DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1969

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JAMES V. DAY, *Vice Chairman*

ASHTON C. BARRETT, *Member*

JAMES F. FANSEEN, *Member*

GEORGE H. HEARN, *Member*

THOMAS LISI, *Secretary*

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FEDERAL MARITIME COMMISSION

DOCKET NO. 67-49

STATES MARINE LINES, INC., ET AL.

v.

PACIFIC COAST EUROPEAN CONFERENCE, ET AL.

Decided June 26, 1968

A conference self-policing system which does not contain specific guarantees against unfairness is illegal and may not be used to adjudicate alleged breaches and assess penalties unless and until appropriate amendments to the self-policing system are made and approved by the Commission. Conference ordered to cease and desist from further actions under said illegal system.

Changes in a conference's self-policing system which subject self-policing determinations to binding arbitration and establish procedures to be followed in adjudicating alleged breaches are substantial modifications of the type which require prior approval by the Commission under section 15 of the Act before they may be effectuated.

The reasonableness of a readmission fee of $12,500 assessed against former members seeking to rejoin the conference where the initial admission fee is only $1,000 raises possible issues of material fact which require an evidentiary-type hearing. Case remanded to the examiner for further proceedings on this question.

George F. Galland, Amy Scupi and *Robert N. Levin* for complainants.

Leonard G. James, F. Conger Fawcett and *John P. Meade* for respondents.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* George H. Hearn, *Vice Chairman;* Ashton C. Barrett, James V. Day, James F. Fanseen, *Commissioners*):

This proceeding was instituted upon the complaint of States Marine Lines, Inc., and Global Bulk Transport, Inc., against the Pacific Coast European Conference (the respondent) and its member lines.[1] The complaint was served on September 18, 1967, and alleges that the self-policing system of the Conference as well as the readmission fee it

[1] The term, respondent, as used herein, includes the Conference and its member lines except States Marine Lines.

assesses against former members seeking to rejoin are in violation of the Shipping Act, 1916, as amended. The complaint requests the Commission to adjudge the Conference's self-policing system and readmission fee to be unlawful and to order the Conference to desist from any action against States Marine under the present self-policing system. It also seeks disapproval of the Conference agreement in its entirety if appropriate modifications are not made within a time to be specified.[2]

THE FACTS

The respondent is a conference of common carriers by water serving the trade from U.S. Pacific Coast and Alaskan ports to ports in Europe and its environs. It operates under an approved section 15 agreement, No. 5200. At the time the complaint was served, States Marine Lines, Inc., and Global Bulk Transport, Inc., operating as a joint service, held a single membership in the Conference.

The respondent's present self-policing system consists of two paragraphs of the basic conference agreement which read as follows:

ARTICLE 15

Breach of Agreement. Except as otherwise provided in Article Four (4), liquidated damages for nonobservance of this Agreement, or of any of the rules, regulations or tariffs of the Conference, shall be not less than Five Hundred Dollars ($500.00) nor more than Ten Thousand Dollars ($10,000). If in the opinion of the Conference members, failure to observe the Conference Agreement or Conference rules, regulations or tariffs, in a particular case, or cumulatively jeopardizes the accomplishment of the basic purposes of this Agreement, the offending party may be expelled from the Conference. The determination as to nonobservance of this Agreement, or of any rule, regulation or tariff of the Conference and whether the offending party shall pay liquidated damages or be expelled from the Conference shall be by agreement of the parties as provided in Article Eight (8). Should an offending party fail to pay liquidated damages assessed hereunder to the Conference within five (5) days after written demand therefor, the said party shall be and become liable to civil action. In no case shall the party complained against cast any vote on the matter under consideration. No expulsion shall become effective until a detailed statement setting forth the reason or reasons therefor has been furnished to the expelled member and a copy of such notification mailed to the governmental agency charged with the administration of Section 15 of the United States Shipping Act, 1916, as amended.

ARTICLE 8

Decisions. Decisions at Duly called meetings are to be made by a three-fourths vote of members present and entitled to vote; otherwise, they are to be made by three-fourths vote of all members entitled to vote. Changes in this agreement, however, shall be made only by unanimous vote of all members entitled to vote.

[2] After States Marine tendered its resignation from the Conference, it did not press this issue further.

The Conference agreement's provisions relating to admission and readmission are contained in articles 11 and 4, which provide in pertinent part:

ARTICLE 11

Each person, firm or corporation, exclusive of present membership or associate membership, shall, at the time of admission, deposit with the Conference, the sum of One Thousand Dollars ($1,000.00) as an admission fee, no part of which shall be returnable to the said member, save and except on the complete dissolution of the conference. * * *

ARTICLE 4

In the event any member should resign or shall have heretofore resigned from the Conference as a former member and thereafter seeks re-admission, it shall not be readmitted, nor shall any subsidiary or affiliated company be admitted, save and except upon payment to the Conference of the sum of Twelve Thousand Five Hundred Dollars ($12,500.00) except when readmitted after three (3) years from the effective date of such resignation, becoming effective after the approval hereof. In the case of a member having been expelled from the Conference, heretofore or hereafter, neither it nor its subsidiary, affiliate or successor shall be readmitted without payment of the aforesaid sum. Any amounts due the Conference arising out of prior membership and which are unpaid at the time readmission or admission is sought, shall be paid in full in addition to the aforesaid sum.

* * * * * * *

Within a few days following the March 1967 decision in *States Marine Lines, Inc.* v. *Federal Maritime Com'n*, 376 F. 2d 230 (D.C. Cir. 1967), counsel for respondent wrote a letter to the Conference Chairman advising that, in his opinion, the self-policing system should be amended to conform to the guidelines laid down by the court.

Subsequently, at a meeting of the Conference held in London in June 1967, proposed modifications to the basic conference agreement were voted upon and approved by all members present [3] including the present complainant, States Marine Lines. Almost immediately after this meeting, States Marine, by telegram, withdrew its approval and acceptance of the modifications on the ground that it wished to review the matter with counsel. It promised to furnish the Conference with its position on the self-policing amendments as soon as possible.[4]

On or about August 22, 1967, the Conference instituted a self-policing action against States Marine for alleged breaches of the Conference agreement seeking liquidated damages in the amount of $130,000.

[3] A modification to the basic agreement, however, requires unanimous approval and Weyerhauser Line was absent and voted against the proposed revisions to the self-policing system by its letter dated July 7, 1967.

[4] On Aug. 29, 1967, States Marine did furnish the Conference with its recommended modifications. These proposals were similar to the system which had been voted on at the London meeting but were considerably more detailed on the procedural safeguards to be afforded the accused as well as the arbitration procedures.

States Marine's reaction to the Conference's charges was to file the complaint in this proceeding. It also sought and obtained an injunction [5] against the Conference and its member lines in the U.S. District Court for the Northern District of California Southern Division (No. 47855) forbidding any attempt to collect penalties from States Marine Lines until the completion of this case before the Commission.

States Marine's complaint alleges that the Conference's self-policing system is illegal in that it does not provide for "fundamental fairness" as defined in the *States Marine* case, supra. Two deficiencies are noted. The first is the lack of any procedures guaranteeing the rights of the accused line to be furnished with all of the evidence to be relied upon and to rebut or explain this evidence. The second is the absence of any provision for a neutral tribunal to pass on the questions of guilt and level of assessment of penalties. The States Marine complaint also charges that the readmission fee of $12,500 is unreasonably high and amounts to a penalty for withdrawal in violation of section 15 and General Order No. 7. The complaint requests us to adjudge the self-policing system as "unlawful and void" under section 15 and to disapprove the readmission fee. It also seeks an order requiring the Conference to "desist from any action against States Marine under such unlawful system looking towards a determination of guilt or the imposition of fines, penalties, or other sanctions."

The Conference answer denies that the present self-policing system violates the standards contained in the court's decision in the *States Marine* case, because it does not affirmatively require unfairness. Moreover, it contends that States Marine would in any conference proceeding actually be accorded all of the procedural safeguards required by the court, including binding arbitration, even though the self-policing provisions of the conference agreement are silent on these subjects.

A prehearing conference before the Examiner was held in Washington on November 21, 1967, at which counsel for the parties agreed that no evidentiary hearing was necessary. The authenticity of certain documents was stipulated, and counsel agreed to stipulate as to the authenticity of others by December 1, 1967.

By the time of the prehearing conference, States Marine Lines had tendered its resignation from the Conference, and this resignation took effect on December 1, 1967. The Examiner closed the record as of December 21, 1967.

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[5] This injunction was subsequently dissolved, but only after a stipulation had been entered into by the parties whereby they agreed that no attempt to collect any penalties which might be assessed would be made until 10 days following a final determination by the Commission in this proceeding.

Subsequently, the Conference Chairman advised States Marine that a meeting of the Conference would be held on January 4, 1968, to consider the outstanding charges. States Marine was invited to be present and to participate in its defense. By letter dated January 3, 1968, States Marine declined to participate and suggested that the matter be postponed until after the Commission reached its decision in this docket.

Nevertheless, the meeting was held, and States Marine was found guilty and penalized by the membership in the amount of $130,000. In a letter signed by the Conference Chairman dated January 5, 1968, States Marine was advised of this action. In this letter, States Marine was also offered an opportunity to have the adverse determinations reviewed by an impartial board of arbitrators.

THE INITIAL DECISION

In his Initial Decision, Examiner Charles E. Morgan found that the present self-policing provisions of Agreement No. 5200 are silent as to procedural safeguards for an accused member line, and that these provisions should contain a minimum of procedural safeguards which will guarantee fair treatment of an accused member line. He concluded that these self-policing provisions are unlawful and in violation of section 15 of the Act. He also concluded that the present readmission provision is unreasonable on its face and constitutes a penalty for withdrawal in violation of section 15 of the Act. He recommended that the Conference be ordered to desist from taking any action under the existing self-policing system.

DISCUSSION

We generally agree with the Examiner's findings and conclusions with respect to the illegality of Respondent's self-policing system. We have determined to review his determinations partly because of events which occurred after the closing of the record and partly because of the contentions of the parties expressed in their exceptions and replies. On the readmission fee issue, we have decided to remand the case to the Examiner for an evidentiary hearing.

Respondent's Present Self-Policing System

As already noted, the present self-policing system contained in Agreement No. 5200 consists of only two paragraphs, articles 15 and 8, under which the Conference members, upon a three-fourths vote, may assess liquidated damages for breaches of the agreement or its rules, regulations, or tariffs in amounts ranging between $500 to

$10,000 per offense.[6] These paragraphs are silent on the procedures to be followed. There is no requirement that the accused line be furnished with the evidence to be used against it or that it be allowed to rebut or explain such evidence and no provision for the final determination of guilt and assessment of penalties by a disinterested and impartial tribunal.

The Conference in this case does not seriously contend that the present self-policing system comports with the requirements of the court in the *States Marine* case. Indeed, counsel for the Conference so advised its chairman within a few days after that decision. However, the Conference argues that there is nothing in its agreement which *requires* the denial of fair procedures or *forbids* the use of arbitration. It attempts to distinguish this case from the *States Marine* case where, it contends, the procedures actually required the withholding of certain kinds of evidence from the accused and permitted a neutral body which had an affiliation with a competitor of the accused to sit in judgment. The Conference sums up its position by saying that its present self-policing plan, whatever its shortcomings, cannot be held to be illegal unless or until it is actually used in a fundamentally unfair manner.

We are, of course, unable to accept this argument. Section 15 as amended, General Order 7, and the case law interpreting the legal requirements under the 1961 self-policing amendment to section 15, all indicate that a self-policing system must contain a specific procedural plan under which disputes will be adjudicated and that this plan must contain guarantees of fundamental fairness.

Section 15 requires that we shall, after notice and hearing, disapprove any agreement "on a finding of inadequate policing of the obligations under it * * *."[7]

Pursuant to this amendment and our general rulemaking authority under the Act, we promulgated General Order 7 on August 22, 1963,[8] saying in part:

> Some comments also challenged the Commission's authority to require the inclusion of self-policing as a condition precedent to approval (or continued approval) of an agreement under section 15. As amended by section 2 of Public Law 87–346 (75 Stat. 763–4), section 15 provides: "The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it. . . ." This provision, in demanding the adequate policing of the obligations under the agreement, clearly presupposes the establishment of some procedure for that purpose. And the establishment of the self-policing procedure is necessarily predicated upon an agreement between

[6] The offending party may also be expelled from Conference membership.

[7] This language was added to section 15 in 1961 by Public Law 87–346, sec. 2, 75 Stat. 764.

[8] 28 F.R. 9257.

the parties. It has been the consistent position of the Commission that such an agreement is a modification which is within the purview of section 15, and this is now expressly fortified by the statute itself. Under section 15, a "true and complete copy, or if oral a true and complete memorandum" of all agreements within the purview of the section must be filed with and approved by the Commission. An Agreement which does not contain the procedure for self-policing which has been adopted by the parties is an incomplete agreement within the meaning of section 15. Conversely, it would seem to be obvious that if the parties make no provision for self-policing, they are ignoring the statute. In either case, their section 15 agreement would have to be disapproved unless the situation were corrected.

As early as 1962, we found "* * * that a system of self-policing is a necessary part of a basic conference agreement since it vitally affects the interrelationship of the members"; [9] and as recently as last year, we held "Adequate *procedures* must be set forth in the basic conference agreement whereby machinery for self-policing is established." [10] (Italics in the original).

On the subject of the adequacy of self-policing systems, the court in *States Marine Lines, Inc.* v. *Federal Maritime Com'n*, 376 F. 2d 230 (D.C. Cir. 1967), was even more explicit:

> * * * the principle becomes obvious that this kind of self-regulatory process must provide specific, realistic guarantees against arbitrary and injurious action. (376 F. 2d 236).

That case was remanded to the Commission because, under the self-policing plan being considered, an accused line might be found guilty on the basis of evidence which it did not have an opportunity to see and because the so-called Neutral Body was permitted to have a connection with one of the Conference members so long as this was disclosed.

By way of summary, the court said:

> * * * given the special characteristics of the shipping industry and the conference system the broad discretion granted a Neutral Body must be subject to some form of continuing internal review. That review must provide reasonable assurance that a member will be penalized only on the basis of evidence it has an adequate opportunity to rebut or explain—in other words that the accused will in fact be treated fairly. (376 F. 2d 242).

We have already had occasion to pass on a self-policing system similar to the one under consideration here. In *Modification of Agreement 5700-4* (Supplemental Report), 10 F.M.C. 179 (1967),[11] the

[9] *States Marine Lines* v. *Trans-Pacific Freight Conf.*, 7 F.M.C. 257 (1962), affirmed *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n*, 314 F. 2d 928 (9th Cir. 1963).

[10] *Modification of Agreement 5700-4*, 10 F.M.C. 261, 272 (1967).

[11] This supplemental report was issued after the matter had been reopened to reconsider our earlier report in the light of the guidelines contained in the subsequent decision in the *States Marine* case, supra.

Conference members themselves sat in judgment on their accused fellow member. Appeal to arbitration was provided for on the question of guilt, but not on the level of assessment of penalties. We held that:

Since the conference members are clearly interested parties, it is essential to provide a safeguard against arbitrary action both as to a finding that a member has violated the conference agreement as well as the penalty to be imposed.

Our conclusion is inescapable that Respondent's self-policing system as presently constituted is legally defective in that it contains no procedures guaranteeing "fundamental fairness" as defined by the court in the *States Marine* case. It may not be used and the assessment against States Marine is void.

This does not mean, however, that the Conference has lost its right of action against States Marine for alleged wrongdoing while a conference member. It could well be that the Conference may still enforce conference obligations incurred by States Marine prior to its resignation from the Conference.

The Conference asserts that when it actually went ahead with the self-policing action against States Marine, it offered all of the procedural safeguards called for by the court in the *States Marine* case including appeal to arbitration if States Marine had chosen to participate and desired them. States Marine, however, preferred not to have anything to do with the proceedings, citing *Trans-Pacific Frgt. Conf. of Japan* v. *Federal Maritime Com'n*, 314 F. 2d 928 (9th Cir. 1963), for the proposition that it could not become involved with an arrangement which required the effectuation of an unapproved modification to a conference agreement in violation of section 15. Thus, Respondents contend it is only because States Marine chose not to participate that all the criteria of "fundamental fairness" were not met, and not because of the policing system itself.

It may be that the Conference fully intended to furnish States Marine with all of the evidence it relied on, and to afford States Marine an opportunity to make whatever defense it deemed appropriate and to permit the matter to be finally decided by a disinterested arbitrator and otherwise comply with the court's guidelines. But, whatever may be said for this *ad hoc* procedural arrangement, it seems to us quite clear that any such offer by the Conference would run directly counter to the requirements of section 15 because to conduct such a proceeding would constitute a substantial change in the basic conference agreement which requires both unanimous consent of the membership and Commission approval before being effectuated. Moreover, any such *ad hoc* arrangement would place States Marine at a decided disadvantage in that it would have no way of determining whether it had been dealt with in "fundamental fairness" until virtually the entire proceeding had been completed and each procedural right had been protected. By then, of course, irreparable harm may have been done.

Under such an arrangement, we would inevitably be called upon in each case to determine whether the particular procedures used were fundamentally fair. The court in the *States Marine* case rejected a similar proposal saying:

> * * * This, of course, is not the responsibility assigned the Commission by Section 15. Section 15 authorizes the Commission to "disapprove, cancel or modify any agreement," not to sit in judgment of the day-to-day operations carried out under that agreement. Moreover, to place the Commission in the role of an on-going appellate panel, intimately involving it in a case-by-case review of the Conferences' Neutral Body system, would hardly be consistent with Congress' intent that the Conferences engage in *self*-regulation. (376 F. 2d at 242.)

The Readmission Fee Issue

In his Initial Decision, the Examiner concluded that the present readmission fee of $12,500 "amounting to 12.5 times the regular admission fee appears on its face to be unreasonably high and to impose an unlawful penalty for withdrawal from the Conference." The Conference strongly excepts to this conclusion and asserts that it is prepared to "come forward with factual reasons affirmatively showing why the provision is reasonable and necessary." States Marine, on the other hand, urges that the Conference "waived" an evidentiary hearing when it agreed to the stipulation in this case. The Conference counters that it was misled as to the continuation of the fee as an issue in the case.

Whichever may be the case, we are extremely hesitant to strike this already approved provision from the agreement merely on the basis of argument alone thus far presented. No valid regulatory purpose will be thwarted if we remand the proceeding to the Examiner for the taking of such relevant evidence as the Conference may offer in justification of its readmission fee. Our remand here does not, of course, indicate that we feel that the Examiner's conclusion was incorrect. We simply feel that the Conference should be afforded an opportunity to fully justify its readmission fee.

An appropriate order will be issued.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

Docket No. 67–49

STATES MARINE LINES, INC., ET AL.

v.

PACIFIC COAST EUROPEAN CONFERENCE, ET AL.

ORDER

The Commission has this day entered its Report in this proceeding which is hereby made a party hereof by reference.

Therefore, it is ordered, That the approval previously given to Agreement No. 5200 be, and the same hereby is, continued on the condition that said agreement be modified by adding provisions establishing a self-policing system in accordance with this Report and Order except that such continued approval shall become null and void unless the agreement so modified is filed with the Commission not later than sixty (60) days from the date of service of this order.

It is further ordered, That the respondent conference and its members desist from any further action under its present self-policing system looking toward the final determination of guilt or the imposition of fines, penalties or other sanctions.

It is further ordered, That this proceeding be and the same hereby is, remanded to the presiding examiner for evidentiary hearings on the readmission fee issue.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

INFORMAL DOCKET NO. 2(I)

MINNESOTA MINING AND MANUFACTURING COMPANY

v.

AMERICAN EXPORT ISBRANDTSEN LINES, INC.

Adopted June 26, 1968

A conference rule providing that claims for adjustment of freight charges, if based on error in weight or measurment, will not be considered unless presented to the carrier before the shipment involved leaves the custody of the carrier, cannot bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, less than two years after charges were paid. Reparation awarded in the amount of $551.55.

J. F. Day for Minnesota Mining and Manufacturing Company, complainant.

Burton H. White and *Frank Ciaccio* for American Export Isbrandtsen Lines, Inc., respondent.

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

Complainant Minnesota Mining and Manufacturing Company of St. Paul, Minnesota, is a manufacturer of coated and related products, and is engaged in the foreign commerce of the United States. American Export Isbrandtsen Lines, Inc., is a common carrier by water in the foreign commerce of the United States and subject to the provisions of the Shipping Act, 1916 (the Act). Complainant alleges that the carrier assessed and collected an overcharge on a shipment of complainant's products from New York to Naples, Italy. The parties have consented to have the claim determined without formal hearing and upon documentary evidence pursuant to rule 19 of the Commission's Rules of Practice and Procedure.

[1] Both parties having consented to the informal procedure under Rule 19(a) (46 C.F.R. 502.301), this decision shall be final unless the Commission elects to review the decision within 15 days from the date of service thereof.

Respondent assessed charges on the shipment, and complainant paid, the sum of $588.76 on February 13, 1967. This was the correct charge by application of respondent's tariff to the goods as described in the bill of lading. On February 14, 1967, complainant completed its audit of the goods involved in the shipment and detected an error in the description of the goods on the bill of lading. On September 6, 1967, claimant advised the carrier of the error and requested a refund. The respondent carrier, a member of the North Atlantic Mediterranean Freight Conference, rejected the claim, citing the Conference Tariff Rule No. 22 which provides in pertinent part:

> Claims for adjustment of freight charges, if based on alleged error in weight or measurement, will not be considered unless presented to the carrier in writing before the shipment involved leaves the custody of the carrier . . . .

Complainant, admitting that its claim was not presented to the carrier while the shipment was in the carrier's custody, challenges the validity of the rule, contending that it is unreasonable and contrary to the provisions of section 22 of the Shipping Act, 1916 (the Act), which provides:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby. . . . The board, if the complaint is filed within two years after the cause of action accrued may direct the payment . . . .

The Commission's rule 19 conforms to the statutory 2-year limitation. Section (b) thereof provides:

> Claims may be filed with the Commission within 2 years from the time the cause of action accrues. The cause of action shall, for the purpose of this section, be deemed to accrue (a) for over-charges upon delivery of the property or the payment of the charges, whichever is later . . . .

This complaint was filed within 2 years of the date payment was made.

The question here presented is whether the conference rule bars complainant's right to recover overcharges when the claim for reparation was filed within 2 years of the date of accrual. The answer is found in *United States of America* v. *American Export Isbrandtsen Lines, Inc.*, Docket No. 67–30, the Initial Decision of Presiding Examiner Page, adopted by the Commission February 1, 1968 (11 FMC 298). It was held that a conference rule providing that claims for adjustment of freight charges must be presented within 6 months after shipment date, cannot bar recovery in a complaint case brought under section 22 of the Act. Respondent is of the opinion that that decision should not be binding upon it; that the whole subject is currently under review in Docket No. 65–5. The question of whether a conference or carrier may, by a time limitation rule, defeat the Commission's jurisdiction under the 2-year limitation in section 22 of the Act, is not an issue in Docket No. 65-5. The Commission's decision in Docket No. 67-30 is binding precedent in any event until modified or reversed. Moreover, the conference rule does not concern a claimant's right to present a claim to the Commission under section 22 of the Act or to pursue a claim by recourse to the courts. The rule provides only that the *carrier* will not consider a claim unless presented within the time specified. Consideration has been given to respondent's proposition that:

> The Conference Rule applicable to the instant case does not bar a claimant from initiating suit. If the claimant takes the simple step of complying with the Tariff *Rule* 22 notice requirement, it can press its claim under and in accordance with *Section* 22 of the Shipping Act.

The argument is not consistent. It proposes that suit is not barred by the rule but, in effect, failure to comply with the rule would bar a complainant from "pressing its claim."

It is concluded that complainant's failure to comply with the conference rule on presentation of claims does not bar recovery of reparation in a proceeding brought pursuant to section 22 of the Act. The question of the reasonableness or unreasonableness of the rule need not be determined to resolve the issue of the complainant's right to reparation.

Respondent contends that complainant has "failed to carry its burden of proof with respect to the true weight and measurement of the cargo." Citing the Carriage of Goods by Sea Act, 1936 [46 U.S.C. 1303, (4)] to support the evidentiary importance of the bill of lading and that it is prima facie evidence of receipt by the carrier of the goods described therein, respondent argues:

> It follows that the burden of proving that the facts were otherwise than as stated in the bill of lading must be on the claimant in any proceeding wherein weight or measurement is brought into question. This burden remains constant and does not shift to the carrier, once a claim is filed.

The burden of proof is, of course, with complainant. Its sworn claim sets forth facts and documents to prove that the "actual" shipment was not as described in the bill of lading. Respondent's evidence to contravert this proof is the bill of lading. The bill of lading may be prima facie evidence of the contents of the shipment but it is not conclusive. 9 Am. Jur., Carriers, § 417. Nor is it, as respondent argues, the best evidence as the term may be applied in this proceeding. Complainant is not barred from presenting evidence that the bill of lading was erroneous. The evidence consists of an interoffice memorandum showing the "actual" description of the goods sold to the consignee and the packing list of the merchandise, both demonstrating the error in the bill of lading. If respondent's argument is addressed to the weight of the evidence, evaluation thereof warrants the conclusion that complainant has met the burden to prove that the bill of lading did not correctly describe the goods actually shipped and this evidence has not been persuasively rebutted. Claimant has shown that the application of respondent's tariff to the "actual" shipment was $551.55 less than the charge based on the erroneous description in the bill of lading. Respondent, a common carrier by water in foreign commerce, received a greater compensation for actual services rendered than specified in its tariff, in violation of section 18(3) of the Act.

ULTIMATE CONCLUSIONS

The conference rule providing that claims for adjustment of freight charges, if based on error in weight or measurement, will not be considered unless presented to the carrier before the shipment involved leaves the custody of the carrier, does not bar recovery of an overcharge as reparation, where the complaint is filed under section 22 of the Shipping Act, 1916, within 2 years of the date of payment of the charges.

The description of the goods shipped by complainant via respondent's vessel as stated in the bill of lading was erroneous, and application of respondent's tariff to the goods actually shipped results in a charge of $37.21.

Respondent collected from complainant the sum of $588.76 for the transportation of complainant's goods, $551.55 more than was properly due for the services rendered, and in violation of section 18(3) of the Shipping Act, 1916.

Complainant is entitled to and is hereby awarded as full reparation the amount of $551.55 with interest at the rate of 6 percent per annum to be added if the reparation is not paid within 30 days.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C.,
June 25, 1968.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66-37

KIMBRELL-LAWRENCE TRANSPORTATION, INC., GENERAL INCREASE IN RATES IN KODIAK ISLAND, ALASKA PENINSULA, AND ALEUTIAN ISLANDS AREA OF ALASKA

Decided July 8, 1968

Rates of respondent Kimbrell-Lawrence Transportation, Inc. (KLT) between Seattle-Bellingham, Washington and the Alaska Peninsula-Aleutian Islands area of Alaska found not unlawful.

KLT required to adopt means for determining amounts to be assigned to "vessel betterments" and "expenses" other than arbitrarily derived percentages. KLT allowed contributions to "profit-sharing" fund as expenses limited to a total of 15 percent during any year.

Investigation discontinued.

Raymond J. Petersen for respondent Kimbrell-Lawrence Transportation, Inc.

George L. Benesch and *Edgar Paul Boyko*, for intervener, State of Alaska.

Fred H. Tolan for intervener Northwest Fish Traffic Committee.

E. Duncan Hamner and *Donald J. Brunner*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

This proceeding was instituted on the Commission's own motion by order served June 6, 1966, to investigate the justness and reasonableness under the Shipping Act, 1916 and the Intercoastal Shipping Act, 1933 of selective increases in rates between Seattle, Wash., and Kodiak Island, Alaska Peninsula, and Aleutian Islands ports published by respondent Kimbrell-Lawrence Transportation, Inc. (KLT), effective June 8, 1966. The State of Alaska (Alaska) intervened.

After hearing and the filing of briefs but prior to the Examiner's decision, respondent filed a second increase of approximately 10 percent on all commodities between Seattle and the named Alaskan ports with the exception of the rate on frozen fish southbound, and established rates between Bellingham, Wash., and the named Alaskan ports for the first time. All rates between Bellingham and the Alaska ports are identical to the Seattle rates with the exception of the rates on frozen fish and frozen crab southbound which are somewhat lower. On January 20, 1967, the Commission expanded the investigation to include the second increase. Further hearings were held on the second increase.[1]

On February 15, 1968, Chief Examiner Gus O. Basham issued an initial decision in which he determined that neither set of rate increases had been shown to be unlawful. There was no oral argument.

Position of the Parties on Exceptions

I

Both *Hearing Counsel* and *Alaska* except to the Examiner's decision. Neither excepts to the Examiner's determination that the rate of return based upon the first set of increases involved herein was not shown to be unlawful, although Hearing Counsel maintain that the rate of return should have been found to be 15.21 percent, and Alaska maintains that the rate of return should have been found to be 18.51 percent. The major objections of these parties are to the Examiner's treatment of certain repair expenses as capitalized assets for inclusion in the rate base and his failure to consider the increased revenue respondent may derive from its second set of rate increases.

A. The Repairs

At the hearings, KLT capitalized as "betterments" 50 percent of its repairs expense for its single vessel for the years 1958–65. However, this capitalization is not reflected in KLT's General Order 11 submissions to the Commission and Hearing Counsel and Alaska argue that neither the evidence of record in this proceeding nor KLT's General Order submission for 1966 indicates that any portion of repairs for that year should be capitalized. They maintain that the General Order 11 treatment of these expenses and the treatment for Federal income tax purposes indicate that the attempt to capitalize the assets in this proceeding is an attempt to inflate KLT's rate base with the consequent reduction of rate of return. They further indicate (1) that KLT itself admits that the 50-percent figure was "entirely an arbitrary selection" not in accord with accepted accounting prac-

[1] The Northwest Fish Traffic Committee intervened and took part in the further hearings, but did not otherwise participate in this proceeding.

tice, (2) that to some extent the capitalization of 50 percent of the "repairs" resulted in the capitalization of items which had already been capitalized once, and (3) that several of the repairs items were inexact as to amount.

B. The Second Rate Increase

Both Hearing Counsel and Alaska admit that "it is impossible to make any meaningful projection of annual revenues and expenses [beyond 1966] * * * due to KLT's anticipated radical change in operations with the addition of a second vessel." They do maintain, however, that some profits will be added to a rate of return which is already at the upper limits of reasonableness and, therefore, the rates in KLT's second round of increases should be declared unlawful. Alaska, moreover, indicates that assuming expenses remain constant, the rate of return including that provided by the second increase would be 27.2 percent.[2]

II

KLT maintains that the initial decision should be affirmed by the Commission.

Discussion and Conclusions

Since Hearing Counsel concede that a rate of return of 15.21 percent is not unreasonable and Alaska concedes that a rate of return of 18.51 percent is not unreasonable, KLT's rate of return with respect to the first set of increases still falls within limits which they acknowledge are proper even if all of the inaccuracies claimed in the exceptions are admitted.

There is substantial evidence of record that the original rate increases are just and reasonable, particularly in light of the high risk of loss of life, capsizing, and loss of cargo involved in crossing the Gulf of Alaska, and we so find.

With respect to the January 1967 rate increase, however, there is nothing in the record upon which the Commission could base a determination in light of the change in KLT's operations occurring in the latter half of 1967 as a result of the addition of the second vessel.[3]

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[2] Alaska also excepts to the Examiner's failure to exclude KLT's contribution to an employee profit-sharing fund of $17,762.04 in 1966 as an expense in computing working capital (although admitting that the effect on the amount of working capital was not substantial in the case) and his allowance of the contribution as an operating expense. Alaska's objection is not to the legitimacy of such funds as an expense in principle, but because, it alleges, there is no effective yearly maximum or minimum required contribution with respect to this particular fund, and KLT could contribute large amounts to the fund in 1 year in an attempt to justify a rate increase.

[3] We take official notice of the fact that this change in KLT's operations has actually occurred.

Although it does appear, as Hearing Counsel and Alaska indicate, that some profits may be added to KLT's rate of return because of the January increases, both the likelihood of these additional profits and their extent are in considerable doubt. As Hearing Counsel acknowledge in their reply brief, increased expenses for KLT in the form of wage increases, increases in Master, Mates and Pilots Union Benefit and rising fuel oil costs totaling $20,724 are certainties. We also note that the ship which KLT has added to its service, the *Polar Pioneer*, is shown by the record to be more than three times larger than KLT's other vessel, and was described at the hearings as requiring a 35-man crew, which factors may further greatly increase wage and fuel oil expenses.

The change in operations did not in any way figure as a basis for the second rate increase, and the expenses relating to that change may have a determinative effect upon the reasonableness of KLT's rate of return. Should our analysis of KLT's financial statements submitted to us pursuant to our General Orders indicate that, after a year's experience with its expanded service, KLT's rate of return may be unlawful, we will at that time institute appropriate proceedings.[4] For the present, however, KLT's rate increases have not been shown to be unlawful.

While our disposition might be said to make it unnecessary, strictly speaking, to rule on the exceptions with respect to the expenses for repairs and the profit-sharing fund, we will do so because we believe such ruling is necessary if meaningful financial records are to be kept in the future. We therefore hold that:

1. With respect to the repairs expense, KLT must adopt a means for determining the extent to which items are properly assigned to this category and the extent to which they should be assigned to the rate base as "betterments" other than the 50-percent allocation which it admitted was "arbitrary" and not in accord with accepted accounting practice. KLT is also reminded that General Order 11, 46 CFR § 512.7(b)(1) requires that where the figures with respect to investment in vessels, including betterments, differ from those reported for Federal income tax purposes, the differences shall be set forth and fully explained; and

2. With respect to the profit-sharing fund, we do not agree with Alaska that the expense item for this fund is illusory. There is a maximum contribution limitation of 15 percent per year of wages paid or payable to eligible participants. Although there is no guaran-

[4] Cf. *Freight Rates and Practices—Florida/Puerto Rico Trade*, 7 F.M.C. 686, 694–697 (1964); *Reduction in Rates—Pac. Coast-Hawaii*, 8 F.M.C. 258, 262–265 (1964).

teed minimum, the only reason stated in the plan for allowing the company not to contribute to the fund for any year is "the judgment and discretion of the Company's directors, [that] it would be detrimental to the best interest and financial security of the Company." Contributions may be paid into the fund in later years for those years in which the company did not originally make contributions, but these payments are limited to making up "deficiencies;" i.e., a 15-percent maximum for each year. We cannot say as a matter of law that KLT's "judgment and discretion" will be exercised in an unreasonable or arbitrary manner. Thus, we will allow contributions to the fund as legitimate expenses for ratemaking purposes, provided, however, that not more than 15 percent be allowed as a total for the profit-sharing fund expense during any year (including amounts assigned to the fund to make up deficiencies from prior years). This limitation is necessary to avoid the situation pointed out by Alaska in its exceptions, whereby KLT could contribute large amounts to the fund in a single year in an attempt to justify a rate increase.

This proceeding is discontinued.

(SEAL) (Signed) FRANCIS C. HURNEY,
Assistant Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 65–34

IN THE MATTER OF DISCOUNTING CONTRACT/NONCONTRACT RATES PURSUANT TO PROVISIONS OF ITEM 735, NOTE 2, OF THE INDIA, PAKISTAN, CEYLON & BURMA OUTWARD FREIGHT CONFERENCE TARIFF No. 10

SUPPLEMENTAL REPORT ON RECONSIDERATION

Decided July 12, 1968

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT, JAMES F. FANSEEN, *Commissioners.*)

This proceeding was instituted by the Commission to determine, *inter alia,* the propriety of the practice instituted by India, Pakistan, Ceylon and Burma Outward Freight Conference (Conference) of offering discount rates on iron and steel commodities, with the discounts being restricted as to certain ports of origin in the United States. Our decision on this matter was issued March 25, 1968.* We noted that the record disclosed many instances of port-restricted discounts and that, generally, the Port of New York has not been given discounts similar to those obtained by the ports of Baltimore, Philadelphia, New Orleans, and Mobile.

The Port of New York Authority (Port Authority) had intervened in the proceeding and strongly objected to the port-restricted discount rates, and alleged that the Port of New York was being subjected to unjust discrimination and undue prejudice and that the competing ports of Baltimore, Philadelphia, New Orleans, and Mobile have been unduly preferred by the use of such rates in violation of sections 16 First and 17 of the Shipping Act, 1916. The Port Authority argued that the reduced rates caused cargo to move through the outports instead of through New York, to the detriment of the Port of New York.

The Conference and Hearing Counsel had contended that there were other factors besides the ocean rates which attracted iron and steel to the outports and that the cargo came first to the outports and the reduced rates were induced to follow the cargo. Factors said

*11 F.M.C. 418.

to have influenced shipments to move through the outports and to justify the port-restricted discounts were shipper preference for the outports, steel mill location near the outports, character of cargo, iron and steel handling facilities at the outports, higher loading costs at Port of New York, and carrier competition at the outports.

We did not reach a determination of the sections 16 and 17 issues in relation to the port-restricted discount practice. We stated in our report:

While the factors of shipper preference, steel mill location, character of cargo, and port facilities tend to show that the iron and steel would have moved away from New York even if there had been no discount, they do not in any way serve to justify the conference member's rate disparities.

Of all the factors considered by the Examiner only two, comparative loading costs and carrier competition, can actually be justification for rate disparities.

When the conference adopted its rate policy, it chose to have uniform rates as to commodities from all United States ports of loading in the trade area. The conference members continued this policy from its inception until they adopted the subject port-restricted rates on iron and steel. The subject discounts on iron and steel are the only port-restricted rates on any commodity that the conference members have adopted.

Having established a policy of uniform rates from all United States ports of loading and continuing such policy for a considerable length of time, the conference members should be required to adequately explain any departure from such basic policy. This the conference has attempted to do. However, as mentioned above, the only factors offered in explanation for such departure, which are actually relevant to or can be offered in support of such departure, are that it was justified to meet competition or that it was justified on the basis of comparative loading costs at the various ports.

We proceeded to find that the cost data in the record was insufficient to conclusively support a finding that loading costs in New York are higher or to show what sort of relationship exists between the cost differences and the rate disparities.

On the issue of carrier competition, we found the record to be lacking in that, while it showed the existence of nonconference carriers, it did not show any information as to specific rates of such carriers or whether such rates might justify the conference's restricted discount rates.

We then remanded the proceeding:

* * * for the purpose of obtaining evidence concerning cost differences incurred by conference carriers at the various ports in question and for the purpose of determining the actual existence of nonconference competition faced by the conference at the various ports in question including evidence as to the rates of both conference and nonconference lines. Finally we ask the Examiner on remand to determine whether any of the information gained on remand will provide justification of the rate disparities in question.

We are now faced with petitions for reconsideration, filed both by the Port Authority and by the Conference.

Both parties suggest that we erred in concluding that only comparative loading costs and carrier competition are properly to be considered in arriving at adjustment of rates as between ports. In support of their position, the parties quote from prior Commission decisions which appear to hold to the contrary.

The Conference cites *Port of New York Authority* v. *AB Svenska et al.*, 4 F.M.B. 202, 209 (1953), in which the Commission stated:

> Even though we find that no unjust discrimination has been shown to be the cause of any injury to New York or Newark, we may say that a rate differential against a port may not be justified for the sole reason that the cost of operation at that port is greater than at another competing port. In *Port Differential Investigation*, 1 U.S.S.B. 61 (1925), the Shipping Board said at page 69:
>
> "* * * the board does not concur in the theory that a carrier is justified in burdening a port with a differential for the sole and only reason that the cost of operation from that port is greater than from some other port. It is obvious to the board that many elements, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others are properly to be considered in arriving at adjustment of rates as between ports."

The Conference also points out that in *Rates from Jacksonville to Puerto Rico*, 10 F.M.C. 376 (1967), the Commission recently stated that:

> * * * volume of traffic, competition, distance, advantage of location, character of traffic, frequency of service, and others are properly to be considered in arriving at adjustment of rates between ports.

The Conference concludes that the Commission decision in this proceeding is directly contrary to its previous decisions and that the holding should be reconsidered in light of the previous decisions.

The Port Authority also feels that our conclusion that differences in loading costs can justify rate differentials is contrary to our conclusion in *Surcharge on Shipments from Buffalo, New York*, 7 F.M.C. 458, where it was held at page 462:

> There are also other elements which should be considered in determining whether a rate differential at a particular port may be upheld, such as volume of traffic, competition, distance, advantages of location, character of traffic, frequency of service, and others, *Port Differential Investigation*, 1 U.S.S.B. 61, 69 (1925). The Conference made no attempt to present evidence on any element except terminal costs.

Hearing Counsel have expressed agreement with the petition for reconsideration.

We have considered the petitions of the Conference and of the Port Authority. We recognize the prior Commission cases cited therein and endorse their holdings. To the extent that our prior decision in this docket regarding criteria to be considered in determining propriety of rate differentials is inconsistent with the holdings of the abovementioned cases, it is hereby rescinded.

This does not affect our prior decision to remand, since the same inadequacies in the record regarding costs and competition still exist. As indicated in the cases cited to us, these two factors should be considered along with the others mentioned in reaching a conclusion regarding the Conference's rate differentials.

For these reasons, we are seeking more evidence on remand. At this juncture we will not limit the evidence on remand to the areas of competition and costs. Rather, any further evidence deemed necessary concerning any of the other relevant factors will also be considered.

There remains the question of how extensively the question of comparative costs should be explored. The Port Authority and Hearing Counsel suggest that if costs are to be considered all steamship operating costs should be exposed on the record, rather than to limit evidence to loading costs. The Conference opposes this view and feels that it is unnecessary to go into such detail to justify the challenged rates in a case such as this which is not a domestic rate case.

The question of costs is present in this proceeding only insofar as the Conference has suggested that a difference in loading costs at the various ports should be considered as justification for the rate disparities. All we are saying or asking is that to the extent that the Conference would have us use the cost criteria as justification for the rate disparity, it must include in the record the requisite data and information which would substantiate the conclusion asserted.

An appropriate order will be entered.

COMMISSIONER GEORGE H. HEARN concurring and dissenting:

I dissent from the supplemental report of the majority insofar as it denies the petition of the Port of New York Authority that the Commission reverse its decision to remand and find the rates in question unlawful. In all other respects I concur in the majority's supplemental report herein.

The majority now opens the case on remand to all facets of the question of violations of sections 16 and 17 of the Shipping Act, 1916, and the entire range of issues are to be litigated anew. The respondents were given ample opportunity but were unable to rebut the plain facts, i.e., that neither higher costs nor any other reasons compelled the port-restricted discounts. (Tr. of Oral Argument, p. 36; Tr., pp. 533–534, 565, 576; Tr., pp. 24–25, 502–503, 627; Initial Decision, p. 21.) There is, therefore, no reason to give the respondents an opportunity to present facts on remand which it was incumbent upon them to present at the outset.

I conclude, as I did in my opinion on original consideration, that the present record plainly indicates evidence sufficient for a finding of violations of sections 16 and 17. (I incorporate herein by reference my opinion in our prior report in this case.) 11 FMC 430 The respondents did not then offer any acceptable justification of the clearly established facts of the detriment to the Port of New York and the port-restricted discounts as the cause thereof. No purpose will be served now by reopening this case for the gathering of apparently non-existent evidence.

I would reverse the prior decision to remand and find the rates in question unlawful under sections 16 and 17.

(S) FRANCIS C. HURNEY,
Assistant Secretary

DOCKET NO. 65–34

IN THE MATTER OF DISCOUNTING CONTRACT/NONCONTRACT RATES PURSUANT TO PROVISIONS OF ITEM 735, NOTE 2, OF THE INDIA, PAKISTAN, CEYLON AND BURMA OUTWARD FREIGHT CONFERENCE TARIFF NO. 10

ORDER

The Commission having this date made and entered of record a supplemental report on reconsideration in this proceeding, which supplemental report is hereby referred to and made a part hereof;

It is ordered, That the remand in this case now pending before the Examiner, consider all of the relevant factors indicated by the supplemental report.

By the Commission.

(S) FRANCIS C. HURNEY,
Assistant Secretary

FEDERAL MARITIME COMMISSION

No. 67–44 (SUB. 1)

IN THE MATTER OF AGREEMENT NO. DC–30 BETWEEN SOUTH ATLANTIC & CARIBBEAN LINES, INC. AND TMT TRAILER FERRY, INC. (C. GORDON ANDERSON, TRUSTEE) FILED PURSUANT TO SECTION 15, SHIPPING ACT, 1916

Adopted July 24, 1968

Agreement DC–30 between South Atlantic and Caribbean Lines, Inc., and TMT Trailer Ferry, Inc. (C. Gordon Anderson, Trustee) fixing rate on refrigerated cargo from Florida Ports to Ports in San Juan, approved.

John Mason for respondent South Atlantic and Caribbean Lines, Inc.

Homer S. Carpenter for respondent TMT Trailer Ferry, Inc.

R. Stanley Harsh and *Donald J. Brunner*, Hearing Counsel.

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

The background for this investigation is found in *South Atlantic and Caribbean Lines, Inc.* (*SACL*) v. *TMT Trailer Ferry, Inc.* (*C. Gordon Anderson, Trustee*) (*TMT*), Docket No. 67–44, wherein SACL alleged that a freight tariff rate of $900 per 40-foot trailer on refrigerated freight, N.O.S., filed by TMT was unreasonably low. In that proceeding, after a motion to dismiss had been filed and a subpoena duces tecum had been executed, the parties being desirous of avoiding delay and expense of further litigation, entered into a stipulation and agreement, DC–30 which provided:

1. TMT will promptly publish in their Freight Tariff No. 4, FMC–F No. 5, Item No. 1208, a rate on "Refrigerated Freight, N.O.S.", of $975.00 per 40-foot trailer, including pickup and delivery at loading and discharging ports, the rate to become effective 30 days after publication, in place of the presently effective rate of $900 per 40-foot trailer, dock-to-dock.

[1] This decision became the decision of the Commission on July 24, 1968.

2. TMT will also publish a trailer overload charge of not less than $1.00 per 100 pounds, to apply to that part of any shipment transported at the rate described in Paragraph No. 1 that exceeds 40,000 pounds. It is not the intention of this paragraph to prejudice or interfere with any other measures by which TMT limits or controls the overloading of trailers by shippers.

3. Nothing in this stipulation and agreement prejudices or limits the right of either TMT or SACAL to make such future changes in their respective rates on refrigerated traffic as, in their respective sole and separate judgment, may be warranted in the future. In the event of any future change by either of them, nothing in this stipulation and agreement shall prejudice or limit the right of the other to exercise any available right or action in connection therewith.

4. Upon the effectiveness of the actions described in paragraphs 1 and 2 above, SACL will move to dismiss the complaint herein, with prejudice.

5. This stipulation and agreement will become effective upon approval by the Federal Maritime Commission pursuant to section 15 of the Shipping Act, 1916, or upon their ruling that such approval is not required.

The Commission ordered this investigation to determine whether the agreement should be approved, disapproved, or modified under section 15 of the Shipping Act, 1916 (the Act), and whether the agreement would violate section 18(a) of the Act, with a view toward making such findings and orders as facts and circumstances shall warrant.

At the prehearing conference held in this proceeding on June 11, 1968, counsel for respondents SACL and TMT, and Hearing Counsel agreed that the basic issue presented was the compensatory nature of the freight rate of $975 per 40-foot trailer on refrigerated freight and further agreed that after conferring, they would come forth with a stipulation of the cost figures relating to that rate. The stipulation and motion to dimiss was filed on June 28, 1968. The parties stipulated that if John J. Gabel, Assistant to the General Manager of TMT, was called as a witness, he would testify that the total trailer load expense for the transportation of refrigerated cargo between Miami or Jacksonville, Fla., on one hand and on the other San Juan, P.R., including pickup and delivery, amounts to $927.28. It was further stipulated that if Delia E. McDermott, staff accountant, Federal Maritime Commission, was called as a witness, she would testify that she spent eight (8) days in TMT's principal place of business, reviewing its records as they relate to the computations upon which Mr. Gable based his conclusion, and that she believes the items set forth therein are generally accurate, and that the resulting figure of $927.28 fairly represents the total cost to TMT of transporting refrigerated cargo in trailerloads between Miami or Jacksonville, Fla., and San Juan, P.R., including pickup and delivery. The computation upon which the stipulation was based and which was included therein, is appended hereto and made a part hereof.

TMT is, and has for some time, been in the experimental stages of reefer operations. Its profit per trailer is $47.72 or approximately 5 percent based on the interim costs presented. Although the cost computations may vary when the experimental stage has passed, available figures warrant a conclusion that as of the present, the rate is compensatory but not excessive.

The fact that a rate is compensatory is not, in all cases, conclusive of its compliance with the Act, however, the rate here at issue is established by a section 15 agreement. Section 15 of the Act in pertinent part, provides:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements, modifications, or cancellations.

All parties have been afforded opportunity to present evidence, hearing counsel representing the public interest, and no evidence has been adduced that would warrant a finding that the agreement, fixing the rate at $975.00 per 40-foot trailer of refrigerated cargo, is dertimental to the commerce of the United States or otherwise in violation of the Act. Nor is there any basis for a required modification of the agreement in any respect. The parties have waived briefs or oral argument.

It is concluded that Agreement DC-30, entered into by and between SACL and TMT on October 5, 1967, should be and hereby is approved, and this proceeding discontinued.

HERBERT K. GREER,
Presiding Examiner.

WASHINGTON, D.C., *July 2, 1968.*

APPENDIX

TMT Trailer Ferry, Inc., cost per refrigerated trailerload,[1] *year 1967*

Item	Total expense	Less: revenue credits	Total expense less revenue credits	Less: specifically applicable expense	Total expense generally applicable	Total expense against southbound trailers [2]	Expense per cubic foot
Vessel operating expense	$2,785,635.17						
Miscellaneous voyage revenue		$15,495.12					
Total vessel operating expense			$2,770,140.05	0	$2,770,140.05		
Administrative and general expense	817,365.51	0	817,365.51	[3] $49,266.17	768,099.34		
Other shipping operations	398,112.83						
Miscellaneous operating revenue		44,915.57					
Total other shipping operations			353,197.26	[3] 203,118.43	150,078.83		
Depreciation and amortization	434,895.41	0	434,895.41	[3] 229,537.18	205,358.23		
Other	843,762.59	0	843,762.59	[4] 757,380.76	86,381.83		
Total	5,279,771.51	60,410.69	5,219,360.82	1,239,302.54	3,980,058.28	$2,237,190.76	$0.31981

	Per trailerload
1967 reefer trailerload general expense 1,444 cubic feet at 0.31981	$461.81
Specific reefer trailer expense (January–April 1968 experience):	
Depreciation	209.04
Nitrogen	202.36
Maintenance	4.07
Pickup and delivery	50.00
Total reefer trailerload expense	927.28

[1] Remarks: It should be noted that TMT is still in the experimental stages of reefer operations. It averages only 2.5 trailers per sailing. We are still making adjustments in the equipment and the operating procedures and it must, therefore, be recognized that these are in the nature of interim costs.

[2] Southbound cube in trailers represented 56.21 percent total in year 1967.

[3] Trailer maintenance; trailer rental; trailer depreciation.

[4] Mechanics-repair and service-land equipment, tires and tubes, cargo handling, nitrogen, platform and warehouse, railroad and other purchased transportation, drivers-land. Motor carrier revenue of $58,978.84 and cargo handling revenue $82,351.73 are offset against above items.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–65

BALLMILL LUMBER & SALES CORP.

v.

PORT OF NEW YORK AUTHORITY, ET AL.

Decided August 14, 1968

SUPPLEMENTAL REPORT ON RECONSIDERATION

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

This proceeding was instituted by a complaint filed by Ballmill Lumber & Sales Corp. (Ballmill) against the Port of New York Authority (Port Authority), Weyerhaeuser Co. (Weyerhaeuser), Atlantic Terminals Inc. (Atlantic), and Maher Lumber Terminal Corp. (Maher). The complaint charged violations of sections 16 and 17 of the Shipping Act, 1916, and requested reparation.

The Commission decision in this proceeding was served April 26, 1968. (*11 FMC 494*) We now have before us a petition for reconsideration filed by Maher. Ballmill has submitted a reply to Maher's petition.

In our report in this proceeding we found that the Port Authority has violated sections 16 First and 17 of the Act in connection with its leasing arrangements at Port Newark with Weyerhaeuser and Ballmill (both wholesale dealers of lumber). We found that Weyerhaeuser had been preferred and that Ballmill and other lumber dealer lessees at Port Newark had been prejudiced as a result of the leasing arrangements.

The facts surrounding the preferential leasing arrangements are as follows.

When the Port Authority took over the administration of Port Newark in 1948, it made the decision that no new lease would issue which gave the lessee the privilege of performing the backhandling of lumber.[1] All lessees were to use the services of the Port Authority, its agent, or designated independent contractor (Maher). The lease negotiated by Ballmill required Ballmill to use Maher for all backhandling of lumber.

However, when Weyerhaeuser negotiated a new lease with the Port Authority in 1953, it was successful in retaining the right to backhandle its own lumber. Weyerhaeuser, pursuant to its earlier lease, had been operating a public terminal at Port Newark through its wholly-owned subsidiary, Atlantic. Atlantic not only performed terminal services for its parent, Weyerhaeuser, but for other receivers of lumber and for water carriers. Under its renewed lease in 1953, Weyerhaeuser retained the right to operate its public terminal through Atlantic. No other tenant or lessee of the Port Authority was successful in acquiring a similar lease provision.

We concluded that these leasing arrangements gave Weyerhaeuser an unreasonable preference over other lessees inasmuch as Weyerhaeuser was permitted to perform its own backhandling and to operate a public terminal while all other lessees were required to use the backhandling services of Maher, the Port Authority's independent contractor.

Upon finding the above-described violations, we ordered the Port Authority to cease and desist from engaging in the violations and to notify the Commission within 30 days of the manner in which it is complying with the Commission decision.

On May 24, 1968, the Port Authority advised the Secretary of the Commission that it was authorizing Ballmill to do otherwise than to employ Maher for the backhandling and other handling of lumber at Port Newark. The Port Authority further advised that as soon as the necessary administrative authority can be secured, they were willing to amend the lease with Ballmill so that section 3 thereof, which sets forth Ballmill's "Rights of Use," will not prevent the operation by Ballmill on its premises of a public lumber terminal.

In other words, the Port Authority proposed to remove the unreasonable preference to Weyerhaeuser by offering a similar preference to Ballmill.

Upon learning of the Port Authority's proposed method of compliance with our order in this docket, Maher filed a petition for reconsideration and for modification of the Commission's report served April 26, 1968.

[1] Backhandling is the delivery of lumber from ship's tackle to a place of rest on the tenant's premises or to a place of rest on the public terminal in the case of nontenants or of those tenants using the public terminal.

Maher suggests that the Port Authority's proposed method of removing the preference to Weyerhaeuser does not dispose of the matter. Maher feels that the problem cannot be solved by extending a similar preference to Ballmill, but rather that it can only be solved by removing from Weyerhaeuser the right to backhandle its own lumber and to operate a public terminal. Maher argues that if giving Weyerhaeuser the right to perform their own backhandling preferred Weyerhaeuser over other tenants, it similarly preferred Weyehaeuser over *all* users of the port. To give Ballmill the right to perform its own backhandling would not remove the preference but would merely compound it, inasmuch as all other receivers of lumber at Port Newark are still denied the right to pick up their own lumber until it has been backhandled to the transit area.

Maher states that it is impractical to allow every lumber receiver to pick up his own lumber at ship's tackle since to do so would result in delay and congestion and, therefore, it is no solution to offer the privilege to all. Rather, Maher suggests that the Port Authority terminate the special privileges accorded to Weyerhaeuser. This would remove all preference and prejudice.

Ballmill states in its reply that it has no objection to the petition for reconsideration insofar as it urges the Commission to withdraw the privileges granted Weyerhaeuser to operate a public terminal and to backhandle lumber.

Ballmill suggests that the Port Authority's offer to give Ballmill the right to operate a public terminal on its premises is an inconsistent and illusory offer and does not remove the undue advantage to Weyerhaeuser. Ballmill points out that while its facilities are right next door to Weyerhaeuser-Atlantic, the berths of Weyerhaeuser-Atlantic continue to be unavailable for use by Ballmill. Ballmill suggests that without a new reasonably comparable long-term lease, without reasonably similar compactness of facilities, without reasonably comparable adjacent berth facilities, and without adequate adjacent transit areas, it is simply a meaningless gesture to tell Ballmill that they can have the same rights as Weyerhaeuser by backhandling their own lumber and operating a public terminal on their premises.

We are not asked upon reconsideration to change our conclusion that the Port Authority has unduly preferred Weyerhaeuser over Ballmill and other lumber dealers in respect to its leasing arrangements at Port Newark. We are only concerned here with how the Port Authority might best remove such preference.

We do not suggest that this preference can only be removed by denying Weyerhaeuser the above-mentioned privileges. As we previously indicated, we wish to permit the Port Authority to determine how they would remove the illegal preference. We will, however, provide a framework within which the Port Authority can make its decision.

The Port Authority could choose to remove the privileges from Weyerhaeuser and thereby remove the preference. However, should the Port Authority decide to continue to afford the privilege to Weyerhaeuser, there remains the alternative of affording a similar privilege to Ballmill and others similarly situated. The Port Authority may say that it has already indicated to Ballmill that it too can have the priviliges of backhandling and operating a public terminal on its premises. However, we think Ballmill's objection to the Port Authority's offer is valid inasmuch as the Port Authority's offer is illusory. Ballmill cannot practically operate a public terminal on its present premises inasmuch as it does not have the use of berth facilities or transit areas. Therefore, we feel that if the Port Authority chooses to remove the preference by affording Ballmill the same privileges as Weyerhaeuser, the Port Authority is required to do more than to permit Ballmill to perform such services under the confines of its present leasehold. The Port Authority must place Ballmill in a position comparable to Weyerhaeuser in respect to the operation of a public lumber terminal and the backhandling of lumber.

We are still faced wth Maher's objection that to afford Ballmill such privileges merely compounds the preference inasmuch as other lumber dealers at Port Newark are still denied the privileges.

Space restrictions and the problems of delay and congestion which would ensue do not make it feasible to permit all lumber dealers to pick up their lumber at the Port Newark terminals. Therefore, we do not think it is unreasonable for the Port Authority to prohibit nontenants from performing their own backhandling. Similarly, it is not unreasonable for the Port Authority to restrict the privilege of backhandling of lumber by lessees to their own premises. In other words, if Ballmill is allowed to operate a terminal, it could not backhandle from Weyerhaeuser's terminal or vice versa. By the same token, nontenants could not expect to go to Ballmill's, Weyerhaeuser's, or Maher's terminals and perform their own backhandling.

In our April 26, 1968, report we also fund that the portion of Maher's lumber handling tariff which provided a volume discount for the handling of lumber at Port Newark subjected Ballmill to undue and unreasonable disadvantage in violation of section 16 First and to be an unreasonable practice under section 17 of the Act. This disadvantage to Ballmill was found to result from the fact that the volume discount on backhandling was not available to Ballmill. This came about by reason of the fact that the discount rate provision applied only to the complete package of truck loading, wharfage, and backhandling. Since Ballmill performed its own truck loading and used its own premises for storage, it did not qualify for the discount. Accordingly, Ballmill received no discount on the single service of backhandling, and this was considered to prejudice Ballmill in its efforts to compete for business. Maher was ordered to cease its violations and to modify its tariff provisions accordingly.

In its petition for reconsideration, Maher has suggested that if the present order in this proceeding remains unchanged, there will be no need for Maher to provide public backhandling to leased areas. They requested that the order as to Maher be modified to permit them to discontinue the publication of backhandling rates to leased areas, but instead to contract privately for such services while continuing in force their present structure, including volume discounts, in respect to the public lumber terminal.

We could not approve Maher's proposal to contract privately for any such services to leased areas. We have previously held that to the extent a terminal operator holds itself out to perform a particular service, it must publish a tariff describing the charges for such service to insure equal treatment of all users of the service. *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, 517 (1966).

However, if the development of circumstances causes Maher to completely discontinue backhandling services to leased areas, there would be no prohibtion against Maher discontinuing the publication of backhandling rates to such areas while continuing in force their present structure, including volume discounts, in respect to the public lumber terminal.

Therefore, it is ordered, That respondent Port of New York Authority is hereby required within 30 days after the date of service of this order to notify the Commission of the manner in which it is complying with our decision and order in this proceeding.

It is further ordered, That the date within which Maher Lumber Terminal Corp. must comply with our decision and order in this proceeding is hereby set for 2 weeks subsequent to the date on which respondent Port of New York Authority complies.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–45

INVESTIGATION OF OCEAN RATE STRUCTURES IN THE TRADE BETWEEN UNITED STATES NORTH ATLANTIC PORTS AND PORTS IN THE UNITED KINGDOM AND EIRE—NORTH ATLANTIC UNITED KINGDOM FREIGHT CONFERENCE, AGREEMENT 7100, AND NORTH ATLANTIC WESTBOUND FREIGHT ASSOCIATION, AGREEMENT 5850

Decided August 14, 1968

The North Atlantic United Kingdom Conference (NAUK) has established rates on General Cargo N.O.S., Egg Albumen, Meat Offal, Onions, Plastic Sheeting, Sleds, and Toys, which are so unreasonably high as to be detrimental to the commerce of the United States contrary to section 18(b)(5) of the Shipping Act, 1916.

Section 18(b)(5) contains two elements: (1) Is the rate unreasonably high or low, and (2) has the unreasonableness of the rate caused detriment to commerce?

An unreasonable rate is one which does not conform to the ratemaking factors of cost, value of service, or other transportation conditions; or a rate which cannot be justified by one or more of these factors.

An adverse party may show prima facie unreasonableness by reference to a lower rate on a similar commodity which moves in a reciprocal or competitive trade.

A rate which is detrimental to commerce is one which causes some economic harm to a segment of our commerce.

Certain rates of NAUK shall be disapproved to be effective 90 days from the date of the order herein. Prior to that time NAUK shall file lower rates on these items, with a justification of the level of the new rate based upon cost, value of service, or other transportation conditions.

Burton H. White, *Elliot B. Nixon*, and *Elkan Turk, Jr.*, for respondent North Atlantic United Kingdom Freight Conference.

Ronald A. Capone and *Robert Henri Binder* for respondent North Atlantic Westbound Freight Association.

Peter J. Connell for Treasury Department.

Phillip F. Zeidman, *Eugene J. Davidson*, *Robert B. Webber*, and *George I. Kaplan* for Small Business Administration.

Donald J. Brunner, *Norman D. Kline*, and *E. Duncan Hamner, Jr.*, Hearing Counsel.

REPORT

BY THE COMMISSION: (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

INTRODUCTION

The Commission instituted this proceeding on December 9, 1965, under sections 15, 18(b)(5), and 22 of the Shipping Act, 1916, and section 212(e) of the Merchant Marine Act, 1936, to investigate the ocean freight rates in the outbound and inbound trades between the United States and the United Kingdom. Examiner E. Robert Seaver served an Initial Decision on January 31, 1968. The Commission heard oral argument on May 17, 1968.

The order of investigation and hearing named as respondents: (1) the North Atlantic United Kingdom Freight Conference (NAUK) and its member lines, who establish the conference rates and file tariffs applicable to the eastbound (outbound) cargo; and (2) the North Atlantic Westbound Freight Association (NAWFA) and its member lines, covering the westbound (inbound) cargo.

The Commission's purpose in this proceeding is, primarily, to investigate the following questions:

1. Is the outbound tariff rate structure, or any individual outbound commodity rate, effectively higher than the inbound rate structure or any individual reciprocal inbound commodity rates?

2. If such disparities exist, are they detrimental to the commerce of the United States, contrary to the public interest, or otherwise in violation of the Shipping Act; and, if so, should the conference agreements be modified or disapproved under section 15 of the Shipping Act?

3. Are any outbound individual commodity rates so unreasonably high as to be detrimental to the commerce of the United States within the meaning of section 18(b)(5) of the Shipping Act and, if so, should the Commission disapprove such rates? Are any specific rates in these trades detrimental to the commerce of the United States, contrary to the public interest, or otherwise in violation of the Act?

4. Are any of respondents' rates unjustly prejudicial to exporters of the United States as compared with their foreign competitors, in violation of section 17 of the Act, or do they give undue preferences in violation of section 16. First?

5. If there is any discrimination caused by rate disparities in these trades, what recommendations should the Commission make to Con-

gress in carrying out the Commission's responsibilities under section 212(e), Merchant Marine Act?

FACTS

The Conferences

NAUK serves the trade outbound from the North Atlantic ports on the United States East Coast to the ports in the United Kingdom. NAWFA vessels serve the trade from the ports in the United Kingdom to both the North Atlantic and South Atlantic ports on the United States East Coast.[1] Some of the conference members offer express-type service between the large ports of New York, Liverpool, and London. Others call at the smaller ports in the United Kingdom such as Glasgow and Manchester and at Baltimore, Philadelphia, and Norfolk in the United States. Still other lines customarily serve both types of ports.

Both conferences were formed after the serious financial difficulties experienced by ocean carriers in 1907. Thus, these conferences are among the world's oldest and most stable conferences. Their members are for the most part very old, well-established steamship lines.[2]

NAUK member lines carry 98 percent of the eastbound liner cargo. This conference operates under a dual rate contract system and it has some 8,000 dual rate shippers signed to exclusive patronage contracts. Practically all of the eastbound cargo is carried at contract rates, which are 15 percent lower than noncontract rates in these trades.

NAWFA has approximately 7,000 contract shippers under its dual rate contract system and the members carry 94 percent of the westbound liner cargo. About 5,100 of the contract shippers are located in the United Kingdom, and some 1,800 in the United States. There are also 203 signers to a special wine and spirits contract. The NAWFA tariff expresses rates in terms of British currency.

Both conferences have the unanimous voting rule in their conference agreements; i.e., if one member opposes any proposal brought before the conference, the proposal is not adopted.

In both conferences, proposed changes in the rates and all normal questions pertaining to rates are taken up by a special group made up of one member from each steamship line. These groups meet about once a week. The rate groups take many factors into account, in a vague, general, and undocumented way, in adopting or revising their rates. They do not go over these factors item by item as they consider a

[1] Eight of the ten NAUK members are also members of NAWFA. There are six members of NAWFA, out of a total of fifteen, that are not members of NAUK. Both conferences are made up of British flag carriers, U.S. flag carriers, and third flag carriers.

[2] For example, Cunard Line has been in this trade for 160 years.

particular rate request or proposal, but the members of the ratemaking bodies are expert in the field and, in casting the vote on behalf of their company, they take some account of some of these factors.

Ratemaking factors are divided into three overall considerations: competition, value of service, and cost of service. The conferences assign overriding importance to competition and the value of service. By the term "value of service", the conferences means more than anything else the value of the commodity being shipped.

One factor alleged never to be considered by either conference in arriving at a rate is the rate on similar commodities moving in the opposite direction. The NAWFA conference chairman confirmed the fact that the conferences give no consideration to the rate in the opposite direction when they are considering a proposed rate change. For some time the present NAWFA chairman was an official of the Cunard Line and represented Cunard in the rate committee for NAWFA. When asked whether he conferred with the Cunard man on the rate committee in the NAUK conference, he stated that he never heard from their man in New York, except that, "We used to exchange Christmas cards."

In both conferences, the shippers desiring to take up rate matters are permitted to meet with the conference committee, but they normally present their applications for rate adjustments on a form, prescribed by the conference, which calls for various pertinent information relating to the cargo.

In the application for rate modification, NAUK obtains the name and description of the commodity, whether it is hazardous, the nature, size, and weight of each package, the value and duty, the point of origin and discharge, the present rate and requested rate, and the anticipated volume of movement, the competitive commodities including price, and reasons for the requested modification. The conference staff then prepares an analysis of the application, containing substantially this same information, for the use of the rate committee. The analysis includes information of rates from competitive sources of supply. In voting on a rate request or proposal, the member representatives do not state their reasons or the standards considered, and the conference does not record in its minutes the reasons for the action, the standards employed, or notify the applicant of the reasons or standards if the request is denied. Neither conference publishes the standards or criteria that are taken into account in establishing rates.

The NAUK group of rate representatives of the member lines calls regular and rather frequent meetings with large shippers. The meetings may continue for a day or more, and the mutual problems are thrashed out at length. These important shippers are able to exert substantially more economic pressure in obtaining the rates they desire than small shippers. Both conferences deal with shipper groups such as the tobacco industry, the copper industry, and the apple industry. In 1966, NAUK received 174 requests for rate adjustments from shippers and took favorable action on 140. NAWFA, in 1965, received 165 requests from shippers for a reduction in rates and took favorable action on 87 requests, well over 50 percent. The conferences are capable of acting upon rate requests in a matter of hours, although normally the requests are acted upon within a few days' time.

The present ratemaking practices in NAUK, which go back for 75 years, have as their goal a yield of maximum profit to the carrier. They seek to charge the highest rate on any particular commodity under which the cargo will move. They freely concede that they charge "what the traffic will bear." It is equally evident that the shipper who is vociferous and persistent in pressing rate requests to the conference is more likely to get a better rate than the shipper who does not approach the conference. As stated earlier, the big shipper with greater economic leverage gets better treatment than the occasional shipper of cargo.

Thus, NAUK has established relatively favorable rates on heavy moving commodities and has kept the rates on the items that move in small gross volume near and, in some instances, above the high general cargo rate of $70.75. A considerable concentration of rates on the heavy moving items is found at the lower end of the rate scale. Seventy-eight of the 116 rates on the heavy movers fall below $40 per ton.

Until 1965, the staff of the NAUK conference had no information regarding the volume of shipment of the various cargoes listed in the tariff. However, since 1965, the member lines provide copies of the manifests to the conference office and from these cargo statistics are maintained. Such statistics are not submitted to the staff of the NAWFA conference. The members are "very secretive" about their carryings, according to the chairman.

In both conferences, general increases in rates are subject to entirely different practices and are the result of entirely different considerations than those applicable to changes in individual commodity rates. They stem from a comparison of overall revenue and overall costs. They can and do result from either normal, gradual increases in carrier costs, or some special circumstances that suddenly increase costs such as increased stevedoring charges.

A comparison of the general increases of the two conferences shows that through 1965, the westbound conference was increasing the level of its overall rate structure at a greater rate of increase than the eastbound conference. Then in 1967, the inbound conference adopted three general rate increases which total 22 percent, or slightly more considering that the last two percentage increases must be applied to the rates as increased by the earlier 1967 increases. The record herein takes into account the January 1, 1967 increase but, of course, does not take into account the later six percent and eight percent increases which were made after the record was closed.

There are some special factors that tend to keep the NAWFA rates down: the existence of very active trade associations in the United Kingdom that negotiate with the conference, competition from manufacturers on the Continent, ability of shippers to transship via Continental ports (the rates from the Continent to the United States being lower than those from the United Kingdom), nonconference competition from the United Kingdom and the Continent, conference competition from the Continent, and carriers destined for the United States Great Lakes and Gulf ports with cargo destined to midwest points. NAWFA gives consideration to rate requests by individual shippers in generally the same way that NAUK does, as described above. Shippers in the United Kingdom who are discontented with the conference rates can take the matter up with the Board of Trade of the British Government. While the Board of Trade does not have jurisdiction to fix rates, it can and does, on rare occasion, take the matter up with the conference.

The Characteristics of the United States/United Kingdom Trades

The economies of the United States and the United Kingdom depend very heavily upon one another as trading partners. In 1964, imports from the United Kingdom constituted nine percent of our total imports and imports into the United Kingdom from the United States accounted for 12 percent of the United Kingdom total. Exports from the United States to the United Kingdom were $1,565,000,000 in 1965, and imports from the United Kingdom to the United States in that year were $1,405,300,000.

United States exports to the United Kingdom have risen steadily since 1950, and the balance of trade has been favorable to the United States each year.

The census figures for 1965 show that 600,000 long tons of commercial liner cargo were transported in ocean commerce outbound and 567,000 tons inbound. When the bulk-type cargoes are eliminated from these statistics, the tonnage carried by the conference vessels is slightly higher inbound than outbound.

The commodities transported by the conferences in 1963 had an aggregate value just under half a billion dollars outbound and a little over half a billion dollars inbound. In that year the inbound conference carried a total of 1,131,461 measurement tons and 518,663 weight tons of cargo. The outbound conference carried 697,272 measurement tons and 327,388 weight tons of general cargo, and 239,541 measurement tons and 191,632 weight tons of bulk cargo. The aggregate revenue of the conference carriers inbound in 1963 was $26,240,981. The total outbound revenues of the conference carriers on general cargo in that year was $19,721,179, and on bulk cargo $1,345,668. These figures have risen steadily with the result that in 1966 the inbound conference carriers earned aggregate revenues of nearly $40,000,000, and the outbound conference carriers nearly $34,000,000 on general cargoes.[3]

In the ensuing years since 1963, the inbound tonnage has remained about the same while the outbound tonnage has increased substantially. In 1966, the outbound conference carriers transported 1,206,481 measurement tons and 519,602 weight tons of general cargo.

The nature of the general cargo moving in these trades is such that they are known as "measurement" trades. That is, the great majority of the commodities shipped measure up to far more than 40 cubic feet per ton of weight. The average long ton of cargo in the eastbound trade is estimated at 80 cubic feet and in the westbound trade, 90 cubic feet.

The conference carriers offer fast and frequent service in both directions. The outbound conference vessels made 383 sailings in 1966, and the inbound conference vessels made 411 sailings in that year.

None of the shippers who testified had any complaints on this score and, in fact, most of them expressed complete satisfaction with the service. For many years, there has been an unusual degree of stability in the rates and the service of the conference carriers in both directions. This stability is very important to shippers because of their need to quote and offer prices, including the cost of transportation, for considerable periods in advance of the actual shipment. Thus, there is an average of more than one inbound and one outbound sailing per day the year round. While this frequency of sailings is probably convenient for shippers at times, it results in an extreme overtonnaging of these trades.

The outbound conference vessels have sailed with an average unused capacity of 60 percent in the past six years, and the inbound conference

[3] The above figures for the inbound conference do not include bulk cargo either because none was carried or the quantity was insignificant. The figures for military cargo are not included in the outbound statistics for the reason, as pointed out by the principal expert witness for respondents, that the conference does not establish the rates on such cargo. For the same reason, the inbound carryings to the South Atlantic ports are excluded from the comparisons because the outbound conference covers only the North Atlantic ports.

vessels have sailed with an average of 66 percent unused capacity. The only expert witness who spoke of a comparison in this regard testified that this is the greatest unused capacity that he has ever found in any trade.

Another significant characteristic of the trades, particularly the outbound trade, is the predominance of a few major moving commodities. There were some 1,650 items in the outbound tariff in 1965. Three quarters of the tonnage carried by the NAUK vessels that year was transported under just 116 of these tariff rates. The heaviest moving commodities outbound are industrial machinery, unmanufactured tobacco, copper, apples and pears, barrels, road building equipment, books, onions, fabrics, synthetic resin, and frozen meat products. Inbound the quantity of whiskey exceeds by far that of any other item moving in the trade, both in terms of tonnage and revenue. Then come electrical machinery, wool, confectionery items, motor cars, record changers, tractors, and steel wire. Sometimes commodities of the same description move in both directions.

Competition in these Trades

Nonconference competition in these trades is very limited in terms of the extent of carryings of the lines that compete with the respondent conference carriers. In 1966, the nonconference share of liner cargo was only two percent outbound and six percent inbound. This absence of competition is due in part to the frequency and the quality of the conference service, which is unexcelled, and because the conferences employ the dual rate exclusive patronage contract system under section 14b of the Shipping Act. However, there is potential competition in these trades, both from liner and tramp operators, and the conferences are very sensitive to the possibility that an increase in rates, particularly on the heavy moving commodities, or a decrease in the frequency of their service, could permit competition to make inroads in these trades.

The eastbound conference keeps the rates low on major moving commodities in the fear that otherwise the shippers of, say, tobacco might either use tramp operators or go to proprietary operations. While there is a heavy movement of bulk-type commodities eastbound, various difficulties incident to the transport of liner-type cargoes by tramp carriers limited the amount of general cargo carried by tramps to less than 26,000 tons outbound, and about 87,000 tons inbound in 1963. Equivalent figures were not shown for other years. The amount of bulk cargo moving inbound in the aggregate is insignificant for purposes of this proceeding.

Five nonconference liner operators offer more or less spasmodic service in these trades: American Export Isbrandtsen Lines (now a conference member), Belgian Car Express Line, Marchessini Lines, States Marine Isthmian Agency, Inc., and Waterman Steamship Corporation. Belgian Car Express Line operates only westbound. Marchessini has roughly one sailing a month from London, Waterman will have three or four sailings a month from Southampton, and States Marine about the same. The Belgian Car Express Line calls only for particular shipments. American Export Isbrandtsen Lines calls irregularly at Southampton and has inaugurated a fortnightly all-container service with two specialized ships.

The respondent conference carriers also see potential competition from the conference and nonconference liner operators offering service from the Bordeaux-Hamburg range on the European continent to the U.S. North Atlantic ports. Some 23 carriers are engaged in this trade which is highly competitive. There is a limited use of these carriers by way of transshipment at continental ports, both in the eastbound and westbound direction, but not in any significant amount. Respondents fear that this competition will increase with the use of through shipments in containers.

Carrier Costs and Revenues

There is no evidence of the valuation of vessels respondent carriers devote to these trades and no data with respect to return on investment.

The overall carrier costs are approximately the same eastbound and westbound in these trades. In a given locale, the rate for stevedoring is the same whether loading or discharging, but a little more cargo can be discharged per hour than loaded; therefore, discharging costs are slightly less per unit of cargo. Stevedoring costs are higher in the United States than in the United Kingdom; thus, the costs of loading and discharging overall would be slightly less westbound. The cost of loading and discharging cargo amounts to approximately 40 percent, on the average, of the total carrier costs.

Comparison of Inbound and Outbound Rate Structures

There are about 2,730 commodities listed in the NAWFA tariff and 1,650 in NAUK. Similar descriptions in the two tariffs are infrequent and coincidental.

The tariffs cannot be compared by merely placing them side by side and thumbing through the 200 or so pages of closely spaced figures. The detailed study and comparison of the inbound and outbound rates and rate structures in these trades made by Daniel H. Mater, Director, Office of Transport Economics, Federal Maritime Commission, and his staff required a period of two years. It was the first time such a complete analysis and comparison of tariffs had been undertaken so, to a degree, Dr. Mater devised techniques for the comparison, although he was guided by recognized statistical principles and methods.

The purpose of Dr. Mater's study was to ascertain whether there was a disparity in rates in the United States/United Kingdom trades and, if so, in what amount. The analysis included three general methods of comparison and charts were prepared to depict the result of each operation. The first method compared the cumulative percentage of rates in the two tariffs within 160 one dollar rate blocks. On a single chart, a curve was plotted for each of the tariffs showing the relationship between the number of rates in each block and the percentage this bears to the total rates in each tariff. Thus, at any point on the respective curves, the percentage of rates below a certain dollar level could be readily ascertained and the two tariffs compared. One such chart was prepared for weight/measurement rates, another for weight rates, and another for all rates in each tariff.[4] The average rate westbound was $38.13, and the average rate eastbound, $54.38. These figures were also described as the arithmetic mean of the tariff rates.[5] The final analysis, after the January 1, 1967 increase in the NAWFA tariff, concluded that the outbound rates were 38 percent higher than the inbound rates.

The inbound tariff contains a much more detailed breakdown of commodity descriptions than the outbound, which accounts for the greater number of rates in the inbound tariff. In order to test the contention that this difference in breakdown distorted the results, Dr. Mater eliminated the diplicate rates with respect to all commodities in both tariffs and found that, on this basis, the disparity was 32 percent.[6]

On September 5, 1967, NAWFA filed a general increase in the inbound rates in the average amount of six percent to become effective December 18, 1967. A general increase of eight percent in the inbound tariff was later filed on December 29, 1967, to be effective January 13, 1968, as a result of the devaluation of the pound sterling on November 18, 1967, from $2.80 to $2.40. The increase was put into effect on

[4] It should be noted that the inbound and outbound tariff generally quote rates on a weight or measurement basis, whichever yields the greater revenue. There is only one rate quoted on a measurement basis; therefore, no measurement rates were compared.

[5] This average is not reached by simply adding all the rates together and dividing by the total number but, instead, each tariff was divided into twenty groups of rates, each representing five percent of the tariff; the mean was then computed for each five percent group and the average then of all of the five percent groups came to thirty-eight percent.

[6] Dr. Mater compared his study with certain actual results which seem to corroborate his price list profiles.

short notice.[7] Taking into account the fact that the devaluation would cause some decrease in payments and the fact that a general rate increase does not produce added revenue in the exact amount of the increase because of "hold downs" resulting from shippers of specific commodities insisting upon and obtaining exemptions from the increase, and based on the expert testimony on these subjects in relation to previous increases, it can fairly be estimated that the two recent NAWFA increases will result in a net increase in rates of at least seven percent. The disparity in the overall rate structures, considered as "price lists", has been narrowed to approximately 25 percent with these recent rate changes.

Rate Disparities Favoring High-Volume Commodities

The NAUK freight rates on commodities moving in large volume are low compared to the rates on commodities moving in small volume or on "paper rates", the rates under which no traffic moves at present. The ratemaking history and the rate statistics of the conference demonstrate that if a shipper has a big block of cargo that will move steadily in the trade, he can negotiate a much better rate with the conference than the sporadic shipper or the shipper of a small volume of cargo.

The total revenue, weight tons carried, and average revenue per weight ton for the 25 major moving commodities for each of the conferences establish that the average revenue per weight ton on those in the outbound conference was $29.36 while the average revenue per weight ton on those in the inbound conference was $63.20.[8]

The principal expert witness of the outbound conference testified that, "NAUK tends to set low rates for heavy-moving commodities while maintaining rates higher on nonmoving or lightly moving items." He contested the statement of Dr. Mater that every item in the tariff was just as important as every other rate and pointed out that tobacco, for example, is carried at a rate which would be equivalent to $10 per ton W/M.[9] This commodity accounted for 20,622 tons outbound in 1965. The witness said that the loss of this cargo would be a severe disadvantage to the conference carriers and that the tobacco industry, therefore, has a strong bargaining position since they could charter vessels or use nonconference carriers if the conference rates were too high. On the other hand, he said, the rate on fire extinguishers, of which five weight tons were shipped outbound in 1965, is $88 per ton and, therefore, in his judgment, no one could "seriously claim

[7] The devaluation would, without a rate change, decrease the amount paid by shippers in the inbound trade.

[8] In the inbound conference, there is not the same rate disparity between the low-moving and the heavy-moving items. The policy in the inbound conferences is to treat both categories of cargo the same.

[9] This rate has been increased since the time his study was made.

that they had the same importance as tobacco. * * * Tobacco represents well over $1 million in revenue to the shipping lines, fire extinguishers $500." [10]

In 1965, the average revenue per weight ton for NAUK's members on commodities moving eastbound in quantities greater than 500 tons was $45.65 as compared with an overall yield of $60.02, on the average. The rates on small and spasmodic shipments have been maintained at or above the general cargo N.O.S. rate ($70.75) and maintained low for heavy-moving commodities. Of the 116 commodities that moved eastbound in quantities over 500 tons in 1965, 78 had a rate below $40. On the other hand, 296 commodities that moved in small volume had rates above $70.

One of the expert witnesses called by Hearing Counsel made a study of this particular problem and reached the conclusion that the outbound tariff actually consists of two tariffs, one having higher rates for the commodities moving in sparse quantities and the other with low rates charged to the commodities moving in large volume. His analysis of the 116 heaviest movers showed that the average revenue per weight ton outbound was $45.65 in 1965, but the average revenue per weight ton on the remaining 1,385 commodities was $102.96 per weight ton. The overall average, inbound, was $55.85.

A study of the background of the ratemaking practices and activities in the NAUK conference shows how this disparity came about. In practically every year for the last 20 years, the conference has adopted an overall rate increase. In one way or another, most of the heavy-moving commodities have been exempted from these general rate increases each year. This means that year after year, the small-moving or nonmoving commodities are subject to annual increases, resulting in a cumulative buildup of the rate level.

N.O.S. Rates

The general cargo N.O.S. rate in the NAUK tariff is $70.75. The equivalent rate in the NAWFA inbound tariff is $53.70 (447/6) [11] or, if the cargo value is very high, "32/6% ad valorem". Thus, the general cargo rate outbound is approximately 32 percent higher than the reciprocal inbound rate. The outbound N.O.S. rate is at least 30 percent higher than the average rate outbound.

The general cargo rate is fixed without regard to any of the recognized standards that are normally considered in the establishment

[10] The conference witnesses acknowledged that tobacco could undoubtedly "stand a higher rate". The import duty alone is $27,000/ton.

[11] The NAWFA tariff expresses rates in terms of British currency. For example, the term 447/6 denotes 447 shillings and 6 pence. The British pound (£) is equivalent to $2.40 and there are 8/4 or 8.33 shillings to the dollar.

of tariff rates, and it is not the product of any negotiation or bargaining between the shipper and the carrier. This rate bears no relationship to the cost of the service or the value of the service, because it is applicable to a widely varying type of cargo; that is, any cargo for which a specific commodity rate cannot be found in the tariff. The general cargo N.O.S. rate in the outbound tariff is by no means a "paper rate". In 1965, the N.O.S. rate was used in the case of 10.6 percent of the shipments. In a staff study of manifests, these "catch all" rates were found to have applied to over one-half of the 194 outbound shipments. These statistics include both the general cargo N.O.S. rate and the N.O.S. rates for particular commodities. The individual commodity N.O.S. rates are not always the same, but as to many commodities, the N.O.S. rate is $70.75.

The N.O.S. rates make up 10.6 percent in the outbound shipments but only 2 percent in the inbound trade. The NAWFA tariff contains substantially more commodity rates than the NAUK tariff because it breaks down the commodity descriptions into greater detail, and it is for this reason that the NAWFA tariff has fewer items subject to N.O.S. rates. The NAUK conference recently cancelled over 400 inactive rates. This will cause these commodities to take N.O.S. rates if they are shipped.

The high NAUK general cargo N.O.S. rate places the onus on a prospective shipper whose commodity is not listed in the conference tariff to demonstrate that the commodity rate should be lower than the N.O.S. rate. The shipper is usually in an unfavorable position to justify a particular rate, as compared to the conference, because of lack of economic pressure and lack of experience. The expert testimony also demonstrated that it is psychologically forbidding and disturbing for shippers, particularly small shippers, to try to convince a shipping conference that the $70.75 N.O.S. rate should be, say, a $40 commodity rate. Rather than undertake this burden, they often simply decide against exporting the commodity.

The existence of the high N.O.S. rate admittedly causes the rate to be higher on some commodities than it would be if a specific commodity rate were in the tariff. This high N.O.S. rate is inhibiting the movement of cargo. Conference witnesses gave examples of instances involving the rates on lobster and on paper toweling where the high N.O.S. rate was reduced by giving a lower specific commodity rate on these items, which then permitted these commodities to move in the trade, or increased the volume of traffic. The export of sleds was completely prohibited by the application of the high N.O.S. rate, although sleds had previously moved under a lower commodity rate.

Apples and Pears

The outbound rate on apples and pears is $1.05 per box or carton of 2.2 cu. ft.; 95 cents when palletized; or $44.25 N.O.S. which has since been cancelled. The cartons stow at about 50 to the ton and measure 2.2 cubic feet each. The reefer rate is $1.55 per box. The rate on apples in boxes in the inbound tariff is 262/6 per ton W/M, or about $32; the outbound rate being about 37 percent higher. The inbound reefer rate on fruit is 447/6 per ton W/M or just under $54, while the outbound rate comes to $77.50.[12]

Apples and pears are the fourth largest commodity transported by the outbound group in terms of carrier revenue. Apples move in by far the larger quantity, but the rates on the two are the same. The United Kingdom is the most important export market for the American shippers. Out of 6,093,000 cartons of apples exported in 1965, 1,655,000, or 27 percent, went to the United Kingdom. While this is a slight increase over the preceding four years, at one time (1934–38) the United States shipped an average of 4,261,000 cartons per year and, earlier (1926–30), 8,344,000 per year. Now, a lot of the decrease must be attributed to increasing competition from France, Italy, Canada, and Australia. The rate from France to the United Kingdom is 75 cents per carton and from Canada 90 cents, unpalletized. The United States and Canada lost 4,000 tons to France in the first period of the 1966 season. In 1966, our exports of apples to the United Kingdom were down 20 to 25 percent.

Apples have an F.O.B. value of about $3.50, on the average, per bushel or carton. The freight approaches one-third of the value, a comparatively high percentage. The apple exporters testified that they will not be able to continue to export at the present level unless the rate is lowered, that both they and the NAUK carriers will lose revenue if the present rate is maintained.

The shipper requests for reductions have been denied by the outbound conference. There is uncertainty in the record as to the exact extent of the difference between the parties, in dollars, because of a dispute as to the definition concerning palletized fruit.

Automobiles

The outbound rate on unboxed automobiles is $32.50 per ton W/M and inbound it is 105/–, or about $12.65 on the larger cars. It costs about $370 to ship the average car (460 cubic feet) from the United States to the United Kingdom via NAUK carriers. The same car

[12] The eight percent inbound increase, which is pending as this decision is in process of preparation, has been taken into account in this and other comparisons described herein.

can be shipped from the United Kingdom to the United States for just under $100. All cars are shipped unboxed, today.

The British manufacturers exported some 12,000 weight tons of automobiles to the United States in 1965, or about 10,000 vehicles. These exports are increasing. The carriers earned $1,240,924 revenue on these cars. These compete with autos manufactured in the United States and American cars compete in England with cars manufactured there and elsewhere, albeit with little success. Few American cars are exported to Great Britain; in 1965 there were 284. This is due in part to British import duties, the preference of the English for the smaller cars, and other factors. But the high freight rate also contributes to dwindling exports, according to the testimony of the representative of the American Automobile Manufacturer's Association.

Books

The outbound rate at which hardback books are transported is the rate on books, N.O.S., or $70.75 per ton W/M. The outbound rate on paperbacks, including comic magazines, is $58.50 per ton W. The inbound rate on books is based on a scale according to value:

Value up to £ 30/40 cu. ft	223/6 W/M
Value up to £ 60 cu. ft	291/6 W/M
Value over £ 60 cu. ft	372/6 W/M or 32/6% ad valorem

The average rate inbound is about $35.50, about one-half of the outbound books, N.O.S. rate.

Shippers of paperback books and magazines testified at some length in protest against the then $70 per ton rate. They were confident that a reduction in the rate would cause an increase in exports. Thereafter, NAUK reduced the rate to the present $58.50.

Books, as an item of cargo, flow in substantial volume in both directions. The United Kingdom imposes no import duty on books. The United States has a small, troublesome duty of three percent on books. No other nation imposes a tariff on books.

Egg Albumen

Dried egg albumen is a by-product in the manufacture of cake mixes. Two exporters of this commodity testified at the hearing in objection to the rate of the outbound conference. The value of egg albumen is about $1.00 per pound and the NAUK rate is approximately $.0485 per pound, or about five percent of the value. The exporters operate on a profit margin of less than five percent. The principal competition of the American exporters in the British market are exporters from Red China. The competition is so keen that just a few cents difference in price means a loss of the sale. One shipper exports about 700 tons a year to the United Kingdom and another somewhat less than this.

The outbound rate on this commodity was $42.50 per ton W/M at the time of the hearing. NAUK increased this rate to $43.50 per ton W/M, effective January 30, 1968. The inbound rate is 332/– per ton W/M, or approximately $40. There is a large disparity between the outbound rate of the NAUK conference and the rate from North Atlantic ports to the Continent. The rate to Hamburg is 2½ cents per pound. The larger shipper does not like to use the nonconference lines, going to the Continent, and then to England through transshipment, because the bacterial regulations make this difficult. Apparently, egg albumen does not move westward in this trade.

The shipper testified that a lower rate, comparable to that to the Continent, would dramatically increase his sales and that the higher outbound rate, as compared to the rate from a competing source, is impeding the export of this commodity.

Meat Offal

The outbound rate on meat offal is $74 per ton W, and the inbound rate is 348/– per ton W/M, or about $42. This commodity stows at 40 to 60 cubic feet per ton, so the W/M rate translates to something a little under $53 per ton on a weight basis. The rate on this commodity to the United Kingdom from Australia is $54.14 and from New Zealand $63.62. Suppliers from those countries compete with the American exporters to the United Kingdom. These same rates apply to continental European ports from those countries. From South America the rate to the United Kingdom is $54.04 free in and stowed, and from South America to continental European ports the rate is $60 free in and stowed. The rate from North Atlantic ports to European continental ports is $55.75 per long ton. This product goes to Le Havre at $2.60 per 100 pounds on the same vessel that transports the commodity to London for $3.30 per 100, even though the vessel stops first at London.

Very large quantities of meat offal are exported to the United Kingdom each year, but the relatively high outbound rate has prevented sales and a lower rate would increase the exports of this commodity.

The witness on behalf of Armour & Company, a major shipper of this commodity to the United Kingdom, testified as follows:

> In view of strong competition from Australia and New Zealand, meat packers who can produce the same products cheaper than U.S. packers and who also enjoy lower rate of import duties, we solemnly feel that the current ocean freight rates from U.S. ports to the United Kingdom on frozen variety meats should be reduced to the level of the rates to continental ports.
>
> The rates to U.K. are about three quarter cent per pound higher than to the continent and our Sales Department has many times advised that they could

not sell in U.K. as our delivered price was one quarter cent or one half cent per pound higher than buyers were willing to pay. This would indicate if U.K. rates were at the same level as continental rates, our quotations would many times result in sales that we cannot make under existing rates.

The witness for International Packers, Ltd., testified that the rates to the United Kingdom from North Atlantic ports should not exceed the rates to the Continent since the costs of the steamship operators are comparable on a voyage to the United Kingdom as to the Continent. He stated that the rates from competing market areas to the United Kingdom are either the same or slightly lower than the rates on the same meat items from the United States to the Continent. An exhibit attached to the testimony of the witness of Swift and Company, another large exporter of this product, states:

The rates from South America, New Zealand and Australia which are considerably greater distance from North Atlantic ports to United Kingdom clearly indicate the unreasonableness of the present applicable rate of $74 from North Atlantic U.S. ports to the United Kingdom.

Then, in another letter attached to the testimony of this witness, he states:

We can say very definitely that a reduction in the ocean freight rate would increase our tonnage [to U.K.] via North Atlantic ports, inasmuch as this would make us somewhat competitive with other gateways.

In these same communications and in his testimony, this witness, as well as other witnesses, also raised the question of the reasonableness of this conference allowing only a five percent differential on container or trailer shipments, whereas the rate to the Continent includes a differential of 10 percent for containers and trailers.

Onions

The onion is an important commodity in our exports to the United Kingdom; in fact, the United Kingdom is the chief consumer of onions exported from the United States, amounting to 500,000 bags with a value of over $600,000 in 1965. Onions are exported principally from New York State. Their value fluctuates over a rather wide range, but generally the freight rate is about 20 percent of the value. The eastbound rate is presently $39.50 per weight ton, not refrigerated.[13] The outbound rate is 24 percent higher than the inbound rate of 267/- per ton W.

The complaint of the onion exporters was not so much based on the disparity between the outbound and the inbound rate, although this inbound rate does furnish a useful basis of comparison even though

[13] At the time of hearing the rate was $32.50.

onions are not imported from the United Kingdom. The basis of the complaint was the fact that the export rate from American North Atlantic ports is somewhat higher than the rate from Canada, which is the chief competitor of the United States exporters. The rate from Canada to the United Kingdom is $27 from Montreal and Quebec and $31 from Toronto. The Canadians also have the benefit of paying the freight in Canadian dollars that have a value of 93 cents, American.

Plastic Sheeting

The Walsen Consolidated Mercantile Company exports to the United Kingdom two grades of plastic sheeting of the type used for furniture upholstering. One is a mylar vinyl laminate of high quality and a value of 90 cents per yard, while the other not reinforced with fabric, is a plain vinyl having a value of 22 cents per yard. NAUK has a single freight rate on plastic sheeting of $59.75 per ton W/M. This comes to 20 percent of the value of the cheaper material. The NAWFA tariff has a sliding scale for the rate on plastic sheeting based on the value of the various grades. The inbound rate on the plain vinyl having a value such as that shipped by Walsen is $33 per ton W/M. Walsen established that this rate is seriously inhibiting the export of this material. In order for this commodity to compete in the United Kingdom market, the lower valued vinyl must have a lower rate than those that have higher values.

Rags

J. Eisenbar and Son exports approximately one and one-half million dollars worth of rags to the United Kingdom each year. These are used in the manufacture of bank note paper. The outbound rate on these rags at the time of the hearing was $32.50 per ton W, and it has subsequently been increased to $35.50. The inbound rate is $23.70, as found in the NAWFA tariff under "Cotton waste." Mr. Eisenbar testified that his company imports annually from the United Kingdom several hundred tons of linen rags which are different from those which his firm exports. The linen rags cannot be used for the making of currency and are not compressed by the same means. Thus, from the point of view of value, stowage factors, and use, the two products are dissimilar. We conclude that no disparity should be found between the two products because of this dissimilarity.

Sleds

The S. L. Allen Company of Philadelphia lost a number of sales of its Flexible Flyer sleds in 1966 because the NAUK conference deleted from its tariff the rate of $32.50, which, due to confusion within the conference ranks, caused the N.O.S. rate of $70.75 to be applied. While the conference chairman testified that he intended that the rate on "toys", $35.50, apply when he eliminated the "sled" rate, this actually didn't happen. One of the conference carriers quoted the $70.75 as the new rate.

Toys

The manufacturers of Ideal, Structo, Gilbert, Playschool, and other well-known toys testified at the request of Hearing Counsel. The American importer of the Matchbox line of toys from United Kingdom testified at the request of NAWFA.

The outbound rate at which most toys move is $35.50 per ton W/M. This averages about 33⅓ percent of the value of the toys. The rate from Canada to United Kingdom is $20 and this disparity has lost American exporters business in the British market. It has also resulted in American firms licensing the manufacture of their designs in Canada for export to the United Kingdom. Market research conducted by the Playschool people resulted in their concluding that the freight rate tc the United Kingdom was prohibitive. Another manufacturer testified that he could get a foothold in the United Kingdom if the rate were the same as that from Canada.

The NAWFA rate on the toys that exceed £200 in value per freight ton is 273/–, or about $32.40, when the 1/13/68 increase of 8 percent is added. The United States toy manufacturers export about $3,000,00(of a total of $1 billion manufactured each year. British toy manufactur ers export about 60 percent of the toys they make.

It is true, as respondents state, that other factors such as British im port duty, high mark-up in their stores, the 10 percent British sur charge on imports, and other factors make it difficult for the Americar toy exporter to compete. Our costs are no higher than those in Canada however, except for the Commonwealth preference in import duties Yet, the Canadians successfully export American toys and some of ou exporters ship out of Canada.

Other Commodities

In addition to the foregoing commodities, the record contains evi dence of the impact of rates upon the movement of the other descrip tions of cargo. For instance, aquariums formerly moved under th general cargo N.O.S. rate of $70.75, and this high rate was inhibitin sales and exports. A shipper sought a reduction to $35.50, but the con ference granted a smaller decrease. Citing an inability to meet U.K and Japanese competition, the shipper returned to the conference agai for a rate of $35.50 in August 1966. The conference granted this re quest, and the shipper's exports increased three-fold.

Another product, hog bristles, moves eastbound at the noncontract rate of $2.65 per cubic foot. The westbound rate was $2.37 per cubic foot. Hog bristles are shipped in both directions from time to time. Exporters in this country experienced heavy competition in the U.K. on hog bristles exported from Red China. However, the freight rate does not appear to be impeding the flow of eastbound hog bristles because Meyer Line, a nonconference carrier to the Continent, has a rate of $1.65 per cubic foot, including transshipment to the U.K. The shipper who testified uses this nonconference rate.

The record contains data with respect to the export of scrap rubber (tire buffings) to the U.K. Prior to June 1966, a large amount of rubber buffings moved through North Atlantic ports to the U.K. This amount gradually decreased in proportion to the increase in NAUK rates. However, while the rate has had an economic impact upon export of rubber buffings, the NAUK rate is still lower than the NAUK rate on ordinary scrap rubber. It is lower than a comparable NAWFA rate, and it has not been shown that it is higher than a rate from a competing source. Thus, there is no disparity in rates. The record also contains some indication that shippers claimed that the NAUK rates impeded exports. These include balloons, candy, copper, zinc, lead, tires, hospital equipment, and construction machinery. The record does not show in what manner shippers of these commodities have been disadvantaged by the NAUK level of rates. The outbound rates on nuts and lobsters were reduced to satisfactory levels during the pendency of this proceeding.

The only inbound rate that came under attack was the rate on lead, but NAWFA has now reduced that rate and it is no longer being protested.

Discussion

The Examiner made appropriate findings under section 18(b)(5) as directed in the Order of Investigation. Generally, he found that the overall conference rate structure in the outbound North Atlantic trade was not so much higher than the conference rate structure in the reciprocal trade, or the inbound so low, that these rate structures can be found to violate any provision of the Shipping Act.

The Examiner, however, noted generally that lowering the freight rate will cause more cargo to move, everything else being equal. This being so, the Examiner found that relatively high rates on low moving or nonmoving commodities in the outbound tariff are inhibiting the movement of goods in this export trade. This, he found to be contrary to section 18(b)(5) under the test of the *Iron and Steel* decision,[14]

[14] *Iron and Steel Rates, Export-Import,* 9 F.M.C. 180 (1965).

because a disparity was shown to exist on low moving and nonmoving commodities and this disparity has inhibited the movement of traffic outbound. Consequently, it became the duty of the carriers to explain or justify that such higher rates were reasonable. This respondents failed to do. Therefore, the Examiner required that the outbound rates on commodities that moved in a volume of less than 100 tons during the year 1965, at a rate in excess of $55 per ton W/M, shall be reduced to that figure because any rates in excess of this figure are contrary to section 18(b)(5).

Next, the Examiner considered the N.O.S. rates in the outbound tariff. The Examiner found that the high NAUK N.O.S. rate places an undue burden upon shippers. He then stated that " * * * if the N.O.S. rate were in an amount approximately equal to the average rate in the entire tariff, the instances of this inequitable burden being placed on the shipper would decrease substantially." Therefore, the Examiner found that some of the N.O.S. rates were contrary to section 18(b)(5). He ordered that these N.O.S. rates be disapproved and that NAUK promulgate new rates not to exceed $55 W/M.

Finally, the Examiner found that the rates on certain specific commodities, including Apples and Pears, Automobiles, Books, Egg Albumen, Meat Offal, Onions, Plastic Sheeting, Rags, Sleds, and Toys, were contrary to section 18(b)(5). The Examiner disapproved the outbound rates on these commodities and directed that such rates be lowered to a level comparable with the rates in a reciprocal or competitive trade.

Both conferences begin their discussions with certain warnings, caveats, and complaints concerning the trial and development of the proceeding. These reflections set the mood of respondents' exceptions. For instance, both respondents claim that their rates were not successfully attacked by any party or a witness, shipper, economist, statistician, or otherwise.

Secondly, respondents emphasize that shippers generally see no merit whatever in a comparison of eastbound and westbound rates between the United States and the United Kingdom. As NAWFA says, "despite the extensive efforts of the Commission's investigative staff to obtain shipper testimony, the overwhelming response was a resounding silence from the shipper community." NAWFA and NAUK thus argue that the scanty reply is strong testimony to the absence of any widespread grievance of the shipping community.[15]

[15] Most of the evidence to this effect was excluded by the presiding examiner, but now under an offer of proof, the Commission has decided that this evidence is immaterial. A finding of a violation of section 18(b)(5) does not depend upon the quantum of shipper vehemence a record contains.

Likewise, this lack of shipper response overshadows the meager sprinkling of adverse shipper testimony.

The respondents also excepted to each adverse finding. We will consider these in conjunction with our discussion of the issues below.

The Examiner, after carefully analyzing the "price profiles" evidence, concluded that the outbound rate structure was not effectively higher than the inbound rate structure. The Examiner noted that there was a 25 percent disparity between the overall rate structures after the most recent rate increases of NAWFA. However, considering the aggregate amounts paid by shippers, the Examiner found the disparity to be less significant. As Hearing Counsel conceded:

> It appears to be true that if we concentrate on yield per ton for the major moving commodities outbound (i.e., over 500 tons) compared to yield per ton inbound [overall commodities], there is no higher outbound disparity.

We agree; no effective or significant disparity between the entire rate structures of the two conferences has been proven which is violative of the Shipping Act.[16] This is not to say that Dr. Mater's studies are not probative evidence. Indeed, Dr. Mater's analyses have served as an effective springboard into the examination of rates on low and nonmoving commodities, N.O.S. rates, and specific commodities.

The Examiner next measured certain NAUK rates against the standards of section 18(b)(5). After finding the rates on minor moving commodities, N.O.S. rates, and certain named commodities to be so unreasonably high as to be detrimental to the commerce of the United States contrary to section 18(b)(5), the Examiner ordered these rates reduced to competitive levels. These holdings have prompted a rash of exceptions, general and specific. Most of these exceptions bring into question the very meaning of section 18(b)(5).

We will first consider the meaning of section 18(b)(5), which provides:

> The Commission shall disapprove any rate or charge filed by a common carrier by water in the foreign commerce of the United States or conference of carriers which, after hearing, it finds to be so unreasonably high or low as to be detrimental to the commerce of the United States.

The section contains two elements:

1. Is the rate unreasonably high or low?

2. Has the unreasonableness of the rate caused detriment to commerce? In short, these elements require the definition and application of two words: unreasonable and detriment.

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[16] Compliance with our decision with respect to N.O.S. rates and the rates on certain specific commodities, will further reduce the overall disparity between the two tariffs.

"Unreasonable" is a common regulatory term.[17] In general, an unreasonable rate is one which does not conform to the ratemaking factors of cost, value of service, or other transportation conditions. In other words, an unreasonable rate is one that cannot be justified by one or more of these factors.

In interpreting section 18(b)(5), the Commission has followed this approach. In *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 191–92 (1965), the Commission measured an outbound rate with an inbound rate to see if one was high in relation to the other; i.e., whether one appeared to be unreasonable. Upon an indication that a rate was unreasonably high and after a showing of detriment to commerce, the carrier quoting the higher rate would be required to justify the rate on the basis of bona fide ratemaking factors.

In *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441, 457 (1966), the Commission restated the position as to whether a rate was reasonable with respect to accepted ratemaking factors. In *Investigation of Rates in the Hong Kong—United States Atlantic and Gulf Trade*, Docket 1083, 11 F.M.C. 168, the Commission again followed this approach under section 18(b)(5). The initial step was to determine whether a rate was unreasonable with respect to out-of-pocket costs (an acceptable ratemaking standard).

Respondents argue that the Commission, by using the comparison of rates technique, announced in *Iron and Steel, supra*, has read the "unreasonable" standard out of section 18(b)(5). Respondents cite the legislative history of the provision:

In summarizing Section 18(b)(5) for his colleagues prior to the Senate vote on the bill, Senator Engle paraphrased it as follows:

> * * * The Commission must disapprove any common carrier or conference freight rate so *irrationally* high or low as to be detrimental to our foreign commerce. (*Index to Legislative History of the Steamship Conference/Dual Rate Law*, 87th Cong., 2d Sess. (1962)).

The late Senator Kefauver also gave guidance for the application of Section 18(b)(5), when he said in an exchange with Senator Engle:

> * * * If the [rates] are so *exorbitantly* high that they are detrimental to the commerce of the United States, the Commission will be authorized to disapprove the rates.
>
> Senator Engle:
>
> But the rates have to be unreasonable to the point they are detrimental to the commerce of the United States.
>
> Senator Kefauver:

[17] It means ordinarily: "a. Not conformable to reason; irrational; also, not governed by reason. b. Immoderate; exorbitant." *Webster's New Collegiate Dictionary*, G. & C. Merriam Co., 1961.

That is what the amendment states.

Senator Engle:

With that understanding, and with that legislative record on the matter, I am perfectly satisfied to accept the amendment. (Legislative History Index at 425–26.)

We accept "irrational" and "exorbitant" as synonyms of "unreasonable". We interpret these excerpts of the legislative history to be explanations of the entire section (i.e., so unreasonably high or low as to be detrimental to the commerce of the United States), not as qualifications of the word "unreasonable".

However, respondents argue that the Examiner never made findings of unreasonableness; he simply found that one rate was higher than another: i.e., "if a rate is *higher*, it will be held to be *unreasonably* high!" We do not interpret the Examiner's initial decision in this manner. The Examiner did make findings with respect to reasonableness of rates. The Examiner first pointed out that rates on particular commodities compared unfavorably with rates in other trades, either reciprocal or competitive. On this comparison, the Examiner noted that such rates appeared to be unreasonable. Following the procedure outlined in *Iron and Steel* and the *Boiler* case, the Examiner then granted the carriers an opportunity to come forward to show that their apparently unreasonable rates were justified by cost, value of service, or other transportation conditions. Unfortunately, respondents chose not to submit such proof even though these facts were solely in the hands of the carriers, and as the Commission has seen here, not readily available to the Commission's staff or other parties.

Both conferences argue that this improperly places the burden of proof upon them. The Examiner followed Commission precedent in which the Commission has further broken down the reasonable standard under section 18(b)(5) to describe the quantum and order of proof required of adversaries. As the Commission said in *Iron and Steel, supra:*

When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rates has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable. All facts pertaining to the reasonableness of the rates are uniquely in the possession of the carriers. Unless so interpreted, section 18(b)(5) becomes a nullity and we will not impute to the Congress the enactment of a meaningless statute. The mere existence of a disparity does not necessarily mean that the higher rate is "detrimental to the commerce of the United States." The Commission would still have the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because the rate is too high. The carrier would be required to justify the level of the rate by showing that the attendant transportation circumstances require that the rate be set at the level. Subjects of justification may include myriad ratemaking factors which might differ between the inbound and outbound rates. These include competition, volume of the movement, stowage, stevedoring costs, and others. 9 F.M.C. at 191–92.

The Commission reiterated this point in the *Boiler* case, *supra.*

There is no evidence of record of the reasonableness of the rates as measured by the excess of revenue over costs of moving the cargo. Thus, the only probative measure of the reasonableness of the rates must be based upon a consideration of rate disparities, either triangular or reciprocal. As we said in *Iron and Steel Rates, Export-Import, supra,* the existence of a disparity, in and of itself, has no conclusive legal significance.

* * * * * * *

Section 18(b)(5) has never been interpreted in the context of triangular disparities. Nevertheless, following the guidance of *Iron and Steel Rates, Export-Import,* we believe triangular disparities should be measured in a similar fashion. Consequently, where a rate disparity is shown between a rate from the United States and a rate from a foreign port to the same destination on similar commodities, and the movement of goods under the higher rate has been impaired, the carrier quoting the rate from the United States should demonstrate the reasonableness of the rate by showing that the transportation conditions in the two trades are not the same in material respects or that the attendant transportation circumstances require that the rate be set at that level. 9 F.M.C. at 457–458.

Most recently, in the *Hong Kong* case, *supra*, the Commission again expressed its reading of section 18(b)(5):

Following these decisions, we will attempt to establish criteria for findings under section 18(b)(5) where one carrier or conference is alleging that the rates of another carrier or conference are so unreasonably low as to be detrimental to the commerce of the United States. The first principle which we will follow is that a rate which fails to meet out-of-pocket costs of the carrier quoting the rate is unreasonably low. By out-of-pocket costs, we mean cost of handling the cargo into and out of the vessel plus any directly assignable costs such as brokerage, etc.

* * * * * * *

It would then be incumbent upon the carrier whose rate has been challenged to rebut the presumption created by showing that his actual out-of-pocket costs and other rate factors vary materially from those developed by the complaining carrier. Docket No. 1083, 11 F.M.C. 168–174 (1968).

In the context of this proceeding, we believe that a party may show that a rate appears to be unreasonable by reference to a lower rate on a similar commodity which moves in a reciprocal or competitive trade.[18] This procedure properly apportions between the parties the burden of proving certain facts and is in conformity with the requirements of the Administrative Procedure Act and the Commission's Rules of Practice and Procedure. An adverse party has, therefore, to show the rate to be unreasonable. A carrier must then come forward

[18] A party must also make out a case of detriment to commerce.

and prove that its rate is reasonable. This does not misplace the burden of proof. Both parties have proceeded in the proper order, and each has demonstrated those facts of which it has particular cognizance.

As noted, the Commission enunciated in the *Iron and Steel* case and the *Boiler* case the procedure to be followed in developing a case under section 18(b)(5). Thus, the Commission stated that the opponents of a rate shall show that the rate appears to be unreasonable; i.e., that the unreasonableness of the rate has caused some economic consequence to the shipper. In spite of this statement of the Commission's prevailing interpretation of section 18(b)(5), NAUK chose not to submit any proof to rebut the prima facie showing that a rate was contrary to section 18(b)(5). Many of the findings in this case depend upon the absolute refusal of NAUK to cooperate in any respect in accordance with the Commission's prior cases. The record does establish the prima facie showing expected of opponents of a rate, but there is absolutely no showing whatsoever in rebuttal.

The Commission cannot extract the true picture from a case when much relevant evidence is absent. If proponents of an attacked rate cause the dearth of such evidence by withholding it, the Commission cannot fail to take that nonfeasance into account in its deliberations in the case where there is a prima facie showing of an 18(b)(5) violation.

Since the carriers refused to submit appropriate data, the Examiner ruled that rates which appear to be unreasonable by virtue of their comparison with other rates were in fact unreasonable because of lack of proof to the contrary. The Commission has previously ruled that a person contesting rates may show them to be prima facie unreasonable by reference to a lower rate on a similar commodity which moves in a reciprocal trade. *Outbound Rates Affecting Export High-Pressure Boilers*, 9 F.M.C. 441, 457 (1966). The obvious reason for this comparison is the assumption that comparable considerations of cost, value of service, and transportation circumstances prevail in competitive trades. As the record shows here, the trades which have been compared are similar. For example, the inbound/outbound trades are served by the same carriers at about the same costs. No distinctive dissimilarities have been shown. Likewise, the outbound trades from the United States to Europe and from Canada to the U.K. have a logical as well as factual similarity to the NAUK trade in the carriers plying these trades, cost, and types of cargoes carried. Indeed, there is sufficient similarity to assume that the trades are the same. As the Supreme Court said in *U.S.* v. *Northern Pacific Ry.*, 288 U.S. 490 (1933):

> Thus, both the appellees and the Commission recognized what has long been settled—that existing rates for similar service to other destinations may be used for comparison as one test, though not a controlling one, upon the question of the reasonableness of the rates in issue. The Commission's reports do not sustain the averments of the petition that the question of reasonableness was disregarded and the order based solely upon a comparison with rates which were unduly and unreasonably low. 288 U.S. at 500.

A person attacking a carrier's rates may rely upon a comparison of rates in competitive trades to show unreasonableness. And it is fair, after a showing of detriment to commerce, to require carriers to come forward to show that "attendant transportation circumstances require that the rate be set at the level." *Iron and Steel Rates, Export-Import, supra*, at 191–92.

The carrier who is in possession of such data may then come forward to show that, based on differences between the trades compared or other tests of reasonableness, a rate which appears to be unreasonable is in fact reasonable judged by acknowledged ratemaking factors (or not detrimental to commerce).

We consider now "detriment to commerce". The conferences urge that the Examiner's findings are erroneous as a matter of law. The initial attack is against the Examiner's premise that all other things being equal, more cargo will move at lower rates. Respondents argue that a rate is not detrimental to commerce simply because more cargo would move under a lower rate. Respondents argue that the proper test of detriment to commerce is whether the ocean rate prevents the cargo from moving, citing *Edmond Weil* v. *Italian Line "Italia"*, 1 U.S.S.B.B. 395 (1935), and *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28 (1939). In turn, respondents argue that the legislative history of section 18(b)(5) shows an intent to codify these cases. In *Imposition of Surcharge by the Far East Conference*, 9 F.M.C. 129 (1965), the Commission followed this "lost sales" approach. See also the *Surcharge at U.S. Atlantic and Gulf Ports*, 10 F.M.C. 13 (1966), in which the Commission found no violation of section 18(b)(5) because a surcharge "did not cause loss of sales or prevent the movement of cargo." In reaching a different conclusion, respondents argue that the Examiner fell into error by following the Commission's dicta in *Iron and Steel Rates, Export-Import, supra*, which stated:

> When a rate disparity in reciprocal trades, on similar commodities appears, and when movement of goods under the higher rate has been impaired, the carrier quoting the rates must demonstrate that the disparate rates are reasonable * * * The Commission [still has] the burden of proving that the rate has had a detrimental effect on commerce; e.g., that tonnage is handicapped in moving because the rate is too high. 9 F.M.C. at 191–192.

The Commission's decision in *Outbound Rates Affecting Export High-Presure Boilers*, *supra* at 456–457, which by dictum prescribed a "limitation on net profit" test of detriment to commerce is, according to respondents, bad law.[19] So, too, is the Examiner's similar definition of "detriment to commerce", i.e. rates which inhibit the movement of cargo.

Detriment, according to Webster, means "injury or damage, or that which causes it; mischief; hurt." In the context of the Shipping Act, the Commision has had opportunity to consider economic factors to determine whether such factors were detrimental to the commerce of the United States. In the *Iron and Steel* case, the Commission defines detriment to mean "that tonnage is handicapped in moving because the rate is too high", 9 F.M.C. at 191. Similarly, in the *Boiler* case, the Commission referred to detriment in these terms: "movement of goods under the higher rate has been impaired." 9 F.M.C. at 458.

In the *Hong Kong* investigation, the Commission stated as follows:

> A complaining carrier in order to make out a case under section 18(b) (5) must also establish a prima facie showing of detriment to commerce. If the complaining carrier can demonstrate an adverse economic impact upon itself, the carrier has made out a prima facie case of detriment to commerce. Again, such proof would be subject to rebuttal by the carrier whose rates have been complained of. Docket No. 1083, 11 F.M.C. 168–174 (1968).

Respondents argue that this concept of "tonnage handicapped in moving" is far too vague to serve as a regulatory standard. Despite these cases, respondents hold out for a more rigid definition; that is, cargo was *prevented* from moving. Certainly, the cases respondents cite are valid; a rate which prevents cargo from moving certainly is detrimental to commerce. But what of a more intangible economic impact, the watering down of profits or the inability of a merchant to enter in a market at all? An unreasonable rate which causes either of these results is detrimental to U.S. commerce. Many situations may arise in which some economic harm other than "lost sales" is worked by a rate upon some aspect of our commerce. Thus, we will not restrict the definition of detriment to commerce to those rates which prevent a commodity from moving. Rather, we will define detriment as something harmful, not limit it to "lost sales" or other rigid formulas.

The Examiner considered the detrimental effect of rates upon commerce, both generally and specifically. Generally, he stated the proposition that all other things being equal, more cargo will move at lower rates. This being generally true, the Examiner felt that rates which

[19] The Commission stated in the *Boiler* case, "Proof of this detriment might run from a showing of loss of a market or a particular sale to some intangible limitation of the ability to participate profitably in a market." 9 F.M.C. at 456.

were unreasonably high may be presumed to have a detrimental effect on commerce.

The Examiner had found that in the outbound trade, lower rates would increase movement and that relatively high rates on cargoes taking an N.O.S. rate on low-moving or nonmoving commodities were inhibiting the movement of these cargoes. Factually, the conferences argue that this analysis is faulty because it fails to consider other factors surrounding the movement of the cargo, that this analysis was not undertaken and, thus, the Examiner indulged in sheer speculation. Furthermore, respondents cite the record to the effect that a tariff rate is either acceptable to a shipper or forms a beginning point for negotiations for a lower rate; and shippers are aware of their strong bargaining position. Shippers do seek and are allowed rate adjustments whether the shippers are large or small.

The Examiner bolstered his general statement with the fact that movement of the high-rated commodities was either nonexistent or of minimum volume—less than 100 tons per year. He found it reasonable to assume that in many instances the high freight rate has had some impact upon the ability of the exporter to develop any movement of these commodities; and furthermore, the lowering of these rates can have no harmful effect upon the carriers because they are now generating little, if any, revenue under these rates.

We grant that any traffic which would result from a lowering of these rates would inure to the benefit of the carriers as well as the exporting public. The Examiner stated a valid economic concept when he said that "all things being equal, more cargo will move at lower rates." We disagree, however, with the Examiner's application of this concept. This economic truism, standing along, does not legally constitute detriment to commerce as contemplated by section 18(b)(5).

Much argument is directed toward the question of the Commission's authority under section 18(b)(5). The conferences support an emasculated version—that the Commission can disapprove a rate only—and Hearing Counsel urge that section 18(b)(5) permits, not only disapproval, but a statement of the level at which a rate will not offend section 18(b)(5).

It is unnecessary to decide this question here. Rather, we will order NAUK to bring in a new rate which satisfies our objections, with a demonstration that the new rate is reasonable as measured by the ratemaking standards of cost, value of service, or other transportation conditions. Failing this, we will take further action.

Low-Moving and Nonmoving Commodities

The Examiner considered rate disparities which favor high volume commodities and found that the evidence set forth above establishes as a general economic fact that in the outbound trade to the United Kingdom, lowering the freight rate on lower-moving or nonmoving commodities will increase the tonnage moving. Of course, the record does not establish the precise elasticity of demand for every commodity. Neither does the record support the conclusion in this case that the relatively high rates on these commodities have inhibited the movement of goods. Many factors may have contributed to the inhibition of the movement, and the freight rate was not shown to be more than a relevant factor and certainly not the controlling factor.

The only facts established on this point are that the rates are disparate on certain commodities and that the commodities move in low volume or not at all. There is no evidence, as there is with specific tariff items, of an adverse impact on our commerce beyond the generality that a lower price tends to attract more business. It is completely arbitrary to order the rate set at a specific level for various unrelated items moving at less than a certain level of tonnage per year. We, therefore, overrule the Examiner as to such rates.

The record shows a continuous policy on behalf of NAUK to weed out paper rates. This is commendable, and we urge both conferences to continue to simplify their tariffs by the elimination of unneeded items. Furthermore, we urge NAUK to commence a program to lower the rates on commodities which move in very small volume, perhaps 100 tons or less per year. High rates on these low-moving items may contribute to the inability of exporters to develop significant movement of these commodities, and it is possible that lower rates may develop some overseas markets for exporters in this country and in turn generate needed additional revenue for the carriers. We believe that both policies would contribute to the well being of our commerce and be in the public interest.

N.O.S. Rates

Next, the Examiner considered the general cargo N.O.S. rate which is $70.75. This is about 32 percent higher than the inbound rate and is established by the conference without regard to any recognized standards normally applied in rate fixing. Certainly, it is not the product of any negotiation or bargaining between shipper and carrier. The rate bears no relationship to cost or value of service. The N.O.S. rate is by no means a paper rate. The Examiner found that the N.O.S. rate is higher on many commodities than the rate would be if a specific description applied. Accordingly, the Examiner concluded that the outbound N.O.S. rate should be no higher than the inbound equivalent and that the rate is contrary to section 18(b)(5). We agree that the general cargo N.O.S. rate is contrary to section 18(b)(5). The rate is significantly high as compared with the inbound rate. NAUK, with the exception of some general statements, offered no justification of the level of this rate. The rate is so high that it has a tendency to inhibit exports; sleds are a cogent example. Accordingly, the general cargo N.O.S. rate is disapproved as contrary to section 18(b) (5).

Apples and Pears

The Examiner found that NAUK's rate on apples and pears was $1.05 per carton. The Examiner stated that there are about 50 cartons stowed to the ton, or 2.2 cubic feet each. The inbound rate is 262/6 per ton W/M or about $32 per ton W/M. Using the Examiner's stowage factors, the NAUK rate works out to $19.11 per ton as freighted (measurement basis) as compared with a $32 W/M inbound rate. Thus, there is no inbound/outbound disparity here.

Likewise, the 95¢ palletized rate does not appear to be disparate. The NAUK rate for apples N.O.S. of $44.25 per ton W/M has been dropped from the tariff; thus, no disparity remains here.[20]

The outbound reefer rate is $1.55 per carton which, according to the Examiner, works out to $77.50 per ton. The inbound rate is 447/6 per ton W/M or $54. Actually, the NAUK rate works out to $27.30 per ton, as freighted, versus $54 inbound. Consequently, we reverse the Examiner's holding with respect to this item.

Automobiles

The Examiner directed that the NAUK rate on automobiles of $32.50 per ton W/M be reduced to $27.50 W/M, the rate from eastern Canada. The rate of the Canada-U.K. Conference from Eastern Canada has, according to respondent NAUK, been increased since the conclusion of the hearings to $32.50 W/M. Thus, utilizing the most recent rate of the Canada-U.K. Conference, any disparity between the NAUK rate and the Canada rate disappears. We, therefore, reverse the Examiner's finding with respect to automobiles.

Books

The Examiner found that the rate of $70.75 on books hardback was contrary to the statute and ordered that it be reduced to $45.25 W/M. The Examiner compared this NAUK rate with the NAUK unbound book rate in order to arrive at a disparity. In our opinion, bound books and unbound sheets are not comparable commodities. We will consider disparities only on comparable commodities. We, therefore, sustain the exceptions and overrule the Examiner.

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[20] The apples N.O.S. rate was a paper rate.

Egg Albumen

The Examiner found the outbound rate on this commodity to be \$42.50 per ton W/M. This was increased to \$43.50 effective January 30, 1968. The inbound rate is 332 shillings per ton W/M or about \$40. NAUK argues that this commodity is shipped in 50-pound cartons measuring about 1.6 cubic feet. There are 1,250 pounds or 25 cartons to a measurement ton of 40 cubic feet. Since the goods are freighted on a measurement rather than a weight basis, the effective rate is 3.5¢ per pound (\$43.50 divided by 1,250 pounds). The Examiner, however, used a rate of \$.0485 per pound. Nevertheless, the rate to the Continent is 2.5¢ per pound. Thus, it would appear that a disparity still exists between the NAUK rate and the Continental rate. The higher rate has had an adverse economic impact on the movement of this item. Thus, the NAUK rate is disapproved. NAUK shall file a new rate, along with its transportation justification, for our consideration.

Meat Offal

The Examiner noted that the outbound rate was \$74 per ton W. This was high compared with the inbound rate which worked out to be \$53 per ton. Secondly, the rate of the North Atlantic Continental Freight Conference was \$55.75. The Examiner found that the higher rate inhibited exports of meat offal. The Examiner required the NAUK rate to be lowered to this latter level. NAUK now states that the Continental rate has been increased as of December 18, 1967, to \$64.50 W. Nevertheless, this disparity still exists between the inbound and outbound rates, as well as between the NAUK and Continental rates. Consequently, we disapprove the NAUK rate of \$74 and direct NAUK to file a new rate with a suitable justification.

Onions

The Examiner found that the NAUK freight rate on onions is a contributing factor to our dwindling exports of onions. The Examiner measured the outbound rate of \$39.50 with the rate from Canada to the U.K. of \$27 per ton. This disparity with the testimony of the economic detriment to shippers of onions from the United States, which was not justified by NAUK, is contrary to section 18(b)(5). We agree. The NAUK rate is hereby disapproved and NAUK is ordered to file a new justifiable rate.

Plastic Sheeting

The NAUK rate on plastic sheeting is \$59.75 per ton W/M. The NAWFA inbound rate has a sliding scale based on value. As applied to the type of plastic sheeting which was examined here, a NAWFA rate of \$33 per ton W/M applies. This disparity was not justified and the failure to provide a lower rate for cheaper grades of plastic sheeting has increased the exporter's cost in the market place without reason. Accordingly, we approve the Examiner's ruling that the rate shall be disapproved as contrary to section 18(b)(5). NAUK shall adopt a new rate based on the relative value of the various grades of plastic sheeting, as is done in the inbound tariff.

Rags

The Examiner found that a comparison of outbound with inbound rates on rags reflected a disparity and that the outbound rate should be reduced to $23.70, the inbound rate. However, the record demonstrates that the rags imported and those exported are significantly different. Rags which are exported are compressed and used for making currency. Linen, as rags, is imported into the United States, but it is not used for currency and is not compressed by machinery. Thus, inbound and outbound rags are not used for the same purposes, are not compressed in the manner, and are really two different products. Thus, no disparity actually exists. We agree and sustain the exceptions to the Examiner's decision with respect to rags.

Sleds

The Examiner compared the rate applicable on sleds—the general cargo N.O.S. rate of $70.75—with the inbound toys rate of $33 W/M. He accepted the testimony of the serious impact of this high rate upon the transportation of sleds. Accordingly, he found the rate to be contrary to section 18(b)(5) and ordered it reduced to the inbound toy rate. We agree that a disparity has been shown, that it has not been justified by NAUK, and that the rate should be disapproved. NAUK shall file a new rate along with a justification.

Toys

The Examiner compared the outbound rate on toys of $35.50 W/M to the rate applicable from Canada to the U.K. of $20. The record shows that this disparity has not been justified and has caused economic harm to American exporters in the British market. The Examiner, therefore, disapproved the rate. We agree that his findings are correct and order that NAUK file a new rate along with a justification thereof.

Conclusion

The foregoing commodity rates we have found to be contrary to section 18(b)(5) as so unreasonably high as to be detrimental to commerce. We will direct that such rates shall be disapproved to be effective 90 days from the date of this order. Prior to that time, NAUK shall file lower rates on those items upon which the rates have been disapproved with a justification of the level of the new rate, based upon cost, value of service, or other transportation conditions. Failing this, the Commission will invoke other lawful sanctions authorized by sections 15, 16, 17, and 18(b) (5) of the Shipping Act, 1916.

An appropriate order will be entered.

[SEAL] (Signed) THOMAS LISI,
Secretary.

ORDER

This proceeding, having been instituted by the Federal Maritime Commission, and the Commission having fully considered the matter and having this day made and entered of record a report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof, and the Commission having found that the North Atlantic Kingdom Freight Conference has established rates on general cargo N.O.S., egg albumen, meat offal, onions, plastic sheeting, sleds, and toys, which rates are so unreasonably high as to be detrimental to the commerce of the United States contrary to section 18(b) (5) of the Shipping Act, 1916;

Therefore, it is ordered, That pursuant to the Commission's authority under section 18(b) (5) of the Shipping Act, 1916, to be effective 90 days from the date of this order, respondent North Atlantic United Kingdom Freight Conference shall cancel such rates and shall file lower rates on these aforementioned items. Respondent North Atlantic United Kingdom Freight Conference shall also file a written justification of the level of the new rates based upon cost, value of service, or other transportation conditions as outlined in the attached report.

By the Commission.

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68-16

ANTHONY G. O'NEILL—FREIGHT FORWARDER LICENSE

Decided October 10, 1968

Applicant not qualified for licensing as an independent ocean freight forwarder inasmuch as the hearing has demonstrated he lacks sufficient knowledge of or experience with the complexities and formalities of exporting procedures.

Applicant not qualified to act in the fiduciary relationship required of a freight forwarder because of his inability to understand and communicate in the English language.

Anthony G. O'Neill for himself.

Donald J. Brunner and *Robert H. Tell* as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

The Commission instituted this proceeding on March 27, 1968, to determine whether Mr. Anthony G. O'Neill (applicant) possesses the necessary qualifications to be issued an independent ocean freight forwarder license.

Applicant had requested a hearing to show that the intended denial of his application was not warranted. Applicant's request followed our notices of intended denial dated January 25, 1968, and February 20, 1968. Hearing was duly held at which applicant was not represented by counsel. Applicant did not file a brief.

Examiner C. W. Robinson served an initial decision on July 5, 1968, to which Hearing Counsel have filed exceptions.

FACTS

Applicant was born in Uruguay in 1910. He has lived in various countries including France and Spain. He came to the United States from Venezuela in 1955 and became a U.S. citizen in 1959.

Applicant obtained a Federal Maritime Board Certificate of Registration (No. 2371) in 1958.[1] By Federal Register notice of September 9, 1960, the Board ordered applicant (among others named) to show cause why his registration should not be canceled because of failure to furnish certain information concerning his operations. When the Board received no response to the order to show cause, the registration was canceled by Federal Register notice of October 22, 1960. Applicant claims that he never received the two notices respecting the cancellation of the certificate. It was not until 1967 that applicant learned of the invalidity of the certificate.

Although applicant received assurances of assistance from friends in foreign countries when he received his certificate in 1958, he took no steps to engage in the business of freight forwarding until 1967, inasmuch as he had too much other work to do. In 1967, acquaintances in in the import/export house of Casa Moneo in New York indicated to him that he would be given some of their business if his certificate was still in effect. He was advised by them to check the matter because the rules and regulations for this type of business had been changed. Upon calling at the New York office of the Commission, he was told that the certificate had been canceled. The present application was filed after applicant learned that his certificate had been canceled.

The only steady occupation applicant has had in this country is that of an elevator operator at two locations in Manhattan, New York City. He has been so employed for the last 12 years.

While living in Europe, applicant was a representative of a French exporting concern and of a Spanish exporting house, each of which shipped to the other country. As part of his duties, he prepared all of the usual commercial documents and made the arrangements for ocean transportation. During his residence in the different foreign countries, he became familiar with documents connected with export shipments.

Applicant has had no experience in the United States as a freight forwarder or with any business related to ocean exporting. Although he has read both the law governing freight forwarders and the Commission's rules and regulations on the subject, he has demonstrated a very limited knowledge of ocean freight forwarding as performed and regulated in the United States, or of export control laws of the United States.

Because of his connections with the French and the Spanish consulates, applicant feels that he will receive support from them in his quest for clients. Furthermore, he believes that some business will come from Casa Moneo, even though that company might do its own for-

[1] Prior to the 1961 passage of Public Law 87-254, General Order 72 of the Federal Maritime Board required each person who engaged in business as a freight forwarder to register with the Board before engaging in such business.

warding or utilize the services of others. His general knowledge of the activities of the Casa Moneo is grounded upon its reputation in Spain.

Applicant has a minimum of office equipment, all located in his home in the Borough of Queens, but he would open an office if the application is successful. Although he has taken no steps to ascertain whether he can secure a surety bond as required by law and by the Commission's General Order 4, applicant has sufficient funds to pay the premium for such a bond.

Applicant's stated reasons for entering the forwarding business are that since he owns a house, he wants to make more money for his family and to improve his standard of living. He also wants to cease the operation of elevators since the work connected therewith is too heavy for him.

The Examiner noted that applicant's accent is difficult to understand, and it is hard for him to converse freely in English or to be sure of his interpretation of some English words. He is attending school in order to improve his English. If a license is issued, applicant would employ an English-speaking secretary to assist in obtaining clients.

In his FMC application form No. 18, applicant gave four completely unresponsive answers to questions posed. In response to the question of how long applicant has been in ocean freight forwarding, applicant replied "From September '58 to July '59." Applicant, in fact. has never operated as a freight forwarder. Applicant's reply to an inquiry about the number of shipments dispatched by applicant in the last year was "25." Applicant, in fact, dispatched no shipments. To the question concerning number of shipper clients during the same period, the answer was "20." In fact, no shipper clients were served by applicant. In response to the question concerning yearly gross revenue derived from freight forwarding fees and compensation by carriers, applicant answered "$25,000" for each category. In fact, applicant received nothing since he did not operate as a freight forwarder.

Applicant admits that these answers are erroneous. He attributes the error to his unfamiliarity with the English language. Applicant stated that he construed the questions regarding unmber of shipments and number of shipper clients to refer to his operations in Europe. He explained that he understood the question regarding forwarding fees and compensation to refer to the amount of money he was willing to invest or put up for his forwarding business.

The answers to the application questions initially were put on paper by applicant himself. They then were given to his nephew, who typed then on one of two copies of the application received from the Commission's New York office. The draft copy was then turned over to someone else's secretary who typed up the second copy, which was filed with the Commission.

Discussion

The Examiner found the applicant to be fit, willing, and able properly to carry on the business of forwarding and to qualify for a license, contingent upon the association with him for a period of 2 years of someone with current experience in the business of ocean freight forwarding. We do not agree with the Examiner's conclusions.

In recommending approval of the license, the Examiner stresses the fact that applicant is an honorable person, educated, experienced generally in international trade, and has the will and determination to make a successful career for himself. These facts are true. Nevertheless, we feel more is required to qualify for a license as an independent ocean freight forwarder.

In our letter of intent to deny, we stated that the specific ground for denial was that applicant did not possess sufficient experience to qualify for licensing. The Examiner glossed over the problem of experience by indicating that lack of extended experience should not be the sole criterion as to whether a license should be granted. The Examiner stated that if it develops, after a reasonable time, that applicant is not capable of or fit for the performance of his functions in a lawful and satisfactory manner, he will more than likely drop by the wayside as do other businessmen under similar circumstances, or complaints probably will be made to the Commission about him, and in the latter case, the Commission has ample authority to take the necessary steps to correct the situation.

We agree that experience is not the sole criterion as to whether a license may be granted. This, however, does not change the fact that experience is an important criterion. We also recognize that an applicant may qualify without actual extended experience as a freight forwarder or in the employ of a freight forwarder. It is conceivable that an applicant could gain sufficient knowledge of forwarder functions, duties, and activities while working in related areas of the ocean export field. However, in this case, we are not satisfied that applicant in fact possesses the required knowledge of the mechanics of freight forwarding. Applicant has had no actual experience as a freight forwarder. Furthermore, the record in this proceeding demonstrates that applicant's experience in international trade has not provided him with the requisite knowledge of ocean freight forwarder activities as performed in the United States export commerce. Applicant has also demonstrated an insufficient knowledge of understanding of this Commission's rules and regulations governing activities of freight forwarders.

Specifically, Hearing Counsel have demonstrated that applicant is unfamiliar with shipper declaration issuance and filing procedure; is unfamiliar with export control laws and schedule B commodity lists; and is unfamiliar with the Commission's pay-over rule.

When questioned about a forwarder's function in regard to export declarations, applicant demonstrated that he was confused about where or with whom they are required to be filed. Applicant also stated he was not familiar with schedule B, a statistical classification of commodities exported from the United States. Schedule B, prepared by the Department of Commerce, classifies commodities and assigns a commodity number to each classification of export items. U.S. export laws require the schedule B commodity number to appear on the shipper's export declaration. The export declaration is required to be filed with a U.S. Collector of Customs at the port of exit. It is a freight forwarder function to prepare and file shipper's export declarations. Applicant has demonstrated his inability to perform this function.

When questioned about the Commission's pay-over rule, which requires a forwarder within 7 days to turn over to the carrier monies entrusted to him by the shipper, applicant indicated that he thought the time limit was something like a month or 2 months.

These examples sufficiently indicate that applicant does not possess a suitable knowledge of the duties, functions, and obligations of an ocean freight forwarder.

Additionally, the facts surrounding applicant's preparation of the FMC application form and the Examiner's finding concerning applicant's difficulty in interpreting the English language indicate that applicant is not sufficiently versed in English to enable him to properly carry out the duties of a freight forwarder. Applicant has admitted that the incorrect answers on his application form resulted from his inability to understand relatively simple questions posed by the application. How then can we be sure that applicant will be able to understand the rather technical language of export declarations, bills of lading, consular invoices, or the Commission's rules and regulations?

The freight forwarding industry is an important segment of the economy of the United States in that it makes possible participation in the export commerce of the United States. There are many complexities and formalities involved in exporting procedures. Congress, in passing the licensing statute recognized these complexities and indicated the importance of having only qualified persons acting as freight forwarders.

The intention of the bill, therefore, under the licensing provision, is to have every person, firm, or corporation who holds himself out as a freight forwarder to be fully competent and qualified to act in the fiduciary relationship which such business necessitates.[2]

We conclude that the hearing which has been afforded applicant, has demonstrated that he is not familiar with the complexities and formalities of exporting procedures. Because of this and because of his inability to understand and communciate in the English language, he is not qualified to act in the fiduciary relationship which is required of the freight forwarding business.

We do not agree with the Examiner's reasoning that applicant should be licensed and if it develops later that applicant is not capable or fit for the performance of his functions, necessary steps can be taken to correct the situation. Such an approach would reverse the proper order of procedure outlined by the licensing statute. We feel that the whole purpose of the licensing statute is to insure at the outset that licensees are well qualified. Only then can we be reasonably certain that the forwarder's duties will be performed in the regular manner.

Accordingly, the application for a freight forwarder's license will be denied. This denial will be without prejudice to any future application.

Vice Chairman James V. Day, dissenting:

I concur with the opinion of the Examiner in this matter in that I find the applicant to be fit, willing, and able properly to carry on the business of forwarding and to qualify for a license, contingent upon the association with him for a period of 2 years of someone with current experience in the business of ocean freight forwarding.

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[2] House Committee on Merchant Marine and Fisheries. H. Rept. No. 1096, 87th Cong., 1st sess., 3 (1961).

FEDERAL MARITIME COMMISSION

DOCKET No. 68-16

ANTHONY G. O'NEILL—FREIGHT FORWARDER LICENSE

ORDER

The Commission having fully considered the above matter and having this date made an entered of record a report containing its conclusion and decision thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the application for license of Anthony G. O'Neill is denied pursuant to section 44 of the Shipping Act, 1916, without prejudice to any future application.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 68-19

G. R. MINON—FREIGHT FORWARDER LICENSE

Decided October 10, 1968

Applicant found not to possess the personal responsibility required to qualify for an independent ocean freight forwarder's license because of his cooperation in the fraudulent diversion of drug shipments and because of his insistence to continue to permit the illegal use of his forwarder number after having been informed of the impropriety of such practice.

Jack Lassar for applicant.

Donald J. Brunner, *Robert M. Sielaty*, and *Robert H. Tell* as Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

The Commission instituted this proceeding on April 16, 1968, to determine whether Mr. G. R. Minon (applicant) possesses the necessary qualifications to be licensed as an independent ocean freight forwarder.

Applicant had requested a hearing to show that the intended denial of his application was not warranted. Applicant's request followed our notice of intended denial dated October 5, 1967. Hearing was duly held. Applicant was not represented by counsel at the hearing but was represented on brief.

Examiner C. W. Robinson [1] served an initial decision on July 26, 1968, to which Hearing Counsel have filed exceptions.

FACTS

In May of 1961, applicant was issued a Certificate of Registration (No. 2834) to operate as an ocean freight forwarder.[2] In January of

[1] The Examiner who presided at the hearing left the employ of the Commission shortly thereafter, and the present Examiner was designated to issue an initial decision. See sec. 5(c) of the Administrative Procedure Act (5 U.S.C.A. 554(d)); Rule 10(e) of the Commission's Rules of Practice and Procedure (46 CFR 502.145).

[2] Prior to the 1961 passage of Public Law 87-254, General Order 72 of the Federal Maritime Board required each person who engaged in business as a freight forwarder to register with the Board before engaging in such business.

1962, after the passage of the present licensing statute (Public Law 87–254), applicant applied to the Commission for a license as an independent ocean freight forwarder. Applicant was permitted to continue operations as a freight forwarder under "grandfather" rights conveyed by the statute to registrants who made timely application for a license.

Prior to his registration as a freight forwarder, applicant was employed by L. Aguinaldo & Co., Inc. (Aguinaldo), an exporter of department store merchandise. Aguinaldo is located at 79 Walker Street, Borough of Manhattan, New York City. During the years 1926 to 1937, applicant worked with Aguinaldo as a packing man and performed other duties incidental to the preparation of merchandise for shipment. Applicant also worked on and off for Aguinaldo from 1937 to 1947 and again part time from 1947 to 1961.

In 1947, applicant became employed as a postal clerk in Brooklyn. He has been employed there since that time. Applicant's working hours at the post office run from 6 p.m. to 2:30 a.m.

Applicant's hours at the post office have enabled him to use the daytime hours for his freight forwarding activities. Applicant does not keep regular hours for his freight forwarding business. He works only when there are shipments, which average about one per month.

Applicant's freight forwarding office consists of space located in a large warehouse rented from Aguinaldo for $25 per month. The warehouse is located on the second floor of Aguinaldo's 79 Walker Street location. The warehouse is shared principally by Aguinaldo and Perez & Co., an exporter of general merchandise to South America. Applicant utilizes only a small area of the warehouse. His equipment there consists of a desk, typewriter, facilities for making out and filing papers and documents, and the usual tools and related articles for packing merchandise for export. A large scale and a telephone are available to him. The telephone is not listed under his name, but the number does appear on his business card.

Applicant's forwarding business is confined to personal and household goods belonging to friends who want them sent to the Philippines. He has forwarded automobiles and refrigerators on occasion. Applicant advises his customers to have their purchases delivered directly to his premises as this saves additional trucking fees. The goods are placed on applicant's rented space and packed when he has the time. Over the years, the shipments have averaged at least one a month, usually consisting of several cases to a shipment. Applicant makes out all the usual shipping papers and documents and has the packages delivered to the ship in time for loading.

Certain facts relating to applicant's past conduct in his operations as an ocean freight forwarder reflect on his personal responsibility and qualification for a forwarder license.

Applicant became acquainted with Jose Buenaventura in 1961. Buenaventura was active in handling export merchandise but the record is not clear whether Buenaventura was acting as a forwarder or a shipper.

The record does show that Buenaventura had either applied for or was considering applying for a FMB forwarder registration number and that before he had obtained the number applicant offered to handle Buenaventura's shipments. Buenaventura refused this offer. However, applicant did permit Buenaventura to use his registration number on one or more occasions in 1961 and 1962, until Buenaventura obtained his own registration number. Under this arrangement, in return for permitting the use of his number, applicant received the 2½-percent brokerage commission paid by the carrier. Applicant was informed that the practice of allowing the use of a freight forwarder number by one not entitled thereto was prohibited.[3] Applicant did not thereafter allow Buenaventura to use his number.

However, it was disclosed at the hearing that application is presently permitting his lessor, Aguinaldo, to use his freight forwarder number when shipping export merchandise. Under this arrangement, applicant performs no forwarding service other than to clear with Customs documents prepared by Aguinaldo. As with his previous arrangement with Buenaventura, applicant receives the 2½-percent brokerage commission from the carrier.

Applicant was introduced to Ralph Sarfati (Sarfati) by Buenaventura some time in 1962. Sarfati was referred to by Buenaventura as a purchasing agent for a drug company in the Philippines. It developed that Sarfati was looking for a freight forwarder to handle his business. In July 1963, Sarfati showed applicant a copy of a letter from Sarfati to Roche International, Inc. (Roche), dated July 23, 1963. The letter amounted to an order for a shipment of Librium capsules for loading on the MS *President Roxas* of United Philippine Lines on August 5. The letter instructed Roche to deliver the order to applicant's warehouse not later than August 1. Applicant was designated in the letter as Sarfati's freight forwarder. Sarfati informed applicant that he wanted him to ship the merchandise for him. Sarfati asked applicant to be on hand at applicant's premises early on the Saturday following July 23 for some merchandise that would be de-

[3] This practice was forbidden at the time by FMB General Order 72 which applied to registrants. The practice is also now forbidden by FMC General Order 4 which applies to licensees or "grandfathers."

livered there to Sarfati. Applicant did as requested and assisted in the unloading of the merchandise and placing it in an elevator which took it upstairs. Rather than holding the merchandise there for subsequent forwarding to the ship, the merchandise was brought back downstairs, with applicant's assistance, and loaded into a station wagon. Sarfati was present during the entire transaction which took about an hour. Sarfati originally told applicant that the shipment was going to the Philippines. Sarfati changed his mind, but applicant states he does not know why.

In September 1963, Sarfati showed applicant a copy of another letter from Sarfati to Roche, dated September 17. This letter was similar in tenor to the letter of July 23, instructing Roche to deliver a shipment of Librium and Librax capsules to applicant's premises not later than September 27 for October 2 loading on the MS *President Garcia* of United Philippine Lines. Applicant asked Sarfati to make delivery to his place of business on a particular day when he was not working at the post office. On the day of delivery, Sarfati and his brother arrived at 79 Walker Street in a taxi. The two brothers and applicant unloaded the shipment from a small truck onto the sidewalk and subsequently into a Cadillac limousine and a station wagon. Two unidentified men accompanied the limousine and assisted in the loading operation. The shipment was accepted by a firm called (by applicant) "Barwein," located on "lower Broadway somewhere."

Applicant told an agent of the Federal Bureau of Investigation (FBI) on May 11, 1964, that he knew at the time that Sarfati acted fraudulently in diverting the two shipments from the Philippines and disposing of them in the domestic market, probably at a price advantage.[4]

Copies of two unsigned bills of lading covering the two shipments were obtained from Roche by an investigator from the Commission's New York office. The name of the consignee and the name of the person to receive the arrival notice in Manila are deleted from each copy. There is of record a copy of a letter from applicant to Roche, dated August 15, 1963, stating: "Please find your copy of the bill of lading substantiating a recent shipment made to the Philippines through our facilities." The letter relates to bill of lading No. 86, dated August 6, 1963, for the first shipment. Bill of lading No. 48, dated October 10, 1963, covered the second shipment, but no letter from applicant to Roche respecting this bill was produced. United Philippines Lines has no record of either shipment.

[4] The FBI was investigating the pattern of Sarfati's operations in connection with the interstate transportation of stolen property; the two shipments here in question were not involved.

Certain facts concerning these two diverted shipments are disputed. The FBI agent who questioned applicant in Buenaventura's office on May 11, 1964, testified that applicant told him that the first shipment was loaded on a small truck; that a Spanish-speaking man gave Sarfati a check; that applicant accompanied Sarfati to a bank; that Sarfati cashed the check and paid him $50, and that applicant turned over to Sarfati a bill of lading. The agent does not recall whether he was told that applicant prepared the bill. Applicant did say, however, that he did not consider the preparation of the bill would be a violation of the rules governing freight forwarders because the bill had not been validated and had not been turned into Customs. Applicant also told the agent that on the day following the delivery of the second shipment Sarfati received a check, gave him $100, and applicant turned over to Sarfati the covering bill of lading. The agent does not remember whether applicant said he prepared the bill.

Applicant now denies that he prepared the two bills of lading, and insists that he received only $10 from Sarfati for each shipment, since he performed no forwarding services. Furthermore, he maintains that Sarfati merely showed his copies of the two letters from Sarfati to Roche and that he could not have prepared the bills of lading as he did not have copies of any papers from which to draw the information to be placed thereon. He points out that anyone can obtain blank bills of lading from ocean carriers. In addition to his general denial about the bills, applicant testified that he never saw No. 86. He cannot explain how his name, his Certificate of Registration number, and his Commission number appear on the two bills, but Sarfati could have known the numbers since he had applicant's card on which the numbers appear. An employee of Roche, when interviewed by a Commission investigator, stated that the bills had been presented to his company by Sarfati to enable him to pick up the shipments.

Applicant contends that his signature on the letter of August 15, 1963, to Roche is a forgery, but admits that the letterhead is his. He does not know how the letterhead was obtained but realizes that Sarfati could have secured some of his stationery because he came to his place of business on occasion. To the untrained eye, the signature on the letter is not the same as applicant's signature on his application for a license or his letter of October 16, 1967, requesting a hearing.

Discussion

The Examiner concluded that applicant is fit, willing, and able properly to carry on the business of forwarding, and qualifies as an independent ocean freight forwarder. The Examiner cautioned, however, that applicant should be warned that any future violation of the Act or of the Commission's rules and regulations pertaining to ocean freight forwarders would warrant revocation of his grandfather operating rights, and that applicant should cease immediately permitting anyone to use his name and/or license number where applicant performs no services connected therewith. We do not agree with the Examiner's conclusion that applicant qualifies for a license.

This proceeding was instituted to determine whether applicant possesses the necessary qualification to be licensed. The order indicated we were specifically concerned with applicant's lack of personal responsibility as evidenced by his past involvement in the preparation of bogus bills of lading on drug shipments.

The drug shipments in question were those described above involving Sarfati and Roche. The record establishes that Sarfati fraudulently diverted the drug shipments, scheduled to go to the Philippines, for sale in the domestic market. This was accomplished through the use of bogus bills of lading and with the cooperation of applicant. The record does not conclusively establish that applicant prepared the bogus bills of lading or even that he knew of their existence. Nevertheless, there is testimony to the effect that applicant did know of the bills of lading and that applicant was paid by Sarfati for producing them.

Regardless of wheher applicant prepared the bills of lading, or whether he knew of them, or whether he received money for producing them; the fact is firmly established that applicant knew what was being done by Sarfati. Applicant knew that the drug shipments were being fraudulently diverted for domestic sale. Knowing this, applicant still cooperated with Sarfati in diverting the shipments and accepted at least a token amount of compensation for his cooperation.

While these facts do not reflect favorably on applicant's character, taken alone, they might not consititute sufficient evidence of lack of personal responsibility to warrant denial of applicant's license. However, the hearing produced other evidence regarding activities of applicant, which reflect further on applicant's personal responsibility and which prompts us to find applicant unqualified to operate as a freight forwarder.

As indicated above, applicant was involved in an arrangement with Buenaventura, whereby Buenaventura was permitted to use applicant's FMB registration number and in return applicant received 2½ percent brokerage commission paid by the carrier for the shipment. Applicant was informed that this practice was contrary to Commission rules relating to practices of freight forwarders. Nevertheless, it now appears that applicant is again involved in a similar scheme. This time the arrangement is with Aguinaldo. As with Buenaventura, applicant receives the 2½-percent compensation from the carrier while permitting Aguinaldo to use his license number. Applicant does not perform the required functions which would entitle him to receive the compensation. Aguinaldo, as seller of merchandise in foreign commerce, is not prohibited from dispatching such merchandise without a license. However, he is not permitted to accept compensation from the carrier on such shipments. The entire arrangement between applicant and Aguinaldo is a scheme whereby applicant fraudulently obtains the compensation from the carrier, which compensation the carrier is not obligated to pay, and which, other than for this scheme, would never be paid.

Applicant's arrangement with Aguinaldo closely resembles the several cases reviewed by the House Committee on Merchant Marine and Fisheries in 1956. Upon review of these cases, that committee concluded that the practices of collection of unearned brokerage fees was widespread and recommended than an appropriate bill should be introduced to provide for the licensing of freight forwarders and that the Federal Maritime Board should formulate reasonable rules, "with particular emphasis uopn the elimination of the automatic payment of unearned brokerage." [5]

The licensing statute followed in 1961 and it provided that carrier compensation could only be paid upon certification by the forwarder that it had performed certain essential functions in regard to the shipment. To further ensure compliance with this requirement, we adopted a rule which stated that "No licensee shall permit his license or name to be used by any person not employed by him for the performance of any freight forwarding services" (46 CFR 510.23(a)). Applicant has been shown to be operating in violation of this rule and in so doing is collecting unearned compensation.

Applicant's insistence to renew this type of conduct after having been previously informed of its impropriety, coupled with his activities in connection with the diverted drug shipments causes us to conclude that applicant does not possess the personal responsibility required to qualify as "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. * * *" [6]

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[5] House Committee on Merchant Marine and Fisheries. H. Rept. No. 2939, 1st sess., 56 (1956).

[6] Sec. 44, Shipping Act, 1916 (46 U.S.C. 841(b)).

We cannot agree with the Examiner's recommendation that applicant should merely be scolded for his past indiscretions and warned about the consequences of any similar future activities. Considering that applicant had previously been informed of the impropriety of permitting someone to use his name or license and considering that applicant knowingly cooperated in the diversion of the drug shipments, we conclude that it would be unduly stretching any concept of fairness to afford applicant still another chance. Accordingly, the application for license will be denied and applicant's grandfather operating rights will be revoked.

12 F.M.C.

ORDER

DOCKET NO. 68–19

G. R. MINON—FREIGHT FORWARDER LICENSE

The Commission having fully considered the above matter 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 application for license of G. R. Minon is denied, and his grandfather operating rights are revoked pursuant to section 44 of the Shipping Act, 1916.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–8

IN THE MATTER OF AGREEMENT 9597 BETWEEN FLOTA MERCANTE GRAN CENTROAMERICANA, S.A., CONTINENTAL LINES, S.A., AND JAN C. UITERWYK CO., INC.

ORDER ADOPTING INITIAL DECISION

October 10, 1968

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* ASHTON C. BARRETT, GEORGE H. HEARN, JAMES F. FANSEEN, *Commissioners.*)

This proceeding is before us on exceptions to the initial decision of Hearing Examiner John Marshall. Respondents' exceptions merely constitute a reargument of the same issues, allegations, and contentions considered by the examiner in his initial decision.

After a careful review and consideration of the record in this proceeding, as well as the exceptions, replies and argument of counsel, we conclude that the examiner's findings and conclusions were well founded and proper. Accordingly, we hereby adopt the examiner's decision as set forth below.

By the Commission.

(S) THOMAS LISI,
Secretary.

ORDER

This proceeding having been initiated by the Federal Maritime Commission pursuant to sections 15, 18(b), and 22 of the Shipping Act, 1916, and the Commission having this day adopted as its own and entered of record the initial decision of the hearing examiner which decision is hereby referred to and made a part hereof;

It is ordered, That respondents, Flota Mercante Gran Centroamericana, S.A., Continental Lines, S.A., and Jan C. Uiterwyk Co., Inc., either directly, or indirectly through any affiliated corporation or person or by any other device, cease and desist from all acts and practices herein found to be in violation of the Shipping Act, 1916.

By the Commission.

(S) THOMAS LISI,
Secretary.

No. 67-8

IN THE MATTER OF AGREEMENT 9597 BETWEEN FLOTA MERCANTE-GRAN CENTROAMERICANA, S.A., CONTINENTAL LINES, S.A. AND JAN C. UITERWYK CO., INC.

Respondents are common carriers by water amenable to the proscriptions of the Shipping Act, 1916.

Respondents entered into and carried out continuing agreements and are presently carrying out an agreement without Commission approval in violation of section 15 of the Shipping Act, 1916.

Respondents have charged different rates than those specified in tariffs on file with the Commission in violation of section 18(b) (3) of the Shipping Act, 1916.

Edwin Longcope for respondent Flota Mercante Gran Centroamericana, S.A.

Thomas K. Roche and *William Faison* for respondents Continental Lines, S.A. and Jan C. Uiterwyk Co., Inc.

Alan F. Wohlstetter, *Ernest Land*, and *Daniel Reiss, Jr.*, for intervener United Fruit Co.

R. Stanley Harsh and *Donald J. Brunner*, Hearing Counsel.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [1]

By Order of Investigation and Hearing, served February 1, 1967, the Commission initiated this proceeding pursuant to sections 15, 18(b) and 22 of the Shipping Act, 1916 [2] (the Act) to determine:

1. Whether Jan C. Uiterwyk Co., Inc., and Continental Lines, S.A. are common carriers by water subject to the Commission's jurisdiction;
2. Whether any agreement between the parties may have been carried out without Commission approval, in violation of section 15 of the Act;
3. Whether the parties to Agreement No. 9597, or any of them, have transported cargo between U.S. Gulf ports and Guatemala in violation of section 18(b) of the Act.

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[1] This decision became the decision of the Commission, October 10, 1968.

[2] 46 U.S.C. 814, 817, and 821.

THE FACTS

1. The agreements here concerned [3] relate to several Guatemalan decrees. On September 22, 1959, the Congress of this Central American Republic enacted Decree No. 1317, known as Ley de Fomento Industrial or the Industrial Development Law, for the purpose of strengthening the national economy and stimulating domestic industries. Under this law certain industries were exempted from paying import duties on specified cargoes during a 10-year period and the "Head of Government" was granted certain powers to restrict such imports. By Decree 5757, issued November 8, 1961, certain imports were designated as "controlled cargo." It was provided that in order for these cargoes to be exempted under Ley de Fomento they "must be carried by the vessels of Flota Mercante Gran Centroamericana or by any steamship line with whom Flota has an agreement." On April 12, 1966, Decree 444 was issued and on May 4, 1966, Decree 468 was issued. These supplanted Decree 5757 and restricted additional commodities to carriage by "state transportation companies" therein defined as companies "owned by the government or in which the government has an interest." [4] In 1966, 32,326 short tons of cargo, excluding bulk wheat, moved in the Gulf/Guatemala trade. 25,302 short tons, or 78-percent of the total, was controlled cargo.

2. In July 1963 Flota Mercante Gran Centroamericana, S. A. (hereinafter Flomerca), entered into an agreement with Continental Lines, S.A. (hereinafter Continental), whereby Continental was authorized to carry controlled cargo in the trade between the gulf ports and the east coast of Guatemala in return for payment of royalties to Flomerca. Jan C. Uiterwyk Co., Inc. (hereinafter sometimes Uiterwyk), having been appointed U.S. general agent for Continental and general gulf agent for Flomerca, issued a solicitation circular containing the statement that "This is the only Guatemalan operation service from Miami and gulf ports to Guatemala, and should therefore be used for Ley de Fomento cargo."

3. The original tariff, issued July 19, 1963, designated the carrier as "Flomerca Continental Line." Following advice from Uiterwyk that "we might run into a controversy with the FMC with regard to the filing of a joint service operation under section 15," a revised

[3] There is no issue of approvability as no agreement is on file.

[4] 99.8 percent of the stock of Flota Mercante Gran Centroamericana is held by the Guatemalan Government. The remaining 0.2 percent is privately held. The company has three operating sections or divisions described by its general manager as: (1) the U.S. Gulf/Central America; (2) the Europe/Central America; and (3) the U.S. North Atlantic/Central America. Its two owned vessels are used in the U.S. North Atlantic/Central America service (New York to Guatemala and Honduras).

title page was issued August 6, 1963, changing the carrier designation to Flomerca Line. The Daily Shipping Guide of August 13, 1963, advertised the operation of the same vessel by Flomerca and Continental to the same ports on the same voyage and an article in the Times Picayune of August 23, 1963, announced the new service inaugurated "by Flomerca Line and Continental Line." By letter dated August 27, 1963, to agents at Miami, New Orleans, Houston, and New York, regarding "Disbursement Accounts Continental Flomerca Service," Uiterwyk advised that "disbursements and collections are all for the account of Continental Lines, S.A. in Antwerp" and that "all outbound freight should go on a pre-paid basis and all inbound freight from the East Coast of Central America on a collect basis, so that all funds can be collected here in dollars."

4. In January 1964, Uiterwyk became a full partner with Continental in the Gulf/Guatemala service which Mr. Uiterwyk, in a confirming letter to Continental, referred to as a "joint venture." Under the provisions of the letter agreement Uiterwyk paid Continental $7,500 to cover one-half of certain previous losses and deposited $7,500 in Continental's account as Uiterwyk's share of the working capital of the venture. Uiterwyk and Continental then began splitting profits and losses 50/50 and Uiterwyk agreed that in the future it would not charge a "general agency commission." By letters to shippers, Uiterwyk continued to urge that they must route their cargo via Flomerca if their receivers were to realize "the privileges under Ley de Fomento."

5. An agreement dated September 9, 1964, retroactive to July 1, 1964, was entered into between Flomerca on one side and Continental/Uiterwyk on the other. In substance, it was agreed (1) that Continental/Uiterwyk, thereinafter named "Operators," would maintain a regular service with regular sailings between gulf ports and Guatemala under the name Flota Mercante Gran Centroamericana, (2) that the service would be entitled to benefits enjoyed by Flomerca under Guatemalan laws, (3) that for this privilege Operators would pay royalties to Flomerca based upon a formula which, after deducting 5 percent from total export and import manifests to cover administrative expenses and general agency fees, would provide from 2.5 percent of annual profits not in excess of $10,000 to 12.5 percent of such profits exceeding $40,000, (4) that financial and operational responsibility for the service would be for the account of Operators and therefore that Flomerca would not have to contribute capital, (5) that Operators would appoint Flomerca "as their general agents for this service in Guatemala" and would pay 2.5 percent on southbound

manifests and 5 percent on northbound manifests, (6) that Uiterwyk would operate the service as general agents and managers in the United States, (7) that Flomerca would do its "utmost" to solicit export and import cargo and would devote "every possible effort to obtain for this service cargo covered by the Guatemalan 'Ley de Fomento'," (8) that Flomerca would not make any agreement with other lines or services which could directly or indirectly affect the gulf service without first consulting with Operators, and (9) that Flomerca would be allowed to have one or more of its own vessels in the gulf service as long as both parties agreed on the terms of said service. On March 19, 1965 a letter to shippers by Uiterwyk's sub-agent, Lone Star Shipping, Inc., circulated a translation of Decree 5757, indicating that controlled cargoes must be carried by Flomerca or any steamship line with which Flomerca has an agreement, with the admonishment "trust you will be guided accordingly."

6. Until June 1964, Continental operated regularly in the gulf/Honduras trade under its own name. It filed tariffs, solicited cargo and advertised sailings. Honduras cargo and Guatemala cargo were carried on the same vessel * * * the former under Continental bills of lading and the latter under Flomerca bills of lading. In June 1964 Continental's tariff was redesignated as that of "Flomerca Line."

7. In August 1964, a carrier called Contramar S.A. started a common carrier service from ports in continental Europe to U.S. North Atlantic ports. This service operates as the "Capital to Capital Line." The following May, Contramar also started serving the trade from these same European ports to U.S. South Atlantic and gulf ports. Continental Lines was and is the general agent for Capital to Capital in Antwerp and Uiterwyk is U.S. general agent. Capital to Capital's U.S. North Atlantic agent, who was appointed by Continental, issued public announcements that this service was to be initiated by Continental with Continental chartered vessels. Two and one half years later this agent testified that it might be difficult to state whether he was agent for Continental, Contramar, or Capital to Capital. Continental and Contramar operate from the same office in Antwerp, they have the same owners and officials, the same people work for both companies, and the same people sign correspondence. Letterheads indicate that they are associated companies. However, it is contended that Continental acts merely as agent for Contramar. Contramar does not operate in any trades outside of the U.S. trades, while Continental operates common carrier services in its own name only in non-U.S. trades, e.g., between Europe and Central America. This is actually a "joint service" with Flomerca. For years Continental

has openly served the Europe/Guatemala trade under an agreement providing access privileges in return for the payment of royalties to Flomerca.

8. On October 28, 1964, Uiterwyk filed its common carrier tariff No. 1 covering inbound and outbound service between U.S. Atlantic and gulf ports and Puerto Rico and named ports in the Caribbean, east and west coast of Central America, South America, and other other ports of the world. This was virtually a worldwide tariff. To the best of Mr. Uiterwyk's recollection, it was never utilized by Jan C. Uiterwyk Co., Inc. However, on February 12, 1965, it was adopted and thereafter utilized in various U.S. trades by Uiterwyk Shipping Ltd., another Uiterwyk family-owned company. Operating as Gulf Lines it expanded into "a liner service from U.S. gulf ports to the European continent." Thereafter the name was changed to, and the tariffs were adopted by, Gulf Lines Ltd., and then Gulf Express Lines Ltd. During this same period still another such company, Uiterwyk Shipping, Inc., was carrying explosives, the principal item covered by the tariff, from gulf ports to Central America. Jan C. Uiterwyk is president of each of the above companies and all of the officers and directors of each are either members of his immediate family or employees of Jan C. Uiterwyk Co., Inc.

9. An agreement dated July 2, 1965, retroactive to July 1, 1965, was next entered into by Flomerca and Continental/Uiterwyk. It included the substance of the previous agreement with certain additions and revisions. (1) The Operators guaranteed Flomerca minimum royalties of 2,000 Quetzal ($2,000) per year, (2) the profit sharing formula was changed to provide that Flomerca would receive 12.5-percent of amounts from $20,000 to $30,000, 15-percent of amounts from $30,000 to $40,000, and 17.5-percent of amounts in excess of $40,000, (3) responsibility for the financial operation and legal activities of the service was to be "for the account of and risk of Operators" and Flomerca was to assume no responsibility resulting from the use of its name on documents such as bills of lading and manifests, (4) claims of all types against the service were to be "handled and paid" by Uiterwyk, (5) "permanent increases or reductions in the freight tariffs to the gulf, will only be issued by mutual agreement between general agents," and " 'Operators' should always try to adjust their tariffs to 'Flomerca's' New York" tariff, (6) emergency rate reductions would be made by Operators "according to their judgment" but not by general agents unless with the approval of Operators, (7) only the Operators would be allowed to submit tariffs to the Federal Maritime Commission, and (8) Flomerca would submit to

Operators cargo solicitation reports and estimates of expenses for newspaper advertising and for printing sailing itineraries. It was further provided that the agreement would remain in effect for 1 year. On March 9, 1966, this agreement was expanded by an addition entitled Annex A which provided for Gulf/Honduras service. It was made retroactive to July 1, 1965.

10. On November 9, 1966, during the course of an informal investigation by this Commission, respondents tendered a copy of the July 2, 1965 agreement to the Commission and asked confirmation of their position which was that no filing and approval under section 15 was required.[5] If, however, the Commission should consider the agreement subject to section 15 approval, such approval was requested. The agreement was given FMC No. 9597. Protests and requests for hearing were thereafter filed by Grace Line, Inc., a common carrier serving Guatemala and Honduras from U.S. ports, the American Steamship Traffic Executives Committee, some of whose member carriers provide common carrier services between U.S. Atlantic and/or gulf ports and Guatemala and Honduras, and United Fruit Co., which then offered a common carrier service between U.S. Atlantic and gulf ports and Guatemala and Honduras. By letter dated January 24, 1967, respondents advised that they understood that it was the initial view of the Commission that the agreement was subject to approval under section 15 and that they had therefore decided to withdraw the submission.

11. An agreement dated January 25, 1967, was then entered into by respondents. Flomerca was designated "Owners" and Uiterwyk and Continental "Agents." It was provided (1) that the previous agreement would be terminated as of that date, (2) that Flomerca would take over the chartering of the three vessels then in use and start a new service for its own risk and account in direct continuation of the service previously operated for the account of Continental/Uiterwyk, (3) that Uiterwyk, in accordance with prior authorization by Flomerca, would charter replacement vessels for the account of Flomerca at rates equal to the rate charged by the vessel owner plus $75 per day, (4) that Uiterwyk was appointed general agent and

[5] Section 15 provides in pertinent part:

"Every common carrier by water, * * * shall file immediately with the Commission a true copy, * * * of every agreement with another such carrier or other person subject to this chapter, * * * to which it may be a party or conform in whole or in part, *fixing or regulating transportation rates* or fares; *giving* or receiving special rates, accommodations, or other *special privileges or advantages; controlling, regulating*, preventing, or destroying *competition*; pooling or *apportioning earnings*, losses, or traffic; alloting ports or restricting or otherwise *regulating the number* and character *of sailings* between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner *providing for an exclusive, preferential*, or *cooperative working arrangement*. The term 'agreement' in this section includes understandings, conferences, and other arrangements." [Italic supplied.]

manager for the new service at stated commissions and fees, but with the reservation that Flomerca must first realize a minimum annual net profit of $68,300 or Uiterwyk's commissions and fees would be reduced as required to produce that result, (5) that Uiterwyk would (*a*) name the port and booking agents in the United States who would receive stated commissions and fees, (*b*) maintain a separate bank account and bookkeeping records and make them available for inspection by Flomerca, (*c*) submit to Flomerca voyage finalization reports and monthly financial statements, (*d*) provide for tariff filings with the Federal Maritime Commission, (*e*) collect freights and pay all disbursements, (*f*) appoint stevedores and arrange and pay for charterer's liability insurance, (*g*) handle and pay claims and vessel "charterhires", and (*h*) assume "the responsibility to satisfy the legal requirements this contract creates in the United States." Uiterwyk was to be reimbursed for all communications, travelling, advertising, promotion, and Federal Maritime Commission tariff filing expenses but under the presumption that these expenses would not exceed those of the previous year. This agreement was to continue for a period of 3 months but it was subsequently extended for 1 year. It has not been submitted to the Commission for approval.

12. Effective the same date, January 25, 1967, Flomerca chartered the three vessels then in this service. The charters were from Navigation, Ltd.,[6] a Bahamian corporation which had been formed by Uiterwyk to take over certain common carrier operations from Uiterwyk Shipping Ltd. in the Central American trade. It is owned 50/50 by Mr. Uiterwyk and his immediate family and the owners of Continental. Jan C. Uiterwyk Co., Inc., executed the charter forms as brokers for Navigation, Ltd. Navigation, Ltd., had previously obtained the vessels by charter from Uiterwyk Shipping, Ltd. A rider clause was added to the January 25, 1967 Flomerca charters to provide that, so long as Uiterwyk continued as general agent for Flomerca gulf service, Uiterwyk would guarantee the charter payments.

13. Thereafter, on April 5, 1967, and again on May 4, 1967, Flomerca chartered from Navigation, Ltd., the *Maria A*, a vessel owned by Jan C. Uiterwyk Co., Inc. These charters also contained the above rider. The charter forms were executed by Jan C. Uiterwyk Co., Inc., as broker for Navigation, Ltd., and as agent for Flomerca.

14. In 1965, Asiatic Petroleum Corp., in New York, invited quotations from three water carriers for the shipment of one empty propane storage tank from Houston, Tex., to Matias de Galvez, Guate-

[6] These were actually subcharters as the vessels were held by Navigation, Ltd., under charters and not as owner.

mala. Flomerca, through Uiterwyk, submitted the low bid of $2,650; the next lowest bid was "around $5,000." The shipment was moved August 26, 1965, on Flomerca's vessel, *The Eny Hoejsgaard*, Voyage 3, under Houston/Matias B/L 23. Had the rates then on file with the Commission been applied, as they should have been, the charge would have been $6,753.02 or $4,103.02 more than the flat rate of $2,650.

15. During the periods May 15, 1965, to June 29, 1965, and January 30, 1966, to July 29, 1966, Flomerca had two separate and different tariffs on file for the gulf ports to Guatemala trade. During the period May 15, 1965, to April 14, 1967, it also had two tariffs on file for the Guatemala to gulf ports trade. Tariffs were filed by Uiterwyk in the name of "Flomerca Line Gulf Service" and by Flomerca in the name of "Flomerca Line," each without knowledge of the other. Each tariff contained some rates that were higher and some that were lower than those contained in the other. A review of the shipments in the outbound trade during a 35-day period, May 15, 1965, to June 20, 1965, revealed that in 10 instances Flomerca had charged the higher of the two applicable rates. During this same period there were 29 instances of improper ratings not attributable to having two tariffs on file.[7] The number of overcharges and undercharges were about even.

DISCUSSION

The Guatemala shipping decrees as such are not here in issue. However, knowledge of their provisions is necessary to an understanding of the various agreements and the operations thereunder which occasioned this investigation. Intervener United Fruit maintains that if Flomerca conducted its operations in the gulf trade in the same lawful manner in which it operates in the New York trade,[8] i.e. for its own risk and account, United Fruit would not have asked the Commission to undertake this action.[9]

Alcoa SS, Inc. v. *Cia Anonima Venezolana*, 7 F.M.C. 345 (1962), affirmed by *Alcoa SS Co.* v. *F.M.C.*, 321 F. 2d 756 (1963) concerned an agreement between CAVN, a Venezuelan government-owned carrier, and Grace Line, a privately-owned American carrier, whereby Grace became the "associated" service of the Venezuelan national flag line and thus authorized to carry classifications of commodities

[7] Three of these were located and disclosed by respondents.

[8] Both trades are subject to the same Guatemalan decrees.

[9] Because of declining revenues United Fruit found it necessary to discontinue its New York/Guatemala service as of Aug. 23, 1967.

exempted or "exonerated" by Venezuelan decree from payment of import duties. The Commission found it to be a section 15 agreement and approved it as being in accordance with the prescribed statutory standards.

The very purpose of Flomerca's initial agreement with Continental and thereafter with Uiterwyk/Continental has been, in the language of section 15, to give special privileges and advantages, to control competition, to apportion earnings, to regulate the number of sailings and to provide for an exclusive, preferential and cooperative working arrangement. Most of these agreements have included specific provisions for fixing and regulating rates. The "special privilege and advantage" which respondents obtained is the exclusive access to 78 percent of the Gulf-Guatemala cargo.[10] On brief, they do not really attempt to contend that the pre-1967 arrangements did not come within the subject areas embraced by section 15.[11] In substance, their position is (1) that the current agreement, i.e., the agreement dated January 25, 1967, is essentially an agency agreement the subject matter of which does not bring it within the ambit of section 15, and (2) that neither Uiterwyk nor Continental has ever operated in this trade as a common carrier. Major emphasis is placed on the noncommon carrier defense.

As to point (1), Hearing Counsel urge (a) that the current agreement in reality is a continuation of past agreements, and (b) that Uiterwyk/Continental conduct the current operation for their own risk and account. United Fruit argues (*a*) that the current agreement is merely a change in form drafted for the purpose of perpetuating the section 15 relationship between the parties which existed under the prior agreements, (*b*) that on its face it provides for the division of profits, and (*c*) that it cannot be read outside its factual environment.

The current agreement begins by giving Flomerca the new designation of "Owners," changes the designation of Uiterwyk/Continental from "Operators" to "Agents," terminates the previous contract dated July 2, 1965, and then provides:

The Owners will start a new service for their own risk and account between the gulf ports and the ports of the east coast of Central America, in direct continu-

[10] The record contains considerable evidence and argument bearing on the economic impact of the agree ments on United Fruit and Gran Colombiana. Respondents counter with the contention that the indicated decreases in carryings were due to Flomerca's more effective cargo solicitation and superior service rather than its exclusive right to carry controlled cargoes. While this anticompetitive "special privilege and advantage" is the obvious crux of this operation, detailed analysis of its impact is neither within the general scope of the order of investigation or any specific issue stated therein.

[11] Flomerca chose not to file a brief. Therefore, unless otherwise stated, the term respondents as hereinafter used refers to Uiterwyk and Continental only.

ation of the service previously operated for the account of Agents [Uiterwyk/Continental].

Mr. Uiterwyk affirmed the self-evident fact that the objective in drafting the current agreement was to free the operation from Commission jurisdiction and to immunize it from protests by competing carriers. They felt that this could best be done by putting it "purely in the name of Flomerca." As earlier found, there were other indicated changes, such as granting Flomerca the right to inspect books of account and to be furnished with voyage finalizations and monthly financial statements. However, as of the time of hearing, 3½ months after the current agreement became effective, Flomerca had made no inspection of the books and there had been no change in the reports or accountings actually submitted. Although questioned at length in an effort to determine specific functions previously performed by respondents that are now performed by Flomerca and vice versa the record is bare of substance. From an operating point of view, the change in designations of the parties and in accounting and reporting provisions are superficial. The present agreement is indeed a continuation of past agreements without material change.

Respondents contend that the present agreement cannot be considered a continuation of past agreements for the further reason that the operative parties are not the same. It is alleged that Continental is now completely out of the picture except that it is being paid a finder's fee by Uiterwyk for bringing Uiterwyk in as general agent for the Flomerca Gulf service.[12] The fact that Continental is named in and signed the current agreement is said to be because this served as "kind of a notice" of the continuation of the service and because of the provision terminating the previous agreement to which Continental was a party.

Flomerca's general manager testified that Continental "must have something to do with the contract, obviously, but I don't know what is the role of the party." Moreover, it appears that in addition to the so-called finder's fees paid to Continental, the earlier noted $75 per day, which is added to replacement charter rates and which was also included in the rates for the three charters taken over on January 25, 1967, is actually received by Navigation, Ltd., the Bahamian corporation jointly owned by the immediate family of Jan C. Uiterwyk and the owners of Continental.[13] This record is inconclusive with

[12] No one suggests that the payment of a finder's fee is a section 15 matter.

[13] Flomerca has paid its Atlantic general agent nothing for the same act of chartering some 15 vessels over the past 3 years. The vessel owner normally pays a 2½ percent fee to the agent-broker.

regard to the detail of Continental's present participation. However, it clearly establishes that this respondent was one of the operators in the past and it will not support a finding to overcome, at the very least, the presumption that it continues to be.[14] In any event, the departure of one of the parties would not per se constitute a discontinuance of the arrangement. Flomerca would continue to serve as general agent in Guatemala and collect royalties while Uiterwyk would continue to conduct the operation.

Hearing Counsel contend that despite the self-serving contract representation that the new service would be for the risk and account of "Owners," the actual operation demonstrates that it is being conducted for the risk and account of Uiterwyk/Continental. The significance of the potential risk is indicated by the following testimony of Mr. Chester, president of Chester, Blackburn & Roder, Inc., ship brokers, managing agents, and agents in the shipping field:[15]

> I was offered a participation in this line, which I turned down for a very good reason.
>
> * * * * * * *
>
> At that time [sometime in 1964] it was very, very clear that the deal was to be very similar to the one in Europe whereby which it was entirely run and operated by Continental Lines and Mr. Uiterwyk and that Flomerca Line would just receive some sort of a royalty. In this I didn't choose to participate.
>
> * * * * * * *
>
> The actual starting of the line took practically very little money. I mean all you need for chartering of a ship, all you need is a month's in advance. It was a question of underwriting the losses while sharing in the profits.

Hearing Counsel urge that substantial risks to respondents are inherent in the present operation as a consequence of (1) the guarantee of a minimum annual net profit to Flomerca of $68,300, and (2) the guarantee of charter payments.[16]

The minimum net profit provision contained in the current agreement provides:

> The commissions and fees cited above are based on the premise that the Owners will earn a minimum net profit in the Gulf Service of $68,300 for the 12-months period of 25 January 1967 to 24 January 1968, or a proportionate amount for a period less than 1 year and the same amount for each equal period during which this contract is in force. If the results of the vessels balance sheets during this period of 12 months do not total a minimum profit of $68,300 for the Owners, Jan C. Uiterwyk Co., Inc., will reduce their commissions and fees to the point

[14] Although requested to do so by Hearing Counsel, Continental did not produce a witness.

[15] This company has been general agent for Flomerca's Atlantic service since July 1, 1964, and for a time was soliciting agent in New York for Flomerca's gulf service.

[16] While Uiterwyk is the single guarantor of record in both instances, the burden, insofar as it would be reflected on funds channeled through Navigation, Ltd., would fall on Continental as well.

necessary so that the Owners will recognize a minimum net profit as stipulated above.

This means that whenever the service earns less than $68,300 Uiterwyk will have to forego commissions and fees to make up the difference. Should the difference equal or exceed accrued commissions and fees, Uiterwyk will receive nothing and will be out of pocket the cost of time, organization, and facilities devoted to the service.

Uiterwyk contends that the converse of Hearing Counsels' position should also be recognized, i.e., that "if the service does well, the agent is going to collect commissions at a very high rate and a nice management fee"; that if the service were to be an utter disaster Flomerca would have to bear all the losses with the agent merely foregoing its commissions and fees; and that Mr. Uiterwyk, a successful businessman, did not assume an undue risk in negotiating the $68,300 figure.

United Fruit urges that the change of expression of profit guarantee to Flomerca from a percentage of profits, as in the past agreements, to the present fixed amount is without significance as the amount may quite conceivably have been selected to equal the royalties received under the earlier agreements. If this be so,[17] the change is one of expression only and the net effect remains unchanged. There is no evidence that what respondents now call a minimum profit is anything more or less than a minimum royalty. Flomerca received in the past, and is receiving at present, a guaranteed minimum annual amount plus additional amounts based upon the profits of the venture.

Hearing Counsel contends that it is an unacceptable euphemism to term a negotiated, guaranteed sum a "profit" and, likewise, to term respondents' compensation, which has all the earmarks of normal profit taking, a "commission" or "fee." The technique employed by respondents in accomplishing the conversion of profits into commissions and fees is to set the commissions and fees [18] so high that, after payment of the guarantee to Flomerca, respondents receive all of the profits until an exceedingly high figure is reached. Mr. Uiterwyk testified:

> * * * the magnitude of the commissions [and fees] provided in this contract is such that the commission [and fees] is *exceedingly high* as compared with the normal standards and as such the amount, according to your commercial calculation and our commercial experience and our knowledge of this service in the line,

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[17] While Mr. Uiterwyk refused to relate the amounts of Flomerca's past royalties to current profits, or even to state whether there is a relationship, he did testify that the service has been profitable.

[18] Commissions are set at 5 percent of manifests and fees at 2½ percent of manifests, plus $1,500 per month, plus $75 per vessel per day on charters.

is such that we still will come out well ourselves if we have to reduce part of this *profit*. (italics supplied.)

Again it is clear that the changes are more apparent than real. Despite rewording, the current agreement continues profit sharing as in the past and, regardless of the profit shown thus far and Mr. Uiterwyk's confidence in the future, the minimum guarantee to Flomerca does constitute a potential risk to respondents.

The earlier noted charter rider clause by which Uiterwyk guarantees payment provides that:

> The financial performance under this charter party is hereby guaranteed by Jan C. Uiterwyk Co., Inc., Tampa, Fla. It is understood that Jan C. Uiterwyk Co., Inc., will maintain this guarantee only for as long as they are general agents for the Flomerca Gulf Service; therefore, whenever Jan C. Uiterwyk Co., Inc., ceases to be general agents for this service, the charter party will terminate simultaneously and vessel will revert to its owner.

Flomerca alleges that this clause was put in to make the agent "work more and get more freight" and that it was only for the initial stages of the "new service." Be that as it may, it clearly conflicts with the agreement provision that Flomerca is to start a new service for its own risk and account and that, in doing so, it will take over the chartering of vessels. This contrary arrangement unquestionably constitutes a very substantial risk to respondents. If the agency continues and charter payments are not met from operating revenues, Uiterwyk will be liable. If the agency terminates at the will of Flomerca, or because of failure, or for any other reason, the vessels will revert to Navigation, Ltd., from whom Flomerca chartered them. Navigation, Ltd., which, as found, is owned 50/50 by the Jan C. Uiterwyk family and the owners of Continental, will then remain bound by whatever contract it had with the party from whom it chartered. In the case of the previously mentioned *Maria A*, this would have been Jan C. Uiterwyk Co., Inc., the owner or the vessel.

The risks borne by Flomerca are not readily apparent. Its general manager testified that it had no investment in the previous operation and that he was unaware of any in the present. Mr. Uiterwyk thereafter testified that the initial working capital for the new service was furnished by Flomerca. This was done, he said, by the transfer of royalty funds due Flomerca for the period July 1, 1966–December 21, 1966, from Uiterwyk's account to Flomerca's account. There is no written evidence of this transaction, authorization having been obtained by Mr. Uiterwyk by telephone on or after January 31, 1967. There is no testimony or other evidence indicating (1) the amount of the funds thus advanced, (2) the normal working capital requirements of the operation, (3) whether this was anything more than a temporary advance pending periodic accounting, (4) from what source future working capital requirements would be met, or (5) whether respondents were to remain liable to Flomerca for these accrued royalties. The lack of a written understanding detailing the commitment of necessary funds, both present and future, is particularly difficult to rationalize in view of the fact that Uiterwyk's income, and thereafter Continental's income, is directly contingent upon the net profit, i.e., gross revenues less all costs, including the cost of working capital. It is clear that the operation has been conducted and is being conducted by respondents for their own risk and account.

Hearing Counsel urge that a comparison of the role of Flomerca in the present gulf service to its role in the Atlantic service shows that respondents continue to direct and control the gulf service and that their powers and functions are not merely those of a managing agent. When asked whether, as general agent for Flomerca's Atlantic service, it was necessary to secure permission from Guatemala before chartering a vessel, Mr. Chester said:

> Oh, yes. They are very sensitive about our authority in practically every area and particularly on an important matter like a charter we have to ordinarily prove to them on telephone and cable that we believe it's necessary and profitable to so do.

If a charter within the scope of a particular authorization is not available "then of course we have to go back." Copies of these charters are furnished Flomerca in Guatemala and are also made available to its auditors in New York.

In the Atlantic service Flomerca requires a monthly statement within 5 days after the end of each month and a voyage accounting, with vouchers attached, within 45 days. The latter includes freight income, commissions, stevedoring charges, port charges, cargo charges, crew wages, crew expense, ship's supplies, and fuel. This service is also audited "about every 6 months," sometimes by surprise. Flomerca applies "constant pressure" for transferals of funds to its account and "within each month there are funds transferred." Moreover, Flomerca negotiates the stevedoring contracts, approves requests for rate changes, controls voyage itineraries and port calls, reviews all expenses, and in general exercises strict direction and control of the Atlantic operation.

In contrast, the record indicates that Flomerca exercises little if any direction or control over the gulf service. Although the current agreement provides that replacement vessels will be chartered in accordance with prior authorization by Flomerca and at rates to be agreed upon by Flomerca at the time, prior authorization has not been obtained nor has there been prior agreement as to charter rates. In fact, Flomerca's general manager stated that he had no knowledge of any replacement charters. They were not signed by Flomerca officials authorized to sign charters and copies were not furnished Flomerca. Respondents decide what vessels to charter, when, and at what rates. The added fee of $75 per vessel day is obviously for something more than services rendered in arranging charters as it ranges from approximately five to six times the normal 2½-percent brokerage fee which, of course, varies with the gross value of the charter.[19]

While under the previous agreement, 60 percent of the "benefits" due Flomerca were to be paid quarterly and the balance after the finalization of accounts as of July 1 each year, it is said that under the current agreement they have a theoretical right to withdraw proceeds due them at any time. Nonetheless, at the time of the hearing, no withdrawals had been requested or made, nor, as earlier found, had there been any inspection of respondents' books or changes in the reports or accountings submitted to Flomerca. It is evident that in the Atlantic trade, Flomerca operates as a true principal while in the gulf trade it merely collects a guaranteed profit or royalty in exchange for respondents' exclusive right to carry government-controlled cargo via a service they continue to direct and control.

There is no questioning the fact that a common carriage service is being conducted. The question is whether respondents are common carriers. The basic arguments offered in support of their contention that they are not common carriers, and therefore that they are not subject to the Commission's jurisdiction, are (1) that Uiterwyk is, and at all times has been, "purely a general agent," (2) that, as a matter of law, the party in whose name the service is held out to the general public is the common carrier, and (3) that there cannot logically be two common carrier parties to the arrangement.

The record shows that Uiterwyk is retained as agent by a number of non related companies, including Azta Shipping Co., Oost Atlantic Lijn, Blue Ribbon Line, and Contramar. Mr. Uiterwyk testified that:

> We are purely general agents and agents in Jan C. Uiterwyk Co., Inc. It is an image we commercially want to protect by all means because only by doing so can we acquire eventual additional lines. So we always have kept this company as a purely general agency operation.

The issue, however, is not what image Mr. Uiterwyk wishes to maintain but whether his functions have been and are those of a common

[19] See page 93, footnote 13.

carrier rather than an agent. The prior agreements on their face leave little doubt. Respondents, as "Operators" engaged in a "joint venture," were required to "maintain a steamship service" under the name of "Flomerca." Flomerca was not the operator of the service. Complete operating authority and all financial and legal responsibility was vested in respondents. Flomerca's general manager testified that Flomerca had no investment in the service and no function except that of general agent in Guatemala for which it was paid a commission. He further testified that the only occasion for royalties was "because we allowed the use of our bills of lading and our manifests with the Flomerca heading" but that Flomerca "did not assume any responsibility for the use of [its] name."

As earlier found, the pre-January 25, 1967, service is being continued without interruption and with no apparent differences in the physical operation. The present common carriage operation has not been materially altered. The redesignations of Flomerca as "Owners" and respondents as "Agents" are clearly superficial. Although it may be conceded that virtually any function may be performed by an agent, the degree of control and ultimate responsibility assumed by respondents in this instance is not in keeping with such status. They are owner/operators rather than agents.

In *Agreement 6210*, 2 U.S.M.C. 166, 168 (1939) the Commission approved a section 15 agreement but suggested the change of the designation of a party, both in a contract form and related bills of lading, from "agent" to a proper characterization of common carrier. Thereafter, in *Transportation by Southeastern Terminal & SS Co.*, 2 U.S.M.C. 795, 798 (1946), when respondents contended that they were "merely agents for the owners," the Commission held:

> There are at least six different organizations here combined in one form or another to engage in the shipping business. The purpose of the formation of the four corporate shipowners was to limit liability to each ship separately. Whether there was a further intention to create devices to evade the regulatory provisions of the shipping acts does not appear of record. Suffice it to say that the purpose of such legislation cannot be nullified in that manner.

Again, in *Waterman* v. *Stockholms Rederiaktiebolag Svea*, 3 U.S.M.C. 131, 132 (1949) the Commission held that *the designation of a person as agent is not conclusive if in his actual course of business he assumes the responsibilities and performs the duties of the carrier*. Directly in point is *Union Stock Yard & Transit Co.* v. *United States*, 308 U.S. 213, 220 (1939) wherein the Supreme Court held that common carrier status cannot be avoided by the device of acting as agent for a common carrier. More recently, in *Tariff Filing Practices of Containerships*, *Inc.*, 9 F.M.C. 56, 69 (1965) the Commission, citing several Supreme Court and lower court decisions, held that the term "common carrier," as employed in the shipping acts, must be interpreted to effectuate the remedial and evident purposes of the statutes and must result in fairness to competing carriers. In operating under both prior and present agreements Uiterwyk assumed the responsibilities and performed the duties of a common carrier.

Turning to Continental's status in the prior arrangement, respondents agree that it certainly involved a situation in which someone was a common carrier. Flomerca, they say, held itself out to the general public, used its name in manifests, bills of lading, advertising, solicitations and tariffs, and therfore Flomerca was the common carrier. The argument is then advanced that:

> * * * If Flomerca was the common carrier, then Continental was not, and vice versa; no matter how one chooses, there cannot logically be two common carriers who were parties to the arrangement.

The assumption that there can be only one common carrier is simply incorrect. There is no such exclusivity in logic or law. In *Puget Sound Tug & Barge* v. *Foss Launch & Tug Co.*, 7 F.M.C. 43 (1962) the Commission held that where two companies entered into a cooperative working arrangement whereby one held out to the public, the other provided and operated the vessels, and the revenues were divided between them, they were both common carriers and the agreement had to be filed for approval under section 15.[20] The company holding out to the public, in this instance Flomerca, is termed a "nonvessel owning common carrier" and the other, which provides and operates the vessels, in this instance Uiterwyk/Continental, is termed the "underlying common carrier." These agreements are between common carriers by water, all operating in the foreign commerce of the United States, and all subject to section 15 of the Act.

In disassociating itself from operations in other U.S. trades, Uiterwyk continues to rely on the theory that only the company in whose name a service is held out is a common carrier subject to regulation.[21] Thus Uiterwyk Shipping, Ltd., Gulf Line, Ltd., Gulf Express Lines, Ltd., or Uiterwyk Shipping, Inc., would be the common carrier in any service conducted in any of these names and the status, if any, of Uiterwyk would be that of agent.[22] Hearing Counsel and

[20] As Hearing Counsel point out, there is no denial that Continental was operating as a common carrier in other U.S. trades at the time the earlier agreements were made.

[21] No cases are cited or found in support of this proposition.

[22] Uiterwyk contends that the Bahamian companies are intended to be shipowners and operators, as well as to acquire real estate, and that the primary reason for their being established in Nassau is so that they can utilize foreign-flag ownership.

United Fruit contend that these related corporations are mere paper shells, without employees, physical assets, or even places of business; that they are all owned and supported by Mr. Jan C. Uiterwyk and his immediate family who create and abandon them at will; that the whole show is run by Uiterwyk, ostensibly as agent but actually as owner/operator; and that the Act was not designed to regulate puppet carriers while the manipulator remains free of common carrier burdens and responsibilities.

Uiterwyk's reply to this is that:

> In any event, even if the "paper shell" theory were adopted, the result would not be to convert (Jan C. Uiterwyk Co., Inc.) into a common carrier. That agency company does not own the Bahamian companies which are alleged to be common carriers; those companies are owned by individuals * * * just as is (Jan C. Uiterwyk Co., Inc.) itself, so that even if the "paper shell" theory were valid the logical conclusion would have to be that the "common carrier" (in any instance where one of the companies actually is a common carrier) would be its individual stockholders, not (Jan C. Uiterwyk Co., Inc.). In other words, no matter how Hearing Counsel chooses to argue the point, his attempted disregard of valid and existing corporations cannot logically or legally be the conclusion that (Jan C. Uiterwyk Co., Inc.) is a common carrier.
>
> * * * * * * *
>
> * * * (Jan C. Uiterwyk Co., Inc.) does not own or have a financial interest in any other of the companies with which various members of the Uiterwyk family are connected.

Navigation, Ltd., which is owned by the same individual owners of Uiterwyk and Continental and is used to channel revenues from the present operation to them, is also said to be a separate and independent legal entity shielded by its corporate veil.

In *Transportation by Southeastern Terminal & SS Co.*, supra, at 798, the Commission held that "when we look through the corporate fiction we find that, at least as far as Eastern and the four corporate shipowners are concerned, those organizations are responsive to the same general policy and subserve the same general investment." The Supreme Court held in *County of Marin* v. *United States*, 356 U.S. 412, 418 (1958) that "a mere corporate shell without property or function can by no stretch of the imagination be deemed a 'carrier.' "

Where a corporation is so organized and controlled, and its affairs are so conducted as to make it a mere sham, agent, or adjunct of another, its separate existence as a distinct corporate entity will be ignored, and the two corporations will be regarded in legal contemplation as one unit. *Southeast Airlines Agency, Compliance Proceeding*, 25 C.A.B. 89, 99 (1957). It is settled law that the corporate entity may be disregarded if failure to do so would aid in the perpetration of a fraud or the circumvention of an applicable statute. *American Airlines, Exemption*, 27 C.A.B. 1112, 13 (October, 1958). Corporate entities may be disregarded where they are made the implement for avoiding a clear legislative purpose. *Schenley Corp.* v. *United States*, 326 U.S. 432, 437 (1945). It is concluded that, insofar as section 15 is concerned, Uiterwyk and its related companies are all one and the same, as are Continental, Contramar, and Capital to Capital. The same is also true of Uiterwyk/Continental and Navigation, Ltd.

Findings number 14 and 15 above concern misratings under section 18(b)(3) of the Act.[23] Respondents admit the propane storage tank undercharge and state that it was merely an inadvertent mistake. On July 27, 1966, Uiterwyk wrote Asiatic Petroleum requesting payment of the undercharge but this was refused.

The double tariff filings are also conceded, as is the finding that, under the rule that in such situations the lower rate is the legally applicable rate,[24] there were 10 overcharges during the 35-day sampling period. Respondents do not deny that during the same period there were an additional 29 misratings unrelated to the double tariff filings. Correction notices were sent out on 22 of these but it was later found that there were errors in rates or weights in four of the corrections.

On brief respondents state that corrections covering repayment of the 10 overcharges have been sent out and that this has been made known to the Commission's staff by the provision of copies. No copies have been received indicating that any of these repayments have in fact been made.[25] On the contrary, the record herein does show that corrections issued on three other shipments further violate the Act by applying the higher rather than the lower rates.[26]

With respect to all of these tariff violations, respondents continue to urge the agency defense * * * that the statute applies to the carrier, Flomerca, and not to its agents. As earlier found, Uiterwyk/Continental is the underlying common carrier in this trade. They operate the service as owner/operators rather than agents and they as well as Flomerca are clearly liable for the above tariff violations. *Puget Sound*

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[23] Section 18(b)(3) provides in pertinent part:

No common carrier by water in foreign commerce * * * shall charge * * * greater or less or different compensation for the transportation of property * * * than the rates and charges which are specified in its tariffs on file with the Commission and duly published and in effect at the time.

[24] Where two tariffs are equally appropriate, the shipper is entitled to have applied the one specifying the lower rate. *United States Borax & Chemical Corp.* v. *Pacific Coast European Conference et al.*, 1968 (Docket No. 66-63, 11 F.M.C. 451).

[25] Official notice is taken of files Nos. 1854 and 2056 located in the Commission's Office of Tariffs and In formal Complaints (Foreign Commerce), Bureau of Compliance.

[26] Hearing Counsel urge that in view of the serious pattern of charging improper rates the Commission direct an audit of the records in this trade, and require respondents to submit a report of overcharges refunded, or steps taken to collect undercharges, and the results of such attempts to collect.

Tug & Barge v. *Foss Launch & Tug Co.*, supra; also *Common Carriers by Water—Status of Express Companies, Truck Lines and Other Nonvessel Carriers*, 6 F.M.B. 245 (1961).

ULTIMATE CONCLUSIONS

On the basis of the foregoing and the entire record it is found and concluded that:

1. Respondents Flomerca and Continental entered into and carried out an agreement without Commission approval from or about July 1963 to January 1964, in violation of section 15, Shipping Act, 1916.

2. Respondents Flomerca, Continental, and Uiterwyk entered into and carried out continuing agreements since January 1964, and are presently carrying out an agreement without Commission approval in violation of section 15, Shipping Act, 1916.

3. Respondents Flomerca, Continental, and Uiterwyk have charged or demanded a greater or less or different compensation for the transportation of property than the rates and charges specified in tariffs on file with the Commission in violation of section 18(b)(3), Shipping Act, 1916.

(S) JOHN MARSHALL,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–24

AGREEMENT NO. 8200, JOINT AGREEMENT BETWEEN THE FAR EAST CONFERENCE AND THE PACIFIC WESTBOUND CONFERENCE; AND MODIFICATIONS OF AGREEMENTS NOS. 8200, 8200–1 AND 8200–2

NOTICE ADOPTING INITIAL DECISION AND ORDER APPROVING AGREEMENTS

(Adopted October 15, 1968)

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 that the decision of the Examiner became the decision of the Commission on October 15, 1968.

Now, therefore, it is ordered:

1. That Agreement No. 8200 be, and hereby is, granted continued approval pursuant to section 15 of the Shipping Act, 1916, as amended, for the period of 1 year from and after the date of this order;

2. That Agreements Nos. 8200–1 and 8200–2 be approved pursuant to section 15 of the Shipping Act, 1916, as amended, and that such approval shall continue for the period of 1 year from and after the date of this order;

3. That any application on behalf of the parties to the aforementioned agreements for extension of the period of the approval of said agreements shall be filed with the Commission with service upon all of the parties to this proceeding not later than the 60th day prior to the expiration of the approvals granted herein; and

4. That this proceeding be discontinued without prejudice to the rights of any of the parties to protest upon any grounds, the approval or continued approval of Agreements Nos. 8200, 8200–1, and/or 8200–2, in any new proceeding relating to those agreements, including the extension of the approval thereof as stated above.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

No. 68–24

FAR EAST CONFERENCE AND PACIFIC WESTBOUND CONFERENCE—AGREEMENT NO. 8200 ET AL.

Continued approval of Agreement No. 8200 for 1 year, and approval of Agreements Nos. 8200–1 and 8200–2, for the same period of time, granted.

Proceeding discontinued, without prejudice to the rights of any party hereto, without waiver or estoppel, to protest or justify, upon any grounds, the continued approval of the agreements, in any new proceeding relating to the agreements, including extension of the approvals here given.

Any application for extension of the period of approval shall be filed with the Commission, with a certificate of service upon all parties hereto, not later than the 60th day prior to expiration of the approvals here given.

Elkan Turk, Jr., for respondent Far East Conference.

Edward D. Ransom for respondent Pacific Westbound Conference.

Mark P. Schlefer and *Leslie Srager* for Board of Commissioners of the Port of New Orleans; *Louis A. Schwartz* for New Orleans Traffic and Transportation Bureau; *James M. Henderson* and *Douglas W. Binns* for The Port of New York Authority; and *Richard D. Ford* for Pacific Coast Association of Port Authorities, petitioners.

J. Kerwin Rooney for Port of Oakland; *Alex C. Cocke* for New Orleans Board of Trade Ltd.; and *Charles H. Lombard* for Alabama State Docks Department, interveners.

Donald J. Brunner and E. Duncan Hamner, as Hearing Counsel.

INITIAL DECISION OF C. W. ROBINSON, PRESIDING EXAMINER[1]

By order served May 1, 1968, the Commission instituted this investigation "to determine whether Agreements Nos. 8200–1 and 8200–2 should be approved, disapproved, or modified; and whether or not continued approval of Agreement No. 8200 is warranted, and if not, whether it should be canceled or modified." The following organizations were named "Petitioners" by the order: Board of Commissioners of the Port of New Orleans; The Port of New York Authority; Pacific Coast Association of Port Authorities; and New Orleans Traffic and Transportation Bureau. Port of Oakland, New Orleans Board of Trade Ltd., and Alabama State Docks Department, intervened.

A prehearing conference was held on May 27, 1968, at which it was agreed that certain procedural steps would be taken by the

[1] This decision became the decision of the Commission on October 15, 1968.

parties; the hearing date was to be scheduled thereafter. In June, counsel for the two conferences and the ports of New York and New Orleans requested the Examiner to forego the time schedule agreed upon to see if they could work out some plan whereby the agreements could be approved without the necessity of a long and costly hearing. As it was his clear responsibility to do so, the Examiner approved the suggestion. On August 23 a joint motion was filed by counsel for the conferences seeking an order of approval of the agreements and the discontinuance of the proceeding, without prejudice (more details herein). Changes in the suggested order attached to the motion thereafter were proposed directly to conference counsel by counsel for New York and New Orleans interests. The changes having been accepted by the conferences, the New York and New Orleans interests and Hearing Counsel endorsed the motion as modified. It would seem advisable to dispose of the proceeding by means of an initial decision rather than by motion.

THE FACTS

1. Agreement No. 8200 (No. 8200), approved December 29, 1952, is a joint effort by the conferences (FEC and PWC) "* * * to assure to the parties hereto, as well as to the manufacturers, merchants, farmers and labor, whose products are exported from the United States to the Far East destinations which may, from time to time, be common to the scope * * *" of the individual agreements of the two conferences, "* * * stability of ocean rates and frequency, regularity and dependability of service which is essential to their continued prosperity * * *."

2. Agreement No. 8200-1 (No. 8200-1), filed on May 13, 1966, modifies Article FOURTH of No. 8200 by providing that all new members of either of the two conferences shall become parties to any supplementary agreements as well as to No. 8200.

3. Agreement No. 8200-2 (No. 8200-2), filed March 15, 1967 and as far as here pertinent, provides for the cooperation between the two conferences in the establishment and maintenance of rates, rules, and regulations to be observed by each of them. Article IX (1) permits rate adjustments by either conference without the concurrence of the other, but the two may agree on changes voluntarily, and (2) the one not making the first adjustment can make its own except where the purpose is to bring the rate relationship within the limits specified in the article; Article X (1) establishes the maximum and minimum amounts by which FEC rates should exceed the local rates of PWC, the maximum being $6 per revenue ton, or its equivalent, and the minimum being the amount of accessorial charges

assessed against cargo under the PWC tariff, and (2) the agreement does not apply to the relationship between PWC overland rates and FEC rates, or between PWC overland rates and PWC local rates; and Article XIII subordinates No. 8200-2 to Article SECOND of No. 8200, the latter enabling the conferences to take independent action under the procedure therein provided.

4. No. 8200 was the subject of investigation in *Joint Agreement—Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553 (1965), wherein it was held, among other things, that the conferences had been carrying out unfiled supplementary agreements. Appeals were taken therefrom to the United States Court of Appeals for the Fifth Circuit, where it was argued in April 1967; no decision has been rendered. The lawfulness of overland rates is involved in two other proceedings before the Commission, docket No. 65-31, *Investigation of Overland and OCP Rates and Absorptions*, and docket No. 66-61, *Board of Commissioners of the Port of New Orleans* v. *Pacific Coast Australasian Tariff Bureau, and Member Lines*, 12 F.M.C. 184, sustaining the propriety of the rates.

DISCUSSION AND CONCLUSIONS

The Gulf and New York parties, the conferences, and Hearing Counsel believe that it would be wasteful to examine again the overland situation that is involved in the appeals before the Fifth Circuit Court of Appeals and the proceedings before the Commission in dockets Nos. 65-31 and 66-61, referred to in the paragraph next above, and they request continued approval of No. 8200 for 1 year and approval of Nos. 8200-1 and 8200-2 for the same period. Any application for extension of the period of approval would be filed with the Commission, with a certificate of service upon all parties to the present proceeding, not later than the 60th day prior to expiration of the approval here sought. Concomitantly, discontinuance of the present proceeding is requested if approval is given to the agreements, "without prejudice to the rights of any of the parties, without waiver, or without estoppel, to protest or justify, upon any grounds, the approval or continued approval of Agreements Nos. 8200, 8200-1, and/or 8200-2, in any new proceeding relating to those agreements, including the extension of the approval thereof * * *." No objections to the motion, as modified, have been received.

In *Joint Agreement, supra*, the Commission stated that there was insufficient evidence to disapprove No. 8200. There being no evidence in the present proceeding which would negate that finding, and there being no opposition to the motion for continued approval of No. 8200 for 1 year, as mentioned, no reason appears why the motion for continued approval thereof should not be granted, especially in view of the built-in safeguards attached to any application which may be filed for extension of such continued approval.

No basic legal objection is observable at this juncture to No. 8200–1, and none has been advanced by any party. Accordingly, approval thereof for 1 year, under the same terms and conditions as in the case of No. 8200, should be received.

The parties realize, and the Examiner agrees, that from a practical point of view it is more desirable to survey for 1 year the results which would flow from No. 8200–2 rather than to proceed at once to a hearing thereon. Furthermore, issues as to overland rates and the maximum and minimum limits on the differential between PWC local rates and FEC rates might well be affected by the decision of the Fifth Circuit Court of Appeals and the decision of the Commission in Dockets Nos. 65–31 and 66–61. The moving parties agree that the effect of rapidly changing transportation conditions in, and the characteristics of the transpacific trade, of which the Examiner is not wholly without knowledge, cannot be assessed at the present time, but the conferences hope that No. 8200–2 may "prevent uncoordinated rate adjustments from damaging the competitive position of merchants on the various coasts and consequently of the ports and carriers serving them." The conferences predict, furthermore, "that a constantly fluctuating relationship between PWC local rates and the corresponding rates of FEC would create commercial chaos and seriously interfere with the marketing of American products in the Far East by merchants on the various coasts of the United States." All-in-all, approval of No. 8200–2 for 1 year, under the same terms and conditions as Nos. 8200 and 8200–1, is justified.

ULTIMATE CONCLUSIONS

It is found and concluded that the three agreements under consideration will not, for a period of 1 year after approval (or continued approval) thereof, be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or operate to the detriment of the commerce of the United States, or be contrary to the public interest, or be in violation of the Shipping Act, 1916, as amended (the Act). Furthermore, it is found and concluded that the three agreements, for the same period of time, will satisfy the requirements of subdivision (1) of the second paragraph of section 15 of the Act, as amended.

Continued approval of No. 8200 for a period of 1 year, and approval of Nos. 8200–1 and 8200–2 for the same period of time, is hereby granted. The proceeding is hereby discontinued, without prejudice to the rights of any party to this proceeding, without waiver or estoppel, to protest or justify, upon any grounds, the continued approval of the agreements in any new proceeding relating to the agreements, including extension of the approvals here given. Any application for extension of the period of approval shall be filed with the Commission, with a certificate of service upon all parties to the present proceeding, not later than the 60th day prior to expiration of the approvals here given.

(Signed) C. W. Robinson,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–26

IN THE MATTER OF AGREEMENTS NOS. T–2108 AND T–2108–A BETWEEN THE CITY OF LOS ANGELES AND JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; AND YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER

Adopted October 15, 1968

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 that the decision became the decision of the Commission on October 15, 1968.

It is ordered, That Agreement No. T–2108 shall be modified (1) to delete a clause requiring a lessee or preferential user of terminal facilities to utilize such facilities so as to substantially exclude other terminals from securing its patronage; (2) to delete the retroactive provision; and (3) to increase the minimum payment provision to a compensatory level. Agreement T–2108 shall be approved upon receipt of appropriate modifications. Agreement T–2108–A is approved subject to modification of Agreement T–2108.

By the Commission.

(Signed) THOMAS LISI,
Secretary.

IN THE MATTER OF AGREEMENTS NOS. T–2108 AND T–2108–A BETWEEN THE CITY OF LOS ANGELES AND JAPAN LINE, LTD.; KAWASAKI KISEN KAISHA, LTD.; MITSUI O.S.K. LINES, LTD.; AND YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.

Agreement No. T–2108 whereby the City of Los Angeles grants the preferential use of terminal facility to four Japanese carriers, approved subject to the deletion of a routing clause and a retroactive effect provision, and subject to an increase in the minimum payment to be made by the lines during any year the agreement is effective.

Agreement No. T–2108–A whereby the City of Los Angeles grants the preferential use of a gantry crane to four Japanese lines approved subject to required modification of Agreement No. T–2108.

Roger Arnebergh, *Edward D. Farrell*, and *Walter C. Foster* for respondent city of Los Angeles.

Reed M. Williams and *Francis L. Tetreault* for respondent Japanese lines.

Leonard Putnam and *Leslie E. Still, Jr.*, for petitioner city of Long Beach.

Albert E. Cronin, Jr. for petitioner Stockton Port District.

William R. Daly for San Diego Unified Port District, intervener.

J. Kerwin Rooney for Port of Oakland, intervener.

Donald J. Brunner and *G. Edward Borst*, Hearing Counsel.

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

The City of Los Angeles, by its Board of Harbor Commissioners (Los Angeles) entered into an agreement with Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsui O.S.K. Lines, Ltd; and Yamashita-Shinnihon Steamship Co., Ltd., all common carriers by water (herein referred to collectively as the Lines), filed with the Commission and designated by it as Agreement No. T–2108, granting to the Lines the preferential use of a container cargo handling terminal. The parties further executed and filed Agreement No. 2108–A whereby Los Angeles grants to the Lines the preferential use of a crane for handling containers. The Commission ordered this investigation to determine whether the agreements should be approved, disapproved, or modified pursuant to section 15 of the Shipping Act, 1916 (the Act).

The city of Long Beach and Stockton Port District were designated as petitioners herein. The city of Oakland and the San Diego Unified Port District intervened.

THE AGREEMENTS

On November 7, 1967, the respondents entered into a "Permit and Agreement" whereby for a period of 3 years (with option to assignees to renew for 2 years), Los Angeles granted to the Lines a facility consisting of 10.54 acres, with improvements to be constructed thereon, to be used for the docking and mooring of vessels, the receipt, handling, loading, unloading, storage, transporting, and delivery of containerized cargo and for uses incidental thereto. The Lines agree to handle and

[1] This decision became the decision of the Commission on October 15, 1968.

route through the Port of Los Angeles (the Port) all of their containerized-cargo vessel business the shipment of which originates or terminates in Japan or the United States and which originates at, is destined to, or transits through metropolitan Los Angeles and the surrounding area tributary to the Port. As an exception to this routing provision, the Lines are permitted to load and discharge container cargo at any other southern California port if carried on conventional break-bulk vessels and semicontainerized vessels if such cargo can be loaded or discharged at a conventional break-bulk facility.

As compensation to the Port, the Lines agree to pay all charges which accrue under the Port tariff for dockage, wharfage, wharf storage, wharf demurrage, and all other tariff charges applicable. If the total amounts of such payments within 1 year are less than $63,420, the Lines will pay the Port the sum necessary to reach that required minimum. If, however, payments to the Port within a year shall equal $235,000, no further payments will be made to the Port. The minimum payment is based on an estimate of the cost of "extra" facilities to be provided by the Port, that is, only costs over and above the construction of an ordinary facility. Maximum compensation is based on the total cost of the facility assigned.

The Port reserves the right to assign to others than the Lines the right to use the premises and facilities as long as such use will not interfere with or delay the conduct of assignees' business. The revenue received by the Port for secondary use is to be credited to the minimum-maximum compensation, the secondary use described for that purpose being containerized cargo and general break-bulk cargo. However, the minimum-maximum is not to be credited with use by vessels owned or operated by a steamship line which as of the date of the agreement, calls at the Port, or is a tenant of the Port.

The Lines may cancel the agreement after the first year. In the event of cancellation, or in the event the agreement is not renewed or extended for a combined total of 10 years, the Lines shall reimburse the Port in the amount of the unamortized balance of those extra costs expended by the Port in providing special facilities which are ordinarily not required for the operation of a break-bulk terminal, an estimate of such costs being attached to the agreement.

It is provided that if the facility is used by the Lines before Commission approval, the agreement shall become effective for all purposes retroactively as of the first day of the month during which such use commenced.

The "Preferential Assignment for Use of Crane" entered into at the time the above agreement was executed, provides for payment to the Port for such use in accordance with Port tariff, provided that if during a year, the payments shall be in excess of $89,000, no further compensation to the Port shall be paid during that year for use of the crane by the Lines. The Port retains the right to allow other persons to use the crane when its use is not required by the Lines, and the revenue from such use is to be retained by the Port.

Only those provisions of the agreement here at issue are above described.

POSITIONS OF THE PARTIES

Petitioner Long Beach resists approval, contending that the "routing" clause and the "retroactive" provision are in violation of section 15 of the Act, that the agreement is unjustly discriminatory or unfair operates to the detriment of the commerce of the United States, is contrary to the public interest, and otherwise violates sections 15, 16, and 17 of the Act. It is argued that the routing clause is a monopolistic practice in restraint of trade, and is therefore in violation of the antitrust laws; and that unlike dual rate contracts, the use of such a practice does not have specific statutory approval. The "retroactive" provision is alleged to violate section 15 of the Act in that it permits operation of the agreement prior to Commission approval. Objection is made to the "free use" by the Lines of the facility after the maximum payment has been reached as violative of sections 16 and 17 of of the Act in that other lines using the Port are subjected to unreasonable prejudice or disadvantage when they are required to pay full tariff. It is argued that the agreement is noncompensatory because Los Angeles will not receive sufficient guaranteed revenue to cover its out-of-pocket costs such as bond costs, direct operating costs, and prorated port costs. Further contention is that Los Angeles is in violation of the Act by operating under the agreement prior to its approval. Long Beach reasons that the commencement of construction of facilities provided for in the agreement is, in effect, carrying out the agreement. Long Beach contests approval of the crane agreement on the ground that it is noncompensatory.

San Diego would not contest approval of the agreements if the routing clause is removed, and argues that the clause unlawfully restricts shippers and consignees from selecting the port through which their goods should move and is otherwise unlawfully restrictive. Cited is section 250, Merchant Marine Act, 1936, which declares it unlawful for a common carrier by water, by means of an agreement, to prevent any other carrier from serving any port designed for the accommodation of ocean-going vessels located on any improvement project authorized by Congress, at the same rates which it charges at the nearest port already regularly served by it.

It is San Diego's position that the routing clause is an attempt tc overrule the intent of Congress expressed in that statute.

Stockton resists approval of the routing clause and considers minimum-maximum compensation provisions in any agreement ap-provable only if no prejudice against any terminal results therefrom or if no other port is in any way injured. Stockton takes the position that the agreement should be disapproved in its entirety.

Los Angeles takes the position that the agreement is compensatory that the basis used for determining the minimum compensation is reasonable and permits the port to recover its investment in extra costs here involved as compared to the cost of a general cargo ter-minal. The routing clause is defended as the only means by which the port can protect its investment of $1½ million; Los Angeles arguing that without the clause, the Lines would be able to tie up the use of the facility for a term of years and still divert their cargo to other ports and that such diversion might render this agreement noncompensatory. The motive of Long Beach in attempting to have the clause disapproved is seen by Los Angeles to be retention of the ability to lure cargo from Los Angeles. Los Angeles argues that i is difficult to conceive of anything more detrimental to commerce than to have a port such as Los Angeles be contractually obligated to set aside a valuable marine terminal for the use of a tenant for a number of years and then permit another port to be in a position to entice away the business of that tenant to the economic detrimen of the port investing in the facility.

Respondent Lines contend that there is no evidence to support finding of unjust discrimination, detriment to commerce, violation o the Act, or detriment to the public interest. They take the positio that the agreement contemplates a fair and equitable operation wit shippers and users being assessed charges based upon identical rates Significance is attributed to the fact that shippers do not oppose th agreement, therefore, it is argued, none have considered the agree ment to be discriminatory to them. No advantage to the Lines ove other carriers is found in the fact that they retain part of the por revenue after the maximum is paid and reference is made to othe agreements with a similar provision which have Commission approva No evidence is seen by the Lines to show injury to any other termin or port, the testimony to that effect being said to be mere conjectur The Lines contend that the agreement is compensatory.

Hearing Counsel see no necessity for the routing clause, and conten it constitutes ambiguous restrictions with regard to the amount containerized cargo which can be handled at other ports. The "retr active" provision is not contested. However, the minimum compensation provided is considered to be unapprovable in that it does not reflect all direct and prorated costs, plus depreciation involved in the entire facility and it is argued that segregating the cost of the extra improvements as a compensation base is improper and results in a noncompensatory minimum.

Oakland did not file a brief.

DISCUSSION AND CONCLUSIONS

All parties to the agreements are subject to the Act and the agreements are subject to the provisions of section 15 thereof. Other facts pertinent to the issues raised are hereinafter set forth.

The Routing Clause

The clause which the parties protesting approval have designated as an "exclusive routing" or "exclusive patronage" provision is as follows:

> It is further understood and agreed that (the Lines) shall handle at and route through the Port of Los Angeles all of their containerized-cargo vessel business the shipment of which originates at, is destined to, or transits through metropolitan Los Angeles and the surrounding area tributary to the Port of Los Angeles. * * * However, any of said four lines may load and discharge container cargo at any other Port in Southern California on conventional break-bulk vessels and semi-containerized vessels only if such cargo can be loaded or discharged at a conventional break-bulk facility; provided however, that in the event such a vessel is shifted to a berth equipped with container handling equipment for the purpose of loading or discharging containerized cargo, such cargo shall be handled at the Port of Los Angeles unless the General Manager specifically consents in writing to the contrary.

The provision is within the purview of section 15 of the Act which requires the filing of agreements:

> * * * controlling, regulating, preventing, or destroying competition; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement.

Section 15 further provides:

> The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement * * * that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports * * * or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this Act, and shall approve all other agreements * * *

Agreements approved by the commission under section 15:

* * * shall be excepted from the provisions of the Act approved July 2, 1890, entitled "An Act to protect trade and commerce against unlawful restraint and monopolies," and amendments and Acts supplementary thereto * * *

The Commission must consider the antitrust implications of any agreement which limits free competition and has adopted the principle that restraints which contravene the antitrust policies of the United States will be approved only if facts appear which demonstrate that the restraints imposed are required by a serious transportation need are necessary to secure important public benefits, or are in furtherance of a valid regulatory purpose of the Act. The Supreme Court, in a recent decision, *Federal Maritime Commission et al.* v. *Aktiebolage Svenska Amerika Linien et al.*, 390 U.S. 238 (1968), commented on the Commission's policy:

Congress has, it is true, decided to confer antitrust immunity unless the agreemen is found to violate certain statutory standards, but as already indicated, the antitrust concepts are intimately involved in the standards Congress chose. The Commission's approach does not make the promise of antitrust immunity meaningless because a restraint that would violate the antitrust laws will still be approved whenever a sufficient justification exists. Nor does the Commission's test by requiring the conference to come forward with a justification for the restraint improperly shift the burden of proof. The Commission must of course adduce substantial evidence to support a finding under one of the four standards of section 15 but once an antitrust violation is established, this alone will normally constitut substantial evidence that the agreement is "contrary to the public interest," unless other evidence in the record fairly detracts from the weight of this factor * * * We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory "public interest" standard.

The routing clause restricts free competition and presumptively run counter to the public interest. *Mediterranean Pools Investigation* F.M.C. 264 (1966). The Commission does not consider that all agreements restricting competition are necessarily and inevitably unjus and unreasonable practices which must be prohibited at any cos But free competition is the rule and a restraint on competition ma not be approved unless sufficient justification therefor appears on th record. The Commission recognized that the burden of sustainin such practices is a heavy one. *California Stevedore & Ballast Co. et a* v. *Stockton Port District et al.*, 7 F.M.C. 75 (1962), at page 84. The po of Los Angeles justifies the clause as a means of protecting its inves ment in the facility and assuring a fair return on the land and improv ments assigned to the Lines for preferential use. The port seeks t require the Lines to move sufficient cargo through the facility t accomplish that purpose. It is evident that if the clause is disapprove the Lines are free to use the facilities at competing ports capable handling containerized cargo. However, the agreement must be read in its entirety to determine whether the clause is necessary to accomplish the purpose for which it has been included; that is, the protection of the port's investment. If the minimum payment is amended as hereinafter required, the port will have the assurance that the facility will not be operated by the Lines in a manner to produce revenue to the port of less than the port's cost of furnishing the land and improvements thereon. Each of the Lines has under construction a containership and intends insofar as possible to carry all containerized traffic on such vessels. The facility assigned is designed to serve containerships. Under the maximum feature of the compensation clause, there is a strong economic inducement for the Lines to make full use of the facility in order to benefit by the free use during any year the maximum is exceeded. Moreover, the Lines are co-owners of a company formed to operate the facility which adds to the inducement for full use. The port, in its brief, states:

> In view of the fact the Japanese Lines have planned a weekly containership service at the Port of Los Angeles, the maximum compensation provided by Agreement No. T–2108 probably will be achieved during the first year of the term of the Agreement.

The record supports that statement.

Applying the test of necessity to the routing clause, it cannot be found that it is required to protect the port's investment and the record falls short of demonstrating justification for exemption from antitrust policies.

Other contentions made by the protesting parties to the routing clause have been considered but not deemed necessary for detailed discussion because of the finding above made. It is recognized the development of facilities contributing to the economical and efficient movement of containers should be encouraged as in the public interest. *In the Matter of Agreement No. T–1870: Terminal Lease Agreement at Long Beach, California*, docket No. 66–9, 11 FMC 12. It is not here found that a routing clause, that is a requirement for a lessee or preferential user under a minimum-maximum compensation arrangement to use the facility assigned to the substantial exclusion of other ports, is unlawful under all circumstances. But it is held that restrictions on free competition which are contrary to the antitrust policies must be fully justified and found a necessary means to further a transportation need. Los Angeles, in providing transportation improvements, is enhancing commerce, but its investment is so well protected by other requirements in the agreement, that deviation from antitrust policies is unnecessary to provide further assurance against a noncompensatory operation.

Consideration has been given to the fact that in this agreement and in the Oakland agreement with the Lines presented in docket No. 68–27, 12 FMC 126 the routing clauses encompass territory tributary to the ports. The record discloses that Overland Common Point (OCP) origins and destinations are common to both ports, thus the Lines and the ports would find difficulty in interpreting the routing clauses with the possibility of future litigation should the parties to the agreements take diverse views as to the cargo covered by the individual agreements.

Compensation

The ports appearing in this proceeding are competitive. In a competitive situation, it is not uncommon for carriers to change from one port to another for various reasons, including inducements offered. But if an inducement is the providing of services at less than the cost to the port, it is to be disapproved. *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 525 (1966). The reason for disapproval is evident. Approval of such a concept would result in requiring other users of the port to bear a portion of the cost of the use by the preferred customers if the port is to remain financially sound. Further, if a precedent is established which permits a port to obtain business in a competitive situation by offering services at less than cost, the ultimate result would be the necessity for all ports to adopt this method in order to remain competitive. The consequences are readily forseeable.

Long Beach contends that Los Angeles has not included all applicable factors in the compensation base. These contentions have been considered but not found persuasive of a conclusion that the maximum payment by the Lines to the Port is less than compensatory. Methods of computing compensation are to be considered, but there is no inflexible rule to bind port officials in determining compensation. *Agreements Nos. T–1953 and T–1953–A; Terminal Lease Agreements Between the City of Oakland and Matson Navigation Co.*, FMC docket No. 66–68 11 FMC 156 (1967). The test to be applied is the ultimate result of the computations. Los Angeles, in arriving at the maximum payment, has considered land and water values, the cost of the improvements to be constructed on the property, the support to the facility from nonrevenue-producing facilities of the port, maintenance and overhead, servicing the bonds issued to finance a portion of the improvements, as well as other incidental expenses. The maximum payment provided in the agreement will produce a 7-percent return on land and water property and a 6-percent return on the improvements to be provided. Although Los Angeles has not included in the compensation base the cost of removal of the old wharf from the premises to be improved and excavation costs of material excavated in the vicinity of the wharf, such exclusions have been reasonably justified and there is no sound basis for a dispute of management judgment in computing the maximum payment. The minimum payment however causes concern.

The minimum compensation is related to a return on the investment in extra facilities required to handle containers, and not on the entire cost of the wharf facility. Los Angeles has determined the cost of providing a general cargo terminal, and has used as a minimum compensation base only the investment in this facility over and above that amount. Applying 4½ percent to this base, Los Angeles finds the return sufficient to cover the cost of the bonds issued to finance that portion of the improvements. This method is considered by the port a matter of business judgment properly exercised by port officials and acceptable as the port does not require other users of general cargo terminals to guarantee a minimum payment. Hearing Counsel takes the position that the minimum fails to consider all direct and prorated costs, plus depreciation, of the entire facility and that if such factors were included in the base, the minimum payment should be increased by approximately $30,000.

In the Port's view, the Lines should be required to guarantee payment sufficient only to cover the cost of the special equipment furnished for the handling of containers. The fallacy of this concept is that the lines have been granted preferential use of the entire facility. The agreement provides:

> Assignee shall use the premises and the facilities situated thereon for the docking and mooring of vessels, the receipt, handling, loading, unloading, storage, transporting, and delivery of containerized cargo and for uses incidental thereto.

The benefit to the Lines emanating from this agreement is that they have the preferred use of a complete facility constructed to meet their needs in transporting containers on vessels designed to handle that type of cargo. Los Angeles in its brief, although in relation to another issue, points out that it is setting aside a valuable harbor asset to the Lines and that it must have some assurance that the use will provide adequate compensation.

An increased minimum payment is necessary to assure that the Port will not furnish services—here the preferential use of an entire facility—at less than cost. In view of the fact, as above found, that there are strong inducements for the Lines to make full use of the facility, the question of the amount of the minimum payment may lose significance in relation to this agreement. Nevertheless, as a matter of principle, compensation, whether minimum or maximum, must be related to the cost of the entire facility assigned, or in other words, to the full extent of the services rendered by a port to an assignee. The minimum payment which is computed on only part of the cost of the facilities is noncompensatory in that it is less than the cost to the port. Negotiations between the Port and the Lines to establish a modified minimum should not cause undue delay in view of the fact that the full use of the facility is probable by reason of economic inducements. If, using the base upon which the maximum compensation was computed, a minimum is established sufficient to assure that the port will not furnish the facilities at less than cost during any year of the pendency of the agreement, such minimum will be approved.

It is noted that the Lines may cancel the agreement at the end of the first year, and in event of cancellation within that time, or if the agreement is not renewed for a total of 10 years, the Lines must reimburse the Port for only the cost of the extra facilities, less depreciation. This provision does not disturb the above finding as it does not relate to the minimum payment. If the agreement is canceled, use by the port of the facility is not limited by a preferential use.

The Retroactive Operation Clause

It is provided in section 3 of the agreement:

> In the event the Federal Maritime Commission shall approve this Permit and Agreement prior to the time Assignee commences to engage in those activities permitted by Section 4 hereof, then the term of this Permit and Agreement shall commence on the first day of the calendar month during which Assignee shall commence such activities.

The next paragraph, which is referred to herein as the retroactive operation or retroactive effect clause, is as follows:

> *In the event, however, that the Federal Maritime Commission shall not approve* this Permit and Agreement until after the Assignee has commenced to engage in such activities, then this Permit and Agreement shall become effective for all purposes as of the first day of the calendar month following such approval; *Provided, however, That this Permit and Agreement shall become effective for all purposes retroactively to the first day of the calendar month during which Assignee shall commence to engage in such activities if such is approved by the Federal Maritime Commission.* (Italic supplied.)

The italicized portion of the clause is contested as in violation of section 15 of the Act which provides in pertinent part:

> Any agreement * * * not approved * * * by the Commission shall be unlawful * * *; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement.

In *Mediterranean Pools Investigation, supra,* it was stated:

> Behind these proposed amendments is the dispute * * * over our authority to approve section 15 agreements "retroactively" or as respondent and the Examiner would have it "agreements bearing earlier effective dates." Whatever nomenclature is employed, Hearing Counsel and the Examiner are talking about the same thing—the authority of the Commission to approve an agreement for a period prior to the effective date of that approval.
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> * * * * * * *
>
> Section 15 actually renders unapproved agreements unlawful in two situations. First, section 15 required that agreements when reached must be "immediately" filed with the Commission. Thus, an agreement which is made but not filed for approval is unlawful even though no action is taken by the parties under it * * * Secondly, section 15 makes it unlawful to carry out "in whole or in part, directly or indirectly" an unapproved agreement. Thus, where as here an agreement has been filed and is pending approval it is only unlawful for the parties to carry out the agreement and the agreement itself is not unlawful. All the parties and the Examiner agree that the Commission may not approve an agreement in such a way as to render lawful that which the statute explicitly declares unlawful, and therefore the Commission may not approve an agreement so as to validate conduct under the agreement prior to its approval.

The Lines contend that the clause here at issue, and in the companion case, docket No. 68–27 supra, is not barred by reason of that decision because:

> The "retroactive effect" section is merely a provision, calling for special approval by the Federal Maritime Commission, which is an element in the overall compensation formula lessening the risk to the Port, and to the respondent lines, that a substantial deviation from their negotiated intention could result from an administrative or judicial processing delay beyond their control. In each of these respects, the situation here present differs from that considered by the Commission in docket No. 1212, Mediterranean Pools Investigation * * *.

Hearing Counsel recommends approval of the clause because as the Commission has accepted the principle of minimum-maximum compensation, it would be reasonable to permit payments made by the Lines prior to approval of the Agreement to apply towards a minimum charge that is ultimately accepted by the Commission. It is argued that no special advantage will accrue to the Lines or Los Angeles with such an arrangement and that since the Lines will not be receiving preferential treatment during the interim period when there is no approved agreement, there will be less advantage than if the agreement had been approved.

As contended by the Lines and Hearing Counsel, the use of the facility prior to approval would not be unlawful if no preferential use was accorded the Lines and if they paid in accordance with the Port's tariff. But the clause is not limited to applying revenue thus paid to the minimum. It provides that the agreement shall "become effective for all purposes." Approval of the clause would give retroactive effect to an unapproved agreement in its entirety. The prohibitions of section 15 are broad and parties to an agreement filed for approval may not "carry out in whole or in part, directly or indirectly any such agreement." The distinction between "carry out" and "give effect to" is not evident. Any action taken by the parties to the agreement prior to approval, if governed by the agreement, is carrying out the agreement. The delay encountered by parties in obtaining adminstrative approval of section 15 agreements is recognized and may, at times, present problems. But the remedy would be modification of the statute which in its present form prohibits section 15 agreements from being carried out, directly or indirectly, prior to Commission approval.

It is concluded that the underscored portion of the clause should be deleted as a prerequisite to approval of the agreement. This disapproval should not result in appreciable additional cost to the Lines. The facility is not at this time ready for occupancy. The Lines anticipate that the first vessel will be served during November 1968.

The Minimum-Maximum Compensation Provisions

Stockton argues that such provisions are lawful only if respondents have demonstrated that they will not result in discrimination or prejudice against any terminal, that no port will be in any way injured, and that cargo will not be diverted from any port or terminal. This argument ignores the provisions of the Shipping Act. Discrimination and prejudice are not per se unlawful. *Philadelphia Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 438, 531 (1935). The statute prohibits only unjust and unreasonable practices. Long Beach objects to these provisions in that after the maximum is paid the Lines will have free use of the facility during the remainder of the year. This will result, according to its argument, in violation of sections 16 and 17 of the Act by giving the Lines undue and unreasonable preference or advantage over users of the Port's facilities who are required to pay tariff rates for all use.

These arguments have appeared in other proceedings in which the Commission has approved minimum-maximum compensation provisions. It has been held that an agreement is not unlawful merely because it does not follow the terminal's tariff charges but that such arrangements must be scrutinized to determine whether illegal discrimination or prejudice may result. *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792 (1966). In this proceeding there is no evidence that any shipper or carrier will suffer undue or unreasonable prejudice or discrimination by virtue of the provisions

If discrimination or prejudice exists, it is related solely to ports. In *Agreement No. T–1768—Terminal Lease Agreement*, 9 F.M.C. 202 (1966) a minimum-maximum compensation provision was approved, however, the Commission found that no cargo would be diverted from one port to another. This finding was related to the discriminatory aspects of an agreement but does not constitute a precedent that an agreement may not cause diversion of cargo. The loss of a potential customer was not considered as constituting unjust discrimination in *Agreement T–4—Terminal Lease Agreement, Long Beach, California*, 8 F.M.C. 521 (1965). In any competitive situation, there is diversion of cargo from one port to another. Los Angeles has, in the past, lost cargo to Long Beach. If all diversion was prohibited, competition would be severely crippled. Any diversion will result in injury to the port losing the cargo and here, certain ports may be deprived of some cargo now handled for the Lines; however, with the disapproval of the routing clause, loss may be mitigated. There is no evidence to warrant the conclusion that any port will lose cargo to the extent that its future profitable operation is threatened. While destructive practices are prohibited as held by the Commission in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. at 430 (1935), no destructive result is envisioned here. The fact that some cargo may be diverted to Los Angeles from other ports is not alone sufficient to show an unjust or unreasonable practice.

The Crane Agreement

Agreement No. T–2108–A is a grant to the Lines by the Port of the preferential use of a crane to be used in connection with the premises assigned by Agreement No. T–2108. The Lines are to pay the Port in accordance with the Port's tariff of $70 per hour until a maximum of $89,000 is reached within any one year. Thereafter, there is no charge to the Lines for use of the crane during that year. The Port's tariff provides that use of the crane shall be under the user's supervision and control and the operation of the crane is the responsibility of the Lines or any other user. The Port anticipates that the crane will be used by others than the Lines, and that the additional compensation thus obtained will be sufficient to cover the other port costs applicable to the crane. The Port has had no prior experience in offering a crane of this type to the public and if it finds that the tariff is not compensatory, it will increase the rate. The agreement provides that the Lines will pay any charge included in an amendment to the tariff.

Long Beach finds the rate of $70 per hour unreasonably low and noncompensatory. This contention is based on the fact that Long Beach has a rate of $70 per hour for a crane costing far less than the

Los Angeles crane. It is also argued that the maximum of $89,000 will produce a gross return of only 6.32 percent which will not cover bond and prorated port costs. Long Beach furnished computations to indicate that only $55,580 would be received by Los Angeles in any one year which would reduce the gross return to 3.95 percent. It argues that there will be no opportunity for Los Angeles to receive additional revenue from secondary use of the crane sufficient to cover costs and to realize a net profit.

As Hearing Counsel points out, the argument by Long Beach that secondary use cannot be contemplated is contrary to the facts of record. The wharf assigned to the Lines is only a portion of the total wharf being constructed by Los Angeles and the crane will serve the entire wharf. The crane will be equipped to handle heavy-lift cargo, dry bulk, and other special cargoes as well as general cargo. Secondary use is to be reasonably anticipated. It was held in *Reduction in Rates—Pacific Coast-Hawaii*, 8 F.M.C. 258, that rates need not necessarily be compensatory during the preliminary period of an operation and that the person furnishing a new service should have the opportunity to attract use of the service. That principle is here applicable. Los Angeles has stated its intent to increase the rate for use of the crane if experience shows the present rate is noncompensatory. If it should fail to do so and if it is shown that the agreement has an unlawful impact or effect on any interested person in the future, the Commission has the authority and duty under section 15 of the Act, to again review it and take action found necessary. See *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792, 801 (1964).

It is concluded that Agreement No. T–2108–A should be approved. However, as the agreements here presented for approval are related, approval of this agreement is subject to the prescribed modifictions of Agreement No. T–2108 and approval of that agreement as modified.

Hearing Counsel and Long Beach refer to a letter to the Commission from four U.S. carriers which expresses concern that regulations of the Japanese Government may prevent them from obtaining terminal facilities and rights at Japanese ports similar to the rights and privileges granted to the Japanese lines in these agreements. While the letter expresses "concern," there is no evidence on this record to support a conclusion that such rights and privileges have been denied or that negotiations with the Japanese Government for similar rights and privileges will fail. If later developments result in prejudice to U.S. lines or show adverse affect on the commerce of the United States, the Commission will, no doubt, reconsider these agreements, but the Commission does not disapprove agreements because of "concern" and without evidence to support disapproval. *Alcoa S.S. Co. Inc.* v. *Cia Anonima Venezolana*, 7 F.M.C. 345, 361 (1962).

The additional issue raised by Long Beach that the agreement is being carried out prior to Commission approval because Los Angeles is constructing the facility in preparation for the use by the Lines, merits little attention. If a port is prohibited from improving its facilities in contemplation of entering into and obtaining Commission approval of an agreement providing for a return to the port on its investment, progress would be unnecessarily and severely limited. The construction of improvements is not carrying out the agreement. It is the commencing of the preferential use that causes the agreement to be in effect.

ULTIMATE CONCLUSIONS

(1) A clause requiring a lessee or preferential user or terminal facilities to utilize such facilities so as to substantially exclude other terminals from securing its patronage restricts free competition in violation of antitrust policies, and must be justified in order for the Commission to approve it under section 15 of the Shipping Act, 1916. The record not demonstrating that such a "routing clause" in Agreement No. T–2108 is required by a serious transportation need, is necessary to secure important public benefit, or is in furtherance of a valid regulatory purpose, it is disapproved.

(2) The retroactive provision of Agreement No. T–2108 cannot be approved, as such approval would sanction carrying out the agreement prior to Commission approval in violation of section 15 of the Shipping Act, 1916, and it is therefore disapproved. The specific language disapproved is underscored in the clause heretofore quoted.

(3) The minimum payment provided in Agreement No. T–2108 is noncompensatory, and would either shift the cost of providing service to nonusers in violation of section 16 "First" of the Shipping Act, 1916, or unjustifiably jeopardize the soundness of the terminal's operations in violation of section 17 of the Act, and it is therefore disapproved.

(4) Agreement No. T–2108 will be approved subject to the deletion of the "routing" and "retroactive" clauses, and its amendment so as to provide for minimum compensation which the Commission shall determine *ex parte* or after further hearing, if appropriate, to be not less than the cost to the port of providing the service.

(5) Agreement No. T–2108–A is approved subject to modification of Agreement No. T–2108, as herein required.

(Signed) HERBERT K. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68–27

IN THE MATTER OF AGREEMENT NO. T–2138 BETWEEN THE PORT OF OAKLAND AND JAPAN LINE, LTD., KAWASAKI KISEN KAISHA, LTD., MITSUI O.S.K. LINES, LIMITED, AND YAMASHITA-SHINNIHON STEAMSHIP CO., LTD.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER

Adopted, October 15, 1968

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 that the decision became the decision of the Commission on October 15, 1968.

It is ordered, That Agreement T–2138 shall be modified to delete the routing clause and the retroactive operation provision, except the first sentence thereof. Agreement T–2138, as amended by Agreement T–2138–1, shall be approved upon receipt of appropriate modifications.

By the Commission.

[SEAL] (S) THOMAS LISI,
Secretary.

Agreement No. T–2138 as amended whereby the City of Oakland grants the preferential use of a terminal facility to four Japanese carriers, approved subject to the deletion of a routing clause and a retroactive effect provision.

J. Kerwin Rooney, for respondent Port of Oakland.

Francis L. Tetrault and *Reed M. Williams*, for respondents Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Limited, Yamashita-Shinnihon Steamship Co., Ltd.

Miriam E. Wolff, for petitioner Port of San Francisco.

Leslie E. Still, Jr., for petitioner City of Long Beach.

Albert E. Cronin, Jr., for petitioner Stockton Port District.

William R. Daly, for San Diego Unified Port District, intervener.

Edward C. Farrell and *Walter C. Foster*, for City of Los Angeles, intervener.

Donald J. Brunner and *G. Edward Borst, Jr.*, Hearing Counsel.

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

Respondent Port of Oakland entered into an agreement with Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd., Mitsui O.S.K. Lines, Limited, and Yamashita-Shinnihon Steamship Co., Ltd. (hereinafter collectively referred to as the Lines), which provides for the preferential assignment of marine terminal facilities at the Port of Oakland, to be used primarily for handling containerized cargo. The agreement was filed with the Commission and assigned No. T–2138. This investigation was ordered to determine whether the agreement should be approved, modified, or disapproved pursuant to section 15 of the Shipping Act, 1916 (the Act). On May 31, 1968, a supplemental agreement enlarging the assigned area and adjusting the maximum compensation was filed, assigned No. T–2138–1. This proceeding was expanded to include the supplemental agreement.

THE AGREEMENT

Parties to the agreement are subject to the Act and the agreement is within the purview of section 15 of the Act.

On January 17, 1968, respondents entered into a "Containership Preferential Assignment Agreement" which was modified on May 31, 1968 whereby the Port of Oakland grants to the Lines a nonexclusive preferential assignment of 8.463 acres to be used for the docking and mooring of containership vessels or semicontainer vessels, for the receipt, assembling, distributing, moving, loading and unloading of goods in containers into and from such vessels and uses incidental thereto, over, through and upon the premises.

The primary use of the premises is described as the containership operations of the assignee, the container operations of semi-container vessels, and the handling of containers not less than twenty (20) feet nor more than forty (40) feet in length carried on break-bulk vessels. Other operations such as handling automobiles and break-bulk cargo, and other container operations are described as secondary use. The agreement further provides that the Lines shall handle at and route through Oakland all of their containerized-cargo vessel business which originates or terminates in Japan or the United States and which transits through the San Francisco Bay Area and surrounding territory tributary to Oakland.

The facility will be operated by a company to be organized by the Lines and their agents. Oakland reserves the right to use all or any part of the premises, provided such use does not interfere with use by

[1] This decision became the decision of the Commission on October 15, 1968.

the Lines. Revenue received from such secondary use is retained by Oakland and not applied to the minimum-maximum compensation set forth in the agreement.

Compensation to be paid by the Lines is based on Oakland's tariff, and revenue to the Port must be a minimum of $162,000 per annum. However, if during the first or any subsequent year the revenue to the Port reaches $178,070, the Lines thereafter will pay no more during that year for the primary use of the premises. Minimum-maximum payments are subject to the following conditions:

In the event that the total tariff revenues derived from the primary use of the premises by the Assignee during any year of this Agreement . . . shall be less than the minimum annual payment specified in Paragraph 6(a) hereof, then one hundred per cent (100%) of the revenues derived from secondary use of the premises (by 3 of the Lines) for special auto carriers and sixty-five per cent (65%) of the revenue derived from all other secondary use of the premises by (the 3 Lines), shall be applied against the minimum annual payment until said minimum is reached or until the end of that year. In the event (such revenue derived from such secondary use) shall be less than said minimum annual payment during any year of this Agreement, then Assignee shall, within thirty (30) days after the end of such year, pay to the Port an additional sum equal to the difference.

Tariff revenues during each year of the Agreement shall be applied against the maximum annual payment specified in Paragraph 6(a) hereof as follows: (1) All revenues from primary use shall be applied against said maximum annual payment during any year of this Agreement; and (2) in the event that the revenues from primary use shall be less than said maximum annual payment, one hundred per cent (100%) of the revenue derived from secondary use of the premises by (the Lines) for special auto carriers, and thirty-five per cent (35%) of the revenues from all other secondary use by (3 of the Lines) shall be applied against said maximum annual payment until said maximum is reached or until the end of that year. It is understood and agreed that all tariff revenues derived from the primary and secondary use of the premises by the Assignee shall accrue to and belong to the Port until the total of the revenues from primary use plus one hundred per cent (100%) of the revenues derived from secondary use by (the Lines) for the special auto carriers plus thirty-five per cent (35%) of the revenues from all other secondary use (by 3 of the Lines) during any year of this Agreement shall equal said maximum annual payment.

It is further provided that after the total tariff revenue from the above described primary and secondary use:

is equal to said maximum annual payment, all tariff revenues for the balance of said year shall be divided between the parties hereto as follows: (1) All traffic revenues from primary use shall accrue to and belong to the Assignee; and (2) sixty-five per cent (65%) of the revenues from secondary use shall accrue to and belong to the Port and thirty-five per cent (35%) thereof shall accrue to and belong to the Assignee. The Port's share of such revenues shall be in addition to said maximum annual payment specified in Paragraph 6(a) hereof.

The parties agree that if the Lines use the assigned facility prior to the effective date of the agreement, compensation for such use will be as stated in the agreement if the Commission approves the retroactive operation clause which is set out in full hereinafter.

The minimum-maximum compensation is to be adjusted when actual cost to the Port of constructing improvements on the premises is determined.

The effective date of the agreement is the date of approval by the Commission and approval by the Japanese Government but not later than January 1, 1969. The termination date is December 31, 1973.

Provisions not involved in the issues presented are not described or set forth herein.

FACTS

Bay Area ports and Southern California ports appearing in this proceeding now handle cargo for the Lines. During 1967, Stockton handled approximately 750 containers for three of the Lines and this volume increased proportionately during the first half of 1968. San Francisco handled approximately 360,000 tons of cargo for the Lines, and received revenue therefrom of $400,000 during 1967. Long Beach handled 344,846 revenue tons and received $389,243 during 1968 and during the first half of 1968, handled 154,811 revenue tons, receiving $187,616. Ports competing with Oakland now have or will have facilities capable of handling containers.

Each of the Lines has under construction a containership which will be approximately 620 feet in length with an 83 foot beam and a capacity of from 708 to 720 containers of 8x8x20 feet. They presently operate five semi-container vessels in their various trades. The Lines intend, to the fullest extent possible, to move all container traffic on containerships, but during the early period of the agreement, containers may be moved on other vessels.

The agreement, with or without the "routing clause" hereinafter discussed, will cause diversion of cargo from Stockton and San Francisco.

POSITIONS OF THE PARTIES

Stockton contests the lawfulness of the agreement in its entirety arguing that the Commission, in approving previous agreements between terminals and carriers did not foresee the dire monopolistic consequences emanating therefrom. Particular objection is made to the routing clause which Stockton deems to be an exclusive patronage provision prohibited except in dual rate agreements which have been the subject of a statutory provision. The minimum-maximum compensation arrangement is considered unlawful for the reason that discrimination against and prejudice to other ports will result therefrom and that cargo will be diverted from other ports because after the maximum payment has been made, the Lines will participate in further revenue, constituting an unlawful rebate and a powerful inducement to the Lines to route all of their traffic through Oakland.

Long Beach would not object to approval of the agreement provided the Commission requires deletion of the routing clause and the Retroactive Operation provision. The routing clause is contested as constituting a restraint on trade repugnant to the anti-trust laws and detrimental to the commerce to the United States. The Retroactive Operation clause is considered unlawful because it permits the agreement to become effective prior to Commission approval.

San Francisco supports the position that the routing clause is unlawful as contrary to the anti-trust laws in that it unreasonably stifles competition, and constitutes violations of Sections 16 and 17 of the Act. Further, it takes the position that this agreement cannot be approved until the Commission has considered a crane rental agreement which the parties intend to execute.

San Diego objects to approval of the agreement only because of the routing clause. The clause is deemed to restrict the right of consignees and shippers to select the carrier and the port through which cargo is moved and also to restrict their choice of inland transportation. Additional objection is found because such a clause permits a port to dictate to the carrier which ports it may serve. It is contended that the record shows that Oakland could operate successfully without the clause, thus it is not justified. In general, San Diego supports the concept that the routing clause is contrary to the antitrust policies of the United States.

Hearing Counsel supports San Francisco's position that the crane agreement between the respondents should have been included in this proceeding but does not agree that approval should be delayed until the Commission considers such supplementary agreement. Although not contesting approval of the agreement, Hearing Counsel finds existing standards of costing defective, primarily because Oakland has based its computations on out-of-pocket costs, and because the cost of construction of improvements does not reflect the full value of the facilities.

Oakland contends that the routing clause is not an "exclusive patronage feature" and that it provides assurance to the port that the facility will handle sufficient cargo to yield a fair return on its investment. It points out that the minimum annual compensation is the amount required to service the Port of Oakland Revenue Bonds issued to finance construction of improvements to be used by the Lines and that additional revenue is necessary to yield a fair and reasonable return to the port. This agreement is said to be consistent with other agreements approved by the Commission.

The respondent Lines argue that the compensation provided is compensatory to Oakland. The Retroactive Operation clause is defended by the argument that it will not make legal earlier conduct which was otherwise illegal, but simply permit a future adjustment in the accounts after approval, "lawfully measured by past events and past legal conduct." It points out that payments prior to approval will be in accordance with Port tariffs.

DISCUSSION AND CONCLUSIONS

The issues here involved are in many respects identical to the issues raised in Docket No. 68-26. 12 F.M.C. 110 which involves a preferential assignment of a terminal facility by the City of Los Angeles to the same carriers here involved. Had it not been for objections by Oakland based on certain differences in the two agreements, the proceedings would have been consolidated. It is here unnecessary to discuss in detail the issues raised concerning the retroactive effect provision and the routing provision of this agreement as reference to the Initial Decision issued in Docket No. 68-26 (which is incorporated herein by reference) will suffice.

The "routing clause" in Agreement No. T-2138 as amended by Agreement No. T-2138-1, is as follows:

> It is further understood and agreed that the Assignee shall handle at and route through the Port of Oakland all of its containerized-cargo vessel business, the shipment of which orginates or terminates in Japan or the United States and which originates at, is destined to, or transits through the San Francisco Bay Area and the surrounding area tributary to the Port of Oakland and this covenant shall be binding upon each of the four Japanese steamship lines comprising the Assignee and upon any successors in interest or assigns of any of said lines in the event of their sale, merger or consolidation with any other company or companies, unless the Executive Director of the Port shall give his prior written consent to the contrary, with the exception that semi-containerships and containers on conventional break-bulk ships may be handled at any other facility.

As found in the Initial Decision in Docket No. 68-26, restrictions on free competition are presumptively contrary to the public interest, and will not be approved by the Commission unless justification for approval appears on the record. Oakland has not demonstrated the necessity for the routing clause. According to its witness the clause was included in this agreement primarily because Los Angeles in a similar agreement with the Lines, made such provision, and Oakland used the clause to protect its competitive position in relation to Los Angeles. Inasmuch as the routing clause has been found not approvable in the Initial Decision issued in Docket No. 68-26, Oakland's basic reason for including it in this agreement no longer exists. Oakland did not deem the clause as "required" and its witness testified only that it helps to assure that the facility assigned to the Lines would be used to such an extent that the Port's investment will be protected. As in the Los Angeles agreement, the compensation provisions above set forth provide a strong incentive for the Lines to make full use of the facility. They must meet a minimum payment by usage or by payment of a penalty for non-use. After the maximum is reached, their further primary use is without cost, and a credit is received for secondary use. Also, the Lines are stockholders in the company organized to manage the facility, an additional incentive to make full use of it.

It is concluded that Oakland has not demonstrated a necessity for the routing clause as a means of protecting its investment and in the absence of such justification, the clause must be deleted, as a prerequisite for approval.

The agreement further provides:

> 48. *Retroactive Operation:* In the event that the facilities covered by this Agreement are ready and are occupied and used by the Assignee prior to the effective date of this Agreement, such occupancy and use shall be pursuant to the applicable tariff of the Port. If and when this Agreement is approved by the Federal Maritime Commission, the compensation payable to the Port by Assignee for occupancy and use of the premises shall be as prescribed by this Agreement. In the event that the Federal Maritime Commission approves such retroactive effect, the compensatory provisions of this Agreement shall be retroactive to and effective from the first day of the calendar month during which the first of the Assignee's containerships berths at the premises.

The lawfulness of a retroactive effect provision was discussed in the Initial Decision served in Docket No. 68–26 and that portion thereof relating to this clause is incorporated herein by reference. It is true, as the Lines contend, that use prior to approval will be in accordance with the Port's tariff which is not unlawful. However, crediting such payments to the minimum-maximum provisions constitutes giving effect to the provisions of an unapproved agreement. As stated in the referenced Initial Decision, "giving effect to" and "carrying out" are terms not readily distinguishable. The clause must be deleted as a prerequisite for approval of the agreement. Use prior to approval must be subject to the Port's tariff.

The compensatory nature of the agreement is not contested, however, Hearing Counsel question the method used by Oakland in establishing the base upon which the minimum-maximum compensation was computed. It is suggested that a set of standards be provided for future terminal agreements which relate to terminals furnishing facilities for containerized cargo. Establishing a set of accounting standards might be beneficial, however, this proceeding is not the vehicle for such action and any attempt to do so herein would constitute rule making without the required notice to all interested parties. The methods used by ports in arriving at rentals or compensation for preferential use are of Commission concern, however, the test here applicable is whether the ultimate result provides adequate compensation to the port. *Agreements No. T-1953 and T-1953-A; Terminal Lease Agreements Between the City of Oakland and Matson Navigation Co.* F.M.C. Docket No. 66-68, 11 F.M.C. 156 (1967). Here, Oakland has demonstrated a rate of return of 6% on its investment from the minimum compensation and 7% from the maximum compensation which may be increased if secondary use develops to a sufficient extent. While the methods adopted by Oakland in computing compensation may not be proper under all circumstances, there is no basis for criticizing the judgment of port management in computing a fair return to the port, which return has been shown to be compensatory.

Stockton, presents the argument that as the agreement provides for an allocation of the terminal charges after the maximum has been reached, there is an unlawful rebate which operates unlawfully to limit competition. The fact that the Lines will derive monetary benefit under the compensation provisions of the agreement is not a sufficient basis to support a finding of undue or unreasonable competitive disadvantage to another port. An agreement is not unlawful or unreasonable merely because it does not follow the terminal's tariff charges. *Agreement No. 8905—Port of Seattle and Alaska S.S. Co.*, 7 F.M.C. 792 (1964). The monetary benefits to the Lines after the maximum is reached are not unlawful refunds merely because thereafter no payments are made or that the tariff earned is apportioned between the parties. Adoption of Stockton's concept would be contrary to the Commission's approval of other agreements providing for financial benefits to an assignee or lessee after payment of a maximum compensation. It is not the level of the rates which is of concern here. It is the overall compensatory nature of the agreement.

Stockton's argument that agreements between terminals and shipping lines having enough traffic to economically force a port to accede to a lower than tariff rate, or lose the business, is not supported by any fact of record. Nor can the dire consequences such as the ultimate prohibition of smaller carriers and ports from remaining competitive be assumed or reasonably foreseen. This agreement may not be disapproved on such fragile grounds. Oakland has developed and improved its port. This development enhances the movement of containerized traffic and is thus beneficial to commerce. Such progress is to be encouraged. Stockton or any other port may not be protected from lawful competitive methods and insulated against all loss of cargo. Stockton's position as to competition and loss of cargo has been discussed and refuted in the Initial Decision in Docket No. 68–26 to which reference is made. See *Alcoa S.S. Co., Inc.* v. *Cia Anonima Venezuolana De Navegacion* 7 F.M.C. 345, 361 (1962).

San Francisco contends that this agreement cannot be approved until the Commission considers an agreement which is to be entered into between Oakland and the Lines for the preferential use of a crane. This agreement is not dependent on the crane agreement and will become effective, if approved as modified as required herein. The Lines and Oakland are bound by the agreement upon approval by the Commission and the Japanese Government whether a crane agreement is or is not approved.

ULTIMATE CONCLUSIONS

Justification for exemption from the antitrust policies of the United States and for approval of the routing clause does not appear on this record.

The retroactive effect provision is unlawful and in violation of section 15 of the Act in that it permits the provisions of the agreement to be carried out prior to approval.

The agreement is compensatory.

Subject to deletion of the routing clause and the retroactive operation provision, except the first sentence thereof, agreement T–2138, as amended by agreement T–2138–1, is approved.

HERBERT K. GREER,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 67–54

CHR. SALVESEN & COMPANY, LTD.

v.

WEST MICHIGAN DOCK & MARKET CORPORATION

Decided December 11, 1968

A person who furnishes wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water is subject to the Shipping Act, 1916, even though the tariff provides only for stevedoring services.

West Michigan Dock & Market Corporation found to have violated section 16 "First" of the Shipping Act, 1916, by unreasonably refusing to serve complainant's vessel in order of time of arrival, and by granting undue preference to another vessel because such other vessel was owned by a regular customer.

West Michigan Dock & Market Corporation found not to have violated section 16 "First" of the Shipping Act, 1916, in the assignment of available shore labor to stevedore the vessel.

Nicholas J. Healy and *Bruce A. McAllister* for complainant.

Robert J. Ables and *Neal M. Mayer* for respondent.

Donald J. Brunner, *G. Edward Borst, Jr.*, and *Robert H. Tell*, Hearing Counsel.

REPORT

BY THE COMMISSION: (JOHN HARLLEE, *Chairman;* JAMES V. DAY, *Vice Chairman;* GEORGE H. HEARN, JAMES F. FANSEEN, *Commissioners.*) *

This proceeding was instituted upon the complaint of Chr. Salvesen & Co. served October 30, 1967. After a hearing and briefs, Examiner Herbert K. Greer issued an initial decision on June 26, 1968. The Commission heard oral argument on exceptions on October 23, 1968.

Complainant Salvesen, manager of the vessel SALDURA, seeks to recover damages in the amount of $109,268.01, together with interest and costs, on its own behalf and on behalf of South Georgia Co., Ltd., owner of the vessel, against respondent West Michigan Dock & Market Corporation, operators of a terminal and storage facility at Muskegon, Michigan.[1]

Salvesen alleges that West Michigan violated section 16 First of the Shipping Act, 1916 (46 U.S.C. 815), by refusing to unload the SALDURA in its regular turn; and that contrary to agreement and

*Commissioner Ashton C. Barrett did not participate.

[1] The parties agreed that a determination should first be made on the issue of respondent's alleged violations of the Act and consequent injury to complainant, and the question of the amount of reparation would be determined by further hearing or (if the parties so agree) pursuant to Rule 15(b) of the Commission's Rules of Practice and Procedure.

custom, respondent deliberately permitted another vessel which arrived after the SALDURA to have priority; and further, that when the SALDURA was permitted to dock and discharge, respondent did not equally apportion its working force between the SALDURA and other vessels being serviced at the same time. The claim for damages is based on the delays caused by the alleged unlawful acts of respondent which prevented the SALDURA from carrying out a contract of affreightment because she was required to bypass another port of call due to the imminent closing of the St. Lawrence Seaway.

FACTS

Salvesen is a corporation engaged in the business of operating vessels for the carriage of merchandise for hire, between ports in the United States on the Great Lakes and foreign ports, with its principal place of business located at Leith, Scotland. During the period of record, South Georgia Co., Ltd., a holding company, was the owner of the vessel SALDURA. Complainant was the manager and operator of the vessel and was authorized by the owner to conduct all business relating to the vessel, including the prosecution of claims arising out of the vessel's operation.

West Michigan is a corporation owning and operating a warehouse and terminal facility at Muskegon, Michigan. West Michigan printed a Stevedoring Services Tariff, distributed it to customers or potential customers upon request, and solicited business by advertising. The tariff set forth a stevedoring rate on wood pulp of $2.20 per net ton, not subject to charge for overtime. The rate included compensation to West Michigan for use of its berths, wharfs, labor, and equipment. The tariff required that copies of inward foreign manifests, stowage plans, and letters of instruction for import cargo should be received by the stevedore at least 36 hours prior to vessel arrival.

During 1965, West Michigan negotiated agreements with customers and potential customers. With one exception, agreements were evidenced only by the customer's acceptance of respondent's tariff.[2] The tariff did not set forth a provision that respondent would handle vessels in order of time of arrival, and as a general rule, respondent did not advise customers or potential customers that it would handle vessels on a first-come, first-served basis. It maintained a bulletin board showing estimated times of arrival for vessels it had agreed to handle, and if a conflict occurred, it was resolved by negotiation with the agents involved. In these negotiations, respondent gave weight

[2] The one written contract in effect during 1965 was with Great Lakes Overseas, Inc., which provided in part:

> If the contractor cannot furnish a satisfactory berth upon vessel's (s') arrival, the Owner, Agent, or Charterer has the right, without prejudice to this agreement, to make other agreements for the handling of the vessel(s).

to the factor that one of the vessels involved was a regular customer. But it was customary in the Great Lakes to handle vessels in their order of arrival.

During 1965, Nedlloyd Line, Inc. was complainant's agent for North America and Phelps Steamship Agency, Inc. under Nedlloyd, was complainant's sub-agent for the Great Lakes area. Phelps had been furnished a copy of respondent's tariff.

During early October 1965, Phelps was advised by Nedlloyd of a booking of approximately 2,000 tons of wood pulp, loading on the SALDURA at Antwerp for discharge at Chicago. Phelps, having knowledge that Chicago stevedores were not equipped for handling wood pulp, advised Nedlloyd that such a commodity coming into Lake Michigan was generally discharged at other ports. The agents and brokers involved agreed that the wood pulp would be diverted from Chicago to Muskegon.

On or about October 14, 1965, Phelps contacted West Michigan's office at Muskegon to discuss the discharge of the SALDURA's wood pulp. Phelps was advised that respondent could handle the cargo, but that more information was needed. Subsequently, respondent received a telephone call from Castle and Overton, brokers, requesting that the wood pulp be handled at Muskegon. At the time West Michigan's warehouses were congested, and for the purpose of determining whether the cargo could be handled, the broker permitted respondent to contact KVP-Sutherland, a consignee of some of the wood pulp. KVP-Sutherland agreed that a portion of the consignment could be loaded direct from ship to railcars, the exact amount to be later determined. On November 10, respondent was advised that approximately one-half, or 900 tons, could be loaded direct from ship to cars.

Some time before October 29, the SALDURA was posted on respondent's bulletin board for arrival during early November.

On October 28, Phelps mailed to respondent two copies of a bill of lading showing the weight and number of bales of wood pulp to be discharged, the covering letter advising that a copy of the manifest was not available. Respondent promptly acknowledged Phelps' letter stating that it had been in touch with Castle & Overton, that the tentative shipping schedule on the wood pulp made it possible from a space standpoint to discharge the SALDURA, but that its schedule of liner vessels was such that it would be unable to provide a berth for the ship until after November 8. Further, "If you can conform to this situation, we will handle the ship and cargo at our tariff rates."

On or about November 1, West Michigan learned that conditions in the Welland Canal had prevented vessels from getting through and that its arrival schedule would be affected. Accordingly, the time of the SALDURA's arrival at Muskegon was uncertain. On November 8, Phelps notified respondent that the vessel would arrive on November 11.

On November 11, the SALDURA arrived at Muskegon, anchored on Muskegon Lake, and was presented for discharge. At that time, the berths at West Michigan's facility capable of handling the ship were occupied by the VIBYHOLM and the HARPEFJELL. Phelps and West Michigan agreed that the SALDURA would be handled at berth No. 3.

Phelps understood that the SALDURA would follow the HARPEFJELL when berth No. 3 was vacated. Respondent did not conform to this understanding, and during the evening of November 14, Phelps learned that the RUSS would follow the HARPEFJELL into berth No. 3.

The RUSS was originally scheduled to arrive at Muskegon on November 8, but on or about November 10, respondent learned that she would not arrive until the morning of November 15.

On November 1, respondent's warehouses were approximately 90 percent full. Because vessels scheduled for arrival were delayed by difficulties in the Welland Canal, the warehouses remained full from November 4 through November 8. Prior to the arrival of the RUSS on November 15, respondent loaded 186 tons of cargo on the RHEINSTEIN, 936 tons on the TROMSTAD, an undetermined amount of cargo on the CLARITA SCHROEDER, and 639 tons on the HARPEFJELL. The ERATO had loaded a portion of its 999 tons of cargo. The VIBYHOLM discharged 784 tons of wood pulp. Space for 900 tons of wood pulp was required for the discharge of the SALDURA. A like amount of wood pulp was to be loaded direct from ship to railcars.

During November 11, 12, and 14, respondent moved cargo for the RUSS into space in warehouse No. 2, vacated by cargo being loaded on the HARPEFJELL.

The HARPEFJELL completed loading 385 tons on November 14, and vacated berth No. 3. Respondent granted the RUSS immediate occupancy of berth No. 3, and the SALDURA, although it had arrived at Muskegon three days before the RUSS, remained at anchor.

The RUSS occupied berth No. 3 until the morning of November 17, her departure from the berth being delayed approximately one day by reason of bad weather.

On November 17, the SALDURA moved from her anchorage to berth No. 3 and commenced discharging cargo at 1245 hours, two and one-half days later than if she had been handled on a first-come, first-served basis.

At the time the SALDURA was berthed, the ERATO was occupying berth No. 8, unloading wire and loading 857 tons of canned cherries. The wire was loaded out on cars and trucks and did not occupy space in respondent's warehouses. The canned cherries were packed in boxes weighing 46 pounds and palletized. The pallets were lowered through the hatches and the cargo manually stored in the hold by longshoremen. On November 17, when the SALDURA began discharging wood pulp, respondent assigned 41 stevedores to work the ERATO; on November 18, 40 stevedores worked the ERATO; and on November 19, for part of the day, 37 worked the vessel.

The ERATO finished loading on November 19, and the RHEINSTEIN came onto berth No. 7 while the SALDURA was still being discharged. For the remainder on November 19, respondent assigned 17 men to the RHEINSTEIN; on the 20th, 41 men; on the 21st, 26 men; and on the 22nd, 27 men, not including part-time workers. On November 20, 15 men from the RHEINSTEIN's crew augmented the men assigned by respondent and on the 21st, 20 crewmen augmented respondent's working force.

The SALDURA commenced discharging on November 17, and respondent assigned to that ship two high-lift operators, a crane operator, and a signal man. On the 18th, the same men were assigned with two teenage boys added, to unhook the bales of wood pulp on the dock. On the 21st, six men were assigned, and on the 22nd, seven men. By arrangement with the ship's captain, 20 crew members worked as longshoremen.

Concerned by the delay in the SALDURA's schedule, its captain offered to respondent the services of two ship's officers capable of handling fork lifts. Respondent originally agreed to furnish additional fork lifts, but did not do so because of union restrictions. Attempts to obtain labor from nearby areas were unsuccessful. Phelps offered to pay an increased stevedoring rate provided respondent would assign additional labor to the SALDURA. The offer was not accepted.

The SALDURA completed discharging wood pulp at 1430 hours, November 22.

The SALDURA was scheduled to take on cargo at Chicago and Milwaukee after discharging the wood pulp. The officially announced closing date for the Seaway being imminent, the SALDURA was required to forego its Chicago commitment. The SALDURA cleared the Saint Lambert Lock early morning, December 3, the official closing date.

The RUSS, the vessel preferred over the SALDURA, was outbound with no port calls before passing through the Seaway.

DISCUSSION

Respondent initially contends that the Commission had no jurisdiction because respondent provided only stevedoring service to the

SALDURA. The Examiner overruled this contention by finding that respondent furnished not only stevedoring services, but also provided wharfage, dock, and warehouse facilities for the vessel and its cargo.

We agree with the Examiner's ruling. Respondent's contention, that the "only activities with respect to the SALDURA was to provide stevedoring services" and that stevedores are not subject to the Act, ignores the fact that respondent furnished not only stevedoring services, but also provided wharfage, dock, and warehouse facilities for the SALDURA and its cargo, clearly establishing respondent within the purview of section 1 of the Act which, in pertinent part, provides:

> The term "other persons subject to this act" means any person not included in the term "common carrier by water", carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water.

It is not disputed that respondent served common carriers by water or that the SALDURA was such a common carrier. Although the tariff, or agreements with carriers, set forth only a rate for stevedoring services, and respondent absorbed other costs "in its warehouse rates or gave the service away gratis", the rate for stevedoring included compensation to respondent for use of its docks, thus, in effect, imposing a charge for the use of those facilities. Thus, respondent is subject to the Shipping Act, 1916.

The Examiner also found that the Commission not only had jurisdiction over the persons in this controversy, but that the Commission also had jurisdiction over the subject matter—a claim that the respondent violated section 16 First.

The complaint alleges two separate causes which resulted in injury to complainant. The first is the delay caused by failure to furnish berth and dock facilities. The second delay alleged to have resulted in injury to complainant is the failure of respondent fairly to apportion its available shore labor. Section 22 provides in pertinent part:

> That any person may file with the board a sworn complaint setting forth any violation of this Act by a common carrier by water, or other person subject to this Act, and asking reparation for the injury, if any, caused thereby * * *. The board, * * * may direct the payment * * * of full reparation to the complainant for the injury caused by such violation * * *.

Thus, the award of reparation must be related to a violation of the Act, and if preference and prejudice in respondent's stevedoring services are not forbidden by section 16 First, reparation cannot be awarded for injury related to those services.

The Examiner next considered a troublesome jurisdictional question in that respondent argues that complainant was without authority to bring this action. Complainant was manager of the vessel SALDURA, not the owner. However, the Examiner was persuaded by complainant's evidence that it managed all of the owner's (South Georgia) affairs. Therefore, the Examiner found the authority necessary to institute suit.

West Michigan argues that the Examiner erred in finding that Salvesen had standing to bring this action.

Complainant managed all of the owner's (South Georgia) affairs, the owner being a holding company. Although South Georgia did not own the SALDURA at the time this proceeding was instituted, the terms of the vessel's sale did not transfer existing claims arising out of the vessel's operation to the purchaser. Such claims remained with South Georgia and complainant, as manager of South Georgia's affairs, had the responsibility and authority to take such action as was required in connection therewith. This claim is founded on the operation of the vessel, to be distinguished from an action *in rem*. The sale of the vessel did not affect the relationship between South Georgia and complainant.

With respect to the merits of the controversy, the first question is whether a terminal operator must serve its patrons in turn. In general, the Commission has held that a terminal operator who offers a service to common carriers by water and to the shipping public is required to serve them on equal terms. In *Investigation of Free Time Practices—Port of San Diego*, 9 F.M.C. 529 (1966), the Commission said:

> In a very real sense of the term, terminals are public utilities. While not always specifically franchised, they nevertheless are engaged in the business of regularly supplying the public with a service which is of public consequence and need and which carries with it the duty to serve the public and treat all persons alike. This is the essence of the public utility concept. 9 F.M.C. at 547.

The record established that the RUSS, although she reached Muskegon after the SALDURA, was permitted to occupy a berth before the SALDURA, which remained at anchor an additional two and one-half days. In arguing that this was unreasonable, complainant proved that it was customary in the Great Lakes for terminals to serve vessels in order of their arrival; that generally, respondent served vessels in this manner; and the SALDURA was the only vessel not served in order of arrival, principally because it was not a regular customer.

The Examiner found that respondent holds itself out as a public terminal. Its agreements with vessels were informal and consisted only of the carriers' acceptance of the terms of respondent's tariff. The tariff was silent on the question of order in which vessels would be worked. The Examiner found that there was no other contract providing for any other method of handling the SALDURA. Complainant had no reason to expect that its vessel would be treated differently.

Respondent admits that the RUSS, although she reached Muskegon after the SALDURA, was given preference and permitted to occupy a berth upon arrival while the SALDURA was required to remain at anchor in Muskegon Lake for an additional two and one-half days. But respondent argues that this was not unlawful. Thus, the issue is whether this preference was undue or unreasonable in violation of section 16 First, which provides that it shall be unlawful for any person subject to the Act:

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

Respondent argues that it was justified in acting as it did because the condition of its warehouse prevented it from accepting the SALDURA until the RUSS had taken on cargo. The Examiner, however, found that as of the day respondent granted preference to the RUSS, the warehouses were sufficiently vacant to permit the handling of the SALDURA's cargo. Thus the Examiner holds that respondent's preference to the RUSS over the SALDURA was a violation of section 16 First.

On exception, West Michigan reargues that it handled the SALDURA in the aforementioned manner because it was unable to handle the wood pulp in its warehouse pursuant to any other time schedule. Thus, West Michigan claims that it was necessary to load the RUSS to make room in the storage area for the wood pulp being discharged from the SALDURA.[3] Furthermore, West Michigan contends that at the time it made its decision as to the priority of vessels, it did not know how much space would be needed because it did not know how much wood pulp would be loaded directly to rail cars; under the circumstances, West Michigan acted as if it would be required to warehouse the entire 1,800 tons of wood pulp.

West Michigan, working with its regular customers, has always attempted to minimize delays of loading or unloading cargo. However, West Michigan contends that it served the SALDURA in the first place as an accommodation to the SALDURA. The business arrangement between the vessel and the terminal was not routine; the SALDURA was not a regular customer. Under all the circumstances, therefore, West Michigan urges the Commission to recognize that a terminal should serve its customers on a first-come, first-served basis, but that this general rule should be tempered with a recognition that regularity of scheduled services should be maintained and demands upon the capacity of a warehouse should be considered.

[3] West Michigan attacks the tonnage figures of the Examiner because it feels that he failed to consider tonnage which moved in and out of the terminal by rail and truck and because the tonnages are not related to cubic capacity upon which the availability of terminal space must be based.

Respondent next seeks to mitigate the Examiner's finding by pointing out that even if the SALDURA had been handled before the RUSS, the warehouse would have been unable to accept the wood pulp until the loadings of two other vessels at berth 7 provided sufficient space to store the SALDURA's wood pulp. Thus, the SALDURA might have been delayed the same number of days.

Complainant proved that it was customary in the Great Lakes area for terminals to serve vessels in order of their arrival; that generally, respondent served vessels in that manner; and, that the SALDURA was the only vessel not served in order of arrival, principally because it was not a regular customer. Furthermore, respondent followed a practice of preferring regular customers. An official of West Michigan stated:

> Well, I suppose if we had a situation just like was developed here, with the SALDURA and the RUSS, and it would come up; that is a not normal situation, because the RUSS was a regular customer. We had been doing business with them for years; they had been calling in there regularly.

Further:

> Well, I think it is pretty generally true that if you are doing business with a customer that is your regular customer, all the time, that you probably will show preferential treatment to that customer.

Respondent's general manager testified:

> We never contemplated work on the SALDURA until after the schedule of liners that terminated with the RHEINHART RUSS was completed.

By letter dated December 6, 1965, relating to the incident here involved, respondent advised Phelps:

> We do not operate under the jurisdiction of the Federal Maritime Commission and do not hold ourselves out to provide public marine terminal services. We limit ourselves to negotiated stevedoring agreements with liner services.

Respondent's argument is based upon the theory that it may legally operate in the above-described way. Respondent contends:

> It is not Respondent's duty to justify, defend or explain its way of doing business. It served its customers in accordance with agreements made. The SALDURA was served thus.

Such agreements have their background in respondent's advertisements, which are in evidence and constitute what it "holds out". It is only necessary to look at them to realize that by circulating them, respondent very clearly held itself out to the public to provide marine terminal services, which the Act requires to be performed for all upon like terms and conditions; and respondent cannot escape this duty by stating its compensation in terms of a stevedoring tariff, or by the terms of agreements with its customers. In any event, respondent's agreements with vessel operators were, with one exception, informal and consisted only of the carrier's acceptance of respondent's tariff. There was no provision in the tariff regarding the order in which vessels would be served.

Respondent's contention that it served the SALDURA in accordance with a negotiated agreement between the parties is dimmed by sharply conflicting testimony regarding the terms agreed upon. Complainant's witnesses testified that respondent agreed to handle the SALDURA on a first-come, first-served basis. Respondent's witness denied such an arrangement and testified that they agree to handle the SALDURA only after handling vessels previously booked. There is nothing in the documentary evidence and uncontradicted testimony (the most reliable guides) to indicate that there was an agreement that the SALDURA must wait for service until after later-arriving "regular customers" were served. Respondent's commitment to complainant for the handling of the SALDURA appears in its letter of October 29, addressed to complainant's agent, stating:

> We have been in touch with Castle and Overton, Inc., and have a tentative shipping schedule on this pulp that makes it possible from our space standpoint to discharge the ship. However, our schedule of liner vessels is such that we will be unable to provide a berth for this ship until after November 8. If you can conform to this situation, we will handle the ship at our tariff rates.

The commitment imposes no condition upon handling the SALDURA after November 8.

Complainant's agent had no reason to expect that the SALDURA would be treated differently from any other vessel. Especially in view of the testimony elicited from respondent's witness that vessels were ordinarily handled in order of arrival, it is difficult to assume that notice of any prospective departure from this practice would have been omitted from the letter had such been respondent's intent. It was not until three days after the SALDURA had been offered for discharge that respondent stated to Phelps that the RUSS, although scheduled for later arrival, would be serviced before the SALDURA. No testimony herein warrants a finding that respondent, during preliminary negotiations, conditioned its handling of the SALDURA in any manner if presented for discharge after November 8.

Although respondent's letter states only that "It is possible from our space standpoint to discharge the ship . . .", it now argues that the condition of its warehouses prevented it from accepting the SALDURA until the RUSS had taken on cargo. On November 1, the warehouses were approximately 90 percent full. Vessels scheduled for arrival were delayed by difficulty in the Welland Canal, the same situation which delayed the SALDURA. From November 4 to November 8, no vessel was loaded or unloaded. Commodities in the warehouse included, according to respondent's witness, "merchandise that was to be loaded aboard the various vessels in November."

Computation of space occupied on November 1 and cargo moved into and out of the warehouses would not support respondent's position. Citing respondent's testimony:

> The first ship in November was the TROMSTAD and it loaded 885 gross tons of cherries and 51 gross tons of engines for a total of 936 tons.
>
> The next ship was the CLARITA SCHROEDER and I do not have with me the tonnage loaded on that particular ship.
>
> Q. The next ship?
>
> A. Was the RHEINSTEIN—motor vessel RHEINSTEIN—loaded on November 9; it loaded 186 tons of cherries.[4]
>
> Q. The next ship?
>
> A. Was the VIBYHOLM and we unloaded 784 tons of wood pulp.
>
> Q.. The next ship?
>
> A. Was the HARPEFJELL and we loaded 575 tons of cherries; 16 tons of refrigerators; 33 tons of hides; and 15 tons of sweepers for 639 tons.

As of November 14, the day respondent granted preference to the RUSS, the space vacated by vessel loadings substantially exceeded cargo received and warehoused. Also to be noted is the fact that the ERATO had partially loaded its cargo. Even considering the different storage characteristics of the various commodities involved, we cannot find that respondent was unable to warehouse 900 tons of wood pulp until 385 tons were loaded on the RUSS. It is significant that on November 11, 12, and 14, respondent moved cargo destined for the RUSS into space made available by outloading the HARPEFJELL. This fact emphasizes the testimony of respondent's general manager that at no time did he intend to serve the SALDURA until regular customers, including the RUSS, had been handled.

Respondent refers to the fact that the situation changed subsequent to its letter of October 29. Difficulty in the Welland Canal upset respondent's schedule of vessel arrivals, but this fact does not justify the preference granted the RUSS. The RUSS was originally scheduled to arrive on November 8 and respondent learned on about November 10 that the arrival date would not be until November 15. On November 8, Phelps advised respondent that the SALDURA would arrive on November 11. Respondent knew, or should have known, that the SALDURA would precede the RUSS in arriving at Muskegon. Respondent was advised that the RUSS was outbound and had no calls to

[4] The RHEINSTEIN returned on November 19 to take on additional cargo.

make before clearing the Seaway while the SALDURA had commitments at Chicago and Milwaukee. Evaluation of the record leads to the conclusion that respondent agreed to handle the SALDURA in the same manner it handled other vessels, but that when circumstances caused a conflict with the RUSS, respondent decided that the regular customer would be given preference.

Respondent further argues that the SALDURA was in a distressed situation and that she was given the best service possible. This position infers that the best possible service available to the SALDURA was that the vessel be handled only after regular customers had been served. The record does not warrant a conclusion that respondent's agreements with other customers bound it to a preferential arrangement. Indeed, respondent's general manager testified "we have no preferential agreements". Therefore, we conclude that the predominant reason for respondent's preference to the RUSS and the disadvantage to the SALDURA was respondent's desire to prefer regular customers.

It is unreasonable for a terminal operator, charged with the duty to treat all persons alike within the bounds of reasonableness, to grant preferential treatment to one common carrier over another on the basis that the preferred carrier is a regular customer. This is not to say that a failure to serve vessels in order of arrival, standing alone, is a violation of section 16 First. Here, the preference to the RUSS and prejudice to the SALDURA was undue and unjust and, therefore, in violation of section 16 First.

Respondent argues that a failure to show a competitive relationship between the SALDURA and the ERATO or the RHEINSTEIN precludes a finding of unlawful prejudice or discrimination. The Commission has held that under certain circumstances, a competitive relationship must be demonstrated. In *Investigation of Free Time Practices—Port of San Diego, supra*, the Commission departed from that general principle and held that a competitive situation need not be shown when the issue involved free time. Respondent's interpretation of that case, that only in proceedings involving free time is competition waived, is unduly restrictive. The test to be applied under the circumstances here appearing is whether two interests are seeking the same or substantially the same service. See *The Boston Shipping Assoc., Inc.* v. *Port of Boston*, 10 F.M.C. 409 (1967). The *San Diego* proceeding made clear that operators of public terminals must afford all customers seeking the same service fair and reasonable treatment. Here, the SALDURA and the preferred vessels were seeking the same service. Therefore, the competition required by section 16 was present.

The next major exception is made to the Examiner's finding that West Michigan violated section 16 First by unfairly allocating the available work force. West Michigan agrees with the Examiner's findings regarding the various labor assignments, but West Michigan urges that the Examiner's analysis does not tell the entire story. According to West Michigan, the record will support the Examiner's facts, but not his conclusion that the allocation of labor was unlawful.

The record shows the scarcity of labor at the time involved; it also shows the practice of West Michigan of discharging wood pulp with the gantry crane at berth 3; finally, the record shows that this is the only practical method of discharging wood pulp at the West Michigan facility. Therefore, West Michigan urges that the SALDURA was handled in the same way, at the same speed, as other ships with the same cargo. The record shows that only one hold was worked because it was the most efficient method of discharging the vessel, not because West Michigan unfairly allocated labor to the vessel. Furthermore, the rate of discharge of the SALDURA was faster per ton than other vessels being handled at the same time. In conclusion, West Michigan states that it simply cannot be argued that terminals must work out equal allocation of labor between ships.

Respondent's allocation of its work force during the period November 11–22, was as follows:

Date	At Berth No. 3	Men	At Berth No. 7	Men
11			CLARITA SCHROEDER	29
			VIBYHOLM	36
12	HARPEFJELL	34	VIBYHOLM	33
13	HARPEFJELL	50	ERATO	19
14	(not shown)			
15	RUSS	25	ERATO	36
16	RUSS	[1]	ERATO	22
17	SALDURA	4	ERATO	41
18	SALDURA	4	ERATO	40
19	SALDURA	6½	ERATO	37 (part day)
			RHEINSTEIN	17 (part day)
20	SALDURA	[2] 8	RHEINSTEIN	41
21	SALDURA	[3] 7	RHEINSTEIN	26
22	SALDURA	7	RHEINSTEIN	27

[1] Had completed loading—delayed by weather.
[2] Includes 4 part-time workers.
[3] Includes crane repairman.

Because of the shortage of labor, respondent began using ship's crew to augment its work force as of November 15. The record does not disclose that ERATO's crewmen were used. The RUSS utilized 19 crewmen to augment labor furnished by respondent. The RHEINSTEIN furnished 15 men on the 20th, and 20 men on the 21st. The

SALDURA furnished 20 crewmen each day to assist in discharging its cargo.

The inquiry is whether, had more men and equipment been made available, the operation would have been expedited. Discharging the SALDURA could not have been expedited by the furnishing of more men, because as a practical matter, only one hold at a time could have been handled. Testimony was offered to show that tracks for the crane and for rail cars extended along the dock at berth No. 3, making the surface uneven and hazardous for the operation of fork lift trucks. It was shown that had ship's gear been utilized, the wood pulp would have been placed on the dock and that to transport the cargo to the platform from which the bales were carried to the warehouse or to rail cars, it would have been necessary to use fork lift trucks; and, that crossing the tracks might result in spilling the bales with a possibility of damage to personnel or to the cargo. Although palletized cargo could be carried over the tracks, the instability of bales of wood pulp when loaded on trucks created a hazard. Thus, respondent's allocation of labor was not an undue or unjust preference unlawful under section 16 First. Therefore, we overrule the Examiner with respect to his finding that the respondent unfairly allocated the available work force.

ULTIMATE CONCLUSIONS

Respondent, at all material times, was subject to the Shipping Act, 1916, and the jurisdiction of the Federal Maritime Commission.

Complainant, as manager of the affairs of South Georgia Company, has authority to prosecute a claim under section 22 of the Act, on its own behalf and on behalf of the vessel owner.

Respondent gave undue and unreasonable preference to the vessel RUSS by granting it a berth before the SALDURA, although the SALDURA had arrived in port three days ahead of the RUSS, in violation of section 16 First.

Respondent did not subject the vessel SALDURA to undue and unreasonable prejudice and disadvantage by failing to allocate a fair proportion of available shore labor to discharge the vessel, in violation of section 16 First.

Respondent's violations of section 16 First of the Act resulted in injury to complainant.

The amount of reparation to which complainant may be entitled will be the subject of further hearing, or in the alternative, the parties may utilize the procedure set forth in Rule 15 of the Commission's Rules of Practice and Procedure. The proceeding, therefore, is remanded to the Examiner for this purpose.

(S) Thomas Lisi,
Secretary

FEDERAL MARITIME COMMISSION

DOCKET NO. 1092

AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

Decided January 3, 1969

The Latin America/Pacific Coast Steamship Conference dual rate contract system, requiring signatory shippers to commit exclusive patronage to the Conference in all three outbound trade areas, and signatory receivers to give their exclusive patronage to the Conference in both inbound trade areas, found contrary to public interest and, accordingly, not permitted approval pursuant to section 14b of the Shipping Act, 1916.

The Conference is required by rule to impose as an amendment to clause 2 of its dual rate contracts the requirement that such contracts be offered separately in each trade area which the Conference serves.

Robert L. Harmon and *William J. Ziegler, Jr.* for Respondents Latin America/Pacific Coast Steamship Conference.

E. Duncan Hammer, Jr. and *Donald J. Brunner*, Hearing Counsel.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

This proceeding is before us again as a result of the remand by the Ninth Circuit Court of Appeals in *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197 (C.A. 9, 1965). It now concerns only the validity under the Shipping Act, 1916 (46 U.S.C. 801, et seq.) of the dual rate contract currently employed by the Latin America/Pacific Coast Steamship Conference. Some background is necessary before proceeding to the issue involved herein.

The Latin America/Pacific Coast Steamship Conference came into being as the result of our approval under section 15 of the Shipping Act (46 U.S.C. 814) of Agreement 8660. Under this agreement, 10 previously independent conferences were amalgamated or merged into one super conference.[1] This Conference now serves the overall trade, both inbound and outbound, between ports on the West Coast of the United States and Canada and the West Coast of South America. Agreement 8660 divides this trade into five trade areas.[2] Only carriers actively serving a given trade area may participate in the establishment of rates, and other matters pertaining to that trade area.

At the same time we approved Agreement 8660 we also granted, under section 14b of the Act, permission to the Conference to use a dual rate contract in the trade areas covered by the agreement. As originally submitted the contract would have bound shippers of goods in any one outbound trade area to the exclusive use of conference vessels in all three outbound trade areas. Conversely, shippers (receivers) in either one of the inbound trade areas had to obligate themselves to the exclusive use of conference vessels in both inbound trade areas.

In Docket 1111, the *Dual Rate* cases, 8 F.M.C. 16 (1964), we conditioned our approval of Agreement 8660 on the requirement that the Conference offer the dual rate contract in each one of the five trade areas, thereby giving shippers the choice of committing the shipments

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[1] The 10 predecessor conferences and the approved agreements under which they operated. were:

Camexco Freight Conference—Agreement 6670
Canal, Central America Northbound Freight Conference—Agreement 6070
Capaca Freight Conference—Agreement 6170
Caribbean/Pacific Northbound Freight Conference—Agreement 8390
Colpac Freight Conference—Agreement 7270
Pacific Coast/Caribbean Sea Ports Conference—Agreement 4294
Pacific Coast/Mexico Freight Conference—Agreement 7570
Pacific Coast/Panama Canal Freight Conference—Agreement 7170
Pacific/West Coast South America Conference—Agreement 4630
West Coast South America/North Pacific Coast Conference—Agreement 6270

[2] There are three outbound trade areas and two inbound:

Trade Area A.—From Pacific Coast ports in the United States and Canada to ports on the Pacific Coast of Mexico, Guatemala, El Salvador Honduras, Nicaragua, Costa Rica, and Puerto Armuelles, R.P.

Trade Area B.—From Pacific Coast ports in the United States and Canada to Colon and Panama City, R.P., Balboa, Cristobal, C.Z., ports in Barbados, British Guiana, British Honduras, Atlantic Coast of Colombia and Costa Rica, Cuba, Dominican Republic, French Guiana, French West Indies, Atlantic Coast of Guatemala, Haiti and the Honduras, Jamaica, Leeward and Windward Islands, Netherlands Antilles, Atlantic Coast of Nicaragua, and the Republic of Panama, Surinam, Trinidad, and Venezuela.

Trade Area C.—From Pacific Coast ports in the United States and Canada to ports in Colombia, Ecuador, Peru and Chile.

Trade Area D.—To Pacific Coast ports of the United States and Canada from Pacific Coast ports of Chile and Peru.

Trade Area E.—To Pacific Coast ports in the United States and Canada from Caribbean ports of Cuba, Jamaica, Haiti, Dominican Republic, Trinidad, Windward and Leeward Islands, Barbados, French and British Guianas, Surinam, French West Indies, Venezuela, Netherlands Antilles and Colombia, Colon and Panama City, R.P., Balboa and Cristobal, C.Z., ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica.

to conference vessels exclusively in one, several, or all of the trade areas encompassed by the agreement. We said:

> 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. 8 F.M.C. 50.

In the *Pacific Coast Conference* case, supra, the Court set aside this requirement. It is solely with this issue that the present proceeding is concerned. The case is in its present posture by virtue of our order of November 16, 1966, wherein we instituted this rulemaking proceeding to determine whether the one-trade-one-contract requirement should be reimposed.[3] By a motion for discontinuance, Respondents challenged the lawfulness of the rulemaking technique called for in the order. Respondents urged that adjudication, not rulemaking, was the appropriate procedure for considering the contract and that section 15, not 14b, was the proper section of the Act under which to proceed. We denied Respondents' motion, noting however, that even though the technique chosen was rulemaking, we would upon an appropriate proffer by Respondents of the subjects they believed required an evidentiary hearing grant them one to insure that they were afforded "all the procedural safeguards to which they were entitled." Respondents

[3] Much has been said by both sides about our order of Feb. 16, 1966, wherein subsequent to the remand by the Court, we approved the contract presently in use by the Conference. The dispute is over whether we intended at that time to reimpose the one-trade-one-contract requirement. Hearing Counsel maintains that such was our intent and that the present proceeding is solely concerned with correcting that erroneous approval. Respondents, on the other hand, argue that we could not have reimposed the requirement at that time without flying in the face of the Court's opinion on remand. Respondents' arguments then were very much the same as those they now make to challenge the propriety of the present proceeding. Our disposition of this proceeding makes it unnecessary to resolve this dispute. For the purposes of this proceeding we are assuming that the present contract was approved and that its use was lawful.

answered that they desired an evidentiary hearing in order to produce as witnesses the Conference Chairman and Secretary, and "a small representative number of shipper witnesses to demonstrate that there is not only no objection to, but actual support on the part of the shipping public for, the present two-contract operation." Accordingly, we ordered a hearing before an Examiner of the Office of Hearing Examiners. The hearing was held, and Examiner Edward C. Johnson issued an Initial Decision. Exceptions were taken to that decision, and we heard oral argument. For the reasons set forth below, our conclusions differ from those of the Examiner.

Before proceeding to the evidence of record, it is necessary to dispose of a threshold issue. Respondents charge us with an end run to circumvent the decision of the Court of Appeals in remanding the case to us. It is Respondents' position that since we originally imposed the one-trade-one-contract requirement under section 15 of the Act, we are not now permitted to seek its imposition under section 14b. Respondents point to no lack of procedural or substantive due process as a result of our proceeding under section 14b.[4] Rather, their charge is grounded upon the fear that the procedure we have chosen will leave us somehow or other free to ignore the record in this proceeding. We, of course, had no such intent in choosing section 14b. Our choice resulted from the Court's remand.[5] In setting aside the one-trade-one-contract requirement, the Court made no statement on the grounds for its action. Consideration of the Court's opinion led us to believe that the Court viewed the requirement as improperly imposed under section 15—such a requirement being properly a part of the dual rate contract and, therefore, a subject for consideration under section 14b. Accordingly, we instituted the present proceeding. Moreover, it is extremely difficult to understand how, under any circumstances, and particularly when we ourselves ordered the hearing in this case, we should feel ourselves free to ignore the record compiled in that hearing.[6] In all fairness to Respondents, their fears may have been raised by Hearing Counsel's contention that "as a matter of law" we had the "inherent power" to impose the requirement apparently relying solely

[4] Respondents' argument challenges both the section of the Act and the rulemaking technique. For the purposes of discussion, we deal with each separately.

[5] Actually, the Court originally set aside our order approving Agreement 8660 in its entirety. The Conference in a petition for reconsideration pointed out that the Court's action left them without a conference. In a second order, the Court said simply:

"As to Petitioner Latin America/Pacific Coast Steamship Conference our attention is called to the fact that Commission order in is entirety was not challenged, but only one of its modifications.

"Accordingly, as to this petition it is ordered that the order under review is set aside only in the respect specified in the petition for review."

[6] The Examiner must have shared some of Respondents' apprehensions because he felt it necessary to point out that we could not look beyond the record.

on some unspecified "expertise." While it should not be necessary, we will nevertheless say that the record was before us, was considered, and that our decision in this proceeding is firmly grounded thereon.

Respondents would also appear to feel that our decision to proceed under section 14b was due to some notion on our part that the one-trade-one-contract requirement would be easier to impose on the Conference under that section than it would be under section 15, for they spend a good deal of time pointing out that whichever section we use the same findings must be made before we impose the requirement. Since we conclude herein that without the one-trade-one-contract requirement Respondents' dual rate contract would be contrary to the public interest, we will agree with Respondents that on this issue in the context of this proceeding that the statutory phrase "contrary to the public interest" as it appears in section 14b has the same meaning as it does in section 15. Thus, in terms of due process to Respondents, it matters little under which section their contract is considered. We remain of the view that the appropriate section for consideration of Respondents' contract is section 14b.

There remains the question of whether rulemaking is the appropriate procedure for this case. The parties' arguments and the Examiner's discussion on this issue are primarily concerned with how the choice of procedure affects the burden of proof. But before dealing with this question one other argument against the use of rulemaking may be easily disposed of. Respondents contend that since this proceeding will result in a rule directed to the activities of "one individual conference" and not to "broad policy consideration relating to the entire maritime industry" the procedure is adjudication under sections 7 and 8 of the Administrative Procedure Act and not rulemaking under section 4 of that Act.[7] That it is not necessary to encompass an entire industry within a rule for it to be valid is clear from the Administrative Procedure Act's definition of a rule which in section 2(c) defines a rule as being either of "general or particular" applicability that a rule may be directed to "particular named persons," see Davis, Administrative Law Treatise, section 5.02 and cases cited therein.

A passage from the Initial Decision of the Examiner best illustrates the dispute which has arisen over the burden of proof in this proceeding. At page 7, the Examiner states:

> Section 10(e) of the Administrative Procedure Act (5 U.S.C.A., par. 706, (1967)) provides that in matters such as we have before us a reviewing court must set aside any agency action, findings or conclusions not supported by sub-

[7] The Examiner states at p. 4 of his Initial Decision, "The present proceeding is not rulemaking pursuant to sec. 4(b) but on the contrary is particular in scope, aimed at respondents alone and does not involve policies regulating an entire industry. * * *"

stantial evidence. Inasmuch as it is not a Rule which is proposed to be made by the Commission, but an Order directed at Respondent Conference alone, the agency, namely, the Federal Maritime Commission, cannot look beyond the hearing record compiled in this proceeding as it might in their [sic] mere policy determinations, for the use of the present approved dual rate contract is supported by substantial evidence. The present proceeding must be governed by the entire record, namely, the record made in 1963 and in particular, by the record compiled as a result of the hearings in San Francisco in August of last year at which time substantially all of the testimony was in justification of the use of the present dual rate contract formerly approved by this Commission. Hearing Counsel argues that the Commission should insist that the Conference offer a dual rate contract in each of the five trading areas, rather than in the two trade areas covered in shipments to Latin America and shipments from Latin America. Apparently, this contention flows from the *Dual Rate* cases, supra which gave no indication that any fact existed which would support the Commission's view that this Conference's dual rate system was "contrary to the public interest and detrimental to commerce." Thus under any due process standards it must be presumed in this proceeding that the Commission does not have sufficient evidence to make any finding of fact which specifically pertains to this Conference's rate system.

From the foregoing it is clear that the crux of the "burden of proof" issue is the substantial evidence test and its applicability here.[8] Our disposition of this case renders the "burden of proof" issue moot since we have applied the substantial evidence test and we conclude herein that such evidence of record establishes that the present dual rate contract is contrary to the public interest within the meaning of section 14b.

Recently the Supreme Court in *F.M.C.* v. *Svenska Amerika Linen*, 390 U.S. 238 (1968), affirmed our attempts to add meaningful content to the statutory phrase "contrary to the public interest." The decision of the Court in *Svenska* was the full expression of the theory that was first espoused in *Isbrandtsen Co.* v. *United States*, 211 F. 2d 51 (C.A.D.C. 1954), where the Court in discussing our authority to grant antitrust exemptions to cartels of steamship lines under section 15 offered the caveat that:

The condition upon which such authority is granted is that the agency entrusted with the duty to protect the public interest scrutinize the agreement to make sure that the conduct thus legalized does not invade the prohibitions of the antitrust laws any more than is necessary to serve the purposes of the regulatory statute.

In *Investigation of Passenger Travel Agents*, 10 F.M.C. 27 (1966), the appeal of which culminated in the Supreme Court's *Svenska* decision, we said:

[8] Since we instituted this proceeding we are in the sense of the Administrative Procedure Act the proponent of the order to impose the one-trade-one-contract requirement upon Respondents. Thus, the Commission bears the burden of proof.

* * * conference restraints which interfere with the policies of the antitrust laws will be approved only if the conferences can "bring forth such facts as would demonstrate that the [restraint] was required by a serious transportation need, necessary to secure important public benefits or in the furtherance of some valid regulatory purpose of the Shipping Act.

On appeal our reliance on antitrust policies as a basis for disapproving a conference agreement was challenged on the ground that such a test "was not a permissible elaboration of the statutory standards" of section 15.

The Supreme Court, in finding this argument not even superficially persuasive, concluded:

By its very nature an illegal restraint of trade is in some ways "contrary to the public interest," and the Commission's antitrust standard, involving an assessment of the necessity for this restraint in terms of legitimate commercial objectives, simply gives understandable content to the broad statutory concept of "the public interest."

* * * * * * *

The Commission must of course adduce substantial evidence to support a finding under one of the four standads of section 15, but once an antitrust violation is established, this alone will normally constitute substantial evidence that the agreement is contrary to the public interest unless other evidence in the record fairly detracts from the weight of this factor. * * * We therefore hold that the antitrust test formulated by the Commission is an appropriate refinement of the statutory "public interest" standard. 390 U.S. 244–46.

No one would seriously contend that without the protection of section 14b, an exclusive patronage tying arrangement offered by a conference (which itself would be subject to the antitrust laws were it not for section 15), would not violate the antitrust laws. Therefore, unless there are to be diametrically opposed meanings attached to the public interest standards as they appear in sections 14b and 15, there is, without more, "substantial evidence" that Respondents' contract is contrary to the public interest.[9] Therefore, it is incumbent upon Respondents to put "other evidence in the record [which] fairly detracts from the weight of this factor"—evidence which demonstrates "the necessity for this restraint in terms of legitimate commercial objectives." Justice Black said in *Svenska*:

It is not unreasonable to require that a conference adopting a particular rule to govern its own affairs, for reasons that are known to the conference itself, must come forward and explain to the Commission what those reasons are.

It would appear that the Conference had this in mind when it requested a hearing to produce as witnesses the Conference Chairman,

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[9] It should be kept in mind that the issue here is not whether Respondents are to be permitted the use of a dual rate contract, but whether there are to be placed certain restrictions on that use.

Secretary and a small representative number of shippers in support of the present contract. The Examiner's continual allusions of Hearing Counsel's failure to produce a single witness in opposition to the contract were unwarranted and the emphasis he apparently placed on this was undue.[10] For it is apparent from the foregoing that the point in issue is not so much who or how many are opposed to the contract as it is a question of the legitimate commercial objectives to be achieved by the present contract of Respondents. It is up to Respondents to show that the two-contract system is required by a serious transportation need, necessary to secure important public benefits or in the furtherance of some valid regulatory purpose of the Shipping Act.[11] With this in mind we will review the testimony of record.

It would unduly lengthen this report to set forth all the testimony quoted by the Examiner in his Initial Decision, a representative sampling will suffice. The witnesses fall into two categories: (1) Conference officials or officials of the member steamship lines or agents of those lines; and (2) shippers, all of whom appeared at the 1963 hearings and whose testimony the Examiner for one reason or another finds less than persuasive. An example of the testimony of an official of a member line, which the Examiner quotes in three different places in his Initial Decision, is that of Mr. Gottshall, Traffic Manager for Sea-Land. Mr. Gottshall is first quoted by the Examiner without reference to the question which elicited the testimony as stating:

> It makes no difference whether you have a collection of conferences or a single conference. There is a high to which a carrier can go and still achieve the business, and there is also a rate at which the shipper can no longer do the business and this is the prime thing in ratemaking. This is the area where you both live.

The question which elicited this testimony is furnished by the Examiner later in his decision when he quotes the identical statement of Mr. Gottshall again. It was, "Would you say, in your opinion, that the lines under the single contract system have more bargaining power in setting rates for shippers than they might otherwise have under a multiple contract system. * * *" The question is whether shippers should have to obligate themselves in more than one trade area and

[10] For a more realistic approach to the absence of shipper witnesses, see the Initial Decision of Examiner E. Robert Seaver in *Investigation of Ocean Rate Structures Between U.S. North Atlantic Ports and Ports in the United Kingdom and Eire,* FMC Docket No. 65–45, and 12 FMC 34.

[11] The fact that Respondents have been operating under the two-contract system for some 2 years is of course a factor to be considered, but it is certainly not dispositive of the issue, nor is it of overwhelming importance. The restraint removed under the so-called antitrust test in *Svenska* had been in effect for over 25 years.

this testimony bears little relevance to that question. Witness Gottshall continues:

Q. Sea-Land operates within other Conferences?

A. Yes.

Q. You spoke about capital cost and I assume from what you said that in the containerized service that you are offering in this trade there had been tremendous—or let's say—more substantial capital costs than might be necessary for a normal operation?

A. That's correct.

Q. In justifying the capital costs of [Sea-Land], would you say that the single Conference in this area with the single contract system is essential to the justification of those capital expenditures?

A. That is true, because with the single contract system we get a stability of rates. We don't look into a situation where there is a rate war, where the rates are running up and down and we don't know what the return in our investment is going to be.

For now, we note only that the witness offers no explanation here or anywhere else in the record of how the single-contract system prevents rate wars.

Another witness quoted at length by the Examiner is Mr. Raymond F. Burley, Chairman of the respondent conference. In Mr. Burley's view, the present contract system:

* * * has permitted us to maintain stability in our rates and in our offerings to the public. We are better able to assure the shipping public that their competitor is getting the same rate, freight rate, as he is, so they have greater surety in the selling in Latin American markets.

Here, again, the witness leaves unexplained the question of just how the single contract system achieves stability rates. The rather obvious difficulty with the proposition of witnesses Burley and Gottshall is that it is the carrier's ability to fix rates in concert under the agreement and its obligation to charge only those rates which bring about that stability which assures the shipper that his competitor is getting the same freight rate that he is. The contract system as such does not prevent discrimination in rates. The contract system is a tying device; it does nothing more nor less than obligate a shipper in exchange for a lower rate to the exclusive use of conference vessels. We find no persuasive evidence in the testimony of record which demonstrates that there would be any more or less stability under a one-contract-one-trade system than there is under the present single contract system.

Increased service is also suggested as a benefit flowing from the single contract system. The Examiner quotes the following testimony of Mr. Robert B. Swenson, Pacific Coast Manager for Balfour, Guthrie & Co. and Westfal-Larsen, as supporting this proposition:

Q. Now, with respect to service as a single contract system have your lines experienced a greater service or greater number of sailings to the shipping public? [sic]

A. With the adoption of 8660, and I don't think this has been brought in previous testimony yet, but I believe everyone would agree that it has certainly increased competition within the Conference very definitely. I can see some examples which are happening today, particularly in the northbound trade. * * * Since the adoption of 8660 these lines now being members of the larger Conference loading into these ports load anything available and come north. It has probably at least doubled the service available to them; maybe tripled the service for all I know, and this is happening today. This is happening every week. We see this happening, we were members of both Conferences in those days. Now, of course, we have more competition in that area than we did then. The same thing happened in Mexico in Salina Cruz, one port, the identical situation.

It is quite obvious that here the witness is talking about the size of the Conference. The testimony contains not a single reference to the contract system. Despite this, the Examiner follows this testimony with the conclusion that from this testimony, and the testimony of other witnesses unspecified, that: "the Conference over the past 2 years of operation in the use of the single dual rate contract system has provided a service which is beneficial in general to all parties concerned, including the public interest, which has been well served.[12]

Other testimony on this proposition while slightly more responsive is no less general. The witnesses content themselves with flat assertions of benefits which ostensibly flow from the single contract system without ever offering an explanation of how the benefits relate to the system. One more example should suffice. Mr. Burley treated the better service question as follows:

Q. Well, with respect to service to the shipping public, what effect if any has the single contract system had on the service?

A. Well, the single contract system and the consolidation of our Conference has given a greater opportunity of service by the steamship lines for the shipping public. Rather than having to be a member of so many individual Conferences, a line that may have a primary interest of handling simply coffee from Latin America to the Pacific Coast on its way from Europe out here, can if it wishes stop and take other commodities than coffee, or it can put a vessel on berth for a Latin America destination en route to Europe without having to join another Conference. We have had that happen * * * it has worked out exactly as we forecast it would work out in our original testimony, that the shipping public would have more lines available for use in servicing the Latin American trade, and that has happened.

Once again, it is the increased scope of the Conference trade area which seems to have brought about such increased service as there is,

[12] The Examiner does not say just how the public interest has been well served. If it is by increased competition, then this would seem, on the basis of the quoted testimony to stem from our approval of Agreement 8660, not from the single contract system, and no witness has as yet shown that the one is dependent upon the other.

and once again the single contract system receives mention only in passing.

We should make it clear that our refusal to find the testimony relied on by the Examiner to conclude that the present contract system should be continued in use, is in no way based upon an assessment of the demeanor of the witnesses. We do not question their veracity; it is only the content of their answers that fails to convince. The testimony consists only of either flat assertions unsupported by any concrete examples or of ambiguous references to benefits which can be more readily attributed to causes other than the present contract system. In fact, the only concrete example of the specific impact of the present contract system is that offered by Dow Chemical Co.

Briefly, Dow requested a lower rate on caustic soda to a port in Trade Area A and the lines serving the area refused to grant it. There was really little incentive for the lines to grant the request since Dow was a contract signator, and pursuant to the terms of the contract, any shipment to that area would have to be made on conference vessels. In any event, Dow, which made most of its shipments in Trade Areas B and C, was unable to obtain the reduction. Dow was, of course, not free to ship nonconference in Area A because of its obligation under the contract. It was only when Dow, well aware that it would lose the lower contract rate on its shipments in Areas B and C, announced its intention to terminate its contract, that the Conference responded by offering to publish only a noncontract rate (at the contract rate level) on caustic soda.[13]

In choosing an organizational structure for their amalgamated conference the Respondents decided to divide it into five trade areas and to restrict participation in matters relating to those trade areas to those member lines actively engaged in them. Presumably, these trade areas are based upon some geographic and operational logic. Thus, within the Conference Respondents have insured the autonomy of the groups of lines operating in a given trade area. Should another line wish to have a say in matters concerning that area, it must institute a service in the area. Rates are geared to the operational circumstances and, presumably, to the needs of the shippers in a given trade. It is only when it seeks to obtain a shipper's exclusive patronage that the Conference adopts an all or nothing approach. Whereas before approval of Agreement 8660 a shipper could have signed a dual rate contract with one, several, or all of ten conferences (assuming they would all have obtained approval of contracts under 14b), now a shipper must

[13] This action by the Conference may explain Dow's withdrawal at an earlier stage of this proceeding.

obligate himself in all three outbound trades and a receiver in both inbound trades. Thus, a shipper who ships the vast majority of his goods in, say, Trade Area A and only rarely has shipments in Trade Area B must nevertheless commit those rare shipments in B to conference vessels in order to obtain the lower contract rate in A. But what are the legitimate commercial objectives achieved by the present contract system, which objectives fairly detract from the weight of the loss of freedom of choice by the shipper? What transportation need is served by the present system? What important public benefits are secured by it? Is the present system imposed in furtherance of some valid regulatory purpose of the Shipping Act?

It has been suggested that the present contract system affords increased stability of rates. But the evidence of record much more readily supports the inference that such stability as exists is due to the concerted ratemaking activity under the conference agreement rather than the contract system. Indeed, the record establishes no real connection between the present contract system and rate stability or the prevention of rate wars.[14]

It has also been suggested that the single contract system has provided increased service to conference shippers. But here again the testimony of record convinces us that any increase in service has resulted from the new trading scope of the Conference under Agreement 8660, not from the operation of the present contract system.

A good deal of time and testimony was devoted to demonstrating that the present system has not permitted the member lines of the Conference to increase rates through monopolistic strength. This simply is not relevant to the question at hand. To the extent that it shows anything, such testimony simply shows that even with a single contract system the Conference falls somewhere short of a complete monopoly. It does not go to any legitimate commercial objective of the system.

Absent the protection of section 14b, the exclusive patronage tying arrangement embodied in a dual rate contract would clearly run counter to the antitrust laws. It is therefore contrary to the public interest unless necessary to pursue some legitimate commercial objective. In

[14] Rate wars are almost exclusively due to the rate-cutting practices of nonconference lines, yet the record is devoid of any meaningful references to nonconference competition. Indeed, the stability alluded to in the testimony is really the absence of discrimination among shippers, apparently as would have been practiced by the member lines themselves. See testimony of Gottshall quoted supra, at p. 156. But such discrimination is prevented by the fact that once the rates are fixed by the members in concert they are required to be published and filed with the Commission under sec. 18(b) of the Shipping Act, and the members are then obligated to charge only those rates. Whether there be a single contract system or a system which embodies the one-trade-one-contract requirement is simply irrelevant to such stability of rates.

the normal run of things, that legitimate commercial objective will be a conference's need to protect itself from the inroads of nonconference competition. Here Respondents have been granted permission to use a dual rate system. We will continue that permission. The only change we will require is that the contract be offered separately in each of the five trade areas, and insofar as the record shows such a contract system will still afford sufficient protection against nonconference competition. We remain unconvinced, for the reason set forth above that the present so-called single-contract system is required by some serious transportation need, necessary to secure important public benefits or in furtherance of any valid regulatory purpose of the Shipping Act. Accordingly, we will not sanction the present system's unwarranted inroads upon the Nation's antitrust policies. An appropriate order will be issued.

Vice Chairman James V. Day dissenting:

I do not find substantial evidence proving that this dual rate contract system is contrary to the public interest. The record of this conference's operations rather shows that the subject system is required by a transportation need, is necessary to secure public benefits, or is in furtherance of a valid regulatory purpose of the Act.

It is sufficient to refer to the following examples of evidence as noted by the Examiner.[15]

Sea-Land testified through Mr. Gottshall:

Q. Once having an advantage of a greater number of shippers who are bound by agreement to ship on Conference vessels, would you say that it is an incentive to the line involved, to extend its service in order to carry more cargo?

A. I would think very definitely so, yes.

Sea-Land testified through Mr. Gottshall:

Q. Woud you say, then, that the employment by a single Conference of a single contract system was encouraging to your extension of service in Latin America?

A. Yes, it was.

Grace Line's executive, Mr. Walker, stated:

Q. Well, with respect to the service that Grace and the other members of the Conference provide in this shipping area, what effect, if any, has the single contract system had on service as such * * * or on the service in your view that is being offered to the public? Has it increased or decreased or affected it in any way?

A. Oh, I would say not only the Grace Line, but there isn't any question that the shipping public gets a much better * * * the service has increased.

[15] Who also concluded that respondents should receive continued approval regarding the subject dual rate system.

Q. In other words, there are more sailings or areas covered by more vessels since the single contract system?

A. Yes sir.

The Chairman of the respondent Conference testified that the subject contract system:

* * * has permitted us to maintain stability in our rates and in our offerings to the public. We are better able to assure the shipping public that their competitor is getting the same rate, freight rate, as he is, so they have greater surety in the selling in Latin American markets.[16]

I would rather think that the present contract system, in view of such testimony as exemplified above, has provided increased service to conference shippers and has tended to increase the stability of rates. I am more particularly pursuaded to this interpretation of the evidence in view of the unrebutted nature of the statements made by those who testified (who were open to cross examination as well) and in view of the fact that after a number of years of operation there was no shipper testimony here complaining against the restraint on shipper flexibility to ship nonconference occasioned by the broad nature of the subject dual rate contract. It is thus reasonable to believe that there have been countervailing benefits for shippers as, for example, those noted above.

On the other hand, it would seem far less certain in protection of the public interest to ignore sworn testimony of carrier management as to the benefits flowing from actual operational experience merely because of the lack of concrete examples or because such benefits possibly could "be more readily attributed to causes other than the present contract system." This is particularly so where the sworn testimony was (1) open to the testing of cross examination; (2) remains unrebutted; and (3) pertains to actual operating experience over a number of years.

I would further emphasize that actual experience must be given proper weight. The factor of actual experience tends to insure the probative value of testimony pointing out the particular benefits attributable to the subject system. I consequently could not here and now find that the conference's mere choice of having an organizational structure of five trade areas (which insures that lines operating in an area have the say in such area)[17] makes the subject system contrary to

[16] This could be so if two competing shippers were both obligated to ship conference at the discounted conference rate in several market areas rather than if one were bound to ship conference at conference rates in several market areas by virtue of having signed several contracts while the other shipper was only bound to ship conference at conference rates in one market area by virtue of signing only one contract. Thus, if both shippers were bound to ship conference at its discount rate in all areas, uncertainty as to carrier (conference or nonconference) to be used and consequent rate juggling would be avoided.

[17] A significant number of the conference carriers operate in several areas.

the public interest or detrimental to commerce. There are a number of other conferences cited in the record which offer approved dual rate contracts covering a geographical area greater than the areas covered by respondent's contract and which thus bind shippers to ship only conference in such far greater area (regardless of the routing of their current business). Broadness of coverage cannot per se be equated with badness in viewing the history of respondent conference. I would deplore any such proclivity in regard to the actual operations of any dual rate system.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1092

AGREEMENT NO. 8660—LATIN AMERICA/PACIFIC COAST STEAMSHIP CONFERENCE AND PROPOSED CONTRACT RATE SYSTEM

ORDER

This proceeding was initiated by the Federal Maritime Commission to determine whether the Commission should by rule require the Latin America/Pacific Coast Steamship Conference and its member lines (Respondents) to offer its dual rate contracts in each of the five trade areas covered by the Conference ageement, and the Commission has fully considered the matter and has this date made and entered of record a Report containing its findings and conclusions thereon, which report is hereby referred to and made a part hereof. The Commission found in said report, inter alia, that the existing conference dual rate system, requiring signatory shippers to commit their exclusive patronage to the Conference in all three outbound trade areas, and signatory receivers to give their exclusive patronage to the Conference in both inbound trade areas, is contrary to the public interest and cannot be permitted approval pursuant to section 14b of the Shipping Act, 1916.

Now, Therefore, It Is Ordered, That Clause 2 of Respondents' dual rate contract be amended to read as follows:

2. *Trades covered by this Agreement:*

This Agreement covers the transportation by water of goods from Pacific Coast ports of the United States and Canada and the ports in Latin America as set forth in the five trade areas described in this clause. Merchants executing this contract may do so for any or all of the trade areas, as they desire, and notation of the trade areas covered by this contract shall be made at the end thereof: (1) From Pacific Coast Ports of the United States and Canada to:

Trade Area A.—Ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua, Costa Rica, and Puerto Armuelles, R.P.;

Trade Area B.—Colon and Panama City, R.P., Balboa and Cristobal, C.Z., ports in Barbados, British Guiana, British Honduras, Atlantic Coast of Colombia, Atlantic Coast of Costa Rica, Cuba, Dominican Republic, French Guiana, French West Indies, Atlantic Coast of Guatemala, Haiti, Atlantic Coast of Honduras, Jamaica, Leeward and Windward Islands, Netherlands Antilles, Atlantic Coast of Nicaragua, Atlantic Coast of the Republic of Panama, Surinam, Trinidad, and Venezuela;

Trade Area C.—Pacific Coast ports in Colombia, Ecuador, Peru, and Chile;

(2) to Pacific Coast Ports of the United States and Canada from:

Trade Area D.—Pacific Coast ports of Chile and Peru;

Trade Area E.—Caribbean ports of Cuba, Jamaica, Haiti, Dominican Republic, Trinidad, Windward and Leeward Islands, Barbados, French and British Guianas, Surinam, French West Indies, Venezuela, Netherlands Antilles and Colombia, Colon and Panama City, R.P., Balboa and Cristobal, C.Z., ports on the Pacific Coast of Mexico, Guatemala, El Salvador, Honduras, Nicaragua, and Costa Rica.

It Is Further Ordered, That, effective 30 days from the date of this order, Respondents' dual rate contracts, amended in accordance with this order, shall be used by Respondents to the exclusion of any other terms and provisions for the purpose of according merchants, shippers, and consignees contract rates.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

*Decided February 20, 1969**

Commission is empowered under section 17 of the Shipping Act, 1916, to reject terminal operator's tariff rule filing which would interfere with or tend to nullify the Commission's authority to prescribe a rule pursuant to that section.

A reasonable truck detention rule must require terminal operators to be responsible for availability of labor to perform tariff services of truck loading and unloading.

A reasonable truck detention rule must take into consideration size of shipments and characteristics of cargo at piers on which rule is to apply.

Joseph A. Byrne, *Mark P. Schlefer*, *John Cunningham*, *Richard J. Gage*, *Robert J. Nolan*, and *Stuart C. Law* for respondents.

Herbert Burstein, *Samuel B. Zinder*, and *Arthur Liberstein* for intervener Empire State Highway Transportation Association, Inc.

Arthur Liberstein and *Charles Landesman* for intervener Wm. Spencer & Son Corp.

Christopher E. Heckman for interveners Harbor Carriers of the Port of New York, James Hughes, Inc., Henry Gillen Sons' Lighterage, Inc., McAllister Lighterage Line, Inc., and Petterson Lighterage & Towing Corp.

Thomas M. Knebel for intervener Middle Atlantic Conference.

James M. Henderson, *Douglas W. Binns*, and *Jacob P. Billig* for interveners Port of New York Authority and Export Packers Association of New York, Inc.

D. J. Speert for intervener Brooklyn Chamber of Commerce.

Leo A. Larkin and *Samuel Mandell* for intervener the city of New York.

J. Warren Mangan for intervener Local 807, International Brotherhood of Teamsters.

Donald J. Brunner and *Robert H. Tell* as Hearing Counsel.

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*Supplemental orders served April 4 and April 7, 1969.

REPORT

BY THE COMMISSION (John Harllee, *Chairman;* James V. Day, *Vice Chairman;* Ashton C. Barrett, George H. Hearn, James F. Fanseen, *Commissioners*):

This proceeding is presently before us as a result of our show-cause order issued to the New York Terminal Conference (Conference) on September 27, 1968. The present show cause proceeding was precipitated by the Conference's failure to comply with a portion of our previous order in this docket.[1]

In our previous report we found after investigation that unusual delays to trucks occurred at the piers operated by the Conference member terminal operators. The Conference had disclaimed liability for any such delays. We concluded that the Conference's failure to develop a rule which would recognize the Conference's responsibility in this area and which would provide a system of compensating truckers for such unusual delays was an unreasonable practice under section 17 of the Shipping Act, 1916. We then directed the Conference to file an appropriate tariff amendment establishing a reasonable rule which would compensate truckers for any unusual delays caused by or under the control of the terminal operators.

Soon after the Court upheld this decision, the staff of the Commission met with representatives of the Conference and the trucking representatives (Empire State Highway Trucking Association (Empire)), in an attempt to reach agreement on a reasonable truck detention rule. Periodic meetings were held until August 21, 1968. The parties were unable to agree on a rule that all would consider reasonable, and the Commission representatives informed them that a memorandum would be forwarded to the Commission recommending that the Commission prescribe a reasonable truck detention rule.

Thereafter the Conference published a truck detention rule to become effective October 1, 1968.[2] We determined that the provisions of the conference rule were not reasonable within the terms of our prior order and of the decision of the Court of Appeals. We thereupon instituted the instant show cause proceeding, rejecting the rule proposed by the Conference and directing the Conference to adopt the truck detention rule set forth in our order, or in the alternative, show cause why the rule should not be prescribed.

Our rejection of the Conference's rule was based on our determination that two provisions of that rule were incompatible with our pre-

[1] See *Truck and Lighter Loading and Unloading,* 9 F.M.C. 505 (1966), upheld in *American Export Isbrandtsen* v. *Federal Maritime Comm.,* 389 F. 2d 962 (D.C. Cir. 1968).

[2] The Conference's proposed rule was designated as "Item 17" of the Conference's Truck Loading and Unloading Tariff No. 7, FMC–T No. 8.

vious order requiring the Conference to adopt a reasonable detention rule.

The Conference rule would provide that detention payments would not be allowed where the delay is caused by "inadequate or insufficient manpower * * *."[3] We found this provision unacceptable because we did not deem it reasonable that a terminal operator should be excused from responsibility for delays occasioned by its failure or inability to obtain labor.

We also determined as unreasonable the Conference's provision which would preclude payment of truck detention on even the smallest shipments until 4 hours after the truck arrives at the terminal and the terminal has cleared and stamped the shipping documents. This provision would allow all shipments of 24,000 pounds or less 4 hours for handling before detention accrues. We stated that a reasonable rule must recognize that less time is required to handle a shipment of 2,000 pounds, for example, than one of 24,000 pounds.

In our order to show cause we proposed a rule which provided that work slowdowns due to insufficient labor would not excuse the terminal operator from its responsibility to pay detention charges. We also provided time limits within which handling of trucks should be accomplished, with a breakdown for shipments from 2,000 pounds to 40,000 pounds.

We have received comments from the Conference, Empire, and Middle Atlantic Conference. All three parties and Hearing Counsel have filed replies.

The Conference, in its response to our order to show cause, seeks first to show that we were not empowered to reject its rule and second to show that the above-mentioned provisions of our proposed rule are contrary to our earlier order, interpreted and affirmed by the Court of Appeals and conversely that their rule conforms with that order.

The comments of the truckers show that they are generally in agreement with the major provisions of our proposed rule while having certain objections to various other provisions.

Hearing Counsel favor our proposed rule but suggest clarification of one minor provision.

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[3] Item 17(G) provides in pertinent part: "No truck detention will be allowed for delays or shutouts resulting from any of the following:

* * * * * * *

(3) inadequate or insufficient manpower occasioned by the failure, refusal, or lack of registered pier personnel in the area to fill work orders duly issued by the Participating Member in accordance with regulations established by the Waterfront Commission of New York Harbor. In this connection, the official records of the Waterfront Commission will be conclusive on the issue of said availability of manpower.

DISCUSSION

The Conference has petitioned us to reconsider our order rejecting its detention rule on the ground that such action exceeds our statutory power.

The Conference maintains that we have only those powers expressly conferred upon us and that while we are authorized by the shipping acts to reject tariffs of carriers in either the foreign trade or the domestic offshore trade, we are not authorized to reject tariffs of terminal operators. The Conference argues further that even if the power to reject can be applied to terminal tariffs, the Shipping Act rejection provisions relate to rejections for failure to comply with procedural requirements regarding form and timeliness of filing whereas our rejection of the Conference's detention rule was based on a determination that the substantive provisions of the rule were unreasonable, and thus our rejection was ineffective and is a nullity.

The Conference misconceives the nature of the action taken here. Perhaps this misconception is partly due to our use of the word "reject" in the show cause order. We recognize that the only Shipping Act provisions which specifically authorize the rejection of tariff filings are section 2 of the Intercoastal Shipping Act, 1933, and section 18(b) (4) of the Shipping Act, 1916, and that these provisions do not apply to terminal operators. However, our action here was undertaken not under a specific statutory power to reject, but pursuant to the authority contained in section 17 [4] of the Shipping Act, as a necessary step to implement and enforce our prior report and order in this proceeding. We previously determined that it was an unreasonable practice for the Conference to fail to adopt a reasonable tariff rule which would provide for compensation to truckers for delays incurred at the Conference members' piers. Having found the practice unreasonable, we have now undertaken to determine, prescribe, and order enforced a reasonable tariff rule governing truck detention. Inherent in our authority to prescribe a reasonable rule or practice is the authority to set aside any rule or practice which would interfere with this authority. To conclude otherwise would give the Conference an absolute right to file and make effective any rule and thereby nullify our power to prescribe reasonable provisions. Such an interpretation of section 17 would abrogate an express grant of statutory authority and therefore would be plainly untenable.

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[4] Sec. 17 provides in pertinent part:

Every such carrier and every other person subject to this act shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the 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.

Our predecessors, in *Storage Charges Under Agreements 6205 and 6215*, 2 U.S.M.C. 48 (1939), addressed themselves to the question of the Commission's section 17 authority to prescribe a reasonable rule or practice. They said:

> We not only have the authority under section 17 to prescribe just and reasonable regulations and practices, but also the power to order them enforced. Clearly, therefore, any means or device tending to nullify or interfere with the enforcement of such regulations and practices must be subject to our condemnation. (P. 53.)

We conclude that we were empowered to reject the Conference's rule and we are therefore denying the Conference's petition for reconsideration.

Responsibility for labor availability

The Conference feels that the portion of our proposed rule which would hold the terminal operators responsible for availability of labor is contrary to our previous order in this proceeding. In our previous order we concluded that the Conference should adopt a detention rule "* * * which will compensate the truckers for unusual truck delays caused by or under the *control* of the terminals." (Italic added.) Relying on this language, the Conference argues that our proposed provision is contrary to the previous order since it would impose liability for delay even where the labor shortage arises from causes wholly beyond the terminal's power to control.[5]

The Conference has gone to some length to show that there are delays at their terminals caused by insufficiency of labor and that the insufficiency of labor is often caused by factors beyond the control of the terminal operators. According to the Conference, the shortage of labor at their terminals usually results from the fact that the amount of labor available at the port of New York is restricted by the Waterfront Commission compact and by the port-wide collective bargaining agreement, neither factor being under the control of the Conference.

The New York Waterfront Commission regulates longshoremen and those employing longshoremen throughout the port of New York. The Waterfront Commission imposes a longshoremen's register and forbids the use in the port of New York of any longshoremen not included in the register. Since 1965, the register has been virtually closed and a sharp decline in available labor has occurred.

The collective bargaining agreement between the New York Shipping Association (NYSA) and the International Longshoremen's Association (ILA) controls the manner in which the men are hired

[5] The Conference recognizes, of course, that the proposed rule would not hold the terminal operators responsible for labor in all instances. The rule recognizes that no detention payments will be allowed for delays or shutouts resulting from strikes or work stoppages.

and the availability of particular classifications of workers. While the NYSA represents terminal operators as well as steamship companies in bargaining, the terminals have no effective voice in determining provisions of the collective bargaining agreement. They are merely associate members of the NYSA and as such have no vote on any decision.

It is the Conference's position that the Waterfront Commission Compact and the Collective Bargaining Agreement together prevent the terminals from obtaining the men they seek. The Conference feels this is not only true for longshore labor generally, but, in particular, with respect to checkers, whose unavailability immediately and drastically slows down the truck line at piers. Thus, says the Conference, to the extent the terminal's inability to obtain labor is caused by either the regulations of the Waterfront Commission, or by the port-wide collective bargaining agreement, it is out of the power of the terminals, either individually or as a group, to control.

The Conference concludes, therefore, that our proposed rule which purports to hold terminal operators responsible for labor in such instances is contrary to the language of our earlier order which requires only that terminal operators accept responsibility for delays caused by factors which are within the control of the terminal operators.

The Conference misunderstands the intent and meaning of our previous order. In that proceeding we recognized that there were many factors causing delays at the Conference's terminals, some of which the terminal operators could not control. We stated that terminal operators are to be responsible only for delays which are within their control. Our use of the word "control" was for the purpose of indicating that the Conference would not be responsible either for delays caused by factors, such as strikes, inclement weather, or other acts of God, or for delays brought on through the fault of the truck operator. We did not mean to suggest that terminal operators would be relieved of responsibility for delays caused by their failure or inability to obtain labor. In fact, insufficient labor and inadequate control of labor were among the causes of delay attributed to the terminal operators in the prior proceedings.

While we do not dispute the Conference's evidence concerning its ability to control labor availability, we do not think such evidence affects their duty as public terminal operators to provide the ways and means of performing a regular service. We believe that, as terminal operators with tariffs on file providing truck loading and unloading services, the conference members obtain the status of a public utility,[6]

[6] See *Investigation of Free Time Practices—Port of San Diego,* 9 F.M.C. 525, 547 (1966).

and in extending these services, the Conference assumes the responsibility of procuring sufficient labor for the efficient discharge of its duties. The procuring of the necessary labor, while at times conceivably beyond the control of the Conference, is nevertheless its responsibility directly incident to obligations it has voluntarily assumed.

We have on previous occasions held responsible, for a particular function, the party on whom commonsense would impute responsibility. Our determination in those cases did not always depend on whether a particular condition was beyond the control of the party held responsible. This principle is best exemplified in *Penna. Motor Truck Ass'n.* v. *Phila. Piers, Inc.*, 4 F.M.B. 192 (1953). In this case it was found that delays by terminal operators in handling truck cargo were occasioned by physical shortcomings of the terminal operator's piers, and increased density of traffic. It was determined that a 2-day free time period for truck cargo was unreasonable. The responsibility of providing reasonable pier facilities was placed on the terminal operators and they were obligated to extend free time. This was true even though the terminal operators could not control the amount of available space on the pier.

In *Free Time and Demurrage Charges—New York*, 3 U.S.M.C. 89 (1948), a carrier's assessment of compensatory demurrage was upheld as lawful in a situation where a strike by truckers made it impossible for the party responsible (consignee) to remove goods. It was recognized that the consignee's inability to remove the goods was caused by forces beyond his control. Nevertheless, the Commission held that because removal from the pier was the consignee's responsibility, the assessment of compensatory demurrage was proper.

The principle of these cases applies here. It is the terminal operator, who holds himself out by tariff to perform truck loading and unloading, who is responsible for completing the service within a reasonable time. Failure to do so is not excused by an inability to obtain labor.

The Conference claims that it cannot obtain labor because the Waterfront Commission register is closed and the number of workers is thereby limited. It is an undisputed fact that the NYSA, the Conference's designated collective bargaining representative, recently opposed an attempt to reopen the register to add more employees. The Waterfront Commission did, however, on March 8, 1968, decide to open the register and that decision was affirmed by the Court by the Court, *NYSA* v. *Waterfront Commission*, 290 N.Y.S. 2d 707.

The Conference has also suggested that we erred in rejecting their rule without affording opportunity for hearing and accordingly they have now submitted factual evidence in the form of affidavits. The

Conference feels that this evidence, which refers to instances of truck detention, which result from the terminal operator's inability to obtain labor, is relevant to a determination of the issues here, and such evidence was not before us when we rejected the Conference rule. With respect to this evidence, the Conference has stated that an oral evidentiary hearing is not requested unless (a) some party desires to controvert this evidence, (b) the Commission is not willing to receive this material in evidence and accord full credit thereto. Hearing Counsel state they do not dispute the facts presented and are willing to take them as true. Neither do the truckers dispute any of the facts, but while accepting their truth *arguendo*, maintain that they are not material here. We agree that this evidence is not material here in view of our decision that the conference members are responsible for availability of labor even though technically certain factors concerning labor availability are beyond their control. Accordingly, there will be no need for further evidentiary proceedings.

The Conference also claims that our rejection of their rule provisions regarding responsibility for labor and the imposition of our own was not based on any evidence before us in the prior proceedings in this docket. The simple answer to this is that in the prior proceedings we decided to hold the Conference responsible for delays only after hearing evidence of the various causes of delay at the Conference's terminals. The evidence established that among the causes of delay attributed to the terminal operators were insufficient labor and/or equipment, and inadequate control over labor.

Schedule of Free Time

Our proposed rule contains the following provision regarding time within which loading or unloading should be accomplished before detention accrues.

(a) When vehicles are loaded or unloaded within the time periods set forth below, there will be no detention charges paid. Vehicles designated will be entitled to detention charges if not completely serviced within the designated time periods on the following basis:

(1) *Non-Appointment Trucks:*

2,000 pounds or less	Not applicable.*
2,001 to 5,000 pounds	165 minutes.
5,001 to 10,000 pounds	195 minutes.
10,001 to 15,000 pounds	225 minutes.
15,001 to 20,000 pounds	255 minutes.
20,001 to 25,000 pounds	285 minutes.
25,001 to 30,000 pounds	300 minutes.
30,001 to 35,000 pounds	330 minutes.
35,001 to 40,000 pounds	360 minutes.
Over 40,000 pounds	390 minutes.

*Nonappointment vehicles with shipments of 2000 pounds or less shall not be entitled to detention charges.

(2) *Appointment Trucks:*

2,000 pounds or less	120 minutes.
2,001 to 5,000 pounds	135 minutes.
5,001 to 10,000 pounds	165 minutes.
10,001 to 15,000 pounds	195 minutes.
15,001 to 20,000 pounds	225 minutes.
20,001 to 25,000 pounds	255 minutes.
25,001 to 30,000 pounds	270 minutes.
30,001 to 35,000 pounds	300 minutes.
35,001 to 40,000 pounds	330 minutes.
Over 40,000 pounds	360 minutes.

This provision was proposed by us after we determined that the Conference's proposed rule was unreasonable because it failed to provide for a breakdown of shipments under 24,000 pounds. The Conference rule read:

D. Truck free time will be as follows:

Volume	*Free time in minutes*
Less than 24,000 lbs	240
24,000 lbs and less than 36,000 lbs	300
36,000 lbs and more	360

The Conference objects to our decision to attempt to impose this provision. The Conference feels that we have no evidence of record on which to base a conclusion that their own proposal is unreasonable. The time limits of the Conference rule are borrowed from a rule of the Middle Atlantic Conference which was approved by the Interstate Commerce Commisison in *Detention of Motor Vehicles—Middle Atl. & New England*, 318 I.C.C. 593, 611 (1962). The time schedule approved in that case applied to time periods during which motor vehicles could be detained by consignors and consignees without being entitled to detention payments. The Conference feels that since the determination of amount of free time involves a certain amount of arbitrariness, it is reasonable to adopt a provision which has previously gained approval.

The Conference offers further support for its own provision by arguing that while generally lighter loads are more easily handled, it by no means follows that 240 minutes is unreasonable for loads of less than 24,000 pounds inasmuch as some light loads may well take 4 hours to handle.

The Conference states that the figure of 24,000 pounds represents, in general, the weight of the cargo which a fully-loaded truck carries, and even where the cargo is such that a load under 24,000 pounds could be unloaded more quickly than the 4 hours provided, this does not mean that such a load should have a shorter free time. The Conference adds that the overall aim and purpose of the detention rule is to assist in reducing the delay of cargo interchange in New York Harbor and the free time schedule of 240 minutes was designed to discourage driblet-sized loads.

We recognize that the determination of amount of free time involves a certain amount of arbitrariness as suggested by the Conference. However, we feel that our own proposed rule is less arbitrary than the Conference's proposal inasmuch as our rule more realistically allots free time in accordance with the size of the shipment and in accordance with conditions existing at the port of New York. It is more realistic because it contains two separate rules for appointment and nonappointment cargo and considers various cargo characteristics. The fact that the Commission rule more accurately reflects factors existing at the New York pier is evidenced by one of the Conference's affidavits which shows that a recent survey sponsored by the Port of New York Authority established that more than 50 percent of the trucks bringing export cargo to the pier carried less than 2,000 pounds per visit.

It is true that the Interstate Commerce Commission approved a free time provision identical to the one in the Conference's proposed rule. However, that same Commission subsequently determined, upon further hearing in *Detention of Motor Vehicles—Middle Atl. & New England*, 325 I.C.C. 336 (1965), that those same free time limits should not be applied to the short-haul territory in and about New York City.

We conclude that the provision as proposed in our show cause order is entirely reasonable and should be adopted by the Conference.

Truckers Objections

As mentioned above, the truckers have voiced certain objections to various provisions of our proposed rule.

Weather Conditions

Middle Atlantic Conference feels that the provision which would relieve terminal operators of responsibility for delays resulting from severe or unusual weather conditions is fine in purpose but as worded is vague and subject to arbitrary interpretation since weather conditions are a matter of degree. We are adopting their suggestion to provide for a board of arbitration to resolve disputes concerning whether conditions on a particular day will or will not excuse detention. The board of arbitration will consist of a representative of the truckers, a representative of the terminal conference, and either a representative of the New York Waterfront Commission or a third party to be selected by the two above-mentioned parties.

Documentation

The truckers object to the provision of our proposed rule which requires documentation to be completed before detention time begins to run and which allows the individual terminal operator to specify what documentation is necessary and whether it is adequate in a particular case. The truckers contend that this provision would permit the terminal operators to defeat the purpose of the detention rule by taking excessive time to complete documentation or by arbitrarily determining that documentation is not sufficient in a particular case.

We believe that if the terminal operator is to be responsible for the orderly handling of trucks at its facility, it will establish procedures which it considers necessary to properly effectuate the documentation rule and, in the event these procedures of the individual terminal operator are found to be unreasonable, we can always review them at a later date. Also, the trucker's argument assumes that the terminal operators will show bad faith in administering the rules concerning documentation. There is no basis for such an assumption. Accordingly, we are adopting the provision as proposed.

Unloading by Truck Operator

The truckers also object to the provision of our proposed rule which provides that detention charges will not apply to vehicles unloaded by the operator if they are spotted at a place convenient for unloading within 120 minutes after proper documentation. The objection here is much the same as to the previous provision, viz. that the terminal operator will be able to take excessive time for documentation and thereby defeat the purpose of the rule. As above, we see no basis for such an assumption and are adopting the provision as proposed.

Sorting of Cargo

Our proposed rule provides that no detention will be paid when sorting or selection is requested or required. The truckers and Hearing Counsel agree that this provision should be clarified to provide that detention will not be paid where the sorting or selection is required or requested by the motor carrier and to provide that where sorting or selection is done for the convenience of the terminal operator, it should not be absolved from liability. We are making this clarification since it embodies our original intention in the proposed rule.

Containers

Our proposed rule provides that containers handled as a single unit will be allowed 120 minutes, regardless of weight, before detention charges accrue.

The truckers feel that the 120 minutes of free time allowed for handling of containers is excessive and will nullify the advantages of efficiency and ease of handling inherent in container traffic.

We believe the 120-minute free time limit is reasonable considering the number of trucks and the physical capacity of the piers and considering that the terminal operator is responsible only for unusual delays.

The Conference maintains that a detention rule on handling of containers is inappropriate since certain containers are handled by terminal operators free-of-charge to the truckers with no tariff provision covering such services. They state that in those instances the entire arrangement is between the steamship lines on the one hand and the shippers, consignees, forwarders, and truckers on the other, with the terminal operator acting only as agent for the steamship company. The terminals are said in these instances to have no control over the number of containers they must handle, nor over the steamship companies' supply of equipment necessary to handle containers.

We recognize that in certain instances Conference member terminal operators do perform a handling service on containers as agent for the steamship companies and that in such cases no charge is provided therefor in the Conference tariff. We agree that in these instances the proposed tariff detention rule would not be applicable. This is not to say that the truckers in such a case would be precluded from looking to the steamship lines for compensation for unusual delays.

The Conference members do, however, in some instances handle containers for truckers and do in fact provide in their tariff for a charge on handling containers. This rate appears in part II of the Rates section (p. 16) of the Conference tariff and it applies a charge varying from $2.90 to $42.51 per unit for handling of various sizes of containers which are moving to or from open flatbed trucks. To the extent that the terminal operators perform a service on containers under this tariff, it is appropriate to provide for compensation for delays in handling and we are requiring such a provision.

Conclusion

We conclude that the Conference has failed to show cause why the rule proposed in our order of September 27, 1968, should not be prescribed. Accordingly, an appropriate order will be issued prescribing the rule as proposed with the modifications discussed in this report. The Conference will be ordered to include the prescribed rule in its tariff.

(SEAL)

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

ORDER

This proceeding was instituted by order to show cause issued September 27, 1968, by the Federal Maritime Commission. The New York Terminal Conference was ordered to show cause why a truck detention rule set forth in the Commission order should not be prescribed pursuant to section 17 of the Shipping Act, 1916. The show cause order was issued because of the Conference's failure to comply with a portion of the Commission's previous order in this docket in which the Conference's failure to adopt a reasonable detention rule was adjudged to be an unreasonable practice under section 17 of the act. The Conference's response to the order to show cause and comments of all other interested parties have been considered. The Commission has this day issued its report in this proceeding, which is hereby incorporated herein by reference, in which it determined that the Conference has failed to show cause why the truck detention rule should not be prescribed.

Therefore, it is ordered, pursuant to section 17 of the Shipping Act, 1916, That the New York Terminal Conference include in its Truck Loading and Unloading Tariff No. 7, FMC-T No. 8, a Truck Detention rule reading as follows:

VEHICLE DETENTION RULES

Section 1—General Provisions

Motor vehicles loading or unloading waterborne freight at piers or marine terminals of members of the New York Terminal Conference shall be entitled to receive detention charges [1] for delays occasioned at

[1] Detention charge as used in this rule means compensation to be paid by marine terminal operators to motor truck companies for delays of motor vehicles at marine terminal facilities.

piers beyond the time set forth in section 4. Detention charges shall accrue in instances where the delays result through no disability, fault, or negligence on the part of the motor vehicle.

No detention will be allowed for delays or shut-outs resulting from strikes or work stoppages. In such cases, it is expected that the terminal operator will attempt to inform all potential users of the pier by telephone or advertisement. Formal notification shall be made to the Federal Maritime Commission of all strikes or work stoppages resulting in delays or shut-outs.

No detention will be allowed for delays resulting from severe or unusual weather conditions. A board of arbitration will resolve disputes concerning whether conditions on a particular day will or will not excuse detention. The board of arbitration shall consist of a representative of the terminal conference, a representative of the truckers, and either a representative of the New York Waterfront Commission or a third party to be selected by the above-mentioned parties.

Work slow downs due to insufficient labor shall not excuse the responsibility of the terminal operator under this rule.

Section 2—Documentation

Detention time does not begin to run until shipping documents[2] required by the terminal operator for release or delivery of cargo are found to be complete. The terminal operator will time stamp an appropriate document (once documentation is completed) which will begin the running of time for detention purposes. Each terminal operator shall specify the documentation necessary to receive or discharge cargo. The terminal operator shall determine whether documentation is adequate and may refuse to handle motor vehicles without full and proper documentation. The terminal operator may in its discretion waive the full documentation requirements, in which case, time shall commence upon granting such waiver.

Section 3—Computation of Time

Time for detention purposes shall commence when the vehicle has completed documentation as provided in section 2.

Terminal operators shall establish an appropriate procedure for recording the time the vehicle has completed loading or unloading.

Detention will accrue during the regular business hours of the terminal, or additional hours if established by the terminal operator or steamship operator, provided the vehicle obtains a pass and has completed documentation as required by section 2 prior to 3 p.m.

[2] Shipping documents as used in this rule generally include, but are not necessarily limited to, the carriers release, dock delivery order, dock receipt, weighing receipt, carrier certificate, container survey form, and other documents and/or notations required by Government authority, port customs, or trade association.

The lunch period as set forth in the labor contract, but not exceeding 1 hour, shall not be included in calculating time or detention.

Section 4—Time

(a) When vehicles are loaded or unloaded within the time periods set forth below, there will be no detention charges paid. Vehicles designated will be entitled to detention charges if not completely serviced within the designated time periods on the following basis:

(1) *Non-Appointment Trucks:*

2,000 pounds or less	Not applicable.*
2,001 to 5,000 pounds	165 minutes.
5,001 to 10,000 pounds	195 minutes.
10,001 to 15,000 pounds	225 minutes.
15,001 to 20,000 pounds	255 minutes.
20,001 to 25,000 pounds	285 minutes.
25,001 to 30,000 pounds	300 minutes.
30,001 to 35,000 pounds	330 minutes.
35,001 to 40,000 pounds	360 minutes.
Over 40,000 pounds	390 minutes.

(2) *Appointment Trucks:*

2,000 pounds or less	120 minutes.
2,001 to 5,000 pounds	135 minutes.
5,001 to 10,000 pounds	165 minutes.
10,001 to 15,000 pounds	195 minutes.
15,001 to 20,000 pounds	225 minutes.
20,001 to 25,000 pounds	255 minutes.
25,001 to 30,000 pounds	270 minutes.
30,001 to 35,000 pounds	300 minutes.
35,001 to 40,000 pounds	330 minutes.
Over 40,000 pounds	360 minutes.

*Nonappointment vehicles with shipments of 2,000 pounds or less shall not be entitled to detention charges.

(b) Containers handled as a single unit will be allowed 120 minutes, regardless of weight, before detention charges accrue.

(c) Motor vehicles unloaded by the operator of such vehicles will be entitled to detention charges if not spotted at a place convenient for unloading within 120 minutes after proper documentation. No detention will be allowed once such vehicles are spotted convenient for unloading.

(d) No detention will be paid when sorting or selection is requested or required by the motor carrier. The terminal operator is not absolved from liability under this rule when sorting or selection is done for his convenience.

Section 5—Charges

When the loading or unloading of freight is delayed beyond the time allowed in section 4, the vehicle shall apply to the terminal operator for detention charges and shall be entitled to $3 for each 15-minute period beyond the time designated in section 4.

It is further ordered, That this order become effective March 31, 1969.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

ORDER

By Order served February 25, 1969, New York Terminal Conference was directed to include in its Truck Loading and Unloading Tariff No. 7, FMC–T No. 8, a truck detention rule as set forth in the Order. Subsequently, the effective date of the Order was postponed at the request of the U.S. Court of Appeals for the District of Columbia Circuit in order to hear argument on a motion to stay.

The Court has this date denied the motion for stay (*American Export-Isbrandtsen Lines, Inc. et al.* v. *Federal Maritime Commission and United States of America*, No. 22,820) and has set the effective date of the Order at April 7, 1969. Accordingly,

It is ordered, That the Order of February 25, 1969, as modified by the Court, shall become effective April 7, 1969.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 1153

TRUCK AND LIGHTER LOADING AND UNLOADING PRACTICES AT NEW YORK HARBOR

ORDER OF CLARIFICATION

On February 25, 1969 the Order in this proceeding was issued by the Federal Maritime Commission. The New York Terminal Conference was ordered, pursuant to section 17 of the Shipping Act, 1916, to include in its Truck Loading and Unloading Tariff No. 7, FMC–T No. 8, the Truck Detention rule set forth in that Order.

Footnote 1 of the rule defines detention charges as follows:

[1] Detention charges as used in this rule means compensation to be paid by marine terminal operators to *motor truck companies* for delays of motor vehicles at marine terminal facilities. (Italic added.)

During the course of the proceeding there was in no instance a differentiation made between motor vehicles operated by "motor truck companies" and those operated by individuals or other types of companies. It is not the intent of the Commission to limit detention payments to motor truck companies; the rule is intended to compensate any type of motor vehicle operators for delays of their vehicles at marine terminal facilities.

Therefore, it is ordered, That footnote 1 of the Vehicle Detention Rules be clarified by omitting the words "motor truck companies" and substituting therefore the words "motor vehicle operators." Footnote 1 will now read as follows:

[1] Detention charge as used in this rule means compensation to be paid by marine terminal operators to motor vehicle operators for delays of motor vehicles at marine terminal facilities.

It is further ordered, That since this order merely constitutes a clarification of the Commission's original order, its effectiveness shall correspond with the effective date of the original order, March 31, 1969.

By the Commission.

[SEAL]

THOMAS LISI,
Secretary.