DECISIONS OF THE

FEDERAL MARITIME COMMISSION

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FEDERAL MARITIME COMMISSION

WASHINGTON, D.C.

June 30, 1969

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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 re-admission 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]

[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

Item	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.

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[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

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[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 to 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 $3,000,000 of a total of $1 billion manufactured each year. British toy manufacturers export about 60 percent of the toys they make.

It is true, as respondents state, that other factors such as British import duty, high mark-up in their stores, the 10 percent British surcharge on imports, and other factors make it difficult for the American 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 our exporters ship out of Canada.

Other Commodities

In addition to the foregoing commodities, the record contains evidence of the impact of rates upon the movement of the other descriptions of cargo. For instance, aquariums formerly moved under the general cargo N.O.S. rate of $70.75, and this high rate was inhibiting sales and exports. A shipper sought a reduction to $35.50, but the conference granted a smaller decrease. Citing an inability to meet U.K. and Japanese competition, the shipper returned to the conference again for a rate of $35.50 in August 1966. The conference granted this request, 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.

[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.

[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*

[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 o 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. *Aktiebolaget 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 agreement 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 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.

The routing clause restricts free competition and presumptively runs counter to the public interest. *Mediterranean Pools Investigation*, 9 F.M.C. 264 (1966). The Commission does not consider that all agreements restricting competition are necessarily and inevitably unjust and unreasonable practices which must be prohibited at any cost. But free competition is the rule and a restraint on competition may not be approved unless sufficient justification therefor appears on the record. The Commission recognized that the burden of sustaining such practices is a heavy one. *California Stevedore & Ballast Co. et al.* v. *Stockton Port District et al.*, 7 F.M.C. 75 (1962), at page 84. The port of Los Angeles justifies the clause as a means of protecting its investment in the facility and assuring a fair return on the land and improvements assigned to the Lines for preferential use. The port seeks to require the Lines to move sufficient cargo through the facility to accomplish that purpose. It is evident that if the clause is disapproved the Lines are free to use the facilities at competing ports capable of 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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> * * * * * * *
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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:

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[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,

[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

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[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.

*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-

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[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.

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[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.

FEDERAL MARITIME COMMISSION

No. 65–31

INVESTIGATION OF OVERLAND AND OCP RATES AND ABSORPTIONS

No. 66–61

BOARD OF COMMISSIONERS OF THE PORT OF NEW ORLEANS

v.

PACIFIC COAST AUSTRALASIAN TARIFF BUREAU, AND MEMBER LINES

Decided February 20, 1969

Since about 1870, competition among the Atlantic, Gulf, and Pacific Gateways has been an economic force in the making of ocean rates on overland/OCP cargo moving between the Far East and the central United States, as distinguished from local or port-to-port cargo moving between the Far East and the Pacific Coast area and not subject to such interseaboard route competition.

The approved conference agreements permitting respondent conference members to set ocean freight rates in the trades they serve authorize them to establish such rates as normal economic forces require; and upon the facts herein, such respondents' overland/OCP rates and absorptions are within the scope of that authority.

Although overland/OCP rates were authorized by section 15, clarity requires that the agreements be updated for the future to include specific reference to the intent of the parties to establish different rates to inland areas and to set up rates and absorptions in implementation thereof.

No agreement is found to exist respecting respondents' overland/OCP rates and absorptions which should be disapproved, canceled, or modified, or which requires approval (other than existing approval), pursuant to section 15 of the Act.

Respondents' current overland/OCP rates and absorptions are found not to give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in violation of section 16 First of the Act; to be unjustly discriminatory between shippers and ports in violation of section 17 of the Act; or to allow any person to obtain transportation of property at less than the regular rates or charges in violation of section 16 Second of the Act.

APPEARANCES (IN DOCKET NO. 65-31, UNLESS OTHERWISE NOTED)

Edward D. Ransom, *Gordon L. Poole*, and *R. Frederic Fisher* for respondents Pacific/Indonesian Conference, Pacific-Straits Conference, Pacific Westbound Conference, Australia, New Zealand, and South Sea Islands Pacific Coast Conference, Philippines-North America Conference, Trans-Pacific Freight Conference (Hong Kong), Trans-Pacific Freight Conference of Japan, Pacific Coast Australasian Tariff Bureau (in Docket No. 66-61 only), American Mail Line, Ltd., American President Lines, Ltd., American Export Isbrandtsen Lines, Inc., Barber-Wilhelmsen Line—Joint Service, The Ben Line Steamers, Ltd., Chinese Maritime Trust, Ltd. (Orient Overseas Line), Fern Line—Joint Service, Fern-Ville Lines, Hamburg-Suedamerikanische Dampsfchifffahrts-Gesellschaft (Columbus Line), Isthmian Lines, Japan Line, Ltd., Kawasaki Kisen Kaisha, Ltd. (K Line), Klaveness Line—Joint Service, Knutsen Line—Joint Service, Maritime Co. of the Philippines, A. P. Moller-Maersk Lines—Joint Service, Nedlloyd & Hoegh Line—Joint Service, Nippon Yusen Kaisha, Ltd., Oceanic Steamship Co., Orient Steam Navigation Co., Ltd., P & O Orient Lines—Joint Service, Pacific Far East Line, Inc., Showa Shipping Co., Ltd., Splosna Plovba (United Yugoslav Lines), States Marine Lines—Joint Service, States Steamship Co., Transatlantic Steamship Co., Ltd., Union Steamship Co. of New Zealand, Ltd., United Philippine Lines, Inc., United States Lines Co. (American Pioneer Line), Waterman Steamship Corp., Wilh. Wilhelmsen Interests—Joint Service, Yamashita-Shinnihon Steamship Co., Inc., and Mitsui O.S.K. Lines, Ltd.

Alan F. Wohlstetter for respondent Taiwan Navigation Co. Ltd.

Ronald A. Capone for respondent United States Lines Co. (other than as conference member).

Richard W. Kurrus for respondent American Export Isbrandtsen Lines, Inc. (other than as conference member).

C. D. Haig, Jr., for intervenor Alabama State Docks Department.

Charles A. Washer for intervenor American Retail Federation.

F. G. Pfrommer for intervenor The Atchison, Topeka, & Santa Fe Railway Co.

Mark P. Schlefer, *Edward E. Wright*, and *Leslie Srager* for the Board of Commissioners of the Port of New Orleans (intervenor in Docket No. 65-31 and complainant in Docket No. 66-61).

Carl S. Parker, Jr., for intervenor Board of Trustees of the Galveston Wharves.

Robert F. Munsell for intervenor Chicago, Milwaukee, St. Paul, & Pacific Railroad Co.

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

Arthur W. Nordstrom for intervenor City of Los Angeles.

N. Marshall Meyers for intervenor The Flying Tiger Line, Inc.

Thomas D. Wilcox for intervenor Great Lakes Terminal Association.

Curtis H. Berg for intervenor Great Northern Railway Co.

W. E. Fincher for intervenor Houston Port Bureau, Inc.

Edwin F. Avery for intervenor International Association of Great Lakes Ports.

Alex C. Cocke for intervenor New Orleans Board of Trade, Ltd. (in Docket Nos. 65–31 and 66–61).

Louis A. Schwartz for intervenor New Orleans Traffic and Transportation Bureau (in Docket Nos. 65–31 and 66–61).

Louis A. Harris for intervenor Northern Pacific Railway Co.

William W. Schwarzer, *Mark O. Kasanin*, and *William H. Armstrong* for intervenor Pacific Coast Association of Port Authorities (in Docket Nos. 65–31 and 66–61).

James M. Henderson, *Douglas W. Binns*, *Sidney Goldstein*, *F. A. Mulhern*, *Arthur L. Winn, Jr.*, *S. H. Moerman*, and *J. Raymond Clark* for intervenor Port of New York Authority (in Docket Nos. 65–31 and 66–61) and North Atlantic Ports Association.

Joseph P. Adams for intervenor the Port of Seattle.

Aaron W. Reese for intervenor San Diego Unified Port District.

Charles C. Miller and *James M. Cooper* for intervenor San Francisco Chamber of Commerce.

Miriam E. Wolff for intervenor San Francisco Port Authority.

Hollis Farwell for intervenor Seattle Traffic Association and Seattle Chamber of Commerce.

Robert W. Smith for intervenor Seaway Port Authority of Duluth.

Marion S. Moore, Jr., for intervenor South Atlantic Ports Association.

A. T. Suter for intervenor Southern Pacific Co.

R. B. Batchelder for intervenor Union Pacific Railroad Co.

Charles R. Seal, *Arthur W. Jacocks*, and *Blair P. Wakefield* for intervenor Virginia State Ports Authority (in Docket Nos. 65–31 and 66–61).

Julian H. Singman for intervenor Washington Public Ports Association.

W. G. Treanor for intervenor The Western Pacific Railroad Co.

Donald J. Brunner, *Samuel B. Nemirow*, *Arthur A. Park, Jr.*, and *Thomas Christensen*, Hearing Counsel (in Docket Nos. 65–31 and 66–61).

REPORT

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

INTRODUCTION

The Commission instituted, upon the informal protests of several interested groups, the investigation in Docket No. 65–31 on August 13, 1965, to determine whether overland/OCP rates and absorptions and agreements were compatible with the Shipping Act, 1916. On October 7, 1966, the Board of Commissioners of the Port of New Orleans filed with the Commission a complaint (Docket No. 66–61) against the Pacific Coast Australasian Tariff Bureau (PCATB) which alleged that the PCATB overland rates and absorptions were contrary to the Shipping Act. The proceedings were consolidated for hearing and decision. After extensive hearings and voluminous briefs, Examiner Walter T. Southworth issued an initial decision on August 22, 1968. Exceptions were filed on October 21, 1968, by Atlantic, Gulf, and Great Lakes Ports, and replies to executions were filed on December 5, 1968. Oral argument was held on January 7, 1969.

Conferences of ocean carriers in the trades between the Pacific Coast and the Far East, Australia, and New Zealand have for many years maintained separate tariffs, called overland or OCP (overland common point) tariffs, applicable under certain conditions to cargo which originates in or is destined for a point in overland or OCP territory—which territory may be described, roughly as that part of the United States east of the Rocky Mountains. All other cargo, including all cargo originating in or finally destined for local territory (points west of the Rockies), is carried under local tariffs. Rates applicable to overland or OCP cargo are usually lower than corresponding local rates; and in addition certain Pacific Coast terminal charges which are assessed against local cargo are assumed by the ocean carrier and the inland carrier; and, in certain circumstances; by the inland carrier alone, pursuit to agreement between the ocean and inland carriers.

Overland/OCP tariffs are designed to meet the competition of ocean carriers operating out of Gulf and Atlantic Coast ports to and from the same foreign ports with respect to cargo originating in or destined for the Central or Midwest United States. For such cargo, the effect of overland/OCP tariffs is to make the aggregate freight charge for inland rail plus ocean transportation via the Pacific Coast gateway competitive with such aggregate charge via the Atlantic or the Gulf gateway. No attempt is made to meet the aggregate freight charge via Great Lakes ports.

Generally, overland rates are outbound ocean rates, while OCP rates are inbound ocean rates, although there is no substantial difference in their nature or purpose and the distinction in terminology is not always observed. "Overland/OCP" will be used herein to refer to either or both.

During 1965, several ports and associations of ports on the Atlantic and Gulf Coasts protested to the Commission, alleging that overland/OCP rates and absorptions result from unfiled and unapproved agreements, are per se unlawfully discriminatory, and unfairly prejudice Atlantic and Gulf Coast ports and certain shippers. The Commission thereafter initiated Docket No. 65–31 to determine whether overland/OCP rates and absorptions and related agreements are unlawful under the Shipping Act. The Commission ordered that the investigation determine—

> Whether any agreements between the carriers or conferences of carriers named as respondents regarding overland or OCP rates and absorptions have not been filed and approved by the Commission as required by section 15; whether there exist any agreements between respondents to execute agreements with inland carriers, freight forwarders, or shipper associations concerning overland or OCP rates and absorptions which have not been filed and approved by the Commission as required by section 15; and whether every agreement respecting overland and OCP rates and absorptions, whether or not previously approved, should for the future be approved, disapproved, canceled, or modified pursuant to the standards of section 15.
>
> Whether all provisions for the granting of overland or OCP rates and absorptions have been filed with the Commission and set forth in public tariffs as required by section 18(b)(1) of the Act and adhered to as required by section 18(b)(3) of the Act.
>
> Whether the collection of any overland or OCP rates or the absorption of any terminal charge gives any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic, or subjects any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in violation of section 16 First; whether the collection of such charges is unjustly discriminatory between shippers and ports in violation of section 17; or whether the collection of such charges allows any person to obtain transportation of

property at less than the regular rates or charges then established by an unjust or unfair device or means in violation of section 16 Second.

The order of investigation named as respondents eight conferences and 46 carriers. Most of the respondent carriers are or were members of one or more of the respondent conferences.

In November 1966, several months after hearings had commenced, the Board of Commissioners of the Port of New Orleans initiated a complaint proceeding (Docket No. 66–61) against PCATB alleging that the conference had established overland/OCP rates to ports in Australia and New Zealand, which diverted substantial but unknown amounts of cargo from complainant to Pacific Coast ports. The overland/OCP tariff was alleged to be unlawful as a rate-fixing agreement, a system of special rates, a port equalization agreement, and a system to regulate other than intraconference competition, not approved by the Commission under section 15 of the Act. Complainant sought an order striking the overland tariff and directing respondents to cease and desist from implementing agreements providing for overland rates and absorptions.

THE FACTS

The Pacific Coast began to compete with the Atlantic and Gulf seaboards, for traffic moving between the central United States and the Far East, immediately after the completion in 1869 of the first transcontinental railroad. Such competition, made commercially practicable by competitive rail and ocean rates applied to that traffic, has existed almost continuously ever since.

In 1868 the first regular steamer service between the Pacific Coast and the Far East had been established, with the aid of a mail contract, by Pacific Mail Steamship Co., which also operated from San Francisco to Panama and thence (with a connection via the Panama railroad which had been completed in 1855) from the Atlantic side of the isthmus to New York. Until the first transcontinental railroad was built, only local cargo—cargo originating at or destined for the Pacific Coast and adjacent areas—was loaded or discharged at the Pacific Coast. Although as a matter of geography the ports of the Far East were thousands of miles closer to the central United States via the Pacific Coast than via any other route, the lack of an adequate overland link prior to 1870 caused all but local Pacific Coast traffic to move through Atlantic and Gulf ports via the Suez Canal, the Cape of Good Hope, or the Isthmus of Panama. The transcontinental railroads made possible a new competitive route which they proceeded promptly to develop, since the relatively sparse population and economic development on the Pacific Coast was not sufficient to generate the traffic needed to justify the cost of building the railroads and provide for their successful operation. The situation of trans-Pacific Ocean carriers was quite similar. Economic necessity required a cooperative effort between the two modes of transportation.

The first railroads worked initially with the Pacific Mail Line; other trans-Pacific lines followed, largely under railroad ownership or control, as the number of transcontinental railroads increased. In order to obtain any part of the traffic then moving via the Suez Canal, the Cape of Good Hope, and the Isthmus of Panama, it was necessary to offer through rates which were much less than the sum of the then-existing local ocean rates to the Pacific Coast and domestic rail rates to Chicago and New York. By agreement with the railroads, the steamship companies quoted through rates from oriental ports via the Pacific seaboard to central and eastern destinations in the United States at whatever figure they found necessary to obtain business in competition with the other routes; similarly, through westbound rates were negotiated with shippers by the railroads. The railroads and steamship lines divided whatever through rate was obtained according to an agreed percentage. The steamship lines' share varied from 25 to 50 percent of the through rate, sometimes subject to a per-pound minimum to the railroad. The proportion of the through rate received by the ocean carrier was less than the port-to-port, or local, rate, and the proportion received by the railroad was less than its domestic rate for transportation between the same points. The combined or through rate from oriental ports to Chicago and New York was sometimes lower than the local steamship rates currently in effect to San Francisco.

In connection with through rates, a through bill of lading was used which offered several advantages to the shipper and consignee, including the absorption by the carriers of terminal charges at the point of transfer between ocean carrier and inland carrier.

The Interstate Commerce Act became law, and the Interstate Commerce Commission was created, in 1887. Soon thereafter, upon the complaint of organizations dedicated to promulgating the trade of certain port cities, the ICC had occasion to consider the practice of the railroads (which was not confined to the transcontinental roads) of accepting, for transportation of imported articles between a port city and an inland point, a proportion of a through rail-ocean rate which was less than the domestic rate of transportation between the same points. The ICC thought it was not permitted to consider the "circumstances and conditions" of foreign traffic in determining whether, under the Commerce Act, it was an act of unjust discrimination to take such a pro rata share of a through rate; and that it was required to consider foreign and domestic traffic, in the movement thereof between any two points in the United States, as like kinds of traffic both of which must be carried under the inland tariff. The Supreme Court held to the contrary in the *Import Rate* case, *Texas & Pacific Ry.* v. *Interstate Commerce Commission*, 162 U.S. 197 (1896), and advised the Commission (p. 233) that it was "empowered to fully consider all the circumstances and conditions that reasonably apply to the situation," including competition that affects rates in the case of traffic originating in foreign ports as well as the competition that affects rates in the case of domestic traffic. In order to meet competition affecting export-import traffic, therefore, a carrier subject to ICC jurisdiction might lawfully make export and import rates (which are in essence divisions of through rates), between a port and an interior point, less than its domestic rates between the same points.

Following the decision in the *Import Rate* case, it remained the general practice to quote through charges for export and import shipments by agreement with shippers as might be required to meet the competition of carriers serving Atlantic ports and transporting Asiatic traffic via the Suez Canal route. In 1906, however, the Hepburn Act amended the Commerce Act so as to compel adherence to filed and published rates, which could be changed only upon due notice. The railroads thereupon filed through rail-ocean rates; but the ICC ruled that international through tariffs to and from nonadjacent foreign countries were unlawful where all parties thereto were not subject to its jurisdiction and that the rail carriers must publish and adhere to proportional rail rate factors to and from the ports. Under the circumstances, with ocean rates frequently changing without regulatory restriction, the railroads deemed it necessary or expedient to cancel their overland/trans-Pacific tariffs in 1908, and for a time exports to Asia and Australia were charged the regular domestic rail rates to San Francisco and the current ocean rates across the Pacific.

According to testimony before the Alexander Committee early in 1913, this made a prohibitive aggregate rate as against the all-water route via Suez; Pacific Mail Line said its business out of San Francisco was "chopped right off." In an effort to regain some of the overland traffic, Pacific Mail worked through a New York freight forwarder who was authorized to solicit oriental business on the basis of an ocean rate proportion as low as $2 per ton. Although this rate was unremunerative, the ocean carrier believed that the railroads would eventually publish proportional rates, and that if it was out of the overland business entirely, it would lose all contact with shippers and consignees "and it would be very hard to get in contact with them again if the railroads did open that gateway." Toyo Kisen Kaishen joined Pacific Mail in this plan, under an agreement whereby overland freight, upon arrival in San Francisco, would go to any steamer of the two companies which might be on the berth.

As Pacific Mail anticipated, the American railroads did begin to publish proportional import-export rates; this apparently became general during 1913, having been started some years earlier by Canadian Pacific in conjunction with its own steamship line operating out of Vancouver. The railroads' tariffs showed, in addition to the import-export rail rates, through rail-ocean rates, for information only; in 1916 (apparently because of wide swings in ocean rates produced by World War I) the ocean rates were dropped, and thereafter only the rail rates were shown.

Meanwhile at least two inbound conferences, the Trans-Pacific Tariff Bureau (Hong Kong and China Branch) and the Trans-Pacific Tariff Bureau (Japan branch), predecessors of the Inbound Hong Kong Conference and the Inbound Japan Conference, were publishing OCP rates applicable only to shipments destined for overland points. The Japan Branch also issued a local, port-to-port tariff; the Hong Kong and China Branch had no jurisdiction over local rates, which were left to the individual carriers to determine for themselves. The two inbound OCP tariffs were published at least as early as 1912.

World War I broke out in August 1914. Although the North Pacific was not a combat zone, the trans-Pacific fleets were quickly reduced by the withdrawal of British and American vessels. The Suez Canal was closed. The Panama Canal was opened in 1915, but its effect was not fully felt until after the war, when it provided a new all-water route between Atlantic and Gulf ports and Pacific ports highly competitive with the Suez route and the overland-Pacific Coast route. It was also during the period of the 1914–1918 World War that the Shipping Act, as well as the Commission's earliest predecessor, came into being.

The Shipping Act, 1916, became effective September 7, 1916. The U.S. Shipping Board, created to administer the Act, was organized early in 1917, and in May 1917 it set up a Division of Regulation to enforce the regulatory provisions of the Act. By that time the United States had entered World War I by declaration of war against Germany; the Board's efforts were thereafter concentrated upon the building and operation of vessels, and for the time being its regulatory activities were submerged. The Division nevertheless proceeded to determine the status of carriers under the regulatory sections of the Act, and directed carriers in domestic and foreign commerce and other persons subject to the Act to file the agreements mentioned in section 15. It was 1919, apparently, before the Board was able to take stock of the regulatory situation. In its Fourth Annual Report, issued December 1, 1920, the Board noted that the "carriers' contracts which were filed prior to and during the war and which lay practically dormant in the files until the beginning of last year have all been brought up to date."

In its Fifth Annual Report, issued December 1, 1921, the Board described the greater attention given by the Division of Regulation during the year ended June 30, 1921, to agreements between water carriers required to be filed under section 15.

In or about 1923, a Standing Committee on Conference Agreements was created and under date of June 16, 1923, counsel in charge of the Division of Regulation transmitted to the Chairman of the Standing Committee a list, with a brief outline, of "such agreements as have been filed in this office under section 15 of the Shipping Act," brought up to date for presentation to the Committee. Under date of June 26, 1923, the Standing Committee indicated its approval of all the agreements, in accordance with counsel's recommendation, by endorsing the memorandum of transmittal. The list of agreements so approved included the agreement of the Inbound Hong Kong Conference (Agreement No. 14) which had been transmitted to the Board for approval under date of August 20, 1917. Also listed and approved were the agreements of the Outbound Australia Conference (Agreement No. 50) which had been transmitted to the Board August 23, 1921; the Inbound Japan Conference (Agreement No. 55) transmitted to the Board December 23, 1921; and PWC (Agreement No. 57) which had been signed January 8, 1923. This approval by the Standing Committee appears to have been an internal matter only, merely bringing up to date the approval already indicated by the Board's "acceptance for filing" without comment, after examination, when the conference papers were submitted.

What ever its earlier knowledge concerning overland/OCP rates, the U.S. Shipping Board was by this time fully familiar with them through the activities of its own Division of Operations in connection with the restoration of conference ratemaking following World War I.

On March 1, 1920, in connection with new arrangements for the operation of Shipping Board vessels, the U.S. Shipping Board ceased to issue tariffs of rates directly through its rate division, and caused rates to be made by conferences of Shipping Board managing agents, organized under the supervision of its Division of Operations. The rules of the conferences required them to submit their recommendations to the Board for approval before making any drastic rate changes. Any questions not unanimously agreed upon were likewise to be submitted to the Board. In its Fourth Annual Report, the Board reported that a relationship in rates and practices among the different districts (i.e., North and South Atlantic, Gulf and Pacific) had been brought about by suggestions or instructions from the rates division. The Trans-Pacific Outward Conference of U.S. Shipping Board Operators and the U.S. Shipping Board Transportation Conference, Homeward Division, were the outbound and inbound trans-Pacific conferences organized pursuant to this arrangement.

At an early meeting of the outbound group a rule was adopted defining overland cargo as applying "only on traffic enjoying railroad line haul received direct from rail carriers, originating at points named in Transcontinental Bureau Export Tariff No. 29–F, supplements thereto or reissues thereof; the idea of the foregoing was to designate from what territory freight must originate to be entitled to the overland rates, also to prevent shipments placed in warehouse at port of loading from receiving the benefit of overland rates." Conference action was taken with respect to rates on both overland and local cargo.

In April 1920 the Homeward Division was compiling data "showing comparative rates in effect at the present time to Pacific Coast, Overland Points and Atlantic Coast ports and members were asked to furnish data showing point of origin, destination and rates" on 16 commodities moving from Shanghai. An inbound tariff from Hong Kong shows an "ocean proportion overland" rate on tea.

About this time the transition from conferences of Shipping Board operators to conferences of general membership was in progress. The Yokohama Committee of the Homeward Division recommended recognizing the Trans-Pacific Freight Bureau of Japan and giving it an opportunity to maintain a tariff. The latter's schedule of rates adopted August 30, 1920, produced from Shipping Board files, is in the record; it shows Pacific Coast rates for 65 commodities, with overland rates in a separate column for most of those items. In each case the overland rate is substantially less than the local or Pacific Coast rate for the same commodity.

In 1921 the Pacific Coast Australasian Tariff Bureau (the Outbound Australia Conference, the respondent in Docket No. 66–61) was formed under Shipping Board auspices, with the Conference Secretary of the

U.S. Shipping Board as its secretary. The Conference's jurisdiction (as in the case of several of respondent conferences) expressly included merchandise shipped via Pacific Coast ports from any overland points, and its first tariff set forth rates less than local tariff rates for certain commodities constituting "through traffic, originating overland points, covered by through bill of lading."

In the outbound oriental trade there had existed until 1920 the Pacific Coast-Oriental Tariff Bureau, with sections at Seattle and San Francisco. In 1920, it was reorganized to include the Shipping Board lines and was called the Pacific Westbound Conference. Changes in railroad export-import rates in August 1920, the depression which began late that year, and diversity of interests between the Pacific Northwest and California groups led to disruption of the Conference, largely over the inability of the parties to agree on, and maintain, rates on overland cargo. The California group maintained local rates fairly well and achieved some unity on overland rates; but the northern lines reduced rates on overland traffic and the California lines retaliated by opening their overland rates, which were already so low that the act was "more a feint than a blow."

The Shipping Board exerted pressure on the trans-Pacific lines to rehabilitate the Pacific Westbound Conference. The Board threatened to open rates, and tendered its "good offices" to induce the warring factions to make peace. After weeks of preliminary negotiations, meetings of the California and Northwest sections were held in the fall of 1922, with representatives of the Shipping Board and the Canadian Government Merchant Marine present. Tariffs of local and overland rates were published, the former issued and effective November 6, 1922, and the latter issued November 4, 1922, effective January 1, 1923. A new conference agreement was prepared and distributed, but was not signed until January 8, 1923. This agreement was designated "No. 57" by the Shipping Board; as amended to date, it is still the basic agreement of respondent PWC.

During the meetings which led to promulgation of the new tariffs and agreement, overland rates, as distinguished from local rates, were necessarily among the major topics; and the agreement was described, in a letter set forth in the minutes, as "the proposed agreement governing westbound local and overland oriental rates." Nevertheless, the only reference to overland traffic in the basic agreement itself was in the jurisdictional clause. As in the usual conference agreement, this clause set forth the "commerce" with respect to which rates were to be agreed upon, and added: "it being understood that such commerce shall include all merchandise that may be shipped westbound via the

Pacific Ocean from or via the said Pacific Ports to the said countries or from any overland points in the United States or Canada."

With the reorganization of PWC under Shipping Board auspices in 1922–23, the fact and theory of overland/OCP ratemaking, in substantially present-day form and purpose, was reaffirmed.

Each of the respondent conferences publishes a tariff, duly filed with the Commission, providing for the application of overland/OCP rates and the assumption of terminal charges in connection with overland OCP cargo, under terms and conditions specified in the respective tariffs.

In the case of the outbound conferences the overland/OCP tariff provisions are applicable if:

1. The shipment originates in overland territory, defined as North Dakota, South Dakota, Nebraska, Colorado, New Mexico, and States east thereof; and

2. The shipment moves directly from place of origin on a through rail export bill of lading, subject only to "transit privileges" permitted under the export rail tariff.

In the case of the inbound conferences other than the Inbound Australia Conference[1] the overland/OCP tariff provisions are applicable if:

1. The shipment is released directly (or within a specified period, usually 14 days) to one of the approved carriers named in the conference tariff (the approved carriers include certain motor carriers, airlines, and freight forwarders, as well as Railway Express Agency and any rail carrier); and

2. The ocean carrier is furnished a copy of the inland carrier's bill of lading or waybill showing forwarding to a destination in OCP territory—the definition of which is the same as the definition of overland territory in the tariffs of the outbound conferences. Cargo not promptly forwarded to an OCP destination is charged the local rate, but upon proof of actual forwarding within 12 months it can receive the OCP rate and refund is made accordingly. In such event, however, terminal charges will be refunded only to the extent provided in the rail tariff; i.e., no terminal charges will be assumed by the ocean carrier.

All the tariffs specify that terminal charges at Pacific Coast ports, consisting of wharfage, handling, and carloading or unloading, will,

[1] In the case of the Inbound Australia Conference, OCP territory is defined as points named in the railroads' Trans-Continental Freight Bureau eastbound import tariff; these include all States in the contiguous United States except California, Oregon, and Nevada. This conference's OCP tariff provisions are applicable only upon cargo delivered to rail carriers in continuous movement, destined to points in OCP territory as defined. At present, separate OCP rates are published only for wool of various descriptions.

in the case of cargo received from or delivered to rail carriers, be assumed jointly by the ocean and rail carriers. Where inland transportation is by approved inland carriers other than rail (inbound conferences only), the tariffs provide that all terminal and loading charges will be absorbed by the inland carrier. This absorption is provided for by agreement with the inland carrier as one of the conditions of listing it as an "approved carrier." [2]

When overland/OCP tariffs do not provide specific commodity rates, the general rule is that the overland cargo N.O.S. rate or the local commodity rate, whichever produces the lesser revenue, will be applied. Thus, the overland/OCP rate will always be at least as low as the local commodity rate, and in addition will have the benefit of the absorption of terminal charges. Where, as in the case of PWC, the Conference has a dual rate (exclusive patronage) contract system applicable to local cargo but not to overland/OCP cargo, overland/OCP cargo will take the local cargo contract rate (if it is lower than the overland/OCP N.O.S. rate and there is no overland/OCP commodity rate) even though the shipper has not entered into an exclusive patronage contract with the ocean carrier.

In their rate deliberations, respondent conferences give attention to the usual rate making factors. In connection with overland/OCP rates, however, a particular factor is competition with the Atlantic and Gulf gateways. The objective is to establish a rate via the Pacific Coast such that the aggregate charges for transportation between foreign ports and the Central United States will be competitive with such charges via the Atlantic or Gulf Coast. For that purpose an effort is made to approach parity, in the matter of inland-plus-ocean transportation, to or from the predominant overland/OCP point of origin or destination (so far as such point is determinable) of the particular commodity movement.

In acting upon a shipper's request for the establishment or adjustment of an overland rate, PWC works from its "Application for Rate Adjustment" form or questionnaire, filled out and submitted by the shipper. The form, which is not confined to overland rate applications, elicits information as to value, physical characteristics, and uses of the commodity; estimated annual tonnage; reasons for requested reduction (including specified particulars as to foreign competition, if any); and competitive commodities. Point of origin and ports of destination are requested; if the point of origin is in overland

[2] It may be noted that in the case of motor and air carriers, etc., the services of loading and unloading are covered by the carrier's tariff rates for transportation; and that such carriers do not provide export or import rates lower than their domestic trades, as do the railroads.

territory, "i.e., east of the nine Western States," the shipper is asked to advise whether shipments will move under through export bills of lading. Carload rail rates per 100 pounds, and minimum carload weights, are requested from point of origin to Pacific, Atlantic and Gulf ports; if the commodity also originates at other inland points "competitive with the above named points or origin," rail rates from such points to Pacific, Atlantic, and Gulf ports are requested. Information supplied is checked (or if not supplied is obtained) to the extent possible from various sources.

The rate necessary to achieve parity with the Atlantic or Gulf gateway is obtained by subtracting the rail charges covering a representative shipment via the Pacific Coast from the sum of the rail and ocean charges for the same shipment via the most likely competitive route. The figures are presented to the conference rate committee together with the shipper's rate application and a staff recommendation. The rate or adjustment finally adopted, if any, is determined by vote of the Conference after consideration of the information developed; it may or may not be that recommended by the staff or rate committee. The rate adopted is ordinarily higher than a rate which would equalize ocean-rail charges, or produce "parity".

In making comparisons with charges via the Atlantic and Gulf, terminal charges are not considered, since competitive rates used for comparisons via the Atlantic and Gulf are invariably on a ship-side basis under which, as in the case of overland/OCP cargo, terminal charges are not made as such against the cargo. Competitive rail-plus-ocean rates may therefore be compared directly with rail-plus-overland/OCP rates.

There is no necessary relation between Pacific Coast local rates and overland/OCP rates for the same commodities; no formula or differential of general application exists or could be established since local and overland/OCP rates are developed independently, using the factor of competitive gateways only in the case of overland/OCP rates because that is the only case in which it is of any importance.

Respondent conferences are "approved conferences" authorized to fix and regulate transportation rates in their respective trades by reason of Commission approval, pursuant to section 15, of their agreements to fix and adhere to such rates. Section 15 authority for ordinary collective ratemaking procedures by the members of respondent conferences is found in their basic organic agreements.

None of respondents' basic conference agreements provides expressly for the promulgation of different rates or tariffs for local and overland traffic. There are express references to overland traffic in some of respondents' current or superseded agreements, but they seem to have evolved from a desire to make it perfectly clear that the participants were undertaking to be bound by conference ratemaking in the matter of both local and overland cargo—not because it was thought necessary to spell this out as a matter of ratemaking authority, but rather because in the past certain conferences had made only overland rates, or had special difficulty in maintaining overland rates because of internal conflict of interests.

The earliest approved agreement of a respondent conference still bearing the original FMC number is that of the Inbound Hong Kong Conference, Agreement No. 14, whose agreement was entered into August 24, 1916, a month before the Shipping Act, 1916, became law and many months before the Shipping Board was organized and operating. This agreement, which was submitted to the Board for approval August 20, 1917, is most explicit in defining through rates to overland points and local rates to Pacific Coast points, and in making it clear that the agreement applies to both; but this obviously had nothing to do with any desire or need to obtain authority for such ratemaking under the Shipping Act, which was not in existence when the agreement was drawn. Prior to the making of this agreement, however, this conference had been concerned only with the portion of the members' traffic which was competitive with the Suez route; as the Alexander Committee was told, its members were "working together against the other conference crowd to swing the business across the Pacific and through the Pacific Coast gateways into the interior cities of the United States"; it did not publish port-to-port rates. The 1916 agreement evidently represents a change in this respect and goes to considerable lengths to emphasize that it is intended to govern the conveyance of all merchandise from conference origins to the Pacific Coast, including that shipped "to the said Pacific Coast and Hawaiian Islands or via the Pacific Coast to any Overland Points in the United States."

The frequent use of such expressions as "to or via" or "from or via" Pacific Coast ports, in the agreements of trans-Pacific conferences, apparently derived from this early Inbound Hong Kong Conference agreement or a similar agreement. In the 1923 PWC agreement, which came into being while the parties were resolving difficulties particularly centered about overland rates as distinguished from local rates, the jurisdictional reference to commerce "from or via the Pacific Coast ports of North America" was redundantly reinforced by adding in parentheses "it being understood that such commerce shall include all merchandise that may be shipped westbound from or via the said

Pacific ports * * * or from any overland points in the United States or Canada."

Some conferences have continued to use the "to (or from) and via" language, and (as in the case of PWC) to add that the inclusion of cargo from "any overland points in the United States" is "understood"; others do not employ such expressions but rely on their authority with respect to all cargo carried by their vessels between Pacific Coast and foreign ports.

Each of the respondent conferences has entered into a so-called rail-water agreement, in substantially identical form, with the transcontinental railroads, providing for the absorption of port terminal charges on overland/OCP traffic at Pacific Coast ports. The present agreement was entered into effective February 5, 1957, and by its terms continues in effect until terminated. It provides that the steamship lines will pay the total cost of loading, unloading, handling, and wharfage on overland/OCP traffic, and will then bill the rail lines for 50 percent thereof. It supersedes an agreement entered into in 1950 which was intended to accomplish substantially the same result by having the steamship lines bill the railroads at specified rates per ton of traffic handled; the rates were calculated to divide the aggregate expenses on an approximately even basis, instead of the mathematically exact division provided at present. PWC submitted the 1950 agreement to the Commission, and received the following ruling from the Chief, Regulation Office (letter dated November 17, 1950):

> We note that the agreement is between the member lines of the Pacific Westbound Conference on the one hand and the members of the Trans-Continental Freight Bureau on the other hand. The rail carriers are subject to the jurisdiction of the Interstate Commerce Commission and not the Federal Maritime Board and serious confusion could arise were the Federal Maritime Board to accord section 15 approval to such an agreement but only in so far as it constituted an agreement between water carriers subject to its jurisdiction.
>
> The conference members are now operating under their approved conference agreement which permits them to coöperate and promote commerce by regulating rates, tariffs and matters directly relating thereto. It would appear therefore, that the conference, in reaching this agreement for absorption out of their freight rates of a portion of terminal charges at Pacific Coast ports, was acting pursuant to their agreement in which event no further approval by the Federal Maritime Board would be required. * * *

Overland/OCP cargo originates or terminates primarily in the Midwest where Atlantic and Gulf ports have an advantage over Pacific Coast ports in the matter of inland transportation rates. On the other hand, Pacific Coast ports are closer by more than 4,000 miles to major ports in the Far East and by more than 2,000 miles to Australia and New Zealand.

As a general rule, in the case of any overland/OCP rate, the aggregate of the corresponding local ocean rate and the inland rail rate to or from the predominant Midwest point of origin or destination of the particular commodity is greater than the aggregate of the ocean rate via either the Gulf or Atlantic Coast and the inland rail rate to or from such Coast; and that the overland/OCP rate, including the assumption of terminal charges, is less than the local rate.

As between the Pacific Coast ports and Atlantic and Gulf ports, the latter have the natural advantage of lower inland mileage and lower rail rates to the industrial concentrations of Midwest America. The Pacific Coast ports counter this natural advantage with their own not inconsiderable natural advantage of being 2,000 to 4,500 miles closer to the relevant foreign ports, with an overall time saving of 10 to 14 days. To obtain the benefit of this advantage and overcome their disadvantage in the matter of inland rates, they find it necessary, because of the relative economic advantages and disadvantages of land and water transportation, to offer rates for this common-territory traffic lower than they charge for noncompetitive local traffic.

Overland/OCP rates have been in effect for so many years, and the Far East trade of all relevant ports has expanded so greatly during that period, that no adverse effect of such rates upon any port can be detected. One can only speculate that the Atlantic/Gulf ports' increase might have been slightly greater had such rates not existed.

The Far East trade from all relevant ports has expanded greatly during the period of record. At New York, Far East exports have increased threefold from 1958 to 1964 and amounted to 25.5 percent of general cargo exports through the port in 1964. New Orleans, which is second only to New York in the value of its trade, increased its imports with Japan by 39 percent in 1964 over 1963, while Asian exports increased 6 percent.

At the same time, the amounts of carrying of overland/OCP cargoes of the Pacific-based conferences represents a small to medium percentage of total conference tonnage. While in the case of the Inbound Hong Kong Conference, OCP cargoes amount to 43 percent of the revenue tons carried by that conference, overall the amount of overland/OCP cargo is a small percentage of the total volume of cargo moving between the Orient and the United States. The record shows that in the case of PWC, its overland cargoes amount only to 7.95 percent. If all of the overland/OCP cargo were diverted to Atlantic and Gulf ports, it would benefit these ports only in some small unmeasurable degree or amount.

Some 25 representatives of exporters or importers testified; and with the exception of the exporters of bentonite clay, all of them find overland/OCP rates of benefit to their business. Many of them stressed the desirability of the alternative Pacific Coast route, providing greater speed and flexibility in meeting sales and production deadlines at competitive cost. Faster service enables them to carry reduced inventories and save financing cost. The through rail export bill of lading accelerates payment for export goods, where letter of credit terms permit payment against such bills of lading without awaiting the issuance of a separate onboard bill of lading by the ocean carrier. Some importers have built warehousing and national distribution centers on the Pacific Coast to service parts of the country other than those better served by the Atlantic and Gulf ports. The availability of an alternate route at comparable cost is important in the event of strikes and other contingencies. Systems of merchandising, distribution, and marketing have been based upon West Coast movement and depend upon the present rate structure. Various businesses have special situations which would be affected adversely by the elimination of overland/OCP rates; the present rate structure helps meet foreign competition in price and service; some movements would be diverted to other ports, including Canadian ports, possibly from surface-to-air transportation, and some movements would be lost entirely as noncompetitive, if the rates were eliminated.

The overland/OCP and export-import rate structures originally arose out of the need to attract sufficient traffic to support the construction and operation of railroads to relatively undeveloped regions, as well as the operation of trans-Pacific water carriers; today they are important producers of revenue for the rail as well as the water carries. The movement of overland/OCP traffic has continued throughout a period of almost 100 years under export-import rail rates and arrangements for the absorption of terminal charges, of which the ICC has indicated its approval. The movement of traffic through Pacific Coast ports under overland/OCP and export-import rates has become an integral part of the Nation's economy and has been and is a controlling factor in the growth and development of trade with the Far East.

Freight forwarders and consolidators handling shipments between the Pacific Coast and Midwest favored overland/OCP rates, since a large proportion of their business moves under such rates. Their testimony was to the effect that the elimination of overland/OCP rates would adversely affect their business and that of shippers, particularly small shippers; several felt that the rates produce export or import traffic which otherwise would not move at all. A shippers' association operating under an ICC piggyback plan believed OCP rates were necessary to make its operation financially feasible. One freight forwarder, located in New York City but with most of his business moving through South Atlantic and Gulf ports, was opposed to overland/OCP rates. In explanation, he said:

> If an account of mine in the Middle West can ship from the Middle West to a Far East country * * * and can obtain a much lower ocean rate via the Pacific Coast, both rail and ocean, than he would receive if he shipped through the Port of New York, he certainly would choose the West Coast movement.

This seems reasonable, except that the hypothesis is not supported by the record. The witness further testified that a letter of credit payable against a through rail-ocean bill of lading, under which the shipper can get his money within 24 hours after cargo is loaded aboard the vessel, gives a distinct advantage over a port like New York. It was his opinion, however, that the cost of transportation, reflected in the laid-down cost at destination, is most important; a fact as to which there was quite general agreement, notwithstanding the service advantages of the Pacific Coast route.

Two over-the-road trucklines, a shippers' association, and an air cargo carrier particularly favor OCP rates because they reduce an imbalance in the transcontinental movement of domestic cargo, which is predominantly westbound. Without such rates more equipment would move empty eastbound. The traffic imbalance has been a problem with truckers for years; because of it OCP cargo is most important. The air cargo carrier, in the absence of OCP rates under which about 25 percent of its eastbound cargo moves, would likewise stand to lose a substantial volume of back-haul cargo, which would exaggerate its imbalance problem and perhaps result in increased rates on other traffic to give a round-trip break-even factor.

The opposing ports employed a transportation consultant and a consulting economist to present testimony to the effect that overland/OCP rates are not economically justified, because they encourage a traffic movement at a higher aggregate cost to the rail and water carriers than the carrier cost via the competitive Atlantic and Gulf routes. This proposition has nothing to do with charges to the shipper, and is not related to rates.

The method showed greater costs per ton for the longer rail hauls to San Francisco compared to Atlantic and Gulf gateways.

The consultant also undertook to determine an average fully distributed cost per revenue ton of all general cargo regardless of description for Lykes, United States Lines, and APL, for the respective routes between the Far East and the Atlantic, Gulf, and Pacific Coasts.

Notwithstanding the vastly greater distances covered by the Atlantic and Gulf carriers, and the observed fact that average days at sea per voyage were 72.9 for Lykes, 57 for United States Lines, and 37.5 for APL, the transportation consultant found a higher vessel expense per revenue ton of cargo for APL (via San Francisco) than for United States Lines (via New York). His "fully distributed" average cost per revenue ton, which included adjustments for overhead and profit, was $43.82 for APL, $44.83 for Lykes, and $42.79 for United States Lines. These costs were offered as representative of the three routes.

The outbound conferences apply overland/OCP rates only to cargo carried from overland territory under a through rail export bill of lading. The inbound conferences apply such rates to cargo delivered by them to approved inland carriers listed in their tariffs—trucklines, airlines, and freight forwarders in addition to rail carriers—destined for overland/OCP territory.

No shipper, inland carrier, or other witness complained of this aspect of overland/OCP tariffs although applications from inland carriers had been declined by some conferences and eventually granted only by certain inbound conferences.

Discussion

The Examiner, in a well-reasoned decision, found that overland/OCP rates were not unlawful under section 15 of the Shipping Act. The Examiner ruled that overland/OCP rates were the product of "routine" activities within the cover of authority conferred by the conference agreements; therefore, there was no need for separate Commission approval of overland/OCP rates or ratemaking practices. The Examiner also found that overland/OCP rates do not violate the antidiscriminatory provisions of sections 16 and 17 of the Shipping Act.

The Atlantic, Gulf, and Great Lakes ports excepted to the Examiner's initial decision. We will consider these exceptions hereafter.

We consider first the issue by the order of investigation whether any agreements between respondents regarding overland/OCP rates have not been filed and approved under section 15. The opposing ports argue that no agreements authorizing overland/OCP rates have been filed or approved, that such a scheme must be separately approved under section 15, and that accordingly all overland/OCP rates are in violation of section 15.

Respondents' conference agreements are approved conferences authorized to fix and regulate transportation rates pursuant to section 15. Their agreements contain specific section 15 authorization to fix rates collectively. Respondents contend that this ratemaking power is adequate authority for the establishment of an overland/OCP system of rates.

None of the conference agreements expressly provides for the promulgation of different rates for local and overland tariffs. Some of the agreements refer to overland traffic, but these references have evolved from a desire to make it clear that the participants wish to be bound by conference ratemaking for both local and overland/OCP cargo. The references do not specifically state that there may be different rates for cargo originating in or destined to overland territory.

The question before the Commission is, therefore, whether the ordinary ratemaking authority sanctions the establishment of an overland/OCP system of rates which is different than the local system.

Since *Section 15 Inquiry*, 1 U.S.S.B. 121 (1927), the Commission and its predecessors have uniformly held that the issuance of tariffs, including rules and regulations covering their application, is a routine matter authorized by an approved basic conference agreement, not requiring separate approval under section 15. *Empire State H'w'y Transp. Ass'n* v. *American Export Lines*, 5 F.M.B. 565, 585 (1959); aff'd sub nom. *Empire State Highway Transp. Ass'n* v. *Federal Maritime Bd.*, 291 F. 2d 336 (D.C. Cir. 1961). In 1961, section 15 of the Act was amended to reflect this principle, and now specifically excepts "tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof" from the requirement of prior approval where agreed upon by "approved conferences" (such as respondents concedely are) and filed and published in accordance with section 18(b), the tariff filing section of the Act. Respondents' overland/OCP rates and absorptions, and all rules and regulations explanatory thereof, are set forth in duly filed tariffs; although the issue is raised by the order of investigation, there is no evidence, and no claim is made, that any respondent has failed to file, publish, and adhere to such tariffs.

Overland/OCP rates (and "absorptions," which are simply provisions for the inclusion, under tariff rates, of certain transportation services which by custom are not, in the case of local traffic, covered by the tariff rates of Pacific Coast carriers) are purely ocean rates in the trades served by respondents, and respondents' basic, approved agreements permit the setting of ocean rates. It is well established, however, that authority under general rate-setting agreements is limited to the adjustment of rates "as the normal economic forces which govern the establishment of such rates may require." *Continental Nut Co.* v. *Pacific Coast River Plate*, 9 F.M.C. 563, 570 (1966). It remains to be determined, therefore, whether overland/OCP tariffs are set and adjusted pursuant to normal, recognized ratemaking factors so as to be includible in published tariffs as routine matter; or whether, as the opposing ports contend, they constitute a device having some ulterior purpose or effect, such as stifling competition outside the conference or discriminating unduly against persons entitled to the protection of the Act; that is to say, whether they depart from the routine establishment or adjustment of rates.

The record establishes, and the opposing ports concede, that the purpose and effect of overland/OCP rates is to make the Pacific Coast carriers competitive with Atlantic and Gulf ocean carries for traffic originating at (or destined for) points in the central part of the United States; so-called overland traffic. Far from stifling competition, as the opposing ports allege, overland/OCP rates (complemented by railroad export-import rates, as are the Atlantic and Gulf ocean rates) not only enhance route competition for such traffic but, to a substantial though imponderable degree, provide a competition which otherwise would not exist. There is no evidence whatever of any purpose to discriminate against anyone. Whether discrimination nevertheless results, and if so whether it is undue, will be considered in another connection; for the moment we are concerned only with primary economic purpose and effect.

It is a cardinal regulatory principle that a common carrier may compete for traffic. *Agreement—Gulf/Mediterranean Ports Conference*, 8 F.M.C. 703, 709 (1965). Rate differentials between different types of traffic may be based upon competition applicable to one type and not the other. *Alaska Rate Investigation No. 3*, 3 U.S.M.C. 43, 49 (1948). There is manifestly no provision of the Shipping Act which can be construed to forbid a carrier to meet competition or to enlarge the scope of its patronage and its volume of business if it can do so without unfairness to those whom it serves. *Board of Commissioners* v. *New York & Porto Rico S.S. Co.*, 1 U.S.S.B. 154, 156 (1929). Reductions to meet competition are proper if they do not result in unremunerative or unlawful rates or go beyond the limits of competition which rest within the managerial discretion of the carrier. *West-Bound Alcoholic Liquor Carload Rates*, 2 U.S.M.C. 198, 204 (1939).

Competition, therefore, is one of the fundamental factors in ocean ratemaking; and competition is the basic, distinguishing factor in the establishment of overland/OCP rates. There is no contention that the level of overland/OCP rates is so low as to be noncompensatory, detrimental to commerce, or otherwise unfair or unlawful. We, therefore, conclude that the rates were set pursuant to normal competition to approach parity with aggregate rates through competitive gateways.

We are swayed by the fact that the predecessors of the Commission knew of the existence of overland/OCP tariffs at the time the various organic agreements were considered and approved. Not only did these early agencies know of such ratemaking practices, but they knew full well that these conferences had every intention of continuing their long-standing practice of setting rates in this manner. For instance, the earliest approved agreement still bearing the original number is that of the Inbound Hong Kong Conference, Agreement No. 14, whose agreement was entered into in 1916. This agreement was submitted to the Board for approval in 1917 and is most explicit in defining through rates to overland points and local rates to Pacific Coast points, and in making it clear that the agreement applies to both. In fact, prior to this agreement, the conference had only been concerned with overland traffic.

Many other agreements followed this early lead in making it clear that their jurisdiction was to include not only local cargo but overland traffic as well. In the 1923 PWC agreement, the parties made it absolutely clear that transportation of cargo from overland points was to be included. These early conferences also openly established separate tariffs containing different rates for local and overland territory, and the predecessors of the Commission were fully aware of these rates through the filing of tariffs and minutes and otherwise. Today, all of the agreements contain jurisdictional language which is broad enough to encompass all cargo moving to or from overland points as well as local traffic. Today, these conferences file these rates as required by section 18(b). These numerous references and the knowledge of the predecessors of the Commission regarding overland rates emphasize the fact that the Commission and its predecessors have at all times been aware of the distinction between the two different classes of traffic observed by the trans-Pacific conferences, and that the Commission intended to sanction this activity when the agreements were approved.

In 1913, the Alexander Committee was told that an inbound conference from Japan issued separate tariffs of local and overland rates, while another conference, from Honk Kong and China, set only overland rates in an effort to meet East Coast competition, leaving local rates to be determined by the members individually.[3] Likewise, outbound carriers were found to set extremely low rates on overland cargo to meet Suez competition. The Alexander Report does not indicate that the Committee regarded overland rates as other than normal competitive rate-setting procedures.

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[3] H. Doc. No. 805, 63d Cong., second sess. (1914).

After World War I, the U.S. Shipping Board closely supervised the functions of certain steamship conferences. These conferences published separate rates for overland/OCP traffic as a matter of course. And when the present PWC was reorganized under Board surveillance, overland/OCP rates were a matter of concern as an important aspect of the ratemaking function of the conference.

In 1946, the Commission took formal notice of PWC's overland/OCP rates, describing their use to compete for "common-territory traffic." *Agreement No. 7790*, 2 U.S.M.C. 775 (1946). Other Commission decisions concerning overland/OCP rates are *Agreements and Practices Re Brokerage*, 3 U.S.M.C. 170 (1949); *Encinal Terminals* v. *Pacific Westbound Conference*, 5 F.M.B. 316 (1957); and Docket No. 872, *Joint Agreement—Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553 (1965). The validity of OCP rates was not in issue in these proceedings. However, Commission recognition of this type of ratemaking system over more than 40 years emphasizes the fact that, when the organic agreements were approved, approval of such systems was contemplated and emphasizes the routine ratemaking nature of tariffs establishing overland/OCP rates.

We have decided that respondent conferences have general ratemaking authority under approved section 15 agreements which authority extends to the issuance of tariff rates, rules, and regulations provided that such tariffs are agreed upon pursuant to normal, recognized ratemaking factors. The overland/OCP tariffs have been established pursuant to normal, recognized ratemaking factors, and, therefore, they constitute routine ratemaking duly authorized by the respective conference agreements.

However, we feel that there is another remaining problem. While we consider the organic agreements to permit overland/OCP rates, the basic agreements do not conform to the rules of clarity regarding the contents of section 15 agreements. As the heated arguments of this proceeding readily suggest a reading of the basic conference agreements does not show the scope and operation of the overland/OCP system of rates without reference to other documents. An interested party would be required to refer to many other documents to understand the system fully. We have found that the organic agreements permitted the OCP rates as routine ratemaking. Our holding is based largely upon the history and development of the system and the full knowledge of the Commission and its predecessors. The overland/OCP system was old and established at the commencement of governmental regulation of waterborne commerce. Nevertheless, we now wish to require that agreements become more explicit in order to avoid any confusion and to avoid lengthy litigation in the future, as in this case. Thus, we will require the conferences to update their basic agreements to reflect the full structure of its ratemaking and the absorptions practiced pursuant thereto. Accordingly, the conferences shall add language to their section 15 agreements to indicate that the general ratemaking authority includes the power to fix rates to or from interior points at levels different from those applicable otherwise, to absorb certain terminal costs, to enter into arrangements regarding such movements to or from interior points with inland carriers, and to conduct other functions incidental thereto. This will better allow third parties to determine from the conference agreements the existence of different rates from overland/OCP territory and the possibility of the absorption of terminal charges. The Commission wishes to make it clear that the tariff rules and regulations of respondent conferences which relate to overland and OCP rates shall remain in full force and effect and are lawful under the Shipping Act.

We have held that the establishment of overland/OCP rates was explicitly sanctioned by the ratemaking authority of the conferences. Thus, those cases [4] dealing with tacit approval are distinguished. The predecessors of the Commission did not tacitly approve overland/OCP rates; expressly approved ratemaking in its various forms, including overland/OCP rates.

The protesting ports rely upon the Supreme Court decision in *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968), in support of their position that there was no underlying authority for the promulgation of overland/OCP rates. In *Volkswagen*, the Pacific Maritime Association, a collective bargaining association of employers, entered into agreements with labor unions to establish a Modernization and Mechanization Fund to permit containerization and labor improvements. No agreement of any kind was filed with the Commission. The question was whether such agreement was required to be filed with and approved by the Commission. The Supreme Court determined that section 15 should be construed to require the filing of this type of agreement, although not previously considered to be subject to the Act, because the agreement fit literally within the broad language of section 15 and because that section required the scrutiny by the Commission of agreements between ocean carriers.

Unlike the *Volkswagen* case, which dealt with the types of agreements required to be filed, we are here attempting to delineate the

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[4] *River Plate and Brazil Confer.* v. *Pressed Steel Car Co.*, 124 F. Supp. 88 (S.D.N.Y. 1954), aff'd 227 F. 2d 60; *Kempner* v. *Federal Maritime Commission*, 313 F. 2d 586 (D.C. Cir. 1963).

scope of an approved agreement. All agreements in which the parties oblige themselves to set rates collectively must be filed and approved. Here respondents have obtained general ratemaking authority. The conferences have established overland/OCP rates pursuant to this authority. Thus, the conferences have satisfied section 15; they have filed their ratemaking agreements. Furthermore, this implementation of underlying authority is published in conference tariffs. The conferences have never avoided surveillance or regulation under the Shipping Act of this or other ratemaking activity.

We do wish to emphasize that we do not find any violation of section 15, even though we require that henceforth agreements shall clearly express that general ratemaking power includes, as it does implicitly, the setting of rates to interior points at levels different than the rates to local territory.

The opposing ports do not undertake to discuss overland/OCP rates as ratemaking at all. Their entire case rests upon the assumption that overland/OCP rates comprise a "system," completely outside the scope of ratemaking as such, of "prima facie discriminatory special rates which have as their objective the regulation and control of competition." This premise is based principally upon analogy between the overland/OCP "system" and other "systems" which have been found to have the characteristics and objectives so assumed, and therefore to require specific approval separate from ordinary ratemaking approval.[5]

Thus, they identify overland/OCP rates with the exclusive patronage contract/noncontract system which was the subject matter of *Isbrandtsen* v. *United States*, 211 F. 2d 51 (1954), cert. denied 347 U.S. 990, and *Maritime Board* v. *Isbrandtsen Co.*, 345 U.S. 481 (1958). In the first *Isbrandtsen* case, the exclusive patronage contract system was sometimes referred to briefly as a "dual rate system"; the opposing ports say that overland/OCP rates, together with local rates, are also a "dual rate system," and thereupon their argument depends. The "scheme of dual rates" in *Isbrandtsen* was not a matter of ratemaking at all, but the imposition of a fixed spread of 9.5 percent between the established rate charged a shipper who signed an exclusive patronage contract with the conference, and a shipper who did not. The cargo was the same, the transportation service and conditions were

[5] The opposing ports also suggest that further inquiry is made unnecessary by the Commission's reference, in the order of investigation, to overland/OCP rates as "special rates" on cargo destined to or received from inland points. Obviously the Commission did not thereby intend at the outset to put overland/OCP into the completely inappropriate sec. 15 category of "giving or receiving special rates, accommodations, or other special privileges or advantages"; i.e., favored treatment or privilege not available to all others similarly situated.

the same, everything was the same except that there was a substantial fixed differential which a shipper could avoid only by agreeing to make all his shipments by vessels of the conference, with liquidated damages in the form of a 50-percent dead freight charge payable for each breach of the contract. The purpose of this dual rate system was of course to tie shippers to the conference, and thereby to curtail or stifle independent nonconference competition (as the Supreme Court found in the second *Isbrandtsen* case). The Court held that it could hardly be classified as an interstitial sort of adjustment since it introduced an "entirely new scheme of rate combination and discrimination not embodied in the basic conference rate agreement."

Now respondents do, in a sense, have dual—pertain to two—rates for certain commodities, one rate applicable to overland traffic and another applicable to local traffic, both available to any shipper dependent upon the competitive transportation conditions surrounding his shipment—not upon whether or not he agrees not to patronize the conference's competitors. Except for the false nexus provided by the ambiguous use of the word "dual," there is no relation whatever between overland/OCP rates and the exclusive patronage contract/noncontract arrangements frequently referred to, in the well-understood idiom of the industry, as "dual rate systems"; and the many court and Commission decisions and dicta involving the latter are not in point. The juxtaposition of similar words does not demonstrate the identity of unlike concepts.

The same fallacy, but based upon the words "port equalization," is found in the analogy between overland/OCP rates and the *Pacific Coast Port Equalization Rule*, 7 F.M.C. 623 (1963), aff'd sub nom. *Pacific Coast European Conference* v. *United States*, 350 F. 2d 197 (9th Cir. 1965); cert. denied 382 U.S. 958 (1965). In the case of overland/OCP rates, route equalization, or equalization of charges via competitive gateways, is recognized as a ratemaking factor and rates are established in contemplation of that and other factors. Of course, a coast, as far as ocean transportation is concerned, is made up of ports, so route or gateway equalization involves, in a broad sense, port equalization. But the "port equalization" at issue in *Pacific Coast Port Equalization Rule* was again not really a matter of conference ratemaking; it was simply an intraconference rule which would permit any conference member to draw cargo from the conference port nearest to the cargo's point of origin to another conference port in the same range, by in effect reducing the agreed conference rate applicable to both ports by an amount equal to the excess of the cost in inland transportation to the latter port. That kind of port equalization makes it possible for a conference member, in order to suit its own convenience or economy of operation, to make the equivalent of an ad hoc rate reduction (the amount of which goes to the inland carrier, not the shipper) to draw cargo from one port to another on the same ocean route. It is not "conventional or routine ratemaking among carriers"; in fact, it is an exception to the ratemaking process, which gives the individual conference member a discretionary power to divert cargo from a port which is served by the same conference, on the same trade route, at the same rates, as the port to which the cargo is diverted. Under certain circumstances, the Commission has found the device justified, in others not; but under no circumstances does it have more than the most superficial resemblance to overland/OCP rates. Futhermore, in the *Pacific Coast Port Equalization Rule*, the Commission concerned itself with the institution of a new arrangement to restrict competition between ports; overland/OCP rates are neither new nor restrictive of competition.

It is true that overland/OCP rates may affect "third party interests such as ports"; but everything a conference does in the way of rate fixing necessarily affects some third-party interest in a greater or less degree. There must be a line drawing to make the Commission's words meaningful; and the Commission obviously did not intend to distinguish otherwise routine ratemaking so as to require special section 15 approval in any instance where, as a result of the application of recognized economic ratemaking factors, a third party—port, shipper, or competitive carrier—is in any degree affected thereby.

The opposing ports also rely upon *Agreement 7700—Establishment of a Rate Structure*, 10 F.M.C. 61 (1966), aff'd sub nom. *Persian Gulf Outward Freight Conf.* v. *Federal Mar. Com'n*, 375 F. 2d 335 (D.C. Cir. 1967), in support of its argument that overland/OCP rates require separate section 15 approval. In that case, the conference filed a tariff establishing different rates for the same commodities depending on whether they were carried in U.S.-flag or foreign-flag vessels. The purpose was claimed to be to enable the foreign-flag members of the conference to compete successfully with other foreign-flag carriers for the carriage of commercial cargo—apparently leaving American-flag carriers completely out of the running except as to cargo for which they might enjoy a legal preference as American-flag carriers, and providing higher rates for such cargo. This singular method of fixing rates of course bears no resemblance to overland/OCP rates (though the opposing ports suggest that it is essentially the same thing because, they say, both are two-level systems) or to any recognized ratemaking method. That the Commission found it to require separate approval as an entirely new scheme of rate combination and discrimination, is no more pertinent than the similar finding in the case of the exclusive patronage dual-rate system.

The opposing ports also rely upon *Continental Nut Co.* v. *Pacific Coast River Plate*, 9 F.M.C. 563, 570 (1966). In that case the conference imposed a surcharge upon a commodity to finance a shipper's association advertising campaign. The Commission found that this was contrary to the conference's section 15 agreement which permitted ratemaking because the surcharge was established outside the normal economic forces which govern the establishment of such rates.

The requirement that one be able to determine the manner and nature of effectuation of an agreement from merely reading the basic agreement was set forth in Docket 872, *Joint Agreement—Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553, 558, following *Associated-Banning Co.* v. *Matson Nav. Co.*, 5 F.M.B. 336 (1957). The Commission pointed out in Docket 872 that it did not thereby limit the scope of "routine actions" which need not be the subject of section 15 filings. It is evident that the application of the requirement will vary with the nature of the basic agreement in question. In the case of an ordinary conference agreement, the matters shown in its tariffs, including rules and regulations as well as the rates themselves, are the result of the implementation of the agreement; the rules and regulations show how the tariff works, not how the agreement itself operates. In other types of agreement the distinction is not always so easy. In *Associated Banning*, it was found that a complicated series of transactions involving the acquisition of other operators' businesses and facilities was not a normal consequence of an approved agreement evidencing little more than a general intention to enter the stevedoring and terminal business as partners. In Docket 872, the agreement was one between two conferences in different, competitive trades; although they were authorized to meet and agree upon the establishment or change of rates, it was found that such authority did not cover a system of "concurrences" and "initiative items" under which one conference in effect surrendered its right even to initiate consideration of certain rate changes without the prior concurrence of the other. This was hardly within the contemplation of ordinary ratemaking procedure. A West Coast shipper, for example, could not know, from an examination of the agreement between the two conferences or of their tariffs, that his rate application to the Pacific Coast Conference for a local rate adjustment might be futile because under an unfiled agreement relating to the method in which the interconference agreement operated, the East Coast Conference could arbitrarily prohibit consideration of the adjustment, in order to serve its own interests and those of East Coast shippers.

In the case of the ordinary conference agreement the way the agreement operates with respect to rates may be satisfied by setting forth in the agreement such matters as the conference organization and the voting powers and privileges of the members. In the case of PWC, for example, standing committees may be appointed to consider and recommend tariff rates and changes, and the members will be bound by the agreement of two-thirds of the members as to "any tariff, freight rate, change, brokerage, traffic regulation and/or any other matter within the scope of this agreement," except as otherwise provided in the Rules and Regulations which are attached to and made a part of the agreement. That is all there is to the manner in which the agreement works as far as ratemaking is concerned; what comes out of the agreement, in the form of local and overland tariffs and rates, changes, and regulations, is set forth in filed tariffs. The way the agreement works is the same with respect to overland/OCP rates as to local rates.

The opposing ports undertake to list six "elements" which, they say, must be covered in the basic conference agreement to meet requirements of "completeness and specificity." These are:

1. The spreads between local and overland rates, or if no definite spreads are indicated, the method for establishing them and their outer limits.
2. The definition of territory in which the overland/OCP rates apply.
3. The commodities covered by the rates or the principles of selection.
4. Whether absorptions apply and, if so, their limits.
5. The terminal ports through which the rates apply or the principle of their selection.
6. The procedures by which decisions are reached in the shifting relationships engendered by the overland/OCP system.

This list quite ignores the fact that overland/OCP rates are established as such by the application of relevant ratemaking factors, and not by a system or formula imposed upon local rates. The record establishes that there are no "spreads" between local and overland rates other than random differences such as may exist between any two rates as a result of the application of different ratemaking factors. There is no method or reason to establish or limit such differences or spreads. The definition of territory to which the rates apply is properly a tariff matter, in the nature of a regulation explanatory of tariff rates, charges, and classifications; the tariff is the normal place for anyone to look for the application of rates, commodities listed, terminal charges covered (i.e., absorptions), and terminal ports through which rates apply.[6] None of these things requires different treatment, because of the promulgation of overland/OCP rates, from that provided under any conference agreement. Neither do the "procedures by which decisions are reached," which properly relate only to the administrative procedures spelled out in every basic agreement for the regulation of the internal affairs of the conference. "Thus, if a conference agreement permits the setting of ocean freight rates in the trade it serves, these rates may be adjusted from time to time as the normal economic forces which govern the establishment of such rates may require." *Continental Nut Co.* v. *Pacific Coast River Plate*, 9 F.M.C. 563, 570 (1966).

The protesting ports also argue that the procedures used by the agency to approve basic conference agreements prior to 1949 were wholly deficient in according any protection to the interest of third parties, provided no opportunity for protest and a hearing, and required no specific agency findings to safeguard the public interest. Thus, the protesting ports urge that these irregularly conferred agency approvals cannot serve as a valid exemption for overland/OCP rates from the antitrust statutes.

The record shows that the conference argeements were approved pursuant to the then prevailing agency practice. Changing administrative regulations and procedures which have been developed over the years cannot revoke the substantive rights which were conferred at that time in accord with the terms of section 15. Cf. *Section 15 Inquiry*, 1 U.S.S.B. 121, 124 (1927). Consequently, we overrule the argument of the protesting ports that the basic agreements were never properly approved under section 15.

Supplementary Agreements Relating to Overland/OCP Rates

Each of the respondent conferences has entered into a rail-water agreement, in substantially identical form, with the transcontinental railroads, providing for the absorption of port terminal charges on overland/OCP traffic at Pacific Coast ports. The present argeement was entered into effective February 5, 1957, and by its terms continues in effect until terminated. It provides that the steamship lines will pay the total cost of loading, unloading, handling, and wharfage on overland/OCP traffic, and will then bill the rail lines for 50 percent thereof. It supersedes an agreement entered into in 1950 which was

[6] With respect to the selection of terminal ports, no additional section 15 authority is necessary. Conferences customarily, pursuant to their section 15 authority, designate terminal ports.

intended to accomplish substantially the same result by having the steamship lines bill the railroads at specified rates per ton of traffic handled; the rates calculated to divide the aggregate expenses on an approximately even basis, instead of the mathematically exact division provided at present.

Under the contemplated revision the rails would pay for all carloading and unloading and the steamship lines for the other items, experience having shown that this would work out to an approximately even split of the aggregate and save a great deal of paperwork.

In addition to the formal rail-water agreement, the record indicated transactions among representatives of the respondent conferences and of the transcontinental railroads which might conceivably be considered understandings concerning the setting of rail or overland ocean rates; and since the two are interdependent in setting overland/OCP rates, any understanding concerning one might affect the other. There were no binding agreements, and the personnel authorized to confer had no ratemaking authority; yet the purpose was quite clearly to bring about action necessary to achieve an effective aggregate of rail and ocean rates.

Since the agreement affects ocean rates, they may be subject to section 15. The agreement is somewhat analogous to a multiemployer agreement with a labor union concerning wages. "The signatories to a collective bargaining agreement are frequently, by the very act of signing, agreeing with their own competitors on matters such as labor costs, certain nonlabor costs, service to be provided to the public, and (indirectly) price increases." *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 284 (1968) (concurring opinion of Mr. Justice Harlan). So the respondent conferences, in collectively agreeing with the railroads on the allocation of terminal costs absorptions, or reaching an understanding as to the proportion of a through overland charge which it is desirable to have covered by the rail or ocean rate,[7] are, by the act of entering into such agreement or understanding, agreeing with each other as conference members on matters more or less directly related to their own rates and charges.[8]

[7] This is putting it as strongly as possible; essentially the relevant transactions between conferences and railroads involved only the exchange of information. Any direct requests for railroad rate action were made only by individual ocean carriers, in the same way that shippers and individual rail carriers made such requests.

[8] There is no need to consider any agreement among the ocean carriers to enter into a joint agreement with third parties, as an agreement separate from the joint agreement itself, any more than it is appropriate to consider the arrival at an agreement to enter into an agreement among themselves; in either case the ultimate agreement is normally the one requiring sec. 15 consideration. The existence of parties thereto not subject to the Act does not affect Commission jurisdiction of the agreement as one among parties who are subject to the Act.

The respondent conference members are authorized by their approved agreements, however, to agree upon rates. The impact upon ocean rates of the rail-water agreement, and of any other conference understandings with the railroads which may possibly be found from the facts of record, is incidental to approved ratemaking based upon such normal economic factors as cost and competition. It is possible, of course, for a third-party agreement to affect rates in such a way as not to be within the approved ratemaking authority; as, for example, the agreement in *Continental Nut Co.* v. *Pacific Coast River Plate*, 9 F.M.C. 563 (1966), to pay over to a trade association an advertising assessment which was reflected directly in a substantial rate increase. There is no such problem here, where the relation to rates is not extraneous to normal ratemaking, particularly in the historical setting of the relevant trades.

It is concluded that in entering into the rail-water agreement to absorb a portion of the terminal charges at Pacific Coast ports, the members of PWC acted pursuant to their approved conference agreement. The same principle also applies to any joint action of record among conferences and railroads toward the establishment of rail or ocean rates which would produce a competitive ocean-rail combination. The latter activity is analogous to the familiar conference activity of negotiating with a shipper in an effort to determine a rate which will produce traffic.

The opposing ports criticize transactions among the respondent conferences having to do with the general adoption of a uniform definition of overland/OCP territory to take the place of the early method of incorporating, by reference, definitions contained in rail tariffs. It appears that PWC recommended that other conferences adopt changes in the definition in 1927 and again in 1935; although the recommendations were not immediately followed, eventually all the conferences except the Inbound Australia Conference adopted the same definition. However, the changes made by the various conferences tend to show that unanimity of action was the exception rather than the rule. But there was undoubtedly an effort to bring about the unanimity which eventually developed. This activity among noncompeting conferences would come within section 15 if it constituted an agreement or understanding "fixing or regulating transportation rates or fares." While a change in substance of the definition of overland/OCP territory could have some effect upon rates of the respective conferences, it does not appear that any changes discussed among the respondent conferences had any substantial effect in that regard; as rate-fixing understandings they were de minimis,[9] particularly in view of the desirable result of uniformity and clarity which was their evident purpose, and the lack of any competition among the conferences.

The Section 18 Issues

The order of investigation directs an inquiry as to the filing of tariffs setting forth all the provisions for the granting of overland/OCP rates and absorptions, as required by section 18(b)(1) of the Act, and as to adherence to filed tariffs as required by section 18(b)(3) of the Act.

The Examiner found that there is no evidence of any failure to file adequately complete tariffs, or to adhere to filed tariffs, in connection with overland/OCP rates or absorptions. No exceptions were made to this finding and we agree. Neither was evidence adduced nor argument made that any of the rates were so unreasonably high or low as to be detrimental to the commerce of the United States contrary to section 18(b)(5). Therefore, no findings can be made under this provision.

The Sections 16 and 17 Issues

The order of investigation raises questions as to possible violation of sections 16 First, 16 Second, and 17 of the Act.

Section 16 Second can be disposed of summarily. That section forbids a carrier to allow any person to obtain transportation at less than the regular rates or charges then established and enforced on its line by any unjust or unfair means or device, such as false billing, false classification, or false weighing. It is thus concerned with surreptitious methods of obtaining transportation at less cost than one's competitor. *Prince Line* v. *American Paper Exports*, 55 F. 2d 1053, 1055 (2d Cir. 1932); *Ambler* v. *Bloedel Donovan Lumber Mills*, 68 F. 2d 268, 271 (9th Cir. 1933); *Hohenberg Brothers Company* v. *Federal Maritime Com'n*, 316 F. 2d 381, 385 (D.C. Cir. 1963). The Examiner found that overland/OCP rates are regular rates prescribed in published tariffs for the traffic to which they are applied in accordance with the terms thereof. He, therefore, found section 16 Second not to be pertinent. No party excepted to this conclusion.

The opposing ports do claim, however, that overland/OCP rates are unduly prejudicial and preferential in violatoin of section 16 First and discriminatory against ports in violation of section 17, and constitute an agreement unjustly discriminatory as between shippers and ports under section 15 of the Act. The Examiner found such allegations to be unfounded. The opposing ports excepted. For the following reasons, we agree with the Examiner.

[9] See *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 276 (1968).

All of the contentions of the opposing ports rest ultimately upon the fact that respondents' overland/OCP rates are different from, and (by reason of lower specific commodity rates or because of absorptions of terminal charges or both) lower than, local rates applicable to corresponding commodities. Their claim of discrimination against and prejudice to Atlantic and Gulf ports is based upon the theory that respondents, by establishing rates which discriminate in favor of traffic originating in or destined for overland territory as against Pacific Coast local traffic, draw away from Atlantic and Gulf ports traffic inherently and geographically belonging to those ports.

Respondents do not serve the Atlantic and Gulf ports themselves or by a through route established with domestic rail carriers; the most that can be said is that, in conjunction with inland carriers, they serve an inland territory which is also served, likewise in conjunction with inland carriers, by the Atlantic and Gulf ports. Notwithstanding the definition of overland/OCP territory in respondents' tariffs as comprising substantially all of the United States east of the Rockies, the aggregate of respondents' ocean rates and inland transportation costs between the Atlantic/Gulf Coasts and the Pacific does not approach parity with ocean rates to and from the Atlantic and Gulf ports themselves.

In a proper case, rates may be established for the carriage of goods originating in or destined for overland/OCP territory which are less than rates for transportation of identical goods, originating in or destined for local territory, over the same ocean route. That question was settled in principle by the Supreme Court in the *Import Rate* case, *Texas & Pac. Ry.* v. *I.C.C.* 162 U.S. 197 (1896), which has been followed by many other court and agency decisions. As early as 1908, the ICC stated in *Pittsburgh Plate Glass Co.*, v. *Pittsburgs C., C. & St. L. Ry. Co.*, 13 I.C.C., 87, 100:

> There is a long line of decisions of the court to the effect that it is neither required by law nor just that the rates of a carrier on traffic subject to intense competition shall mark the limit or measure of its rates on traffic not subject to such competition.
>
> Transportation from a seaport of the United States * * * to an interior American destination in completion of a through movement of freight from a port of a foreign * * * country, whether upon a joint through rate or upon a separately established, or proportional, inland rate applicable only to imports moving through, is not a "like service" to that of the transportation independent and complete within itself of traffic starting at such domestic port, though bound for the same destination.

The protesting ports say that the Commission distinguished ICC precedents from maritime regulatory treatment of port relationships in *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474, 478 (1941). There the Commissioner denied a motion to dismiss a complaint on the alleged ground that ports are not susceptible to undue preference or prejudice under *Texas & Pacific RR Co.* v. *United States*, 289 U.S. 627, 644 (1933). No one makes any such contention in this proceeding. The 1933 *Texas & Pacific* case, insofar as it held that ports as such were not susceptible to undue preference or prejudice, was in effect reversed by a 1935 amendment to the Commerce Act, which added "ports, port districts, gateways and transit points" to the localities protected by the Commerce Act. "The purpose of this amendment was only to restore to the [Interstate Commerce] Commission a power which it has previously exercised, but which the Supreme Court has held the Commission did not have." *Boston & Main RR* v. *United States*, 202 F. Supp. 830, 836 (1962), aff'd per curiam 373 U.S. 372. *Boston & Maine* recognized that railroad export-import rates have an impact upon ports as such, just as the Commission held with respect to port-to-port rates in *City of Mobile*. The decision in *City of Mobile* does not affect the pertinence of any ICC precedents referred to herein.

Recent Commission decisions have expressly recognized that the principle established in the *Import Rate* case is applicable under our Act. In *Disposition of Container Marine Lines, etc.*, 11 F.M.C. 476 (1968), the Commission said:

> The Interstate Commerce Commission has long held that rates between inland points published in conjunction with water transportation in our export or import trade need not be the same as local rates between the same inland points. The lawfulness of such a difference in rates, the ICC holds, must be determined by considering whether the circumstances and conditions controlling the import and export rates are the same as or different from those surrounding the domestic rates, including the circumstances affecting the movement of foreign commerce before reaching the United States. *Tex. & Pac. Railway* v. *Interstate Com. Com.*, 162 U.S. 197 (1896); *Texas & Pacific Ry. Co.* v. *U.S.*, 289 U.S. 627 (1933). Likewise, the question of whether the ocean portion of a through rate is unjustly discriminatory or unreasonably prejudicial because it differs from a conference port-to-port rate is a question of fact to be determined after a thorough consideration of all the circumstances and conditions, including the circumstances affecting the inland transportation (p. 492).

In *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, 11 F.M.C. 202 (1967), the Commission said:

> * * * All this, however, is not to say that a case of undue prejudice is made out by a mere showing of lower rates between competing shippers. Other factors may work to make a preference or prejudice reasonable or due. For instance, competition from another carrier at the allegedly preferred point of destination or of origin may justify the difference in rates. *Texas & Pac. Railway* v. *I.C.C.*, 162 U.S. 197 (1896); *East Tenn. &c. Ry. Co.* v. *I.C.C.*, 181 U.S. 1 (1901). (p. 210).

The *Import Rate* case recognizes that the fact of competition affecting traffic having a different ultimate destination or origin is as much a fact to be considered as geographical or other advantages incident to the shipper's or receiver's location. Thus, the local shipper located on the Pacific Coast has the advantage of being closer to a Pacific Coast port, and closer to the Far East market, than the shipper located at Chicago; but the latter has the advantage of a competitive route via the Atlantic and Gulf. By establishing lower rates applicable to shippers who have the benefit of Atlantic and Gulf port competition (which, under the existing rail rate structure, is effective as far west as the Rockies), the respondent ocean carriers offering the Pacific Coast route are enabled to obtain traffic for themselves and provide the Chicago shipper with the benefit to which his location on a competitive route entitles him; and "inasmuch as competition undoubtedly tends to diminution of charges," the competition so offered through overland/OCP rates necessarily tends to maintain lower rate levels for all shippers via the Atlantic and Gulf. This rate competition ultimately benefits the Atlantic and Gulf ports, of course, even if it causes them to lose the immediate benefit of additional traffic which the elimination of competitive overland/OCP rates would presumably provide.

The Atlantic/Gulf route competition and consequent lower overland/OCP rates necessarily reduce the geographical advantage of the shipper located in local territory, who has the geographical disadvantage, on the other hand, of not having practical access to the competitive Atlantic/Gulf route; but, again for geographical reasons, he also never loses completely his overall freight-rate advantage over his inland competitor. Notwithstanding Hearing Counsel's efforts to obtain shipper testimony reflecting all viewpoints, not a single shipper witness located on or near the Pacific Coast voiced any objection to overland/OCP rates by reason of their being lower than local rates. The reason appears to be that overall costs of transportation, inland plus ocean, remain lower for such shippers, whose lower inland transportation costs outweigh any differences between local and overland/OCP rates.[10]

[10] The only objections came from two shippers of bentonite clay whose mines and shipping points are located in Wyoming at the eastern extremity of local territory. They have competitors who also mine in Wyoming, but transport the clay to South Dakota for processing and have overland/OCP rates available from that point. The evidence indicates, however, that the complaining witnesses have not in fact been substantially disadvantaged by the ocean rate situation. PWC has given them the same nominal local rate as the overland rate, although the latter remains lower by reason of the absorption of terminal charges. The Outbound Australia Conference actually included this area within overland territory to satisfy these shippers. Nevertheless, they ship to Australia via Atlantic and Gulf ports. Neither has any evidence of prejudice been shown to the PWC range.

In the *Import Rate* case, the ICC was advised that when presented with a charge of unjust discrimination, it is to:

> * * * take into consideration all the facts of the given case, among which are to be considered the welfare and advantage of the common carrier, and of the great body of the citizens of the United States * * * (T)he Commission is not only to consider the wishes and interests of the shippers and merchants of large cities, but to consider also the desire and advantage of the carriers in securing special forms of traffic, and the interest of the public that the carriers should secure that traffic, rather than abandon it, or not attempt to secure it. *Texas & Pac. Ry* v. *I.C.C.*, 162 U.S. 197, 218 (1896).

The Claim that Overland/OCP Traffic Inherently Belongs to Atlantic/Gulf Ports

It is undisputed that overland/OCP cargo originates or terminates primarily in the Midwest where Atlantic and Gulf ports have an advantage over Pacific Coast ports in the matter of inland transportation rates. On the other hand, Pacific Coast ports are closer by more than 4,000 miles to major ports in the Far East and by more than 2,000 miles to Australia and New Zealand.

In the case of any overland/OCP rate, the aggregate of the correspondent local ocean rate and the inland rail rate to or from the predominant Midwest point of origin or destination of the particular commodity is greater than the aggregate of the ocean rate via either the Gulf or Atlantic Coast and the inland rail rate to or from such Coast; and that the overland/OCP rate, including the assumption of terminal charges, is less than the local rate. Otherwise, there would not normally be an overland/OCP rate. Hence, it is argued that there is, in the case of overland/OCP rates, an effective absorption, vis-a-vis the local rates, of some part of the inland transportation differential, notwithstanding that the overland/OCP rate is determined in the light of the competitive aggregate ocean plus inland rate and not by subtracting the inland rate differential from the local rate, as was done, in effect, in all the so-called port differential cases. *Sea-Land Services, Inc.* v. *South Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338, 345 (1966).

The opposing ports contend that by reason of such absorption of the inland differential, or some portion thereof, overland/OCP rates violate section 16 of the Act by "the drawing away of traffic inherently and geographically belonging to" Atlantic and Gulf ports; citing such cases as *City of Mobile* v. *Baltimore Insular Line, Inc.*, 2 U.S.M.C. 474 (1941); *City of Portland* v. *Pacific Westbound Conference*, 4 F.M.B. 664 (1955); *Stockton Port District* v. *Pacific Westbound Con.*, 9 F.M.C. 12 (1965); *Sea-Land Services* v. *S. Atlantic & Caribbean Line, Inc.*, 9 F.M.C. 338 (1966); and *Reduced Rates on Machin-*

ery and Tractors to Puerto Rico, 9 F.M.C. 465 (1966). As stated in the last case, *Reduced Rates to Puerto Rico*, 9 F.M.C., *supra*, at 476, "the right of a port, or carrier serving that port, to cargo from naturally tributary areas is fundamental and must be recognized." The Commission has determined that section 8 of the Merchant Marine Act, 1920, established such a policy, which should be followed wherever possible. In *City of Portland*, *supra*, the Commission's predecessor said:

> * * * That section [8 of the 1920 Act] requires, all other factors being substantially equal, that a given geographical area and its ports should receive the benefits of or be subject to the burdens naturally incident to its proximity or lack of proximity to another geographical area. To the extent, therefore, that the ports of a given geographical area give or can give adequate transportation services, we look with disfavor on equalization rules or practices which divert traffic away from the natural direction of the flow of traffic. 4 F.M.B. 679.

Except for *Reduced Rates to Puerto Rico*, the cases cited above involved the equalization of inland transportation costs to or from ports in the same range, coming within the definition of "port equalization" in *Sea-Land Service:* "* * * the allowance or absorption by the ocean carrier of such amount as will make the shipper's cost of overland transportation identical, or substantially so, from his inland point of origin to any one of two or more ports." 9 F.M.C. at 344. There was no question in any of the cases of meeting a competitive combination of inland rates plus ocean rates via a competitive coast. *Reduced Rates to Puerto Rico* was concerned with differences in ocean rates in domestic commerce between Puerto Rico and ports in the North and South Atlantic; and the Commission recognized that a carrier "should be able to utilize its 'natural advantage' of a closer location to port of discharge to charge lower rates than more distantly situated carriers." 9 F.M.C. at 477.

However, even if overland/OCP rates be considered the equivalent of "port equalization" as defined in *Sea-Land Services*, the rule invoked by the opposing ports contemplates that the point of origin or destination is "naturally tributary" to the port from which the traffic is "diverted" by equalization, and not tributary to the port to which it is so diverted. *Sea-Land Services*, *supra*, at 344; *Stockton Port District*, *supra*, at 22–24; *Beaumont Port Commission* v. *Seatrain Lines, Inc.*, 2 U.S.M.C. 699, 703 (1943). The opposing ports claim virtually all of the United States east of the Rockies—that is to say, the overland territory—as naturally tributary to Atlantic and Gulf ports in terms of rail and truck rate structures; comparative rail cost; normal channels of export-import movement; and geographic proximity. Respondents reply that mileage and inland rates alone do not determine a port's tributary territory, and that other factors include the natural and historical flow of traffic, the value of the service to the shipper, financial and economic ties, the proximity of ports to the port of discharge, and the public interest as a whole (not merely that of the particular ports involved); citing *Stockton Port District*, 9 F.M.C. 12, 21–23 (1965), aff'd 369 F. 2d 380 (9th Cir. 1966), cert. den., 386 U.S. 1031 (1967); *Rates from Jacksonville to Puerto Rico*, 10 F.M.C. 376, 383 (1967); *City of Portland*, 4 F.M.B. 664, 667, aff'd sub nom.; *Pacific Far East Lines* v. *United States*, 246 F. 2d 711 (D.C. Cir. 1957); and *Reduced Rates to Puerto Rico*, 9 F.M.C. 465, 477 (1966).

All the factors mentioned by both sides are properly to be considered in determining whether any particular zone or territory is "naturally tributary" to a port. It is also a matter of common sense. The naturally tributary concept based upon section 8 of the 1920 Act has to do with the territory locally tributary to a particular port; not with the general territory which an entire range of ports, or more than one range or seaboard, may serve competitively. In *Beaumont*, *supra*, at 703, the Commission said: "Our decision in the previous report [*Beaumont Port Commission* v. *Seatrain Lines*, 2 U.S.M.C. 500] condemned practices which permit a carrier to attract to its line traffic which is not naturally tributary to the port it serves, thus depriving other ports of their *local* tributary traffic." [Emphasis added.] While it was recognized in the same case that an area could be tributary to more than one port—in that case the Galveston Bay group of ports—the tributary area was that "centrally, economically, and naturally" served by the group of ports, all of which were in a closely related, limited geographical area, comparable to the San Francisco Bay area in *Stockton Port District*. When the concept is expanded to include the entire central portion of the United States as naturally tributary to all the ports situated on the Atlantic and Gulf Coasts and the Great Lakes, as opposed to the Pacific Coast, it loses all significance; for that territory is generally tributary to all four ranges of ports, and locally tributary to none, except, in part, to the Great Lakes. From the local Chicago area, for instance, Great Lakes ports would have a great advantage over Atlantic and Gulf ports in the cost of inland transportation, but a disadvantage by reason of a longer and slower ocean route and less frequent, seasonal service.

As between the Pacific Coast ports and Atlantic and Gulf ports, the latter have the natural advantage of lower inland mileage and lower rail rates to the industrial concentrations of Midwest America. The Pacific Coast ports counter this natural advantage with their own not inconsiderable natural advantage of being 2,000 to 4,500 miles closer to the relevant foreign ports, with an overall time saving of 10 to 14 days. To obtain the benefit of this advantage and overcome their disadvantage in the matter of inland rates, they find it necessary, because of the relative economic advantages and disadvantages of land and water transportation, to offer rates for this common-territory traffic lower than they charge for noncompetitive local traffic. Cf. *Agreement No. 7790*, 2 U.S.M.C. 775, 777 (1946).

In the *Dual Rate* cases, 8 F.M.C. 16, 35 (1964), the Commission defined a "natural transportation route" as "a traffic path reasonably warranted by economic criteria such as costs, time, available facilities, the nature of the shipment and any other economic criteria appropriate in the circumstances." Under that definition, the central United States is served by four natural transportation routes, respectively via the Atlantic, Pacific, Gulf, and Great Lakes gateways. Each of these offers its own economic attractions, the relative importance of which will vary with the nature of the cargo. Cargo to and from this common territory is diverted from one range to another in response to competitive factors. Cf. *Agreements—U.S. Atlantic & Gulf*, 10 F.M.C. 240, 246, 247 (1966). Ever since the transcontinental railroads were built, the Pacific Coast has offered the shortest route in time and miles between this territory and the Orient. It cannot be inhibited from competing effectively for this cargo on the theory that such traffic inherently "belongs" to the Atlantic, Gulf, and Great Lakes ranges, or of any one of them. To apply the principle of the so-called port equalization cases in these circumstances is to reduce the "tributary territory" concept to the absurd.[11]

Finally, the protesting ports argue that the Examiner erred in refusing to grant subpenas duces tecum to develop proof of the economic justification, if any, for overland/OCP rates. Thus, the protesting ports argue that fairness requires that the Commission delay its decision until proof can be developed on these matters.

The protesting ports sought subpenas duces tecum to develop additional proof of the impact of OCP rates. Upon motion of respondents, the Examiner quashed the subpenas, reciting that the hearing had already been completed and that the information sought to be obtained in no way contradicted or disproved the evidence already submitted

[11] Based upon the cost study which purports to show lower average cost per revenue ton for the Atlantic and Gulf carriers, the protesting ports argue that there is no economic justification for overland/OCP rates and, in fact, that such rates are economically wasteful. The argument is not persuasive. It fails to take into consideration the ultimate destination. For instance, it is 4,500 to 5,000 miles farther to Yokohama and Manila from New Orleans and New York than from San Francisco. The failure to take these distances into consideration renders these data valueless.

in the case. We agree. The information which the protesting ports seek would be directed to the proposition that overland/OCP rates were unlawfully prejudicial or discriminatory in some manner. We have already held that such rates simply comprise lawful competition in the midwestern part of the United States, which area is open for competition between all the various ranges. The Commission has decided that regardless of the magnitude of cargo carried at overland/OCP rates, rates set as they are at present are lawful under the Shipping Act. We, therefore, uphold the decision of the Examiner with respect to the protesting ports.

COMMISSIONER GEORGE H. HEARN, DISSENTING

I disagree with the conclusions of the majority report. In addition, I believe that one very important issue, in fact the heart of the matter, was overlooked in this case from its inception. Consequently, I find the record inadequate as a basis for the sanctioning of a continuation of the overland/OCP system under the conditions set forth in the majority report.

The overland/OCP system is the product of an age when transportation conditions were very dissimilar to those prevailing today. Radical changes have occurred in the 100 years since the completion of the first transcontinental railroad. Recent advances in transportation technology reveal the extent of the evolution in the industry. The basic service prerequisites have come to be economy of time and directness of route. Today the movement of goods is thought of in such terms as "intermodalism," "containerization," and the "land-bridge." The overland/OCP system, although of a different generation than those concepts, is closely related to them, and it might be considered the granddaddy of intermodalism as we know it today.

When the United States became traversable by rail, the promoters of West Coast interests realized the value to developing Pacific Coast ports of a transcontinental cargo movement. They were aware, too, that in order to obtain such cargo, attractive and promotional rates would have to be offered which would in turn sharpen competition with the East and Gulf Coasts. Thus, the development of the overland/OCP system was also the genesis of the intermodalism which underpins many modern transportation services. We must not, therefore, jettison the overland/OCP system because of its age. Although it is old, its justification need not be tradition bound and viewed only in terms of the motivations of yesteryear.

Modern transportation has increased the need to seek the most direct route and offer shippers the shortest transit time. To accomplish this, equalizations and absorptions have become essential transportation ingredients in one form or another. This does not mean, however, that equalizations and absorptions should be employed without need and justification. Equalizations and absorptions should not be used to the detriment of any segment of the shipping industry, or to compel some segments to subsidize others, or to artifically support systems which are self-sustaining on their own merits. In other words, each member of the transportation community should pay its own way, its own fair share.

This reasoning applies to the instant case which involves a national equalization or absorption which was not fully tested in the development of the record. There is insufficient support for the conclusion that the overland/OCP system does not violate section 15. The record is almost devoid of evidence as to whether the overland/OCP rates may be unreasonable or detrimental to the commerce of the United States under section 18(b)(5). I agree with the premise of the majority that competition can be used as a basis for establishing rate differentials; but I contend that differentials, however otherwise acceptable or supportable, may not be set at unreasonable levels. As the majority report states, no evidence was adduced or argument made that any of the overland/OCP rates violate section 18(b)(5), and, therefore, no conclusions can be drawn on that issue. It is my contention that the issue of the rate levels was never considered although it is crucial to the outcome of this case and despite the fact that section 18(b) was included in the Order of Investigation in Docket No. 65–31. Accordingly, I conclude that no final determination can be made as to the entire section 15 issue until the level of the differentials is fully examined.

If the rates are reasonable there is no reason to further doubt the validity of the overland/OCP system. If the rates are unreasonable the question arises whether the overland/OCP system as currently structured can survive economically with rates set at reasonable levels. If the overland/OCP system can continue to operate only on the basis of rates detrimental to our commerce, it must be found violative of section 15.

It is stated that the overland/OCP system is well entrenched in our commerce and highly beneficial to shippers. If that is so, it may be argued that rate differentials now being maintained and apparently inherent in the system may be unreasonable.

One differential is that between the overland/OCP rates and the rates through the Atlantic and Gulf Coasts. The length of the movement via the Pacific Coast is shorter than through the Atlantic and

Gulf Coasts. Nonetheless, the rail and water carriers have offered reduced rates in an effort to give overland/OCP shippers a third competitive route. This action is not in question; and it may be desirable and necessary in view of the new transportation techniques in use and those yet to be devised. The question remains, however, whether the level of the overland/OCP rates is commensurate with the current ability of the OCP carriers to attract cargo. This question gains added importance when one considers recent innovations in transportation which render shorter, more direct and intermodal movements so desirable. Shippers, or users, should pay their fair share of the costs of service benefits they receive.

An unreasonable differential may exist also between the local West Coast rates and the ocean portion of the overland/rates. I do not find on this record that the overland/OCP system involves any inland absorptions which discriminate against local shippers. There exists, nevertheless, the question as to whether that differential results in local shippers subsidizing overland/OCP shippers. That no shipper complaints were received in this regard is not dispositive of the issue. The Federal Maritime Commission, as custodian of the public interest, is empowered, indeed required, to act on its own motion when there is reason to believe that there is a course of conduct being pursued which may violate the Shipping Act.

I do not contend that the overland/OCP rates are so unreasonable as to be detrimental to our commerce or otherwise in violation of the Shipping Act. I say only that this case cannot be brought to a proper conclusion until the questions as to rates are answered. The level of the rates was not examined in this case, and I can make no final determination as to whether the overland/OCP system fully comports with the requirements of section 15.

The majority conclude that the overland/OCP tariffs constitute routine ratemaking pursuant to general ratemaking authority granted when the conference agreements at issue were approved. I consider the overland/OCP system to be subject to section 15 approval, and it must be set forth, in general, in the basic agreements. The majority seem to reach a similar conclusion; but they require only that "the conferences shall add language to their section 15 agreements to indicate that the general ratemaking authority includes" the outlines of the functioning of the overland/OCP system. Thus it appears that the majority will permit the conferences to modify their section 15 agreements without receiving the Federal Maritime Commission approval required under section 15, and will accept whatever "language" the conferences present. Section 15 states that conferences must file "with the

Commission a true copy * * * of every agreement * * * or modification * * * thereof * * *. The term 'agreement' in this section includes understandings, conferences, and other arrangements * * *. Any agreement and any modification * * * of any agreement not approved * * * by the Commission shall be unlawful * * *; before approval * * * it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreemnt [or] modification * * *." It is unclear to me what status the "added language" will have under the procedure required by the majority. The basic structure of the overland/OCP system must either be general ratemaking or section 15 subject matter. It cannot be both.

In my opinion, I would require the conferences to submit the structure of the overland/OCP system in the form of modifications to their agreements. Those modifications would then require section 15 approval; and therein lies my difficulty. I could not pass on the merits of the modifications on the basis of the record so far developed. This is because the record does not include sufficient evidence as to the level of the overland/OCP rates in light of section 18(b)(5), despite the inclusion of the entire section 18(b) in the Order of Investigation dated August 13, 1965.

A conference, regardless of the scope of the section 15 authority granted in the basic agreement, "is not authorized to violate other provisions of the Shipping Act nor the general standards of section 15." *Rates on U.S. Government Cargo*, F.M.C. Docket No. 65–13, 11 F.M.C. 263, 282. If the differentials which are ingredients of the overland/OCP system are so unreasonable as to be detrimental to the commerce of the United States and if the conferences offering overland/OCP service can continue to do so only with rates which are unreasonable, the overland/OCP system must be disapproved under section 15.

The Commission has repeatedly stated that it "may disapprove or modify a conference agreement under section 15, if the rates set by the conference are so unreasonably high or low as to be detrimental to the Commerce of the United States." *Iron and Steel Rates, Export-Import*, 9 F.M.C. 180, 193. See also: *Edmond Weil* v. *Italian Line "Italia"* 1 U.S.S.B.B. 395; *Pacific Coast-River Plate Brazil Rates*, 2 U.S.M.C. 28.

Absent a thorough examination of the overland/OCP rate structure, no final determination can be made in the case before us. The Commission is obligated under its Congressionally delegated authority to consider whether the rate structure offends the provisions of section 15. If, as I have said, the overland/OCP system can operate only by the offering of rates detrimental to our commerce, the conference members could then agree only to provide a transportation service based upon rates which the Commission has found to violate the Shipping Act. This is not permissible. In *Rates on U.S. Government Cargoes, supra*, the Commission found that the conference members were charging rates which they knew to be in violation of section 18(b)(5). The Commission concluded that because the rates were detrimental to our commerce and contrary to the public interest, the conference agreement was operating in violation of section 15. This reasoning applies equally to the case under consideration.

There is insufficient evidence in the record before us to make a determination on this vital issue. Despite the broad scope of the first ordering paragraph of the Order of Investigation in Docket No. 65–31, section 18(b)(5) was not pursued in this case and, therefore, a complete record was not compiled. Consequently, I would remand this case to the Examiner for the taking of evidence which would permit a proper resolution of the crucial section 15 issue. Until such time as the matter is finally resolved I would continue the existing approval of the overland/OCP system as granted under the original approval of the conference agreements at issue.

Although I can make no final determination of the issues in this case, I consider it necessary to comment on certain conclusions of the majority with which I do not agree.

I disagree with the conclusion of the majority that the overland/OCP tariffs constitute routine ratemaking. That the Federal Maritime Commission's predecessors may have viewed it as such is not necessarily binding upon this Commission. I believe that the overland/OCP system must be viewed within the context of the current theory of regulation. Regulatory agencies are not supposed "to regulate the present and the future within the inflexible limits of yesterday." *American Trucking Assoc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397, 416. Whether or not overland/OCP rates were originally established under routine ratemaking authority, they do not now fall within that sphere. Under current regulatory principles embodied in the 1961 amendments to the Shipping Act and espoused in recent court decisions, the overland/OCP system falls within the purview of section 15.

The scope of a conference agreement must include in full the manner and nature in which the agreement will be effectuated. *Joint Agreement-Far East Conf. and Pac. W.B. Conf.*, 8 F.M.C. 553. The agreement must reveal how the agreement operates. This is not accomplished by granting a conference carte blanche authority, as the majority do, to extend its tariff provisions in any direction it may desire subsequent to the granting of general ratemaking authority, or to indiscriminately assert competition as the sole justification for otherwise unsupported differentials. *Matson Navigation Co.* v. *F.M.C. and U.S.A.*, 405 F. 2d 796 (1968), 9th Cir., No. 22, 604, Dec. 18, 1968. So in the instant case a reading of the basic conference agreements will not enlighten the reader as to the manner of effectuating the agreements with regard to overland/OCP rates. The overland/OCP system is not established in the ordinary course of ratemaking as we have come to accept that principle.

In *Volkswagenwerk* v. *FMC*, 390 U.S. 261 (1968), the Supreme Court found an agreement subject to section 15, contrary to the Commission's decision. The Court, in commenting on the scope of section 15, said: "The Commission thus took an extremely narrow view of a statute that uses expansive language." A court of appeals decision sheds more light on the Commission's responsibility in this case. In *Matson Navigation Co.* v. *FMC*, *supra*, the court vacated an order of the Commission approving an agreement of merger. It was contended before the court that the agreement approved was incomplete and did no constitute the entire agreement among the parties. The court said:

> The Commission thus cast its official approval and the mantle of antitrust immunity over whatever arrangements the lines might come up with * * * this is not consistent with the intent of § 15.

In exercising its responsibilities under section 15, the Commission cannot, therefore, leave it to the parties to include within the scope of their agreement whatever they "might come up with" under the guise of routine ratemaking. It is true that the overland/OCP system is nothing new. The system has been operative for about 100 years. This, however, neither excuses the parties thereto from complying with the intent of the Shipping Act, nor the Commission from exercising its full responsibility thereunder. The Commission must know what it is approving, and must insure that approved agreements contain, in "sufficient detail to apprise the public, just what activities will be undertaken." *Agreement 9448—North Atlantic Outbound/European Trade*, 10 F.M.C. 299, 307.

I disagree also with the majority's discussion concerning port equalization and the naturally tributary concept.

The majority report sets forth various distinctions between the overland/OCP system and port equalization. There are minor differences; but, fundamentally, the two methods of ratemaking are founded on the same principle. Both involve absorption. No matter how we may denominate the rate system at issue, it remains, in essence, a system of equalization—in this case "national equalization."

In regard to the naturally tributary concept, the majority correctly rebuts the contention that most of the United States east of the Rocky Mountains is naturally tributary to the East and Gulf Coasts. The argument should, however, be carried further. We are now entering an era in transportation when concepts such as "naturally tributary" may no longer suit the needs of transportation. The Commission should make it clear that these concepts cannot prevail if they prevent substantial benefits from inurring to the shipping public or obstruct innovative action in transportation.

For the aforestated reasons I would remand this case to the Examiner for taking of evidence in accordance with the Commission's Notice of Investigation and Hearing served August 13, 1965.

(SEAL) THOMAS LISI, *Secretary.*

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 403

ITALSIDER ALTI FORNI E ACCIAIERIE RIUNITE ILVA E CORNIGLIANO, S.P.A., GENOA, ITALY

v.

LYKES BROS. STEAMSHIP CO., INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

Decision adopted March 25, 1969

No exceptions having been taken 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 initial decision became the decision of the Commission on March 25, 1969.

It is ordered, That Lykes Bros. Steamship Co. refund to Italsider Alti Forni e Acciaierie Riunite Ilva e Cornigliano the amount of $7,270.93.

It is further ordered, That Lykes Bros. Steamship Co. publish, in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 403, served March 26, 1969, that, effective November 3, 1968, the rate stated herein under PROJECT RATES, STEEL MILLS—ITALY is applicable to Brindisi, Italy, subject to all other applicable rules, regulations, terms, and conditions of the said rate and of this tariff.

It is further ordered, That Lykes Bros. Steamship Co. notify the Commission, on or before April 25, 1969, of the date and manner in which the refund herein ordered was made.

By the Commission.

(SEAL) /S/ THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 403

ITALSIDER ALTI FORNI E ACCIAIERIE RIUNITE ILVA E CORNIGLIANO, S.P.A., GENOA, ITALY

v.

LYKES BROS. STEAMSHIP CO., INC.

Decision adopted March 25, 1969

Respondent is permitted to refund to complainant the sum of $7,270.93 as part of the freight charges assessed and collected for the transportation of steel mill components from Wilmington, N.C., to Brindisi, Italy, in November 1968.

T. S. Buchanan, Jr., for respondent.

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

This is an application filed by Lykes Bros. Steamship Co., Inc. (Lykes), concurred in by Gulf/Mediterranean Ports Conference (the conference), of which Lykes is a member, and by complainant, for permission to refund to complainant the sum of $7,270.93 as part of the charges assessed and collected by Lykes for the transportation of the cargo referred to hereinafter. The application is the first submitted under Public Law 90-298, 90th Congress, 75 Stat. 764, approved April 29, 1968, which provides in part as follows:

> * * * the Federal Maritime Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce or conference of such carriers to refund a portion of freight charges collected from a shipper * * * where it appears that there is an error in a tariff of a clerical or administrative nature * * * and that such refund * * * will not result in discrimination among shippers: *Provided further*, That the common carrier * * * or conference of such carriers has, prior to applying for authority to make refund, filed a new tariff with the Federal Maritime Commission which sets forth the rate on which such refund * * * would be based * * *

[1] This decision became the decision of the Commission March 25, 1969.

Pursuant to bill of lading number 1, dated at New York, N.Y., November 3, 1968, complainant delivered to Lykes, at Wilmington, N.C., a shipment of steel mill components for transportation on Lykes' vessel *Genevieve Lykes* to Brindisi, Italy, consigned to order of shipper. Weighing 271,866 pounds and measuring 19,215 cubic feet, the shipment was delivered at destination on November 14, 1968. Freight charges of $16,891.01 were assessed in accordance with the applicable rate under the description PROJECT RATES, STEEL MILLS—ITALY, contained in 8th revised page 170 of Gulf & South Atlantic/Mediterranean (excluding Spain) tariff No. 10 (FMC No. 5) of the conference, effective August 29, 1968.[2] In addition, arbitrary charges of $7,270.93 were assessed in accordance with the applicable rate and terms contained in original page 168–A, effective January 5, 1967, and 5th revised page 29, effective July 15, 1968, published in the same tariff.[3] Total charges of $24,161.94 were paid by complainant to Lykes on November 12, 1968.

At the time of shipment the base rate was applicable to named Italian base ports and named outposts, all of which were exempt from arbitrary charges. It had been the intention of the conference to exempt from arbitrary charges *all* the base ports and outports to which steel mills were to be shipped, and when the rate was published the conference believed, on information then current, that there would be only three such outports. At the time the shipment was booked by Lykes it was not noted that Brindisi was not one of the exempt outports. Effective November 18, 1968 (15 days after the issuance of the bill of lading), 9th revised page 170 was published to amend the tariff to include Brindisi as an arbitrary-exempt outport.

Clearly the application involves a situation within the purview of Public Law 90–298; namely, "an error in a tariff of a clerical or administrative nature." Good cause appearing, Lykes hereby is permitted to refund to complainant the sum of $7,270.93, as requested, but subject to agreement by Lykes that it will comply with that part of the statute which says:

> *Provided further*, That the carrier or conference agrees that if permission is granted by the Federal Maritime Commission, an appropriate notice will be published in the tariff, or such other steps taken as the Federal Maritime Com-

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[2] A rate of $34.50 per ton, W/M.

[3] Sixth revised p. 29: "TO OTHER PORTS. Unless otherwise specified, rates to other ports on direct or transhipment shall be constructed by adding arbitrary stipulated for the particular outport to the nearest Base Port rate.* * *"

Original p. 168–A: "*RATE BASIS:* EXCEPT ON COTTON & PITCH PINE LUMBER AND/OR TIMBER (AS SHOWN) ARBITRARIES APPLY PER TON WM, AND RATE YIELDING VESSEL THE GREATER REVENUE MUST BE CHARGED." The arbitrary in this instance was $15 per ton.

mission may require, which give notice of the rate on which such refund * * * would be based, and additional refunds * * * shall be made with respect to other shipments in the manner prescribed by the Commission in its order approving the application * * *.[4]

Since the application states that there are "no special docket applications or decided or pending formal proceedings involving the same rate situation," and that there are "no shipments other than that of complainant of the same or similar commodity which moved via respondent or any other member of the Conference during approximately the same period of time at the rate applicable with an arbitrary at the time of the shipment * * *,"[5] no steps need be taken by Lykes other than publication in the tariff of the appropriate notice referred to in that part of the statute just quoted. The refund shall be effectuated within 30 days after publication of the notice in the tariff, and within 5 days thereafter Lykes shall notify the Commission of the date of the refund and the manner in which payment was made.

C. W. ROBINSON,
Presiding Examiner.

WASHINGTON, D.C., *March 3, 1969.*

[4] See also rule 6(b) of the Commission's Rules of Practice and Procedure, to the same general effect (Federal Register of Sept. 25, 1968, p. 14412, 46 CFR 502.92).

[5] These statements are in substantial compliance with the prescribed form of special docket application set forth in rule 6(b).

FEDERAL MARITIME COMMISSION

DOCKET No. 69-9

SOUTH ATLANTIC AND CARIBBEAN LINE, INC.—ORDER TO SHOW CAUSE

Decided April 4, 1969

Attempted embargo of South Atlantic and Caribbean Line, Inc. unlawful because not due to an inability to carry. Order to cease and desist issued.

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

Herbert Burstein for intervenors Transconex, Inc., and United Freightways Corp.

Robert N. Karasch for intervenor Puerto Rican Forwarding Co., Inc.

Richard S. Harsh and *Donald J. Brunner* as Hearing Counsel.

REPORT

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

This proceeding concerns the validity under section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) of an "embargo" imposed by South Atlantic and Caribbean Line, Inc. (SACL).

SACL is a common carrier by water serving, among others, the trade between Miami, Florida, and San Juan, P.R. As required by section 2 of the Intercoastal Act, SACL files its rates, fares, and charges for this service with the Commission. These tariffs provide a so-called freight-all-kinds (FAK) rate. Under this rate SACL spots an empty highway trailer (also known as a container) at a shipper's premises within the limits of greater Miami.[1] After the shipper loads the trailer, SACL picks it up and hauls it to the marine terminal for loading aboard a vessel for carriage to San Juan. SACL's rates for this service are $700 for a 35-foot trailer and $800 for a 40-foot trailer.

[1] The limits are set forth in SACL's tariffs.

Intervenors Transconex, Inc., United Freightways Corp., and Puerto Rican Forwarding Co., Inc., are nonvessel operating common carriers (NVO) by water within the meaning of the decision is docket 815—*Determination of Common Carrier Status*, 6 F.M.B. 245, 287 (1961). As such they hold themselves out to the general public to transport general commodities in Miami-San Juan trade by tariffs filed with the Commission. Under these tariffs, intervenors consolidate less-than-trailerload shipments into full trailerloads and tender them to SACL for transportation at the FAK rates.

On February 19, 1969, the International Longshoremen's Association (ILA), and the employers of longshoremen at the Port of Miami entered into a "Deepsea Longshore Agreement," the provisions of which were made retroactive to October 1, 1968. Clause 19 of this agreement provides in part:

Containerization

(a) Containers owned or leased by employer-members (including containers on wheels) containing LTL loads or consolidated full-container loads which are destined for or come from, any person (including a consolidator who stuffs containers of outbound cargo or a distributor who strips containers of inbound cargo) who is not the beneficial owner of the cargo, and which either comes from or is destined to any point within a 50-mile radius from the center of any ports covered by this agreement shall be stuffed and stripped by ILA labor at longshore rates on a waterfront facility.

Clause 19 also contains a series of rules which like the quoted portion above "are designed to protect and preserve the work jurisdiction of longshoremen and all other ILA crafts at deepsea piers and terminals." Under these rules, any container which meets the criteria of clause 19 may upon its arrival at SACL's terminal facilities be unloaded (stripped), and reloaded (stuffed) by ILA labor. However, if "for any reason" a container is no longer at the waterfront facility where it should have been "stuffed or stripped" by ILA labor, then "the steamship carrier shall pay to the joint welfare fund liquidated damages of $250 per container which should have been stuffed or stripped."

SACL does not itself employ longshore labor at Miami and is not a party to the February 19 agreement. SACL's stevedoring at Miami is performed by Eagle, Inc., an unrelated company who presumably is a party to the agreement. In any event, SACL views clause 19 as a "lawful limitation upon the transportation service which SACL, as a common carrier by water, can perform at the port of Miami."

On March 6, 1969, SACL published its "Embargo Notice" which stated that effective immediately SACL would no longer book or accept for loading aboard or discharge from its ships at Miami any container which: (*a*) Contains LTL loads or consolidated full container loads, and (*b*) comes from or is destined to any point within a 50-mile radius from the center of Miami. As originally published, the notice contained a "proviso" under which SACL would transport such cargo if: (*a*) The ILA agreed to handle the container without unloading and reloading, and (*b*) the shipper would sign a statement agreeing to indemnify SACL in the amount of $250 per container in the event the ILA invoked the liquidated damages provision of clause 19. The proviso was deleted after the Commission's Bureau of Domestic Regulation expressed concern over the validity of the indemnification requirement.[2] As it now stands, SACL's "Embargo Notice" constitutes an absolute refusal to carry "clause 19 cargo." The intervenor's containers are among those "embargoed" by SACL. No NVO containers would be accepted under the present "Embargo Notice."

SACL itself candidly admits that if the ILA does not insist upon its right to unload and reload NVO containers at the SACL terminal, it is physically capable of handling the traffic. Intervenors just as readily admit that if the ILA does insist upon unloading and reloading their containers, SACL's facilities would not be adequate. In other words, congestion is not a problem unless the ILA insists upon unloading and reloading the NVO trailers. As yet the ILA has not invoked clause 19 and SACL has carried some NVO containers since the longshore agreement became effective.

Discussion and Conclusions

The only question presented is whether SACL's "Embargo Notice" imposed a true embargo. If it did, the filing and notice requirements of section 2 of the Intercoastal Act[3] do not apply and the notice is valid.

A common carrier by water subject to the provisions of the Intercoastal Act has a duty and obligation to accept and carry all cargo tendered to it in accordance with the terms and conditions of its published and filed tariffs. *Order That A.H. Bull SS. Co. Show Cause*, 7 F.M.C. 133 (1962). It is equally clear that any alterations in those

[2] The indemnity provision would presumably have constituted a condition of carriage not set forth in SACL's tariffs.

[3] The relevant part of sec. 2 provides:

> No change shall be made in the rates, fares, or charges, or classifications, rules, or regulations, which have been filed and posted as required by this section, except by the publication, filing, and posting as aforesaid of a new schedule or schedules which shall become effective not earlier than 30 days after date of postponing and filing thereof with the Board, and such schedule or schedules shall plainly show the changes proposed to be made in the schedule or schedules then in force and the time when the rates, fares, charges, classifications, rules, or regulations as changed are to become effective: *Provided,* That the Board may, in its discretion and for good cause, allow changes upon less than the period of 30 days herein specified: * * *

terms and conditions must be published and filed to be effective 30 days from the date of filing and publication, or the subject of a special permission granted under section 2 of the Intercoastal Shipping Act. Historically, however, certain occurrences such as the intervention of acts of God or the common enemy, or congestion at a carrier's terminal facilities such that it is physically incapable of handling the traffic, have relieved the carrier from the obligation to carry for all indiscriminately. *Galveston Truck Line, Corp.* v. *Ada Motor Lines, Inc.*, 73 M.C.C. 617 (1957); *Boston Wool Trade Assoc.* v. *Merchants and Miners Transp. Co.*, 1 U.S.S.B. 32 (1921). Financial loss on the carriage does not normally, without more, constitute sufficient justification for the imposition of an embargo. *A.H. Bull*, *supra.*[4] There must be a physical disability to carry.

SACL, by its own admission, is under no existing physical disability to carry the cargo in question and, unless there is some other good and sufficient reason for imposing the "embargo", it is unlawful and a cease and desist order should be issued.

SACL contends that any such cease and desist order would, rather than remove a violation of section 2 of the Intercoastal Act, create a new violation because SACL would then be compelled to perform "a substantial additional terminal service" for which there is no provision in its tariff. This, it is contended, would be in violation of that part of secton 2 which provides that tariffs:

> * * * shall also state separately each terminal or other charge, privilege, or facility, granted or allowed, and any rules, or regulations which in anywise change, affect or determine any part of the aggregate of such aforesaid rates, or the value of the service rendered * * *.

In SACL's view, since its tariffs do not provide for the unloading and reloading of NVO trailers, it would be unlawful for them to perform this service under its existing tariff. Thus, should we order SACL to lift its embargo, we would in effect be directing a violation of section 2. There is in this contention of basic flaw which inheres in virtually every argument made by SACL in support of its "Embargo Notice."

As SACL itself says, it does not want to perform this "additional terminal service." It is not something offered by SACL to the shipping public as an aid to efficient transportation of goods. If it can be characterized as anything from SACL's point of view, it is a penalty for handling NVO trailers. It is the result of a labor dispute and arises

[4] At one point SACL offers an "unrecoverable financial loss" as justification. It attempts to distinguish the *Bull* case on the grounds that in that case there was involved a financial loss incurred in providing an already existing service while here the loss would be incurred in providing a "new service," i.e., unloading and reloading NVO trailers. We find this distinction irrelevant and without merit.

from a collective bargaining agreement to which SACL is not a party. While it may be true that ultimately SACL might have to alter the terms and conditions under which it will hold itself out to transport NVO trailers, it may do so only in the manner prescribed by law—the manner clearly prescribed by section 2 of the Intercoastal Shipping Act. Until this is done, SACL must accept and carry all cargo tendered to it under the terms and conditions of its existing tariffs. We are not here concerned with the ultimate validity of clause 19. Such a determination is beyond our jurisdiction and is within the province of the National Labor Relations Board. But whatever its validity, we cannot permit the mere execution of a collective bargaining agreement to override the clear requirements of a statute we are charged to administer. Statutes controlling the activities of common carriers and the obligations of those carriers are not subordinate to the requirements of labor contracts. *Galveston Truck Line Corp.* v. *Ada Motor Lines, Inc., supra*, at 627.

We are not without sympathy for the position in which SACL finds itself, but it is of course not an excuse for the imposition of an unlawful embargo. Other avenues were open, not the least of which was the application for special permission for a short notice filing to amend SACL's tariffs. Thus, until SACL's tariffs are properly amended, it must accept the NVO trailers under the existing terms and conditions set forth therein.[5] This disposes of yet another argument of SACL's—that the shipper has failed in his duty "to tender the merchandise in good order and condition for shipment," thereby relieving SACL of the obligation to transport it. It is sufficient here to say that SACL's tariff has no provision that it will accept only trailers stuffed or stripped by ILA labor; therefore, any such condition is invalidly imposed.[6]

Finally, and in yet another attempt to distinguish the *Bull* case, supra, SACL argues that our decision in that case rested upon insufficient authority. It is SACL's position that our decision in that case necessarily rested upon the authority to compel a carrier subject to our jurisdiction to continue providing service. Without resort to a full discussion of the flaws involved in SACL's reasoning, we think it suffi-

[5] This conclusion does not, of course, compel SACL to provide service in the "certificate of convenience and necessity" sense. We are merely requiring that SACL fulfill its common carrier obligation in accordance with its own tariffs. Our decision here does not go to any amendments to those tariffs which SACL may file in the future.

[6] The principle that SACL must transport cargo in accordance wth its present tariffs and what we have said concerning SACL's obligations vis-a-vis the demands of the ILA also disposes of the arguments of SACL that to handle the NVO containers would be to grant them an undue advantage over other traffic carried by SACL. Moreover, it is an extremely dubious advantage to unload an already properly loaded trailer and reload it. In fact it is more in the nature of a disadvantage.

cient to point out that in our decision in the *Bull* case we expressly denied resort to that authority—an authority which we admittedly do not have.

If we have not dealt at length with each and every argument proferred by SACL, it is not because we have not considered them. Rather, they are all disposed of by the overriding principle that SACL is bound to perform the service it holds itself out to perform in its published tariff unless and until those tariffs are amended in the manner prescribed by section 2 of the Intercoastal Act.

In summary, SACL by its own admission, is capable of carrying the cargo here at issue as circumstances now stand. Since there is no physical disability to carry the embargo is unlawfully imposed and a cease and desist order will issue. Our decision here does not reach either the validity of the collective bargaining agreement and clause 19 or the question of what actions by SACL would be proper should the ILA insist on invoking clause 19. We think it worth repeating, however, that SACL has open to it the filing of an application for special permission under Rule 14 of Tariff Circular No. 3, and that any such application would of course receive prompt consideration. By this we do not mean to be instructing SACL or any other party in a particular course of action. Parties on both sides of the issue stated at oral argument that they thought this dispute should have been settled by the parties without resort to this Commission. We agree; and we leave it to the parties to devise a mutually agreeable settlement.

The Commission is well aware that many problems have suddenly arisen, and more are likely to emerge, for various shipping interests as a result of the new longshore contract. Although the Commission cannot deal with the new labor contract which is the immediate source of this condition, we can deal with those persons affected by it and within our jurisdiction. In that posture we do not intend to permit disruptions of our waterborne foreign or domestic offshore commerce. Again, we will not impose solutions on the parties herein; but we will be receptive to solutions presented to us which are lawful and consistent with just consideration of all interests and the public weal.

We would have accepted, on application for short notice filing, the indemnification provision as originally utilized by SACL. Now we would accept any appropriate tariff filing on short notice, the result of which would be to make the carrier whole in the event clause 19 is invoked and which would enable the cargo to move.

(SEAL) (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 69-9

SOUTH ATLANTIC AND CARIBBEAN LINE, INC.—ORDER TO SHOW CAUSE

ORDER

The Federal Maritime Commission instituted this proceeding to determine the validity under section 2 of the Intercoastal Shipping Act, 1933 (46 U.S.C. 844) of an "embargo" imposed by South Atlantic and Caribbean Line, Inc., and the Commission having this date made and entered its report stating its findings and conclusions, which report is made a part hereof by reference:

Therefore, it is ordered, That South Atlantic and Caribbean Line, Inc., cease and desist from enforcing its "Embargo Notice" dated March 6, 1969.

By the Commission.

(SEAL) (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET NO. 68-3

LAKE CHARLES HARBOR AND TERMINAL DISTRICT

v.

PORT OF BEAUMONT NAVIGATION DISTRICT OF JEFFERSON COUNTY, TEX.

Decided April 23, 1969

Respondent's wharfage and unloading tariff, which assesses a lower rate on shipments of bagged rice from Arkansas origins than on shipments of the same commodity from other origins, not shown to constitute an undue or unjust preference or prejudice in violation of section 16 First of the Shipping Act, 1916, and not shown to constitute an unreasonable regulation under section 17 of that act.

Apparent prejudicial terminal operator rate disparity not unduly or unjustly prejudicial or unreasonable when only user of the higher rate is shown to benefit thereby and the lower rate is not shown to be less than compensatory.

Apparent prejudicial terminal operator rate disparity not unduly or unjustly prejudicial or unreasonable to competing terminal when there is no showing of related injury to competing terminal.

D. C. Davis for complainant Lake Charles Harbor and Terminal District.

Donald MacLeay and *Peter A. Greene* for respondent Port of Beaumont Navigation District of Jefferson County, Tex.

Alex C. Cocke for New Orleans Board of Trade, Ltd., intervener.

Louis A. Schwartz and *L. F. Daspit* for New Orleans Traffic and Transportation Bureau, intervener.

Cyrus C. Guidry for Board of Commissioners of Port of New Orleans, intervener.

W. E. Fincher for Houston Port Bureau, intervener.

Carl S. Parker, Jr., for Port of Galveston, Tex.

Donald J. Brunner and *G. Edward Borst, 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.*)

This proceeding arises out of a complaint filed January 11, 1968, by Lake Charles Harbor and Terminal District (complainant). The complaint alleges that Port of Beaumont Navigation District of Jefferson County, Tex. (respondent), in violation of sections 16 and 17 of the Shipping Act, 1916, applies lower wharfage and unloading charges on bagged rice originating in Arkansas and Tennessee than it assesses on the same commodity originating at other locations.

New Orleans Board of Trade, Ltd., New Orleans Traffic and Transportation Bureau, Board of Commissioners of the Port of New Orleans, Houston Port Bureau, Inc., Port of Galveston, and Hearing Counsel intervened. Of the interveners, only Hearing Counsel have filed a brief.

Hearings were held before Examiner Gus O. Basham. Because of his subsequent unavailability due to retirement, the proceeding was assigned to Examiner Herbert K. Greer for initial decision. The initial decision was issued on August 15, 1968. Complainant excepted to this decision. Due to illness of counsel, oral argument was postponed to February 26, 1969.

FACTS

Complainant is a political subdivision of the State of Louisiana and owns and operates the Port of Lake Charles, La. Respondent operates the Port of Beaumont, Tex. Complainant and respondent are competitors for the handling of export bagged rice originating from Arkansas locations. Mobile, Ala., and various other Louisiana and Texas ports also compete for the same traffic.

While complainant handles some rice from Arkansas origins, its main source of export rice is from Louisiana origins. Respondent's sources of export rice are the Beaumont Rice Mills, Inc. (Beaumont Mill), located at Beaumont, Tex., and rice from Arkansas origins. Respondent is not competitive with complainant for rice from Louisiana origins because of the higher overland rates, which would be incurred in moving Louisiana rice to Beaumont. Nor is respondent competitive with other Texas ports for the handling of rice from Texas origins, as all Texas millers ship through ports located near their mills.

Rail rates on bagged rice from Arkansas origins have been equalized and are the same to all the above-mentioned ports. Therefore, any difference in costs for bringing bagged rice from Arkansas origins to shipside are reflected in the wharfage and unloading costs at the various ports.

Comparative rail and port costs, Arkansas origins to shipside on multi and single movements of rice per 100 pounds are: Through Mobile, 32.9 cents and 35.4 cents; through Beaumont, 34 cents and 36.5 cents; through Orange, 34.35 cents and 36.85 cents; through New Orleans, 35 cents and 37.5 cents; through Lake Charles, 35 cents and 37.5 cents; and through Houston, Tex. 38.5 cents and 41 cents. Since the rail rates are equalized, these figures reflect the difference in wharfage and unloading charges applicable on bagged rice at the various Gulf ports.

Mobile, Ala., and Orange, Tex., publish wharfage and unloading charges and the railroads serving these ports also publish an unloading charge. A shipper may elect to have the railroad or the port perform unloading services, generally selecting the port because of a lower rate. Complainant and New Orleans, La., publish a wharfage charge, but unloading charges at these ports are contained in a tariff published by the railroads serving them. The railroads perform the unloading services through a contractor and the rate is determined by negotiations between the contractor and the railroads. Complainant does not participate in negotiations for unloading charges at its facility.

As of the date of the complaint, the Texas Port Terminal Tariff [1] set forth separate wharfage and unloading charges applicable to bagged rice. The tariff shows rates on bagged rice at respondent's port of 1¾ cents per 100 lbs. for wharfage and of 10¼ per 100 lbs. for unloading. This amounts to a rate of 12 cents per 100 lbs. for the combined services. Respondent applied this tariff to bagged rice from most origins, but published a tariff which provided for combined wharfage and unloading charges of 8 cents per 100 lbs. on shipments originating at stations in Arkansas, also Memphis, Capleville, or Forsythe, Tenn., and certain Louisiana stations. After the complaint was filed, respondent amended this tariff to delete the references to Louisiana stations, which had been included by mistake. At the time this proceeding was heard, respondent applied a lower wharfage and unloading rate on rice originating in Arkansas and Tennessee than on rice from other origins.

Beaumont Mill, respondent's only Texas source of rice, thereby pays a higher wharfage and unloading charge at respondent's facility than paid by Arkansas or Tennessee shippers. By reason of its location Beaumont Mill pays only a switching charge to reach respondent's facility, whereas Arkansas rice shippers incur a line-haul rate. Although the Beaumont Mill is the only shipper utilizing respondent's port paying higher unloading and wharfage charges, it strongly supports the

[1] This tariff, designated ICC 1041, was filed by the Texas-Louisiana Freight Bureau and shows the wharfage, loading, unloading, switching, and other terminal charges at the Texas ports of Beaumont, Brownsville, Corpus Christi, Freeport, Galveston, Houston, Clinton Docks, Orange, Port Arthur, Port Isabel, and Texas City.

differential. This mill is heavily dependent upon the export rice business and the major portion of its production is sold to export merchandisers who frequently combine the Beaumont Mill production with rice from other origins in order to accumulate the volume necessary to fill orders. The Beaumont Mill production is generally insufficient for that purpose. If Arkansas rice is not shipped through Beaumont, that mill would be limited in its ability to deal with export merchandisers.

In September 1964, respondent published special rates on Arkansas rice totaling 6.85 cents per 100 lbs. for wharfage and unloading. This equalled the rates then applicable at complainant's port. In October 1965, the unloading rate at complainant's port was increased 2 cents per 100 lbs. for a combined rate of 8.85 cents per 100 lbs. This increase coincided with the railroad's decision to eliminate an absorption of 1.25 cents per 100 lbs. at complainant's port. Respondent, a month later, increased its combined rate to the level of complainant's. From November 1965 to July 1967 complainant and respondent both applied rates of 8.85 cents per 100 lbs. for wharfage and unloading of Arkansas rice. In July 1967, complainant's rate was increased to 9.85 cents per 100 lbs. In January 1968, complainant and respondent both reduced their rates 0.85 cents per 100 lbs., giving complainant a rate of 9 cents per 100 lbs. and respondent a rate of 8 cents per 100 lbs. at the time of hearing.

Prior to October 15, 1965, complainant handled the major portion of Arkansas export rice, whereas currently between complainant and respondent the greater portion of Arkansas export rice now passes through respondent's facility.

Testimony was produced to show that complainant's facility has recently been too congested to handle Arkansas rice in addition to Louisiana rice. Certain Arkansas rice exporters indicated that they have been confronted with rail car demurrage and lack of pier space at complainant's facility. Additionally, complainant's official magazine contained a statement that during 1967 the Port of Lake Charles put far more tonnage through its transit sheds than the national average but still could not handle all the cargo offered.

Complainant's witness countered with testimony that Lake Charles has the facilities to handle the Arkansas rice; that it will take any rice that is offered; and that, although it is an instrumentality of the State of Louisiana, it has no duty to prefer Louisiana grainers and millers.

Discussion

The question in this proceeding is whether respondent's practice of assessing a lower wharfage and unloading rate on bagged rice originating in Arkansas [2] than it assesses on the same commodity originating at other locations results in any illegal preference, prejudice, or unreasonable practice prohibited by sections 16 or 17 of the act.

The Examiner found nothing objectional about respondent's rate practice. He reasoned that no person is injured by the practice and, accordingly, any preference or prejudice resulting therefrom is neither unjust nor unreasonable. The Examiner found that upon considering the interest of complainant, the interest of respondent, the interest of shippers, the effect of the rates on commerce, and all relevant transportation conditions, respondent's rate disparity is justified.

We agree that no violation is shown in this case. However, further elaboration is appropriate in view of the somewhat unique circumstances of this case.

It is an undisputed fact that respondent assesses a 12 cents per 100 lbs. wharfage and unloading charge on bagged rice originating in Texas, while assessing an 8 cents per 100 lbs. rate for the same service on bagged rice originating in Arkansas. Complainant correctly views this as a prima facie case of preference to Arkansas millers and prejudice to the single Texas miller (Beaumont Mill) who uses respondent's facility. The question to be resolved then is whether this preference and prejudice is undue or unjust within the meaning of the Shipping Act provisions.[3]

Complainant feels an unjust preference or prejudice results because the rate practice in question forces the Beaumont Mill to pay an unreasonable rate or a greater amount than is justly due respondent. Complainant argues that respondent is taking advantage of Beaumont Mill's proximity to the Port of Beaumont which renders its cargo captive to that port. This proximity to respondent's port is said to make it possible for Beaumont Mill to pay a higher wharfage and unloading rate, since it incurs no line-haul charge to ship from that port, and since the alternative of shipping to another port would be even more costly because of the line-haul involved. Complainant believes that Beaumont Mill's proximity to the port is being exploited by respondent for the purpose of gaining additional revenue which would support a lower rate on Arkansas rice to attract that cargo to respondent's port.

Complainant's position is simply that this preference is not justified; that as a matter of law Beaumont Mill should not have to pay more than any other shipper; that Beaumont Mill's representation of satis-

[2] While respondent's lower rate applies to certain Tennessee shipments as well, the evidence in this proceeding was limited to the effect of the rate on Arkansas rice.

[3] This Commission and its predecessors have long recognized that secs. 16 and 17 are not absolute prohibitions of preference or prejudice and that a showing of undue or unjust preference or prejudice must be demonstrated by substantial proof. See *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538 (1936) and *Port of New York Authority* v. *A. B. Svenska*, 4 F.M.B. 202 (1953).

faction with the arrangement has no bearing on the lawfulness of the arrangement; and that it is improper to try to justify the arrangement by comparing the respective combined line-haul and terminal costs incurred by the two localities of shippers.

Normally, as complainant suggests, if a terminal operator charges a different rate to different users for an identical service, an easy case of "undue preference or prejudice" can be developed. It is clear that under such circumstances some form of preference or prejudice results. It would be an uncommon situation in which such a patent preference or prejudice would not be construed to be unjust or unreasonable in violation of the Shipping Act. We think, however, that the circumstances attending this case cause it to be included in that uncommon number of cases.

This case is unusual in that the only shipper (Beaumont Mill) who is ostensibly prejudiced by the contested rate scheme strongly supports the differential and has demonstrated that it in fact derives an indirect benefit from it. Beaumont Mill is heavily dependent upon the export rice business. The major portion of its production is sold to export merchandisers who frequently find it necessary to combine Beaumont Mill's production with rice from other origins in order to accumulate the required volume to fill export orders. Beaumont Mill's production generally is insufficient for that purpose, and it favors the lower rate of Arkansas rice since, without the Arkansas rice Beaumont Mill would be limited in its ability to deal with export merchandisers.

While our decision here is based to some extent on the fact that the only user of the apparently "prejudicial" rate supports and benefits from the rate disparity, this fact alone might not justify the disparity. More is involved here.

Respondent's rate practice would still be considered unjustly preferential and unreasonable if Beaumont Mill's nonprotested payment of the higher rate in fact subsidizes a noncompensatory rate on Arkansas rice. No evidence has been submitted to show that such a result occurs here. However, complainant suggests that it is apparent from the very nature of respondent's rate practice that the Texas shipper is paying a higher rate than necessary and thereby is subsidizing Arkansas shippers. Complainant seems to argue that, on its face, respondent's rate practice is unreasonable, inasmuch as either the Texas rate is unreasonably high or the Arkansas rate is so low as to be noncompensatory and to require subsidization by the Texas rate. As mentioned above, complainant has submitted no evidence on the question of reasonableness or compensatoriness of the respective rate levels. Complainant apparently is willing to rely on its theory that the rate differential indicates on its face that either one or the other rate level is unreasonable.

Our analysis of respondent's rate schedules does not lead to the requested conclusion. Both rate levels might well fall within a range of reasonableness and, absent any evidence to the contrary, complainant's position cannot be upheld.[4]

Since there has been no showing of specific injury to Beaumont Mill and since the specific rate levels are not shown to be unreasonably high or low, and since it is not apparent from the terms of the tariff that the lower rate is being subsidized by the higher, we conclude that respondent's rate practice with respect to bagged rice is not shown to be unduly or unjustly prejudicial or preferential to any user of respondent's unloading and wharfage services.

Complainant has also characterized respondent's rate scheme as unduly prejudicial to the Port of Lake Charles and therefore unreasonable. The alleged injury to Lake Charles is said to result from the fact that respondent's rate differential supports a lower rate at Beaumont on Arkansas rice, causing such shipments to be diverted from complainant's port at Lake Charles to respondent's port at Beaumont.

The Examiner concludes that complainant has not adduced evidence to support a finding that its competitive position has been subjected to undue or unreasonable prejudice or disadvantage. After reviewing the evidence on this point, the Examiner concludes that, although at times complainant may be able to handle some rice from Arkansas origins, its ability to do so is limited and that, although complainant has lost much of its former volume of Arkansas rice, the diversion of that commodity has not been shown to have caused complainant significant loss of overall revenue or profit. These conclusions are based on his findings that complainant's facility is congested during rice movement periods; that complainant, as an instrumentality of the State of Louisiana, must give primary consideration to the needs of Louisiana rice growers and millers; that Arkansas rice growers have encountered difficulties in connection with shipping through complainant's facility; and that complainant's official magazine stated that in 1967 the port put far more tonnage through its transit sheds than the national average, but still could not handle all the traffic offered.

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[4] This case differs from *Investigation of Free Time Practices—Port of San Diego*, 9 F.M C. 525 (1966), where we found an excessive free time practice to constitute an offer of storage at a *free* or *noncompensatory* rate We disapproved the practice, even though no specific showing of injury to any user was produced. It was obvious from the nature of the particular service that certain shippers, whose commercial practices did not permit them to use the free storage offer, were supporting the use of it by others.

Complainant takes specific exception to various matters regarding the Examiner's conclusions on this point. A discussion of the specific exceptions will serve to develop our reasoning in support of the Examiner's conclusions.

Complainant excepts to the Examiner's finding that complainant, as an instrumentality of the State of Louisiana, must give primary consideration to the needs of Louisiana rice growers. Complainant characterizes this as absolutely incorrect. Whether or not complainant is required to prefer Louisiana millers over others is immaterial. The fact is that the weight of the evidence in this proceeding indicates that complainant either was not particularly interested in handling Arkansas rice or simply was unable to handle it because of congestion resulting from the large Louisiana rice movement. In either event complainant would not appear to be injured by the diversion of Arkansas rice from its facility.

Complainant also excepts to the findings that the large number of rail cars on hand at given periods of time indicate that complainant's terminal was frequently congested and that complainant's ability to handle additional Arkansas rice was highly doubtful. Complainant states that the record contains no details about what specific number of such cars might have contained rice. While this is true, the fact is that the described congestion of rail cars occurred during rice moving periods. If we add to this the testimony of Arkansas rice shippers concerning the difficulties experienced at complainant's facility, and the statement of the Port of Lake Charles that during 1967 that port could not handle all the cargo offered, it would be fair to conclude that congestion existed and that complainant's ability to handle Arkansas rice was limited.

The Examiner, however, gave only casual treatment to what we consider to be the real crux of the question of injury to complainant. We feel that complainant has failed to demonstrate that it is respondent's rate practice which has caused the diversion of Arkansas rice from complainant's port. There is some evidence that rice has been diverted from Lake Charles. There is no concrete evidence showing a connection between this fact and respondent's rate practice. Complainant has only inferred such a connection.

We find the evidence supports other equally plausible explanations. Respondent has offered a lower wharfage and unloading rate on Arkansas rice than on Texas rice continuously since September 1964. It is only since sometime in 1965 that complainant has experienced diversion of rice from its facility. In October 1965, unloading charges were increased at complainant's port, when the railroad there eliminated the absorption of a portion of that charge. Increased unloading rates might well cause Arkansas rice shippers to look elsewhere. In July 1967, complainant increased its wharfage charge at Lake Charles. Prior to this increase, the combined wharfage and unloading rates on bagged rice from Arkansas had been identical at Lake Charles and Beaumont. Increased wharfage rates might well have caused Arkansas rice shippers to look elsewhere.

In short, this record will not permit a conclusion that the diversion of Arkansas rice from complainant's port has caused an injury to complainant and, in any event, we cannot conclude that any such diversion of rice is caused by respondent's rate practices.

Complainant objects to the Examiner's failure to find that nowhere in the Gulf or continental United States is a different charge made for an identical service on the same commodity except at Beaumont, Tex. The record neither supports nor refutes complainant's requested finding. Assuming that complainant's position is correct, it would not change our conclusions in this proceeding. The fact that a rate scheme is unique may cause us to take a close look at it, but does not in itself say anything about its reasonableness.

Upon reviewing all evidence, the Examiner concluded that the interest of Texas shippers would not be enhanced by removing the differential. Arkansas rice producers and shippers benefit by reason of lower overall transportation costs. Complainant now handles substantially all of the rice cargo it is able to efficiently handle. Complainant has not demonstrated the manner in which its competitive position would be improved by eliminating respondent's differential. Competition for the handling of rice is not only between complainant and respondent, but includes the port at Mobile where overall transportation costs are less than at other ports. To all this, add the fact that commerce is benefited by the facilitated movement of both Arkansas and Texas rice at Beaumont, and the sum of all these factors supports our conclusion that nothing has been brought forth in this proceeding to show that respondent's rate practice is other than just or reasonable.

CONCLUSION

Complainant has proven no violation of the Shipping Act, with respect to respondent's wharfage and unloading schedules applicable to bagged rice. Accordingly, the requested cease and desist order is not warranted, and the complaint is hereby dismissed.

(SEAL)

THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

DOCKET No. 66–11

ARTHUR SCHWARTZ AND JUSTAMERE FARMS, INC.

v.

GRACE LINE, INC.

Initial Decision Adopted May 21, 1969

Cancellation by respondent of 2-year banana freighting agreement entered into with complainant Justamere Farms, Inc., pursuant to Federal Maritime Board's order of May 4, 1959, for failure to meet its obligations in accordance with conditions of the agreement found not in violation of said order or any provision of the Shipping Act, 1916.

Omission or refusal of respondent to offer refrigerated space to either complainant for 2-year period following that covered by canceled agreement because complainants lacked financial responsibility to qualify for agreements and were not *bona fide* banana shippers found not in violation of order of May 4, 1959, or any provision of the Shipping Act, 1916.

Complaint dismissed.

Milton L. Cobert for complainants.

Paul W. Williams, *Arthur Mermin*, *H. Richard Schumacher*, and *Burton V. Wides* for respondent.

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 before us on exceptions of complainant to the initial decision of Examiner Walter T. Southworth. There was no oral argument. These exceptions relate both to the conclusions reached by the examiner and the manner in which he conducted the proceedings. As for the latter, examination of the record in this proceeding reveals that the examiner's conduct of the proceeding was entirely proper and the complainants' exceptions are without merit.

The exceptions urging that the examiner erred in his conclusions are nothing more than rearguments of positions fully briefed and exhaustively treated by the examiner. Again, after a careful review of the record we find that the initial decision in this proceeding is in all respects proper and well founded, and we hereby adopt it as our own and make it part hereof.

The complaint is dismissed.

[SEAL] (Signed) THOMAS LISI, *Secretary.*

FEDERAL MARITIME COMMISSION

No. 66–11

ARTHUR SCHWARTZ AND
JUSTAMERE FARMS, INC.
v.
GRACE LINE, INC.

Cancellation by respondent of 2-year banana freighting agreement entered into with complainant Justamere Farms, Inc., pursuant to the Commission's order of May 4, 1959 (5 F.M.B. 615, 627), found to have been for good cause and in accordance with conditions of the agreement, and not in violation of the said order or of any provision of the Shipping Act, 1916.

Respondent found not to have violated the said order of May 4, 1959, or any provision of the Shipping Act, 1916, by omitting or refusing to offer refrigerated space to either complainant for the 2-year period following that covered by the canceled agreement.

Complaint dismissed.

Milton L. Cobert for complainants.

Paul W. Williams, *Arthur Mermin*, and *H. Richard Schumacher* for respondent.

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

This proceeding was commenced by the filing of the complaint of Arthur Schwartz and Justamere Farms, Inc., seeking reparation in an amount not less than $500,000 for damages allegedly sustained by reason of unfair and discriminatory acts of respondent in connection with banana freighting agreements employed by respondent pursuant to an order of the Commission issued May 4, 1959. Following service of a bill of particulars and a prehearing conference, complainants served an amended complaint (hereinafter referred to as the complaint unless the context otherwise indicates) which contained additional allegations relating to the same general subject-matter and increased the alleged damages and claim for reparation to "at least $750,000."

[1] This decision became the decision of the Commission May 21, 1969.

The complaint alleges that complainant Schwartz, individually and in joint venture with others and as general manager of complainant Justamere, contracted with respondent Grace Line for the carriage of bananas from Ecuador to New York, under banana freighting agreements prepared pursuant to, and subject to the terms and conditions of, an order of the Commission's predecessor, and subject to the continuing jurisdiction and supervision of the Commission.[2] The order referred to (hereinafter the Order) was entered in the proceedings entitled *Banana Distributors, Inc.* v. *Grace Line Inc.* and *Arthur Schwartz* v. *Grace Line Inc.*, 5 F.M.B. 615, 627 (1959) (hereinafter referred to as dockets 771 and 775). The Order provides, among other things hereinafter set forth, that Grace Line shall offer refrigerated space, upon a fair and reasonable basis and upon reasonable notice, to all qualified shippers of bananas for successive forward booking periods of not to exceed 2 years. The complaint sets forth seven causes of action following the introductory allegations summarized above; five of them were dismissed on respondent's motion prior to hearing, three because they accrued, if at all, more than 2 years prior to the commencement of the proceeding and therefore were not within the Commission's jurisdiction under the 2-year limitation of section 22 of the act, and two because they did not state causes of action against respondent under the act. The examiner's ruling on the motion to dismiss was served November 29, 1967, and was not appealed.

The two remaining causes of action (designated the Fifth and Sixth in the complaint), as to which respondent's motion to dismiss was denied and upon which hearing was held, have to do with respondent's cancellation of Justamere's banana freighting agreement for the 2-year period ending in February 1966, and respondent's failure to offer a banana freighting agreement to either complainant for the subsequent 2-year period beginning in March 1966. The allegations of these causes of action, as amplified by bills of particulars, are briefly as follows:

Fifth Cause of Action (on behalf of complainant Justamere Farms, Inc., only): On November 10, 1965, respondent canceled complainant Justamere's then-existing banana freighting agreement covering the 2-year period ending in February 1966, in claimed reliance on a clause thereof which permitted cancellation if Justamere failed to make payments due under the contract, or to furnish a new bond, when such defaulted payments exceeded 50 percent of the face value of the performance bond which Justamere had supplied pursuant to the contract. Respondent had built up charges in such an amount by (1) refusing to recognize the relief from its contract obligations to which Justamere was entitled under the "Strikes" and "Act of God" clauses in the contract (Justamere's ba-

[2] "Commission" hereinafter refers to the Federal Maritime Commission or its predecessor agency, the Federal Maritime Board.

nana supply having been reduced by catastrophic weather, and its cargoes severely or totally damaged as the result of strikes), and (2) arbitrarily, unfairly and discriminatorily rejecting Justamere's just claims for cargo damage while giving fair and equitable consideration to the claims of other similar shippers. Respondent was aware that by refusal to honor Justamere's just claims and to recognize the relief to which it was entitled by reason of the "Strikes" and "Act of God" clauses, Justamere would be deprived of revenue and working capital, thus affording respondent an opportunity to cancel the banana freighting agreement, in violation of the Order and section 16[3] of the act. Reparation is sought in the amount of approximately $19,000.

Sixth Cause of Action (on behalf of both complainants, Schwartz and Justamere): In or about February 1966, respondent offered banana freighting agreements for the 2-year period ending in February 1968. Although "complainant" is and was an experienced and qualified banana importer, protected by the Order and entitled to notice and offer of space, respondent failed to offer space or make it available to complainant for the said period, in violation of the Order and section 16 of the act. Because of "said refusal," complainant has been deprived of the opportunity to import bananas during the 2-year period. Reparation is sought in the amount of approximately $342,000.

Respondent says that it canceled Justamere's 1964–66 banana-freighting agreement because Justamere breached the agreement by failing to pay freight and stevedoring bills due and payable thereunder on 14 voyages from June to November 1965, in an aggregate amount exceeding $50,000. It concedes that it did not solicit banana freighting agreements from complainants for the 1966–68 period, but says that it was not required to do so under the Commission's Order, and denies that complainants or either of them made any request for space for this period until after allocation thereof had been completed, despite their knowledge of when the new booking period would begin. Respondent denies the other material allegations of the complaint. Certain affirmative defenses are pleaded. These include allegations that Justamere did not act as a principal in using the space allocated to it by Grace under the 1964–66 contract, as it had represented it would do; that Justamere was not in fact a qualified banana shipper within the meaning of the Commission's Order; and that neither Schwartz nor Justamere was or would have been qualified as a financially responsible shipper or otherwise to receive a space allocation for the 1966–68 period.

At a prehearing conference it was determined that the parties would be given an opportunity to present evidence with respect to the amount of any reparation following determination of the question of respondent's liability, if any.

[3] 46 U.S.C.A. 815. This section is specified in complainants' brief; the complaint alleges violation of the Order and the act in general terms.

The Facts

Complainant Schwartz, a resident of Califon, N.J., is vice president, general manager and, as he says, "chief cook and bottle washer" of complainant Justamere Farms, Inc., a New Jersey corporation incorporated in 1953 which operates a cattle farm at Califon, engages in securities transactions on a rather large scale, and since 1953, has from time to time engaged in various transactions related to the importation of bananas and other fruit from Latin America. Justamere is a family corporation all of whose stock is owned by Schwartz's immediate family; in 1964 he owned 50 percent, according to a license application to the Department of Agriculture, but he owns none at present. For most purposes in connection with this proceeding, Justamere and Schwartz can be considered one and the same person, although the transactions with which we are directly concerned were in form between Grace and the corporation, Justamere.

Complainant Schwartz engaged in transactions related to the importation of bananas or other fruit at various times during the period from 1928 to 1953. For several years after 1953 he did not engage in any business activity connected with the banana business. In that year he went to work for a Wall Street brokerage firm as a customer's man, or registered representative. He acted as such for six brokerage firms, successively, from 1953 until 1963, while still operating the farm (which operation apparently included security trading through a margin account in the name of Justamere).

In or about 1962, while working for a brokerage firm, he also participated, as a partner or managing agent, in a banana importing venture with or on behalf of the firm of Prevor-Mayrsohn, a fruit importer which had not previously dealt in bananas.

In March 1963, in the middle of a 2-year forward booking period, Schwartz applied to respondent for an allocation of space, in connection with a space reallocation made in April of that year; but he did not perfect his application, allegedly because he could not do so within the time allowed for the completion thereof.

Under date of February 13, 1964, Justamere, by Schwartz as its general manager, applied to respondent for a minimum of 12,000 cu. ft. and maximum of 25,000 cu. ft. of refrigerated space for the carriage of bananas on respondent's weekly Ecuador-New York service for the 2-year forward booking period beginning March 1, 1964. Justamere was allocated two bins aggregating 4,334 cu. ft., for which it entered into a banana freighting agreement on February 27, 1964. In March 1965, the agreement was amended, under circumstances set forth hereinafter, to increase Justamere's space to 26,574 cu. ft. It is this agreement—and the cancellation thereof in November 1965—with which the first of the two remaining causes of action (the Fifth Cause of Action of the complaint) is concerned.

Grace Line Inc., has carried bananas from Ecuador to the Atlantic Coast of the United States, in connection with its regularly scheduled liner service, since the 1930's. Prior to the Commission's decision in dockets 771 and 775, which (as supplemented May 4, 1959) was sustained by the Court of Appeals for the Second Circuit (*Grace Line* v. *Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961)), Grace carried bananas only under privately negotiated contracts.

The Order, issued upon the Commission's supplemental decision of May 4, 1959 (5 F.M.B. 615, 627), was substantially the same as an order issued August 19, 1957, upon the Commission's original decision in the same proceedings (5 F.M.B. 278, 287), which had been reversed and remanded by the court of appeals (*Grace Line Inc.* v. *Federal Maritime Board*, 263 F. 2d 709 (2d Cir. 1958)). Both orders required Grace to discontinue the carriage of bananas under the contracts formerly used, and directed that Grace offer to "its present shippers and all qualified shippers, including complainants and their supporting intervenors, upon a fair and reasonable basis and upon reasonable notice, refrigerated space for the carriage of bananas on respondent's vessels from Ecuador to U.S. Atlantic ports for a period not to exceed 2 years, said period to begin not later than July 1, 1959 (October 1, 1957, in the earlier order), and . . . thereafter offer, for periods not to exceed 2 years, refrigerated space available for such carriage." Further provisions of the Order are set forth in the margin.[4] The

[4] *It is further ordered,* That respondent shall employ uniform, fair, and reasonable standards in determining the qualifications of applicant shippers, and in exercising its judgment in this regard, respondent shall take into consideration applicant's (1) financial capacity to engage in the banana business on a scale proportionate to the refrigerated space requested, (2) ability to arrange for the purchase, loading, and stowage of the bananas to be shipped, and (3) ability to arrange for the discharge of bananas; to this end, respondent may require applicant shippers to provide verified information sufficient to enable respondent to make the necessary determinations;

It is further ordered, That respondent be, and it is hereby, notified and required to establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, stowing, transporting, carrying, and discharging of bananas on or from its vessels, which regulations and practices may include the following requirements: (*a*) Each shipper shall furnish and maintain as security for the performance of all its obligations under the 2-year forward booking a deposit in cash, negotiable securities, or a bond satisfactory to respondent equal to 12½ percent of the total minimum freight charges due under said forward booking; (*b*) no shipper shall be permitted, without the approval of respondent, to assign the forward booking or otherwise transfer any right secured by him under said forward booking; (*c*) the payment by the shipper of dead freight of up to 90 percent of complete utilization of space assigned; (*d*) loading, stowing, and unloading shall be at the expense and risk of the shipper, and respondent shall have the right to designate the stevedore or itself perform the necessary stevedoring at the port of discharge; (*e*) during the Chilean fruit season respondent may proportion-

Order is still in full force and effect. Grace has at all times undertaken to comply with the Order, and complied with the earlier order pending its appeal therefrom.

Although Schwartz had been the complainant in docket 775, the second of the two proceedings initiated in 1955 which led to the issuance of the Order, he did not attempt to secure space for a full forward booking period pursuant to either order until February 1964, when the application described above was made in the name of Justamere, resulting in the agreement dated February 27, 1964. At that time Grace entered into contracts, similar except as to the amount of space reserved, with 15 applicants including Justamere, each for the 2-year forward booking period beginning March 1, 1964, and concluding with the last vessel to depart Guayaquil in February 1966. All the contracts, generally called "banana freighting agreements," followed a form which had been filed with the Commission.

The banana freighting agreement entered into between Grace and Justamere (referred to therein as the "Shipper") recited that it covered the transportation of bananas from Ecuador to New York in suitable refrigerated space, consisting of specified bins aggregating 4,334 cu. ft., in each of Grace's weekly passenger vessels. Freight was payable at the rate of 80 cents per box of bananas with a minimum charge of 28.7 cents per cu. ft., used or not used, equal to $1,250 for each sailing. This guaranteed payment represented 90 percent of full freight for complete utilization of the space allocated, at 2½ cu. ft. per box and 80 cents per box. On up to 12 sailings in each 12-month period, the Shipper, upon 5 days' notice prior to sailing, might elect to guarantee a 75 percent minimum payment, or 24 cents per cu. ft. of space used or not used; on each such voyage the minimum freight would be $1,050.

Bananas were to be loaded by the Shipper or his agent, without expense to the vessel.

Bills of lading were to refer to the freighting agreement, and show quantity stated by Shipper.

At the Port of New York, bananas were to be unloaded and stowed

ately reduce the refrigerated space assigned to banana shippers, without discrimination, upon reasonable notice, to permit the carriage of Chilean fruit; (*f*) the treatment as a single shipper of those individuals, partnerships, or corporations who are affiliated with each other to the extent of 10 percent or more common ownership;

It is further ordered, That respondent shall file with the Board (*a*) copies of the 2-year forward bookings entered into hereunder, (*b*) the regulations and practices adopted by respondent relating to the receiving, handling, stowing, transporting, carrying, and discharging of bananas, and (*c*) the criteria used by respondent in determining what applicant shippers are qualified;

It is further ordered, That these proceedings be held open for further proceedings on the claims of complainants for reparation, if any.

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in trucks or other vehicles provided by Shipper by stevedores named in the contract (subject to change by Grace), all such work to be done "on behalf of the cargo." Stevedoring rates (per ton) were specified in the contract, subject to adjustments geared to any changes in labor contracts.

It was expressly provided that Grace would not be liable for any loss or damage resulting from delay in discharging by reason of strike conditions or labor disturbances, authorized or unauthorized, or by any reason beyond the control of Grace.

Grace agreed to maintain refrigeration temperatures within 2°, plus or minus, of the temperature specified by Shipper in writing for each voyage, and otherwise would not be responsible except for willful neglect.

Neither party was to be responsible for default due to strikes, acts of God, government regulations or restrictions, etc.; provided that if the Shipper's bananas had been loaded on a vessel and Grace was unable to deliver them into an Atlantic port for any of the reasons specified, the minimum freight provided for would nevertheless be payable.

The agreement recited that the Shipper had deposited $15,625 in securities, equal to 12½ percent of the aggregate minimum freight guaranteed for 2 years based on 90 percent use of space, as a guarantee of prompt payment of all charges due Grace under the contract.

The Shipper agreed not to assign the agreement or "otherwise transfer any rights secured" thereby without the written approval of Grace.

Justamere did not use the space covered by its agreement with Grace for the transportation of bananas which it owned or which were consigned to it as purchaser. It did not, in fact, purchase any bananas at any time or ship bananas for its own account. Upon the execution of its agreement with Grace, Justamere entered into an agreement with a grower (which was superseded from time to time by successive similar agreements with one or more other growers) under which it agreed "to assign refrigerated space that they have in the Cia. Grace Line for the transportation of bananas to the United States" for a specific quantity of bananas. The grower agreed to ship, weekly, enough bananas to fil the space so assigned, and to recognize Justamere as the exclusive agent for the sale, upon commission, of the fruit. Justamere agreed to arrange for advances against bills of lading (in amounts substantially less than the market value, f.o.b. Guayaquil, of the growers' shipments); but if the proceeds of sale, after deduction of Justamere's commission, freight charged by Grace Line, stevedoring and other expenses, were not sufficient to cover the advance, Justamere was to charge the deficiency against the grower's account, to be recovered from the proceeds of other shipments. The agreement further provided that 50 percent of the net proceeds of sale were to be paid to Schwartz personally, as "guarantor of Justamere Farms, Inc.," until a fund of $5,000 was established as a guarantee against default by the grower. In addition to its commissions of 7 percent to 9 percent (depending on sale price) charged to the grower, Justamere collected from the purchaser of each shipment "wharfage" or "pier" charges of 10 cents per box, or 17½ cents per hundred weight on stems, which it retained.

From time to time Justamere notified Grace of the names of its "suppliers," sometimes instructing Grace to permit them to "utilize" particular space "or any other space that we may have in the event of the inability on the part of our other suppliers to make delivery at any time." The facts set forth in the foregoing paragraph were not known to Grace until it learned of them in connection with the present proceeding. The Order pursuant to which the banana freighting agreement with Justamere was entered into required Grace to take into consideration, in determining the qualifications of applicants, their ability to arrange for the purchase of the bananas to be shipped.[5] In Justamere's application, upon which Grace had relied, Justamere had named persons from whom it intended to secure bananas "at market prices," and had stated that Schwartz and/or Justamere had previously purchased bananas from growers in Ecuador for resale in the United States.

As between Justamere and Grace, performance of the banana-freighting agreement appeared to progress quite uneventfully almost to the end of 1964. On November 30, 1964, Grace advised Justamere and all other contract-holders that "in view of the strong representations made to Grace Line by shippers of bananas under similar contracts as to the market conditions presently prevailing," it would amend the contracts temporarily to change the basis for freight charges to 24 cents per cu. ft. allocated, regardless of the quantity of bananas shipped. This concession reduced Justamere's guaranteed minimum (and maximum) freight to $1,050 per voyage. The change was to be effective from December 1, 1964 to January 15, 1965, but in January it was extended 2 months to March 15, 1965, "inasmuch as the circumstances prompting our offer * * * have remained unchanged." In March 1965, when the temporary concession expired, Grace offered to establish the rate at 26 cents per cu. ft. allocated, used or not, effective until the end of the contract period. Justamere and all other con-

[5] In his complaint against Grace in docket 775, Schwartz had alleged that he had been and still was "in a position to purchase bananas from growers in Ecuador, and to sell such bananas at a profit in markets * * * in the United States."

tract-holders executed formal amendments providing for this change, which would have made Justamere's minimum-maximum freight bill $1,117 per voyage had it maintained the same space allocation.

At about the same time Grace informed all contract-holders and "other interested parties of record" that about 22,000 cu. ft. of banana space might become available; two contractors, Cia. Exportadora Tropical Americana S.A. and Frutera Granja, S.A., having sought to relinquish their space and contracts if others could be found to take their places. Justamere (which had protested that its original allocation was inadequate) was the only applicant for this space, and its contract was amended March 25, 1965, to reflect the assumption of the additional space, effective with sailings subsequent to March 30, 1965. As amended, Justamere's contract allocated to it 11 specified bins aggregating 26,754 cu. ft. on each weekly voyage of Grace's passenger vessels, for which Justamere undertook to pay $6,910 per voyage, space used or not. Justamere's security deposit was increased to $49,915; in lieu of this deposit, Justamere later provided a $50,000 surety bond written by a bonding company. The agreement provided for a transitional allocation of 14,348 cu. ft., with guaranteed freight of $3,730, for the March 30, 1965, sailing of *Santa Mercedes;* however, when Justamere was unable to fill this space on the March 30 voyage, Grace forgave the difference, about $1,462, between the guaranteed freight and outturn freight on bananas actually shipped.

Meanwhile Justamere had failed to pay guaranteed freight on two volages, *Santa Magdalena* V56, which had sailed December 21, 1964, and *Santa Maria* V38, which had sailed on or about December 29, 1964. Grace had waived minimum freight on the voyage preceding these two sailings (*Santa Mariana* V46) because of the threat of a strike by the International Longshoremen's Association (ILA). By telegram dated December 16, 1964, however, it had advised all contract holders, including Justamere, that ILA negotiations had been successfully settled, that there would be no work stoppage, and that "therefore the *Santa Magdalena* will load bananas at Guayaquil on December 20 and 21 as scheduled and succeeding ships will load as scheduled." Justamere loaded no bananas on either *Santa Magdalena* or the next vessel, *Santa Maria.* On December 17, 1964, Schwartz wrote that Grace's telegram of the 16th gave it very little time, and that it was doing its best to obtain loading for the *Magdalena* sailing, but that it would "assume no responsibility in the event we are unable to obtain fruit." There was no contemporary explanation of Justamere's failure to load any bananas on the *Maria.* On January 16, 1965, however, Schwartz wrote that "we refrained from loading the above two vessels [*Magdalena* and *Maria*] in view of your inability to guarantee us that our fruit would be unloaded in view of the yet unsettled maritime strike." Of course Grace was not obliged to "guarantee" against a strike; further, this explanation was not offered until after the ILA had gone on strike, on January 11, 1965, following rejection by the union membership of the settlement which had been agreed to by union negotiators. Prior to January 8, 1965, neither Schwartz nor anyone else had expressed any concern about the possibility of a strike after the settlement of December 16, and it had been generally assumed that there would be no strike. Cf. *In the Matter of Free Time, etc., at New York Harbor*, 11 F.M.C. 238 (docket No. 65–14). Justamere's failure to ship any bananas on these two vessels was actually due to a dispute with its then "supplier" (Cia. Agricola Machala, the actual shipper against Justamere's space), which was thereafter replaced by Toledo Saenz, according to a notice given by Justamere to Grace under date of December 29, 1964. Machala and Schwartz had had a dispute about cocoa beans, which had some connection, not clearly defined, with Machala's failure to ship bananas and the switch to Toledo Saenz. Justamere was obliged by the terms of its agreement to pay guaranteed freight of $1,050 for each of these voyages, which were not affected by the ILA strike.

In June 1965, Justamere finally paid the $2,100 minimum freight due since January, "under protest," after a conference at which Grace told Schwartz that it would review certain claims which Justamere had advanced. Justamere's counsel transmitted the payment with a letter stating: "Payment is being made only because you have agreed to consider claims arising out of the same labor dispute on other voyages, and because you hold security fund out of which payment will be taken unless made now."

Grace's insistence upon the foregoing payment is described in complainant's brief as a "documented episode" where "harsh and prejudicial treatment meted out to Justamere can be directly compared with an unwarranted advantage awarded to a favored shipper." In prehearing discovery proceedings, complainant learned that while 13 of the 14 other contract holders had paid full guaranteed freight, aggregating $166,050, for these two voyages, the 14th, J. B. Joselow, had paid only $8,563.66 against guaranteed freight billed of $8,900 ($4,450 per voyage). Joselow had held out $336.34 against his billing on the Magdalena V56, because a truck carrying bananas for the vessel had been unexpectedly delayed in reaching the port of loading; he therefore paid on outturn instead of the full amount of guaranteed freight, on the theory that he had been prevented from fully utilizing his space by a circumstance within the force majeure clause of the freighting agreement. Grace abandoned efforts to collect this bill in September 1965; it did not charge it against Joselow's posted security, but in effect accepted Joselow's explanation, after ascertaining that it was factually correct, and canceled the billing. There was no connection or similarity of circumstances between Justamere's refusal to pay any freight for these two voyages and Joselow's succesful avoidance of $336 in freight payable; and Grace' insistence upon payment by Justamere, notwithstanding the Joselow incident, was no more an act of discrimination than was its collection of $166,050 guaranteed freight from the other shippers on the same voyages. It was not, as complainants argue, a case of two shippers receiving different treatment under identical circumstances. Joselow paid full guaranteed freight on one of the voyages and apparently would have done the same on the other but for an accident which prevented utilization of a portion of its allocated space; and Joselow paid 96 percent of the guaranteed freight on the two voyages. Justamere did not load on either voyage, and made no claim of accident or other condition beyond its control, other than the plea, now abandoned, of short notice with respect to the first voyage. Justamere paid nothing at all for the space reserved for its use on these voyages, until prodded into action after 6 months. It is not necessary to find that Joselow's conduct was proper under his contract, or that Grace was without fault in ultimately accepting Joselow's argument. The Joselow incident was in no sense a discrimination directed against Justamere such as to require or justify a waiver by Grace of all or any part of the freight payable under Justamere's contract on two voyages. In fact Justamere could not even claim contemporary knowledge of the Joselow incident as an excuse for its refusal to make the payments when due.

Justamere's payment on June 12, 1965 of the $2,100 due since January 1965, was immediately offset by its failure to pay stevedoring charges in the amount of $2,281.06 due under its contract for discharging its bananas from *Santa Mariana* V58, which had arrived in the Port of New York June 10, 1965. For every voyage from that time until Grace finally canceled its contract in November, Justamere failed to pay all or a portion of stevedoring charges or freight charges, or both. Details of the unpaid charges are as follows:

Vessel name and voyage number ("Santa" omitted)	*Arrival date Port of N.Y.*	*Unpaid charges*	
		Stevedoring	*Freight*
Mariana V58	June 10, 1965	$2, 281. 06	
Magdalena V68	June 17, 1965	2, 594. 81	
Maria V50	June 24, 1965	1, 603. 64	(waived)
Mercedes V32	July 1, 1965	2, 525. 66	$4, 971. 46
(Service suspended between July 1 and September 17—Marine Engineers' (MEBA) strike.)			
Mariana V60	Sept. 17, 1965		2, 267. 73
Maria V58	Sept. 23, 1965		2, 078. 78
Magdalena V70	Sept. 30, 1965		2, 301. 21
Mercedes V40	Oct. 7, 1965		1, 495. 55
Mariana V68	Oct. 14, 1965		2, 350. 85
Maria V60	Oct. 21, 1965	1, 715. 27	2, 730. 58
Magdalena V78	Oct. 28, 1965	1, 721. 82	2, 659. 42
Mercedes V42	Nov. 4, 1965	895. 61	4, 747. 63
Mariana V70	Nov. 11, 1965	1, 541. 17	3, 309. 73
Maria V62	Nov. 18, 1965		6, 910. 00
		$14, 879. 04	$35, 822. 94
Total unpaid charges			$50, 701. 98

The first item of unpaid freight—$4,971.46—is the full amount of freight billed, based upon outturn or fruit delivered; guaranteed freight having been waived in advance because of a strike threat, as hereinafter described. The last item of unpaid freight, $6,910, was the full amount of freight billed and payable under Justamere's contract; Justamere paid no freight on this voyage, from which it took delivery of bananas which it sold for $13,386.32. All the other items of unpaid freight represent the difference between the guaranteed freight billed and payable under Justamere's contract, and the amount it paid.

The first two voyages on which Justamere defaulted, *Mariana* V58 and *Magdalena* V68, had been normal voyages, although Grace had waived guaranteed freight on *Magdalena* V68 because of the possibility of strike-caused delay which did not materialize. Unloading of *Maria* V50 and *Mercedes* V32 was delayed, however, as a result of the strike of seagoing personnel represented by the Marine Engineers Beneficial Association (MEBA). All bananas aboard *Maria* V50 were lost; Grace waived all freight, and charged only for stevedore services in dumping the fruit. This waiver was pursuant to telegraphic notice sent to all shippers before the vessel loaded, setting forth the possibility of a work stoppage, waiving guaranteed freight and leaving it up to the shippers whether they shipped any bananas or not; subject only to their being charged for stevedoring services, and freight on fruit not lost ("outturn"), if they undertook to ship any bananas on these voyages. On *Mercedes* V32, the delay did not cause the loss of all bananas, and Grace billed freight on outturn, pursuant to a similar prior telegraphic notice.

After the arrival of *Mercedes* V32, service was suspended because of the strike, and did not resume until *Mariana* V60, which arrived September 17, 1965. Justamere not only failed to pay stevedoring charges and freight billed on *Maria* V50 and *Mercedes* V32 but also asserted claims against Grace for cargo lost, notwithstanding express provisions of the banana freighting agreement and bills of lading relieving Grace of liability for such losses, and notwithstanding the telegrams dispatched by Grace before the ships were loaded. Further details of the claims are set forth hereinafter.

When service was suspended because of the MEBA strike, Justamere owed Grace $13,976, against bills for all stevedoring on the four voyages next preceding the suspension, and freight billed of $4,971 on bananas delivered upon the last of these voyages, which Justamere had accepted and sold for $9,428 (unpaid stevedoring and freight on this voyage, whose unloading was delayed by the MEBA strike, totaled $7,496).

September 9, 1965, Grace sent a telegram to Justamere requesting payment of these bills. The same day Justamere's attorney wrote Grace's attorney, asking for "an appointment at which all matters in dispute can be aired and adjusted." The letter referred to a conference (apparently one held June 10, 1965, just before Justamere began to default on stevedoring and freight charges) at which "it was agreed that my client's claims would be examined and determined without delay." The record does not show whether or not there was any relation between this letter and Grace's letter of the same date demanding payment of outstanding bills. At any rate, Justamere made no payment, and on September 15, 1965, Grace wrote Justamere's surety, Peerless Insurance Co. ("Peerless"), asking payment of $13,976.63 under the terms of Justamere's bond. A copy of this letter was sent to Justamere.

The next day, September 16, Schwartz and his attorney conferred with a Grace attorney. Schwartz took the position that Justamere had not defaulted on bills due Grace, because Justamere had claims of over $50,000 against Grace which, it was contended, Grace had promised to give "prompt and sympathetic consideration" but had not done so. Grace had in fact told Schwartz in June that it would review a number of claims which Justamere had made prior to that time, aggregating about $12,000; since then Justamere had increased the amount by some $41,000. Schwartz insisted that Grace give him a formal ruling on all the claims, none of which had been honored.

At or about the same time, Justamere instructed Peerless not to make any payment to Grace on its bond, asserting that Grace was "remiss in its obligation" to Justamere and that Justamere's attorneys were "planning their course of action to recover approximately $49,000 in valid claims due us from Grace Line"; and agreeing to hold the bonding company harmless against loss. The bond (which was in the amount of $50,000, and signed by Justamere as principal and Peerless as surety) provided that Grace might draw upon the bond for payment of any charges incurred under the banana freighting agreement, upon written notification by Grace that Justamere had failed to pay them promptly when due; and further provided:

4. Notwithstanding that the Shipper JUSTAMERE FARMS, INC. may have a claim against GRACE LINE INC., whether or not arising by, through, or out of the aforementioned "Banana Freighting Agreement", it is understood and agreed that GRACE LINE INC. shall nevertheless have the right to draw on this bond as is heretofore provided for herein, but the said Shipper and the Surety Company shall retain any rights which they may have by virtue of the said contract, or by virtue of subrogation thereunder against GRACE LINE INC.

Presumably because of Justamere's insistence that it make no payment, Peerless refused and continues to refuse to pay on its bond notwithstanding the foregoing provision.

On October 1, 1965, Grace's freight claim agent sent Justamere five letters, each referring to one or more claims variously dated from March 29, 1965 to September 1, 1965, which Grace had not allowed. Justamere had asserted these as its reason for not paying stevedore and freight bills, and Grace had agreed at Justamere's request to have its claim agent examine them. The claims, which are discussed in detail hereinafter, aggregated over $53,000. The claim agent rejected all of them by letters in substantially the same form, stating: "Our investigation has developed no liability for the account of Grace Line Inc.," and "We must, therefore, respectfully decline your claim(s) * * * with full reservation of all defenses contained in the bill(s) of lading and/or otherwise."

Meanwhile service had resumed, following the MEBA strike, with the sailing of *Santa Mariana* V60 on or about September 9, arriving September 17, 1965. Justamere was unable to fill its space on this voyage, and began before the vessel arrived to importune Grace to waive guaranteed freight. Grace refused to do so. Under date of September 20, 1965, Justamere (by Schwartz) wrote Grace as follows:

We reply to your letter of September 13, 1965, and we note that you refuse to give us and our growers consideration for their inability to fill our allocated banana space due to the after affects (sic) of the strike.

Your statement that you cannot make any special provisions applicable to one shipper and not to all others is irrelevant as we made no such request. Our request in behalf of our growers should certainly apply to all of the shippers, but particularly to us. The other shippers with whom you have contracted space have been able to continue to ship on foreign flag vessels during the strike with your assistance and in discharging at your pier in Port Newark.[6] As indicated in our letter to you of September 9, 1965, our group of small independent growers relied entirely on the Grace Line, and therefore, they were particularly hard hit financially.

We attach a letter from one of our associate growers, Sr. Antonio Ajoy, who explains his inability to suddenly resume operations on a normal basis. Our other growers suffered severe crop damage. All of them need a few week's time to re-establish normal operations. You are aware that this is a situation of "force majeure". Surely Grace Line can offer its cooperation to small growers to whom it has repeatedly given assurances of such cooperation.

We enclose our check covering ocean freight on the "Santa Mariana" V60, based upon the formula applied to the shipment on the "Santa Mercedes", your invoice of July 21, 1965, to wit, 2.3 cubic feet per box at 26¢ per cubic foot, or a total of $4,642.27.

We are prepared to bring this matter before the Federal Maritime Board for arbitration, and we assure you that we would be willing to abide by their decision. We trust, however, that you will accept this letter and our check as payment in full for freight charges on the "Santa Mariana" V60.

Since Justamere's guaranteed freight was $6,910 per voyage under its contract, its payment based upon outturn left Justamere nearly $2,300 short on freight payable against *Santa Mariana* V60. The reason given in its letter for its growers' alleged inability to fill its allocated space—the growers' need of "a few week's time to reestablish normal operations" following the strike—is quite different from the reason subsequently advanced by Schwartz and alleged in the complaint: that Justamere's supply of bananas was reduced because the effects of floods which had occurred back in April of 1965 were at last being felt. More important, the letter of Justamere's "associate grower," Ajoy, attached to Justamere's letter, reveals that Ajoy's "inability to suddenly resume operations on a normal basis" resulted from neither strike nor flood damage: Ajoy had, during the strike period, contracted to sell his entire production to two "large exporting companies" until the end of the year. The record does not show either that this had

[6] Justamere also had a contract for space on the foreign-flag Chilean Line, but ceased to use the space in August 1965—right in the middle of the MEBA strike, when Grace service was suspended—because, Schwartz testified, of a controversy concerning the regularity of Chilean's service. In a subsequent letter to Chilean about the controversy (Chilean apparently charged breach of contract, and Schwartz was claiming over $26,000 damages) he quoted Toledo Saenz as having said that "he and the other growers would under no circumstances make shipments on the Chilean Line until they were assured that you would guarantee your service"; and said that Ajoy had repeatedly offered to ship if certain claims were settled, assurances given, etc. It was a strange time to have refused to ship for such reasons. As appears below, Ajoy had in fact contracted to sell his entire production elsewhere.

been done with Justamere's concurrence, or that Justamere charged Ajoy with breach of their agreement. Ajoy had apparently counted on purchasing bananas in the open market to ship in Grace's vessels, but an increase in demand had raised the price so that it was not profitable to do so, at least under the kind of deal he had with Justamere. Neither he nor Justamere wished to buy bananas at the prevailing market; in fact there is no evidence that Justamere ever considered doing so, not withstanding its statement to Grace, in its original space application, that it contemplated doing just that. Instead, both Schwartz and Ajoy tried to induce Grace to absorb the consequences of Ajoy's action by waiving freight on any unused portion of the space held under contract by Justamere. Grace refused; there was no evidence of a general supply problem, and all its other contract holders were consistently complying with their contract obligations. Ajoy was at least frank in giving the real reason for his failure to ship, although he blamed his indiscretion on Grace's Ecuador office for having "categorically informed him" (as well it may have) that "the strike could last few days, few months, or a year, and that they could not venture to indicate when the strike could terminate."

Justamere's letter speaks of "severe crop damage" suffered by other growers; which damage, according to Schwartz's testimony, resulted from failure to cut bananas during the MEBA strike. There were only two "other growers" immediately prior to the strike, and one of them never shipped to Justamere after the strike; his disappearance was not explained. The other, Toledo, Saenz, who had represented about 20 percent of Justamere's supply, continued to ship—about normally on the first poststrike voyage, and in generally decreasing volume thereafter. The greater part of Justamere's supply after the strike came from growers who had not shipped to Justamere prior thereto. One of them, Hanchi, had entered into a contract to begin shipments June 22, 1965, but the strike had intervened; another, Ayala, was to start September 7, 1965; the contracts of the other two, Cevellos and Seminario, are undated, but their shipments did not start until October 8, 1965, and November 12, 1965, respectively. Except in the case of the major shipper, Ajoy, and the earlier case of Machala, who had had a dispute with Schwartz about cocoa beans, the reasons for the numerous changes in Justamere's suppliers are not revealed.

There is no credible evidence that Justamere's failure or inability to utilize its contract space adequately resulted from crop damage related in any way to the MEBA strike. Its failure, following the MEBA strike period, to pay guaranteed freight pursuant to its contract cannot be justified or excused under any theory of "force majeure," under the "strike" clause of the contract or otherwise.

Justamere continued throughout the fall of 1965 to pay freight on outturn in lieu of the amounts billed pursuant to its contract; in October it began to default on stevedoring charges also. The amounts due and unpaid on each voyage are shown in the tabulation above. Grace notified the bonding company, and requested payment from it, as each default occurred. Finally Grace gave notice of cancellation of Justamere's freighting agreement effective November 15, 1968. As of that date freight due and unpaid under the agreement totaled $28,912.94; stevedoring charges due and unpaid totaled $14,879.04. The unpaid billings thus aggregated $43,791.98, not far from the $50,000 limit of Justamere's surety bond. Justamere promptly exceeded the limit by failing to pay any freight at all on *Santa Maria* V62, which arrived November 18, 1965. This increased its default to $50,701.98. It appears that it did pay stevedoring charges on the latter voyage, *Santa Maria* V62. It took delivery of 6634 boxes and 470 stems of bananas from this vessel, and sold them for $13,386.32 plus "wharfage."

Wholly apart from any consideration of ordinary contract law, the freighting agreement between Grace and Justamere (and all Grace's banana freighting agreements in effect at the time) provided expressly that the agreement might be canceled forthwith by Grace in the event of any material breach thereof by the "Shipper," and further provided (as did Justamere's surety bond) that the freighting agreement might be canceled if a new surety bond, in the amount of the original bond, was not furnished within 10 days after Grace had drawn upon the bond in amounts totalling more than 50 percent of its face amount. Justamere's unpaid indebtedness exceeded 50 percent of its $50,000 bond when it defaulted on guaranteed freight and stevedoring charges applicable to *Santa Maria* V60, which arrived October 21, 1965.

There is no dispute as to the amounts of unpaid freight and stevedoring charges shown in the above tabulation, or as to their being owed to Grace under the terms of Justamere's contract. Further, it appears that Justamere collected all or a great part of the amounts so owed to Grace from its growers, by charges against the proceeds of the sales of their bananas under its agency agreements with the growers. Schwartz testified that he charged the growers freight for the number cubic feet of space they had contracted for with Justamere, on the basis of what Justamere was obligated to pay under its contract with Grace; but he paid Grace only for the actual space used (as he calculated it), and asked Grace to waive the difference—allegedly with the idea (not expressed in his accountings with the growers) that if he succeeded in getting a waiver from Grace, he would return to the growers, pro rata, the amount waived by Grace. As for stevedoring, which he also charged to the growers and deducted from the proceeds of sale of their bananas, the only excuse offered for failure to pay Grace was that Grace had refused to pay certain alleged cargo damage and shortage claims which Justamere asserted. Schwartz testified: "I will gladly allow Grace Line the full amount of the stevedoring they charge, upon settlement with me for claims that they owed me prior to this litigation." In the same category, presumably, is the full amount ($6,910) of freight on *Santa Maria* V62, arriving November 18, 1965, no part of which has been paid; and the outturn freight ($4,971) billed against fruit delivered and sold on *Santa Mercedes* V32, which arrived July 1, 1965.

Before discussing the claims which Justamere would set off against unpaid freight and stevedoring, brief mention should be made of certain events immediately following the cancellation, which was effective November 15, 1965. On November 16, 1965, Justamere informed Grace by telegram that its cable of November 11, telling its growers of the imminent cancellation, was apparently not received in time to prevent cutting bananas, and that 8,000 boxes were ready for shipment on the voyage then about to load (*Santa Magdalena* V80). The telegram concluded: "We remind you of Mr. McNeil's promise to protect our growers against loss." Grace thereupon permitted the growers to load the bananas, which were consigned to Justamere. When Grace billed Justamere, prior to arrival of the vessel, for estimated outturn freight and stevedoring charges on these bananas in the amount of $5,744, Justamere refused to have anything to do with the shipment, and wrote Grace: "Acceptance of this shipment was on your own volition as you had already canceled our contract. We accept no responsibility for this shipment." Grace then induced Justamere to endorse the bills of lading over to it so that the bananas might be sold, and Grace itself arranged for their sale for $10,871. The problems resulting from this shipment were not resolved until January 25, 1966, when Grace, Justamere, and Bank of North America entered into a letter agreement with respect thereto. Pursuant to this agreement, Grace remitted the proceeds of sale, after deduction of costs of sale and stevedoring, to the Bank, to be applied by the Bank to claims against it arising from letters of credit which it had issued. Justamere's growers had evidently obtained their usual advances from banks in Ecuador under the letters of credit which Justamere was obligated to establish under its agreements with them, against the bills of lading consigning the bananas to Justamere; but Justamere had disassociated itself from the entire transaction and failed to reimburse the issuing Bank. Two Ecuadorian banks looked to the Bank, and the Bank looked to Grace, to whom the bills of lading had been endorsed, for reimbursement of the payments made to the growers. One Ecuadorian bank had agreed to settle one of the claims, amounting to $7,500, for $6,585; Grace waived freight on the shipment; and the Bank agreed to pay the Ecuadorian claims as compromised and to look to Justamere for any deficiency, which could not exceed about $320. The record does not show whether or not Justamere made any payment under this agreement.

Justamere's cargo damage claims

The claims relied upon by Justamere to excuse its defaults in payment of freight and stevedoring charges, and which are alleged to have been arbitrarily and discriminatorily rejected by Grace, fall into four categories:

1. "ILA strike claims," aggregating $7,877, based upon depreciation in market value allegedly resulting from strike-caused delay in unloading four vessels in January and February, 1965.
2. "MEBA strike claims," aggregating $41,731, based upon loss or depreciation of bananas by reason of strike-caused delay in unloading two vessels in June and July, 1965.
3. A claim of $1,953 for alleged "faulty refrigeration," said to have caused damage to a portion of a cargo which arrived June 10, 1965.
4. So-called shortage claims aggregating $2,241, based upon alleged delivery of fewer bananas than were loaded in Justamere's space at Guayaquil, on seven voyages in the spring of 1965.

1. The ILA Strike Claims

The ILA claims, for damages which allegedly arose in January and February, were all presented to Grace under date of May 18, 1965. Each is stated to be for "losses suffered on damaged bananas due to longshoreman's strike." They were in substance as follows:

Voyage	*Arrived*	*Unloaded*	*Amount of claim*
Mercedes V20	Jan. 14, 1965	Jan. 24, 1965	$1,917.75 (1,700 boxes @ $3.30 per box, $5,610, less $3,692.25 received upon sale).
Maria V40	Feb. 4, 1965	Feb. 14, 1965	$2,308.50 (1,720 boxes @ $3.30 per box, $5,676, less $3,367.50 received upon sale).
Mercedes V22	Feb. 12, 1965	Feb. 17, 1965	$2,209.40 (1,755 boxes @ $3.30 per box, $5,791.50, less $3,582.10 received upon sale).
Mariana V50	Feb. 20, 1965	Feb. 20, 1965	$1,441.40 (1,658 boxes @ $3.30 per box, $5,471.40, less $4,030 received upon sale).

The banana freighting agreement between Justamere and Grace provided:

10) In the event that the discharge of bananas from any of Grace's vessels is delayed by reason of strike conditions, or labor disturbances, authorized or unauthorized, or by any reason beyond the control of Grace, Grace shall not be liable for any loss or damages resulting therefrom.

In addition, Grace's bill of lading incorporated the provisions of the Carriage of Goods by Sea Act, with certain modifications not pertinent here. Section 4(2)(j) of the said Act, 46 U.S.C.A. 1304(2)(j), provides:

Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

* * *

(j) strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: *Provided*, that nothing herein contained shall be construed to relieve a carrier from responsibility for the carrier's own acts;

It is undisputed that any delay in unloading these vessels (there was actually no delay in unloading *Mariana* V50) was caused by the ILA strike which, as described hereinabove, began January 11, 1965, following the unexpected rejection by the union membership of the settlement agreed to by their bargaining representatives. The claims themselves impute the damage alleged in all four cases to the longshoremen's strike. The banana freighting agreement between Justamere and Grace, and Grace's bill of lading, bar all such claims, and Grace's rejection of them cannot be deemed arbitrary or discriminatory, since no such claims were allowed in the case of any other shipper.

Certain claims of a different nature were allowed other shippers, however, in connection with the first three of these "ILA" voyages (*Mercedes* V20, *Maria* V40, and *Mercedes* V22). While none of these other shippers had the temerity to ask for damages to cargo resulting from strike-caused delay, they did contend that Grace should waive guaranteed freight to the extent that it exceeded outturn of bananas delivered and accepted, because each of these vessels had been affected by a strike, and in such cases Grace had in the past (when it was aware of a strike threat prior to loading) waived guaranteed freight in advance of loading. Grace had done so in the case of *Mariana* V46 (arriving December 22, 1964), when the possibility of an ILA strike was a recognized possibility at the time she sailed. Grace had also waived, by telegram in advance of loading, guaranteed freight on *Mariana* V48 (arriving January 22, 1965) and *Magdalena* V58 (arriving January 30, 1965), the next two vessels to sail from Guayaquil after the strike began; and on *Mariana* V50, which sailed February 12, 1965, and arrived February 20, 1965, after the strike had ended in New York, and was in fact not affected, although Justamere filed a damage claim with respect to her. For reasons not clear in the record, however, Grace did not waive minimum freight on two intervening voyages, *Maria* V40 arriving February 4, 1965, and *Mercedes* V22 arriving February 12, 1965; and it had not waived on the earlier *Mercedes* V20, because when she sailed, on or about January 6, 1965, there was no prospect of a strike.

Thus while *Mercedes* V20, *Maria* V40, and *Mercedes* V22 were all affected by the strike to the extent of the unloading delays set forth in the above summary of Justamere's ILA claims, guaranteed minimum freight had not been waived as to any of them. Eleven of the 15 contract holders—all of them except Justamere, Standard Fruit, Frutera Granja, and Compania Exportadora Tropical Americana—although billed the full amount of guaranteed freight, remitted only on outturn, arguing that historically, whenever the Port of New York was faced with strike conditions, minimum freight charges had been waived and actual loadings left to the discretion of shippers, with freight charges assessed only "on outturn basis consistent with condition of the fruit." They demanded that these voyages, which were in fact affected by strike conditions, be treated the same as those voyages on which Grace, foreseeing the possibility of strike damage, had waived dead freight [7] in advance.

Grace did not accede to these demands for several months. Finally on June 16, 1965 (following a May 18 recommendation by its executive responsible for operations under the banana agreements), Grace

[7] Dead freight ordinarily means freight charges for space contracted for but not used. When Grace charged only on "outturn," however, it did not charge for fruit shipped but abandoned at the pier because of its condition; and the waiver of freight charges for such fruit was technically a waiver of more than "dead freight." In the present proceeding, both dead freight, in the technical sense, and freight on abandoned fruit, are frequently included in so-called dead freight or false freight.

decided to waive dead freight in the cases of *Mercedes* V20 and *Maria* V40, "in light of previous circumstances and established policy." This involved the cancellation of outstanding billings of $18,157.18 on *Mercedes* V20 and $14,391.50 on *Maria* V40. These shippers paid a total of $95,000 freight on the two voyages.

Grace considered *Mercedes* V22 to be in a different category, apparently because she arrived when the strike was officially over, although she was delayed in unloading by strike-related causes: a shortage of labor and the need to unload the *Maria* V40, which had arrived a week earlier. The *Mercedes* V22 billings remained in dispute until February 1, 1966, when management decided to cancel the outstanding differences, as in the case of *Mercedes* V20 and *Maria* V40. This involved the cancellation of $12,468.30 in billings to seven contract holders.

As a logical proposition, there was some merit to the argument of the shippers; and there was no reason why Grace could not, in its discretion, waive its contract right to minimum freight under the circumstances, although it almost certainly could not have been compelled to do so simply because of prior prospective (as opposed to retroactive) waivers. When it did waive strict performance, however, it should have done so "across the board," not merely for the complaining majority of contract holders. Its failure to do so, constituted, on its face, an unjust discrimination. But it was not, as Justamere would have it, evidence of "unflagging efforts to accomodate and propitiate" favored shippers while "simultaneously engaged in hounding Justamere to its doom." Justamere (which was making a much larger claim, relatively, on a different theory in connection with the same voyages) was not the only shipper discriminated against; there were three other such shippers, two of whom were adversely affected to a considerably greater degree than Justamere, although they are cited in Justamere's brief as special recipients of "benevolence, understanding, cooperation and forgiveness unhesitatingly extended by Grace" to its shippers other than Justamere. Had all four been given the same treatment as those whose unpaid billings were canceled, they would respectively have benefitted to the following extent:

Justamere	$96.00
Cia. Exportadora Tropical Americana ("Extra")	[8] 4,799.88
Standard Fruit & S.S. Co	---------
Frutera Granja	1,125.00

[8] The failure to include "Extra" may have been due to the fact that the latter was asking Grace to waive $4,975, its full guaranteed freight on *Santa Mercedes* V22, because (as Grace confirmed) a labor dispute had prevented it from getting fruit to the ship. Grace eventually granted the waiver; had it not done so, this shipper would have been entitled to a similar waiver because of Grace's waiver of other shippers' guaranteed freight on this voyage.

In Justamere's case, the benefit would have been very small, since Justamere had apparently loaded quite full and had had a relatively high outturn, on which freight was almost equivalent to its guaranteed minimum (as it was in the case of Standard Fruit and, except for *Mercedes* V22, "Extra"). The discrimination, therefore, was relatively trifling. But Justamere should be given the benefit, however small, of the policy followed by Grace with respect to other shippers similarly situated, to the extent of an appropriate credit against its unpaid obligations to Grace. Nevertheless the incident does not excuse nonperformance by Justamere in unrelated circumstances, and it lends no weight to Justamere's legally insupportable cargo damage claims of some $6,400 on the same voyages.

Neither does the incident demonstrate (as complainants allege) discrimination against Justamere in Grace's insistence that Justamere pay the $2,100 in contract freight, which Justamere was then withholding, on the two December 1964 voyages—*Santa Magdalena* V56 and *Santa Maria* V38, discussed above. In the case of those two voyages, as well as the January-February voyages, Grace did not waive minimum freight in advance, since it did not anticipate strike conditions. The vital difference is that the December voyages were not in fact affected by strike conditions, as were the others. In addition, though not determinative, it is quite evident (as set forth above) that Justamere's failure to load on the December voyages resulted from a dispute with its "grower," not from any strike-connected reason.

In order to maintain some perspective, it may be noted that the dead freight waived on the three January–February voyages, aggregating $30,625.48, is about 21 percent of the freight billed to the relevant shippers on the same voyages; they paid an aggregate of $143,000. The amount claimed by Justamere in connection with the same voyages, by way of cargo damages, is about $6,400, or more than 200 percent of the $3,150 freight billed to (and paid by) Justamere on those voyages. The $96 which Justamere would have received had it been forgiven dead freight, as were the others, is about 3 percent of the freight billed to Justamere on the three voyages.

2. The MEBA Strike Claims

These claims, aggregating $41,731 (including freight and stevedoring charges billed but not paid in the amount of $8,638, for which Justamere takes credit in its claim), represent about 77 percent of the total amount of Justamere's cargo claims. They are based upon damage to cargo resulting from delays in unloading two vessels because of a strike called by the Marine Engineers' Beneficial Association (MEBA) against Grace and other American-flag carriers. The vessels were *Santa Maria* V50, scheduled to load at Guayaquil June 15–16 and arrive at Port Newark June 24, 1965; and *Santa Mercedes* V32, scheduled to load June 23–24 and arrive July 1.

June 11, 1965, 4 days before the *Maria* V50 was scheduled to start loading, Grace sent a telegram to Justamere and all other shippers stating that despite the likelihood that a strike deadline of June 15 would be extended, it could "express no opinion as to the possibilities of a work stoppage." Therefore, it stated, it was waiving the guarantee of full freight on the *Maria*, and said:

> We are leaving business risk with shippers as to whether you ship full or limited quantity or no bananas depending solely upon your own business judgment and evaluation of circumstances. For shipments per SANTA MARIA, V–50, freight on boxed or stem bananas will be computed on the basis of your allocated space which you utilize pro rata in relation to full freight otherwise payable under current contract as amended. In event shippers load bananas on SANTA MARIA, V–50, and vessel subsequently affected by strike conditions and bananas lost due to deteriorated condition the disposition of such bananas and costs involved will be for the account of the cargo with Grace Line waiving the corresponding ocean freight charges.

The *Maria* V50 arrived at Port Newark June 24, 1965, but due to the strike was not unloaded until July 13, 1965. All bananas aboard were destroyed, including 6,999 boxes consigned to Justamere. Pursuant to the telegram just quoted, Grace waived all freight charges for the voyage and billed shippers for costs involved in disposition of the spoiled bananas—in Justamere's case, stevedoring charges of $1,603.64, which Justamere has not paid. All other shippers paid such charges, and none made any claim for loss of cargo. Justamere presented a claim, under date of September 1, 1965, for "Loss occasioned by reason of your failure to discharge bananas as per our letters and telegrams," [9] in the amount of $17,070.05 after certain deductions for freight (which was in fact waived by Grace for all shippers) and stevedoring charges.

On June 21, 1965, two days before the *Mercedes* V32 was scheduled to start loading, Grace sent another telegram. It stated that while there was encouraging evidence of progress in the seagoing labor contract negotiations and a likelihood that an agreement would be reached, it could express no opinion as to the possibilities of a work stoppage "although the *Santa Magdalena* V68, worked in Port Newark June 17

[9] One of the telegrams is in evidence. In it, Schwartz charged Grace with having told him that "either the strikers would permit unloading * * * or that you already had ready for signature an application for immediate relief under the Taft-Hartley Act. * * * We request you to ask President Lyndon Johnson for immediate relief under the Taft-Hartley Act and will hold you responsible for all damages attributable to your failure to have done so."

without incident." The balance of the telegram was the same as the above-quoted portion of the earlier telegram with respect to the *Maria.*

The *Mercedes* V32 arrived on schedule, July 1, 1965, but was not unloaded until July 12. Justamere had permitted its suppliers to ship a substantial cargo, around 100 percent of their allotted capacity, on this voyage, although all other shippers had heeded the strike warning and reduced their shipments by 50 percent or more; three of the four largest shippers did not ship at all.[10] On September 1, 1965, Justamere filed a claim for $16,023. This was based upon the alleged market value on arrival of 8,809 boxes at $3.20 per box and 952 stems at $5, or $32,948, less ocean freight charges of $4,971 and stevedoring charges of $2,525, less "moneys collected from customers" of $9,428. Justamere has not paid any part of the freight (which was billed only on fruit delivered, or "outturn," in accordance with Grace's telegram) or stevedoring charges. Only seven other contract holders accepted delivery of fruit from this voyage; those that did paid in full the outturn freight. All shippers other than Justamere paid their stevedoring charges in full. No one except Justamere made any attempt to charge Grace for lost or damaged cargo.

By the terms of Justamere's contract and the bills of lading, any claim for damage to cargo resulting from the MEBA strike was clearly barred, as were the ILA strike claims. Furthermore, Grace's telegrams to Justamere with respect to the MEBA voyages (including *Santa Magdalena* V68, the voyage prior to *Santa Maria* V50, which arrived June 17 and was promptly unloaded without damage to cargo) spelled out the risk involved, waived freight except upon saleable bananas actually delivered—i.e., not "lost due to deteriorated condition"—and left it to the shippers' judgment as to whether they should load at all; provided that if bananas were shipped the shipper would be responsible for stevedoring charges and freight on fruit not lost. Under these circumstances, Justamere has no shadow of a claim for loss or damage to cargo resulting from the strike-caused unloading delay, and no excuse for nonpayment of the freight and stevedoring charges billed to it on these vessels.

Schwartz testified to a telephone conversation with a Grace Line official in which the latter allegedly told Schwartz that "he was certain that, in the first place, there would be no strike; there would be no picket lines; and in the second place, if by some chance that there would be a slip-up, that the Taft-Hartley Act would be immediately invoked."

[10] Similarly on *Santa Magdalena* V68, the first of the MEBA voyages on which Grace waived guaranteed freight in advance because of the strike danger, most shippers cut their shipments by more than 50 percent, but Justamere's growers shipped almost full. On that occasion Justamere won the gamble, since there was no delay in unloading; on the next two voyages it lost. More precisely, the growers lost; Justamere charged them commissions, as well as the amount of its advances, on bananas which were dumped.

On the strength of that, Schwartz said, "we ordered loading on the two vessels." Such a conversation, even if it took place exactly as alleged, would hardly vary the terms of the written contract between Grace and Justamere. However, Schwartz finally placed the time of the alleged telephone conversation as a week or so before Grace's telegram of June 11, 1965 in which Grace put the risk of loading on the *Maria* squarely up to the shipper. It is not necessary to determine whether the telephone conversation took place as alleged, or what the effect thereof might have been; for the telegrams of June 11 (*Maria*) and June 21 (*Mercedes*) superseded any commitment that could conceivably be spelled out of it.

Complainants suggest no finding or conclusion with respect to the MEBA claims, and their briefs refer to them only peripherally.

No discrimination against Justamere can be found in Grace's refusal to allow any part of the $41,730 MEBA claims, *Santa Maria* V50 and *Santa Mercedes* V32. On the other hand, Grace would be susceptible to charges of preference had it not insisted upon payment by Justamere of freight upon saleable fruit accepted, and stevedoring charges, in accordance with the terms announced in its telegrams and adhered to by other shippers.

3. The "Faulty Refrigeration Claim"

In June 1965, Justamere filed a $1,953 claim for bananas "damaged and lost due faulty refrigeration," discharged June 11, 1965, from *Santa Mariana* V58, which arrived June 10, 1965. The claim was for 407 boxes lost completely, at $3 per box, and 732 boxes of damaged fruit sold at $2 per box, or $1 less than the market price.

Grace obtained a report on this claim from T. D. Baker & Co., cargo surveyors, who at its request inspected the shipment aboard the vessel on June 11. The surveyors found that cartons containing normal green fruit were among and adjacent to cartons containing the fully ripe, or turning, bananas. They discussed this condition with the "importer's representative," who did not offer any explanation. They concluded that the condition complained of resulted from packing mature fruit.

While the record does not contain all the correspondence between the parties concerning this claim, it appears that Grace told Schwartz it found no negligence on its part, that Schwartz threatened to sue, and that Grace reiterated its stand, stating: "We feel certain after you review the facts again that you will agree that the position taken by us was just." Schwartz insisted that Grace's own surveyors and employees were in agreement with him that "the vessel or its machinery was at fault in this particular hold." The surveyor's report rendered immediately after the incident is quite to the contrary.

This proceeding is not concerned with the adjudication of Justamere's cargo claims against Grace, but (incidentally) with allegations that Grace unfairly and arbitrarily rejected Justamere's cargo claims, and unfairly and unjustly discriminated against Justamere in its treatment thereof. The record with respect to the refrigeration claim does not support any such allegations. Rather it indicates that Grace went to some trouble and expense to discover whether Justamere's claim had any merit, and was advised by an independent surveyor that it had none. There is nothing to suggest that it might have acted differently had any other shipper presented this or any similar claim.

It is noted that although Justamere credited each of its three shippers on this voyage at the average selling price, per box, of the entire Justamere consignment, it charged most of the boxes lost to one shipper, Ajoy, as "overripe fruit." Of 507 boxes stated to have been "lost repacking," 480 were charged to Ajoy, 15 to Loayza and 12 to Toledo Saenz. As percentages of the respective growers' shipments, these charges amounted to about 7.8 percent for Ajoy, one-fifth of 1 percent for Toledo Saenz, and seven-tenths of 1 percent for Loayza. This is consistent with the surveyor's observation that most of the cartons containing ripe fruit bore the number 583 (a number used by Ajoy), "with a very small amount of cartons bearing two other numbers." It is also consistent with Schwartz's testimony as to his method of handling losses due to ripe or defective fruit where several growers shipped on a particular voyage; he credited them at the average selling price per box, but charged boxes lost through repacking in accordance with his observation as to the percentage of ripe or defective fruit in each grower's shipment. Evidently Schwartz was quite aware that Ajoy had shipped a large percentage of ripe fruit on this voyage.

The "Shortage" Claims

Complainant Justamere introduced seven claims for specified numbers of boxes or stems of bananas stated to be "short" or "not delivered," which Grace had refused to pay:

Claim dated (1965)	Voyage	Arrival date (1965)	Amount
Mar. 29	*Magdalena* V62	Mar. 25	$45. 50
Apr. 13	*Mercedes* V26	Apr. 8	191. 50
Apr. 17	*Mariana* V54	Apr. 15	186. 50
May 12	*Magdalena* V64	Apr. 22	182. 40
May 13	*Maria* V46	Apr. 29	918. 00
May 15	*Mercedes* V28	May 6	177. 00
June 21	*Magdalena* V68	June 17	540. 00
Total			2, 240. 90

Each claim is supported by a copy of a Grace bill of lading showing the number of boxes or stems which "shipper states" to have been loaded in a specified location on the ship, such as "Hatch No. 4 Deck D." Each such bill of lading bears a statement to the effect that it is issued under and pursuant to a freighting agreement dated February 27, 1964, between Grace and Justamere Farms, Inc. Also attached to each claim is what appears to be a copy of a statement of quantity shipped to Justamere, signed by the grower, as submitted to a Guayaquil bank in connection with the collection of the grower's advance under its letter of credit arrangement with Justamere. There are no other supporting documents.

Schwartz testified that a shortage claim is one for failure to deliver boxes placed aboard at time of shipment and not delivered at discharge of a vessel; "and that can be due to missing boxes, or it can be due to boxes breaking by defective conveyors breaking them which very often takes place." Grace conceded that claims were paid from time to time for boxes damaged in unloading, when properly verified. In such cases it was the practice for a Grace Line representative and the shipper's representative to sign in duplicate a damage report recording the incident; a copy of the report was kept by each representative. Justamere did not produce any such damage reports in support of the claims in question, and Schwartz denied knowledge of the existence of the practice; however, a former part-time employee of Justamere, called on its behalf, confirmed the practice. A report signed by this employee and a Grace representative, in connection with a claim submitted by Justamere December 10, 1965, was produced by Grace (*Mariana* V70, Nov. 11, 1965; claim dated Dec. 10, 1965). The claim had been allowed to the extent supported by the signed report.

No claims have been allowed any banana shipper based, as were the seven Justamere claims in issue, solely upon alleged differences between "shipper's count" bills of lading and outturn amounts—i.e., quantity delivered to and accepted by the consignee. One shipper other than Justamere was shown to have made one such claim, but it was rejected.

The banana freighting agreement between Justamere and Grace called for loading to be done by the shipper or his agent, in specified bins, and for the issuance of a bill of lading showing quantity stated by the shipper. The agreement originally provided for freight to be computed on outturn; if the vessel or cargo was lost so that certified outturn weight certificates were not available, freight was to be paid nevertheless, not on input but "on the basis of the certified outturn weight certificate of the last banana shipment of the shipper * * * preceding such loss of vessel or cargo, or on the basis of the minimum freight payment required herein, whichever is greater." The agreement was amended to provide for payment of agreed guaranteed freight, regardless of outturn. Either way, there was no occasion for Grace to check loading quantities, unless to protect itself against claims of unexplained disappearance during the voyage, a theoretical possibility which the freighting agreement does not cover. Grace did not in fact check inputs. But even if it be assumed that the "shipper's count" bill of lading (and manifest) amounts were correct—as they probably were, barring mistakes, since the shippers paid Ecuadorian taxes and obtained export licenses on the basis of their own declared count—Justamere did not establish that the "missing" boxes were in fact missing on arrival. Banana consignees rework the cargo on the dock; they eliminate spoiled or damaged fruit and repack containers with marketable fruit only. This is done by their "selectors" who inspect the fruit for ripes or injury before it is counted and placed on trucks for delivery to customers. The record does not show that the shortages alleged in these claims were called to Grace's attention before bananas were turned over to Justamere's "selectors"; Justamere's claims showed, at the most, shipper's count per bill of lading, less boxes lost in repacking; the difference between the resultant figure and the number "loaded on trucks per outturn weights" was called "boxes not received." Sometimes "outturn count" or "outturn per checkers" was used instead of "outturn weights." Some claims merely listed a number of boxes "short." Justamere never established the accuracy of its figures as to quantities lost in repacking, or that the difference between bill of lading count and outturn resulted from anything other than the elimination, through repacking, of ripe, diseased or damaged fruit. In the case of one of the claims—for 95 boxes "short delivered" on *Santa Magdalena* V68—Grace was able to show from Justamere's records that the only boxes missing were lost in repacking. In his accounting to the growers, Schwartz showed that all but 121 boxes had been sold; as to these he stated: "This cargo had a lot of ripe fruit. Note 121 totally lost in repacking." The claim against Grace, amounting to $285, was obviously spurious in this instance.

Justamere argues that Grace must have discriminated against it because concededly bananas were quite often damaged in discharge, other shippers collected for such claims, and no such claims, other than the one of November 11, 1965, were allowed Justamere. But, except for the latter claim, there was no evidence that Justamere ever submitted a claim for boxes damaged or destroyed in unloading. Justamere's brief to the contrary, the seven "shortage" claims purport to be only for "missing boxes." Either Justamere was extremely lax in its unloading and claims procedures, or it practically never lost any bananas in unloading mishaps. In this connection, it seems strange that six of the seven "shortage" claims, which are all dated more than a year after Justamere's shipments began, cover almost consecutive voyages starting March 25, 1965. The last claim related to *Magdalena* V68, one of the voyages with respect to which Grace waived guaranteed freight and charged only upon outturn, because of the strike of MEBA. Justamere was accordingly billed, and paid, only upon outturn, which did not include the fruit allegedly missing.

From the records of a company which sold bananas, and submitted claims, on behalf of several of Grace's banana shippers, it was shown that over the period from January 1965 to March 1966, 81 percent of claims presented had been paid by Grace. Justamere would contrast this with the rejection of all its seven shortage claims. There is no basis for comparison or contrast, however. The claims allowed were all for destroyed boxes or, as to two claims, damage from improper temperature. The only claim comparable with Justamere's shortage claims—one for "missing boxes"—was not allowed. The company official who presented the evidence confirmed the practice of setting aside boxes damaged by the unloading conveyors, going over them with a Grace representative on the spot (with whom they "battle back and forth" as to the number of boxes damaged), and signing an agreed statement to support each claim for damaged boxes. Justamere produced no evidence of its ever having submitted any such claims, although Grace produced the claim on Justamere's behalf which had been allowed in November 1965 for destroyed boxes.

Discrimination is not proved by showing only that claims of other shippers were allowed. The record does not establish any discrimination or preference as between Grace's handling of comparable cargo claims of Justamere and those submitted by others. Upon such evidence as there is as to the nature and substance of Justamere's claims and the way they were presented to Grace, it cannot be concluded that Grace's action with respect thereto was unjust, unfair, or arbitrary.

The "unauthorized dumping" claim

The parties' briefs refer to a claim submitted by Justamere in October 1965 which was not specified in complainants' bill of particulars as an instance of discrimination, but was among papers later supplied by Grace to Justamere, pursuant to arrangements for discovery. The claim is for the market value of 95 stems shipped on *Santa Mercedes* V40, and allegedly left on the dock by Justamere and destroyed without its authorization. A letter accompanying the claim says they were set aside "late Friday night, October 8, 1965, inasmuch as it was impossible to secure a truck at that hour," with "instructions" that they would be picked up early Monday morning. Monday morning they were found to have been "removed from the dock"—Justamere says it was informed that they had been dumped—wherefore Justamere requested Grace to pay it, promptly, the "market value of 5 cents per pound." Grace rejected the claim. Justamere points to it as a claim unpaid even though, it is seriously contended, a Grace employee had acknowledged its validity by endorsing it with the word "liability" followed by his initials; since a sheet of paper attached to the claim contains the following writing:

Liability
Nil

The contention that liability was thus conceded by someone whose initials were "Nil" is frivolous. Further, the freighting agreement provides:

If the Shipper fails to furnish trucks, lighters, carfloats and/or rail cars on dock promptly upon arrival of the vessel or otherwise refuse to take delivery of bananas discharged from the vessel whether or not during overtime hours, Saturdays, Sundays and holidays, Grace may discharge the bananas to dock and/or lighters and shall not be liable for any loss or damages resulting therefrom * * *

Grace's rejection of this claim does not furnish any support to complainant's allegations of discrimination.

The claim to relief under the "acts of God" provision of the banana freighting agreement

The complaint alleges that commencing in December 1964, and continuing until June 1965, there was sustained and unusual rainfall in the vicinity of Guayaquil, causing unprecedented flooding of banana plantations and destruction of roads and bridges; that this "catastrophe" was widely publicized and known to respondent; that the floods and consequent devastation constituted an "act of God" which seriously damaged the plantations supplying Justamere, directly and through inability of the growers to deliver fruit to the port; and that the disruption and devastation continued until September 1965 and still causes loss of production and interferes with normal transportation, among Justamere's growers.

By reason of this act of God, it is alleged, complainant was prevented from obtaining an adequate supply of bananas to fill the "minmum space" set forth in its banana freighting agreement; but Grace "did insist upon and assert its claim for discharge and differences in freight," refusing to recognize the relief to which complainant was entitled under the "acts of God" (as well as the "strikes") clause in the agreement.

This story was somewhat modified by Schwartz's testimony. Regardless of the allegations of the verified complaint, he said, the rainy season in Ecuador started in April; there was no weather problem when he contracted with Grace for additional space late in March 1965; and he first became aware of the extraordinary rainfall when he received newspaper articles dated April 11 and April 12, 1965, which told of severe floods affecting certain towns (not including Quevedo, where Justamere's growers were located) in the province of Los Rios. The articles said that plantations of cocoa, coffee, bananas, and corn had been destroyed, and that overland traffic between certain towns had been paralyzed. There is no evidence however, that the plantations of any of Justamere's growers suffered any damage, temporary or permanent, or that his growers had any transportation trouble. On the contrary, Justamere shipped full on every voyage after March 30, 1965, until June 24, 1965, after which shipments were suspended because of the MEBA strike. In May 1965, Justamere amended its agreement with Chilean Line to double its space commitment. By that time the rain was over and gone, and so were its effects.

Other contract holders, including Exportadora Bananera Noboa S.A. (Noboa) and others referred to by complainants as Grace's "favored friends," advised Grace of the weather trouble in April, and requested Grace to charge freight only on outturn during the "emergency," because of flood damage to plantations and roads which, it was claimed, caused most companies to have short shipments. Grace turned down the requests. In a telegram to Noboa, it stated: "After complete review of situation including overall loading performance *Santa Magdalena* V64 and *Santa Maria* V46 our position is that full freight per contract applies and other possible provisions not applicable these vessels." Justamere was evidently one of those shippers that contributed to the "overall loading performance" mentioned, since it shipped full during this period, and did not claim that weather damage interfered with its operation.

Faced with the latter fact, Schwartz testified that the effects of the April flooding became apparent after the MEBA strike, which ended in September 1965. The record, which includes voluminous government and other statistics, is overwhelmingly to the contrary. In September 1965, moreover, Schwartz had ascribed his inability to get fruit to a temporary condition caused by the MEBA strike; and in fact his chief difficulty, as we have seen, was the loss of his principal supplier's crop—not by flood or strike damage, but because it was contracted to be sold elsewhere.

Schwartz produced a somewhat ambiguous letter on the letterhead of an Ecuador Government agency, Direccion Nacional del Banano, which was dated February 16, 1966 (about 2 weeks before this proceeding was commenced), and was in reply to a letter from one Jorge Madinya, a promoter who acted for Justamere in Ecuador in certain phases of its operations. The letter from Madinya was not produced, and Madinya did not testify; neither, of course, did the writer of the proferred letter. The letter says that 1965 exports were 30 percent lower than in 1964, and further states: "Observing that in the final months of the year to which we refer the production was not sufficient to supply the export demand and this was due among other causes to the serious losses occasioned by the rigorous rainy season, that exceeded by a large margin the normal rainfall at this time of year. This rainfall * * * produced floods of the banana plantations, destruction of ways of communication, all of which was of grave damage for the production and to the grower of bananas, about which the national newspapers gave ample information." The information from the "national newspapers," so far as the record shows, had to do exclusively with local flooding in April; the letter cannot have intended, and is not alleged, to refer to rainfall in the latter part of the year. Further, official published statistics of Direccion Nacional del Banano show that total banana exports of bananas from Ecuador were at the highest levels of the year in September, October, and November 1965, the only months after March when Justamere had any supply difficulty; and that such exports to the United States alone were at their highest point of the year in October 1965, while September and November were exceeded only by March, April, and May. The official statistics also show that while Ecuador's total exports of bananas for the year 1965 were about 15 percent (not 30 percent) less than for the year 1964, such exports for the 3 months of September, October, and November were about 4 percent higher in 1965 than in 1964. This negates the contention that the supply of bananas was reduced during the period when Justamere did not utilize its full shipping space. It also tends to show that the increase in market price during this period, which discouraged Justamere's grower, Ajoy, from purchasing bananas in the open market, resulted from increased demand.

It is concluded that there is no credible evidence, either with respect to the banana supply in general or Justamere's sources in particular, to support a conclusion that performance of Justamere's contract with Grace (or full utilization of Justamere's space, which is not the same thing at all) was impeded, much less prevented, by any act of God—including without limitation weather phenomena, and their consequences, in Ecuador. In view of the facts shown to have existed, it is not necessary to consider whether, if acts of God had effected Justamere's particular sources of supply, it might have been excused from its obligation to pay freight when bananas were available from other sources, although at a higher cost, and the purposes of the freighting agreement were not completely frustrated.

Acts alleged to constitute general preference of other shippers

In addition to instances set forth above in which Grace is alleged to have given preference to others and to have discriminated against Justamere in similar circumstances, complainants cite other instances of alleged failure to require performance by others of their obligations under the banana freighting contracts, which they say contrasts generally with Grace's insistence upon strict compliance by Justamere.

One instance was a matter of $450, the full freight payable by Frutera Granja on *Santa Magdalena* V46, arriving August 13, 1964. Granja pleaded force majeure when his truck, carrying fruit to the port for loading on this voyage, went through a bridge; a following truck was also unable to cross the broken bridge, and the entire shipment was lost. Grace accepted this as a case of force majeure and waived dead freight on the voyage; under similar circumstances it had not enforced collection of $336 from the shipper Joselow, one of whose trucks had missed the *Magdalena* V56 sailing in December 1964. This was the only waiver in the case of Granja, who paid dead freight on a number of voyages before his unused space was voluntarily relinquished to Justamere in March 1965.

Noboa was allowed a claim of $538.20 under the act of God clause when a barge sank while carrying Noboa's bananas to be loaded to Grace's vessel (*Santa Maria* V46). Noboa purchased fruit to take the place of that lost, but was unable to pack all of it in time for the vessel's departure. Noboa lost 4,100 boxes of bananas in the sinking; Grace waived dead freight equivalent to the 900 boxes which could not be packed in time. The amount waived was about four-hundredths of 1 percent of the $1,328,990 in freight paid by Noboa during its contract period.

Another incident involved I. B. Joselow. He did not load on *Santa Mariana* V74, arriving January 6, 1966, claiming that he did so because of a Government decree fixing minimum prices to planters, and that he was excused from paying guaranteed freight under the provision of his contract relating to acts of God, governments, etc. Grace did not accept the excuse, but eventually wrote off the unpaid dead freight charge of $2,412.50 when Joselow, whose contract expired 2 months later, did not apply for a contract for the 1966–68 period. This incident occurred after Justamere's contract had been canceled for good cause, so it was hardly an act of discrimination against Justamere. It may be that Grace should have enforced its claim against Joselow's bond, even if it cost more in time, trouble, and lawyer's fees than the amount recoverable. But with Joselow going out of the business, no other shipper could have suffered any competitive disadvantage because Grace took the path of least resistance—particularly Justamere, which was itself out of the business and in default by upwards of $50,000 at the time.

In December 1965, Grace granted a temporary reduction in guaranteed freight to all shippers because of seasonal market conditions in the United States, following a request by Noboa. It will be recalled that Grace had likewise made a temporary concession to all shippers, including Justamere, in December 1964, "in view of the strong representations made to Grace Line by shippers of bananas under similar contracts as to the market conditions presently prevailing." It was solely a matter of good business judgment to make such general concessions under the circumstances, notwithstanding the Commission's authorization, in the Order, of firm 2-year advance booking agreements. Banana exports from Ecuador were in fact about 31 percent lower in December 1965 than in November 1965, and about 28 percent lower in December 1964 than in November 1964. Nevertheless, complainants call the seasonal concession of December 1965, which was effective on three voyages beginning 6 weeks after Justamere's last shipment, the "final stroke to the picture of deliberate, calculated and vengeful discrimination against Arthur Schwartz. * * * This episode underscores graphically Grace Line's Janus-faced attitude, the smiling countenance reserved for its favored shippers, and the frown invariably cast upon Justamere. It barely waited for the corpse of Justamere's enterprise to cool before scuttling to alleviate Noboa's woes, hastening to bestow the very relief it had coldly and deliberately withheld until Arthur Schwartz had been successfully disposed of."

This contention is as absurd in substance as in form. The timing of the concession in late December 1965 was obviously determined (as it had been in December 1964) by seasonal market conditions in the United States, and not by the cancellation of Justamere's contract in the middle of November. The reason for the general seasonal concession was quite the opposite of that advanced by Justamere as ground for a special concession to itself. In the one case it was a matter of too many bananas for the existing consumers' market to absorb—a condition which affected the entire trade and all shippers proportionately. In Justamere's case it was the failure of a single contract holder (allegedly because of a shortage of bananas) to utilize the space reserved for it by contract, at a time when the performance of all other shippers demonstrated that there was no general problem of supply or demand.

An equally imaginary grievance has to do with certain shipments of frozen shrimp in space normally used for bananas. The space allotted to Banana Distributors, Inc., and Standard Fruit Co. included in each case a freezer compartment which, unlike the rest of the vessels' refrigerated space designed for the carriage of bananas, could be brought down to below-zero temperatures, and was thus suitable for carrying frozen cargo as well as the mildly refrigerated bananas. On several occasions, by arrangement with the affected shipper, Grace utilized one of these freezer compartments to carry frozen shrimp, a high-rated cargo. To make up for the space thus taken, Grace sometimes, but not always, arranged for the use by such shipper of space not being used by another contract holder (such as Frutera Granja), who would otherwise have paid dead freight, and adjusted freight charges accordingly. Justamere argues that the transactions involving the freezer space were somehow discriminatory as to Justamere because Justamere was never given the opportunity to release space for or in connection with the carriage of shrimp. The contention is without merit. The use of the freezer compartments for shrimp was in every case for Grace's convenience and not to accommodate any banana shipper. Further, all except one of the voyages on which the freezer space was utilized occurred during the period before Justamere's contract was amended to increase its space allocation, when it was shipping full and wanted more space. The exception was the first voyage after the MEBA strike. In that case shrimp was loaded in the freezer compartment in Standard Fruit's space while the ship lay at Guayaquil during the strike, when Grace had no reason to believe that Justamere or anyone else would have difficulty in filling his banana space when the strike was over; and in fact no one did except, as Schwartz told Grace after the vessel had sailed, Justamere. Justamere never evinced any desire to surrender any of the space reserved for its use; it just wanted to be excused from paying for the portion it did not use on any voyage. Justamere's space could not have been used for shrimp in any event; and there is nothing to suggest that Standard surrendered its freezer space (which represented about 9 percent of its total space) for any reason other than to accommodate Grace. No preference of or discrimination against any banana shipper can be conjured up from the transactions involving the use of the freezer compartments for the carriage of shrimp.

The failure to offer complainants a banana freighting agreement for the period 1966–68

Grace's several banana freighting agreements for the 1964–66 period expired, by their terms, with the last sailing from Ecuador in February 1966; a fact necessarily known to Justamere as a contract holder, and to Schwartz. The next 2-year period would begin, therefore, with the first sailing in March 1966; necessarily, applications for space should have been made well before then.

In February 1966, Grace sent a written notice to those then shipping bananas aboard its vessels from Guayaquil to New York, and to others who had expressed an interest in shipping bananas in that trade. No such notice was sent to Schwartz or Justamere. Neither of them was then shipping nor, it is found, had expressed any definite interest in a new contract, although Schwartz testified that he was in "constant communication" with Grace representatives after the 1965 cancellation and had asked that they send him a "form."

Grace did not complete its allocations of space for the 1966–68 booking period until March 9 or 10. Prior thereto it had not received any application from Schwartz or Justamere. On February 28, 1966, complainants served their original complaint in this proceeding; it does not contain any allegations with respect to the 1966–68 booking period then about to commence. In response to a demand for a bill of particulars of the amended complaint served in December 1966, Schwartz produced a copy of a letter dated March 11, 1968, addressed to Grace Line Inc. (to no one's particular attention, as was Justamere's usual custom in its correspondence with Grace) which he alleges was mailed to Grace on or about that date, but which Grace has never been able to find in its files. The letter was as follows:

In accordance with your recent offerings of refrigerated space for bananas under new forward booking arrangements, and confirming my prior request by telephone for space, I take this opportunity to formally request you for an allocation of approximately 26,000 cubic feet.

I point out again that despite the fact that I have been qualified by the Maritime Board as a banana importer, you have failed to send me any written notice of the availability of space under the new contracts.

Very truly yours,
JUSTAMERE FARMS, INC.
Arthur Schwartz

The examiner has serious doubts as to whether the letter was ever sent, and is satisfied that it was not received by Grace. Even if it was sent and received, however, it was too late to be of any material significance, since, as Schwartz and Justamere had reason to expect, the allocation of space had been completed.[11] In May and June 1966, Schwartz and his attorney made several requests for space, by letter and orally; they did not mention the March 11 letter in their correspondence. In May 1966 Schwartz claimed to have a request from "an agency of the Ecuadorian Government" to "resume my selling arrangements in behalf of these small growers." Grace pointed out that, as Schwartz knew, the line's banana space had been completely sold out under duly authorized banana freighting agreements; and further stated:

> * * * Moreover, in the absence of convincing proof to the contrary we must assume that a deliberate continued failure to pay minimum freight charges; the direction to the bonding company to refuse payment on its bond; and the failure to date to pay us either past-due freight charges or damages consequent to our cancellation of your Banana Freighting Agreement continue to render Justamere Farms and you insufficiently responsible financially to undertake banana carriage on our vessels.

According to Justamere's Federal income-tax return, as of January 31, 1966, its accounts payable were $441,533, against accounts receivable of $4,050 and cash of $2,538. Current liabilities exceeded current assets by $496,000. Even if "other investments" of $196,586—constituting all its remaining assets other than land and buildings—be included as current assets, Justamere's current liabilities exceeded current assets by more than $200,000, although it had reported a net profit for each of the 2 fiscal years just past, which included the period of its banana freighting agreement and the cancellation thereof. Prior to the latter period, Justamere had lost $176,000 on security transactions, resulting in a net operating loss of $154,000, in the year ending January 31, 1963, and had had a net operating loss of $48,000 in the year ending January 31, 1964. As of January 31, 1966, its tax return showed a capital deficit of more than $250,000.[12]

Summary Discussion

The theory of the complaint is that Grace, in order to bring about the cancellation of Justamere's banana freighting agreement, engaged in unfair, unjust, and discriminatory acts deliberately designed

[11] In dockets 771 and 775 (5 F.M.B. 615), the Commission noted, at p. 626: "We are mindful that once the system is initiated, qualified applicants for space would be foreclosed from any proration in the space until the end of any given period."

[12] With its application dated Feb. 13, 1964, for the 1964–66 forward booking period, Justamere submitted a "statement of assets and liabilities" as of June 30, 1963, showing an excess of assets over liabilities of nearly $230,000. According to its Federal income-tax return for the year ended Jan. 31, 1965, however, it had a capital deficit at the beginning of that year (i.e., at Jan. 31, 1964) of $291,708; and its current liabilities then exceeded current assets (including therein "other investments") by over $312,000. Justamere made no effort to reconcile or explain these figures.

to drain Justamere's capital so as to make it impossible for Justamere to meet its contract obligations, and thus enable Grace to invoke the termination provisions thereof. The complaint alleges that Grace, knowing that Justamere would thereby be deprived of the necessary capital necessary to operate its "banana importing business," (1) refused to adjudicate and pay its claims equitably and fairly, while discriminatorily according fair and equitable consideration to the claims of other shippers; and (2) refused to recognize the relief to which Justamere was entitled under the "strike" and "act of God" provisions of the banana freighting agreement.

Complainants do not deny that Justamere breached its agreement by its failure to pay freight and stevedoring charges due thereunder. This is consistent with the theory of the complaint. The record does not, however, support the major premises of the theory: that Justamere's defaults resulted from its loss of capital, which in turn was caused by respondent's acts. There was no proof, and no findings are proposed, with respect to any deprivation or reduction of Justamere's capital. On the contrary, Schwartz testified that he had sufficient capital, at all times, to continue the business; and that he didn't need to borrow any money from sources available to him. The alleged losses which Justamere sought to recover by claims or requests for "relief" were in fact passed on to and borne by the growers who shipped in Justamere's space; and moneys representing the defaulted payments admittedly due Grace did not go to the growers but were held by Justamere, thus enhancing its working capital.

If we assume, arguendo, that Justamere would have been deprived of essential working capital if it had paid the freight and stevedoring charges it was legally bound to pay under its agreement, and that it was therefore justified in withholding payment of freight and stevedoring to the extent of valid claims for relief under its agreement, we are met by the fact that, upon the record, there were no such valid claims. As for cargo damage claims, those not clearly barred by contract were of doubtful validity at best, as far as the record reveals, and in any event aggregated less than 9 percent of Justamere's defaulted indebtedness.

All this being so, complainants in their brief have abandoned the basic allegations of their complaint, except for the unsupported assertion that "all of Grace Line's actions were deliberately calculated to force Justamere to its knees, until such time as it could be legally expelled." The theory now seems to be that Justamere was "evicted as a shipper" on Grace's vessels not by denying Justamere its rights under the banana freighting agreement and causing it to dissipate its capital, but solely through the granting of preferences to other contract holders. Complainants do not undertake to establish any causal connection between any such preferences and the defaults of Justamere which led to the cancellation of its banana freighting agreement.

The record reveals one instance in which it may be found that, as a matter of law, Grace discriminated among contract holders similarly situated, to the disadvantage of Justamere (and at least one other contract holder) and to the advantage of other contract holders. That instance was the forgiveness of "dead freight" to the majority of contract holders, but not to Justamere, on three "ILA" voyages in January and February 1965— *Santa Mercedes* V20, *Santa Maria* V40, and *Santa Mercedes* V22. It appears, however, that the disadvantage to Justamere by reason of this discrimination amounted to $96. Even if it were many times that amount (and complainants do not challenge respondent's computation) it would not have justified Justamere's repeated defaults. Justamere did not, and does not now, ask that it be given the same treatment as other shippers on these three voyages; instead it has asserted, and had asserted at the time, claims for $6,400 for cargo damage, which are and were patently without merit.

All the other instances of alleged preference, so far as they are of any substance whatever, are isolated instances of permitting contract holders to avoid the payment of relatively small amounts which were probably collectible under the contract, but as to which there was a more or less colorable basis for relief. There is nothing in the record to suggest that any of these incidents in fact disadvantaged, or was intended to disadvantage, Justamere. They do not resemble, in kind or magnitude, the extravagant claims asserted by Justamere.[13]

Justamere was granted relief from its contract obligation to the extent of a waiver of $1,462 in guaranteed freight upon the occasion of the "transitional" voyage at the time Justamere's space was expanded; it developed that Justamere had been too optimistic in committing itself for space on this voyage, and the concession could not have affected other shippers. Also, Grace waived, and as a practical matter had to waive, all freight on *Santa Magdalena* V80, on bananas consigned to Justamere, which it accepted at Justamere's request

[13] For all contract holders other than Justamere, the total difference between freight billed and freight paid is $53,731. This includes all freight waived after the event (most of it arises out of the three ILA voyages) as well as amounts withheld by shippers and uncollected. The figure represents seven-tenths of 1 percent of total freight billings to these shippers, all of whom paid all stevedoring charges without exception. Upon the same basis, for Justamere the difference between freight billed and freight paid is $37,284, of which $1,462 was waived. This represents more than 17 percent of the freight billed to Justamere. Besides, Justamere defaulted on $14,879 in stevedoring charges; the total amount unpaid is $52,163, or more than 24 percent of total freight billed to Justamere pursuant to its agreement. Twenty-four percent of the freight billed to all other contract holders would amount to nearly $2,000,000.

following the cancellation of Justamere's agreement. On the other hand, Grace rejected requests of the allegedly preferred shippers for relaxation of their obligations under their agreements where it found that they were not in order.

Complainants' argument of prejudice against them is based in part upon their own characterization of Schwartz as an "irritant," "unquestionably contentious and disputatious." [14] Complainants also allege that Scharwtz has been the object of Grace's "longstanding resentment and animosity" because of his 1955 complaint in docket No. 775, which (together with the complaint in docket No. 771) led to the Commission's order.[15] In his dealings with Grace, Schwartz has not displayed qualities consistent with harmonious relations and the mutual trust and confidence desirable among parties who must work together under an arrangement such as the 2-year banana freighting agreement. Cf. *Trusteed Funds* v. *Dacey*, 160 F. 2d 413, 421 (1st Cir. 1947), and *McClayton* v. *W. B. Cassell Co.*, 66 F. Supp. 165, 170 (D.C. Md. 1946). But even if Grace may have preferred not to do business with Schwartz, it does not follow that he was subjected to "prejudice" as that word is used in the statute. There is no evidence, and no reason to assume, that animosity toward Schwartz had anything to do with such concessions as others were able to worm out of Grace, or that it influenced Grace's rejection of Justamere's always dubious, frequently disingenuous, and for the most part preposterous, claims and demands.

Complainants' main brief, and their proposed findings, do not mention the matter of respondent's failure to offer them space for the 1966–68 period, allegedly in violation of the Order and section 16 of the Act. This cause of action, which asks some $324,000 in reparation, is given brief mention (without any reference to the record) in com-

[14] Many of Schwartz's ventures have been attended by serious disputes or litigation. After a banana venture with Isbrandtsen Steamship Co. in 1952, he sued for over a million dollars and settled out of court. A banana agreement with Grancolombiana Line in 1963–64 (in Justamere's name) became the subject of litigation still pending. Two ship charters eventuated in the arbitration of claims against the owners. His banana freighting agreement with Chilean Line came to an end with claims and counterclaims which are still pending. He began proceedings against one of his customers under the Perishable Agricultural Commodities Act. He is negotiating settlement of a dispute with a partner in a venture for banana shipments from Ecuador to France. A dispute over cocoa beans brought him to arbitration. In 1955 a judgment was outstanding against him in a Florida court in the amount of $46,000. He now has a right-of-way dispute in court in New Jersey. He left one of the Wall Street brokers by whom he was employed because of a dispute about a sale of securities, in which he claimed some thousands of dollars. In 1964 he asked Grace to deliver to Justamere some bananas belonging to another shipper who, he claimed, was attempting to break a contract with Justamere. He testified that the growers with whom he dealt in connection with his 1964–66 Grace agreement owe him money—a great deal more than he owes Grace.

[15] However, Banana Distributors, Inc., which initiated the 1955 litigation with its complaint in docket No. 771 several months before Schwartz served a similar complaint, is one of Grace's favored shippers, according to complainant's brief.

plainants' reply brief, where it is alleged that Grace "was merely continuing its existing policy of discrimination against complainants by refusing to consider him in any respect during the 1966–68 freighting period." As indicated above, it is found that there was no such policy of discrimination against complainants.

Justamere's existing defaults under its prior contract were sufficient to justify a refusal by Grace to enter into further contractual relations of the same sort with Justamere or Schwartz, and *a priori* to justify its failure to offer space to Justamere or Schwartz or to send them any notification of its readiness to accept applications for the 1966–68 period, even if either of them had given timely indication, as the Order implicitly requires, or definite interest in making application. Nothing could have been more repugnant to the qualification of a shipper under the Order than a continued failure and refusal to pay, or permit to be paid on its behalf, its outstanding freight and stevedoring bills. This is so entirely apart from the question of Justamere's ability to pay—which, in view of Justamere's financial condition as presented to the Internal Revenue Service, is a very serious one.

The Commission's 1959 finding, in dockets 771 and 775, that Schwartz was then a qualified shipper to whom Grace should offer space pursuant to the Order was of course not conclusive for all time, as Schwartz has contended. The Order includes certain standards for determining the qualifications of applicants, and the Commission manifestly did not intend to exempt Schwartz from continuing compliance with these or other reasonable standards. Whatever Schwartz's potential ability may have appeared to be at the time of the Commission's decision, Schwartz and Justamere have now shown themselves not to be "qualified shippers" within the meaning of the Commission's Order.

In dockets 771 and 775, the Commission was concerned with the fair and reasonable proration of shipping space among shippers, existing and potential, in the relevant trade. It recognized the danger of any requirement that the carrier be required to enter into the prescribed forward booking contracts indiscriminately, and put appropriate safeguards in the Order. These included provisions relating to the financial and commercial competence of applicants (including specifically their ability to purchase bananas), the payment of dead freight to assure utilization of space allocated, prohibitions against the transfer of rights secured under the agreement, and the furnishing of a substantial performance bond. Such provisions were not to protect the carrier alone. They provided some assurance that space needed to fulfill the genuine demands of the trade would not be diverted to in-competent, irresponsible, or otherwise unqualified operators who would not make the fullest possible use of it, to the common detriment of the carrier, fully qualified shippers, and the commerce of the United States.

Justamere's operations were quite different from what the Commission's decision contemplated. Its avoidance of responsibility was not confined to its failure to pay its bills. Justamere did not purchase bananas, as Schwartz had told the Commission, in his complaint in docket 775, he was at all times prepared to do. The shipping space reserved to Justamere through its "freighting agreement" was not used to transport Justamere's goods, but was parceled out by Justamere, without regard to the qualification standards of the Order, to subcontractors who were the real shippers and to whom Justamere attempted to transfer substantially all the risks of the enterprise, in return for a theoretical possibility of profit which never materialized. Justamere used its "freighting agreement" to establish itself as the growers' exclusive selling agent; as Schwartz testified, he was "definitely a commission agent." Justamere made no investment in the business, other than working capital to finance advances to growers pending sale of their shipments; it owned no trucks or storage or other operating facilities. It had no personnel in Ecuador to acquire or inspect fruit or supervise its loading. Moreover, Schwartz testified that while the "large exporters" buy the best possible quality and reject everything in between, he "wouldn't throw out and reject every stem." In fact he did not see the bananas until they arrived at the Port of New York. "If they were reasonably good, I could sell them to my trade perhaps at 10, 25, 20 below the high priced monopolistic market." This contrasts with the Commission's conviction (5 F.M.C., pp. 624, 625) that bananas of different shippers can be commingled in the same compartment, since "all shippers rigidly inspect their fruit prior to loading."

Schwartz's operations during the 1964–66 period, carried out through Justamere Farms, Inc., did not redound to the benefit of the growers, who still owed him money according to Schwartz and at least one of whom was still trying to collect his agreed advances from Schwartz; they left Grace with more than $50,000 in unpaid freight and stevedoring bills; and they resulted in the diversion of refrigerated space, neither used nor paid for, which should have been available for the use of qualified shippers.

It is found and concluded that complainants Justamere and Schwartz were not qualified shippers within the meaning of the Commission's Order at the time when, pursuant to the said Order, respondent offered refrigerated space for the carriage of bananas on its vessels from Ecuador to New York for the 2-year period beginning in March 1966 and ending in February 1968.

ULTIMATE CONCLUSIONS

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record herein, it is found and concluded that:

1. The cancellation by respondent Grace Line Inc. of its banana freighting agreement with complainant Justamere Farms, Inc., dated February 27, 1964, as supplemented and amended, did not violate any provision of the Commission's Order issued May 4, 1959, in the proceeding entitled *Arthur Schwartz* v. *Grace Line Inc.*, 5 F.M.B. 615, 627.

2. The said cancellation was for good cause and in accordance with the terms and conditions of said agreement, and did not subject, or result from the subjection of, complainants Justamere and Arthur Schwartz, or either of them, to any undue or unreasonable disadvantage or prejudice or discrimination, and did not make or give or result from the making or giving of any undue or unreasonable preference or advantage, in violation of section 16 First of the Shipping Act, 1916; and did not violate any other provision of the said Act.

3. Respondent Grace Line Inc. did not violate any provision of the Commission's said Order issued May 4, 1959, by omitting or refusing to offer refrigerated space to complainants or either of them for the forward booking period beginning in March 1966 and ending in February 1968 or for any portion of said period.

4. The omission or refusal of respondent Grace Line Inc. to offer refrigerated space to complainants, or either of them, for the said forward booking period or any portion thereof did not subject either complainant to any undue or unreasonable prejudice or disadvantage or discrimination, or make or give any undue or unreasonable preference or advantage in violation of the provisions of section 16 First of the said Act; and did not violate any other provision of the said Act.

An appropriate order dismissing the complaint herein will be entered.

(Signed) WALTER T. SOUTHWORTH,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–5

PROPOSED RULE COVERING TIME LIMIT ON THE FILING OF OVERCHARGE CLAIMS

Decided May 27, 1969

Present voluntarily established rules of carriers prescribing time limits for the presentation to them of claims for adjustment of freight charges not shown to be unreasonable, unjustly discriminatory, or otherwise unlawful.

Commission proposed rule to prohibit carrier rules providing a time for presentation of claims to carriers of less than 2 years from date of shipment not promulgated as sufficient showing for necessity of such rule not demonstrated.

Carrier limitations on time for presentation of claims to them cannot be used in any way to limit or condition right of recovery in reparation action based on such claims brought before the Commission within 2 years of event upon which reparation claim is based.

Proceeding discontinued.

Paul S. Aufrichtig for Petitioner Ocean Freight Consultants, Inc.

Burton H. White, *Elliott B. Nixon*, and *Randolph W. Taylor* for Interveners West Coast of Italy, Sicilian and Adriatic Ports/North Atlantic Range Conference (WINAC) and Continental North Atlantic Westbound Freight Association.

Edward D. Ransom, *Robert Fremlin*, *Elkan Turk*, *and Thomas E. Kimball* for Intervener Pacific Westbound Conference.

Elmer C. Maddy, *John Williams*, and *Carl T. Tursi* for Interveners North Atlantic Baltic Freight Conference, North Atlantic Continental Freight Conference, North Atlantic French Atlantic Freight Conference, Far East Conference, North Atlantic United Kingdom Freight Conference, North Atlantic Mediterranean Freight Conference, Atlantic & Gulf/Panama Canal Zone, Colon & Panama City Conference, Atlantic & Gulf/West Coast of Central America & Mexico Conference, Atlantic & Gulf/West Coast of South America Conference, East Coast Colombia Conference, Havana Steamship Conference, Havana Northbound Rate Agreement, Leeward & Windward Islands

& Guianas Conference, Santiago de Cuba Conference, United States Atlantic & Gulf-Haiti Conference, United States Atlantic & Gulf-Jamaica Conference, United States Atlantic & Gulf-Santo Domingo Conference, United States Atlantic & Gulf-Venezuela and Netherlands Antilles Conference, West Coast South America Northbound Conference, Atlantic and Gulf/Indonesia Conference, Atlantic and Gulf/Singapore, Malaya and Thailand Conference, Calcutta, East Coast of India and East Pakistan/U.S.A. Conference, India, Pakistan, Ceylon and Burma Outward Freight Conference, South and East Africa Rate Agreement No. 8054, West Coast of India and Pakistan/U.S.A. Conference, River Plate and Brazil Conference and U.S. Atlantic & Gulf/Australia-New Zealand Conference.

Ronald A. Capone, *Robert Henri Binder*, and *Stuart S. Dye* for Intervener North Atlantic Westbound Freight Association.

John P. Meade, *Leonard G. James*, and *F. Conger Fawcett* for Interveners Latin America/Pacific Coast Steamship Conference, Outward Continental North Pacific Freight Conference, Pacific Coast European Conference, Pacific Coast River Plate Brazil Conference, Pacific/Indonesian Conference, and Pacific-Straits Conference.

Dudley J. Clapp for Intervener Military Sea Transportation Service, Department of Defense.

Abraham Sterman for Intervener United Nations.

Barrie Vreeland for Intervener Shippers' Conference of Greater New York, Inc.

Desmond B. Goodwin for Intervener Burroughs Corp.

Robert Sergeant for Intervener Lamp and Shade Institute of America.

Mark Tannenbaum for Intervener Mark Tannenbaum Company.

Robert E. Vantine for Interveners Bloomingdale Bros., the New York Retail Traffic Association, and National Retail Merchants Association.

Paul T. Smith for Intervener United States General Accounting Office.

Donald J. Brunner, *E. Duncan Hamner*, and *Robert P. Watkins*, Hearing Counsel.[1]

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[1] The following were granted intervention but did not otherwise participate in the proceeding: Department Store Traffic Coordinating Corp., Government of Israel Supply Mission, Toscany Imports Ltd., Italy-America Chamber of Commerce, Commerce and Industry Association of New York, Inc., ToscPort International Corp., Sea-Land Service, Inc., Foster Wheeler Corp., International Association of Great Lakes Ports, Gulf Oil Corp., Gulf/Associated Freight Conferences, Gulf/Mediterranean Ports Conference, Gulf/United Kingdom Conference, and Gulf/Scandinavian & Baltic Sea Ports Conference.

REPORT

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

PROCEDURAL BACKGROUND

This proceeding is before us on exceptions to the initial decision of Examiner John Marshall. The proceeding was originally instituted on March 27, 1965, to examine the validity under the Shipping Act, 1916 (the 1916 Act) and the Intercoastal Shipping Act, 1933 (1933 Act), of certain restrictions imposed by carriers subject to our jurisdiction limiting the time within which they would voluntarily consider claims for adjustment of freight charges. The Commission alleged that the restrictions might be contrary to:

(1) Section 22 of the 1916 Act by establishing a period for limitation of claims other than the 2-year period provided therein;

(2) Section 18(b)(3) of the 1916 Act and section 2 of the 1933 Act by allowing a carrier to retain freight charges greater than those specified in its tariff;

(3) Section 17 of the 1916 Act as constituting an unjust or unreasonable practice.

Specifically, promulgation of the following rule was proposed:

> Common carriers by water as defined in section 1 of the Shipping Act, 1916, as amended (46 U.S.C. 801), shall not by tariff rule or otherwise limit to less than 2 years after the date of shipment the time within which claims for adjustment of freight charges may be presented.

We did not, however, promulgate the rule. In our earlier report, "Time Limit on the Filing of Overcharge Claims," 10 F.M.C. 1 (1966), we distinguished between a regulation which would limit to less than 2 years the time within which a person may file a complaint under section 22 of the 1916 Act or which would attempt to place conditions on that right, on the one hand, and on the other hand, those regulations which merely limit to less than 2 years the time within which the carriers would voluntarily consider claims for freight adjustments presented to them. We found the former to be contrary to the congressional policy embodied in section 22 which guarantees to claimants the right to pursue actions for reparation before the Commission within the 2-year period from date of violation free from carrier-imposed restraints.[2] We concluded that a limitation upon the time during which

[2] Although so far as appeared no carrier actually had a rule of this type, the arguments raised by the carriers in the course of the proceeding indicating their position that such rules would be lawful required that the Commission clarify the situation to insure that shippers and consignees would be guaranteed their rights to file claims for and in proper cases collect reparation free of any possible restraints which might be imposed by carriers in the future.

a carrier will voluntarily consider a claim did not of itself necessarily prevent the shipper or consignee from filing for or recovering reparation as provided in section 22, and since the proceeding had been limited to written comments and oral argument before the Commission, there was no evidence to indicate that these limitations had operated in a manner contrary to the reparation procedure provided in section 22. Similarly, we found section 18(b)(3) of the 1916 Act and section 2 of the 1933 Act would not outlaw the carrier-imposed time limitations unless it could be shown that the limitations had the effect of preventing recovery of just claims under section 22 of the 1916 Act. Finally, we observed that the second paragraph of section 17 of the 1916 Act was not applicable to practices of the type under investigation, since it related solely to practices involving forwarding and terminal operations. The proceeding was discontinued.

Ocean Freight Consultants, Inc. (OFC), a firm providing an ocean freight auditing service, petitioned on July 25, 1966, for reopening of the rulemaking proceeding, the institution of a Commission investigation, or such further proceedings as might be necessary to prohibit the present practices of carriers with respect to claims for adjustment of freight charges, and the adoption of the proposed rule.

We requested further comment from interested persons indicating (1) the sections of the 1916 Act under which the existing carrier-imposed time limitation rules were challenged and under which the proposed rule should be promulgated, together with a full statement of the facts and law relied upon, and (2) the type of hearing required if the proceeding were reopened.

Various shippers, shipper organizations, and OFC filed comments indicating their dislike for certain carriers' practices, and alleging violation of various sections of the 1916 Act. The Commission reopened the proceeding, setting it down for full evidentiary hearings before an examiner. The issues presented by the reopened proceeding are:

Whether the present carrier time limitation rules—

1. Have resulted in or will result in unfair or unjust discrimination in the adjustment and settlement of claims contrary to section 14 Fourth;

2. Have resulted in or will result in unjust discrimination, detriment to the commerce of the United States, contrariness to the public interest, or the failure or refusal to adopt and maintain reasonable procedures or have prompt and fair hearings and consideration of shippers' requests and complaints under section 15;

3. Have resulted in or will result in undue or unreasonable preference or advantage or undue or unreasonable prejudice or disadvantage contrary to section 16 First;

4. Have resulted in or will result in retention of unlawful charges by carriers under section 18(b)(3) of the 1916 Act and section 2 of the 1933 Act;

5. Have resulted in or will result in preventing shippers from filing for or recovering reparation pursuant to claims under section 22; and

6. Necessitate the promulgation of the proposed rule under section 43.

Situation With Respect to Carrier-Imposed Time Limitations

Although there is no "standard" carrier-imposed time limitation provision, nearly all provide for 6 months from shipment as the time within which claims based on alleged overcharges must be presented to the carriers (called generally herein, "6-month rules"). A few tariffs of carriers operating in our domestic offshore commerce provide for greater or lesser periods. Many carrier rules also provide that claims based on "weight" or "measurement" (a few add "description") will not be considered unless presented before the shipment leaves the carrier's possession, while some make consideration after such time a matter of carrier discretion.

Only 22 of 76 carriers in the domestic offshore trade with tariffs on file with the Commission have overcharge time limitation rules; of 132 conferences in the foreign commerce of the United States with tariffs on file with the Commission about half (65) have no time limitation rule. Of the remaining 67, 45 are outbound and 22 are inbound. There are nonconference carriers which have time limitation rules and there are conferences which have no such rules but whose individual members may.

The Initial Decision

In his initial decision, the examiner concluded that the carrier-imposed time limitations had not violated and were not likely to violate either sections 14 Fourth, 15, 16, and 18(b)(3) of the 1916 Act or section 2 of the 1933 Act. He further concluded that the limitations did not preclude shippers from filing for or recovering reparation under section 22. He, therefore, found no necessity for the promulgation of the Commission proposed rule under section 43 of the 1916 Act. Additionally, the examiner concluded that in any case the Commission has no jurisdiction to promulgate any rule prescribing the time within which carriers must consider claims presented to them for adjustment of freight charges.

Exceptions have been filed to the initial decision alleging that each of the above-mentioned findings and conclusions of the examiner is incorrect as being contrary to law and/or the evidence and testimony presented in the proceeding. Exceptions are also taken to the examiner's exclusion of certain proffered evidence and testimony from the record in this proceeding as well as his failure to take "official notice" of certain matters. Except for the position taken by the examiner on our jurisdiction to promulgate any rule governing carrier-imposed time limitations, our conclusion generally agrees with his.

Authority To Promulgate Rule

All parties excepting to the initial decision take issue with the examiner's conclusion that regardless of what the effects of the carrier time limitation rules were shown to be, the Commission lacks the authority to promulgate its proposed rule. These proponents of our proposed rule contend that the Commission has broad rulemaking powers authorizing it to promulgate a rule relating to the subject matter of any section of its statutes irrespective of a showing that such rule is needed to prevent violations of a type which has occurred in the past or is likely to occur in the future. Additionally, they urge that even if the Commission's rulemaking powers are not so broad, the carrier time limitation rules are violations per se of section 18(b)(3) of the 1916 Act and section 2 of the 1933 Act, because adherence to them can only result in the retention of greater compensation for the transportation service rendered than that specified in the tariff whenever overcharges are made and no claim is presented to the carrier within the specified time. Finally, the argument is made that the language of section 22 of the 1916 Act and the interpretation by courts and administrative agencies of similar statutes establishing limitation periods indicate Congress in section 22 enunciated a public policy outlawing carrier limitations of less than 2 years on consideration of overcharge claims.

Opponents of our proposed rule urge that the examiner was correct in his conclusion that we lack the authority in any case to promulgate the proposed rule because there is no specific authority to promulgate rules relating to the time within which carriers must consider claims in the statutes we administer. They point to the Interstate Commerce Commission and its experience under the Interstate Commerce Act and argue that since the shipping acts and the Interstate Commerce Act are to be similarly construed (see *U.S. Navigation Co.* v. *Cunard S.S. Co.*, 284 U.S. 474 (1932)), the presence of specific time limitations in the Interstate Commerce Act and the absence in our statutes should compel the conclusion that we are without jurisdiction over carrier-imposed time limitations. Alternatively, the carriers assert that, even assuming the Commission had the authority to prohibit time limitations if they violated the statutes we administer, they may not be prohibited on the theory that they are per se violative of sections 2 and 18(b)(3).

The Commission has carefully reviewed the reasoning which led the examiner to conclude that we were without jurisdiction to promulgate a rule governing the time within which carriers subject to our jurisdiction will voluntarily accept for consideration claims for freight adjustments. We have also considered the arguments of the parties, both those in support of and those opposing the conclusion of the examiner. Nothing presented here requires that we change our conclusions as set forth in our prior report in this proceeding. (10 F.M.C. 1)

As for the attempted analogy between the Interstate Commerce Act and the statutes we administer, we have already said in response to much the same argument:

> The practice of the ICC prior to the amendments of the statutes under which it operates providing that claims against carriers and forwarders had to be made and that actions on such claims had to be brought within certain time limitations is not instructive for our purposes. (Ibid. at 5)

We might also reiterate that our decision not to promulgate the rule at this time is not to be interpreted to allow carriers in any way to limit the right of a shipper to file his claim under section 22 of the 1916 Act, including but not limited to such matters as attempting to condition the filing of a complaint with us upon a prior filing with the carrier.

"Necessity" for Proposed Rule

Proponents of the proposed rule make two basic attacks on the present carrier-imposed limitation provisions, one relating to the unlawfulness of the periods established by these provisions, and the other concerning the allegedly inequitable manner in which these provisions have been applied; both of which, they allege, demonstrate the necessity for the proposed rule.

Lawfulness of the Limitation Periods

Proponents of the proposed rule maintain that shippers are unable to have their files audited until after carrier limitation periods have expired and are thus unable to file within the time allowed. Additionally, they allege that claims are often not acknowledged and, if filed after the limitation periods have expired, are not considered, even if acknowledged to be valid. Delays in settlement of many claims are also alleged and it is charged that carriers have in specific instances actively defeated the right of shippers to seek reparation here by effectively utilizing their limitation rules to "waste away" the 2-year period for bringing an action before the Commission.

The ground upon which time limitation rules established by carriers can be declared to be unreasonable is of course the inability of shippers to discover the basis of the alleged wrongs and to present claims with the carriers for their correction within the prescribed periods. In short, is 6 months a fair, reasonable time to allow shippers to discover and file overcharge claims? [3]

Robert E. Vantine appeared on behalf (and in his capacity as general traffic manager) of Bloomingdale's New York and its six branch stores, a division of Federated Department Stores. Mr. Vantine maintained that carrier-imposed 6-month limitations for the filing of claims with them are unreasonable because of the usual course of his company's business operations. He testified that the merchandise of many shippers is often transported in a consolidated shipment covered by a single bill of lading. It takes a staff of five to nine people in the import office from 7 to 10 days to obtain landed costs of each commodity in a shipment. Two to four days are needed to remove freight from the piers, and another week is needed to obtain all cases and cartons from U.S. Public Stores. Over 75 percent of Bloomingdale's imports are stored, because of the large volume during June, July, and August, until they are ready for processing "in our normal receiving operation." When merchandise is called in from the warehouse, it is matched to the receiving record attached to the figured invoice. Shipments are then checked for shortages and damage, and merchandise is "retailed" by the individual department manager, after which price tickets are made and marketing is done. Imports for the branch stores are sent to these stores from the warehouse together with the invoices after the merchandise is retailed at the New York store. Loss and damage claims are then processed and sent back to the import office which computes the prorated charges covering the loss and/or damage portion of the shipment and releases supporting documents for actual claim filing with the carrier. "It is impossible to release any documents from our files until every single invoice has been checked, marked, and processed

[3] As we have observed, the typical period of time carriers establish for the presentation of alleged overcharge claims is "six months from the date of shipment." Although a few carriers operating in our domestic offshore trades have greater or lesser limitation periods, no representatives of any domestic offshore carriers testified, and the evidence and testimony of shipper witnesses related almost exclusively to overcharge claims in foreign trades. In fact, the only indications of record that domestic claims are different from foreign claims would seem to suggest that they may be processed more quickly. The limitations respecting the time within which carriers will consider overcharge claims based on alleged errors in weight, measurement, or description present a special situation which we will treat separately hereinafter.

through the necessary nonselling departments which can take upwards of 6 months from date of shipment." Although domestic freight bills are audited internally and are sent out for post audit "after one year", no audit is made of foreign freight bills. The reason given for this is that "we * * * do not have the various steamship lines' tariffs * * * We would have to probably hire extra people * * * just to take the tariffs and to keep them up to date * * * we do not employ * * * and expert rate man who knows steamship tariffs." It was estimated that the total additional expense involved in a preaudit of freight bills would be "in the neighborhood of $15,000 and $20,000", and that the expense "was not justified because the loss estimated on overcharge claims was only $5,000 to $6,000." In instances where moneys are advanced by the shipper's agent, it might take "some time" to get "evidence of the paid freight bill." At one time post (payment) audits were performed for Bloomingdale's by OFC, but such audits have not been made for 3 or 4 years.[4]

Mr. Barrie Vreeland, appearing on behalf of the Shippers' Conference of Greater New York, Inc., an association consisting of approximately 60 large and small manufacturing and trading industries in the greater New York area, also maintained that shippers could not present claims within the time periods established by carriers because of the expense required for a preaudit (which he estimated would require "a fully assigned man or personnel to work on a daily basis"). He raised the problem, also alluded to by Mr. Vantine, of the difficulty in obtaining quickly all the documents which might be needed to substantiate a claim which the shipper may have prepared abroad, because of the great distance involved in import transactions. Mr. Vreeland also acknowledged that the reason why foreign departments of corporations do not employ the time and money to audit foreign claims is that "The big money is in domestic."

Mr. Desmond B. Goodwin, traffic manager, Burroughs Corp., testified that his company had not made an audit in well over a year, and

[4] Although Mr. Vantine also appeared on behalf of the New York Retail Traffic Association, a nonprofit organization comprised of 32 leading retail stores in and around the New York area, it does not appear from the record exactly what the experience of these stores has been with respect to carrier limitation rules or that their methods in handling claims are similar to those of Bloomingdale's. The record in this proceeding merely shows that Mr. Vantine was authorized "to speak on the matter" of the carrier rules because the "problem in trying to file overcharge claims, we find is a common thing with our other store members." Copies of Mr. Vantine's statement were not submitted to anybody in the association prior to his testimony. At the oral argument, Mr. Vantine also appeared on behalf of the National Retail Merchants Association, an organization comprised of over 12,000 retail stores throughout the United States, which excepts to the examiner's decision on the grounds that carrier rules denied shippers "the opportunity to * * * have their shipments audited by an outside agency, in order to recover overcharges due to the present * * * six-month limitation on the filing of ocean freight shipments."

that no full or regularly occurring audit is performed but that documents are called in from the company's divisions for a "spot check" at irregular intervals of not less than a year. Spot checks are performed only upon a select number of freight bills, after which the freight bills are sent to an outside audit firm for post-audit. Few overcharge claims are picked up in the internal spot check, many more being picked up in the outside audit.

Robert Sergeant, appearing on behalf of the Lamp and Shade Institute of America, testified that many of his members must use an outside auditing firm to do their auditing because of their inexperience with tariff matters, and that "the internal handling, the insurance * * * the internal workings of the organization, the limited personnel, small organizations * * *" contribute to the inability of shippers to have audits made within six months. He acknowledges, however, that some of them do use an outside agency to file claims within carrier-imposed 6-month rules.

Mr. Henry Wegner, executive vice president, Ocean Freight Consultants, Inc., also testified that his customers were not able to perform audits within 6 months or make documents available to outside auditing firms within that time.

The foregoing indeed shows that claims are not normally presented to carriers within 6 months, but it does not show that 6 months is an unreasonable period in which to require that claims be presented. The testimony demonstrates that some shippers do not present their ocean freight overcharge claims because of their merchandising practices, others because of their internal auditing procedures (or lack thereof), and still others because they prefer to process claims which offer a greater monetary return. These are all matters of managerial judgment and we will not intrude in this area. Moreover, they are matters not relevant to the ability of a shipper to present a claim in a timely fashion. Insofar as delays are caused by a shipper's internal procedures, or even by a backlog of auditing with which a shipper might be faced, the delays are "chargeable solely to [the shipper]." (See *United States* v. *S.S. Clairborne*, 252 F. Supp. 897, 900 (S.D. Ala. 1966).

The only relevant consideration is whether or not shippers can acquire the necessary documents and can make some sort of preliminary examination of them in order to present a claim to the carrier within 6 months. There is no indication on this record that they cannot do so. The general allegations that claims cannot be filed in a timely fashion, to the extent they are supported at all, are supported by factors which are not relevant.[5]

Once a claim is "presented" within the meaning of the carrier rules more detailed information may be needed to substantiate the claim. However, the essential purpose of carrier's limitation rules is merely to require that an indication be made to the carrier within its prescribed time period that a shipper is presenting a claim on a certain matter and to inform the carrier in a general way of the basis for that claim. The uncontradicted testimony of one experienced in both foreign freight forwarding and auditing activities stated that the limitation periods could be met by filing the bill of lading and/or freight bill together with a statement of the basis of claim. Although additional documents such as shipper's certified invoices and packing lists might be important in eventually establishing the validity of a claim, there is no requirement under the carrier rules either that claims be fully substantiated or that refund be made within 6 months. Furthermore, once a claim has finally been denied by a carrier, the shipper may still seek and in a proper case recover reparation before the Commission at any time within 2 years of the alleged injury, and this is true whether the claim has been denied by the carrier on the merits or on the basis of a time limitation rule.

We find the record in this proceeding bare of any significant indications that a 2-year period is needed for the filing of overcharge claims. The record actually shows that all types of shippers, small and large, acting for themselves or through forwarders, importers, and exporters, not only can, but in fact do, file claims within 6 months.

Shipper testimony indicates that since very small amounts (often less than $200) are involved in overcharge claims, some shippers do not wish to spend time and money trying to collect them. But this situation would exist whether there was a 6-month rule or no rule at all. The only meaningful indication of an additional substantial financial outlay which might have an impact on the filing of claims would be the expense necessitated by the utilization of a preaudit. The question of whether to pursue such a practice is also obviously one

[5] The extent to which internal procedures like those described by some of the shipper witnesses herein are widespread, moreover, does not appear. Although several of these witnesses represented large shipper groups because the 6-month rules were matters of common interest, there is no clear indication of record that merchandising and auditing practices like those described by these witnesses were common to all or even most of the members of their associations. In most cases speakers' statements were not submitted for approval to the groups for which they spoke.

Additionally, even if such considerations were relevant, they would not, on the basis of the record in the proceeding, adequately support the promulgation of the Commission's proposed 2-year rule since the longest period mentioned in connection with the delays alleged to be caused by such practices is about 1 year.

properly within the sphere of business judgment, but there is nothing inherent in the carrier limitation rules which would necessitate such preaudit, nor does the record indicate that the operation of the rules has made it necessary.

Several shipper interests testified, as indicated above, that many shippers did not possess the requisite skill required to interpret tariffs and could not afford to have or did not have tariffs readily available. These arguments likewise do not indicate that the carrier time limitation rules are unreasonable. The technical problems involved in tariff interpretation are facts of transportation life and would exist under any or even in the absence of carrier limitation rules.

Since we find that shippers can and do present claims to carriers within their limitation periods, we cannot conclude that the mere establishment of these periods by conferences is an unreasonable procedure for hearing and considering shippers requests and complaints. For the same reason, we cannot find that such periods are unreasonable if established by nonconference carriers or individually by conference carriers. Furthermore, the limitation rules cannot be found to violate either section 14 Fourth or 16 First of the 1916 Act since they purport to treat everyone subject to them alike [6] and since all types of shippers can and do comply with them.[7]

Section 15 requires not only that the procedures established by conferences for hearing and considering shippers' requests and complaints be "reasonable" but also that they insure that such hearing and consideration will be given "promptly" and "fairly".

In maintaining that carriers use their time limitation provisions so as not to promptly hear and consider their requests and complaints, shippers maintain that claims are often not acknowledged and that delays in settlement are encountered. The failure to acknowledge or promptly consider claims would obviously, when adopted as a practice by conferences, be unlawful under section 15. Moreover, such failure by conferences or carriers could result in violations of sections 2 and 18(b)(3) and defeat actions for reparation contrary to the policy of section 22.

There is, however, no necessary relationship between failures to acknowledge claims and a limitation rule. Neither is there a necessary

[6] The U.S. Government presents a justified exception, and its situation is considered infra at 20–22.

[7] Section 14 Fourth forbids carriers to "unfairly treat or unjustly discriminate against any shipper in the matter of adjustment and settlement of claims." Section 16 First prohibits any undue or unreasonable preference of advantage or any undue or unreasonable prejudice or disadvantage to any particular person. The question of whether the application of the limitation rules has resulted or will result in unlawful activities under the statutory provisions involved in this proceeding is treated infra at pages 20–25.

relationship between delays in the settlement of a claim, once it has been presented to the carrier, and a rule prescribing the time during which a claim must be so presented. Clearly such occurrences could exist under the Commission's proposed 2-year rule or no rule at all. On the other hand, the existence of 6-month rules clearly does not in itself prevent acknowledgment or cause delay in processing claims.[8] If such relationships exist, they must therefore be demonstrated "on the record."

The record in this proceeding fails to show a relationship between failures to acknowledge and delays in processing claims and the carrier rules. Moreover, it fails to show that failure to acknowledge or delays in processing claims are in general common occurrences. To the contrary, the record is replete with documentary evidence of consideration of claims filed within carrier limitation periods provided by carrier rules and acknowledgment of claims filed after limitation periods had expired. There is little indication that claims filed after the expiration of the limitation periods were not acknowledged, aside from the bare allegations to that effect from a few witnesses.[9] Insofar as delays are concerned, some delay is necessitated by attempts by carriers to verify older claims. In spite of this, however, payment of claims in general appear to have been quite prompt.[10]

Thus, carrier limitation rules, not having been shown to be unreasonable or unfair as to time periods provided for the presentation of claims, and not having been shown to have been used by conferences or carriers to fail to acknowledge or to delay settlement of claims, can only be declared unlawful as procedures[11] if their effect is to violate sections 2 and 18(b)(3) by defeating the policy of section 22. There is nothing inherent in the carriers' present time limitation rules which would prevent a shipper from seeking reparation based on overcharges and in a proper case collecting them if a complaint is filed under section 22 at any time within 2 years of the alleged injury. Moreover, we

[8] Of course, such rules if valid would allow carriers to refuse to consider voluntarily claims filed after 6 months. However, since, as we have indicated, such procedures have not been shown to be unreasonable, if not shown to be otherwise unlawful, the refusal to consider claims not filed within the limitation periods established by carriers as distinguished from a general failure to acknowledge claims or the delay in considering timely filed claims, would not be improper.

[9] A very few "follow up" form letters from OFC (about a dozen at most), indicate that letters originally sent to carriers were not acknowledged, but the original letters with respect to these claims are not of record and even with respect to the claims to which the follow up letters refer, the exhibits often indicate that discussions were being conducted between OFC and the carriers. There is some indication that claims already denied either on the merits or as time barred were not acknowledged when refiled.

[10] Exhibits cited by OFC to indicate delay in payment of claims show the vast majority of them were paid within 4 months from time of filing.

[11] This is, of course, aside from the question of inequities in their application, discussed infra, 20–25.

have declared that it would be contrary to the policy of Congress and a violation of the shippers' rights granted by section 22 for a carrier in any way to limit or condition the availability of the reparation remedy. The sole remaining question under section 22, therefore, is whether there has been a sufficient showing in this proceeding that carrier limitation rules have been used as a device to thwart recovery before the Commission. In maintaining that the rules have had such effects, the shipper interests in this proceeding allege that carriers keep the existence of section 22 as a "jealous secret," that shippers are not informed by carriers of the right to reparation under the 1916 Act, that even if they knew of such remedy, the expense of pursuing it would be prohibitive, and that the record shows several instances of carriers' "wasting away" the 2-year statute of limitations for filing complaints with the Commission through their 6-month limitation rules. Although carriers generally do not inform shippers about section 22 procedures, there is absolutely nothing in the record in this proceeding that bears out the allegation that carriers guard the existence of section 22 as a "jealous secret." If fact, there is documentary proof of several instances in which carriers and conferences have informed shippers that nothing in their rules in any way prohibits a shipper from seeking reparation before the Commission in a proceeding brought under section 22.

It is obviously true that all shippers may not know of the remedies available under the 1916 Act. Because of this, the Commission publishes a special booklet describing in detail, but in simple, nontechnical language the remedies available to shippers under the statutes it administers. The booklet "Ocean Freight Rate Guidelines for Shippers," is available for general sale to the public at the U.S. Government Printing Office. Pages 10–11 of the booklet describe the procedures offered by the Commission for informal staff adjustment of claims [12] as well as reparation procedures under section 22.

The evidence of record gives no indication that carriers have thwarted the shippers' right to seek reparation under section 22 by "wasting away" the 2-year period during which such action could have been brought. The impression given by OFC is that shippers were deluded into believing that overcharges would be refunded on claims which had been presented after the expiration of the limitation periods and then, after the 2 years had run, such claims were denied on the basis of a time limitation rule. Although there is an abundant

[12] Evidence of record suggests that on several occasions overcharges were recovered informally through the assistance rendered by the Commission's staff without the necessity of filing a complaint under section 22.

amount of evidence indicating that claims filed after expiration of limitation periods were denied by carriers as time barred, and there is a showing that some late-filed claims were paid, there is virtually no evidence indicating that shippers were misled by carriers into thinking that carrier rules would be waived and discovering to their detriment when claims were eventually denied on the basis of carrier-imposed limitation rules that it was too late to file a complaint with the Commission.[13]

We conclude, therefore, that the carrier rules have not been shown to, and as we have observed cannot lawfully be used to, prevent the recovery of overcharges made in violation of sections 2 and 18(b)(3) within the statutory period provided in section 22.

Finally, although the costs of pursuing recovery of alleged overcharges before the Commission would exist any time a shipper sought reparation here regardless of whether carriers had limitation rules or not and thus bear no direct relationship to such rules, we do not wish cost to act as a deterrent to anyone seeking to recover overcharges, no matter how small the amount in controversy. Specifically for this reason we have promulgated special simplified procedures for the handling of all claims involving $1,000 or less, specifically including overcharge claims.[14] (Rules of Practice and Procedure 19 and 20, 46 CFR 502.301 and 502.311.) These procedures are neither costly nor time consuming. All that is required is the filing of a sworn claim together with supporting documents. Unless the carrier against whom the claim is made does not consent to determination of the claim on the basis of documents and written arguments, no further activity is required on the part of the shipper. If the carrier demands a more formal adjudication, he files an answer to the claim and the shipper may if he chooses file a reply, which need be nothing more than a clarification of his original claim. If a reply is filed, the shipper serves a copy on the carrier. Oral hearings and arguments before an examiner will not be held unless the examiner feels that such are necessary to the proper disposition of the proceeding. In fact, before hearings are held parties requesting them must demonstrate that "the filing of

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[13] The evidence of record which OFC contends supports such a conclusion relates to several claims which were originally filed in periods ranging from about a year to 1½ years from date of injury by Westinghouse and had already twice been denied on the basis of a 6-month rule with an indication that they would also probably have been denied on the merits. These claims were then resubmitted by OFC after the 2-year statute had run.

[14] The evidence of record indicates that the average overcharge claim is under $200, and very few individual claims exceed $1,000. Moreover, individual claims may be aggregated in a single filing if they total less than $1,000, and in the rare instances where overcharge claims exceed $1,000 they may be consolidated and handled by a single examiner (see 46 CFR 502.158) when such handling facilitates the processing of claims involving the same parties and similar issues. In fact, such consolidation occurs as a matter of course.

affidavits or other documents will not permit the fair and expeditious disposition of the claim, and the precise nature of the facts to be proved at the hearing." The Commission reserves the statutory right to review all final determinations of the examiner. Thus, unless a party can demonstrate that more is needed, the small claims procedure requires merely the submission of a few pieces of paper.

On the basis of the foregoing, we conclude that there has been no demonstration that the 6-month rules now used by carriers are unlawful as procedures and no necessity on such basis has therefore been shown for the promulgation of the Commission's proposed rule.

Overcharge Claims Based on Weight, Measurement, or Description

Some carrier-imposed time limitation provisions require that overcharge claims based on alleged errors 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.[15] Others include "errors in description" in the category of claims which must be presented while the shipment involved is still in the custody of the carrier.[16] Still others provide that claims for overcharges based on alleged errors in weight or measurement may be considered by the carrier if presented within 6 months but may be rejected if not presented while the cargo to which they relate is still in the carrier's custody.[17] Shippers (or the forwarders who act as their agents) are guaranteed prompt issuance of bills of lading by law, and the evidence of record indicates that such bills of lading are in fact available to them at or shortly after the time the vessel sails. Other documents which may be helpful in establishing such claims are also promptly available to shippers. Packing lists provided by packinghouses engaged in the business of packaging shipments for export which are issued to shippers and acknowledged by OFC to be used by these shippers or their forwarders to supply the information which appears on the bills of lading are also obviously available to shippers or their agents, in such cases not only before cargo arrives at destination but at the time it is delivered to the carrier. Additionally, OFC acknowledges that dock receipts, which must by law be issued when cargo is received by carriers, have provisions for the receiving clerk to show measurements, and that any discrepancy between these figures and the packing list can be checked. If any error occurs, the shipper should be able to con-

[15] See e.g. North Atlantic Mediterranean Freight Tariff No. 10, FMC–3, 2d rev. p. 36, effective Dec. 6, 1968.

[16] See e.g. Pacific Westbound Conference Local Freight Tariff No. 3, FMC–8, original p. 43, effective Mar. 15, 1969.

[17] See e.g. U.S. Atlantic & Gulf Santo Domingo Conference Freight Tariff FMC No. 1, 4th rev. p. 13, effective May 6, 1968.

tact the consignee or his agent in sufficient time to have the cargo rechecked at destination before the carrier releases it from its custody. Most of the evidence and arguments in this proceeding related to claims other than those involving alleged errors of weight or measurement, and there is no clear showing on the record in this proceeding that carrier rules requiring the presentation of certain claims before shipments leave the custody of the carrier have prevented shippers from making a timely presentation of such claims because the necessary documents were not available in time.

On the other hand, the record indicates that there are some practical considerations supporting the carriers' overcharge limitations. Hearing counsel themselves indicate that "the older the claim the more difficult the proof" and that "proof of misweighing or mismeasurement or misdescription is obviously more difficult after the goods leave the custody of the carrier * * *." Obviously it is extremely difficult to verify weights and measures and in many instances descriptions once cargo has been released from a carrier's custody. Cargo can be reweighed or remeasured while still within a carrier's custody and such calculations determined with absolute certainty. Once removal has been made, however, the carrier no longer has the means to verify weights or measurements physically. In many cases cargo is untraceable either because it has been consumed or no longer exists in its original form. In still others it has been sold and is no longer available to the original shipper or consignee. Even if cargo were still in existence and could be tendered to carriers for reweighing or remeasuring, the possibility exists that it may be less than it originally was. Descriptions, too, are difficult to verify because once cargo is put into the stream of commerce its physical characteristics may have changed so that it no longer resembles the description originally contained in the bill of lading or other documents available to shippers and carriers. Overcharge claims based on changes in commodity descriptions after the cargo has left the carrier's custody may also present problems requiring technical guidance from experts such as engineers and chemists which the record here shows can be especially difficult and time-consuming. The carriers' efforts to protect themselves against such claims cannot on the basis of the record in this proceeding be said to be unreasonable.

Lawfulness of Manner of Enforcement of Time Limitation Provisions

A number of conferences have amended their tariffs to specifically exempt overcharge claims by the Government from the 6-month rules, and only three of four carriers still apply these rules to the Government. In these few instances the General Accounting Office withholds payment pending a preaudit.

It has been contended in exceptions to the initial decision that the failure to apply time limitation rules to claims presented by the Government results in the unfair treatment of or unjust discrimination against any other shipper in the matter of the adjustment or settlement of claims in violation of section 14 Fourth. It is true that when the United States comes down from its position of sovereignty and enters the field of transportation it may subject itself to the same conditions affecting that transportation to which private individuals may lawfully be subjected. Specifically, it has been held that limitation periods providing for the time of both filing of claims with carriers and the bringing of suits are valid conditions controlling the Government's transportation contracts when such conditions are lawful when applied to other shippers.[18] However, the United States also has the power to exempt itself from conditions of carriage which may lawfully be applied to other shippers,[19] and in fact article 11 of the Standard Military Sea Transportation Service contract exempts the Government from the provisions of the Carriage of Goods by Sea Act requiring notice of loss or damage before the carrier surrenders custody of the cargo and the institution of suit based on loss or damage claims within 1 year. The United States does not generally bargain with the carriers at arm's length and as an equal.[20] The General Accounting Office is required by statute (31 U.S.C. 71) to audit ocean transportation accounts, and in situations in which carriers refuse to exempt the Government from limitation rules has refused to make freight payments until the accounts have been audited.

Section 14 Fourth does not outlaw all differing treatments between shippers with respect to the adjustment and settlement of claims but only those which are "unfair" or "unjustly discriminatory," and it is well settled that the determination of whether or not actions under 14 Fourth are unjustly discriminatory or unfair is a question of fact whose resolution must turn upon the record established in a particular proceeding [21] and that the existence of unfair or unjustly discriminatory conduct must be clearly established by substantial proof.[22]

There is nothing in any prior decision of the Commission which would dictate, as OFC contends, that the United States must in all

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[18] See e.g. *United States* v. *Chicago, R.I. & P.R. Co.*, 200 F. 2d 263 (5th Cir. 1952); *United States* v. *Seaboard Airline R.R. Co.*, 22 F. 2d 113 (4th Cir. 1927).

[19] For indications of the existence of this power see *U.S.* v. *Gydnia American Shipping Lines*, 57 F. Supp. 369 (D.C. N.Y. 1944) and *U.S.* v. *Cia. Naveira Continental S.A.*, 202 F. Supp. 698 (S.D. N.Y. 1962).

[20] For example, the Government may lawfully require as a condition for dealing with carriers that rates be guaranteed for 1 year. See *American Export Isbrandtsen Lines, Inc.* v. *F.M.C.* 380 F. 2d 609, 612 (D.C. Cir. 1967).

[21] See *American Export Isbrandtsen Lines, Inc.* v. *F.M.C.*, *supra*, at 619.

[22] See *Phila. Ocean Traffic Bureau* v. *Export S.S. Corp.*, 1 U.S.S.B.B. 538, 541 (1936).

circumstances be treated like every other shipper,[23] and hearing counsel themselves conceded that the Government is unique and may be entitled to special treatment on occasion. We conclude that although the United States as a shipper has no absolute right to be exempted from the carrier limitation rules, the failure to apply such rules to the United States is not unfair or unjustly discriminatory with respect to other shippers because of the peculiar bargaining position of the United States, originating in statute and sanctioned by court decisions. Additionally, the carriers have a legitimate interest in facilitating prompt payment of freight charges, and the record in this proceeding indicates a variety of problems which the United States may meet in its attempts to comply with the carriers' time limitations because of its unique size and the far-flung nature of its transportation activities.

OFC and hearing counsel contend that, even if the exemption of the Government is proper, the inequitable manner of applying time limitation rules to other shippers has resulted in unfair treatment of and unjust discrimination between those shippers in the adjustment and settlement of claims in violation of section 14 Fourth.

In support of this contention hearing counsel maintain that their exhibit 74, a listing of claims filed by the United Nations as a shipper against various carriers, indicating some claims filed after the carrier 6-month limitation periods were paid and some were not, shows that the United Nations was also "frequently exempted" from the carrier limitations and that the proferred evidence contained in this exhibit shows sufficient proof of violation of section 14 Fourth to require promulgation of the Commission proposed rule. Exhibit 74 was excluded by the examiner, and hearing counsel and OFC except to this exclusion.[24] Even assuming, arguendo, that the examiner should have admitted

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[23] OFC refers as authority for this proposition to several statements made by a Commission examiner in the initial decision in docket No. 66–49, *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*. These statements indicate only that Government shipments are in the commerce of the United States within the meaning of the 1916 Act and indicate the examiner's opinion as to whether or not a competitive relationship is necessary between shippers to establish violations of sections 16 and 17 of the 1916 Act. The Commission's report in docket 66–49, 11 F.M.C. 202 (1967) (reversed on other grounds, *American Export Lines, Inc., and Prudential Lines, Inc.* v. *FMC and United States*, — F. 2d — (2d Cir. 1969)), differed from that of the examiner. In it the Commission merely found, after concurring with the examiner that Government shipments are "commerce," that charging two agencies of the Government, the Department of State and the Military Sea Transportation Service, different freight rates violated the first paragraph of section 17 of the 1916 Act, but not section 16 absent a showing of a competitive relationship. The use of the same language in section 14 Fourth as that used to relate to unlawful rates under section 17, i.e. "unjustly discriminatory," would seem to indicate that the carriers are incorrect in asserting that a competitive relationship between shippers is required to establish a violation of 14 Fourth.

[24] The examiner had excluded the exhibit because of the failure to make available for examination the bills of lading and the proof of payment for each claim which would have shown the nature of the claim involved and demonstrated payment in fact.

exhibit 74 into evidence, we cannot agree with hearing counsel that it shows an "exemption" of the United Nations from the carrier rules. The exhibit, as clarified and refined by hearing counsel in their exceptions, shows that only 62 claims out of 175 filed after 6 months were paid. According to hearing counsel's chart, which treats each line in each conference separately, one line paid 41, another 3, 4 other lines 2 each, and 10 lines 1 claim each. Most lines paid none. Except for the 41 claims paid by one line, there are almost as many single carriers involved as there are "late payed" claims.[25]

The remaining exhibits of record are equally unconvincing of any clear pattern of discrimination or unfair treatment. In fact, the "pattern" indicated would seem to be that the farther in time the claim was made from the end of the limitation period the less likely it was to be paid [26] and that such misapplications of the rules have grown less frequent with the passage of time.[27] Specific responses to inquiries from the chairman of the Associated Latin American Freight Conference indicate that the payment of at least some claims after the expiration of the time periods was the result of inadvertence due to "clerical or administrative error." Although self-serving "after the fact" statements are generally not entitled to much weight, there are indications here that such inadvertence may in fact have been real.[28] Although the record in this proceeding does not show the total number of overcharge claims filed by or for any or all claimants in any given period, what can be gleaned from the record would seem to show that the number of overcharge claims filed against all ocean carriers

[25] It might also be observed with reference to these 41 claims, that they may in fact not indicate violations of 6-month rules at all. These claims were paid by Blue Star Line in the trade in which it operates as a member of the North Atlantic Mediterranean Freight Conference which, as has been noted, has a rule allowing the consideration and payment of overcharge claims presented after 6 months in cases of obvious errors in calculation. Lacking the supporting bills of lading, one may, of course, not be sure, but it is possible these claims may have been based on such errors and thus payment would have been proper under the rule.

[26] OFC's charts indicate the following relationships between claims rejected and time of claim for carriers using 6-month limitation rules:

	Time between shipments and claims				
	Over 6 but under 12 mths.	12–18 mths.	18–24 mths.	Over 24 mths.	Total
Claims Paid	22	2	9	3	36
Claims Rejected	5	17	40	10	72

[27] OFC's charts, prepared in the first third of 1966, indicate 1 late filed claim was paid in 1966, 4 in 1965, 12 in 1964, 16 in 1963, and 3 in 1962.

[28] The claim of actual inadvertence is in fact supported by independent evidence in at least one specific instance. An official of the Atlantic & Gulf/West Coast of South America Conference advised that a time barred claim had been paid by the Chilean Line because a clerical error had been made in approving the adjustment, the reading of the date of shipment as April 1963, when it was really April 1962. This is borne out by his letter to OFC authorizing the adjustment wherein the date of vessel departure was mistakenly given as April 5, 1963.

in a single year may well be in the hundred of thousands.[29] The total number of all overcharge claims of record in this proceeding which were paid after expiration of the limitation periods does not appear to exceed 200. Many of these claims were filed from 4 days to 1 month after the time periods expired.

Many different single carriers are involved, often in only a single case. To the extent carriers deviated from their rules and paid shippers after their limitation periods had expired, they did so with respect to both small and large shippers alike. In short, there is nothing in the record to demonstrate that the carriers have discriminated between shippers in the adjustment or settlement of claims or that they are likely to do so, let alone the existence or likelihood of "unjust" or "unfair" discrimination or treatment in this regard. Moreover, even if some showing of unjust discrimination in the application of carrier limitation rules had been made, this would not necessarily dictate promulgation of the Commission's proposed rule. A distinction must be made between the validity of the rule itself and the validity of its application to individual shippers. Rules not unlawful in themselves do not necessarily become unlawful because they may not always lawfully be applied. Promulgation of the proposed rule is not the remedy for individual misapplications of the carrier-imposed limitations.

OFC also maintains that the application of carrier rules has caused violations of section 16 of the 1916 Act. However, it follows that if no showing has been made of unjustly discriminatory or unfair treatment under section 14 Fourth, OFC's claim of "undue or unreasonable preference or advantage" or "undue or unreasonable prejudice or disadvantage" of any particular person within the meaning of section 16 must be rejected, since the establishment of a violation of section 16 generally appears to require in addition to the demonstration of dissimilar treatment between shippers lacking here, a showing, also lacking here, of a competitive relationship between shippers. See *North Atlantic Mediterranean Freight Conference—Rates on Household Goods*, supra. It is equally clear that the carrier rules are not unjustly discriminatory between shippers within the meaning of section 15.

Finally, there is no evidence that any conference has failed to "fairly consider" any claims properly filed with it. Nor can we on this record find unlawful conduct under other provisions of section 15 (i.e., "con-

[29] The record shows that in the period 1964–66 Grace Line alone handled 1,489 overcharge claims, and that in a 3-year period Royal Netherlands Steamship Co. handled approximately 6,000 overcharge claims, just relating to alleged errors in weight or measurement or obvious errors in calculation.

trariness to the public interest", or "detriment to the commerce of the United States") since the allegations of violations of these provisions by hearing counsel are conclusory in nature and hearing counsel rest them solely upon the allegations of violations of other statutory provisions which we have found the record herein does not support.

Miscellaneous Exceptions to the Initial Decision

In addition to the exceptions already discussed, OFC excepts to the examiner's exclusion from evidence of letters and certain other matters appended to their reply brief to the examiner which they claim were made necessary because of incorrect statements made in a conference brief, and the examiner's conduct of the proceeding in general and his issuance of a subpeona against OFC in particular.

Each of these objections is without substance. The matters appended to OFC's brief were properly excluded by the examiner for the reasons that they were not introduced at the hearing, although available at the time and hence were not subjected to the possibility of cross-examination of their purported authors, or because they contained testimony which attempted to contradict evidence introduced at the hearing which also of course could not be tested by cross-examination. Moreover, even assuming that the contested matter should have been admitted, however, its presence in the record would make no difference in our conclusions here.

Exception is also taken to the examiner's failure to take official notice of discrimination between shippers, economic reprisals by carriers against shippers, and the report of the investigating officer in fact finding investigation No. 6. Questions of discrimination and economic reprisal are so clearly questions of fact and improper for official notice that this exception borders on the frivolous. The examiner's refusal was absolutely correct. The "facts" found in the investigative report are not facts which have been found by the Commission, and which it knows in its expertise but merely the conclusions of a member of the Commission's staff. Even if we were to take official notice of the conclusions contained in the investigative report, they would in no way affect the results we have reached in this case. It should also be noted that although the examiner did not officially notice the report, he did allow OFC's attorney to use its findings in questioning a witness, and invited him to utilize the report in his arguments on brief, of which opportunity he availed himself.

Exception is also taken to the examiner's "noticing" of the Court's decision in *Armement Deppe* v. *United States*, 399 F. 2d 794 (5th Cir-1968). The examiner's use and interpretation of the court decision was proper. The fact that the decision was handed down after briefs had been filed with the examiner is irrelevant. It is his function to examine all of the law which he feels has a bearing on the resolution of a legal issue. The matter is one involving interpretation of the law and does not involve questions of "fact" to be noticed at all. Additionally, exception was taken to the examiner's official notice of protocol to amend the international convention for the unification of certain rules of law relating to bills of lading, done at Brussels, 24 February 1968.

The protocol has not as of this date been transmitted by the U.S. Department of State to the Senate for ratification. While the examiner certainly acted properly in considering its possible implications, we have chosen not to do so because our decision not to promulgate the proposed rule herein could not be affected by any interpretation of the protocol.

Finally, OFC charges that the examiner's conduct of the proceeding was unfair. We find no merit for this contention whatsoever. The examiner generally allowed a wide latitude to all parties, most particularly OFC and often over objections of conference counsel, to explore all possibly relevant matters. The fact that a subpoena was issued against OFC is not an indication that it was unfairly treated. The subpoena in question was not only the only one served in the proceeding but was the only one requested by any party. The matter required to be produced was entirely relevant to the proceeding, relating in general to OFC's method of operation and in particular to overcharge claims denied on the basis of carrier limitation rules. Moreover, the subpoena was in fact quashed in part because the examiner felt one of its demands was unreasonable. Any exceptions not specifically treated herein have been considered and rejected as immaterial or otherwise without merit, or unnecessary to the decision herein.

For the reasons stated in this report, we conclude that the proposed rule should not be issued.

The proceeding is discontinued.

Commissioner GEORGE H. HEARN, *dissenting:*

I concur generally with the majority report in its conclusions relating to the lawfulness of carrier 6-month rules and the reasons for denying the staff proposed 2-year rule. To require carriers to process claims submitted after 6 months might encourage spurious claims and unduly burden carriers in their attempts to defend against all claims.

In upholding the carrier rules the majority report finds nothing therein which would prevent a shipper from seeking reparation under section 22 of the Shipping Act, 1916. It is found, further, by the majority that there is insufficient evidence of a use by carriers of their rules to thwart recovery before the Commission or mislead shippers as to the finality of the 6-month time limitation.

On the other hand, the majority report does point out that the carrier 6-month rules cannot be used to prevent shippers from seeking reparation before the Commission within the 2 years provided in section 22.

I think the Commission is obligated to go further than this warning to the carriers by way of an opinion. The average shipper is much less learned than carriers in the laws and rules pertaining to reparation and other disputes. Shippers have only the carrier's tariff to guide them. The shippers and carriers are often unequal in their positions vis-a-vis each other.

Consequently, I would require the carriers and conferences to include in their tariffs (where the 6-month rules are set forth or referred to) a recital to the effect that the 6-month limitation in no way abrogates the shipper's rights under section 22. Some carriers and conferences have, according to the evidence, informed shippers of their rights under section 22. If this has been done voluntarily, it cannot be an undue burden to place on carriers and conferences the requirement to so advise shippers.

I, therefore, dissent from the continued approval of the carrier 6-month rules without a provision therein informing shippers of their rights under section 22.

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

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 404

HAWAIIAN AGRICIDE & FERTILIZER CO., LTD.

v.

MICRONESIA INTEROCEAN LINE, INC.

NOTICE OF ADOPTION OF INITIAL DECISION AND ORDER GRANTING REFUND

Adopted June 11, 1969

No exceptions having been taken 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 initial decision became the decision of the Commission on June 11, 1969.

It is ordered, That Micronesia Interocean Line refund to Hawaiian Agricide and Fertilizer Co., Ltd., the amount of $676.26.

It is further ordered, That Micronesia Interocean Line, Inc., publish promptly in its appropriate tariff, the following notice:

Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 404, that effective December 23, 1968, the rate on fertilizer, n.o.s., in bags or sacks, from Honolulu, Hawaii, to Koror, Palau, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent during the period from December 23, 1968, until March 12, 1969, inclusive, is $45.25 a ton of 2,000 pounds, subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

It is further ordered, That Micronesia Interocean Line notify the Secretary on or before July 11, 1969, of the date and manner in which the refund herein ordered has been made.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET No. 404

HAWAIIAN AGRICIDE & FERTILIZER CO., LTD.

v.

MICRONESIA INTEROCEAN LINE, INC.

Refund authorized of portion of freight charges collected because of error due to inadvertence in failure to file a new tariff item on shipment of fertilizer, in bags, from Honolulu, Hawaii, to Koror, Palau, Western Caroline Islands.

Richard K. Tam for complainant.
Kai Angermann for respondent.

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

This application under section 18(b)(3) of the Shipping Act, 1916, (the Act), was seasonably filed on May 12, 1969, within 180 days from the date of shipment, by the respondent, Micronesia Interocean Line, Inc., and it was concurred in by the complainant, Hawaiian Agricide & Fertilizer Co., Ltd. The application is for permission to refund to the complainant $676.26 as a portion of the freight charges collected on 20,440 pounds of fertilizer, in bags, shipped December 23, 1968, from Honolulu, Hawaii, to Koror, Palau, Western Caroline Islands.

An agreement between the Trust Territory of the Pacific Islands and the respondent calls for freight rates no higher than those in effect on shipments moving on vessels of the Pacific Far East Line to the Trust Territory via Guam, or on the vessels of various other carriers to the Trust Territory via Japan.

The shipment of fertilizer herein in issue was charged a cargo n.o.s. rate of $94.50 w./m., whereas it apparently could have been moved on Pacific Far East Line at a rate of $45 a ton. Respondent originally issued its own tariff effective September 2, 1968, but erroneously omitted a commodity rate for fertilizer, in bags. It subsequently established a commodity rate for fertilizer, n.o.s., in bags or sacks, of $45.25 a ton of 2,000 pounds effective March 13, 1969. Respondent previously had attempted to obtain statistics showing commodities, etc., on movements

[1] This decision became the decision of the Commission June 11, 1969.

to the Trust Territory but was unable to do so in part because records in Saipan were destroyed by typhoon Jean.

Based on the respondent's newly established rate of $45.25, and freight charges of $462.46, compared with the freight charged of $1,138.72, approval is now sought to refund the difference of $676.26. No other shipments of fertilizer moved on respondent's line during this period in issue, and the authorization of the refund will not discriminate among any shippers.

Section 18(b)(3) of the Act provides, that the Commission may in its discretion and for good cause shown permit a common carrier by water in foreign commerce to refund a portion of freight charges collected where it appears that there is an error due to inadvertence in a failure to file a new tariff item, and that such refund will not result in discrimination among shippers, provided that the common carrier has, prior to applying for authority to make refund, filed a new tariff item which sets forth the rate on which such refund would be based, and provided further that if permission is granted by the Commission to the carrier to make the refund that an appropriate notice will be published in the tariff, or such other steps taken as the Commission may require, which give notice of the rate on which such refund would be based.

In Special Docket No. 403, *Italsider Alti Forni e Acciaierie Riunite Ilva e Cornigliano, S.p.A., Genoa, Italy* v. *Lykes Bros. Steamship Co., Inc.*, decided March 26, 1969, the Commission required publication of a tariff notice regarding a refund under section 18(b)(3) of the Act. A similar notice in the present proceeding appears to be required. Accordingly, the respondent shall be required to publish in its appropriate tariff the following notice if this application receives final approval:

> Notice is hereby given, as required by the decision of the Federal Maritime Commission in Special Docket No. 404, that effective December 23, 1968, the rate on fertilizer, n.o.s., in bags or sacks, from Honolulu, Hawaii, to Koror, Palau, Western Caroline Islands for purposes of refunds or waiver of freight charges on any shipments which may have been shipped on vessels of the respondent during the period from December 23, 1968, until March 12, 1969, inclusive, is $45.25 a ton of 2,000 pounds, subject to all other applicable rules, regulations, terms and conditions of the said rate and of this tariff.

Good cause shown, the respondent hereby is authorized to refund to the complainant $676.26, provided that the respondent upon receiving final permission to make this refund publishes the notice set out in the paragraph preceding this one. The respondent shall notify the Commission within 30 days after the date of final decision herein of the date and manner in which the refund herein authorized was made.

CHARLES E. MORGAN,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–46

HENRY GILLEN'S SONS LIGHTERAGE, INC., ET AL.

v.

AMERICAN STEVEDORES, INC., ET AL.

DOCKET NO. 66–47

HENRY GILLEN'S SONS LIGHTERAGE, INC., ET. AL.

v.

COLUMBIA STEVEDORING CO., ET AL.

Initial Decision Adopted June 27, 1969

Where the Commission in prior decision and order directed respondents to discontinue charges for shipside lighter service in the future, without an express finding of past unlawfulness of such charges, complainant in reparation proceeding cannot rely upon such prior decision and order to establish that past charges were unlawful, since determination of future unlawfulness does not necessarily mean that past acts were found to be unlawful at the time thereof.

In a reparation proceeding, parties who were not parties to a prior adjudicatory proceeding are not bound under theory of collateral estoppel by the Commission's findings in the prior proceeding.

In reparation proceeding to recover charges for shipside loading and unloading of lighters, were complainant lightermen relied upon Commission decision and order in an investigation proceeding for proof of unlawfulness of the charges, held as to charges prior to effective date of that decision that unlawfulness thereof was not established, either by findings in the investigation proceeding or upon record in the reparation proceeding, and that in any event lightermen could not recover without proof of actual injury where Commission had expressly found charges to be authorized by approved section 15 agreement and therefore not unlawful per se.

Complainants found entitled to reparation, without proof of injury, for charges assessed by parties to prior investigation proceeding subsequent to effective date of order therein forbidding such charges for the future.

Christopher E. Heckman for complainants.

Mark P. Schlefer and *Stephen F. Eilperin* for respondents American Stevedores, Inc., Bay Ridge Operating Co., Inc., Grace Line Inc., International Terminal Operating Co., Inc., Maher Stevedoring Co., Inc., Marra Bros., Inc., John W. McGrath Corp., Nacirema Operating Co., Inc., Northeast Marine Terminal Co., Inc., Pittston Stevedoring Corp., Transoceanic Terminal Corp. and Universal Terminal & Stevedoring Corp. (in docket No. 66-46).

Elven S. Sheahan for respondent The Cunard Steam-Ship Co., Ltd. (in docket No. 66-46).

Frank A. Fritz and *Averill M. Williams* for respondent T. Hogan & Sons, Inc. (in docket No. 66-47).

REPORT

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

These consolidated complaints were brought by the three complainant lighterage companies to recover as reparation the full amount of charges levied by respondents for the loading or unloading of complainants' lighters and barges alongside vessels moored at piers in New York Harbor. The reparation claims were based on our prior decision in docket 1153—*Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (1966), wherein we found the imposition of a charge to lightermen for the service in question to be an unjust and unreasonable practice.

Docket 66-46 is before us on exceptions to the initial decision of Walter T. Southworth, presiding examiner, issued on March 19, 1969. The examiner found that reparation was not warranted for charges assessed prior to our decision in docket 1153 and that reparation was warranted, without proof of actual injury, for charges assessed after that decision. Complainants excepted to that portion of the decision denying reparation while respondents excepted to that portion awarding reparation.

We find that the exceptions are essentially a reargument of contentions which were exhaustively briefed and considered by the examiner in his initial decision. Upon consideration of the record, the exceptions, briefs, and arguments of counsel, we conclude that the examiner's findings and conclusions in docket 66-46 were well supported and correct. Accordingly, we adopt the initial decision in that proceeding as our own and make it a part hereof.

We issued a notice of intention to review docket 66-47 in the absence of exceptions to the examiner's decision in that proceeding. The examiner found that respondent T. Hogan & Sons, Inc., was not subject to Commission jurisdiction and concluded that we could not entertain a complaint against Hogan seeking reparation under section 22 of the Shipping Act, 1916, as amended.

Additionally, Hogan was not a party to docket 1153 and our order therein requiring respondents in that proceeding to delete the charges in question from their tariff did not apply to Hogan. Therefore, complainants cannot now obtain recovery from Hogan solely by relying on our past decision in docket No. 1153. Since complainants introduced no independent proof of illegality of charges assessed by Hogan, no reparation can be awarded.

In other words, it is unnecessary for us to resolve the jurisdictional question to reach our decision. Accordingly, we are adopting the examiner's decision in these proceedings except that portion thereof which discusses the question of Commission jurisdiction over respondent Hogan, with which we express neither agreement nor disagreement.

The complaint in docket No. 66–46 is dismissed as to respondents Cunard Steam-Ship Co., Ltd., and Morace Stevedoring Corp. The complaint in docket No. 66–47 is dismissed in its entirety.

The remaining parties to docket No. 66–46 may either agree or make proof respecting the amount of reparation, if any, due from each respondent to each complainant in accordance with this decision, pursuant to rule 15 of the Commission's Rules of Practice and Procedure, subject to the stipulation of the parties approved January 14, 1969.

(SEAL.) THOMAS LISI, *Secretary.*

FEDERAL MARITIME COMMISSION

DOCKET NO. 66–46

HENRY GILLEN'S SONS LIGHTERAGE, INC., ET AL.

v.

AMERICAN STEVEDORES, INC., ET AL.

DOCKET NO. 66–47

HENRY GILLEN'S SONS LIGHTERAGE, INC., ET AL.

v.

COLUMBIA STEVEDORING CO., ET AL.

The Commission is without jurisdiction to direct payment of reparation pursuant to section 22 of the Shipping Act, 1916, by a stevedoring contractor who does not furnish wharfage, dock, warehouse, or other such terminal facilities, and is neither a carrier nor a forwarder, and therefore is not a "common carrier by water, or other person subject to this act."

Where the Commission in prior decision and order directed respondents to discontinue charges for shipside lighter service in the future, without an express finding of past unlawfulness of such charges, complainant in reparation proceeding cannot rely upon such prior decision and order to establish that past charges were unlawful, since determination of future unlawfulness does not necessarily mean that past acts were found to be unlawful at the time thereof.

In a reparation proceeding, parties who were not parties to a prior adjudicatory proceeding are not bound under theory of collateral estoppel by the Commission's findings in the prior proceeding.

In reparation proceeding to recover charges for shipside loading and unloading of lighters, where complainant lightermen relied upon Commission decision and order in an investigation proceeding for proof of unlawfulness of the charges, held as to charges prior to effective date of that decision that unlawfulness thereof was not established, either by findings in the investigation proceeding or upon record in the reparation proceeding and that in any event lightermen could not recover without proof of actual injury where Commission had expressly found charges to be authorized by approved section 15 agreement and therefore not unlawful per se. As to charges assessed by parties to investigation proceeding subsequent to effective date of order therein forbidding such charges for the future, complainants found entitled to reparation without proof of injury.

Christopher E. Heckman for complainants.

Mark P. Schlefer and *Stephen F. Eilperin* for respondents American Stevedores, Inc., Bay Ridge Operating Co., Inc., Grace Line Inc., International Terminal Operating Co., Inc., Maher Stevedoring Co., Inc., Marra Bros., Inc., John W. McGrath Corp., Nacirema Operating Co., Inc., Northeast Marine Terminal Co., Inc., Pittston Stevedoring Corp., Transoceanic Terminal Corp., and Universal Terminal & Stevedoring Corp. (in docket No. 66-46).

Elven S. Sheahan for respondent The Cunard Steam-Ship Co., Ltd. (in docket No. 66-46).

Frank A. Fritz and *Averill M. Williams* for respondent T. Hogan & Sons, Inc. (in docket No. 66-47).

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

These are complaint proceedings, consolidated for hearing and decision, brought by three lighterage companies to recover by way of reparation the full amount of charges severally paid by them to respondent terminal operators and stevedoring contractors for services in connection with the loading or unloading of complainants' lighters and barges alongside vessels moored at piers in New York Harbor. The complaints were filed in August 1966, following the Commission's[2] decision of May 16, 1966, in docket No. 1153, *Truck and Lighter Loading and Unloading Practices at New York Harbor*, 9 F.M.C. 505 (hereinafter "No. 1153"). In that decision the Commission held that: (1) The imposition of a charge pursuant to lighterage tariff No. 2 of the New York Terminal Conference for over-the-side transfer services of the kind in issue here was authorized by the approved section 15 agreement of the said Terminal Conference, but that (2) the imposition of such charge "is nevertheless an unjust and unreasonable practice under section 17" of the Shipping Act, 1916 (the act). 9 F.M.C. at 510, 511. Certain other practices, not pertinent here, were found to be contrary to section 16 First or section 17 of the act. By order served May 16, 1966, the Commission ordered the respondents therein (the Terminal Conference and its members) to cease and desist from engaging in "the violations of section 16 First and section 17 of the (act) herein found to have been committed by respondents" and, within 45 days after the said date, to modify the provisions of their lighterage tariff No. 2 and their truck tariff No. 6 "in a manner consistent with our report herein." Id. at 524.

[1] This decision became the decision of the Commission June 27, 1969.

[2] "Commission" as used herein refers to the Federal Maritime Commission or its immediate predecessor, the Federal Maritime Board.

On August 4, 1966, complainants (all of whom had been intervenors in No. 1153) filed their complaint in the above-captioned docket No. 66–46 against 16 members or former members of the New York Terminal Conference,[3] all of whom had been respondents in No. 1153 to whom the Commission's said order of May 16, 1966, had been directed except Morace Stevedoring Corp. (Morace) and Cunard Steam-Ship Co., Ltd. (Cunard). Cunard, although originally named as a respondent in No. 1153, had been dismissed as a respondent by order of the Commission dated May 5, 1964. Morace was never a party to that proceeding.

The complaint lists, by date and amount, a number of payments allegedly made, under protest, by specified complainants to specified respondents, pursuant to the conference's lighterage tariff, for over-the-side transfer between lighters and vessels alongside piers operated by respondents. Most but not all of the payments are alleged to have been invoiced upon dates which are within the 2-year period prior to August 4, 1966, and presumably cover transactions at or about those dates.[4] Complainants allege that they have been injured to the extent of the payments made, and seek to recover the amounts thereof, aggregating about $284,000, as unlawful, unjust, and unreasonable charges in violation of secs. 15, 16 and 17 of the act.

On August 15, 1966, the same three complainants filed their complaint in the above-captioned docket No. 66–47 against T. Hogan & Sons, Inc. (Hogan), a corporation which is not alleged to have been a member of the Terminal Conference and was not a respondent in No. 1153.[5] Hogan is alleged to have collected charges from certain of the three complainants for similar services aggregating about $18,000, which the complainants seek to recover under allegations similar to those of the complaint in docket No. 66–46.

The proceedings were stayed pending decision of the U.S. Court of Appeals upon a petition to review the Commission's order in No. 1153. Upon such petition the Commission's decision was affirmed in all respects. *American Export-Isbrandtsen Lines et al.* v. *Federal*

[3] American Stevedores, Inc., Bay Ridge Operating Co., Inc., Cunard Steamship Company Limited, Grace Line, Inc., International Terminal Operating Co., Inc., Maher Stevedoring Co., Inc., Marra Bros., Inc., Morace Stevedoring Corporation, John W. McGrath Corporation, Nacirema Operating Co., Inc., Northeast Marine Terminal Company, Inc., Pier 8 Terminals, Inc., Pittston Stevedoring Corp., Transoceanic Terminal Corporation, Turner & Blanchard, Inc., and Universal Terminal & Stevedoring Corp.

[4] Since respondent's charges were fixed by filed and published tariffs, complainants' right to contest them arose and their cause of action accrued, if at all, upon the date the services were performed rather than any subsequent date of billing.

[5] The complaint in No. 66–47 was dismissed as to two other respondents similarly situated, Columbia Stevedoring Co. and United Fruit Co., since the only claims asserted against those respondents were clearly barred by the 2-year limitation of sec. 22 of the act.

Maritime Commission, 389 F. 2d 962 (D.C. Cir. 1968). The consolidated cases were heard August 7 and 8, 1968. Thereafter the parties undertook, pursuant to stipulations at the hearing, to agree upon the amounts of reparation involved, if any. After it became apparent that they could not reach timely agreement upon all details, they stipulated, with the examiner's approval, that the examiner should proceed to decide the issues as to violations, injury to complainants, right to reparation and dates of accrual thereof; and that if complainants were found entitled to reparation, the amount thereof should thereafter be determined by a stipulated procedure for agreement or further hearing upon failure to agree. Ruling upon "Stipulation of the Parties," dated January 14, 1969.

Complainants' claim for reparation is based entirely upon the Commission's decision in No. 1153. They say that since the Commission found charges to lightermen for over-the-side transfer between vessel and lighter to result in double charges for the same services and therefore to violate section 17 of the act, the charges theretofore collected from complainants by respondents for such services have been determined to be illegal may be recovered by complainants. They contend that the Commission's determination of illegality applied to all charges for identical services whether or not, exacted by a party to No. 1153, and that recovery may be had by the lightermen as the persons obliged to pay such allegedly illegal charges, without further proof of loss or injury to them.

Respondent members of the New York Terminal Conference (hereinafter sometimes referred to as the Terminal Conference respondents) argue that the Commission is without jurisdiction to award reparation for illegal stevedoring practices; that it cannot award reparation based upon an investigation instituted on its own motion where, they say, no finding of past unlawfulness was made; that the charges in issue were authorized, as the Commission held, by respondents' approved section 15 agreement, and such authorization cannot be retroactively repealed; that complainants cannot show injury to themselves; and that in any event the Commission should not, in its discretion, award reparation.[6]

[6] These respondents also state that they "reserve the right" to reassert their argument, made upon a motion to dismiss, that failure of complainants to verify their complaints in the first instance was fatal to Commission jurisidiction. The examiner denied the motion to dismiss without prejudice to renewal thereof if respondents did not verify their complaints promptly; permitted complainants to verify their complaints; and held that such verification prior to hearing cured the initial failure to verify, citing *Johnston Broadcasting Co.* v *Federal Communications Commission*, 175 F. 2d 351 (D.C. Cir. 1949); *In re Royal Circle of Friends Bldg. Corp.*, 159 F. 2d 539 (7th Cir. 1947); *City Cabs, Inc.* v. *Federal Communications Commission*, 275 F. 2d 165 (D.C. Cir. 1960); and *Berwick* v. *Federal Communications Commission*, 286 F. 2d 97 (D.C. Cir. 1960). Ruling dated May 29, 1968.

Respondent Cunard advances several of the same arguments, and adds that it was not a party to lighterage tariff No. 2, having resigned from the Terminal Conference in March 1964; and that the Commission dismissed Cunard as a respondent in No. 1153, prior to decision therein, noting in its order of dismissal that hearing counsel did not oppose the dismissal "inasmuch as the record made during the hearings contains no allegations of any past violation by Cunard."

Respondent Hogan contends that it is not subject to Commission jurisdiction, since it is a stevedoring contractor only and not a terminal operator, and is therefore not an "other person subject to the act." It points out that it was not a party to the Terminal Conference agreement or tariff or to No. 1153, and contends that as to itself there has been a complete failure of proof of illegality.

The Facts

During the 1920's, about 75 percent of the cargo loaded to or discharged from ships upon the New York City waterfront moved to or from the oceangoing vessels by lighter, as against 25 percent that moved over the road. When cargo was transferred directly—over the side—between the ship and a lighter owned or employed by shipper or consignee, the lighterman supplied his own men, usually casual waterfront labor, to move cargo over the lighter's deck to or from the ship's tackle, from or to the point of stowage on the lighter. If the cargo was moved from the lighter to the steamship pier, or vice versa, instead of being transferred directly between lighter and ship, the work was likewise done by labor supplied by the lighterman. Around the time of World War I, the lightermen began to use the stevedores who were engaged in working the oceangoing vessels, to move the cargo to and from the ship's tackle on the lighter's deck, rather than provide their own men for this purpose. When they used the stevedores, it was pursuant to arrangements, usually informal in nature, between the lightermen and stevedores, under which the lightermen paid the stevedores an agreed amount for the services; otherwise no charge was made against the lighter by the vessel, terminal operator or stevedoring contractor in connection with moving cargo over the side to or from the lighter. With the subsequent formalization of labor practices (presumably as a result of legislation affecting labor relations and wages and hours), the use of the vessels' stevedores instead of lightermen's labor became general at or about the time of World War II. Schedules of charges for direct transfer between lighter and vessel were worked out between the Stevedoring Committee and the Lighterage Committee of the Maritime Association of the Port of New York (the Maritime Exchange), an association whose members included steamship operators, ship chandlers and insurance interests as well as stevedores, terminal operators, and lightermen. The lightermen paid such agreed charges for handling cargo aboard their lighters, in connection with over-the-side transfer, in lieu of performing the work themselves. When cargo was transferred between lighter and pier, the lightermen generally used, and now use almost exclusively, the firm of William Spencer & Son, who are primarily railroad stevedores engaged in loading and unloading railroad lighters and cars at steamship terminals. Spencer's charges are negotiated with the lightermen. Spencer's charges to independent lightermen for transfer between lighter and pier were at all times two to three times the amount of respondents' charges to lightermen in connection with direct transfer between lighter and ship, since the latter covered only movement on the lighter deck from the ship's hook to point of rest, and stowage, on the lighter, or vice versa.

From and after 1949, at least, it was the practice to include, in contracts between carriers and stevedores or terminal operators covering the stevedoring of the carriers' vessels, the following clause or an equivalent provision:

> Income from handling lighters and cars: The contractor shall collect and retain its customary charges for labor services in connection with the loading and unloading of railroad cars, lighters, barges, and scows.

The foregoing clause was developed and published by the Stevedoring Committee of the Maritime Association of the Port of New York in 1949. The "customary charges" referred to therein included those in issue here.

The amount of the charges for direct transfer came up for discussion between the lighterage and stevedoring committees every 2 years. Agreement upon rates for the ensuing period was attended by considerable wrangling, particularly as labor became more expensive while the lightermen's business was declining rapidly (a witness estimated that only 3 or 4 percent of all cargo now moves by independent lighter). From 1951 to 1961 printed rate sheets were published, bearing the heading "Schedule of rates for loading and discharging derrick lighters, covered barges, and deck scows, alongside of vessels in the Port of New York adopted by the Stevedoring and Lighterage Committees of the Maritime Association of the Port of New York." The last of these stated that it was effective from October 1, 1959 to September 30, 1961.

In or about 1960, the terminal operators, who as such were subject to the Commission's jurisdiction, realized for the first time, apparently, that their joint agreement upon such rates required Commission approval. In 1954 they had filed for section 15 approval an agreement, designated "New York Terminal Conference Agreement," with respect to charges for truck loading at their terminals (F.M.C. Agreement No. 8005, approved March 23, 1955). Under date of May 6, 1960, they submitted an amendmant to agreement No. 8005 which recited that the parties desired to "establish, publish, and maintain tariffs fixing charges for loading and unloading lighters and barges at piers operated by said parties"; and provided for appropriate amendments to agreement No. 8005 to authorize such activity. The amending agreement, No. 8005–3, was duly approved by the Commission June 30, 1960.

Pursuant to this agreement, the Terminal Conference issued its "Lighterage Tariff No. 1" dated January 20, 1961, effective February 20, 1961, showing rates for various commodities and cargo not otherwise specified. Except for the addition of less-volume rates applicable to transfers aggregating less than 100 tons, the rates were the same as those in the then-current rate sheet agreed upon by the stevedoring and lighterage committees. The rates were stated to cover "the service of loading and unloading derrick lighters, covered barges, and deck scows (all of which will hereinafter be referred to as 'lighters') alongside vessels which are moored at steamship piers within the Port of Greater New York operated by the participating terminal operators"; and to include "whatever movement is necessary aboard the lighter to make cargo accessible to the ocean vessel's loading gear, and the affixing of cargo to said loading gear" as well as "stowage of cargo aboard lighters in a safe, reasonably efficient manner consistent with the custom and practice in the Port of New York." The terminal operator agreed to supply all necessary labor and equipment; mechanical apparatus used on lighters was to have rubber-tired wheels and be of such weight and construction as to avoid damage to the lighter. Charges were to be for the account of the owner of the lighter, unless the terminal operator was given prior notice to the contrary in writing.

Under date of January 31, 1961, the three complainants herein filed with the Commission an unsworn "protest and petition for suspension," which alleged, among other things, that the parties to the tariff received full and adequate compensation from the steamship operators for the same services; and that collection of the tariff charges from the protesting lighter owners or operators would constitute double compensation and unjust enrichment for the same services. The "protest and petition" did not constitute, and was not treated as, a "sworn complaint" under section 22 of the act which commenced a proceeding before the Commission. No action appears to have been taken on the protest until after the Terminal Conference issued a revised "Lighterage Tariff No. 2," effective May 27, 1963, in the same form as tariff No. 1 but with different rates, with respect to which the three complainants immediately filed an unsworn "protest and complaint" in substantially the same form as the earlier "protest and petition."

By order of investigation and hearing served October 25, 1963, the Commission initiated the investigation hereinabove referred to, No. 1153. The order of investigation referred to Terminal Conference Agreement No. 8005 and the two lighterage tariffs, and noted that both of these tariffs had been protested on the alleged ground, among others, that the lighterage charges duplicated stevedoring charges assessed against the vessel and resulted in double payment for the same service. Complainants were not made parties to the proceeding by the order, but subsequently joined in a petition for leave to intervene, which was duly granted November 21, 1963. As stated above, Morace and Hogan (which was not a party to agreement No. 8005) were not made parties to the proceeding, and Cunard was dismissed as a party more than 2 years before the Commission's order was entered.

The Commission's decision and order in No. 1153, which are discussed hereinafter, were served May 16, 1966. Thereafter respondents herein generally ceased to make any charges against lighter operators in connection with over-the-side transfers.[7]

Since that time, however, at least some of the respondents have collected similar charges either from the carrier or the shipper or consignee—usually the carrier. Sometimes a carrier has asked the terminal operator to bill the shipper or consignee, and the operator has done so. It was the position of the terminal operators and stevedores that since their reimbursement for the work aboard lighters had come from the lightermen, the Commission's order requiring them to forego any charges against the lightermen made it necessary to collect an equivalent amount from the carrier; they refused to do the work without being paid for it. Their contracts for stevedoring the vessels had been made on contemplation of their collecting the lighterage charges from the lightermen and had expressly provided that they should retain such charges; and the stevedoring contract rates had been determined and agreed upon accordingly. Further, it appears from the uncontroverted testimony in the instant proceedings that it costs more to work cargo to and from lighters than to and from the pier, because of lower operating productivity as well as additional nonproductive hours. Nonproductive time is required to rig the ship's tackle for over-the-side operation and to put mechanical handling equipment such as lift trucks aboard the lighters and remove it, and time is lost while lighters

[7] At the hearing, the complaints were amended to claim reparation for charges, if any, made after the dates of the complaints and listed in tabulations introduced as exhibits (subject to the stipulations hereinabove referred to concerning determination of the amounts of any reparation).

are shifted to proper position opposite the vessels' hatches. The limited working space aboard a lighter makes the movement of cargo to and from the hook slower than on the pier, particularly when it is necessary to segregate cargo for loading or unloading; and cargo must be properly stowed on the lighter under the lighter captain's supervision. In discharging copper, which is the principal commodity for which independent lighters are now employed, a comparison on vessels of similar type showed that 39.8 tons per hour could be worked from ship to pier against 27.3 tons per hour from ship to lighter.

The lightermen's rates to their customers (the shippers or consignees) had at all times included the cost of over-the-side transfer; their contracts with their customers expressly provided that shipside loading or unloading of lighters should be done by the lightermen. At or about the time when, pursuant to the Commission's order, they ceased to be billed in connection with over-the-side transfer, they renegotiated their contracts with their customers to delete the amount of the charges for over-the-side transfer from their rates to their customers. As a result of contemporaneous adjustment due to increased tug costs, it did not follow that their rates were reduced: but they would have been increased more if the transfer costs had not been eliminated. Prior thereto, when lighters were worked to the dock, instead of over the side, through no fault of the lighterman, the lighterman billed his customer (pursuant to an express provision of his contract with his customer) for the greater amount it cost him to transfer the cargo to or from the pier (usually done by Spencer), less the exact amount he would have been charged by respondents had the lighter been worked over the side. Thus the lighterman's rate to his customer was credited with the amount thereof against the higher charges which the lighterman was required to pay, and which he likewise passed on to the customer, when he was directed to work to the pier instead of over the side.

Additional findings are included in the following discussion where appropriate.

The Status of T. Hogan & Sons, Inc., an Independent Stevedoring Contractor, in a Proceeding for Reparation Under the Act

Hogan denies that it is subject to the Commission's jurisdiction, since it is not a terminal operator but is in the business of stevedoring only, as an independent contractor. Complainants concede that Hogan was not a member of the Terminal Operators' Conference or a party to its tariff. Prior to the hearing complainants contended, and said they would show, that Hogan was a terminal operator; but no proof thereof was offered, and the undisputed evidence was all to the contrary.

Since Hogan is not a carrier, the Commission's jurisdiction to direct it to pay reparation under section 22 of the act depends on its being an "other person subject to the act," defined in section 1 thereof as "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 a forwarder and does not furnish or have any interest in any such terminal facilities. It is purely in the business of providing stevedoring services for and in connection with the loading and unloading of ships at terminal facilities furnished by others. Despite statements of a predecessor agency in *Status of Carloaders and Unloaders*, U.S.M.C. 761, 767 (1946), cited by complainants, the Commission has not asserted jurisdiction over stevedores not engaged in other activities of a kind which independently make them subject to the act. *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75, 81 (1962); *Philippine Merchants Steamship Co.* v. *Cargill, Inc.*, 9 F.M.C. 155, 161, 162 (1965); *Chr. Salvesen & Co.* v. *West Michigan D & M Corp.*, 12 F.M.C. 135, (Dec. 12, 1968).

Stevedoring is not a "facility" such as a wharf, dock or warehouse, and the rule of ejusdem generis restricts "other terminal facilities" to things similar to those enumerated. That a stevedore furnishes portable labor-saving devices, such as hand tools and lift trucks, for the use of its men does not bring it within the act; such devices could hardly be considered to be "terminal facilities," particularly in the context of "wharfage, docks, and warehouses." The term clearly refers to permanent terminal installations such as docks and warehouses, dockside elevators, crane installations, and the like. An early version of the bill which became section 1 of the act included, in the definition of "other persons subject to the act," the "business of forwarding, ferrying, towing, or furnishing transfer, lighterage, dock, warehouse, or other terminal facilities." Even in this broader version, stevedoring was not specified although it probably represented a larger per-ton cost factor than most if not all of the things mentioned. If it be considered to have been included in "transfer," the elimination of the latter word showed an intention to eliminate it. *United States* v. *American Union Transport*, 327 U.S. 437, 452 (1946).

It seems reasonable to assume that stevedoring as such was excluded simply because stevedores, to the extent that their services are rendered in connection with common carriers by water, are merely servants or contractors employed by carriers or terminal operators who are subject to the act.

It is concluded that the Commission is without jurisdiction to entertain a complaint seeking reparation under section 22 against respondent Hogan, an independent contractor which furnishes no relevant facilities or services other than stevedoring services and is neither a carrier nor another person subject to the act as one who furnishes terminal facilities in connection with a carrier. Since Hogan is the only remaining party respondent in docket No. 66–47, the complaint in that proceeding must be dismissed for lack of jurisdiction.

Jurisdiction Over Stevedoring Practices of Respondents Who Are Subject to the Act

The Terminal Conference respondents, although concededly subject to Commission jurisdiction by reason of their terminal operations, argue that the Commission is without jurisdiction to award reparation based upon their stevedoring practices because stevedores are not subject to the act. That does not follow. As terminal operators, these respondents have sought and obtained the Commission's approval of an agreement authorizing charges for services of the very kind in question, thus securing antitrust exemption for their rate-fixing activity thereunder. In imposing rates so established, they are subject, as "other persons subject to the act," to the requirement of section 17 that they observe just and reasonable practices in connection with the receiving, handling, and delivery of property. Commission jurisdiction over respondents depends on respondents' status as carriers or other persons subject to the act—not upon the nature of the particular practices which are the subject of inquiry. When jurisiction has been established, the Commission's authority extends to any of their acts and practices which are within the scope of the act. The Terminal Conference respondents are indisputably subject to the act; and the matters in issue, which are directly concerned with practices relating to the handling of cargo, are clearly within the Commission's authority with respect to persons subject to the act. *American Export-Isbrandtsen Lines* v. *Federal Maritime Commission*, 389 F. 2d 962, 972 (D.C. Cir. 1968); *California Stevedore & Ballast Co.* v. *Stockton Port District*, 7 F.M.C. 75, 81 (1962); and cf. *Grace Line* v. *Federal Maritime Board*, 280 F. 2d 790 (2d Cir. 1960), cert. denied, 364 U.S. 933 (1961).

The Commission's Decision in No. 1153 as Proof of Illegality of Charges for Which Complainants Seek Reparation

Complainants did not attempt to show as an original matter that respondents' charges in issue here violated the act. For that they relied exclusively upon the decision and order of the Commission in No. 1153, which they submit constitutes collateral estoppel on all the issues involved in the instant proceeding.

The common-law doctrine of res judicata, including the subsidiary doctrine of collateral estoppel, is designed to prevent the relitigation by the same parties of the same claims or issues. 2 Davis Administrative law (hereinafter "Davis"), section 18.12. "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *United States* v. *Utah Const. & Mining Co.*, 384 U.S. 394, 422 (1966). "There was a contested proceeding before the (Interstate Commerce) Commission, with decision depending upon the present issue and the present parties taking opposite sides upon it. Res judicata should and does apply." *Seatrain Lines* v. *Penna. R. Co.*, 207 F. 2d 255, 259 (3d Cir. 1953). "The party asserting collateral estoppel has the burden of showing that issues are identical and that they were decided on the merits in the first proceeding. Lack of identity of issues may result from differences in facts, in subject matter, in periods of time, in case law, in statutory provisions, in notions of public interest, in qualifications of tribunals, and in other similar factors." Davis, section 18.12. "In name and tradition 'res judicata' means thing adjudicated. Only what is adjudicated can be res judicata. Administrative action other than adjudication cannot be res judicata. Even if an exercise of the rulemaking power depends on a finding of facts, neither the rule nor the finding is regarded as res judicata." Davis, section 18.08.

Complainants do not seriously contend that collateral estoppel applies with respect to Morace or Cunard (or to Hogan, if jurisdiction be assumed arguendo); and it clearly cannot, since they were not parties to No. 1153 (Cunard having been dismissed before decision and before the submission of proposed findings and conclusions).

The Terminal Conference respondents who were parties to No. 1153 contend that since the Commission cannot, under section 22, award reparation in an investigation initiated on its own motion, a party seeking reparation cannot rely on the investigation proceeding but must present independent proof that respondents' actions were unlawful. This conclusion does not follow. The real question is whether the precise matters necessary to establish a right to reparation were determined by the Commission in an investigation proceeding, adjudicatory in nature, so as to constitute collateral estoppel under the principles set forth above. For example, the Commission cannot order reparation based solely upon its findings in an investigation where no express finding of past unlawfulness was intentionally made; and the fact that the Commission has ordered that a practice be discontinued as unlawful does not necessarily mean that the Commission has deter-

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mined that prior acts of a similar kind were unlawful at the time thereof. *William N. Feinstein & Co.* v. *United States*, 317 F. 2d 509 (2d Cir. 1963).

Feinstein concerned a railroad's charges for unloading onions at pier stations in New York City. The long history of the case is set forth in the District Court's decision, 209 F. Supp. 613 (S.D.N.Y. 1962). The Interstate Commerce Commission (ICC) had found after hearing that the charges were not shown to be just and reasonable and ordered them to be canceled as of a specified future date. In reaching its conclusion of unlawfulness, the ICC concluded (among other things) that under the applicable tariffs the line haul rate included delivery and that delivery was not effected until the onions were unloaded by the carrier and placed on the pier floor; that the exaction of the unloading charges in addition to the line haul charge violated the Interstate Commerce Act; and that the labor cost of unloading the traffic in issue was only about half of that for unloading other freight delivered at the same or similar points for which no separate charge was made.

Thereafter, a shipper sued for reparation in the U.S. District Court, as the Commerce Act provides, alleging that assessment of the charges during the period prior to cancellation thereof was necessarily unlawful by reason of the ICC's decision. The court held that although the Commission's decision and order put an end to the unloading charges for the future, it did not follow that the Commission also decided that they had been unlawful when paid; and that the plaintiff's claim for reparation required an express finding by the Commission that the unloading charge was unjust and unreasonable during the prior period. *Feinstein* v. *New York Central R. Co.*, 159 F. Supp. 460 (S.D.N.Y. 1958); summarized 209 F. Supp., p. 618.

The shipper thereupon filed a complaint with the Commission alleging that the charges were unlawful during the period at issue, as an assessment for a service which was included in the line-haul transportation; and that the findings and conclusion of the ICC, in the proceeding which had canceled the charges for the future, were applicable to charges imposed during the period immediately prior to cancellation, for which reparation was sought. The primary issue before the ICC was not the reasonableness of the charges when made, but whether the unloading charge could lawfully be exacted in any amount.[8] The ICC refused to make the finding requested upon the basis of its earlier decision, stating that the shipper "fail(ed) to recognize the inherent differences between findings of past and future unreasonableness." It

[8] See 209 F. Supp. 613, 622. The fact that in an earlier decision, which had not been superseded at the time the charges were made, the ICC had held the charges to be just and reasonable in amount was not a significant factor in the proceedings described above.

concluded that the prior charges were not shown to have been unjust, unreasonable, or otherwise unlawful when made. *Feinstein* v. *N.Y. Central R. Co.*, 313 I.C.C. 783, 789, 793 (1961).

The shipper then filed suit to set aside the ICC's report and order. One of the primary grounds asserted was the alleged inconsistency of the decision's ultimate conclusion, and certain of its subsidiary findings, with the ICC's prior determination. It contended that the facts elicited before the ICC in both cases were identical and that therefore the different findings and conclusion in the later proceeding were by their very nature illogical, arbitrary, and illegal. The court held (*Feinstein* v. *United States*, 209 F. Supp. 613, 620 (S.D.N.Y. 1962); aff. 317 F. 2d 509 (2d Cir. 1963)):

> * * * This contention is not sustainable. The mere fact that a Commission decision may be inconsistent with a prior Commission determination is not a valid ground for its reversal. * * * An administrative body, such as the Commission, is not required to deal with a particular case as it has dealt with a prior case that seems similar since diverse factors may be present in the second determination which the Commission feels, in the exercise of its specialized experience, justify a different result. In the situation presented here, the record in the prior case might have been inadequate or the Commission might have been wrong in its first determination. * * *
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> * * * The Commission in (the earlier decision) * * * merely held that the charges were not shown to be just and reasonable for future application. Such a finding of unlawfulness for the future, however, did not logically compel a subsequent finding of unlawfulness for the past. As was stated by the Supreme Court in *Baer Bros. Mercantile Co.* v. *Denver & R.G.R. Co.*, 233 U.S. 479, 486, 34 S. Ct. 641, 58 L. Ed. 1055:
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>> * * * awarding reparation for the past and fixing rates for the future involve the determination of matters essentially different. One is in its nature private and the other public. One is made by the Commission in its quasi-judicial capacity to measure past injuries sustained by a private shipper; the other, in its quasi-legislative capacity, to prevent future injury to the public.
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> Thus there was extant no prior finding which would bind the Commission in 313 I.C.C. 783 to find that the unloading charge was unlawful when paid.

So, when an appropriate administrative agency determines that a charge for a particular kind of service is unlawful regardless of amount, and forbids the future imposition of such a charge without expressly finding that past charges of the same nature were unlawful when made, a claimant seeking reparation for such past charges cannot rely upon that decision to establish that the charges were unlawful. In such a situation the claimant must seek and obtain from the agency, upon evidence adduced in the reparation proceeding, a determination that the past charges were unlawful when made; and even though the evidence adduced is the same as that which was before the agency in the earlier proceeding, the agency need not necessarily find past unlawfulness.

Complainants here contend in effect that they should prevail under the rule of *Feinstein.* They assert that there is a prior finding that past acts of respondents constituted a violation of law, so as to bind the Commission to find that the charges in issue were unlawful, simply because its order referred to "violations * * * herein found to *have been committed* by respondents." [Emphasis complainants'.] These words appear in the Commission's order, however, and not in its findings and conclusions; and the order states that its findings and conclusions are contained in its decision.[9] The pertinent paragraph of the order was not a finding or conclusion but a direction to respondents to cease such violations as it had found, in its report, "to have been committed"; and the order directs respondents to modify their lighterage tariff, which it found to be authorized by their approved agreement, within 45 days after the date of service of the order. There is a general finding of past violation in failure to adopt a proper lighter detention rule; of that the Commission says "failure to do so for the future will be, as it has been in the past, contrary to section 17 of the act." 9 F.M.C., p. 514. Whatever the effect of such language may have been with respect to the lighter detention practice, there is no such finding, conclusion or observation with respect to the lighter loading and unloading charges. On the contrary, the Commission's finding that the conference agreement "does authorize" the charges was an affirmative finding of past legality under section 15 of the act, as charges established and governed by normal economic forces. *Continental Nut Co.* v. *Pacific Coast River Plate Conf.*, 9 F.M.C. 563, 570.

That neither the Commission nor (at that time) any of complainants was concerned with unlawfulness of the lighter charges in the past is

[9] The entire text of the order, which applied to all the several different subjects disposed of by the Commission's decision of May 16, 1966, was as follows (9 F.M.C., p. 524; emphasis added):

> This proceeding having been initiated by the Federal Maritime Commission, and the Commission having fully considered the matter and having 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;
>
> *It is ordered,* That respondents be, and they are hereby, notified and required to cease and desist from engaging in the violations of section 16 First and section 17 of the Shipping Act, 1916 (46 U.S.C. 815, 816), *herein found to have been committed by respondents;* and
>
> *It is further ordered,* That respondents be, and they are hereby required, within 45 days after the date of service of this order to modify the provisions of their Lighterage Tariff No. 2 and their Truck Tariff No. 6, in a manner consistent with our report herein; and
>
> *It is further ordered,* That the proceedings in Docket 1153 are hereby discontinued except for that portion thereof upon which the Examiner reserved decision pending resolution of a related subpoena enforcement proceeding currently before the courts.

indicated by the dismissal of two respondents, without objection from the complainants as intervenors, upon their plea that they had resigned from the Terminal Conference after No. 1153 was commenced. Packet Shipping Corp. moved January 13, 1964, to be dismissed because it had resigned from the Terminal Conference effective December 22, 1963 (the investigation was instituted October 25, 1963) and had not done over-the-side lighter work since June 14, 1963. Packet was dismissed March 6, 1964, just before hearings commenced, without objection from anyone. Cunard moved to be dismissed April 14, 1964, after hearings had terminated, upon the grounds (so far as pertinent to lighterage) that it had resigned from the Terminal Conference March 17, 1964—after hearings had commenced—and had decided not to file a lighterage tariff. There being no objection to Cunard's motion, the Commission dismissed Cunard as a respondent May 5, 1964, stating: "In view of Cunard's resignation from the New York Terminal Conference, and its filing of its own truck loading tariff, no further useful purpose would be served by its continuing as a party respondent herein." The dismissal of Cunard after hearing simply because, while hearings were in progress, it had resigned from the Terminal Conference and resolved not to file its own lighter-handling tariff was (like the dismissal of Packet) inconsistent with any intention, on the Commission's part, to make any findings of past violations; and no such findings were in fact made.[10]

It is found and concluded that in its decision and order served May 16, 1966, in No. 1153, the Commission neither made nor intended to make any finding or conclusion to the effect that charges assessed pursuant to the Terminal Conference respondents' lighterage tariff No. 1 or No. 2 prior to service of its said decision and order were unlawful at the time they were assessed.

The Lawfulness of the Charges Prior to the Decision in No. 1153

The record herein establishes that at all times prior to the effective date of the Commission's decision and order in No. 1153, respondents' charges in connection with shipside loading or unloading of shippers' and consignees' lighters were in accordance with the long-standing custom and practice of the Port of New York; that in the case of the respondent Terminal Conference members such charges were authorized by an agreement duly approved, pursuant to section 15 of the act,

[10] The Commission noted in its order dismissing Cunard that hearing counsel did not oppose the "withdrawal" of Cunard inasmuch as the hearing record contained no "allegations" of any past violations by Cunard. Respondents say the record was identical with respect to themselves and Cunard. The Commission's findings in No. 1153 do not suggest any material distinction, and complainants contend that Cunard's over-the-side operations were in all respects the same as the other respondents.

by the Commission; that pursuant to the aforesaid custom and practice of the port the responsibility for performing the services covered by such charges was not undertaken by ocean carriers as part of their transportation service, but was understood to be the responsibility of the shipper or consignee and as such was assumed by the lightermen, who by contract with their employing shippers and consignees collected from such customers the full cost of performing, or causing to be performed, the said services. Upon such findings it must be concluded that the charges in issue, to the extent that they were made with respect to transactions occurring prior to June 30, 1966, the effective date of the Commission's order, were not unlawful.

Such conclusion is not inconsistent with the Commission's decision in No. 1153. Rather this is a clear example of the difference between awarding reparation for the past and determining future practice, which may and in this case does justify results which might otherwise seem to be inconsistent. *Feinstein* v. *United States*, 317 F. 2d 509, 512 (2d Cir. 1963).

In No. 1153, the Commission determined that the imposition of the charges for the future would violate section 17 because it resulted in a double charge. In arriving at that conclusion the Commission relied upon reasoning from abstract principles which, while appropriate in that proceeding, does not compel, or upon this record permit, the award of reparation sought here.

In No. 1153, the Commission noted that traditionally the ship has the responsibility of moving cargo between the end of ship's tackle and place of rest on the pier, and that in the absence of a special handling charge,[11] the freight rate will include the charge for such stevedoring. The respondents therein apparently undertook to show, as they did in the instant proceeding, that additional expense was included in direct transfer services, but upon the basis of proof to the contrary which was not offered in the instant case, the Commission resolved a conflict of evidence against respondents' contention. The Commission then reasoned that in direct transfer, the lighter deck replaces the pier as the place of rest.[12] Since the respondent terminal operators were paid by the ship to perform the stevedoring function, which included movement of cargo to and from place of rest (on the pier), it concluded

[11] As, for example, at Pacific coast ports, where tariff rates are broken down to provide for separate charges to cover this portion of the stevedoring function. *Sun-Maid Raisin Growers Assn.* v. *United States*, 33 F. Supp. 959 (N.D. Cal. 1940), aff. 312 U.S. 677 (1940).

[12] Upon the record in the instant proceeding, it could not be found that movement between end of ship's tackle and place of rest on the lighter deck is equivalent to movement between end of ship's tackle and place of rest on the pier; for there is competent, convincing and uncontroverted evidence establishing that extra expense is involved in the lighter operation. It is not necessary, however, to rely upon this apparent difference between the records in this and the earlier proceeding.

syllogistically that their charge to the lightermen for direct transfer service "results in collecting twice for the performance of a single service—the imposition of a double charge."

The Commission was not concerned with, and did not discuss, the facts that traditionally the ship did not assume the responsibility of moving cargo between ship's tackle and place of rest (including stowage) on shippers' or consignees' lighters; that the carrier's traditional obligation to move cargo between ship's tackle and place of rest on the pier, like the carrier's obligation to allow free time, was by custom of the port deemed inapplicable in the case of lighter delivery and pickup; [13] that the amount received from the carriers by the terminal operators for all stevedoring services was arrived at in contemplation of this tradition or custom of the port, with contracts expressly providing for the collection and retention, by stevedore-terminal operators, of charges "customarily" assessed against the lightermen; and that the lightermen contracted with shippers or consignees to perform the work of shipside-loading and unloading, with lighterage rates fixed accordingly. For the purposes of No. 1153, these matters were considered irrelevant; the Commission's point was simply that since a service which the Commission found to be equivalent to the service in question was covered by the freight paid by the shipper to the carrier, there should not in the future be an additional charge for the service in question, notwithstanding a long-standing practice to the contrary.

The obligation to provide the service without extra charge was necessarily found to be the carriers', but the Commission had the terminal operators, not the carriers, before it in No. 1153. There could be no inequity in the Commission's accomplishing its purpose for the future by requiring the terminal operators to stop assessing the charge, for it could assume that the operators would in the future collect enough from the carriers to cover the service which, it had determined, the carriers should provide. The record herein shows that that in fact has occurred; for the respondents have collected additional compensation, equal to the amount of the disputed charges, from the carriers since they have been required to forego any charges to the lightermen. Similarly, the Commission did not find it necessary to mention respondents' argument that elimination of the charges would produce a windfall for the lightermen, who by contract had undertaken to perform the services. The reviewing court explained why that argument was not material to the Commission's position. The Commission could reasonably conclude, the court said, that the rate charged by the lighter-

[13] In determining past unlawfulness, the history of the charges at the port and the action of the parties in relation thereto would have been important in determining whether loading and unloading lighters had been a part of transportation. *Adams* v. *Mills*, 286 U.S. 397, 409 (1932).

men to the shipper would be reduced commensurately (389 F. 2d, at p. 973).

Like the Commission, the court gave no consideration to the possibility of a retrospective application of the Commission's ruling, which would indeed produce a windfall for the lightermen. It would cause the respondent terminal operators, who had not in fact been paid by the carriers for the service in question, to return the compensation they had received for such service to the lightermen, who had already collected the full amount thereof from their customers, the shippers and consignees. The shippers and consignees, the only ones who could on any theory be said to make a double payment (once to the carriers as part of the freight and once to the lightermen) would receive nothing. The carrier, the only person who could be said to collect twice (once by way of the freight collected from the shipper, and once by arranging through its stevedoring contracts to have the stevedore get his compensation from the lightermen) would give up nothing.[14]

Such would be the result of applying retrospectively a ruling evolved for prospective application. It illustrates what the ICC called the inherent differences between findings of past and future unreasonableness. *Feinstein* v. *N.Y. Central R. Co.*, 313 I.C.C. 783, 789.

Proof of Injury as a Prerequisite to Reparation

The Terminal Conference respondents contend that even if the charges be deemed to have been unlawful when made, the Commission should not, in its discretion, award reparation under the circumstances; citing *Consolo* v. *Federal Maritime Commission*, 383 U.S. 607, 621 (1966). They further contend that as a matter of law there can be no reparation because complainants were not injured. As to the period prior to the effective date of the Commission's decision and order in No. 1153, the examiner agrees with respondents on both counts; but not as to any subsequent charges imposed by those respondents who were parties to No. 1153 at the date of the said order.

It is evident that there was no actual injury to the complainant lightermen; concededly their rates to their customers included a definite factor to cover the charges in issue, which they eliminated only after respondents had eliminated the charges pursuant to the Commission's order. Complainants argue that the question of injury to them is not in issue, however, because of the rule that the carrier ought not to be allowed to retain an illegal profit, and the only one who can take it

[14] Since nothing is free in the long run, it may be assumed that freight rates will eventually include an increment for the additional charges now payable by the carrier to stevedores or terminal operators; however, the amount thereof will be spread among all shippers instead of the few shippers employing lighters, who prior to the Commission's order were paying such charges in addition to the same freight paid by all other shippers.

from him is the one from whom the carrier took the sum; citing *Southern Pacific Co.* v. *Darnell-Taenzer Co.*, 245 U.S. 531, 534 (1918). However, *Interstate Commerce Commission* v. *United States*, 289 U.S. 385 (1933) made it clear that that rule applies only where the charge exacted of a shipper is excessive or unreasonable in and of itself and therefore inherently unlawful. The court said, at page 390:

> * * * But a different measure of recovery is applicable "where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less." *So. Pac. Co.* v. *Darnell-Taenzer Co.* (245 U.S. 531 (1918)), p 534. Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less (*Penn. R. Co.* v. *International Coal Co.* (230 U.S. 184 (1913)), pp. 206, 207), but which, whether more or less, is something to be proved and not presumed. *Ibid*, p. 204. "Recovery cannot be had unless it is shown that, as a result of defendant's acts, damages in some amount susceptible of expression in figures resulted." *Keogh* v. *C. & N. W. Ry. Co.* (260 U.S. 156 (1922)), p. 165. The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.

The present case is analogous to that of a discriminatory charge, reasonable in itself, and not to that of a charge which is "excessive or unreasonable, in and of itself," and therefore unlawful per se. There is no complaint here as to the amount of the charge. The Commission expressly found, in No. 1153, that the charge contained in respondents' tariff was authorized by the Terminal Conference respondents' section 15 agreement, which the Commission had approved upon an examination that "fail(ed) to show said agreement to be unjustly discriminatory or unfair * * * or violative of the (act)." The Commission's finding necessarily carried with it a finding that the assessment of charges so found to be authorized was not inherently unlawful so as to permit recovery of reparation without proof of loss under *Southern Pacific* and the later ICC case.[15]

It does not follow, of course, that such charges, however lawful per se, might lawfully be collected twice; and that is in fact the essence of complainants' claim. To recover reparation upon such a claim, however, they must show that respondents in fact collected each charge twice, and that as a result of respondents' acts, they suffered actual damage. To paraphrase the court's observation in the ICC case, 289 U.S. at page 390, the question is not how much better

[15] Although the Commission ordered respondents in No. 1153 to modify their lighterage tariff. in accordance with its decision, within 45 days, it did not direct them to modify their sec. 15 agreement, and it appears that the agreement is still in effect without relevant change. The decision and order established, however, that the respondents therein could not lawfully implement the agreement by the imposition of over-the-side charges under the circumstances described in the decision, after a date 45 days from the date of the order. After that effective date such charges were no longer of the kind authorized by the agreement. Cf. *Continental Nut Co.* v. *Pacific Coast River Plate Conf.*, 9 F.M.C. 563 (1966).

off the complainants would be if they had not paid the charges, but how much worse off they are, under all the circumstances, because they have paid them. The evidence discloses not that complainants paid the charges twice, directly or indirectly, but that at all times prior to the Commission's decision in No. 1153, and until an unspecified date thereafter, they made but one payment and collected the entire amount thereof from their customers. When they worked their lighters to the pier they collected an additional amount precisely equal to the difference between the charges in issue and the higher charges which they had to pay others for service to the pier.[16] Complainants had expressly contracted with their customers to perform the shipside loading and unloading which respondents actually performed in return for the charges. Prior to the effective date of the Commission's order in No. 1153, after which complainants revised their rates to their customers (and respondents, for the most part, ceased to assess the charges in issue), complainants were in effect adding the charges under a sort of "cost-plus" arrangement. Cf. *Hanover Shoe* v. *United Shoe Machinery*, 392 U.S. 481, 494 (1968).

Even if it be assumed, arguendo, that respondents violated section 17 when they assessed the charges against complainants prior to the Commission's order in No. 1153, it is concluded that complainants would not be entitled to reparation with respect thereto, because they have not shown that any injury to themselves was caused thereby.

The Commission's order in No. 1153 was served May 16, 1966, and required the respondents in that proceeding to modify the provisions of their lighterage tariff No. 2, in a manner consistent with its decision, within 45 days; i.e., on or before June 30, 1966. The assessment of any of the charges at issue by any of the respondents herein who were subject to the Commission's said order was unlawful per se, in violation of section 17 of the act, with respect to loading or unloading after that date;[17] and complainants are entitled to reparation in the amount of any such charges without further proof of injury, pursuant to section 22 of the act.

[16] Had respondents not been permitted to collect the charges, it is possible that respondents, or the carriers, would have required complainants to work to the pier, and thus to pay Spencer's higher charges, on some occasions; but it does not appear, as respondents suggest, that this would always have been the case, so as to provide a further ground for denial of reparation. Over-the-side transfer was of benefit to the carrier as well as the shipper or consignee; the benefit to the carrier was reduced (and the already substantial benefit to the shipper or consignee enhanced) by the requirement that no charges be collected from the lightermen, but the record does not establish that it has been completely eliminated.

[17] If the charges were imposed, after the Commission's order, pursuant to agreement among the Terminal Conference respondents, they likewise violated sec. 15; the record suggests, however, that the respondents proceeded individually after the date of the order, since several of them apparently ceased to impose the charges.

It is not necessary to consider the effect of the Commission's order with respect to charges thereafter assessed by respondents Morace and Cunard, who were not respondents in No. 1153 and subject to the Commission's order therein, since the schedules of claims submitted by claimants show no charges by such respondents after the date of the said order. Respondent Hogan was clearly not a carrier or other person subject to the act, whom the Commission could direct to pay reparation under section 22.

Ultimate Conclusions

Findings and conclusions proposed by the parties have been incorporated herein to the extent that they are found to be material and supported by the record, and are otherwise denied.

Upon the record in these proceedings it is concluded and found that:

1. The Commission is without jurisdiction to entertain a complaint against T. Hogan & Sons, Inc., under section 22 of the Shipping Act, 1916, since said respondent was not at any material time a "common carrier by water, or other person subject to this act."

2. Prior to the effective date of the Commission's decision and order served May 22, 1966 in *Truck and Lighter Loading and Unloading*, 9 F.M.C. 505, the imposition by respondents or any of them of charges in connection with the shipside loading and unloading of complainants' lighters has not been shown to have violated the Shipping Act, 1916, and did not injure complainants.

3. Such charges as were imposed against complainants in connection with the shipside loading or unloading, after June 30, 1966 (the effective date of the said order of the Commission), of complainants' lighters, by respondents American Stevedores, Inc., Bay Ridge Operating Co., Inc., Grace Line Inc., International Terminal Operating Co., Inc., Maher Stevedoring Co., Inc., Marra Bros., Inc., John W. McGrath Corp., Nacirema Operating Co., Inc., Northeast Marine Terminal Co., Inc., Pier 8 Terminals, Inc., Pittston Stevedoring Corp., Transoceanic Terminal Corp., Turner & Blanchard, Inc., and Universal Terminal & Stevedoring Corp., or any of them, were in violation of section 17 of the Shipping Act, 1916; and complainants are entitled to reparation in the amount thereof.

An order will be entered dismissing the complaint in docket No. 66–46 with respect to respondents Cunard Steam-Ship Co., Ltd., and Morace Stevedoring Corp., and dismissing the complaint in docket No. 66–47.

The remaining parties to docket No. 66–46 may either agree or make proof respecting the amount of reparation, if any, due from each respondent to each complainant in accordance with this decision, pursuant to rule 15 of the Commission's Rules of Practice and Procedure, subject to the stipulation of the parties approved January 14, 1969.

S/ WALTER T. SOUTHWORTH,
Presiding Examiner.

FEDERAL MARITIME COMMISSION

No. 1118

PACIFIC COAST EUROPEAN CONFERENCE—INCREASED HANDLING CHARGES

Adopted November 17, 1966

Increased cargo handling charges of the Pacific Coast European Conference not found to violate section 15 or section 18(b)(5) of the Shipping Act, 1916; and proceeding discontinued.

Leonard G. James, *Robert L. Harmon*, *Charles F. Warren*, and *F. Conger Fawcett* for respondent, the Pacific Coast European Conference and its member lines.

Wm. Jarrel Smith, Jr., *Robert J. Blackwell*, *Frank G. Gormley*, *Harold F. Witsaman*, *Norman D. Kline*, *Richard L. Abbott*, *Samuel B. Nemirow*, and *Donald J. Brunner* as Hearing Counsel.

H. E. Franklin for Seattle Traffic Association, intervener.

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

This investigatory proceeding was instituted to determine if increased cargo handling charges of the Pacific Coast European Conference (the Conference) violate sections 15 or 18(b)(5) of the Shipping Act, 1916 (the Act). Both the Conference and Hearing Counsel now ask that the proceeding be discontinued. The intervener, Seattle Traffic Association did not participate in the hearing, and has filed nothing but its petition to intervene.

The charges in question are made for handling cargo from the place where it is turned over to the carrier to ship's tackle, a service not covered by the ocean carriage rate. The propriety of such charges has been specifically recognized in *J. G. Boswell Company, et al.* v. *American-Hawaiian Steamship Company, et al.*, 2 U.S.M.C. 95 (1939) and other cases. This being true, and the Conference's approved agreement

[1] This decision became the decision of the Commission on Nov. 17, 1966.

covering the establishment and maintenance of such charges, they are not objectionable under section 15 of the Act.[2]

There is no evidence that the charges under investigation [3] are "so unreasonably high or low as to be detrimental to the commerce of the United States," and all the evidence is to the contrary.

Those who protested the original increases no longer do so, and when contacted by Hearing Counsel, advised that they did not desire to press the matter further or to testify in this proceeding. The increases in the charges made since this proceeding was instituted have produced no protests.

The undisputed evidence is that the Conference uses the most economical means available to handle the cargo, and that the charges (although at times they may show a profit) are intended to reimburse the carriers, and no more. Such charges are *prima facie* reasonable, and here there is no evidence that they are excessive.

It is found that the charges here under investigation are not shown to violate section 15 or section 18(b)(5) of the Shipping Act, 1916, and the proceeding is discontinued.

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

Washington, D.C.
October 27, 1966

[2] Paragraph (1) of Agreement No. 5200 covers *inter alia* "the establishment * * * of agreed rates for *or in connection with* the transportation of cargo". Emphasis supplied.

[3] These include increases subsequent to the institution of the proceeding, bringing the charges to their present level.

FEDERAL MARITIME COMMISSION

DOCKET NO. 65–12

CROWN STEEL SALES, INC. ET AL.

v.

PORT OF CHICAGO MARINE TERMINAL ASSOCIATION ET AL.

Adopted by the Commission January 23, 1967

The 9 cents per 100 pounds inland carrier loading and unloading charge assessed by terminal operators at the Port of Chicago found to be noncompensatory but not found to have been an unjust or unreasonable practice in violation of section 17, or to have unduly or unreasonably prejudiced importers of iron and steel, or other shippers using the Port of Chicago, in violation of section 16 First, or to have operated in a manner detrimental to the commerce of the United States or contrary to the public interest in violation of section 15.

The tariff amendments of Mediterranean-U.S.A. Great Lakes Westbound Freight Conference and Federal Pacific Lakes Line found not to have been in violation of notice of change provisions of section 18(b)(2).

Federal & Atlantic Lakes Line found not to have violated the unjust or unreasonable practice provisions of section 17 or the tariff compliance provisions of section 18(b)(3).

The "Associated Great Lakes Freight Conferences" found not to be an interconference agreement organization subject to section 15 approval.

The Great Lakes United Kingdom Westbound Conference found not to have violated section 18(b)(2) by not filing a tariff amendment in 1965.

Respondent terminals are admonished to restudy and revise their tariff rate structures.

Complaint dismissed.

Alan D. Hutchison for complainants Crown Steel Sales, Inc., Heads & Threads Division of MSL Industries, Inc., Interstate Steel Co., Metron Incorporated, Nortown Steel Supply Company, Taubensee

Steel & Wire Co., The Metron Steel Corp., Union Steel Co., Wilson Steel & Wire Co., and Wire Sales Co.

Joseph E. Wyse and *Abraham A. Diamond* for respondents Port of Chicago Marine Terminal Association and its members North Pier Terminal Co., Calumet Harbor Terminals, Inc., Great Lakes Storage and Contracting Co., Maritime Services, Ltd., Rogers Terminal and Shipping Corporation, and Transoceanic Terminal Corp.

Warren A. Jackman and *Daniel K. Schlorf* for respondents Federal Marine Terminals, Inc., Federal & Atlantic Lakes Line and Federal Pacific Lakes Line.

Thomas K. Roche and *William F. Faison* for respondents United States Great Lakes Bordeaux/Hamburg Range Westbound Conference, Scandinavia Baltic Great Lakes Westbound Freight Conference, Great Lakes United Kingdom Westbound Conference, the member lines of said conferences, and Associated Great Lakes Freight Conferences.

Elliott B. Nixon for respondent Mediterranean-U.S.A. Great Lakes Westbound Freight Conference.

Philip G. Kraemer for intervener Traffic Board of the North Atlantic Ports Association.

Donald J. Brunner and *Norman D. Kline* intervener Hearing Counsel.

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

This proceeding is before us on exceptions to the initial decision of Hearing Examiner John Marshall. Complainants' exceptions merely constitute a reargument of the same issues, allegations, and contentions considered by the Examiner in his initial decision with the exception of two points not raised in the opening brief of complainants.[1]

After a careful review and consideration of the record in this proceeding, we conclude that the Examiner's disposition of the issues herein was well founded and proper. Accordingly, we hereby adopt the Examiner's decision which is set forth below.

INITIAL DECISION OF JOHN MARSHALL, PRESIDING EXAMINER [2]

Complainants, all located in the Chicago area, are users of steel normally imported through the Port of Chicago. They allege that the establishment of an inland carrier loading and unloading charge of 9 cents per 100 pounds, effective April 1, 1965, constituted violations of various sections of the Shipping Act, 1916, by respondent terminal

[1] A discussion of these points is found in this report following the Initial Decision. See post.

[2] This decision was adopted by the Commission January 23, 1967.

operators, steamship carriers and conferences.[3] More specifically, it is charged that:

1. The 9-cent charge assessed under the tariffs of the Port of Chicago Marine Terminal Association [4] and Federal Marine Terminals, Inc., is an unjust and unreasonable practice in violation of section 17 of the Act. Furthermore, that since it applies to all cargo regardless of ease of handling, bulk, or value, it is unduly prejudicial to iron and steel and unduly preferential to general cargo in violation of section 16 First of the Act.

2. The charge operates to the detriment of the commerce of the United States, is contrary to the public interest, creates undue and unreasonable prejudice to shippers using the Port of Chicago and is in violation of sections 15 and 16 First of the Act.

3. The tariff amendment of the Mediterranean-U.S.A. Great Lakes Westbound Freight Conference,[5] filed March 12, 1965, to become effective March 15, 1965, and of Federal Pacific Lakes Line,[6] filed April 22, 1965, to become effective April 23, 1965, both discontinuing the practice of including terminal charges in the ocean freight rate, constituted indirect rate increases in violation of the thirty-day notice requirement of section 18(b) (2).

4. The United States Great Lakes-Bordeaux/Hamburg Range Eastbound and Westbound Conferences, the United States Great Lakes-Scandinavian and Baltic Eastbound and Westbound Conferences and the Great Lakes United Kingdom Eastbound and Westbound Conferences [7] took concerted action through the Associated Great Lakes Freight Conferences to obtain an indirect rate increase without filing an inter-conference agreement as required by section 15.

5. The Great Lakes United Kingdom Westbound Conference failed to file a tariff amendment reflecting the indirect rate increase, thus violating sections 15 and 18(b) (2).

6. Federal & Atlantic Lakes Line filed an amendment to its tariff [8] on April 9, 1965, to become effective May 10, 1965, but attempted to collect the 9¢ truck loading charge through its subsidiary, Federal

[3] The pertinent portions of the Shipping Act, 1916, as amended (the Act), are attached as Appendix A.

[4] Port of Chicago Marine Terminal Association Tariff No. 1, Section VII, FMC No. T-12.

[5] No. 6-FMC-2, Page N 13, Fourth Revised, Rule 35.

[6] Federal Pacific Lakes Line—FMC No. 2, 2nd Revised Page 2.

[7] The three eastbound conferences were included on brief but were not named respondents in the complaint and did not participate in the proceeding.

[8] Federal & Atlantic Lakes Line, FMC No. 2, 2nd Revised Page 3.

Marine Terminals, Inc., before the effective date, in violation of sections 15 [9] and 18(b)(3).

Respondents filed answers in the nature of general denials.[10]

THE FACTS

The record establishes the following facts:

1. Respondent terminal operators are engaged in the business of stevedoring and marine terminal operations. As stevedores, they load and discharge cargo from water carriers. As marine terminal operators, they provide a waterfront facility and perform various services to accomplish the interchange of cargo between inland carriers and water carriers.

2. From the time oceangoing vessels first entered the Great Lakes, it had been the practice of those serving the Port of Chicago in the foreign trades to include railroad car and truck loading and unloading (hereinafter collectively termed truck loading) within their ocean line-haul rates. Except for Duluth, this was the practice at other Great Lakes ports but not elsewhere in the United States or at major foreign ports. As early as 1960 ship owners, seeking some form of economic relief in serving the Great Lakes trade, expressed the desire that this practice be changed to conform to that more normally followed. They were faced with the fact that, while ocean freight rates from Lakes ports necessarily tended to be on the same approximate level as those from competitive tidewater ports, the Lakes services involved extra voyage time of 15 to 20 days and the absorption of truck loading charges. The latter represented a cost burden of $2 to $3 per ton.

3. Acting through the United States Great Lakes Shipping Association [11] (Shipping Association), the owners endeavored to persuade terminal operators [12] at Chicago and other Great Lakes ports to form associations, file tariffs and assess truck loading charges, thus relieving the carriers of this expense.

4. The Chicago terminal operators were not anxious to file tariffs as they did not wish to become involved in government regulation,

[9] On brief, section 15 was apparently dropped and section 17 added.

[10] Intervener Traffic Board of the North Atlantic Ports Association took no part in the proceeding.

[11] Previously the Chicago Overseas Shipping Association. It is concerned with matters of interest to both conference and nonconference lines serving the area but it does not fix rates. It was not the entity which decided to separate truck loading charges from ocean rates.

[12] "Terminal operators" as used hereinafter does not include respondent Federal Marine Terminals, Inc. Federal is not a member of the Port of Chicago Marine Terminal Association and did not begin operations until 1965.

to assume the burden of collecting terminal charges, or to incur expenses for the preparation of tariffs and for legal services. They were also apprehensive as to the likelihood of diverting traffic to other ports. Consequently, they refused to adopt an agreement and tariff which a special committee of the Shipping Association drafted in the fall 1961.

5. On September 20, 1962, the Federal Maritime Commission ordered a non-adjudicatory investigation regarding the practices of common carriers by water in the United States Great Lakes overseas trades.[13] The Report and Findings, served January 21, 1963, contained the following finding and conclusion:

> 7. Certain carriers and conferences of carriers operating in the Great Lakes have a tariff rule substantially as follows:
>
> > Rates are port to port as customary and unless otherwise specifically stated do not cover charges established by custom of the port and/or established port tariffs which are for the account of the owners of the goods.

The practice of these carriers in interpreting their present tariffs as including customary terminal charges at Great Lakes ports other than Duluth, is a distortion and in violation of such rule, which is itself ambiguous.

6. Following service of the investigative Report and Findings, the Commission's Executive Director, in January 1963, communicated with each steamship conference and many of the individual lines then serving the Great Lakes requesting voluntary compliance with this finding. No voluntary compliance was forthcoming.

7. On May 16, 1963, the Chicago terminal operators changed their position and informed the Shipping Association that they had agreed to form a terminal association and to thereafter file a tariff. However, the operators pointed out that they were fearful of possible legal expenses in carrying out the wishes of the carriers and felt that they should not be called upon to shoulder the entire burden. An agreement forming the Port of Chicago Marine Terminal Association (Terminal Association) was filed July 11, 1963, and approved by the Commission March 17, 1964; but no terminal tariff was forthcoming.

8. On August 8, 1963, the Commission instituted a formal investigation to determine whether conferences and independent carriers serving the Great Lakes in foreign trades were in violation of sections 15, 16, 17, or 18(b) of the Act.[14] During the course of the proceedings, but before hearing, Hearing Counsel conducted a series of discussions

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[13] *Possible Discrimination by Activities of Carriers Operating in Trades Between Great Lakes Ports and Foreign Ports,* Fact Finding Investigation No. 2.

[14] *Carriers Operating in Trades Between Great Lakes Ports and Foreign Ports,* Docket No. 1135.

with all respondents and the Commission's staff. These eventually produced a mutually acceptable clarification of the objectionable rule. An effect of this clarification was the separation of truck loading charges from the ocean rates, contrary to then prevailing practices at Great Lakes ports other than Duluth.[15]

9. On May 22, 1964, counsel for the terminal operators advised the ship owners that a truck loading tariff had been prepared but could not be filed until an agreement could be arrived at with the carriers which would afford adequate protection to the terminal operators in the event of litigation or other difficulty arising out of the enforcement of their tariff. Negotiations conducted over the preceding four years had failed to solve various problems including (1) the apparent refusal of some of the carriers to be parties to a protection agreement, and (2) the limited period covered by the carriers' proposed guarantee of tariff collections. The terminal operators offered the alternative suggestion that, prior to any change in the tariffs of either the carriers or the terminal operators, the Federal Maritime Commission be asked to decide who should bear the charge for truck loading at Great Lakes ports.

10. Discussions and meetings continued and the carriers continued to urge the terminal operators to file a tariff. On July 29, 1964, the terminal operators advised the carriers that they would file a tariff if they were given a guarantee of indemnification by the carriers against all losses and legal expenses arising out of the filing of such tariff. The carriers offered an alternative plan, which was not accepted, and again requested that a tariff be filed, preferably before October 15, 1964, to be effective before the 1965 Great Lakes shipping season. No tariff was filed. On January 7, 1965, another meeting was held at which the terminal operators offered to assess truck loading charges if the carriers would undertake the collection of the charges. This was because the terminal operators considered their administrative staffs inadequate to handle credit arrangements and other detailed functions incident to collections. It was agreed that a formal proposal would be submitted for consideration by the carriers.

11. The carriers filed amended tariffs with the Commission during March, effective on or before April 1965, and on March 24, 1965, advised the terminal operators by telegram that a terminal tariff had to be filed immediately as the carriers' amended tariffs no longer provided for absorption of truck loading charges and that such absorption would therefore be illegal. Thus, the Terminal Association had no

[15] The practice at Duluth of assessing truck loading charges against the cargo, rather than the vessel, gave rise to the section 16 First and 17 violations alleged in the Commission's Order of Investigation in Docket No. 1135.

choice but to file a terminal tariff. An informal meeting of its members was held at once and a tariff establishing 9¢ as the truck loading charge was mailed to the Commission that same day, March 24, to be issued March 29, effective April 1, 1965. This action was ratified at a formal meeting of the Terminal Association held April 13, 1965. Section VII of this tariff provided as follows:

> A charge of nine cents (9¢) per 100 pounds will be made against the shipper, consignee, or owner of cargo for the service of loading and unloading cargo to and from railroad cars and trucks, and is applicable on all cargo handled on, through, or by the terminal whether or not said cargo actually comes to rest on the terminal premises in its transfer or terminal property between the inland carrier and the vessel, with a minimum charge of $1.00 per bill of lading.
>
> This charge is to be collected from the shipper, consignee or owner of the cargo by the vessel or its agent.
>
> This charge shall be paid by the vessel or its agent to the Terminal Operator along with and at the same time as other charges payable to the Terminal Operator by the vessel, its owner, agent or operator.

12. Associated Great Lakes Freight Conferences (AGLFC) is an administrative name employed for certain housekeeping functions by the three Eastbound conferences, each of which serve different areas.[16] Such functions include leasing office quarters, paying bills and distributing general information of common interest. It has no formal organization and holds no meetings. The secretary of the three conferences, Mr. DeGroote, serves as manager-secretary of AGLFC. Two other office employees of the conferences also assist with the work of AGLFC.

13. Until 1953, only one of these conferences existed. When the Commission approved the other two, it was decided that, for reasons of economy, all three would use the office facilities of the original conference for common housekeeping functions. The Commission has been aware of the existence of AGLFC at least since 1959 and, for a time, listed it in a publication of approved agreements, the so-called "Green Book".[17] The conferences are otherwise separate, noncompetitive, and make their decisions independently of each other. There is no agreement between them with respect to ratemaking or any other matter pertaining to the operations of their member carriers.

14. The above-mentioned telegram of March 24, 1965, to the terminal operators was dispatched by AGLFC. Thereafter, on March 30, 1965, with authority from its participating conferences, it published

[16] United States Great Lakes Bordeaux/Hamburg Range Eastbound Conference, United States Great Lakes Scanlinavia and Baltic Eastbound Conference, and Great Lakes United Kingdom Eastbound Conference.

[17] Approved Steamship Conference and Related Agreements, published periodically by the Federal Maritime Commission.

the following notice to exporters and importers on behalf of the three Eastbound as well as the three counterpart Westbound conferences.[18]

CHICAGO, MILWAUKEE, DULUTH, DETROIT, TOLEDO, CLEVELAND
(AND OTHER U.S. GREAT LAKES PORTS)

Terminal Charges

For your information please note that with the opening of the 1965 Shipping Season, at all U.S. Great Lakes Ports, the rates of freight cover only loading/unloading of cargo on or from the vessel, direct from/to cars or trucks or from/to place of rest on the dock or in the shed.

All prior costs or costs beyond including loading/unloading of cars or trucks, are for the account of the cargo.

The Terminal Operators at U.S. Great Lakes Ports will assess a separate charge for the loading/unloading of railcars/trucks which will be collected by them or Carriers agents, in accordance with the Terminal Tariffs, from the Exporters at the U.S. Great Lakes ports of Loading or from Importers at the U.S. Great Lakes ports of discharge.

15. The ambiguity referred to by the Report and Findings in Fact Finding Investigation No. 2, and by the Commission's Executive Director's letters of January 1963, having been removed by the filed tariffs, the Commission, on September 29, 1965, granted a motion of Hearing Counsel to discontinue Docket No. 1135 as moot.

16. The establishment of the 9-cent charge, contrary to prior practices, came as a surprise to complainant importers. The record shows that during the 1965 shipping season, they made payments totaling approximately $197,300 for truck loading iron and steel items. As is customary, most of these imports were purchased from foreign suppliers during October, November, and December for delivery beginning the following April when the season opened. Because of severe competition in this field of business, the importers were seldom able to pass this increased cost on to their customers or back to their suppliers. Their profits were therefore reduced by the sum of the loading charges plus certain related accounting and legal expenses. A few sales may have been lost.

17. Toward the end of 1963, more than a year before the terminal tariff was filed, the terminal operators conducted a relatively simple study (hereinafter called study No. 1) covering the period October 28 to November 8, 1963, in an effort to determine specific truck loading costs. Though still resisting the installation of a charge, they were conscious of the possibility that it might be forced upon them. The cost of truck loading iron and steel products was found to be approximately 9.5 cents per 100 pounds, refrigerated cargo 17 cents, machinery

[18] The owners going eastbound were substantially if not entirely the same as those going westbound.

and heavy lifts 13.6 cents, pre-palletized cargo 5.3 cents, and general cargo-NOS 13.6 cents. Realizing that the study was inadequate as a basis for a permanent rate structure, the terminal operators retained Mr. Philip E. Linnekin, an authority in the field of cost accounting with extensive experience as a consultant on marine terminal rate matters. On October 26, 1964, he issued a preliminary report (study No. 2) recommending procedures to be followed in determining costs and formulating a complete marine terminal tariff. He specifically pointed out, *inter alia*, that:

(1) Study No. 1 was inadequate for a permanent rate structure because, among other reasons, the cost period was too short and labor costs were out of date.

(2) Rates should be separately established for those commodities moving in substantial volume where handling characteristics such as type of package, stowage factors, etc., affect the output.

(3) The costs determined through the recommended procedures would serve as a basis for an initial tariff to be effective only until more complete and defensible cost studies could be compiled during the next shipping season.

(4) Cost is only one factor in rate-making. Others include competition, volume, and ability to pay.

18. Thereafter the terminal operators decided that the initial tariff would not be a complete terminal tariff including dockage and wharfage but would be limited to loading and unloading of inland carriers. A preliminary study submitted by Mr. Linnekin February 18, 1965 (study No. 3) was accordingly limited to such costs. It covered the operations of four of respondent terminals during the months of October and November 1964.[19] Some of the data was actual and some estimated.

19. Mr. Linnekin concluded, and so advised the terminal operators, that studies No. 1 and 3, together with the published rates of other terminals,[20] should provide a reasonable basis for their *initial* tariff to become effective with the opening of the 1965 season. However, he urged that substantive cost studies be made by all operators during the coming season because "a permanent rate structure, capable of withstanding complaint by the shipping public, or inquiry by the Federal Maritime Commission, must be more firmly based."

20. Study No. 3 recommended rates on iron and steel products varying from 8 cents (Steel, in coils) to 16 cents (Over 40-foot length), classifications of cargo from 4 cents (Pre-palletized cargo) to 49 cents (General cargo measuring over 160 cu. ft. per 2240 lbs.), and on General cargo-NOS 12 cents per 100 pounds. However, a review of cost studies No. 1 and 3, together with a comparison of the rates with

[19] North Pier Terminal Co., Great Lakes Storage & Contracting Co., Rogers Terminal & Shipping Corporation, and Transoceanic Terminal Corp.

[20] Those considered included New York, Philadelphia, and Gulf and South Atlantic ports.

those at Philadelphia and New York, and knowledge that railroads serving South Atlantic and Gulf ports had recently increased their line haul rates by 9 cents per hundred weight to offset loading and unloading costs for commodities moving through those ports, persuaded the terminal operators that a 9 cent rate would not be excessive or noncompetitive and would not invite attack with respect to any particular commodity. Mr. Linnekin continued to prefer a commodity tariff [21] but agreed that under the circumstances in which this particular rate was published, it was a reasonable thing to do.

21. After the opening of the 1965 season, the terminal operators retained Mr. Linnekin to conduct the further, more definitive study he had recommended (study No. 4). This was desired for use in this proceeding, the complaint having been filed May 4, 1965, as well as future ratemaking considerations. It covers the 3-month period of August, September, and October 1965, considered reasonably normal months representing about 40 percent of the shipping season, and includes the operating results of the four then operating members of the Chicago Marine Terminal Association.[22] Data was submitted to Mr. Linnekin by the terminal operators on forms which he prepared. Included were separate reports for each rail car and truck loading and unloading operation, some 19,244 in all. Tonnages, man-hours and direct costs were determined for touch labor, lift trucks, cranes, checkers, foremen, and overhead. Ten percent was added to commodity totals as provision for profit before federal income taxes. The study was distributed to all parties before the hearing in this proceeding. In summary, it disclosed the following:

	Short tons	Total cost	Total cost and profit	Cost (in cents Per 100 lbs.)
Iron and Steel Products:				
wire rods, in coils	22,987	$26,577	$29,235	6.3
angles, bars, beams, billets, etc	29,137	30,944	34,038	5.8
pipe	1,328	1,799	1,979	7.5
plate	1,742	1,041	1,145	3.3
sheet steel	10,512	9,129	10,042	4.8
flanges	1,170	3,566	3,923	16.7
Total iron and steel products	66,876	73,056	80,362	6.0
Other commodities	175,293	562,294	618,523	17.6
All commodities	242,169	635,350	698,885	14.4

22. Thereafter, during the course of the hearing, Mr. Linnekin testified that, in accordance with principles underlying the so-called

[21] References to commodity tariffs and commodity rates include other forms of cargo classification such as weight, measurement, packaging, and palletization.

[22] Rogers Terminal and Shipping Corporation, North Pier Terminal Company's Navy Pier and Lake Calumet operations, Transoceanic Terminal Corporation's South Chicago operation and Shed 3 operation at Lake Calumet, and Great Lakes Storage and Contracting Company's Navy Pier operation.

Freas formula,[23] these costs should be adjusted to include provision for the cost of facilities, composed mainly of rentals, leasehold improvements, and related costs paid by the terminal operators. Based upon costs reported in periodic operating statements of respondent terminal operators, the cost of facilities was computed to be equal to 5 cents per 100 pounds. When applied equally to each commodity, this produced a total cost for iron and steel products of 11 cents, all other commodities 22.6 cents, and an average of all commodities 19.4 cents.

23. Based upon the single rate of 9 cents for all commodities for the months of August, September, and October 1965, Mr. Linnekin determined that, without provision for cost of facilities, there was a total revenue deficiency of $262,981 or 5.4 cents per 100 pounds. Iron and steel products produced a profit of $47,321 before allowance for cost of facilities but a deficit thereafter.

24. Iron and steel products constitute the major commodities moving through the Port of Chicago. During the above three-month period, they totaled 66,876 short tons. Approximate tonnages of other commodities moving in substantial volume during the same period were bagged cargo 48,000 tons, general cargo 32,000 tons, refrigerated cargo 15,000 tons, barrels and drums 12,000 tons, and liquor, wine and beer 12,000 tons.

25. The terminal operators continue to maintain separate commodity rates in their contracts for the provision of stevedoring services to the vessels. They are based upon difficulty of handling and the magnitude of liability for damage or loss. A representative contract shows that the 1965 stevedoring rates on steel products were considerably lower than rates on other commodities. While steel products rates ranged from $3.97 to $5.25 per long ton, the rate for bagged cargo was $7.96, general cargo-NOS $8.17, refrigerated cargo $12, cargo in kegs or barrels $8.06, and liquor, wine and beer $9.95. The rate for toys and Christmas ornaments of $49.73 per long ton was the only rate higher than the $12 rate for refrigerated cargo.

26. Until 1965, stevedoring commodity rates were applied by the terminal operators in determining the charges for services which included truck loading. Now the cargoes are moved from the vessel to the "point of rest" at a commodity rate under a stevedoring contract and from there to the truck at the uniform tariff rate of 9¢. The Linnekin studies are limited to cost analyses and are not concerned

[23] This is a formula for segregating marine terminal costs among wharfinger services for the purpose of allocating such costs between vessel and cargo. It was approved in Docket No. 640. *Terminal Rate Structure—California Ports*, 3 U.S.M.C. 57 (1948) for application to California ports and in Docket No. 744, *Terminal Rate Structure—Pacific Northwest Ports*, 5 F.M.B. 53 (1956) for application to Pacific Northwest Ports. In principle, it is applicable to other ports but with variations as required by unlike practices and conditions.

with such other ratemaking factors as competition, value and ability to pay.

27. There are some ports which use uniform rate truck loading tariffs, e.g., Philadelphia, Baltimore, and Norfolk, but commodity rate tariffs are far more common. Included in the latter group are the ports of New York, North and South Carolina, Georgia, Mobile, Houston, and Great Lakes Ports of Detroit and Milwaukee. At Boston and at Pacific Coast ports, the truck services arrange for truck loading and the terminal operator does not enter into it.

28. Since respondent Federal Marine Terminals, Inc., a nonmember of the Port of Chicago Marine Terminal Association, did not start operations until 1965, it had no actual experience upon which to base a study of loading and unloading costs. For competitive reasons, it simply adopted the 9-cent rate assessed by Association member operators.

Discussion

The 9-Cent Charge

Section 17 of the Act makes it unlawful for any person subject thereto to observe unjust or unreasonable practices relating to the receiving, handling, storing or delivery of property. Complainants contend that the 9-cent truck-loading charge constitutes an unjust and unreasonable practice. In support of this position, they urge that the terminal operators failed to make an adequate cost study and to give adequate public notice; that the studies that were conducted were insufficient and inaccurate; that the Terminal Association refused to consider a commodity rather than a uniform flat rate even though aware of the differences in the cost of handling different commodities; that the allowance of a profit margin of 10 percent is unjust and unreasonable; that a number of the cost allocations to loading iron and steel in the latest Linnekin report (No. 4) are inappropriate or unduly high resulting in overcharging for this commodity; that the allocation of "cost of facilities" is primarily a charge to dockage and wharfage and is not a proper charge for truck loading any commodity; and that respondent Federal Marine Terminals conducted no cost studies to justify its 9-cent rate.

Hearing Counsel urge that the record does not show that the 9-cent charge is clearly an unjust or unreasonable practice in violation of section 17 at this time, but that it is of questionable propriety and may eventually prove to be unreasonable. Specific note is taken of the fact that there is no showing that the charge disrupted the importation of steel into Chicago or caused any significant loss of sales. It is emphasized that the charge from an overall standpoint is noncompensatory and that if Mr. Linnekin's allocation of cost of facilities, or a reasonable portion thereof, is accepted, it is noncompensatory with respect to iron and steel. As hearing counsel rightly conclude, there is some question as to the propriety of a single rate which ignores different handling characteristics among individual commodities and results in substantial deficits.

Adequacy of Studies and Notice

In considering the positions taken by the parties with regard to the adequacy of the rate studies underlying the terminal tariff, a material distinction must be recognized. Respondent terminals and hearing counsel expressly base their respective judgments upon the acceptance of the tariff as being the *initial* one, i.e., a rate structure that is temporary to the extent that it is subject to the accumulation of actual experience and further study. Complainants indicate no such qualification and thus apparently presume it to be of a more permanent nature. On brief their repeated reference is to "a permanent rate structure."

The terminal operators realized, or should have realized, that they would eventually have to adopt their own tariff but they did not know when. This remained uncertain until receipt of the March 24, 1965 telegram advising that the carriers had amended their tariffs to eliminate the absorption of truck loading charges. The terminal operators were thereby compelled to immediately promulgate a tariff to become effective upon the opening of the shipping season the following week. Longer notice to importers was not possible.[24] In any event, it is to be recalled that since virtually all of the iron and steel products concerned were purchased before the end of the preceding December, and that the ultimate market was competitive to such a degree that cost increases could not be passed on, subsequent notice of whatever length would have been of little, if any, benefit to complainants.

The determination, with reasonable certainty, of an enduring rate for a particular service requires actual experience in the performance of the service in the manner anticipated. Moreover, the experience must be reasonably current. Studies based on out-of-date costs and procedures are of limited value. Initial rates cannot be more than reasonable approximations to be used until actual experience provides a basis for more positive and lasting determinations. In the past, the Commission has afforded carriers the opportunity to develop their

[24] There is no provision of law or regulation requiring notice with respect to tariffs filed by terminal operators. The agreement creating the Port of Chicago Marine Terminal Association, as approved by the Commission March 17, 1964, provides for 30 days' notice of tariff *changes*, unless good cause exists for shorter notice, but this does not apply to an *initial* filing.

services without having their initial rates declared unlawful.[25] This has been true even when the initial rates were found to be noncompensatory and despite the Commission's repeated holding that rates which continue to be noncompensatory impose a burden on other services performed by terminal operators and are detrimental to the commerce of the United States within the meaning of section 15 of the Act.[26]

The terminal operators' tariff establishing the separate loading charge for the 1965 season was their first. They were without prior experience or time to conduct further studies. Under the circumstances, reliance upon the two earlier preliminary studies (Nos. 1 and 3), their reference to such things as rates at Philadelphia and New York terminals,[27] the previously noted 9-cent increase in line-haul rates of railroads to cover loading and unloading costs on commodities moving through South Atlantic and Gulf ports, and their general recognition of competitive considerations, was just and reasonable. In fact, it was about all they could do.

Commodity Rates and Handling Costs

Complainants contend that it is unjust, unreasonable, and unduly prejudicial to burden an easily and inexpensively handled commodity such as steel with a 9-cent charge while commodities which are much more difficult and expensive to handle pay the same rate. "Steel is being charged more than its fair share, while commodities which are expensive to handle * * * are being undercharged and actually subsidized by steel."

Hearing Counsel's problem with the uniform rate is that by ignoring differences in handling characteristics, it produces substantial deficits. The 9-cent rate is not considered by them to be unduly low or high with respect to iron and steel products, but they find it noncompensatory when related to the cost of handling other commodities. They urge that the indefinite continuance of a rate structure which results in substantial deficits may prove detrimental to the commerce of the United States. While they conclude that the means to rectify this situation, whether by establishment of a commodity rate tariff or by some

[25] *Reduced Rates on Machinery and Tractors From United States Atlantic Ports to Ports in Puerto Rico,* FMC Docket No 1187, May 10. 1966, p 13; *Reduction in Rates—Pacific Coast-Hawaii, Oliver J Olson & Co,* 8 F.M.C. 258, 265 (1964), *Freight Rates and Practices—Florida/Puerto Rico Trade,* 7 F.M C. 686, 694, 695 (1964).

[26] *Status of Carloaders and Unloaders,* 2 U.S.M.C. 761, 773, (1946); *Seas Shipping Co v. American South African Line,* 1 U.S.S.B.B 568, 583 (1936); and *Status of Carloaders and Unloaders,* 3 U S.M C. 116, 121 (1949)

[27] The comparable iron and steel rate at Philadelphia was 9½ cents and at New York 8½ to 10 cents. At Detroit and Milwaukee, the rates were lower However, without detailed information regarding such things as costs, revenues, union affiliations, contract requirements, leasehold arrangements, etc., the value of such comparisons is limited. Respondents say that such information is not readily available from other terminals.

other adjustment of rates to reflect costs, is for the terminal operators to fashion, they feel that the Commission should maintain close surveillance over the situation.

Respondent terminal operators argue that they have no obligation to adopt a commodity tariff. They rely upon the fact that terminals at Philadelphia, Baltimore and Norfolk apply uniform truck loading rates and that it is not uncommon for rail carriers to employ uniform rates for port handling services. A number of Interstate Commerce Commission cases are cited in support of the contention that uniform rates are proper for terminal services.

The record shows that the 9-cent rate is generally depressed. A reduction on iron and steel products would therefore be inappropriate. The fact that the rate, when applied to other commodities, is even less compensatory cannot justify a reduction for these products.

The use by other terminals and rail carriers of uniform rates is relevant with regard to the question of whether uniform rates are, per se, unlawful, what the local practices are and, perhaps in a general way, the relative magnitudes of rates for similar services. However, as this record is without evidence bearing on costs, types and volumes of cargo, handling characteristics, labor arrangements, competition, and other factors pertinent to the operations of terminals at the three above-named ports, no determination can be made as to whether their use of uniform rates is, or is not, unjust, unreasonable, discriminatory, or detrimental to the commerce. The record does show that the majority of the marine terminals in this country which have truck loading tariffs prescribe commodity rates and that a uniform rate of 9 cents is below the cost of providing the service at Port of Chicago terminals.

Among the Interstate Commerce Commission cases cited in support of uniform rates are three which have to do with switching charges.[28] They pertain to the movement of cars between tracks and sidings. The cost of performing this service is presumably uniform and does not depend upon the handling characteristics of the contents of the rail cars. In two other cited cases, the Commission actually disapproved the charges.[29] As Hearing Counsel point out, all of the remaining ICC cases cited really stand for the proposition that a carrier is entitled to reasonable compensation for its services and that rates should be at a compensatory level to insure that no party is unduly burdened with an unfair proportion of the cost. In one case, the Commission in approving a port handling charge of 50 cents per ton on imported China

[28] *Reciprocal Switching at Richmond, Va.,* 222 I.C.C. 783 (1937) ; *Switching Rates in Chicago Switching District,* 195 I.C.C. 89 (1933) ; *Switching Charges at Floydada, Texas,* 206 I.C.C. 671 (1934).

[29] *Rates on Hawaii Consolidated Railway,* 118 I.C.C. 489 (1926) ; *Import Iron and Steel Articles,* 129 I.C.C. 350 (1927).

clay and ball clay, in carloads, from North Atlantic ports, specifically pointed out that this approximately equalled "the actual cost to the carriers of performing this service".[30] In still another, the Commission stated that loading and unloading charges which were below cost were unlawful concessions, unjustly discriminatory and conferred undue and unreasonable preferences.[31] In another case, the Commission made clear that its decision was based upon cost determinations and the charges should approximate the cost of service.[32]

In the remaining two cited cases,[33] the Commission approved uniform loading and unloading charges to be added to the line-haul rates of various railroads to cover the costs of a variety of services required at the ports for transferring and handling oceangoing cargo. In *Ex Parte* No. 212 (304 I.C.C. at 375), the Commission concluded as follows:

> The cost of these loading and unloading services should and must be borne, *as nearly as may be*, by the shippers and consignees for whom they are rendered, in order to avoid an undue burden on other traffic and the shippers and consignees thereof, and to enable respondents to render adequate transportation service. (Italic supplied.)

In giving meaning to the Interstate Commerce Commission's judgment that the cost of loading and unloading services *should and must be borne*, *as nearly as may be*, by those for whom rendered, particular facts and circumstances pertinent to that proceeding and to railroad operations and tariffs must be kept in mind. The objective was to provide uniform charges for similar services at New York and Philadelphia as well as other points in the "eastern territory". Despite contentions by shippers that the charges should reflect the actual costs at each port and for specific commodities, the Commission accepted average costs as justification for the proposed uniform charges. The fact is that it had no alternative. Railroad tariffs include great numbers, even thousands, of commodity rates. The Commission did not have, and could not reasonably obtain, individual commodity cost studies. Under the circumstances, reliance upon cost averages was "as nearly as may be * * * ."

In this case, on the other hand, the Chicago terminal operators have studies, although preliminary and with inadequacies and deficiencies, of individual commodity handling costs. Moreover, they now have actual operating experience of reasonable duration. Mr. Linnekin, in study No. 3 advised that a permanent rate structure should not be based upon

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30 *International Paper Company*, 177 I.C.C. 191, 195 (1931).

31 *Freight Forwarding Investigation*, 229 I.C.C. 201, 237 (1938).

32 *Charges for Protective Services to Perishable Freight*, 241 I.C.C. 503, 549 (1940).

33 *Increased Freight Rates, 1958, Ex Parte* No. 212, 302 I.C.C. 665 (1957) and 304 I.C.C. 289 (1958); *Increased Freight Rates*, 1960, *Ex Parte* No. 223, 311 I.C.C. 373 (1960).

anything less than a full shipping season under an initial tariff. The three month Linnekin study (No. 4) details the costs applicable to six categories of iron and steel products and to "Other products". The average for the iron and steel products of 6 cents (before the allocation of 5 cents additional for cost of facilities) is approximately one-third of the 17.6 cents shown for "Other products". Each of the previously mentioned 19,244 separate reports of loading and unloading operations identifies the commodity. It is obviously advantageous to be concerned with one or a few rates rather than with the multitude of rates that a substantial refinement of cost analysis and judgment would produce. However, commodities moving through the Port of Chicago in major volume have been found to fall into relatively few classifications bearing any significant relationship to handling characteristics. In order of approximate tonnages moved during the August–October 1965 study period, the principal commodities, or classifications of cargo, were iron and steel products 67,000 tons, bagged cargo 48,000 tons, general cargo 32,000 tons, refrigerated cargo 15,000 tons, barrels and drums 12,000 tons, and liquor, wine and beer 12,000 tons. These terminal operators are clearly in a far better position than the railroads to tailor their rate structures to recognize handling costs and to produce compensatory revenues. As Hearing Counsel note, imprecise general increases in line-haul rates were the only means available to the railroads in the cited ICC cases.

Noncompensatory Rates

The Federal Maritime Commission, as earlier noted, has long held that noncompensatory rates are detrimental to the commerce of the United States within the meaning of section 15. In *Investigation of Free Time Practices—Port of San Diego*, FMC Docket No. 1217, May 25, 1966, pp. 25 and 31, the Commission has again stated that noncompensatory rates are unduly prejudicial and unreasonable within the meaning of sections 16 and 17 of the Act.

* * * the practice (granting stowage at noncompensatory rates) was unduly and unreasonably prejudicial within the meaning of section 16 First. This was so because users of storage at noncompensatory rates were not providing their proper share of essential terminal revenue and thus, "a disproportionate share of this burden [was] being shifted to users of other terminal services whose charges are [or should be] based on rates considered to be reasonable [or compensatory] * * *." 2 U.S.M.C. at 603.

*   *   *   *   *   *   *

* * * practices which result in the provision of services at rates or charges less than that which it costs the terminal to provide the service are unreasonable practices within the meaning of section 17. The concern with the compensatoriness of terminal rates and charges, aside from any prejudice or preferrence non-

compensatory charges may work, is a thread running throughout terminal case law. In fact no other concept fully explains the precedent. (Cases cited.)

Respondent terminal operators are by now in a position to undertake the revision of their rate structures to the end that charges are compensatory and are borne, as nearly as may be, by those for whom the services are rendered. For that matter, the Terminal Association has just filed a tariff revision which increases the charge from 9 to 10 cents except on (1) specified manufactured iron and steel articles, (2) pre-palletized or pre-unitized cargo, and (3) commodities in reusable outer containers.[34] While this is certainly a step in the right direction, reference to the previously noted disparities in the cost of handling particular commodities, and the relative volumes of the major categories or classes of cargo moving through this port, leaves substantial doubt as to whether the revised rates (1) are reasonably compensatory and (2) place the cost burden upon those for whom the loading and unloading services are rendered. The tariff revision, naturally, does not disclose the cost data and other ratemaking factors relied upon.

Profit Margin

Complainants contend that the markup of 10 percent over cost, used by Mr. Linnekin as an allowance for profit before income taxes (study No. 4), is too high. They point out that the steel fabricators work on a 2-percent profit margin and that in *Terminal Rate Structure—California Ports*, 3 USMC 57, 64 (1948), the Commission allowed a return of 7 percent on invested capital.

On the basis of August–October 1965 costs, adjusted to approximate the entire shipping season, the terminal operators' 10 percent before-tax profit margin is found to become about 5.6 percent after federal income taxes. In judging the cost-profit ratio of one business versus another, the makeup of the costs of each is significant. A reasonable profit ratio for a business which incurs large costs for materials, such as steel fabricating, is not directly comparable to a business, such as a marine terminal operation, which incurs most of its costs for labor and service equipment. Also, in this instance, resort to return on invested capital would not be appropriate as most of the terminals' facilities and equipments are rented. The fact that, over the past 3 years, these terminals have not been making 10 percent before taxes on their overall operations (including stevedoring) is not de-

[34] This tariff revision, of which official notice is taken, is on file with the Commission and is designated FMC-T No. 2, First Revised Page—No. 17 *et seq.*, issued August 1, 1966, effective September 1, 1966. On brief, counsel for complainants and Hearing Counsel refer to a recently revised tariff of respondent Federal Marine Terminals, Inc. This is not on file with the Commission or otherwise subject to official notice.

terminative, and the record does not otherwise show the allowance to the unjust or unreasonable for this type of business.

Cost of "Checkers"

Objection is also raised to including a charge of $7,508 representing the cost of "Checkers".[35] Complainants' argument is not that the function is unnecessary but rather that the cost should be assessed against the vessel for the use of terminal facilities and services and not against the cargo for truck loading. They point out that Mr. Linnekin, in study No. 2, advised the terminal operators that "checking cost should not be included in loading and unloading". However, in study No. 3, after the terminal operators had decided not to adopt a complete terminal tariff covering all services normally provided by marine terminals, but only a loading and unloading charge, he further advised as follows:

> On the assumption that the Association would be publishing a complete marine terminal tariff, we did not provide any instructions for the accumulation of the costs of checking cargo when handled to and from inland carriers. In such a complete tariff, checking costs would more logically fall in some other category. Under the present circumstances, we believe that checking costs should be provided for in loading and unloading rates.

The Commission has held that, under the Freas formula, handling and service charges are assessed against the party for whom they have been incurred. In this case, the charges are incurred on behalf of the consignees and are against the cargo. The added argument that the Terminal Association's revision of its tariff in 1966 [36] to include specific reference to checking in the definition of truck loading constitutes an admission that checking was not properly chargeable to truck loading under its 1965 tariff is of limited validity. One could argue the other way with at least equal logic.

Overhead

As earlier found, respondent terminal operators are engaged in stevedoring as well as terminal operations. Study No. 4 contains an allowance for truck loading overhead expense of $106,831. $10,315 is attributed to iron and steel products. Complainants contend that the record would seem to indicate that all of the overhead expenses have been applied against truck loading and none to any of the other func-

[35] These are people who are employed by the terminal operators to count the cargo and determine whether it is in good condition. They are stationed at the truck or rail car.

[36] Port of Chicago Marine Terminal Association Tariff No. 2, issued March 7, 1966, effective April 7, 1966.

tions carried on by these combined stevedore/terminal operations. The study contains the following explanation of this computation:

By reference to operating statements of each operator, the percentage relationship of overhead expenses to touch labor costs were determined. The separate percentages were weighted in the same manner as the foremen costs. The weighted percentage amounted to 44.5%.

The touch labor costs for truck loading during the months of August, September and October 1965, as reported to Mr. Linnekin by the terminal operators, were $240,066, of which $23,175 was for iron and steel products. Application of a percentage ratio of overhead to touch labor clearly serves to allocate overhead between stevedoring and terminal operating services in direct proportion to the touch labor expenses of each. Moreover, Mr. Linnekin testified that this computation was made in conformance with the principles set forth in the Freas formula, an objective of which was to apportion terminal expenses between vessel and cargo. Stevedoring expenses in this instance are accordingly assessed against the vessel, and truck loading expenses are assessed against the cargo.

In *Terminal Rate Structure—California Ports*, *supra*, at page 59, it is stated that:

All expenditures were apportioned to vessel and cargo in proportion to the use made of the facilities provided and of the services rendered. The vessel was held responsible to the wharfinger for all usages and services from, but not including, the point of rest on outbound traffic and to, but not including, the point of rest on inbound traffic. All other wharfinger costs were assessed against the cargo. The point of rest is the location at which the inbound cargo is deposited and the outbound cargo is picked up by the steamship company.

Cost of Facilities

Complainants contend that the allocation of 5 cents per 100 pounds for cost of facilities is not a proper charge to truck loading. They point out that at West Coast ports this cost is allocated to wharfage.

Ratemaking processes at individual ports, whether or not based upon the Freas formula, must be varied to recognize local differences in practices, procedures and objectives. In this instance, there are such differences which are peculiar to the West Coast. Mr. Linnekin testified that in the original studies in Dockets Nos. 640 and 744, *supra*, one-half of the cost of aisle space in transit sheds, open areas, and rear loading platforms was allocated to loading and unloading rail cars and trucks but that this cost is now allocated to wharfage for the following reasons:

One is to establish uniformity of practices within the membership group of the California Association of Port Authorities. Some of those ports are what we call landlord ports. They provide a facility but do not perform any physical handling operations. Other ports we call operating ports, who not only provide a facility but also perform the services of loading and unloading, checking, and other related general services.

The landlord ports perform no loading or unloading, but under the Freas formula as it was originally constructed, for cost purposes costs were allocated to those operations.

So to develop uniformity within their own group they have reallocated those costs on the part of the landlord ports to wharfage, so that all members of that association are now on a comparable basis of applying a cost formula. The same is true of the Northwest.

Another reason is that the competing car loading and unloading conferences in the San Francisco Bay and Souhtern California do not have a facility. This work is done by stevedores, and the competition in these loading and unloading rates is a factor of rate making, so to be consistent with the manner in which those conferences develop their costs, the facility costs are not presently being considered as a part of the rate making for loading and unloading. They are allocated to wharfage.

A third reason is that there is no truck loading and unloading performed as such by California and Northwest ports under marine terminal tariffs.

*   *   *   *   *   *   *

* * * At the Pacific Coast * * * there is a uniform wharfage charge on general cargo of 80 cents, with minor exceptions. At the Port of Chicago the wharfage charge is 20 cents, and this includes both the Port of Chicago and the Chicago Port District. In both instances, both Chicago and the Pacific Coast, the wharfage charge is collected from the vessel and is passed on by the vessel to the cargo.

Another difference is that the terminal operator on the West Coast * * * pays only for office space. They don't pay anything else for the rest of the terminal except at the Port of San Francisco, where there is a nominal charge, called a preferential assignment charge.

Another pertinent consideration is that at Chicago wharfage and dockage charges, although collected by the tenant terminal operators, are prescribed by the tariffs of, and are remitted to, the City of Chicago and the Chicago Regional Port District. Therefore, unless the City and/or the Port District arrange to reduce rents proportionately, the collection of cost of facilities through wharfage charges would not benefit the terminal operators who actually incur the expense.

All costs should be apportioned to the various services concerned. There is no question that facility costs are being incurred in connection with (*a*) stevedoring, (*b*) truck loading, and (*c*) wharfage. These costs should be distributed accordingly and the stevedoring portion recovered by the stevedoring business through their contract rates charged the vessel, the truck loading portion by the terminal operators through their truck loading charges or some tariff charge against the cargo, and the wharfage portion though wharfage charges coupled with reduced rents. Although no exhibit was presented, Mr. Linnekin testified that, using actual costs revealed in respondents' operating statements which were disclosed to complainants, he calculated and applied facility costs in accordance with the service apportionment provisions of the Freas formula. Eventually, of course, the apportionment of terminal service costs for given commodities, as between cargo and vessel, becomes academic because all such costs as well as those of the water transportation are ultimately borne by the cargo importer.

Both complainants and Hearing Counsel violently, and with considerable justification, object to the manner in which cost of facilities was brought into and developed on this record. They consider it a last minute effort to support the 9-cent charge for iron and steel products. It was not included in any of the studies and came as a complete surprise to the parties when raised during the course of Mr. Linnekin's testimony. In fact, both Hearing Counsel and complainants understood certain statements contained in studies 2, 3, and 4 to mean that cost of facilities was a charge assessable against the vessel; that it was provided for in the terminal services portion of the stevedore contracts; and that it was not proportioned to truck loading under the Freas formula. They were also misled by the fact that the exhibit detailing the calculation of the revenue deficiency of the 9-cent rate made no provision for the allocation of cost of facilities against truck loading. In addition to coming without notice, this cost adjustment item was without the carefully prepared explanation of the method of computation so typical of other calculations contained in Mr. Linnekin's exhibits. There was no explanation of the allocation of this cost as between truck loading, stevedoring, and wharfage.

Mr. Linnekin testified that cost of facilities was not a last minute thought and that this was indicated in his first report (study No. 2) wherein he suggested a new tariff item (a charge against the vessel) called "Terminal Facility and Service"; that under the Freas formula a portion of the cost of facilities is allocable to truck loading; that if these costs are not so allocated, cargo will be "getting a free ride on facilities"; that in comparison to Pacific Coast ports, the Port of Chicago wharfage charge is about 25 percent of what it should be; that he had been hard pressed to complete study No. 4 in time to meet even the postponed date of this hearing; and that he hoped to eventually come up with a Freas formula application that will definitely recognize facility costs and get them into cost studies on a more sophisticated basis.

There are ample grounds for finding procedural faults on both sides. Counsel for respondent Terminal Association and Mr. Linnekin, who has appeared as an expert witness in many Federal Maritime

Commission hearings, should have prepared an exhibit of some kind disclosing at least the data and method of computation employed and the proportionate allocations of the cost to other charges such as wharfage and stevedoring. On the other hand, counsel for complainants, or Hearing Counsel could have moved to adjourn the hearing pending preparation of a reasonable explanation of the calculation or, failing that, to strike that portion of Mr. Linnekin's testimony. Also, at least some information could have been gained from reviewing his work papers which he had with him. Be that as it may, and acknowledging that there are grounds for uncertainty and some doubt regarding the 5-cent adjustment, the fact remains that, as Hearing Counsel point out, the cost of facilities is properly allocable in some proportion to truck loading charges, the 9-cent rate is depressed overall, and the cost of service is not the only element in ratemaking.

Federal Marine Terminals, Inc.

Respondent Federal Marine Terminals, Inc., a non-member of the Terminal Association, without operating experience prior to 1965, but faced with competition from all of the terminals in the area, did not engage in an unjust or unreasonable practice by merely adopting the Terminal Association's initial tariff without conducting its own cost study. Under the circumstances, it would seem to be a most reasonable thing to have done, at least initially.

Mediterranean-U.S.A. Great Lakes Westbound Freight Conference and Federal Pacific Lakes Line

Complainants charge that respondents Mediterranean-U.S.A. Great Lakes Westbound Freight Conference and Federal Pacific Lakes Line included truck loading in the ocean rate prior to the 1965 season; that by tariff amendments in March and April 1965, respectively, with less than 30 days' notice to the shipping public, they eliminated the service of truck loading from the ocean rate; and that these tariff amendments resulted in an increase in cost to shippers in violation of section 18(b)(2) of the Act. Section 18(b)(2) requires that no change shall be made in ocean rates, rules, or regulations which result in an increase in cost to the shipper except by publication and filing with the Commission not less than 30 days prior to the effective date.

Had the conference tariff actually authorized the inclusion of truck loading charges in the ocean freight rates, any amendment providing that the charges would be for the account of the cargo, and thus increase the cost to the shipping public, would have required 30 days' notice. Before amendment, the conference tariff provided:

Rates apply from under tackle export vessel at port of loading *to end of ship's tackle*, Cleveland, Detroit, Toledo, Chicago, Milwaukee or any other United States ports * * * (Italic supplied).

After amendment the tariff provided:

TERMINAL CHARGES U.S.A.: To all ports of discharge rates named herein cover discharge of cargo from vessel direct to cars or trucks or to place of rest on the dock or in the shed, all costs beyond, including *the loading of rail cars or trucks will be for account of cargo importers.* (Italic supplied.)

The amendment did not reflect a change in the service offered as the previous tariff did not authorize the absorption of the truck loading charges in the ocean rates. Such rates applied only "to end of ship's tackle" and therefore the restatement by amendment did not require 30 days' notice.[37]

The tariff of Federal Pacific, before amendment, provided:

Ocean freight rates set out herein apply from and to first place of rest on dock or in barge or transport alongside the ship, all other expenses being for the account of the cargo, except that the ocean freight rates named herein cover *handling to rail car or truck tailgate,* direct or via the dock, on steel, on general cargo. (Italic supplied.)

After the amendment, the tariff provided:

Unless otherwise specified, all rates published herein apply from ship's tackle at all ports of loading to the dock or place of rest in the shed at all ports of discharge. All other costs at discharge port including cost for *loading to cars or trucks* or other means of transportation are for the account of cargo. Wharfage or lighterage or all other expenses beyond ship's tackle at the loading port are for the account of the owner, shipper or consignee of the cargo, payable at the loading port. (Italic supplied.)

Here again, the tariff before amendment did not authorize the absorption of the truck loading charges. "* * * handling to rail car or truck tailgate" is not analogous to "loading to cars or trucks". One is alongside and the other on board. The record does not show who is now paying for this handling service nor whether its deletion from the tariff resulted in an increase in cost to shippers. In any event, the specific exclusion in the amended tariff of truck loading services which were not included in the previous tariff did not effect a change in service and did not require 30 days' notice.

Associated Great Lakes Freight Conferences

Complainants contend that six conferences, three Eastbound and three Westbound (see footnote 7), took concerted action, through the Associated Great Lakes Freight Conferences (AGLFC) to obtain an

[37] The issue of whether the absorption of terminal charges in ocean rates prior to 1965 constituted a violation of section 18(b)(3) is not within the scope of this proceeding.

indirect rate increase in violation of section 15, and that AGLFC is a de facto interconference agreement organization in violation of section 15.

As found above, AGLFC is in reality an administrative name used to identify a housekeeping office supported by the three Eastbound conferences. The objective is simply administrative economy * * * to avoid the expense of maintaining three housekeeping offices. The record shows that AGLFC has nothing to do with ratemaking or any other matter pertaining to the operations of the carrier members of the conferences. It is not an interconference agreement organization or so-called "super conference." In fact, it holds no meetings and has no charter, articles of association, or bylaws prescribing any type or form of organization.

In its true substance, AGLFC represents a cooperative working arrangement having no function pertaining to competitive matters. The participating conferences are not in competition. In a recent decision, the Commission reaffirmed its past judgment holding that such cooperative working arrangements are not section 15 agreements:

Although the literal language of Section 15 is broad enough to encompass any "cooperative working arrangement" entered into by persons subject to the Act, the legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or travelling public or their representatives. *D. J. Roach Inc.* v. *Albany Port District et al.*, 5 F.M.B. 333, 335.

Thus, for example, while agreements of persons subject to the Act to pool secretarial workers or share office space may literally be "cooperative working arrangements", they are not the type of agreements which affect competition by the parties in vying to serve outsiders and hence are not subject to Section 15. *Volkswagenwerk A. G.* v. *Marine Terminals Corp.*, 9 F.M.C. 77 (1965).

The Origin of the Terminal Truck Loading Charge

The discontinuance of the practice of absorbing truck loading charges in ocean rates did not come about by conspiracy or concerted action subject to section 15 approval. It had been the subject of discussions between the carriers and the terminal operators for years, but to no avail. In the end, it was actually precipitated by the Commission itself through Fact Finding Investigation No. 2 and Docket No. 1135. Tariff amendments were filed at various times during March 1965 except for one conference, Great Lakes United Kingdom Westbound, which filed no amendment until 1966. The use of the joint telegram of March 24, 1965, and the joint notice of March 30, 1965, by the six conferences does not, of itself, indicate the existence of an agreement subject to section 15 approval. In a case in point involving handling charges, the Commission held:

* * * As heretofore noted, the action taken by defendant carriers in their respective conferences concerning the establishment of said charge has been evidenced by amendments and supplements to conference tariffs filed in connection with and forming a part of their approved conference agreements on file with this Commission. The issuance of the joint notice on behalf of a number of conferences, of itself, does not justify a finding that the action was taken pursuant to agreement between the conferences. *Los Angeles By-Product Co.* v. *Barber S.S. Lines, Inc.*, 2 U.S.M.C. 106, 114 (1939).

Great Lakes United Kingdom Westbound Conference

Next, by complaint but not on brief, complainants allege that the Great Lakes United Kingdom Westbound Conference violated sections 15 and 18(b)(2) by failing to file a tariff amendment in 1965 reflecting the indirect rate increase, i.e. an amendment providing that its ocean rates would no longer include truck loading charges. Suffice it to say that, as Hearing Counsel aptly point out in some detail, there was no violation because the unamended tariff, although in need of clarification, was keyed to "the custom of the ports" and thus rendered flexible enough to provide authorization for respondents' discontinuance of the absorption of these charges when the custom of the port so changed.

Federal & Atlantic Lakes Line

Lastly, complainants contend that respondent Federal & Atlantic Lakes Line amended its tariff to discontinue the absorption of the truck loading charge in the ocean freight effective May 10, 1965, but attempted to collect the 9¢ charge through its subsidiary, Federal Marine Terminals, Inc., before the effective date, in violation of sections 17 and 18(b)(3). This carrier's tariff, before amendment, contained exactly the same provision regarding terminal charges as the previously discussed tariff of respondent Federal Pacific Lakes Line. Both specified that ocean freight rates covered "handling to rail car or truck tailgate". Thus, as before, the tariff did not authorize the absorption of truck loading charges and therefore the amendment specifically excluding this service was actually a clarification and not a change in services. Under a proper application of the tariff before amendment, truck loading charges were for the account of the cargo (see footnote 37). The record does not show that this respondent at any time collected such charges for its own account in violation of its tariff. The effective date specified for the clarifying amendment and the corporate relationship, if any, of Federal Marine Terminals, Inc. are therefore immaterial.

Ultimate Findings and Conclusions

Even though some of the elements of the costs relied upon may have been overstated, the record on the whole supports the conclusion that the expense of truck loading iron and steel, as well as other commodities, exceeds the assessed charge of 9 cents per 100 pounds.

The record does not show and will not support a finding that the 9-cent charge has been an unjust or unreasonable practice in violation of section 17, or that the charge has unduly or unreasonably prejudiced or disadvantaged shippers or importers of iron and steel products in violation of section 16 First, or that the charge has operated in a manner that was detrimental to the commerce of the United States or contrary to the public interest in violation of section 15.

However, the prolonged continuance of this charge, even as recently changed, may well be subject to question. While the record shows that the terminal operators acted in good faith in the first instance, they have now gained sufficient experience to enable them to determine, with far greater certainty and particularity, a rate structure under which the charges will be compensatory and will be borne, as nearly as may be, by those for whom the services are rendered. Prompt action to this end is expected.

There was no violation of the tariff change notice provisions of section 18(b)(2) by respondents Mediterranean-U.S.A. Great Lakes Westbound Freight Conference, or Federal Pacific Lakes Line, or of the unjust and unreasonable practice provisions of section 17, or tariff compliance provisions of section 18(b)(3) by Federal & Atlantic Lakes Line. Their tariffs prior to 1965 did not authorize absorption of truck loading charges by the ocean carriers. Amendments filed in 1965 did not change but merely clarified the provisions of the previous tariffs.

The "Associated Great Lakes Freight Conferences" is an administrative name describing an office facility utilized by the three participating eastbound steamship conferences for housekeeping functions only. It is not a de facto interconference agreement organization regulating competition among its participants or a cooperative working arrangement of a nature requiring section 15 approval.

Respondent Great Lakes United Kingdom Westbound Conference did not violate section 15 or 18(b)(2) by not filing a tariff amendment in 1965 since its tariff then in effect, although ambiguous, authorized discontinuance of the absorption of truck loading charges in accordance with the changed custom of the port.

The complaint is hereby dismissed.

John Marshall,
Presiding Examiner.

On exception, Complainants have requested a remand of the case to the Presiding Examiner with instructions to review the financial statements of the respondent terminal operators for the 1965 Great Lakes shipping season.

A proceeding should not be reopened except for "unusual or weighty reasons".[38] It is the view of the Commission that these reasons are not present in this case, and reopening would be disruptive of the administrative process.

Complainants have also injected new arguments relating to the tariffs of Federal Pacific Lakes Line and Federal and Atlantic Lakes Lines to support their position that these respondents effected changes in service without complying with sections 18(b) (2) and (3) of the Shipping Act.

In regard to Federal Pacific Lakes Line, complainants ask us to reconsider the tariffs in light of additional tariff language not previously taken into account by the Examiner or the parties. Cited is the tariff provision which states that "At Lake Superior ports second handling charges are for account of the cargo." Complainants argue that cargo, therefore, is not accountable for such charges at other Great Lakes ports (including Chicago), and the carrier must have included them as part of its ocean freight rates previously. The amended tariff deletes references to these charges, illustrating that the carrier no longer will absorb these charges. However, there is nothing in the record to show what "second handling" means. Complainants are inferring one interpretation from the context. One could infer another interpretation as well. The record will not clearly support one interpretation over another. There can thus be no finding of a violation of law on the sole basis of inference or preference for a particular interpretation.

Complainants contend that Federal and Atlantic Lakes Lines collected loading charges before May 10, 1965, the effective date of its tariff amendment in violation of section 18(b) (3). This tariff amendment does not clearly reflect a change in service wherein truck loading ceased to be included in the carrier's ocean freight rates. Moreover, the record does not show whether "terminal charges" assessed before May 10, 1965, presumably for truck loading, were paid to the carrier for its own account in violation of its tariff or as a collecting agent for the terminal operator, Federal Marine Terminals, Inc. As the Examiner

[38] *Alaska Steamship Co. et al.* v. *Federal Maritime Commission*, 356 F. 2d 59, at 62 (1966). (See also *Interstate Commerce Commission* v. *City of Jersey City*, 322 U.S. 503. 514–515 (1943)).

correctly found under a proper application of respondents' tariff in effect until May 10, 1965, truck loading charges were for the account of the cargo anyway. They should therefore have been paid by Complainants both before and after the tariff was amended. A finding of violation of section 18(b)(3) by this respondent, therefore, does not have sufficiently clear record support.

It is ordered, That this proceeding is hereby dismissed.

By the Commission.

[SEAL] (Signed) THOMAS LISI,
Secretary.

APPENDIX A

Shipping Act, 1916, As Amended, 46 U.S.C. 801 *et seq.*

Section 15, in part:

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character 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.

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. * * *

Section 16 First, in part:

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

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

Section 17, in part:

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

Section 18(b) (2), in part:

(2) No change shall be made in rates, charges, classifications, rules or regulations, which results in an increase in cost to the shipper, nor shall any new or initial rate of any common carrier by water in foreign commerce or conference of such carriers be instituted, except by the publication, and filing, as aforesaid, of a new tariff or tariffs which shall become effective not earlier than thirty days after the date of publication and filing thereof with the Commission, and each such tariff or tariffs shall plainly show the changes proposed to be made in the tariff or tariffs then in force and the time when the rates, charges, classifications, rules or regulations as changed are to become effective * * * The term "tariff" as used in this paragraph shall include any amendment, supplement or reissue.

Section 18(b) (3):

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

Section 22, in part:

Any person may file with the Federal Maritime Board a sworn complaint setting forth any violation of this chapter by a common carrier by water, or other person subject to this chapter, and asking reparation for the injury, if any, caused thereby. The Board shall furnish a copy of the complaint to such carrier or other person, who shall, within a reasonable time specified by the Board, satisfy the complaint or answer it in writing. If the complaint is not satisfied the Board shall, except as otherwise provided in this chapter, investigate it in such manner and by such means, and make such order as it deems proper. The Board, if the complaint is filed within two years after the cause of action accrued, may direct the payment, on or before a day named, of full reparation to the complainant for the injury caused by such violation.

TABLE OF COMMODITIES

Apples and pears. U.S. North Atlantic and United Kingdom-Eire. 34.
Automobiles. U.S. North Atlantic and United Kingdom-Eire. 34.
Books. U.S. North Atlantic and United Kingdom-Eire. 34.
Egg albumen. U.S. North Atlantic and United Kingdom-Eire. 34.
General. Seattle-Bellingham, Wash. and Alaska Peninsula-Aleutian Islands. 20.
General. United States—United Kingdom-Eire. 34.
Meat offal. U.S. North Atlantic and United Kingdom-Eire. 34.
Onions. U.S. North Atlantic and United Kingdom-Eire. 34.
Plastic sheeting. U.S. North Atlantic and United Kingdom-Eire. 34.
Rags. U.S. North Atlantic and United Kingdom-Eire. 34.
Refregerated cargo. Florida to San Juan, P.R. 25.
Sleds. U.S. North Atlantic and United Kingdom-Eire. 34.
Toys. U.S. North Atlantic and United Kingdom-Eire. 34.

INDEX DIGEST

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

ABSORPTIONS. See Overland/OCP Rates and Absorptions.

ADMINISTRATIVE PROCEDURE ACT. See Practice and Procedure.

AGREEMENTS UNDER SECTION 15. See also Common Carriers; Dual Rates; Overland/OCP Rates and Absorptions; Terminal Leases.

—In general

Original and continuing agreements, giving special privileges and advantages with respect to access to Gulf-Guatemala cargo, entered into between Flomerca and Continental/Uiterwyk, were subject to section 15 and were carried out without Commission approval in violation of that section. Fact that the current agreement referred to Continental/Uiterwyk as "agents" did not mean that the agreement was not within the ambit of section 15. From an operating point of view, change in designations of the parties and in accounting and reporting provisions were superficial. The "agents" continued to direct and control the service. Although designated as "agents", they were common carriers. Agreement 9597 Between Flota Mercante Gran Centroamericana, S.A., Continental Lines, S.A., and Jan C. Uiterwyk Co., Inc., 83 (92 et seq.)

Agreements between conferences, providing among other matters for cooperation in establishment and maintenance of rates are approved for one year and the proceeding discontinued without prejudice to the rights of any party, without waiver or estoppel, to protest or justify on any grounds the continued approval of the agreements in any new proceeding relating to the agreements, including extension of the approval given. 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, 104 (107–109).

—Admission to conference membership

Question of whether conference readmission fee of $12,500, in contrast to an admission fee of $1,000, is reasonable is remanded to the Examiner to give the conference an opportunity to justify it. States Marine Lines, Inc. *v.* Pacific Coast European Conference, 1 (9).

—Agreement not subject to approval

A conference, in reality an administrative name used by several conferences for householding duties such as leasing office quarters, paying bills and distributing general information to the public, and which had nothing to do with ratemaking or any other matter pertaining to the operations of the

carrier members of the conferences, which were not in competition, was not a "super conference", but rather a cooperative working arrangement. The arrangement did not affect competition and was not subject to section 15. Crown Steel Sales, Inc. *v.* Port of Chicago Marine Terminal Assn., 353 (377).

Discontinuance of a practice of absorbing truck loading charges on ocean rates did not come about by conspiracy or concerted action subject to section 15 approval. Issuance of a joint telegram and joint notice by conferences did not, of itself, indicate the existence of an agreement subject to section 15 approval. Id. (377–378).

—Antitrust policy

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. Agreements Nos. T–2108 and T–2108–A Between the City of Los Angeles and Japan Line, Ltd., et al., 110 (116).

—Rates

Agreement betwen carriers fixing the rate of one carrier for refrigerated cargo from ports in Florida to San Juan, Puerto Rico, was approved. The rate was compensatory but that fact is not, in all cases, conclusive of its compliance with the 1916 Act; however, the rate was established by a section 15 agreement and no evidence was adduced that would warrant a finding that the agreement was detrimental to commerce or otherwise in violation of the Shipping Act. Agreement No. DC–30 Between South Atlantic & Caribbean Lines, Inc. and TMT Trailer Ferry, Inc., 25 (27).

A conference did not violate sections 15 and 18(b)(2) by failing to file a tariff amendment reflecting an indirect rate increase when truck loading charges were no longer included in ocean rates. The unamended tariff was keyed to "the custom of the ports" and thus rendered flexible enough to provide authorization for discontinuance of the absorption of the charges when the custom of the port so changed. Crown Steel Sales, Inc. *v.* Port of Chicago Marine Terminal Assn., 353 (378).

—Self-policing

Argument that a self-policing plan, whatever its shortcomings, cannot be held to be illegal unless or until it is actually used in a fundamentally unfair manner, cannot be accepted. Section 15 of the 1916 Act, 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 this plan must contain guarantees of fundamental fairness. States Marine Lines, Inc. *v.* Pacific Coast European Conference, 1 (6).

Self-policing system which provides for assessment of liquidated damages for breaches of the conference agreement or its rules, regulations, or tariffs, which is silent on the procedures to be followed, and which contains 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, is legally defective in that it contains no procedures guaranteeing fundamental fairness. It may not be used and an assessment against an accused member is void. Id. (5–6, 8).

The fact that a self-policing system may not be used because it contains no procedures guaranteeing fundamental fairness and that an assessment against an accused member is void, does not mean that the conference has lost its right of action against the accused member for alleged wrongdoing while a conference member. It could well be that the conference may still enforce conference obligations incurred by a member prior to its resignation from the conference. Id. (8).

An offer by a conference to afford an accused member all procedural safeguards, including arbitration, notwithstanding the silence of the agreement as to procedural safeguards, was not sufficient. Any such offer would run 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 the accused member at a decided disadvantage in that it would not be able to determine whether it had been dealt with in fundamental fairness until the proceeding had been completed and each procedural right had been protected. Id. (8–9).

BILLS OF LADING.

The bill of lading may be prima facie evidence of the contents of the shipment but it is not conclusive. Nor is it the best evidence. Evaluation of the weight of the evidence warranted the conclusion that complainant had met the burden of proving that the bill of lading did not correctly describe the goods actually shipped. Minnesota Mining and Manufacturing Co. *v.* American Export Isbrandtsen Lines, Inc., 11 (13–14).

BURDEN OF PROOF. See Practice and Procedure.

COMMON CARRIERS. See also Embargoes.

Respondents, parties to agreements for carriage of cargo between the Gulf ports and Guatemala, were common carriers, notwithstanding their designation as agents for the third party to the agreements. The degree of control and ultimate responsibility assumed by respondents was not in keeping with agency status. Common carrier status cannot be avoided by the device of acting as agent for a common carrier. The assumption that there can be only one common carrier is not correct. The company holding out to the public was a "non-vessel owning common carrier", and respondents were the "underlying common carrier". Agreement 9597 Between Flota Mercante Gran Centroamericana, S.A., Continental Lines, S.A., and Jan C. Uiterwyk Co., Inc., 83 (98–100).

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 as one unit. The corporate entity may be disregarded if failure to do so would aid in perpetration of a fraud or circumvention of an applicable statute. Insofar as section 15 is concerned, respondents could not avoid common carrier status on the theory that only the company in whose name a service is held out is a common carrier subject to regulation. Id. (101–102).

DISCRIMINATION

Parties to a terminal lease with minimum-maximum payment provisions were not required to show that the payment provisions would not result in discrimination or prejudice against any terminal, that no port would be in any way injured, and that cargo would be diverted from any port or terminal. Discrimination and prejudice are not unlawful per se. The Shipping Act prohibits only unjust and unreasonable practices. There was no evidence that any shipper or carrier would suffer undue or unreasonable prejudice or discrimination. In any competitive situation, there is diversion of cargo from one port to another. There was no evidence in this case that any port would lose cargo to the extent that its future profitable operation was threatened. The fact that some cargo might be diverted from other ports was not alone sufficient to show an unjust or unreasonable practice. Agreements Nos. T–2108 and T–2108–A Between the City of Los Angeles and Japan Line, Ltd., et al., 110 (122–123).

The purpose and effect of overland/OCP rates is to make Pacific Coast carriers competitive with Atlantic and Gulf ocean carriers for traffic originating at or destined for points in the central United States. Overland/OCP rates, far from stifling competition, not only enhance route competition for such traffic but, to a substantial degree, provide a competition which otherwise would not exist. There is no evidence of any purpose to discriminate against anyone. Overland and OCP Rates and Absorptions, 184 (206).

Overland/OCP rates are not unduly prejudicial and preferential in violation of section 16 First or discriminatory against ports in violation of section 17, and do not constitute an agreement unjustly discriminatory as between shippers and ports under section 15. Id. (218).

Exemption of the government from carriers' time limit rule on the filing of overcharge claims does not violate section 14 Fourth. That section does not outlaw all different treatments between shippers with respect to the adjustment and settlement of claims but only those which are "unfair" or "unjustly discriminatory", and this is a question of fact. The existence of unfair or unjustly discriminatory conduct must be clearly established by substantial proof. Failure to apply the rule to the government is not unfair or unjustly discriminatory with respect to other shippers, since the government is in a peculiar bargaining position, originating in statute and sanctioned by court decisions. Also the United States has a variety of problems in attempting to comply with carriers' time limitations. Time Limit on Filing of Overcharge Claims, 298 (315).

Record did not show that carriers' time limitation rules for filing overcharge claims was applied in an inequitable manner so as to result in unfair treatment of and unjust discrimination between shippers in violation of section 14 Fourth. Even if such a showing had been made, it would not necessarily dictate promulgation of a rule by the Commission. It follows that if no showing was made of unjustly discriminatory or unfair treatment under section 14 Fourth, a claim of undue or unreasonable preference of any particular person within the meaning of section 16 must be rejected, since the establishment of a violation of section 16 generally appears to require, in addition to a showing of dissimilar treatment between shippers, a showing, lacking here, of a competitive relationship between shippers. It is also equally clear that the carriers' rules are not unjustly discriminatory between shippers under section 15. Nor was there any conduct contrary to the public interest or detrimental to commerce. Id. (316–319).

DUAL RATES.

In seeking to impose a one-trade-one-contract requirement under section 14b, the Commission was not trying to circumvent a court decision remanding the case. In setting aside the requirement, the court made no statement of the grounds for its action. Consideration of the court's opinion led the Commission 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. The record in the earlier case was considered and the decision in the present proceeding was firmly grounded thereon. In terms of due process to respondents, it mattered little under which section their contract was considered, since the statutory phrase "contrary to the public interest", in the context of the proceeding, had the same meaning under both sections. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, 149 (152–153).

Rulemaking proceeding to determine whether a one-trade-one-dual rate contract requirement should be reimposed on a conference (operating in five trading areas with a single contract) was proper. It is not necessary to encompass the entire industry for a rule to be valid in accordance with requirements of the Administrative Procedure Act. Section 2(c) of that Act defines a rule as being either of "general or particular" applicability, and a rule may be directed to particular named persons. Id. (153).

Since the Commission instituted the proceeding it was in the sense of the Administrative Procedure Act the proponent of the order to impose the one-trade-one-contract requirement and, thus, it bore the burden of proof. The "burden of proof" issue was moot since the Commission applied the substantial evidence test and concluded that the evidence of record established that the present dual rate contract covering five trade areas was contrary to the public interest within the meaning of section 14b. Id. (154).

No one would seriously contend that without the protection of section 14b, an exclusive patronage tying arrangement offered by a conference 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 14 and 15, there is, without more, "substantial evidence" that respondents' dual rate contract is contrary to the public interest. Therefore, it is incumbent on respondents to put other evidence in the record to fairly detract from the weight of this factor. Id. (155).

It is the carrier's ability to fix rates in concert under an 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. The contract rate system as such does not prevent discrimination in rates. The system is a tying device. There is no persuasive evidence 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 covering five trade areas. Id. (157).

Evidence of record does not support the proposition that increased service flows as a benefit from conference's single contract rate system covering five trade areas. In testimony relied on to support the proposition, the witnesses were talking about the size of the conference, or were making flat assertions of benefits without offering an explanation of how the benefits related to the system. Id. (157–159).

Evidence of record much more readily supports the inference that such stability of rates as exists is due to the concerted ratemaking activity under the conference agreement rather than the conference contract rate system. The record establishes no real connection between the present contract system and rate stability or the prevention of rate wars. Stability alluded to in the testimony is the absence of discrimination among shippers. Such discrimination is prevented by the fact that once rates are fixed they are required to be published and filed with the Commission, and conference members are then obligated to charge only those rates. Whether there be a single contract system covering five trade areas or a system which embodies the one-trade-one-contract requirement is irrelevant to such stability of rates. Id. (160).

Evidence of record is convincing that any increase in service to conference shippers has resulted from the new trading scope of the conference under its agreement, not from the operation of the single contract rate system covering the five trading areas. Id. (160).

Demonstrating that conference single contract rate system covering five trade areas has not permitted the members to increase rates through monopolistic strength, is not relevant to the question of whether the system should be approved. 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. Id. (160).

Without the protection of section 14b, a dual rate tying arrangement would run counter to the antitrust laws. It is therefore contrary to the public interest unless necessary to pursue some legitimate commercial objective. Normally, that objective will be a conference's need to protect itself from the inroads of nonconference competition. Conference will be permitted to continue its dual rate system, but must offer a separate contract in each of the five trade areas. Such a system will still afford sufficient protection against nonconference competition. The Commission remains unconvinced that the present system covering all five areas 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. Id. (160–161).

Overland/OCP rates, together with local rates, are not a "dual rate system". The rates are in a sense dual, since one rate is applicable to overland traffic and another to local traffic, both available to any shipper dependent on the competitive transportation conditions surrounding his shipment, not on whether or not he agrees not to patronize the conference's competitors. Except for the false nexus provided by the ambiguous use of the word "dual", there is no relation whatever between overland/OCP rates and the exclusive patronage contract/noncontract arrangement frequently called "dual rate systems". Overland and OCP Rates and Absorptions, 184 (210–211).

EMBARGOES.

A common carrier by water subject to the Intercoastal Shipping Act has a duty and obligation to accept and carry all cargo tendered to it in accordance with the terms and conditions of its published and filed tariffs. Any alterations in the terms and conditions must be published and filed to be effective 30 days from the date of filing and publication, or the subject of a special permission granted under section 2 of the Act. Historically, certain occurrences such as intervention of the acts of God or the common enemy, or congestion at a carrier's terminal facilities such that it is physically incapable of handling the traffic, have relieved the carrier from its obligation to carry for all indiscriminately. Financial loss on the carriage does not normally without more, constitute justification for an embargo. There must be a physical disability to carry. South Atlantic and Caribbean Line, Inc.—Order To Show Cause, 237 (240).

Carrier which was not under a physical disability to carry certain containerized cargo could not lawfully impose an embargo on such cargo because of the terms of a collective bargaining agreement under which a container could on arrival at the carrier's terminal facilities be unloaded and reloaded by ILA labor, or the carrier could be required to pay liquidated damages to a joint welfare fund. While the carrier might have to alter the terms and conditions under which it will hold itself out to transport the particular trailers, it may do so only in the manner prescribed by section 2 of the Intercoastal Shipping Act. Until this is done, the carrier must accept and carry all cargo tendered to it under the terms and conditions of its existing tariffs. Statutes controlling the activities of common carriers and the obligations of these carriers are not subordinate to the requirements of labor contracts. The carrier could file an application for special permission for a short notice filing to amend its tariffs. The Commission would accept any appropriate tariff filing on short notice, the result of which would be to make the carrier whole in the event the labor agreement was invoked and which would enable the cargo to move. Id. (240–242).

FREE TIME. See Loading and Unloading Practices.

FREIGHT FORWARDING.

A showing that an applicant for a freight forwarder license was an honorable person, educated, experienced generally in international trade, and had the determination to make a successful career for himself, was not sufficient to qualify the applicant for a license. While experience is not the sole criterion for qualification, it is an important one, and the applicant in fact did not show that he possessed the required knowledge of the mechanics of freight forwarding. Applicant's experience in international trade had not provided him with the requisite knowledge of freight forwarding in United States export commerce. Applicant also had demonstrated an insufficient knowledge of understanding of the Commission's rules governing activities of freight forwarders. Applicant was unable to prepare and file shipper's export declarations. Anthony G. O'Neill—Freight Forwarder Iicense, 68 (71–72).

Facts surrounding applicant's preparation of the FMC application form and the Examiner's finding concerning applicant's difficulty in interpreting the English language indicated that applicant was not sufficiently versed in the language to enable him to carry out the duties of a freight forwarder. Congress, in passing the licensing statute, recognized the complexities involved in exporting procedures and indicated the importance of having only qualified persons acting as freight forwarders. Because applicant was not familiar with these complexities and because he was not able to understand and communicate in the English language, he was not qualified to act in the fiduciary relationship required of the freight forwarding business. An approach of granting a license and later taking it away if applicant it not capable would reverse the proper order of procedure outlined in the law. Id. (72–73).

Where an applicant for a freight forwarder license had been involved in the preparation of bogus bills of lading on drug shipments, and applicant at least knew that the drug shipments were being fraudulently diverted for domestic sale and, knowing this, cooperated in the diversion and accepted at least a token amount of compensation, the facts might not constitute sufficient evidence of lack of personal responsibility to warrant denial of license. However, the applicant also permitted another person to use his FMB registration number and received a brokerage commission and, after being informed that this practice was contrary to Commission rules, applicant was again involved in a similar scheme with a seller of merchandise in foreign commerce. The seller was not prohibited from dispatching such merchandise without a license, but he is not permitted to accept compensation from the carrier on such shipments. Applicant operated in violation of the rule that "no licensee shall permit his license or name to be used by any person not employed by him for performance of any freight forwarding services". Applicant was not qualified for a license. G. R. Minon—Freight Forwarder License, 75 (80–81).

Applicant for a freight forwarder license should not merely be scolded for 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 he knowingly cooperated in diversion of drug shipments, it would be unduly stretching any concept of fairness to afford applicant another chance. Id. (82).

GENERAL ORDER 7. See Agreements Under Section 15.

GENERAL ORDER 11. See Rates and Ratemaking.

JURISDICTION OF COMMISSION.

Decision of the Examiner is adopted except that portion which discusses the question of Commission jurisdiction over a stevedore, with which the Commission expresses neither agreement nor disagreement. Henry Gillen's Sons Lighterage, Inc. *v.* American Stevedores, 325 (327).

The Commission has jurisdiction over stevedoring practices of terminal operators which perform stevedoring services. In imposing rates established pursuant to an approved agreement, they are subject, as "other persons subject to the Act", to the requirement of section 17 that they observe just and reasonable practices in connection with the receiving, handling, and delivery of property. Id. (338).

LOADING AND UNLOADING PRACTICES.

Truck detention rule proposed by the Commission, which rule would hold terminal operators responsible for availability of labor, is not contrary to the Commission's previous order in the proceeding. The previous order referred to delays caused by or under the control of the terminals. Some delays at terminals are attributed by the operators to restrictions by the waterfront commission compact on the availability of labor at the port of New York and to the port-wide collective bargaining agreement, neither factor being under the control of the operators. By using the word "control" the Commission did not mean to suggest that terminal operators would be relieved of responsibility for delays caused by their failure or inability to obtain labor. As terminal operators with tariffs on file providing truck loading and unloading services, conference members obtain the status of a public utility, and the conference assumes the responsibility for procuring sufficient labor. At times the procuring of necessary labor may be beyond the control of the conference, but the conference has the responsibility directly incident to obligations it has voluntarily assumed. Truck and Lighter Loading and Unloading Practices at New York Harbor, 166 (170–173).

Terminal conference truck detention rule must take into consideration the size of the shipment and conditions existing at the piers. Commission rule is more realistic than conference rule because it contains two separate rules for appointment and non-appointment cargo and considers various cargo characteristics. The conference rule would allow all shipments of 24,000 pounds or less 4 hours for handling before detention accrues. The ICC approved a free time provision identical to the one in the conference's proposed rule, but later determined that those same free time limits should not be applied to the short-haul territory in and about New York City. Id (173–175).

Truck detention rule relieving terminal operators of responsibility for delays resulting from severe or unusual weather conditions will be modified to provide for a board of arbitration to resolve disputes concerning whether conditions on a particular day will or will not excuse detention. Id. (175).

Truck detention rule which requires documentation to be completed before detention time begins to run and which allows terminal operator to specify what documentation is necessary, and whether it is adequate in a particular case, will not be modified. There is no basis for the assumption that the terminal operators will act in bad faith. Id. (176).

Provision of truck detention rule 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, will not be modified. There is no basis for the assumption that the terminal operator will take excessive time for documentation. Id. (176).

Truck detention rule providing that no detention will be paid when sorting or selection is requested or required is 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. Id. (176).

Free time limit of 120 minutes allowed for handling of containers 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. In instances where the terminal operator performs a handling service on containers as agent for the steamship companies and where no charge is provided therefor in the conference tariff, the tariff detention rule would not apply. Truckers could look to the steamship lines for compensation for unusual delays. To the extent that terminal operators perform a service on containers under their tariff, it is appropriate to provide for compensation for delays in handling. Id. (177).

Truck detention rule defining detention charges as compensation to be paid by terminal operators to "motor truck companies" for delays of motor vehicles at the terminal facilities, is clarified to substitute the words "motor vehicle operators" for "motor truck companies". Id. (183).

OVERCHARGE CLAIMS. See Reparation.

OVERLAND/OCP RATES AND ABSORPTIONS.

Since 1927, the Commission and its predecessors have uniformly held that the issuance of tariffs, including rules and regulations covering their application, is a routine matter authorized by an approved basic conference agreement, not requiring separate approval under section 15. In 1961, section 15 was amended to reflect this principle. Conferences' overland/OCP rates and absorptions, and all rules and regulations explanatory thereof, are set forth in duly filed tariffs. There is no evidence that any conference has failed to file, publish, and adhere to such tariffs. Overland and OCP Rates and Absorptions, 184 (205).

Overland/OCP rates and absorptions are purely ocean rates in trades served by conferences, and the conferences' basic, approved agreements permit the setting of ocean rates. However, that authority under general rate-setting agreements is limited to the adjustment of rates "as the normal economic forces which govern the establishment of such rates may require". The question is whether overland/OCP tariffs are set and adjusted pursuant to normal ratemaking factors so as to be publishable as routine matter, or whether they constitute a device having an ulterior purpose, such as stifling competition outside the conference or unduly discriminating against persons entitled to protection of the Shipping Act. Id. (205–206).

The purpose and effect of overland/OCP rates is to make Pacific Coast carriers competitive with Atlantic and Gulf ocean carriers for traffic originating at or destined for points in the central United States. Overland/OCP rates, far from stifling competition, not only enhance route competition for such traffic but, to a substantial degree, provide a competition which otherwise would not exist. There is no evidence of any purpose to discriminate against anyone. Id. (206).

It is a cardinal regulatory principle that a common carrier may compete for traffic. Rate differentials between types of traffic may be based on competition applicable to one type and not the other. The Shipping Act does not forbid a carrier to meet competition or to enlarge the scope of its patronage and volume of business if it can do so without unfairness to those it serves. Reductions to meet competition are proper if they do not result in unremunerative or unlawful rates or go beyond the limits of competition which rest within the managerial discretion of the carrier. Id. (206).

Competition is one of the fundamental factors in ocean ratemaking, and competition is the basic, distinguishing factor in the establishment of overland/OCP rates. Conferences' overland/OCP rates were set pursuant to normal competition to approach parity with aggregate rates through competitive gateways. Id. (206–207).

Predecessors of the Commission know of the existence of overland/OCP tariffs at the time the various organic conference agreements were considered and approved. They also knew that the conferences intended to continue their long-standing practice of setting rates in this manner. A 1916 agreement, approved in 1917, was most explicit in defining rates to overland points and local rates to Pacific Coast points, and in making it clear that the agreement appled to both. Many later agreements made it clear that their jurisdiction included local cargo and overland traffic. Early conferences also openly established separate tariffs containing different rates for local and overland territory, and predecessors of the Commission knew of these rates. All agreements now contain jurisdictional language broad enough to cover local and overland traffic. All of this means that the Commission intended to sanction this activity when the agreements were approved. Id. (207).

Conferences have general ratemaking authority under approved section 15 agreements which authority extends to the issuance of tariff rates, rules, and regulations provided that such tariffs are agreed upon pursuant to normal, recognized ratemaking factors. Overland/OCP tariffs have been established pursuant to normal, recognized ratemaking factors, and, therefore, they constitute routine ratemaking duly authorized by conference agreements. Id. (208).

While organic agreements permit overland/OCP rates, the agreements do not conform to the rules of clarity regarding the contents of section 15 agreements. Reference to other documents is required. Conferences must update their basic agreements to reflect the full structure of their ratemaking and the absorptions practiced pursuant thereto. Language must be added to section 15 agreements to indicate that the general ratemaking authority includes the power to fix rates to and from interior points at levels different from those applicable otherwise, to absorb certain terminal costs, to enter into arrangements regarding such movements to or from interior points with inland carriers, and to conduct other functions incidental thereto. Tariff rules and regulations of conferences which relate to overland/OCP rates remain in full force and are lawful. Id. (208–209).

All agreements in which the parties oblige themselves to set rates collectively must be filed and approved. Conferences have established overland/OCP rates pursuant to their general ratemaking authority. Thus, the conferences have satisfied section 15. No violation of section 15 is found, even though conference agreements must henceforth clearly express that general ratemaking power includes, as it does implicitly, the setting of rates to interior points at levels different from the rates to local territory. Id. (210).

The Commission, in referring in the order of investigation to overland/OCP rates as "special rates" on cargo destined to or received from inland points, obviously did not intend to put the rates into the completely inappropriate section 15 category of "giving or receiving special rates, accommodations or other special privileges or advantages". Id. (210).

Overland/OCP rates, together with local rates, are not a "dual rate system". The rates are in a sense dual, since one rate is applicable to overland traffic and another to local traffic, both available to any shipper dependent on the competitive transportation conditions surrounding his shipment, not on whether or not he agrees not to patronize the conference's competitors. Except for the false nexus provided by the ambiguous use of the word "dual", there is no relation whatever between overland/OCP rates and the exclusive patronage contract/noncontract arrangement frequently called "dual rate systems". Id. (210–211).

Overland/OCP rates are not "port equalization". In the case of overland/OCP rates, route equalization, or equalization of charges via competitive gateways, is recognized as a ratemaking factor and rates are established in contemplation of that and other factors. A coast, as far as ocean transportation is concerned, is made up of ports, so route or gateway equalization involves, in a broad sense, port equalization. Port equalization which makes it possible for a conference member to make the equivalent of an ad hoc rate reduction to draw cargo from one port to another on the same ocean route is not "conventional or routine ratemaking among carriers". It is sometimes justified, but under no circumstances does it more than most superficially resemble overland/OCP rates. Overland/OCP rates may affect third party interests, such as ports. The Commission did not intend to distinguish otherwise routine ratemaking so as to require special section 15 approval in any instance where, as the result of the application of recognized economic ratemaking factors, a third party is in any degree affected thereby. Id. (211–212).

Overland/OCP rates do not require separate section 15 approval because the Commission held previously that a conference rule establishing different rates for the same commodities depending on whether they were carried in U.S.-flag or foreign-flag vessels required section 15 approval. Id. (212).

Overland/OCP rates do not require section 15 approval because the Commission held previously that a conference surcharge on a commodity to finance a shipper's association advertising campaign was contrary to the conference's section 15 agreement. The surcharge was established outside the normal economic forces which govern the establishment of such rates. Id. (213).

The requirement that one be able to determine the manner and nature of effectuation of an agreement from merely reading the basic agreement does not limit the scope of "routine actions" which need not be the subject of section 15 filings. The application of the requirement will vary with the nature of the basic agreement involved. In the case of an ordinary conference agreement, the matters shown in the tariffs, including rules and regulations as well as the rates themselves, are the result of the implementation of the agreement; the rules and regulations show how the tariff works, not how the agreement itself operates. The way the agreement operates with respect to rates may be satisfied by setting forth in the agreement such matters as the conference organization and the voting powers and privileges of the members. Id. (213–214).

Basic conference agreements need not cover the spreads between local and overland rates, definition of territory in which overland/OCP rates apply, commodities covered, application of absorptions, terminal ports through which the rates apply, or procedures by which decisions are reached. There are no "spreads" between local and overland rates. Definition of territory is properly a tariff matter. The tariff is the normal place for one to look for application of rates, commodities listed, terminal charges covered (i.e., absorptions), and terminal ports through which rates apply. None of these require different treatment, because of overland/OCP rates, from that provided under any conference agreement. Neither do procedures by which decisions are reached. Id. (214–215).

Changing administrative regulations and procedures which have been developed over the years with respect to consideration and approval of section 15 agreements cannot revoke the substantive rights conferred by approval of agreements under the agency practice prevailing at the time of approval. Id. (215).

In entering into a rail-water agreement to absorb a portion of the terminal charges at Pacific Coast ports, conference members acted pursuant to their approved conference agreement. The same principle applies to any joint action of record among conferences and railroads toward the establishment of rail or ocean rates which would produce a competitive ocean-rail combination. The latter activity is analogous to the familiar conference activity of negotiating with a shipper in an effort to determine a rate which will produce traffic. Id. (217).

Transactions among non-competing conferences having to do with the general adoption of a uniform definition of overland/OCP territory would come within section 15 if they constituted an agreement or understanding "fixing or regulating transportation rates or fares". While a change in definition could have some effect on rates it was not substantial effect in that regard. As rate-fixing understandings they were de minimis. Id. (217–218).

Overland/OCP regular tariff rates do not violate section 16 Second which is concerned with the surreptitious methods of obtaining transportation at less cost than one's competitor. Id. (218).

Overland/OCP rates are not unduly prejudicial and preferential in violation of section 16 First or discriminatory against ports in violation of section 17, and do not constitute an agreement unjustly discriminatory as between shippers and ports under section 15. Id. (218).

In a proper case, rates may be established for the carriage of goods originating in or destined for overland/OCP territory which are less than rates for transportation of identical goods, originating in or destined for local territory, over the same ocean route. The fact of competition affecting traffic having a different ultimate destination or origin is as much a fact to be considered as geographical or other advantages incident to the shipper's or receiver's location. No shipper located on or near the Pacific Coast voiced any objection to overland/OCP rates by reason of their being lower than local rates. Id. (219–221).

Contention of Atlantic and Gulf ports that by reason of absorption of the inland differential, or some portion thereof, overland/OCP rates violate section 16 of the Shipping Act by "the drawing away of traffic inherently and geographically belonging to" Atlantic and Gulf ports, is rejected. Section 8 of the Merchant Marine Act of 1920 requires that the right of a port to cargo from naturally tributary areas be recognized. However, even if overland/OCP rates be considered the equivalent of "port equalization" (condemned in many cases), the rule contemplates that the point of origin or destination is "naturally tributary" to the port from which the traffic is "diverted" by equalization, and not tributary to the port to which it is so diverted. The naturally tributary concept based on the 1920 Act has to do with the territory naturally tributary to a particular port, not with the general territory which an entire range of ports, or more than one range or seaboard, may serve competitively. The overland territory involved in the present case is generally tributary to Atlantic, Gulf, Great Lakes and Pacific ports and locally tributary to none (except, in part, to the Great Lakes). The Pacific Coast cannot be inhibited from competing effectively for cargo from the central United States on the theory that such traffic inherently belongs to the Atlantic, Gulf, and Great Lakes ranges. To apply the principle of the so-called port equalization cases in these circumstances is to reduce the "tributary territory" concept to the absurd. Id. (222–225).

PORT EQUALIZATION.

Overland/OCP rates are not "port equalization". In the case of overland/OCP rates, route equalization, or equalization of charges via competitive gateways, is recognized as a ratemaking factor and rates are established in contemplation of that and other factors. A coast, as far as ocean transportation is concerned, is made up of ports, so route or gateway equalization involves, in a broad sense, port equalization. Port equalization which makes it possible for a conference member to make the equivalent of an ad hoc rate reduction to draw cargo from one port to another on the same ocean route is not "conventional or routine ratemaking among carriers". It is sometimes justified, but under no circumstances does it more than most superficially resemble overland/OCP rates. Overland/OCP rates may affect third party interests, such as ports. The Commission did not intend to distinguish otherwise routine ratemaking so as to require special section 15 approval in any instance where, as the result of the application of recognized economic ratemaking factors, a third party is in any degree affected thereby. Overland and OCP Rates and Absorptions, 184 (211–212).

Contention of Atlantic and Gulf ports that by reason of absorption of the inland differential, or some portion thereof, overland/OCP rates violate section 16 of the Shipping Act by "the drawing away of traffic inherently and geographically belonging to" Atlantic and Gulf ports, is rejected. Section 8 of the Merchant Marine Act of 1920 requires that the right of a port to cargo from naturally tributary areas be recognized. However, even if overland/OCP rates be considered the equivalent of "port equalization" (condemned in many cases), the rule contemplates that the point of origin or destination is "naturally tributary" to the port from which the traffic is "diverted" by equalization, and not tributary to the port to which it is so diverted. The naturally tributary concept based on the 1920 Act has to do with the territory naturally tributary to a particular port, not with the general territory which an entire range of ports, or more than one range or seaboard, may serve competitively. The overland territory involved in the present case is generally tributary to Atlantic, Gulf, Great Lakes and Pacific ports and locally tributary to none (except, in part, to the Great Lakes). The Pacific Coast cannot be inhibited from competing effectively for cargo from the central United States on the theory that such traffic inherently belongs to the Atlantic, Gulf, and Great Lakes ranges. To apply the principle of the so-called port equalization cases in these circumstances is to reduce the "tributary territory" concept to the absurd. Id. (222–225).

PORTS. See also Terminal Operators.

Prior decision [11 FMC 418] regarding criteria to be considered in determining propriety of rate differentials between ports is inconsistent with holdings in other cases and is rescinded. Remand order to determine whether comparative loading costs and nonconference carrier competition justified port-restricted discount rates is expanded to include consideration of other factors relevant to the determination. To the extent that the conference would have the Commission use the cost criteria as justification for the rate disparity, it must include in the record the requisite data and information which would substantiate its position. Discounting Contract/Non-Contract Rates Pursuant to the Provisions of Item 735, Note 2, of the India, Pakistan, Ceylon & Burma Outward Freight Conference Tariff No. 10, 20 (22-23).

PRACTICE AND PROCEDURE.

—Administrative Procedure Act

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. This procedure properly apportions the burden of proving certain facts and is in conformity with requirements of the Administrative Procedure Act and the Commission's rules. An adverse party has to show the rate to be unreasonable and the carrier must then come forward and prove that its rate is reasonable. Ocean Rate Structures in the Trade Between United States North Atlantic Ports and Ports in the United Kingdom and Eire, 34 (58).

Rulemaking proceeding to determine whether a one-trade-one-dual rate contract requirement should be reimposed on a conference (operating in five trading areas with a single contract) was proper. It is not necessary to encompass the entire industry for a rule to be valid in accordance with requirements of the Administrative Procedure Act. Section 2(c) of that Act defines a rule as being either of "general or particular" applicability, and a rule may be directed to particular named persons. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, 149 (153).

Since the Commission instituted the proceeding it was in the sense of the Administrative Procedure Act the proponent of the order to impose the one-trade-one-contract requirement and, thus, it bore the burden of proof. The "burden of proof" issued was moot since the Commission applied the substantial evidence test and concluded that the evidence of record established that the present dual rate contract covering five trade areas was contrary to the public interest within the meaning of section 14b. Id. (154).

—Burden of proof

The burden of proof was on complainant in a reparation case. Where complainant's sworn claim set forth facts and documents to prove that a shipment of goods was not as described in the bill of lading, and the carrier's evidence to contravert this proof was the bill of lading, complainant had met its burden of proof. The bill of lading may be prima facie evidence of the contents of the shipment but it is not conclusive. Nor is it the best evidence. Evaluation of the weight of the evidence warranted the conclusion that complainant had met the burden of proving that the bill of lading did not correctly describe the goods actually shipped. Minnesota Mining and Manufacturing Co. *v.* American Export Isbrandtsen Lines, Inc., 11 (13-14).

In finding rates on particular commodities to be unreasonably high, the Examiner did not improperly place the burden of proof on conferences. The Examiner pointed out that rates on particular commodities compared unfavorably with rates in other trades, either reciprocal or competitive, and then noted that such rates appeared to be unreasonable. 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. The carriers chose not to submit such proof even though the facts were solely in their hands and not readily available to the Commission's staff or other parties. Ocean Rate Structures in the Trade Between United States North Atlantic Ports and Ports in the United Kingdom and Eire, 34 (57).

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. This procedure properly opportions the burden of proving certain facts and is in conformity with requirements of the Administrative Procedure Act and the Commission's rules. An adverse party has to show the rate to be unreasonable and the carrier must then come forward and prove that its rate is reasonable. Id. (58).

Since the Commission instituted the proceeding it was in the sense of the Administrative Procedure Act the proponent of the order to impose the one-trade-one-contract requirement and, thus, it bore the burden of proof. The "burden of proof" issue was moot since the Commission applied the substantial evidence test and concluded that the evidence of record established that the present dual rate contract covering five trade areas was contrary to the public interest within the meaning of section 14b. Agreement No. 8660—Latin America/Pacific Coast Steamship Conference and Proposed Contract Rate System, 149 (154).

—Cross-examination

Matters appended to a brief were properly excluded by the Examiner for the reasons that they were not introduced at the hearing and thus not subjected to the possibility of cross-examination, or because the contained testimony which attempted to contradict evidence introduced at the hearing which also could not be tested by cross-examination. Time Limit on the Filing of Overcharge Claims, 298 (319).

—Official notice

Questions of discrimination and economic reprisal are so clearly questions of fact and improper for official notice that it borders on the frivolous to except to the Examiners failure to take such notice. "Facts" found in an investigative report are not facts found by the Commission but merely conclusions of staff member. Time Limit on the Filing of Overcharge Claims, 298 (319).

Examiner's use and interpretation of a court decision handed down after briefs had been filed with the Examiner was proper. The Examiner should examine all the law which he feels has a bearing on the resolution of a legal issue. The matter is one involving interpretation of the law and does not involve questions of "fact" to be noted at all. Id. (319–320).

PRACTICES. See Terminal Leases; Terminal Operators.

PREFERENCE AND PREJUDICE.

Parties to a terminal lease with minimum-maximum payment provisions were not required to show that the payment provisions would not result in discrimination or prejudice against any terminal, that no port would be in any way injured, and that cargo would not be diverted from any port or terminal. Discrimination and prejudice are not unlawful per se. The Shipping Act prohibits only unjust and unreasonable practices. There was no evidence that any shipper or carrier would suffer undue or unreasonable prejudice or discrimination. In any competitive situation, there is diversion of cargo from one port to another. There was no evidence in this case that any port would lose cargo to the extent that its future profitable operation was threatened. The fact that some cargo might be diverted from other ports was not alone sufficient to show an unjust or unreasonable practice. Agreements Nos. T–2108 and T–2108–A Between the City of Los Angeles and Japan Line, Ltd., et al., 110 (122–123).

Terminal operator did not violate section 16 First by unfairly allocating its stevedoring forces as between vessels. Discharging of complainant's vessels 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. Chr. Salvesen & Co., Ltd. *v.* West Michigan Dock & Market Corp., 135 (139).

Where a terminal operator refused to serve complainant's vessel in order of time of arrival, serving instead another vessel which arrived later; it was customary in the Great Lakes for terminals to serve vessels in order of arrival; generally respondent served vessels in this manner; and complainant's vessel was the only one not so served, principally because it was not a regular customer, the issue was whether the preference was undue or unreasonable in violation of section 16 First of the Shipping Act. Id. (141–142).

Where a terminal operator refused to serve complainant's vessel in order of time of arrival, serving instead another vessel which arrived later, and the predominant reason for the preference and disadvantage was respondent's desire to prefer regular customers, respondent violated section 16 First of the Shipping Act. It is unreasonable for a terminal operator 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. In this case, the preference and prejudice was undue and unjust. Respondent's attempts to justify the preference and prejudice on grounds that its warehouse could not handle cargo from complainant's vessel until the preferred vessel had taken on cargo or other vessel at berth had been loaded, and that it handled respondent's vessel in accordance with a negotiated agreement which permitted handling of vessels previously booked, were not borne out by the record. Id. (142–146).

The competition required by section 16, in order to justify a finding of unlawful prejudice is present where two interests are seeking the same or substantially the same services. Operators of public terminals must afford all customers seeking the same service fair and reasonable treatments. Id. (146).

Overland/OCP rates are not unduly prejudicial and preferential in violation of section 16 First or discriminatory against ports in violation of section 17, and do not constitute an agreement unjustly discriminatory as between shippers and ports under section 15. Overland and OCP Rates and Absorptions, 184 (218).

Sections 16 and 17 are not absolute prohibitions of preference or prejudice and a showing of undue or unjust preference or prejudice must be demonstrated by substantial proof. Lake Charles Harbor and Terminal District *v.* Port of Beaumont Navigation District of Jefferson County, Texas, 244 (248).

Normally, if a terminal operator charges a different rate to different users for an identical service, an easy case of "undue preference or prejudice" can be developed. Some form of preference or prejudice clearly results. In an uncommon number of cases, such a patent preference or prejudice is not unjust or unreasonable in violation of the Shipping Act. Id. (249).

Tariff of Port of Beaumont, which assessed lower wharfage and unloading charges on bagged rice originating in Arkansas than on the same commodity originating in a Beaumont mill, was not unduly preferential or prejudicial to any user of the services, in view of the facts that the Beaumont shipper supported the differential as permitting it to combine its rice production with rice from Arkansas in order to accumulate the required volume to fill export orders; and the lower rate was not shown to be less than compensatory and there was no evidence that both rate levels were not reasonable. Id. (249–250).

Tariff of Port of Beaumont, which assessed lower wharfage and unloading charges on bagged rice originating in Arkansas than on the same commodity originating elsewhere, was not unduly prejudicial to the Port of Lake Charles, Louisiana, and therefore unreasonable. The Louisiana port was either not particularly interested in handling Arkansas rice or was unable to handle it because of congestion resulting from the large Louisiana rice movement. Most importantly, while there was some evidence that rice had been diverted from Lake Charles, there was no concrete evidence showing a connection between that fact and the Beaumont port's rate practice. Assuming that the rate scheme was unique, that in itself does not say anything about its reasonableness. Id. (250–252).

Record did not show that carriers' time limitation rules for filing overcharge claims was applied in an inequitable manner so as to result in unfair treatment of and unjust discrimination between shippers in violation of section 14 Fourth. Even if such a showing had been made, it would not necessarily dictate promulgation of a rule by the Commission. It follows that if no showing was made of unjustly discriminatory or unfair treatment under section 14 Fourth, a claim of undue or unreasonable preference of any particular person within the meaning of section 16 must be rejected, since the establishment of a violation of section 16 generally appears to require, in addition to a showing of dissimilar treatment between shippers, a showing, lacking here, of a competitive relationship between shippers. It is also equally clear that the carriers' rules are not unjustly discriminatory between shippers under section 15. Nor was there any conduct contrary to the public interest or detrimental to commerce. Time Limit on the Filing of Overcharge Claims, 298 (316–319).

A 9¢ per 100 pounds inland carrier loading and unloading charge assessed by terminal operators at the Port of Chicago was not an unreasonable practice in violation of section 17, or unreasonably prejudicial to importers of iron and steel (inexpensively handled) or other shippers in violation of section 16 First, or detrimental to commerce in violation of section 15. The tariff was noncompensatory, but was an initial tariff; and the terminal operators had relied, inter alia, upon earlier preliminary studies and the fact that other terminals applied uniform truck loading rates rather than commodity rates. The operators would be expected to take prompt action to adopt a rate structure under which the charges would be compensatory and would be borne, as nearly as may be, by those for whom the services were rendered. Crown Steel Sales, Inc. *v.* Port of Chicago Marine Terminal Assn., 353 (364–375, 379).

RATES. See also Agreements Under Section 15; Dual Rates; Ports.

—Commodity rates

Outbound (to the United Kingdom) general cargo N.O.S. rate of $70.75, which is 32% higher than the inbound rate and which bears no relationship to cost or value of service, is contrary to section 18(b)(5). The rate is so high that it has a tendency to inhibit exports, and is disapproved as contrary to section 18(b)(5). Ocean Rate Structures in the Trade Between United States North Atlantic Ports and Ports in the United Kingdom and Eire, 34 (63–64).

There is no inbound/outbound rate disparity on apples and pears where the outbound rate works out to $19.11 per ton as freighted (measurement basis) as compared with a $32 W/M inbound rate. The outbound reefer rate works out ot $27.30 per ton, as freighted, versus $54 inbound. Id. (64).

NAUK rate of $32.50 per ton W/M on automobiles from eastern Canada need not be reduced since the rate of the Canada-U.K. Conference from eastern Canada has been increased to the same rate. Id. (64).

Conference rate on books hardback need not be reduced from $70.75 to 45.25 W/M. The rate was compared with the unbound book rate to arrive at a disparity. Bound books and unbound sheets are not comparable commodities. Id. (64).

Conference rates on egg albumen, meat offal, onions, plastic sheeting, sleds, and toys outbound in the United States/United Kingdom trade, are so unreasonably high as to be detrimental to United States commerce, and new rates must be filed with transportation justification therefor. Id. (65–66).

—Detriment to commerce

Section 18(b)(5) of the Shipping Act contains two elements: Is the rate unreasonably high or low, and has the unreasonableness of the rate caused detriment to commerce? Ocean Rate Structures in the Trade Between United States North Atlantic Ports and Ports in the United Kingdom and Eire, 34 (55).

A person attacking a carrier's rates may rely on a comparison of rates in competitive trades to show unreasonableness. It is fair, after a showing of detriment to commerce, to require carriers to come forward to show that transportation circumstances require the rate under attack. The carrier 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). Id. (60).

The statement that "all things being equal, more cargo will move at lower rates" is a valid economic concept. This economic truism, standing alone, does not legally constitute detriment to commerce under section 18(b)(5) of the Shipping Act. Id. (62).

Relatively high rates on low-moving and nonmoving commodities in the United States/United Kingdom outbound trade were not shown to have inhibited the movement of goods. There is no evidence of an adverse impact on our commerce beyond the generality that a lower price tends to attract more business. It would be 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. Outbound conference is urged to lower rates on commodities which move in very small volumes perhaps 100 tons or less per year. Conferences are urged to eliminate paper rates. Id. (63).

—*Profit sharing fund*

Carrier's expense item for a profit sharing fund was not illusory. Although there was no guaranteed minimum, the only reason stated in the plan for allowing the Company not to contribute for any year was "the judgment and discretion of the company's directors, [that] it would be detrimental to the best interest and financial security of the Company". The Commission could not say as a matter of law that the carrier's "judgment and discretion" would be exercised in an unreasonable or arbitrary manner. Contributions to the fund were allowable as legitimate expenses for ratemaking purposes, provided not more than 15 percent be allowed as a total for the fund expense during any year (including deficiencies from prior years). Kimbrell-Lawrence Transportation, Inc.—General Increase in Rates in Kodiak Island, Alaska Peninsula and Aleutian Islands Area of Alaska, 15 (18–19).

—*Reasonableness*

Original rate increases of a carrier in Alaskan trades, providing a rate of return of from 15.21 to 18.51 percent were 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. As to a second rate increase, some profits may be added to the rate of return, but the likelihood of these additional profits and their extent was in considerable doubt. The carrier had added a second vessel but this charge did not figure as a basis for the second rate increase, and the expenses relating to that change may have a determinative effect on the reasonableness of the carrier's rate of return. If analysis of financial statements submitted to the Commission indicated that, after a year's experience with expanded service, the carrier's rate of return might be unlawful, an appropriate proceeding would be instituted. For the present the rate increases were not shown to be unlawful. Kimbrell-Lawrence Transportation, Inc. — General Increase in Rates in Kodiak Island, Alaska Peninsula and Aleutian Islands Area of Alaska, 15 (17–18).

A finding of a violation of section 18(b)(5) of the Shipping Act does not depend upon the quantum of shipper vehemence a record contains. Ocean Rate Structures in the Trade Between United States North Atlantic Ports and Ports in the United Kingdom and Eire, 34 (54).

Section 18(b)(5) of the Shipping Act contains two elements: Is the rate unreasonably high or low, and has the unreasonableness of the rate caused detriment to commerce? Id. (55).

There is no effective or significant disparity between the entire rate structures of conferences in the inbound and outbound United States/United Kingdom Trades which is violative of the Shipping Act. The disparity was 25 percent and, on the basis of the aggregate amounts paid by shippers, the disparity would be less significant. Id. (55).

In general, an unreasonable rate is one which does not conform to the ratemaking factors of cost, value of service, or other transportation conditions. An unreasonable rate is one which cannot be justified by one or more of these factors. Id. (56).

In determining whether a rate is unreasonable under section 18(b)(5) of the Shipping Act, the Commission accepts "irrational" and "exorbitant" as synonyms of "unreasonable". Excerpts from the legislative history in which the terms "irrational" and "exorbitant" were used are interpreted to be explanations of section 18(b)(5), not qualifications of the word "unreasonable". Id. (56–57).

In finding rates on particular commodities to be unreasonably high, the Examiner did not improperly place the burden of proof on conferences. The Examiner pointed out that rates on particular commodities compared unfavorably with rates in other trades, either reciprocal or competitive, and then noted that such rates appeared to be unreasonable. 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. The carriers chose not to submit such proof even though the facts were solely in their hands and not readily available to the Commission's staff or other parties. Id. (57).

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. This procedure properly apportions the burden of proving certain facts and is in conformity with requirements of the Administrative Procedure Act and the Commission's rules. An adverse party has to show the rate to be unreasonable and the carrier must then come forward and prove that its rate is reasonable. Id. (58).

The opponents of a rate must show that the rate appears to be unreasonable, i.e., that the unreasonableness of the rate has caused some economic consequence to the shipper. If proponents of an attacked rate withhold evidence, 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. Id. (59).

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. The obvious reason is the assumption that comparable considerations of cost, value of service, and transportation conditions prevail in the competitive trades. Inbound/outbound trades between the United States and the United Kingdom are served by the same carriers at about the same cost. No distinctive dissimilarities have been shown. Id. (59).

A person attacking a carrier's rates may rely on a comparison of rates in competitive trades to show unreasonableness. It is fair, after a showing of detriment to commerce, to require carriers to come forward to show that transportation circumstances require the rate under attack. The carrier 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). Id. (60).

The proper test of detriment to commerce (in connection with the unreasonableness of a rate) is not solely whether the rate prevents the cargo from moving. The Commission has followed a number of approaches, such as "lost sales", "limitation on net profit" (by dictum), and "tonnage handicapped in moving". An unreasonable rate which causes the watering down of profits or the inability of a merchant to enter in a market is destrimental to commerce. The Commission will define detriment as something harmful, not limit it to "lost sales" or other rigid formulas. Id. (60–61).

The Commission does not decide whether it can disapprove a rate only under section 18(b)(5) of the Shipping Act, or whether it can not only disapprove a rate but state the level at which a rate will not offend section 18(b)(5). Rather, the Commission orders the conference in the outbound trade between the United States and the United Kingdom to bring in a new rate with a demonstration that it is reasonable as measured by the ratemaking standards of cost, value of service, or other transportation conditions. Id. (62).

Increased charges made by a conference for handling cargo from the place where it is turned over to the carrier to ship's tackle, a service not covered by the ocean carriage rate, were not objectionable under section 15 and were not shown to be "so unreasonably high or low as to be detrimental to the commerce of the United States" under section 18(b)(5). The conference used the most economical means available to handle the cargo and the charges (although at times they might show a profit) were intended only to reimburse the carriers. Such charges were prima facie reasonable. Pacific Coast European Conference—Increased Handling Charges, 351.

—Vessel expenses

With respect to repairs expense for a vessel, a carrier 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 an arbitrary 50 percent allocation. General Order 11 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. Kimbrell-Lawrence Transportation, Inc.—General Increase in Rates in Kodiak Island, Alaska Peninsula and Aleutian Islands Area of Alaska, 15 (18).

—Undercharges

Carrier which charged a lower rate on a shipment of a propane storage tank from the Gulf to Guatemala than the rate on file with the Commission violated section 18(b)(3) of the 1916 Act. Agreement 9597 Between Flota Mercante Gran Centroamericana, SA., Confinental Lines, S.A., and Jan C. Uiterwyk Co., Inc., 83 (91, 102).

REBATES. See Terminal Leases.

REPARATION.

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, cannot bar recovery of an overcharge as reparation, where the complaint is timely filed under section 22 of the Shipping Act. Question of the reasonableness of the rule need not be determined to resolve the issue of complainant's right to reparation. Minnesota Mining and Manufacturing Co. *v.* American Export Isbrandtsen Lines, Inc., 11 (12–13).

The burden of proof was on complainant in a reparation case. Where complainant's sworn claim set forth facts and documents to prove that a shipment of goods was not as described in the bill of lading, and the carrier's evidence to contravert this proof was the bill of lading, complainant had met its burden of proof. The bill of lading may be prima facie evidence of the contents of the shipment but it is not conclusive. Nor is it the best evidence. Evaluation of the weight of the evidence warranted the conclusion that complainant had met the burden of proving that the bill of lading did not correctly describe the goods actually shipped. Id. (13–14).

Under section 22 of the Shipping Act, the award of reparation must be related to a violation of the Act, and if preference and prejudice in stevedoring services are not forbidden by section 16. First, reparation cannot be awarded for injury related to those services. Chr. Salvesen & Co., Ltd. *v.* West Michigan Dock & Market Corp., 135 (140).

Manager of a vessel, which managed all of the owner's business, had standing to prosecute claims for reparation, although the vessel had been sold prior to the complaint. The terms of the sale did not transfer existing claims. Such claims remained with the seller and complainant, as manager of the seller's affairs, had authority to take any action required in connection therewith. The claim was founded on the operation of the vessel, as distinguished from an action in rem. Id. (141).

Carrier is permitted to refund a portion of freight charges collected because of an error in its tariff of a clerical or administrative nature. The carrier had intended to exempt the shipment of steel mill components to Brindisi, Italy, from arbitrary charges at all base ports and outports to which steel mills were to be shipped, and when the rate was published the conference believed that there would be only three such outports. At the time the shipment was booked it was not noted that Brindisi was not one of the exempt outports. Italsider Alti Forni e Acciaierie Riunite Ilva e Cornigliano, S.p.A., Genoa, Italy *v.* Lykes Bros. Steamship Co., Inc., 233 (234).

Carrier did not violate an order of the Federal Maritime Board requiring it to offer refrigerated space on a fair and reasonable basis to all qualified shippers of bananas and did not violate section 16 First, or any other provision of the Shipping Act when it cancelled a two-year banana freighting agreement for failure of complainant to pay freight and stevedoring charges. Complainant attempted to excuse its defaults by claiming that the carrier had arbitrarily and discriminatorily rejected certain "strike" and other claims. However, some of these claims were barred by the agreement and similar claims had not been allowed other shippers, except for a trifling instance of discrimination involving $96; some claims were without any substance whatsoever; some claims for damages to banana shipments were not cognizable under the agreement; and other claims were imaginary. Arthur Schwartz and Justamere Farms, Inc. *v.* Grace Line, Inc., 253 (272–289, 297).

Carrier which cancelled a two-year banana freighting agreement for failure of complainant to pay freight and stevedoring charge did not engage in unfair, unjust and discriminatory acts deliberately designed to draw complainant's capital so as to make it impossible for complainant to meet its contract obligations. There was no proof with respect to any deprivation or reduction of complainant's capital. Alleged losses which complainant sought to recover by claims were borne by the growers who shipped in complainant's space, and money representing defaulted payments admittedly due the carrier were held by complainant. Assuming complainant would have been deprived of essential working capital if it had paid the freight and stevedoring, and that it was therefore justified in withholding payments to the extent of valid claims for relief, there was no such valid claims. No causal connection between alleged preferences given to other contract holders and the defaults of complainant were established. One instance of a discrimination amounted to $96. There was no evidence that any "prejudice" was involved in the carrier's rejection of complainant's always dubious, frequently disingenuous, and for the most part preposterous, claims and demands. Id. (291–294).

Carrier did not violate an order of the Federal Maritime Board requiring it to offer refrigerated space to all qualified shippers of bananas for a two-year forward booking period, and did not violate section 16 First or any other provision of the Shipping Act when it omitted or refused to offer refrigerated space to complainants. Existing defaults under prior contract were sufficient to justify the omission or refusal. Nothing could have been more repugnant to the qualification of a shipper under the order than a continued failure and refusal to pay outstanding freight and stevedoring bills. Also there was a very serious question of one of complainant's ability to pay in view of its financial condition as presented to Internal Revenue. A 1959 finding that one of complainants was a qualified shipper was not conclusive for all time. One of complainants had operated quite differently from what the Board contemplated: It did not purchase bananas; the shipping space was parceled out without regard to the qualification standards of the order; and it never inspected fruit prior to loading. Id. (294–297).

The Commission has authority, under certain circumstances to promulgate a rule governing the time within which carriers will voluntarily accept for consideration claims for freight adjustments, in accordance with the prior decision in the matter [10 FMC 1]. Decision not to promulgate a rule is not to be interpreted to allow carriers in any way to limit the right of a shipper to file his claim under section 22 of the 1916 Act, including but not limited to such matters as attempting to condition the filing of the complaint with the Commission on a prior filing with the carrier. Time Limit on Filing of Overcharge Claims, 298 (304).

Carriers' six month time limit rule for filing of overcharge claims is not unreasonable because some shippers do not present their claims because of merchandising practices, others because of internal auditing procedures (or lack thereof), and still others because they prefer to process claims which offer a greater monetary reward. The delays are chargeable to the shipper. Shippers are able to present their claims within six months, although more detailed information may be needed to substantiate the claims. The limitation rules do not violate sections 14 Fourth or 16 First of the 1916 Act since they purport to treat everyone subject to them alike and since all types of shippers can and do comply with them. Id. (305–309).

Section 15 requires not only that the procedures established by conferences for hearing and considering shippers' requests and complaints be "reasonable" but also that they insure that such hearing and consideration will be given "promptly" and fairly". Failure to acknowledge or promptly consider overcharge claims would, when adopted as a practice by conferences, be unlawful under section 15. Such failure by conferences or carriers could result in violations of section 2 of the 1933 Act and section 18(b)(3) of the 1916 Act and defeat actions for reparation contrary to the policy of section 22. There is, however, no necessary relationship between failures to acknowledge claims, or delays in settlement, and a time limitation rule. The record failed to show a relationship between failures to acknowledge and delays in processing claims and the carrier rules. Id. (309–310).

Carrier limitation rules, not shown to be unreasonable or unfair as to time periods for presentation of claims, and not shown to have been used to fail to acknowledge or to delay settlement of claims, can only be declared unlawful as procedures if their effect is to violate section 2 of the Intercoastal Act or section 18(b)(3) of the Shipping Act by defeating the policy of section 22 of the Shipping Act. Nothing inherent in the carriers' present rules prevents a shipper from seeking reparation based on overcharges and collecting them if a complaint is filed under section 22 within 2 years of the alleged injury. It would be contrary to Congressional policy and a violation of the shipper's rights under section 22 for a carrier in any way to limit or condition the availability of the reparation remedy. As to whether carrier rules have been used as a device to thwart recovery before the Commission, nothing in the record bears out the allegation that carriers guard the existence of section 22 as a "jealous secret". All shippers may not know of the remedies available to them, but the Commission publishes a booklet on the subject. Carriers were not shown to have thwarted the shippers' rights to seek reparation by "wasting away" the 2-year period. Id. (310–312).

Although the costs of pursuing recovery of alleged over-charges before the Commission would exist any time a shipper sought reparation regardless of whether carriers had limitation rules and thus bear no direct relationship to such rules, the Commission does not wish cost to act as a deterrent to the seeking of recovery for overcharges, no matter how small the amount. Thus, a small claims ($1,000 or less) procedure has been established. Id. (312–313).

Carrier-imposed time limits on the filing of overcharge claims involving alleged errors in weight or measurement or description, and providing that claims must be presented before the shipments leave the custody of the carrier, were not shown to be unlawful. Id. (313–314).

Exemption of the government from carriers' time limit rule on the filing of overcharge claims does not violate section 14 Fourth. That section does not outlaw all different treatments between shippers with respect to the adjustment and settlement of claims but only those which are "unfair" or "unjustly discriminatory", and this is a question of fact. The existence of unfair or unjustly discriminatory conduct must be clearly established by substantial proof. Failure to apply the rule to the government is not unfair or unjustly discriminatory with respect to other shippers, since the government is in a peculiar bargaining position, originating in statute and sanctioned by court decisions. Also, the United States has a variety of problems in attempting to comply with carriers' time limitations. Id. (315).

Record did not show that carriers' time limitation rules for filing overcharge claims was applied in an inequitable manner so as to result in unfair treatment of and unjust discrimination between shippers in violation of section 14 Fourth. Even if such a showing had been made, it would not necessarily dictate promulgation of a rule by the Commission. It follows that if no showing was made of unjustly discriminatory or unfair treatment under section 14 Fourth, a claim of undue or unreasonable preference of any particular person within the meaning of section 16 must be rejected, since the establishment of a violation of section 16 generally appears to require, in addition to a showing of dissimilar treatment between shippers, a showing, lacking here, of a competitive relationship between shippers. It is also equally clear that the carriers' rules are not unjustly discriminatory between shippers under section 15. Nor was there any conduct contrary to the public interest or detrimental to commerce. Id. (316–319).

Carrier is authorized to refund portion of freight charges collected on shipment of fertilizer, in bags, from Hawaii to the Western Caroline Islands. Agreement between the Trust Territory of the Pacific Islands and the carrier called for freight rates no higher than those in effect on shipments moving in vessels of another carrier to the Trust Territory via Guam or on vessels of various other carriers to the Trust Territory via Japan. The shipment was charged a cargo n.o.s. rate, whereas it could have been moved on another line at a lower rate. The carrier had inadvertently failed to file a new tariff item on fertilizer, in bags. Hawaiian Agricide & Fertilizer Co., Ltd. *v.* Micronesia Interocean Line, Inc., 322 (323–324).

Where complainants sought to obtain recovery from respondent of charges levied for the loading or unloading of lighters and barges, replying on a prior Commission decision, but respondent was not a party to the prior decision and complainants introduced no independent proof of illegality of the charges assessed by respondent, no reparation could be awarded. Henry Gillen's Sons Lighterage, Inc. *v.* American Stevedores, Inc., 325 (327).

It does not follow that, since the Commission cannot award reparation in an investigation initiated on its own motion, a party seeking reparation cannot rely on the investigation proceeding but must present independent proof that respondents' actions were unlawful. The real question is whether the precise matters necessary to establish a right to reparation were determined by the Commission in an investigation proceeding, adjudicatory in nature, so as to constitute collateral estoppel. The Commission cannot order reparation based solely on its findings in an investigation where no express finding of past unlawfulness was intentionally made; and the fact that the Commission has ordered that a practice be discontinued as unlawful does not necessarily mean that the Commission determined that prior acts of a similar kind were unlawful at the time thereof. Id. (339–340).

When an appropriate administrative agency determines that a charge for a particular kind of service is unlawful regardless of amount, and forbids the future imposition of such a charge without expressly finding that past charges of the same nature were unlawful when made, a claimant seeking reparation for such past charges cannot rely upon that decision to establish that the charges were unlawful. The claimant must seek and obtain from the agency, upon evidence adduced in the reparation proceeding, a determination that the past charges were unlawful when made. Even though the evidence adduced is the same as that which was before the agency in the earlier proceeding, the agency need not necessarily find past unlawfulness. Id. (341–342).

Where the Commission in a prior order directed respondents to discontinue charge for certain lighter service "herein found to have been committed by respondents", but neither in its findings or conclusions was there any statement that the charge was unlawful in the past, a complainant in a reparation proceeding could not rely on the prior decision and order to establish that the past charge was unlawful. On the contrary, the Commission's finding that the conference agreement "does authorize" the charges was an affirmative finding of past legality under sction 15. Id. (342–343).

Where respondents' charges in connection with shipside loading or unloading of shippers' and consignees' lighters were in accordance with long-standing custom; in the case of respondent conference members such charges were authorized by an approved agreement; the responsibility for performing the services covered by the charges was not undertaken by the carriers as part of their transportation service, but was understood to be the responsibility of the shipper or consignee and as such was assumed by the lighter-men who collected the cost of such services, the charges were not unlawful prior to the effective date of a Commission order holding that the imposition of the charges in the future would result in a violation of section 17. The Commission's point was simply that since a service which the Commission found to be equivalent to the service in question was covered by the freight paid by the shipper to the carrier, there should not in the future be an additional charge for the service in question, notwithstanding a long-standing practice to the contrary. Id. (344–345).

Lightermen could not recover reparation for certain charges paid to terminal operators prior to Commission decision directing the terminal operators to discontinue the charge. The charges were not unlawful per se and there was no proof of injury. As to charges assessed after the Commission decision, the lightermen were entitled to reparation without proof of injury. Id. (346–348).

SELF-POLICING. See Agreements Under Section 15.

STEVEDORING. See Jurisdiction of Commission; Terminal Operators.

TARIFFS. See also Terminal Operators.

Carrier which had on file with the Commission two separate and different tariffs, with each tariff containing some rates higher and some lower than those in the other, violated section 18(b)(3) when it charged the higher rate. Where two tariffs are equally appropriate, the shipper is entitled to the lower rate. Agreement 9597 Between Flota Mercante Gran Centroamericana, S.A., Continental Lines, S.A., and Jan C. Uiterwyk Co., Inc., 83 (91, 102).

Basic conference agreements need not cover the spreads between local and overland rates, definition of territory in which overland/OCP rates apply, commodities covered, application of absorptions, terminal ports through which the rates apply, or procedures by which decisions are reached. There are no "spreads" between local and overland rates. Definition of territory is properly a tariff matter. The tariff is the normal place for one to look for application of rates, commodities listed, terminal charges covered (i.e., absorptions), and terminal ports through which rates apply. None of these require different treatment, because of overland/OCP rates, from that provided under any conference agreement. Neither do procedures by which decisions are reached. Overland and OCP Rates and Absorptions, 184 (214–215).

A conference which amended its tariff, on less than 30 days' notice, to allegedly eliminate the service of loading rail cars or trucks from the ocean rate, thus increasing the cost to the shipper, did not violate section 18(b)(2), since the tariff did not reflect a change in the service offered as the previous tariff did not authorize absorption of truck loading charges in the ocean rates. Such rates applied only "to end of ship's tackle". Crown Steel Sales, Inc. *v.* Port of Chicago Marine Terminal Assn., 353 (375–376).

A carrier which amended its tariff, on less than 30 days' notice, to provide that the cost for "loading to cars or trucks" was for the account of cargo did not violate section 18(b)(2), since the previous tariff provided that ocean freight rates covered "handling to rail car or truck tailgate" and this did not authorize absorption of truck loading charges. "Handling to rail car or truck tailgate" is not analogous to "loading to cars or trucks". One is alongside and the other on board. Id. (376).

Carrier did not violate sections 17 and 18(b)(3) by amending its tariff to discontinue absorption of a truck loading charge but attempting to collect such a charge through its subsidiary terminal company before the effective date of the tariff charge. The tariff did not authorize absorption of truck loading charges and therefore the amendment was actually a clarification and not a charge in service. Truck loading charges were for the account of cargo. Id. (378, 381).

Proceeding will not be reopened on the basis of new arguments relating to tariffs involved. There could be no finding of a violation of law on the sole basis of inference or preference for a particular interpretation of a tariff provision. Id. (380).

TERMINAL LEASES.

Clause of terminal agreement between the Port of Los Angeles and four Japanese carriers which provides for "exclusive routing" of the carriers' containerized-cargo vessel business, the shipment of which originates at, is destined to, or transits through Los Angeles and surrounding area tributary to the Port, restricts free competition and presumptively runs counter to the public interest. The burden of sustaining such a practice is a heavy one. The clause was inserted to protect the Port's investment. Under the minmum-maximum payments provision of the agreement, the Port was assured of recouping its costs and the assignee was induced to make full use of the facilities in order to benefit from free use when the maximum was exceeded, which would probably occur during the first year of the agreement. Applying the test of necessity, the routing clause was not required to protect the Port's investment and the record fell short of demonstrating justification for exemption from antitrust policies. Agreements Nos. T-2108 and T-2108-A Between the City of Los Angeles and Japan Line, Ltd., et al., 110 (116-117).

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. Approval 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. Id. (118).

A terminal lease agreement must be conpensatory. Methods of computing compensation are to be considered but there is no inflexible rule to bind port officials in determining compensation. The test to be applied is the ultimate result of the computations. Id. (118).

Maximum payment provision of terminal lease was compensatory. It would provide a 7-percent return on land and water property and a 6-percent return on improvements to be provided. Although the Port had not included in the compensation base the cost of removal of the old wharf from the premises to be improved and excavation costs, such exclusions had been reasonably justified and there was no sound basis for a dispute of management judgment in computing the maximum payment. Id. (118-119).

Minimum payment provision of terminal lease agreement is noncompensatory. The minimum was related to a return on the investment in extra facilities required to handle containers, and not on the entire cost of the wharf facility. The fallacy of this concept was that the assignee had been granted preferential use of the entire facility. The minimum payment as computed was noncompensatory in that it was less than the cost to the port. Id. (119-120).

Retroactive effect clause of preferential, minimum-maximum payments terminal agreement cannot be approved. Use of the facility prior to approval of the agreement would not be unlawful if no preferential use was accorded the carriers and if they paid in accordance with the Port's tariff. But the clause was not limited to applying revenue thus paid to the minimum. It provided that the agreement should become effective for all purposes. Parties may not carry out an agreement prior to approval. "Giving effect to" and "carrying out" are not readily distinguishable. Any action taken by the parties prior to approval, if governed by the agreement, is carrying out the agreement. Id. (121–122).

Parties to a terminal lease with minimum-maximum payment provisions were not required to show that the payment provisions would not result in discrimination or prejudice against any terminal, that no port would be in any way injured, and that cargo would not be diverted from any port or terminal. Discrimination and prejudice are not unlawful per se. The Shipping Act prohibits only unjust and unreasonable practices. There was no evidence that any shipper or carrier would suffer undue or unreasonable projudice or discrimination. In any competitive situation, there is diversion of cargo from one port to another. There was no evidence in this case that any port would lose cargo to the extent that its future profitable operation was threatened. The fact that some cargo might be diverted from other ports was not alone sufficient to show an unjust or unreasonable practice. Id. (122–123).

Agreement providing for preferential use of a terminal's crane in connection with lease of premises was approved. As to the contention that the agreement was noncompensatory, secondary use was to be reasonably anticipated; rates need not necessarily be compensatory during the preliminary period of an operation; and the terminal intended to increase the rate if it was found not to be compensatory. If it failed to do so and if it was shown that the agreement had an unlawful impact on any interested person in the future, the Commission would have the authority and duty under section 15 to again review it and take appropriate action. Id. (123–124).

Terminal lease agreement giving Japanese carriers preferential use of facilities would not be disapproved because of the "concern" of U.S. carriers that regulations of the Japanese government might prevent them from obtaining similar rights at Japanese ports. The Commission does not disapprove agreements because of "concern" and without evidence to support disapproval. Id. (124–125).

A port is not prohibited from improving its facilities in contemplation of entering into and obtaining Commission approval of an agreement provision for a return to the port on its investment. Construction of improvements is not carrying out the agreement. Id. (125).

Clause of terminal agreement between the Port of Oakland and four Japanese carriers which provides for exclusive routing of the carriers' containerized-cargo vessel business, the shipment of which originates at or terminates in Japan or the United States and which originates at, is destined to, or transits through the San Francisco Bay Area and surrounding area tributary to the Port of Oakland, restricts free competition and is presumptively contrary to the public interest and will not be approved in the absence of justification therefor. Inasmuch as the routing clause was found not approvable in the case of the Port of Los Angeles [12 FMC 110], Oakland's basic reason for including it no longer existed. Oakland did not deem the clause as "required". Compensation provisions of the agreement provided a strong incentive for the carriers to make full use of the facility. Oakland failed to show a need for the clause as a means of protecting its investment and the clause must be deleted. Agreement No. T–2138 Between the Port of Oakland and Japan Line, Ltd., et al., 126 (131–132).

Clause of preferential, minimum-maximum payments terminal agreement, providing for retroactive effect, could not be approved. Crediting of payments made prior to approval to the minimum-maximum provisions constituted giving effect to the provisions of an unapproved agreement. "Giving effect" and "carrying out" are terms not readily distinguishable. The clause must be deleted as a prerequisite to approval. Id. (132).

Establishing a set of accounting standards to apply to future terminal agreements relating to terminals furnishing facilities for containerized cargo might be beneficial. However, any attempt to do so in this proceeding would constitute rulemaking without the required notice to all interested parties. 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. While methods used by the Port of Oakland in computing compensation may not be proper under all circumstances, there was no basis for criticizing the judgment of management in computing a fair return, which return was shown to be compensatory. Id. (133).

Argument by Stockton Port District that as a preferential, minimum-maximum terminal 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, was rejected. The fact that the carriers would derive monetary benefit under the compensation provisions was not a sufficient basis to support a finding of undue or unreasonable competitive disadvantage to another port. An agreement is not unlawful because it does not follow the terminal's tariff charges. Monetary benefits to the carriers after the maximum was reached would not be unlawful refunds merely because thereafter no payments were made or that the tariff earned was apportioned between the parties. Id. (133).

TERMINAL OPERATORS. See also Terminal Leases; Loading and Unloading Practices.

Where a Port Authority was permitting a lumber dealer to operate a public terminal and to backhandle its own lumber while denying other lessees the same privileges, the Port Authority could choose to remove the privileges and thus remove the preference, or it could afford a similar privilege to others similarly situated. If it chooses the latter course, it must place the prejudiced lessee in a position comparable to the privileged lessee in respect to the operation of a public lumber terminal and the backhandling of lumber. It would not be unreasonable for the Port Authority to prohibit nontenants from performing their own backhandling in view of space restrictions and problem of delay and congestions which would ensue. Similarly it would not be unreasonable for the Port Authority to restrict the privilege of backhandling of lumber by lessees to their own premises. Ballmill Lumber & Sales Corp. *v.* Port of New York Authority, 29 (32).

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. An operator would not be permitted to discontinue publication of lumber backhandling rates to leased areas, but instead to contract privately for such services, while continuing in effect its present structure, including volume discounts, in respect to the public lumber terminal. If the development of circumstances caused the operator to discontinue backhandling services to leased areas, the operator could discontinue publication of backhandling rates to such areas while continuing in force to present rate structure. Id. (33).

Terminal operator did not violate section 16 First by unfairly allocating its stevedoring forces as between vessels. Discharging of complainant's vessels 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. Chr. Salvesen & Co., Ltd. *v.* West Michigan Dock & Market Corp., 135 (139).

A company which furnished stevedoring services to a common carrier and also provided wharfage, dock and warehouse facilities was subject to the Shipping Act. Although the tariff, or agreements with carriers, set forth only a rate for stevedoring services, and the company absorbed other costs "in its warehouse rates or gave the service away gratis", the rate included compensation for use of docks, thus, in effect, imposing a charge for the use of facilities. Id. (140).

Where a terminal operator refused to serve complainant's vessel in order of time of arrival, serving instead another vessel which arrived later; it was customary in the Great Lakes for terminals to serve vessels in order of arrival; generally respondent served vessels in this manner; and complainant's vessel was the only one not so served, principally because it was not a regular customer, the issue was whether the preference was undue or unreasonable in violation of section 16 First of the Shipping Act. Id. (141–142).

Where a terminal operator refused to serve complainant's vessel in order of time of arrival, serving instead another vessel which arrived later, and the predominant reason for the preference and disadvantage was respondent's desire to prefer regular customers, respondent violated section 16 First of the Shipping Act. It is unreasonable for a terminal operator 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. In this case, the preference and prejudice was undue and unjust. Respondent attempts to justify the preference and prejudice on grounds that its warehouse could not handle cargo from complainant's vessel until the preferred vessel had taken on cargo or other vessel at berth had been loaded, and that it handled respondent's vessel in accordance with a negotiated agreement which permitted handling of vessels previously booked, were not borne out by the record. Id. (142–146).

The competition required by section 16, in order to justify a finding of unlawful prejudice is present where two interests are seeking the same or substantially the same services. Operators of public terminals must afford all customers seeking the same service fair and reasonable treatments. Id. (146).

The Commission has the power under section 17 to reject a terminal operator's tariff rule. Inherent in the 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 a terminal an absolute right to file and make effective any rule and thereby nullify the Commission's power to prescribe reasonable regulations. Truck and Lighter Loading and Unloading Practices at New York Harbor, 166 (169–170).

Normally, if a terminal operator charges a different rate to different users for an identical service, an easy case of "undue preference or prejudice" can be developed. Some form of preference or prejudice clearly results. In an

uncommon number of cases, such a patent preference or prejudice is not unjust or unreasonable in violation of the Shipping Act. Lake Charles Harbor and Terminal District *v.* Port of Beaumont Navigation District of Jefferson County, Texas, 244 (249).

Tariff of Port Beaumont, which assessed lower wharfage and unloading charges on bagged rice originating in Arkansas than on the same commodity originating in a Beaumont mill, was not unduly preferential or prejudicial to any user of the services, in view of the facts that the Beaumont shipper supported the differential as permitting it to combine its rice production with rice from Arkansas in order to accumulate the required volume to fill export orders; and the lower rate was not shown to be less than compensatory and there was no evidence that both rate levels were not reasonable. Id. (249–250).

Tariff of Port of Beaumont, which assessed lower wharfage and unloading charges on bagged rice originating in Arkansas than on the same commodity originating elsewhere, was not unduly prejudicial to the Port of Lake Charles, Louisiana, and therefore unreasonable. The Louisiana port was either not particularly interested in handling Arkansas rice or was unable to handle it because of congestion resulting from the large Louisiana rice movement. Most importantly, while there was some evidence that rice had been diverted from Lake Charles, there was no concrete evidence showing a connection between that fact and the Beaumont port's rate practice. Assuming that the rate scheme was unique, that in itself does not say anything about its reasonableness. Id. (250–252).

A 9¢ per 100 pounds inland carrier loading and unloading charge assessed by terminal operators at the Port of Chicago was not an unreasonable practice in violation of section 17, or unreasonably prejudicial to importers of iron and steel (inexpensively handled) or other shippers in violation of section 16 First, or detrimental to commerce in violation of section 15. The tariff was noncompensatory, but was an initial tariff; and the terminal operators had relied, inter alia, upon earlier preliminary studies and the fact that other terminals applied uniform truck loading rates rather than commodity rates. The operators would be expected to take prompt action to adopt a rate structure under which the charges would be compensatory and would be borne, as nearly as may be, by those for whom the services were rendered. Crown Steel Sales, Inc. *v.* Port of Chicago Marine Terminal Assn., 353 (364–375, 379).

UNDERCHARGES. See Rates.

WHARFAGE. See Terminal Operators.