rate Agreement
No. 1029—Deli-New York Rate Agreement
No. 1033—North Atlantic French Atlantic Freight Conference
No. 1034—North Atlantic Mediterranean Freight Conference
No. 1037—North Atlantic Baltic Freight Conference
No. 1039—North Atlantic United Kingdom Freight Conference

No. 1042—River Plate/United States-Canada Freight Conference
No. 1043—River Plate and Brazil Conferences
No. 1046—West Coast of Italy, Sicilian & Adriatic Ports/North Atlantic Range Conference
No. 1049—United States Atlantic & Gulf/Australia New Zealand Conference
No. 1051—Straits/Pacific Conference
No. 1052—Straits/New York Conference
No. 1055—Pacific/Straits Conference
No. 1056—Pacific Indonesian Conference
No. 1058—North Atlantic Westbound Freight Association (Wines & Spirits Contract)
No. 1059—North Atlantic Westbound Freight Association
No. 1081—West Coast of India and Pakistan/U.S.A. Conference
No. 1109—Ipar Transport, Limited
No. 1110—D. B. Turkish Cargo Line
No. 1111—Dual-Rate Contracts, 1963—Adjudication of Major Issues

REPORT

BY THE COMMISSION (JOHN HARLLEE, *Chairman;* THOS. E. STAKEM, *Vice Chairman;* ASHTON C. BARRETT and JAMES V. DAY, *Commissioners*)

INTRODUCTION

These are proceedings under section 14b of the Shipping Act, 1916 (75 Stat. 762; 46 U.S.C. 813a), for the approval of so-called dual rate contracts used by common carriers by water and conferences of such carriers in the foreign commerce of the United States.[2] Most of the proceedings involve the approval of contracts which were in use at the time Public Law 87–346 was enacted. Under the terms of section 3 of Public Law 87–346, as amended, these contracts are not lawful beyond April 3, 1964.

In this report we have combined the aforesaid contracts for discussion and decision. The full terms of the contracts as approved by us are set forth in the orders appended hereto. The Initial Decisions of the Examiners which preceded this report dealt in most instances with the contracts of several conferences in related trade areas. Certain common issues were severed from some of the proceedings in-

[2] One proceeding, Docket No. 1092, also involves the approval of a new organic conference agreement under section 15 of the Shipping Act, whereby several presently existing conferences in the Pacific Coast/Latin American trades seek approval of an agreement which would combine the several conferences under a single agreement. The approval of this new conference agreement and such separate discussion of the use of dual rate contracts by this conference as is necessary are set forth at the end of this report.

volving specific contracts and were joined for hearing in Docket No. 1111 before a panel of five Examiners.[3]

Our determination to deal with all the contracts in a single report was prompted by several considerations. In its report on the bill which ultimately became Public Law 87–346, the Committee on the Merchant Marine and Fisheries of the House of Representatives made it clear that insofar as was possible dual rate contracts should be standard or uniform. The Committee said:

It is the expectation of the committee that a standard form of contract to be utilized by all conferences will be approved by the Board with such riders as may be required to suit the needs of a particular trade. This will greatly simplify the problems of shippers, who of necessity must be members of a number of conferences, with respect to interpretation and application of differing provisions. (H. Rpt. No. 498, 87th Cong., 1st Sess., p. 9 (1961)).

This sentiment was further expressed by the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives in its Report on the Ocean Freight Industry published several months following the enactment of Public Law 87–346.[4] The Anti-

[3] Docket No. 1111 treated the following issues:

Definition of Contract Shipper

(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

Contract Shipper Commitment

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

Legal Right to Select the Carrier

(c) Whether the provision required by section 14b(3) in all contracts, to limit the coverage of the contracts to "those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier" requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14b(3) should be incorporated verbatim, in the contracts.

Notice, Disclosure and Burden of Proof

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

Termination for Breach

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant.

The foregoing issues were severed in the following dockets: Nos. 1001 through 1007, inclusive; Nos. 1012 through 1023, inclusive; Nos. 1025 through 1031, inclusive; No. 1042; No. 1043; Nos. 1045 through 1057, inclusive; No. 1059; and No. 1101.

[4] For the part that the Antitrust Subcommittee played in the enactment of P.L. 87–346 see H.R. Rpt. No. 498, 87th Cong., 1st Sess., p. 6 and Sen. Rpt. No. 860, 87th Cong., 1st Sess., p. 10.

NOTE: There are no footnotes numbered 5 or 6, nor is there a page numbered 6.

trust Subcommittee in its recommendations related to Public Law 87–346 said:

3. The Federal Maritime Commission should establish minimal standards for dual-rate contracts beyond those set forth in Public Law 87–346 and should devise and publish a basic form contract to be used by all conferences. Any deviation from the form should be carefully studied by the Commission to insure that there is no discrimination against individuals or groups or shippers. (Report of the Antitrust Subcommittee of the Committee on the Judiciary of the House of Representatives Pursuant to H. Res. 56, 87th Cong., 2d Sess., p. 390 (1962)).

A further consideration in the combining of all contracts for a single decision was the fact that the contract provisions which should be permitted in each instance depend for the most part upon construction of the statute rather than upon the peculiar facts of a particular trade. In these circumstances, both consistency and efficiency promoted a single discussion. The fact that a number of individual hearings were held and that there have been a number of initial decisions by several Examiners has furnished us with perhaps a broader background for this decision than would have been the case if but a single hearing had been held.

In reaching our conclusions we have considered the arguments presented in all the cases included herein. We discuss herein those arguments which appear to be of substance. Arguments and exceptions to the Initial Decisions not discussed herein were considered by us and found to be not justified.

BACKGROUND TO PUBLIC LAW 87–346

Public Law 87–346 is the latest event in the long and controversial history of dual rate contracts in the water-borne commerce of the United States. The lawfulness of dual rate contracts was challenged as early as 1922 when our predecessor, the United States Shipping Board, found that the use of such a contract by an individual carrier was unlawful under sections 16 and 17 of the Shipping Act (46 U.S.C. 815, 816). *Eden Mining Co.* v. *Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922).

A few years later an individual carrier sought, under the antitrust laws, to enjoin the use of a dual rate system by a conference of carriers. The charge was made that the system had not been approved by the Shipping Board under section 15 of the Shipping Act (46 U.S.C. 814) and therefore was open to challenge under the antitrust laws. The Supreme Court found that the matters complained of lay primarily within the jurisdiction of the Shipping Board under the Shipping Act and affirmed the dismissal of the bill of complaint. *United States Nav. Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932). In

Cunard the Court made it plain that it was not passing upon the lawfulness of dual rate systems under the Shipping Act. Thus, in answer to an assertion that the dual rate contract there in issue could not lawfully be approved, the Court replied that this was "by no means clear." 284 U.S. at 487.

The following year the Shipping Board again had the occasion to speak on the lawfulness of dual rate contracts. In *Rawleigh* v. *Stoomvaart, et al.* 1 U.S.S.B. 285 (1933), the Shipping Board found that a dual contract used by a conference of carriers, as distinguished from the single carrier agreement in *Eden Mining, supra*, was not unlawful. The Shipping Board distinguished *Eden Mining* upon the ground, among others, that the conference contract offered the shipper the use of several carriers and therefore, in the judgment of the Shipping Board, was not subject to the same objections as a single carrier system.

The next major controversy over such agreements came when the Department of Justice sought an injunction under the antitrust statutes against a conference dual rate system which had not been approved by the United States Maritime Commission. Again, the Supreme Court held that the matters complained of were within the exclusive primary jurisdiction of the Maritime Commission under the Shipping Act and did not rule upon the lawfulness of the system. *Far East Conference* v. *United States*, 342 U.S. 570 (1952).

Finally, the lawfulness of such agreements under the Shipping Act was directly presented to the Supreme Court in *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481 (1958), where a dual rate system which had been expressly approved by the Board was challenged. The Court set aside the Board's approval of the contract system on the ground that it was a "resort to other discriminating or unfair methods to stifle outside competition in violation of section 14 Third" of the Shipping Act, 1916 (46 U.S.C. 812), 356 U.S. at 493.

The Isbrandtsen decision cast serious doubt upon the lawfulness of all dual rate systems; and shortly following this decision Congress enacted legislation to permit, temporarily, the continued use of dual rate systems by conferences organized pursuant to agreements approved by the then Federal Maritime Board.[7] Immediately upon the enactment of this interim legislation the Committee on Merchant Marine and Fisheries of the House of Representatives commenced a study of conferences and dual rate systems. Concurrently, the Antitrust Subcommittee of the Committee on the Judiciary of

[7] Public Law 85-626 (72 Stat. 574).

the House of Representatives commenced a connected study of certain antitrust practices in the ocean freight industry.

Public Law 87–346 resulted from these studies. It permits the use of dual rate contracts but only if the Commission finds that certain safeguards have been met. In adopting this course Congress, in a sense, reaffirmed the earlier philosophy of section 15 of the Shipping Act which, by authorizing supervised competition-restricting agreements among carriers, recognizes that there is some justification in the water-borne foreign commerce for making exception to our normal antitrust policies.

We will now discuss the specific requirements of the statute, with frequent reference to primary documents of the legislative history of Public Law 87–346.[8] While section 14b authorizes the use of dual rate contracts by both common carriers and conferences of such carriers, we, for convenience, have generally used the term "conference" as including the one individual carrier whose dual rate contract is before us. Further, since section 14b also authorizes dual rate contracts with both shippers and consignees, our use of the term "merchant" generally includes both shippers and consignees.

THE STATUTORY REQUIREMENTS

Before considering the numbered provisions of section 14b which relate to the required express provisions of all contracts there are two general requirements of the section which demand brief preliminary discussion. In generally describing the nature of the contracts to be permitted, section 14b states that the Commission shall permit contracts which are "available to all shippers and consignees on equal terms and conditions" and which provide lower rates to a shipper or consignee "who agrees to give all or any fixed portion of his patronage" to the carrier or conference offering the dual rate contract.

Under the first of these provisions there is the question of whether the Commission can permit a contract which is offered only to shippers or only to consignees. The phrase "shippers and consignees" appears to have been used in the statute to eliminate any doubt regarding whether so-called consignee contracts could be continued

[8] Shortened citations to these documents are used as follows:

"House Hearings" refers to Hearings before Special Subcommittee on Steamship Conferences of the Committee on Merchant Marine and Fisheries, House of Representatives, on H.R. 4299, 87th Congress, 1st Session (1961).

"House Report" refers to House Report No. 498, 87th Congress, 1st Session (1961).

"Senate Hearings" refers to Hearings before Merchant Marine and Fisheries Subcommittee of the Committee on Commerce, U.S. Senate, on Steamship Conference/Dual Rate Bill, H.R. 6775, 87th Congress, 1st Session (1961).

"Senate Report" refers to Senate Report No. 860, 87th Congress, 1st Session (1961).

under the statute rather than for the purpose of requiring that all contracts be offered on both sides of the ocean.

As originally introduced, H.R. 4299 (the direct predecessor to H.R. 6775 which was ultimately enacted as Public Law 87–346) stated that the then Federal Maritime Board could permit contracts "available to all shippers in the trade on equal terms and conditions." In commenting on this provision of H.R. 4299, the Under Secretary of Commerce, speaking for the Maritime Board, suggested that the bill be amended by defining the word "shipper" as used therein to include consignors and consignees. In explaining the motive for this amendment, the Under Secretary said, "many of the exclusive patronage contracts currently in effect are between consignors as well as consignees and carriers. The recommended language would make it clear that such arrangements may be continued and shall be governed by the safeguards erected in the proposed section." (House Hearings, p. 6; House Report, p. 17.) Presumably in response to this suggestion by the Under Secretary, Draft Revision No. 2 of H.R. 4299 permitted contracts "available to all shippers and consignees on equal terms and conditions." (House Hearings pp. 535–536.)

Elsewhere in the hearings on H.R. 4299 there is expressed concern on the part of carriers and conferences that the bill as originally introduced might not permit the continuation of consignee contracts then in existence. (See House Hearings pp. 177, 357, and 511.) Shippers were likewise concerned that the bill as originally introduced might not permit the continuation of their consignee contracts or might not require that the safeguards of the bill be included in consignee contracts. (See House Hearings pp. 388–389, 411.)

From all this it would appear that the intent of the statute is to permit the continuation of so-called consignee contracts rather than to demand that if a contract is used it must be offered both to the exporter in one country and to the importer in the other country. The decision of whether to solicit contract signatories on both sides of the ocean, like the decision of whether to use a dual rate system at all, will therefore be left to the conference.

Under the second of the above provisions there is the question of whether the merchant must have the option of excluding a portion of his shipments from the obligation of the contract. The proposed contracts fall into two basic categories: (1) those which require the merchant to use the conference vessels for *all* of his shipments (except for commodities expressly exempted by the eighth numbered provision of section 14b) and (2) those which obligate the merchant to exclusive patronage only for specific commodities. The first type is generally used in the export trades; the second is generally used in the import trades. In this regard the proposed contracts generally are unchanged from those which were in effect at the time Public Law 87–346 was enacted.

The legislative history of the "all or any fixed portion" phrase of the statute is scant but nevertheless enlightening. As originally introduced, H.R. 4299 dealt only with arrangements whereby a merchant would be given a lower rate if he promised his "exclusive patronage." (See House Hearings, p. 1.) In testifying on this provision of H.R. 4299, Mr. Edward Bransten of the Pacific Coffee Association criticized the "exclusive patronage" wording because, in his opinion, the statute so worded would not have outlawed 80% or 90% patronage contracts and would not have required that such contracts contain the statutory safeguards. (House Hearings, p. 389.) (In this connection it should be remembered that H.R. 4299 first expressly outlawed "exclusive patronage" contracts and then by a proviso permitted the use of such contracts if they contained certain provisions and were approved by the then Federal Maritime Board.) Mr. J. Richard Townsend, appearing as counsel for the Pacific Coast Coffee Association, also explained to the House Committee that, in his opinion, the bill as it then stood would not prohibit conferences from offering contract rates for 80% or 90% of a merchant's patronage but not including any of the safeguards imposed by the bill for exclusive patronage dual rate contracts. (House Hearings, pp. 397–398.) Mr. Bransten and Mr. Townsend testified before the Committee on April 10, 1961. Draft Revision No. 2 of H.R. 4299, published on April 13, 1961, changed "his exclusive patronage" to "all or any part of his patronage." (House Hearings, p. 536.) This language ultimately became "all or any fixed portion of his patronage" in the Senate subcommittee print of August 8, 1961. (Senate Hearings, pp. 603–604.)

From all this it is evident that the intent underlying the phrase "all or any fixed portion" was not to require that under all dual rate contracts lower rates had to be offered for a fixed percentage of the merchant's cargo. The phrase was intended rather to make it clear that if such fixed portion contracts were offered they would be subject to the same safeguards as "exclusive patronage" contracts. We therefore will not require that conferences permit shippers the option of offering only a fixed portion of their shipments to the conference in exchange for lower rates.

Prompt Release

The first numbered provision of section 14b requires that every contract contain a provision which expressly:

(1) permits prompt release of the contract shipper from the contract with respect to any shipment or shipments for which the contract carrier or con-

ference of carriers cannot provide as much space as the contract shipper shall require on reasonable notice.

Most of the conferences have recognized the benefits both to themselves and to the contract shippers of defining what is meant by "prompt release." The contracts of these conferences require that the merchant notify the conference that he needs space for a particular shipment. The conference is then allowed a specific period of time by which it must notify the merchant that space will be available within a fixed number of days from the sailing date requested by the merchant.

A few of the contracts presented in these proceedings contain but the bare words of the statutory provision and merely state that the merchant will be "promptly" released from the contract where the conference cannot provide space for his shipment. Some of these conferences have argued that the fixing of specific times under this provision of the statute is unnecessary because in the past they have always been reasonable in their treatment of merchants. If this be true then there should be no objection to a contract provision which informs each merchant of his rights and fixes with some certainty the obligations of the parties.

In the interest of avoiding future controversies over what, in fact, constitutes prompt release of the merchant, we are requiring that all contracts, by their terms, fix the time period by which the conference must respond to a request for space and the time by which the conference must furnish space. We have permitted some variation in these times among the various trades depending upon what appeared to be the reasonable commercial needs in the particular trade.

Rate Increases

Under the second numbered provision of section 14b all contracts must contain a provision which expressly:

(2) provides that whenever a tariff rate for the carriage of goods under the contract becomes effective, insofar as it is under the control of the carrier or conference of carriers, it shall not be increased before a reasonable period, but in no case less than ninety days:

Read most literally, this provision of the statute would simply require that rates not be increased more often than once every 90 days. However, numerous witnesses, both shippers and carriers, who testified before the Senate and House Committees during the consideration of H.R. 4299 and H.R. 6775 viewed this provision as requiring 90 days' *notice* of rate increases rather than the bare assurance that rates would not be increased more often than once every 90 days.[9] It was recog-

[9] See, for instance House Hearings pp. 270, 325, and 352–353; Senate Hearings pp. 249, 519, 533, 675, 712, and 719.

nized by these witnesses that merchants offering goods for sale in our foreign commerce must know the ocean freight rate well in advance of shipment. A contract which merely assures the merchant that a rate which was increased today will not be again increased sooner than 90 days from today does not meet this need. With the passage of each day under such a contract the merchant has one day less for the planning of future sales and after the running of the initial 90 days the merchant is assured nothing. It appears therefore the overriding intent of the statute and the reasonable requirements of our foreign commerce demand that merchants be given a minimum of 90 days' advance notice of increases in rates. This would seem a reasonable *quid pro quo* on the part of the conference for the merchant's exclusive patronage.

In recognition of this practical need of our commerce, a great number of the conferences have included a 90 days' notice provision in their proposed contracts.

Many of these contracts also contain provisions which permit the merchant to give notice of cancellation of his contract effective with a proposed rate increase and, in turn, permit the conference a period of time during which it may reach a decision whether to withdraw its proposed rate increase rather than suffer numerous merchant cancellations. Such provisions have the salutary effect of discouraging rate increases which might be completely unacceptable to merchants and would make it unnecessary that the merchant unqualifiedly cancel his contract upon notice of a rate increase which he found unacceptable. Such provisions would not, of course, interfere with the merchant's statutory right to cancel his contract without cause upon 90 days' notice.

A contract provision which permits merchants 30 days after notice of a rate increase in which to decide whether they will continue under the contract and, in turn, permits the carriers 30 days in which to decide whether the proposed increase should be withdrawn would appear to be fair to both merchants and carriers. In keeping with the legislative intent that the Commission should, insofar as possible, standardize dual rate contracts, we are requiring that all contracts include a uniform clause relating to provision (2) of section 14b. This clause, which is set out below, requires 90 days' notice of rate increases and includes the conditional cancellation provision just discussed. Rate increases necessitated by emergency conditions outside the control of the carriers are permitted under a separate contract provision which will be discussed below.

In order to dispel any doubt regarding the applicability of section 18(b) of the Act to rate changes under dual rate contracts, we are requiring that all rate changes must conform with section 18(b)(2).

The further requirement of section 18(b) that carriers must offer subscriptions to their tariffs is also to be explicitly stated in the required standard clause.

In order to clear up the question of notice to merchants who sign a contract during a time that an outstanding notice of increase is running, the standard clause also states that both rates and notice of proposed rate increases shall be considered to have become effective on their original dates rather than to have become effective with the signing of the individual contract. In order to eliminate the possibility of different notice dates to different merchants, notice is accomplished by tariff publication.

The following clause will be included in all contracts:

(a) The Carriers shall make no change in rates, charges, classifications, rules or regulations, which results in an increase or decrease in cost to the Merchant, except as provided by section 18(b)(2) of the Shipping Act, 1916, and the Rules of the Federal Maritime Commission: *Provided, however*, the rates of freight under this agreement are subject to increase from time to time and the Carriers, insofar as such increases are under the control of the Carriers, will give notice thereof not less than ninety (90) calendar days in advance of the increases by publishing them ninety (90) calendar days in advance in the ------------------------------ Conference Tariff. Should circumstances necessitate increasing the rates by notice as aforesaid and should such increased rates be not acceptable to the Merchant, the Merchant may tender notice of termination of this Agreement to become effective as of the effective date of the proposed increase by giving written notice of such intention to the Conference within thirty (30) calendar days after the date of notice, as aforesaid, of the proposed increase: *Further provided, however*, that the Carriers may, within thirty (30) calendar days subsequent to the expiration of the aforesaid thirty (30) calendar day period, notify the Merchant in writing that they elect to continue this Agreement under the existing effective rates and, in the event the Carriers give such notice, this Agreement shall remain in full force and effect as if the proposed increase had never been made and the Merchant's notice of termination had never been given.

(b) The Conference shall offer to the Merchant a subscription to its tariffs at a reasonably compensatory price, however, the Merchant shall be bound by all notices accomplished as aforesaid without regard to whether it subscribes to the Conference tariff. Tariffs shall be open to the Merchant's inspection at the Conference offices and at each of the offices of the Carriers during regular business hours.

(c) The rates initially applicable under this Agreement shall be deemed to have become effective with their original effective date through filing with the Federal Maritime Commission rather than to have become effective with the signing of this Agreement and notices of proposed rate increases which are outstanding at the time this contract becomes effective shall run from the date of publication in the tariff rather than from the date of this Agreement.

Legal Right to Select the Carrier

Under the third numbered provision of section 14b all contracts must contain a provision which expressly:

(3) covers only those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier: *Provided, however,* That it shall be deemed a breach of the contract if, before the time of shipment and with the intent to avoid his obligation under the contract, the contract shipper divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier which is not a party to the contract:

There are two questions which arise under this provision of the statute. Historically, both have been troublesome; neither is easy of resolution. First is the question of the circumstances under which the merchant is restricted to the use of conference vessels for the transportation of goods which he purchases or sells. The second question, which arises indirectly, is the extent to which companies affiliated with the signatory to the contract should be bound by the single merchant's signature. Both of these issues were segregated from most of the cases and were given separate treatment in Docket No. 1111.

The major controversy over contract clauses dealing with the first question concerns the presumptions, if any, which may be drawn by the carriers where the signatory merchant has participated in some fashion in the arrangements for ocean transportation or where the shipping documents list the merchant as either shipper or consignee. Many of the proposed contracts contain language which would raise a conclusive presumption that the signatory merchant had the legal right to select the carrier if his name appeared on certain shipping documents or if he otherwise participated in the ocean routing or the selection of the ocean carrier. While we agree that these circumstances may suggest that the merchant had the legal right to select the carrier, the statute does not appear to permit such circumstances, and nothing more, to prove conclusively legal right to select the carrier. In short, the statute does not appear to permit a presumption here which would preclude the proof of the true situation.[10]

On the other hand, some recognition of the practical problems which a conference must face in proving that a merchant had the legal right to select the carrier seems desirable. The merchant himself will

[10] As was brought out in many of these proceedings, letter of credit financing generally requires that bills of lading be taken out in the name of the selling merchant without regard to whether the purchaser may have in fact directed the ocean routing or chosen the carrier. Even absent such testimony, however, we have discovered nothing in the records of these proceedings which would warrant a conclusion that mere participation in the arrangements for ocean transportation or the mere appearance of a name on a bill of lading or other shipping document would themselves prove conclusively that the merchant had the right to select the ocean carrier.

ordinarily be in sole possession of all the facts which would prove or disprove his legal right to select the carrier. We are therefore approving a contract provision which will raise a rebuttable presumption, as it were, that the merchant possessed the legal right at the time of shipment to select the ocean carrier if he participated in the arrangement for ocean transportation or if his name appears on a bill of lading or export declaration as shipper or consignee. This provision is optional with carriers. Those who desire some provision relating to presumptions may use it. Those carriers that desire no language in the contract relating to presumptions need not include it.

In accordance with the House Committee Report we are also requiring that all contracts expressly state that nothing therein shall require the merchant to forego a sale unless the shipment is made on a conference vessel.[11]

Paragraphs numbered 1, 2, 3, and 5 of the following provision will be required in all contracts. Paragraph number 4 may be used by those conferences which desire a provision which raises a presumption where the signatory merchant is named in the bill of lading or export declaration or participates in the ocean routing.

1. If the Merchant has the legal right at the time of shipment to select a carrier for the shipment of any goods subject to this Agreement, whether by the expressed or implied terms of an agreement for the purchase, sale or transfer of such goods, shipment for his own account, operation of law, or otherwise, the Merchant shall select one or more of the Carriers.
2. If Merchant's vendor or vendee has the legal right to select the carrier and fails to exercise that right or otherwise permits Merchant to select the carrier, Merchant shall be deemed to have the legal right to select the carrier.
3. It shall be deemed a breach of this Agreement, if before the time of shipment, the Merchant, with the intent of avoiding his obligation hereunder, divests himself, or with the same intent permits himself to be divested, of the legal right to select the carrier and the shipment is carried by a carrier not a party hereto.
4. For the purposes of this Article, the Merchant shall be deemed prima facie to have the legal right at the time of shipment to select the carrier for any shipment.
    (a) with respect to which the Merchant arranged or participated in the arrangements for ocean shipment, or selected or participated in the selection of the ocean carrier, or
    (b) with respect to which the Merchant's name appears on the bill of lading or export declaration as shipper or consignee.[12]

[11] House Report, p. 9.

[12] Because of special circumstances shown to exist in the Hong Kong trades involved in Docket Nos. 1031 and 1050 the following additional language will be permitted in those contracts:

"With respect to which merchant participated in the arrangement for ocean shipment beyond the delivery to the ocean carrier's terminal or alongside the carrier's vessel and without in any way exhausting what may constitute subterfuge or evasion within the meaning of Article ------ hereof, the merchant shall be deemed prima facie to have the

5. Nothing contained in this Agreement shall require the Merchant to refuse to purchase, sell or transfer any goods on terms which vest the legal right to select the carrier in any other person.

Turning to the second problem presented under provision (3) of section 14b, the legislative history of the section makes it clear that Congress left it to the Commission to specify the circumstances under which affiliated companies would be bound under the contract by a single merchant's signature. Many of the proposed contracts would include all affiliates without regard to the signatory merchant's control over the affiliate. A few contracts bind only the signatory merchant. Others would bind only those affiliates which the signatory merchant has the power to control.

The desire of some conferences to bind all the affiliates of the contract signatory to a single contract would seem prompted primarily by two objectives: (1) To ease the solicitation or sales efforts of the conferences by tying an entire corporate complex by a single contract and (2) To make it less easy for a signatory merchant to evade his obligations under the contract through the subterfuge of using an affiliated company for nonconference shipments. Neither of these interests is, in our view, sufficient to permit a clause which would bind all of the signatory merchant's affiliated companies without regard to the merchant's control over the affiliated company. In the words of the Senate Committee, "no single answer which would include or exclude all shipments made by all such related companies could suffice." [13]

An appropriate contract provision dealing with this question should take into account that section 14b was designed in some measure as a device for strengthening conferences by assuring them a nucleus of cargo and should recognize the problems of contract evasion which arise if only the signatory merchant is bound to the contract. We agree with the findings on this problem by the panel of Examiners in Docket No. 1111, especially since their reasoning was grounded upon

legal right to select the carrier for any shipment made in fact by such merchant in respect of which the name of any firm or person, being associated with the local agents of a nonconference line appears as the shipper on the relevant bill of lading and any merchant using this subterfuge shall be deemed prima facie to have violated his contract with the carriers."

[13] In speaking of the problems left to the Commission for resolution, the Senate Report said, at page 14:

"One such matter involves another 'coverage of the contract' question, somewhat like the f.o.b./f.a.s. problem. To what extent should dual rate contracts cover goods shipped by a company which is a subsidiary, affiliate or associate of the contract shipper? Obviously, no simple answer which would include or exclude all shipments made by all such related companies could suffice. The 'good faith of the contract shipper' issue is present in large proportions. If the answer were left entirely to contract shippers, it is quite conceivable that some would have subsidiaries for the express purpose of using the conference carrier only when it suited them. But if it were left entirely to the contract carrier or conference, it might well be that no matter how legitimate and autonomous the subsidiary, affiliate or associate company, the claim of 'all-or-nothing' might be made against the contract shipper."

an interpretation of the broad legislative intent of section 14b rather than upon any facts peculiar to an individual case.

The Examiners found that if a conference did not desire to bind a merchant's affiliates by a single contract, then it need not. However, those conferences which desire to bind affiliates should use a uniform clause which binds only those affiliated companies over which the signatory merchant regularly exercises working control in relation to shipping matters. As the Examiners pointed out, the legislative history of this provision of the statute indicates that Congress recognized that some, but not necessarily all, of a merchant's affiliates might properly be bound to a single contract. By imposing the test of regular control over shipping matters, the clause which we are approving prevents the merchant from avoiding his obligations under the contract by merely routing particular shipments in the name of an affiliated company. The further requirement in this clause that all companies over which merchant exercises this control be listed in the contract serves two additional purposes. It gives the conference a complete list of the companies entitled to contract rates, and it places a compulsion on the merchant to fully inform the conference of the names of all companies obligated under the contract. As the Examiners observed, however, no purpose under the contract would be served by requiring the merchant to also list related companies not controlled by the merchant.

It has been argued that the ease of forming subsidiaries or affiliates in some countries requires that the contract include all affiliates. If the contract binds all affiliates whose shipping matters are controlled by the signatory merchant, however, the ease of forming or extinguishing affiliates will not make such affiliates any less bound under the contract. Instances may occur where a signatory merchant breaches his contract through the use of a controlled affiliate. But no words in any agreement can assure that the parties will not breach their contract. In an attempt to make it clear that the contract requires the good faith of the parties the clause which we are approving includes a specific provision regarding various subterfuges.

The following clause will be uniformly required in all contracts with the exception that those conferences who do not desire an affiliates clause may omit the second paragraph.

The Merchant undertakes to ship or cause to be shipped all of its ocean shipments moving in the trade on vessels of the Carriers unless otherwise provided in this agreement.

The term "Merchant" shall include the party signing this contract as shipper and any of his parent, subsidiary, or other related companies or entities who may engage in the shipment of commodities in the trade covered by this contract and over whom he regularly exercises direction and working control (as distinguished from the possession of the power to exercise such direction and control) in relation to shipping matters, whether the shipments are made by or in the name of the "Merchant", any such-related company or entity, or an agent or shipping representative acting on their behalf. The names of such related companies and entities, all of whom shall have the unrestricted benefits of this contract and be fully bound thereby, are listed at the end of this contract. The party signing this contract as "Merchant" warrants and represents that the list is true and complete, that he will promptly notify the Carriers in writing of any future changes in the list, and that he has authority to enter into this contract on behalf of the said related companies and entities so listed.

In agreeing to confine the carriage of its (their) shipments to the vessels of the Carriers the Merchant promises and declares that it is his (their) intent to do so without evasion or subterfuge either directly or indirectly by any means, including the use of intermediaries or persons, firms or entities affiliated with or related to the Merchant.

The Carriers agree that they will not provide contract rates to anyone not bound by a shipper's rate agreement with the Carriers. The Merchant agrees that he will not obtain contract rates for any person not entitled to them, including related companies not bound by this contract, by making shipments under this contract on behalf of any such person.

Natural Routing

The fourth numbered provision of section 14b requires that all contracts include a provision which expressly:

(4) does not require the contract shipper to divert shipment of goods from natural routings not served by the carrier or conference of carriers where direct carriage is available.

The mere absence of a contract provision requiring diversion from natural routings is insufficient to meet this requirement in that the statute directs that all contracts *expressly* not require diversion. As was the case with "Prompt Release," discussed above, definition of "Natural Routing" in the contract will, in the words of the House Committee, "greatly simplify the problems of shippers, who of necessity must be members of a number conferences, with respect to interpretation and application of differing provisions." [14] We are therefore requiring that all contracts contain a uniform or standard clause on this subject as set out below.

We have included in this clause a requirement that where a merchant intends to exercise his right under this clause to use a non-conference carrier he must first notify the conference of his desire or need for service on the direct route and afford the conference an opportunity to provide such service. The approved clause also resolves what might be considered an ambiguity under this provision of the statute by requiring the merchant to use conference vessels if the conference provides service on a natural routing for the particular shipment. Thus, the contract requires shipment on conference ves-

[14] House Report, p. 9.

sels unless this constitutes *unnatural* or *indirect* routing. It has been suggested that the statute does not permit this construction. We disagree. The overall philosophy of the statute reaffirms an earlier Congressional conclusion that steamship conferences, if properly regulated, can be beneficial to our commerce and that exclusive patronage contracts under fair terms and conditions should be permitted as a means of assuring conferences a nucleus of cargo. There is no justifiable need served by relieving the merchant of his obligation to use conference vessels merely because a nonconference carrier is calling at one of the several ports through which a particular shipment could "naturally" move, and the conference calls at another port of equal natural routing but not the port served by the nonconference line. To permit the merchant to avoid his contract in these circumstance would amount to little more than obligating the merchant to use conference vessels when there was no satisfactory nonconference service available.

As we have construed the "natural routing" provision of section 14b the merchant will be free under his contract to use nonconference vessels if in fact the use of conference vessels would require him to divert his cargo to unnatural routes. The merchant will not be permitted to escape his contract obligations, however, when the nonconference service is no more natural, as it were, than that of the conference.

The following clause will be required in all contracts

> This agreement does not require the Merchant to divert shipments of goods from natural transportation routes not served by conference vessels where direct carriage is available: *Provided, however*, That where the Carriers provide service between any two ports within the scope of this contract which constitute a natural transportation route between the origin and destination of such shipment, the Merchant shall be obligated to select the Carriers' service. A natural transportation route is a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances. Whenever Merchant intends to assert his rights under this article to use a carrier who is not a party hereto, and the port through which Merchant intends to ship or receive his goods is within the scope of this agreement, Merchant shall first so notify the conference in accordance with the provisions of Article [prompt release] hereof.

Damages for Breach

The fifth numbered provision of section 14b requires that all contracts contain a provision which expressly:

> (5) limits damages recoverable for breach by either party to actual damages to be determined after breach in accordance with the principles of contract law: *Provided, however*, That the contract may specify that in the case of a

breach by a contract shipper the damages may be an amount not exceeding the freight charges computed at the contract rate on the particular shipment, less the cost of handling.

There is only one aspect of this provision which presented any serious controversy in these proceedings. All of the proposed contracts contain provisions which substantially paraphrase this provision, including its proviso.[15] However, some of the proposed contracts contain provisions which would permit the carriers to suspend or terminate the merchant's right to contract rates prior to any adjudication that the merchant has breached his contract and would keep the merchant bound to exclusive patronage at the higher, noncontract rates during the pendency of arbitration or adjudication of an alleged breach. Generally, where these latter provisions have appeared, the conferences have agreed or have provided in their contracts that if the adjudication or arbitration is ultimately in the merchant's favor then the conference would refund to the merchant the difference between the contract rate and the noncontract rate which he had paid during the pendency of the litigation or arbitration.

The Senate Committee was clear in its statement that punitive suspensions or terminations by the conferences of merchants' contracts are not permitted under the statute. The Committee said:

Most of the dual rate contracts now used by the conferences serving U.S. ports provide for liquidated damages in the amount of dead freight, without deducting anything for cost of handling. In addition, many of them provide that if of a shipper who has breached does not promptly pay the liquidated damages due, or if he breaches twice in a year, his contract shall be cancelled and he shall thereafter pay the noncontract rate. The bill would allow no such penalties. (Senate Report, p. 213.)

This statement makes it plain that the limits of the merchant's punishment for violation of his contract are the damages provided by the statute and nothing more. We therefore will not permit clauses which suspend a merchant's rights but continue his obligations as an additional penalty for breach of his contract.

However, provisions which would suspend both the merchant's obligations and his rights under the contract if he does not promptly dispute or deny claims made by the conference that he has breached his contract or suspend his obligations and rights during a period that he fails to pay damages adjudged due would not appear to be contrary to the statute. Such a suspension of the merchant's contract, running only for so long as the merchant fails to pay damages ad-

[15] Some proposed contracts also provide that the cost of handling will be assumed to be a fixed percentage of the contract rate with either party having the option to challenge this cost in the particular case. Such provisions appear reasonable and therefore will be permitted.

judged due, is hardly punitive. It simply terminates the contract for that period of time during which one party refuses to fulfill his obligations. It does not impose punishment over and above damages. If the adjudged damages are promptly paid the contract is never suspended.

Some of the conferences have argued that if, under such circumstances, both the merchant's rights and obligations are suspended, unscrupulous merchants will intentionally breach their contracts by a small shipment via a nonconference vessel in order to work a cancellation of their agreements on less than the required 90 days' notice. We do not believe, however, that this poses any serious problem. Under the approved clause which is set out below, the soonest that a merchant's contract could be suspended would be 30 days following the discovery by the conference of facts which would raise a suspicion of a breach. Presumably, some period would transpire between the merchant's shipment and the conference's discovery of that fact, and a further period of time would be consumed by the conference in informally verifying its suspicions. Thus, it is likely that it would be well in excess of 30 days following a shipment in violation of the contract before the contract could be suspended. Furthermore, for the merchant to reap any appreciable benefits from such a subterfuge his shipment would have to be relatively insignificant because if he breaches his contract he remains liable for damages without regard to whether his later failure to dispute his liability works a suspension of his contract.

We are not requiring that any contract contain an express provision giving the conference the right to suspend a merchant's rights and obligations under the contract for failure to pay adjudged damages. However, those conferences which have indicated by their proposed contracts that they desire coverage of this subject, will use the following provision which would, of course, be in addition to the mandatory provision of the statute fixing the measure of damages:

(1) Upon the failure of the Merchant to pay or dispute his liability to pay liquidated damages as herein specified for breach of the contract within 30 days after receipt of notice by registered mail from the Conference that they are due and payable the Conference shall suspend the Merchant's rights and obligations under the contract until he pays such damages.

(2) If, within 30 days after receipt of such notice the Merchant notifies the Conference by registered mail that he disputes the claim, the Conference shall within 30 days thereafter proceed in accordance with Article to adjudicate its claim for damages, and if it does not do so, said claim shall be forever barred. If the adjudication is in the Conference's favor, and the damages are not paid within 30 days after the adjudication becomes final, the Conference shall suspend the Merchant's rights and obligations under the contract until he pays the damages.

(3) No suspension shall abrogate any cause of action which shall have arisen prior to the suspension.

(4) Payment of damages shall automatically terminate suspension.

(5) The Conference shall notify the Federal Maritime Commission of each suspension and of each termination of suspension, within 10 days after the event.

To avoid later controversy regarding what might be meant in the contract by "cost of handling," we are requiring that where a liquidated damage provision is used in a contract the deduction from the contract rate shall be the "cost of loading and unloading." This is in perfect agreement with the Senate Committee's statement that "the cost of handling is understood to mean the cost of loading the cargo onto the vessel and discharging the cargo from the vessels." (Senate Report, p. 13.)

Shipper Cancellation

The next numbered provision of section 14b requires that all contracts contain a provision which expressly:

(6) Permits the contract shipper to terminate at any time without penalty upon ninety days' notice.

All of the proposed contracts contain, as they must, clauses which conform with this provision of the statute. Therefore, no discussion is here necessary.[16]

Spread Between Contract and Noncontract Rates

The next numbered provision of section 14b requires that each contract contain a provision which expressly:

(7) Provides for a spread between ordinary rates and rates charged contract shippers which the Commission finds to be reasonable in all the circumstances but which spread shall in no event be more than 15 per centum of the ordinary rates.

Most of the proposed contracts expressly provide for the maximum 15 percent spread. A few provide for ordinary rates 15 percent higher than the contract rates which results in a spread of approximately 13 percent of the higher, ordinary rates. In none of these proceedings was there any shipper objection to the spreads as proposed by the conferences nor did any independent or nonconference carrier appear in opposition to the spreads as proposed. In these proceedings as in the Senate and House Hearings, there was, as the Senate Committee said, "general satisfaction with the 15 percent spread." (Senate Report, p. 14.)

---

[16] A few of the contracts contain clauses which state, in substance, that either party may cancel the contract on 90 days' notice. In the case of termination by the conference, cancellation would, of course, have to be in accordance with the third-from-last sentence of section 14b.

In discussing this provision of the statute the House Committee said:

> The provision authorizing the maximum spread between the rate charged the casual shipper and the exclusive patronage contract signer of 15 percent appeared to the Committee, in the light of its experience, as reasonable. The problem was to find a figure that would not act as a penalty upon the shipper who did not choose to limit his shipments to conferences and at the same time would provide sufficient inducement to others to execute agreements. As stated, it is the belief of the Committee, which was shared by carrier and shipper witnesses alike, that the dual rate conference system provides definite advantages in assuring a nucleus of cargo to established carriers, thus enabling them to provide the equipment and service required by the majority of shippers. The contract/noncontract spread is the best practical device to assure these aims and the 15 percent difference in rates is, in the judgment of the Committee, fair and reasonable to achieve this end without imposing a penalty or discriminating against the nonsigner. (House Report, p. 8.)

In these circumstances we find that the 15 percent spread as provided for in the majority of the proposed contracts is reasonable. It follows, of course, that the 13 percent spread of some of the proposed contracts is also reasonable. A number of the contracts also provide for the statement of rates in the highest multiple of 5 cents, or 25 cents, which does not result in a spread greater than 15 percent. This appears to be a reasonable provision and will therefore be permitted.

Cargoes Excluded from the Contract

The next numbered provision of section 14b requires that each contract contain a provision which expressly:

> (8) Excludes cargo of the contract shippers which is loaded and carried in bulk without mark or count except liquid bulk cargoes, other than chemicals, in less than full shipload lots: *Provided, however*, That upon finding that economic factors so warrant, the Commission may exclude from the contract any commodity subject to the foregoing exception.

All of the proposed contracts include provisions generally following this language. Many of the contracts as approved by the Examiners both in Docket No. 1111 and in other cases which were not consolidated for hearing in Docket No. 1111, also provide for the exclusion of liquid petroleum in less-than-full shipload lots.

We are requiring that all contracts exclude liquid bulk petroleum in less-than-full shipload lots.

As originally proposed, this provision would have excluded all bulk cargo, without exception, from the coverage of all contracts.[17]

[17] As reported by the Senate Commitee the provision read:
"(7) excludes cargo of the contract shipper which is loaded in bulk without mark or count." (Senate Report, p. 39.)
No similar provision appeared in H.R. 6775, as it passed the House. (107 Cong. Rec. 9369–9372.)

It was amended during the Senate debate to read substantially as finally enacted. The only explanation of the amendment to remove liquid bulk, except liquid chemicals, was that the provision as reported by the Senate Committee was broader than was necessary. (107 Cong. Rec. 18250.) The most detailed information and argument presented in the Senate Hearings relative to the bulk exemption were from Dow Chemical Co., who explained at some length the requirements of their particular business which made it necessary that bulk cargoes be excluded from contract coverage. Dow's contentions were, in part, that their chemicals should be permitted the exclusions which had in the past been generally accorded liquid petroleum. (Senate Hearings, pp. 506–509.)

It is not clear whether Congress thought the phrase "liquid chemicals" included liquid petroleum, but certainly the same factors which prompted the exclusion of liquid chemicals would serve also to exclude liquid petroleum. This conclusion is further reinforced by the obvious practical difficulties in many instances of determining with any assurance whether a particular liquid should properly be called "petroleum" and not "chemical."

Other Contract Provisions

The ninth and last numbered clause of section 14b states that dual rate contracts shall contain such other provisions "not inconsistent herewith as the Commission shall require or permit." There are a number of matters which have arisen in these proceedings which must be dealt with under this portion of section 14b.

a. *Notice of shipment via nonconference vessel.* The issue of what notice, if any, should be given by the merchant of the movement of goods via nonconference vessels was severed from a number of the individual proceedings and treated in Docket No. 1111. A variety of provisions have been suggested. Their purpose, of course, is to aid the conference in policing its contracts. The basic merchant objections to these provisions are that the statute does not require notice and that a notice requirement would impose an administrative burden upon them and would possibly lead to interference with purchases or sales or to improper disclosure of the details of their business transactions.

In Docket No. 1111 the panel of Examiners found that a reasonable notice requirement should be permitted. We agree. Some recognition of the practical problems of enforcement of dual rate contracts would seem permissible, if not desirable. Both the Senate and House Committees acknowledged that the good faith of the signatory merchant is important to the survival of any contract system.[18] A reasonable

[18] Senate Report, p. 13, House Report, p. 9.

notice provision would help assure this good faith. The provision approved by the Examiners in Docket No. 1111 appears reasonable and we will therefore permit its use in all contracts. This clause limits notice to shipments which have already moved via a nonconference vessel and thus avoids conference interference in a pending sale. Only the bare essentials of the transaction need to included in the notice and hence the burden on the merchant should be slight. The following clause will be permitted:

> Within ten (10) days after the event in any transaction in which the Merchant is a party and the legal right to select the carrier is vested in a person other than the Merchant, and if he has knowledge that the shipment has been made via a nonconference carrier, the Merchant shall notify the Conference in writing of this fact, giving the names of the Merchant and his customer (or vendor), the commodity involved and the quantity thereof, and the name of the nonconference carrier: *Provided, however*, That where the activities of the Merchant are so extensive in area or the nature or volume of his sales or purchases makes it impracticable to give notice within ten (10) days, the Merchant shall give notice as promptly as possible after the event.

b. *Disclosure by merchant of facts relative to the routing of a particular shipment.* The issue of what rules of discovery against merchant should be permitted in the contracts was also given special treatment in Docket No. 1111. It was treated individually in other proceedings. Here again, a reasonable disclosure provision would appear to be proper in recognition of the problems which the conference must face in policing its contracts. The basic facts concerning a merchant's shipments will in many instances be available only from the merchant's files. Merchant objection to disclosure provisions was based more on the possible abuse by the conferences of such a provision than upon disagreement with the principle of disclosure itself. The clause approved by the panel of Examiners in Docket No. 1111 strikes a fair balance between carrier and merchant interests and therefore is approved for inclusion in those contracts where the conference has expressed a desire for language covering the subject of disclosure. This clause is as follows:

> In order that the conference may investigate the facts as to any shipment of the Merchant that has moved, or that the Merchant or the conference believes has moved, via a nonconference carrier, and upon written request clearly so specifying, the Merchant, at his option, (1) will furnish to the conference chairman, secretary, or other duly authorized conference representative or attorney, such information or copies of such documents which relate thereto and are in his possession or reasonably available to him, or (2) allow the foregoing persons to examine such documents on the premises of the Merchant where they are regularly kept. Pricing data and similar information may be deleted from the documents at the option of the Merchant, and there shall be no disclosure of any information in violation of section 20 of the Shipping Act, 1916, as amended.

Many conferences objected to the portion of this provision which permits the merchant the option to require examination at the merchant's office which may be some distance from the conference office. As noted, however, the provision seeks to strike a fair balance between conference and merchant interests. It should discourage conference harassment of merchants by intemperate use of discovery but at the same time it does not impose an unreasonable burden on the conference. Moreover, we would assume that in most instances merchants will wish to furnish copies to the conference rather than to permit an outsider to look through their files in their own office.

c. *Burden of proof.* Many of the proposed contracts would place upon the merchant the burden of proving that he did not violate his contract in various circumstances. This was also one of the issues treated in Docket No. 1111. The arguments in support of placing the burden of proof upon the merchant have generally been arguments of convenience. The conferences contend that because in many instances the proof of a breach will depend upon the merchant's intent, he should have the burden of proving his intent. The language of the panel of Examiners in Docket No. 1111 is generally appropriate here:

> The general rule that he who claims a breach must prove the breach is so strongly entrenched in American jurisprudence that there must be some compelling reason not to follow it in the case of dual-rate contracts. Nothing has been shown to this Panel which would justify the finding that dual-rate contracts are so sacrosanct or so important as to require treatment different from that accorded most other contracts. We are not unaware, of course, that Congress, by enacting section 14b, has recognized the desirability of the dual-rate system, but it also has hedged the system with various restrictions in order to protect shippers.

As was discussed above under provision (3) of section 14b (Legal Right to Select the Carrier), we have approved a contract provision which makes the appearance of a merchant's name upon certain documents or his participation in the ocean routing of the cargo prima facie proof that he had the legal right to select the carrier. This places some burden of going forward on the merchant. More is not needed. We therefore will not approve any clause which places the burden of proof, as such, on the merchant.

d. *Merchant's right to use owned or chartered vessels.* This issue was also treated by the panel of Examiners in Docket No. 1111. Their conclusion was that contract provisions which at present permit merchants to use their owned or chartered vessels should be continued but that conferences who have not permitted such exclusions in the past should not now be required to do so under the new law.

Exclusion from contract coverage of a merchant's goods moving on the merchant's owned or chartered vessels would primarily benefit larger shippers. However, neither the economic philosophy of the United States nor section 14b of the Shipping Act requires that a merchant be deprived of all normal economies which go along with largeness. An important purpose of the Shipping Act is to facilitate the flow of commerce, and while it recognizes that a proper conference system can contribute to this end, it does not undertake to give the conference prior claim on all cargoes nor afford the conferences protection from all possible competition. We therefore are requiring that all contracts, whether or not they previously did so, shall permit merchants to transport cargoes on their owned vessels, or on vessels chartered by the merchant provided the term of the charter is 6 months or more. By limiting this to charters for periods of some duration, the conferences are accorded reasonable protection from spot raiding of cargoes and merchants accorded the right to engage in bona fide proprietary carriage under reasonable conditions.

e. *Geographic scope of the contract.* Two questions have arisen in these proceedings relative to the geographic areas to be covered by the contracts. The first is the inclusion in contracts of commerce over which we have no direct jurisdiction. Some of the contracts require, for example, that the merchant promise exclusive patronage from or to ports on one of the United States coasts and contiguous ports in Canada and/or Mexico. The argument has been made that because the Commission has no direct regulation over non-United States commerce, Canada and Mexico should not be included in the contracts presented to the Commission for approval.

The purpose of the inclusion of these areas in a single contract is to obligate merchants who desire dual rate contracts from or to the United States to also obligate themselves to exclusive patronage from or to ports contiguous to the United States. This is a natural result of the fact that the conference offers service to all such ports. If merchants were permitted to obtain lower rates by promising their exclusive patronage only from or to United States ports, they could easily use nonconference vessels from or to nearby Canadian or Mexican ports and honor the contract only when it met their convenience. We, therefore, are permitting contracts to include Canada and/or Mexico where these areas are included in the service offered by the conference.

The second question here concerns the inclusion in the contract of foreign areas not presently served by the conference vessels. This question has arisen in connection with foreign areas which are presently not being served because of political reasons. Examples of such areas are Communist China and Cuba. The conferences have generally argued that they should be permitted to include these areas in their contracts in order to facilitate their resumption of service when political conditions permit. We find no harm in permitting such areas to be included. This inclusion will constitute no more than so-called stand-by authority to reinstitute dual rate contracts at such time as service is resumed.

One of these cases presents an additional, related problem. The proposed contract of the River Plate Brazil Conferences (Docket No. 1043) would include Great Lakes ports in addition to United States Atlantic and Gulf ports when only one conference member serves Great Lakes ports and then with only one sailing per month during that part of the year that the Lakes are open to navigation. Under these circumstances a single carrier would be permitted the benefit of the full economic force behind the conference contract with the conference, as such, offering no service to the Great Lakes. Or, as the Examiner stated in his Initial Decision:

> The proposed contract is unjustly discriminatory because shippers must subscribe to inadequate conference service out of the Great Lakes in order to get needed contract rates from Atlantic and Gulf ports.

We, therfore, will not permit the contract of the River Plate and Brazil Conferences to include the Great Lakes. Of course, at such time as the conference extends fuller service to the Great Lakes it may apply for permission to extend the scope of its contract system.[19]

f. *Arbitration.* Most of the proposed contracts contain clauses which require or permit arbitration of disputes arising thereunder. Some of the initial decisions have required that these clauses be qualified so as to permit arbitration only of those matters falling outside the jurisdiction of the Commission. This qualification is said to be necessary in order to avoid conflict with section 22 of the Shipping Act which provides "That any person may file with the Commission sworn complaint setting forth any violation of the Act. . . ." While we agree that the contract should not, nor cannot, oust the Commission from its jurisdiction and duties under the Shipping Act, limiting arbitration only to matters outside the jurisdiction of the Commission may be more restrictive than is necessary.[20] Arbitration has developed as an efficient means of settling disputes under commercial contracts generally and would appear to be an appropriate means of disposing of routine disputes which arise under dual rate contracts. We therefore have no objection to clauses which call for the arbitration of disputes provided they contain the following statement: "nothing herein shall deprive the Federal Maritime Commission of its jurisdiction."

g. *Contract amendments and applicability of the Shipping Act.* Many of the proposed contracts contain clauses which acknowledge

[19] The Examiner would also withhold approval of the dual rate system as to Atlantic and Gulf ports unless the organic conference agreement were modified to eliminate the Great Lakes. It would appear that this modification of the conference agreement is better treated outside this proceeding. We are therefore not here requiring the modification of the conference agreement but rather will study the matter further with a view to possible future action.

[20] See *Swift & Co.* v. *Federal Maritime Commission,* 306 F. 2d 277 (D.C. Cir., 1962).

that any amendments thereto are subject to the approval of the Commission. Some conferences argue that such provisions are unnecessary as they merely state a requirement of law. In order to avoid any misunderstanding on the part of shippers who may in many instances be unaware of the status of such agreements, we are requiring that all contracts contain a provision specifically stating that all modifications are subject to the Commission's approval. For similar reasons we are also requiring that the contracts include a provision acknowledging that interpretations thereof must be made in the light of the Shipping Act and the rules and regulatons of the Commission.

h. *Contracts of carriage.* Many of the proposed contracts contain provisions which state that contracts of carriage must be made with the individual conference carrier and that the other conference members have no liability under such contracts of carriage. These provisions were generally approved by the Examiners. They appear to be included merely to avoid any misunderstanding of the part of the merchant regarding the fact that the merchant must make arrangements with the individual conference members for the carriage of the specific cargoes and that the conference as a whole does not assume the normal carrier liabilities of the member line under whose bill of lading the cargo moves. As such they seem proper and will be permitted.

i. *Open rates.* The conferences have generally sought in these proceedings a means whereby they could open rates on particular commodities to meet temporary and abnormal competitive conditions without being considered to have terminated their contracts as to such commodities. Merchants generally favored permitting conferences this flexibility. In an interpretative ruling published March 2, 1962 (27 F.R. 2046, 46 C.F.R. § 530.1) we expressed the opinion that section 14b appeared to preclude such flexibility. In retrospect, and having had the benefit of the views of all parties as well as the Examiners in these proceedings, we think that flexibility in the opening of rates, under proper safeguards, is permissible under the statute.

In Docket No. 1111 and in the other cases where the matter was at issue the Examiners generally found that there was a justifiable need on the part of the conferences for some flexibility in opening rates to meet abnormal competitive conditions. It was said that for the opening of rates to be of any benefit to the conference, it must be able to do so swiftly since one of the objectives thereof is to enable the individual conference members to move promptly in reducing rates to meet the competition. In a rapidly declining rate situation the conference machinery is often too unwieldy to keep up with the day-to-day fluctuations. While we do not suggest that the opening of rates is an altruistic move, it must be recognized that in many instances rates are opened in response to the demands of contract shippers. If the disparity between the conference contract rates and the rates of the carriers outside the conference becomes too great shippers will soon abandon the conference service. To keep up with the rate fluctuations in some instances requires that rate fixing initiative be returned to the individual conference members.

Under the clause which we are approving and which was approved by the examiners in Docket No. 1111, the conference will be permitted to open rates without advance notice but the individual carrier members would not be permitted to charge rates in excess of the last published conference contract rate for a period of 90 days after the rate has been opened. Also, the conference would have to give 90 days' notice of the return of the rate to the conference dual rate system. This clause was generally agreeable to the conferences, their only objection being that the limit on rate increases should be 30, rather than 90, days.[21] The 90-day requirement is necessary however to assure that the opening of rates will not be used to accomplish a rate increase on less than the required notice. Under the approved clause, when a rate is opened the contract shippers are released from their contract with regard to the particular commodity. In these circumstances the conference carriers individually possess the initiative in meeting the rates of the carriers outside the conference and must compete individually for the open rated cargo. The approved clause further recognizes that merchants need advance notice that a rate will be returned to the conference contract system and requires 90 days' notice of this event. Tariff filings while rates are open would, of course, be subject to section 18(b).

The following clause is approved for use by those conferences who desire to provide in their contracts for the opening of rates. Our interpretative ruling of March 2, 1962, will be withdrawn.

> The Merchant and the Carriers recognize that mutual benefits are derived from freedom on the part of the Carriers to open rates, where conditions in the Trade require such action, without thereby terminating the dual rate system as applicable to the commodity involved; therefore, it is agreed that the Conference, to meet the demands of the Merchants and of the Trade may suspend the application of the contract as to any commodity through the opening of the rate on such commodity (including opening subject to maximum or minimum rates) provided that none of the Carriers during a period of ninety days after the date when the opening of such rate becomes effective shall quote a rate in excess of the Conference contract rate applicable to such commodity on the effective date of the opening of the rate and provided further that the rate shall not thereafter be closed and the commodity returned to the application

[21] A few conferences initially sought approval of clauses which provided for so-called open dual rates. This innovation appears to have been offered as one means of avoiding our March 2, 1962, ruling. These conferences have indicated that a clause similar to that which we are approving would also be agreeable to them. Under these circumstances it is necessary that we discuss the merits and vices of such clauses.

of the contract system on less than ninety days' notice by the Carriers through the filing of contract-non-contract rates in their tariff.

j. *Conditions beyond the control of the carriers.* The proposed contracts generally contain provisions which would permit the suspension of service or rate increases on short notice where abnormal conditions beyond the control of the carriers are present. Both the words of the statute and its legislative history indicate that the carriers were to be permitted some flexibility under the contracts in extraordinary circumstances.

Provision (2) of section 14b specifically acknowledges that under some circumstances the carriers would be permitted to increase rates on less than normal notice. As originally passed by the Senate, this provision of the section expressly provided that the limit on rate increases was not to apply in cases of "war or other force majeure." (107 Cong. Rec. 17946 et seq.) This phrase was deleted by the House-Senate conferees. (107 Cong. Rec. 19289.) Although the Conference Report did not specifically discuss this deletion, Senator Engle, one of the conferees, explained on the floor of the Senate that the Senate conferees agreed to the deletion "because it was redundant." Senator Engle explained that "Such occurrences are always beyond the control of the contracting parties and therefore may not impose upon them obligations which they did not intend to assume when they made their contract." (107 Cong. Rec. 19782.)

In recognition of this legislative history we are permitting contract clauses which provide for exceptions to the routine of the contract system in extraordinary circumstances.

First, we are approving a contract provision which authorizes the complete suspension of the contract system under circumstances where war or other governmental action interferes with the service of the carriers. This provision merely requires that the carriers notify the merchants of the suspension of the system and give 15 days' notice of the resumption of the system. Those conferences or carriers which desire to provide for this contingency in their contracts shall use the following clause:

In the event of war, hostilities, warlike operations, embargoes, blockades, regulations of any governmental authority pertaining thereto, or any other official interferences with commercial intercourse arising from the above conditions, which affect the operations of any of the Carriers in the trade covered by this Agreement, the Carrier or Carriers may suspend the effectiveness of this Agreement with respect to the operations affected, and shall notify the Merchant of such suspension. Upon cessation of any cause or causes of suspension set forth in this article and invoked by any Carrier or Carriers, said Carrier or Carriers shall forthwith reassume its or their rights and obligations hereunder and notify the Merchant on fifteen (15) days' written notice that its suspension is terminated.

Further, in order that the conference may, if it so desires, continue its contract system notwithstanding war or other governmental action which adversely affects carrier service and in recognition that the costs and risks of service increase precipitously in such circumstances, we are approving a clause which permits rate increases on 15 days' notice in such circumstances. The approved clause would also permit the continuation of the contract system at higher rates imposed in compliance with section 18(b) of the Shipping Act in other extraordinary circumstances which unduly impede or delay the carriers service. Where rates are increased in either of these situations the merchant is also given the right to suspend his obligations under the contract for the duration of such increases. Those conferences or carriers which desire to provide for rate increases in such circumstances shall use the following clause:

In the event of any of the conditions enumerated in Article * * * [the clause set out above] the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions, in lieu of suspension. Such increase or increases shall be on not less than 15 days' written notice to the merchant, who may notify the carrier or carriers in writing not less than 10 days' before increases are to become effective of its intention to suspend this Agreement insofar as such increase or increases is or are concerned, and in such event the Agreement shall be suspended as of the effective date of such increase or increases, unless the carrier or carriers shall give written notice that such increase or increases have been rescinded and cancelled.

In the event of any extraordinary conditions not enumerated in Article * * * [the clause set out above] which conditions may unduly impede, obstruct, or delay the obligations of the carrier or carriers, the carrier or carriers may increase any rate or rates affected thereby, in order to meet such conditions; provided, however, that nothing in this article shall be construed to limit the provisions of Section 18(b) of the Shipping Act, 1916, in regard to the notice provisions of rate changes. The merchant may, not less than 10 days before increases are to become effective, notify the carrier or carriers that this agreement shall be suspended insofar as the increases are concerned, as of the effective date of the increases, unless the carrier or carriers shall give notice that such increase or increases have been rescinded and cancelled.

DOCKET NOS. 1109 AND 1110

Some special comment is necessary regarding the contract systems of Ipar Transport, Limited (No. 1109) and D. B. Turkish Cargo Line (No. 1110) which are the only single carrier contract systems included in these proceedings.[22] The only objection to these individual carrier rate systems came from the North American Mediterranean Freight Conference which, to some extent, parallels the service of Ipar and Turkish Cargo. The Conference has also applied for permission to use a dual rate contract. The conference argues in the main that two

[22] Ipar has given notice of cancellation of its dual rate system. However, this cancellation does not become effective until April 6, 1964, and therefore its contract is included herein.

dual rate contracts in the same trade can only produce instability and chaos and therefore should not be permitted. The conference also challenges the lawfulness of individual carrier dual rate systems.

There would appear to be no doubt that Public Law 87–346 allows individual carriers to use dual rate contracts under the same requirements as conferences. Both in the preamble to Public Law 87–346 and throughout section 14b the separate terms "carrier" and "conference" are used. To say that a single carrier is nevertheless to be denied a dual rate system where it is in competition with a conference is to read the word "carrier" out of the statute. At least since 1914 it has been recognized that conferences (or rate-fixing combinations by some other name) are the all but universal rule in foreign waterborne commerce.[23] Thus it must be concluded that Congress in repeatedly using the word "carrier" intended to differentiate and to sanction the same treatment for an individual line as for a conference in the matter of dual rate contracts. We are therefore permitting the dual rate contract of these lines as modified to conform with our findings as to all contracts.

DOCKET NO. 1092

As mentioned above, one of these proceedings also involves the approval of a new conference agreement which would combine under a single agreement several conferences in the Pacific Coast/Latin American Trade. This new agreement (Agreement No. 8660) provides for the fixing of rates and practices in the trade between Pacific Coast ports in the United States and Canada on the one hand and ports in the Caribbean, Central America, and South America (excluding ports in Brazil, Uruguay, and Argentina) on the other. The new conference would replace 10 currently existing conferences which embrace this trade area.

The primary objection to Agreement No. 8660 is that it would concentrate too much power in one conference. It should be noted, however, that the purpose of the agreement is to increase generally the efficiency of conference administration. The agreement is divided into five trade areas (three outbound from the United States and two inbound), and only those carriers who provide service in the particular trade area may vote on rates and practices which apply to that area. Thus, while the new agreement takes the place of 10 currently existing agreements, it creates what amounts to 5 new conferences under a single administrative office.

[23] See Report on Steamship Agreements & Affiliations in the American Foreign & Domestic Trade of the House of Representatives Committee on the Merchant Marine and Fisheries, 63rd Cong., Vol. 4, p. 415 (1914). (Generally known as the "Alexander Report.")

We recognize that while the new agreement may promote administrative efficiency, it also to some extent provides greater control over competition in these trades. However, this particular consolidation of several conferences serving contiguous areas does not of itself appear to be unlawful. We perceive no undue increase in competitive strength by reason of the arrangement. We will therefore approve Agreement No. 8660. We will also observe closely the future operation under the agreement so as to insure that the standards of section 15 of the Shipping Act are met.

The use of a dual rate contract by the new conference presents a special problem, however. As discussed above, the conference members themselves have recognized that five separate trade areas are involved and that a carrier who does not serve a particular trade should not be permitted to control the rates and practices in that trade. Yet, if the conference is permitted to offer a single dual rate contract which includes all five of the trade areas, merchants will be forced to obligate themselves to exclusive conference patronage in trade areas not desired in order to obtain contract rates in a trade area where they feel the dual rate contract meets their needs. This seems to us neither necessary nor fair.

We have approved the new agreement on the ground that it is largely concerned with providing a means of central administration for a number of conferences. In keeping with this, we are approving the use of a dual rate contract in each of these five trade areas and merchants must be offered the privilege of executing a contract for any or all of the trade areas, as they desire. We find that it would be both contrary to the public interest and detrimental to commerce for the conference to require that a merchant obligate himself to exclusive patronage in all of these trade areas in order to obtain contract rates in a single trade. Any such requirement would, of necessity, bring into serious question the new conference arrangement itself.

What we have said above in our general discussion of the express requirements of section 14b applies to the contract form proposed by this new conference and its proposed contract will be modified accordingly.

One intervener in Docket No. 1092 argues that there is no "need" for the extension of the dual rate system to areas included in the new conference agreement which are not now covered by existing dual rate systems of the individual conferences. Section 14b does not require that the conference demonstrate a positive need for the system as a prerequisite for approval. Rather it authorizes the use of dual rate contracts if they meet certain safeguards. Moreover, it appears that the requirements which we have here generally imposed on all contracts satisfy most of this intervener's objections.

One other matter regarding the contract system of the new conference requires some discussion. The tariffs of the conferences who are combining under the new agreement split their total charges for ocean freight into two parts. One is a so-called freight rate which is in payment for service from ship's tackle at port of origin to ship's tackle at the destination port. The other is a so-called handling charge which is in payment for movement of the cargo from ship's tackle to place of rest on the dock. The conferences acknowledge that "the handling charge is a component part of the overall freight paid for transportation." While there would appear to be nothing in section 14b which would require that two levels of "handling charges" be stated by conferences using dual rate systems, it would make folly of the section to permit conferences to avoid the rate stability or guarantee which the section assures contract shippers through the simple device of segregating into separate elements the prices charged for the total carrier services. While we will not require the conferences to state two levels of "handling charges" in their tariffs, they should be aware that they will not be permitted to increase their handling charges on less than the 90 days' notice required of carriers using dual rate systems.

We recognize that it may take some time to accomplish the details involved in the dissolution of the 10 separate conferences and in formally organizing the new conference and that the dual rate contracts of the 8 of the 10 conferences which currently use contracts, expire by the terms of section 3 of Public Law 87–346 on April 4, 1964. The individual conferences will therefore be allowed to use the dual rate contract proposed by the new conference, as modified herein, until such time as the new conference can be formally organized.

CONCLUSION

The contracts submitted in these proceedings, modified as set out in the orders attached hereto, are found to comply with the requirements of section 14b of the Shipping Act, 1916. Provisions which have been found herein to be permissible, but not mandatory, may be added or deleted from the contracts as set out in the attached orders [22] before said contracts are tendered to merchants for signing.

Commissioner Patterson concurring and dissenting:

The following report covers what would be my response to applications filed pursuant to section 14b of the Shipping Act, 1916 (Act), by 57 conferences of carriers and one carrier in the foreign commerce of the United States for permission to use 24 types of contract forms to

[22] Attachments omitted here due to length.

be tendered merchant shippers. The proposed contract forms provide lower rates to a shipper or consignee who agrees to give all or a fixed portion of his patronage to such conferences or carriers and generally contain provisions which the applicants claim conform to the description of such contracts in section 14b. The contracts are referred to generally hereafter as the "contracts."

Each application and its annexed contract forms has been made the subject of a docketed proceeding to determine whether the Commission should permit the use of these standard form contracts so drafted to make them available to all shippers and consignees on equal terms and conditions. We are required to give permission to use "unless the Commission finds that the contract, amendment or modification thereof will be detrimental to the commerce of the United States or contrary to the public interest, or unjustly discriminatory or unfair as between shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors" and if the contract, amendment or modification "expressly" contains eight specific types of obligations. In performing this function we have been authorized by section 14b(9) to approve a contract containing "such other provisions not inconsistent herewith as the Commission shall require or permit"; and by section 3 of Public Law 87–346 to "approve, disapprove, cancel or modify all such agreements and amendments in accordance with the provisions of this Act" (Public Law 87–346).

The purpose of these proceedings is to comply with this mandate and with the congressional directive to the Commission in section 3 that it shall approve, disapprove, cancel or modify contracts within the period ending April 3, 1964.

Acting pursuant to these mandates the majority of the members of the Commission have required that each of the applicants' contracts must be modified to achieve conformity with section 14b by the use of certain required provisions and no others and has in effect declared invalid the applicants' provisions on the same subjects.

The majority's newly prescribed and required provisions are not found in any application for permission to use a contract submitted by respondents, nor have they been proposed by the examiners and accepted by respondents, but have been conceived and adopted by the majority for compulsory use. None of the required provisions has been subjected to review, hearing, or comment. By this process the initiative for submitting a contract which we will permit to be used is taken away from the applicants and is assumed by the majority even though there is no finding that the provisions they are to replace have any of the prohibited effects referred to in the first sentence of section 14b which were quoted above.

The congressional intent of section 14b, as I see it, is to place the initiative for preparing a contract on the applicant carriers or their conferences acting according to their own commercial needs, and to place the burden of not permitting (i.e., forbidding) the use of a contract on us after we show the prohibited effects exist in any case, or nonconformity with any of the eight conditions in section 14b.

It is from this base that I embarked on the task of reviewing and considering whether or not to permit the use of contracts.

Dissent is based on the failure of the majority (1) to conform to the requirements of section 14b, and of section 3 of Public Law 87–346, (a) by denying notice and hearing on future nonconforming proposals and (b) by failing to meet the burden of showing how applicants do not conform before refusing to permit use of contracts; (2) to conform to the requirements of section 4 of the Administrative Procedure Act, and (3) to follow congressional policy in its treatment of proposed contracts.

(1)(a) The ignored statutory compulsions of section 14b are that carrier-applied-for contracts should not be prejudged but should be permitted after notice and hearing (i.e., adjudication) unless the Commission finds a particular contract will be detrimental to commerce or contrary to the other standards listed, or fails to cover expressly the enumerated subjects. If we say that each future contract, no matter what it contains, is not to be permitted without the prescribed clauses, we are making our order, not after notice and hearing on each contract, but before a hearing thereon. Notice and hearing with respect to future proposals has been denied because of the presently announced rule that only the required clauses will be permitted hereafter. Section 14b is being disregarded when the right of notice and hearing is foreclosed.

(1)(b) The requirements of section 14b in a proceeding to permit the use of a contract or to forbid the use of a contract is to review each applicant's contract on its own merits, one by one. The purpose of these proceedings is not to prescribe the use of the Commission's contract by any particular applicant, nor is it to perfect or rewrite contracts, but only to measure each applicant's contract by statutory tests and to forbid use after an adjudication if the measure is not met. If the contract fails, the Commission's order may require other provisions as authorized in (9) of section 14b or the Commission may modify by its order in accordance with section 3 of Public Law 87–346. Before modifying or requiring something else, however, the Commission must show how the applicant's contract has failed to meet the measure. The Commission has a statutory obligation or "burden" to do at least this much. The use of item (9), providing that a contract may contain such other conditions as the Commission may require or permit, or of section 3, directing the Commission within a year to approve, disapprove or modify agreements, is simply a useful way of expediting an order giving permission to use a contract instead of just forbidding various provisions and wasting time with repeated re-applications until a permissible contract is achieved.

The majority justifies as consistent with the law or as reasonable the contract provisions it has required as substitutes for those applied for in contracts. It does not follow that because a government-required reasonable provision is consistent with the law, all other provisions are automatically contrary to the requirements of section 14b. The burden to show failure of other provisions to conform rests on the Commission *before* it may exercise its own judgment. The majority has overlooked this essential procedural step.

(2) Section 4 of the Administrative Procedure Act provides that general notice of proposed rules shall be published and interested persons shall be afforded the opportunity to participate in the formulation of rules through the submission of views or comments before rules are adopted. The majority, by prescribing for the first time in its report the only contract provisions that must be embodied in all future contracts before it will permit the use of a contract, has thereby made a statement of general applicability and future effect. The presently prescribed provisions are for the guidance of the public if any applicant wants to get permission to use a contract.

The panel of five examiners in Docket No. 1111 understood what they were doing in this respect when they prescribed similar provisions: " . . . the present proceeding . . . is rulemaking in nature" although adjudicatory in form, they said (p. 62). In spite of their understanding, they refused to alter their procedure, however. The Commission makes no comparable acknowledgment, but its deeds are consistent with such an understanding that it is making rules.

There has been no general notice published that the prescribed provisions were being considered and that interested persons were being given an opportunity to participate in their formulation through the submission of views. The only effort in this direction was in Docket No. 983, giving notice on March 21, 1963, of a rule-making proceeding to consider adoption of rules governing contract rate systems and including a standard form of dual-rate exclusive patronage contract. Comments were due on May 25, 1963. These rules are still awaiting adoption, and they are not part of this proceeding. The deficiency in notice is not supplied by the "Orders of Investigation and Hearing" in the dockets herein, because the only purpose of such orders was to initiate an adjudication of whether the particular contract met the requirements of section 14b, and no proposed rule was ever published in any of these notices. The decision to require prescribed provisions was made later, but with no change in the orders of investigation, nor publication of any notice of proposed rulemaking.

Except for interrogation in oral argument, applicants have had no indication, much less has the rest of the public had notice, that the prescribed provisions would be required. Neither have other interested persons not respondents or intervenors herein had any opportunity to participate in the formulation of these particular rule-made provisions.

It is not considered that the provisions of section 14b(9) or section 3 of Public Law 87–346, authorizing requirements and modifications in contracts, supersede the mandate of section 4 of the Administrative Procedure Act in regard to a need for notice of proposed rulemaking as to the newly prescribed provisions having general applicability and future effect. Item (9) is to authorize changes having particular applicability and present effect on specific contracts being considered for a grant of permission to use them.

There is no doubt that Congress intended that we should establish standards for dual-rate contracts and that we would be expected to provide a standard form of contract which all conferences might utilize, as the majority says. I am confident that it was equally expected that we would observe existing laws governing procedures to be followed in achieving the intended results. The assertion of an expectation by a Congressional Committee does not justify abandonment of existing prescriptions of law. Congressional expectations are not enough to repeal section 4 of the Administrative Procedure Act in regard to these contracts. The Committee's expectation was to be accomplished in our rulemaking Docket No. 983, which is still awaiting action by the Commission.

The desirability of uniform results is assigned as a reason for compulsory rule-made provisions. Desirability, however, is no substitute for statutory compulsion. The majority has committed a fatal error in not complying with the Administrative Procedure Act.

(3) Lastly, there is a fundamental policy error in the majority's base of approach. Its base point assumption is that there is something absolute, final, or superior about what the Government prescribes when it administers a law, at least until the Government decides to make a change. This should not be so. The commercial trading context in which these contracts are used cannot function with such rigidity when there is any new development such as section 14b. In the commercial world, the ability to change obligations in response to experienced needs after mutual consent within the guides put up by section 14b is an essential factor of existence. Congress has carefully

avoided imposing an inflexible revision of historically developed trading conditions, but has only altered some of the conditions. Why should we do what Congress has avoided? A period of adjustment, within the guidelines of section 14b, will be required in traditional contracting practices in world-wide trades. Our job is to review and pass on the diverse forms of adjustment. This adjustment should be allowed if possible, and should not be immediately shut off and solidified into new rule-imposed rigidities emanating from a Government agency at only one end of the trading route, no matter how high-minded and superior the adjustments may seem to us at the moment.

As a part of our program to review applications for permission to use contracts pursuant to section 14b, it was decided that there were five issues common to all application proceedings; consequently, their severance from existing application proceedings was ordered. The issues were stated in the order initiating Docket No. 1111 as follows:

Definition of Contract Shipper

(a) Whether the Commission should approve, disapprove or require modification of contract provisions requiring inclusion in the contract of affiliates of the contract shipper or of other connected companies.

Contract Shipper Commitment

(b) To what degree, if any, may or should contracts exclude a portion of shipments, commodities, or shipments on owned or chartered vessels?

Legal Right to Select the Carrier

(c) Whether the provision required by section 14(b)(3) in all contracts, to limit the coverage of the contracts to "those goods of the contract shipper as to the shipment of which he has the legal right at the time of shipment to select the carrier" requires special language in the contracts in order to avoid uncertainty and potential disputes as to the obligations of the merchant, or whether the language of section 14(b)(3) should be incorporated, verbatim, in the contracts.

Notice, Disclosure and Burden of Proof

(d) Whether the Commission should approve, disapprove or require modification of contract provisions imposing notice and disclosure requirements upon the contract shipper in the event of non-conference shipments or of suspected or alleged breach of contract, and provisions relating to the burden of proof as to whether he has violated the contract.

Termination for Breach

(e) Whether the contracts should permit carriers or conferences to terminate individual contracts for breach or alleged breach of contract by the merchant.

A separate proceeding was docketed to consider the above issues, and a panel of five examiners has served an initial decision giving its answers to the five questions.

The issues described in (a) and (c) are discussed together in the majority's report under the heading "Legal Right to Select the

Carrier." For convenience the discussion herein is re-separated into two parts called the "legal rights" issue and the "affiliates" issue. Dissent is to the majority's conclusions on both these issues.

1. The "legal rights" issue.

After the contract shipper has been determined, section 14b(3) requires that the contract cover only those goods of such shipper "as to the shipment of which he has the legal right at the time of shipment to select the carrier." The legal right to select defines the goods subject to the contract obligation. The right to select must be determined later at the time of shipment by external evidence in a specific transaction. The external evidence relates to arrangements the contract shipper, or merchant as he is called in many of the contracts, makes later on with the persons to whom the goods are sold or with the persons financing the sale of the goods subject to shipment.

The majority has resolved the problems connected with the necessities of such later determination on evidence, by the apparently simple expedient of drafting a five-paragraph section of which four paragraphs "will be required in all contracts" and a fifth containing two subparagraphs that "may be used by those conferences which desire a provision which raises a presumption where the signatory merchant is named in the bill of lading or export declaration or participates in the ocean routing."

After reading these prescribed paragraphs the parties to a contract will still have the practical problem of locating the legal right to select the carrier. The majority has prescribed four paragraphs using the statutory terms "legal right," the very terms needing definition, and then has made optional the use of the fifth paragraph defining how the legal right might be determined. At the moment of providing a useful guide, it backs away from the last step with only an optional provision.

The reasons for a dissent from all compulsory requirements have already been stated, but I further dissent from the decision to permit the optional paragraph only and no other as a solution to this problem. In reality, a very restricted choice is given by the option because variations of the option are not permitted. Many applicants submitted what should be permissible variations.

The optional paragraphs resolved the evidence problem by providing "the Merchant shall be deemed prima facie to have the legal right . . ." if he "arranged" the ocean shipment or if his name appears on the bill of lading or export declaration as shipper. There is no objection to the use of his name on the bill of lading or export declaration as evidence, nor in participation in arrangements. There is objection to the "prima facie" test which restricts the parties to an illusory and unworkable guide.

What is "prima facie" is at best indefinite, but some lack of clarity in the mandated paragraph is dispelled by the majority's disclosure of what it has in mind when it uses the term: "We are therefore approving a contract provision which will raise a rebuttable presumption, as it were, that the merchant possessed the legal right at the time of shipment to sělect the ocean carrier . . . Those who desire some provision relating to presumptions may use it . . ." A "rebuttable presumption" is the true basis of the optional provision, and is a true revelation of what is meant by "prima facie." Applicants who do not desire such a provision relating to presumption, but desire instead some other objective way of fixing the evidence, have no other choice. Many such provisions were applied for. The choice has been denied them with no finding that other alternatives have any of the effects prohibited by the first sentence of section 14b. All the majority does is announce its results without providing any consecutively thought out linkage to the statute.

It is entirely consistent with section 14b(3), on the contrary, to find that there is a compelling public interest and advantage to commerce in letting the bill of lading point to the true selector of the carrier, by means of contract provisions which deem the merchant to have the legal right to select if his name appears on the carrier's bill of lading as shipper.

The statute makes it necessary to determine the fact of who has the legal right to select the carrier. This simply means that there must be a finding of fact based on evidence, not that anyone has to establish final truth. The latter is rarely known. The evidence need only show what, as a practical matter, can be determined as to the identity of the shipper in any particular shipment. As a practical matter, taking the evidence of what carrier's bill of lading form has been chosen, what the merchant himself intends and has written on the bill of lading, and what is accepted by the master of the ship as shown by his signature simply provides a clear, definite standard by which to measure performance. What is more, the proposed provision is known ahead of time and will guide the parties' action so that their business conduct may be based on a known test. Both merchant and carrier know ahead of time that if a person is called a shipper on the bill of lading then he will be one under the contract. The need for presuming later can be avoided. The test is consistent with reality.

Implicit, but not stated in the prescribed provision, if used, is an assumption that it is wrong to deem the shipper on the bill of lading to be the shipper under the contract if this is a conclusive presumption. So the majority has set about reversing this presumption and substituting a rebuttable one, with the words "deemed prima facie." It is assumed that the right to select the carrier is an abstraction which somehow becomes reality and truth after presumption and rebuttal.

This seems to assume further that you can take the "legal right" to make a choice, or to select, and consider the act of choosing apart from other manifestations of power and conduct in the business world by rebutting and counter-rebutting your way to the truth. Many conference provisions examined avoid this by making conduct the guide.

The many respondents in these proceedings who made conduct the guide did so by applying for permission to use contracts which make it a breach of contract if the merchant ships on noncontract ships and his name shows up on a bill of lading as the shipper. These contract provisions are frozen out without any finding that they are detrimental to the commerce or contrary to any other prohibition of section 14b.

All the applicants have done is to say that if merchants have used their power and then have done certain things in a business transaction dealing with the sale of goods, and if as a result someone's name gets shown as a shipper on the bill of lading, then these actions constitute substantial evidence in that particular transaction that the person named really is the shipper who selected the carrier. When it is provided that the name typed in on a bill of lading form opposite the word "shipper" (which has been on all bill of lading forms I have seen) shall also mean that person had the legal right, it means the evidence is so substantial that it will overcome any other evidence as to who is the shipper with a legal right to select a carrier.

The advantage to commerce in such provisions is first that they recognize that the basic problem is one of proof where nothing is said ahead of time about the right to select the carrier and they fill in the gap, and, second, that they will bring added certainty to an area of past misunderstanding between carriers and merchants.

To understand how the gap in proof is supplied and how it can provide advance warning to merchants, we may start with the premise that the term "shipper" means the person who ships, who sends goods on their journey by having them placed on board a ship. My understanding is shared by the witness who testified in Docket No. 1111 as to financing as follows:

Q. * * * You have referred a number of times to shipper testimony and I am wondering if you can tell us what you mean when you say shipper?

A. When I refer to a shipper I was referring to a cotton merchant, merchandiser of cotton who is in the exporting business and he would be the shipper.

Q. Is it correct to say you mean the exporter as opposed to the foreign consignee?

A. Definitely. A shipper will be the merchant himself.

Q. Is that your understanding that that is the usual usage of the term in the trade?

A. I would say yes, the shipper would be the man that exports the cotton and presumably would be the man who sold the cotton.

(Transcript, p. 2467, line 25, and p. 2468, lines 1–13.) The understandings reflected above derive support from the ordinary dictionary definition which ought to do here as confirmation of our respective understanding: "one who ships goods; broadly, one who sends goods by any form of conveyance."

In ocean transportation such person, customarily and absent a special agreement, selects the conveyance, in this case a ship, by making arrangements commonly called "booking" with the carrier which provides the required ocean transportation.

If a blank line for the insertion of a name on a bill of lading after the word "shipper" is filled in by the insertion of a person or company's name, absent any other qualification, and taking such writing at face value, one would conclude that the person who made out the form and called himself a shipper was the one who selected the conveying carrier. As one of the attorneys being examined in Docket No. 1111 said, "The appearance of his name as shipper on the bill of lading necessarily means that he is asserting and exercising control over the movement of those goods . . . if it's an authorized assertion of control over the goods he has the right to select the carrier and has exercised it by booking the cargo . . ." (Vol. 3, Transcript, p. 30). Such a person usually arranges or participates in the arrangements for the ocean shipment, in other words.

Before a merchant prepares a bill of lading, he must decide which carrier's bill of lading form is to be used. After he decides he must give instructions that a bill of lading form with the selected carrier's name printed at the top be used and that the "leading marks necessary for identification of the goods" or other identifying symbols on the packages containing the property he has sold be written on the face of the form along with his name opposite the word shipper, to the extent required by the Carriage of Goods by Sea Act.[1] By this conduct, and

[1] April 16, 1936, c. 229, § 3, 49 Stat. 1208, 46 U.S.C. § 1303. Section (3) provides:

"(1) * * *

"(2) * * *

Contents of bill

"(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

* * *"

The law does not require the shipper to "furnish in writing" the name of the vessel, dates, ports or the shipper's or consignor's or the consignee's names and addresses, but by custom this information is written in at the same time as the cargo information is furnished.

by this exercise of power, the merchant makes a choice whether he does so as agent or principal. When the merchant instructs that his name be used as shipper in the carrier's bill of lading and his property be described therein, he has at that moment participated in the arrangement for ocean shipment and has asserted a right to choose a carrier. It is to avoid the consequences of this choice that contract shippers who have divested themselves of the right to select try to subtract from the implications of the proof supplied by the shipper designation of a bill of lading, so that it will no longer supply proof that they exercised any right to select. To justify the subtraction, it is pointed out that many other business practices depend upon the presence of the merchant's name as shipper in the bill of lading, even though he may no longer exercise the right to select.

The normal or prima facie conclusion about what the shipper designation proves may be distorted by these other business practices. Such practices as having a special agreement covering the conditions of sale, pricing, and financing security arrangements influence the location of the power to select the carrier. The power to select may be removed from the person whose name appears on the goods as shipper. Nevertheless, the customary practice in banking is "that the beneficiary should appear as shipper" in a bill of lading (Docket No. 1111, Exhibit 41, and Transcript, p. 2462, Testimony of Richards, and p. 2463, lines 5–10, 2466, lines 1–15, and 2478, lines 7–13). The beneficiary is the person who gets the money for the sale price. In banking transactions, the letter of credit may control the choice of the carrier, but what goes in the bill of lading may be less adjustable because of the requirements of the Carriage of Goods by Sea Act. The terms of the letter of credit, however, are subject to negotiation on these subjects. (Transcript, p. 2478, lines 14–25, 2479, lines 1–18, and 2481, lines 17–24.) Government programs are also influential. The Government's Commodity Credit Corporation requirements, for another example, create distortions by making the exporter "produce an on-board bill of lading in his name in order to receive the payment-in-kind certificates or to satisfy the bonded obligation to export the cotton under the cotton export sales program." A witness also stated, "It is a matter of virtual necessity therefore that the U.S. shipper's name appear on an on-board bill of lading regardless of whether he has any control, or right to control, the shipment." (Docket No. 1111, Exhibit 45, pp. 2 and 3, Statement of Eric A. Catmur, American Cotton Shippers Association. Supporting references were also made to U.S. Department of Agriculture, Commodity Credit Corporation Announcement CN–EX–18, section II–D–3, paragraph 6, signed by Raymond A. Iones, Administrator, FAS, and to: "United States Department of Agriculture, Agricultural Stabilization and Conservation Service Payment-in-Kind Regulations," Article 7, chapter XIV, Commodity Credit Corporation, subchapter C—Export Programs, Part 1482—Cotton, section 1482.610, par. (c), signed and dated June 19, 1963, by H. D. Godfrey, Exec. Vice Pres., CCC.) This testimony and these regulations prove, if anything, that either the reported practices have nothing to do with carrier selection, or, to the extent they do have an influence, they require distortion of traditional understandings based on the usual attributes of power in the shipper status. Section 14b recognizes this aspect of power when it refers to a contract shipper who "permits himself to be divested of the legal right to select the carrier." Implicit here is recognition of a need to divest the usual power to choose. If the divesting occurs the evidence should show that when the fact of choice changes, the appearance of choice should also change, rather than remain deceptively the same simply to accommodate to the lack of adaptability of letters of credit and governmental regulations.

In effect, there is a commercially accepted practice, at least where a beneficiary or exporter does not select the carrier, of distorting the proof about the usual powers of the shipper named in the bill of lading. This may be done to carry out the terms of a letter of credit or to accommodate governmental regulations, but it is at variance with the normally understood facts as the bill of lading terms show them.

The foregoing considerations to the contrary, there are good reasons why a common understanding of the term "shipper" should not be distorted by allowing a contract shipper, who divests himself of the right to select, to remain a shipper on a bill of lading.

When we deal with the information on the face of a bill of lading, we are not dealing with legal subtleties, but with general understandings of people in shipping departments of exporters who make out the documents, of people on the docks who read the bill of lading. The shipper is not helpless and has full control over this information under the Carriage of Goods by Sea Act as well as by his own conduct. If he has changed his rights or status, he is the one to know about it and tell the carrier. He can do this since, by law, the shipper or exporter must prepare the bill of lading, and should underwrite the accuracy of the information. Accordingly, it is important that the Commission impose on shippers a high degree of care and establish commonly accepted understandings to serve as proofs useful in administering contracts affecting the commerce of the United States.

If the bill of lading is to be a reliable shipping document I see no reason why the Commission should allow the plain meaning of the bill of lading to be distorted simply to facilitate financing or to accommodate governmental regulations, particularly where an element of deception may occur. On the contrary, the integrity of the bill of lading should be preserved, and other commercial practices should be adapted by revisions in letters of credit or in regulations. The bill of lading, if it is an accurate shipping document, should provide valid proof for the purpose of determining whether or not there has been performance of the merchant's contract. These two documents, as well as what is marked on the cargo packages, should be all consistent with each other. This can be accomplished by exporting merchants keeping their names off the bill of lading when they are not carrier-selecting shippers. If merchants are not accurate about their shipper status in the bill of lading, then they must either take the consequences of the factual representations for the purpose of performing the merchant's contract or prove beyond a doubt that a mistake was made.

One witness said difficulty arises "when another carrier is specified by the buyer and a conference attempts to apply a rule at variance with the terms of sale, which gives the buyer control of the carrier." The difficulty vanishes, however, if the merchant-seller does not agree to assume obligations at variance with the terms of his exclusive patronage contract. It is not the conference's attempt to apply a rule at variance with the terms of sale that creates the difficulty, but the seller's choosing terms of sale wherein he acts as buyer's agent in selecting the carrier contrary to his obligation as a merchant and the seller's activity in preparing the bill of lading. The buyer, consistently with section 14b, may reserve the right to select the carrier and the merchant may relinquish the right, but the buyer must do so independently and may not involve the merchant in the selection, and the merchant must stay out of the activity surrounding the choice of the carrier. There is no interference here with sales contracts, but only a requirement that the merchant make his actions and his papers consistent with his choice not to assume the shipper's right to select the carrier. If a merchant wants to retain control of the goods as against the buyer for security purposes, then he may not give up to the buyer one of the chief attributes of ownership, the power to control the choice of a carrier, and may not disguise the relinquishment by continuing to call himself a shipper to avoid obligations under the merchant's contract.

The majority refers to the "House Committee Report" and also requires that nothing in a contract "shall require the merchant to forego a sale unless the shipment is made by a conference vessel." Reference is made to page 9 of the House Report on section 14b before enactment. What the Report said was that its provision "prohibits a conference or carrier from requiring a contract signatory to forego a sale unless shipment is made via conference vessels." The contracts reviewed do not require forgoing a sale, so the prohibition is satisfied. Merchants are still free to make any type of sale they want. All they have to do is prepare a precise bill of lading and stay out of the arrangements for ocean shipment.

Provisions along the lines discussed are also consistent with past decisions of this agency and conform to the congressional intent of section 14b.

The proposed shipper test is consistent with at least two decisions of the Commission or its predecessors wherein resort was had to the bill of lading to prove who was the shipper. The former Board said: "We deem it highly desirable that simple tests and standards be applicable [in determining when a given shipment is or is not covered by the shipper's agreement]. To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper." *In The Matter of The Statement of Japan-Atlantic & Gulf Freight Conference Filed Under General Order 76* (1955), 4 F.M.B. 706, 740, reversed *Isbrandtsen Company* v. *United States* (U.S. App. D.C. 1956) 239 F. 2d 933, aff'd 356 U.S. 481. (The above statement was not involved in the reversal.) The Board also had the following to say: "Respondents claim that Isbrandtsen is not a shipper and therefore can not claim that he has been discriminated against as a shipper. Isbrandtsen's name appears as a shipper on the bills of lading in evidence . . ." *Isbrandtsen Co., Inc., et al.* v. *States Marine et al.* 6 FMC 422 at 447 (1961), aff'd 313 F. 2d 906, *certiorari denied*, 374 U.S. 831 (1963).

The proposed solution, consistent with these past decisions, contributes a practical solution of the difficult problem of deciding, among opposing positions, who selects the carrier in any given case. Reconciliation of competing claims was described as follows in the Report of the Committee on Merchant Marine and Fisheries to accompany H.R. 6775, which later became section 14b:

> Some shippers complained that a few conferences were extreme in their demands on contract shipments requiring shippers to use conference vessels even if the shipper had no legal right to choose the carrier. On the other hand, steamship companies also complained that unscrupulous shippers would use conference vessels at the contract rates when it suited them or ship by nonconference lines without loss of contract rights merely by changing the terms of sale. It was extremely difficult to reconcile the two opposing requirements of this basic feature of the shipping contract. 87th Cong., 1st Sess., Report No. 498, p. 9; *Index to Legislative History of the Steamship Conference/Dual Rate Law*, p. 120, 87th Cong., 2nd Sess., Senate Doc. No. 100.

These comments reflect a long-standing controversy over whether certain shipments, notably those consisting of goods sold on freight-on-board or freight-at-side of ship terms, were covered by exclusive patronage contracts. It was hoped the proposed language of section 14b(3) would help resolve these disputes. Still the problem of proof of the right to select the carrier remained. The bill-of-lading shipper test appeared to offer a way out on the ground that the bill of lading correctly points to the true shipper who selects the carrier.

A frequent argument we heard was that the record amply demonstrates that the question of who has the legal right to select has nothing to do with whose name appears on the bill of lading or who arranges the shipment. This is undoubtedly true, but it does not preclude action by us which makes the act of selection have something to do with whose name gets on the bill of lading. Another point to make is that the merchant does have something to do with the selection and his name is there because of his activities, and because he wants benefits inconsistent with such activities. The merchant does have a choice as to whether he will act as agent for someone who is not a party to the contract. If the agency requires the merchant to deliver goods to a nonconference vessel and the securing of a bill of lading naming the merchant as "shipper" the agency is inconsistent with the contractual obligations to the conference and should not be accepted by him.

It was hoped that the Commission would provide some help in reconciling the two opposing requirements referred to by the Committee, but it is feared the majority has left us just as far from a solution as ever, because its "prima facie" provision actually will be productive of delays, arguments, and controversies. The provision is too indefinite for practical purposes.

Ideally, a contract should be drafted so that the actions constituting performance can be tested by objective standards. It should be written in terms of future acts. It should require people to do specific things at certain times and in a prescribed manner. A contract which is not specific and certain as to the actions required may fail for want of definiteness or impossibility of ascertainment of the required performance. Making legal rules of evidence, such as "prima facie" and legal conclusions such as "legal right," the subject of a contract obligation does not meet the conditions of objectivity and definiteness. They only postpone ascertainment of the facts which should be speedily ascertainable in the commercial world. A contract which makes the ascertainment of performance depend on a presumption subject to rebuttal or on a legal right simply converts the test of performance into claims and counter-claims. A right of rebuttal invites denial that one had a "legal right," itself an intangible concept, and leads to further rebuttal as to the contrary of the contrary, etc. The proofs of carrier selection will have to consist of a miscellany of cables, shipping papers, half-remembered telephone conversations, oral testimony, correspondence, both available and unavailable, and a host of who-struck-John arguments by merchants about who was to select the carrier and when and how he was to do it. I would reject this program of shifting rebuttals in favor of a practical objective standard.

The substitute language, by giving the appearance of proof when it refers to the shipper test, and by taking the test away with the rebuttal right, leaves us just where we were before Congress acted—in the middle of an argument over the merchant's shifting status. We are, furthermore, right back where we started with no practical, objective means of precluding what hearing counsel described as "the even more odious practice of having the merchant make a nonconference shipment for the nonsignatory and claim it was not his shipment even though he is named as 'shipper' because by the terms of sale, he did not have the 'legal right' to select the carrier." The prima facie provision gives such a "claim" a dignity it would not otherwise have.

The need for an objective standard is so compelling that the bill-of-lading shipper test might well be applied as a conclusive test.

For these reasons, I think the proposed requirement is contrary to the public interest and detrimental to the commerce of the United States.

2. The "affiliates" issue.

In an effort to define the persons to be obligated as "all shippers and consignees" (the terms used in the first sentence of section 14b) and to become "the contract shipper" (under item (3) of section 14b), some contracts proposed to cover "the Merchant, its agents and its subsidiary, associated or parent companies." This was called for convenience the "all affiliates" clause. Other contracts proposed to cover only the shipper named at the end of the contract above the space for the signature (the contract referred to, it is to be noted, also contained an unclear, undefined reference to evasion by subsidiaries). Between these extremes were various provisions attempting to define the extent of corporate control which would cause the contract's obligations to apply to a merchant. Each should be potentially permissible, without prejudgment. In the inbound trading contracts, the provision should take into consideration the laws and customs of the foreign areas where the signatory merchants would be located. In the outbound trading contracts, the provision should accommodate itself to contemporary corporate organization and control in this country and of each signatory's peculiar situation. The majority does not permit such flexibility.

There is no difficulty in saying that the all-affiliate clause in contracts with U.S. merchants is contrary to the public interest because

(1) it is uncertain as to its applicability and therefore productive of disputes, delaying expeditious closing of transactions; (2) it is oppressive in its operation by binding companies having little commercial identity of interest with the signatory company; and (3) it will not accomplish its professed objective of preventing fraud and evasion by merchants. If anything, the broad clause will invite fraud by its extreme demands. Evasion, like bad morality, is not stopped by private contract any more than by laws. Short of an "all affiliates" clause, any affiliate provision should be permitted which confines the corporate affiliates to be bound to those over which the signatory merchant exercises effective working control over management decisions affecting ocean transportation (to be ascertained by tests to be negotiated), or such companies (decided upon through negotiation before the contract is signed) as are named in the contract at the end under the signatures or elsewhere. The latter will assure certainty as to the meeting of the minds of the parties as to just what entities are to be obligated. Under either guide, there is no impediment to the conference seeking a separate contract with those affiliates which the merchant excludes from the listing on his contract. These standards have been applied in the review of the contracts further on in this report.

The issues described in (b) of the order initiating Docket No. 1111 are discussed in the majority's report under the heading "Merchant's right to use owned or chartered vessels." I concur with the majority's conclusion that contracts should allow carriage on owned or chartered vessels of merchants and that there should be a six months or more charter requirement.

The issues described in (d) of the order initiating Docket No. 1111 are discussed in the majority's report under the two headings "Disclosure by merchant of facts relative to the routing of a particular shipment" and "Burden of proof." I concur generally with the majority's conclusion that we should not permit use of any provision which requires the merchant to sustain the burden of proof of innocence of carrier claims of breach of contract. The merchant may be required to make relevant papers, such as bills of lading, available and to disprove established evidence of breach of contract, but no more. What should be permitted or forbidden in any case should depend on the applicant's contract proposals.

The issues described in (e) of the order initiating Docket No. 1111 are discussed in the majority's report under the heading "Damages for Breach." Authority to "not permit clauses which suspend a merchant's rights but continue his obligations as an additional penalty for breach of his contract" is asserted, based on derivation from a statement in a Senate Committee report. Such a statement is not law and, insofar as the portion quoted by the majority says the bill that became section 14b "would allow no such penalties," it is in error. Dissent is to the majority's decision to forbid any reasonable termination or penalty provision to enforce damages for breach provisions.

A reasonable termination provision is one which gives the conferences a right to terminate after an arbitration followed by a finding that a breach of contract is proven and a refusal to pay assessed damages. A provision that if the merchant who has breached his contract, or who has refused to adjudicate a claimed breach, and does not pay promptly the liquidated damages due, or if he breaches his contract twice in a year, his contract shall be terminated and thereafter be required to pay the noncontract rate, is also reasonable and should be permissible if some means of establishing the breach besides a mere assertion by the carrier is provided. Provisions which penalize by keeping the merchant obligated, assessing damages, and suspending his rights to reduced rates might be permissible if suspension is limited until damages are paid or the dispute adjudicated, and if there is provision for a refund with interest if the adjudication goes against the conference. I would permit, but the majority would not permit, these provisions or variations thereof which on examination and analysis were shown not to involve the prohibited effects of section 14b. The majority makes none of the necessary findings as to prohibited effects and justifies its conclusion solely on an interpretation of section 14b(5), apparently supported by legislative intent as an aid to statutory construction.

It is impossible for me to equate the statutory limitation on damages in item (5) recoverable for breach with a provision concerning what happens when a merchant breaches his contract or refuses to pay damages assessed, and concurrently refuses to adjudicate the dispute. We should distinguish between damages and penalties. Refusal to allow such penalties, which have nothing to do with the measurement of damages, would have to be expressly enacted into law to be binding on the Commission. The added prohibition was not put in the law and may not be put there where the legislative intent is so clearly absent. The majority's use of statements showing legislative intent as an aid to statutory construction is applicable only where there is an ambiguity about the words of the enacted law. There is no such ambiguity here. The damage limitation is clear and may not be stretched to disallow additional penalties for refusal to pay damages or to adjudicate disputes. Therefore, this statement provides no basis for denying an applicant permission to use other types of penalty provisions for refusal to adjudicate or to pay. The Senate Committee's opinion that the bill "would allow no such penalties" never found its way into the law, and we should not put the prohibition in the law if Congress didn't.

The majority also discusses, as generalized issues, several additional issues to the five referred to the panel of examiners in Docket No. 1111. These issues relate to (1) prompt release of shippers from exclusive patronage contract obligations if the conference cannot furnish transportation when needed; (2) a prohibition against rate increases before at least 90 days after a rate becomes effective; (3) a prohibition against requiring shippers to divert shipments from a "natural routing" to give patronage; (4) a limitation on the amount of damages chargeable for breach of contract; (5) the right of the shipper to cancel his contract on 90 days' notice; (6) the amount of the differential between contract and noncontract rates; and (7) exclusion of certain bulk cargoes from exclusive patronage contract obligations.

Without agreeing with the reasoning, concurrence with the majority's conclusions in regard to items (1), (3), (5), and (6) is possible, except, of course, to the majority's requirement for the use of standard provisions on the above subjects.

With regard to item (2), it is impossible to read-in any "overriding intent of the statute" that a prohibition against an increase "before a reasonable period, but in no case less than 90 days" is translatable into a 90-day notice requirement for rates subject to contracts. The statutory notice provisions of section 18(b)(2) speak for themselves and are all the law requires. No contract provision is needed covering such provisions. The required 90-day notice clause requires more than what the Commission may permit applicants to use.

With regard to item (4) there is a discussion below indicating the belief that suspensions of rights while continuing a merchant's obligations and similar penalties for breaches of contract, which are distinguishable from damages, are normal and permissible methods for enforcing contract obligations. Penalty provisions may be permitted as long as they do not automatically invoke the penalty and require the merchant to sustain the burden of proof of innocence simply on the basis of a carrier's claim of breach of contract.

Lastly, with respect to item (7), we have no authority to make a general exclusion of liquid bulk petroleum products in less-than-full shipload lots. The statute says the exclusion of commodities must be allowed by the Commission "upon a finding that economic factors so warrant." Economic factors in any given trade covered by a contract must be looked into and a specific finding made, instead of the proposed across-the-board exclusion. The need for findings cannot be avoided by statutory interpretation involving speculation as to what Congress intended.

The following conclusions as to whether or not the Commission should permit the use of specific contracts are subject to the foregoing reservations as to the interpretation of section 14b, even though not expressly referred to in the text that follows.

In the third part of this dissent, each of the 24 types of contract forms is reviewed and conclusions made as to whether we should permit its use. Such procedure is required as a consequence of the belief that under section 14b the Commission's duty to each applicant is to give individual consideration to its contract and that the majority has not discharged this duty properly.

The contracts are taken up in the order of dates on which the examiner served his opinion on the contracts.

The contracts subjected to this review are the contracts initially submitted by the applicants, plus the modifications made as of the close of the hearing with an applicant's consent, and plus the modifications made after the examiner's decision with the applicant's consent as evidenced by a failure to except to the modifications.

The following opinions as to the permissibility of these contracts are qualified by the preceding observations on the generalized issues applicable to contracts.

Docket Nos. 1033, 1034, 1037, 1039:

Four conferences applied for permission to use one contract form for trading from North Atlantic ports to French ports, Mediterranean ports, Baltic ports, and United Kingdom ports in Europe.

The applicants' contract in Article 1(a), as I understand it, requires the parties to negotiate and agree to the affiliates to be obligated and to name them in an "Appendix A" *before* the contract is signed. Disagreement later over the exclusion of an affiliate may not be made the subject of a breach of contract action, if the contract is to be permissible.

Additionally, Article 1(a)(iii) makes the merchant list in Appendix "B" all other affiliates not to be obligated. The latter requirement according to the record is to assist the conference in solicitation for cargo. Such purpose is so remote from the purposes of section 14b and so burdensome on merchants, particularly the large corporate complexes, that it is considered a detriment to commerce and should not be permitted.

Article 1(c) conforms generally to section 14b(8) and excludes liquid bulk cargoes, but also includes petroleum products in less than shipload lots. The examiner, in response to an intervenor's presentation, found that economic factors warranted the exclusion of petroleum products as authorized by item (8). Technical factors differentiating the loading, handling, transporting, and unloading of petroleum products from other types of packaged commodities were proven.

Technical factors are not "economic factors;" nevertheless, the technical factors shown have an economic effect on the costs of loading, storing, and berthing of ships and on their handling and storage facilities to accommodate the needs of petroleum shippers sufficiently to sustain the examiner's finding that economic factors warranted a revision of this contract. The examiner's revision is sustainable on the facts of these dockets.

Article 5 requires a merchant to apply to "all" carriers for space, but the examiner changed this to require application to "one or more" carriers. The "all" is excessively burdensome to a merchant, thus a detriment to commerce, and we should not permit the "all" carrier application for space.

Article 8 makes the merchant prove, simply on the basis of a question arising, that he did not divest himself of the right to select a carrier. The conference under Article 7 obligates the merchant to make records available, and the addition of a burden of disproof in response to a question alone, contrary to the normal rule that the person making the charge has the burden of proof, is oppressive to the point of being against the public interest. The examiner's refusal to permit Article 8 should be sustained.

Except as noted with respect to Articles 1, 5, and 8, we should permit the use of the contract in the above dockets.

Docket Nos. 1055, 1056:

Two conferences applied for permission to use one contract form for trading from Pacific coast ports to ports in the Republic of the United States of Indonesia. The contract available for review did not show any signature page, but if the all-affiliate clause is not used and each party to be obligated is named, we should permit the use of the contract in the above dockets. (It is noted this contract was extensively revised by the examiner, but no exceptions thereto were taken.)

Docket No. 1002:

One conference applied for permission to use a contract form for trading from ports on the Pacific coast to ports in Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Vietnam, South Vietnam, Cambodia, Republic of the Philippines, and Thailand.

We should permit the use of the subject contract in the above docket.

Docket Nos. 1012, 1020, 1101, 1106:

Four conferences applied for permission to use two contract forms, one for outbound trade and one for inbound trade between India, Pakistan, Ceylon, and Burma area ports and U.S. Atlantic and Gulf of Mexico ports.

Article 6, fifth paragraph of the outward contract, obligates the merchant to bear the burden of proof if he has to defend himself against a charge he did not have the right to select the carrier. The fourth paragraph requires the merchant to furnish documents. For the reasons noted in the discussion of the contract subject of Docket Nos. 1033, 1034, 1037, and 1039, the use of this provision should not be permitted.

Except as noted with respect to Article 6 above, we should permit the use of these two contracts.

Docket Nos. 1005, 1023, 1031, and 1050:

Four conferences applied for permission to use four contract forms (three conferences use the Far East Conference Merchant's Rate Agreement with minor modifications) in trading between the U.S. Pacific, Gulf of Mexico, and Atlantic coasts to the Republic of the Philippines; from the U.S. Atlantic and Gulf of Mexico to the Far East (Japan, Korea, Taiwan, Siberia, Manchuria, China, Hong Kong, Vietnam, Cambodia, and the Republic of the Philippines); from Hong Kong, Amoy, Foochow, and south, Formosa, and Vietnam (excluding Saigon) to U.S. Atlantic and Gulf coast; and from the same areas to U.S. and Canada Pacific coast and Hawaii.

We should permit the use of this contract, but because it is the first contract to require, for practical purposes, a conclusive presumption test to determine the right to select a carrier, some added comments are offered.

Article 1(c) makes the bill of lading "shipper" the one who has the legal right to select the carrier, provided there is no such presumption if "the Merchant proves" that his name on the bill is for reasons not related (1) to retention of a security interest and (2) to the transaction between the merchant and his vendor or vendee or the carrier. The proviso to the conclusive presumption in effect contains two exceptions which, for practical purposes, all but cancel out the proviso and leave the conclusive presumption intact. One may complain that this is an overly-clever technique, but the result is still permissible. It has been indicated in the discussion hereinabove that a conclusive presumption might be permitted and the present proposal comes about as close to a conclusive presumption as possible. The use of presumptions as a basis of contract obligations has been criticized above. Possibly the use is inevitable because Congress has injected "intent" as one of the elements of a breach of contract ("with intent to avoid his obligation").

Normally, intent is used as an element of the violation of criminal laws and is not material in commercial transactions. To make the contract commercially effective, some method of proving speedily this elusive concept is imperative. A contract obligation concerning the proofs to be used to establish a right may be inevitable, for all its shortcomings, but the majority's effort to confine the use of the evidence to shifting rebuttals prevents any effective execution of section 14b(3). It is a detriment to commerce to provoke commercial disputation by means of a provision that cannot be effectively enforced by anyone.

I dissent from the majority's action in not permitting the use of this applicant's Article 1(c) which can actually be enforced. We should permit the use of this contract.

Docket Nos. 1001, 1006, 1053:

Three conferences apply for permission to use one contract form in trading between the Gulf of Mexico and the Mediterranean and French Atlantic ports and between South Atlantic and United Kingdom and Eire and Continental European ports. The liquidated-damages provision attempts to conform with section 14b(5) by its Article 9(a) in which it "is hereby stipulated and agreed that 'the cost of handling' shall be equal . . . to 33⅓% of such freight charges, except that either party, at its option, may elect to prove the actual cost of handling . . ." This should not be permissible because the law refers to "cost," not to arbitrarily chosen amounts even if based on "the experience of the carriers or on estimates." Cost means what would have been actual cost, which is determinable from schedules of charges, and nothing else will do. The merchant is entitled to this deduction from freight otherwise applicable, and it is unfair to ask him to gamble on what he can prove in an expensive arbitration proceeding where the burden of proving the cost may be on the merchant even though he has no easy way of getting the handling cost evidence he will need. The terminal and stevedoring charges are usually billed to the carriers, and the rate schedules are most easily available to the carriers. The use of the third sentence of Article 9(a) should not be permitted. It is contrary to section 14b(5) to use an arbitrarily fixed amount instead of a reasonable estimate of handling costs.

Except as noted with respect to Article 9, we should permit the use of the contract in the above dockets.

Docket Nos. 1051, 1052:

Two conferences applied for permission to use one contract form in trading from Straits of Malay areas to Pacific coast ports and New York (inbound).

The Commission should permit the use of the contract in the above dockets.

Docket No. 1007:

One conference applied for permission to use a contract form in trading between the Pacific coast ports of the United States and the

United Kingdom, Ireland, the Scandinavian Peninsula, and Continental Europe.

The applicant failed to include a provision covering natural routing. Section 14b(4) requires the Commission to find, before it may permit use of a contract, that the contract "expressly . . . does not require" diversion of cargoes "from natural routings." Since there is no express provision along these lines in this contract, I would not permit use of this contract unless the provision is included. There is a great deal of logic and plausibility to the applicant's argument that the mandate of item (4) is in negative terms so an absence of any provision requiring diversion is permissible. Unfortunately, the statute, by requiring us to find the contract expressly covers the subject, precludes a disregard of the mandate for reasons of logic.

In other respects we should permit the use of the contract in the above docket.

Docket No. 1046:

One conference applied for permission to use one contract form in trading between the west coast of Italy, Sicily, and Adriatic ports and the U.S. North Atlantic range of ports. We should permit the use of the contract in the above docket.

Docket Nos. 1058 and 1059:

One conference applied for permission to use a contract form covering wine and spirits commodities and another contract covering general commodities in trading westbound in the North Atlantic between the United Kingdom and Eire and the U.S. Atlantic coast ports.

We should permit the use of the contract in Docket No. 1058, subject to the revision made by the examiner in Clause 9 which, it is understood, applicants "do not disagree with."

We should also permit the use of the contract in Docket No. 1059, subject (1) to the revision of Clause 8 suggested by the applicants and adopted by the examiner, and (2) to the addition of the arbitration clause proposed by applicants in their motion of February 20, 1964.

Docket Nos. 1015 and 1017:

Two conferences applied for permission to use one contract form in trading from Atlantic and Gulf of Mexico coast ports to ports in the State of Singapore, Federation of Malaya, Thailand, Colony of Sarawak, Colony of British North Borneo, and the British Protected State of Brunei.

Each applicant proposes a provision giving it the right to increase rates or impose a surcharge on certain contingencies on less notice than authorized by section 18(b). The examiner correctly refused to permit such provisions. Whatever may be allowed by section 18(b) is allowed by statute regardless of this contract, but inconsistent contract obligations should be taken out. As the examiner notes, the requirements of section 18(b) need not be repeated in the contract.

We should permit the use of this contract in the above docket, modified by the examiner.

Docket Nos. 1026, 1027, 1028, and 1029:

Four conferences apply for permission to use one contract form in trading from ports in Indonesia (except the east coast of Sumatra between Langsa and Indragi) to ports on the Atlantic coast and on the west coast of North America. The Deli-New York agreement also includes Gulf of Mexico ports.

We should permit the use of the contract in the above dockets.

Dockets Nos. 1042, 1043:

Two conferences apply for permission to use one contract in trading between ports in Argentina, Paraguay, and Uruguay in South America and ports in the U.S. Atlantic coast and the Gulf of Mexico.

The contract in Docket No. 1043 covers shippers from the Great Lakes area. The facts showed that at the time of the hearings only one member of the conference actually served the Great Lakes area, providing service only once each month during the 8-month navigation season. The conference operates on a two-thirds voting rule. Rate questions would be decided by 13 of the 14 conference members. This means that carriers not serving the Great Lakes area would fix the rates and might even fix rates at a level at which the member carrier could not attract business. The lack of interest in Great Lakes trade by such a substantial number of carriers dictates that the conference not be allowed to tie up shippers to an exclusive patronage contract until it can show a larger commercial interest.

Other evidence showed that one shipper located in the Great Lakes area shipped from Gulf, Atlantic, and Great Lakes ports and if it should be tied in to the conference on the Great Lakes to get service elsewhere, it would be tied in with inadequate service. The possibility of inadequacy was reinforced by a showing that the conference carrier in the area had imposed a limitation of the amount of the shipper's cargo it would accept, preventing the shipper from making a sale for a larger amount of cargo, for lack of other available carrier space.

The proposed restraint on shippers and control over rates by parties without a more serious interest in the trade and a better ability to handle shipments would be a detriment to commerce.

We should not permit the use of the contract in Docket No. 1043 unless its scope is changed to omit any requirement that Great Lakes area shippers must sign up. In other respects we should permit the use of this contract in these dockets.

Dockets Nos. 1013, 1014, 1016, 1019, 1021, 1022, 1025, 1030, 1045, 1047, 1048, 1054, 1018:

Thirteen conferences applied for permission to use one contract in trading between Atlantic and Gulf of Mexico coast ports and ports in Central America and the Caribbean area and Venezuela and the north coast of Colombia ports and another contract in trading between Atlantic and Gulf of Mexico ports and the west coast of Colombia, Ecuador, Peru, and Chile.

We should permit the use of the contract in the subject dockets.

Docket No. 1049:

One conference applied for permission to use a contract in trading from ports on the U.S. Atlantic and Gulf of Mexico to ports in Australia and New Zealand.

This contract, as it is now before us, covers Great Lakes ports even though the conference agreement of association does not authorize rate-fixing agreements covering such ports. The contract subject of the initial application did not include such coverage. Until the conference agreement is expanded and the Commission thereafter permits the use of this contract in Great Lakes trading based on the facts shown to exist at the time of a further application for permission to use a contract tieing shippers in the Great Lakes area, permission should not be given to use the contract. There is not enough record evidence for a decision on Great Lakes coverage at this time.

Subject to the exclusion of an obligation to ship via conference carriers from the Great Lakes area, we should permit the use of the contract in this docket.

Dockets Nos. 1003, 1009, 1010. 1011, 1018, 1035, 1040, 1041, 1044, and 1057:

Ten conferences apply for permission to use one contract form in trading between Pacific coast ports and ports in Latin America, other than ports on the east coast of South America.

Each applicant's Articles 1 and 3 require the merchant to "give all his patronage to the carriers." This language is not equivalent to the requirements of section 14b that the contract "expressly" cover "only those goods of the contract shipper" of which he has "the legal right at the time of shipment to select the carrier." This contract is either silent on the subject of coverage, as delineated by the "legal right" to select provision, or is so uncertain as to be meaningless. The reference to "patronage" in each applicant's Article 1 has no clear or necessary relation to "those goods" or to legal rights therein which Item (3) prescribes to describe the necessary obligations of the parties. Under section 14b(3) the parties must examine evidence as to the merchant's other agreements with respect to the goods to find out whether the contract obligation to select a conference carrier applies or not, and may not be compelled to define anything so vague as "patronage," before the obligation to select can be established. Each applicant's provision does not comply with section 14b(3) and may not be permitted.

Article 6 provides that if no carrier "is able to furnish reasonably prompt space for specific shipments when requested by the shipper" the latter will be free to use nonconference ships. Section 14b(1) requires the contract to permit "prompt release of the contract shipper" under the same circumstances. In most cases an exact conformity with statutory language would be unimpeachable, but in this case it is believed Congress meant that applicants should do a little more than embody a source of dispute over what is "prompt" in the contract by establishing an ascertainable period of time, and that the Commission should review the proposed time limit in the context of the particular circumstances. A provision which specifies only "prompt" and does not specify a time should not be permitted because it does not comply with section 14b(1).

Except as noted with respect to Articles 1 and 6 above, we should permit the use of the contract in these dockets.

Docket Nos. 1109, 1110:

Two carriers applied for permission to use a contract form in trading between U.S. ports and Turkish ports. During the proceedings the Ipar Transport tariff and application to use a contract was withdrawn, leaving the only respondent-applicant D. B. Turkish Cargo Line. The latter's contract is the only one subject to this report.

We should permit the use of the contract only as modified by the examiner in this docket.

Docket No. 1081:

(This docket was the first in the order of dates in which the examiner served his opinion.)

One conference applied for permission to use a contract form for trading from the west coast of India and Pakistan to U.S. Atlantic and Gulf of Mexico ports.

Subject to the comments herein, the Commission should permit the use of the contract in the above docket.

This report is confined to a discussion of exclusive patronage contracts and not to conference agreements under section 15 of the Act.

FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

SPECIAL DOCKET NO. 367

CALIFORNIA PACKING CORPORATION, ET AL.

v.

HAWAII/ORIENT RATE AGREEMENT

REPORT

(Thomas E. Stakem, *Vice Chairman;* Ashton C. Barrett, *Commissioner;* James V. Day, *Commissioner*):

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on March 19, 1964.

It is ordered, That the application of Hawaii/Orient Rate agreement to waive collection of certain undercharges be and is hereby granted.

John Harllee, *Chairman* and John S. Patterson, *Commissioner*, *dissenting:*

The Commission has ordered that the application of the conference called Hawaii/Orient Rate Agreement, filed on behalf of States Steamship Company, American President Lines, Ltd., and United States Lines Company, to repay to shippers certain overcharges should be granted. The Commission has determined not to review the Examiner's decision that the applicant need not collect from shippers amounts in excess of $28 per 2,000 pounds for the transportation of canned pineapple and canned pineapple juice from Honolulu, Hawaii, to Yokohama and Kobe, Japan, during the period January 1, 1963, to March 31, 1963, inclusive. The reason assigned is that the shippers were not required to pay freight on the basis of the rates and charges specified in each carrier's tariffs on file with the Commission and published and in effect at the time because a rate established by the carriers in a tariff page which "the conference's secretary, through oversight, failed to file * * * with the Commission" was justifiably charged instead.

The facts are quite clear that the rate the shippers are required to pay is not based on the duly published and effective tariffs, but on an unfiled and unpublished tariff.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87–346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time; nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commission's "Rules of Practice and Procedure," effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above Congressional enactment.

It is our opinion that the facts in this case show beyond any doubt that the carriers are collecting and receiving a less compensation for the transportation of property than the charges specified in their tariffs on file with the Commission and duly published and in effect at the time. For these reasons we dissent from the determination of the majority of the Commission to not review and reverse the decision of the Examiner in this docket.

By the Commission, March 19, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 367

HAWAII/ORIENT RATE AGREEMENT

v.

CALIFORNIA PACKING CORPORATION, ET AL.

Application of Hawaii/Orient Rate Agreement on behalf of member lines States Steamship Company, American President Lines, Ltd., and United States Lines Company, pursuant to rule 6(b) of the Commission's Rules of Practice and Procedure, to waive collection of undercharges, granted.

E. N. Bowen for Hawaii/Orient Rate Agreement.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

Hawaii/Orient Rate Agreement (the conference) is an approved steamship conference (Agreement No. 8290), the member lines of which carry freight from Hawaii to Yokohama and Kobe, Japan, and other ports. On behalf of three of its member lines, who have concurred in the application, States Steamship Company, American President Lines, Ltd., and United States Lines Company, it here applies for permission to waive collection from all shippers for whom its member lines carried canned pineapple and canned pineapple juice from Honolulu, Hawaii to Yokohama and Kobe, Japan, during the period January 1, 1963 to March 31, 1963, inclusive, of amounts in excess of $28 per 2,000 pounds (the rate at which freight was collected) for such carriage. These shippers are named, and have all concurred in the application.

This is what happened. The regular conference tariff rate (established by Freight Tariff No. 1, First Revised Page 20, effective June 10, 1957) for canned pineapple and canned pineapple juice, Honolulu to Yokohama and Kobe is $49.25 per 2,000 pounds. By Second Revised Page No. 20-A of Freight Tariff No. 1, the conference tem-

[1] This decision became the decision of the Commission of March 19, 1964.

porarily superseded this rate with a special rate of $28 per 2,000 pounds. This rate became effective May 21, 1962, and according to the tariff terms, expired on December 31, 1962, when the regular $49.25 rate automatically became effective again.

Prior to December 31, 1962, however, the conference printed and distributed a tariff page correction (No. 178) which, had it been filed with the Commission, would have prevented the $49.25 rate from becoming effective on January 1, 1963, by extending the special $28 rate to March 31, 1963.

The conference's secretary, through oversight, failed to file this corrected page with the Commission. During the period January 1, 1963, to March 31, 1963, canned pineapple and canned pineapple juice, Honolulu to Yokohama and Kobe was booked at the $28 special rate which the carriers, their agents, and the shippers believed had been filed and was the effective rate, and the carriers collected from shippers at the $28 rate.

In the latter part of March, 1963, the Conference discovered that it had not filed the $28 rate, and attempted to do so retroactively so as to prevent the applicability of the $49.25 rate from midnight of December 31, 1962. The Bureau of Foreign Regulation during the last week of March 1963, correctly rejected a page naming the $28 rate period May 21, 1962 (the initial effective date of the $28 special rate) to March 31, 1963, *because it was retroactive*, and hence its filing would contravene section 18(b) of the Shipping Act, 1916.

The *bona fides* of the conference and its member lines with respect to their intention of continuing the special $28 rate beyond December 31, 1962, is shown by the fact that on April 1, 1963, the conference filed Ninth Revised Page No. 20, "issued in lieu of Eighth Revised Page No. 20 rejected by the Federal Maritime Commission." This revised page named the $28 rate for the period April 1, 1963, to December 31, 1963. It was accepted, and (having subsequently been extended) is now effective until June 30, 1964. The facts, as above set out, are substantially the same as those considered by the Commission in *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62, (January 23, 1962) and *Martini & Rossi S.p.A.*, *et al.* v. *Lykes Bros. Steamship Co., Inc.*, 7 F.M.C. 453 (November 16, 1962), and decision here is ruled by the Commission's decisions in those cases.

In *Martini & Rossi*, the Commission summarized the facts as follows:

During the month of January 1962, the carrier * * * had on file with the Commission its Special Rate Circular No. 2 containing rates for commodities such as those here involved. This Circular had an expiration date of January 31, 1962, after which the higher rates published in Lykes' Westbound Freight Tariff No. 1, also on file with the Commission, would apply absent an extension of the

Circular. Lykes intended to extend the lower rates but * * * failed to make the necessary filing with the Commission.

Lykes' employees continued to solicit cargo on the basis of the lower rates, apparently in ignorance of the fact that Circular No. 2 had expired. On discovering the situation Lykes filed Special Rate Circular No. 3, effective February 20, 1962, reinstating the lower rates, but in the interim the shipments here in question had been booked, transported and paid for on the basis of the lower rates. These were not the rates legally applicable to the shipments, since Lykes' Westbound Mediterranean Freight Tariff went into effect, albeit inadvertently, on February 1, 1962, and was in force until February 20, 1962. Having received less than the lawful rates, Lykes is in violation of the * * * statutory requirement (that only the charges computed at the rate on file be collected). It is also obligated to collect the undercharges from the shippers concerned.

* * * * * * *

The carrier's failure to continue in effect the rates it had been charging and which it actually quoted during the relevant period, was the result of oversight * * *. The record contains no hint that the parties concerned were not acting in complete good faith.

* * * * * * *

The paramount question in cases of this type is whether granting the requested relief will result in discrimination. This is because the primary purpose of the * * * tariff filing provisions of the Shipping Act, 1916 * * * is to prevent discrimination. If this purpose will not be defeated we think we are unquestionably clothed with discretion to permit corrective action under the rule. We have the responsibility for administering that Act, * * * and are empowered among other things to see that equity and justice are done in the matter of reparations.

* * * * * * *

The record in this case shows that granting the relief sought will not result in discrimination and that such grant, as in the *Higa* case, *supra*, will relieve innocent shippers from the consequences of the carrier's failure to effectuate an intended tariff filing.

This record shows that granting the relief sought will not result in discrimination, and will relieve innocent shippers who relied upon the unfiled $28 rate, from the consequences of the carriers' failure to effectuate the intended tariff filing.

The application therefore is granted.

(Signed) PAUL D. PAGE, Jr.,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 364

L'ALUMINIUM FRANCAIS

v.

AMERICAN EXPORT LINES, INC.

Application of American Export Lines, Inc. for an order authorizing the payment of the sum of $1,285.23, as reparation in connection with a shipment of aluminum from Marseilles to Chicago, denied.

A. T. De Smedt for American Export Lines, Inc.
H. Chabot for L'Aluminium Francais.

INITIAL DECISION OF PAUL D. PAGE, JR., PRESIDING EXAMINER [1]

American Export Lines, Inc. (Export) here applies for an order authorizing it to pay to L'Aluminium Francais (Francais) the sum of $1,285.23. This sum represents the difference between $2,923.26 actually collected by Export from Francais for a shipment (the only shipment carried at this approximate time by member lines of the conference involved) of aluminum wire from Marseilles, France to Chicago, Ill. in April 1963 at $58, the legally applicable rate, and $1,638.03, the charge which would have been made at the $32.50 rate Export here seeks to retroactively apply.

These are the record facts, stated in chronological order:

(1) About the first of March 1963 Francais orally protested to the "Marseilles Committee" of the Mediterranean/U.S.A. Great Lakes Westbound Freight Conference (the conference) the conference $58 rate on aluminum wire in rolls from Marseilles to Chicago. Export was a member of the conference, and as such, charged shippers conference rates.[2]

---

[1] This decision became the decision of the Commission on April 7, 1964, and an order was entered denying the application.

[2] In a letter to the conference secretary dated February 3, 1964, Sté Pechiney (an affiliate of Francais, which acted for Francais in this matter) states that this was done "at the beginning of the month of March * * * as soon as the tariff rates were known." The accuracy of the last phrase may be debatable, because the $58 rate became effective on November 30, 1961, and had been "known" since that date. It is possible that in Marseilles it is customary to issue advices of "change or no change" in rates from Marseilles to the Great Lakes about the first of each March, shortly before the Lakes open, but in any event *the reason why* the protest was made *at that time* is immaterial here.

(2) Francais was then told by the head of the Marseilles Committee that its request seemed well grounded, and that "a favorable decision" could be expected, but that "any modification of the tariff would have to be decided at the meeting which was to be held in Paris in April" 1963.

(3) On April 3, 1963, Sté Pechiney put its request in a letter to the conference.[3] In pertinent part, this letter envisioned shipments of aluminum wire in rolls from Marseilles to Chicago during 1963, but indicated that shipments would not be made at any rate higher than $32.50 per ton, and requested that such a rate should be put into effect to cover shipments made during the Lake's 1963 open season.

(4) On April 5, 1963, Francais loaded the cargo in question on Export's *Extavia*, and prepaid freight at the $58 rate. *Extavia* sailed from Marseilles April 6, and arrived at Chicago on April 26, 1964.[4]

(5) Some time between April 3, 1963, and April 10, 1963, the April 3, 1963 Sté Pechiney letter was communicated to the conference secretary at Nice. On April 10, 1963, by Circular No. 13, the conference secretary advised all conference members of the Sté Pechiney letter (without indicating its date) and at the Paris meeting which was held April 19, 1963, the conference reduced the rate to $47.[5]

(6) Francais requested reconsideration, and subsequent to May 2, 1963, when the secretary advised members of Francais' request, a rate of $32.50 on aluminum wire in cases, drums, and in rolls, was authorized. The conference forwarded to the Commission a Third Revised Page 79, which, if it had been accepted, would have made the $32.50 rate effective on May 20, 1963. It was, however, received by the Commission on June 4, 1963, and rejected on the same day because it was retroactive according to its terms.

(7) The conference then filed a Fourth Revised Page 79, stating the same rate as the rejected page to become prospectively effective June 12, 1963, which it did.

---

[3] This letter was addressed to "Monsieur Moscovitz" as president of the conference. In the letter referred to in footnote 2, Sté Pechiney says that "Mr. M. Moscovitz" was on April 3, 1963, "president of the local (Marseilles) committee of the conference." It is immaterial here if there was one Moscovitz or two Moscovitz's, or what offices were held. Both the March oral representations, and the written April representations of Francais were made by Francais to a conference representative who had no power to modify the tariff under discussion.

[4] In this, and certain other matters of detail, this opinion relies upon government records, and any party, on timely request will be afforded an opportunity to show the contrary (rule 13g, 46 C.F.R. 502.227).

[5] The Commission's files indicate that this was a reduction of a $62.50 rate on aluminum wire *in drums* not rolls, although the application states that "the rate was reduced from the then current $58 weight basis." Which it was does not affect decision here. (See the conference's Tariff 4, Second Revised Page 79, which became effective May 1, 1963.)

(8) The $32.50 rate, however, remained in effect less than three weeks, for by Tariff 5, Original Page 79, the conference raised it to $35.75, effective July 1, 1963.

DISCUSSION AND CONCLUSIONS

The foregoing specific findings of fact support and compel the conclusion that while granting the relief sought herein would not result in discrimination, it would not relieve an innocent shipper from the consequences of the carrier's failure to effectuate an intended tariff filing, but would, on the other hand, give a shipper the benefit of a rate which the conference at no time intended to apply to the shipper's cargo moving on the *Extavia* in April 1963, and which the shipper knew did not apply, when he shipped the cargo. This case therefore, is one which the decisions in *Y. Higa Enterprises, Ltd.* v. *Pacific Far East Line, Inc.*, 7 F.M.C. 62 (January 23, 1962), *Martini & Rossi S.p.A., et al.* v. *Lykes Bros. Steamship Co., Inc.* 7 F.M.C. 453 (November 16, 1962) and similar cases do not control.

The facts of this case make it unique. They support and compel the conclusion that when Francais loaded on *Extavia*, April 5, 1963, Francais knew (or at the very least was charged with knowledge) that the $58 rate was the only rate the carrier could legally charge, and that the carrier was (as it still is) expressly prohibited by law from rebating, refunding, or remitting any part of the freight money paid by Francais, in any manner or by any device. See section 18(b)(3), Shipping Act, 1916 which section had been effective for fifteen months before Francais made the shipment here involved.

Undoubtedly, when Francais, about the first of March, orally initiated its attempt to get the rate reduced to $32.50 it hoped to have the $32.50 rate made effective on the first ship it utilized to send aluminum wire in rolls from Marseilles to Chicago in 1963. (The *Extavia* was the first ship Francais utilized, and may well have been the first Marseilles-to-Chicago sailing in that year. The Lakes opened April 15, and *Extavia* reached Chicago April 26, 1963.)

On April 3, 1963, when Francais made its written protest, Francais could not reasonably have expected that the reduced rate would be made applicable to the shipment it intended to make a day or two later. *Extavia*, as Francais undoubtedly knew, sailed from Rijeka for Marseilles the day before the letter was written. Francais had been told by the conference's Marseilles Committee that the rate matter would have to be decided in Paris, some time in April. There is not a scintilla of evidence to support a finding that when Francais loaded aboard *Extavia* on April 5, and paid at the $58 rate, it believed or had reason to believe that the Paris meeting would be held, the rate reduced and filed by cable so as to become effective before *Extavia* sailed from

Marseilles the next day, April 6.[6] And most certainly neither conference nor carrier did anything to cause Francais to believe that.

It could be argued that Francais believed that at its meeting in Paris, later in April, the conference would reduce the rate to $32.50 retroactively so that the $32.50 rate would apply to cargo loaded on *Extavia* for her April 6 sailing from Marseilles. First, there is no evidence that Francais so believed, and second, it appears that when, subsequent to May 2, 1963, the conference undertook to reduce the rate to $32.50, it did not attempt to make the effective date one which would bring *Extavia*'s April 6 sailing within the scope of the reduction, and did not then feel (as it still does not feel) that Francais had requested such action by the conference. In a letter to the Commission dated September 12, 1964, urging approval of the application in this case (and attached to the application) the secretary says in part:

> Member lines of this Conference further fully agree that the rate which came into application on "Aluminum Wire," on May 20th, could be made retroactive for the above shipment, as *should such a rate reduction had been requested at the time*, member lines would have been in favor of same. [Emphasis supplied.] [7]

Finally, and most importantly, as heretofore pointed out, the conference could not make the rate effective retroactively, and Francais knew or at least was charged with knowledge of that fact. No principle of equity or justice authorizes this Commission to base an award to any party upon that party's prospective reliance upon the performance of an unlawful act by another.

Inasmuch as no Commission decision supports granting this application, and no sound reasoning can be said to support it, the application is hereby denied.

(Signed) PAUL D. PAGE, JR.,
Presiding Examiner.

---

[6] Decreasing rates by cabled filing was practical in April 1963. Compare Special Docket Nos. 245–257 inc., 7 F.M.C. 473, where it was not practical to do this—although the carrier tried.

[7] The statement that the rate "came into application * * * on May 20" is erroneous. It did not become effective until June 12, 1963. See Finding 6, *supra*.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 366

MIDWEST EXPORT & IMPORT CO. AND
GREEN TEXTILE EXPORT AND IMPORT CO., INC.

v.

F. W. HARTMANN & CO., INC., AGENTS FOR HANSA LINE

REPORT

BY THE COMMISSION (Thomas E. Stakem, *Vice Chairman* Ashton C. BARRETT, *Commissioner;* James V. Day, *Commissioner*):

No exceptions having been filed to the initial decision of the Examiner in this proceeding, and the Commission having determined not to review same, notice is hereby given, in accordance with Rule 13(d) of the Commission's Rules of Practice and Procedure, that the decision became the decision of the Commission on April 21, 1964.

It is ordered, That the application of F. W. Hartmann & Co., Inc., as agents for Hansa Line, to refund a portion of certain freight charges as specified in the Examiner's decision to complainants be and it is hereby granted.

John Harllee, *Chairman*, and John S. Patterson, *Commissioner*, dissenting:

The Commission has ordered that the application of F. W. Hartmann & Co., Inc., as agents for Hansa Line, to refund to two shipper-consignees a portion of the freight charges collected should be granted. The Commission has determined not to review the Examiner's decision that the Hansa Line may refund the amount of $1,608.21 to Midwest Export & Import Co., Inc., and $2,062.57 to Green Textile Import & Export Co., Inc., because the importers were required to pay freight on the basis of the rates and charges specified in the carrier's tariffs on file with the Commission and published and in effect at the time instead of a rate established by the carrier which was not in the tariff nor published nor on file.

Various excuses are assigned for the deficiency, but the facts show clearly that Hansa Line by its agents transported some baled jute rags from Suez to New York and Philadelphia at a time when the legally filed and effective tariffs of the Red Sea & Gulf of Aden/U.S. Atlantic & Gulf Tariff No. 1 observed by Hansa Line did not include a rate for such a classification of commodities. Accordingly, Hansa Line charged the rate for commodities not classified, commonly known as "not otherwise specified" or the "N.O.S." rate. There is no question and no party contends that any other applicable rate than the N.O.S. rate was specified in the tariffs governing the Hansa Line service and that such tariff was on file with the Commission and duly published and in effect at the time.

Section 18(b)(3) of the Shipping Act, 1916, enacted by Congress in Public Law 87-346, approved October 3, 1961, provides as follows:

> No common carrier by water in foreign commerce or conference of such carriers shall charge or demand or collect or receive a greater or less or different compensation for the transportation of property or for any service in connection therewith than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time nor shall any such carrier rebate, refund, or remit in any manner or by any device any portion of the rates or charges so specified, nor extend or deny to any person any privilege or facility, except in accordance with such tariffs.

Whatever rights Rule 6(b) of the Commissions "Rules of Practice and Procedure," effective July 31, 1953, may give, the rule may not sanction disregard of the clear terms of the above Congressional enactment.

It is our opinion that the facts before us in this case, as disclosed by the Examiner's decision, show beyond any doubt that the carrier is refunding and remitting a portion of the rates or charges specified in its tariffs on file with the Commission and duly published and in effect at the time. The carrier is also collecting and receiving a less and different compensation for the transportation of property than the aforesaid filed tariffs.

There is another reason for our dissent. Rule 6(b) is entitled "Voluntary payment of reparation." The only authorization for the granting of reparation is contained in Section 22 of the Shipping Act, 1916, which relates only to injury caused by "any violation of this Act." We think it clear, therefore, that Rule 6(b) authorizes only the voluntary payment of reparation for violation of the Act. In fact all applications filed pursuant to Rule 6(b) require a statement that "The undersigned carrier(s) hereby admits that when exacted the freight charges collected were unlawful in violation of sections(s) * * * of the Shipping Act, 1916, as amended." No such statement was included in the application here under consideration and no violation of the Act is apparent.

For these reasons we dissent from the determination of the majority of the Commisson to not review and reverse the decison of the Examiner in this Docket.

(Signed) THOMAS LISI,
Secretary.

APRIL 21, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 366

MIDWEST EXPORT & IMPORT CO. AND GREEN TEXTILE IMPORT & EXPORT CO., INC.

v.

F. W. HARTMAN & CO., INC., AGENTS FOR HANSA LINE

Application under Rule 6(b) for permission to refund a portion of freight charges collected is granted.

INITIAL DECISION OF WALTER T. SOUTHWORTH, EXAMINER [1]

F. W. Hartmann & Company, Inc., as agent for Hansa Line ("Hansa"), applies for permission under Rule 6(b) of the Commission's Rules of Practice and Procedure to refund to two shipper-consignees a portion of the freight charges collected on certain shipments of baled jute rags which had originated in Bombay and were carried by Hansa from Suez to New York and Philadelphia under the following circumstances:

The jute rags had been shipped from Bombay, for discharge in New York and Philadelphia, on the *Suzanne* of Kulukundis Lines, Ltd. When the *Suzanne* arrived at Suez, in or about February 1963, she was arrested under legal process issued by a court of the United Arab Republic, in a proceeding arising out of the financial difficulties of the Kulukundis interests. The ship lay idle at Suez with her cargo aboard from February until August 1963. The cargo included a large number of shipments of hides, whose consignees took action through the Tanners Council of America to obtain a release thereof through the court. Apparently the court of the U.A.R. would not recognize a claim for the release of less than all the cargo; at any rate, the Tanners Council communicated with the consignees of all the cargo (including the nominal complainants herein) and obtained authority to arrange for the release, with expenses to be prorated among all receivers and ocean freight charges from Suez to be "collect."

[1] This decision became the decision of the Commission on April 21, 1964, and an order was issued granting the application.

The Tanners Council then made arrangements with Hansa pursuant to which the cargo ex the *Suzanne* was shipped from Suez consigned to the order of "Messrs. Tanners Consul of America" in Hansa's m/s *Greiffenfels*.

A month earlier Hansa had carried from Aden, in its m/s *Kandelfels*, several hundred tons of cargo which had been removed from the Kulukundis ship *Ines* at Aden under similar circumstances. In that case Hansa had been advised what commodities were aboard the ship and, since such commodities never moved from the Red Sea area and therefore were not specifically provided for in the applicable tariff under the Red Sea & Gulf of Aden/U.S. Atlantic & Gulf Rate Agreement, Hansa had agreed to amend such tariff to include rates for the specific items involved, including wool, gum karaya and goat skins, identical with those in Tariff No. 5 of the West Coast of India and Pakistan/U.S.A. conference, of which Hansa was also a member. However, in making arrangements with Hansa for the cargo from the *Suzanne*, the Tanners Council of America did not reveal that that cargo included baled jute rags. Since this commodity was not specifically provided for in the applicable tariff (Red Sea & Gulf of Aden/U.S. Atlantic & Gulf Tariff No. 1), Hansa charged the complainants herein, and collected, freight at the General Cargo N.O.S. ("not otherwise specified") rate of $59 per cubic meter. This N.O.S. rate from Suez is almost three times the specific commodity rate for jute rags of $21.25 per cubic meter from Bombay, under the West Coast of India and Pakistan/U.S.A. tariff.

Hansa's position, briefly, is that it was not aware, before the *Greiffenfels* sailed from Suez, that jute rags were going to be shipped, and that therefore the rate was not discussed; that if it had known, it would have amended the applicable tariff to provide the same rate as from Bombay (as it had previously done in the case of other commodities not normally shipped from the Red Sea area); and that it is willing, and desires, to make an equivalent adjustment through the refund herein proposed.

This application arises out of an unusual situation, not likely to recur. There was unquestionably misunderstanding, error and inadvertence. Had the carrier known what commodities it was agreeing to carry, it would have filed the $21.25 rate which already existed under its tariff for carriage from Bombay—a much greater distance than from Suez, which is on the route from Bombay. Inadvertently, the carrier was not fully advised as to the consist of the goods to be transshipped; whether this was primarily the fault of the carrier in failing to inquire, or of the Tanners Council in misstating the consist or failing to describe it completely, does not appear from the record. Probably it was a mutual mistake. The carrier, since it was dealing with the Tanners Council, would naturally assume that it was concerned only with hides unless advised to the contrary. The Tanners Council, being principally concerned with its members' affairs, presumably did not consider the incidental shipments of jute to have any great significance. The actual consignee-shippers, who had bought the jute on the basis of a freight rate of $21.25 per cubic meter from Bombay, assumed that the freight for the same shipment from the wayport of Suez would not exceed the rate for the whole distance. As the Commission stated in *Lykes Bros. Steamship Co., Inc. Application to Refund*, etc., 7 F.M.C. 602, at p. 603: "Whether or not this was a justified assumption, the shipper had no reason to expect freight to be charged at a rate more than 130 percent greater than it had recently paid to move the same item." The rate charged in the present case was actually more than 175 percent greater than the rate to move the same goods all the way from Bombay.

Upon the record, the rate of $59 appears *prima facie* to have been unjust and unreasonable. As stated in *Lykes Bros.*, however, it is not necessary that the rate be shown to be unjust, unreasonable or otherwise unlawful; it is sufficient that the relief sought "will relieve an innocent shipper of the consequences of the carrier's failure to file a proper rate." Here there was certainly a failure of the carrier to file a proper rate for the commodity in question; and the basic reason for its failure was the same as in *Lykes Bros.* There the carrier had an outward rate for "fosfatefeeders," but did not file any inward rate because movements of such items were "rare" in the inward trade. Here the carrier had filed a rate for baled jute rags from Bombay, but no rate from the intermediate Red Sea area, because such commodities "never" moved in that trade.

Since the carrier's application has been amended to cover all the jute shipments of the *Suzanne*, and since the commodity does not move normally in the Red Sea/U.S.A. trade, there can be no discrimination by reason of the granting of this application; on the contrary the disadvantage to the consignees which resulted from their unfortunate involvement in the Kulukundis affair would be considerably magnified if the application were denied. The carrier will be permitted to refund the difference between the freight paid at the rate of $59 per cubic meter, and the amount at the rate of $21.25 which would have been charged had the carrier ascertained all the facts when the transaction was negotiated.

In the case of complainant Midwest Import & Export Co., Inc., P.O. Box 5425, Detroit 11, Mich., freight on a shipment of 42.6017 cubic meters was collected at the N.O.S. rate of $59 per cubic meter, in the amount of $2,513.50. At the rate of $21.25 per cubic meter the freight would be $905.29. An order will be entered granting the application for permission to refund the difference of $1,608.21 to said complainant.

In the case of complainant Green Textile Import & Export Co., Inc., 241 Church St., New York 13, N.Y., freight on a shipment of 26.531 cubic meters was collected at the rate of $59 per cubic meter, in the amount of $1,565.33. On another shipment of 29.6538 cubic meters, the carrier purported to collect freight at the rate of $59 per cubic meter; however, through arithmetical error the amount actually collected on this shipment was $1,691.16, instead of $1,749.57. The amount actually collected on the two shipments, therefore, was $3,256.49. At the rate of $21.25 per cubic meter, the freight would have been $563.78 on one of the shipments and $630.14 on the other, a total of $1,193.92. An order will be entered granting the application to the extent of permitting a refund of the difference of $2,062.57 to said complainant.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 1077

INVESTIGATION OF INCREASED RATES IN THE ATLANTIC/GULF PUERTO RICO TRADE—OUTWARD FREIGHT TARIFF NO. 1 FMC–F NO. 1, J. L. MARTY, AGENT

Decided March 19, 1964

Increased rates on dried beans, feed and feedstuffs, slacked lime, soda ash, and certain other commodities of respondents from U.S. Gulf ports to Puerto Rico found just and reasonable. Proceeding discontinued.

Carl H. Wheeler for respondent Waterman Steamship Corporation of Puerto Rico.

Mark P. Schlefer for respondent Lykes Brothers Steamship Co., Inc.

John T. Rigby for intervener the Commonwealth of Puerto Rico.

Norman D. Kline and *Frank Gormley* as Hearing Counsel.

INITIAL DECISION OF CHARLES E. MORGAN, PRESIDING EXAMINER [1]

This is an investigation to determine the lawfulness under the Shipping Act, 1916, as amended, and the Intercoastal Shipping Act, 1933, as amended, of certain increased rates of the respondents, Waterman Steamship Corporation of Puerto Rico (Waterman), and Lykes Brothers Steamship Co., Inc. (Lykes), from United States Gulf ports to Puerto Rico.

By original order served December 4, 1962, there were placed in issue Waterman's rates contained in 18 pages of the U.S. Atlantic and Gulf-Puerto Rico Tariff FMC–F No. 1. By supplemental orders served on January 9 and 31, 1963, the investigation was broadened to include Lykes' rates contained in 17 pages of the above tariff, and the additional rates of Waterman on coal in bags and citrus pulp. The increased rate on coal in bags was suspended until May 27, 1963, and became effective on May 28, 1963. None of the other rates were suspended. All of the increases came into effect, although at least one rate since voluntarily has been cancelled.

---

[1] This decision became the decision of the Commission on March 19, 1964. See Rules 13(d), and 13(h), Rules of Practice and Procedure, 46 C.F.R. 502.224 and 502.228.

In lieu of an oral hearing, a procedure was agreed on whereby joint statements of fact were filed on December 9, 1963, as Exhibit Nos. 1 and 2. Hearing Counsel and the respondents had cooperated in the preparation and the submittal of these facts, and in that connection Hearing Counsel had visited the office of respondents to verify certain financial data. The Commonwealth of Puerto Rico intervened but has not taken a position in opposition to the proposed increased rates.

An opening brief was filed by Hearing Counsel, and the respondents waived the filing of reply briefs. No shipper nor other party opposes the increased rates, and Hearing Counsel concludes that the increased rates should be approved.

Waterman operates a regular weekly service between the ports of Mobile and New Orleans, on the one hand, and, on the other, the Puerto Rican ports of San Juan, Ponce, and Mayaguez.

Until about June 1, 1961, Waterman was a member of the United States Atlantic and Gulf-Puerto Rican Conference and a party to tariffs published by that Conference. Upon the termination of the Conference in 1961, Waterman adopted the former Conference tariffs as its own. The former Conference tariffs applied between both United States Atlantic and Gulf ports, on the one hand, and on the other, Puerto Rico. Said tariffs named commodity rates governing the movement of some articles, which because of their geographical origin, moved only through Atlantic Coast ports while other articles moved only through Gulf ports.

There are 29 Waterman rates under investigation. But of the 29 commodities covered by these rates, Waterman in 1962 transported only 16 commodities. Some of the principal heavier moving of these are feed and feed-stuffs, dried beans, slacked lime, corn meal, box shooks, citrus pulp, and beet pulp.

Cost figures submitted herein show that Waterman's revenues in 1962 were less than its fully distributed costs on 14 of the above 16 commodities. The net losses, per 40 cubic feet, ranged from $0.83 on dried beans to $7.53 on soap flakes, chips, or granules. On slacked lime the net loss was $7.28. The only two commodities showing a profit were $0.18 on wall or insulating board, and $6.23 on cotton or felt waste. The total transportation costs on these two commodities respectively were $13.82 and $21.77 per 40 cubic feet. The increased rate on waste has been cancelled voluntarily by Waterman and it did not carry a single shipment of waste while the increased rate was in effect. Effective December 2, 1963, Waterman changed the rate on waste from $4 per 100 pounds to $0.40 per cubic foot. The former rate had been predicated upon an average density of the waste of 170 cubic feet per ton of 2,000 pounds, but this density has been increased because of improved methods of machine compressing of bales. This factor and the competitive rate of Alcoa Steamship Company, Inc. of $0.40 per cubic foot caused Waterman to change its rate. Pursuant to this new rate, Waterman will derive revenues of only $16 per measurement ton as against total transportation costs of $21.77 per measurement ton of cotton or felt waste. The above costs do not reflect any increases for 1963.

Lykes provides a fortnightly service from west Gulf of Mexico ports of the United States to Puerto Rico. It regularly calls at Lake Charles, Houston, and Galveston, and from time to time depending upon cargo offerings also calls at Beaumont, Port Arthur, Orange, and Corpus Christi. Discharge is regularly made at San Juan, Mayaguez, and Ponce.

There are 31 rates of Lykes under investigation. But of the 31 commodities covered by these rates, Lykes in 1962 transported only 13 low-rate commodities. Some of the principal heavier moving of these are soda ash, dried beans, slacked lime, feed and feedstuffs, and common laundry soap. Cost figures herein show that Lykes' revenues in 1962 were less than its fully distributed costs on 12 of the above 13 commodities. These net losses, per 40 cubic feet, ranged from $0.82 on soya bean meal to $9.75 on common laundry soap. The only commodity showing a profit is cotton waste with $2.90 per measurement ton before taxes, and $1.39 after corporate income taxes of 52 percent. This profit is about five percent of the gross revenue of $25.60 per measurement ton on cotton waste. Lykes also believes that the stowage factor of 70 cubic feet per ton used by it to compute the costs of transporting cotton waste may be understated. In that event its cost would be understated and its profit overstated.

The rates herein under investigation appear well within the zone of maximum reasonableness. It is concluded and found that the increased rates of the respondents herein are just and reasonable. An order will be entered discontinuing the proceeding.

(Signed) CHARLES E. MORGAN,
Presiding Examiner.

MARCH 19, 1964.

FEDERAL MARITIME COMMISSION

No. 1000

CALIFORNIA STEVEDORE & BALLAST CO. ET AL.

v.

STOCKTON ELEVATORS, INC.

Decided April 21, 1964

Respondent, a public grain terminal also engaged in stevedoring at its facilities, found to have violated section 17 of the Shipping Act, 1916, by engaging in the following unreasonable practices:

1. Passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum markup which also includes its profit on stevedoring.
2. Failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike.
3. Failing to assess the charge against its subcontractor which performs respondent's stevedoring under an exclusive contract.
4. Assessing such charge exclusively against complainants who are competing stevedores.

Richard W. Kurrus and *James N. Jacobi* for complainants.
H. Stanton Orser for respondent.
Gus O. Basham, Chief Examiner.

REPORT

BY THE COMMISSION (John Harllee, *Chairman*, Thos. E. Stakem, *Vice Chairman*, James V. Day, Ashton C. Barrett *Commissioners*):

Proceedings

Complainants are six stevedoring firms [1] seeking to enjoin respondent, Stockton Elevators, Inc., a grain terminal, from carrying on certain activities alleged to be "unreasonable practices relating to or connected with the receiving, handling, storing or delivering of prop-

[1] California Stevedore and Ballast Co., Marine Terminals Corporation, San Francisco Stevedoring Co., Schirmer Stevedoring Co., Ltd., Seaboard Stevedoring Corporation and Yerba Buena Corporation.

erty" in violation of section 17 of the Shipping Act, 1916. The activities are said to be designed to create and perpetuate a monopoly in the stevedoring of bulk cargoes loaded into vessels at respondent's public terminal facilities. After hearing and briefs, the Examiner, in his initial decision, found that respondent's practices (1) of passing on to the ship its established rental charge for the use of loading equipment, in the form of a lump-sum markup which also included its profit on stevedoring; (2) of failing to publish the charge specifically to apply against the ship, or the cargo or against all stevedores alike; (3) of failing to assess the charge against its subcontractor which performs respondent's stevedoring work under an exclusive contract; and (4) of assessing charges exclusively against complainants who are competing stevedores were unreasonable within the meaning of section 17. The case is before us upon exceptions by respondent.

In Docket 898, *California Stevedore & Ballast Co., et al.* v. *Stockton Port District and Stockton Elevators*, 7 F.M.C. 75 (1962), these same six complainants obtained an order from the Commission requiring Stockton Elevators, Inc. and Stockton Port District to cease and desist from carrying out certain agreements whereby Stockton Elevators, granted to Stockton Port District the exclusive contractual right to stevedore all vessels loading or unloading bulk grains or rice at respondent's elevator. The Commission found this to be an unreasonable practice within the meaning of section 17 of the Shipping Act, 1916, which practice operated to the detriment of the commerce of the United States.

On October 10, 1961, shortly after the Examiner issued his initial decision in Docket 898, also finding the practice unlawful, respondent amended its tariff by publishing an equipment rental charge of 15 cents per ton, effective October 15, 1961, on equipment to be used in loading and trimming bulk cargoes.[2]

In addition to operating as a public grain terminal, respondent also contracts with vessels for stevedoring in competition with complainants. It employs Jones Stevedoring Company (Jones), as its subcontractor to perform its stevedoring exclusively. Respondent does not assess the equipment rental charge against Jones but would levy it against complainants and other outside stevedores using its loading equipment.

---

[2] *EQUIPMENT RENTAL:* Equipment, and maintenance thereof is available from Stockton Elevators for use in the loading and trimming of bulk cargoes.

Rental: 15¢ per short ton loaded*.

* Rental on above equipment and services when used in connection with such edible commodities as rice to be charged at 24½ cents per short ton loaded and to include complete clean-up and fumigation of all equipment prior to use.

Said rental to cover use of: Tarps, pans, spouts, flexes, and power telescopes as well as maintenance thereof. And to include power for trimmers and other electrical equipment; also spot maintenance on trimmers by elevators mechanics.

Complainants allege that this rental charge renders them noncompetitive at respondent's facilities, that its imposition on them exclusively constitutes an unreasonable practice in violation of section 17, and that it is but another device to exclude complainants and other stevedores from the terminal in defiance of the Commission's decision in docket 898.

Respondent maintains that when it performs stevedoring it includes the 15 cent rental charge in its bill to the vessel for stevedoring services; that as a public grain terminal, its obligation to deliver grain under its delivery charge does not extend beyond the spout fixed to its elevator; and that it is entitled to a rental charge for its equipment when such is used by complainants or other outside stevedoring firms to convey the grain from the elevator's fixed loading spout to the inside of the vessel hold.

The Examiner made the following findings of evidentiary facts which, with one minor exception discussed later, we adopt as our own.[3]

Complainant Seaboard Stevedoring Corporation (Seaboard) asserts that it cannot compete with respondent. One of Seaboard's principals asked it to bid on a vessel at respondent's terminal, but the offer was turned down because of the 15-cent charge. It informed Seaboard it could get service cheaper from respondent if Seaboard charged the 15-cent rental charge. In addition to the equipment rental charge, respondent imposes on the cargo a wharfage charge of 50 cents per ton, and a delivery charge to the end of spout of 60 cents per ton, and against the vessel a service charge of 25 cents per ton. Seaboard is not aware of any other instances where a terminal assesses an equipment rental charge of this type. Grain terminals, including the Port of Stockton Grain Terminal, commonly assess a charge against the cargo for delivery at end of spout.

Seaboard's definition of "end of spout" is the end of the property of the elevator in the compartment of the ship in which the grain is blown. This includes the attachments that are put on at the end of the belt. Such attachments are used at other terminals in the San Francisco Bay area, but are not furnished by the stevedore.

Complainant Yerba Buena Corporation stevedored four vessels at respondent's terminal during March and April 1962.[4] In each instance the connection to the spout had been removed and had to be rerigged, which entailed quite a bit of time. Respondent imposed the rental charges,[5] amounting to $934.20, which have not been paid.

---

[3] Quotation marks have been omitted for the sake of convenience.

[4] Complainant San Francisco Stevedoring Company also stevedored a ship at respondent's elevator on January 26, 1962, and used the equipment in question.

[5] The equipment used by complainant consisted of flex buckets, telescopic pipe, flex pipe, save-alls, goosenecks, power winch, and electrical power.

The person who solicited this bid for Yerba Buena testified that "with the 15 cents [rental charge] it did not leave us anything." This complainant, which also stevedores grain at Port of Stockton Grain Terminal, had had no difficulty there concerning the dismantling of telescopic spouts and flexes, which are furnished without charge. The only equipment furnished by complainants are trimmers, and the necessary equipment to operate them. The charge for delivering grain there, of 60 cents per ton, includes delivery through the telescopes. The grain elevators in the Bay area, including the Port of Stockton Grain Terminal, make the same delivery, wharfage and service charges as respondent, but do not assess any charge for rental of somewhat similar equipment used for conveying grain from spout to vessel.

Yerba Buena has clients, three of whom were identified, who want to use its services at respondent's elevator, but its solicitor has been told by them that its rates, with the inclusion of the 15-cent charge, are not competitive with those of respondent. This complainant competes successfully at the Port of Stockton Grain Terminal with Jones, which is a private contract stevedore like Yerba Buena, both hiring the same labor and paying the same wage scale. Yerba Buena states that it could also compete with Jones at respondent's terminal were it not for the rental charge, which as stated, is not assessed against Jones.

Respondent relies upon the following facts to prove that it is entitled to a reasonable charge for use of the equipment in question. They are offered to support its argument that under its tariff, its obligation to the ship (a) is to deliver only to the end of the spout ("ex-spout") to a point over ship where the grain can fall free, but (b) does not include conveyance beyond spout by equipment for use or convenience of the stevedore in stowing or trimming the vessel.

Respondent's definition of "end of spout" is the bare end of the cylindrical tube fixed to the tower of the elevator. It telescopes to position the end of spout outboard or inboard over ship's hold, and is controlled by an elevator employee. A ship could be loaded from such spout (without the loading equipment in question), but not very efficiently.

The spout has shackles for the affixing of additional equipment used by the stevedore to convey the grain into various compartments and holds of the ship. This equipment, the use and rental of which is in issue here, is described as telescopic pipes, flexes, thrower, adapter, trimmers and by such singular names as "horsehead" and "elephant trunk." The horsehead is an adapter, attached to the spout, by which the flow of grain is controlled. To the horsehead it attached the elephant trunk, which is a group of flex buckets linked by a chain. They give mobility and feed into the telescopic pipes. These pipes are telescoped up and down by a motor attached to the horsehead. They feed into the trimmer, suspended from ship's tackle, which throws the grain into the hold. Respondent has three sets of such equipment (one a spare) which it developed at considerable costs,[6] and acquired after October, 1961.

In loading a ship, the gear must be hauled up and replaced three to five times per hatch. Before the above-described equipment was developed such operation was performed by block and tackle by the stevedore, taking as much as one-half hour for a move. The new equipment has increased production by 20 percent.

The practice of large grain elevators in the Pacific Northwest and in Southern California, comparable in size to that of respondent, is for the stevedore to supply equipment similar to that in question, and for the terminal to make a charge of 15 to 25 cents per ton for equipment supplied for *unloading* vessels, such as fork lifts, cranes, etc.

At the smaller terminals in the San Francisco Bay area, there are available manually operated extensions of the spout which are furnished by the elevators to stevedores without charge. According to respondent, these elevators do not have or need improved equipment since their capacities cannot utilize the increased loading rates possible. Respondent, which handles 80 percent of bulk agricultural commodities shipped from California and whose maximum loading rate is 800 tons per hour, does not consider such elevators representative of Northern California. The comparable loading rate at the Port of Stockton Grain Terminal is 300 tons per hour.

In respondent's opinion, the assessment of the 15 cent charge against the cargo would run counter to the practices in the grain trade since long-established buying and selling practices are to deliver, to sell and be responsible for charges on export shipments to end of spout.

The charge is made, according to respondent, to amortize the cost of past and continuing development and to return a profit on respondent's investment, and it was fixed on what respondent believes to be sound business principles.

Respondent maintains that it competes with complainants for stevedoring at its terminal and has bid for stevedoring work since July 1961. It quotes a flat maximum rate per ton, enters into a contract with the ship and guarantees the rate it quotes. Although its witness testified it never reduces a bid to get business, he added that on occasion there may be an "invoice reduction" if the loading is particularly good.

---

[6] A complete set of this equipment would cost between 15 and 25 thousand dollars. None of complainants own such equipment.

Complainants have free access to the dock and ships it may be stevedoring there, and can use their own equipment, if it is reasonably capable of doing the job.

Respondent loaded 156 vessels between October 1961 and February 1963, without complaint and with success. It did not increase its rates for stevedoring following the recent 10 percent increase in longshoremen's wages. Respondent attributes its success in competition with complainants to its claimed ability to achieve better production, faster turnaround and lower overall cost to the ship.

To demonstrate that complainants are not excluded from stevedoring there, respondent points to the fact that one of the complainants (Yerba Buena) stevedored four ships at its terminal. There was no interference or harassment by respondent. This complainant understood the 15-cent charge, used the equipment in question, and was given spot maintenance on its machines. In one instance both of complainant's trimmers broke down and respondent loaned one of its trimmers to finish the job.

Respondent states that if complainants had the necessary equipment, they could use it at respondent's elevator, and the 15-cent charge would not be assessed. Respondent does not put out bids for its exclusive stevedoring arrangement, but if it did, it would "still reserve the right to * * * give consideration to other factors than the economic ones, such as the type of equipment available, the caliber of the personnel who would do the supervisory work, and things of that sort * * *."

After finding the foregoing, the Examiner stated the controlling question in the proceeding as "whether the 15-cent rental charge is used by respondent as a device to exclude complainants from conducting their business on its docks," and from there went on to review in some detail the testimony concerning the basis of the charge and the manner in which it is applied. His review of the testimony is as follows:

The manager and vice president-treasurer of respondent testified that in fixing the charge of 15 cents they took into consideration the increased efficiency of the loading operation and the resulting decreased costs of the loading, the investment in the equipment, and primarily, rental charges of 15 to 25 cents made at other elevators on the West Coast for equipment used in discharging vessels, such as fork lifts, cranes, etc.

This witness also testified that the quotations by respondent to the ship for stevedoring include the equipment rental charge, which is not separately stated as such; that Jones bills respondent for its cost plus profit; that in billing the ship for stevedoring, respondent adds a lump-sum markup to Jones' charges to include (a) at least 15 cents per ton to cover the equipment rental charge, plus (b) an amount for respondent's profit on the stevedoring; and that the bill to the ship shows a flat charge per ton, without identifying any amount as the rental charge.[7]

Respondent's accountant testified that the billings to the steamship companies for stevedoring performed by respondent on the 156 ships it loaded exceeded the amount charged to respondent by Jones for stevedoring by at least 15 cents per short ton, except in one instance where it was 12 cents, and that the charges were paid by the ship in every instance. Such billings were not broken down to show the rental charge separately. Neither witness presented any cost figures to show that 15 cents is a proper charge to use in amortizing the equipment in question.

* * * * * * *

Respondent filed exceptions to the Initial Decision in which it reasserted its position that the equipment rental charge, is fair, reasonable and nondiscriminatory, and that complainants are able to compete at Stockton Elevators. The only new matters brought out in the exceptions are respondent's contentions that contrary to the Examiner's finding Jones' contract with respondent was not a so-called "cost plus profit contract" and did not guarantee any certain margin of profit to Jones.[8] Respondent further asserts that since the Examiner found that respondent did not use the rental charge as a device to exclude competing stevedores, we should "decline to issue an order on the ground that there has been no evidence of wrongdoing."

Respondent misapprehends our responsibilities under section 17. It is our duty under that section to remove all unlawful discriminations whether there is an intent to so discriminate or not. The same harm flows from an unintended discrimination as from one fully intended. It is the consequence of not the motive behind the discrimination which produces the harm. Thus, for the reasons set forth below, most of which constitute a restatement of those found in the Initial Decision, we agree with the result reached by the Examiner.

We agree with respondent that the employment of one stevedoring subcontractor in preference to another or even to the exclusion of another does not necessarily constitute an unreasonable regulation or practice under section 17, see *D. J. Roach Inc.* v. *Albany Port District*

---

[7] He testified that: "We have to charge it [rental charge] to the vessel whether we do the stevedoring or California Stevedoring and Ballast or Yerba Buena does the stevedoring. It is charged in all cases."

[8] At page 8 of the Initial Decision the Examiner in reviewing the testimony of respondent's own witness found that "Jones bills respondent for its cost plus profit." Respondent admits that the error was caused by its own witness but contends that the invoices in the record demonstrate that the statement should be that Jones billed respondent for costs plus profit if any.

et al. 5 FMB 333 (1957). But that is not the question here. The issue here does not concern who is to be respondent's subcontractor, rather it is the difference in treatment accorded by respondent to Jones, and to itself as a stevedore, on the one hand, as compared with the treatment of complainants on the other. This difference in treatment results from the imposition of the rental charge upon complainants, but not upon Jones. Moreover, it is not imposed *by* respondent acting as owner and operator of the terminal, *upon* respondent acting in the capacity of a stevedore, in the same manner as it is imposed upon complainants.

A ship has the right to contract for stevedoring with a qualified stevedore [9] of its choice, and the chosen stevedore has the right to perform such stevedoring work at a public grain terminal. *Baton Rouge Port Commission* v. *United States and Federal Maritime Board*, 287 F.2d 86 (1961).

Granting that a public terminal elevator may make a fair and nondiscriminatory charge for the use of any of its facilities; and that the terminal is entitled to a fair return on its investment, the question remains: Is the charge fair, reasonable and nondiscriminatory?

At the outset it is important to note that the tariff item naming the rental charge is ambiguous in not stating who is to pay the charge. Therefore, respondent conceivably could place the charge against the stevedore, the vessel or the cargo. Also, it can make the charge against some stevedores and not others as in the situation presented here. For there is a vast difference between having to pay a rental charge as complainants do which they then must pass on to the ship or absorb out of profit; and the situation which respondent (as a stevedore) enjoys of being able to bury the charge in a lump-sum "markup" which also includes its profit. To say the least, this is an unreasonable practice which may be a source of potential discrimination.

While Jones is a subcontractor, it is also in fact a private stevedoring firm in competition with complainants for the stevedoring business at Stockton. Yet it is not charged the rental fee assessed against complainants, and the result is that it has enjoyed all of the business, except on the five ships *ante*. The record is persuasive that if this charge were made against Jones also, or that it was published specifically to apply against the ship or against the cargo, complainants would have no trouble in getting a share of the business. It is well enough to say, as respondent does, that in passing the charge on to the vessel by means of a markup, respondent is putting itself and Jones on a competitive parity with complainants and other outside stevedoring firms. But, there is no compulsion on respondent to include all or any part of the

[9] Respondent's manager conceded that complainants are reputable firms.

rental charge in the markup. It may reduce the rental charge in the markup below the 15-cent charge, as it did in one instance. If this is done there is no means of knowing what the markup actually is or whether it includes all, or even any part of the rental charge except by auditing respondent's accounts, and perhaps making a cost study. Moreover, the record provides no cost figures from which a rental fee could be determined which would fairly amortize the investment. Assume for instance that 5 cents per ton is a proper amount to include; this would give respondent an advantage of 10 cents per ton in bidding for the business. Thus, viewing the arrangement from a regulatory standpoint, its flaw lies in the fact that the so-called rental markup is interwoven with profit markup and short of an audit of respondent's books no one but respondent knows which is which.

Without in any way impugning the motives of respondent, it must be concluded that in burying the rental charge in a lump-sum markup which also includes profit, it has opened the door for discrimination of a most invidious nature. Because it is impossible to tell where the charge will fall the tariff provision is potentially discriminatory. Moreover, its generality affords an unwarranted degree of possible variance between what respondent says the provision means and the actual practice thereunder. Not only potential discrimination in unequal application of a tariff, but the mere possibility of a variance between regulation and practice render both regulation and practice unreasonable, *Lopez Trucking Inc.* v. *Wiggin Terminals Inc.* 5 FMB 3, 15 (1956).

Respondent has suggested that a separate rental charge against the vessel would make the terminal noncompetitive with other grain terminals. Yet respondent's manager testified that it had to assess the rental charge against the vessel, and does so assess it. Then why should respondent not state in its tariff that it will do so? It would appear that repondent's reluctance to publicly provide for assessment of the charge against the ship is based upon one of two assumptions. Either the full charge is not now being paid by the vessel via the markup, or the carrier and the trade are unaware that the vessel pays the fee, in which case they will learn about it from this proceeding. If it should be considered that the end of spout is the place from which the grain falls into the ship or the trimmer, the fee could be incorporated in the delivery charge against the cargo, which as respondent's manager admitted, pays all the charges in the final analysis. As a last resort, it could be placed unequivocally against all stevedores, including Jones. Any of these measures would remove any taint of discrimination or unreasonableness.

As stated before, respondent is free to employ any stevedore as a subcontractor. But where such arrangement becomes an integral part of an unreasonable practice which operates to the detriment of a class of persons, as revealed here, the niceties of the legal relationship must be ignored, if necessary, to correct the situation.[10] The siutation, to all intents and purposes, is the same as that condemned in Docket 898, *supra*, namely, that Jones has an exclusive contract and complainants are still unable to break the monopoly. Much is said of the efficiency of respondent as the operator of the elevator and as the stevedore. Respondent does the soliciting and the billing, but Jones performs the stevedoring, and there is no evidence that Jones is more proficient than complainants. We assume that respondent, as a matter of self interest, would maintain the same level of efficiency of its elevator operations regardless of whether Jones or complainants or any other qualified stevedore performed the stevedoring.

Thus, we conclude as did the Examiner that respondent's practices (1) of passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum markup which also includes its profit on stevedoring; (2) of failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike; (3) of failing to assess the charge against its subcontractor which performs respondents stevedoring under an exclusive contract; and (4) of assessing such charge exclusively against complainants, who are competing stevedores—are unreasonable in violation of section 17 of the 1916 Act. Respondent may as suggested above by tariff rule assess the charge against the ship, against the cargo, or against all stevedores, including Jones. An appropriate order will be entered.

SEPARATE REPORT OF COMMISSIONER PATTERSON:

The majority report is almost word for word the conclusions and reasoning made in the Examiner's Initial Decision, with which I fully agree. However, the majority adds a reason resulting in a basic departure from the Examiner's Decision with which I disagree.

I do not agree that our responsibilities under the second paragraph of section 17 are "to remove all unlawful discriminations whether there is an intent to so discriminate or not." The second paragraph of section 17 reads as follows:

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

[10] Any restrictions of the 1916 Act are by legal implication imported into the contract. *Compagnie Generale Transatlantique* v. *American Tobacco Co.*, 31 F. 2d 663, 280 U.S. 555; *Contract Rates-Port of Redwood City*, 2 U.S.M.C. 727, 736 (1945).

There is nothing in the above language which relates to discriminations by other persons such as terminals as defined in the first section of the Shipping Act, 1916. Discriminations by other persons are referred to in sections 15 and 16 of the Act.

The terminal practices described herein have been found to be unjust or unreasonable, and this is all that is necessary. There is no need on the facts of this case to decide whether the practices are discriminations, nor whether we have a duty to remove them.

The Examiner's reasoning was quite adequate for the result herein and he was correct in confining himself to a finding and conclusion "that respondent's practices * * * are unreasonable in violation of section 17 of the 1916 Act."

FEDERAL MARITIME COMMISSION

No. 1000

CALIFORNIA STEVEDORE & BALLAST CO. ET AL.

v.

STOCKTON ELEVATORS, INC.

Full investigation of the matters and things involved in this proceeding having been had, and the Commission on April 21, 1964, having made and entered of record a report stating its conclusions and decisions thereon, which report is hereby referred to and made a part hereof, and having found that respondent Stockton Elevators has violated section 17, Shipping Act, 1916 (46 U.S.C. 816, 39 Stat. 734), by engaging in the following unreasonable practices:

1. Passing on to the ship its established rental charge, for the use of loading equipment, in the form of a lump-sum markup which also includes its profit on stevedoring.
2. Failing to publish the charge specifically to apply against the ship, or the cargo, or against all stevedores alike.
3. Failing to assess the charge against its subcontractor which performs respondent's stevedoring under an exclusive contract.
4. Assessing such charge exclusively against complainants who are competing stevedores.

It is ordered, That respondent cease and desist from engaging in the above enumerated unreasonable practices; and

It is further ordered, That within 15 days of the service of this order respondent Stockton Elevators modify its tariff clearly to show the amount of the rental charge and against whom it is to be assessed, and conform its conduct in reference to the collection of the charge to the tariff as so modified.

By the Commission, April 21, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

No. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES D/B/A PATRICK & GRAVES

Decided April 21, 1964

Applicants because of (1) operations in violation of section 44; (2) submission of false financial statements to the Commission; (3) false certifications to carriers in order to collect brokerage unlawfully; (4) lax financial practices found not fit to properly carry on the business of forwarding and their applications for licenses as independent ocean freight forwarders denied.*

Milton Schwartz for respondents.

Robert J. Blackwell, *Wm. Jarrel Smith, Jr.*, and *J. Scot Provan*, Hearing Counsel.

Paul D, Page, Jr., Hearing Examiner.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* Ashton C. Barrett and John S. Patterson, *Commisisoners*):

This proceeding is before us upon the exceptions of Hearing Counsel to the Initial Decision of the Examiner in which he concluded that Patrick & Graves and Dixie Forwarding Co., Inc., should each be granted licenses as independent ocean freight forwarders under section 44 of the Shipping Act, 1916 (46 U.S.C. 841(b)).

*See Report on Reconsideration of June 26, 1964, setting aside this decision and granting the applications.

Under section 44 a person desiring to engage in the carrying on of the business of forwarding must first secure a license from the Commission and the Commission must issue the license if the applicant is "fit, willing, and able to carry on the business of forwarding and to conform to the provisions of [(the Shipping)] Act and the rules and regulations of the Commission issued thereunder." The section also requires that the Commission consider whether "the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936." Operation without a license constitues a violation of section 44.

Section 44 became effective on September 19, 1961, and Congress granted so-called "grandfather rights" to those independent ocean freight forwarders who, on the effective date of the Act were "carrying on the business of forwarding under a registration number issued by the Commission." Such forwarders were allowed to continue in business for a period of one hundred and twenty days after the effective date of section 44 without a license, and if the forwarder applied for a license within the one hundred and twenty days, he could continue to operate until otherwise ordered by the Commission.

While these proceedings are concerned with two applications, for all practical purposes an individual, Mr. L. H. Graves (Graves) is the applicant. Graves wholly owns Patrick & Graves and substantially owns Dixie Forwarding Co., Inc. (Dixie), a corporation of which he is president.

Patrick & Graves and Dixie first applied for licenses by applications dated May 18, 1962. The one hundred and twenty days for the preservation of "grandfather rights" expired January 17, 1962.

On March 22, 1963, the Commission by letters advised applicants of its intent to deny licenses to both Patrick & Graves and Dixie and further advised both that section 44 prohibited them "from engaging in the business unless and until a license is issued." Despite this and a previous warning from an investigator of the Commission, Patrick & Graves and Dixie continued without a license, to carry on the business of forwarding subsequent to the effective date of section 44, and were still doing so as of the close of hearings in July, 1963. Shortly after filing their applications, Dixie and Patrick & Graves each provided bond in the amount of $10,000.

Over a period of not more than 6 months, extending from late 1961 to early 1962, Graves wrote at least 250 "insufficient funds" checks, and as a result Graves was asked by one bank to close out the Patrick & Graves and Dixie accounts. Dixie and Patrick & Graves changed banks in the early fall of 1962. Graves testified that the reason for the "insufficient funds" checks was that they were written on customers' checks that either "bounced" or were slow in being paid. The new bank handles customers' checks deposited by Graves "for collection" rather than as deposits. Neither Patrick & Graves nor Dixie may draw on these checks until they are notified by the bank that they have been paid.

As a result of their consistent failure to pay current accounts on time, most, if not all, steamship lines and the Customs House have placed Patrick & Graves and Dixie on a "cash basis." There is no evidence in the record of what effect, if any, that this will have on their operations.

Section 44 requires that before a freight forwarder may collect brokerage from a carrier he must be licensed by the Commission under that section. Since some time in late 1961 or early 1962, Dixie has been falsely certifying to steamship companies that it was licensed by the Federal Maritime Commission as an independent ocean freight forwarder. This certification was accomplished by rubber-stamping invoices to the carrier and was done for the purpose of collecting brokerage.

Dixie, by exchange of letters and informal understandings for cooperative working arrangements, has entered into agreements with other forwarders and at least some of these letters have not been filed with the Commission.

During the field investigation in October 1962, an investigator of the Commission requested that Graves submit financial statements for Patrick & Graves and Dixie. Graves submitted balance sheets dated October 31, 1961. When asked by the investigator for an up-to-date balance sheet, Graves submitted the same balance sheets, but the date now appeared as March 30, 1962, and the name of a firm of certified public accountants had been placed thereon.

The foregoing constitutes the facts over which there is no genuine dispute and all which were, in substantially the same form, found by the Examiner in his Initial Decision. There have been omitted, however, certain mitigating circumstances found by the Examiner to constitute facts but which to some extent at least constitute conclusions. Hearing Counsel excepted to most if not all of these, and they are dealt with below.

Hearing Counsel excepts to the conclusion of the Examiner that Patrick & Graves and Dixie are qualified for licensing as independent ocean freight forwarders. It is Hearing Counsel's position that the applicants are disqualified because of a series of previous illegal and irresponsible business transactions which render them unfit for licensing within the meaning of section 44. In their replies to the exceptions of Hearing Counsel, applicants appear to take the position that past illegal conduct has no bearing on the issuance of a license to do business in the future. Applicants further appear to urge that the

Commission in reviewing an initial decision of the Examiner is under the same restrictions as a court in its review of a final decision of the Commission. The latter contention misconceives the role of the Commission in this proceeding. While entitled to weight any recommended or initial decision which comes before us on review remains only a recommendation. In reviewing an initial decision the Commission exercises all the powers we would have in making the initial decision itself. *Unapproved Section 15 Agreements—South African Trade*, 7 F.M.C. 159 (1962). We agree with Hearing Counsel, and on the basis of the record before us, we are compelled to overrule the Examiner.

After reviewing certain decisions of the Interstate Commerce Commission, the Examiner concluded (1) that licensing statutes should be liberally construed and (2) that past violations of law do not constitute an absolute bar to approval under a licensing statute. We do not disagree with the conclusions nor with the Examiner's interpretation of the cases relied upon.[1] But it is stated with equal clarity in those cases that violations of law can and should be taken into consideration in determining the fitness of an applicant. The fitness of the applicants is the issue here. The Examiner puts the points to be weighed against licensing applicants as (1) violation of law, (2) lax financial practices, and (3) false representations.

It is beyond dispute that applicants have operated without a license in violation of section 44 since January 17, 1962, the deadline for filing applications to preserve "grandfather rights." The Examiner further concluded that Graves had heard that forwarders required licenses sometime prior to January 17, 1962, but that "the information probably went in one ear and out the other." From this and from the fact that the simple act of filing the application would have rendered the operation lawful, the Examiner concludes "that the failure to file was sheer negligence rather than a calculated act."

The record demonstrates that a then employee of Dixie on at least several occasions, both before and after the critical date, spoke to Graves concerning the requirement of a license, and on one occasion tried to give Graves the necessary application forms but was told by Graves that he (Graves) already had them. The only evidence to the contrary is Graves's self-serving testimony to the effect that he did not recall any such conversations nor did he believe they had taken place. The only conclusion to be drawn is that Graves was told of the licensing requirement. The Examiner also came to this conclusion but apparently excused this violation of law on the ground that the operations were "neither the crafty and 'concealed' operations of a sneak * * * or the planned and deliberate defiance of one who

[1] These cases are: *Lifshultz Fast Freight Extension—Wisconsin*, 285 ICC 659 (1955); *American Red Ball*, etc., 82 MCC 391 (1961); *Chicago Express, Inc.*, 75 MCC 531 (1958).

refuses to comply with licensing requirements." It is difficult to understand just how Graves could have concealed his operations if he had thought this necessary and that his operations were deliberate is beyond doubt. Moreover, it must be kept in mind that Graves was faced with the "dilemma" of operating without a license or closing down his business solely by reason of his own "sheer negligence." The record in this proceeding clearly shows that the attitude of negligent indifference characterized virtually every facet of Graves's forwarding operations.

The Examiner dismisses misrepresentations contained in the so-called "up-dated" balance sheet on the ground that it harmed nobody and that there was no evidence "that Graves intended anything more than to get through with what he probably considered an unreasonable interruption of his business, as promptly and inexpensively as possible." We disagree, and this supposition does not seem to comport with the conclusion of the Examiner that "Graves promptly undertook to comply with the law when he really appreciated what the law said and that it meant what it said." It cannot be denied that Graves knew he needed a license or that he was at the time undergoing an investigation to determine his qualifications for that license. Yet when asked to submit a current balance sheet by the very agency charged with licensing him, he simply directs a secretary to change the date on one previously submitted and further he caused to be placed thereon the name of a firm of certified public accountants. He then personally signed and submitted the balance sheets. Such conduct is inexcusable on any grounds let alone those of time and expense. The record clearly establishes that the false balance sheets were submitted in a deliberate attempt to mislead the Commission and must be considered as another indication of the contempt, or at the very least, the complete indifference of Graves to the duties and responsibilities of a member of a regulated industry.[2]

The Examiner found and concluded that Dixie misrepresented that it was a licensed forwarder in order to collect brokerage from carriers. But again the Examiner dismisses this representation on the ground "that it is unlikely that it deceived anybody: it injured nobody: and making it was the only practical way in which Dixie could collect money it fairly earned." If we understand the reasoning correctly we cannot agree with it.

If the record demonstrates anything it shows that the misrepresentation was meant to deceive and did so. It certainly injured those carriers which paid brokerage when not required to do so. But more importantly, practicability affords no excuse for violation of the law.

[2] Additionally Graves did not comply with a further request made after submission of the false balance sheet for a correct and current one for the fiscal year ending Oct. 31, 1962.

The Examiner refers to testimony of Graves that when he began to use the stamp he thought that "Commission" meant "Board." The Examiner points out that when Graves was apprised of the difference by an investigator of the Commission "he (Graves) had the certificate form amended to include Dixie's Board registration number as 'FMB-1424' and felt that by doing so he had corrected anything wrong." This is not precisely correct. The certification itself was not amended. Rather, separate and apart from the certification an additional stamp was placed in the lower left hand corner of the invoice. This stamp included "FMB-1424" and a statement that brokerage was paid on the strict understanding that no part of the brokerage would revert to the shipper or consignee in compliance with section 16 of the Shipping Act, 1916. The certification remained precisely the same and represented Dixie as licensed by the Commission. This action hardly comports with a desire to obey the law. The only reasonable action to correct the misrepresentation was the removal of the certification and this Graves did not do. This failure represents at best a shocking indifference to the requirements of the law and a total lack of any desire on the part of Graves to expend any effort in informing himself of his duties and responsibilities under the law.

After a careful analysis of the Initial Decision it would appear that the Examiner concluded that Graves's misrepresentations and operations in violation of the law did not render him unfit because they were not "fraudulent" or "crafty and concealed" or "sinister" or that there was little likelihood that they deceived or actually caused harm to anyone. We disagree with this conclusion and to the extent that we have already commented on it nothing more need be said. It is important, however, to keep in mind that there exists between the shipper and forwarder a *fiduciary relationship* which will be discussed in some detail after a consideration of the applicant's financial responsibility.

We cannot agree with the Examiner that Graves's assurances of future financial responsibility on the witness stand warrant belief. The Examiner gives them credence because of Graves's demeanor, the sale of some stock for approximately $57,000 and an estimate by Graves that Dixie's net balance would be $150,000 made again on the stand at the hearing. One difficulty with these assurances is the failure to submit the last requested balance sheet. The Examiner points to the fact that no additional request was made subsequent to October 1962. This of course has no bearing on the fact that the best possible way to establish the financial worth of the applicants is the submission of a current balance sheet. To accept Graves's assurances is to continue the clear pattern that characterized all his activities, that of failing to meet even the minimum requirements of sound operational integrity.

One client of Graves, whom the Examiner characterized as vague and elderly, though the testimony itself is not at all vague, testified that he had suffered harm and had transferred his account because of the failure of Graves to pay the carrier on time.

After careful consideration of all the testimony and exhibits in this proceeding, we find that the record clearly establishes (1) that the applicants knew sometime before January 17, 1962, that a license was required, but in spite of that knowledge failed to file a timely application and operated in violation of section 44; (2) that Graves knowingly filed a falsely dated balance sheet with the name of a firm of certified public accountants improperly placed thereon in an effort to mislead the Commission; (3) that Dixie falsely certified with intent to deceive that it was licensed by the Commission as an independent ocean freight forwarder in order to collect brokerage from carriers in violation of section 44 and when specifically apprised of the falseness of the certification failed to cause its removal from the invoices; and (4) has demonstrated a lack of that kind of financial responsibility compatible with the duties and responsibilities of an independent ocean freight forwarder. The fact that Graves always ultimately made his bad checks good in our view again demonstrates that Graves does that which his very presence in business requires only when he is placed under pressure to do so.

The record in this proceeding reveals that forwarders frequently have in their possession large amounts of their clients' funds. They also frequently hold negotiable documents for others. Moreover, forwarders have access to confidential business secrets. Anyone acting in such a fiduciary capacity should of his own initiative, seek to attain the highest degree of business responsibility and integrity. This initiative is totally lacking in Graves, and his actions as spread across this record establish an attitude of at best complete indifference and at worst willful negligence regarding the duties and responsibilities imposed upon him by the law. His protestations of past ignorance of these duties and responsibilities and his assurance of future good behavior have a decidedly hollow ring when tested against the other evidence of record and his own past conduct. The Examiner places great stress upon the demeanor of Graves on the witness stand and upon the "unconscious fervor" with which Graves gave the Examiner himself the assurance of future behavior in full compliance with the law.

Demeanor is, of course, a valid consideration in weighing testimony, but where as here, belief based on demeanor contradicts the substantial evidence of record, the demeanor may characterize nothing more than a consummate poise on the part of the witness. Regarding the "unconscious fervor" with which Graves assured the Examiner that his future operations would be in complete conformity with the law, it is difficult to conceive a different answer to the Examiner's question.[3] Secondly, even if it may be assumed that Graves meant what he said, the record of Graves's operations demonstrates above all else, that Graves's assurance regarding even the most serious of matters were of little weight and any "unconscious fervor" would in all probability prove a fleeting thing when confronted with the practical necessities of operating a profitable forwarding business. Such fervor would undoubtedly vanish along with the assurance if in Graves's opinion some deviation from the law as dictated by practical necessity.

The freight forwarder occupies a position of enormous competitive and economic power as to carriers and enjoys a fiduciary relationship with shippers. He is in a position to do grave economic harm to both. A good example of this appears in *Compania Anonima Venezolana De Navegacion* v. *A. J. Perez Export Company*, 303 F. 2d 692 (CA 5, 1962), *cert. den.*, 371 U.S. 942 (1962), where a carrier's agent brought suit for unpaid freight monies which the shipper had paid to the forwarder but which the forwarder had not paid to the carrier. The Court had the following to say at p. 698:

> Under the due bills the Freight Forwarder promised to pay the freight or return the bills of lading within three days. Thus, within four days of the release of the bills of lading, the Agent knew that the Freight Forwarder was not honoring its promise to pay or return. Nothing, absolutely nothing, was done by the Agent except some unidentifiable weak-kneed requests made of the Freight Forwarder to do as it had promised. Not a word was breathed to the Shipper until May 9, 1955—more than five months after the one recent shipment in November 1954 and practically ten months as to all other. * * * The explanation for this action—which the trial Judge characterized as incredible—was not hard to find. The Agent did not really try very hard, nor, by the nature of things, could he either press too strongly for payment by the Freight Forwarder, or take the extraordinary step for notifying the Shipper that the Freight Forwarder had defaulted on his trust. This was because competitive forces in the shipping business are so severe in the solicitation and booking of outbound export traffic, that the Agent, dependent upon its generated traffic for its compensation * * * did not wish to incur the ill will of the Freight Forwarder as a source of added business from other shippers in the future. And where excessive pressure on the Freight Forwarder to pay its obligations might be thought untactful, it was completely out of the question, so the Agent made clear, for it to embarrass this potential source of future business by exposing his infidelity, incompetence, or down-right dishonesty to the principal (the Shipper). To collect the freight from the Freight Forwarder was important. But one

[3] This assurance was given in the following colloquy between the Examiner and Graves.:

EXAMINER. "If Dixie and Patrick & Graves should be licensed by the Commission, will you and these companies conform to this Act, and to the requirements, rules and regulations of the Commission issued thereunder?"

GRAVES. "You can bet that I will."

cannot read this record without the uncomfortable conviction that what was more important was preserving the good will of the Freight Forwarder lest traffic suffer tomorrow.

In a footnote, which we have omitted from the above quotation, the Court cites the decision in Docket Nos. 765 and 831, *Investigation of Practices, Operations, Actions and Agreements of Ocean Freight Forwarders*, 6 FMB 327 (1961).[4]

In that decision the Federal Maritime Board, the Commission's predecessor, found that "brokerage" payments to freight forwarders by ocean common carriers had resulted in widespread malpractices including illegal rebates to shippers, resulting in discriminations as between shippers, and that such payments should be prohibited, and that various other practices in the forwarding industry were violative of the Shipping Act, 1916. These findings were the products of an extensive investigation by the Board. The Board issued proposed regulations prohibiting brokerage and otherwise regulating the industry. For several years, also, Congressional Committees had been probing into freight forwarding practices in the ocean foreign commerce, and there had been numerous prior agency and court cases involving forwarder practices and compensation.[5]

Faced with what they described as a substantial loss of revenue because of the Board's proposed ban on brokerage payments by common carriers, the forwarders appealed to Congress for the enactment of legislation which would permit such payments under appropriate safeguards. In response to this appeal, P.L. 87–254, *supra*, was enacted authorizing carriers to compensate forwarders if duly licensed by the Commission and if certain other prescribed conditions were met. These provisions were incorporated into a new section 44 of the Shipping Act, 1916. In passing this legislation Congress took cognizance of the malpractices which had led to the Board's action and explicitly authorized and directed the Commission to administer the program for licensing enacted therein to prescribe rules and regula-

---

[4] In this footnote 14 at page 699, the Court noted that the decision set forth in detail "the abuses thought to result from freight brokers having such a competitive death grip on generated traffic with a resulting practical inability to ocean carriers to do anything which might incur the ill will of freight forwarders."

[5] See for example *House and Senate Reports:* 84th Cong., H. Rept No. 2939, 7/26/56; 85th Cong., H. Rept. No. 2333, 7/31/58; 86th Cong., H. Rept. No. 798, 8/6/59; 87th Cong., H. Rept. No. 1096, H.R. 2488, 8/31/61; 87th Cong., S. Rept. No. 691, S. 1368, 8/9/61.

United States v. *American Union Transport*, 327 U.S. 437 (1946); Docket No. 657, *Agreements and Practices Pertaining to Brokerage, and Related Matters*, 3 U.S.M.C. 170, aff'd; *Atlantic & Gulf/West Coast Conference* v. *United States*, 90 F. Supp. 554, 94 F. Supp. 138 (SD NY, 1950); *Joint Committee* v. *Pacific Westbound Conference*, 4 F.M.B. 166, 172 (1953); *Agreements and Practices re Brokerage*, 3 U.S.M.C. 170, 177 (1949); Dockets 765/831, *Investigation of Practices and Agreements of Common Carriers by Water in Connection with Payment of Brokerage or other Fees to Ocean Freight Forwarders and Freight Brokers*, which was consolidated with Docket No. 765, *supra*.

tions governing the industry's conduct. As we said in Senate Report 691, 87th Congress, accompanying the bill that became P.L. 87–254:

> We recognize that malpractices have been widespread in the past, but we are confident that the regulatory authority given the Board in this bill will prevent such practices in the future, and we therefore have no hesitancy in recommending that the bill as amended be approved.

The business integrity of one who occupies the position of freight forwarder should be above reproach, and he should clearly demonstrate a complete awareness of and a willingness to accept the responsibilities that the preferred position imposes. Graves has shown an almost total lack of both. As the House Committee on Merchant Marine and Fisheries pointed out: "The intention of the * * * licensing provision [section 44] is to have every person, firm or corporation who holds himself out as a forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates." Thus the philosophy of section 44 is such that the shipping public should be entitled to rely upon the responsibility and integrity as well as the technical ability of a freight forwarder. The record here, however, demonstrates that members of the shipping public who do busines with Graves do so at their own risk. We cannot conscientiously license such an applicant and thereby suggest to the shipping community that we have probed his conduct and found him "fully competent and qualified" to act in a fiduciary capacity.

On the record before us we find and conclude that applicants, Patrick & Graves and Dixie Forwarding Co., Inc., are not fit properly to carry on the business of forwarding within the meaning of section 44 of the Shipping Act, 1916, and their applications for licenses as independent ocean freight forwarders under that section are hereby denied.

Vice Chairman THOS. E. STAKEM dissenting.

What the majority decision does is to put out of business freight forwarders who, as Hearing Counsel stated on the record that the Examiner found, are sufficiently experienced and efficient in the mechanics of forwarding to enable them to properly carry on the business of ocean freight forwarding. The opinion calls certain conduct of the applicants "shocking." The majority opinion shocks me.

Reviewing the whole record leads to the inescapable conclusion that it contains no substantial evidentiary basis for the majority decision of the Commission that, contrary to the examiner's findings, applicants "are not fit properly to carry on the business of forwarding." It is upon this very narrow ground that the majority elects to sweep away applicants' livelihood, earned for many years in a business which, as the record establishes, the examiner finds, and the majority does not deny, applicants are *willing* and *able* properly to carry on.

Notwithstanding the lip service of the majority to the liberal construction of the statutory language which has been given over a period of years by the Interstate Commerce Commission, the majority converts the statute into an economic death sentence to be imposed without giving the victim a chance to save his livelihood. The majority says that it does not disagree with the examiner's conclusions that licensing statutes should be liberally construed, and that past violations of law do not constitute an absolute bar to approval under a licensing statute. Thereafter it construes the licensing statute here involved as requiring an applicant to be one whose business integrity is "above reproach" and that he "clearly demonstrates a complete awareness of and a willingness to accept the responsibilities" of the freight forwarding business. This is not a liberal but an extraordinarily strict construction of the statute, and it constitutes the unsound basis upon which the majority opinion rests. It is fortunate for many wholly competent freight forwarders we have licensed that they were called upon to meet no such stern test. The majority decision turns primarily therefore upon a point of statutory construction rather than administrative expertise.

The majority theory is that we shall license only those sterling characters we know to be trustworthy and know this so well that we are willing to give the public our assurance of it. Frankly, I see no evidence to indicate that this would be practical and much common sense as well as sound statutory guides point to another and well charted course. When Congress selected the language "fit, willing and able," it did not do so in the dark. It knew how the Interstate Commerce Commission had administered licensing under substantially the same formula. Had Congress intended the Commission to take the diametrically opposite course taken here, Congress surely would have said so.

There is if course, a basic and important reason why Congress would not wish to set up as a requisite for an initial license the super-standard of requiring that an applicant demonstrate that its business integrity is "above reproach" and requiring that the applicant demonstrate that it is "seeking to obtain *the highest degree* of business responsibility." So to do comes perilously close to *ex post facto* criminal legislation.

The Commission would do well to recognize and apply as sound what the Interstate Commerce Commission said in *Carloader Corp. Freight Forwarder Application*, 260, I.C.C. 123, 127 (1944):

> The statute prescribes specific penalties for violations thereof and we deem it unnecessary to deny this application because of the unauthorized operation in the past.

What the majority opinion sets up as a test is something which might well be imposed as a guide to future conduct. All licensed forwarders would then be on notice that only by living up to that standard can they retain their licenses. It is plainly otherwise, however, with respect to securing an initial license by an established operator. Where a man has put years of effort and many dollars into building up a business which did not have to be licensed, only to see it swept away by the decision of the Commission based on applicants' blameworthy conduct while not licensed, amounts to a penalty which Congress with informed judgment, obviously considered too cruel to impose.

The majority, of course, believes that Graves is a very bad man, and is not backward about saying so. In my opinion this is inconsistent with the fact that his businesses are going concerns and that only *one* dissatisfied customer turns up in the record of the public hearing and he under subpoena.

The majority makes much of the "fiduciary relationship" of forwarders with shippers, and says in effect that Graves cannot meet the requirements for such a relationship. How in the world then, has he succeeded in occupying it so long?

The heart of the majority decision is in the express over-ruling of the examiner's conclusion that Graves was sincere in his testimony that if licensed by the Commission he "will conform to the Act, and to the requirements, rules and regulations of the Commission issued thereunder," and the majority's feeling that Graves will not live up to that assurance. Conceding that the examiner's conclusion was based upon the demeanor of the witness, the majority takes the position that this is a case wherein the "belief based on demeanor contradicts the substantial evidence of record." It is not such a case. The fact that Graves's conduct in the past, when he had no license to lose was not good, is certainly not substantial evidence that if Graves gets a license he will throw it away by the same sort of conduct, which the examiner's decision, the majority opinion, and this dissenting decision unanimously condemn. I respectfully say to my colleagues, that their reasoning upon this point is logically unsound, and their rejection of the examiner's conclusion on the crediblity of the witness is contrary to applicable law. It must be conceded that if Graves will do what he says he will do, by complying with the law and our regulations, he will be a good forwarder, and should be licensed.

I do not consider applicable here the sound rule in *Alcoa Steamship Company, Inc.* v. *Commission*, 321 F 2d. 756, 758 (D.C. Cir., 1963), that although an examiner's decision is entitled to great weight, the Commission's view of the evidence is what counts. Neither does it appear the court would consider the rule applicable, for the court was careful to point out that "the credibility of witnesses was not involved." Here it is directly and importantly involved, as *the witness is testifying about his own intentions*, and if he intends to protect himself in the future he is telling the truth. I consider it legally arbitrary and capricious action to decide a case by the finding of three men that a witness they didn't hear testify wasn't telling the truth. Mr. Justice Frankfurter's quotation in the well known *Universal Camera* case seems in point. It reads:

> In general, the relationship upon appeal between the hearing commissioner and the agency to a considerable extent ought to be that of trial court to appellate court. Conclusions, interpretations, law, and policy should, of course, be open to full review. On the other hand, on matters which the hearing commissioner, having heard the evidence and seen the witnesses, is best qualified to decide, the agency should be reluctant to disturb his findings unless error is clearly shown.

No really serious consideration appears to have been given by the majority to either the examiner's suggestion that the business of these applicants be closely supervised by our staff (by doing which we would follow sound I.C.C. precedent) or applicants' petition for reopening, in which they tender complete cooperation in procedures the Commission may prescribe to protect the public interest. It is questionable if applicants have not been here denied due process of law without such consideration, and a showing (to my mind impossible on this record) that the only way to protect the public is to put applicants out of business.

Finally, I believe that the examiner's initial opinion was and this dissenting opinion is a dispassionate consideration of the facts, and weighing of the public and the private interest. Both conclude that it is possible to protect the public without sacrificing the private interest. My fellow Commissioners who take the contrary view, are unquestionably sincere in castigating Graves. The examiner did not, and I do not point to Graves as a paragon of virtue. I simply do not consider him so bad and dangerous that he cannot be given even the chance to reform, and must be summarily denied a license.

The matter of past violations of law by the applicants can be handled in this case like all other similar violations that come to the Commissioner's attention.

Commissioner JAMES V. DAY dissenting:

The majority has gone contrary to established precedent in so restrictively defining what constitutes a "fit" applicant for a forwarder license. By such action, the majority has destroyed two enterprises which possess an expertise in forwarding acquired over a number of years prior to when the industry was under regulatory requirements and has thus removed a source of valuable service to the public of years' standing, not to mention the resultant losses to applicants' employees and ownership.

220-178 O - 66 - 10

In defining a "fit" forwarder, the majority maintains that "the business integrity of one who occupies the position of freight forwarder should be *above reproach*" and that "anyone acting in such a fiduciary capacity should of his own initiative seek to attain the *highest degree* of business responsibility and integrity." [Italics added.]

Our licensing statute simply states, *inter alia*, that applicants qualify for licenses if the Commission finds that they are "fit, willing and able properly to carry on the business of forwarding." This language is indeed similar to the licensing statute administered by the ICC and Congress was well aware in adopting such language for our statute of the interpretation given to the ICC law. As the Examiner says, from the beginning it has been held that such licensing statutes should be liberally construed, particularly in the early stages of regulation—as here. (Citing *Lifschultz Fast Freight Extension—Wisconsin*, 285 I.C.C. 659, 665 (1955)). He further states that neither unauthorized operations, nor violation of Commission regulations, nor lax financial practices will necessarily constitute a bar to licensing (Citing *American Red Ball*, etc., 82 M.C.C. 391, 398 (1961) wherein application approved). He also refers to another ICC case holding that "* * * there is no inflexible formula which must be followed in making the determination, and each case must be decided on the facts presented, consideration being given to such factors as the nature and extent of past violations, the effect thereof upon regulation, mitigating circumstances, and whether the carriers' past conduct represents a flagrant and persistent disregard of the provisions of the act." (*Chicago Express, Inc.*, 75 M.C.C. 531 (1958)—license granted under circumstances similar to the case here). Yet the majority, while stating that it does not disagree with the Examiner's conclusions (that licensing statutes should be liberally construed and that past violations of law do not constitute an absolute bar) nor with the Examiner's interpretations of the above cases, nevertheless defines "fitness" as "above reproach" and does indeed absolutely bar applicants from being licensed.

The majority and the Examiner agree that the decisive facts to be here weighed are of three types—(1) violation of law, (2) lax financial practices, and (3) false representations.

As to (1) violation of law—in that applicants have operated without a license—the Examiner held that Graves's action in *applying for a license*, admittedly late but immediately upon recognizing the serious import of the law, and *continuing to operate* after applying, at the risk of a fine and opposition to his license so as to save his business, did not constitute "the planned and deliberate *defiance* of one who refuses to comply with licensing requirements." [Italics added.]

Nor does the majority, in noting the operations were deliberate, characterize them as a defiant refusal to comply. The majority merely would define them as resulting from negligent indifference.

As to (2) lax financial practices—as evidenced by issuance of bad checks—the Examiner noted that there is no proof that any check was known to be worthless when it was drawn, that applicants' accounts were weakened by worthless checks deposited, and that applicants made good all their checks immediately and that corrective action has been taken. The majority's position is obviously strained when it says the fact that Graves "ultimately" made his bad checks good only demonstrates that Graves does that which he must only when placed under pressure.

The majority refers to one client of Graves as testifying he had suffered harm and had transferred his account because of a failure of Graves to pay the carrier on time. The Examiner notes that this witness also testified that none of his shipments had been delayed and that the record does not support any inference that Dixie's customers are handicapped in any way by anything for which Dixie is responsible.

As to (3) misrepresentation—in that Graves supplied an updated balance sheet to the Commission investigator and used an invoice stamp indicating Dixie was a licensed forwarder. The Examiner held that these misrepresentations were not fatal to the license application because of certain mitigating circumstances.

The Examiner found that Graves updated the balance sheet without any appreciation of the gravity of his action and there was "no evidence that Graves intended anything more than to get through with what he probably considered an unreasonable interruption of his business as promptly and inexpensively as possible." The majority recognize that Graves's action may be considered as in indication of "complete indifference * * * to the duties and responsibilities of a member of a regulated industry." (Applicants have since filed per their petition quite current balance sheets-for Dixie as of 2/28/64 and for Patrick & Graves as of 12/31/63—with the Commission).

The Examiner found with respect to the invoice stamp that "Graves' testimony indicates that at least at first, he confused a Maritime Board registration number with a Commission license. Further, that when the point came up, he had the certificate form amended—and felt that by so doing he had corrected anything wrong." [1] Further, the Examiner noted that the use of the certificate did not frustrate the intention of Congress which was to prevent the payment of brokerage to "dummy forwarders" and safeguard payment only to forwarders per-

[1] More precisely, Graves began using an additional stamp.

forming services which Dixie actually performed. Further, Graves indicated on the witness stand that he would discontinue use of the false certificate. The majority, without referring to this indication and dismissing Graves's prior effort to correct the situtation, describes Graves's failure to remove the certification as representing a shocking indifference to the requirements of law and a total lack of any desire to expend any effort in informing himself of his duties and responsibilities under the law.

The record in this proceeding shows that forwarders frequently hold large amounts of their clients' funds, negotiable documents belonging to others, and have access to confidential business secrets. Any person exhibiting a proclivity to dispense such funds, documents and secrets improperly would not appear to be a fit applicant for licensing. The applicants here, however, are not accused essentially of such fault. Applicant's unlicensed operations, and misrepresentations may be said to indicate an attitude of indifference and reluctance to comply with a new statutory requirement.[2] But indifference and reluctance is not quite flagrant disregard or calculated defiance of a new regulatory authority. The Examiner attaches considerable weight to Graves's chastened attitude. The Examiner observed his demeanor. Graves's past actions following upon the enactment of new licensing legislation are not of such a nature as to bar our recognition of a sincere and firm intent to conduct operations in the future conforming to new statutory and Commission requirements.

Both the Examiner and even Graves in his petition would contemplate a periodic Commission review or audit of his future actions to see that he conforms to the law. This is worthy of consideration. Past actions noted, of course, are not to be condoned and any violation of law should be referred to the proper authorities for appropriate action. (See *Carloader Corp. Freight Forwarder Application*, 260 ICC 123, 127 (1944)).

On balance, the applicants' past actions do not make them unfit nor have they been found unwilling or unable to continue in business and serve the public. It would not be a departure from past precedent to award them a license and such action would be in keeping with our past actions in licensing forwarders who, upon our weighing their applications both pro and con, have been found to have met the test of the statute.

An appropriate order will be entered.

---

[2] With respect to Graves's issuing checks which initially were not supported by funds, his immediate correction of the situation and his assurances and demeanor on the witness stand can support a finding that such practices should not bar him from a license. (See Examiner's decision at page 12 and Appendix thereto at page IV.)

FEDERAL MARITIME COMMISSION

No. 1115

APPLICATION FOR FREIGHT FORWARDING LICENSE
DIXIE FORWARDING CO., INC.

No. 1116

APPLICATION FOR FREIGHT FORWARDING LICENSE
MR. L. H. GRAVES, D/B/A PATRICK & GRAVES

The Commission having fully considered the above matters and having this date 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 the applications for licenses of Dixie Forwarding Co., Inc. and L. H. Graves, d/b/a Patrick & Graves, are hereby denied pursuant to section 44(b), Shipping Act, 1916, and Rule 510.8 of General Order 4.

By order of the Commission, April 21, 1964.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 732

H. KEMPNER

v.

LYKES BROS. STEAMSHIP CO., INC., ET AL.

Decided April 30, 1964

Complaint against certain respondents dismissed with prejudice as result of settlement between complainant and said respondents of claim for reparation on shipments of cotton from U.S. Gulf ports to ports in the Mediterranean.

Delmar W. Holloman for complainant.

Edward S. Bagley for respondents except States Marine Corporation of Delaware (which is not a party to settlement).

THIRD DECISION ON REMAND OF GUS O. BASHAM, CHIEF EXAMINER,[1]

DETERMINING REPARATION DUE COMPLAINANT

The decision of the Federal Maritime Board in *Isbrandtsen Co., Inc., et al.* v. *States Marine et al.* 6 F.M.B. 422 (1961) dismissing the complaint herein was reversed by the United States Court of Appeals (D.C.) on January 10, 1963. The Court remanded the proceeding to the Commission (successor to the Board) for the assessment of reparation, if any, due to complainant.[2] In turn, the Commission by order of November 21, 1963, remanded the proceeding to the Examiner for that purpose.

Complainant, on March 16, 1964, submitted the following Stipulation and Agreement between it and respondents [3] executed on March

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

[2] The Court said: "The discriminatory (dual) rates here involved were not approved by the regulatory agency merely because it was silent concerning them, and the rates were therefore illegal."

[3] Respondents herein are all of the lines named in the original complaint except States Marine Corporation of Delaware, and Lykes Bros. Steamship Co., Inc., the latter having previously settled with complainant. (See First Report on Remand in Docket 732 etc.)

16, 1964, and requested the dismissal with prejudice of the complaint against them:

This Stipulation and Agreement is entered into between H. Kempner, a Massachusetts trust, on the one hand, and Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritime del Nervion, Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line), and the Gulf/Mediterranean Ports Conference, and Waterman Steamship Corporation, Alexandria Navigation Company, S.A.E., Bloomfield Steamship Company, Blue Funnel Line-Java New York Line, Compagnie de Navigation Cyprien Fabre (Fabre Line), Compagnie Generale Transatlantique (French Line), Concordia Line, Ellerman & Bucknall Associated Lines, Fern-Ville Mediterranean Lines-Fearnley & Eger and A. F. Klaveness & Company A/S, Hellenic Lines, Ltd., Leif Hoegh & Company A/S (Hoegh Lines), Isthmian Steamship Company, Prudential Steamship Corporation, Larrinaga Steamship Company, Ltd. (Larrinaga Line), Richard Meyer Company of Texas, Strachan Shipping Company (Strachan Line), Thos. & Jas. Harrison (Harrison Line), and Israeli Judges Line Shipping & Navigation Co., Ltd., all of which are more fully described in the complaint and answer in Docket No. 732 before the Federal Maritime Commission, on the other.

Whereas, the aforesaid H. Kempner is the complainant in the proceeding in Docket No. 732 before the Federal Maritime Commission (which term, where appropriate, shall include the Federal Maritime Board), seeking to recover reparations against Kerr Steamship Company [Kerr], Societa Italiana di Armamento "SIDARMA" [Sidarma], Compania Maritima de Nervion [Nervion], and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) [Creole], among others, and which proceeding further names the other parties hereinabove set forth as respondents, all as will more fully appear from the complaint and answer in the said proceeding; and

Whereas, in addition to the reparations claimed against Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritima del Nervion, and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) for the period through December 31, 1952, by the aforesaid H. Kempner as set forth in the complaint in the said proceeding, and said H. Kempner shipped at non-contract rates consignments of cotton via the vessels of Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritima del Nervion, and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) and/or the other respondents named herein from January 1, 1953, to the date of the interim legislation enacted by Congress which made lawful the dual-rate contract systems of the aforesaid Conference insofar as it might be applied subsequent to the date of the enactment of that legislation, August 12, 1958; and

Whereas, the United States Court of Appeals for the District of Columbia Circuit by decision dated January 10, 1963, reversed the decision of the Federal Maritime Commission in the aforesaid proceedings and ordered the proceedings remanded to the Commission for the assessment of reparations due to the complainants thereunder; and

Whereas, the Conference and its members, including the parties named hereinabove, deny that they are liable to the aforesaid H. Kempner for any alleged reparations and/or damages; and

Whereas, the parties are desirous of settling, satisfying and compromising their differences to avoid the necessity for further proceedings and the expense, inconvenience, and delays which would be occasioned thereby;

Now, therefore, for and in consideration of the mutual undertakings of the parties hereto, it is hereby stipulated and agreed by and between the said parties that:

1. H. Kempner hereby releases any and all claims which it may have had against Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compagnia Maritima del Nervion, Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line), and the Gulf/Mediterranean Ports Conference, and Waterman Steamship Corporation, Alexandria Navigation Company, S.A.E., Bloomfield Steamship Company, Blue Funnel Line-Java New York Line, Compagnie de Navigation Cyprien Fabre (Fabre Line), Compagnie Generale Transatlantique (French Line), Concordia Line, Ellerman & Bucknall Associated Lines, Fern-Ville Mediterranean Lines-Fearnley & Eger and A. F. Klaveness & Company A/S, Hellenic Lines, Ltd., Leif Hoegh & Company A/S (Hoegh Lines), Isthmian Steamship Company, Prudential Steamship Corporation, Larrinaga Steamship Company, Ltd. (Larrinaga Line), Richard Meyer Company of Texas, Strachan Shipping Company (Strachan Line), Thos. & Jas. Harrison (Harrison Line), and Israeli Judges Line Shipping & Navigation Co., Ltd. in connection with the matters alleged in the complaint in Docket No. 732 before the Federal Maritime Commission, including all claims for damages and/or reparations arising out of the payment by H. Kempner of non-contract rates under the dual-rate system involved, including those covering shipments which were effected during the period subsequent to December 31, 1952.

2. Upon the execution of this Agreement the parties hereto shall advise the Federal Maritime Commission that the controversy which is the subject of the complaint in Docket No. 732 before the Federal Maritime Commission has been settled insofar as it applies to the respondents named in Paragraph No. 1 hereinabove and that H. Kempner has withdrawn its complaint, as amended, insofar as it pertains to the said respondents, and request an order by the Commission dismissing the said complaint, with prejudice, insofar as it pertains to the said respondents.

3. Upon the dismissal of the complaint, as hereinabove set forth, the Kerr Steamship Company, Societa Italiana di Armamento "SIDARMA", Compania Maritima del Nervion, and Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line) shall pay to H. Kempner, including principal, interest thereon, costs, and any other amounts which may be due, the following sums:

Compania Maritima del Nervion and Kerr Steamship Company, agents	\$5, 000. 00
Societa Italiana di Armamento "SIDARMA"	\$2, 713. 06
Societa Anonima Navigazione Alta Italia, Ltd., Genoa (Creole Line)	\$3, 000. 00

4. This Agreement is entered into by and between the parties for the purpose of settling, satisfying, and compromising the differences set forth hereinabove and for the avoidance of the expense, inconvenience, and delays which would be involved in any further litigation between them. Neither this Agreement nor any payment hereunder shall be construed as an admission that H. Kempner is entitled to recover damages and/or reparations against the respondents named hereinabove in any amount whatsoever.

This document was served upon the attorneys for all other respondents herein, who have filed no objection to the proposed settlement.

The complaint herein was filed timely, therefore none of the shipments are time barred. The amount of reparation claimed therein

($3,339.54 from Kerr/Nervion, $1,779.06 from Sidarma and $2,436.78 from Creole, all with interest), was calculated on basis of the difference between the noncontract rate paid and the contract rate sought, applied to the weight of the shipments involved.

The amounts agreed upon in settlement of the claims ($5,000 from Kerr/Nervion, $2,713.06 from Sidarma and $3,000 from Cerole) is equivalent to the reparation originally sought plus a nominal amount of interest.

Premises considered, an order will be entered dismissing the complaint, with prejudice, as to respondents named in the Stipulation and Agreement only. This action should not be construed as an approval of any particular amount of interest on the claims involved; and is without prejudice to any findings which may be made with reference to the remaining claim for reparation against the remaining respondent.

(Signed) GUS O. BASHAM,
Presiding Examiner.

APRIL 15, 1964.

FEDERAL MARITIME COMMISSION

No. 1165

APPLICATION FOR FREIGHT FORWARDING LICENSE

CARLOS H. CABEZAS, 97 73D STREET, BROOKLYN, NEW YORK

Decided June 2, 1964

Application of Carlos H. Cabezas for freight forwarding license denied because of lack of financial capability compatible with the duties and responsibilities of a freight forwarder, and unwillingness to conform to the requirements, rules and regulations of the Commission.

Michael Patestides for Applicant.
J. Scot Provan, Hearing Counsel.

INITIAL DECISION OF HERBERT K. GREER, EXAMINER [1]

Carlos H. Cabezas of Brooklyn, New York (applicant) filed his application for a license to operate as an independent ocean freight forwarder with the Federal Maritime Commission (Commission). The Commission, after considering the application, notified the applicant of its intent to deny his application because he was not financially qualified and further, because he had failed to respond properly to lawful inquiries of the Commission. The applicant requested the opportunity to show at a hearing that denial of his application was unwarranted and this proceeding was instituted to afford him that opportunity.

THE FACTS

The record discloses the following facts:

1. Applicant resides at 97 73d Street, Brooklyn, N.Y., and presently conducts his business at that address.

2. He has been engaged in the business of forwarding for about 12 years, except for a period when the volume of business did not warrant continuing the occupation.

3. Freight forwarding is an integral part of applicant's livelihood.

4. His business involves the forwarding of general merchandise, machinery, luggage and "any sort of shipments" primarily to South American ports.

[1] This decision became the decision of the Commission on June 2, 1964 and an order was issued denying the application. See Rules 13(d) and 13(h), Rules of Practice and Procedure (46 CFR 502.224, 502.228).

5. Applicant holds Captain's papers issued by the Chilean Government and has had extensive experience at sea.

6. Applicant was charged with aiding and abetting one Amiano in operating as a freight forwarder in violation of the Shipping Act and appeared before a Federal Court on January 9, 1964, without counsel; at the direction of the Judge of the Federal Court, applicant tendered a certified copy of his 1962 individual income tax return and after examining the return, the Court found that applicant had a marginal income and appointed a lawyer to defend him.

7. An investigator for the Commission was charged with the responsibility of investigating applicant's qualification for a forwarding license; the investigation was not completed due to failure of applicant to keep appointments made with the investigator.

8. Applicant did not comply with the request of the investigator to produce books and records for the reason that such documents were in storage in a warehouse and applicant considered them unavailable.

Discussion

Public Law 87–254, amended the Shipping Act, 1916 (the Act) by providing in the first section thereof a definition of "carrying on the business of forwarding" and by adding section 44 which requires the licensing of forwarders. In pertinent part, the statute provides:

> Section 44. (a) No person shall engage in carrying on the business of forwarding as defined in this Act unless such person holds a license issued by the Federal Maritime Commission to engage in such business: * * *
>
> (b) A forwarder's license shall be issued to any qualified applicant therefor if it is found by the Commission that the applicant is, or will be, an independent ocean freight forwarder as defined in this Act and is fit, willing, and able properly to carry on the business of forwarding and to conform to the provisions of this Act and the requirements, rules, and regulations of the Commission issued thereunder, and that the proposed forwarding business is, or will be, consistent with the national maritime policies declared in the Merchant Marine Act, 1936; otherwise such application shall be denied.

The statute places upon the Commission the duty of determining that an applicant for a license is fit, willing and able to properly carry on a forwarding business, and further, that he is willing and able to conform to the Act and the Commission's requirements, rules and regulations. The determination of the fitness, willingness, and ability of the applicant must be by application of the Commission's sound discretion. It is well recognized that discretion may not be exercised in an arbitrary or capricious manner and in licensing or refusal to license, consideration must be given to constitutional and lawful safeguards of individuals and their right to make a living. *Archer* v. *SEC*, 133 Fed. 2d 795, cert. denied 319 U.S. 767.

The record discloses that applicant did not respond to the Commission's proper inquiries. This fact raises reasonable doubt that he is willing or able to conform to the requirements, rules and regulations of the Commission and forecloses an affirmative finding that he is so willing and able to conform. Applicant offered no evidence of his financial qualifications at the hearing. His request to present documentary evidence of his financial ability pursuant to Rule 10(w) of the Commission's Rules of Practice and Procedure was granted with concurrence of Hearing Counsel. Applicant failed to furnish the documentary evidence within the two week period allowed by the Examiner at the hearing or within more than a month subsequent to the expiration of that period. Through his counsel, he has elected to rely on the evidence presented at the hearing.

His failure to present documentary evidence of his financial status and waiver of the opportunity to do so, permits only the conclusions that favorable evidence is not available to him. Evidence of lack of financial ability was presented by Hearing Counsel. Within recent months, a Federal Court determined that applicant's financial status was marginal and found it necessary to appoint an attorney to defend applicant in a matter involving violation of the Shipping Act, 1916, as amended.

Section 44(b) of the Act provides that a license shall be issued *if it is found* that an applicant is fit, willing, and able to properly carry on the business of forwarding and to conform to the provisions of the Act as well as the requirements, rules and regulations of the Commission. In view of the attitude and behavior of the applicant in regard to the Commission's lawful inquiries and his questionable financial status, the findings prerequisite to issuing a license cannot be made. Applicant has not complained, nor could he complain in view of the facts and circumstances here presented, that refusal of his license would be an arbitrary or capricious exercise of discretion. In the absence of the findings required by the statute, denial of the license is mandatory.

CONCLUSIONS

Applicant does not possess that kind of financial responsibility compatible with the duties and responsibilities of a freight forwarder. It cannot be found that he is willing and able to conform to the provisions of the Act or the Commission's requirements, rules and regulations.

The application for a freight forwarding license is denied. An appropriate order will be entered.

(Signed) HERBERT K. GREER,
Presiding Examiner.

MAY 8, 1964.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 369

E. MAHLAB D/B/A OVERSEAS LEATHER IMPORTING CO.

COMPLAINANT

v.

CONCORDIA LINE (JOINT SERVICE OF DAMPSKIBSAKTIESELSKABET ALASKA, AKTIESELSKABET ATLAS, DAMPSKIBSAKTIESELSKABET IDAHO, SKIPSAKSJESELSKAPET HILDA KNUDSEN, AND SKIPSAKSJESELSKAPET SAMUEL BAKKE)

RESPONDENT

Application of Concordia Line for authority to refund to E. Mahlab d/b/a Overseas Leather Importing Co. the sum of $367.20 in connection with a shipment from Beirut, Lebanon to New York, denied.

Thomas K. Roche, Esq. and *Sanford C. Miller, Esq.* for applicant.

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

Concordia Line (Joint Service of Dampskibsaktieselskabet Alaska, Aktieselskabet Atlas, Dampskibsaktieselskabet Idaho, Skipsaksjeselskapet Hilda Knudsen, and Skipsaksjeselskapet Samuel Bakke) (Concordia), respondent and applicant filed an application pursuant to Rule 6(b) of the Commission's Rules of Practice and Procedure,[2] for permission to make a partial repayment of freight on a shipment of goatskins in bundles shipped from Beirut, Lebanon, via way ports to New York on or about April 24, 1963 on its vessel *Concordia Star.* This shipment was on a "freight collect" basis, the freight being for the account of the United States receiver.

[1] This decision became the decision of the Commission on April 30, 1964 and an order was issued denying the application. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224 and 502.228.

[2] Rule 6(b) provides: "Carriers or other persons subject to the shipping acts may file applications for the voluntary payment of reparation or for pemission to waive collection of undercharges, even though no complaint has been filed pursuant to rule 5(b). All such applications shall be made in accordance with the form prescribed in Appendix II(5) herein, shall describe in detail the transaction out of which the claim for reparation arose, and shall be filed within the 2-year statutory period referred to in rule 5(c). Such applications will be considered the equivalent of a complaint and answer thereto admitting the facts complained of. If allowed, an order for payment will be issued by the Commission."

The shipment's aggregate weight or measurement was 28.80 cubic meters or 9,600 kilograms. The consignor is one Hashim A. Rahman Mohammad, in Beirut and the consignee is complainant (by endorsement) in New York City. The aggregate freight charges collected on this shipment on March 29, 1963, by Concordia amounted to $1,101.60, the said amount being paid by the complainant herein. The basis on which the freight charges were collected was predicated upon $38.25 per cubic meter in accordance with the Concordia Line Eastern Mediterranean/U.S. Atlantic Westbound Freight Tariff F.M.C. Number 1, Revised Page No. 14. The rate sought to be applied was $76.50 per weight ton (1,000 kilos) and the aggregate freight charges at the rate sought to be applied would be $734.40. The refund request is for the difference namely $367.20.

Concordia asks for authority to cure a hardship which has been imposed upon complainant, a small American importer, by reason of an inadvertent oversight with respect to its tariff rates applicable to goatskins. This shipment in question was made on a "freight collect" basis, the freight being for the account of the United States receiver and upon the issuance of the bill of lading on or about April 24, 1963, the shipper called to the attention of Concordia's agent that Concordia's tariff was very much higher than the rate being charged by American Export Lines (Export), Concordia's competitor. On April 26, Concordia's Beirut agent thereupon cabled its head office in Norway and asked permission to make the necessary adjustment. The vessel, however, had sailed on April 25, the day before the agent brought the matter to the owner's attention and the head office in Norway replied to the Beirut agent that the adjustment requested could not then be made. Thereafter when the goods arrived in New York in late May, the receiver called to the attention of Concordia's general agent that the freight rate was far higher than the rate charged for similar shipments by Export which serves the same trade. Concordia states that it has been its policy to set rates at competitive levels and when it learned that the American Export freight rate on this item was $76.50 per weight ton, which would have resulted in total freight on the shipment of $734.40, Concordia's traffic officials agreed that the rate should have been at the same level. The rate, however, in Concordia's tariff was as above shown which resulted in the amount of $1,101.60. Thereafter Concordia after investigating the matter further learned that this older freight rate had been carried over inadvertently from an older tariff and that the unduly high rate had not been detected because no shipments of the commodity had been offered to Concordia, and that if this disparity had been known to Concordia in time to permit the filing of the necessary tariff amendment, Concordia would have filed the appropriate tariff amendment reducing the rate (this has since been done). However, as noted, the vessel had already sailed from Lebanon when its Beirut agent first raised the question with Concordia's head office, and by the time the receiver of the goatskins in New York called the error to Concordia's attention the only step then available was for Concordia to seek permission from the Federal Maritime Commission (Commission) to rectify the inadvertent error.

It would appear that the facts in the present case do not fall within the category of cases in which relief has been granted by the Commission. Although it is alleged by Concordia that there was a misunderstanding or at least an inadvertent mistake in not filing its newer tariff in relation to the charges involved in the shipment of goatskins, nevertheless it would appear that those engaged in the export and import trade would know or make it their business to determine the costs of shipping services they intend to use. Shipping costs are an integral part of the costs of commodities that are to be sold and it would be basic to inquire about or to know these costs inasmuch as they enter into the price which an importer will have to pay for his merchandise. Although competitive rates on the shipment of goatskins from Beirut, Lebanon, to New York were then at different levels it must be assumed that the consignor in Beirut as well as the New York consignee knew what the shipping charges would be when the cargo was booked for shipment to New York. It cannot be said that the shipper and the consignee were misled for there was no error or inadvertence as to the tariff rate then on file at the time of the shipment.[3] The facts in the present case do not fit within the scope of the *Martini & Rossi* decision, Special Docket No. 244, F.M.C. 453 (1962), which holds that innocent shippers should not be made to bear the consequences of a carrier's neglect in filing a tariff rate that the parties, acting in good faith, had agreed would apply. Actually the shipper in this case knew or should have known or could have readily ascertained what the tariff was since it was then on file even though the carrier apparently was without knowledge at that time that its rate was higher than that of its competitor, Export, serving the same trade. To be sure the carrier in the present instance will receive a substantial windfall at the expense of the shipper. However, the carrier is getting exactly the amount which its tariff provided for—nothing more, nothing less—even though the shipper could have used a competitive line (Export) and gotten a much lower rate.

There was no misunderstanding as to the rate to be applied. The carrier's agent may have agreed that his principal's rate was high but he did not accept the shipment with any concurrent promise that a

[3] (Concordia Line Eastern Mediterranean/U.S. Atlantic Westbound Freight Tariff F.M.C. No. 1 Revised page 14.)

lower rate would be applied. The shipper was not treated unfairly. He shipped with his eyes open as to the charges and the consignee was not an innocent party herein. The fact that the consignee was required to pay a rate which, subsequent to his shipment, was lowered to meet the rate of a competing carrier is no basis for permitting the lower rate to become retroactively effective. Under approved and lawful practices, a carrier may lower his rates to meet competition. It is, however, the retroactive application of rates that is forbidden. To permit such a practice would be to make a farce of the statute requiring the filing of rates and the charging of the rates as filed.

It is precisely this set of facts that distinguishes this case from the cases in which the Commission has heretofore granted relief. The carrier simply charged the rate which its tariff provided and the shipper or consignee paid that rate even though it apparently discovered shortly after the shipment had moved out of Beirut that the tariff charges were noticeably higher than Export's, its competitor, was charging.

The application is denied. An appropriate order will be entered.

(Signed) EDWARD C. JOHNSON,
Presiding Examiner,

APRIL 2, 1964.

FEDERAL MARITIME COMMISSION

No. 1061

BULKLEY DUNTON OVERSEAS, S.A.

v.

BLUE STAR SHIPPING CORPORATION

Handling charges of respondent terminal not found to constitute unjust or unreasonable practice in violation of section 17 of the Shipping Act, 1916.

Harold Mitherz, Esq. and *Howard A. Pratt, Esq.*, Tanzer, Mullaney, Mitherz & Pratt for Bulkley Dunton Overseas, S.A.

James J. Bierbower, Esq. for Blue Star Shipping Corporation.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

During the period 1959–61 complainant Bulkley Dunton Overseas, S.A., a New York City based corporation organized under the laws of Panama, was engaged in the export of wood pulp supplied by the St. Marys Kraft Mills, a paper manufacturing company located at St. Marys, Georgia.[2] The complaint is against respondent Blue Star Shipping Corporation as lessee and operator of the Kings Bay Marine Terminal, Kings Bay Station (St. Marys), Georgia (the "Terminal"). As amended, it alleges unjust and unreasonable rules, regulations and practices (i.e. handling charges) by respondent in violation of the second paragraph of section 17 of the Shipping Act, 1916 (the "Act"), and seeks reparation therefor.

The second paragraph of section 17 provides:

Every [common carrier by water in foreign commerce] and every other person subject to this Act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the [Commission] finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[1] This decision became the decision of the Commission on June 9, 1964. See Rules 13(d) and 13(h), Rules of Practice and Procedure, 46 CFR 502.224, 502.228.

[2] Since July 1961 wood pulp has not been available from this source for export as Kraft has required the entire supply for its own paper production.

The facts are that between on or about March 21, 1959, and July 19, 1961, complainant shipped for export over the Terminal an aggregate of 23,836 tons of wood pulp by 31 separate shipments (see Appendix). However, only the last 16 shipments, which totaled 13,404.25 tons and which occurred on and after May 17, 1960,[3] are here concerned. Complainant admits that the 15 earlier shipments are time-barred by the 2-year limitation prescribed by section 22 of the Act.

Although these shipments, as delivered in railroad freight cars, were in stacks ranging from three to seven bales high, respondent usually handled them in stacks of five bales. This handling was done either by respondent's employees or by arrangement with stevedores for which respondent paid. Each bale weighed approximately 500 pounds and, even when stacked, they were not bound together. It is understandable that the stacking involved considerable effort and that the tendency of the top bale to fall off posed safety problems. Two workmen suffered broken arms and one a broken leg. The pertinent provisions of the Terminal's tariff provided as follows:

Item 18 *Definition of the term "handling."*

The term "handling" as used in this tariff means the physical handling or movement of cargo between shipside and cars, shipside and motor vehicles, shipside and storage or between storage and cars or trucks; and one handling charge is assessed for each movement of cargo except that when the Terminal is required to load cargo on pallets furnished by the Shipper or Consignee at time of handling out, the handling out charge will be fifty percent (50%) higher than the regular handling charges published in this tariff. Handling charges are assessed against the cargo.

Item A–55 *Handling—Cargo moving direct between cars and ships.*

On all cargo moving direct between rail cars, trucks, trailers and/or vehicles and ships, the stevedore and/or stevedoring companies will handle and receive 33⅓ percent of the applicable tariff rate.[4]

Item 269 *Charges for wharfage and handling* (in cents per ton of 2,000 pounds).

	Wharfage	*Handling*
Wood Pulp, in bales 1,000 pounds and over	30	69
In units under 1,000 pounds	30	95

Respondent charged, and complainant paid, handling charges of 95 cents per ton of 2,000 pounds for the said 16 shipments, or a total sum of $12,734.06. In a few but undetermined number of instances, two of the participating stevedoring companies[5] waived, and respondent therefore did not pay, the one third share specified by Item A–55.

[3] This assumes a valid filing of the complaint not more than 2 years thereafter, although required copies and exhibits thereto were not received until June 4 and 11, 1962, respectively.

[4] The complete tariff of record herein (Ex. 1) contains an amendment of uncertain date excluding this clause. However, both parties contend that the exclusion did not occur until near the end or even after the period in question. The original tariff was filed with the Federal Maritime Board October 17, 1958, but the amendment was not.

[5] Strachan Shipping Company and Southern Shipping Company.

The president of the Terminal, in referring to one of the stevedoring companies, testified that "They said we couldn't make it up here at the Terminal no matter what we were charging and they said they had theirs from stevedoring costs and we could have it * * * just keep it."

It is complainant's position that respondent engaged in unjust and unreasonable practices, in violation of section 17, (a) by issuing a tariff that was ambiguous to complainant's detriment, and (b) by collecting a handling charge on the basis that it was to be divided with the stevedores, not so dividing it, keeping the matter secret, and not refunding the unpaid amount.[6]

In developing the issue of ambiguity, complainant argues (Brief p. 4) that tariff Item 269 contains two conflicting descriptions, the first referring to wood pulp in *bales* of 1,000 pounds and over, and the other to *units* under 1,000 pounds; that this necessitates specific recognition of the *handling charge* provision set forth in Item 18 as applying to *each movement;* that each movement consisted of five bales, weighing approximately 2,500 pounds in total, and was therefore subject to the over 1,000 pound handling charge of 69 cents rather than the 95-cent rate; that wood pulp is typically moved in bales of 400 to 600 pounds, not heavier; and that, in any event, where rates conflict due to ambiguity, the lowest is applicable. Abruptly stated, the contention is that the units moved were the *stacks* rather than the individual bales. The difference of 26 cents between the two rates, which totals $3,485.11, is claimed as a "rate overcharge." Further hearing is proposed to determine the amount of the handling charge due but not paid to stevedores and therefore said to constitute additional overcharges refundable to complainant.

On brief, complainant, although contending that respondent's tariff was ambiguous and confusing, states that it was not supplied with a copy of the tariff until July 28, 1961, more than a week after the last shipment was invoiced; that prior to commencement of the shipments, the handling rate and charge had been explained orally only; and that it did not question or protest the 95-cent rate until the last shipment. There was no written correspondence between the parties until August 30, 1961, more than a month after the last shipment.

Respondent takes the position that its tariff was not ambiguous; that the imposition of the 95-cent handling charge was just and reasonable because the shipments involved individual bales weighing less than 1,000 pounds each; and that the stevedores waived payment of their one-third share of the handling charges because of the amount of

[6] By its complaint, and at the outset of the hearing, complainant also contended that the assessment of a handling charge was unjust and unreasonable because "the wharfage and handling assessments are duplicative * * *." However, judging from its brief, including proposed findings and conclusions, it appears that this contention has been abandoned. In any case, the record shows that the two assessments were not duplicative.

handling actually performed by respondent. In short, respondent argues that the 95-cent handling charge was proper, that it was properly assessed, that all shippers were treated alike, and that the record herein requires that the complaint be dismissed.

Discussion

With regard to the ambiguity of respondent's tariff, the ingenuity of complainant's argument exceeds its merit. Bales and units are indeed different words. One could add such words as bundles, bags, boxes, packages, rolls, or any other term indicating a separate, self-contained, composite accumulation of wood pulp and the meaning would be adequately clear. Unless a number were bound or otherwise joined together in such manner as to facilitate movement as a single unit, the individual weight of each would govern under this tariff. Called by whatever name, the number of such units that might be stacked on a fork lift truck or other conveyance is irrelevant and may not be seized upon to sustain a claim of tariff ambiguity or confusion. In truth, the evidence and argument advanced in this case by complainant leaves some doubt as to whether there really was ambiguity or lack of understanding. Complainant was not new to the wood pulp exporting business and this particular handling charge item was not novel. In fact, it was virtually copied from the then effective Terminal Tariff of the nearby "Municipal Docks and Terminals of the City of Jacksonville, Florida." (Ex. 5), which provided as follows:

	Wharfage	*Handling*
Woodpulp, in bales:		
In units under 1,000 pounds	30	95
In units 1,000 pounds or over	30	69

There is no question but that such tariffs must be construed strictly and that wherever they are ambiguous the doubt should be resolved against the Terminal. Nevertheless, fair and reasonable construction must be given. The terms must be construed in the sense in which they are generally understood and accepted, and shippers cannot be permitted to avail themselves of strained or unnatural construction. *Thomas G. Crowe* et al. v. *Southern S.S.* et al., 1 U.S.S.B. 145, 147.

It seems clear that complainant was here seeking to exploit an apparent opportunity to eliminate the handling charge or at least get it reduced. Had respondent agreed to either, it would have been in violation of its tariff.

Complainant's contention that it paid the handling charge on the premise that a one-third portion would be paid to the stevedores (Brief p. 7) is also questionable. The last shipment was invoiced July 19, 1961. The complaint filed in May 1962 makes no reference to payments to stevedores. In fact the record indicates that complainant first became aware that this provision had been in the tariff when it was disclosed, during the course of the hearing on March 5, 1963, that the copy of the tariff supplied complainant on July 28, 1961, contained a subsequent amendment which omitted this reference entirely. Of even more direct significance is the fact that, under the circumstances, complainant was not a party in interest with regard to that provision of the tariff. The provision need not have been in the tariff at all, and as contained was strictly a matter between the stevedores and respondent. They were at liberty to waive payments, in whole or in part, and without reference to shippers.

ULTIMATE CONCLUSIONS

The record in this case does not disclose nor will it support a finding that regulations and practices established and observed by respondent in the assessment of handling charges for wood pulp were ambiguous, unjust, unreasonable, or otherwise violative of section 17 of the Act.

An order dismissing the complaint should be entered.

(Signed) JOHN MARSHALL,
Presiding Examiner.

MARCH 19, 1964.

APPENDIX

BULKLEY DUNTON OVERSEAS S.A., 295 MADISON AVENUE, NEW YORK

Shipments of Wood-Pulp Over Kings Bay Marine Terminal

Invoice No.	Date	Vessel	Short tons
37	3/21/59	Southland	1,362.00
43-A	4/24/59	Mimi Horn	386.25
47-A	5/23/59	Elizabeth Lykes	611.00
46-A	5/25/59	Casa Blanca	505.00
59-A	8/25/59	Fernwave	303.00
63-A	9/23/59	Tana	1,208.00
66-B	10/13/59	Ferngrove	606.75
76-2	12/4/59	Stanwear	527.50
75-2	12/7/59	Frank Lykes	303.00
75-3	12/7/59	Frank Lykes	303.75
75-1	12/7/59	Frank Lykes	425.25
91-1	2/15/60	Barbara	362.00
92-A	2/24/60	Corneville	1,221.00
97-1	3/22/60	Crestville	1,214.25
97-1	3/4/60	Consul Arlt	1,093.00
81-1	5/17/60	Sonderburg	1,174.50
81-1	5/27/60	Fernplant	1,030.75
84-1	6/14/60	Barbara	1,031.75
95-1	7/11/60	Libreville	597.00
85-1	7/11/60	Fernbank	733.00
97-2	7/26/60	Fernstate	1,057.50
103-1	8/25/60	Syllum	789.50
106-1	9/20/60	Lieberville	848.25
104-1	9/30/60	Hasselburg	999.50
119-1	12/7/60	Sue Lykes	1,202.75
146-F-1	3/20/61	Barbara	670.25
127-F-1	2/3/61	Teklatorm	424.00
146-F-1	3/20/61	Barbara	670.25
166-1	6/23/61	Edmund Hugo Stinnes	692.50
161-1	5/17/61	Bovec	609.00
169-1	7/19/61	Almeria Lykes	873.75
		Total short tons	23,836.00